MINISTRY OF JUSTICE

ATTORNEY GENERAL'S MEMORANDUM

ON THE PROCEDURE FOR OBTAINING LEGAL ADVICE, PROCEDURE FOR THE PREPARATION, PUBLICATION AND PASSING OF PROPOSED LEGISLATION AND KEY STEPS IN CIVIL LITIGATION COMMENCED BY OR AGAINST THE MALAWI GOVERNMENT

January 2023

PREFACE

The Attorney General's Chambers is mandated to assist the Malawi Government to promote constitutionalism, the rule of law, transparency and accountability in, and access to justice by the people of Malawi. As part of this mandate, the Attorney General's Chambers provides legal advice and legal services to Ministries, Departments and Agencies, including the Parliament of Malawi and the Malawi Judiciary, on a wide range of matters, including general legal advisory services, legislative drafting and civil litigation.

The first edition of this Memorandum was issued on 30th December 1980 to serve as an internal tool to inform, streamline and guide the process for the provision by the Attorney General's Chambers of legal advice and legal services to Ministries, Departments and Agencies. Except for minor amendments made in 2013, the Memorandum has substantially remained the same.

This edition is intended is intended to update the 1980 edition by addressing gaps and other challenges that have since emerged and are impacting on the efficiency the the Attorney General's Chambers in the performance of its mandate. Apart from streamlining and clarifying the procedure the Attorney General's Chambers and its client Ministries, Departments and Agencies must follow to obtain legal advice or legal services, this edition for the first time includes an overview of civil litigation involving the Malawi Government.

This Memorandum is intended to guide (a) members of the Attorney General's Chamber in the provision of legal advice and legal services to Ministries, Departments and Agencies and (b) officials of those institutions who are key in seeking legal advice on various matters, the preparation of legislation and the conduct of civil litigation involving them. Members of the Cabinet will also find this Memorandum enlightening and useful in view of the role they play in the legislative-making process and in making decisions that could be a subject of civil litigation.

The Honourable Thabo Chakaka Nyirenda

ATTORNEY GENERAL

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PART 1
INTRODUCTION

1. Purpose of this Memorandum

1.1. The purpose of this Memorandum is to outline–

(a) the procedure for obtaining legal advice from the Attorney General's chambers;

(b) the procedure for the preparation, drafting, publication and passing of proposed legislation; and

(c) key steps and issues in civil litigation commenced by or against the Government.

1.2. Requests for legal advice and instructions for drafting legislation or to conduct civil litigation on behalf of a Ministry or Department must comply with the procedures outlined in this Memorandum to ensure that they are as clear and complete as possible. Clear and complete requests will prevent protracted dialogue between the Attorney General's Chambers and the client Ministry, Department or Agency concerned and facilitate timely provision to the client Ministry, Department or Agency of the required legal advice and services.

1.4. This Memorandum supersedes previous memoranda, circular minutes, directives, etc issued by the Attorney General on matters outlined in this Memorandum.

PART 2
LEGAL ADVICE

2.0 Procedure for obtaining legal advice

2.1. The starting point is to understand the source of legal advice for Ministries, Departments and Agencies. By virtue of section 98 (1) of the Constitution of Malawi, the Attorney General is the principal legal adviser to the Government.

By section 98 (2) of the Constitution, the powers vested in the office of the Attorney General may be exercised by the person appointed to that office or, subject to his or her general or special instructions, persons in the public service acting as his or her subordinates, or such other legally qualified persons acting on the instructions of the Attorney General. By virtue of section 50 of the General Interpretation Act, the Attorney General and Solicitor General are the Law Officers of the Government.

2.2. Therefore, the only authorized people who may give Ministries, Departments and Agencies legal advice are the Attorney General, the Solicitor General, persons in the public service acting as the subordinates of the Attorney General, or such as legally qualified persons acting on the instructions of the Attorney General.

2.3. Consequently, except with the written authority of the Attorney General, Ministries, Departments and Agencies should refrain from obtaining legal advice or services from lawyers outside the Ministry of Justice because those lawyers are not subordinate to the Attorney General.

2.4. It should always be borne in mind when requesting legal advice that a sound and well reasoned legal opinion on a situation cannot be given, unless the facts of the situation are fully, accurately and chronologically stated. For this purpose, as well as for purposes of record and to prevent or minimize misunderstandings, it is essential that–

(a) a request for legal advice, and the legal advice given, are in writing;

(b) a request for legal advice should be submitted by the Principal Secretary of the Ministry or Department or the Chief Executive Officer of the Agency concerned and must be addressed to the Attorney General or Solicitor General and not to individual officers of the Attorney General's Chambers.

2.5. Every request for legal advice must disclose fully all relevant information, including adverse information, and must be accompanied by copies of all the documents relevant to the request such as written contracts, agreements, letters, records, reports, etc.

2.6. Where a draft of a document is submitted for vetting or advice, the hard copy submission should be accompanied by an electronic version of the document to facilitate timely provision of feedback and advice.

2.7. Requests for legal advice must be submitted to the Attorney General's Chambers in good time as soon as the need is identified or has arisen. As a guide, requests to draft or vet contracts or other legal documents must be submitted not less than three weeks before the signing date in order to give the Attorney General's Chambers sufficient time to review and, if need be, seek clarifications from the Ministry, Department or Agency concerned before redrafting the documents.

2.8. All officers in the Attorney General's Chambers are under instructions to refuse to advise anyone verbally or on the telephone and to refuse to advise anyone who casually drops in, except in extremely urgent circumstances or in cases of extreme emergency. In any event, no responsibility is taken for verbal advice given; it is all too often misunderstood or misinterpreted. Therefore, where advice is given verbally, the Ministry, Department or Ageney concerned must at the earliest opportunity obtain written confirmation of the advice from the Attorney General's Chambers.

3. Confidentiality of legal advice from the Attorney General's Chambers

3.1. All legal advice from the Attorney General's Chambers to Ministries, Departments and Agencies is confidential from the moment it is issued and in the course of transmission to and upon receipt by the client Ministry, Department or Agency concerned, and should not be disclosed to the public or any unauthorized person without the authority of the Attorney General's Chambers before the issue in respect of which the legal advice was sought is finally resolved. Any officer who violates this instruction is liable to face disciplinary action under the Malawi Public Service Regulations.

3.2. Where an inquiry is received from a member of the public or media regarding the substance of the legal advice, the Ministry, Department or Agency concerned should refrain from discussing with, or commenting on the details of the legal advice to, the inquirer but, instead and, if necessary, refer the inquirer

to the Attorney General's Chambers to determine whether the confidentiality of the legal advice in question violates the Access to Information Act.

4. In-house legal counsel

4.1. While in-house legal counsel fall in the category of "persons in the public service", they do not, in the performance of their duties, act as the Attorney General's subordinate officers; nor do they act on the Attorney General's instructions for the purposes of section 98 (2) of the Constitution.

4.2. While well-trained and experienced in-house legal counsel help Ministries, Departments and Agencies with legal issues pertaining to their sectoral mandates, the opinions they render do not constitute legal advice within the meaning of section 98 of the Constitution. Such opinions must not be taken as conclusive legal advice on any subject-matter but as a guide to understanding the legal issues in play.

4.3. In this regard, the Attorney General will not take responsibility for any legal advice or opinion that does not originate from the Attorney General's Chambers or rendered by counsel subordinate to the Attorney General.

4.4. To safeguard the interests of the Government, in-house legal counsel, including counsel from the Attorney General's Chambers seconded to the legal common service, must advise the Principal Secretary of their Ministry, Department or Agency to seek legal advice from the Attorney General's Chambers on matters with serious legal implications such as high value or complicated procurement contracts.

4.5. Where a Ministry, Department or Agency has in-house legal counsel, every request for legal advice, to draft legislation or to conduct civil litigation on behalf of the Ministry, Department or Agency must be prepared by or, first, be reviewed by the in-house lawyer and submitted to the Attorney General's Chambers only after the in-house lawyer, in his professional judgment, is satisfied that the request is adequate and is legally sound.

5. Meetings

5.1. Often Ministries request the attendance of a lawyer from the Attorney General's Chambers at in-house meetings concerned with purely administrative or policy matters before seeking legal advice in accordance with the requirements set out

in paragraph 2. Advice on matters of policy or administration is not a function of the Attorney General. Ministries are therefore advised to deal with such matters without the participation of a lawyer from the Attorney General's Chambers.

5.2. A lawyer from the Attorney General's Chambers will only attend meetings where purely legal problems are anticipated to arise. Such meetings must ideally be held in the Attorney General's Chambers for easy access to relevant reference materials and, where necessary, consultation with the Attorney General or Solicitor General, as the case may be. Meetings may be held outside the Attorney General's Chambers only with the specific written permission of the Chief Legislative Counsel or Chief State Advocate (Civil Litigation) given in consultation with the Attorney General or Solicitor General.

5.3. Where a lawyer from the Attorney General's Chambers does attend a meeting or hold discussions with officers of a Ministry, Department or Agency on proposals for drafting legislation or on a potential court case or on any legal issue, it is the responsibility of the officer of the Ministry, Department or Agency concerned to note any decisions reached and to embody these in a letter to the Attorney General's Chambers in expansion of any drafting or civil litigation instructions which may have already been given. Unless and until such letter is received, no action will be taken by the Attorney General's Chambers on any such decision.

5.4. Where legal advice is given verbally at or during a meeting, it is the responsibility of the Ministry, Department or Agency concerned to request the Attorney Chamber's Chambers to confirm the advice in writing before acting on it. The Attorney General will not take any responsibility for advice given verbally unless it is confirmed in writing.

PART 3
LEGISLATIVE DRAFTING
Policy Development

6. The Policy Stage

6.1. Legislation is the formal expression of a policy, and it follows that before legislation can be drafted the policy sought to be implemented by it must be determined.

6.2. Accordingly, where the Principal Secretary of a Ministry considers that new legislation is required to carry out the policy of the Ministry or a Department or Agency under the Ministry, or that existing legislation is unsatisfactory and must be amended, the advice of the Attorney General's Chambers must be sought in good time, in writing, stating clearly –

(a) what the policy is;

(b) in what respect the existing legislation is deficient;

(c) how it is proposed to carry the policy into effect; and

(d) which other Ministries are concerned and whether they have been consulted, and if so, what their reaction to the legislative proposal is.

6.3. Where the proposal is to amend existing legislation, an audit of the legislation should be done to identify the gaps, weaknesses and solutions to address them, and consideration should always be given to the general improvement of the existing legislation. The Principal Secretary of the instructing Ministry, Department or Agency and the key members of the technical team should read the existing legislation thoroughly in its entirety and consider a holistic approach to its amendment.

6.4. Where the gaps or weaknesses identified are not extensive, for example, requiring the revision of penalties only, preference should be given to amending the appropriate part of the legislation rather than repealing it in whole and replacing it with new legislation.

6.5. The Principal Secretary must at this stage bear in mind the constitutional responsibility of the executive under section 7 of the Constitution of Malawi, to initiate policies and legislation and implement laws which embody the express wishes of the people of Malawi, and which promote the principles of the Constitution. It is the responsibility of the Ministry, Department or Agency concerned and not of the Attorney General's Chambers to ensure that proposals for new legislation or amending existing legislation meet this fundamental constitutional requirement. The Principal Secretary and his or her technical team should always remember that it is not the function of the Attorney General's Chambers to initiate or determine policy.

6.6. At the policy development stage, ideas are usually expressed in general terms which are not sufficiently clear to enable Legislative Counsel to produce the desired legislation. It is important for the senior technical officers of the

instructing Ministry to critically think through all the detail of all policy issues to ensure that the resultant drafting instructions are complete and sufficiently clear to Legislative Counsel. This means that the instructing Ministry must first settle the policy it wants to implement by way of legislation before Legislative Counsel can begin the drafting process.

6.7. Many problems arise where the policy issues and drafting instructions to Legislative Counsel are incomplete or incoherent. The problems often arise in three ways. Firstly, during the drafting process causing unnecessary delays in the drafting of the Bill because of unresolved policy issues. Secondly, after the Bill has been tabled in the National Assembly attracting unwarranted amendments because the policy issues were not properly and critically thought through. Thirdly, after the Bill has been passed by Parliament and assented to by the President only to discover implementation challenges caused by some deficiencies in the legislation.

6.8. Ministries are strongly advised to conduct an audit commonly referred to as Regulatory Impact Assessment (RIA) of the proposed legislation to ensure that all policy issues are ironed out and resolved and that the resultant drafting instructions are complete and coherent. A checklist for conducting a regulatory impact assessment is attached to this Memorandum as Appendix 1.

6.9. Where a Ministry intends to establish a statutory body to implement the Minstry's policy, prior consultations must be done with the Ministry of Finance before seeking Cabinet approval to establish the statutory body. This should be done through a Cabinet Paper justifying the need for a completely new institution to implement the policy and resultant legislation. This is so because it is the responsibility of the Ministry of Finance to advise on the financial matters relating to the operation and management of public institutions.

Cabinet Paper

7. Cabinet Paper procedure

7.1. A request for the drafting of proposed legislation should not be submitted to the Attorney General's Chambers before the Cabinet has (a) given approval, in principle, to the drafting of the legislation after consideration of a Cabinet Paper setting forth, in full, the reasons why the legislation is required, and (b) directing that the proposed legislation, when drafted, be referred to the Cabinet

Committee on Constitutional, Legal and Parliamentary Affairs for consideration.

7.2. A Cabinet Paper forms the basis upon which drafting instructions will eventually be prepared. It informs Cabinet of the need for, and the mischief intended to be addressed by, the proposed legislation. It also informs Cabinet of the implementation, financing and other matters intended to be addressed in the proposed legislation. Therefore, except for money Bills and in cases of extreme urgency or emergency, the Attorney General's Chambers will not commence the legislative drafting process, without prior Cabinet approval especially where the intention is to create a new public institution.

7.3. The preparation and drafting of a Cabinet Paper seeking approval for drafting legislation are the responsibility and function of the instructing Ministry and not of the Attorney General's Chambers. However, before the Cabinet Paper is submitted to the Cabinet Office, a copy thereof should be forwarded to the Attorney General's Chamber for advice and will be returned with a note of any suggested alterations.

7.4. A Cabinet Paper must be concise and must not omit any facts or information that the Cabinet must know of to reach an informed decision. The Cabinet Paper must set out, in separate parts, arguments for and against the legislative proposal and, as necessary, summarize alternative proposals. It should end with a carefully framed paragraph stating the points requiring decision and detailing the directions being requested from Cabinet and confirming that section 7 of the Constitution of Malawi has been complied with.

7.5. The instructing Ministry initiating the Cabinet Paper must ensure that every other Ministry affected by the proposal is fully consulted and its views properly recorded in the Cabinet Paper. Further, the Principal Secretary of the instructing Ministry should, before developing a Cabinet Paper, obtain the personal direction of his or her Minister, as the policy holder. The Cabinet Paper must be initialed by the responsible Minister who is required to own and present it to the Cabinet.

7.6. It is not until the preliminary policy work is complete and the Cabinet has given approval, in principle, that the instructing Ministry can give the Attorney General's Chambers instructions to draft the required legislation. The drafting instructions must be capable of bringing Legislative Counsel to the point where

he or she is competent to deal with the subject matter from a legislative point of view, especially where the proposal deals with complex technical issues.

7.7. The procedures on the preparation of Cabinet Papers set out in paragraphs 6.1 to 6.6 above are subject to any written instructions issued, from time to time, by the Cabinet Office.

Drafting Instructions

8. Purpose of drafting instructions

8.1. It is the responsibility of the instructing Ministry to initiate the legislative drafting process. This is done by the instructing Ministry by submitting to the Attorney General's Chambers complete and coherent drafting instructions.

8.2. Drafting instructions describe and limit what the proposed legislation is to contain and serve several purposes, including the following –

(a) they act as a reference point or benchmark for determining whether the legislation to be drafted does what the Cabinet authorized;

(b) they set out, in clear, unambiguous terms, what the problem to be resolved is;

(c) they provide information regarding the purpose of the legislation proposed;

(d) they set out the way that purpose is to be achieved;

(e) they set out what effect the proposed legislation will have on legislation which is already in existence as well as (where the proposed legislation is new rather than an amendment) what effect the proposed legislation will have on an existing situation;

(f) they guide Legislative Counsel on overall structure of the proposed legislation; and

(g) they save drafting time.

8.3. When the aims of the instructing Ministry are clear, the work of Legislative Counsel is made easier; when the aims are unclear, or incomplete, those inadequacies are reflected in the final legislative drafting product. Properly prepared drafting instructions assist Legislative Counsel to understand what is required in the proposed legislation.

9. What form should drafting instructions take?

9.1. Where the Cabinet has approved, in principle, the proposal for the drafting of legislation, the instructing Ministry must as soon as possible submit to the Attorney General's Chambers formal and complete drafting instructions issued under the hand of the Principal Secretary that the legislation be now drafted. The drafting instructions must be accompanied by a copy of the Cabinet Directive issued by the Cabinet Office authorizing the drafting of the legislation. The Attorney General's Chambers will not commence drafting work based on instructions otherwise given.

9.2. The drafting instructions must, amongst other things, state clearly –

(a) the background information on the existing legislative framework and a clear description of the problem that the legislation aims to address;

(b) a clear description of the solution being proposed to solve the problem for the instructing Ministry to achieve its desired outcome;

(c) why the desired outcome cannot be achieved without the need for legislation;

(d) how the Ministry thinks the existing law should be changed for the desired outcome to be achieved;

(e) the existing law on the subject;

(f) what consequential amendments, if any, will be needed to other legislation;

(g) which other Ministries are affected by the proposal and whether or not they support it;

(h) what consultation has taken place inside and outside the Government and the outcome of that consultation;

(i) commencement issues: whether the proposed legislation will enter into force upon publication in the *Gazette*, or on a specified date, or on a date dependent on a specific event (for example, the coming into force of another Act of Parliament), or on a date to be determined by the responsible Minster by Order published in the *Gazette;*

(j) any administrative provisions considered necessary to give effect to the legislative proposal; and

(k) the sanction proposed for the enforcement of any provisions of the proposed legislation intended to criminalize any activities.

9.3. It is imperative that overall, the drafting instructions are as detailed as possible written in clear, layman's language (i.e., narrative form) and it is important to note that summaries are not sufficient. Thus, for instance, if a licensing body or authority is being set up by the proposed legislation: the name; objects; powers; functions of the body; the number of members of the board thereof; how those members are to be appointed and by whom; the consequences of non-compliance with the licensing requirements; and the commencement date must be set out specifically. Furthermore, if there are sanctions imposed for non-compliance, the actual amount of the fines or terms of imprisonment must be set out in the instructions.

9.4. If it is intended that the proposed legislation be modelled after a foreign legislation, a copy of such foreign legislation should be attached to the drafting instructions with a separate note explaining the reasons.

9.5. The Attorney General's Chambers will deal with requests to draft legislation on a rotational basis according to the legislative calendar approved by the Cabinet. Where legislation is required so urgently that the Ministry concerned feels that all work on other legislation previously requested should be postponed, the responsible Minister must first seek Cabinet approval giving reasons for requesting priority. Any request for priority treatment must be submitted to the Attorney General's Chambers under the hand of the Principal Secretary and must be accompanied by a copy of the Cabinet approval. The Attorney General's Chambers will reject any request for priority treatment that is not backed by a Cabinet directive.

9.6. Unjustified requests for priority are not only unfair in that they delay other Ministries' Bills, but they also place Legislative Counsel under undue pressure, resulting in drafting errors being made. Therefore, requests to the Cabinet to approve priority treatment for the drafting of Bills must be sparingly made. Finance and taxation Bills, however, will, if necessary, be granted automatic priority by Legislative Counsel.

9.7. The Chief Legislative Counsel has full authority to return drafting instructions to the instructing Ministry, and to defer action, if, in his or her opinion, they are insufficient for drafting work to proceed. Where this happens no further action in the matter will be taken by any member of the Attorney General's Chambers until the deficiency has been remedied.

9.8. A checklist for preparing drafting instructions is attached to this Memorandum as Appendix 2 for the convenience of instructing Ministries. The checklist is not intended to be exhaustive; instructing Ministries are encouraged to consider other issues not covered by the checklist to ensure that the resultant drafting instructions are complete, clear, and sufficient to enable Legislative Counsel to begin the work of translating the instructing Ministry's policy into clear and workable legislative language. Properly thought through and carefully prepared drafting instructions are key to effective legislative drafting.

10. Layman's draft legislation

10.1. The general rule or principle is that legislation is drafted by Legislative Counsel. Legislative Counsel is trained in the science of translating, as well as is humanly possible, ministerial policy statements or proposals into proper legislative language and format.

10.2. In exceptional circumstances (e.g., where the subject matter is particularly complex or technical), the Ministry concerned may find that preparing instructions in the form of draft legislation (a layman's draft) is useful in thinking out policy and administrative details in a lucid and coherent way. Drafting instructions in this form, annotated, and supplemented with an explanatory memorandum, can also greatly facilitate the drafting process. Precedents from other jurisdictions can also be useful where the subject matter is complex or technical or, indeed, where there is no existing legislation in place to deal with a new or unique situation which that other jurisdiction has dealt with successfully.

10.3. At the same time, however, officers of the Ministry concerned should understand that Legislative Counsel is responsible for the drafting of the legislation and is not bound to follow the organization or language proposed in the layman's draft if it is clearly shown that such proposed form would not achieve the objective of the proposed legislation or would not adhere to the form and style of legislative instruments in Malawi.

The Drafting Stage

11. The drafting process

11.1. Once clear and complete drafting instructions are received by the Attorney General's Chambers, Legislative Counsel will produce a preliminary draft of the Bill of the proposed legislation and prepare one or more revisions before discussing it with or seeking the comments thereon of the instructing Ministry and any other Ministry affected by the proposed legislation. The process continues until after the instructing Ministry and Legislative Counsel are satisfied with the form and content of the proposed legislation. Drafts can be discussed, criticized, and tested in a discussion group, but the responsibility for setting up the draft or making any changes and finalizing it ultimately devolves on Legislative Counsel acting alone. No satisfactory draft can be prepared by a group of people acting as a drafting committee.

11.2. The instructing Ministry should, as soon as possible, submit comments on each draft of the Bill, in writing, to the Attorney General's Chambers as quickly as possible after the receipt of the preliminary draft to facilitate the finalization of the draft Bill.

11.3. It is the responsibility of the Principal Secretary of the instructing Ministry to brief his or her Minister throughout the consultative process, on progress on the drafting of the proposed legislation and issues arising from the drafting process.

11.4. When drafting is completed, the Attorney General's Chambers will supply to the instructing Ministry the draft Bill together with any legal advice or comments considered necessary.

12. Legislative programme and time needed to draft a Bill

12.1. Legislative drafting is a tedious and sometimes a complex exercise. The time needed to complete drafting of a Bill depends on the complexity or novelty of the underpinning policy and the quality of the drafting instructions.

12.2. Some Bills might be simple and in standard form and can be drafted speedily. Others might involve major or complex legislative areas and take months or even years to draft. In most cases, the time needed to draft a Bill is long because the Ministry concerned is in a hurry to take its legislative proposal to Parliament before all the loose ends of the underpinning policy are tied up and resolved.

12.3. Therefore, to facilitate an orderly and predictable legislative drafting process, Legislative Counsel will not begin work on any proposed legislative proposal, which is not included in the annual legislative programme or calendar duly approved by the Cabinet prior to commencement of each financial year.

12.4. A legislative programme or calendar is a list of proposed Bills that the Cabinet has approved to be drafted in a specified financial year. The list allows Legislative Counsel to concentrate on priority Bills only that the Cabinet considers are required to deliver the Government's development agenda within the specified financial year. It also helps to make the best use of scarce resources (both human and financial) available in the Attorney General's Chambers. This will ease unnecessary pressure on the small team of Legislative Counsel and promote the production of good quality Bills.

12.5. The list of Bills to be included in the annual legislative plan will be compiled by the Attorney General's chambers in consultation with Ministries not less than six months before the end of each financial year in order to allow for the Cabinet to approve it in advance of the ensuing financial year. Thereafter, the Attorney General's Chambers will reject any request to draft proposed legislation that is not in the legislative programme or calendar as approved by the Cabinet, except financial Bills or Bills required to address an emergency or an extremely urgent matter. What amounts to an emergency or extremely urgent matter will be determined by the Cabinet and not by the Attorney General's Chambers. The Chief Legislative Counsel will co-ordinate the compilation of the list.

12.6. It must be emphasized that there is no guarantee that Bills listed in the legislative programme or calendar will be drafted by the Attorney General's Chambers in any event. The timetable for the drafting of a Bill will be agreed between the instructing Ministry and Legislative Counsel and will depend on the complexity of the legislative proposal and available resource, among other things.

12.7. For these reasons, it is unwise for any Ministry to give public assurances that a Bill will be drafted within a given time frame even if it is listed in the legislative programme or calendar. This must be avoided at any cost. Legislative drafting is not a leisure process. What may seemingly be a simple, straightforward legislative proposal at the time the Attorney General's Chambers is given drafting instructions, can subsequently turn out to be a tedious, complex, and lengthy exercise requiring the resolution of difficult problems not previously

anticipated or envisaged. This is especially the case where the legislative proposal was not previously thought through carefully by the instructing Ministry or affects several other Ministries.

12.8. The time needed to draft the Bill may also be dictated by several other factors, including the following –

(a) whether Parliament has constitutional authority to enact the proposed legislation;

(b) whether any of the proposed provisions constitute unnecessary repetitions of provisions in existing Acts of general application such as the General Interpretation Act;

(c) whether the provisions proposed vary from those in an Act of general application already in existence, and whether there is good reason for the difference. Conflicting legislation must then be specifically identified and dealt with;

(d) whether the proposed legislation deals with matters that are also dealt with by another Bill that is being prepared or has been introduced in Parliament (if so, the Ministry responsible should be consulted about the overlap); and

(e) whether the proposal is intended to respond to a specific court decision, legal opinion, or international convention (if so, this should be identified and provided to Legislative Counsel).

12.9. By and large, unless the legislative proposal is intended to address an extreme emergency, Legislative Counsel requires sufficient space and time to produce quality legislative work that not only translates policy into effective legislation but also that stands the test of time. As already stated above, good and effective legislation can take months or even years to be produced and completed.

13. Consultants

13.1. Sometimes an instructing Ministry may see the need for a consultant to assist in the policy-making process, the drafting of the proposed legislation, or both. While the services of a consultant can be useful, a distinction must be made between legal and legislative drafting. Legislative drafting requires additional specialized skills that go beyond the drafting of ordinary legal documents that are not intended to have any legislative effect.

13.2. It should therefore not be assumed that just because a consultant is qualified in his or her field of expertise, he or she can produce a complete and workable draft of the proposed legislation in the style and to the standard that have evolved over time from the experiences of successive Legislative Counsel in the Attorney General's Chambers. Things can go awry and rather than being a blessing, the services of a consultant can become a nightmare for the instructing ministry.

13.3. The following guidelines are recommended for dealing with consultants –

A. Before engaging a consultant, the instructing Ministry will do well to seek the advice of the Attorney General's Chambers as to whether it is necessary to do so. Oftentimes, instructing Ministries have discovered too late that in fact Legislative Counsel would have worked on the proposal without the need for a consultant thereby subjecting the Government to unnecessary expenditure of public funds.

B. Where it is confirmed that a consultant must be employed, the instructing Ministry should:

1. Ensure that the necessary terms of reference spell out, in very clear terms, exactly what must be done by the consultant.
2. If the consultant is to assist in only the drawing up of policy guidelines, the terms of reference must say so clearly.
3. <u>If the consultant is required to do draw up policy guidelines and produce a layman's draft,</u> the terms of reference must clearly so stipulate.
4. Involve the Attorney General's Chambers to advise in drawing up the consultant's terms of reference, qualifications and experience to ensure the recruitment of a suitable candidate.

C. Since the client of the Attorney General's Chambers is the instructing Ministry and not the consultant, the Attorney General's Chambers will not deal directly with the consultant, except in very exceptional circumstances and, even then, only in the presence of a representative of the instructing Ministry. The instructing Ministry must therefore make sure that it understands fully what the consultant's recommendations to it are, so that it can relay those clearly to the Attorney General's Chambers.

D. Once the consultant has completed his or her task, he or she must give the instructing Ministry his or her recommendations in the form of a report. It is the responsibility of the instructing Ministry and not of the Attorney General's Chambers to then ensure that the report fully addresses the consultant's terms of reference before seeking Cabinet approval for the drafting of the required Bill.

E. No drafting instructions based partly or wholly on a consultant's report must be submitted to the Attorney General's chambers without Cabinet approval of the proposed legislative solutions contained in the consultant's report.

F. Where the Cabinet approves the legislative recommendations in a consultant's report (including any layman's draft which may be part of, or be attached to, the report), the instructing Ministry should forward, with its own prepared drafting instructions to the Attorney General's Chambers, a copy of the report and the layman's draft, where it has been produced.

14. Consequential amendments

14.1. New legislation often affects provisions of other legislation, necessitating consequential amendments to the other legislation. Consequential amendments come essentially in two forms –

(a) simple and straightforward amendments that do not affect the substance of existing legislation and are limited to housekeeping matters such as changing sections and cross references or correcting typographical errors; and

(b) substantial amendments consequent upon or necessitated by changes to existing legislation or policy shift, as reflected in the proposed legislation, on a matter addressed in existing legislation.

14.2. While the former form of amendments may be taken at the drafting stage, the latter must be identified at an early stage and reflected clearly in the drafting instructions to the Attorney General's Chambers.

14.3. Consequential amendments may be required in –

(a) legislation which is not yet in force;

(b) Bills which are currently before the National Assembly; and

(c) legislation which is already in force.

15. The role of the Law Commission

15.1. The role of the Law Commission is often confused with the mandate of the Attorney General's Chambers to draft legislation on behalf of Ministries, Departments and Agencies. The Law Commission derives its powers and functions from the Constitution of Malawi and the Law Commission Act. Broadly put, the role of the Law Commission is to conduct law reform in Malawi. Law reform is the process of reviewing, developing and recommending changes to the body of the laws of Malawi to –

(a) bring it into line with current conditions and ensuring it meets current needs of the country;

(b) remove defects in the law;

(c) simplify the law;

(d) adopt new or more effective methods of administering the law and dispensing justice; and

(e) promote improved access to justice.

15.2. The Law Commission uses the following three methods to identify a law reform area –

(a) submissions received from the general public (individuals) and bodies;

(b) ~~by the Law Commission~~ on its own volition in trying to implement Government policies or trying to implement or domesticate Malawi's obligations under international conventions or in response to social change; or

(c) the Attorney General, on behalf of the Malawi Government, may request the Law Commission to consider any matter of law that is considered to require reform or any area that is considered to require development of legislation.

15.3. Since Ministries and Departments have no legal personalities of their own and since Agencies implement policies formulated by their mother Ministries, Ministries, Departments and Agencies should seek the advice of the Attorney General's Chambers whether any matter of law before them qualifies for law reform by the Law Commission or the drafting of appropriate legislation by the Attorney General's Chambers.

15.4. The Law Commission has no mandate to formulate Government policy upon which sectoral legislation administered by Ministries, Departments and Agencies is based. Therefore, Ministries, Departments and Agencies must refrain from requesting the Law Commission to draft new legislation or amendments to existing legislation for this is clearly outside the mandate of the Law Commission.

Procedure after the Drafting Stage

16. Approval of Bills by the Cabinet

16.1. When drafting of the Bill is completed and the instructing Ministry is satisfied that its proposals have been correctly and adequately reflected in it, the instructing Ministry must instruct the Attorney General's Chambers to submit hard copies of the Bill to the instructing Ministry, for submission to the Cabinet for approval. Under no circumstances will the instructing Ministry be given an electronic version of the Bill. This is to ensure that the copies that finally go to the Cabinet are the latest and correct drafts produced by Legislative Counsel. The Attorney General's Chambers will not take any responsibility for copies otherwise produced and submitted to the Cabinet, Government Printer for printing or the National Assembly.

16.2. The Attorney General's Chambers will supply the instructing Ministry not less than three copies of the draft Bill together with any legal advice or comments considered necessary.

16.3. The instructing Ministry must submit the draft Bill to the Cabinet for approval by preparing –

(a) Such number of copies of the Bill usually not less than 30 copies as the Cabinet Office may advise; and

(b) a further Cabinet Paper requesting Cabinet approval of the Bill as drafted.

16.4. Once the Bill has been submitted to Cabinet Office for Cabinet approval processes, the instructing Ministry cannot give instructions to Legislative Counsel for alteration of the Bill. From this point alterations can only be made upon approval of the Cabinet Committee or Cabinet.

16.5. Cabinet Papers are confidential documents and must be headed and treated as such, and must be of high quality, clean, legible, and printed on good quality paper.

16.6. All Bills are referred in the first instance, to the Cabinet Committee on Constitutional, Legal and Parliamentary Affairs before consideration by the full Cabinet. The Principal Secretary of the instructing Ministry and his or her officials are required to attend meetings of the Cabinet and/or Cabinet Committee at which the Bill is discussed to provide any relevant technical explanations.

16.7. The instructing Ministry must adhere to the deadline fixed by the Cabinet Office for the submission of Bills and accompanying Cabinet Papers and other documents to the Committee and full Cabinet to give members of cabinet enough time to study the contents of all the documents.

16.8. The Cabinet Committee may recommend improvements to be incorportated in the Bill before submission to the full Cabinet. The instructing Ministry must submit in writing to the Attorney General's Chambers without delay the improvements recommended by the Committee. After the recommenations are incorporated by the Attorney General's Chambers, the revised draft Bill will then be submitted to full Cabinet for consideration and approval. When Cabinet has approved the draft Bill, with or without amendments, the approval will appear in the form of a Cabinet Directive issued to the instructing Ministry, to the Attorney General's Chambers, and to any other concerned Ministries.

16.9. Upon receipt of the Cabinet Directive, Legislative Counsel will settle the final text of the Bill including its Objects and Reasons and accompanying Memorandum and submit the Bill, duly endorsed with the signature of the Attorney General, to the Government Printer to initiate the process of publishing it in the Gazette.

17. Procedure for the publication of Bills

17.1. Upon receipt of the final text of the Bill as settled by Legislative Counsel, the Government Printer produces, on the instruction of Legislative Counsel in charge of the Bill, an author's proof of the Bill for him or her to proof-read and approve for publication. Based on Legislative Counsel's approval, the

Government Printer will then print the Bill on blue paper and publish it in the *Gazette*.

17.2. The Government Printer is under strict instructions to refuse to print or publish any Bill, subsidiary legislation or legislative instrument without the written approval of Legislative Counsel. This is to ensure that published Bills are indeed those drafted in the Attorney General's Chambers. The Attorney General's Chambers takes no responsibility for Bills that are otherwise printed or published

17.3. Once a Bill has formally been published in the *Gazette* it cannot be altered except by –

(a) cancellation and complete re-publication; or

(b) amendment at the Committee Stage during the legislative process in the National Assembly (see below).

17.4. It should be noted that apart from the hard copies of the Bill, the Attorney General's Chambers also submits read-only electronic versions of the Bills to Parliament for circulation to Members of Parliament for their convenience.

18. Financial Bills procedure

18.1. Section 57 of the Constitution as well as Part XXV of the Standing Orders of the National Assembly require that the National Assembly shall not proceed upon any financial Bill, motion, or petition without the recommendation of the Minister of Finance. The instructing Ministry should therefore consult the Minister of Finance before proceeding upon legislation with financial implications.

19. Procedure for the consideration of Bills in the National Assembly

19.1. The consideration of Bills by Parliament is governed by the Standing Orders of the National Assembly. Principal Secretaries and their technical officers must familiarize themselves in full with the Standing Orders to be better able to advise their Ministers on parliamentary procedures and practice relating to Bills and related matters. Principal Secretaries must ensure that copies of the Standing Orders are available in his or her Ministry for ease of reference.

19.2. Standing Order 125 (2) provides that upon publication of the Bill in the *Gazette,* the Clerk of the National Assembly shall circulate a copy of the Bill to each

Member of the National Assembly at least 28 days before the Bill is introduced for the first time in the National Assembly.

19.3. Principal Secretaries and their senior officers should take note and always bear in mind that a practice has evolved in the National Assembly that a Bill that does not comply with this Standing Order will not be introduced in the National Assembly unless it is so urgent or of a nature as not to permit compliance with the Standing Order. Compliance with Standing Order 125 (2) is, therefore, of greatest importance.

19.4. Where it is necessary to introduce a Bill without complying with Standing Order 125 (2), the Principal Secretary of the instructing Ministry must advise his or her Minister to give notice to the Speaker under Standing Order 126 (1) of a motion, to be moved by the Minister, requesting and justifying to the National Assembly that the provisions of Standing Order 125 (2) be dispensed with in respect of the Bill.

20. The process in the National Assembly for enacting Bills

20.1. The process in the National Assembly for enacting a Bill is governed by Standing Orders 127 to 134. The Bill goes through five stages before it is submitted to the President for assent. The stages are as follows –

First reading:

The Bill is "read a first time" by a clerk of the National Assembly reading out the short title of the Bill and the responsible Minister moving a motion that the Bill be read "the first time". No debate is carried out at this stage.

Second reading:

After moving a motion that the Bill be "read a second time", the responsible Minister reads the Second Reading Speech, highlighting salient policy features of the Bill followed by a debate on the Bill by Members of the National Assembly. It is the responsibility of the instructing Ministry and not of the Attorney General's Chambers to prepare the Second Reading Speech.

Committee stage:

During this stage, the National Assembly turns itself into a Committee of the Whole House. The Bill is examined and considered clause by clause. Amendments can be moved and adopted by the Members of the National Assembly at this stage. Where an amendment proposed to any clause at this stage is likely to lead to complications, the responsible Minister must seek under Standing Order 130 (2) a postponement of any further consideration of the clause in question to allow time for reflection and to seek the advice of the Attorney General's Chambers. Under no circumstances should the responsible Minister accept or be advised to accept an amendment without first seeking the advice of the Attorney General's Chambers unless the amendment is obviously and clearly not complicated and cannot lead to complications elsewhere in the Bill or in the implementation of the resulting Act of Parliament. If it is desired by the responsible Minister to move an amendment to a Bill, the amendment should be prepared in consultation with Legislative Counsel.

Report stage:

The National Assembly reverts into plenary at this stage and the responsible Minister reports that the Bill passed through the Committee Stage with or without any amendments and moves that it be read a third time.

Third reading and passing of Bill:

The Bill is "read a third time" and the responsible Minister moves a motion that it now be passed.

21. Presidential Assent of Bills

21.1. When the Bill is passed by the National Assembly, the Clerk of the National Assembly instructs the Government Printer to prepare two copies on green vellum paper of the final and authentic version of the Bill as amended and passed by the National Assembly. It is the duty of the Clerk of the National Assembly to communicate all the amendments to the Government Printer and ensure that they have all been incorporated in the final copies. The Clerk of the National Assembly then certifies the final copies and forwards them to the Speaker of Parliament for submission to the President to give the Presidential Assent.

21.2. When the Presidential Assent is given, the Clerk of the National Assembly instructs the Government Printer to publish the Bill as an Act. The Clerk places one copy of the assented Bill with the President's signature in the records of Parliament, and sends the other copy to the National Archives.

22. Coming into force of Acts of Parliament

22.1. An Act passed by the National Assembly and assented to by the President comes into force in the following ways -

A. Where no specific date is specified in the Act, it comes into force after midnight following publication in the *Gazette*.

B. On some other future date specifically stated in the Act itself.

C. Where the Act specifically states that it will come into force on a date to be appointed by the responsible Minister by notice published in the *Gazette*, the Act comes into force on the date so appointed by the Minister. The Minister may appoint different dates for the coming into force of different sections or parts of the Act.

D. Where the Act specifically states that it will come into operation upon the occurrence of a stated event, the Act will come into force on the date the event occurs.

22.2. Where the Act is to come into force as stated in paragraph 19.1 (C), it is the duty of the Principal Secretary of the instructing Ministry and not of the Attorney General's Chambers to –

(a) advise the responsible Minister regarding the date on which the Act or any section of it should come into force;

(b) give instructions to the Attorney General's Chambers for production of a commencement notice, appointing a day on which the Act will comew into force; and

(c) when the Government Notice has been approved and signed by the responsible Minister, to arrange for its publication in the *Gazette*.

Subsidiary Legislation

23. Preliminary notes

23.1. The primary power to make laws is vested in Parliament by virtue of section 8 of the Constitution of Malawi. However, from time to time, Parliament, with respect to any Act of Parliament, delegates to the executive or judiciary the power to make subsidiary legislation within the specification and for the purposes laid out in the Act of Parliament. Any subsidiary legislation that exceeds those limitations or purposes is invalid. For example, subsidiary legislation cannot impose a fine or other form of punishment more or greater than the limit prescribed in or address issues that are outside the framework of the principal legislation.

23.2. In many respects, the guidelines for the drafting, processing and publication of subsidiary legislation are like the guidelines for the drafting and processing of principal legislation, and just like principal legislation, subsidiary legislation comes into operation, upon publication in the *Gazette*. It should be noted that subsidiary legislation cannot be promulgated before the enabling principal legislation comes into force.

23.3. Since the Executive or Judiciary make subsidiary legislation under delegated authority, section 58 (1) of the Constitution requires that any subsidiary legislation so made must be laid before Parliament for transparency, accountability and oversight purposes. This requirement is mandatory and not optional. It is, therefore, imperative that Principal Secretaries advise their Ministers to lay subsidiary legislation made by them before Parliament by adhering to the following procedure:

1. Where the subsidiary legislation is promulgated while the National Assembly is sitting, the responsible Minister should lay the subsidiary legislation before the National Assembly before it adjourns *sine die*.
2. Where the subsidiary legislation is promulgated while the National Assembly is not sitting, the instructing Ministry should submit the subsidiary legislation to the Clerk of Parliament to facilitate its laying before the National Assembly at the next sitting.

24. General principles applicable to subsidiary legislation

24.1. Principal Secretaries and their officers must note the following general principles applicable to subsidiary legislation –

A. Just like principal legislation, no subsidiary legislation comes into operation, unless it has been published in the *Gazette* (section 17 (1) of the General Interpretation Act).

B. Subsidiary legislation should generally cover procedural issues under or arising from the principal legislation.

C. Where no date of commencement is expressly stated in the subsidiary legislation, the subsidiary legislation shall come into operation on the expiry of the day immediately preceding the day of its publication in the *Gazette* or, where it is enacted either in the subsidiary legislation that subsidiary legislation shall come into operation on some specified day, it shall, unless it is made to operate retrospectively to any date, come into operation on the expiry of the day immediately preceding that day (section 17 (2) of the General Interpretation Act).

D. Any subsidiary legislation, except where a contrary intention appears, may be made to operate retrospectively to any date, not being a date earlier than the commencement of the principal law under which such subsidiary legislation is made. However, no person shall be made or become liable to any penalty whatsoever in respect of any act committed or failure to do anything before the day on which such subsidiary legislation is published in the *Gazette* (section 18 of the General Interpretation Act).

E. In all subsidiary legislation, except where a contrary intention appears –

(a) expressions used have the same respective meanings as in the principal legislation under the authority of which the subsidiary legislation was made; and

(b) any reference to "the Act" means the Act under the authority of which the subsidiary legislation was made (section 19 of the General Interpretation Act).

F. Where the Act which confers power to make subsidiary legislation or to prescribe forms, has been assented to by the President, such power may, unless a contrary intention appears, be exercised at any time after such

assent, so however that any subsidiary legislation made in exercise of such power shall not take effect until the Act comes into operation except to the extent necessary for bringing the Act into operation (section 20 of the General Interpretation Act).

G. (1) Subsidiary legislation –

(a) shall not be inconsistent with the provisions of any Act and, consequently, any subsidiary legislation shall be of no effect to the extent of such inconsistency; and

(b) may at any time be amended by the same authority making the subsidiary legislation and in the same way it was made. However, where such authority has been replaced wholly or in part by another authority, the power conferred on the original authority may be exercised by the replacing authority;

(2) There may be annexed to the breach of any subsidiary legislation such penalty, unless otherwise provided in the principal legilslation, not exceeding a fine of K1000 and three months imprisonment in default, or both such fine and imprisonment, as the authority making the subsidiary legislation may think fit (section 21 of the General Interpretation Act).

H. Unless a contrary intention appears, there may be provided in subsidiary legislation all or any of the following fees –

(1) specific fees or charges;

(2) maximum fees or charges;

(3) minimum fees or charges;

(4) the payment of fees or charges either generally or under specific conditions or in specific circumstances; and

(5) the reduction, waiver, or refund, in whole or in part, of any such fees or charges, either upon the happening of a certain event or in the discretion of a specified person.

25. Submission and drafting of lay drafts of subsidiary legislation

25.1. All matters which are to appear as a Government Notice in the *Gazette Supplement* must be submitted to the Attorney General's Chambers for drafting into appropriate legislatie language before submission to the responsible

Minister, or other appropriate authority, for signature. These include Rules, Regulations, Notices, Orders, By-laws or Directives. Government Notices cannot be processed by the Attorney General's Chambers after signature of the responsible authority has already been appended. The Attorney General's Chambers will reject and return all Government Notices that are signed by the Minister without the approval of the Attorney General's Chambers.

25.2. A request for the drafting of the subsidiary legislation must be made, in writing, under the hand of the Principal Secretary of the instructing Ministry or a senior officer designated by him stating the reasons for the subsidiary legislation. A request should be accompanied by a lay draft of the requisite Government Notice in duplicate. Every such request should be made in good time before the subsidiary legislation concerned is required for publication.

25.3. After the drafting process is completed, the lay draft will be returned to the instructing Ministry and must be faired for signature, unless this has been done in the course of re-drafting. It is the responsibility of the instructing Ministry to ensure that the faired copies in all respects correspond with the amendments made by Legislative Counsel. The faired copies to be signed must be on thick paper embossed with the Malawi Coat of Arms, not on flimsy paper.

26. Procedure before publication

26.1. After signature, two signed copies of the relevant subsdiary legislative instrument will be forwarded to the Attorney General's Chambers for the necessary approval before printing, and for onward transmission of one such copy to the Government Printer, for publication of the requisite Government Notice in the *Gazette*.

26.2. The Editor of the *Gazette* and the Government Printer have instructions to reject any Government Notice for publication, unless it bears the Ministry of Justice stamp of approval for printing and the signature of the Legislative Counsel concerned.

26.3. The *Gazette* is published every Friday and all material desired for inclusion in any week should reach the Editor not later than Wednesday of the previous week, and earlier in the case of material of any substantial length or complexity.

27. Difference between a Government Notice and a General Notice

27.1. A Government Notice is the instrument by which subsidiary legislation made by a Minister or some other specified authority pursuant to a power delegated by Parliament in an Act of Parliament is published in the *Gazette*. The legislation is called subsidiary legislation because it is secondary to or derived from the principal Act under which it is made. It is for this reason that subsidiary legislation is also known as secondary or delegated legislation. Subsidiary legislation has the same legislative force as the principal or primary Act under which it is made.

27.2. A General Notice is the instrument by which the Government makes announcements of matters of a general nature which have no or are not intended to have legislative force, for example, appointments in the public service. For this reason, there is no need for such notices to be vetted by the Attorney General's Chambers prior to publication in the *Gazette* especially where a previously approved precedent exists.

PART 4
CIVIL LITIGATION

28. What is civil litigation?

28.1. Civil litigation is a term used to describe the legal process commenced by one person or entity (the Claimant) against another person or entity (the Defendant) in a court of law to resolve a dispute or disagreement between them that they have failed to resolve amicably outside the court. To succeed, the Claimant is required to prove his or her case on the balance of probabilities, meaning that he or she must produce evidence, oral and/or documentary, in court that consistently shows more likely than not that the Defendant is liable for the wrongs allegedly suffered by the Claimant. The Claimant and Defendant may also conveniently be referred to by the common expression "litigants".

28.2. Civil litigation is different from criminal proceedings or prosecution. Criminal prosecution deals with the resolution of crimes such as theft, robbery, burglary, rape, murder, manslaughter, corruption, fraud, etc., or statutory offences such as those under the Road Traffic Act or Taxation Act. This part of the Memorandum

deals with civil litigation only. Criminal prosecution falls within the realm of the Directorate of Public Prosecutions and, at operational level, is outside the direct mandate of the Attorney General's Chambers.

28.3. For the purposes of civil litigation, the Malawi Government is treated like any other litigant and can, therefore, sue or be sued as such in a court of law. The law that makes this possible is the Civil Procedure (Suits by or against the Government or public officers) Act. The Act states that suits by or against the Government or public officers must be commenced by, or against, the Attorney General. Principal Secretaries and their key officers are urged to keep copies of this Act and familiarize themselves with it.

The most common types of civil litigation involving the Government arise from breach of contract for the supply of goods or services; employment or labour disputes; medical malpractices; personal injury from road accidents involving Government vehicles; false imprisonment; malicious prosecution; and judicial review of decisions or actions of the Government. In most of the cases, the suit is against the Government. But there is absolutely no reason why the Government cannot commence legal action against any person with respect to any civil wrong it has suffered and in respect of which it has incurred a loss or suffered injury.

29. What are the key stages in civil litigation?

29.1. For the purposes of this Memorandum, the key stages in civil litigation are the preliminary stage; commencement stage; mediation stage; trial or hearing stage; judgment stage; enforcement of judgment stage and appeal stage.

A. Preliminary stage:

(1) Any person who intends to sue the Government is required to give the Attorney General three months' written notice of the intended civil suit outlining in detail the cause of action that has prompted the person to sue the Government. Sometimes, the Claimant directly serves the notice on the client Ministry concerned. The Principal Secretary of the client Ministry must immediately forward the notice to the Attorney General's Chambers and, as time is of the essence in

civil litigation, immediately thereafter proceed to prepare the written brief referred to in subparagraphs (3), (4) and (5) below.

(2) The notice triggers the civil litigation process against the Government. Its purpose is to enable the Attorney General's Chambers to study the facts in relation to the law, consult the client Ministry concerned and determine whether to defend the impending case or settle it out of court to save time and expense. The full cooperation of the client Ministry is crucial at this stage for the Attorney General's Chambers to determine and advise on the action that best serves the interest of the Government.

(3) Where the Claimant serves the notice of intended civil suit on the Attorney General, the State Advocate in charge of the matter will forward to the client Ministry concerned a copy of the notice. Upon receipt of the notice, the Principal Secretary of the client Ministry should acknowledge receipt, in writing, and study the facts as narrated therein and prepare a bound written brief giving clear and adequate instructions to the Attorney General to admit or deny liability. It is absolutely important that the Principal Secretary and his or her Minister must be aware of the case from beginning to end in order to guide their officials in the handling of the factual and legal issues involved.

(4) The written brief must be in narrative form and signed by the Principal Secretary or the head of Department directly concerned with the case. The facts of the case must be numbered consecutively and presented in chronological order, clearly showing the dates on which and places where they occurred, and the persons involved. The brief must outline both positive and adverse facts and end with a clearly stated position of the client Ministry, whether it admits or denies liability. It is the responsibility of the Ministry or Department concerned and not of the Attorney General's Chambers to provide the fact and evidence directly or indirectly relevant to the case. In doing so, the client Ministry or Department must avoid exaggerating the facts or evidence or providing facts that are clearly untrue or cannot be supported by any evidence known to its officials.

(5) The written brief must be bound together with clear copies of all relevant documents attached in a logical order to enable the Attorney General's Chambers to study the brief and understand the facts and issues involved, call for additional documents and/or a meeting with the client Ministry to iron out any grey areas in the facts and evidence provided by the client Ministry. The Attorney General's Chambers will reject and return to the client Ministry a written brief that is not properly bound, contains illegible or poorly produced and arranged copies of documents, and/or provides inadequate instructions upon which to draw up or infer a defence. This obviously would cause needless waste of time as the three months-notice period ticks away and must be avoided at any cost.

(6) When the facts and nature of the evidence are agreed, State Advocate will prepare a response to the Claimant. Ideally, this must be done before the expiry of the three-months statutory notice of civil suit in the hope that the response will satisfy the Claimant and prevent him or her from proceeding to commence legal action. Legal costs are triggered once legal action is commenced.

(7) Depending on the complexity of the case and/or the sensitivity of the issues involved, the Principal Secretary and/or a very senior officer of the client Ministry conversant with the case must be prepared to attend, often at short notice, meetings in the Attorney General's Chambers as the case progresses.

(8) It must be noted that the requirement of the Notice of Civil Suit referred to in subparagraph A (1) above does not apply to judicial review cases.

B. Commencement stage:

(1) A case is commenced against the Government when the Claimant has lodged in the court a summons and statement of claim and served them on the Attorney General. The summons and statement of claim outline the nature of the Claimant's claim against the Government based on the facts and evidence reflected in the notice of intended civil suit.

(2) The Attorney General's Chambers has a maximum of 28 days from the date the summons and statement of claim are served on the Attorney General to either admit liability or defend the case according to the instructions in the written brief prepared by the client Ministry.

(3) Where a decision is made to defend the case, the State Advocate will prepare and lodge a statement of defence in the court before the expiry of the 28 days so long as the written brief submitted by the client Ministry contains clear and sufficient facts and evidence supporting the defence. Failure to lodge in court and serve a statement of defence on the Claimant within the 28-day period will result in the Claimant obtaining from the court a judgment in default of defence without notice to the Attorney General's Chambers.

(4) There will be no excuse for inaction at this point since more than three months will have expired from the time the Claimant served his or her notice of civil suit on the Attorney General or the client Ministry. A court may, on the application of the Defendant, set aside the default judgment and allow the Claimant to lodge a statement of defence, but this happens only in exceptional circumstances and for justifiable reasons. A default judgment against the Government must, therefore, be avoided at any cost.

C. Mediation stage:

(1) The Rules of the High Court require that the litigants undergo a mandatory mediation process under the supervision of a judge in cases before the High Court, or before the Registrar of the industrial Relations court with respect to employment matters.

(2) The purpose of the mandatory mediation is to explore ways in which the litigants could settle the dispute between them amicably without the need for a full trial and save the litigants from incurring consequential legal costs. If no amicable agreement is reached during the mediation process, the judge terminates the mediation and orders that the case proceeds to full trial before another judge.

(3) During the mediation session, the litigants talk to each other directly with minimum involvement of their legal practitioners. The rules of the High Court require that a litigant should have authority to settle a matter during the mediation session and further that a litigant who requires the approval of another person before agreeing to a settlement shall, before the commencement of the mediation session, arrange to have ready means of communication to that other person throughout the mediation session.

(4) For this reason, the Principal Secretary of the client Ministry or a relatively senior officer designated by him or her who can make decisions must attend the mediation session or be on standby throughout the mediation to guide the client Ministry's representatives in the mediation session on what may or may not be conceded.

D. Trial or hearing stage:

(1) The trial is where the judge hears oral evidence and arguments from the litigants and their witnesses and admits in evidence relevant documents filed by the litigants in support of their arguments. The State Advocate in charge of the case will prepare in consultation with the client Ministry, a Trial Bundle consisting of all the documents that are key to a successful trial. The documents will include but not limited to a list of case authorities, witness statements, sworn statements, skeleton arguments, and expert reports, if any.

(2) Prior to the trial, the State Advocate will convene a pre-trial briefing with the client Ministry's witnesses and explain the key issues in the trial, including the procedure for the examination of witnesses, namely, examination in chief, cross-examination, and re-examination to prepare them for the trial. It is important that witnesses are truthful in giving evidence since lying in court under oath is a serious offence that can lead to conviction for perjury. Also, witnesses must not exaggerate or concede facts or positions which are correct.

(3) Depending on the complexity or sensitivity of the issues involved, the Principal Secretary and/or the Minister of the client Ministry may be required to give evidence in support of the Government's case. This is why both of them must be aware (from the beginning to the end of the case) of the facts and issues involded and the evidence in support of the Government's position.

E. Judgment and appeals:

(1) A judgment marks the end of a case in a court where it was commenced. The judgment is delivered by the presiding judge in writing and outlines the decision of the judge and the reasons for the decision. It bears the date on which it is given or made and is authenticated with the official seal of the court. The Attorney General's Chambers will notify the client Ministry of the judgment, forward a copy for its records, and advise the client Ministry of steps, if any, that need to be taken following delivery of the judgment.

(2) Where the Attorney General's Chambers considers that an appeal is justified, it will advise the client Ministry accordingly and, subject to the client Ministry's instructions, proceed to take steps to lodge the appeal with the High Court or Supreme Court of Appeal as the case may be.

(3) Where an appeal is lodged by the person who sued the Government and lost in lower court, the State Advocate will forward a copy of the grounds of appeal to the client Ministry to study and provide such additional information as the Attorney General's Chambers may require to oppose or admit the appeal or any part thereof within a time frame advised by the State Advocate. That time frame must strictly be adhered to avoid compromising the Government's defence to the appeal.

(4) The party that lodges the appeal is referred to as the Appellent whereas the party that opposes or defends the appeal is referred to as the Respondent.

30. Limitation periods

30.1. It is important for Principal Secretaries and their officers to always bear in mind that the written law and the rules of procedure of the High Court impose various time frames known in law as limitation periods within which certain actions or steps in a case may be taken either before commencement of the case or as it progresses through the civil litigating process.

30.2. The limitation periods are intended to promote efficiency and predictability in civil litigation from beginning to end. They are also intended to bring finality to potential disputes by ensuring that cases are brought to court in a reasonably good time. Failure to observe the limitation periods can be fatal and costly to the Government. An obvious example is where a judgment in default of defence has been obtained against the Attorney General for whatever reason and an application to set it aside is dismissed by the court. A default judgment entitles the Claimant to direct the Sheriff of Malawi to seize Government property to satisfy his or her claim.

30.3. A Principal Secretary and/or any member of his or her technical team who fails for inexplicable or unjustifiable reasons to take any action required to comply with any limitation period will be reported to the Secretary to the President and Cabinet to consider taking appropriate disciplinary action against him or her.

31. Judicial review

31.1. Judicial review is a process or means by which the High Court of Malawi supervises how public authorities exercise their power or carry out their duties. The judicial review jurisdiction of the High Court is rooted in section 43 of the Constitution of Malawi which provides that *"every person shall have a right to (a) lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interst are affected or threatened; (b) be furnished with reasons, in writing, for administrative action where his or her rights, freedoms, legitimate expecttaions or interests are affected"*.

31.2. Therefore, judicial review covers the review by the High Court of –

(a) a law, an action or decision of the Government or a public authority for conformity with the Constitution; or

(b) a decision, action or failure by a public authority to act in relation to the exercise of a public function in order to determine –

(i) its lawfulness;

(ii) its procedural fairness;

(iii) its justification of the reasons provided, if any; or

(iv) bad faith, if any,

where a right, freedom, interests or legitimate expectation of a person is affected or threatened.

31.3. It is important to note that judicial review is concerned with reviewing not the merits of the decision of public authorties but with the decision-making process by which public authorities make their decisions. Thus, judicial review is not intended to take away from public authorties the powers and discretions properly vested in them by law to administer Government business and to substitute the High Court judge as the decision-maker. Put simply, judicial review is intended to ensure that public authorities use their powers and discretions in the proper manner in accordance with the requirements of the law. Heads of public institutions must ensure that decisions made in their institutions are lawful, fair and procedural and can be justified.

PART 5
CONCLUSION

32. In conclusion, it is important to remember that the effectiveness of the Attorney General's Chambers depends largely on the quality of requests received from client Ministries, Departments and Agencies for the provision of legal advice or legal services. This entails that the heads and key technical experts of these institutions must be fully conversant with the policy, institutional, legal and regulatory frameworks of their institutions to be able to prepare and submit well thought out requests for legal advice, to draft legislation or to conduct civil litigation on behalf of the Government.

33. Therefore, while the guidelines given in this Memorandum are for guidance only and are not intended to be exhaustive, the Attorney General believes that strict adherence with them will improve and strengthen the provision by the Attorney General's Chambers of legal

advice and legal services to client Ministries, Departments and Agencies and, through them, the Malawi Government.

34. For these reasons, Principal Secretaries and Chief Executive Officers of Agencies must ensure that sufficient copies of this Memorandum are readily available at all times to key technical officers and that they are familiar with its contents.
35. Any comments or request for clarification should be forwarded in writing under the hand of the Principal Secretary of a Ministry or Department or the Chief Executive Oficer of an Agency to:

The Attorney General
Ministry of Justice
Private Bag 333
Capital City
Lilongwe 3

and/or to such email address or addresses as the Attorney General's Chambers may from time to time advise.

APPENDIX 1

CHECKLIST FOR THE CONDUCT OF REGULATORY IMPACT ASSESSMENT (RIA)

Six main elements for Regulatory Impact Assessment

Step 1: Identifying the problem.

- Describe the nature and extent of the problem that is being addressed.
- Identify the key players and affected populations.
- Establish the underlying causes of the problem.
- Is the problem in the government's remit to act? Does it pass the necessity and value-added test?
- Develop a clear baseline scenario, including, where necessary, sensitivity analysis, and risk assessment.

Step 2: Define the objectives.

- Set objectives that correspond to the problem and its root causes.
- Establish objectives at a number of levels, going from the general to the specific and operational.

Step 3: Develop main policy objectives.

- Identify policy options and, where appropriate, distinguish between the options for content and the ones for delivery mechanisms (i.e., regulatory and non-regulatory approaches).
- Begin to narrow the range through screening for technical and other constraints, and by measuring against criteria of effectiveness, efficiency, and coherence.
- Draw-up a shortlist of potentially valid options for further analysis.

Step 4: Analyse the impacts of the options

- Identify the direct and indirect economic, social, gender, and environmental impacts and how they occur.
- Identify who is affected and how they are affected.

- Assess the impacts against the baseline in qualitative, quantitative, and monetary terms – if quantification is not possible, explain why this is the case.
- Identify and assess the administrative burden or simplification benefits, or provide a justification if this not done.
- Consider the risks and uncertainties in the policy choices, including obstacles to transportation and compliance.

Step 5: Compare the options

- Consider the positive and negative impacts for each option on the basis of criteria clearly linked to the objectives.
- Where feasible, display aggregated and disaggregated results.
- Present comparisons between options by categories of impact or affected stakeholder.
- Identify, where possible and appropriate, a preferred option.

Step 6: Outline policy monitoring and evaluation

- Identify core progress indicators for the key objectives of the possible intervention.
- Provide a broad outline of possible monitoring and evaluation arrangements.

Factors to consider

The RIA must as far as possible respond to the following issues:

(a) What is the nature and scale of the problem, how is it evolving, and who is most affected by it?
(b) What are the views of the stakeholders concerned?
(c) What are the main policy options for reaching these objectives?
(d) What are the likely economic, social and environmental impacts of those options?
(e) How do the main options compare in terms of effectiveness, efficiency and coherence in solving the problems?
(f) How could future monitoring and evaluation be organized?
(g) What is the status quo – in terms of existing policy or legal framework, and how adequate is it?
(h) Are there any relevant court judgments on the challenges or gaps in the status quo?
(i) What is the economic impact, fiscal cost, compliance cost, social, environmental and cultural impacts of the proposed legislation?

(j) Risk assessment: Risks should be expressed in terms of how exposed each option is to future uncertainty. Some form of sensitivity or scenario analysis should be presented. A qualitative description of any risks and uncertainties - particularly for tangible costs and benefits – should also be given.

(k) Determine who to consult – conduct a stakeholder mapping. This is intended to feed directly into the process of detail and meaningful consultation and participation. The purpose of consultation is to provide confidence about the workability of proposals and that options have been properly considered. The benefits of consultation in RIA include:

    (i) better information contributing to better quality regulatory proposals;
    (ii) increased scrutiny of analysis of officials and advice, allowing potential problems to be identified early;
    (iii) durability as better designed policies are likely to need amendments once introduced;
    (iv) increased public buy-in or acceptance as stakeholders are more likely to accept a proposal they have been involved in developing;
    (v) improved understanding and compliance (therefore improved regulatory effectiveness);
    (vi) conclusions and recommendations: These should clearly explain what decisions are required, what choices are available, and what stage of the policy process the RIA reflects. Failing to clearly articulate the difference between the status quo and the outcome that is being presented via the Cabinet (either the preferred option or any of the alternatives) will limit the transparency of the RIA.

APPENDIX 2

CHECKLIST FOR LEGISLATIVE DRAFTING INSTRUCTIONS

Bills

	Cabinet Paper with which the instructing Ministry sought approval for the drafting of the proposed legislation
	Policy approved by Cabinet underpinning the proposed legislation
	Cabinet Directive approving the policy and drafting of proposed legislation
	Relevant similar foreign legislation
	Model legislation on the subject-matter of the proposed legislation
	Relevant international instruments
	Court judgments by foreign courts and courts of Malawi on the subject-matter of the proposed legislation
	Relevant reports (including consultancy reports)
	Significant consultations with other MDAs
	Related legislative proposals, whether recent, current, or proposed (including any such legislative proposals for which another Ministry or Department is responsible
	At least 2 instructing senior officers (include their contact details)
	Proposed commencement date
	Deadlines that Legislative Counsel may need to be aware of
	Consequential amendments of any existing legislation
	Proposed punishment or penalties
	The matters that subsidiary legislation should provide for
	Transitional provisions, any licenses, rights, permits to be saved and how they should be saved.

When a Bill is creating a legal body

	Name of the body
	Duties, functions, and powers of the body
	Number of members making up the body
	Who those members will be
	The terms of their appointments, how long a term will be and whether they can be re-appointed
	Qualifications for appointment as a member

	Provisions for removal of a member
	Head of the secretariat

Subsidiary legislation

	Enabling provision
	At least 2 instructing senior officers (include their contact details)
	Proposed commencement date
	If revoking and replacing any subsidiary legislation, include the current subsidiary legislation
	If amending any subsidiary legislation, include the current subsidiary legislation
	Proposed punishment or penalties