PARLIAMENT OF MALAWI

Guidelines for Bill Drafting and Analysis

February 2020

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LIST OF ABBREVIATIONS AND ACRONYMS

House	National Assembly
MP	Member of Parliament
S.	Section
SO	Standing Order

FOREWORD

I have the pleasure to present to you the Guidelines for Bill Drafting and Analysis. The Guidelines offer important knowledge and skills in Bill drafting and analysis. The development of the guidelines has been informed by the Government's provisions and guidance contained in the Constitution, Attorney General's Memorandum, the Guide to Executive Decision Making Processes, the Standing Orders of Parliament, and the Malawi National Assembly Strategic Plan (2015 – 2020).

These Guidelines are part of the on-going reforms in the Parliament. It is hoped that the Guidelines will standardize the Bill drafting and analysis process as well as bring in a high quality standard of research evidence in debating and decision-making process for all Bills within Parliament Finally, let me acknowledge all partners and stakeholders for their efforts in producing these Guidelines. These Guidelines will contribute to the provision of effective support to the Members of Parliament (MPs) and overall service delivery by Parliament.

Fiona Kalemba
Clerk of the Parliament of Malawi

PREFACE

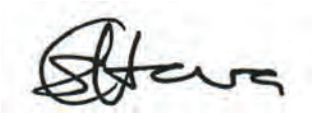
The critical functions of Parliament, of legislation, oversight and representation, make it necessary to have guidelines that promote and enable an increased focus on Bill drafting and analysis in the delivery of these functions. These Guidelines have been developed primarily for use by technical staff who support the work of Members of Parliament (MPs) in the House and committees. These guidelines are also a tool that anyone involved in the Bill drafting and analysis processes will find useful. The main purpose of the guidelines is to enhance understanding of the Bill drafting and analysis process to ensure that quality Bills are proposed, and interrogated accordingly in order to improve the quality of debate and decision-making in Parliament.

The guidelines cannot be fully comprehensive and are not a substitute to consulting detailed guidance on aspects of the institutional framework, legislative and financial processes and statutory obligations within Parliament and with Government.

The Guidelines cover:

a) legislation making process;
b) analysis of Bills;
c) drafting of Bills; and
d) structure of the Bills.

It is therefore hoped that the guidelines will be used as a reference tool for technical staff in Parliament.



Catherine Gotani Hara
Speaker of the Parliament of Malawi

ACKNOWLEDGEMENTS

The development of the Guidelines for Bill Drafting and Analysis has been made possible through the leadership of the Parliament of Malawi, in collaboration with various partners and stakeholders. The Parliament of Malawi would like to acknowledge the technical input of the heads of sections and staff that comprised the core team which supported the development of the manual. The list of people who contributed to the development of the manual is attached in the Annex.

The development of these Guidelines was made possible through Parliament's collaboration with the Malawi Parliamentary Support Initiative (M-PSI), a year-long project implemented by the African Institute for Development Policy (AFIDEP). The Parliament of Malawi would like to thank AFIDEP for providing technical assistance in the development of the Guidelines. The Parliament of Malawi would also like to extend its appreciation to all M-PSI partners who provided invaluable inputs into the development of the Guidelines.

Finally, the development of these Guidelines would not have been possible without financial support from the United States Agency for Development (USAID) through the Counterpart International – Supporting the Efforts of Partners (STEPS) program. The Parliament of Malawi is greatly appreciative of the continued support it receives towards the fulfilment of its mandate.

1 INTRODUCTION

1. INTRODUCTION

1.1 Purpose of these Guidelines

These Guidelines provide a framework to help improve the process and quality of Bill drafting and analysis in the Parliament of Malawi. The purpose is to ensure that quality Bills are proposed by Members of Parliament (MPs), and also that proposed laws by the executive and MPs are sound, and likely to produce efficient and effective results that contribute to socio-economic development in the country.

1.2 Structure of these Guidelines

1.2.1 These Guidelines are structured as follows:

- Legislation making process provides the stages of the legislative process in order to ensure all MPs and parliamentary staff understand this process in-depth
- Bill analysis provides guidance for undertaking effective analysis of Bills
- Bill drafting provides guidance and tips for drafting quality Bills
- Structure of Bills outlines the different components in a Bill to enable understanding when drafting and/or analyzing Bills
- Glossary of terms defines important terms used generally in parliamentary proceedings

1.2.2 Subject to paragraph 1.2.3, these Guidelines may be reviewed and updated periodically to ensure that it captures emerging issues and lessons in Bill drafting and analysis.

1.2.3 These Guidelines shall automatically lapse immediately at the expiry of five years from the date of issuance.

LEGISLATION MAKING PROCESS

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2. LEGISLATION MAKING PROCESS

2.1 Parliament

2.1.1 Parliament is the chief source of law in Malawi. Section 48(1) of the Constitution vests all legislative powers of the Republic in Parliament. Section 49 of the Constitution defines Parliament as consisting of the National Assembly and the President as Head of State.

2.1.2 See also s.89(1)(a) of the Constitution which gives the President legislative powers to assent to Bills and promulgate Bills duly passed by the National Assembly.

2.1.3 Section 73 of the Constitution makes provision regarding the President's assent.

2.2 Procedure of Enacting Bills

2.2.1 The procedure pertaining to the enactment of Bills is laid down in Part XXII of the Standing Orders adopted on 5th November 2013 (SO).

2.2.2 A Bill is defined as a proposal for a new law which has been presented to the House. A Bill may be initiated by (a) a Minister, (b) an MP, (c) an Order of the House and (d) an agency that is not part of the Government: see SO 120 (Initiation of Bills).

2.3 Categories of Bills

2.3.1 There are basically two categories of Bills: public bills and private bills.

2.3.2 Public bills deal with questions of national interest.

2.3.3 The purpose of private bills is to grant powers, special rights or exemptions to a person or persons, including corporations.

2.3.4 Sometimes, a Bill may seem to be both public and private in nature, that is, "hybrid bill". Unlike under British parliamentary practice which allows this type of Bill, that is not the case under SO.

2.3.5 As discussed under paragraph 2.4, both the Constitution and SO recognise only three types of Bills, namely, Government Bills, Private Bills and Private Member's Bills, and these do not include "hybrid bills". How then should the National Assembly handle a"hybrid bill"? It is submitted that such a Bill should be dealt with as a public bill.

2.4 Types of Bills

2.4.1 Section 66 of the Constitution provides for three types of Bills, namely, Government Bills, Private Bills and Private Member's Bills.

2.4.2 Government Bills

2.4.2.1 Government Bills are Bills promulgated by the Government. They are introduced to Parliament on behalf of the Government by a Minister: See also SO 121 (Initiation of Bills).

2.4.2.2 Every Government Bill has to be signed by the Attorney General: see SO 121 (Government Bill).

2.4.3 Private Bills

2.4.3.1 Private Bills are promulgated by an agency that is not part of the Government and introduced to Parliament on behalf of that agency where that agency is mandated by an Act of Parliament so to do: see s. 66(2)(b) of the Constitution.

2.4.3.2 Private Bills are subject to same Parliamentary procedures as those applicable to Public Bills. However, it is open to the House to impose such other requirements as the House may deem fit: see SO 124 (Private Bills).

2.4.3.3 Private Bills before the House are dealt with as Private Members' Business, since they are moved by Members who do not hold ministerial office.

2.4.4 Private Member`s Bills

2.4.4.1 Private Member's Bills are Bills put forward by individual MPs and these Bills reflect issues that are close to the hearts of the respective MPs putting them forward.

2.4.4.2 Every MP has a right to move a Private Member's Bill: see SO 122 (Private Members' Bill).

2.4.3.3 Debate on Private Member's Bills is oftentimes scheduled to take place only during the day of private Members Business.

2.5 Stages in the Processing of a Bill

2.5.1 Procedure for Preparation of Legislation

2.5.1.1 The procedure for preparation of Government Bills is laid down in the "Attorney General's Memorandum (Ref. No. C.343/40 of 30th December, 1980) entitled "Procedure for Obtaining Legal Advice and for the Preparation, Publication and Passing of Proposed Legislation". The relevant part of the Memorandum is set out in the Annex 1.

2.5.1.2 Once Cabinet has given approval in principle to the drafting of the legislation that is contemplated, a Parliamentary Draftsperson is instructed to come up with a draft Bill.

2.5.1.3 Unlike with Government Bills, whose preparation is also governed by

2.5.1.3 Unlike with Government Bills, whose preparation is also governed by the Attorney General's Memorandum, there is no special procedure as such laid down to govern the detailed steps to be followed in the preparation of Private Bills and Private Member's Bill respectively.

2.5.1.4 Once a Bill has been cleared by Cabinet, it has to be published and thereafter placed before the House normally twenty one days before the House meets.

2.5.2 Notice

2.5.2.1 The introduction of any Bill requires written notice. The notice is meant to give MPs sufficient time to digest the Bill, consult their constituents and other stakeholders on the Bill.

2.5.2.2 The title of the Bill to be introduced is then placed on the Notice Paper.

2.5.2.3 There are special rules dealing with the introduction of Bills that involve the expenditure of public funds and Bills that are based on ways and means motions.

2.5.2.4 A Minister or a MP normally provides a brief summary of the Bill he or she is introducing. A Minister rarely provides any explanation when requesting leave to introduce a Bill but is permitted to and may do so later, under "Statements by Ministers", during Routine Proceedings.

2.5.2.5 A Bill is required to be circulated to each MP at least 28 days before the Bill is "First read" in the House: see SO 125 (Publication of Bills). This requirement may be waived in respect of Government Bills. The waiver must be grounded on urgency and "the mover must, with particularity, inform the House the reason for the urgency and the consequences to the nation of not passing the motion": see SO 126 (Waiver of Notice).

2.5.2.6 By its very nature, a waiver must be the exception than the norm; otherwise the frequent resort to the waiver provision has the effect of eroding the purpose for providing adequate notice. Cogent reasons must be advanced for seeking leave of the House for the waiver.

2.5.3 First Reading

2.5.3.1 The first real stage in the legislative process is the introduction and first reading of the Bill. Once the notice period has passed, the MP or Minister seeks leave to introduce his or her Bill when the item "Introduction of Government Bills" or "Introduction of Private Members' Bills" is called during Routine Proceedings.

2.5.3.2 The Bill is "read a first time" by reading aloud the short title only: see SO 127 (First Reading).

2.5.3.3 The Minister or an MP in Charge may move a motion without notice to refer the Bill to a relevant committee or an ad hoc committee: see SO 127 (First Reading). Doing so allows members of a committee to exam-

ine the principle of a Bill before it is approved by the House and to propose amendments to alter its scope.

2.5.4 Second Reading

2.5.4.1 At the conclusion of the first reading, the Minister-in-Charge or Member-in-Charge may either name a future day to be appointed for the next stage of the Bill or move that the next stage be taken forthwith:

2.5.4.2 When the second reading of Bills is reached in the Order of Business for that day, the Speaker shall call upon the Minister-in-Charge or Member-in-Charge to speak to the motion that the Bill be read a second time: SO 128

2.5.4.3 Thereafter, if a relevant committee has submitted a report on the Bill, the Speaker shall call upon the chairperson of the committee to present the report for debate at this stage: SO 128. The report may include findings on the general merits and principles of the Bill. It may also recommend such amendments as are relevant to the subject matter of the Bill. However, such amendments are to be debated when the Bill is being considered by a committee of the House: see SO 128

2.5.5 Committee Stage

2.5.5.1 This stage involves a more detailed examination by the Whole House of the Bill, clause by clause, or a group of clauses, and amendments are made where necessary: see SO 129 (Committee Stage).

2.5.5.2 At the conclusion of the Second Reading, the Minister-in-Charge or Member-in-Charge may either name a future day to be appointed for the next stage or move that the next stage be taken forthwith: SO 129 2.5.5.3 Once the Bill has been read a second time, the next stage shall be the consideration of the Bill by a committee of the Whole House clause-by-clause or groups of clauses.

2.5.5.4 Any proposed new clause may be considered either after the clauses of the Bill have been disposed of, and before any consideration of any schedule of the Bill, or at the appropriate time during this stage of the Bill as the chairperson may determine

2.5.5.5 At any time during consideration of a Bill in the Committee of the Whole House, a motion may be made to commit, or re-commit, the Bill to a relevant Committee. If such a motion is carried, proceedings on the Bill in the Committee of the Whole House shall be suspended until the Committee presents its report.

2.5.6 Report Stage

2.5.6.1 At this stage, the Minister-in-Charge or the Member-in- charge of the Bill reports to the House progress made on the Bill during the Committee Stage for consideration: see SO 131 (Report Stage).

2.5.6.2 Generally, the same rules relating to the admissibility of amendments

proposed at committee stage apply to those at report stage. However, in order to prevent report stage from merely becoming a repetition of committee stage, the Speaker is authorized to select and group amendments for debate. The Speaker also determines whether each motion should be voted on separately or as part of a group. This ruling is made at the beginning of the report stage debate.

2.5.6.3 There is no debate at report stage unless amendments are proposed. If the changes introduced are acceptable and there are no other changes, the Bill will go through to the Third Reading.

2.5.7 Third Reading

2.5.7.1 Third reading is the final stage a Bill must pass and only minor amendments can be added at this stage: see SO 132 (Third Reading).

2.5.7.2 It is also at this point that MPs must decide whether the Bill should be adopted. Debate at this stage focuses on the final form of the Bill. Reasoned amendments are permitted. An amendment to recommit the Bill to a committee with instructions to reconsider certain clauses is also acceptable.

2.5.7.3 Third reading and passage of a Bill are moved in the same motion. Thereafter, MPs vote and if the majority agrees to it, the Bill is then said to have been passed by the National Assembly (Cf Bills needing fixed majority). Once the motion for third reading has been adopted, the Clerk certifies that the Bill has passed.

2.5.8 Assent and Coming into Force of an Act

2.5.8.1 Since Parliament is composed of the National Assembly and the President, a Bill passed by the National Assembly does not become law unless assented to by the President.

2.5.8.2 Where a Bill is presented to the President for assent, the President shall either assent or withhold assent. This has to be done within 21 days from the date the Bill is presented to the President: see SO 134 (Printing of Bill and Presidential assent) and s. 73 of the Constitution.

2.5.8.3 After the President`s assent, the Act does not become effective until it has been published in the Gazette, but Parliament may prescribe that a law shall not come into force until some later date, after its publication in the Gazette: see s. 74 of the Constitution.

ANALYSING BILLS

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3. ANALYSING BILLS

3.1 Development of Bills

A good starting point in analyzing Bills is to examine/understand the process through which the Bill in question has been developed. This is important as it helps one to appreciate the level of quality of the Bill. The following are important considerations to make at this stage.

3.1.1 Has an impact analysis been conducted?

Since legislation seeks to address a societal problem, it is necessary that an impact assessment is conducted to inform the solutions and to safeguard against unintended adverse consequences. An impact assessment should often be conducted to assess (a) economic impacts; (b) on administration of public sector services; (c) existing law and on rights of citizens; (c) on the environment; and (d) social impacts. Often this research will involve examining approaches to tackling the issue from the country or other countries, as well as assess the positive and negative impacts of existing and proposed legislation and non-legislative alternatives. This analysis should involve a range of robust methods in policy analysis. Checking whether an impact analysis has been conducted and how it has informed the proposed law is an important consideration at this stage of bill analysis.

3.1.2 Have alternatives been considered?

Legislation or policies approved have a lasting impact on development efforts in any country. As such, it is important to ensure that all possible alternatives to tackling the problem have been considered. It is therefore always important to ask the question: is what the bill is proposing the most efficient and effective option for addressing this problem? Ideally, this question should have been asked and answered during the development of the Bill, but at the analysis stage, it is important to confirm that all possible options have been considered.

3.1.3 Have experts been involved?

Varied expert opinions are important in ensuring that Bills propose robust and viable options for addressing a problem. Often individual experts or expert committees will be involved in providing suggestions or options for addressing the problem and undertaking a critical review of proposed solutions to a given problem. At the analysis stage, it is important to check that experts were involved in the bill development process and that their views shaped the solutions proposed in the draft legislation.

3.1.4 Have consultations been undertaken with beneficiaries and others affected by the Bill?

Given the impact of legislation on society, it is important to ensure that beneficiaries and others affected by the proposed legislation have been consulted and their views taken into consideration by the proposed solutions to the problem. There may be exceptions where consultations may not be possible, such as during emergencies, or due to budget limitations. At the analysis stage, it is important that one checks whether consultations with all beneficiaries and other groups affected by the proposed legislation have been conducted and the results considered in the solutions proposed. It is expected that the impact assessment will have been shared with the beneficiaries who may identify other impacts that have not been foreseen.

3.2. Form and structure

Before embarking on an in-depth reading of a Bill, it is important to skim through, reviewing headings and sub-headings, to understand the structure of the Bill and determine how different sections fit into the whole Bill. This helps to understand the flow and logic of the Bill. Bills will have definitions of terms as used in the Bill, and this is the point when you should read this section to understand how terms are being used in the Bill. It may also be useful at this point to locate and review existing laws and policies relating to the issue the Bill is addressing, so that when you embark on in-depth reading of the Bill, you have a good understanding of the context.

3.3 Comprehension – Is the proposed legislation easy to understand?

The need to ensure that a proposed legislation is understandable is most important. If a legislation is understandable, then it is more likely that people will read it and comply, and this will enhance respect for the law. When analyzing a draft bill, check for the following factors which increase comprehension of any legislation:

- A logical flow of the text and the different sections of the bill
- A systematic approach to drafting that breaks up the text into units of information that relate to each other
- A uniform numbering system
- Consistency in the use of different terminologies
- Language used is grammatically correct
- Language used is clear, simple, precise, and easy to understand
- It is concise, no unnecessary content
- Explanatory notes accompanying proposed legislation describe the reasons for the legislation, its purpose, and a simple description of its major components

3.4 Do the proposed solution(s) in the bill address the problem?

3.4.1 Purpose and objectives of proposed legislation

The purpose and objectives of the bill need to focus on addressing the problem that it is seeking to address. Analysis of proposed legislation therefore should explore the problem(s) that the bill is seeking to address by answering the following questions:

- What is the problem that the bill is seeking to address?
- What are the facts on this problem?
    - Who is affected by the problem?
    - What are the impacts of this problem on the country's development efforts?
- What are the existing policy and/or legislations for addressing the problem?
- What are the most effective approaches to tackling the problem being addressed by proposed legislation?
- Is the bill addressing a priority development issue or should priority be given instead to priority development issues?

3.4.2 Proposed solution(s)

Having understood the problem and possible solutions, the analyst should now shift

to assessing whether the solution(s) proposed by the draft legislation will effectively address the problem. To do this, the analyst should seek answers to the following questions:

- Is the proposed solution the most efficient, effective, and less costly?
- Is the proposed solution feasible?
- Is it clear what the law requires to be done or not done?
- What are the desired effects of the proposed legislation? Is it likely that the proposed legislation will lead to the desired effects? (analyse the political, social and economic impacts of the proposed legislation)
- Is the proposed legislation likely to bring about undesired effects?
- Is the proposed legislation sensitive to socio-cultural considerations (beliefs, values)?
- Are there aspects of the proposed solutions in the legislation that still require further investigation? Does this investigation or research need to be done now or can be done once the bill is passed?
- Is the proposed legislation providing both short-term and long-term solutions to the problem?
- Are there more viable, alternative approaches to addressing the problem compared to those proposed in the bill?

3.5 Effects of proposed legislation

It is important to assess if the proposed legislation will have any effects on existing laws, rights, and processes. The following questions will help assess these:

- Will the proposed legislation have any effects on existing law?
  - If yes, what effects?
  - Is there need to amend existing law for the proposed legislation to work well?
  - Is the proposed legislation conflicting with or creating uncertainty existing law?

- Will the proposed legislation have any effects on existing rights, privileges and obligations?
  - Which rights, privileges and obligations will be affected by the proposed legislation?
  - How should the affected rights, privileges and obligations be continued, ended or modified in the proposed legislation?

- Will the proposed legislation have any effects on processes, appointments, agreements and proceedings?
  - Are there existing processes, appointments, agreements and proceedings that will be affected by the proposed legislation?
  - How should the proposed legislation provide for these processes, appointments, agreements and proceedings?
  - Does the proposed legislation require introduction of new processes, appointments, agreements and proceedings?

3.6 Implementation of the proposed legislation

3.6.1 Financial implications

3.6.1.1 Analysis of Bills needs to assess the resources, both financial and administrative, needed to enforce or implement the proposed legislation. This is important because if these resources are not provided, the legislation will fail. Important questions to ask when analyzing a bill include:

- What are the financial costs and human resources required to implement the law? These costs and human resources include start-up costs, educational, training and informational costs, and ongoing administrative and enforcement resources and costs, and monitoring and review costs
- Are the required expenditures part of the current approved expenditures of Parliament under the Budget Law? If not, how will the cost be paid?
- What are the potential human and financial benefits of the proposed legislation?
- Do the benefits of the proposed legislation outweigh the costs?

3.6.1.2 In cases where the estimated costs have already been budgeted, the analyst needs to answer these questions:

- Which government department is responsible for financial oversight?
- Are any financial components of the law missing? For instance, will the law add an additional burden on existing government departments or the court system, and has that been taken into account in financial and human resource planning?

3.6.1.3 If the proposed legislation is introducing a new tax or charge, check that:

- The new tax is in line with Malawi's taxation laws
- The proposed legislation clearly states who must pay the tax or charge, when this should be paid, and provides the mechanisms for imposing the tax or charge, collecting and enforcing the tax or charge

3.6.2 Administrative arrangements

The administration of laws determines whether laws work or fail. Effective and efficient administration of laws will ensure that they work as expected to realise the envisaged outcomes. Analysis will need to cover the following:

- The proposed legislation will not result in duplication or conflict of laws, overlapping mandates of individuals or institutions, or multiplicity of decision-makers
- The proposed legislation is clear about the government institution or agency that is responsible for administering the legislation and clear about enforcement roles and responsibilities
- The proposed legislation will have efficient processes that avoid delay, expedite decision-making, and avoid unnecessary "red-tape"

3.6.3 Creation of institutions

If the proposed legislation is creating new institutions, the analyst should ensure the proposed legislation answers these questions:

- Is the mandate of the institution clearly defined and sufficiently broad to enable the institution to do an effective job? What legal authority does the institute need?
- Will the institution's mandate affect other entities or government departments? Have possible conflicts and duplication been resolved?
- Who appoints members of the institution?
- How long are the terms of office for members? Will they be reappointed? If yes, how many times can they be reappointed?
- Will the institution set its own rules of procedure? Should these be approved, and by who?
- Is any public participation required or expected in the institution's work or decision-making? If so, what is the nature of the participation?
- Should decisions of the institution be reviewable by a court or other entity? If so, is the procedure for doing so known?
- To whom will the institution be accountable?
- Who will audit finances and operations and when, and how will this be reported?
- How will the institution be resourced – its staff; its funding; employees? Are staff to be appointed solely by the institution or is the appointment subject to approval, and by who?
- What is the legal status of the institution? Is it a legal entity separate from or part of the government?
- If the institution is intended to be independent of government, how is this assured in the legislation?
- If the government is to direct or influence decision-making by the institution – is it clear how this is to be done?

3.6.4 Subsidiary law

If the implementation of the proposed legislation requires more rules to be made, the analyst needs to check that the proposed legislation:

- Identifies the person or entity that is authorized to make the rules (i.e. subsidiary laws).
- Confers sufficient power to the person or entity to make the necessary rules. This power should, however, not conflict with or override the principal legislation or other laws.
- Provides guidance on the process of making and publishing the rules and levels of approval needed for these rules to be effective.

3.6.5 Enforcement and compliance of the law

If a law is hard to enforce, then it will be hard to realise its purpose. Ideas for improving effectiveness of legislation have been evolving to promote and encourage self-regulation and provide rewards and incentives for compliance. Involving those to be regulated by the law in its design is one of the ways being recommended as useful in improving self-regulation and compliance. With this shift in thinking, enforcement should be seen as a last resort. Analysis of proposed legislation should examine the following:

- Involvement of those to be regulated in the design of the legislation as a way of improving compliance and self-regulation

- If the Bill proposes legislative schemes that:

    - Provide for methods of rewarding or providing incentives for compliance with the law

    - Uses lower cost, least adversarial, and voluntary mechanisms first – including incentives and disincentives, to gain compliance with the law

    - Uses adjudicative processes as a last resort

    - If possible, allows options to loop back to lower cost, least adversarial and voluntary mechanisms at appropriate points in the enforcement process

    - Uses the court system appropriately without over-burdening it.

3.6.6 Retroactive effects

Generally, proposed legislation should not have a retroactive effect, i.e. take effect from a date in the past. Legislations with retroactive effects may be allowed in very limited cases. The analyst should therefore assess draft legislation to identify any retroactive effects, and consider how the effects should be addressed in the proposed law. These effects and considerations should be discussed in-depth before the Bill passes into law. Some examples of cases where legislation with retroactive effects may be allowed include when the bill:

- Confers a benefit that may be retroactive
- Is confirming past appointments
- Is proposing taxation provisions that were announced at an earlier date; so the retrospective effect dates back to the date when the taxes were announced.

3.7 Monitoring and accountability mechanisms for the proposed legislation

3.7.1 Effective law needs to provide for mechanisms for periodical monitoring and accountability to ensure that the legislation is achieving its purpose. Analysis of bill should check whether the bill:

- Identifies the institution or title of the government official responsible for its implementation or administration
- Outlines what is required of the institution or government official responsible for implementing or administering the law, including the need for the institution or government official to provide publicly available reports of how the legislative responsibilities are being managed
- Provides mechanisms for assessing the effect and relevance of the legislation. These mechanisms could include:
    - A requirement for periodic reports to Parliament on whether the legislation is meeting its purpose or has created a trend toward meeting its purpose
    - A requirement for another entity to review the legislation periodically to

check its effectiveness and relevance and provide these reports to Parliament
- Mandating some independent agencies to review the legislation and provide a public report to Parliament (e.g. expert panels, law commission, etc.)

3.7.2 To be able to assess a law's effectiveness, it is important that data on the issue is gathered or established at the time of the development of the law. This data is important as it will provide a basis for future comparison to demonstrate the effect of the law.

3.7.3 Analysts should generally assess the effectiveness and efficiency of proposed laws where possible. Effective and efficient legislation will:

- Provide a good basis for economic growth
- Not create an overburdened bureaucracy
- Not create too much "red tape" for the public and business
- Give society confidence in the law

3.7.4 Analysts should assess these factors when analyzing proposed legislation.

3.7.5 For legislation meant for temporary periods, such as legislations for emergency situations, analysts should check that they provide a "sunset clause", which is a section in the legislation that says the law is repealed at a certain future fixed date unless it is amended to extend its life.

3.8 Constitutional Issues

3.8.1 The Constitution of Malawi is the supreme law of the country. Therefore, all laws enacted in the country must respect and conform to the Constitution. Analysis of Bills should always ascertain that they respect and conform to the Constitution.

3.8.2 The Constitution of Malawi recognizes a wide range of human rights, freedoms and privileges in Chapter IV (see Annex 4). Analysts should check that the proposed legislation does not impinge on any of these rights, freedoms and privileges of citizens.

3.9 International Obligations

Malawi is party to various international agreements and treaties. These agreements will include United Nations Conventions, continental conventions through the African Union, among others. Analysis of proposed legislation should assess that the legislation complies with any international agreements and treaties that the country is party to.

DRAFTING BILLS 4

4. DRAFTING BILLS

4.1 Introduction

Although Government bills have dominated the work of Parliament in Malawi for many years, MPs are increasingly starting to bring private members bills into the House. This has created a need for skills in bill drafting among technical staff in Parliament. This Chapter seeks to provide direction to staff to ensure they draft effective and quality bills.

4.2 Words

4.2.1 The aim of writing is to communicate. In order to effectively communicate the right words must be used. Finding the right words is not, however, an easy exercise. This is because words have a tremendous potential for vagueness, ambiguity, inaccuracy and imprecision. Great writers have long been aware of the imperfection of words. Megarry states that *"few words possess precision of mathematical symbols"*[1] That statement is echoed by Holmes J.:

> *"A word is not a crystal, transparent and unchanged, it is the skin of living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used."*[2]

4.2.2 It cannot, therefore, be doubted that the nature of words makes the writing of clear and precise prose a most difficult task even under ideal conditions. A bill drafter, however, faces as it is shown under paragraph 4.3.3 the worse of conditions.

4.3 The Needs of a Bill Drafter

4.3.1 The purpose of drafting legislation is to translate the legislative intention into written words. Since legislation must be drafted to be understood, a bill drafter must use the correct words, i.e., words that compel the interpretation that the bill drafter wishes. Unfortunately, the bill drafter faces two main problems in his or her noble task.

4.3.2 Firstly, there is the problem of meaning of words. If meaning of words stay in place, the bill drafter would have some confidence in what sense the reader would make of the words used in the bill. However, most words, if not all, have multiple meanings which meanings increase when words are affected by different contexts.

4.3.3 Secondly, a bill drafter faces a hostile audience in that each person affected by a law seeks to interpret the law in a way that is beneficial to him or her. Bills must, therefore, be drafted in such a way that there should be no doubt as to the legislative intent. A bill drafter's lot is best summed up by Steven J.:

> *"A considerable degree of precision is required … to draft Acts of Parliament, which though they may be easy to understand, people continually try to misunderstand, and in which therefore it is not enough to attain a degree of precision which a person reading in good faith can understand but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand."*[3]

1 Megarry, A Second Miscellany-at-Law, p.154
2 Towne v. Eisner (1918) 245 U.S. 418 at 425
3 Re Castion: (1891) 10. B. 167.

4.4 Communication

4.4.1 A bill drafter is mainly concerned with written communication. In written communication, there are three main elements namely the author, the audience and the written utterances.[4] For the purposes of these Guidelines, the first element is not relevant.

4.4.2 A bill drafter must at the outset find out the audience at whom the intended legislation is targeted. The nature of the audience helps to determine the concept, the basic arrangement and the special language that the bill drafter should use.

4.4.3 With bills, the audience is generally more varied. It is important that this point be borne in mind since drafting must relate to the audience to be reached. Legislation meant primarily for Government officials may need to be drafted differently from legislation meant for the public as a whole. Equally true, a law addressed to a highly specialized segment of the public, e.g., engineers, may be drafted differently from a law addressed to the public at large.

4.4.4 The element of audience is all the more reason why a bill drafter must master correct use of words. Reed Dickerson's caution is not out of place:

> "There is no surer trap for the draftsman than to use a term in a sense significantly different from that normally attributed to it by audience to whom the instrument is addressed."[5]

4.4.5 A bill drafter must, therefore, strive to use correct words, i.e., words that aid comprehension. It is certainly not good draftsmanship to use words that the audience is least likely to understand.

4.4.6 What one set of readers finds easy may be quite difficult for another set, or may not be understood by them in the way the bill drafter intended. These competing interests need to be balanced and given due weight. The weight to be given to different competing interests may be different from bill to bill.

4.5 A Bill Drafter and the Courts

4.5.1 To be effective according to legislative intent, legislation must carry the same meaning to those who will exercise it as to the bill drafter. For all legislative instruments, the ultimate audience includes courts which may be called upon to interpret the legislation.

4.5.2 This means that in choosing words, a bill drafter must have courts in mind since ***"the object is to see that in the ultimate resort, the judge is driven to adopt the meaning which the draftsman wants him to adopt."***[6]

4.5.3 To attain this object, a bill drafter must use correct words. A bill drafter is in a better position to know that he or she has used correct words if he or she understands his or her relationship to courts. As Cross has written:

> "*It is important to appreciate the mutual dependency of the draftsman and the courts when the latter are engaged in statutory interpretation. The draftsman will find it difficult to convey the Parliamentary intent to the court unless he knows they will attach the same meaning to his words as that in which he employs them. Hence the need for a common standard of interpre-*

4 See Reed Dickerson, The Fundamentals of Legal Drafting, 2nd ed., p.26.
5 ibid., p.19.
6 Nazareth J., Could our statutes be simpler

tation."[7]

4.5.4 A bill drafter must, therefore, have regard to how the courts interpret words. Over the years, the courts have evolved rules of interpretation.

4.5.4.1 Grammatical and ordinary meaning

Words used in legislation will be given their ordinary meaning according to the rules of grammar.[8] A bill drafter must, therefore, adhere to established and accepted rules of grammar, syntax and composition. He or she must also as much as possible use words in their ordinary sense. If a word is to have a special or secondary meaning, he must take pains to make that meaning clear.

4.5.4.2 Modification of grammatical and ordinary meaning

4.5.4.2.1 If a reading of words in their grammatical and ordinary sense results in disharmony, the courts will modify the strict grammatical or ordinary meaning so far as is necessary to produce harmony.[9]

4.5.4.2.2 The result obtainable after the courts modify the sense of the words used may not be what the bill drafter intended. A bill drafter must, therefore, ensure not only that there is no inconsistency within the individual clauses but also that all clauses produce a consistent whole.

4.5.4.3 Technical words

4.5.4.3.1 Words in a statute aimed at a particular activity will normally be read in the sense given to them by people engaged in the activity. Lord Esher explains the position:

> "*If the Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary usage of language. If the Act is one passed with reference to a particular trade, business or transaction, known and understood to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words. For instance, the words "waist" or the "skin" are well-known terms as applied to a ship, and nobody would think of their meaning the waist or skin of a person when they are used in an Act of Parliament dealing with ships.*"[10] – Emphasis by underlining supplied

4.5.4.3.2 A bill drafter must, therefore, use words in their technical sense when he or she is drafting a technical statute.

4.5.4.4 Surplusage of words

4.5.4.4.1 The habit of adding words is strong, less strong is the need to

7 Cross, Statutory Interpretation, p.171
8 See D.P.P.V. Hester [1973] A.C. 296
9 The case of Inland Revenue Commissioners v. Hinchy [1960] A.C. 748 sheds more light on the matter
10 Unwin v. Hanson [1891] 2 Q. B. 115 at p.119

examine the need for them. All too often, the result of surplusage is an accumulation of words that add mere bulk than meaning.

4.5.4.4.2 A bill drafter should not insert into a bill unnecessary words. Courts strain to give meaning to all words in a statute and if unnecessary words are used, there is the danger that the meaning construed by the court may not coincide with the meaning intended by the bill drafter.[11]

4.5.4.5 Ambiguity

4.5.4.5.1 In ordinary language "***ambiguity***" is confined to situations in which the same word is capable of meaning two different things but in relation to statutory interpretation, judge usage sanctions the application of the word to describe any kind of doubtful meaning of words, phrases or longer statutory provisions.[12]

4.5.4.5.2 There are two main sources of ambiguity. Syntactical ambiguity results from combining words, which are unambiguous taken separately, in such a way that the meaning of the words together is ambiguous.

4.5.4.5.3 The second kind of ambiguity arises from the word itself and not from its use with other words, i.e., the word itself has two or more distinct meanings. It hardly needs saying that such words are a commonplace.

4.5.4.5.4 A bill drafter must avoid using ambiguous words since if two or more meanings are reasonably possible, the courts will have to make a choice. They will generally select a meaning that is best in harmony with the whole statute. However, where the choice is not clearly indicated by the context, the courts will select a meaning that to them seems more reasonable. Their standard of reasonableness may, unfortunately, not coincide with that of the bill drafter.

4.5.4.5.5 As already noted, almost each word is intrinsically ambiguous. How then is the bill drafter to avoid ambiguity? Thornton provides the answer:

> "*A draftsman must exercise continuing care to ensure that the potential ambiguity of words with a multiple meaning is nullified by the context in which they are used. If ambiguity cannot readily be removed by context, consideration should be given to amplification of the words by adding the minimum number of words necessary for the purpose. If that cannot be conveniently done, a definition may be desirable.*"[13]

4.5.4.5.6 The upshot of the discussion on ambiguity is that a bill drafter

11 See Chapter 3, G.C. Thornton, ibid., p.50
12 Cross, ibid., p.213
13 Thornton, ibid., p.13

must be on his or her guard at all times to foresee any possible ambiguity, and, if this occurs, he or she should find some other words or arrangement where this ambiguity can be eliminated. In short, a bill drafter must not be satisfied until he or she has found the words which will communicate his or her intended meaning most accurately.

4.6 Presumptions

4.6.1 In choosing words, a bill drafter must also bear in mind presumptions. The word "presumption" is used in relation to burden of proof. The implication is that a particular conclusion is likely to be drawn by a court in absence of a good reason for reaching a different one.[14]

4.6.2 There are many different presumptions. The more common or well-known presumptions relate to ouster of jurisdiction,[15] vested rights,[16] general defenses, strict construction of penal statutes.[17] Presumptions of particular relevance to these Guidelines are:

4.6.2.1 *Re-enactment*

4.6.2.1.1 When parliament re-enacts a statutory provision in the same words that have been the subject of a judicial decision, there is a presumption that Parliament intended to confirm the judicial decision:

> "*When a statutory provision is re-enacted in the same words and those words have been the subject of a judicial decision, it is natural to assume that the draftsman was aware of that decision, and it is not unreasonable to say that there is a presumption that Parliament intended to endorse that decision.*"[18]

4.6.2.1.2 This presumption underscores why it is necessary that a bill drafter must, before drafting any piece of legislation, make thorough research into the existing law, including court judgements.

4.6.2.2 Consistency

4.6.2.2.1 A bill drafter must use the same word or expression if he or she means the same thing and he or she must use different words or expressions if he or she means a different thing. Lack of consistency undoubtedly creates problems of ambiguity or obscurity especially when the provision is being construed by the courts.

4.6.2.2.2 Courts will assume consistency and if there is inconsistency they are likely to find a meaning not intended by the bill drafter. Louis Philippe Pigeon explains:

14 Cross, ibid., p.142
15 See Pyx Granite Co. Ltd. V. Minister of Housing and Local Government [1960] A.C. 260.
16 See Allen v. Thorn Electric Industries Limited [1968] 1 Q.B. 487.
17 See D.P.P. v. Otterwell [1970] A.C. 642.
18 Per Gaffard L.J. in Re Cathcart, ex parte Campbell (1869) 5 C.R. App. 603 at 613.

> "*In legislative drafting, if the same word or expression is not repeated, the courts will presume not that the writer intended to vary his word or expression, but rather that he intended to draw a distinction, or introduce a shade of meaning.*"[19]

4.6.2.2.3 In this regard, it is important that the bill drafter must be absolutely methodical, i.e., he or she must ensure that each recurring word or expression is used consistently. He or she must avoid using the same word in more than one sense. Conversely, he or she must avoid using different words to denote the same thing or idea. For example, a bill drafter must not refer to a person as a "beneficiary" in one clause of a bill and refer to him or her as a "devisee" in another clause of the bill. Equally true, where a bill drafter refers to "real property" in a bill, he or she must not, if the same thing is meant, refer to it farther on in the bill as "lands and premises" and end up by referring to it as "house and lot".

4.7 The Unwritten Utterances

4.7.1 This is the element to which a bill drafter must devote his or her primary attention. His or her goals are the express meanings of particular words and the internal context, including syntax, that he or she creates within an instrument.

4.7.2 Sense is communicated not only by dictionary meaning of words but also by arrangement of the words in sentence patterns. A sentence is a pattern in which words are grouped in a particular way.[20] The nature of the grouping contributes to and in most cases controls the sense conveyed.

4.7.3 A legislative sentence is structurally not different from any "grammatical" sentence. In recognition of this point, Driedger says:

> "*Good legislative drafting requires the application of the basic standards and principles of grammar and composition.*"[21]

4.7.4 It is, therefore, important that a bill drafter should have a good working knowledge of words, grammar and composition.

4.7.5 Grammar is such a wide subject that it is not possible to deal with it extensively in these Guidelines. The most that can be done is to highlight some fundamental rules of grammar that are of practical significance to a bill drafter.

4.7.5.1 Syntax

4.7.5.1.1 A bill drafter must pay great attention to syntax – the grammatical arrangement of the words by which their connection and relation in a sentence are shown. Syntactic ambiguity probably gives rise to more difficult and uncertainty as to the intended interpretation of legislation than anything else. A bill drafter is concerned here with the function of each word, or group of

19 Pigeon, Drafting and Interpreting Legislation, 2nd ed., p.47
20 See Thornton, ibid., p.17
21 E. Driedger, The Composition of Legislation, 2nd ed. P. 85

words, in relation to the remainder of the sentence.

4.7.5.1.2 In a clause of a bill, the bill drafter must clarify:

(a) the legal subject – the person to whom the law is to apply;
(b) the legal action – the law which is to apply; and
(c) the circumstances in which the law is to apply.

4.7.5.1.3 The main difficult arises over (c) – often referred to as the modifier.

4.7.5.2 Modifiers

4.7.5.2.1 Thornton defines a modifier as "a word or group of words which make the meaning of other words more exact by limiting, restricting or describing them."[22]

4.7.5.2.2 The rule regarding modifiers is that the structure of a sentence must be such that the relationship of the modifier to the word or group of words it modifies is apparent and ambiguous.

4.7.5.2.3 A bill drafter must therefore arrange a modifier as near as possible to the sentence element it modifies. Such an arrangement goes a long way in providing a solution to ambiguous modification. It is not however a complete answer since it does not solve the problem presented by the dangling modifier. [23]

4.7.5.3 Present Tense

4.7.5.3.1 There is a general convention that a statute is "***always speaking***" and thus the correct tense to use is the present and not the future tense.

4.7.5.3.2 One significance of this convention is that a bill drafter should remember to confine the use of "***shall***" to its mandatory sense as expressing an obligation, in contrast to the use of the word "***may***" denoting a permission or a discretion.

4.7.5.4 Faulty Reference of Pronouns

4.7.5.4.1 The use of pronouns requires care. A sentence is more likely to be ambiguous if the relationship of a pronoun to its antecedent is not obvious and definite.[24]

4.7.5.4.2 A bill drafter can make the relationship of a pronoun to its antecedent as closely as possible. However, just as is the case with modifiers, the close proximity of a pronoun to its antecedent

22 Thornton, ibid., p.23.
23 A useful treatment of the problem is found in Thornton, ibid., pp.23 et seq
24 Thornton quotes 2 Kings 19: 35 as an example, "and when they arose early in the morning, behold, they were all dead corpses."

does not always prevent ambiguity. For example:

> "*In the event of the President giving notice to the Speaker of his decision not to assent to the Bill, he shall thereupon dissolve Parliament.*"

4.7.5.4.3 "he" in the above example is ambiguous. It may relate to either the President or the Speaker. In such a case, the ambiguity can be removed by repeating the antecedent.

4.7.5.5 Choice of Familiar Words

4.7.5.5.1 A bill drafter must select familiar words that best express the intended meaning according to common and accepted usage. He or she must prefer the familiar word to the far-fetched since the prime consideration in drafting must be to use words that aid comprehension.

4.7.5.5.2 Many writers acknowledge the need to use familiar words. Sir Ernest Gower's call is ***"Be short, be simple, be human …"***[25] Paradoxically, even great thinkers whose works many find difficult to understand recognize the importance of using familiar words. For example, Aristotle observed:

> "*Style to be good must be clear. Clearness is secured by using the words that are current and ordinary.*"[26]

4.7.5.5.3 The danger of using unfamiliar words is that they lead to breakdown of communication. This is because in the ordinary course of things, when readers come across an unfamiliar word which is not understood, they skip over it or guess. Often, their guesses are wrong.

4.7.5.5.4 A bill drafter must not, however, be carried away in using familiar words. He or she needs to understand that the rule that familiar words should be preferred to the unfamiliar is only a subsidiary rule. The primary rule is that a bill drafter must use the words that most exactly and precisely convey the intended sense. Therefore, where only an unfamiliar word is capable of communicating the intended sense, then that unfamiliar word must be used.

4.7.5.6 Verbiage

4.7.5.6.1 A bill drafter should always try to express himself or herself in simple English and should avoid long words and long sentences. He should not use more words than are necessary to make the meaning of the Bill clear.

4.7.5.6.2 If it is possible to reduce detailed provisions dealing with vari-

25 Sir Ernest Gowers. The complete Plain Words, p. 83.
26 Cited by Barzun, Simple and Direct, p.17.

ous particular circumstances into one broad rule covering all of them, and any similar circumstances that may arise, this should be done. Constant revision, if there is time for it, will help in this direction.

4.7.5.6.3 Circulation must be avoided. It is important that a bill drafter should observe this rule since unnecessary words may be read as modifying the ordinary sense and this may lead a reader to a meaning not intended by the bill drafter. The danger posed by circumlocution is well expressed by Professor Eagleson:

> "*When one word will do it is inefficient to use more. It is also likely to mislead readers who are enticed to search for some unintended nuance in the natural belief that an additional sense could be the only reason for the drafter using an extra term.*"[27]

4.7.5.6.4 A bill drafter must, therefore, avoid every needless word and if a word conveys the same meaning as a phrase, he must use the word and not the phrase.

4.7.5.6.5 In the pursuit to avoid verbiage lies a trap for the unwary bill drafter. A bill drafter who is most eager to avoid verbiage may go to the opposite extreme and write few words or make sentences too short. The result is skimpy language that is so abbreviated that it becomes hard to understand. Horace said it all: "***I labor to be brief and become obscure***"[28]

4.7.5.6.6 A bill drafter must, therefore, bear in mind that fewer words are preferable only if they convey the intended meaning. If more words are needed to convey the intended meaning, the bill drafter should not hesitate to set out matter at length, if by doing so, the intended meaning becomes clearer.

4.7.5.7 Punctuation, spelling, etc.

4.7.5.7.1 Punctuation, if used correctly, indicates the structural form of a clause and helps the reader to understand the intended meaning of the words; it should not by itself alone be relied upon to cure syntactic ambiguities. This can often best be done splitting a clause into paragraphs and sub-paragraphs. It involves careful analysis by the bill drafter and should generally be adopted, unless the intended meaning can be more easily conveyed by means of separate sections or subsections

4.7.5.7.2 A bill drafter must also pay special attention to the form of spelling which he or she uses and for this purpose he or she must have available a good dictionary. The bill drafter should ensure that the spelling of any particular word is consistent, not only throughout the bill he is drafting, but also with that used in the

27 Prof. Eagleson, Efficiency in Legal Drafting, p. 24.
28 Cited by Thornton, ibid., p. 50

existing law.

4.7.5.7.3 The use of capital letters should be restricted to cases where special attention is to be drawn to particular circumstances, or to statutory or administrative bodies. Care must be taken to ensure that, where once an expression has been spelt in one part of the Bill with capital letters, capitals are used throughout the bill for the same expression.

4.8 Voice

4.8.1 Writing must be straight forward. This can best be achieved by using the active voice rather than the passive voice. Active voice is more direct, more forceful and more understandable.

4.8.2 Passive voice has notably two disadvantages. Firstly, it takes more words. For example:

Passive Voice	*Active Voice*
The order was made by the Magistrate that …	The Magistrate ordered that…
The Committee was appointed by the President to …	The President appointed the Committee to …
Five directors of the Corporation shall be appointed by the Minister	The Minister shall appoint five directors of the Corporation.

4.8.3 Secondly, passive voice often leaves unclear who is doing what to whom. In legislative drafting, this is a serious weakness since the law requires that when a power or duty is conferred or imposed, the identity of the person on whom it is conferred or imposed should immediately be apparent. Thornton elaborates:

> "*Expressions in the passive voice may lead to a lack of directness. For example, a section enabling or requiring a certain action to be taken may be grammatically adequate and apparently complete in meaning although the person so enabled or obliged is not mentioned. The form of the active voice is such that the draftsman's attention is necessarily directed to the necessity to identify the person concerned.*"[29]

4.9 Provisio

4.9.1 Use should not be made of the proviso where the intended meaning can be conveyed by the use of conjunction or by the addition of a separate section or subsection.

4.9.2 Textbook writers always condemn the use of the proviso but it often continues to flourish in modern legislation. A bill drafter should consider carefully whether it is necessary to make use of this device and should endeavor to eliminate it completely; it is nearly always possible to find some other way of expressing the intended meaning more accurately. The continued use of the proviso can be justified, if at all, only where it is used to create an exception.

29 Thornton, ibid., p. 52

4.10 Intelligibility and Style of Drafting

4.10.1 A bill drafter's task is not only to determine the law but also to communicate it. He must therefore develop a style of drafting that makes legislation to be readily understood.

4.10.2 Intelligibility in everyday writing is best achieved by writing with simplicity. However, in drafting legislation simplicity without more will not do since a ***"law which is drafted in simple but imprecise terms will be uncertain in the scope of its application and for that reason fail to achieve the intended legal result".*** [30]

4.10.3 Precision on its own is not also the answer. A law drafted in precise but not simple terms may on account of its incomprehensibility fail to achieve the intended result. The blind pursuit of precision will inevitably lead to complexity. In the apt observation by Louis Phillippe's observation **"*once an attempt is made at precision beyond a certain point, the result is not the precision sought, but greater imprecision*."**[31]

4.10.4 In fact, many commentators have pinpointed the pursuit for precision at all costs as the main weakness with so called English or common law style of legislative drafting. Under this style of drafting, the greatest effort is made to say all, to define all, to leave nothing to imagination and never to presume upon the reader's intelligence. Its proponents claim that it has the advantage of certainty.[32]

4.10.5 That the English style of drafting unfailingly achieves certainty has been challenged. Here is Louis Phillippe in tremendous form:

> "*Use of this method [the English style] will consistently result in laws which are perfectly comprehensively – or so we are tempted to think. But take down any volume of statute and you will see to what point the law can become difficult to understand … The endless verbiage and countless precautions intended to make it intelligible, the final result being something so complex as to constitute a veritable challenge to intelligence. It has to be explained to be understood.*"[33]

4.10.6 It is not possible in these Guidelines to fully discuss the merits or demerits of the common law style of drafting as against other styles of drafting, notably the civil law style of drafting. Suffice to say that both have their merits and demerits.[34]

4.10.7 What this boils down to, it is submitted, is that whichever style a bill drafter adopts, his or her task will best be satisfied by writing with simplicity and precision. The "and" is used advisedly. Neither simplicity nor precision should be sacrificed at the altar of the other.

4.10.8 While a bill drafter must seek to cover all circumstances which are reasonably likely to occur, he or she should not try to provide for every conceivable possibility – to do that would needlessly add to the length and complexity of the bill. In certain cases, a deliberate policy decision is made to confine a bill to general guidelines and to leave its detailed application to those assigned the responsibility to administer it. In such cases, a bill drafter should warn the concerned parties of the possible effects of such general

30 Ibid., p. 49
31 Pigeon, ibid., p. 84
32 For an exhaustive analysis, see Nazareth J., ibid.
33 Pigeon, ibid., p.14.
34 See Nazareth J., ibid.

guidelines and he or she should, as far as possible, ensure that the general purpose and scope of the bill are clear from its context. The bill drafter should also see any subsidiary legislation which is to be made for giving effects to the general guidelines.

4.11 Preliminary Stages of Drafting

4.11.1 A bill drafter has to undertake extensive legal and factual research into the scope of the problem with which he or she has to deal with. Such research may help to show at an early stage whether constitutional or other legal difficulties and consideration may be involved. Such research may also indicate that no new legislation is in fact needed in order to deal with the problem, or that the problem can be adequately dealt with by means of subsidiary legislation made under an existing law.

4.11.2 By the very nature of the scope and variety of legislation, it is not possible to lay down any hard and fast rules as to the content of drafting instructions. There are, however, certain matters which should be dealt with in the instructions and these include:

(a) sufficient background information to enable the bill drafter to appreciate all the facts and problems with which the bill is to deal with;

(b) the objectives of the Bill, with accurate information on all necessary details, including those of a technical nature;

(c) the consultation which has taken place on the proposed legislation, either within or outside the Government and the advice given at, and the conclusion of, those consultation;

(d) reference to any relevant court decisions on the matters at issue;

(e) references to the report of any commission or other body which considered the matters at issue;

(f) the administrative provisions needed to implement the Bill and the manner in which it is to be enforced;

(g) the extent to which existing laws may have to be amended or repealed, and whether transitional provisions may be needed to deal with matters which have arisen before the Bill comes into operation;

(h) the procedure and manner of appeal against ministerial decisions where, as a matter of policy, those appeals are considered desirable; and

(i) any special provisions which may be needed for bringing the Bill into operation from any particular date, past or future.

4.11.3 A bill drafter who finds himself or herself faced with vague or incomplete instructions has to obtain further information from officers of the Ministry concerned and with officers of other Ministries who have specialized knowledge of the matters involved. In these consultations, the bill drafter should try and visualize the situation which will arise in practice once the legislation comes into operation and he or she must ensure that all its implications are fully appreciated by those concerned.

4.11.4 Legislation is only of value if the necessary administrative machinery is available to ensure that the legislation can be fully implemented. It is clearly most undesirable to clog the statute book with laws which cannot be enforced and implemented. The welfare of the country depends largely upon the quality, and not the quantity, of its civil service and the same is true of its legislation.

4.11.5 Matters of essentially legal significance which a bill drafter should raise and discuss in the course of his or her consultations during the drafting of the Bills include:

(a) retrospective legislation;
(b) the extra-territorial effect, if any, to be given to a Bill;
(c) whether the Bill is to bind the State;
(d) appropriate safeguard for persons already engaged in a trade or profession which is to be regulated by legislation for the first time; and
(v) special provisions concerning evidence and the onus of proof.

4.11.6 Apart from making himself or herself fully aware of all the facts in the problem with which he has to deal, a bill drafter must study all relevant laws which have any bearing, whether directly or indirectly, on that problem. In relation to this question of legal research, a bill drafter must pay particular regard to certain basic matters to which it is desirable to refer at this stage.

4.11.7 The bill drafter must have a thorough knowledge and understanding of the Constitution. The Constitution contains Chapter VI which deals specifically with the legislative powers of the State. Specific reference should also be made to Chapter IV of the Constitution which sets out fundamental human rights, and extreme care is needed to ensure that those provisions are meticulously observed. The Constitution also lays down specific safeguards in the enactment of particular types of legislation, such as legislation to amend the Constitution itself: see Chapter XXI of the Constitution.

4.11.8 *The General Interpretation Act (GIA)*

4.11.8.1 A bill drafter must make himself thoroughly familiar with the GIA. However short and apparently simple a bill may appear to be, it is essential for a bill drafter to read through the GIA each time he or she prepares a draft Bill and to check his draft with the whole of that Act. The GIA contains provisions which usually apply to any legislation, unless the context otherwise requires. These acts will be found to contain various definitions which will apply to any legislation unless specifically varied or departed from in the particular legislation which is being drafted. It is, of course, generally a waste of effort and Parliamentary time for a bill drafter to repeat matters adequately covered in the GIA. There are, however, certain occasions when it may be helpful or desirable for administrative or technical reasons, to repeat definitions of particular importance to that clause. For example, a definition of “financial year” in legislation establishing a statutory corporation.

4.11.8.2 Quite apart also from definitions, the GIA contains some very useful provisions of general application and a bill drafter must know these, as in each case he or she must make up his or her own mind whether to rely on those provisions or vary or depart from them.

4.11.9 *External Law*

This category includes provisions of the relevant common law and of statutes of general application in force in England which have been "received" as part of the law of Malawi and which have not been amended or repealed by Malawi.

4.11.10 *Case Law*

4.11.10.1A bill drafter must always refer, and have regard to any decision of the courts which are relevant to the problem confronting him or her relating to the wording or form of the proposed legislation.

4.11.10.2A bill drafter should not confine his or her legal research to the law of Malawi. Many problems will not be unique to Malawi and his or her research should be extended to the laws of other countries where similar problems may have already been dealt with and where similar valuable precedents may be found. In making use of precedents from either within or outside Malawi, a bill drafter must be careful to make necessary adaptations in applying these precedents to the particular situation with which he or she has to deal.

4.11.10.2Laws are frequently amended and a bill drafter must ensure that his or her research takes all these amendments into account. As far as his or her own books are concerned, a bill drafter will find that the safest method to adopt in keeping his or her books up to date is to make the arrangements himself or herself. It is dangerous for him or her to rely on any clerk to carry out this vital task. Moreover, he or she will find that the best way of being alive to, and appreciating, the full effect of legislative changes as they occur, is by amending his or her own books.

4.12 Preparation of Legislative Scheme

4.12.1 Before a bill drafter can begin the actual composition of a Bill, he or she must make a rough outline of the framework of the Bill and he must decide on a scheme or arrangement which will bring together, in the clearest and most logical form, the essential provisions needed to deal with the problem. By the time the bill drafter reaches this stage, he or she will have gained a full appreciation of the essential facts, both from his drafting instructions and from the clarification of those instructions which he or she has obtained as a result of the existing law and, through his or her legal research he or she may have obtained useful information in the form of precedents or otherwise as to how the particular problem has been dealt with elsewhere.

4.12.2 The preparation of this legislative scheme is a difficult matter and requires a good deal of self-discipline on the part of the bill drafter. A bill drafter should conform to the form of the legislation generally adopted for Malawi as far as practicable.

4.12.3 So far as possible, there should be one subject for each Bill and different matters which have no connection with each other should not be dealt with in the same Bill. Generally speaking, a Bill will deal first with the basic objectives and main principles of the legislation and then with any appropriate administrative machinery required for making the Bills effective.

4.12.4 The best way of preparing a legislative scheme is to set down draft marginal notes of the clause needed to cover the essential provisions of the Bill. Once this has been done, consideration must be given to the order in which these clauses should appear in the Bill. This may be done by grouping some clauses together and deciding whether clarity and correct interpretation of the Bill can be improved by dividing it into specific parts or under specific headings. This matter is considered in greater detail in Annex 2.

4.12.5 The great advantage gained in preparing a legislative scheme lies in the opportunity it gives the bill drafter for clarifying his or her thoughts. The scheme enables him or her to see whether the problem, with which he or she has to deal, has been covered in its entirety and whether all relevant matters have been concluded. The scheme will frequently bring to light matters to which inadequate consideration has been given in the drafting instructions.

4.12.6 The bill drafter must then have further consultations with the sponsoring entity so that further instructions can be obtained to bridge any gaps which have been revealed – gaps which may result in the Bill being unenforceable or administratively impracticable. It must be emphasized that, as the drafting stage proceeds, inadequacies in the scheme may become apparent. New factors may have to be taken into account which may involve amendments to the scheme. A scheme is, therefore, necessarily a flexible arrangement but its preparation does help to pinpoint basic difficulties at an early stage. If these difficulties come to light later on, it may be necessary to abandon a draft and make a completely new start.

4.13 The Drafting Stage – General Observations

4.13.1 The task of a bill drafter is to put into words, in the form of legislation, the policy decision which has been taken in relation to any particular problem, or rather the ideas behind that decision.

4.13.2 In his or her choice of words to be used and the form of the draft bill, the bill drafter must bear in mind that his or her draft must fit in naturally with the general framework of the existing law in Malawi. He must, therefore, study carefully the manner and style in which the existing law has been drafted and, unless there are compelling reasons for him or her to do otherwise, he or she should adapt his or her style to that already in use.

4.13.3 Confusion is bound to result if the drafting style changes each time there is a new bill drafter. Some changes must occur from time to time in order to keep pace with modern techniques of drafting with the ever increasing scope and nature of Malawi's needs and in order to take into account decisions of the courts. However, consistency of style is very important and changes should only take place after the most careful consideration by the bill drafter in consultation with his professional colleagues, including the Attorney General and the Chief Legislative Counsel. In this context, any changes merely for the sake of change have obvious dangers and should always be avoided.

4.13.4 A bill drafter, having by careful thought and analysis made up his or her mind as to the objectives of the Bill and the manner in which those objectives can be achieved, must now choose the most appropriate words and form of the Bill.

4.14 Preparation of the Draft Bill

4.14.1 There are various practical matters which are of particular relevance to the bill drafter when he begins the actual drafting of a Bill.

4.14.2 A bill drafter may choose to make use of a precedent. The bill drafter must use great care to adapt any precedent in such a way as to ensure that it fits naturally into his or her own draft and is relevant to the scope and objectives of his or her own draft. He or she must also carry out a careful check to see whether the precedent he or she is adapting has been the subject of any judicial decision or subsequent legislative amendment.

4.14.3 There are of course many occasions where a bill drafter may have to deal with what seems to him or her to be an entirely novel situation and one in which he or she must rely on his or her own ingenuity. He or she should, however, make as extensive a research as possible before he or she reaches the conclusion that no relevant assistance is available to him or her from any source and that he or she must strike new grounds.

4.14.4 Where an adaptable precedent is found, the bill drafter should be careful to make a note on his draft of the relevant reference. This may seem to be an obvious precaution to take, but in practice it is sometimes forgotten, with the result that the bill drafter may have to spend valuable time and frustrating effort in discovering the relevant precedent.

4.14.5 In the first draft, the bill drafter will construct the Bill on the foundations he or she has worked out in the legislative scheme he has prepared. He or she will find it easier to deal with each clause on a separate page and he or she should leave a wide margin on each page with plenty of space between each line. This is essential as in practical every case he or she will find that he or she has to make amendments in the revision stage.

4.14.6 An interval of time should be allowed to elapse between the completion of the first draft and the start of the revision stage. This interval will allow the bill drafter to bring a fresh and clearer mind to the revision and he or she will be able to detect more easily errors, omission and inconsistencies in the first draft. He or she may also be able to make it shorter, without obscuring its intended meaning.

4.14.7 During the drafting process, the bill drafter must constantly check his or her draft with other laws and in particular with the GIA. He or she should always insert a date on each of his or her drafts and should never destroy his or her earlier drafts. He or she may well find that at some later date, he or she may want to revert to some wording he or she has used in an earlier draft.

4.14.8 Once the draft has been revised to his or her own satisfaction, he or she should whenever possible ask a colleague or colleagues to read the draft. If a colleague, on reading the draft, interprets it in a manner not intended by the bill drafter, it will indicate at once that some changes in the draft may be needed.

4.14.9 In most cases, the bill drafter will have to prepare a number of drafts before he or she is in a position to send the draft Bill to the sponsoring entity.

4.14.10 The bill drafter must check his or her draft carefully and ensure that it reads as a coherent

and consistent whole. Words and expressions specifically defined in the interpretation clause of a Bill apply throughout the Bill and a bill drafter must check that this carries out the intended result in every case. One way of ensuring that this is not overlooked is for the bill drafter to underline these words or expressions every time he or she uses them; this will then draw them specifically to his or her attention when he or she makes the final revision of his draft.

4.14.11 In the first draft, a bill drafter is primarily concerned to ensure that he or she has covered all the basic objectives of the proposed legislation and that there are no practical difficulties in administering and enforcing it. At this stage, he or she does not pay so much attention to matters of drafting style, but at the revision stage he or she must consider whether any improvement in the wording, style and arrangement can be achieved so that the legislation becomes more readable and intelligible to those persons most likely to be effected by it.

4.14.12 A great deal of legislation is by its very nature complicated but a bill drafter must always remember that his or her first duty is to convey the legislative intention as clearly as possible and that niceties of literary style must give way to the accurate communication of the law to the public.

4.15 The Form and Main Provisions of a Bill

The form and main provisions of a Bill have already been discussed under Chapter 3 in relation to the structure of Bills.

4.16 Penal Provisions

4.16.1 As has already been pointed out, one of the most important matters which a bill drafter has to consider in the early stages of the drafting process is the manner in which an Act is to be enforced. In the light of his or her drafting instructions, a bill drafter must make up his mind as to the best way of achieving the main objectives of the Act and whether some penal provisions are needed to assist in this process.

4.16.2 A penal provision should state clearly:

(a) the prohibited act, omissions or course of conduct which constitutes, and is declared to be, an offence;
(b) whether the provisions applies to everybody or only to person belonging to a certain category, for example, to an owner of a motor vehicle or to a citizen; and
(c) the penalty or sanction for the offence

4.16.3 As already mentioned in paragraph 3.14.2, a penal provision is always strictly construed and where there are reasonable interpretation of the provision, the one which avoids a penalty will be adopted.

4.16.4 There are number of different ways of setting out a penal provision but probably the clearest and therefore the best is – "***A person who… (the prohibited act) commits an offence and is liable to … (the penalty)***". Sometimes the ingredients of the offence are set out in, say, s. 16 and a later section is inserted which begins "***A persons who contravenes section 16 commits an offence and is liable to… (the penalty)***". The word "*contravenes*" is advisedly used because it is defined in the GIA to include "***a failure to***

comply"

4.16.5 A bill drafter must ensure that any penal provision fits into the background of the general law and he or she must, therefore, consider whether:

(a) it is necessary to create a new offence or whether the matter can be dealt with adequately under other existing legislation such as the Penal Code;
(b) any particular limitations are needed, such as a time limit within which a prosecution must be commenced or whether the prior written consent of the Attorney General or the Director of Public Prosecutions must be obtained before a prosecution may be commenced;
(c) the new offence falls within the jurisdiction of a particular class of court or whether some specific provisions are needed to this effect;
(d) there are any relevant restrictions in the Constitution such as, for example, s. 42(2) (f) (vi) of the Constitution which gives an accused person a right not to be convicted of an offence in respect of any act or omission which did not, at the time it took place, constitute such an offence.

4.16.6 There is a general presumption that, in the absence of some clear provisions or implicit indication to the contrary, the prosecution must prove ***mens rea*** – that the accused persons acted with criminal intent. However, in some cases, such as in matters of public health or in other matters where the primary object and intention is to control actions or conduct in the public interest, offences of strict or absolute liability are not uncommon and in these cases the prosecution does not have to prove ***mens rea*****.**

4.16.7 A bill drafter must obtain clear instructions in those cases where mens rea is not to be an essential ingredient of an offence and he or she must then ensure that the offence is drafted in words which clearly carry out those instructions.

4.16.8 Quite apart from the questions of ***mens rea*****,** there may be occasions when an exception is needed to the general rule that the onus of proof in criminal proceedings remains on the prosecution throughout. A bill drafter should try and persuade the bill sponsoring entity against exceptions of this kind. Where special reasons for shifting the onus of proof to accused persons can be shown in particular cases, as for example, in matters concerning custom cases, as for example, in matters concerning custom duties on imported goods, provision to this effect must be worded in the clearest terms.

4.16.9 In determining appropriate penalties for the offences created under the Bill, a bill drafter should have regard to the following factors:

(a) instructions on this point from the bill sponsoring entity;
(b) the gravity of the offence;
(c) the probable prevalence of the offence and the consequent need for a deterrent sentence;
(d) the need to maintain a consistent pattern with the structure and scale of penalties in the other relevant Acts.

4.16.10 It is desirable to provide first for the payment of a fine and alternative punishment of imprisonment or the cumulative punishment of fine and imprisonment is appropriate only where a fine alone is clearly inadequate. Some offences, such as those concerned

with customs, currency and other revenue matters, may involve a considerable pecuniary loss to the State and may call for a very heavy fine with a term of imprisonment in default of payment of the fine.

4.16.11 A bill drafter must pay attention to general provisions in the GIA relating to penalties. One such provision prescribes that the penalty imposed in the Act is the maximum penalty and therefore a court has the power to impose a lesser penalty: see s. 54 of the GIA.

4.16.12 In certain cases, it may be necessary to provide that if an offence continues after a person has been convicted, he or she commits a further offence and is liable to a further fine for each day on which the offence is continued. A provision of this kind must be expressed very clearly as there is a general presumption against the creation of continuing offences.

4.16.13 Difficulties of interpretation sometimes arise as to whether a section, which imposes a penal sanction, takes away the right of a person to bring an action for some form of civil redress arising out of the same facts. In such cases, a bill drafter should obtain instructions on this point and then clarify the section by either expressly conferring or excluding the right to bring a civil action.

4.16.14 Whenever possible, an appropriate penalty should be prescribed for each offence. Often a clause is inserted providing a general penalty for any contravention of the Bill but this should only be done where the offences thus created are of similar gravity.

4.16.15 A Bill may provide that a contravention of subsidiary legislation made under the Bill is an offence and may prescribe the penalty in the Bill itself. Offences against subsidiary legislation vary greatly in gravity and it is, therefore, desirable for the Act to provide that the subsidiary legislation may itself prescribe offences and appropriate penalties. Section 21(e) of the GIA provides that, in the absence of any contrary intention, "there may be annexed to the breach of any subsidiary legislation Such penalty not exceeding K1,000 or such term of imprisonment not exceeding three months or both such fine and imprisonment" and therefore specific provision is needed in the Act itself if these limits are to be varied.

4.16.16 Various ancillary provisions may be needed in a Bill relating to the forfeiture of property, the cancellation of licences and the payment of compensation. The Act must make it clear whether these matters are to arise automatically on a conviction for an offence or, as is usually the case, on the court making the appropriate order in exercise of specific powers conferred on it by the Act.

4.17 Subsidiary Legislation

4.17.1 Parliament itself has not the time available to deal with all aspects of legislation and it is, therefore, inevitable that in very many Acts provisions are inserted whereby certain legislative powers are delegated to the executive or the judiciary: see s. 58 of the Constitution.

4.17.2 It is largely a matter of discretion to decide the scope of the powers which should be delegated in any particular case, but any delegation should be limited to administrative or procedural matters needed for implementing the objectives of the legislation, and

matters of principle should not be delegated but should be left to Parliament itself.

4.17.3 The expression "subsidiary legislation" or "subordinate legislation" covers a variety of matters such as regulations, rules, by –laws, order and notices.

4.17.4 There are two main matters for the bill drafter to consider, namely, the form of the enabling clause and the form of the subsidiary legislation.

4.17.5 The Enabling Clause

4.17.5.1 Before a bill drafter can begin to draft this clause, he or she must obtain a very clear idea of the scope and content of the subsidiary legislation which is going to be needed. The time to obtain this information is at the stage when he receives his drafting instructions and discusses the objectives and intended operation of the Act with the sponsoring entity. This information is essential for the bill drafter as he or she must ensure that the terms of the clause are wide enough to authorize the making of such subsidiary legislation as may be needed.

4.17.5.2 Parliament retains some control over subsidiary legislation, either by requiring its approval before the subsidiary legislation comes into operation or by resolving, within a specified period, that the subsidiary legislation be annulled. As an added safeguard, a Bill may require that consultations with, or approval of, some specific person(s) must be obtained before making any subsidiary legislation.

4.17.5.3 The actual form of enabling clause varies but in some part of the clause, either before or after an enumeration of the specific powers, there will be found some general words, as for example, ***"for carrying the purposes and provisions of this Act into effect"*** These general words do not enable subsidiary legislation to be made which goes beyond the scope of the Act; they merely authorise the making of subsidiary legislation for administrative or procedural matters ancillary to that scope.

4.17.5.4 Where subsidiary legislation is made which contains penal provisions, the general powers are strictly interpreted and a bill drafter should confine any penal provisions to matters clearly falling within the specific powers set out in the clause. He or she should not rely in the aspect of the general powers.

4.17.5.5 Sometimes it may be necessary for the person given power to make subsidiary legislation to be allowed to sub-delegate the exercise of the power conferred on him or her. A power of sub-delegation is not easily implied: see ss. 36 of the GIA. Thus, where it is needed, a bill drafter should include an express provision to this effect.

4.17.6 The Form of Subsidiary Legislation

4.17.6.1 In drafting subsidiary legislation, a bill drafter must ensure that all its provisions are intra vires, that is to say, that they fall within the scope of the powers set out in the enabling clause. He or she must also remember that subsidiary legislation, which is inconsistent with the provisions of the Act under which it is made, is void to the extent of the inconsisten-

cy.

4.17.6.2 Subsidiary legislations can take a number of forms and the enabling section will specify the form which it is to take in any particular case. Some of the more common forms are:

(a) rules of regulations – these terms are often used indiscriminately but rules normally deal with procedural matters, whereas regulations cover subsidiary legislation of a more general nature;

(b) orders and notices – these terms are often interchangeable and are appropriate in the application of an Act to specific places or persons, or in the appointment of officials;

(c) by-laws – these are the means whereby local or pubic authorities exercise the subsidiary law-making powers given to them by the Act;

4.17.6.3 Words and expressions in subsidiary legislation normally have the same meanings as in the Act under which it is made. However, sometimes it becomes necessary for as a word to have a different meaning and in these cases the subsidiary legislation should contain a specific definition for this purpose.

4.17.6.4 The essential factor for a bill drafter to take into account when drafting subsidiary legislation is that its validity can be challenged in court on the ground that it exceeds the authority conferred by the Act, in other words, that it is ***ultra vires***. A bill drafter must not hesitate to advise the sponsoring entity of any possible difficulty in this respect. The sponsoring entity may take the view that this is a risk which, in the circumstances, should be run, but the bill drafter should do his or her utmost to persuade the sponsoring entity to defer the matter until the Act can be amended by widening the enabling section and thus provide the necessary authority for the subsidiary legislation required.

4.17.6.5 As with any advice given by a bill drafter on any important matter such as this, he or she should ensure that the advice is given in writing or, if given verbally in the first instance, that the advice is immediately confirmed in writing.

4.17.6.6 Subsidiary legislation must be published in the ***Gazette*** and, unless specifically provided otherwise, it will come into operation on the date of its publication: see s. 17 of GIA

4.17.6.7 It should be noted also that, where an Act confers power on a Minister to make regulations, there is no authority for a civil servant to sign the regulation on behalf of the Minister.

4.17.6.8 It is also important to bear in mind the provisions of section 58 of the Constitution which require subsidiary legislation to be laid before Parliament in accordance with its standing orders.

4.18 Operation of Legislation

4.18.1 Commencement and application provisions have been discussed in Chapter 3 and these matters are now further considered.

4.18.2 An Act will apply to the whole of Malawi unless a specific provision is inserted restricting its application to one or more particular areas. It is sometimes necessary to preserve flexibility in this matter and this can best be done by giving a designated office holder (e.g., the President, the Chief Justice, etc.,) the power to apply the whole or part of the Act to such areas as he or she may by order or notice designate from time to time. A good example of this can be found when, under the Constitution or other legislation, a state of emergency is declared in respect of part only of Malawi and is later extended by a further declaration affecting a further part or the remainder of Malawi.

4.18.3 An Act will not normally have extra-territorial effect – it will normally apply only to the areas within Malawi. In some cases, the State may wish to legislate extra-territorial, for example, in relation to Malawian citizens when they are abroad, and it is the necessary to cover this by inserting an express provision to this effect in the Act.

4.18.4 Legislation should as far as possible not be given retrospective effect. It is wrong in principle to change the character of past acts and transactions which were validly carried out upon the basis of the then existing law. Restriction with regards to criminal offences has already been made in paragraphs 3.14 and 4.16.

4.18.5 There is a presumption against the retrospective operation of statutes and a court will not give retrospective force to statutes unless, by the use of express words or necessary implication, it appears clear that such was the intention of the Parliament.

4.18.6 In practice, bill drafters are frequently told that a statute should be made retrospective, that is to say, that it should be deemed to have come into operation on a date prior to its enactment or that it should be made operative with respect to past transactions as of a past time. In these circumstances, a bill drafter must point out the objections referred to above; he or she must draw a distinction between those matters which are illegal as being contrary to the Constitution, and those matters which adversely affect existing rights and therefore appear to him unreasonable and undesirable. If in the latter case, his or her objections are not accepted for policy or other reasons, he or she must carry out his instructions by inserting words in the Act expressly giving effect to the intention of the Government.

4.19 Conclusion

4.19.1 Two main conclusions can be drawn from the foregoing.

4.19.2 Firstly, the use of words is not an exact science because many words, if not all, have a tremendous potential for ambiguity, vagueness or inaccuracy. The sources of these horrors are chiefly the generic character of words and the readiness of words to derive meaning from their surrounding context.

4.19.3 Secondly, the task of a bill drafter is to communicate the legislative intent, i.e., law. Common sense suggests that to effectively communicate, simplicity is demanded. However, laws settle rights and liabilities and are enforced by courts. Precision is, therefore, also demanded. A bill drafter must, therefore, use words that strike a balance or compro-

mise between simplicity and precision and such words are most hard to find.

4.17.4 All in all, the importance of correct use of words by a bill drafter cannot be overstressed. The consequences of incorrect use of words are grave. A bill drafter must, therefore, overcome the **"*devilishness of words*".** In order to defeat **"*the devil*",** a bill drafter needs to understand the nature of words and their combination into sentences. Copen's advice is in point:

> "*Words are the draftsman's most important tools and a worker of any craft must understand his tools thoroughly before trying to use them professionally.*"[35]

35 Copen, Writing from a Legal Perspective, p.11

STRUCTURE OF BILLS

5

5. STRUCTURE OF BILLS

5.1 Introduction

A Bill is composed of a number of components (elements) and the key ones include a Bill number, memorandum, enacting clause, preamble, table of contents, clauses titles (long and short), commencement provisions, application provisions, interpretation provisions, substantive provisions, administrative provisions, penal provisions and final provisions (repeals, savings and transitional provisions).

5.2 Bill number

5.2.1 When a Bill is introduced in the House, it is assigned a number to facilitate filing and reference.

5.2.2 The number is made up of the year in which it was introduced in the House and a number based on the order in which Bills were introduced in that year.

5.3 Memorandum

5.1 The Memorandum is a summary of the purpose and main provisions of the Bill: see SO 120(3). It is meant to contribute to a better understanding of the contents of the Bill, of which it is not a part. For this reason, it appears separately at the beginning of the Bill.

5.2 The Memorandum is sometimes prepared by the bill drafter and sometimes by the entity sponsoring the bill (sponsoring entity). In the latter case, it is obviously very desirable that the entity sponsoring must consult the bill drafter when preparing the Memorandum, so that the House and the public are not misled as to the intended effect of the Bill.

5.3 The Memorandum is not included in the published Act.

5.4 Enacting Clause

The enacting clause is an essential part of the Bill. It states the authority under which the Bill is enacted. It consists of the words **"ENACTED** by the Parliament of Malawi as follows-". It appears immediately after the long title.

5.5 Preamble

5.5.1 Sometimes a Bill has a preamble, which sets out its purposes and the reasons for introducing it [which explains why the Bill is being enacted]. The preamble appears between the enacting clause and the long title. [The preamble goes at the very start of the Bill before the enacting words]

5.5.2 Preambles may be used for the purposes of interpreting obscure words in the Act itself. Where the words of the Act itself are clear and ambiguous, the preamble cannot be used to cut down the meaning of those words but, where the words are capable of more than one meaning, the construction which best fits the preamble will preferred.

5.5.3 The use of preamble is nowadays rare and is generally limited to Acts dealing with constitutional matters or the application of international conventions. It also provides a convenient method of introducing an Act which seeks to validate "illegalities" and indemnify those responsible for them.

5.6 Table of Contents

5.6.1 As an aid to readers, a Bill contains a table of contents. The table of contents is not, however, considered to be part of the Bill.

5.6.2 While there is no specific rule regarding the content of Bills, there must still be a theme of relevancy among the various issues addressed in the Bill. Those issues must be relevant to and subject to the umbrella which is raised by the terminology of the long title of the Bill.

5.7 Clauses

5.7.1 Clauses are the basic building blocks of Bills. Clauses may be divided into subclauses, and then into paragraphs and even subparagraphs.

5.7.2 A Bill may (but need not) also be divided into chapters, parts, divisions and subdivisions, each containing one or more clauses; however, the numbering of the clauses is continuous from beginning to end. A clause should express a single idea, preferably in a single sentence. A number of related ideas may be set out in subclauses within a single clause.

5.7.3 The practice is to use the expression "clause" until a Bill becomes law, after which the expression "section" is used.

5.7.4 The grouping of clauses into a Divisions, Parts, etc., is elaborated on in Annex 2.

5.8 Titles

5.8.1 Each Bill has two titles—a long title and a short title.

5.8.2 Long title

5.8.2.1 The long title sets out a description of the Bill [it indicates the scope of the Bill]. This is usually done in a very general way but it must accurately reflect its contents, e.g., **"A Bill *entitled* An Act to ... and for related purposes".**

5.8.2.2 When a Bill is assented to by the President, the words **"A Bill entitled"** are dropped from the long title.

5.8.2.3 Where there is any ambiguity or uncertainty in the language of an Act, the long title may be of assistance in ascertaining the scope of the Act. Where the language of the Act is plain, effect must be given to that language, notwithstanding the fact that it goes beyond the matters set out in the long title.

5.8.2.4 A bill drafter must ensure that the long title covers all the principal purposes of the Act, and some general words such as ***"and matters connected therewith or incidental thereto"*** should be added to cover minor matters. Where an Act is amended in some manner which does not fall within the scope of the long title, the long title should itself be amended to cover this.

5.8.3 Short title

5.8.3.1 The short title is the name that is used to refer to a particular Bill. It provides a convenient way of identifying and citing the Bill. The year of enactment is added to the short title.

5.8.3.2 A short title does not necessarily cover all aspects of the Bill. As a general rule, a short title should be as informative as possible (within reason) and should not cause unnecessary confusion to users of legislation.

5.9 Commencement Provisions

5.9.1 Commencement provisions specify when the Act or certain of its provisions shall come into operation. It is of the greatest importance to ensure that the date on which an Act is to come into operation should be easily ascertained.

5.9.2 Where a specific date of commencement is inserted in the Bill, it should appear in clause 1 in conjunction with the citation of the short title or in the clause immediately following.

5.9.3 In the absence of a commencement provision in the Bill, the Act will take effect on the day it is assented to: See s. 74 of the Constitution and s. 9 of the GIA which provide for a default commencement if no commencement provision is included.

5.10 Application provisions

5.10.1 An application provision will be used where it is necessary to specify the matters to which the Bill applies to. Application provisions may deal with any one or more of the following matters:

(a) whether the Act is to extend the circumstances arising before, or pending at, the date of commencement, for example, in the matters relating to taxation or pensions;
(b) the geographical area, where only part of the State is to be affected;
(c) the particular class of persons or things to be affected;
(d) whether the Act or part of it is to be given extra-territorial affect;
(e) whether the Act is to bind the State. For example, s.2 of the Employment Act provides "(1) Subject to subsection (2), this Act applies to the private sector and the Government ..." .

5.10.2 Section 58 of the GIA provides that no written law shall, in any manner whatsoever, affect the rights of the Government unless it is therein expressly provided, or unless it appears by necessary implication that the Government is to be so bound.

5.11 Interpretation Provisions

5.11.1 Interpretation provisions are used for a number of purposes. Primarily, they are used to assist in conveying to the reader the intended purposes of the legislation in as simple, unambiguous and consistent manner as possible and also in avoiding needless repetition.

5.11.2 Definitions are used to say what particular words mean and to give words special meaning for the particular Bill. In other cases, definitions take a word that has a broad meaning and say that for the purposes of the Bill it has a more limited meaning.

5.11.3 Definitions should be used sparingly and, before inserting a definition, a bill drafter must decide how it will assist in the correct interpretation of the Act. He or she must make a careful check of the GIA as a definition of a word can generally be omitted if the word is already defined in the GIA in the sense intended. Sometimes, it may be better to avoid a precise definition and to leave the interpretation of a word to normal usage or to the courts.

5.11.4 The word to be defined is followed by the word "means" or the word "includes". The former indicates that the meaning set out is intended to be complete in itself, whereas the latter indicates that the usual meaning of the word is to be extended also to the particular meaning set out. The expressions "means and includes" should not be used as the significance of each of these words differ. A definition may, however, combine both words where it is necessary to remove doubts as to its extent, e.g, "licensed proprietor" means any person to whom a license is issued and includes any agent of that person.

5.11.5 A definition should not contain matters beyond its reasonable scope, e.g., "cattle" should not be defined to include "horses".

5.11.6 Further, a definition should be confined to setting out the meaning to be given to a particular word or expression and should not include substantive matters. Thus where a Minister is to be given power to appoint directors of corporation, a section to this effect should be inserted in the main body of the Act. It is not sufficient merely to define director as "a person appointed as such by the Minister" The correct way of dealing with this is to insert a separate section conferring this power of appointment and to add a reference to this section in the definition of directors.

5.11.7 Although it is sometimes convenient for reasons of brevity to refer to another enactment in a definition, as, for example, "legal practitioner" means a person admitted as a legal practitioner under the Legal Education and Legal Practitioners Act, it is generally better for a bill drafter to repeat a definition in full so that the draft is self-contained. Referential legislation causes many difficulties in practice

5.11.8 Definitions are placed at the beginning of a Bill but they are written last. A bill drafter will find it better to leave the detailed drafting of this clause until he or she has completed the draft of the Bill, making a note as he or she proceeds of any words and expressions which can be usefully included in the interpretation clause.

5.11.9 Ambiguities are discovered when a complete draft is under review. Note must be made of the fact that where a definition is intended only to effect one Part or one clause, it should be placed in that Part or clause. For example, "In this Part, "…" means …"

5.11.10 Definitions usually appear in a list. The defined words are put in italics and are listed in alphabetical order.

5.11.11 Used properly, definitions are powerful tools to make bills shorter, more understandable and more precise.

5.12 Substantive Provisions

These are provisions which are required to be dealt with in relation to the subject matter under consideration: they set out the basic objectives and main principles of the Act.

5.13 Administrative Provisions

These provisions seek to address administrative and practical problems likely to arise in the implementation of the Bill. It is generally better to insert these provisions after the substantive provisions.

5.14 Penal Provisions

5.14.1 A penal provision consists of two essential parts: first, a statement of the prohibited act, omission or other course of conduct and secondly, provision for the sanction that is applicable in the case of breach.

5.14.2 It must be borne in mind that penal provisions never stand alone; they form part of the wider criminal law. They are subject to restrictive constructions. As such, courts will give the benefit of doubt to an accused in case of possible alternative constructions.

5.15 Miscellaneous Provisions

5.15.1 These clauses cover a variety of matters concerning, or arising out of, the main objective of the Act. The most common examples are clauses which contain offences and penalties and the clauses which enable subsidiary legislation to be made. These clauses may be either dealt with separately in other parts of the Act, e.g., final provisions, or included under this category. Both these matters are of particular importance to the bill drafter and are considered in Chapter 4.

5.16 Final Provisions

5.16.1 These include savings, transitional provisions and repeals.

5.16.2 The function of a savings provision is to preserve a law, a right, a privilege or an obligation which would otherwise be repealed or cease to have effect. The function of a transitional provision is to make special provisions for the application of legislation to the circumstances which exist at the time when that legislation comes into operation.

5.16.3 The two terms are loosely used with overlapping meanings. The necessity of both of them is a result of change in the law, whether the change is caused by a new Act or by repeal or amendment of an existing Act. Consideration of whether special savings or transitional provisions are necessary is an important part of every drafting exercise.

5.16.4 In practice a bill drafter will often deal with savings and transitional provisions together, as there is often no clear cut division between them in practice. These matters become relevant where the law is changed either by the enactment of a new Act or by the repeal or amendment of an existing Act.

5.16.5 Transitional provisions are inserted in order to apply the provisions of a new Act to situations already in existence when the Act comes into operation. For example, such provisions retain the validity of an existing appointment or licence by providing that it shall be given the same effect as if made or issued under the new Act. Other examples occur where:

(a) a person already practicing a trade or profession has to be registered under the new Act within a specified time;

(b) a new body corporate is to take the place of an existing body and provisions are needed to vest the assets and liabilities of the existing body in the new body, to retain staff and to continue pending actions.

5.16.6 Section 14(1)(e) of the GIA is relevant. It provides that all subsidiary legislation made under the repealed Act, and not inconsistent with the new Act, continues in force as if made, and until revoked, under the new Act. Nevertheless, the recommended practice is for a bill drafter to insert a specific section to this effect

5.16.7 Where any repeal of legislation is needed, a bill drafter should insert a specific clause to this effect and should never rely on any repeal arising by implication. A repeal provision should not be mixed up with other provisions and where several existing Acts are to be repealed, it is convenient to insert them in a specific schedule for this purpose.

5.17 Schedules

5.17.1 Schedules contain matters unsuitable for insertion in the main body of the bill. Examples include matters of details or of procedure, tables, diagrams, lists, maps, treaties and protocols. The insertion of such matters in a schedule often makes an Act more readable and simplifies interpretation. Schedules may also be used in respect of repeals and transitional provisions, if they are long or complicated.

5.17.2 Schedules form part of the Act and will be construed with it: see s. 8 of the GIA. Where part of a schedule is repugnant to provisions in the main body of the Act, the latter will prevail.

5.17.3 Schedules are placed at the end of the Bill.

5.17.4 Generally, it is better to insert forms in schedules in subsidiary legislation than in Schedules to an Act, as the former can be more easily amended than an Act.

6 GLOSSARY OF TERMS

6. GLOSSARY OF TERMS

Bill	A proposal for a new law which has been presented to the House: see SO 3 (Definitions).
House	The National Assembly
Aforethought	Arrived at beforehand; a premeditated
Amicus curiea	A friend of the court (One who interposes in a legal action)
Attractive nuisance	A condition on one's premises that is dangerous to children and yet so alluring to them that they may enter
Causa sine qua non	The determining cause, without which a result would not have occurred.
Clean hands doctrine	The principle by which the court of equity requires that a person who comes to the Court for relief must not be guilty of wrongful conduct.
Common law	Legal rules, principles, and usage that rest upon court decisions rather than upon statutes or other written declarations
Declaratory judgement:	A decision stating the rights and duties of parties, but involving no relief as a result
De facto	In fact or reality, as contrasted with de jure, by right or by law
De minimis non curat lex	The law is not concerned with trifles
Doctrine	A rule or principle of law developed by court decisions.
Due process of law	A course of legal proceedings according to the rule of justice established to enforce and protect private rights.
Equal protection	Generally refers to the guaranty under the Constitution that all persons should enjoy the same protection of the law
Equity	A principle which provides justice when ordinary law may be inadequate
Good faith	Sincere motivation or behavior lacking fraud or deceit
Guardian	One entrusted by law with the control and custody of another person or estate.
In absentia	In [someone's] absence.)

Malfeasance	Legal misconduct; an act that is legally wrong
Misfeasance	The doing of a lawful act in an unlawful manner
Moot question	(1) an academic question; (2) a question which has lost siginificance because it has already been decided, or for other reasons
Nonfeasance	The failure to act, when action is legally required
Nullity	Something that has no legal effect.
Patent ambiguity	Obvious upon ordinary inspection
Presumption	An assumption about the existence of a fact; a presumption may be either rebuttable or irrebuttable (Conclusive)
Prima facie case	A cause of action sufficiently established to justify a favorable verdict if the other party to the action does not rebut the evidence.
Punitive damages	Damages beyond compensatory damages, imposed to punish the defendant for his act.
Remedy	The means of enforcing a legal right or redressing a legal Injury
Res ipsa loquitur	The thing speaks for itself
Res judicata	The thing having already been adjudicated
Strict Construction	Narrow or literal construction of language.
Vicarious liability	The imposition of liability upon one person for the acts of another.

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REFERENCES

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ANNEXES

ANNEX 1

DRAFTING OF GOVERNMENT BILLS

"PART B- BILLS
PRELIMINARY STEPS TO BE TAKEN

Advice on Drafting

1. Where the Principal Secretary of a Ministry considers that existing legislation may be unsatisfactory, or that new legislation is required in order to carry out the policy of the Ministry, the Principal Secretary should seek the advice of the Law Officers in good time. The Law Officers are the Attorney General and the Solicitor General; however, the Chief Parliamentary Draftsman and the Parliamentary Draftsmen have authority to advice on behalf of the Law Officers with respect to legislative matters. No other officer in the Attorney General's Chamber has such authority.

2. Before any approach is made for advice with respect to amending existing legislating or promulgating new legislation, it is essential that the problem and the proposals for its solution be worked out, in detail, by a Responsible Officer in the Ministry concerned. A clear idea must be gained by him or her of –

- what the policy is;
- in what particular respect the existing legislation is deficient;
- how it is proposed to carry the policy into effect (with particular reference to the staff and finances available); and
- what other Ministries are concerned.

3. In addition, consideration should always be given to the general improvement of existing legislation. Therefore, the Responsible Officer should always read and have regard to the legislation with which he or she is concerned in its entirely, and should suggest for consideration any other amendments which he or she thinks could usefully be dealt with at the same time as the particular amendment desired.

4. A request to the Attorney General for the drafting of proposed legislation should be submitted, and in any case such a request will not ordinarily be complied with, unless and until Cabinet has given approval in principle to the drafting of the legislation after consideration of a Cabinet Paper setting forth in full the reasons why such legislation is required.

5. Any Cabinet Paper, containing a request for the preparation of legislation is the responsibility of the appropriate Ministry and not of the Attorney General. However, a copy of the draft Cabinet Paper should always be forwarded to the Attorney General for advice, and will be returned with a note of any suggested alterations. In any event, no such Cabinet Paper should be submitted unless the advice of the Attorney General has first been sought and obtained.

Cabinet Paper Procedure

6. A Cabinet Paper should open with a concise, but complete summary of the matter being put before cabinet for decision, and should not omit any of the facts which Cabinet will need to know in order to reach a decision. The Cabinet Paper may set out the points of any arguments for and against a proposal, or may summarize alternative proposals, and should record the views of all Ministries affected by the proposal. The Cabinet Paper should end with a carefully framed paragraph stating the points requiring decision and detailing the directions being requested from Cabinet.

7. Where Cabinet is being invited to decide a matter which affects, or is likely to affect any Ministry,

other than that from which the Cabinet Paper originates, the Ministry initiating the Cabinet Paper must ensure that every other such Ministry is fully consulted and its views properly recorded in the Cabinet Paper before submission to the Cabinet Office. No Officer of any Ministry should represent the views of his Ministry of legislation without first obtaining the personal direction of his or her Minister.

8. Before a Cabinet Paper can be accepted for inclusion in the Agenda, the original copy submitted must be initialed by the Minister presenting it and by all other Ministries who are in any way concerned with the subject matter.

9. When Cabinet has given approval in principle to proposals requiring the drafting of legislation, the Cabinet Office will send to the Attorney General a copy of the Cabinet Directions given thereon. The Ministry initiating the proposals and also any other Ministry concerned with the subject matter will also receive a copy of the Cabinet Directions. So far as the Attorney General is concerned, these directions constitute the necessary authority to commence the work of drafting.

PART C- DRAFTING OF BILLS

10. The Principal Secretary of the responsible Ministry must submit detailed written instructions to the Attorney General for the drafting of any legislation required. The detailed instructions may include -

- a copy of any suggested draft which the Ministry may wish to put forward (such a draft will normally be provided where amendments only are required); and
- a copy of any foreign legislation consulted, or relied upon, to support the request for legislation.

11. The Chief Parliamentary Draftsman has full authority to refer back to the responsible Ministry, and to defer action, if in his or her opinion the instructions are insufficient for drafting to proceed; where this is done no further action in the matter will be taken by any member of the Drafting Section until the deficiency has been remedied.

12. In preparing a draft Bill, the officer-in charge of drafting the Bill will act in consultation with the instructing Ministry and any other Ministry concerned. Where several Ministries are concerned, it may be necessary to prepare two or more successive drafts for circulation before a final draft can be prepared. If a Bill is required so urgently that the responsible Ministry feels that drafting work on other legislation should be postponed, the Principal Secretary of that Ministry personally should write to the Attorney General or the Solicitor General, always giving full reasons for requesting priority. Unless there is such urgency, requests for drafting of legislation will ordinarily be dealt with in strict rotation according to the date of the request and submission of proper drafting instructions; Finance and Taxation Bills, however, will if necessary be granted automatic priority by the drafting staff.

13. When drafting is completed, the Attorney General's Chambers will supply to the Ministry not less than three copies of the draft Bill together with any legal advice or comment considered necessary.

Approval of Bills by Cabinet

14. The responsible Ministry must submit the draft Bill to Cabinet for approval by preparing -

- not less than 30 copies of the Bill; and
- a further Cabinet Paper,

for transmission to the Cabinet Office for inclusion of the matters in the Agenda of the next meeting of Cabinet.

15. The Cabinet Paper should comment on any special points which have arisen during the draft-

ing of the Bill and, in the case of a Bill to amend an Act, must contain a statement that ***"The whole of the Act to be amended has been examined and no other amendments beyond those for which approval is now sought can be usefully included in the Bill"*** Unless the circumstances are exceptional, Cabinet may not approve more than one Bill to amend the same Act in any one year, and a second amending Bill in a year will require, in the preliminary Cabinet Paper, a full explanation by the Ministry concerned as to why a second Bill has become necessary.

16. Cabinet Papers are confidential documents and must be headed and treated as such. A Cabinet Paper, together with any attachments, should be submitted to the Clerk to the Cabinet before the notified deadline. The Cabinet Paper will be laid before His Excellency the President, and it is essential that it be of high quality. In particular, it must be clean, clearly legible and of good quality paper.

17. All Bills are referred in the first instance, to the Cabinet Committee on Parliamentary and Legal Affairs before consideration by Cabinet and the Minister and officials responsible for the Bill are required to attend the meeting of the Committee at which the Bill is discussed.

18. The Agenda for every Cabinet Meeting is required to be approved by His or Her Excellency the President before the Agenda and the approved Cabinet Papers are circulated to members of the Cabinet. The members of the Cabinet require time to study the contents of all relevant documents before a Cabinet Meeting. Therefore, a deadline of one week before the date fixed for the Cabinet Committee on Parliamentary and Legal Affairs and Cabinet Meeting, respectively, is to be regarded as the bare minimum for submission of Papers and any other material intended for discussion thereat.

19. When the Cabinet has given approval for the publication of a draft Bill, whether with or without any desired amendments, the approval will appear in the form of a Cabinet Directive issued by the Cabinet Office to the responsible Ministry, to the Attorney General, and to any other Ministries that are concerned.

Action Following Cabinet Approval of a Bill

20. The Attorney General's Chamber will prepare two faired copies of the Bills as approved and will send them to the responsible Ministry together with a draft of the proposed Objects and Reasons. In addition there is required to be appended to the Bill a Memorandum stating the points of policy and other salient features in the Bill which the responsible Ministry considers that the attention of the public should be drawn. The Memorandum should be developed by the responsible Ministry in consultation with the Attorney General's Chambers. The Attorney General's Chamber will then settle the final form of the Memorandum and Objects and Reasons and cause the two clean copies of the Bill, with the Memorandum and Objects and Reasons attached, to be forwarded to the Clerk of National Assembly for submission to the Speaker.

Procedure for Publication of Bills

21. As soon as the Bill has been accepted by the Speaker, the Clerk of the National Assembly will forward one copy to the Government Printer for printing; the officer-in-charge of the draft of the Bill will usually facilitate the process. The Government Printer's proof will be checked and approved by the Attorney General's Chambers and returned for printing. The Government Printer will publish the Bill in the Gazette, and is responsible for the delivery of copies of the Bill to the Clerk of the National Assembly.

22. In so far this maybe relevant for the purposes of introducing Bills in Parliament, the publication of Bill is governed by the Standing Orders of the National Assembly. Standing Order 114 provides that a Bill shall be published in the ***Gazette*** in at least two issues at intervals of not less than 21 days before the Bill is read for the first time in Parliament. Compliance with this Standing Order is of the greatest importance and it

should be noted that a practice has evolved that every Bill which does not comply with the provisions of that Standing Order will not be introduced into Parliament unless the Bill is so urgent or of a nature as not permit compliance with Standing Order 114.

23. In the case of a long Bill, the text must be in the hands of the Government Printer a considerable time (normally 14 days or more) before the date of publication to permit the setting up of type and the correction of proofs. Thus there will normally be an interval of at least eight weeks between the submission to Cabinet and introduction into the National Assembly. Two of these weeks represent the time needed for Cabinet Procedure, one week for acceptance by the speaker, two weeks for the period of preparation by the Government Printer and three weeks for the period of publication. It is the duty of every Principal Secretary to ensure that his or her Minister understands the reasons for the length of this interval.

24. If a Minister wishes to introduce a Bill without complying with the provisions of Standing Order 114 regarding publication on the ground that it is of so urgent a nature that it does not permit a compliance with those provisions, he or she can do so only by moving a Motion under Standing Order 114 (4) that those provisions be dispensed with in respect of that particular Bill.

Financial Procedure

25. Section 57 (1) of the Constitution as well as Part XXX of the Standing Orders of the National Assembly requires that the National Assembly shall not proceed upon any financial Bill, motion or petition without the recommendation of the Minister responsible for finance. Accordingly, where the implementation of any Bill will involve the expenditure of funds for which the National Assembly has not already made provision, the responsible Ministry must obtain the necessary recommendation from the Minister of Finance and see that this recommendation is submitted to the Speaker in sufficient time for the Speaker to give a ruling without delaying the introduction of the Bill. This recommendation may be sought at any time before the Bill is submitted to the Clerk of the National Assembly and in seeking such recommendation the responsible Ministry should explain the full financial implications of the Bill not only in respect of the current year but in respect of future years also. Each responsible Ministry shall also inform the Attorney General when it submits any recommendation to the Speaker.

Second Reading

26. It is the responsibility of a Ministry which initiates a Bill to prepare material for the Second Reading Speech introducing the Bill into the National Assembly. The Second Reading Speech should be cleared with the draftsman in the Attorney General's Chambers who prepared the draft Bill. Normally it will be that Ministry's own Minister who will introduce and take the Bill through the National Assembly, but it may on occasion be another Minister or Deputy Minister who does so.

27. Where the Bill will be introduced by someone other than the appropriate Minister, the Ministry must at an early stage find out which Minister will introduce the Bill and supply him or her with the draft of a suitable Second Reading Speech, and all other information and material he or she may require, to explain clearly to the National Assembly the purpose of the Bill, and to anticipate questions which may be raised in the course of the debate. A copy of the Speech should also be supplied to the Clerk of the National Assembly before 9 o'clock in the morning of the day before the debate, in case it should become necessary for some other Minister to introduce the Bill.

Amendment During Debate

28. It is the duty of the Principal Secretary of the responsible Ministry either to attend the National

Assembly at the Second Reading and at the Committee Stage of every Bill for which his or her Ministry is responsible, or to ensure that some other officer does so who is capable of advising his or her Minister on any question which may arise during the debate on the Second Reading or proposals for amendment which may be moved at the Committee Stage. It is also particularly important that the Secretary to the Treasury, or some other officer cable of advising the Minister of Finance, is in attendance at the National Assembly at all times during the Budget Session when the Minister of Finance may have to answer questions by Members examining the Estimates.

29. It is, of course dangerous to make amendments to Bills in Parliament without some opportunity for reflection, at first glance an amendment may appear to be sound but on reflection will turn out to conflict with some other provision of the Bill or with an existing statute. No amendment to any Bill should be accepted without the advice of the Law Officers. It is desired by the responsible Minister to move an amendment to a Bill, the amendment should be prepared in consultation with the officials of the Ministry and the Law Officers, and the Minister should be advised on the procedure for moving amendments. One of the Law Officers or a Parliamentary Draftsman is always in attendance at the National Assembly during the Second Reading and Committee Stage of all Bills.

30. Once a Bill has been published in the Gazette it cannot be altered except

(a) by complete re-publication; or
(b) by amendment at the Committee Stage in the National Assembly.

Where a Minister intends to move an amendment at Committee Stage, this should not only have been prepared in consultation with a Law Officer but the Clerk of the National Assembly will require to be informed by a Law Officer that the amendment is in order.

31. Principal Secretaries should ensure that their Ministers are advised that, especially in the case of complicated Bills, it may be dangerous to accept any amendments by a Member of Parliament unless it is obviously not complicated in itself and cannot lead to complications elsewhere in the Bill. Standing Order 121 (5) of the National Assembly provides for the postponement of consideration of any clause of a Bill during Committee Stage and the Ministers should be encouraged to take advantage of these provisions to persuade the National Assembly that amendments proposed can and should be more carefully considered by Government especially in cases where insufficient notice has been given to allow for such consideration.

Presidential Assent

32. Responsibility for the clerical accuracy of a Bill passes from the Attorney general to the Clerk of the National Assembly when the Speaker has accepted the Bill for debate by the National Assembly. The Clerk of the National Assembly is required to ensure that all amendments made during the passage of a Bill through the National Assembly are notified to the Government Printer. The Government Printer will prepare two copies on green vellum paper of the final and authentic version of the Bill as Passed in the National Assembly and these will be certified by the Clerk after checking by him. These certified copies are then presented by the Speaker to His Excellency the President for assent, and immediately after signature by His or Her Excellency they will be dated, sealed and returned to the Speaker's Office for publication.

33. The Clerk of the National Assembly will notify the Government Printer of the date of assent so that the Act can be published as a supplement to the ***Gazette***. Serial numbers as between Acts assented to on the same day will be allocated by the Government Printer (for economy in typesetting and printing), subject to special directions as to priority of publication in case of urgency. Finally the two signed vellum copies of each Act will be distributed by the Clerk as follows-

- one copy to the Records of Parliament; and
- one copy to the National Archives.

Coming into force of Acts

34. Section 74 of the Constitution in effect provides that a Bill becomes law when (assented to and) published in the ***Gazette***.

35. Under the Constitution, when a Bill has been assented to it becomes law but the law does not come into operation at least until the day it has been published in the ***Gazette***. The actual date on which an Act becomes operative may also be stated in the Act itself. Moreover the Act may state that it is to come into operation on a date to be appointed by the Minister by notice in the ***Gazette*** (and different dates may then be appointed in respect of different sections or parts of the Act), and in such cases it is duty of the Principal Secretary of the responsible Ministry to advise his or her Minister regarding the date on which the Act or any section or part of it should be brought into operation, and to submit to the Law Officers a draft Government Notice for this Purpose and when the Notice has been approved, to see to its publication after the Minister's signature has been obtained.

SUBSDIARY LEGISLATION

Submission and Clearance of Drafts

36. All matters which are to appear as Government Notice in the ***Gazette*** Supplement must be submitted for clearance to the Attorney General's Chambers before submission to the Minister, or other appropriate authority, for signature. Government Notices cannot be cleared after signature.

37. A request for the clearance of subsidiary legislation must be made in writing with the reasons for the subsidiary legislation concerned stated fully. 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.

38. After clearance, the draft of a Government Notice will be returned to the sender and must be faired for signature, unless this has been done in the course of re-drafting. It is the responsibility of the Ministry concerned to ensure that the faired copies in all respects correspond with the lay draft amended as may have been necessary by the Parliamentary Draftsman. The faired copies to be signed must be on thick paper embossed with the Malawi Coat of arms, not on flimsy copy.

Procedure before Publication

39. After signature, two signed copies of the relevant instrument will be forwarded to the Attorney General's Chambers for the necessary approval before printing, and for the onward transmission of one such copy to the Government Printer for publication in the ***Gazette***. The letter under which the signed copies are forwarded should contain a reference to the fact of clearance prior to signature, and to the Parliamentary Draftsman who gave such clearance.

40. 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 Parliamentary Draftsman concerned.

41. Where a form of notice which is to appear in the main ***Gazette*** is a General Notice and has once been approved by the Attorney General's Chambers, further notice in the same or substantially similar form need not be submitted for clearance and, upon signature, may be sent direct to the Editor of the ***Gazette*** for onward transmission to the Government Printer for publication.

42. The ***Gazette*** is published every Friday and all material desired for inclusion in any particular 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.

ANNEX 2

DIVISION OF A BILL INTO CHAPTERS, PARTS, ETC.

The clarity of a text of a Bill is greatly affected by the way it is organised. The division of a Bill into Chapters, Parts, Divisions, etc., and the words chosen for their headings, helps the reader to find his or her way quickly to the particular provision with which he or she is primarily concerned. The over-riding consideration, which should influence a bill drafter in making this decision, is whether it helps to implement the legislative scheme as a whole and communicate the intended interpretation to the reader. A bill drafter must be careful to see that a particular clause is placed in the Part, and only in the Part, to which it belongs. Where it is intended that a clause affect more than one Part, that clause must be included in a Part which is clearly shown to be of general application to the Act as a whole.

Chapters

Chapters are the highest level of division that a Bill can be broken up into.

Normally, only very large Bills have Chapters. An example of an Act with Chapters is the Defence Force Act.

Chapters are given Arabic numbers (1, 2, 3, etc).

Parts

If a Bill has Chapters, the Chapters will usually be divided into Parts.

Also, many mediumsized Bills, Acts and instruments are divided into Parts without there being any Chapters. An example of an Act with Parts but no Chapters is the Employment Act

Parts are given Arabic numbers (1, 2, 3 etc). For an Act that is divided into Chapters, the Part numbering starts again at the start of each new Chapter.

There are some older Acts and instruments in which the Parts have Roman numbers (e.g. I, II, III etc). If a new Part is added to such an Act or instrument, it is also given a Roman number.

Divisions

If a Bill has Parts, some of them may be broken up into Divisions.

An example of a Part that is broken into Divisions is to be found in the Personal Property Security Act.

Divisions are given Arabic numbers (1, 2, 3 etc). The Division numbering starts again at the start of each new Part.

Subdivisions

If a Bill has Divisions, some of those Divisions may be broken into Subdivisions. You can only have a Subdivision where you have a Division.

An example of a Division that is broken into Subdivisions is to be found in the Personal Property Security Act

Subdivisions are lettered (A, B, C etc). The Subdivision lettering starts again at the start of each new Division.

Clauses

A clause is a chunk of information identified by a bolded clause number and a marginal note. There are no specific rules about how much information can be put into a single clause—this is up to the bill drafter (subject to an inhouse rule that a clause should not be "too long"). A clause or sub clause can contain more than one sentence.

Clauses can be single units or they can be broken up further.

Clauses are given Arabic numbers (1, 2, 3 etc). The numbering runs from the start of the Bill until the end of the Bill.

Subsections

One way of breaking clauses up further is to divide them into subclauses.

Subclauses are identified by an Arabic number in brackets (e.g.: subsection (1)). If a clause is broken into sub clauses, there should be two or more of them in the clause.

Paragraphs

Paragraphing is an obvious way of making a sentence more digestible, by separating out bite-size chunks. However, paragraphing can be overdone. It is distracting to the reader if the paragraphs are too short or break up the flow of the sentence. Many bill drafters avoid descending to sub-paragraphs ((i), (ii) etc.), so as to avoid requiring the reader to hold too much in the mind. The point at which sub-paragraphing impedes understanding is very quickly reached.

Sometimes a subclause, or a clause that doesn't have any subclauses, is divided into paragraphs.

A paragraph is identified by a lower-case letter in brackets (e.g.: paragraph (a), (b), (c) etc).

Subparagraphs

Sometimes a paragraph is divided up into subparagraphs. You can only have subparagraphs if you have paragraphs.

Subparagraphs are identified by roman letters in brackets (e.g.: (i), (ii), (iii) etc).

Subsubparagraphs

Some subparagraphs are divided into subsubparagraphs. You can only have subsubparagraphs if you have subparagraphs.

Modern drafting style discourages such style.

Subsubparagraphs are identified by a capital letter in brackets (e.g.: (A), (B), (C) etc).

Headings

To assist the reader in the correct interpretation of the Act, headings are inserted throughout the text. In past practice, such headings have never been considered to be part of the Bill and have not therefore been subject to amendment. In recent years, however, some authorities on the legislative process have modified their po-

sition in this regard in response to jurisprudence, and committees of the House have occasionally amended headings when changes to a Bill justify an amendment to a heading.

It helps if a clause heading gives as full an indication of the contents of the clause as it can, consistent with keeping the heading reasonably short (many drafters make sure that their headings do not go into a second line). But a clause heading may not need to repeat the work done by a Chapter or Part heading.

Marginal Notes

Each clause is given a marginal note and this provides a guide to the contents of the section. It must be short and accurate and no attempt should be made to set out a summary of the whole contents of the clause.

The choice of an appropriate marginal note is often difficult but this occurs when the section has been over-loaded.

ANNEX 3 - BILL DIGEST TEMPLATE

This template should be used together with guidance provided in these Guidelines.

Title of Bill:		
Section		**Description of Section Content**
1.	**Bill development**	This section should answer the following questions: • Was an impact analysis done? • Have alternatives to proposed solutions been considered? • Have experts or expert committees been involved in the development of the bill • Have beneficiaries and other stakeholders affected by the Bill been consulted during the development of the Bill?
2.	**Content of the Bill**	This section should have various sub-sections that answer various questions: ***2.1 Is the Bill easy to understand?*** ***2.2 Do the proposed solution(s) in the Bill address the problem?*** • What is the problem the Bill trying to address? Does the purpose and objective of the Bill address the problem? • Will the proposed solutions be effective in addressing the problem? • What effects will the legislation have? • Will the legislation have any undesired effects? • Will the proposed legislation have any effects on existing law? ***2.3 What are the financial implications for implementation of the Bill?*** ***2.4 What are the administrative arrangements for implementation of the Bill?*** ***2.5 Is the Bill creating any new institutions?*** • If yes, does it provide guidance for the creation of the new institutions? ***2.6 Does the Bill propose the need for subsidiary law for its implementation?*** • If yes, does it provide guidance on how the subsidiary law will be made? ***2.7 Will it be easy to enforce the law and promote compliance?*** ***2.8 Will the implementation of the law have retroactive effects?***
3.	**Constitutional Issues**	This section should answer the questions: • Does the Bill comply with the Constitution of Malawi? • Does the Bill respect human rights and freedoms provided for in the Constitution of Malawi?
4.	**International Obligations**	This section answers the question: • Does the Bill affect any international treaties that the Government of Malawi is party to?

ANNEX 4

HUMAN RIGHTS AS ENSHRINED IN THE CONSTITUTION OF MALAWI

• Right to life • Right to personal liberty • Protection of human dignity and personal freedoms • Equality – prohibition of discrimination of any persons • Right to privacy • Protection of the family as the natural and fundamental group unit of society • Rights of children • Rights of women • Right to education • Right to cultural life and language of choice • Prohibition of slavery, servitude and forced labour • Right to engage in economic activity, to pursue livelihoods • Right to development • Right to fair and safe labour practices, fair remuneration, equal remuneration for work of equivalent value, right to join trade unions, and right to withdraw labour	• Freedom of association • Freedom of conscience • Freedom of opinion • Freedom of expression • Freedom of the press • Freedom of access to information • Freedom of assembly • Freedom of movement and residence • Political rights including right to form, join or participate in political parties, right to participate in peaceful political activities, right to vote • Right of access to justice and legal remedies • Rights of people who have been arrested and detained, and right to a fair trial • Right to administrative justice

ANNEX 5

LIST OF PEOPLE WHO CONTRIBUTED TO THE DEVELOPMENT OF THE GUIDELINES FOR BILL DRAFTING AND ANALYSIS

Name	Designation
Prof. Nyovani Madise	Director of Research and Development Policy and Head of Malawi Office - AFIDEP
Salim Ahmed Mapila	Research and Policy Associate - AFIDEP
Justice Kenyatta Nyirenda	Consultant and Judge of the High Court of Malawi
Lovemore Nyongo	Controller of Planning Services - Parliament
Gibson Kanyerere	Policy and Planning Officer - Parliament
Kizito Pheleni	Chief Parliamentary Legal Counsel - Parliament
Janet Chingeni	Parliamentary Legal Counsel - Parliament
Tilly Sindile Likomwa	Assistant Clerk of Parliament (Legal Services) - Parliament