REPORT OF THE LAW COMMISSION ON THE REVIEW OF THE CORRUPT PRACTICES ACT

TO: THE MINISTER OF JUSTICE, HON. H.D. PHOYA

This is the report of the Law Commission which was appointed to review the corrupt practices act.

The commission hereby submits the Report pursuant to section 135(d) of the constitution and commends the recommendations contained in the Report to the Government; Parliament and people of Malawi.

members

JUSTICE GEORGE M. CHIMASULA PHIRI	C*hairperson of the Commission* the Judiciary
.....	
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MR. RECKFORD KAMPANJE	*Budget Director*, Ministry of Finance
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REV. DR. FR. ROBERT T. MWAUNGULU	Episcopal Conference of Malawi; Civil Society
MR. PERKS M. LIGOYA	Economics Association of Malawi (ECAMA)
DR. KHWIMA NTHARA	*Lecturer*, Department of Economics, Chancellor College, University of Malawi

dated 25th september, 2002

Changes in the membership of the Commission

Two other persons appointed to the Commission were the late Mrs. Cynthia Selemani, representing the society of accountants in malawi, who passed away during the tenure of the commission, and Mr. Jimmy Koreia-Mpatsa, representing the Malawi Confederation of Chambers of Commerce and Industry, but he was unable from the start to participate in the commission and resigned his appointment.

One Commissioner, Mr. Modecai Msisha, SC, legal practitioner, did not participate in much of the Commission's deliberations although he did not resign his appointment. He therefore felt personally unable to lay claim to much of the recommendations of the Commission and to sign the Report.

Programme Officers

Four law reform officers in all served as programme officers for this programme, starting with Mrs. Matilda Katopola and Mrs. Maureen Kondowe who were later succeeded by Mr. Allison Mbang'ombe and Mr. Chikosa Silungwe.

Acknowledgements

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INTRODUCTION

Prior to 1995 Malawi's corrupt practices law was provided for only in the Penal Code under the Part of the Code on offences against the administration of lawful authority. Offences of corrupt practices under this law were expressed to be misdemeanours and the maximum penalty was imprisonment for three years.

In recognition of the worrying trend in the increase of cases related to corruption in Malawian society, it was felt that it was time that some comprehensive provisions were made in the laws to deal with the problem. This resulted in the enactment of the Corrupt Practices Act of 1995 which established the Anti-Corruption Bureau as the agency of the Government to investigate and prosecute offences of corrupt practices and also to undertake functions aimed at preventing corruption.

The law under the Corrupt Practices Act has therefore been applied since early 1996. From the experience gained in operating the law under the Act, it became apparent to the Bureau that there were a number of shortcomings in the law under this Act that needed to be addressed through a process of law reform. Consequently, early in 2001 the Bureau made a submission to the Law Commission which highlighted and explained the areas of the law that the Bureau had experienced the most serious operational problems with and in respect of which the Bureau was seeking amendments to the Act.

Following the Bureau's submission, a panel of experts was set up which constitutes the membership of the special Law Commission , formally appointed under section 133 of the Constitution, to review the 1995 Corrupt Practices Act.

In summary, the problem areas in the operation of the law under the Act as identified by the Anti-Corruption Bureau concerned a number of substantive and procedural issues, including-

- definitions of certain terms such as "agent", "corruption" "influence" and "gratification";

- the legal status of the Bureau as a Government Department not having its own legal personality as a corporation;

- performance of certain functions, namely, the prosecution of offences, being subject to the consent or direction of the Director of Public Prosecutions who functions within the Executive structure of the Government;

- inadequacy of provisions on obstruction of officers of the Bureau;

- the Bureau having to submit its Reports to the Minister and not directly to the National Assembly;

- the range of activities that constitute corrupt practices by public officers;

- the lack of a specific offence regarding misuse of public office;

- declaration or disclosure of assets by elected and senior public officials where required by law to so declare or disclose;

- inadequacy of provisions on possession of unexplained property by public officials where value exceeds one's official emoluments;

- the issue of the penalty for corruption offences being subject to a minimum period of five years imprisonment without judicial discretion, perceived, because of its severity, to result in flimsy acquittals by the courts and thus contributing to public perceptions about the law on corruption being weak;

- lack of provisions for the protection of informers or whistle-blowers;

- the requirement of evidence of corroboration for certain offences and thus creating

unnecessary impediments to successful prosecution of those offences;

- the need to incorporate the concept of "tender of pardon", as in some jurisdictions of the SADC Region, to encourage suspects to make true and full disclosure of what they know regarding the offence;

- the need for investigation and prosecution by the Bureau of other offences under any other law discovered or disclosed in the course of investigating corruption offences under the Corrupt Practices Act;

- the need for additional powers ancillary to the stipulated functions of the Bureau.

The Commission first met at the end of October, 2001, to determine its work plan. The Commission adopted its work plan which, in part, anticipated the holding of a number of consultative meetings with various stakeholders spanning a cross-section of Malawian society to seek society's input into the work of the Commission on this matter of major public concern and interest.

The Commission took a few more months before it reconvened due to delayed release of donor funding for administrative reasons. After receipt of funding the Commission next reconvened in May, 2002. At that meeting the Commission was alerted to the fact that the task before it had assumed some urgency in meeting the expectations of the community, the Government and Malawi's co-operating development partners for an adequate law to combat corruption in Malawi.

The Commission also understood that its mandate was not to overhaul the present Act and redraft the law on corruption but rather to review the present Act in relation to the provisions that had presented operational difficulties as had been identified by the Bureau. The Commission also considered that proceeding directly to review those provisions was the process likely to prove to be the more expeditious for the Commission to complete its task within the expected time-

frame of before the end of the year 2002. In addition, the Commission was satisfied that the material that had been prepared and presented to it had sufficiently identified the operational problems with the present state of the law under the Act and was also sufficient in proposing possible legislative amendments for consideration by the Commission to address those problems.

The material consisted of a detailed outline of legislative proposals submitted by the Bureau and a Report of the analysis of those submissions, supported by research, made by a joint Task Force of professional officers of the Bureau and the programme officers at the Law Commission. The Commission therefore resolved to proceed directly to review the Act on the basis of the Bureau's submissions and the Report of the Task Force. However, the Commission also felt that it was open to it to analyse other provisions in the Act that were sufficiently relevant to addressing operational problems.

Mindful of the urgency attached to the task before it, the Commission revised its work plan so as to accelerate its work and complete its task in time for its Report to be laid in Parliament during the last meeting of Parliament towards the year's end. To that end, the Commission decided to meet twice a month, beginning from the month of June, and met each time for three to six days.

During its meetings, the proceedings of the Commission took the form of closely examining the proposals for amendments as submitted by the Bureau and considering the analysis in the Report of the Task Force. Some work was assigned to committees of the members who met during the days of the meetings or in between meetings and their reports were considered in plenary.

The Commission also studied several precedents on anti-corruption statutes from a number of other Commonwealth jurisdictions, notably, the statutes of Botswana, Zambia, Hong Kong, the United Kingdom and Singapore, and also studied other legal texts and protocols on anti-corruption measures. In addition, the Commission sought submissions from the general public through notices published in the *Gazette* and in newspapers, and the Commission received a few such submissions which it duly considered.

What follows in this Report are the specific findings and recommendations made by the

Commission; and all matters recommended to be incorporated into the Act have been indicated in **bold.**

SPECIFIC FINDINGS AND RECOMMENDATIONS

PART I

PRELIMINARY

SECTION 3 *[Interpretation of terms]*

The Commission considered some of the terms defined under this general interpretation provision and has made recommendations in relation to those terms.

"agent"

As presently defined, the term "agent" excludes employees of an organization (as a public body or a private body) in relation to activities within the organization.

The Commission observed that this definition is introduced in relation to offences under section 27 of the Act concerning corrupt transactions involving relationships of "principal" and "agent" in the traditional sense of business transactions. The Commission acknowledged that indeed in a number of situations an employee of an organization fell outside the category of "agent" of the organization and therefore of the relationship of "principal and agent" with the organization.

The Commission noted the proposal by the Bureau to include an employee of an organization as agent of the organization for the purposes of all the several offences under section 27. The Bureau submitted that it has come upon cases where employees of an organization have intentionally falsified documents in transactions between the organization and other bodies to defraud, or cause loss to, the organization and have thus committed offences akin to the offence by agents under section 27(3), but they cannot be prosecuted under the Bureau's mandate because they are excluded from the definition of "agent". Yet, in the Corrupt Practices Act there is no other offence for which the Bureau has power to prosecute such offending employees.

In its submission the Bureau stressed that it did not see any justification for the law on corruption not to include employees as agents of their employing organization; and in this regard legislation can be cited from other jurisdictions within the Region (such as Botswana and Zambia) and within the broader Commonwealth (such as the United Kingdom) which had defined the term "agent" to include employees. The Commission noted that, on the other hand, the definition of the term "principal" as assigned in the Act includes an employer and this definition is also for the purposes of the offences under section 27 involving relationships of "principal" and "agent". If an employer can stand in the position of "principal" it appeared logical to the Commission to deduce that in relation to an employer an employee could stand in the position of "agent".

However, some members of the Commission felt concerned at possible implications in law as for example in relation to the Civil Service and other public bodies if public officers were treated as "agents" and the Government as the "principal" when operationally such distinction is rather artificial or is blurred.

In order to properly consider the matter and reach appropriate consensus, the Commission deferred its final consideration of the Bureau's submission until after it had reviewed the provisions of section 27.

After considering section 27, the Commission agreed with the Bureau's submission to include "employee" in the definition of the term "agent" to read as follows-

> **"agent" means any person who acts for or on behalf, or in the name, of a public body or a private body or any other person, and includes a trustee, an administrator, an executor and an employee.**

"casual gift"

The definition of the expression "casual gift" was not a subject of the Bureau's submission, but the Commission gave attention to it. The gist of this definition is that gifts are

exempted from attracting the penal provisions of the Act if they fall within the definition of "casual gifts". The definition reads-

> "casual gift" means any conventional hospitality on a modest scale or an unsolicited gift of modest value not exceeding K500 offered to a person in recognition or appreciation of his services, or as a gesture of goodwill towards him, and includes any inexpensive seasonal gift offered to staff or associates by public and private bodies or private individuals on festive or other special occasions, which is not in any way connected with the performance of a person's official duty so as to constitute an offence under Part IV.

The Commission observed that specifying the value of exempted gifts in amounts of money was not appropriate since the value of money tends to fall rapidly or over time with inflation. The amount of K500 was prescribed in 1995 when the Act was enacted and to-date that amount has fallen several fold in value and has been rendered meaningless.

Secondly, in the view of the Commission the context in which a gift is given will determine whether it is in the nature of conventional hospitality, a seasonal gift or a gift relating to a festive or other special occasion or whether the gift is given in circumstances of corruption. For this reason the Commission did not see any purpose for granting special exemption for festive or similar gifts. On the contrary, the Commission felt that express recognition or exemption of such gifts in the law may give the impression that some types of donations are exempt from the wrath of the law even if they may be corruptly given and indeed such a provision may promote the prevalence of such donations being given in circumstances of corruption. In short, such a provision may become the veil for what are typically corrupt gifts.

The Commission therefore recommends that Malawi should follow developments in other countries which, in strengthening their laws on corruption, have done away with the concept of "casual gifts" as defined in our Act. The exemption of "casual gifts" should therefore be deleted.

"corruptly"

The Commission observed that the term “corruptly” was the basic word used in the Act to import or denote corruption. The only other variation used in the Act is the expression “corrupt practice” or “corrupt practices” which also carries the title of the Act but is not defined.

The Commission recommends adopting the approach of defining the expression “corrupt practice” so as to clearly indicate the practices or activities that amount to, or constitute, corruption. This is also the approach under international protocols on corruption, including the SADC protocol. The adverbial form “corruptly” would then be defined to relate to engaging in corrupt practices.

In essence, “corrupt practice” or “corruption” is the offering, giving, receiving, obtaining or soliciting of any thing of value (i.e. any “advantage” as defined later in this Report in connection with the term “gratification”) to influence actions of officials in the discharge of their duties. In relation to officials in public bodies, corrupt practice is recognized to extend to diversion by them of public property to purposes to which the property was not intended for.

Another recognized form of corrupt practice is “influence peddling” which entails illicitly obtaining advantage through one’s position, relationship or standing of influence.

The Commission considered whether to also include “extortion” as an offence of corruption since, from the cases cited to the Commission by the Bureau, several instances of extortion are committed in circumstances of corruption. In those circumstances “extortion” entails corrupt demanding or receiving by a person in office of a fee for services which should be performed gratuitously or, where compensation is permissible, corrupt demanding of a larger fee than is justified or corrupt demanding of a fee which is not due. For this purpose the Commission recommends that the term “extortion” should be defined in the Act.

As regards extortion, the Commission noted that in other jurisdictions of the Commonwealth extortion has been removed from the definition of corrupt practices and it has been made part of the offence of theft or as a separate offence under the general code of crimes. The Commission however did not consider that in the case of Malawi there would be any duplicity if extortion was made punishable as an offence of corrupt practices in appropriate

cases in addition to being punishable as an offence of dishonesty under the Penal Code or under any other law.

In light of the foregoing considerations, the Commission recommends the following new definitions to encompass corruption-

"corruptly" means the doing of, or the engaging in, any corrupt practice;

"corrupt practice" means-

(a) the offering, giving, receiving, obtaining or soliciting of any advantage to influence the action of any public officer or any official or any other person in the discharge of the duties of that public officer, official or other person;

(b) the diversion of any property of a public body to or for purposes unrelated to those that the property was intended for;

(c) influence peddling;

(d) the extortion of any advantage;

(e) misuse or abuse of office.

"extortion", in relation to corrupt practice, includes-

(a) demanding or receiving by a person in office of a fee or other payment for services, work, supplies or other thing which should be performed, done, delivered, offered, provided or given gratuitously; or

(b) where compensation is permissible, demanding or receiving of a fee or other payment larger than is justified or which is not due;

"gratification"

This is another term that is most central to the law on corruption. It is the term used to describe and embrace all forms and manifestations in which corrupt practices are rewarded or paid for in cash or in kind.

The Commission observed that in its ordinary meaning the term "gratification" (without the rather involved inclusive definition assigned to it in the Act) would not be as all embracing of the various forms in which bribes are given or corrupt practices are rewarded. The Commission recommends that in preference to the term "gratification" the term "advantage" should be substituted for not only being a simpler English word and more familiar in common usage but also for being of much broader application and scope in its ordinary meaning.

Nonetheless, the Commission considered that even with the change to use the word "advantage" it would still be necessary to expressly bring into its statutory meaning under this law other elements that may not be obvious in every respect such as the granting of "loans" (since these may be claimed to be repayable) and the creation of "conditions of a favourable position of one person over another" (since such conduct may not always result in an advantage directly to the perpetrator).

The term "advantage" would thus be defined as follows-

"advantage" means any benefit, service, enjoyment or gratification, whether direct or indirect, and includes a payment, whether in cash or in kind, or any rebate, deduction, concession or loan, and any condition or circumstance that puts one person or class of persons in a favourable position over another.

"influence"

In its submission the Bureau sought to have the term "influence" defined in relation to the new offence of "performing functions corruptly by public officers" and "misuse of public office" which the Bureau has included in its legislative proposals. According to the Bureau's submission, the definition of the term "influence" should infer use of influence whether or not the influence is exerted and whether or not it leads to intended results.

On the question of exerting influence, the Commission considered this factor to be superfluous since in its ordinary and legal usages "influence" or use of it imports an element of exertion. On the other hand, the Commission accepted the need to expressly provide for the element of whether or not the use of influence leads to the intended result.

The Commission therefore recommends that the term "influence" be defined in the Act as follows-

"influence" means any influence, whether or not the use of it leads to the intended result.

"property"

The term "property" has not been defined in the Act. It has been used frequently in combination with the expression "pecuniary resources" in reference to proceeds of crime derived from offences committed against the Act. In seeking to include all shades and variations of proceeds of crime, the Bureau in its submission has additionally used the terms "profits", "wealth", "assets", "business" and "benefits".

The Commission agrees that there is need to widen the description of the proceeds of crime under the Act and was aware that legislative practice internationally favoured such wider description. The Commission was also aware that in the Government Bill on money-laundering currently pending enactment by Parliament (viz, the Money Laundering Bill, 2002; Bill No.6/2002) the description of proceeds of crime has been made much broader consistent with international practice. The Commission recommends that a similar definition be adopted for the purposes of the Corrupt Practices Act. Such a definition would satisfy the concerns of the Bureau and harmonize the law under recent enactments in addressing similar matters. In the

view of the Commission, the term “property” and “pecuniary resources” should remain the terms to be used in the Act with the recommended broader definition attached. In their combined usage throughout the Act, they appear as “pecuniary resources or property” and they should remain in that order.

Thus the Commission recommends the following new definition-

“pecuniary resources or property”, when used to denote the proceeds of crime or any thing obtained from or connected with, or suspected to have been obtained from or to be connected with, the commission of an offence under this Act or other written law, includes pecuniary resources or property of whatever description into which any pecuniary resources or property derived or realized from the commission of the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains derived or realized from such pecuniary resources or property at any time since the commission of the offence.

PART II
THE ANTI-CORRUPTION BUREAU

SECTION 4(2) *[Status of the Bureau as a Government Department]*

In its submission, the Bureau had raised the issue of its status as a department of the Government as provided by subsection (2) of section 4. This issue was raised in relation to legal suits by or against the Bureau as discussed in the case of *Apex Car Sales Limited vs The Anti Corruption Bureau*, (Civil Cause No. 3479 of 2000) in which the High Court held (correctly in the view of the Commission) that in accordance with the Civil Procedure (Suits by or against the Government or Public Officers) Act (Cap. 6:01), suits by or against the Bureau are to be either in the name of the Attorney General or in the name of the Director of the Bureau as the appropriate public officer. The Bureau merely sought to be guided by the Commission on this issue and as to the provisions that may be made to ensure that civil suits by or against the Bureau are not always directed to the Attorney General as it may not be in every

case that this may be convenient, proper or transparent or may best serve the interests of justice.

The Commission affirms that the present status of the Bureau as a Government Department was the most appropriate for this institution whose powers of investigating and prosecuting aspects of criminal offences are inherently of a sovereign nature and ought to be exercised within the domain of the sovereign structure of the Government. It was important that the Bureau was not seen to be a subsidiary or subservient institution under Government control which would be the case if it did not itself have the status of Government. The Bureau exercises powers of arrest of individuals, subjects individuals to criminal proceedings before the courts resulting in committing them to prisons on remand or conviction or to conditional bail, exercises powers of search and seizure, issues orders freezing bank accounts and transactions and issues like orders demanding compliance in one form or another. These are all examples of sovereign powers and must be exercised within the framework of the sovereign authority of the State through government departments that are accountable to the people.

As regards the issue of civil suits by or against the Bureau, the Commission agrees with the submission of the Bureau given the nature of the functions of the Bureau whose authority is often directed towards individuals in Government institutions. The Commission has drawn from the example of the Electoral Commission which, in its enabling Act, has been conferred authority to either seek legal representation by the Attorney General or to instruct private counsel to provide legal representation as the peculiarities of the particular case may demand. Additionally, the Commission recommends that it should be expressly provided in this Act that civil suits arising from the exercise of the powers and functions of the Bureau should be instituted in the name of the Director of the Bureau, and this will be a mere restatement of a legal position already tenable under the Civil Procedure (Suits by or against the Government or Public Officers) Act although there is a common tendency always to direct such suits to the Attorney General.

To address the two matters of civil suits in the name of the Bureau and legal representation of the Bureau in civil suits, the Commission recommends the introduction of two new provisions, as section 5A and section 5B, to follow immediately after section 5 as shown further below.

SECTION 5(2) *[Independence of the Bureau]*

The Commission considered the provision on the institutional independence of the Bureau as provided for under subsection (2) of section 5. That provision is in the following terms-

> The Director shall be subject to the direction or control of the Minister on all matters of policy, but otherwise shall not be subject to the control or direction of any person in the performance of his professional duties.

First, the Commission observed that the distinction between "matters of policy" (for which the Bureau is subject to the Minister's direction and control) and matters concerning the "performance of professional duties" was not always easy to draw. Although on behalf of the Bureau it was made clear to the Commission that the Bureau did not, to-date, experience undue interference or at all and considered itself professionally independent, the Commission took the view, *ex abundanti cautela,* that the position of good political will and benevolence towards the Bureau may not always exist and the law needed to avoid leaving matters of such critical importance to chance. The Commission also took cognisance of the emerging trends of best practices in establishing anti-corruption agencies as stipulated under various SADC regional protocols on corruption which require granting unqualified institutional independence to such agencies. Functional independence was, among other things, particularly essential in raising and sustaining public confidence in such institutions.

The Commission considered that the uniform formula that has been used in the Constitution in establishing the functional independence of the four institutions of democratic governance of the Electoral Commission, the Office of the Ombudsman, the Human Rights Commission and the Law Commission has properly served as an appropriate provision for conferring the necessary degree of operational independence of such institutions. The Commission wishes to observe that in general and in common government practice, the Anti Corruption Bureau is classified as the fifth State institution of democratic governance along with those other four institutions.

Following that settled provision in the Constitution, the Commission recommends that

subsection (2) of section 5 be deleted and substituted as follows-

The Bureau shall exercise its functions and powers independent of the direction or interference of any other person or authority.

So formulated, this provision should be moved to section 4, which deals with establishment and status of the Bureau, and to become subsection (3) of that section.

Subsection (3) of section 5 should consequently be renumbered as subsection (2) of that section.

With the adoption of such a provision on the functional independence of the Bureau, the Commission recommends that, consistent with related provisions applicable to the other mentioned institutions of democratic governance, a further provision should be made as a subsection of section 4 requiring the Director, for reasons of accountability of the Bureau as a State institution, to make periodic reports to the authorities regarding the general conduct of the affairs of the Bureau. Such a requirement would not be in the nature of subjecting the Bureau to those authorities in respect of discharging its duties, but is necessary as recognition that the Bureau is charged with carrying out functions of the Government.

Thus, the following provision should be added to section 4 as subsection (4)-

(4) The Director shall submit reports to the President and to the Minister regarding the general conduct of the affairs of the Bureau.

A similar provision is to be found in the Law Commission Act and in the Human Rights Commission Act.

NEW SECTIONS 5A and 5B *[Civil suits and legal representation]*

As explained above in relation to section 4(2), the Commission recommends the following two new provisions on civil suits by or against the Bureau and on legal representation of the

Bureau in such suits-

Civil suits by or against the Director
Cap 6:01

5A. Any civil suit arising from the exercise of the functions, duties and powers of the Bureau or the Director shall be instituted by or against the public office of the Director, but the provisions of the Civil Procedure (Suits by or against the Government or Public Officers) Act shall otherwise apply in respect of any such suit as they apply in respect of any suit by or against any other public officer.

Legal representation

5B. The Director may, apart from the Attorney General instruct any legal practitioner-

(a) to provide legal representation to the Director in any civil proceeding before any court, including any proceeding concerning appeals against the decisions of the Director on any aspect of the exercise of the functions, duties and powers of the Bureau or of the Director; or

(b) generally to provide legal advice to the Director or to act for or on behalf of the Director.

PART III
FUNCTIONS AND POWERS OF THE BUREAU

SECTION 10(1) *[Functions of the Bureau]*

This is the provision that sets out the general mandate of the Bureau, conferring on the Bureau its present three basic functions, namely, preventing corruption, receiving and investigating

complaints of corruption and prosecuting corruption offences created by the Act, and, thirdly, investigating public officers on conduct conducive to corrupt practices.

The Bureau submits that the range and scope of those functions have not proved adequate for the effective functioning of the Bureau. While the Bureau does not propose any change to the function of prevention of corruption as laid down in paragraph (a) of subsection (1), the Bureau has sought amendments to the functions of receiving and investigating corruption complaints and prosecuting corruption offences as laid down in paragraph (b) of subsection (1) and to the function of investigating corrupt conduct of public officers and reporting on them to the Minister as laid down in paragraph (c) of subsection (1).

Further, the Bureau has also submitted that there is need to expand its mandate by additional functions to enable the Bureau to prosecute offences under any law (apart from offences under the Act) which are disclosed or discovered in the course of investigating offences under the Act; to report the corrupt conduct of public officers to whoever may be the appropriate authority and not necessarily to the Minister; to submit its findings made during investigation of offences and make its recommendations thereon to the appropriate authority which should be required to respond to those findings and recommendations; to perform ancillary functions.

In reviewing the functions of the Bureau under paragraph (b) of subsection (1) of receiving and investigating complaints of corruption, the Commission understood that operationally the Bureau has taken this function as not permitting the Bureau to investigate any offence without first having received a complaint of an alleged or suspected corrupt practice. Thus, in practice the Bureau has felt constrained, or that it does not have power, to be pro-active in investigating corruption offences from information coming to the Bureau otherwise than by way of complaints.

The Commission considered that if that was the intention of the law under paragraph (b) of subsection (1) then indeed the provision is unduly constraining of the functioning of the Bureau. Research findings made by the Commission indicate that it is an aspect of best practice in combatting corruption to confer on the official investigating agency the power to investigate offences on the basis of information it may receive or come upon through any source and one such common source would be “whistle blowers” who may not necessarily be in the

position of complainants. Giving the Bureau such authority would also serve to complement the other functions of the Bureau such as that of preventing corruption.

However, the Commission also considered that the function of receiving complaints should be maintained as a separate function on its own. Receiving complaints of corruption will remain an important function for initiating investigations and the Bureau will need to create a complaints receiving and examining mechanism.

The Commission therefore recommends that paragraph (b) of subsection (1) be split into three paragraphs to provide separately for the functions of receiving complaints of corruption, investigating such complaints and other reports of corruption and prosecuting corruption offences.

In relation to the function of the Bureau to prosecute offences as provided in the present paragraph (b) of subsection (1), the Commission recommends that this function, which is expressed to be subject to the directions of the Director of Public Prosecutions, should be conferred on the Bureau without that qualification so that professionally, as with all other functions, the Bureau performs its prosecution function independently as envisaged by the Act and by the principle behind the establishment of the Bureau as a separate and specialized agency. Thus, reference to the directions of the Director of Public Prosecutions should be deleted. The separate matter of "consent" by the Director of Public Prosecutions to prosecutions by the Bureau of offences under Part IV of the Act as required by section 42 of the Act has been raised in the Bureau's submission to the Commission and the Commission has considered the matter in relation to section 42 later in this Report.

Turning to the additional functions sought by the Bureau, the Commission debated at length the proposed function to enable the Bureau to prosecute any offence under any other law which the Bureau discovers or becomes aware of while investigating offences under the Act. One issue that concerned the Commission was the propriety of conferring on the Bureau authority to prosecute offences that are not allied or related to corruption. Was it feasible to expect the Bureau to have capacity at any time (in terms of human, financial and material resources) to prosecute such wide range of offences over and above those under the Act. Would this be a judicious use of the Bureau which has been established as a specialized body to

combat corruption. Will the community understand, appreciate and accept the added value of this expanded mandate of the Bureau or will the community not consider it to be an unnecessary burden intended to divert the Bureau's concentration from its core functions. These and many other similar detracting factors engaged the Commission at considerable length.

However, against those detracting factors, the Commission also considered that there was a number of other factors that warranted the adoption of a provision to empower the Bureau to also prosecute offences, whether allied or related to corruption or which may not be so related, that are discovered in the course of investigating corruption offences. The principal justification for taking this position is that the Commission understood that corruption offences tend to mutate into various forms and by pursuing corruption offences in their mutated forms the Bureau is likely to follow the root, and get to the bottom, of such offences. Another consideration was that as a Government agency operating with public resources if the Bureau has already gathered sufficient evidence confirming the commission of any offence it would not be economic or cost effective for the Bureau to turn over the docket to another Government agent, such as the police or the Director of Public Prosecutions, merely for prosecution when the Bureau itself has the professional competence to prosecute the matter.

The Commission was also made aware of similar developments within the SADC Region, notably in Zambia, where the adoption and pursuit of such a provision has led to successful results in the prosecution of corruption and related offences.

In the final analysis, therefore, the Commission recommends that the Bureau be conferred authority to also prosecute offences under any other law disclosed to it while investigating offences under the Act. In the view of the Commission it is also a mitigating consideration that the investigation and prosecution of such offences by the Bureau will not be an originating call or function upon the Bureau but rather a secondary function to the investigation of offences under the Act.

With regard to the function of the Bureau to investigate, and report on, the corrupt conduct of public officers, the Commission felt that the matter of the conduct of public officers being conducive to corrupt practices needed special attention in the law on corruption due to the

position of public trust and responsibility to the public which holders of public office enjoy and the impersonal nature of public assets and finances placed under their control. The function of the Bureau as laid down in paragraph (c) should therefore be maintained. However, the Commission agrees with the Bureau, and recommends, that the report of any such investigation be submitted to any appropriate authority as applicable and not necessarily to the Minister. Paragraph (c) should therefore be amended accordingly.

Finally with regard to another additional function sought by the Bureau to enable it to perform ancillary functions, the Commission agrees that it would be in-keeping with legislative practice in Malawi, in conferring statutory functions on institutions, to confer on the Bureau general authority to do things ancillary to the specified functions and powers. The Commission however recommends that this type of authority should be conferred as a power under section 11 and not as a function under section 10. The Commission has examined a number of statutes enacted recently and considers as a suitable provision to adopt the similar authority conferred on the Human Rights Commission in section 15(1)(h) of its enabling statute, the Human Rights Commission Act, 1998 (Act No. 14 of 1998).

While on this subject of the functions of the Bureau, the Commission considered that it would be appropriate to enable the Bureau to conduct an inquiry into any matter in relation to the exercise of its functions and such authority should itself be conferred as a function under subsection (1) of section 10.

To take account of the foregoing considerations and recommendations, the Commission recommends that paragraphs (b) and (c) of subsection (1) of section 10 be deleted and the following new paragraphs (b) to (i) be introduced-

(b) receive any complaints, report or other information of any alleged or suspected corrupt practice or offence under this Act;

(c) investigate any complaint, report or other information received under paragraph (b);

(d) investigate any alleged or suspected offence under this Act;

(e) investigate any offence under any written law disclosed in the course of investigating any alleged or suspected corrupt practice or offence under this Act;

(f) prosecute any offence under this Act;

(g) prosecute any offence under any written law disclosed in the course of investigating any alleged or suspected corrupt practice or offence under this Act;

(h) investigate the conduct of any public officer which in the opinion of the Bureau may be connected with or conducive to corrupt practices and to report thereon to the appropriate authority;

(i) inquire into any matter in relation to the exercise of its other functions under this section.

New subsection (4) of section 10 *[Authority of the Bureau to recommend corrective measures]*

The Commission considered at length the proposal by the Bureau to confer on it, in connection with its investigative functions, a related function for it to submit to the relevant appropriate authority findings of its investigations in relation to any offence, whether conducted in a public body or a private body, and its recommendations thereon as to any action that needs to be taken by the appropriate authority to correct or otherwise address the findings.

The Commission accepted the principle of such a provision as necessary in a law to combat corruption and particularly in relation to the function of the Bureau to prevent corruption.

The Commission therefore recommends that a new provision to that effect be introduced

as subsection (4) of section 10 as follows-

> (4) Where the Bureau has carried out any investigation of any alleged or suspected corrupt practice or offence under this Act or under any other written law, it may, if it considers it necessary so to do, report its findings and recommendations to the appropriate authority regarding any matter which reveals, or points to, the existence or prevalence of any conduct connected with, or conducive to, corrupt practices; and in any such report the Bureau may require the appropriate authority to take or institute such corrective action or measure as the Bureau shall reasonably specify in the report or to explain to the Bureau why such action or measure may not be taken or instituted or what other action or measure may instead be taken or instituted, and the Bureau may make such modification to its recommendations or requirements as it may consider desirable.

Further discussion over this new provision concerned the issue of the propriety of the Bureau appearing to issue instructions to the management of corporate entities, particularly private bodies. In the end, the Commission considered that any such recommendations are intended and meant to relate to matters of corrupt practices for which the Bureau is the competent agency of the State to deal with and address, and the provision was therefore appropriate.

SECTION 11 *[General powers of the Bureau]*

The Bureau submitted that the application of paragraph (a) and paragraph (b) was rather limited.

Paragraph (a) requires the sanction of the Director of the Bureau for the conduct of an inquiry or an investigation to be carried out. The Bureau submitted that the discharge of all functions of the Bureau should be specifically sanctioned by the Director.

The Commission however held a contrary position and affirmed as proper the position under this paragraph of identifying specific functions which require to be specifically sanctioned

by the Director. The Commission generally understood that the functions of the Bureau that would require to be discharged only if the Director has given his or her sanction are those which fall into the category of functions the exercise of which would impinge upon the human rights of subjects. In this connection, the Commission sought to identify what other functions may need to be specified in paragraph (a) as also requiring sanctioning by the Director. The function to prosecute offences was considered, but the Commission did not see why this function, which follows investigations already sanctioned by the Director, should itself be the subject of further sanctioning by the Director. The function of prevention of corruption was also cited, but the Commission was of the view that this function was in the nature of an administrative duty of the Bureau and its performance did not warrant a statutory requirement in the Act for specific authorization by the Director.

However, while the Commission took the position that paragraph (a) should be retained, the Commission recognized the authority of the Director to issue office practice guidelines regarding the exercise of the functions of the Bureau by various officers of the Bureau and it would be proper, as a matter of office procedure, for the Director in such guidelines to prescribe which other functions of the Bureau would require his or her sanctioning.

Paragraph (b) of subsection (1) empowers the Director to require a public officer to answer questions concerning duties of any other public officer or other person. The word "other" has meant that the public officer summoned by the Bureau is not liable under the authority of this provision to answer questions about his or her own duties. The Bureau submits that this legal position has created an undue restriction for it in its investigative duties as it cannot obtain information from a public officer about his or her own duties except if the public officer is treated as a suspect for an offence.

The Commission considered the submission of the Bureau at length and partly in light of the constitutional right of an individual against self incrimination as stipulated in section 42(2)(c) of the Constitution. Although this right is provided for in relation to an accused person, the Commission acknowledged that it is a right inherent to human beings.

However, the Commission also acknowledged that in the nature of the law against corruption it was essential to confer on the Bureau authority to seek information about a public officer's duties from the public officer himself or herself. If conferring such authority on the Bureau were to be a restriction or a limitation on the right against self incrimination, the Commission could consider such restriction or limitation as reasonable and necessary in an open and democratic society and therefore as permissible under the test laid down in subsection (2) of section 44 of the Constitution.

Paragraph (b) should therefore be amended to make a public officer liable to answer questions about his or her own duties.

Paragraph (b), with the recommended amendment, would read as follows-

(b) require any public officer or other person to answer questions concerning the duties of that public officer or of any other public officer or other person, and order the production for inspection of any standing orders, directives or office instructions relating to the duties of the public officer or such other public officer or other person;

The Commission affirmed that the word "require" as used in this paragraph was appropriate and carried the correct meaning as intended. It would not be appropriate in that part of the paragraph to substitute the word "require" with the word "order" as proposed by the Bureau in its submission.

New paragraph (d), *[General power to require information]*

The Commission observed that there was lack of a general power in section 11 and in the rest of the Act that would enable the Bureau to require or demand information from individuals. The Commission considered that such power was necessary in relation to the function of the Bureau to investigate alleged or suspected offences. The Commission therefore recommends that such power be provided for under section 11 and that a new paragraph to that effect be added as follows-

(d) require any person, including any public officer, to provide any information, or to answer any question, in connection with an inquiry or investigation under this Act.

New paragraph (e) *[Ancillary power]*

As discussed and explained in relation to section 10(1) on the functions of the Bureau regarding the need to confer authority on the Bureau for ancillary matters connected with its functions, the Commission recommends that the following provision be added as paragraph (e) of section 11(1) -

(e) do or perform such other acts or things as are reasonably necessary or required for the exercise of the functions of the Bureau and the performance of his duties.

Subsection (2) *[Powers of access to records, etc., and of search of premises, etc.]*

As a consequence of the recommendation made in relation to section 15 to grant powers of arrest without warrant in certain circumstances, the Commission considered that it would be logical to similarly grant the Bureau powers of access to records and of search of premises and seizure of items of evidence without a court warrant in respect of any incidence of an offence for which the Bureau has effected an arrest without warrant. This exception to the requirement of a search warrant should be provided for as a new subsection (5) of section 11.

Thus, subsection (2) of section 11 should be amended to commence with the words-

(2) Except as provided in subsection (5), in the performance of his duties...

Paragraph (a) of subsection (2) *[Restriction on access to Government - held records]*

This paragraph grants the Bureau access to records, books, returns, reports and other documentation relating to the work of the Government, public bodies as well as private bodies. However, the paragraph makes exception in respect of what it refers to as "state secrets" by denying the Bureau immediate access to such records if held by the Government. It requires the Bureau to serve the search warrant issued by a court only on the responsible Minister personally and on no other responsible official and it further requires that a period of seven days must pass before the Bureau gains access to the records so as to allow the Minister to contest the warrant in court against access to such materials of evidence.

The Commission considered the exception granted in respect of government-held records as an anomaly. The Commission doubted the wisdom of the law that appeared to acknowledge that a document, that has been listed in a search warrant duly issued by a court as qualifying as evidence of corrupt practices, can be protected as a state secret. In the view of the Commission, whatever evidences or attests to corruption cannot be compatible with the classification of a state secret. The Commission considered that the procedure provided by the exception, beyond the requirement of a search warrant issued by a court, was cumbersome and did not reflect the express will of the Government to curb corruption at all levels. In the research it carried out, the Commission did not find any similar precedent under the laws of other jurisdictions in the Commonwealth.

The Commission therefore recommends that the proviso to paragraph (a) of subsection (2) should be deleted.

New subsection (5) *[Search without warrant]*

The new subsection (5), to be introduced as alluded to in relation to subsection (2) in the discussion for dispensing with a search warrant, should read as follows-

(5) Where an arrest has been made without warrant under section 15 (2), the power of access and search granted under subsection (2) of this section may be

exercised without the warrant of a magistrate or without an order of any court in relation to the offence in respect of which the arrest without warrant has been made.

SECTION 13 *[Obstruction of officers of the Bureau]*

This section makes it an offence to *obstruct* an officer of the Bureau in the execution of his or her duties. The other words used to denote variations of obstruction are "assaults" and "resists".

In its submission, the Bureau has proposed additional variations of obstruction, being "insults", "interrupts", "abuses", "humiliates", "mocks", and "ridicules". The reason for this proposal is that officers of the Bureau have been subjected to these types of treatment in the course of executing their duties.

The Commission considered that several of those new elements verge more on being personally offending to the individual than on obstructing him or her as an officer of the Bureau from executing official duties and as such did not warrant to be brought into the offence of obstruction or to become the subject of a separate offence in the context of the law on corruption. In the view of the Commission the matter of the sanctity of the institution of the Bureau will become clear to the community with time. The Commission was made aware of precedents of recently enacted statutes within the Region under which such wrongs have been made punishable offences, but the Commission did not agree that such an approach was appropriate.

However, the Commission acknowledged that the present wording of section 13 misses out the element of threats to officers and that this should be brought into the offence of obstructing created by this section.

The Commission also felt that the section could more appropriately be redrafted with two paragraphs to more distinctly express the offence of obstructing officers generally and the offence of hindering entry to premises, vehicles, etc. for search and seizure.

To bring into the offence the element of threatening officers and to restructure the section into paragraphs, the Commission recommends that section 13 should be replaced as follows-

Obstructing of officers of the Bureau

13. Any person who-

(a) assaults, resists, in any way threatens or otherwise obstructs the Director, the Deputy Director or other officer of the Bureau in the execution of his duties;

(b) unlawfully hinders or delays the Director, Deputy Director or other officer of the Bureau in effecting entry into or upon any premises, boat, aircraft or vehicle,

shall be guilty of an offence and liable to a fine of K70,000 and to imprisonment for seven years.

SECTION 14 *[Giving false reports or information to the Bureau]*

This section creates offences against making false reports or giving misleading information to the Bureau.

The Commission agreed with the Bureau's submission that the scope of the offence under section 14 was inadequate as, for example, in paragraph (a) in limiting itself to "reports" which may be interpreted as not including other forms, mode or manner in which false information may be given and in paragraph (b) by penalising false information which is not given by way of a report only if it is misleading. The Commission therefore agreed that the wording of section 14 needed to be appropriately reviewed in its scope.

In reviewing the wording of section 14, the Commission took the view that the fact that the person accused of an offence under this section did not know that the report or information he was giving to the Bureau was false should be raised as a defence by that person rather than

for such fact to be proved by the prosecution. The Commission weighed this position of shifting or appearing to shift the evidential burden in this respect to the accused but concluded that once all other elements of the offence had been proved by the prosecution, the element that the accused did not know that the report or information he or she had given was false lay more within his or her competence than with the prosecution, and the Commission considered that the requirement to have such matter raised as a defence was appropriate in the context of a law on corruption. The Commission noted that one other jurisdiction in the Region, Zambia, has also through law reform, gone the similar way on this matter.

Accordingly, the Commission recommends that section 14 should be repealed and replaced as follows -

False reports or information to the Bureau

14. (1) Any person who-

(a) gives or causes to be given to the Bureau testimony or information or a report which is false in any material particular in relation to any matter under investigation by the Bureau;

(b) makes or causes to be made to the Bureau a false report of the commission of an offence under this Act or under any other written law;

(c) misleads the Director, Deputy Director or other officer of the Bureau by giving or causing to be given to them or to the Bureau false information or by making or causing to be made to them or to the Bureau any false statements or accusations,

shall be guilty of an offence and liable to a fine of K100,000 and to

imprisonment for ten years.

(2) It shall be a defence to a charge for an offence against subsection (1) that the accused did not know, or did not have reasonable grounds to believe, that the matter in question was false.

SECTION 15 *[The Bureau's powers of arrest]*

The Bureau's powers of arrest, as conferred by section 15, may be exercised only if the arrest has been authorized by a warrant issued by a magistrate.

The Bureau has submitted that the requirement of a court warrant prior to making an arrest has created operational difficulties for the Bureau in circumstances in which it has been necessary to effect an immediate arrest of a person suspected of a corruption offence to secure vital evidence or to restrict the offender in order to secure his court attendance. It was not always practicable to obtain a court warrant in time without risking loss of evidence or the escape of the offender as, for example, where the offence is committed at odd hours, in remote places, or at points of departure from Malawi at the borders or at airports. Thus, the Bureau has submitted that for the effective operation of the law against corruption, the Bureau needs to be conferred powers to arrest without warrant.

The Commission spent considerable time on this matter. The Commission was concerned that proliferating the grant of powers of arrest without warrant to law enforcement agencies of the State would weaken the constitutional guarantees and safeguards of the individual's personal liberty and freedom from arbitrary arrest. It was imperative that these constitutional rights are given meaning and are adequately protected under the laws, and the Commission viewed the requirement of a court warrant to effect an arrest as an appropriate safeguard.

The Commission was aware that in the case of the police, their powers of arrest, as conferred by the Criminal Procedure and Evidence Code (Cap. 8:01), may be exercised with or without warrant depending on whether the offence is prescribed to be a cognizable offence or not. If the offence is cognizable, the offender may be arrested without a warrant, and if the offence is not cognizable, a court warrant is required in order for the police to arrest the offender.

Cognizability of an offence relative to the police powers of arrest has become synonymous with arrest without warrant. In essence, however, cognizability relates to the perceived seriousness of a particular offence. To the extent that the listing down, in the Criminal Procedure and Evidence Code, of an offence as a cognizable offence is by executive order the current list has included several offences that clearly are not in essence cognizable as they are not of a serious nature. The Commission was made aware that the special Law Commission on Criminal Justice Reform has reviewed the list of cognizable offences and has recommended reducing the list significantly to include strictly serious offences only. The Commission welcomed this approach as being in furtherance of the constitutional guarantees against arbitrary arrests.

In the case of offences under the Corrupt Practices Act, the Commission did not consider that it was appropriate to take the same approach as in the Criminal Procedure and Evidence Code to confer powers to classify, by executive order, all or any particular offences under the Corrupt Practices Act as being cognizable. The Commission could not perceive any rational basis for such classification in respect of all offences, or for such distinction between offences, under the Corrupt Practices Act. The Commission was of the view that the Bureau's powers of arrest under the Act should, as a rule, continue to be exercised upon the authority of a court warrant.

However, the Commission appreciated and accepted that there may be circumstances, as articulated in the Bureau's submission to the Commission, which may justify effecting an instant arrest of a suspect for reasons of securing evidence or securing his court attendance. The Commission agonized over possible excesses in the use of powers of arrest without warrant but was satisfied that, given the size of the staff of the Bureau, which is likely to remain relatively small, and given the elaborate procedures and practices manuals which the Bureau has resorted to developing for the guidance of its law enforcement personnel, incidences of abuse of powers of arrest without warrant were likely to be minimal if at all, and effective disciplinary control could be instituted to check and curb such abuses. Another safeguard that was present in the minds of the Commissioners was the 48 hour rule in the Constitution (section 42(2)(b) and (e)) by which every arrested person is to be brought before a court soon after the arrest and in any case not later than forty-eight hours after the arrest; and once before a court he or she will be

formally charged or be informed of the reasons for his or her continued detention or, unless the interests of justice require otherwise, be released with or without bail.

Accordingly, the Commission recommends the introduction of an exception to the requirement of an arrest warrant by providing for an arrest without warrant where there exists both-

(a) the necessity to arrest in order to prevent the concealment, loss or destruction of evidence with respect to an offence; and

(b) the circumstances are so urgent as to require the immediate exercise of the power of arrest without the authority of a warrant or the order of a court.

The Commission further recommends that such instant arrest should be effected only with respect to offences under the Corrupt Practices Act. This qualification is being made in light of the recommendation earlier in this Report to authorize the Bureau to investigate and prosecute offences under any other Act disclosed in the course of investigating offences under the Corrupt Practices Act. For such other offences, being those disclosed in the course of the Bureau investigating offences under the Corrupt Practices Act, there was always likely to be sufficient latitude of time to obtain an arrest warrant from a court.

To take account of the foregoing considerations, the Commission recommends that section 15 be redrafted into two subsections as follows-

Powers of arrest

15. (1) Save as exceptionally provided for in subsection (2), the Director, the Deputy Director or any other officer of the Bureau of such category and such senior rank as the Director may determine by directions in writing, may, if authorized by warrant issued by a magistrate, arrest any person whom he reasonably suspects to have committed or is about to commit an offence under this Act or under

any other written law.

(2) The power of arrest under subsection (1) may, in respect only of an offence under this Act, be exercised without the warrant of a magistrate or without an order of any court if, and only if-

(a) it is necessary to make the arrest in order to prevent the concealment, loss, destruction or disappearance of any evidence relating to the offence the person is reasonably suspected to have committed or to be about to commit; and

(b) the circumstances are so urgent as to require the immediate exercise of the power of arrest without such warrant or order.

SECTION 21 *[Laying of annual reports of the Bureau before Parliament]*

The matter raised by the Bureau regarding the laying of its annual reports in Parliament appeared to the Commission to be straightforward in that in its submission the Bureau merely sought to streamline the procedure to ensure timely presentation of its annual reports to the National Assembly. At present, the procedure entails submitting the reports to the Minister who is required to present the reports to the National Assembly as soon as he considers possible, which may mean at his or her convenience.

In considering this matter, the Commission took the view that the nature and importance of the functions and the work of the Bureau required that its activities are regularly brought to the attention of the authorities at the highest level of government so that they are made aware of the prevalence or status of corruption in public bodies and in society and of the mechanisms that are available, and the successes and failures, in the fight against corruption. For this purpose, the Commission considered that it was necessary for the law to provide for the annual reports also to be submitted to the President and to Cabinet in addition to being laid in the National Assembly.

Section 21 also confers authority on the Public Appointments Committee of the National Assembly to summon the Director of the Bureau to answer questions on the contents of the reports and generally to give account of the Bureau's performance. The Commission observed that this authority ought to be exercised by any other relevant Committee of the National Assembly with oversight functions concerning the work of the Bureau, such as the Legal Affairs Committee (relative to conduct of prosecutions by the Bureau) or in the event that the National Assembly may establish a specialized Committee on matters of corruption. The Commission therefore recommends that the authority under subsection (3) should be conferred on any competent committee of the National Assembly.

Thus, the Commission recommends that section 21 be replaced as follows-

Annual reports

21. (1) The Director shall, within three months after the end of every year, submit to the National Assembly and to the President, the Cabinet, and the Minister a report on the activities of the Bureau during the previous year.

(2) The Minister shall formally lay the report submitted under subsection (1) in the National Assembly within fourteen days of the date of the report or, if the National Assembly is then not sitting, within the first fourteen days of the next sitting of the National Assembly.

(3) Any competent committee of the National Assembly may at any time summon the Director to appear before it to answer questions on the contents of the report submitted under subsection (1) and generally to give account of the performance of the functions of the Bureau or of his duties.

SECTION 23 *[Restriction on disposal of property]*

Subsection (1)

This section confers power on the Bureau to restrict disposal of property that is the subject of, or is connected to, any criminal investigation being undertaken by the Bureau. In the case of *Secucom Holdings Limited vs. The Anti-Corruption Bureau* (Civil Cause No. 225 of 2000), a question of legal interpretation arose as to whether the term "property" as used in the section extends to contracts. The court ruled that a contract was property within the meaning of the section.

The Bureau has submitted that it would serve to clarify the legal position if the section expressly referred to contracts since there was possible risk that the court decision could be overturned in future or could be distinguished on the facts.

The Commission agreed with the Bureau's submission and recommends to expressly make reference not only to contracts but also to agreements, transactions and similar arrangements. It is a common statutory principle in criminal investigations to extend the power to restrict disposal of property also to restriction of any dealing under any contract implicated in the investigations.

Further, in respect of the power of the Bureau to restrict disposal of property, the Commission noted that under the present wording of subsection (1), which is the enabling provision, the restriction order is to be directed to the person being investigated or prosecuted for the offence. This means that in order to effectively block disposal of the property, every person or body (including banks and other financial institutions, for example) has to be made the subject of the investigation or prosecution. This position is obviously unsatisfactory and unnecessary. The Commission recommends that the provision should refer instead to the property as being the

subject of, or being implicated in, an investigation or prosecution.

The Commission further recommends to extend the application of the Bureau's authority under subsection (1) of restricting disposal of property to offences under other written law in view of the Commission's recommendation to allow the Bureau to investigate and prosecute offences under other written laws.

To take account of those matters, the Commission recommends that subsection (1) be redrafted to read as follows-

> **(1) Where the Bureau has instituted an investigation or a prosecution in respect of an offence under this Act or under any other written law, the Director may, by written notice to any person, direct that such person shall not, without the written consent of the Director, dispose of or otherwise deal with any property, or proceed with any contract, transaction, agreement or other arrangement, specified in such notice, which is the subject of, or is otherwise implicated in, such investigation or prosecution.**

Subsection (3) *[Period of notice of a restriction order]*

In its submission, the Bureau also sought an extension of time from the present three months to twelve months for the initial period an order restricting disposal of property is to remain in force. The Bureau submits that a longer period was found to be necessary in complicated cases to complete investigations.

The Commission observed that under the present provision the Bureau is allowed to apply to a magistrate for the grant of an extension of the period by a further three months period each time, for unlimited number of times, as long as the Bureau can show cause why the order should be renewed.

The Commission gave due consideration to the Bureau's submission but was not

convinced that an extension of time, as proposed by the Bureau, would better serve the interest of justice. The Commission was in fact concerned that an extended period that the property remained under a restriction order was likely to prejudice or jeopardize the interest of the owner, creditors and other parties having claims to the property.

The Commission therefore does not recommend an extension of the periods as proposed by the Bureau and that the three months periods as presently prescribed should remain.

NEW SECTION 23A *[Separate provision to confer powers of seizure, etc.]*

As explained later in this Report in relation to subsection (5) of section 32, the Commission recommends that the provisions of that subsection, conferring power of seizure of property tainted with corruption, should be made into a separate section at the end of Part III as section 23A, as follows-

Seizure of property, etc.,

23A. At any stage during the investigation of, or the proceedings for, an offence under this Act, a court may issue a warrant authorizing the Director, the Deputy Director or a senior police officer to seize or freeze any document, or other records or evidence or any asset, account, money or other pecuniary resource, wealth, property, or business or other interest.

PART IV

OFFENCES

NEW SECTIONS 25A and 25B *[Public officers performing functions corruptly; and abuse or misuse of public office]*

The Commission agreed with the Bureau's submission to create two new offences to deal specifically with public officers performing their functions corruptly and to deal with abuse or misuse of public office. The Commission was satisfied that those two classes of common corrupt

practices in public offices are not adequately or appropriately covered by the existing range of corruption offences as laid down in Chapter IV of the Act. The definition of the expression "corrupt practices" as recommended by the Commission will become relevant in defining the scope of activities punishable under the proposed new offences.

The Commission recommends that the two new offences should be prescribed under Chapter IV of the Act as being among the core corruption offences that have been outlined in that Chapter. They should constitute sections 25A and 25B, as follows-

Public officers performing functions corruptly

25A. (1) Any public officer who, being concerned with any matter or transaction falling within or connected with the jurisdiction, powers, duties or functions of his office, exercises or performs his powers, duties or functions corruptly, or otherwise acts corruptly, in relation to such matter or transaction shall be guilty of an offence.

(2) Any person who uses his influence on, or induces or persuades, a public officer concerned with any matter or transaction falling within or connected with that public officer's jurisdiction, powers, duties or functions to exercise or perform his powers, duties or functions corruptly, or otherwise to act corruptly, in relation to such matter or transaction shall be guilty of an offence.

Misuse of public office

25B. (1) Any public officer who uses, misuses or abuses his public office, or his position, status or authority as a public officer, for his personal advantage or for the advantage of another person or to obtain, directly or indirectly, for himself or for another person, any advantage, wealth, property, profit or business interest shall be guilty of an offence.

(2) Any person who uses his influence on, or induces or

persuades, a public officer to use, misuse or abuse his public office, or his position, status or authority as a public officer, for such person's advantage or for the advantage of another person or to obtain, directly or indirectly, for such person or for another person any advantage, wealth, property, profit or business interest shall be guilty of an offence.

Subsection (3) of the new section 25B *[Arbitrary decisions by public officers resulting in losses to the Government or a public body]*

In relation to the proposed new offence of misuse of public office, the Commission considered the issue of arbitrary decisions by public officers made in contravention of established procedures and resulting in losses to the Government or a public body. The question before the Commission was whether such arbitrary decisions by public officers should constitute a separate offence under the Corrupt Practices Act or whether they should be used as presumptions of proof of the offence of abuse of office.

The Commission took the view that in most cases arbitrary decisions by public officers served as evidence of abuse of office and they should be made to constitute presumptions of proof of the offence. The Commission therefore recommends that a provision to that effect be made as subsection (3) of the new section 25B, as follows-

(3) Where in any proceedings for an offence under this section the prosecution proves that the accused did or directed to be done, or was in any way party to the doing of, any arbitrary act which resulted in the loss or damage of any property of the Government or of a public body or in the diversion of such property to or for purposes for which it was not intended the accused shall, unless he gives proof to the contrary, be presumed to have committed the offence charged.

FAILURE TO MAKE DISCLOSURE OF ASSETS AND LIABILITIES

In its submission, the Bureau proposed the introduction of an offence under the Corrupt Practices Act to punish failure by public officers to make disclosure, or to make proper disclosure, of assets and liabilities if they hold positions in connection with which they are required to make full disclosure of their assets and liabilities and those of their spouses. The Bureau's proposal was intended to give effect to the requirements of section 88(3) of the Constitution with respect to members of the Cabinet and section 213 of the Constitution with respect to Members of Parliament and public officials in Government and parastatals holding senior ranks to be specified by the relevant Committee of the National Assembly.

The Commission understood the objective of the assets disclosure requirements in the Constitution to be to foster probity among holders of public office. In the view of the Commission, disclosure of assets as envisaged by the Constitution calls for an Act of Parliament to make provision for an elaborate mechanism to regulate the manner in which declaration of assets and liabilities is to be made. In the absence of appropriate statutory procedures it would not be proper or fair to those affected for the State to proceed to create offences for failure to comply.

The Commission was therefore loath to recommend the introduction, at this time before appropriate legislation is in place, of the relevant offence under the Corrupt Practices Act as proposed by the Bureau. Since the power to oversee disclosure of assets has been conferred by the Constitution on a Committee of the National Assembly, action to initiate legislation in this regard principally lay with the institution of the National Assembly and may be taken in liaison with the Bureau and the office of the Attorney General or, if need be, the office of the Law Commissioner.

SECTION 27 *[Corrupt transactions by or with agents]*

In relation to this provision, the Commission discussed only a few points of a textual nature. First, with the new definitions of "corruptly" and "corrupt practices" as recommended by the Commission, the use of the word "corruptly" to describe the various actions of graft is probably unnecessary in relation to subsections (1) and (2) but it needs to be retained in relation to subsections (3) and (4).

In subsection (3), the Commission observed that the provision would read better with the insertion of a comma after the word "uses" in the second line to correspond with the first comma in the first line so as to separate the reference to any person dealing with an agent from the reference to any agent in relation to the principal. Then, for the convenience of the reader, the second comma in the first line and the first comma in the second line may be removed, although they are otherwise properly placed.

In relation to subsection (4), at one point the Commission observed that the provision could stand on its own as a separate offence of corrupt use of the influence which one has over a public officer. Upon further reflection, however, the Commission resolved to leave the provision under section 27 since the subject of the offence (i.e. any person) may well stand in the position of an agent of or for someone else in a transaction with a public body. The context within which the offence is introduced is in the nature of business transactions with public bodies and the medium of agents would not be unusual. Nonetheless, the Commission recommends an amendment to subsection (4) to insert the phrase "**does any thing**" immediately before the words "in order" so as to capture situations where there is no advantage conferred but there is evidence of corrupt exercise of influence.

SECTION 32 *[Possession of unexplained property of a public officer]*

Under this section, where there are reasonable grounds to believe that a public officer lives beyond his or her means relative to his or her official emoluments or has or controls possessions or property or funds disproportionate to his or her official emoluments or other known sources of income, the Bureau may investigate such public officer and may require him or her to give account of how he or she came to attain such a standard of living.

The raising of suspicion of corruption against unexplained property of persons holding public office is a common provision in all anti-corruption statutes of other jurisdictions that the Commission has studied. However, unlike in other jurisdictions, under the Malawi statute there is no consequence for failure to provide a satisfactory explanation. Our law ends at requiring an explanation without going further to provide for penal consequence where the property or wealth

of a public officer cannot be satisfactorily explained. The Commission considered this position to be a shortcoming in our statute as it rendered the requirement for an explanation without a purpose and made possession of unexplained property by public officers a non-offence and, therefore, non-consequential.

The Commission agreed with the submission of the Bureau on the need to provide for an appropriate offence. To that end, the Commission recommends that this may be achieved by adopting a combination of the present wording of subsections (1) and (2) of our Act with the formulation to be found in some statutes of other countries in our Region, notably, Zambia. This would entail amending subsection (2) to read as follows-

(2) A public officer who, after due investigation carried out under subsection (1), is found to -

(a) maintain a standard of living above that which is commensurate with his present or past official emoluments or other known sources of income;

(b) be in control or possession of pecuniary resources or property disproportionate to his present or past official emoluments or other known sources of income; or

(c) be in receipt, **directly or indirectly**, of the benefit of any services which he may reasonably be suspected of having received corruptly or in circumstances which amount to an offence under this Act,

shall, unless he gives a reasonable explanation, be charged with having or having had under his control or in his possession pecuniary resources or property reasonably suspected of having been corruptly acquired and, unless he gives a satisfactory explanation to the court as to how else he was able to maintain such a standard of living, or such pecuniary resources or property came under his control or his possession, or he came to enjoy the benefits of such services, he

shall be guilty of an offence.

In subsection (1), paragraph (c) should similarly be amended by inserting after the word "receipt" the words "**, directly or indirectly**," as in paragraph (c) of the redrafted subsection (2).

With the recommendation later in this Report to confer the power under section 43 (to obtain information) on the Director of the Bureau instead of the Director of Public Prosecutions, the present authority of the Director of the Bureau under section 32 to demand due account of unexplained property in respect of a public officer will be effected through the powers under section 43 and indeed through the general powers of the Bureau to carry out due investigations.

Subsection (3) *[Tracing of property]* and subsection (4) *[Evidence of value of property]*

The Commission recommends that subsections (3) and (4) of section 32, which make provision as to evidence in tracing property to one's close relatives and as to evidence of the value of property before and after the commission of an offence, should continue to apply with respect to all offences under Part IV.

With the recommendation to make section 32 an offence section, the provisions of subsections (3) and (4) should be moved out of section 32 to become separate sections still under Part IV. The Commission recommends that they should respectively constitute two new sections as section 36A and section 36B.

Subsection (5) *[Power of seizure of property]*

In view of the Commission's recommendation that section 32 should only relate to the offence of public officers being in possession of unexplained property, the power of seizure of property and other items of evidence conferred by subsection (5), expressed to apply in respect of all offences under Part IV, should be provided for under a separate section of its own and the Commission also recommends that its application should extend to all offences under the Act. It

should be provided for under Part III to be a new section 23A as already introduced earlier in this Report.

SECTION 34 *[Penalty for corruption offences]*

The Commission considered three matters in relation to section 34.

First, the Commission considered the issue of the mandatory minimum sentence of five years imprisonment for corruption offences under Chapter IV of the Act and was concerned, from well documented statistics of judicial records, that the advent of mandatory sentences without judicial discretion tended to result in unwarranted acquittals because courts are often reluctant to convict an offender where they are denied judicial discretion on sentencing to take account of the particular circumstances of the case or to give consideration to any mitigating factors about the offender. Such unwarranted acquittals erode public confidence in the law enforcement agency and in the law itself.

The Commission took cognisance of Government's acceptance of the recommendation of the Law Commission on Criminal Justice Reforms made in its Report on the review of the Penal Code (published in the *Gazette* issue of 28th June, 2000) as reflected in the Penal Code (Amendment) Bill, 2001 (Bill No.2 /2001) currently pending enactment before Parliament, to remove, in respect of corruption offences under the Penal Code, the mandatory minimum sentence of five years imprisonment introduced in 1995 when enacting the Corrupt Practices Act to bring consistency between the two statutes.

The Commission recommends that the mandatory minimum sentence of five years in the Corrupt Practices Act should similarly be removed.

Secondly, the Commission did not see any rational basis, in terms of policy or principle, for the distinction of providing for a lesser penalty where the offence is in respect of a private body as opposed to a public body or where the offender is not a public officer. The Commission recommends to do away with this distinction on the general penalty.

Thirdly, the Commission considered that the sentence of a maximum of twelve years imprisonment, as under the present provision, was sufficiently severe for corruption offences both as a measure of punishment and deterrence.

Consequently, the Commission recommends that section 34 be deleted and replaced as follows -

Penalty **34. Any person who is guilty of an offence under this Part shall be liable to imprisonment for twelve years.**

NEW SECTION 36A *[Tracing of property]*

As explained in relation to subsections (3) and (4) of section 32, the provisions of subsection (3) of that section should be incorporated under a new separate section as follows-

Tracing of property **36A. Where a court is satisfied in proceedings for an offence under this Part that, having regard to the closeness of his relationship to the accused and to other relevant circumstances, there is reason to believe that any person was holding pecuniary resources or property in trust for or otherwise on behalf of the accused or acquired such pecuniary resources or property as a gift or loan from the accused without adequate consideration, such pecuniary resources or property shall, until the contrary is proved, be deemed to have been under the control or in the possession of the accused.**

NEW SECTION 36B *[Evidence of value of property]*

Similarly, the provisions of subsection (4) of section 32 should constitute a new separate section as follows-

Value **36B. In any proceedings for an offence under this Part, the**

of property

court may infer that property was obtained or derived as a result of the commission of an offence where there is evidence establishing that the value after the commission of the offence of all the property of the accused exceeds the value of all the property before the commission of the offence, and the court is satisfied that his income from sources unrelated to the offence he is alleged to have committed cannot reasonably account for that increase in value.

PART V
ADDITIONAL PENALTIES AND RECOVERY OF CORRUPT GRATIFICATION

SECTION 37 *[Penalty additional to other punishment]*

The Commission considered the additional penalty provided for by section 37 which is to order a convicted person to return the value of a bribe or other gratification to the person who gave it to him and if the one who gave the bribe cannot be traced or is himself implicated in the offence, the value is to be forfeited to the Government.

The Commission recommends that a more satisfactory provision for effective enforcement of the law should extend to the forfeiture of all property that may be traced to be tainted with the corruption offence for which a person has been convicted and that all such property should be forfeited to the Government so that no one takes or continues to take benefit of property tainted with corruption. This forfeiture would only be in the event of the conviction of a person for any of the core offences of corruption under Part IV of the Act.

It is also recognized that proceeds of crime derived from corruption offence (as with the kindred offences of money-laundering and drug trafficking) are often stashed away to outside jurisdictions regarded as safe havens to avoid tracing. International practice allows for legislation to provide for court orders requiring the convicted person to facilitate for the return, transfer or repatriation, to the country of the court's jurisdiction, of any money or property, or the value of any property, maintained or located outside the jurisdiction and which has been

identified as part of the proceeds of crime derived from the offence. Failure to comply with such order renders the convicted person liable for contempt charges, and this has shown success in ensuring recovery of proceeds of crime

To correct a textual error, reference in section 37 to section 35 should be to section 34.

Thus, the Commission recommends that section 37 should be redrafted to read as follows-

Penalty additional to other punishment

37. Where any person is convicted of an offence under Part IV, the court shall, in addition to any other penalty that it may pass under section 34-

(a) order that any money or other pecuniary resources wealth, property, profit, asset, business interest or other advantage, or the value thereof, as is ascertained by the court to have been acquired through or to be tainted with or otherwise connected with the commission of the offence shall be forfeited to the Government, and , for the purpose of such forfeiture, the court may, immediately upon such conviction or at any time after conviction upon application by the Bureau, make further orders-

(i) requiring the convicted person to effect or facilitate, by any means possible in the circumstances, the return, transfer or repatriation to Malawi of any money or other financial resources or any property or the value of any property maintained or located

outside Malawi that may be attached to the order of forfeiture under this paragraph; or

(ii) for otherwise effecting the order of forfeiture under this paragraph as the court may consider necessary,

and failure by the convicted person to comply with any such further order shall render him liable to conviction, without further procedure, for contempt of court;

(b) where appropriate, order the convicted person to pay to the rightful owner the amount or value, as determined by the court, of any advantage actually received or obtained by him:

Provided that where, after reasonable inquiry, the rightful owner cannot be found, or is himself implicated in the giving of the advantage, the court shall order that the amount or value thereof shall be forfeited to the Government.

SECTION 42 *[Requirement of the DPP's consent to all prosecutions of offences under Part IV]*

Section 42 requires the Bureau to obtain the consent of the Director of Public Prosecutions (DPP) in order to institute prosecution against any person for an offence under Part IV of the Act. This Part lays down the major corruption offences prescribed by the Act.

The Bureau has submitted that while in the majority of cases it has received the DPP's consent, in the few cases where the DPP's consent has been withheld, the Bureau has not been satisfied with the grounds for the withholding of the consent. In those cases the Bureau has felt frustrated and its own mandate undermined by such action of the DPP. On those occasions the issue of the DPP's consent turned to be a bone of contention between the Bureau and the office of the DPP; and in one instance the issue became of concern to the relevant oversight committee of Parliament, the Legal Affairs Committee, prompting the Committee to summon the Director of the Bureau and the DPP, together, to hear them out on the issue. Thus, the Bureau views the requirement of the DPP's consent as an impediment and a hindrance to the discharge of one of its principal functions under the Act, viz, to prosecute corruption offences. Therefore, in its submission, the Bureau has sought to have the requirement of the DPP's consent removed.

The Commission was privileged to have the DPP, Mr. Fahad Assani, on its membership and to hear his response, on behalf of his office, to the submission by the Bureau. It was necessary to hear the DPP on the matter although the Commission fully appreciated that the matter was raised purely for reasons of operational efficacy of the Bureau and not as acrimony between the Bureau and the office of the DPP. The DPP made interventions to rebuff any accusations of impropriety regarding the decision of his office to withhold consent in the particular cases; and in one case he had recused himself for being a personal acquaintance of one of the accused and the decision to withhold consent was made by an officer other than himself. Furthermore, the DPP produced to the Commission his office memoranda on the concerned cases which clearly gave the succinct professional opinions on the facts of the case leading to the decision made in each case to withhold consent.

The Commission felt it necessary to give the foregoing setting to its consideration of the issue of the DPP's consent. The Commission wishes to stress that it nonetheless approached the issue in as balanced a manner as possible and in the end, after considerable discussion, the Commission was at one in the recommendation it has made on this matter.

The Commission considered a number of issues surrounding this matter. The Commission fully acknowledged the overarching responsibility of the DPP for public prosecutions

as granted to that office by the Constitution. The Commission noted though that at the same time the language of the Constitution, in conferring such responsibility on the DPP, also acknowledges that the law may also confer authority on other agencies to institute and conduct public prosecutions. Section 99, in so far as is relevant, is in the following terms-

"The Director of Public Prosecutions

99. (1) There shall be a Director of Public Prosecutions, whose office shall be a public office.

(2) The Director of Public Prosecutions shall have power in any criminal case in which he or she considers it desirable so to do-

(a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person;

(b) to take over and continue any criminal proceedings which have been *instituted or undertaken by any other person or authority*; and

(c) to discontinue at any stage before judgement is delivered any criminal proceedings instituted or undertaken by himself or herself or *any other person or authority*.

(3) Subject to section 101(2), the powers conferred on the Director of Public Prosecutions by subsection (2)(b) and (c) shall be vested in him or her to the exclusion of any other person or authority and whenever exercised, reasons for the exercise shall be provided to the Legal Affairs Committee of Parliament within ten days:

> Provided that where *any other person or authority has instituted criminal proceedings,* nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of *that person or authority and with the leave of the court*.".

Clearly therefore, the authority to institute and conduct criminal proceedings is not reserved only to the DPP. It may be conferred by law on any other person or authority, as was done in the Corrupt Practices Act by conferring this authority on the Bureau as the specialized agency of the State in the fight against corruption. The only powers reserved to the DPP are the power to take over and continue criminal proceedings and the power to discontinue criminal proceedings as provided in paragraphs (b) and (c) of section 99(2) of the Constitution.

At one point the Commission rationalized the requirement, in the Corrupt Practices Act, of the DPP's consent on the basis of the overarching constitutional responsibility of that office over public prosecutions requiring the office to have a controlling involvement in every public prosecution that may be instituted. However, the Commission noted that under the Corrupt Practices Act, the DPP's consent was required only in respect of offences under Part IV of the Act and not in respect of the other offences under the Act. Indeed, the Commission was of the view that it was not feasible to require the DPP's consent for every prosecution of an offence under any law. In the view of the Commission the DPP had sufficient controlling authority over public prosecutions through the powers of his office under section 99(2)(b) and (c) of the Constitution to take over and continue, or to discontinue, any prosecution instituted by any other person or authority.

The Commission was concerned that the requirement of the DPP's consent had the potential forever to be a source of conflicts and disagreements between the Bureau and the office of the DPP. In regard to corruption offences such developments could lead to perceptions of impropriety on the part of the DPP where consent is withheld. It was important to protect the integrity of the office of the DPP as one of the most important offices of State in the broad framework of the authority and functions of the State so that, among other things, public confidence in such high public offices tends not to be eroded.

The Commission also considered the question of keeping the Bureau in check against arbitrary use of its authority, but observed that such was not the purpose of the requirement for consent. The Act made the Bureau answerable to Parliament for the exercise and performance of its powers and functions and officials of the Bureau could be appropriately questioned.

On balance therefore the Commission took the view that the requirement of the DPP's consent for the prosecution by the Bureau of, selectively, only offences under Part IV of the Act did not contribute to the strengthening, to the appropriate degree, of the country's legal framework in the fight against corruption and that it was likely to do more harm than good to public perceptions of the otherwise serious and sincere efforts of the Government to fight corruption through the institution of the Bureau. The Commission did not see what significantly would be lost without the requirement of the DPP's consent in the scheme of the law under the Act that could not be achieved through the DPP's intervention, where necessary, under the powers of that office conferred by section 99(2)(b) and (c) of the Cosntitution.

The Commission therefore recommends the repeal of section 42 to remove the requirement of the DPP's consent from the scheme of the Act.

SECTION 43 *[Power of the Director of Public Prosecutions to obtain information]*

The Commission considered that the power conferred by this section on the Director of Public Prosecutions to obtain information required in connection with investigations of corruption offences was a proper power to be discharged by the Bureau for the purposes of its investigation functions. The Commission was informed that in practice this power is substantively discharged by the Bureau and only nominally by the Director of Public Prosecutions just to satisfy the requirements of the section. The Commission was satisfied that the Bureau has the necessary institutional competence for itself to discharge the power under section 43.

The Commission therefore recommends that section 43 be amended to substitute the reference to the "Director of Public Prosecutions" with the reference to the "**Director**" of the

Bureau.

Further, the Commission recommends that the provisions of section 43, as a power to be conferred on the Bureau, should be moved to Part III of the Act which is on the establishment, functions and powers of the Bureau and, in terms of the proper sequence of the provisions of that Part, they should constitute a new section 12A with the words "**Further powers to obtain information**" as the marginal note to the section.

As regards the offence of non-compliance presently created by this section, the Commission recommends that the penalty for that offence should be aligned with the general penalty, as recommended under the new section 49A, for other offences of non-compliance with orders, demands, requirements and notices issued by the Bureau to be a maximum fine of K50,000 and imprisonment for two years.

Section 44 *[Bail where suspect or accused is about to leave Malawi]*

As with the power under section 43, similarly the power under section 44 to seek special bail conditions where a suspect or an accused is about to leave Malawi should more appropriately be conferred on the Bureau instead of the Director of Public Prosecutions. The Commission therefore recommends that in section 44 reference to the Director of Public Prosecutions should be to the **Director** of the Bureau.

The provisions of this section as amended should then also be moved to Part III to be the new section 12B.

Proposed new provisions on "*corroborative evidence of accretion of value of the property of a suspect or an accused*" and on "*tracing of property to the suspect's or accused's relatives*"

In its submission, the Bureau made proposals to introduce two new sections to make provision for corroborative evidence of accretion of the value of the property of a person suspected or accused of a corruption offence and regarding the tracing of the property of such

person to members of his or her immediate family or other close relatives.

The Commission considered those two proposals. In the end, the Commission was satisfied that their intent and purpose was to the same effect as the already existing provisions of subsections (3) and (4) of section 32 which the Commission has recommended should constitute separate sections (section 36B and 36C) under Part IV to continue to apply in respect of all offences of corruption under that Part.

NEW SECTION 49A *[Non compliance with Bureau's orders, directions, etc.]*

In several instances in the Act the Bureau has powers to issue orders, notices and directions for the purposes of its functions of investigation and prevention of corruption offences. The Commission agreed with the Bureau's submission that it would complement the authority of the Bureau in issuing such orders to provide for an offence for failure to comply with the orders.

The Commission recommends an offence under Part VIII, on miscellaneous provisions, as follows-

Non-compliance with Bureau's orders, directions, etc.

49A. Any person who contravenes or fails to comply with any order, direction, notice, requirement or demand of the Bureau issued, given or made under this Act shall be guilty of an offence and liable to a fine of K50,000 and to imprisonment for two years.

SECTION 50 *[Conviction notwithstanding absence of DPP's consent]*

Following the Commission's recommendation to repeal section 42 to remove the requirement of the DPP's consent, section 50 should be amended to delete references to the DPP's consent.

NEW SECTION 51A *[Protection of whistle-blowers]*

It is widely acknowledged that one major shortcoming of our statute is its failure to make any provision at all for the protection of whistle-blowers and other informers. Every specialised law to fight corruption ought to make appropriate provisions to protect informers particularly to safeguard, against reprisals, individuals working in, or doing business with, public and private institutions or organisations who, often out of civic duty or considerations of public interest, would wish to tip or alert the law enforcement agencies about incidences of corrupt practices in those institutions or organizations but are fearful of reprisals if discovered to be the sources of information to the agencies.

The Commission has considered a number of well settled precedents from various jurisdictions of the Commonwealth. Out of such survey, the Commission recommends the adoption of the following provision as appropriate for the protection of informers to be introduced as section 51A.

Protection of whistle-blowers and other informers

51A. (1) Any person believing that the public interest overrides the interest of the institution, organization or office in or under which he serves or to which he is subject or overrides the interest of a particular community, association or society to which he belongs, and any other person whosoever, may inform the Bureau or the police of an alleged or suspected corrupt practice, or other offence connected therewith, which he knows or believes is being perpetrated by or in that institution, organisation, office, community, association or society.

(2) Except as provided in subsections (3) and (4), no information

relating to a whistle-blower or to any other informer who has provided information to the Bureau or to the police pursuant to subsection (1) as to an offence under this Act shall be admitted in evidence in any civil or criminal proceeding, and no witness shall be obliged or permitted to disclose the name or address of such whistle-blower or other informer, or state any matter which might lead to his discovery.

(3) If any books, documents or papers which are in evidence or liable to inspection in any civil or criminal proceeding contain any entry in which the whistle-blower or other informer is named or described or which might lead to his discovery, the court before which the proceeding is heard shall cause all such passages to be concealed from view or to be obliterated so far as is necessary to protect the whistle-blower or other informer from discovery, but no further.

(4) If on a trial for any offence under this Act the court, after full inquiry into the case, is of the opinion that the whistle-blower or other informer willfully provided information which he knew or believed to be false, or did not believe to be true, in material particular, or if in any other proceeding the court is of the opinion that justice cannot be fully done between the parties thereto without the discovery of the whistle-blower or other informer, the court may permit inquiry and require full disclosure concerning the whistle-blower or other informer, and, if the information was provided in writing, require the production of the original thereof.

(5) Any person who, having knowledge that any person referred to

in this section as a whistle-blower or an informer, has informed the Bureau or the police of an alleged or a suspected corrupt practice, or other offence connected therewith, takes, by himself or through another person, an action of any kind to punish or victimize such whistle-blower or informer in any way shall be guilty of an offence liable to a fine of K50,000 and to imprisonment for two years.

NEW SECTION 52A *[Appeals]*

The Commission noted that the Act does not make provision specifically for appeals by the Bureau against rulings, directions or judgments of a court in proceedings for offences under the Act. This means that the provisions of the Criminal Procedure and Evidence Code will apply regarding appeals by the Bureau. Section 346(3) of the Code limits the prosecution to appealing only on a point of law. The authority however is conferred on the Director of Public Prosecutions and is only exercised by other public prosecutors (including those in the establishment of the Bureau) by delegation.

The Commission considered that it would be more expedient for the Bureau if it were conferred similar authority directly. The Commission therefore recommends a provision to that effect under Part VIII, on miscellaneous provisions, as section 52A, as follows-

Appeals 52A. In any proceedings for an offence under this Act, the prosecution may appeal against any final judgment or order, including a finding of acquittal, of the trial court if, and only if, dissatisfied upon a point of law; but, save as so provided, no appeal shall lie by the prosecution against a finding of acquittal by the trial court.

NEW SECTION 53A *[DPP to be informed of Bureau's case load]*

While the Commission has recommended removal of the requirement of the DPP's consent, on the other hand the Commission recognized that there was need for the Bureau and the office of the DPP to continue to co-operate though not in conditions of subjection of one to the other. For that purpose, the Commission recommends that some formalized linkage between them would foster such co-operation where appropriate. To that end, the Commission recommends the introduction of a provision to require the Bureau to let the DPP know of its case load by informing him or her of the commencement and conclusion of every prosecution instituted and conducted by the Bureau. Such a provision would fit in under Part VIII of the Act on miscellaneous provisions as one of the final provisions to be inserted as section 53A just before section 54 on rule-making power, as follows-

Director to inform the Director of Public Prosecutions

53A. The Director shall inform the Director of Public Prosecutions, with sufficient particularity, of the commencement and the conclusion of every prosecution instituted by the Bureau.

TENDER OF PARDON

One of the proposals included in the Bureau's submission to the Commission was a wholly novel concept of "tender of pardon". By this concept, a person suspected or accused of having committed an offence of corruption in common with other persons would be offered a tender or a grant of pardon from any criminal prosecution arising from the circumstances of the offence if he or she undertakes to disclose all facts and circumstances within his knowledge relating to the offence and also relating to every other person involved in the commission of the offence and to deliver up every document or other thing constituting direct or corroborative evidence of the commission of the offence.

The person accepting the offer of pardon upon giving such undertaking would not himself or herself be charged with the offence but would be required to testify as a witness at the trial against the other person or persons charged. If such person is found to have wilfully concealed any thing material to the case or to have given false testimony, the offer of pardon would be withdrawn and he or she will be liable to be charged with the offence. But, if at the end of the trial, he or she is certified by the trial court to have testified truthfully on all matters on which he or she was examined during trial, then, on behalf of the State, the Director of Public Prosecutions would grant such person the pardon to indemnify him or her against prosecution for the particular offence or any other offence arising from the circumstances. The Commission noted that the Zambian statute contains a provision to the similar effect introduced in 1996.

The Commission considered the concept of tender of pardon as essentially dealing with the evidence of an accomplice (i.e. a person who is party to the commission of an offence jointly with another person or other persons) and the Commission compared the proposed procedure with the already existing procedure developed under section 242 of the Criminal Procedure and Evidence Code in dealing with the evidence of an accomplice. Section 242 of the Code makes an accomplice a competent witness in a trial of a co-accused but, through judicial decisions, courts have cautioned against convicting upon the uncorroborated evidence of an accomplice. The Law Commission on Criminal Justice Reforms, which has just completed reviewing the Criminal Procedure and Evidence Code, has recommended in its draft Report to codify the case law into statutory law under section 242 of the Code as subsection (2) thereof, as follows-

Accomplice

242. An accomplice shall be a competent witness against an accused person; and a conviction shall not be set aside merely because it proceeds upon the uncorroborated testimony of an accomplice:

Provided that the court shall take cognisance of the fact that it is unsafe to convict an accused on the uncorroborated evidence of an accomplice, and shall weigh the evidence, and if it comes to the conclusion that the evidence of the accomplice, although uncorroborated, is true, it

may be used as a basis of a conviction.

The Commission felt that the procedure of tender of pardon proposed by the Bureau called into consideration a number of issues. For example, the issue of the right against self incrimination guaranteed by section 42(2)(c) of the Constitution which was likely to be violated should the offer of pardon be withdrawn on account of the evidence given being found to be only partly false; the issue of recovery of the property, if any, benefited by such witness out of the corruption that constitutes the offence in the absence of a conviction; the issue of whether partial indemnity against criminal proceedings alone, without extending it to civil proceedings as well, would be sufficient to ensure that the witness makes full disclosure and whether it would be appropriate in a criminal context for the law also to grant immunity from civil claims; the issue of the constitutional right to equality before the law and whether such procedure could not be held to be inherently discriminatory between persons who may be offenders of the same degree.

Additionally, the Commission was concerned that the proposed procedure could itself be open to corrupt practices by those charged with the responsibility to decide as to which of the alleged offenders is to be offered the tender of pardon. The Commission was also not altogether satisfied that the involvement of the courts in a procedure meant to work for the expediency of the prosecution would not compromise to some degree their status of impartiality. Further, the involvement of the Director of Public Prosecutions only at the end of the process was likely to entail hard choices for the holder of the office in accepting to grant the certificate of pardon to the witness and the success of the procedure was likely to depend on the institutional co-operation between the Bureau and the office of the DPP.

In view of the foregoing considerations, the Commission did not feel able to recommend the immediate introduction of the concept of tender of pardon. The Commission proposes to carry out further studies to fully understand how the concept actually operates in jurisdictions where it has been introduced and then determined whether and with what appropriate procedure it could be introduced in Malawi under the Corrupt Practices Act. The Commission therefore resolved that the matter of tender of pardon should, if necessary, be a subject of a separate Report of the Commission's findings and recommendations in due course so that legislative action

is not held back on the rest of the Commission's recommendations in this Report.

SUBSIDIARY LEGISLATION

After reviewing provisions in the Act, the Commission turned its attention to Regulations made under the Act by the Minister. The Commission observed that some of these Regulations covered matters of a substantive nature that needed to have been promulgated at the level of the authority of Parliament and therefore in the Act itself and not by way of subsidiary legislation delegated to the executive branch. Section 58(2) of the Constitution restricts Parliament from delegating to the executive any legislative powers which would substantially and significantly affect the fundamental rights and freedoms recognized by the Constitution. The Commission considered that the power of the State to prescribe offences of a serious nature which would attract severe penalties ought to be exercised by Parliament in that such offences would, without argument, significantly affect a person's right to his or her personal liberty.

Legislative practice in Malawi is to the same effect of restricting Regulations or other subsidiary legislation to providing only for regulatory matters, such as prescribing fees, forms, procedures, technical specifications, periods and dates of validity or expiry of certain processes, renewals, issuance of licences and certificates, filing of returns, submission of information and similar matters. This restriction also comes out clearly from the General Interpretation Act (Cap. 1:01) which, in section 21(e), restricts the level of penalties that may be attached to breaches of subsidiary legislation to not more than a fine of K1,000 and three months imprisonment.

The Regulations that have been made under the Corrupt Practices Act have in some instances provided for offences clearly intended to be regarded as being of a serious nature. These include the offences of "dealing in contracts" under the Corrupt Practices (Prohibition of Abuse of Information) Regulations (Government Notice No. 46/1999), the offence of "non-disclosure of interest" under the Corrupt Practices (Disclosure by Public Officers of Interest in Contracts) Regulations (Government Notice No. 47/1999), and the offence of "unauthorized

disclosure by officers of the Bureau" under the Corrupt Practices (Oath of Secrecy) Regulations (Government Notice No. 48/1999). There is therefore the risk that a court may declare the relevant provisions of the Regulations as invalid for being inconsistent with the Constitution or with the General Interpretation Act.

Accordingly, the Commission recommends that the concerned offences presently prescribed in the Regulations be transferred to the Act. The two offences of "dealing in contracts" and "non-disclosure of interest" should be prescribed among the core corruption offences under Part IV of the Act, as follows-

Dealing in contracts

25C. (1) This section shall apply to any information which-

(a) a public officer holds by virtue of his office;

(b) would not be expected, or it would not be reasonable for it, to be disclosed by a public officer except in the proper performance of the functions of his office; or

(c) the public officer holding the information knows or ought to know that it is unpublished tender information in relation to any contract or proposed contract of a public body.

(2) Any public officer who holds information to which this section applies, or any person who has, directly or indirectly, obtained any such information from a public officer whom that person knows or has reasonable cause to believe held the information by virtue of his office, and who-

(a) deals in any contract or proposed contract to which the information relates and in which the public body is involved;

(b) counsels or procures another person to deal in any such contract or proposed contract, knowing or having reasonable cause to believe that such other person would deal in such contract or proposed contract;

(c) communicates to any other person the information held or, as the case may be, obtained by him if he knows or has reasonable cause to believe that such other person or any other person would make use of the information for the purpose of dealing in, or counselling or procuring any person to deal in, any contract or proposed contract to which the information relates and in which a public body is involved,

shall be guilty of an offence.

Disclosure of interest by public officers

25D. (1) Where a contract or proposed contract in which a public officer or any member of his immediate family, or other close associate of his, has a direct or indirect interest is, to his knowledge, being, or is to be, considered-

(a) at a meeting at which the public officer is or will be present; or

(b) in any other circumstances relating to his duties as a public officer,

such public officer shall, at the commencement of the meeting or at any time upon becoming so aware, declare to the meeting or to the appropriate authority or in the manner prescribed the nature of such interest and shall not take part in the discussion or consideration of the contract or proposed contract or vote on any matter or do any other thing relating to the contract or proposed contract.

(2) Any public officer who-

(a) fails to make a declaration of interest as required by subsection (1);

(b) in making the declaration of interest pursuant to subsection (1), he makes a false declaration or a false statement;

(c) otherwise contravenes subsection (1),

shall be guilty of an offence.

(3) It shall be a defence to a charge for an offence against subsection 2(b) that the accused did not know, or did not have reasonable grounds to believe that the declaration or statement was false.

(4) In this section-

"interest" means interest in a private capacity;

"member of immediate family" in relation to a public officer, includes that public officer's spouse, child, parent, brother, sister, grandchild, grandparent, uncle, aunt and other close relative.

The offence of "unauthorized disclosure" should be placed under Part VIII among miscellaneous provisions, as follows-

Unauthorized disclosure by employees, etc., of the Bureau

49B. Any person in the service of the Bureau as an employee, an agent or a consultant or in any other capacity, and having taken an oath of secrecy in the prescribed form in relation thereto, who-

(a) except as a witness in any court or in pursuance of his duties in relation to the Bureau, directly or indirectly, provides or discloses to any unauthorized person the nature or contents of any document, communication or information whatsoever which has come to his knowledge in the course of his duties in relation to the Bureau;

(b) makes use for his own purposes or for the purposes of any other person any knowledge acquired from such document, communication or information,

shall be guilty of an offence and shall be liable to a fine of K50,000 and imprisonment for two years.

The concerned Regulations should then be amended accordingly simply to edit them on

account of the matters removed from the texts of the Regulations.

CORRUPT PRACTICES (AMENDMENT) BILL

ARRANGEMENT OF SECTIONS

SECTION

A BILL

entitled

An Act to amend the Corrupt Practices Act, 1995.

ENACTED by the Parliament of Malawi as follows-

Short title

1. This Act may be cited as the Corrupt Practices (Amendment) Act.

Amendment of s. 3 of

2. The Corrupt Practices Act, 1995, hereinafter referred to as the

Act No. 18 of 1995

"principal Act", is amended-

(a) in section 3-

(i) by deleting the definitions "agent", "casual gift", "corruptly" and "gratification"; and

(ii) by inserting therein, in its proper alphabetical order, each of the following new definitions-

"advantage" means any benefit, service, enjoyment or gratification, whether direct or indirect, and includes a payment, whether in cash or in kind, or any rebate, deduction, concession or loan, and any condition or circumstance that puts one person or class of persons in a favourable position over another;

"agent" means any person who acts for or on behalf, or in the name, of a public body or a private body or any other person, and includes a trustee, an administrator, an executor and an employee;

"corruptly" means the doing of, or the engaging in, any corrupt practice;

"corrupt practice" means-

(a) the offering, giving, receiving, obtaining or soliciting of any advantage to influence the action of any public officer or any official or any other person in the discharge of the duties of that public officer, official or other person;

(b) the diversion of any property of a public body to or for purposes unrelated to those that the property was intended for;

(c) influence peddling;

(d) the extortion of any advantage;

(e) misuse or abuse of office;

"extortion", in relation to corrupt practice, includes-

(a) demanding or receiving by a person in office of a fee or other payment for services, work, supplies or other thing which should be performed, done, delivered, offered, provided or given gratuitously; or

(b) where compensation is permissible, demanding

or receiving of a fee or other payment larger than is justified or which is not due;

"influence" means any influence, whether or not the use of it leads to the intended result;

"pecuniary resources or property", when used to denote the proceeds of crime or any thing obtained from or connected with, or suspected to have been obtained from or to be connected with, the commission of an offence under this Act or other written law, includes pecuniary resources or property of whatever description into which any pecuniary resources or property derived or realized from the commission of the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains derived or realized from such pecuniary resources or property at any time since the commission of the offence;

(b) by deleting the word "gratification" wherever it appears in the principal Act and substituting therefor the word "advantage";

(c) by deleting the words "casual gifts" wherever they appear in the principal Act.

Amendment of s. 4 of the principal Act

3. Section 4 of the principal Act is amended by adding thereto the following new provisions as subsection (3) and subsection (4)-

"(3) The Bureau shall exercise its functions and powers independent of the direction or interference of any other person or authority.

(4) The Director shall submit reports to the President and to the Minister regarding the general conduct of the affairs of the Bureau.".

Amendment of s. 5 of the principal Act

4. Section 5 of the principal Act is amended -

(a) by deleting subsection (2); and

(2) by renumbering subsection (3) as subsection (2).

Insertion of new ss. 5A and 5B into the principal

5. The principal Act is amended by inserting therein immediately after section 5 the following new provisions as section 5A and section 5B-

Act

"Civil suits by or against the Director

5A. Any civil suit arising from the exercise of the functions, duties and powers of the Bureau or the Director shall be instituted by or against the public office of the Director, but the provisions of the Civil Procedure (Suits by or against the Government or Public Officers) Act shall otherwise apply in respect of any such suit as they apply in respect of any suit by or against any other public officer.

Cap 6:01

Legal representation

5B. The Director may, apart from the Attorney General, instruct any legal practitioner-

(a) to provide legal representation to the Director in any civil proceeding before any court, including any proceeding concerning appeals against the decisions of the Director on any aspect of the exercise of the functions, duties and powers of the Bureau or of the Director; or

(b) generally to provide legal advice or to act for on behalf of the Director.".

Amendment of s. 10 of the principal Act

6. Section 10 of the principal Act is amended-

(a) in subsection (1), by deleting paragraphs (b) and (c) and substituting therefor the following new paragraphs (b) to (i)-

"(b) receive any complaints, report or other information of any alleged or suspected corrupt practice or offence under this Act;

(a) investigate any complaint, report or other information received under paragraph (b);

(b) investigate any alleged or suspected offence under this Act;

(c) investigate any offence under any written law disclosed in the course of investigating any alleged or suspected corrupt practice or offence under this Act;

(d) prosecute any offence under this Act;

(e) prosecute any offence under any written law disclosed in the course of investigating any alleged or suspected corrupt practice or offence under this Act;

(f) investigate the conduct of any public officer which in the opinion

of the Bureau may be connected with or conducive to corrupt practices and to report thereon to the appropriate authority;

(g) inquire into any matter in relation to the exercise of its other functions under this section.".

(b) by adding thereto the following new provision as subsection (4)-

"(4) Where the Bureau has carried out any investigation of any alleged or suspected corrupt practice or offence under this Act or under any other written law, it may, if it considers it necessary so to do, report its findings and recommendations to the appropriate authority regarding any matter which reveals, or points to, the existence or prevalence of any conduct connected with, or conducive to, corrupt practices; and in any such report, the Bureau may require the appropriate authority to take or institute such corrective action or measure as the Bureau shall reasonably specify in the report or to explain to the Bureau why such action or measure may not be taken or instituted or what other action or measure may instead be taken or instituted, and the Bureau may make such modification to its recommendations or requirements as it may consider desirable.".

Amendment of s. 11 of the principal Act

7. Section 11 of the principal Act is amended-

(a) in subsection (1)-

(i) by deleting paragraph (b) and substituting therefor the following-

"(b) require any public officer or other person to answer questions concerning the duties of that public officer or of any other public officer or other person, and order the production for inspection of any standing orders, directives or office instructions relating to the duties of the public officer or such other public officer or other person;";

(ii) by adding thereto the following new provisions as paragraph (d) and paragraph (e)-

"(d) require any person, including any public officer, to provide any information, or to answer any question, in connection with an inquiry or investigation under this Act;

(e) do or perform such other acts or things as are reasonably necessary or required for the exercise of the functions of the Bureau and the performance of his duties.";

(b) in subsection (2) -

(i) by deleting the words "In the performance of his duties" and substituting therefor the words "Except as provided in section (5), in the performance of his duties";

(ii) in paragraph (a), by deleting all the words commencing with "but so however" to the end;

(c) by adding the following new provision as subsection (5)-

"(5) Where an arrest has been made without warrant under section 15 (2), the power of access and search granted under subsection (2) of this section may be exercised without the warrant of a magistrate or without an order of any court in relation to the offence in respect of which the arrest without warrant has been made.".

Insertion of new ss. 12A and 12B into the principal Act

8. The principal Act is amended by inserting therein immediately after section 12 the following new provisions as section 12A and section 12B-

"Further powers of the Director to obtain information

12A. If, in the course of any investigation or proceedings relating to any offence under Part IV, the Director is satisfied that it would assist or expedite such investigation or proceedings, he may, by notice, require-

(a) any suspected person to furnish a sworn statement in writing enumerating all movable or immovable property belonging to or possessed by him, and specifying the date on which every such property was acquired and the consideration paid therefor, and explaining whether the property was acquired by way of purchase, gift, bequest, inheritance or otherwise;

(b) any suspected person to furnish a sworn statement in writing of any moneys or other property sent out of Malawi by him during such period as may be specified in such notice;

(c) any other person with whom the Director believes that the suspected person had any financial transactions or other business dealing relating to an offence under Part IV to furnish a sworn statement in writing enumerating all movable or immovable property belonging to or possessed by such other person at the materials time:

Provided that the Director shall not require any such other person to furnish such

sworn statement unless he has reasonable ground to believe that such information can assist in the investigation or proceedings;

(d) the Commissioner of Taxes, notwithstanding the provisions of section 6 of the Taxation Act, Cap 41:01 to furnish all information in his possession relating to the affairs of any suspected person and to produce or furnish any documents or a certified true copy of any document relating to such suspected person which is in the possession or under the control of the Commissioner of Taxes;

(e) the manager of any bank to furnish any information or the originals, or certified true copies, of the accounts or the statements of account at the bank of any suspected person.

(2) Every person on whom a notice is served by the

Director under subsection (1) shall, notwithstanding any oath of secrecy, comply with the requirements of the notice within such time as may be specified therein, and any person who wilfully neglects or fails to comply shall be guilty of an offence and liable to a fine of K50,000 and to imprisonment for two years.

Bail where suspect or accused is about to leave Malawi

12B. If any person against whom investigations or proceedings for an offence under Part IV are pending is preparing or about to leave Malawi, whether temporarily or permanently, the Director or any officer authorized by him in that behalf may apply to any court for an order requiring such person to furnish bail in any sum, or, if he has already been admitted to bail, in such greater sum and on such additional conditions, as the case may require, with or without sureties; and in any such application the court may make such order as it deems fit.".

Replacement

9. Section 13 of the principal Act is repealed and replaced as follows-

of s. 13 of the principal Act

"Obstructing of officers of the Bureau

13. Any person who-

(a) assaults, resists, in any way threatens or otherwise obstructs the Director, the Deputy Director or other officer of the Bureau in the execution of his duties;

(b) unlawfully hinders or delays the Director, Deputy Director or other officer of the Bureau in effecting entry into or upon any premises, boat, aircraft or vehicle,

shall be guilty of an offence and liable to a fine of K70,000 and to imprisonment for seven years.".

Replacement of s. 14 of the principal Act

10. Section 14 of the principal Act is repealed and replaced as follows-

"False reports or information to the Bureau

14. (1) Any person who-

(a) gives or causes to be given to the Bureau testimony or information or a report which

is false in any material particular in relation to any matter under investigation by the Bureau;

(b) makes or causes to be made to the Bureau a false report of the commission of an offence under this Act or under any other written law;

(c) misleads the Director, Deputy Director or other officer of the Bureau by giving or causing to be given to them or to the Bureau false information or by making or causing to be made to them or to the Bureau any false statements or accusations,

shall be guilty of an offence and liable to a fine of K100,000 and to imprisonment for ten years.

(2) It shall be a defence to a charge for an offence against subsection (1) that the accused did not know, or did not have reasonable grounds to believe, that the matter in question was false.”.

Replacement of s. 15 of the principal Act

11. Section 15 of the principal Act is repealed and replaced as follows-

"Powers of arrest

15. (1) Save as exceptionally provided in subsection (2), the Director, the Deputy Director or any other officer of the Bureau of such category and such senior rank as the Director may determine by directions in writing, may, if authorized by warrant issued by a magistrate, arrest any person whom he reasonably suspects to have committed or is about to commit an offence under this Act or under any other written law.

(2) The power of arrest under subsection (1) may, in respect only of an offence under this Act, be exercised without the warrant of a magistrate or without an order of any court if, and only if-

(a) it is necessary to make the arrest in order to prevent the concealment, loss, destruction or disappearance of any evidence relating to the

offence the person is reasonably suspected to have committed or to be about to commit; and

(b) the circumstances are so urgent as to require the immediate exercise of the power of arrest without such warrant or order.".

Replacement of s. 21 of the principal Act

12. Section 21 of the principal Act is repealed and replaced as follows-

"Annual reports

21. (1) The Director shall, within three months after the end of every year, submit to the National Assembly and to the President, the Cabinet, and the Minister a report on the activities of the Bureau during the previous year.

(2) The Minister shall formally lay the report submitted under subsection (1) in the National Assembly within fourteen days of the date of the report or, if the National Assembly is then not sitting, within the first fourteen days of the next sitting of the National Assembly.

(3) Any competent committee of the National Assembly may at any time summon the Director to appear before it to answer questions on the contents of the report submitted under subsection (1) and generally to give account of the performance of the functions of the Bureau or of his duties.".

Amendment of s. 23 of the principal Act

13. Section 23 of the principal Act is amended by deleting subsection (1) and substituting therefor the following-

"(1) Where the Bureau has instituted an investigation or a prosecution in respect of an offence under this Act or under any other written law, the Director may, by written notice to any person, direct that such person shall not, without the written consent of the Director, dispose of or otherwise deal with any property, or proceed with any contract, transaction, agreement or other arrangement, specified in such notice, which is the subject of, or is otherwise implicated in, such investigation or

prosecution.”.

Insertion of new s. 23A into the principal Act

14. The principal Act is amended by inserting therein immediately after section 23 the following new provision as section 23A-

“Seizure of property, etc.,

23A. At any stage during the investigation of, or the proceedings for, an offence under this Act, a court may issue a warrant authorizing the Director, the Deputy Director or a senior police officer to seize or freeze any document, or other records or evidence or any asset, account, money or other pecuniary resource, wealth, property, or business or other interest.”.

Insertion of new ss. 25A, 25B, 25C and 25D into the principal Act

15. The principal Act is amended by inserting therein immediately after section 25 the following new provisions as section 25A, section 25B, section 25C and section 25D-

“Public officers

25A. (1) Any public officer who, being concerned with

performing functions corruptly

any matter or transaction falling within or connected with the jurisdiction, powers, duties or functions of his office, exercises or performs his powers, duties or functions corruptly, or otherwise acts corruptly, in relation to such matter or transaction shall be guilty of an offence.

(2) Any person who uses his influence on, or induces or persuades, a public officer concerned with any matter or transaction falling within or connected with that public officer's jurisdiction, powers, duties or functions to exercise or perform his powers, duties or functions corruptly, or otherwise to act corruptly, in relation to such matter or transaction shall be guilty of an offence.

Misuse of public office

25B. (1) Any public officer who uses, misuses or abuses his public office, or his position, status or authority

as a public officer, for his personal advantage or for the advantage of another person or to obtain, directly or indirectly, for himself or for another person, any advantage, wealth, property, profit or business interest shall be guilty of an offence.

(2) Any person who uses his influence on, or induces or persuades, a public officer to use, misuse or abuse his public office, or his position, status or authority as a public officer, for such person's advantage or for the advantage of another person or to obtain, directly or indirectly, for such person or for another person any advantage, wealth, property, profit or business interest shall be guilty of an offence.

Dealing in contracts

25C. (1) This section shall apply to any information which-

(a) a public officer holds by virtue of his office;

(b) would not be expected, or it would not be reasonable for it, to be disclosed by a public officer except in the proper performance of the functions of his office; or

(c) the public officer holding the information knows or ought to know that it is unpublished tender information in relation to any contract or proposed contract of a public body.

(2) Any public officer who holds information to which this section applies, or any person who has, directly or indirectly, obtained any such information from a public officer whom that person knows or has reasonable cause to believe held the information by virtue of his office, and who-

(a) deals in any contract or proposed contract to which the information relates and in which the public body is involved;

(b) counsels or procures another person to deal in

any such contract or proposed contract, knowing or having reasonable cause to believe that such other person would deal in such contract or proposed contract;

(c) communicates to any other person the information held or, as the case may be, obtained by him if he knows or has reasonable cause to believe that such other person or any other person would make use of the information for the purpose of dealing in, or counselling or procuring any person to deal in, any contract or proposed contract to which the information relates and in which a public body is involved,

shall be guilty of an offence.

Disclosure of interest by public officers

25D. (1) Where a contract or proposed contract in which a public officer or any member of his immediate family, or other close associate of his, has a direct or indirect interest is, to his knowledge, being, or is to be, considered-

(a) at a meeting at which the public officer is or will be present; or

(b) in any other circumstances relating to his duties as a public officer,

he shall, at the commencement of the meeting or at any time upon becoming so aware, declare to the meeting or to the appropriate authority or in the manner prescribed the nature of such interest and shall not take part in the discussion or consideration of the contract or proposed contract or vote on any matter or do any other thing relating to the contract or proposed contract.

(2) Any public officer who-

(a) fails to make a declaration of interest as required by subsection (1);

(b) in making a declaration of interest pursuant to subsection (1), he makes a false declaration or a false statement;

(c) otherwise contravenes subsection (1),

shall be guilty of an offence.

(3) It shall be a defence to a charge for an offence against

subsection 2(b) that the accused did not know, or did not have reasonable grounds to believe that the declaration or statement was false.

(4) In this section-

"interest" means interest in a private capacity;

"member of immediate family" in relation to a public officer, includes that public officer's spouse, child, parent, brother, sister, grandchild, grandparent, uncle, aunt and other close relative.".

Amendment of s. 27 of the principal Act

16. Section 27 of the principal Act is amended-

(a) in subsection (1) -

(i) by deleting the word "corruptly" where it appears;

(ii) by inserting immediately before the words "shall be guilty of an offence" the words "or otherwise acts corruptly in relation to his principal's affairs or business";

(c) in subsection (2)-

(i) by deleting the word "corruptly" wherever it appears;

(ii) by inserting immediately before the words "shall be guilty of an offence" the words "or otherwise acts corruptly in relation to his principal's affairs or business".

(c) in subsection (3)-

(i) by deleting the second comma in the first line and first comma in the second line;

(ii) by inserting a comma after the word "uses" appearing in the second line.

Amendment of s. 32 of the principal act

17. Section 32 of the principal Act is amended-

(a) in subsection (1), in paragraph (c), by inserting after the words "in receipt" the words ", directly or indirectly,";

(b) in subsection (2)-

(i) in paragraph (c), by inserting after the words "be in receipt" the words ",directly or indirectly,";

(ii) by deleting all the words commencing with "shall, within days of being requested" to the end and substituting therefor the words " shall, unless he gives a reasonable explanation, be charged with

having or having had under his control or in his possession pecuniary resources or property reasonably suspected of having been corruptly acquired and, unless he gives a satisfactory explanation to the court as to how else he was able to maintain such a standard of living, or such pecuniary resources or property came under his control or his possession, or he came to enjoy the benefits of such services, he shall be guilty of an offence";

(c) by deleting subsections (3), (4) and (5);

(d) by renumbering subsection (6) as subsection (3).

Replacement of s. 34 of the principal Act

18. Section 34 of the principal Act is deleted and replaced as follows-

"Penalty **34.** Any person who is guilty of an offence under this Part shall be liable to imprisonment for twelve years.".

Insertion of new ss. 36A and 36B into the principal Act

19. The principal Act is amended by inserting therein immediately after section 36 the following provisions as section 36A and section 36B-

"Tracing of **36A.** Where a court is satisfied in proceedings for an

property

offence under this Part that, having regard to the closeness of his relationship to the accused and to other relevant circumstances, there is reason to believe that any person was holding pecuniary resources or property in trust for or otherwise on behalf of the accused or acquired such pecuniary resources or property as a gift or loan from the accused without adequate consideration, such pecuniary resources or property shall, until the contrary is proved, be deemed to have been under the control or in the possession of the accused.

Value of property

36B. In any proceedings for an offence under this Part, the court may infer that property was obtained or derived as a result of the commission of an offence where there is evidence establishing that the value after the commission of the offence of all his property of the accused

exceeds the value of all the property before the commission of the offence, and the court is satisfied that his income from sources unrelated to the offence he is alleged to have committed cannot reasonably account for that increase in value.".

Replacement of s. 37 of the principal Act

20. Section 37 of the principal Act is repealed and replaced as follows-

"Penalty additional to other punishment

37. Where any person is convicted of an offence under Part IV, the court shall, in addition to any other penalty that it may pass under section 34-

(a) order that any money or other pecuniary resources, wealth, property, profit, asset, business interest or other advantage, or the value thereof, as is ascertained by the court to have been acquired through or to be tainted with or otherwise connected with the

commission of the offence shall be forfeited to the Government, and , for the purpose of such forfeiture, the court may, immediately upon such conviction or at any time after conviction upon application by the Bureau, make further orders-

(i) requiring the convicted person to effect or facilitate, by any means possible in the circumstances, the return, transfer or repatriation to Malawi of any money or other financial resources or any property or the value of any property maintained or located outside Malawi that may be attached to the order of forfeiture under this paragraph; or

(ii) for otherwise effecting the order of forfeiture under this paragraph as the court may consider necessary,

and failure by the convicted person to comply with any such further order shall render him liable to conviction, without further procedure, for contempt of court;

(b) where appropriate, order the convicted person to pay to the rightful owner the amount or value, as determined by the court, of any advantage actually received or obtained by him:

Provided that where, after reasonable inquiry, the rightful owner cannot be found, or is himself implicated in the giving of the

advantage, the court shall order that the amount or value thereof shall be forfeited to the Government.".

Repeal of s. 42 of the principal Act

21. Section 42 of the principal Act is repealed.

Repeal of s. 43 of the principal Act

22. Section 43 of the principal Act is repealed.

Repeal of s. 44 of the principal Act

23. Section 44 of the principal Act is repealed.

Insertion of new ss. 49A and 49B into the principal Act

24. The principal Act is amended by inserting therein immediately after section 49 the following new provisions as section 49A and section 49B-

"Non-compliance with Bureau's orders, directions, etc.

49A. Any person who contravenes or fails to comply with any order, direction, notice, requirement or demand of the Bureau issued, given or made under this

Act shall be guilty of an offence and liable to a fine of K50,000 and to imprisonment for two years.

Unauthorized disclosure by employees, etc., of the Bureau

49B. Any person in the service of the Bureau as an employee, an agent or a consultant or in any other capacity, and having taken an oath of secrecy in the prescribed form in relation thereto, who-

(a) except as a witness in any court or in pursuance of his duties in relation to the Bureau, directly or indirectly, provides or discloses to any unauthorized person the nature or contents of any document, communication or information whatsoever which has come to his knowledge in the course of his duties in relation to the Bureau;

(a) makes use for his own purposes or for the purposes of any other person any knowledge acquired from any document, communication or information which he has acquired or obtained in the course of his duties in relation to the Bureau,

shall be guilty of an offence and shall be liable to a fine of K50,000 and imprisonment for two years.".

Amendment of s. 50 of the principal Act

25. Section 50 of the principal Act is amended-

(a) in subsection (1), by deleting the words ", notwithstanding the absence of the written consent of the Director of Public Prosecutions in respect of such other offence,";

(b) in subsection (2), by deleting the words ", notwithstanding the absence of the written consent of the Director of the Public Prosecutions in respect of the particulars supported by the evidence adduced".

Insertion of new s. 51A into the principal Act

26. The principal Act is amended by inserting therein immediately after section 51 the following new provision as section 51A-

"Protection of whistle-blowers and other informers

51A. (1) Any person believing that the public interest overrides the interest of the institution, organization or office in or under which he serves or to which he is subject or overrides the interest of a particular community, association or society to which he belongs, and any other person whosoever, may inform the Bureau or the police of an alleged or suspected corrupt practice, or other offence connected therewith, which he knows or believes is being perpetrated by or in that institution, organisation, office, community, association or society.

(2) Except as provided in subsections (3) and (4), no information relating to a whistle-blower or to any other informer who has provided information to the Bureau or to the police pursuant to subsection (1) as to an offence under this Act shall be admitted in evidence in any civil or criminal proceeding, and no witness shall be obliged or permitted to disclose the name or address of such whistle-blower or other informer, or state any matter which might lead to his discovery.

(3) If any books, documents or papers which are in evidence or liable to inspection in any civil or criminal proceeding contain any entry in which the whistle-blower or other informer is named or described or which might lead to his discovery, the court before which the proceeding is heard shall cause all such passages to be concealed

from view or to be obliterated so far as is necessary to protect the whistle-blower or other informer from discovery, but no further.

(4) If on a trial for any offence under this Act the court, after full inquiry into the case, is of the opinion that the whistle-blower or other informer wilfully provided information which he knew or believed to be false, or did not believe to be true, in material particular, or if in any other proceeding the court is of the opinion that justice cannot be fully done between the parties thereto without the discovery of the whistle-blower or other informer, the court may permit inquiry and require full disclosure concerning the whistle-blower or other informer, and, if the information was provided in writing, require the production of the original thereof.

(5) Any person who, having knowledge that any person referred to in this section as a whistle-blower or an informer, has informed the Bureau or the police of an alleged or a suspected corrupt practice, or other offence connected therewith, takes, by himself or through another person, an action of any kind to punish or victimise such whistle-blower or informer in any way shall be guilty of an offence and liable to a fine of K50,000 and to imprisonment for two years.".

Insertion of new s. 52A into the principal Act

27. The principal Act is amended by inserting therein immediately after section 52 the following new provision as section 52A-

"Appeals

52A. In any proceedings for an offence under this Act,

the prosecution may appeal against any final judgment or order, including a finding of acquittal, of the trial court if, and only if, dissatisfied upon a point of law; but, save as so provided, no appeal shall lie by the prosecution against a finding of acquittal by the trial court.".

Insertion of new s. 53A into the principal Act

28. The principal Act is amended by inserting therein immediately after section 53 the following new provision as section 53A as follows-

"Director to inform the Director of Public Prosecutions

53A. The Director shall inform the Director of Public Prosecutions, with sufficient particularity, of the commencement and the conclusion of every prosecution instituted by the Bureau.".

OBJECTS AND REASONS

The object of this Bill is to effect amendments to the Corrupt Practices Act as recommended by the Law Commission on the Review of the Corrupt Practices Act appointed

under section 133 of the Constitution. The amendments recommended by the Commission aim at strengthening the legal framework under the Act for the fight against corruption in public bodies.

GOVERNMENT NOTICE No. ....

CORRUPT PRACTICES ACT

(No. 18 of 1995)

CORRUPT PRACTICES (PROHIBITION OF

ABUSE OF INFORMATION OBTAINED IN OFFICIAL CAPACITY)

(REPEAL) REGULATIONS, 20 ...

IN EXERCISE of the powers conferred by section 54 of the Corrupt Practices Act, I, ..., Minister of Justice, make the following Regulations-

Citation 1. These Regulations may be cited as Corrupt Practices (Prohibition of Abuse of Information Obtained in Official Capacity) (Repeal) Regulations, 20 ...

Repeal of GN 46/ 1999

2. The Corrupt Practices (Prohibition of Abuse of Information Obtained in Official Capacity) Regulations, 1999, are repealed.

Made this day of 20 ...

.....

Minister of Justice

(File No. ACB ....)

GOVERNMENT NOTICE No. ...

CORRUPT PRACTICES ACT

(No. 18 of 1995)

CORRUPT PRACTICES (DISCLOSURE BY PUBLIC OFFICERS

OF INTEREST IN CONTRACTS AND PROPOSED CONTRACTS)

(REPEAL) REGULATIONS, 20 ...

IN EXERCISE of the powers conferred by section 54 of the Corrupt Practices Act, I, ..., Minister of Justice, make the following Regulations-

Citation 1. These Regulations may be cited as the Corrupt Practices (Disclosure by Public Officers of Interest in Contracts and Proposed Contracts) (Repeal) Regulations, 20 ...

Repeal of GN 47/1999

2. The Corrupt Practices (Disclosure by Public Officers of Interest in Contracts and Proposed Contracts) Regulations, 1999, are repealed.

Made this day of 20 ...

.....

Minister of Justice

(File No. ACB ...)

GOVERNMENT NOTICE No. ...

CORRUPT PRACTICES ACT

(No. 18 of 1995)

CORRUPT PRACTICES (OATH OF SECRECY) REGULATIONS, 20 ..

IN EXERCISE of the powers conferred by section 54 of the Corrupt Practices Act, I, ..., Minister of Justice, make the following Regulations-

Citation

1. These Regulations may be cited as the Corrupt Practices (Oath of Secrecy) Regulations, 20...

Oath of secrecy

2. (1) The Director may require any person engaged in the service of the

Bureau, whether as an employee, an agent, a consultant or in any other capacity, to take an oath of secrecy in relation to his duties as such employee, agent, consultant or such other capacity.

(2) The oath of secrecy required to be taken by a person referred to in subregulation (1) shall be in the form set out in the Schedule.

Schedule

(3) Instead of taking an oath, a person referred to in subregulation (1) may make an affirmation which shall be in the like form as set out in the Schedule with the substitution of the word “affirm” for the word “swear” and the omission of the last sentence.

Repeal of GN. 48/1999

3. The Corrupt Practices (Oath of Secrecy) Regulations, 1999, are repealed.

SCHEDULE reg. 2(2)

OATH OF SECRECY

1, ..., having been appointed or engaged as .....*in the service of the Anti-Corruption Bureau, do solemnly swear that, except in accordance with this Act, I will not, directly or indirectly , reveal the business or proceedings of the Anti-Corruption Bureau or the nature or contents of any document, communication or information whatsoever or any matter coming to my knowledge in my capacity as such .....; and that I will well and truly perform my duties in that capacity. So help me God.

Sworn/Affirmed this day of 20 ...

.....

Signature of Deponent

Before Me: .....

Commissioner for Oaths

* Here indicate title of office, if employee; or capacity, if engaged as agent or consultant or another capacity.

Made this day of 20 ...

.....

Minister of Justice

(File No. ACB ...)