

GAZETTE EXTRAORDINARY

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Report of the Law Commission (No. 13D)**

LAW COMMISSION REPORT NO. 24

CONSTITUTION OF MALAWI

REPORT OF THE LAW COMMISSION ON THE REVIEW OF THE
LEGAL EDUCATION AND LEGAL PRACTITIONERS ACT, Cap 3:04

The Report of the Law Commission on the Legal Education and Legal Practitioners Act (Cap. 3:04) is hereby published as Law Commission Report No. 24, and shall be laid in Parliament, pursuant to section 135 (d) of the Constitution.

Dated this 22nd day of May, 2013.

Mr. Ralph Kasambara, SC
*Minister of Justice and
Constitutional Affairs*

FILE NO. LC/01/13

**REPORT OF THE LAW COMMISSION ON THE REVIEW OF
THE LEGAL EDUCATION AND LEGAL PRACTITIONERS ACT,
CAP 3:04**

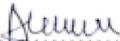
TO: THE HONOURABLE MR. RALPH KASAMBARA, SC, MINISTER OF JUSTICE AND CONSTITUTIONAL AFFAIRS

This is the Report on the Review of the Legal Education and Legal Practitioners Act (Cap. 3:04) by the special Law Commission appointed under section 133 of the Constitution.

We, the members of the Commission, submit this Report pursuant to section 135 of the Constitution and commend the Report and its recommendations to the Government, Parliament and the people of Malawi.

MEMBERS:

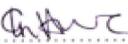
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Malawi Supreme Court of Appeal


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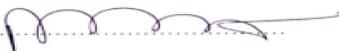
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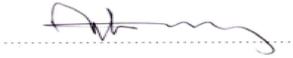

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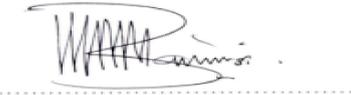
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Dated 15th November, 2012

Programme Officers

The Principal Programme Officer for this Programme was Mr. Chizaso Eric Nyirongo, LLB (Hons), LLM (Oslo), Postgraduate Diploma (Legislative Drafting) (ILI), Assistant Chief Law Reform Officer and he was assisted by Mrs. Eddah Chavula, LLB (Hons), Mr. Allison Mbang’ombe, LLB (Hons), LLM (Warwick), MBA and Mr. Isaac Songea, LLB (Hons) (Malawi), Assistant Law Reform Officer. Mr. Songea left the Commission before the completion of the programme.

On a sad note, Mr. Peter Chiniko who was a Programme Officer on this Programme at its inception passed away on 6th September, 2008. May his soul rest in peace.

Acknowledgements

Funding for this Programme was provided by the European Union (EU) Rule of Law Programme and the Government of Malawi.

Changes in the Composition of the Commission

Mrs. Annabel Mtalimanja who represented the Ministry of Justice and

Constitutional Affairs went on maternity leave and was replaced by Mrs. Rosemary Kanyuka. Although she contributed to the recommendations of the special Law Commission, she has not signed this Report.

On 27th August, 2009, Mr. Temwa Nyirenda, SC, who was a Commissioner on this Programme also passed away. Mr. Nyirenda, SC was a senior legal practitioner with vast experience in the legal profession and made a very significant contribution during this Programme. He was nominated for appointment as Commissioner by the Malawi Law Society. May his soul rest in peace.

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Executive Summary

The Legal Education and Legal Practitioners Act became law on 12th September, 1965. The Act provides for preliminary and miscellaneous matters; the Malawi Council for Legal Education; Admission to Practice; Notaries Public; Discipline; and the Malawi Law Society. The Act also makes provision for subsidiary legislation and accordingly provides for Malawi Law Society Rules; Legal Practitioners' Accounts Rules; Legal Practitioners' Practice Rules; Legal Practitioners (Accountants' Certificate) Rules; and the Legal Practitioners (Scale and Minimum Charges) Rules.

Since 1965, the Act saw major amendments in 2004, following recommendations of a special Law Commission was appointed to review Parts III and IV of the Act. These Parts provide for the procedure for admission to practice the profession of the law in Malawi. Although the specific mandate of the said special Law Commission was confined to review of the admission to practice aspect of the Act, a number of pertinent issues regarding legal education and legal practice in general were raised by or brought to the attention of that special Law Commission. These included issues such as regulation of appointment of Senior Counsel, provision for administration of the estate of a deceased legal practitioner and a comprehensive review of the Act in order to update it in several respects. It was also of the view that there had been a number of policy and constitutional developments that necessitated a general review of the Act. That special Law Commission released its Report in September 2002.

The second major amendment came in 2010, when the Ministry of Justice and Constitutional Affairs, through amendment of section 6 of the Act, introduced the Malawi Institute of Legal Education.

Following the earlier recommendation for a comprehensive review of the Act with an aim of generally updating the Act, the Malawi Law Society made a submission to that effect in a letter to the Law Commission dated 10th March 2004.

In July 2006, the Ministry of Justice, the Malawi Law Society and the Law Commission agreed that the Law Commission should undertake the review of the Act and the special Law Commission on the Review of the Legal Education and Legal Practitioners Act was empanelled in June 2008. Earlier in 2008, the Law Commission had held a number of meetings with the relevant stakeholders in order to map out the direction of the comprehensive review process. The stakeholders included the Malawi Law Society, the Faculty of Law, Chancellor College and the Judiciary (including all the three levels of the Magistracy, the High Court and the Supreme Court of Appeal). It was around the same time that the Malawi Law Society prepared draft legislation to repeal the Act. The Commission considered, among other numerous materials, the draft proposals and benefitted from them. The Commission began its work on reviewing the Act in July, 2008.

The special Law Commission then invited submissions from members of the general public through notices in newspapers; held meetings of the Commission; conducted study visits to Kenya and Zambia in order to obtain a comparative perspective from other jurisdictions; held one National Consultative Workshop; and considered the feedback from the consultative forum.

The Bill proposed by the special Law Commission is comprehensive and provides a legislative framework for the regulation of the legal profession in Malawi. While the Bill has maintained all the Parts of the Act as amended in 2003, each and every Part has been thoroughly revised and reviewed. For instance, the Part on Discipline has introduced a two tier system of handling complaints against legal practitioners and introduced powers of the Malawi Law Society to impose some disciplinary measures against errant legal practitioners. In the proposed Bill, the Malawi Institute of Legal Education has been created and given powers related to the admission of legal practitioners to practice the profession of the law in Malawi. It shall, in this regard, complement the Council of Legal Education. The Malawi Law Society, although a creature of statute shall continue not to be funded from public resources and the proposed legislation has introduced a Society Levy which shall assist the Society in raising funds for its sustenance.

The proposed legislation also provides for the administration and organization of the Malawi Law Society and in particular, provides for the establishment of chapters of the Society. New provisions regarding the establishment, operation and conclusion of legal practice have also been introduced by, among other things, moving some provisions from subsidiary legislation to the main legislation.

While Senior Counsel have from time immemorial been appointed by Heads of State, the proposed legislation has now laid out a transparent procedure to regulate how this prestigious honour shall be conferred on excelling legal practitioners. This process includes the establishment of an Honours Committee comprising eminent legal practitioners which shall play a pivotal role in selecting those that are worthy the honour. The proposed legislation also creates a Fidelity Fund which shall be used to compensate people who incur loss from errant legal practitioners.

1.0 INTRODUCTION

1.1 General Background

The Legal Education and Legal Practitioners Act became law on 12th April, 1965, barely one year after Malawi attained independence from the United Kingdom. The Act was intended to, according to its long title, establish a Council for Legal Education and to provide for its functions and responsibilities; to establish criteria for the admission of persons to practice before the courts of Malawi as legal practitioners; to provide for the professional discipline of legal practitioners; to establish the Malawi Law Society as a body corporate and to make provision for its objects and membership; to make comprehensive provision in relation to notaries public and for other matters.

The Act is divided into eight parts and as it stands now it has four schedules. Other than making provision for preliminary and miscellaneous matters, the Act has parts providing for Malawi Council for Legal Education; Admission to Practice; Notaries Public; Discipline; and the Malawi Law Society. The Act also makes provision for subsidiary legislation and accordingly provides for Malawi Law Society Rules; Legal Practitioners' Accounts Rules; Legal Practitioners' Practice Rules; Legal Practitioners (Accountants' Certificate) Rules; and the Legal Practitioners (Scale and Minimum Charges) Rules.

Since 1965, the Act has been amended several times. The last major amendment came in 2004. The 2004 amendment was a result of recommendations by a special Law Commission appointed to review Parts III and IV of the Act after the Law Commission had received submissions from individuals who sought modifications to the legal provisions on admission to the Malawi Bar as they were then. These individuals were lawyers trained in the former Soviet Union, lawyers who had studied and obtained their qualifications in Roman-Dutch jurisdictions such as South Africa and persons who qualified as lawyers in other foreign jurisdictions such as the United Kingdom and qualified as barristers without having practiced law in those foreign jurisdictions.¹

The applicants made their submission on behalf of several others who had undergone their legal training in the former Soviet Union. They urged the Law Commission to amend provisions on admission to Malawi Bar on the ground that the said provisions, as they were then, discriminated against persons who were qualified in jurisdictions other than those listed in the First Schedule to the Act as it was then. They specifically requested that the then First Schedule be amended to the effect that it included or recognized the admission of lawyers qualified from the former Soviet Union.² These individuals had also made a similar request to the Minister of Justice and Attorney General in their letter dated 12th September 1995 and through a petition they made to Parliament the same year.

In submissions from the applicants, it was argued that the then provisions on admission also adversely affected them because the Act excluded those that

¹ Law Commission Report No. 7; Report of the Law Commission on the Review of the Legal Education and Legal Practitioners Act; September 2002; page 5.

² Ibid.

obtained their qualifications from jurisdictions whose legal system is not based on English common law like themselves. Their prayer was that the law should be amended to allow them to be admitted to practice as legal practitioners at the Bar in Malawi.

On the other hand, the applicants had argued that their scope of employment opportunities in Malawi was limited to teaching law at the University of Malawi.³ They too requested that the law on admission to practice law in Malawi should be amended so that they too would be admitted to practice.

Following these submissions, the Law Commission consulted the Malawi Law Society as the relevant professional body interested in the issues raised in the submissions, seeking its view on the submissions. That consultation resulted in the review programme which commenced with the setting up of a special Law Commission in 1998 to review Parts III and IV of the Act and make necessary recommendations.⁴

Although the specific mandate of the said sister special Law Commission was confined to review of the admission aspect of the Act, a number of pertinent issues regarding legal education and legal practice in general were raised by or brought to the attention of that special Law Commission. These included issues such as regulation of appointment of Senior Counsel, provision for administration of the estate of a deceased legal practitioner and a comprehensive review of the Act in order to update it in several respects.⁵ It was also of the view that there had been a number of policy and constitutional developments that necessitated a general review of the Act. That special Law Commission released its Report in September 2002. Parliament passed the Legal Education and Legal Practitioners (Amendment) Act on 12th December 2003.⁶

Following the earlier recommendation for a comprehensive review of the Act with an aim of generally updating the Act, the Malawi Law Society made a submission to that effect in a letter to the Law Commission dated 10th March 2004, almost three months after the Amendment Bill was assented to.⁷

In its submission, the Malawi Law Society referred to some key problems it was facing regarding discipline of its members due to the legal framework governing the legal profession in Malawi. It noted with concern that it does not have power under the current legal framework, to move the High Court in a motion for disciplinary action against its own members. It also expressed concern that it lacks legal mandate to discipline its own members.⁸ The Malawi Law Society further observed that under the current legal framework, the *locus standi*

³ However it must be noted that the law, as it was then, did not bar barristers from being admitted to practice law in Malawi.

⁴ Ibid at page 4.

⁵ Ibid.

⁶ See the Legal Education and Legal Practitioners (Amendment) Act, being Act No. 9 of 2004.

⁷ It was assented to on 14th January 2004.

⁸ Under section 37 of the Act, the Disciplinary Committee of the Society is only mandated to investigate allegations of legal practitioners' misconduct. If it establishes that there is a *prima facie* case against a legal practitioner, the Committee is supposed to report the matter to the Attorney General who then may apply for an order of the court under section 21 of the Act.

to initiate a motion for a disciplinary order is the preserve of the Attorney General. Its view is that this arrangement would pose serious difficulties for the Society if it were to initiate a motion for disciplinary action against bearers of the offices of the Attorney General and the Solicitor General in case they commit an act of misconduct envisaged under section 21 of the Act. Therefore the Malawi Law Society urged the Law Commission to set up a special Law Commission “to review the whole Legal Education and Legal Practitioners Act” with a view of revisiting the legal framework governing the self-regulation of the legal profession in Malawi.

On 27th October 2005, Hon. Billy Kaunda, M.P, moved a private members Bill in the National Assembly seeking amendment of Legal Education and Legal Practitioners Act. His motion sought—

(a) to make it mandatory for Malawi Law Society to establish a fidelity fund from which victims of legal practitioners’ financial misconduct might be compensated;

(b) to create an autonomous committee to oversee the Disciplinary Committee of the Society;

(c) to establish a consumer complaints centre, the composition of which would include an auditor who according to the Motion, would promote transparency; and

(d) to liberalize debt collection so that it is not confined to legal practitioners only.⁹

In reaction to this development, the Malawi Law Society wrote to the Speaker of the National Assembly on 12th April 2005, vehemently opposed to the suggestions that the Act be amended, without Hon. Kaunda, M.P. consulting the Society. The Society expressed concern that Hon. Kaunda did not consult it on the matter yet the latter has statutory mandate to assist and protect the public on all matters touching the law. This process coincided with a period when the media, especially newspapers were ubiquitous with alleged cases of legal practitioners’ misconduct. In the letter to the Speaker of the National Assembly, the Society referred to these cases as “extreme examples of failed lawyers”.

It was around the same time that the Malawi Law Society prepared draft legislation to repeal the Act. The Malawi Law Society actually came up with a number of proposals regarding the statute(s) that would repeal the Act. At some point, the Society proposed a split and creation of two statutes, the Legal Profession Act and the Legal Education Act; while at another time, it was suggested that the proposed law be styled the Legal Practitioners Act. In sum, the proposed statutes were availed to the Law Commission prior to commencement of this Programme and it was agreed between the Law Commission and the Law Society that the proposed statutes reflect a summary of the views from the Society

⁹ Honourable Kaunda’s letter to Law Commission dated 13th March 2005 and the Daily Times of Monday, 11th April, 2005 at page 4.

especially with respect to content of the proposed law. The Commission considered, among other numerous materials, these proposals and benefitted from them.

A resolution was therefore reached in July 2006 by the Ministry of Justice, the Malawi Law Society and the Law Commission that the Law Commission should undertake the review of the Act.

The Law Commission, between March and April, 2008, held a number of meetings with the relevant stakeholders in order to map out the direction of the comprehensive review process. The stakeholders included the Malawi Law Society, the Faculty of Law, Chancellor College and the Judiciary (including all the three levels of the Magistracy, the High Court and the Supreme Court of Appeal). This process informed the current process and also expounded on the views these principal stakeholders held with respect to the desired direction and product of the review process. The Law Commission learnt that the Malawi Law Society had earlier commenced its own process to review the Act by engaging a consultant for the purpose and that the process had advanced to a stage where a draft Bill was concluded. This proposed Bill was availed to the Law Commission and was considered at length in the review process by the special Law Commission.

The special Law Commission on the Review of the Legal Education and Legal Practitioners Act was empanelled in June 2008. The Commission began its work on reviewing the Act in July 2008.

1.2 Terms of Reference

The special Law Commission developed the following Terms of Reference to guide its work—

- (a) to amend the Act to conform to the aspirations of the Constitution and applicable international norms;
- (b) to create certain bodies, institutions and mechanisms which will make the legal profession a transparent and accountable profession;
- (c) to create a fidelity fund for legal practitioners;
- (d) to create an institute for the administration of training prerequisite for admission to practice in Malawi;
- (e) to create an elaborate disciplinary regime within the legal profession for dealing with transgressions by legal practitioners swiftly and fairly through a process which creates and sustains confidence in the public eye;
- (f) to determine status of paralegals;
- (g) to review all subsidiary legislation regulating the legal profession;
- (h) to review any laws affecting the legal profession made by, or under the authority of Parliament;

(i) to review additional laws within the legislative power of the National Assembly to effect change to the unwritten laws of Malawi, including customary law;

(j) to harmonize statutory and customary laws; and

(k) to make any changes to the application of any laws.

1.3 Work Methodology

The Commission adopted the following methodology in the review of the Act:

(a) inviting submissions from members of the general public through notices in newspapers;

(b) holding meetings of the Commission for three days, at least once a month, over a total period of thirty months;

(c) conducting study visits to Kenya and Zambia in order to obtain a comparative perspective from other jurisdictions;

(d) holding one National Consultative Workshop which was held from 25th to 26th March, 2009 in Blantyre. The participants at the Workshop were drawn from the public service; academia; faith organizations; private sector; and the public; and

(e) considering the feedback from the consultative forum. All submissions, comments and criticisms that were made were considered and debated and in some cases have been incorporated in this Report.

In performing its functions, the special Law Commission also:

(a) examined international instruments, such as:

(i) the Universal Declaration of Human Rights;

(ii) the International Covenant on Civil and Political Rights;

(iii) the International Covenant on Economic, Social and Cultural Rights; and

(iv) the Convention on the Elimination of All Forms of Discrimination Against Women, with respect to the legal profession;

(b) in recognition of work already undertaken, had regard to all relevant documents and reports, including—

(i) the Constitution of the Republic of Malawi and other written laws;

(ii) national policy documents, such as the Malawi Growth and Development Strategy¹⁰;

(iii) reports of the Law Commission including the Report on the Review of the Legal Education and Legal Practitioners Act¹¹; and

(iv) the Legal Education and Legal Practitioners (Amendment) Act, 2010;

(c) considered any relevant law of any other country, particularly, within the Southern Africa Development Community;

(d) considered any relevant customary laws and practices;

(e) consulted stakeholders at a national workshop in order to solicit views on the findings and recommendations of the Commission; and

(f) made recommendations on any other matters relating to the legal profession.

1.4 Format of the Report

The first part of this Report is the narrative part which contains specific findings and recommendations made by the Commission. All recommendations made by the Commission for enactment are indicated in bold. The second part of this Report contains draft Bills which have been attached to this Report as Appendices per section 7(1) (g) of the Law Commission Act (Cap. 3:09).

2.0 Basis and Issues for Reform

2.1 Overview of the Existing Law

The existing legal framework regulating the legal profession consists mainly of the Legal Education and Legal Practitioners Act. The principal legislation in Malawi is the Constitution. The Constitution has made no specific reference to the regulation of the legal profession but has made provision for some aspects which inevitably touch on the legal profession in terms of its role in ensuring the protection of the sanctity of a constitutional order in Malawi. The preamble of the Constitution provides, among other things, that the People of Malawi are desirous of creating a constitutional order based on the need for an open, democratic and accountable Government. The legal profession has a paramount role in the realization of this desire by ensuring that openness, democracy and accountability are entrenched. Similarly, the legal profession has a major role in assisting the Judiciary in interpreting, protecting and enforcing the Constitution and all laws in accordance with the Constitution in an independent and impartial manner.

In section 13(m), Government has a role to promote law and order and respect for society through humane application and enforcement of laws and policing standards. The role of the legal profession in the realization of proper

¹⁰ The Commission considered the 2006 version of the MGDS.

¹¹ Law Commission Report No. 7: Report of the Law Commission on the Review of the Legal Education and Legal Practitioners Act, September 2002: Government Printer.

administration of justice cannot be overemphasized. Although the general enforcement of the Constitution rests upon the shoulders of the legal profession and its practitioners, the role of legal practitioners under some provisions of the Constitution such as section 42 with respect to arrests, detention and fair trial has been given specific prominence. Entitlement of only legal practitioners to qualify to hold the office of judge also gives an indication of the calibre of individuals that are legal practitioners by merging the professional and ethical standards that are expected of them.

At policy level, Government adopted the Malawi Growth and Development Strategy 2006-2011 (MGDS) in 2006 whose overall objective is to reduce poverty through sustained economic growth and infrastructure development. The six key priority areas of the MGDS are agriculture and food security; irrigation and water development; transport infrastructure development; energy generation and supply; integrated rural development; and prevention and management of nutrition disorders, and HIV and AIDS. It might appear from the face of it that the focus of the blueprint has left professional development out of the picture. However, the key priority areas interface with the legal profession in a myriad of ways. Improvement of any of these areas would feed into the core business of the legal profession in such areas as improving access to justice through provision of infrastructure such as courts and legal houses; agriculture and food security which tends to affect crime rates and prevention and management of HIV and AIDS which has also affected legal practitioners by killing individuals on whom vast resources have been spent to educate.

In creating a conducive environment for private sector investment to stimulate production of goods and services hence creating employment opportunities, the legal profession becomes a primary beneficiary. The MGDS also identifies five thematic areas which are sustainable economic growth, social protection, social development, infrastructure development, and improved governance. The MGDS highlights the importance of all these areas by maintaining focus on accelerated and sustainable growth, while outlining steps to ensure social development, good governance and environmental sustainability. The MGDS provides that progress in all the five areas will increase prosperity, reduce poverty and assist in the achievement of the Millennium Development Goals.

Theme Five on Improved Governance has been unpacked into six sub-themes which touch on the following areas: Macroeconomic Growth; Public Policy Formulation, Fiscal Management, Public Sector Management and Corruption; Decentralization; Developing a Strong Justice System and Rule of law; Security; and Corporate Governance. As such, the legal profession has a role to play in the realization of the goals of the MGDS and the realization of those goals also positively affects development of the profession. The law is an instrument for development for its core function is to restructure, plan and encourage enterprise. thus, it is an instrument of wide-scale social and economic

planning.¹² Therefore training of legal practitioners has to envisage the important role of the law in realization of national development.

2.2 Amendment versus Repeal

The Commission considered whether to amend the existing law or repeal the existing law and develop new legislation all together. The Commission appreciated the enormity of either task in light of discharging its mandate to comprehensively review the Act. The Commission was of the view that amending the Act, as it stands, would necessitate too numerous changes that it would erode the clarity and flow of the proposed amendment Act.

The Commission having critically analysed every Part of the Act finds that it has, accordingly, made significant recommendations on each one of them. The Commission also recommends substantive changes to the subsidiary legislation made under the Act with a view to making referencing of the provisions less tedious and more user-friendly. Therefore the Commission recommends that a new Bill altogether, repealing the existing law and incorporating all recommendations be drafted. It also recommends that separate legislation on debt collection be developed. The draft legislation is attached to this Report.

¹² Cotterrell, Roger; *The Sociology of Law: An Introduction*; Butterworths; London; 2nd Ed; (1992); p.44.

SPECIFIC FINDINGS AND RECOMMENDATIONS

PART I—PRELIMINARY

SECTION 1 [*Short title*]

Section 1 provides that the short title for the Act is the Legal Education and Legal Practitioners Act. The Commission took note of the views expressed by the Malawi Law Society towards creating two statutes, one regulating legal education and another regulating the legal profession. The Society proposed that the former statute be styled the Legal Education Act while the latter would be styled the Legal Profession Act.

The Commission noted that within the Region and elsewhere, there are a number of statutes regulating education and practice of the profession of law. For instance, in Zambia there are three statutes namely the Legal Practitioners Act,¹³ the Law Association of Zambia Act¹⁴ and the Zambia Institute of Advanced Legal Education Act.¹⁵ In Kenya, they have the Advocates Act,¹⁶ the Council for Legal Education Act¹⁷ and the Law Society of Kenya Act.¹⁸ Furthermore in Kenya, consultations were underway on development of a Fidelity Fund Bill.¹⁹ In Namibia, there is a Legal Practitioners Act²⁰ and the Legal Practitioners' Fidelity Fund Act.²¹

The Commission considered the practice in all these countries and resolved that in Malawi the principal legislation on education and profession of the law should remain one. The Commission resolved thus taking into account the need for promoting accessibility to the law and further noted that the *status quo* has not countered any problems. Therefore the Commission recommends that the current short title should be retained.

However, in light of the proposed repeal of the Act, the Commission recommends that the short title should also include provision for commencement of the proposed law. The new provision shall provide as follows:

Short title and commencement	... This Act may be cited as the Legal Education and Legal Practitioners Act, 20... and shall come into force on a date to be appointed by the Minister, by notice published in the <i>Gazette</i>.
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¹³ Chapter 30 of the Laws of Zambia.

¹⁴ Chapter 31 of the Laws of Zambia.

¹⁵ Chapter 49 of the Laws of Zambia.

¹⁶ Chapter 16 of the Laws of Kenya.

¹⁷ Chapter 16A of the Laws of Kenya.

¹⁸ Chapter 18 of the Laws of Kenya.

¹⁹ This was when the Commission visited Kenya in December, 2008.

²⁰ Act number 15 of 1995.

²¹ Act number 22 of 1990.

SECTION 2 [*Interpretation*]

The Commission considered the definitions under section 2 and recommends amendment to this section in order to modify existing definitions and introduce new definitions in light of other changes made to the Act.

“Council”

According to the Act, the word means or refers to the Council of Legal Education established under the Act. The Commission looked at the definitions for the term in other comparable jurisdictions like Kenya²², Namibia²³ and Zambia²⁴ where the term refers to institutions that perform similar functions and duties although in some instances, the scope of the powers and functions of Councils in these jurisdictions slightly differs from those under the Act. The Commission recommends that the definition of the term “Council” should be retained.

“legal practitioner”

The Act defines this term to mean a person who has been admitted to practice the profession of law before the High Court, or before any court subordinate thereto, and whose name has been inscribed upon the Roll. The Commission observed that once a person is so admitted, his or her name remains on the Roll unless they have been struck off the Roll²⁵ and remains so even if one does not renew his practising licence. This is so because the definition of the term “legal practitioner” does not distinguish a legal practitioner who has a valid and current practising licence from another whose name remains on the Roll simply by virtue of their admission to practice.

The position is the same in Kenya where an advocate’s name also remains on the Roll even if he does not renew his Practising Certificate²⁶ but curtails the advocate’s right of audience before the courts. This position also obtains in Zambia.

The Commission considered whether it would be necessary to restrict the definition of the term to a person who has a current practising licence or not. Furthermore, the Commission considered whether the current definition encourages some unscrupulous legal practitioners to practice law in Malawi without a valid practising licence.

The Commission observed that if the definition of the term would exclude lawyers that were admitted and whose names were inscribed upon the Roll but have not taken out a practising licence then the definition of the Roll itself would be affected. This is so because the word “Roll” refers to the Roll of legal practitioners. This would mean that a legal practitioner who did not take out a

²² The Council of Legal Education Act, Chapter 16A of the Laws of Kenya.

²³ This is the executive committee of the law society established under section 45 of the Legal Practitioners Act of Namibia.

²⁴ Section 2 of the Zambia Institute of Advanced Legal Education; Chapter 49 of the Laws of Zambia.

²⁵ Section 21 of the Act.

²⁶ As it is referred to in that country

practising licence in a particular year, for whatever reason, would have to be struck off the Roll since the Roll is a Roll of legal practitioners with valid practising licences. The Commission appreciated that in comparable foreign jurisdictions, the name of a legal practitioner without a valid practising licence remains on the Roll unless he is struck off the Roll. The Commission therefore recommends that the definition of the term “legal practitioner” should not make reference to whether the legal practitioner has a valid practising licence or not.

The Commission further observed that the definition of “legal practitioner” refers to a person who has been admitted to practice the profession of the law before the High Court or before any court subordinate thereto. The Commission noted that this provision excludes the Supreme Court of Appeal where legal practitioners have a right of audience. The General Interpretation Act²⁷ defines the High Court as the High Court of Malawi as established under the Constitution.²⁸ The Supreme Court Act²⁹ defines a court, for the purpose of that Act, as to mean the Supreme Court of Appeal.³⁰ On the other hand the General Interpretation Act defines the word ‘court’ as “any court of the Republic of competent jurisdiction”.

Therefore the Commission recommends deleting of the words “High Court and any court subordinate thereto” and replace it with the word “court” as follows:

“legal practitioner” means a person—

(a) who has been admitted to practice the profession of the law before a court; and

(b) whose name has been inscribed upon the Roll.

“Malawi Law Examination”

The term is defined in the Act as the examination in the local laws, practice and procedure of Malawi to be set by the Council from time to time in accordance with section 10 thereof. The Commission was mindful of the fact that it has recommended the establishment of the Malawi Institute of Legal Education which shall be mandated to set down this examination on behalf of the Council.

The Commission therefore recommends that the definition of this term should reflect this recommendation. Consequently, the new definition would read as follows:

“Malawi Law Examination” means examination in the local laws, legal practice and procedure of Malawi set by the Institute, from time to time, in accordance with section...;

²⁷ Cap.1:01 of the Laws of Malawi.

²⁸ See section 108 of the Constitution.

²⁹ Cap.3:01 of the Laws of Malawi.

³⁰ See Order I Rule 2 of the Supreme Court Rules

“Registrar”

The Act defines the word “Registrar” as the Registrar of the High Court. The Commission recommends retention of this definition.

“Roll”

The Commission debated this definition at length and was mindful that a new procedure with respect to admission to practice has been proposed under this review process. The proposed procedure shall require every person who, having successfully completed the course at the Institute and wants to practice the profession of the law in Malawi, to apply to be admitted to practice the profession of the law in Malawi. The Commission noted the reference to a supplementary Roll in the definition which it found has been rendered superfluous as every legal practitioner, notwithstanding the fact that he does or does not intend to practice in public service, has to apply for admission to practice the profession of law in Malawi.

The Commission therefore recommends amendment of this definition by deleting the words “, and, save for the purposes of subsections (4) and (5) of section 11, includes the Supplementary Roll” after “legal practitioner”. Consequently, the Commission further recommends that the definition of the phrase “supplementary Roll” should be deleted.

The new definition shall read as follows:

“Roll” means the Roll of Legal Practitioners maintained by the Registrar on which is inscribed the name of every person admitted to practice as a legal practitioner;

NEW DEFINITIONS

The Commission recommends that in light of various recommendations made in this Report, some new definitions should be adopted under section 2.

The Commission took cognizance of the establishment of a new institution under Part IIA styled Malawi Institute of Legal Education under the Legal Education and Legal Practitioners (Amendment) Act, 2010³¹. The Commission recommends that this institution shall be defined accordingly in the Act as follows—

“Institute” means the Malawi Institute of Legal Education established under section ...;

Since the Malawi Law Society is key to the functions and activities of other institutions established under the proposed law, and that reference to it may be made prior to the provision establishing it formally under the Act, the Commission considered that the Malawi Law Society should be defined under the proposed law as follows—

³¹ Act No. 25 of 2010

“Society” means the Malawi Law Society established under section ...;

The Commission also noted that the word ‘client’ has been defined under the Rules made under the Act and recommends that the definition be made under the main legislation as follows—

“client” means any person on whose account a legal practitioner holds or receives client’s money;

PART II—THE MALAWI COUNCIL OF LEGAL EDUCATION

SECTION 3 [*Establishment of Council of Legal Education*]

This provision establishes the Council for Legal Education as a body corporate with power to hold land, sue and be sued in its corporate name. The Commission noted that this is a standard provision establishing an institution under law. The Commission observed that it is appropriate for the Council to continue existing as a body corporate and recommends retention of this definition.

SECTION 4 [*Functions of the Council*]

The section stipulates that the functions of the Council are to make regulations for syllabus and curriculum of legal education at law schools in Malawi; to establish, conduct, regulate, manage, control and supervise courses of legal education in Malawi; to conduct, regulate, manage, control and supervise the holding of examination in law in Malawi, and in particular, to set the examination papers for and make arrangements for invigilation of such examinations, and to provide for marking of the examination papers. It is also mandated to advise and make recommendations to the Minister generally on matters relating to legal education and the requisite qualification for the admission and enrollment of legal practitioners and to perform such other functions and deal with such matters relating to legal education as the Minister, may, in writing, from time to time, direct.

The Commission appreciated the possible conflict of the powers of the Council under section 4 of the Act and those of the University Council in the University of Malawi Act.³² For instance, under section 4, matters of legal education are under the Council including matters of the syllabus and curriculum, setting of law examinations, invigilating and marking. The Law School at Chancellor College is under the University of Malawi³³ and is also guided by the University of Malawi Act which provides that matters relating to examinations, syllabus and curriculum of any subject at any college of the university are handled by the Senate established under the University of Malawi Act.³⁴ In case of other institutions that might be permitted to offer legal education in Malawi, it may be expected that they would also be guided by institutional rules as well as the legal

³² Cap. 30:02

³³ Section 20 (2) of the University of Malawi Act

³⁴ Section 31 of the University Act provides that the senate may by Senate Regulations make provision for, inter alia, matters relating to teaching within the University, or to the teaching of any specified subject and the conduct and supervision of examinations.

education legislation.

This prompted the Commission to take considerable time appreciating the functions of institutions with similar mandate as the Council for Legal Education in other jurisdictions. The Commission observed that in Namibia the equivalent to a Council for Legal Education is called the Board of Legal Education. The Board is concerned with regulation of post graduate legal education. It also collaborates with the Faculty of Law of the University of Namibia in designing the syllabus and determining any other requirements for the course of undergraduate study.³⁵ Namibia also has a Justice Training Centre and the Namibian Legal Practitioners Act provides for a course of post graduate study for the training of candidate legal practitioners at the Centre.³⁶

The functions of the Board for Legal Education are in relation to registering candidate legal practitioners at the Centre; approving syllabus of the course at the Centre; laying down guidelines in relation to the nature of the practical training to be provided at the centre; acting as moderator for the Legal Practitioners' Qualifying Examination; setting and holding examinations; issuing certificates to candidate legal practitioners who have passed the Legal Practitioners' Qualifying Examination and to investigate and advise on any matter concerning legal education that pertains to the legal profession.³⁷ The Board regulates, controls and manages those who are about to enter the profession of the law and start practicing. It is therefore strategically placed and empowered to scrutinize persons wishing to be admitted to practice law in Namibia.

In Zambia, the Council is known as the Council of the Zambia Institute of Advanced Legal Education (hereinafter called the "Zambian Council").³⁸ Just like in Namibia, its emphasis is on post graduate legal studies.³⁹ In particular, the Zambian Council sets minimum education entry qualifications of persons seeking enrollment into the institute; provides minimum educational qualifications for students who wish to be admitted to the bar; provides training in legislative drafting; approves qualifications of students with law degrees equivalent to the law degree offered at any University in Zambia for purposes of admission; approves qualifications of foreign students who wish to be enrolled into the institute, and who come from countries that have reciprocal arrangements with Zambia; sets and holds examinations for candidates for admission as legal practitioners; provides post-graduate judicial training for magistrates and judges; encourages international co-operation in post-graduate legal and legislative drafting studies provided by the Zambian Council; provides such post-graduate courses of legal studies and sets and holds examinations in such courses as the

³⁵ Section 11 (g) of the Legal Practitioners Act, Act No. 15 of 1995 of the Laws of Namibia

³⁶ Section 16 of the Legal Practitioners Act of Namibia

³⁷ Section 11 of the Legal Practitioners Act of Namibia

³⁸ Section 3 of the Zambia Institute of Advanced Legal Education Act, Act No. 10 of 1996, Cap 49 of the Laws of Zambia

³⁹ Section 4 of the Zambia Institute of Advanced Legal Education provides that the functions of the council shall be to provide national, regional and international legal post-graduate studies and training in legislative drafting.

Zambian Council may think necessary; prepares and publishes a syllabus of courses of study essential for purposes of any examination set and held by the Zambian Council; issues certificates to persons who are successful candidates of examinations conducted by the Zambian Council; and does all such things connected with or incidental to the foregoing.⁴⁰

The foregoing functions seem broad but they all deal with controlling and trying to maintain the quality of people who wish to be admitted to the bar and practice the profession of the law. The Zambian Council does not concern itself with legal education at undergraduate level because in Zambia a person can only be admitted to practice law if he first goes through the Zambian Institute of Advanced Legal Education where they have placed their quality control measures.

In Kenya, the main object and purpose of the Council of Legal Education is to exercise general supervision and control over legal education and in particular to establish, manage and control such training institutions as may be necessary for, among other things, organizing and conducting courses of instruction for the acquisition of legal knowledge, professional skills and experience by persons seeking admission to the Roll of Advocates in Kenya, in such subjects as the Council may prescribe.⁴¹

In Nigeria, the Council of Legal Education has the responsibility for the legal education of persons seeking to become members of the legal profession.⁴²

From the foregoing, it is clear that the functions of the Council in comparable jurisdictions have to do with regulating postgraduate training of people who wish to be admitted to the bar. The Commission therefore recommends that this should be the main function of the Council of Legal Education in Malawi.

The Commission considered the fact that there are a number of institutions that would like to offer legal education. The Commission was of the view that it would be counterproductive if such institutions would not meet the minimum standards of legal education for purposes of admission to the practice of the legal profession. The Commission was of the view that such institutions need to be accredited by a monitoring body that would also enforce compliance with some minimum standards of legal education.

The Commission benefited from the comparative studies where it found that other Councils of Legal Education also play the role of accrediting institutions intending to offer legal education and generally enforce the minimum standards of legal education for the said purpose. The Commission further resolved that the power to determine criteria for accrediting institutions intending to offer legal education should vest in the Council and should be publicized to all parties when they express interest to offer legal education. The criteria, shall among other

⁴⁰ Section 4 (1) of the Zambia Institute of Advanced Legal Education Act.

⁴¹ Section 6 (1) and (2) (a) of The Council of Legal Education Act Cap. 16A of the Laws of Kenya

⁴² Section 1 (2) of the Legal Education (Consolidation, etc) Act, Cap. 206 of Laws of the Federal Republic of Nigeria

things, require institutions intending to offer legal education to specify the subjects that shall be offered in order for one to acquire a law qualification; the facilities available for the pursuit of a law qualification; entry requirements for applicants; the level of expertise in professional staff available to teach law courses; location and accessibility of the law school; and any other factor that the Council may deem appropriate.

Therefore the Commission resolved that the Council should be the umbrella body to accredit schools or colleges intending to offer legal education in the country. The Commission further resolved that the implementation role under section 4 of the Act should be deleted so that this role is left to the individual institutions, that section 4 (c) should be restricted to Malawi Bar Examinations only and that the Council should regulate award of law qualifications in Malawi.

The Commission also recommends that the proposed law should clearly stipulate the object for which the Council is established and that the functions for which the Council is established should be reconsidered and re-arranged. The Commission was of the view that if the objects for which the Council is established are clearly stipulated, then this shall eliminate the confusion between the roles of the Council and the proposed Institute. The Commission recommends that, over and above its current functions, the Council should undertake the function of accrediting schools and colleges that intend to offer legal education in order to ensure high quality of legal education in Malawi. The Commission also recommends that the Council should have a supervisory role over the Institute.

The Commission therefore recommends the amendment of section 4 as follows—

Object and
functions of the
Council

... (1) **The object and purpose for which the Council is established is to exercise general supervision and control over legal education in Malawi and to advise the Government in relation to all aspects of legal education.**

(2) Without prejudice to the generality of subsection (1), the functions of the Council shall include to—

(a) administer, regulate, manage and control the Institute;

(b) make rules for the syllabus and curriculum of legal education, and for attendance at law schools, in Malawi;

(c) advise and make recommendations to the Minister generally on matters relating to legal education and the requisite qualifications for the admission and enrollment of legal practitioners;

(d) set criteria for accrediting institutions offering

or intending to offer legal education;

(e) accredit schools and colleges offering or intending to offer legal education in Malawi;

(f) approve qualifications of persons with law degrees obtained from other countries; and

(g) perform such other functions and deal with such matters relating to legal education as the Minister may, in writing, from time to time, direct.

SECTION 5 [*Members of the Council*]

This section provides for the membership of the Council which includes: the Chief Justice of Malawi, who is the Chairperson; the Attorney General or a representative appointed by him; a Justice of Appeal or a Judge of the High Court to be appointed by the Chief Justice; a magistrate of a subordinate court in Malawi to be appointed by the Chief Justice; two persons in the legal service of Government, to be appointed by the Minister; the Chairman of the Malawi Law Society; a legal practitioner to be nominated by the Malawi Law Society and appointed by the Minister; and two law teachers in Malawi, to be appointed by the Minister.

The Commission noted the similarity in composition of Councils in comparable jurisdictions, and that members of diverse institutions dealing with legal matters are included in the membership of those Councils.⁴³

The Commission observed that currently the Council is not effective partly because of its composition. Most of the members comprising the membership do so by virtue of their offices all of which are busy offices. It was also observed that section 5 of the Act not only mandates the Chief Justice to be a member of the Council but also to be its Chairperson. The Commission observed that the office of the Chief Justice is an extremely busy office and resolved that the Chief Justice should be given an opportunity to opt out of the membership of the Council. The Commission therefore recommends that the opening statement of section 5 should be amended to the effect that the Chief Justice may opt out of the membership of the Council, if he so wishes, in which case he would appoint a serving Judge who would be the Chairperson as follows:

... The Council shall consist of the Chief Justice or a serving Judge appointed by the Chief Justice, who shall be Chairperson of the Council,

The Commission observed that under the Act, in section 5(b), the Chief Justice may appoint a Justice of Appeal or a Judge of the High Court to the

⁴³ See section 3 of the Council of Legal Education Act of Kenya; Chapter 16A of the Laws of Kenya, section 5 (1) of the Zambia Institute of Advanced Legal Education Act, Chapter 49 of the Laws of Zambia and section 8 (2) of the Legal Practitioners Act of Namibia, Act No. 15 of 1995

Council. The Commission noted that under the Constitution in section 111, judge means Justice of Appeal, Acting Justice of Appeal, a Judge of the High Court or an Acting Judge of the High Court. The Commission was persuaded to embrace the constitutional definition of judge and recommends deletion of the words “Justice of Appeal or a Judge of the High Court” in section 5 (b) and to replace the deleted words with the following word “serving Judge”.

The Commission also observed that the Malawi Law Society which is a major stakeholder in the welfare of the Council should be represented by at least two members over and above the Chairperson of the Society. Realizing the varied interests between legal practitioners with some in the public service and others in the private sector, there is need for higher representation of this varied interest within the Council.

In Zambia, the Council consists of the following members: the Attorney-General, with the Solicitor-General as an alternate member; a judge appointed by the Chief Justice; the Director of Public Prosecutions; the Chief Parliamentary Draftsman; the Director of the Law Development Commission; a representative of the School of Law of a public university; a representative of the Law Association of Zambia; the Clerk of the National Assembly; two legal practitioners; a person from any country in Southern or Eastern Africa; and the Director.⁴⁴ The Council is chaired by the Attorney General⁴⁵ and the Vice-Chairperson is appointed by the Minister from amongst the members.⁴⁶

The Commission also observed that the Judiciary is over represented in the Council. It has a third of the seats available.

The Commission therefore recommends the amendment of the provision by adding the words “(1)” between “5.” and “The Council...” and deletion of the word “and” after the word “Minister” in paragraph (f) and the introduction of the following provision—

(...) two (2) legal practitioners of at least ten (10) years standing at the Bar nominated by the Society and appointed by the Minister;

after paragraph (g).

The Commission also recommends that the Council should have a vice chairperson to avoid the likelihood of the Council failing to meet because of the absence of the Chairperson. It recommends therefore that a new subsection should be inserted to the effect that the Council shall elect its Vice Chairperson during its first meeting.

The Commission further noted that the current membership structure has only provided for the Chairperson but has omitted the designation of the Secretary for the Council whose functions are critical in the functioning of the Council. The Commission recommends the introduction of a Secretariat for the Council which shall facilitate execution of the functions of the Council.

⁴⁴ Section 5(1) of the Zambia Institute of Advanced Legal Education Act

⁴⁵ Ibid. subsection 2

⁴⁶ Ibid. subsection 3

The Commission further recommends the adoption of the following provisions with respect to the Vice Chairperson and Secretary of the Council as follows—

(2) The Council shall elect, at its first meeting, from among its members, a Vice-Chairperson.

(3) The Executive Director of the Council shall be the Secretary to the Council.

SECTION 6 [*Tenure of members*]

This provision stipulates that members of the Council shall hold office for a period not exceeding four years as stipulated in the instrument of appointment. It further states that a member may serve for a lesser period in case of resignation or cessation of qualifications prerequisite to the appointment. Appointed members are eligible for reappointment. In Zambia, tenure of office of members of the Council is three years and members are eligible for re-appointment for a further period of three years⁴⁷ while in Kenya, tenure for the members of a similar Council is four years⁴⁸ and in Namibia, it is three years.⁴⁹

The Commission, having observed that section 6 is silent on the issue of re-appointment of serving members, further recommends that section 6 should be amended to provide for eligibility of members for re-appointment. The Commission recommends that where a serving member is re-appointed, the re-appointment should be for another term of four years.

The Commission was of the view that the current tenure is in order and therefore recommends that it should be retained. However, it is of the view that there is need for a separate provision covering situations where a vacancy arises in the membership of the Council. A vacancy may occur if a member is removed from office; becomes bankrupt or of unsound mind; dies; or misconducts himself. In view of this recommendation, the Commission considered which authority shall have powers to remove an appointed member from the Council. The Commission observed that the Chief Justice is a member of the Council and appoints some members of the Council while the Minister appoints some members but is not a member of the Council. The Commission also observed that the powers of removal of any member has not been expressly provided for in section 6. The Commission felt that the Minister is better placed to exercise powers of removal from office of any member from office except those members who are in the Council by virtue of office.

The Commission therefore recommends the amendment of the section as follows—

⁴⁷ According to section 6(1) of the Zambia Institute of Advanced Legal Education Act

⁴⁸ See section 5 of the Council of Legal Education of Kenya, Chapter 16A of the Laws of Kenya.

⁴⁹ Section 6 of the Zambia Institute of Legal Education Act and section 8 (4) of the Legal Practitioners Act of Namibia respectively

Tenure and
vacancy

... (1) A person appointed to the Council, other than an *ex-officio* member, shall hold office as a member of the Council for a period of four (4) years and may be eligible for re-appointment for one (1) more term.

(2) A vacancy in the office of an appointed member shall occur, if the member—

(a) dies;

(b) is adjudged bankrupt;

(c) has physical or mental incapacity;

(d) is sentenced under any written law to a term of imprisonment without an option of a fine;

(e) ceases to possess the qualification necessary as a prerequisite to appointment;

(f) is absent from three (3) consecutive meetings of the Council, of which he has had notice; or

(g) resigns in accordance with subsection (3).

(3) An appointed member may at any time resign his office by giving one (1) month written notice to the Minister.

(4) An appointed member may be removed from office by the Minister before the expiration of his term of office, if the Minister is satisfied that the appointed member—

(a) is incompetent; or

(b) has misconducted himself.

(5) A vacancy in the membership of the Council shall be filled, for the remainder of the term, by the appointment of a new member:

Provided that if the remaining period is less than six (6) months, the vacancy may not be filled until the expiry of the period.

SECTION 7 [*Procedure of Council*]

This section stipulates procedure of the Council's meetings. It also stipulates that quorum for the Council's meetings is five members. The Commission recommends retention of the provision but subject to rearrangement of the provisions as follows:

Procedure of
Council

... (1) The Council may regulate its own procedure.

(2) The quorum of the Council shall be five (5) members.

(3) The validity of any of the proceedings of the Council

shall not be affected by a vacancy in the membership of the Council, or by a defect in the appointment of a member, or by reason that a person not entitled to do so took part in any proceedings.

SECTION 8 [*Powers of Council*]

The provision stipulates that the Council has such powers to do such things as it considers expedient for the carrying out of its responsibilities. However, it further states that the members of the Council are not entitled to remuneration or allowances in respect of their office. But it further states that the Minister may authorize payment of travelling and other allowances at the rate applicable to officers in the service of Government.

The Commission examined the provision in light of practice for Government officers in similar institutions and whether they receive remuneration or allowances and found that they actually do receive remuneration or allowances. The Commission therefore found no reason for excluding members of the Council from receiving remuneration or allowances.

The Commission observes that the provision does not specify the powers of the Council, and found this unsatisfactory. The Commission recommends that some powers be elaborated under the section. The Commission further recommends that this section be amended by splitting it into two sections to read as follows:

Powers of
the Council

... For the better performance of its functions, the Council shall have power to—

(a) establish committees and delegate to any such committees any of its functions as the Council considers necessary;

(b) enter into a contract or agreement;

(c) raise money by way of loans or overdrafts;

(d) receive donations of money or other property from any person or body of persons for the furtherance of its functions;

(e) publish, from time to time, professional or other information which it deems necessary or expedient for the performance or exercise of the functions of the Council; and

(f) to do any act, matter or thing it deems necessary for fulfilling the functions of the Council.

Allowance ... Members of the Council shall be paid an allowance determined by the Minister, from time to time.

NEW PROVISIONS

The Commission noted that the Council has not been visibly active to the legal profession and the public at large since its inception. The Commission considered that one of the reasons for this has been the absence of a permanent secretariat where the Council is based. The Commission was of the view that if a secretariat was put in place, there would be better organization and coordination of the activities of the Council. The members of the profession would also be in a better position to access personnel who are resident at the premises of the institution in case issues regarding or involving the secretariat arise. The Commission recommends the establishment of a secretariat of the Council, its structures and employees. The Commission therefore recommends the introduction of new provisions as follows—

Secretariat of the Council ... The Secretariat of the Council shall consist of the Executive Director and other members of staff of the Council appointed under this Act.

Executive Director ... (1) There shall be the office of the Executive Director of the Council who shall be the chief executive officer of the Council and shall perform duties assigned to his office by the Council from time to time.

(2) The Executive Director shall be appointed by the Council on terms and conditions determined by the Council.

(3) The Executive Director shall be a person who has a qualification in law and has practiced the profession of the law for at least ten (10) years.

(4) The Executive Director shall hold office for a period of three (3) years and may be re-appointed.

Duties of the Executive Director ... (1) Subject to the general and special directions of the Council, the Executive Director shall be responsible for the day to day management of the Council and shall exercise executive and administrative control over the staff of the Council.

(2) The Executive Director or any other officer of the Council that the Executive Director may designate, shall attend meetings of the Council or of any committee of the Council and may address the meetings but shall not vote on any matter.

(3) A person presiding at any meeting referred to in

subsection (2) may for good reason, require the Executive Director or the officer referred to in that subsection, to withdraw from the meeting.

Removal of
Executive
Director

... (1) The Council may remove the Executive Director from office on the following grounds:

(a) misconduct;

(b) incompetence;

(c) physical or mental incapacity;

(d) bankruptcy; or

(e) where he is otherwise unable or unfit to discharge the functions of his office.

(2) The Council shall only remove the Executive Director from office upon giving him a reasonable opportunity to be heard.

Staff

... (1) The Council may appoint other staff, subordinate to the Executive Director, as the Council considers necessary for the proper discharge of its functions.

(2) The Council may, by directions in writing, delegate to the Executive Director, appointment of junior officers of the Council as specified in the directions.

(3) The Executive Director shall report to the Council, at its regular meetings or as the Council may request, every appointment made pursuant to subsection (2).

The Commission was also of the view that one of the reasons for lack of vibrancy in the activities of the Council is the absence of clear guidelines as to when the Council should meet. The Commission was of the view that the Council should be obliged to meet regularly to transact its business. In Zambia, the Council is obliged to meet for the transactions of business at least once in every three months.⁵⁰ Further, the Chairperson of the Council is mandated to call a meeting of the Council by giving notice of less than the recommended period if one third of the members so request.⁵¹

The Commission recommends that the law should provide for meetings of the Council. The Commission felt that if the Council is obliged to meet by law, then its visibility shall be enhanced. The Commission therefore recommends the adoption of the following new provision as follows—

Meetings of
the Council

... (1) The Council shall meet, at least once every three (3) months, at a place and at a time determined by the Chairperson.

⁵⁰ Section 9 (2) of the Zambia Institute of Advanced Legal Education Act

⁵¹ *Ibid.* sub-section 3

(2) An ordinary meeting of the Council shall be convened upon giving a written notice of at least fourteen (14) days to the members.

(3) The Chairperson—

(a) may, at his own instance,; or

(b) shall at the written request of three (3) or more members and within seven (7) days of the request, convene an extraordinary meeting of the Council, at a place and a time appointed by him.

The Commission further considered that one of the reasons given by membership of the Council for failure to hold meetings has been the issue of funding. The Commission noted that the Act does not provide for funding mechanisms for the Council notwithstanding the fact that it is a body corporate established by statute.

The Commission noted that in other comparable jurisdictions, similar Councils are funded by their governments. This is the case in Kenya⁵² and Zambia.⁵³ In Namibia, administrative work of the Board of Legal Education is done by an officer of the Ministry of Justice.⁵⁴ The Ministry may designate an officer to act as secretary of the Board or of any committee of the Board.⁵⁵ The Commission also appreciates that the Malawi Law Society advocated for this position in its proposed Legal Profession Bill.⁵⁶

The Commission therefore recommends that the proposed law should provide for funding for the Council and that the principal source of funding shall be the Consolidated Fund through a vote from the National Assembly. It further recommends that the Council should be empowered to receive funds from other sources as well. This position is in line with other comparative jurisdictions such as Zambia, where it is expressly stipulated in the Act that it shall receive moneys appropriated by Parliament, paid to the Council by way of fees, levy, grants or donations.⁵⁷ The Commission therefore recommends the adoption of financial provisions as follows:

Funding of the ... (1) The funds of the Council shall consist of—
Council

(a) sums appropriated by Parliament for purposes of the Council; and

(b) money raised by the Council by way of fees, donations, subscriptions, gifts or charges.

⁵² Section 16 (3) of the Council of Legal Education Act, Chapter 16A of the Laws of Kenya.

⁵³ Section 17 (1) of the Zambia Institute of Legal Education Act, Chapter 49 of the Laws of Zambia.

⁵⁴ Section 14 of the Legal Practitioners Act of Namibia, Act No. 15 of 1995.

⁵⁵ *Ibid.*

⁵⁶ Section 9 of the said proposed Bill.

⁵⁷ *Ibid.* section 17

(2) The Council shall apply its funds for the purposes of its objectives and may invest any surplus of its funds.

Accounting and auditing

Cap. 37:02

... (1) The Council shall keep and maintain proper books and records of account of its funds and property and shall in every respect comply with the Public Finance Management Act.

(2) The accounts of the Council shall be examined and audited annually by the Auditor General or an auditor appointed by the Council and approved by the Auditor General, but the Minister may direct that the accounts of the Council be examined and audited at any time.

PART III—ADMISSION TO PRACTICE

This Part was the subject matter of the review process undertaken in 2002 by the Law Commission. The provisions referred to under this Part, where applicable, are those in the Legal Education and Legal Practitioners (Amendment) Act, Act No. 9 of 2004.

The Commission noted that this Part provides for different categories of applicants for admission to practice as legal practitioners in Malawi. These categories include applicants who hold a law degree from the University of Malawi; applicants who hold foreign law qualifications; applicants in a special cause or matter; and applicants who have been admitted to practice the profession of law outside Malawi. There are more categories which include *ex-officio* legal practitioners and other legally qualified public officers who may also apply. There is also a distinction based on citizenship which requires non-citizens to hold residence for a minimum period of three months prior to application.

The Commission considered that the current scheme is rather confusing and intertwined and that it is necessary for the Commission to clarify these categories and their qualifications for admission to practice law.

SECTION 9 [*Admission to practice*]

This section bars a person who was not admitted in accordance with the Act from practicing as a legal practitioner in Malawi,⁵⁸ prohibits a person that is conditionally admitted from practicing, unless, he or she complies with the conditions of the admission.⁵⁹ It also stipulates qualifications for admission under the Act.⁶⁰

The Commission noted its earlier recommendation that, for purposes of admission to practice as a legal practitioner in Malawi, one must have a law degree from the University of Malawi or a local institution accredited by the

⁵⁸ Subsection (1).

⁵⁹ *Ibid.* subsection (2).

⁶⁰ *Ibid.* subsections (3), (4), (5), (6) and (7).

Council of Legal Education to offer a law degree. The Commission therefore noted that section 9 (4) (a) which only recognizes the University of Malawi, if not aligned with this recommendation, would be inconsistent with the said recommendation. The Commission therefore recommends that the said provision should be amended by deleting the words, “(a) he holds a degree in law awarded by the University of Malawi;” and replacing them with the words “**(a) a degree in law awarded by an institution accredited to offer legal education by the Council;**”. The Commission recalled its earlier recommendation that the Council shall be responsible for the accreditation of all law schools operating in Malawi, including the University of Malawi Law School.

The Commission observed that section 9 (2) provides for conditional admission which is provided for under section 11A of the Act. The Commission considered dealing with this provision together with section 11A where it has recommended deletion of section 11A. It follows therefore that section 9 (2) also be deleted.

The Commission further observed that in Zambia, eligibility for admission is met when a person possesses a law degree from the University of Zambia and has enrolled with the Institute for a one year post graduate course and has passed the Legal Practitioners’ Qualifying Examination.⁶¹

The Commission considered the provisions of subsection (3) and noted that in light of the latter recommendations regarding sections 11 and 12 (3), subsection (3) should be deleted and replaced with the following provision—

(...) A person shall not apply for admission to practice as a legal practitioner, unless he qualifies for admission in accordance with section

The Commission debated the provision of subsection (4) at length and noted that the provision opens up the admission to practice the profession of law in Malawi to non-Malawians as long as the non-Malawian citizen “has resided in Malawi for a continuous period of not less than three months immediately before the date of the filing of his petition for admission under section 12”.⁶² The Commission considered that while this has been the practice before, the period of three months is too short. The Commission was of the view that it is also not clear what the person would be doing within the three months of residence in Malawi nor has the law specified the obligations that arise within the three months. The Commission also referred to the submissions that were made in 1995 and observed that while this provision was already in the Act then, the purpose of section 9 (4) was to cater for Malawians. The alternative that is offered under section 9 (4) with respect to residence for three months applies to applicants under section 12 which covers individuals who apply to appear in a specific cause or matter. The Commission resolved that in order to clarify the categories of people admitted to practice the profession of law in Malawi, section 9 should be amended

⁶¹ Section 11 A of the Legal Practitioners Act of Zambia

⁶² Law Commission Report No. 7

to provide for one category of Malawian citizens only.

In respect of paragraph (b) of section 9 (4), the Commission noted that in the Report of the Law Commission on the Review of the Legal Education and Legal Practitioners Act⁶³, its sister Commission justified retention of “the long standing recognition of legal qualifications obtained from jurisdictions of the territories of the British Isles” on the ground that “the system of law in Malawi is based on the system of law in the United Kingdom.⁶⁴ The Commission further observed that while this justification was earlier applicable to Commonwealth countries, the admission of countries such as Mozambique and Rwanda into the Commonwealth paints a different picture. Rwanda and Mozambique were former colonies of Belgium and Portugal respectively and do not use the Common Law as the basic system of law. The Commission considered that it is possible that more countries that do not apply the Common Law as a basic system of law may be admitted into the Commonwealth and to sustain this provision would subject Malawi to admitting legal practitioners who have studied or practiced under an incompatible system of law.

The Commission observed that under section 9 (5), a recognizable foreign law qualification is one that has been awarded from a jurisdiction that applies as its prevailing basic system of law, the Common Law or Roman-Dutch Law as practiced in the countries of Southern Africa, the recognition of admission to practice should be restricted to those countries whose law qualifications are recognised as acceptable foreign law qualifications in Malawi. Therefore the Commission recommends that sections 9 (4) (b) should be amended by deleting the words “England and Wales, Scotland, Northern Ireland or the Republic of Ireland” and replacing them with the words:

“a country which applies, as its prevailing system of law,—

(a) the Common Law or a legal system founded wholly or in part on the Common Law; or

(b) the Roman-Dutch Law, as practiced in Southern Africa.”

The Commission also noted that in light of its earlier recommendation to restrict the application of section 9 to Malawian citizens, subsection (5) should be amended accordingly by deleting the opening words of subsection (5) and paragraph (a) and replacing them with the words—

(...) A person may be admitted to practice as a legal practitioner, if he is a citizen of Malawi at the date of the filing of his petition for admission, and if he holds:

(a) ...”

On the same account of the provision being restricted to Malawians, the Commission recommends the deletion of subsection (5) (d).

⁶³ Page 10, third paragraph

⁶⁴ *Ibid.*

In light of the foregoing recommendations, the Commission recommends deletion of this provision and recommends the introduction of a new provision as follows—

Admission to practice ... (1) A person shall not practice as a legal practitioner in Malawi, unless he has been admitted to practice in accordance with this Act.

(2) A person shall not apply for admission to practice as a legal practitioner, unless he qualifies for admission in accordance with section

(3) An application for admission to practice as a legal practitioner shall be made by petition, verified by an affidavit of the petitioner and shall be heard by the Chief Justice in open court.

(4) The Chief Justice may make rules generally regulating the procedure for the admission to practice of any person and more particularly concerning the form of any petition, the affidavit or other annexures required to be filed with any petition, and their form, the procedure on the hearing of a petition, the order to be made after a hearing, the oath or oaths to be taken by any person admitted to practice.

SECTION 9A [Conditions for recognition of a foreign law qualification]

This provision was introduced in 2004. It sets conditions that the Council may employ in order to recognize a foreign law qualification whose holder wants to be admitted to practice as a legal practitioner in Malawi.⁶⁵ It also lists the factors that the Council may consider for the purposes of so recognizing the foreign law qualification, which include:

- (a) the subjects of law studied;
- (b) the content and duration of the courses of study that led to the award of the law degree;
- (c) the basic system of law applied in the jurisdiction from which the degree was obtained;
- (d) whether the applicant was admitted to practice the profession of law in the jurisdiction from which the qualification was obtained, and, if not, whether he fulfilled all the eligibility requirements for admission to practice the profession of law in that jurisdiction; and
- (e) other matters of proficiency that appear relevant to the Council.⁶⁶

⁶⁵ Subsection (1).

⁶⁶ Subsection (2).

In other jurisdictions, Zambia, for instance, a foreign law qualification must first be recognised by the University of Zambia as being academically equivalent to a law degree obtained from the University of Zambia before the Council approves it.⁶⁷ It is after this that the holder is enrolled with the institute to pursue a one year post graduate course and must pass the Legal Practitioner Qualifying Examination, that is when he can be admitted to practice law in Zambia. Where the law degree which was obtained outside Zambia is found not to be up to the required standard, the applicant must take remedial courses at the Law School. However, degrees obtained from non-common law jurisdictions are not recognized and the applicant must acquire a Zambian law degree in order to be accepted for admission to practice law in Zambia.

The Commission recommends that the conditions set out under subsection (1) should be attached to the definition of a foreign law qualification and further that the opening statement for subsection (1) should be deleted. The Commission recommends retention of subsection (2) under the new provisions.

The Commission therefore recommends the adoption of a new provision as follows—

**Qualifications
for admission
to practice**

... (1) A person may be admitted to practice as a legal practitioner if he is a citizen of Malawi at the date of the filing of his petition for admission, and if he holds—

(a) a degree in law awarded by an institution accredited to offer legal education by the Council; or

(b) a foreign law qualification as defined in subsection (4);

and has enrolled with the Institute for a period of not less than one (1) year and has passed the Malawi Law Examination.

(2) If a citizen of Malawi has been admitted to practice as a legal practitioner in a country which applies, as its prevailing system of law,—

(a) the Common Law or a legal system founded wholly or in part on the Common Law; or

(b) Roman-Dutch Law, as practiced in Southern Africa,

he may, upon passing the Malawi Law Examination, apply to the Chief Justice, for admission to practice as a legal practitioner.

(3) A citizen of Malawi who holds a foreign law qualification shall not be eligible to be admitted to practice,

⁶⁷ *Ibid.* section 11.

unless:

(a) the foreign law qualification was obtained from a jurisdiction that applies, as its prevailing basic system of law,:

(i) the Common Law or a legal system founded wholly or in part on the Common Law; or

(ii) Roman-Dutch law as applied and practiced in countries of Southern Africa;

(b) he is, in the jurisdiction from which the foreign law qualification was obtained, either—

(i) admitted to practice the profession of law and is not under any disciplinary charge for professional misconduct; or

(ii) eligible to practice the profession of law, but, although otherwise eligible, he is denied such eligibility solely on the ground that he is not a citizen or a resident of, or does not owe allegiance to, or solely to, the country or territory of that jurisdiction; and

(c) he has passed the Malawi Law Examination.

(4) For the purpose of this Part, “a foreign law qualification” means an undergraduate degree in law, taught in the English language, comprising subjects specified by the Council from time to time and obtained from a jurisdiction other than Malawi, and—

(a) was obtained pursuant to a course of undergraduate study, with a University or similar institution, that is designed to last at least three (3) academic years;

(b) is, as assessed by the Council, comparable in scope to the undergraduate degree in law awarded by a public University in Malawi, designated for that purpose, by the Council or otherwise to be of the appropriate scope for the training of a person to qualify him to practice the profession of law; and

(c) constitutes qualifying training towards eligibility for admission to practice the profession of law in the jurisdiction from which it was obtained.

(5) In assessing a foreign law qualification for purposes

of its recognition, the Council shall consider-

- (a) the subjects of law studied;
 - (b) the content and duration of the courses of study that led to the award of the law degree;
 - (c) the basic system of law applied in the jurisdiction from which the degree was obtained;
 - (d) whether the applicant was admitted to practice the profession of law in the jurisdiction from which the qualification was obtained, and, if not, whether he fulfilled all the eligibility requirements for admission to practice the profession of law in that jurisdiction save only as otherwise provided in section ... (3) (b) (ii); and
 - (e) other matters of proficiency as may appear relevant to the Council.
- (6) For purposes of this Part, “Southern Africa” includes countries listed in the [...] Schedule.

SECTION 10 [*Malawi Law Examination*]

This section was also amended in 2004. It requires a person who seeks to be admitted to practice as a legal practitioner in Malawi but whose law qualifications were obtained from a foreign jurisdiction to sit for the Malawi Law Examination.⁶⁸ It also obliges the Council to set, conduct and manage the examination,⁶⁹ provides for the examination fee payable by the aspiring candidates,⁷⁰ and provides that a candidate may not repeat taking the examinations more than four times subsequent to the first attempt.⁷¹

The Commission recommends the amendment of this provision in light of the proposal to introduce an Institute which shall take over some functions of the Council in this regard. For instance, under section 10 (1), it is the Institute that shall certify in writing to the Registrar that the petitioner has passed the Malawi Law Examination; under section 10 (2), the Malawi Law Examination shall be set, conducted and managed by the Institute and that the powers conferred under paragraphs (a) and (b) of that subsection, shall be exercised by the Institute. The Commission therefore recommends that the word “Council” in section 10 be deleted and be replaced with the word “**Institute**” wherever it appears in that section.

However, the Commission noted that if the functions under section 10 are generally undertaken by the Institute, the reference to the Council under

⁶⁸ Subsection (1).

⁶⁹ Subsections (2) and (3).

⁷⁰ Subsections (4) and (5).

⁷¹ Subsection (9).

subsection (8) should be maintained since the appeal cannot lie to the body that made the decision in the first place. As such, the Commission recommends retention of subsection (8).

In light of the foregoing recommendations, the Commission recommends the adoption of the following provision:

Malawi Law
Examination

... (1) **Except as otherwise provided under this Act, a person who seeks to be admitted to practice law in Malawi shall be required to take the Malawi Law Examination.**

(2) **A petition for admission shall not be heard, unless the Institute has certified in writing to the Registrar that the applicant has passed the Malawi Law Examination.**

(3) **The Malawi Law Examination shall be set, conducted and managed by the Institute, and for that purpose the Institute shall—**

(a) **develop a syllabus in respect of which candidates shall be examined and shall make the syllabus generally available; and**

(b) **make available to every candidate, at least thirty (30) days before the date of the examination, a copy of the syllabus for the examination.**

(4) **The Institute shall review the syllabus from time to time.**

(5) **The Institute may enlist the services of any person, body or institution with relevant expertise to assist it with the development of the syllabus referred to in subsection (2) and the setting, conduct or management of the Malawi Law Examination.**

(6) **A candidate of the Malawi Law Examination shall, before taking the examination, —**

(a) **produce the original copy of his qualification for recognition by the Institute; and**

(b) **pay to the Institute such fees, as may be prescribed.**

(7) **Any examination fee paid by a candidate shall not be refundable whether the candidate passes or fails the examination.**

(8) **A candidate who fails the Malawi Law Examination and disputes the result may appeal to the Council to have his answers re-marked and the Council, if satisfied with the**

reasons in support of the appeal, shall direct that the answers be re-marked within a reasonable time by any other competent person appointed by the Institute for that purpose.

(9) A candidate who fails the Malawi Law Examination may re-take the examination for a maximum of four (4) times subsequent to the first attempt.

SECTION 11 [*Admission to practice of legally qualified public officers*]

This section stipulates that a person who holds a degree in law awarded by the University of Malawi, or was admitted to practice as a member of the profession of law in England and Wales, Scotland, Northern Ireland or the Republic of Ireland, and has been in active employment in Government service including the Office of the Ombudsman, the Human Rights Commission and the Law Commission for a period of at least one year may apply to the Chief Justice to be admitted to practice as a legal practitioner. This admission is unconditional.⁷²

The Commission considered the provision in light of the proposed Institute and felt that there are cases where Government would like to engage lawyers from other jurisdictions as a matter of urgency. The Commission considered that these lawyers shall be screened by Government and as such, they need not be required to attend the Institute as prescribed by the Commission in its recommendation. The Commission considered that Government should endeavour to engage lawyers who have already been admitted to practice in their countries of origin. In case of lawyers graduating from the University of Malawi or any university in Malawi accredited by the Council, the Commission recommended that such lawyers should, as a matter of course, go through the Institute prior to engagement by Government.

The Commission therefore recommends amendment of this provision by deleting the words “holds a degree in law awarded by the University of Malawi or”.

In consequence, the Commission recommends the adoption of the following new provision—

Admission to
practice of
legally
qualified
public officers

... **(1) A person who—**

(a) has been admitted to practice as a legal practitioner in a country, other than Malawi, which applies, as its prevailing system of law,—

(i) the Common Law or a legal system founded wholly or in part on the Common Law; or

⁷² Law Commission, Law Commission Report No. 7: Report of the Law Commission on the Review of the Legal Education and Legal Practitioners Act; September 2002.

(ii) the Roman-Dutch Law, as practiced in Southern Africa; and

(b) has been in active employment, in a judicial or legal capacity in public service, performing legal duties on behalf of the Government for a period of one (1) year,

may, on making an application to the Chief Justice in that behalf, be admitted by the Chief Justice, after consultation with the Council, to practice as a legal practitioner.

(2) Every application under subsection (1) shall be by petition addressed to the Chief Justice and verified by affidavit of the applicant and shall be made within ninety (90) days from the date of completing the qualifying period specified under subsection (1).

(3) The Chief Justice may hear an application made out of time upon good cause being shown, by affidavit of the applicant, as to why the application was not made within the prescribed period.

SECTION 11A [*Conditional admission to practice*]

This section, as amended in 2004, provides that a person who practiced as a qualified legal practitioner for a period of at least two years in—

(a) a jurisdiction which applies, as its prevailing system of law, the Common Law or a legal system founded wholly or in part on the Common Law; or

(b) a country of Southern Africa which applies, as its prevailing basic system of law, the Roman-Dutch Law,

and that person does not possess qualifications set out in section 11 or 12 (3), may be admitted conditionally. It also indicates that the following categories of persons seeking to be admitted to practice as a legal practitioner in Malawi may be so admitted conditionally:

(a) person who holds a degree in law awarded by the University of Malawi;

(b) a person who has practiced for a period of less than two years in—

(i) a jurisdiction which applies, as its prevailing system of law, the Common Law or a legal system founded wholly or in part on the Common Law; or

(ii) a country of Southern Africa which applies, as its prevailing basic system of law, the Roman-Dutch Law.

Section 11A (2) of the Act was not amended. It sets the conditions for a person who has been admitted to practice as a legal practitioner conditionally. Subsection (3) of section 11A of the principal Act too was not amended. It provides for the procedure through which an application for removal of conditional admission may be made. The Commission having observed that in light of the introduction of the Institute, the only circumstance under which a person may be admitted conditionally is on re-admission. The Commission therefore found that section 11A is obsolete and recommends its deletion.

SECTION 12 [*Procedure on applications for admission to practice*]

Section 12 provides for the procedure an applicant for admission to practice the profession of the law is required to follow in order to get admitted to practice. It also provides for the procedure to be followed by a person seeking to practice in a specific cause. The latter is required to pay a prescribed fee per amendment of subsection (3).

The Commission observed that the prescribed fees under section 12 (3) is still very minimal. The Commission was of the view that the fees under subsection (3) should be significant and recommends that fees under this subsection should be prescribed in the proposed law. The Commission was of a further view that fees hereunder should be payable to Malawi Law Society. The Commission found this position appropriate since the Society is mandated to protect both the profession and the legal practitioners on the one hand and the public on the other. The Commission was also mindful of the recommendation that the Society and the Attorney General should be mandated to be served with any process of an application for admission and also be given the right to respond to the issues raised by the applicant in his affidavit in support of the application. It was the Commission's view that the fee, if payable to the Society would enable the Society to effectively carry out this mandate.

The Commission also considered whether the applicant seeking to be admitted to appear in a specific cause under subsection (3) would have to contribute to the Fidelity Fund. The Commission was of the view that although applications hereunder are for a specific cause or causes, the purpose for which the Fidelity Fund was established may still arise and loss may occur. The applicant for appearance in specific cause should, therefore, not be exempt from the requirement of Fidelity Fund contribution.

The Commission recommends retention, subject to an amendment that the fees under subsection (3) should be payable to Malawi Law Society and that the subsection should be a stand-alone section as follows:

Admission to
practice in a
specific cause

... (1) The Chief Justice may, without formality, admit to practice as a legal practitioner for the purpose of a specific cause or matter, any person who, in the opinion of the Chief Justice—

(a) has sufficient legal knowledge and qualifications;

(b) is of good character;

(c) has come to Malawi for the purpose of appearing in the specific cause or matter;

(d) has paid a fee to the Society as prescribed in the [...] Schedule; and

(e) has paid a contribution to the Fidelity Fund, as determined by the Society.

(2) A person admitted to practice in accordance with this section shall, for purposes of this Act, be deemed to be a legal practitioner for the period he is required to appear in the cause or matter.

SECTION 12A [*Reciprocal recognition to practice the profession of law*]

This is a new provision brought as a result of the 2004 (Amendment) Act. It provides for the procedure in which there may be reciprocal recognition in other countries, to practice the profession of law as a result of bilateral or multilateral agreements between Malawi and any other country or group of countries. The provision limits this recognition to only those countries or group of countries with which Malawi has entered into a written bilateral or multilateral agreement to that effect.

The Commission considered the rationale behind the introduction of this provision as justified in the Report of the Law Commission on the Legal Education and Legal Practitioners Act.⁷³ The main justification for inclusion of this provision was to make the Act progressive. During its stakeholders' workshop, prior to the 2004 amendment, the Commission was persuaded by participants on the need to anticipate regional protocols allowing reciprocal recognition of the practice of the profession of law. The participants had in mind the regional framework of the Common Market for East and Central Africa (COMESA), under which a court of law has been established to hear commercial and investment disputes emanating from within the regional grouping. They also had in mind such framework within the Southern Africa Development Community (SADC).

The said Report indicates that the Commission then was faced with two options, namely, to wait for promulgation and ratification of such a protocol by which time the contents and context of the agreement would be appreciated by the parties involved, or, to 'act progressively enacting an enabling provision in the Act for the reciprocal recognition of such practice'. The earlier Commission opted for the latter.

⁷³ Law Commission Report No. 7, at pages 21 and 22.

However, the Commission was of a different view. On the one hand, it noted that the justification for the position is not *in tandem* with the effect of the provision. The Commission was of the view that for a legal practitioner from this country to appear in either a COMESA or SADC court or tribunal, he does not need the envisaged reciprocal agreement between Malawi and the country in which the court is situated. What is crucial is whether or not Malawi promulgated and ratified the enabling treaty. This is so because the legal practitioner would not seek right of audience in the domestic courts of that country. The legal practitioner would seek such right in the regional court. On the other hand the effect of section 12A is that it enables the Executive to enter into the agreement with any other country, be it within COMESA or SADC or otherwise. The Report records the earlier Commission's view that it would be appropriate for the Executive to consult Malawi Law Society and the Council of Legal Education before entering into such agreement 'to ensure that the interests of the profession are protected'.

Therefore the Commission was of the view that in respect of the COMESA and SADC Regional Courts, section 12A is not necessary. In case Malawi would want, at political level, to enter into the envisaged reciprocal agreement with any other country that would be in respect of right of audience in domestic courts of the parties. The Commission, therefore, was of the view that the best approach to the issue is to wait until Malawi enters into such an agreement in which case enabling rules would be made accordingly under a provision akin to the current section 44 (1).

Consequently, the Commission recommends deletion of this provision.

NEW MATTERS WITH RESPECT TO PROCEDURE FOR ADMISSION TO PRACTICE

The Commission observed that it is established practice that during the hearing of a petition for admission to practice as a legal practitioner, the Attorney General and the Society are given an opportunity to be heard in the matter on the understanding of the interest they have in the matter. Sometimes, the Attorney General or the Society do object to the admission of an applicant legal practitioner and the court may or may not allow the objection. The Commission was of the view that this role of the Attorney General and the Society is critical in ensuring that the integrity of the profession is protected. However, the Commission lamented that there is no formal provision recognizing the role of these two institutions in the admission process. The Commission therefore recommends the introduction of specific provisions requiring the Attorney General and the Society to become parties to an application for admission by a lawyer intending to practice as a legal practitioner in Malawi.

The Commission further observed that with the Institute in place⁷⁴ and its main role being preparation of aspiring legal practitioners for legal practice, it

⁷⁴ The Malawi Institute of Legal Education was introduced by law through Legal Education and Legal Practitioners (Amendment) Act, Act No. 25 of 2010.

shall no longer be necessary to require that upon admission to practice, a legal practitioner should be supervised for a period of at least one year. The Commission, however, found that supervision would still be required in cases of re-admission.

The Commission also noted that there is need for an applicant for admission to practice to make full and frank disclosure of his or her background and report any matter which is likely to affect his or her application. If any matter is deliberately withheld, which ought to have been disclosed because it would have affected the outcome of the application for admission to practice, or if disclosed, it was not disclosed fully and frankly, then the disciplinary mechanism shall be instituted against the legal practitioner.

The Commission also observed that for an esteemed profession, the legal profession should require that upon admission to practice, a legal practitioner must take an oath to uphold such values as are necessary in order to maintain the good reputation of the profession.

The Commission therefore recommends the adoption of new provisions as follows—

Attorney General and Society party to admission proceedings

... (1) A person applying for admission to practice as legal practitioner shall serve the petition on the Attorney General and the Society.

(2) The Attorney General or the Society may reply to any matter raised in the petition and shall be given an opportunity to be heard at the hearing of any application, by any person, for admission to practice as a legal practitioner.

Applicant to make full disclosure

... (1) In an application for admission to practice as a legal practitioner, the applicant shall make full disclosure of all material facts that would affect the outcome of his application.

(2) If the applicant does not make full disclosure of all material facts in his application, the Attorney General or the Society may, at any time that the material facts come to their knowledge, apply to the Chief Justice to nullify the admission.

(3) The Attorney General or the Society may, in addition to the application under subsection (2), institute disciplinary or legal proceedings against the applicant.

Oath or affirmation

... A person who applies to be admitted to practice the profession of law in Malawi, shall, before he is admitted, take an oath or affirmation prescribed in the [...] Schedule,

that he shall—

- (a) uphold the Constitution;**
- (b) uphold the interests of their clients; and**
- (c) maintain the integrity of the profession of law.**

PART IV—ARTICLED CLERKS

SECTION 13 [*Articled clerks who may be admitted to practice*]

The Part on articled clerks comprising only one section was repealed in 2004. The Commission considered this matter and agreed with the reasoning of its sister Commission on the repeal of this provision.⁷⁵

PART V—NOTARIES PUBLIC

SECTION 14 [*Interpretation*]

This section provides that the expression “to practice as a notary public” means to perform *mutatis mutandis* the functions and duties commonly performed by a notary public in England.

The Commission established that a notary public is a public officer constituted by law to serve the public in non-contentious matters usually concerned with estates, deeds, powers-of-attorney, and foreign and international business. A notary’s main functions depend on his or her jurisdiction. The main functions involve administration of oaths and affirmations, taking affidavits and statutory declarations, authenticating the execution of certain classes of documents, taking acknowledgements of deeds and other conveyances, protest notes and bills of exchange, provide notice of foreign drafts, preparing marine protests in cases of damage, providing exemplifications and notarial copies, and performing certain other official acts. The acts described above are referred to as notarization or notarial acts.

Notaries Public can be traced back to ancient Rome where they were called *scribae*, *tabellius* or *notarius*.⁷⁶ The history of Notaries shows that the office of a public notary is a public office with a long and distinguished history. The office has its origin in the civil institutions of ancient Rome. Public officials, called *scribae*, that is to say, scribes, rose in rank from being mere copiers and transcribers to a learned profession prominent in private and public affairs. Some were permanent officials attached to the Senate and courts of law whose duties were to record public proceedings, transcribe state papers, supply magistrates with legal forms, register decrees and judgments of magistrates.

In the last century of the Roman Republic, probably in the time of Emperor Cicero, a new form of shorthand was invented and certain arbitrary marks and

⁷⁵ See Report No.7, Report of the Law Commission on the Review of the Legal Education and Legal Practitioners Act, September, 2002, Government Printer, Zomba.

⁷⁶ Chapter 1 of *Brooke’s Notary* (12th Edition).

signs, called *notae*, were substituted for words in common use. A writer who adopted the new method was called a *notarius*. Originally, a notary was one who took down statements in shorthand and wrote them out in the form of memoranda or minutes. Later, the title *notarius* was applied almost exclusively to registrars attached to high government officials, including provincial governors and secretaries to the Emperor.

Notwithstanding the collapse of the Western Empire in the 5th Century AD, the notary remained a figure of some importance in many parts of continental Europe throughout the Dark Ages. When the civil law experienced its renaissance in medieval Italy from the 12th Century onwards, the notary was established as a central institution of that law, a position which still obtains in countries whose legal systems are derived from the civil law.

The separate development of the common law in England, free from most of the influences of Roman law, meant that notaries were not introduced into England until later in the thirteenth and fourteenth centuries. At first, notaries in England were appointed by the Papal Legate. In 1279, the Archbishop of Canterbury was authorized by the Pope to appoint notaries. Not surprisingly, in those early days, many of the notaries were members of the clergy. In the course of time, members of the clergy ceased to take part in secular business and laymen, especially in towns and trading centres, began to assume the official character and functions of a modern notary.

A notary public in common law jurisdictions which includes England and Wales, is described in *Brooke's Notary*⁷⁷ as an officer of the law whose public office and duty it is to draw, attest to or certify under his official seal deeds and other documents, including wills or other testamentary documents, conveyances of real and personal property and powers of attorney; to authenticate such documents under his signature and official seal in such a manner as to render them acceptable, as proof of the matters attested by him, to the judicial or other public authorities in the country where they are to be used, whether by means of issuing a notarial certificate as to the due execution of such documents or by drawing them in the form of public instruments; to keep a protocol containing originals of all instruments which he makes in the public form and to issue authentic copies of such instruments; to administer oaths and declarations for use in proceedings to note or certify transactions relating to negotiable instruments, and to draw up protests or other formal papers relating to occurrences on the voyages of ships and their navigation as well as the carriage of cargo in ships.⁷⁸

Documents certified by notaries are sealed with the notary's seal or stamp and are recorded by the notary in a register (also called a "protocol") maintained and permanently kept by him or her. These are known as "notarial acts". In countries subscribing to the Hague Convention Abolishing the Requirement for Legalization of Foreign Public Documents only one further act of certification is

⁷⁷ Page 19.

⁷⁸ *Ibid.*

required, known as an *apostille*, and is issued by a government department (usually the Foreign Affairs Department or similar). For other countries, an “authentication” or “legalization” must be issued by the Foreign Affairs Ministry of the country from which the document is being sent or the Embassy, Consulate-General, or High Commission of the country to which it is being sent.

In other countries, notaries public are regulated by a separate legislation.⁷⁹ The specific legislation provides for the appointment and enrollment of notaries public, the regulation of the duties of the office of notary public and also empowers magistrates,⁸⁰ ambassadors⁸¹ and other specified public officers⁸² to perform specific notarial acts.

A notary public may perform the following functions: verify, authenticate and attest the execution of deeds and other documents, contracts and powers of attorney; verify translations of documents; present inland or foreign bills of exchange for payment, note the same, and amplify or extend such noting by preparing and signing the protest; note, amplify or extend, prepare, sign and seal protests concerning demurrage and other ships’ protests; superintend the drawing by lot of bonds of foreign States or corporations redeemable by drawings on fixed dates, and certify the numbers of the bonds so drawn; administer oaths and affirmations; prepare and take affidavits and declarations in lieu of oaths; take declarations, oaths and affidavits relating to stamp and other duties; take declarations in actions pending in any Commonwealth country relating to debt, where one of the parties reside in that or relating to real property situate in such Commonwealth country; and take declaration by the attesting witness of a will or deed or by any other competent person to prove the due execution thereof.⁸³

The Commission observed that in light of section 14 which provides that “to practice as a notary public” means to perform *mutatis mutandis* the duties and functions commonly performed by a notary public of England, it is necessary to list down the common functions of a notary public in England which are the following—

- (a) attesting to the signature and execution of documents;
- (b) authenticating the execution of documents;
- (c) authenticating the contents of documents;
- (d) administration of oaths and declarations;
- (e) drawing up or noting (and extending) protests of happenings to ships, crews and cargoes;
- (f) presenting bills of exchange for acceptance and payment, noting and protesting bills in cases of dishonour and preparing acts of honour;

⁷⁹ For instance, the Notaries Public and Notarial Functions Act (Cap. 35 of the Laws of Zambia).

⁸⁰ Notaries Public and Notarial Functions Act, section 12.

⁸¹ *Ibid.*, section 15.

⁸² *Ibid.*, section 13 mandates certain customs officers to perform functions of a notary public.

⁸³ Section 7 of the Notaries Public and Notarial Functions Act.

- (g) attending upon the drawing up of bonds;
- (h) drawing mercantile documents, deeds, sales or purchases of property, and wills in English and (via translation), in foreign languages for use in Britain, the Commonwealth and other foreign countries;
- (i) providing documents to deal with the administration of the estate of people who are abroad, or owning property abroad;
- (j) authenticating personal documents and information for immigration or emigration purposes, marriage applications or for purposes of working abroad;
- (k) verification of translations from foreign languages to English and vice versa;
- (l) taking evidence in England and Wales as a Commissioner for Oaths for foreign courts;
- (m) provision of notarial copies;
- (n) preparing and witnessing powers of attorney, corporate records, contracts for use in Britain or overseas;
- (o) authenticating company and business documents and transactions; and
- (p) international domain name transfers.

The Commission examined each and every function separately and noted that not all these functions are applicable in Malawi because either they are not exclusively performed by notaries public or because the transactions do not occur in Malawi. The Commission therefore recommends that only those functions that are relevant to Malawi shall be retained from the above list.

SECTION 15 [*Appointment of notaries public*]

This section stipulates how and who can apply for a certificate to practice as a notary public. It says that he must be a licensed legal practitioner and that the application must be made to the Chief Justice.⁸⁴ It further outlines the factors that the Chief Justice considers when determining the application.⁸⁵ It also states that granting of the said certificate is at the discretion of the Chief Justice and that it cannot be granted to a legal practitioner who has not held out a practicing licence for three years.⁸⁶

The Commission further considered the process of appointing a notary public and agreed that the appointing authority should remain the Chief Justice. However, with respect to conditions for appointment, the Commission noted that in Zambia, the Chief Justice is mandated to appoint any legal practitioner as a

⁸⁴ Subsection (1).

⁸⁵ Subsection (2).

⁸⁶ *Ibid.*

notary public if he has practiced law for at least five years immediately preceding his application for appointment as a notary public. Further, the Chief Justice may also, in his discretion and for good reasons, appoint a legal practitioner who has been engaged in the practice of law for a period of less than five years as a notary public. The Commission resolved that in light of the seriousness of the functions of a notary public and further in light of the gravity of the consequences of errors arising from exercise of those functions, only a legal practitioner of ten years standing at the Bar should be eligible for appointment as a notary public.

During the stakeholders consultative workshop, some participants expressed reservations that ten years was too much a qualification for an applicant for a certificate to practice as a notary public. They further pointed out that the functions of a notary public are not that complicated to warrant ten years experience as a legal practitioner. The Commission considered this submission accordingly. However it observed that ten years experience is essential since one would have acquired the required expertise to enable him perform the duties of a notary public effectively. The Commission further maintained its view that the consequences of underperformance in the execution of the duties of a notary public would, in certain cases be catastrophic and could raise doubts on the credibility of not only the practice of notaries public in particular but also that of the legal profession in general.

As such, the Commission recommends the deletion of section 15(2) (b) and replacing it with a provision that requires a legal practitioner to have practised for a period exceeding 10 years.

SECTIONS 16-18 [*Provisions related to certificate to practice as a notary public*]

Section 16 provides for the notary public certificate form, renewal of the certificate, recording of every renewal in the Roll and replacement of the certificate in case of loss or destruction or mutilation thereof. Section 17 stipulates what should be contained in the jurat whenever an oath, affidavit, declaration or acknowledgement is made before a notary public. Section 18 outlines conditions on which the Chief Justice may suspend or cancel a certificate to practice as a notary public. He may either suspend or cancel the said certificate if the concerned notary public ceases to practice as a legal practitioner. However, if the Chief Justice is of the opinion that the concerned notary public is not performing his duties as such satisfactorily, he may cancel the certificate.

The Commission recommends retention of these provisions.

SECTION 19 [*Penalty*]

This section provides for a penalty against a person who holds himself to be a notary public or receives any fees or rewards without being entitled to. For first offence, the penalty is a fine of K200 while for subsequent offence it is a fine of K500 and imprisonment for six months.

The Commission observed that the punishment for the offence provided for under this provision is out of date. It noted that although there is in place a Fines (Conversions) Act⁸⁷ which has a formula for enhancing outdated fines but still recommends that the penalty be enhanced in light of the grave consequences that would arise in case of a person holding out as a notary public. The Commission recommends the amendment of section 19 by deleting the words “K200” and replacing them with the words “K250,000” and further by deleting the words “K500” and replacing them with the words “K500,000”. The term of imprisonment for this offence has been maintained.

SECTION 20 [*Powers of the Chief Justice*]

This section empowers the Chief Justice to make rules for carrying out the purposes of Part V. The Commission observed that the Chief Justice has not promulgated the rules for the carrying out of purposes of Part V but recommends that the provision be retained in order to allow the Chief Justice to exercise his discretion to promulgate the rules.

In light of the foregoing, the Commission recommends the revision of Part V as follows—

PART ...

NOTARIES PUBLIC

Appointment
of a notary
public

... — (1) A legal practitioner who has been practising the profession of law for at least ten (10) years may apply to the Chief Justice for a certificate entitling him to practice as a notary public.

(2) In considering the application for such a certificate, the Chief Justice shall have regard to the requirements of the public and the number of notaries public already entitled to practice in the districts in which such notaries public reside.

(3) The granting of a certificate to practice as a notary public shall be in the sole discretion of the Chief Justice and the certificate shall not be granted to a legal practitioner who has not held a licence to practice for three years prior to his application, unless the Chief Justice for good reason thinks fit so to do.

(4) The Registrar shall maintain a Register for Notaries Public which shall include—

(a) the name of the notary public;

⁸⁷ Cap. 7: 06

(b) the date of appointment to practice as a notary public; and

(c) the location and address of the notary public.

Functions of
a notary
public

... The functions of a notary public shall include—

(a) attesting to the signature and execution of documents;

(b) authenticating execution of documents;

(c) authenticating the contents of documents;

(d) administering oaths and declarations;

(e) attending upon the drawing up of bonds;

(f) drawing mercantile documents, deeds, sales or purchases of property, wills and other legal documents, for use abroad;

(g) authenticating documents to deal with the administration of the estate of people who are abroad, or own property abroad;

(h) authenticating personal documents and information for immigration or emigration purposes, marriage applications or for purposes of working abroad;

(i) authentication of translations from foreign languages to English and vice versa;

(j) taking evidence in Malawi as a Commissioner for Oaths for foreign courts;

(k) provision of notarial copies;

(l) preparing and witnessing powers of attorney, corporate records, contracts for use in Malawi or other countries;

(m) authenticating company and business documents and transactions;

(n) conducting international domain name transfers; and

(o) any other function as may be prescribed by an Act of Parliament.

Certificate to
practice as a
notary

... —(1) A certificate to practice as a notary public shall be in the form set out in Part ... of the [...] Schedule hereto and

shall entitle the person named on it, upon payment of a fee set out in Part ... of the [...] Schedule hereto, to practice as such until the 31st March next following the date of issue and to levy fees in accordance with Part ... of the [...] Schedule.

(2) Every such certificate shall, on the expiry of its validity, be renewed by the Chief Justice for a period of one year, by endorsement thereon by the Registrar of the High Court, upon the application of the person named therein, and upon payment of the fees set out in Part ... of the [...] Schedule.

(3) The granting of every certificate under this section and every renewal thereof shall be recorded in the Register.

(4) When a certificate granted under the section has been lost, destroyed or mutilated, it shall be replaced by a fresh certificate upon application by the person named on it and upon payment of the fee set out in Part ... of the [...] Schedule.

(5) The Registrar shall keep a separate Register for renewal of certificates of notaries public.

Jurat to state where and when oath, etc. is taken

... A notary public before whom an oath, affidavit, declaration or acknowledgement is taken or made shall state truly in the jurat or attestation at what place and on what date the oath, affidavit, declaration or acknowledgement is taken or made.

Suspension or cancellation

... The Chief Justice may—

(a) suspend or cancel a certificate granted under section ..., if a notary public ceases to be entitled to practice as a legal practitioner in Malawi; or

(b) cancel a certificate granted under section ..., if, in the opinion of the Chief Justice, the notary public fails to carry out his duties as a notary public satisfactorily.

Penalty

... (1) A person shall not hold himself out to be a notary public or receive a fee or reward as a notary public without being entitled to practice as such or perform duties as such.

(2) A person who contravenes this section commits an offence and shall, upon conviction, be liable to a fine of two hundred and fifty thousand Kwacha (K250,000), and for a subsequent offence to a fine of five hundred thousand

Kwacha (K500,000) and imprisonment for six (6) months.

(3) Nothing in this section shall be construed as to exempt a person from any prosecution under any other law to which he would otherwise be liable as long as the person shall not be punished twice for the same offence.

Power of the
Chief Justice

... The Chief Justice may make rules for carrying out the purposes of this Part.

PART VI—DISCIPLINE

The legal profession in Malawi comprises legal practitioners engaged in various activities in private practice, public service, corporate sector and teaching. Disciplinary powers over a legal practitioner in Malawi are vested in the High Court since under the Act, only the High Court may on its own motion or on an application by the Attorney General make an order suspending any legal practitioner or striking any legal practitioner off the Roll or may admonish any legal practitioner.⁸⁸ The Act also establishes the Disciplinary Committee of the Malawi Law Society that inquires into the conduct of a legal practitioner either at the request of the High Court or on a complaint made by any person which indicates that there may be grounds on which the High Court could exercise its disciplinary powers over a legal practitioner.⁸⁹ This Disciplinary Committee of the Law Society comprises the Solicitor General and two other members elected by the Society.⁹⁰

Upon an inquiry made by the Disciplinary Committee and upon the Committee finding that the complaint was well founded, the Committee is required to report to the Attorney General who is thereupon empowered to apply to the High Court for an order of punishment against the errant legal practitioner. Three types of punishment may be meted out by the High Court and these include an order of suspension, striking the legal practitioner off the Roll or admonishing the legal practitioner.⁹¹ If, however, a *prima facie* case has not been established, the Committee has powers to dismiss the complaint.⁹²

The Law Commission conducted preliminary consultations with various stakeholders prior to the commencement of this review and the issue of discipline of legal practitioners featured highly. Stakeholders observed that the Disciplinary Committee is one of the most passive Committees of the Malawi Law Society and yet by far very important. According to the Society, it has been receiving, and the media has been reporting extensively on, complaints from the public against legal practitioners regarding fraud, embezzlement of clients' funds and matters of

⁸⁸ Section 21(1) of the Act. The same section goes further to cite the circumstances under which a legal practitioner may be suspended, struck off the Roll or admonished.

⁸⁹ Section 37(1) and (2) of the Act.

⁹⁰ *Ibid.*

⁹¹ Section 34 (4)

⁹² Subsection 5

professional mishandling of clients' cases. It has been reported that most of these complaints have not been acted upon.

Justification was given explaining why the Disciplinary Committee has been dormant and has not vigilantly taken out disciplinary proceedings against errant legal practitioners in Malawi. Firstly, it was stated that the inclusion of the Solicitor General, whose office doubles with that of Secretary of Justice, is a very busy officer which fact makes convening meetings of the Disciplinary Committee often impossible. It was suggested by those who were consulted that if the disciplinary process was left entirely in the hands of the Malawi Law Society, the process could be fast tracked.

Secondly, it was stated that after an inquiry and a complaint is held to be well founded, there appears to be a long process in trying to discipline the legal practitioner involved. As earlier stated, the Disciplinary Committee (which has difficulties meeting) has to submit a report to the Attorney General. The Attorney General (who is also a very busy officer) has to make an application in the High Court. Then the High Court has to set down the matter for hearing, hear the matter and then make an order. Those who were consulted observed that complaints get entangled within the said processes and usually they are rarely addressed often leaving a feeling of discontentment in the complainants.

Thirdly, those who were consulted observed that the punishment of striking a legal practitioner off the Roll is excessive since it is for life. They viewed this punishment as being extremely harsh as there is no provision for re-admission to practice the profession of the law in Malawi for a legal practitioner who has been disbarred even after he has shown visible signs of rehabilitation. It has been argued that the prospect of getting the legal practitioner disbarred perhaps deters those who are charged with exercising disciplinary functions from exercising them for fear of inflicting permanent punishment on an individual who may become rehabilitated and become more ethical.

SECTION 21 [*Disciplinary powers of the High Court*]

This section outlines the disciplinary powers of the High Court against a legal practitioner who is guilty of professional misconduct.⁹³ It stipulates in detail what constitutes professional misconduct for a legal practitioner.⁹⁴ The Act states that the High Court may exercise these powers on its own motion and after such inquiry as it thinks fit, or on an application made by the Attorney General.⁹⁵

This section also stipulates the remedial interventions that the High Court may make in case a legal practitioner is found guilty of dishonesty in connection with his practice as a legal practitioner or in connection with any trust of which he is a trustee,⁹⁶ and whenever a legal practitioner is struck off the Roll or

⁹³ Subsection (1).

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ Subsection (2).

suspended.⁹⁷ Lastly, the section states that the Chief Justice sitting alone, or together with such other judge or judges as he may direct, may preside over an application made under this section.⁹⁸ It prohibits making an order suspending or striking off the Roll any legal practitioner before giving him an opportunity to defend himself against the allegations made against him.⁹⁹ The Commission recommends that the High Court should maintain its disciplinary powers under section 21 (1).

The Commission observed that there are rampant cases of embezzlement or misappropriation of clients' money by legal practitioners. Hence the Commission felt that there is need to address the said problems. The Commission further recommends that the circumstances under which the High Court may exercise its disciplinary powers under section 21 (1) should be extended to embezzling client's money and corrupting officers of the court.

The Commission also recommends that paragraphs (c) and (d) of subsection (1) should be amended to reflect the modern trends of touting for clients. "Touting" is a practice where an individual solicits customers, votes, or patronage, especially in a brazen way. "Touting" also means to obtain and deal in information on racehorses. According to the American Bar Association, "touting" is where a person advertises, promotes, or otherwise describes a security for sale without disclosing that the person is being paid to do so. The understanding of touting within the legal profession in Malawi is in the sense where a person solicits clients. The Commission noted that touting is prohibited under the Act and further observed that there are modern trends emerging for touting clients. The Commission noted that these modern trends include creation of websites, sign posts or billboards where lawyers and law firms go beyond expression of areas of expertise of their firms and begin to solicit clients.

In Kenya, both advertisement and touting are offences.¹⁰⁰ However the issue of advertisement is even more problematic. The controversial issue is the extent to which websites may be deemed to be used by advocates as instruments of committing the offence of advertisement.¹⁰¹ Similarly, in Zambia, both touting and advertisement are offences.¹⁰²

The Commission therefore recommends amendment of section 21(1) as follows—

(...) directly or indirectly, applies or seeks instructions for professional business or does or permits, in the carrying out of his practice, any act or thing which can reasonably be regarded as touting or advertising or as calculated to attract business unfairly; or

⁹⁷ Subsection (3).

⁹⁸ Subsection (4).

⁹⁹ *Ibid.*

¹⁰⁰ Section 38 of the Advocates Act of Kenya, Chapter 16 of the Laws of Kenya.

¹⁰¹ Report of Law Commission's Comparative Study Visit to Kenya, December 2009.

¹⁰² Section 52 of the Legal Practitioners Act of Zambia.

(...) embezzles money belonging to his client;

The Commission was of the view that the Act should provide for prohibition of legal practitioners from conducting legal practice in a manner that is likely to pose a conflict of interest or breach confidentiality. The Commission noted that conflict of interest would arise, among other instances, where a legal practitioner's interest conflicts with that of his client. For instance, where, in case of representing more than one client, a legal practitioner advances the interest of one party at the apparent expense of the other or others, as the case may be, or where a legal practitioner uses or attempts to use confidential information he got in the course of serving one client to advance the interest of another client at the expense of the former. The Commission considered that if any of these circumstances arises, it should constitute misconduct for which a legal practitioner would face disciplinary action. Therefore the Commission recommends the adoption of the following subsection to section 21 as an act of misconduct by a legal practitioner as follows:

(...) acts in a manner that poses or is likely to pose a conflict of interest or breach of confidentiality;

The Commission noted that there have been complaints that some legal practitioners were at times acting without having express instructions from the person involved. This is common in personal injury claims. In most cases, where money is due to that person the practitioner embezzles the money because he was acting behind the victim's back. The Commission was of the view that this tarnishes the image of the profession and therefore has to be curbed.

Conversely, the Commission noted that sometimes legal practitioners do not follow any procedure when they want to discharge themselves from conducting matters including those before the courts. The Commission learnt that in some cases a legal practitioner, having discharged himself unprocedurally from conduct of a matter, simply stops attending to the matter or absconds from appearing in court on behalf of his client. The Commission noted that in civil matters, the legal practitioner can use the procedure under Order 67 of the Rules of the Supreme Court to discharge himself from conduct of a matter. However this order is not applicable in criminal matters. While the Commission recommends that criminal procedure laws, especially the Criminal Procedure and Evidence Code¹⁰³ should specifically provide for engagement and discharge of a legal practitioner for an accused person, the proposed law should prohibit legal practitioners from discharging themselves from conduct of matters without following procedure.

Therefore Commission recommends the adoption of the following provisions with respect to representation by and discharge of a legal practitioner:

(...) engages himself to represent a person without receiving instructions from the person; or

¹⁰³ Cap. 8:01

(...) discharges himself from a client without due notice to the client and, where applicable, to the court;

With respect to the issue of accountability of legal practitioners, the Commission observed that the Act has made provision for legal practitioners' accounts in subsidiary legislation under Legal Practitioners' Accounts Rules and Legal Practitioners (Accountants' Certificates) Rules. The first set of rules deal with management of client's accounts while the latter deals with the certificate of an accountant which has to be delivered to the Society annually, with the exception of public officers from submitting the accountant's certificate, among other things.

The Commission learnt that in other jurisdictions like Zambia, such provisions are found in the principal legislation and not under subsidiary legislation. The Commission was of the view that there is need to highlight the importance of accountability in the principal legislation. The Commission was therefore of the view that while the bulk of the provisions under the Rules shall remain in subsidiary legislation, the principle behind accountability and transparency of legal practitioners should be placed in the main legislation. The Commission was convinced that this recommendation provides for both prominence of the principle of accountability and also allows for flexibility since the Rules are more amenable to change.

The Commission therefore recommends adoption of the following provisions:

Client's
account

... —(1) A legal practitioner shall not hold or receive client's money without first opening a client's account at a bank in his name or the name of his firm in which name, the word "client" appears.

(2) Every legal practitioner shall, immediately upon receipt, deposit any client's money or any money that he elects to pay into the client's account.

Accounting
for client's
money

... —(1) Every legal practitioner shall at all times keep properly written up such books and accounts as may be necessary—

(a) to show all his dealings with—

(i) client's money held or received or paid by him; or

(ii) any other money dealt with by him through a client's account; and

(b) to distinguish such money held, received or paid by him on account of each separate client and to distinguish such money from other money held,

received, or paid by him on any other account.

(2) Every legal practitioner shall preserve for at least seven (7) years from the date of the last entry therein all accounts, books, ledgers or records kept by him under this Part.

(3) A legal practitioner who contravenes this section shall be liable to disciplinary action.

The Commission also observed that in comparable foreign jurisdictions like Zambia and Kenya, there are provisions regulating *inter alia* setting up of legal practice, management and dissolution of the practice. The Commission was of the view that such provisions are very pertinent as they not only ensure that minimum standards are adhered to but also ensure that the general public is effectively protected from hazardous practice of the profession.

Therefore the Commission recommends the adoption of the following provision—

... A legal practitioner shall not establish a legal firm, whether as sole practitioner or in partnership with other legal practitioners, unless—

(a) the legal practitioner has been practising the profession of the law for at least five (5) years; and

(b) the principal office of the firm and any branch thereof complies with the Legal Practitioners Practice Rules.

SECTION 22 [*When legal practitioner may not practice*]

This section stipulates that a legal practitioner whose name has been struck off the Roll cannot practice as a legal practitioner and that the one who has been suspended cannot practice the profession of the law in Malawi so long as his suspension subsists.

The Commission observed that the law in Malawi is quite severe with respect to errant legal practitioners. The severity of the law, in the Commission's view, arises from the fact that when a legal practitioner has been struck off the Roll, the punishment is permanent. In Kenya, a legal practitioner who was struck off the Roll may be restored on the Roll of Advocates if the Chief Justice, either on his own initiative or on recommendation by the Disciplinary Committee, thinks fit.¹⁰⁴ In Zambia, the Chief Justice is mandated to make an order as to the restoration to the Roll of a practitioner whose name has been removed from or struck off the Roll.¹⁰⁵ He may do so on his own initiative or on the

¹⁰⁴ Section 71 of the Advocates Act of Kenya.

¹⁰⁵ Section 33 of the Legal Practitioners Act.

recommendation of the Disciplinary Committee.¹⁰⁶ However, sentiments were echoed during the study visit that even though the law so provides, it is very unlikely that restoration could be done as the errant practitioner is presumed to have committed a serious offence or misconduct to warrant being struck off the Roll.

The Commission recommends that this position should change in line with other recommendations it has made with respect to discipline. In line with the recommendation made in this Report, the Commission did not find it necessary to continue with the punishment of permanently barring a legal practitioner who has been struck off the Roll. The Commission therefore recommends that a legal practitioner who has been struck off the Roll should be given an opportunity to apply for readmission on expiry of five years from the date he was struck off the Roll. The Chief Justice may, in his discretion, attach some conditions on readmission which may include a requirement that the legal practitioner should enrol with the Institute or be supervised or that he sits for the Malawi Law Examination.

The Commission further noted that the period for suspension should not exceed two years. In order to ensure that consumers of legal services are protected from legal practitioners who have been struck off or suspended, the Commission recommends that the Society should publish names of legal practitioners who have been struck off the Roll or are suspended in newspapers with wide circulation. In case of suspension, the publication should also indicate the duration of the suspension.

The Commission reflected on which authority should have power to strike off a legal practitioner from the Roll. It was observed that the Chief Justice who has powers to have the name of a legal practitioner inscribed upon the Roll should retain the power to strike off the errant legal practitioner. The Commission also noted that it is the Registrar of the High Court who maintains the Roll and therefore disciplinary powers to strike a legal practitioner off the Roll be exercised by the Chief Justice. However the Commission recommended that the Disciplinary Committee of the Society should be mandated to apply to the Chief Justice under section 21 of the Act that a legal practitioner be struck off the Roll or that it be mandated to recommend to the Chief Justice that a legal practitioner be struck off the Roll.

Therefore the Commission recommends amendment of section 22 and introduction of a new provision with respect to re-admission under the Part on Discipline as follows—

- | | |
|--------------|--|
| Striking off | ... A legal practitioner whose name has been struck off the Roll shall not practice the profession of the law in Malawi. |
| Suspension | ... (1) A legal practitioner suspended by an order made under section ... shall not practice the profession of the law in |

¹⁰⁶ *Ibid.*

Malawi during the period of suspension.

(2) A legal practitioner shall not be suspended from practising the profession of the law for a period exceeding two (2) years.

Practising while struck off or suspended

... A legal practitioner who practises the profession of the law while he is struck off the Roll or he is suspended commits an offence and shall, upon conviction, be liable to a fine of five million Kwacha (K5,000,000) and imprisonment for five (5) years.

Publication of legal practitioners struck off or suspended

... The Society shall publish, in the *Gazette* and in at least two (2) newspapers with the widest circulation, names of legal practitioners who are struck off the Roll or are suspended and, in the case of suspension, the period of suspension.

Re-admission

... (1) A legal practitioner whose name is struck off the Roll may, after the expiry of five (5) years, apply to the Chief Justice for re-admission to practice.

(2) On receipt of an application for re-admission, the Chief Justice may,:

(a) re-admit the applicant;

(b) refuse to re-admit the applicant; or

(c) order that the applicant not be re-admitted unless the applicant—

(i) enrolls at the Institute and successfully passes the Malawi Law Examination; or

(ii) be supervised by a legal practitioner of not less than ten (10) years standing at the Bar for a period not exceeding one (1) year.

SECTION 23 [*Annual licence*]

This section obliges a legal practitioner to take out a practising licence upon admission to practice and upon payment of a prescribed fee,¹⁰⁷ renew his practising licence annually thereafter after payment of a prescribed fee.¹⁰⁸

A licence to practice expires on 31st January of every year.¹⁰⁹ A legal practitioner loses his right to practice unless he renews the practising licence. In case a legal practitioner does not renew his practising licence for six months after it expired, he cannot renew it unless he applies to the Chief Justice¹¹⁰ giving

¹⁰⁷ See the Second Schedule.

¹⁰⁸ *Ibid.* However the practice is that he has to show proof of payment of his subscription to the Malawi Law Society.

¹⁰⁹ Subsection (2).

¹¹⁰ Subsection (4).

reasons why he could not renew his licence on time. This section does not apply to legal practitioners admitted under section 12 (3) and *ex-officio* legal practitioners.¹¹¹

Likewise in Zambia, a legal practitioner must take out a practising licence and to have it renewed every year, upon admission to practice. This entails that a legal practitioner pays annual subscriptions to the Law Association which is responsible for issuing and renewing practising certificates to its members working in private practice. The Law Association considers a legal practitioner as being of good standing when he pays annual licence fees. For purposes of renewal of practising licence, the Law Association requires every legal practitioner to submit audited accounts by the 30th of November each year as an early submission of an application for renewal of licence. Late submission may be entertained only up to the 30th of December each year. After this date, no legal practitioner can renew their licence.

The Commission noted that in other jurisdictions like Kenya, it is mandatory for legal practitioners to undertake a certain content of continuing legal education within each year as a condition precedent to renewal of a practice licence. The Malawi Law Society also proposed that this should be made mandatory for legal practitioners in Malawi under the proposed legislation. The Society proposed that a legal practitioner should undertake at least fifty hours of such education during one calendar year. The Society further proposed that attendance to continuing legal education courses should be a precondition for renewal of a legal practitioner's practice licence. The Society further proposes that it should release and circulate a list of legal practitioners who are supposed to undergo certain courses during a particular completed year.

The Commission observed that continuing legal education is very important to legal practitioners as there are always emerging issues that the legal practitioner has to acquaint himself with. It was of the view that the requirement would also enhance professional development among legal practitioners. The Commission therefore recommends that the law should provide for the mandatory continuing education which shall be a precondition for renewal of a practising licence.

However, it was the Commission's view that fifty hours proposed by the Society are excessive considering the demands of legal practice. The Commission therefore proposes a scheme where a minimum number of units or courses are prescribed before renewal of practising licences where each unit shall represent a given period of time. The Commission recommends five units of continuing legal education. The Society would have to come up with content of one unit or devise criteria of determining what units a particular course, seminar and other activities would be worth.

The Commission turned down the suggestion that the Society should release and circulate a list of legal practitioners who are supposed to undergo certain

¹¹¹ Subsection (5).

courses during a particular completed year. The Commission holds a strong view that such a practice would prejudice those affected by this arrangement. As already pointed out the rationale for this recommendation is not inadequacy of knowledge on the part of the legal practitioner, but rather because of the need to ensure that legal practitioners are always up-to-date with emerging issues. Therefore the Commission recommends that the Society should take the approach used in Kenya where the Kenya Law Society releases a calendar of annual events in which legal practitioners would participate to accumulate their units. This calendar already allocates the number of units that a particular event carries. It also indicates the participation fees per event. The Commission was of the view that this arrangement would enable both individual legal practitioners and law firms to plan properly for this important undertaking.

The Commission was mindful that it recommends that the Society should be the responsible authority for renewing practicing licences and that a legal practitioner who has not been struck off the Roll or has not been suspended may renew his practicing licence, if he has—

- (a) paid the annual subscription to the Society;
 - (b) paid his annual contribution to the Fidelity Fund¹¹²;
 - (c) performed the full hours prescribed for the annual mandatory *pro-bono* work¹¹³;
 - (d) where applicable, a valid Indemnity Insurance cover is in place¹¹⁴;
- and
- (e) fulfilled the requirement for mandatory continuing legal education.

The Commission was mindful of its recommendation that legal practitioners in the public service should be exempt from some of the conditions of renewal of practicing licence stated above such as performing *pro-bono* work and obtaining Indemnity Insurance cover. The Commission therefore recommended that this provision should be improved to cater for the said recommendations. However the substance of the rest of the provision should be maintained.

The Commission therefore recommends that the provision on Annual licence be amended by introducing a new subsection under the new Part on Legal Practice which shall read as follows:

(...) The Society shall not issue a licence to practice to a legal practitioner, unless the legal practitioner has—

- (a) paid the annual subscription to the Society;**
- (b) performed the full hours prescribed for the annual mandatory *pro bono* work as determined by the Society, from time**

¹¹² See Part 2 under New Parts and Consequential Provisions of this Report.

¹¹³ See New Provisions under this section.

¹¹⁴ See Part 2 under New Parts and Consequential Provisions of this Report..

to time;

(c) attained the minimum number of units of continuing legal education;

(d) paid an annual contribution to the Fidelity Fund;

(e) a valid annual indemnity insurance cover; and

(f) where applicable, complied with penalties imposed under this Act.

The Commission therefore recommends that the old subsection (3) and (4) be renumbered to (4) and (5) respectively. As for the current subsection (5), the Commission resolved that in light of the new subsection (3), it has become obsolete and should be repealed accordingly.

The Commission was of the view that it is necessary to have a provision stipulating that a legal practitioner is required to deliver his accountants' certificate within a prescribed period, although legal practitioners are, in practice, required to do this before renewing their licences. However the Commission recommends that this position should be buttressed by being provided for in the principal legislation.

The Commission, therefore, recommends that the following provision be included as a subsection to this section:

(6) Subject to subsection (2), every legal practitioner shall annually deliver to the Society, an Accountant's Certificate in accordance with the Legal Practitioner (Accountants' Certificates) Rules.

SECTION 24 [*Unlawfully acting as a legal practitioner, etc., an offence*]

This section creates an offence punishable by £100 where a person unlawfully acts as a legal practitioner. One commits this offence if one, being a person who is not or has ceased to practice as a legal practitioner, before the courts of Malawi, does any of the acts outlined under subsection (1). However for a person to be prosecuted under this section, the Director of Public Prosecution has to give a written consent.¹¹⁵ The exception to this provision is where a person appears in his own right in any proceedings in which he is a party.¹¹⁶

The Commission noted that there are dissenting schools of thought on whether or not the law restricts debt collection to legal practitioners only. One school of thought argues that construction of section 24 (1) (c) entails that it is only legal practitioners who can collect debt. The other school of thought argues that the said provision does not restrict debt collection to legal practitioners only. The latter argue further that if the first school of thought is right then the provision

¹¹⁵ Subsection (2).

¹¹⁶ Subsection (5).

contravenes section 29 of the Constitution which gives every person a right to economic activity one of which is debt collection. The former group counter-argue that although the right to economic activity is guaranteed under the Constitution, it cannot be pursued without regulation since there is plenty of illegal activity which people might pursue in the name or under the authority of section 29. The Commission considered this matter at length and debated whether or not that status quo should be maintained.

Firstly, upon examination of section 24 (1) (c), the Commission was of the view that debt collection is a preserve of legal practitioners only and it is an offence for a non-legal practitioner to conduct debt collection. However, the Commission observed that lawyers are not but may be trained to collect debt. The Commission noted the earlier attempts to liberalize debt collection through legislation proposed by Hon. Billy Kaunda who moved a private members Bill in the National Assembly to amend the Act and enact Debt Collectors Act.¹¹⁷ The Commission considered arguments in favour of and against liberalizing debt collection to all manner of people and considered that protection of creditors is of paramount importance. The Commission noted that the issue of training in debt collection falls away since Law Schools may opt to offer courses in this area and as such, legal practitioners may be trained, if there is need to supplement what is taught already.

Secondly, the Commission observed that although debt collection may be liberalized, non-legal practitioners cannot use tools of a legal practitioner to collect debt. As such, a non-legal practitioner cannot use a warrant of execution to collect debt and that all debt collection by non-legal practitioners shall exist outside legal practice. Consequently, the enforcement of a judgement debt shall not be considered debt collection available for non-legal practitioners. In terms of what work may be undertaken by non legal practitioner debt collectors, the Commission considered that it shall be that which has been expressly allowed by statute. The Commission recommends that section 24(1) (c) be amended by excluding cases where particular work is regulated by an Act of Parliament.

The Commission noted that in other jurisdictions such as Zambia and South Africa, debt collection is not a preserve for lawyers. As such, the Commission further recommends that ethical standards for debt collectors should be high so that the public should be protected and that debt collection should be regulated by legislation on debt collection.

The Commission therefore recommends adoption of a separate piece of legislation that shall regulate debt collection. The proposed Bill on debt collection is attached to this Report as Appendix II. The proposed legislation on debt collection shall be termed the “**Debt Collectors Act**”. The “**Debt Collectors Act**” shall provide for a mechanism for regulating the trade of debt collection for non-legal practitioners by providing for an institution which shall register, monitor and regulate the trade. The proposed institution shall be termed the Debt Collection

¹¹⁷ The private member’s Bill was moved on 27th October, 2005.

Council. The Council shall be served by elected office bearers and shall have its own secretariat. The Commission further recommends the establishment of the Council's disciplinary machinery which shall comprise largely of legal practitioners. Legal practitioners would comprise the disciplinary mechanism on account of their involvement in the practice and also in order to enhance the confidence of the public in a practice which they are involved.

The "**Debt Collectors Act**" shall further require debt collectors to register and be licensed before they are allowed to practice. Only licensed debt collectors may earn remuneration by charging fees for their work. The proposed legislation also provides for ancillary powers to the Minister to regulate debt collection and for other incidental matters.

With respect to section 24, the Commission recommends retention subject to amendment on the penalties prescribed for the offences. The Commission therefore recommends amendment of section 24 by deleting the words "£100" and replacing them with the words "**K5,000,000 and imprisonment for ten (10) years**".

However, the Commission was concerned that very few people have been arrested for the offences created under this provision, let alone been prosecuted. It therefore recommends that the Society should be mandated to prosecute such cases, where and when it so wishes having obtained written consent from the Director of Public Prosecutions. The Commission was of the view that this would be in line with the Society's mandate to protect the public under the current section 26 (1) (d) of the Act.

The Commission therefore recommends amendment to section 24 (2) as follows—

(2) The Society shall not prosecute a person for an offence under this section—

(a) without the written consent of the Director of Public Prosecutions; and

(b) for any work restricted by this section which is regulated by an Act of Parliament.

NEW PROVISIONS

PRO-BONO WORK

The Commission was also mindful of the Malawi Law Society's proposal that the law should provide that legal practitioners should perform fifty hours of mandatory *pro bono* services per year. The Commission defined *pro-bono* services to include providing free legal advice and free legal representation to the needy and deserving. It further proposed that the provision should exempt legal practitioners in 'active employment in public service'.

The Commission adopted the proposal. However it cautioned against legal practitioners picking up the cases anyhow. The Commission therefore recommends that the Society should allocate the *pro bono* work to the legal practitioners. It was of the view that the Society may liaise with the Department of Legal Aid and Non Governmental Organizations (NGOs) to identify the needy and deserving and allocate their cases to legal practitioners. It was the Commission's view that in this way the Society can easily monitor the cases it has referred to practitioners. The Commission also observed that the Society may need to consider *pro bono* services that legal practitioners already do on their own when allocating the mandatory *pro bono* work. In this case, legal practitioners already undertaking *pro bono* services would have to inform the Society of that fact.

However, the Commission was of the view that that the law should not provide for the number of hours for which a legal practitioner should perform *pro bono* legal services. Instead the law should mandate the Society to allocate a fair amount of *pro bono* to its members per year. The Commission recommends that the Society should be given the discretion to determine the amount of work knowing that inevitably there would be carry-over assignments in respect of some legal practitioners.

The Commission considered legal practitioners who for one reason or another would not be able to undertake the mandatory *pro bono* services. The Commission recommends that the law should require defaulting practitioners to pay a sum of money, prescribed by the Society, to be used by the Society to meet the expenses of another practitioner or practitioners who would be allocated the cases instead.

In case of non-compliance, the Society recommended that the Society should be mandated to take disciplinary action against such practitioner. This would also apply to practitioners who would handle the cases allocated to them unprofessionally. This is so because the Commission held the view that the law should protect members of the public whose cases would be allocated to legal practitioners under this proposed provision from having their work handled below par.

In cases of costs awarded in *pro bono* cases, the Commission recommends that the funds should be remitted to the Society.

Therefore the Commission recommends adoption of the following provision under a new Part on Legal Practice:

Pro bono
work ...— (1) The Society shall allocate *pro bono* work to every legal practitioner annually.

(2) When allocating the *pro bono* work, the Society shall have regard to *pro bono* work that a legal practitioner already undertook on his own in that particular year and

any outstanding *pro bono* work that a legal practitioner may have.

(3) Where a legal practitioner informs the Society that he will not be able to perform the *pro bono* work, he shall pay to the Society an amount of money, determined by the Society, with which the Society shall hire services of another legal practitioner to perform the work.

(4) A legal practitioner who contravenes this section shall be liable to disciplinary action.

(5) This section shall not apply to legal practitioners in the public service.

CLIENTS' RIGHTS AND PROPERTY

The Commission also noted that there is need for the Society to exercise its duty of protecting the public even where the legal practitioner-client relationship is curtailed by death of the legal practitioner. The Commission held the view that this is more critical where the legal practitioner dies intestate. It observed that in such cases, a client's interests and property such as testamentary instruments, deeds, documentary evidence and many others that were in the custody of the deceased legal practitioner are at the mercy of the administrators of the legal practitioner's deceased estate. This is very risky for clients as not only their interests might not be addressed but also their valuable property might be lost.

The Commission drew lessons from some comparable foreign jurisdictions. In Zambia, the law provides that the Law Association of Zambia can deal with property of certain legal practitioners.¹¹⁸ This applies where a legal practitioner who has either been struck off the Roll or is suspended from practice and fails to satisfy the Law Association that he has made suitable arrangements for making available to his clients or some other practitioner or practitioners instructed by his clients or by himself all documents and sums of money due to him or his firm or held by him or his firm on behalf of his clients or subject to any trust. The Zambian law also provides for measures through which the Association can intervene, where necessary, in cases where a legal practitioner dies, abandons his practice, is adjudged bankrupt or makes a composition or arrangement with his creditors, or is prevented, for any other reason, from performing his functions as a legal practitioner. However this applies where the Law Association is satisfied that the clients of the legal practitioner concerned are likely to suffer due to failure to make such suitable arrangements as referred above. By virtue of this provision, sums of money are vested in the Law Association and the Association maintains a separate account for such sums, holds such sums on trust for the persons entitled to benefit from it and deals with such sums in accordance with any prescribed rules.

¹¹⁸ Section 69 of the Legal Practitioners Act of Zambia; Chapter 30 of the Laws of Zambia.

In Kenya, the Law Society started implementing such interventions without the enabling legislative framework. However, it was challenged by one of the concerned parties who successfully argued that the Society's actions were arbitrary in the absence of enabling legislative provision.

The Commission noted the significance of such provisions which would enable the Society to protect the public where the situations anticipated above arose. It was the Commission's considered view that the law should mandate the Society to promptly appoint a legal practitioner to handle the practice with an aim of preserving the interests of the clients whenever such situations arise. This legal practitioner would secure documents belonging to the clients and ensure that sums of money due to the clients are protected. This interim care-taker would be answerable to the Society. Therefore it recommends adoption of new provisions under a new Part on Legal Practice as follows:

Client's rights
and interests

...— (1) A legal practitioner who is struck off the Roll or is suspended from practice shall, within twenty one (21) days from the date of striking off or suspension, as the case may be, make arrangements for availing to his clients or other legal practitioner instructed by his clients or himself—

(a) all deeds, wills or testamentary documents, documents constituting or evidencing title to any property, papers, books of account, records, vouchers and other documents in his or his firm's possession or control, or relating to any trust of which he is a sole trustee, or co-trustee with one or more of his partners, clerks or servants; and

(b) all sums of money due from him or his firm or held by him or his firm on behalf of his clients or subjected to any trust as aforesaid.

(2) Where the legal practitioner referred to in subsection (1) fails to comply with subsection (1), the Society shall order him to produce or deliver documents or property referred to in subsection (1) to another legal practitioner appointed by the Society within a period prescribed by the Society.

(3) A person who has possession or control of the documents or property referred to in subsection (1) and does not comply immediately with requirements imposed under this section, commits an offence and shall, upon conviction, be liable to a fine of five hundred thousand Kwacha (K500,000) and six (6) months imprisonment.

(4) A legal practitioner appointed by the Society under subsection (2) shall make inquiries to ascertain who the

owner of the documents or property is and shall deal with those documents or property in accordance with the directions given to him by the owner.

(5) The Society shall also exercise its powers under subsection (2), with necessary modifications, in relation to a legal practitioner who:

(a) dies;

(b) abandons his practice;

(c) is adjudged bankrupt or makes a composition or arrangement with his creditors ; or

(d) is prevented, for any other reason, from performing his functions as a legal practitioner,

and where the Society is satisfied that his clients are likely to suffer due to his failure to make such suitable arrangements as referred to in subsection (1).

(6) A legal practitioner who is struck off or suspended is entitled to receive fees for work done prior to and notwithstanding the striking off or suspension.

PART VII—THE MALAWI LAW SOCIETY

The Malawi Law Society is established as a body corporate under Part VII of the Act replacing the Nyasaland Law Society which had hitherto been the Law Society for legal practitioners in the then Nyasaland. It has several objects, among which is the objective of representing, protecting and assisting legal practitioners regarding conditions of practice. The Society was also established to maintain public trust in the legal profession and the legal system altogether. This is achieved, among other things, by the establishment of a Disciplinary Committee of the Society under section 37. The functions and duties of the Disciplinary Committee are discussed below.

When the Society was consulted, it found the provisions on the objects of the Society satisfactory and made no additions. The Society, however, expressed a desire for the law to detail the organization and structures of the Society. The Society proposed the recognition of an Assembly of the Society with clear powers and functions. It further proposed that Chapters of the Society should be legally recognized and be provided for in the proposed law.

In Kenya, the Law Society is established under a separate statute, the Law Society of Kenya Act.¹¹⁹ In sum, the said statute provides for the establishment

¹¹⁹ Chapter 18 of the Laws of Kenya.

of the Kenyan Law Society; its membership; constitution and powers of the Council; other officers of the Society; General meetings of the Society; the common seal; minutes, accounts and reports of the Society; and regulations.¹²⁰ The Kenyan Law Society is also a body corporate with perpetual succession and power to sue and be sued in its own name. The objects of the Kenyan Law Society are almost similar to those of the Malawi Law Society. The Kenyan statute has made specific provision that the Law Society shall assist the Government and the courts in all matters affecting legislation and the administration and practice of the law in Kenya.

For purposes of proper management of the affairs of the Law Society of Kenya, the Act establishes a Council comprising the Chairman, the Vice Chairman and nine other members elected annually. The Council has powers to exercise all powers of the Society.

The Law Society of Kenya also undertakes some donor funded programmes. It also generates revenue from proceeds from journal sales. Furthermore, the Society collects fees from its members for participating in the continuing legal education programmes. Owing to its large membership, the Society also gets some funds from the penalties meted out to advocates for misconduct. Such fines are payable to the Society.

The Law Society of Namibia is established under the Legal Practitioners Act. It is a body corporate with perpetual succession and a common seal; it is capable of suing and being sued in its name and is vested with powers to do all such things as bodies corporate may do and suffer.¹²¹ The objects of the Namibian Law Society are similar to those of the Malawi Law Society. However, some objects have been presented clearer than in Malawi such as:

- (a) furthering the development of the law as an instrument of social engineering and social justice;
- (b) definition and enforcement of correct and uniform practice and discipline among members;
- (c) promotion of social intercourse among members;
- (d) co-operation with representative bodies of other professions; and seeking enhancement of the rule of law and protection of human rights.¹²²

The Law Society of Namibia has been vested with corporate powers which among other things, include hiring of staff for the institution.¹²³ The Act also provides for membership to the Law Society and general meetings of the Society.¹²⁴

¹²⁰ Parts II, III, IV, V, VI, VII, VIII and IX of the Act respectively.

¹²¹ Section 40 of the Legal Practitioners Act, 1995 of Namibia.

¹²² Section 41 (c), (g), (i), (k) and (m).

¹²³ Section 42 (g).

¹²⁴ Sections 43 and 44 respectively.

In Zambia, the equivalent to the Malawi Law Society is called the Law Association of Zambia. It is a body corporate established under a separate statute.¹²⁵ The objects of the Law Association are similar to those from Kenya, Namibia and Malawi. Among its objects, the Association seeks to promote reform of the law; participation during drafting of legislation; promotion of the rule of law and rights and liberties of individuals.¹²⁶ Membership to the Law Association is in two categories: ordinary and associate.¹²⁷

The Commission appreciated that Malawi Law Society has been instrumental in entrenching the human rights culture and democratization in Malawi. As a body corporate, the General Assembly of the Law Society has established a fully functional secretariat which operates under the Executive Director. The Commission was of the view that there is need to ensure smooth operations of the Society. Lessons drawn from other jurisdictions should go a long way in entrenching and strengthening the gains already made by the Law Society as it stands now.

The Commission therefore recommends that the proposed law should make provision for a secretariat and staff of the Society headed by an Executive Director who shall be recruited in a specified transparent and accountable manner. The proposed law shall also provide for the functions and administration of the secretariat.

SECTION 25 [*Establishment of Malawi Law Society, vesting of assets and dissolution of the Nyasaland Law Society*]

Subsection (1) establishes the Malawi Law Society as a body corporate whereas subsection (2) is a transitional clause which vested all property and assets of the Nyasaland Law Society in the Malawi Law Society upon coming into force of this Act.

The Commission observed that subsection (1) is a standard clause when establishing a statutory institution and recommends retention. However the Commission observed that subsection (2) is a transitional provision whose aim was to dissolve the Nyasaland Law Society and vest its property in the Malawi Law Society. The Commission was of the view that the provision is obsolete and therefore recommends that it be deleted. The Commission noted that the side note to this provision should also be amended by deleting the words, “vesting of assets and dissolution of the Nyasaland Law Society” after the word “Society”.

SECTION 26 [*Objects of the society*]

Subsection (1) sets out the objects of the Society. Subsection (2) exempts application of the Finance and Audit Act to the Society until such time as the Minister may, in his discretion, direct.

¹²⁵ Sections 47 and 48 respectively.

¹²⁶ Section 4 of the Law Society Act of Zambia.

¹²⁷ Section 5 thereof.

The Commission observed that the objectives as they stand should not be altered but that further objectives should be introduced in line with the current responsibilities that fall upon the Society. The Commission was of the view that the Society is a major stakeholder in matters of legislation, administration of the law and justice and legal practice. The Commission further noted that in other jurisdictions like Kenya and Zambia, the position is that the Law Societies play an advisory role to Government on these matters. In Zambia, the Law Association is also mandated to consider the qualifications of lawyers and to make recommendations to Government on such matters.¹²⁸

The Commission further observed that development of the law is a matter which is of great importance to the Society and as such, the Society should be mandated to promote research which would assist in the development of the Malawian legal system and jurisprudence. In this regard, the Commission adopted one of the objects of the Law Association of Zambia, which is “*to promote research in the development of the law in general and particularly in relation to applicability and suitability of received law; the character and content of customary law and the influence of industrial, commercial and technological development on society and social institutions.*”¹²⁹

The Law Association of Zambia does not receive funding from Government but it mobilizes its own financial resources from membership fees paid by its members. The amount of fees varies with the period a legal practitioner has been in practice. The longer a member practises, more is paid. Members are categorized as follows—

- (a) those who have practiced for 10 to 15 years;
- (b) those between 5 to 10 years standing; and
- (c) those below 5 years.

The Law Association also produces publications which it sells. It also conducts seminars and workshops from which it gets revenue. Another source of funding is from local organizations, businesses, foreign and international law associations.

The Commission therefore recommends the amendment of section 26 (1) by deleting paragraph (h) and replacing it with the following provisions with respect to objects of the Society—

- (...) promote research towards the development of the law;**
- (...) advise Government on all matters affecting legislation and the administration and practice of the law in Malawi;**
- (...) regulate the setting up, management and dissolution of legal**

¹²⁸ Section 4 (e) of the Law Association of Zambia Act

¹²⁹ *Ibid* paragraph (i)

practice; and

(...) do all other things that are incidental or conducive to the attainment of the foregoing objects or any of them.

The Commission considered the provisions of subsection (2) and wondered whether the Minister has since directed the application of the Finance and Audit Act¹³⁰ to the Society. The Commission observed that the aim of the Finance and Audit Act was to provide for the administration, control and audit of the public finances of Malawi and for the control of the powers of statutory bodies. Section 26 (2) provides that the Finance and Audit Act shall not apply to the Society until when the Minister directs. The Society is established as a statutory body and if the Society receives any public finances, then that Act would apply.

The Commission observed that under section 32A under Part VA of the Finance and Audit Act applied to every statutory body, notwithstanding anything to the contrary in any other law. Among the provision under Part VA are provisions for submission of a capital budget to the Minister responsible for the statutory corporation; submission to the Minister of an income and expenditure budget; payment of surplus funds to the Treasury; deposits of money into special accounts; and submission of annual financial reports.

The Commission considered that perhaps since Government has not been funding the Society, there has been no need for the Finance and Audit Act to apply. The Commission further observed that the Finance and Audit Act was substantively repealed in 2003 by the Public Finance Management Act¹³¹ with a smaller remainder repealed by the Public Audit Act¹³². However, since the Commission recommends that funds for the Society should not come from the Consolidated Fund, there appears to be no reason why the successor law to the Finance and Audit Act should also apply to the Society. In light of the recommendation that Parliament should not provide funds for the operation of the Society, the Act does not need to apply to the Society.

The Public Finance Management Act in Part VIII provides that the Part applies to all statutory bodies. A statutory body has been defined, by both the Public Audit Act and the Public Finance Management Act, as “a body of persons, whether incorporated or unincorporated, ..., established by any written law, ...”.¹³³ Since the Society shall not draw from the Consolidated Fund, the Commission therefore recommends deletion of the reference to the Finance and Audit Act which is now obsolete and the replacement of reference to that law with the Public Finance Management Act and Public Audit Act.

¹³⁰ Cap. 37:01

¹³¹ Cap. 37:02

¹³² Cap. 37:01

¹³³ See sections 2 of the respective Acts.

SECTION 27 [*Membership of the Society*]

Membership of the Society comprises all legal practitioners;¹³⁴ the Attorney General, the Solicitor General, any person in the public service, other than a judge, having the qualifications required for admission as a legal practitioner¹³⁵; and persons who have been elected honorary members of the Society.¹³⁶

In comparison, the Law Association of Zambia has two types of membership. The first category is of members of the Association by virtue of being legal practitioners admitted to the Roll of legal practitioners in Zambia or qualified to practice elsewhere as a lawyer; those awarded the degree of Bachelor of Law by the University of Zambia; and those holding a degree or qualification that is acceptable for purposes of practice - who are called ordinary members.¹³⁷ The other category comprises associate members.¹³⁸ The Law Association is responsible for issuing and renewing practicing certificates¹³⁹ to its members in private practice. Lawyers who are working in Government are not required to take out these practicing certificates in order for them to practice as Government lawyers unless they wish to do so in their individual capacities. They would however be required to have practicing licences if they wish to undertake private practice. Failure to pay subscription fees means that the legal practitioner is no longer a member of the Law Association. As a consequence only legal practitioners who are members of the Law Association in this manner are subject to the jurisdiction of the Association.

The Commission considered the membership of the Society and resolved that all legal practitioners should continue being members of the Society. For those persons acquiring membership under section 29, the Commission recommends that this category be abolished since it was created on the understanding that these legal practitioners are *ex-officio* and do not have to take out practice licences in order to appear in court. In light of the recommendation that there should be established an Institute of Legal Education, all legal practitioners will have to be admitted to practice before they commence legal practice within the public sector or elsewhere. As such, the distinction made under this provision is superfluous.

The Commission therefore recommends that this provision be amended by deleting paragraph “b”.

SECTION 28 [*Every legal practitioner to be member of the Society*]

This provision creates compulsory membership of the Society for legal practitioners that hold a current practising licence. This membership only subsists

¹³⁴ See section 28.

¹³⁵ See section 29 (1).

¹³⁶ See section 30.

¹³⁷ Section 5 (3) of the Law Association of Zambia Act.

¹³⁸ *Ibid* sub-section (4)

¹³⁹ Section 35 of the Legal Practitioners Act.

as long as the legal practitioner's practising licence has not expired.¹⁴⁰ The legal practitioner ceases to be a member of the Society in case he is struck off the Roll.¹⁴¹ If a legal practitioner is suspended, he ceases to be entitled to any of the rights and privileges of membership.

The Commission considered whether it would be necessary to oblige all legal practitioners to be members of the Society. It considered the issue of freedom of association and considered whether compulsory membership infringes the legal practitioner's freedom of association since section 32(2) of the Constitution provides that no person may be compelled to belong to an association. In considering this matter, the Commission considered as being of utmost importance that all legal practitioners in Malawi should be subjected to the disciplinary regime of the Society in order to preserve the integrity of the profession. The Society was established with a view to protect the public on all matters concerning the legal profession and as such, becomes a regulator of the legal profession in its entirety. Compelling a legal practitioner to become a member of the Society is not simply about enjoying the rights and privileges of membership but also a means of ensuring that there is uniformity in practice and discipline of the members.

As such, the Commission held the view that if this provision compels a legal practitioner to belong to an association, it can be justified for the reasons given and that since the limitation is statutory, it is prescribed by law. This limitation is also reasonable, acceptable by international standards and necessary in a democratic dispensation. If a legal practitioner was left to choose to opt out of membership, the public would be left vulnerable to legal practitioners whose professional misconduct would not be regulated by the Society. Therefore the Commission recommends retention.

The Commission also recommends that since a legal practitioner whose name has been struck off the Roll may be re-admitted upon an application to the Chief Justice and satisfying the condition of enrolling with the Institute and passing the Malawi Law Examinations, it is not necessary to provide separately for this category of legal practitioners.

SECTION 29 [*Persons entitled to become members*]

This provision states that any person in the public service, other than a judge, and having the qualifications required for admission as a legal practitioner, other than the passing of the Malawi Law Examination may apply to be admitted as a member of the Society during such time as they hold their office or appointment.¹⁴² The Society may elect to its membership any person resident in Malawi who possesses legal qualifications acceptable by the Society. However

¹⁴⁰ Subsection (2).

¹⁴¹ Subsection (3)

¹⁴² Subsection (1).

the person must consent to be such a member.¹⁴³

The Commission observed that the exception that was made to judges was, in its view, supposed to apply across the board to all judicial officers. This was because some judicial officers, while being lawyers, are magistrates or Chairpersons of other tribunals such as the Industrial Relations Court. Since the Commission recommends that all legal practitioners shall have to be admitted after attending the Institute and passing the Law Examination, it recommends deletion of subsection (1). However the Commission recommends that subsection (2) should be retained.

SECTION 30 [*Honorary members*]

Under this provision, the Society has power to elect a person it thinks fit as an honorary member for life or for such period as it deems appropriate. An honorary member must consent to be elected as such a member. The Commission was of the view that this category would apply to people who have gained prominence and eminence in the field of law or any other discipline from which the law has benefitted. These individuals would, for instance, include professors and other academics. The Commission was also of the view that the Society should come up with clear guidelines on who can be considered for honorary membership in order to avoid arbitrariness in selection. The Commission recommends retention.

SECTION 31 [*Fees and subscriptions*]

This section obliges the members of the Society to pay such fees and subscription as may be prescribed by the Minister after consultation with the Minister of Finance. Honorary members are exempt from this obligation.

The Commission wondered whether the Minister after consultation with the Minister of Finance should be retained as the authority to prescribe the membership fees and subscription to the Society. The Commission presumed that the Minister of Finance might want to know what fees and subscription is charged to legal practitioners for purposes of section 26 (2) which provides for applicability of the Finance and Audit Act. However the Commission observed that this consultation might unnecessarily delay the process due to bureaucracy.

The Commission also noted that the Society had proposed that the membership fees and subscriptions should be determined by the Executive Committee of the Society. The Commission considered that stakeholders have to be given a chance to determine the membership fees and subscription. It was of the view that this would promote acceptability and compliance. It therefore recommends that the Minister should prescribe membership fees and subscription on the recommendation of the Society. This is also the position in other jurisdictions like Zambia where it is the Association which prescribes

¹⁴³ Subsection (2).

¹⁴⁴ Section 6 of the Law Association of Zambia Act.

subscription fees for its members.¹⁴⁴

The Commission therefore recommends amendment of section 31 as follows:

Fees and subscription	<p>... (1) A member of the Society shall pay, to the Society, fees and subscription prescribed by the Minister, on recommendation of the Society.</p> <p>(2) An honorary member shall not be required to pay subscription.</p>
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SECTION 32 [*Resignation*]

This section bars a member of the Society by virtue of section 28 of the Act from resigning from the Society unless the member's current practising licence expires. However, the other members may resign, or may be expelled on such grounds as may be specified by the Society upon being given an opportunity to answer an allegation made against him or her.

The Commission was of the view that this provision lacks clarity because it combines matters of resignation and expulsion. The Commission therefore recommends that it should be split into two subsections. The first subsection should deal with matters of resignation of members of the Society by virtue of section 28 who cannot resign as long as they hold a valid practising licence. The rationale is that the spirit of compulsory membership under section 28 should not be defeated by those members that may opt out of the membership and therefore not subjected to the disciplinary machinery of the Society. The second subsection should deal with matters of expulsion of those who became members by virtue of sections 29 and 30.

The Law Association of Zambia Act provides for expulsion and suspension of members as well as resignation and cessation of membership in two separate provisions.¹⁴⁵ The Commission further recommends that the second subsection should provide that such members shall not be expelled from the membership of the Society before being given an opportunity to defend themselves against the allegations levelled against them.

The Commission further considered that the provision on expulsion should also provide the grounds upon which a member may be expelled. In light of the foregoing, the Commission therefore recommends the amendment of section 32 by deleting the whole provision and replacing it as follows:

Resignation and expulsion	<p>... (1) A member of the Society by virtue of section ... may not resign from the Society while his licence to practice is in force.</p>
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¹⁴⁵ See sections 7 and 8 of the Law Association of Zambia Act

(2) A member of the Society, who is a member other than by virtue of section ..., may be expelled from membership of the Society, if the member—

(a) is adjudged bankrupt;

(b) ceases to hold a qualification enabling him to become a member; or

(c) conducts himself in a manner that brings the Society into disrepute, after having been given a reasonable opportunity of answering the allegations levelled against him.

SECTION 33 [*Cessation of membership*]

This clause provides that a member automatically ceases to be as such if he ceases to qualify for membership. However, honorary members are exempt from the application of this rule.

In Zambia, there is a legal provision for cessation of membership of the Law Association which provides that if a member ceases to be qualified for membership of the Law Association, he or she is no longer a member.¹⁴⁶

The Commission recommends retention of this section.

SECTION 34 [*Election*]

This section obliges the Society to conduct elections for office bearers and committees not later than 28th February each year. The Commission considered the appropriateness of 28th February as the date on which elections should be held. The Commission was of the view that, in light of the requirements for auditing of the accounts of the Society after the closure of the financial year of the Society, there is need to give ample time for such activities to be concluded before a new Executive Committee is elected into office. The Commission proposes the date of 31st March for elections and recommends a new provision as follows:

Election ... An annual election shall be held by the Society not later than 31st March in every year, at which election the Society shall elect officers or committees from its members, as may be deemed necessary.

SECTION 35 [*Delegation of powers and functions*]

This provision allows the Society to delegate all or any of its powers to its officers or to any of its committees. In other comparative jurisdictions like Zambia there is a similar provision which provides that the Executive Committee referred to as the Council shall exercise all powers of the Law Association.¹⁴⁷

¹⁴⁶ See section 8 (2) of the Law Association of Zambia Act.

¹⁴⁷ Section 11 (1) of the Law Association of Zambia Act.

The Commission recommends retention of this section.

SECTION 36 [*Society's power to make rules*]

The provision empowers the Society to make rules for the better carrying out of the purposes of Part VII and objects for which the Society is established.¹⁴⁸ The High Court has power to make an order for the implementation or enforcement of rights conferred upon the Society or its committees by rules made regarding resignation of members. The Chief Justice has power to make rules of court for purposes of the powers conferred on the High Court.¹⁴⁹

The Commission considered the powers that are conferred upon the Society and noted that the Commission has made specific recommendations regarding some of the powers, for instance, with respect to subsection (2) (g), and recommends that the subsection be amended accordingly to reflect the change in numbering.

The Commission observed that although this section has subsection (4), it does not have subsection (3). The Commission noted that this strange arrangement is compounded by the reference under subsection (4) to paragraph (e) of subsection (3). The Commission wondered whether indeed the reference to subsection (3) in subsection (4) was made to resignation of members on the powers of the High Court or it was reference to the missing subsection. The Commission checked the earlier versions of the Act and found no reference to the third subsection and concluded that perhaps the absence of subsection (3) was an error. The Commission therefore recommends that section 36 be amended by renumbering the provisions and deleting the words “(4)” at the end of paragraph (2) and replacing them with the words “(3)”.

In light of the foregoing discussion on the Malawi Law Society, the Commission recommends the adoption of a new Part on establishment of the Malawi Law Society as follows:

PART ...

ESTABLISHMENT OF MALAWI LAW SOCIETY

Establishment of Malawi Law Society

...— There is established a body corporate to be known as the “Malawi Law Society” with perpetual succession and a common seal, with power to hold land, to sue and be sued in its corporate name.

Objects of Society

...— The objects for which the Society is established are to—
(a) represent, protect and assist legal practitioners regarding conditions of practice and otherwise;

¹⁴⁸ See subsection (2) for outline of specific rules that the Society may make.

¹⁴⁹ However note that the section does not have subsection (3) although it is referred to in subsection (4).

(b) present generally the views of legal practitioners and to sustain and preserve their rights and status;

(c) protect and assist the public in Malawi on all matters touching, ancillary or incidental to the law;

(d) promote research towards the development of the law;

(e) advise Government on all matters affecting legislation and the administration and practice of the law in Malawi;

(f) regulate the setting up, management and dissolution of legal practice; and

(g) do all other things that are incidental or conducive to the attainment of the foregoing objects or any of them.

Powers of the Society ...— The Society shall have powers to—

(a) engage in formal or informal activities designed to foster and extend the study of the law, and for the benefit both of members of the Society and other persons interested in the profession of the law;

(b) acquire, hold, develop or dispose of properties, whether movable or immovable, and to derive capital or income therefrom, for all or any of the objects of the Society;

(c) raise or borrow money for all or any of the objects of the Society in a manner and on security determined by the Society, from time to time;

(d) invest or deal with money of the Society not immediately required in a manner determined by the Society; and

(e) do all other things that are incidental or conducive to the attainment of the objects of the Society or any of them or of any objects under any other written law.

Membership of the Society ...— The membership of the Society shall consist of the following—

(a) all legal practitioners who are members by reason of section ...;

(b) all persons admitted to membership of the Society under section ... and; and

(c) all persons appointed as honorary members of the Society under section

Every legal practitioner to be member of Society

... (1) A person whose name is inscribed upon the Roll shall, without election or appointment, become a member of the Society from the date on which his name was inscribed upon the Roll.

(2) A member of the Society by reason of subsection (1) shall remain a member of the Society, until his name is removed, whether at his own request or otherwise, and in case of the latter, upon approval by the Society, from the Roll.

(3) A member of the Society by reason of subsection (1), and who—

(a) is suspended from practising; or

(b) has not paid subscription fees to the Society,

shall not be entitled during the period of such suspension or non-payment, to any of the rights and privileges of membership.

(4) The Society may, from time to time, confer membership on any other person resident in Malawi who possesses legal qualifications acceptable to the Society and who consents to be conferred membership.

Honorary members

... The Society may confer honorary membership, either for life or for any period as it may deem appropriate, on any person it deems fit and who consents to the election.

Fees and subscription

... (1) A member of the Society shall pay fees and subscription, to the Society, prescribed by the Minister, on recommendation of the Society.

(2) An honorary member shall not be required to pay subscription.

Resignation and subscription

... (1) A member of the Society by virtue of section ... may not resign from the Society while his licence to practice is in force.

(2) A member of the Society, who is a member other than by virtue of section ..., may be expelled from the Society, if the member—

(a) is adjudged or declared bankrupt;

(b) ceases to hold a qualification enabling him to

become a member; or

(c) conducts himself in a manner that brings the Society into disrepute, after having been given a reasonable opportunity to be heard.

Cessation of membership ...— Any member of the Society, other than an honorary member, who ceases to qualify for membership shall automatically cease to be a member of the Society.

Election ... An annual election shall be held by the Society not later than 31st March in every year, where the Society shall elect officers or committees from its members, as may be deemed necessary.

Delegation of powers and functions ...—(1) The Society may, from time to time, delegate any of its powers or functions to any one or more of its officers or to any committee of the Society.

(2) For purposes of this section, “an officer” means an elected member and the Executive Director of the Society.

Society’s powers to make rules ...—(1) The Society may make rules prescribing anything which under this Part may be or is to be prescribed, and generally for the better carrying out of the purposes of this Part and the objects for which the Society is established.

(2) Without prejudice to the generality of subsection (1) and subject to section ..., the Society may make rules for—

(a) the annual and other subscriptions of the Society;

(b) the manner of application for membership of the Society;

(c) standards of professional conduct with which every legal practitioner shall comply;

(d) criteria for conferment of honorary membership to the Society;

(e) the grounds for expulsion of members of the Society and the procedure relating thereto;

(f) the resignation of members;

(g) the regulation of powers exercisable by any committee of the Society, and delegation of the powers;

(h) the manner of convening meetings of the Society and of committees, and quorums thereof, and the procedure relating thereto;

(i) the manner in which, and the conditions subject

to which, any member not present at a general meeting may vote by proxy on any resolution before that meeting;

(j) the manner of election, removal and replacement of officers of the Society;

(k) the design, custody and use of the common seal;

(l) the regulation on setting up, running and dissolution of a legal practice;

(m) the classes of resolutions at meetings of the Society and their effect;

(n) the manner in which members shall fulfill the requirement to undertake annual continuing legal education;

(o) the requirements relating to the Fidelity Fund and indemnity insurance cover; and

(p) any other matter the Society deems necessary for the proper conduct and regulation of its affairs.

(3) The High Court shall have jurisdiction to make any order it deems necessary or appropriate for the implementation or enforcement of any of the rights conferred upon the Society or any committee thereof, as the case may be, by rules made under this section.

SECTION 37 [*Disciplinary Committee*]

The section establishes the Disciplinary Committee of the Society which comprises the Solicitor General and two other members elected by the Society. The mandate of the Committee is to inquire into the conduct of legal practitioners either at the request of the High Court or on a complaint made by any person. In case of the latter, there must be indications that there may be grounds on which the High Court could make an order suspending a legal practitioner or striking him off the Roll.¹⁵⁰ Subsection (3) provides for the procedure of the Disciplinary Committee while subsection (4) mandates the Committee, upon finding a *prima facie* case against the legal practitioner, to report the matter to the Attorney General who is then empowered to apply to the High Court for an order of suspension or striking off.

The Commission observed that the current set-up is not the most effective way of dealing with errant elements within the legal fraternity. The Commission noted that notwithstanding numerous complaints against members of the Society, the number of cases handled by the Committee appears negligible. The Commission further observed that in light of the current constitutional order

¹⁵⁰ Subsection (2) paragraph (b).

which is rights-based, there is need for protection of the consumer public especially clients whose resources or interests may be at stake. The Commission further observed that the lawyer-client relationship is a fiduciary one which is sustained by trust between the two parties. Therefore, the Commission felt necessary to review section 37 and further resolved that the disciplinary mechanism provided under this provision should be overhauled and reconstituted.

The Commission's first observation was that while there is a Part on Discipline, the Disciplinary Committee of the Society is placed under a different Part of the Act when both provisions relate to conduct of the same group of people. In Kenya, the Disciplinary Committee is under the Part on discipline.¹⁵¹ The Commission recommends that matters of discipline should be addressed under one Part in the proposed legislation and that the provision under section 37 be moved and should be placed under the Part on Discipline.

The Commission then recommends that in place of the Disciplinary Committee only, there should be a two-tier system of managing complaints from members of the public. The Commission therefore recommends the establishment of a Complaints Committee whose mandate shall be to receive and investigate complaints from the public and, after assessment that a case has been made against a legal practitioner, make recommendations to the Disciplinary Committee. The Commission emphasized that the role of the Complaints Committee shall be to screen complaints and not to prosecute them. In order to boost confidence from members of the public, the Commission further recommends that composition of the Complaints Committee should include members of the public. On considering the membership of the Complaints Committee in total, the Commission looked at other jurisdictions with similar arrangements such as Kenya. The Commission noted that in Kenya, the President appoints Commissioners to sit on this Committee. The Commission resolved that the membership of the Complaints Committee shall be appointed by the Attorney General. The Commission recommends twelve members as follows:

- (a) six legal practitioners nominated by the Society; and
- (b) six members of the public nominated by the Attorney General.

The Commission proposes that any three members of the Committee, one of whom is a legal practitioner, form a quorum. As such, a number of Complaints Committees can sit simultaneously and speedily dispose of complaints. The Commission recommends further that the appointment of members to the Complaints Committee should be based on the geographical distribution of legal practitioners in order to ensure that the complaints are disposed of quickly. The Commission however was quick to note that this did not necessarily mean that legal practitioners appointed as members of the Complaints Committee will be restricted to serve only within the region in which they reside or practice. This observation was made since there are regions with very few lawyers and the

¹⁵¹ Section 57 of the Advocates Act of Kenya.

numbers would exhaust quickly after the members have been reappointed twice.

The Commission also considered the tenure of members of the Complaints Committee and resolved that members shall be appointed for a period of two years after which they may be eligible for re-appointment only twice. As such, a member can be appointed to the Complaints Committee for a maximum of six years.

In terms of procedure of the Complaints Committee, the Commission resolved that the Complaints Committee should be empowered to regulate its own procedure. This notwithstanding, the Commission emphasized that the Complaints Committee should maintain public confidence by speedily disposing of complaints. The Commission therefore resolved that the proposed law should provide for a time frame within which complaints have to be disposed of by the Complaints Committee. The proposed length of time for disposal of these matters is twenty-eight days from the date that the complaint is received.

The Commission was of the view that the Disciplinary Committee is not effective because, unlike in other jurisdictions, it does not impose penalties on errant legal practitioners but rather, upon determining that a *prima facie* case has been established, reports the matter to the Attorney General. The Commission observed that this is one reason why the public trust has been compromised. The Commission observed that the situation is even made worse by the fact that even the Attorney General cannot impose the penalties and has to make an application to the High Court which is mandated by the law to impose penalties against the errant legal practitioner.

In Zambia, one of the Law Association's objects is to protect and assist the public in all matters touching, ancillary or incidental to the legal profession.¹⁵² The Association has powers to appoint a Legal Practitioners' Committee whose members are appointed by the Association to handle disciplinary matters at first instance, it receives complaints from the Secretariat. However unlike in Malawi, the Committee has mandate to impose sanctions on the errant legal practitioner. The court may, on the recommendation of the Disciplinary Committee, admonish the legal practitioner or make such order as to the removing or striking his name from the Roll, suspend him from practice, or payment of fine and make any order as it thinks appropriate.¹⁵³ Clerks of law firms are also subject to this provision.

In Kenya, the mandate of the disciplinary committee is even broader. If the Committee is satisfied that a case of professional misconduct has been made out, it may also order that the advocate be admonished; or be suspended from practice for a period not exceeding five years; or that the advocate's name be struck off the Roll; or that such advocate should pay a fine not exceeding fifty thousand Shillings or indeed a combination of the above orders as the Committee thinks

¹⁵² Section 4 of the Law Association of Zambia Act.

¹⁵³ *Ibid*; section 28 (1) of the Act.

fit.¹⁵⁴

The Commission was of the view that a similar set-up would be effective in Malawi. This would not only enhance the authority of the Disciplinary Committee but also ensure that some matters are dealt with the expediency they deserve. Therefore the Commission recommends that the Disciplinary Committee should have mandate to mete out punishment against the errant legal practitioners. Then the aggrieved party may commence judicial review proceedings of the decision at the High Court.

The Commission proposes that the penalties that the Disciplinary Committee shall be empowered to mete out against the errant legal practitioner shall include:

- (a) recommendation to the Chief Justice for striking a legal practitioner off the Roll;
- (b) suspension;
- (c) fine;
- (d) admonition; or
- (e) order of restitution.

The Commission observed that while the Society shall be mandated to finance the operation of the Committee, the Disciplinary Committee shall be empowered to impose the costs of the proceedings on the party that is found at fault. Although this shall not be imposed as a penalty, it shall be adopted as a measure of ensuring that errant parties are responsible for their actions and the disciplinary mechanism is made self-sustaining. The Commission recommends that there shall be a right to apply for review of any decision of the Disciplinary Committee to a judge of the High Court.

The Commission then considered the composition of the Disciplinary Committee. Initially the Commission was of the view that since the office of the Attorney General heads the bar, this office should not be left out of the composition of the Disciplinary Committee. However, during the consultative workshop, stakeholders were of the view that the Ministry of Justice would be over represented with the inclusion of the Attorney General. Furthermore, the Commission was informed by the stakeholders that the institutional arrangement of the Ministry of Justice is that the Solicitor General deputises the Attorney General. As such it would not be prudent for both offices to be included on the composition of the Disciplinary Committee. Therefore the Commission rescinded its decision to include the Attorney General on the composition of the Disciplinary Committee.

While the Commission commended that the small membership ought to have made it easy for them to meet and dispose of matters, this has not been the case. The Commission has no problems with the involvement of the Solicitor General

¹⁵⁴ Section ... (4) of the Advocates Act of Kenya.

but felt that the number of legal practitioners has to be increased. The Commission further recommends that two persons should be appointed to represent members of the public. These two members would represent the consumers of legal services rendered by legal practitioners. The Commission recommends the following composition of the Disciplinary Committee—

- (a) the Solicitor General, who shall be the Chairperson;
- (b) three members of the Society; and
- (c) two members of the public who are of good standing in society and are not legal practitioners.

The Commission recommends that four members should form a quorum for the Disciplinary Committee. It further recommends that the Disciplinary Committee shall, in the absence of the Chairperson, elect one of the members to be Chairperson. With respect to tenure, the Commission also proposed that members should be appointed for a period of two years after which they would be eligible for re-appointment for another two terms in total serving for a maximum period of six years.

The Commission further recommends that the Disciplinary Committee should regulate its own procedure but that in order to maintain public confidence in the Disciplinary Committee, the law should provide a time frame within which complaints have to be disposed of. The Commission therefore recommends a period of ninety days. However, the Commission recommends that the Committee should be allowed to extend this period, upon giving reason for so doing, for a further thirty days. Additionally, the Commission further recommends that as a matter of practice, the Disciplinary Committee shall no longer be the forum of first instance since all complaints shall be directed to the Complaints Committee. However, the Disciplinary Committee shall retain powers of investigation if there is a matter which has been referred to it or has been disposed of by the Complaints Committee but in the view of the Disciplinary Committee, it is a matter which needs to be further investigated. The Disciplinary Committee may also institute an investigation over a matter pending before it.

The Commission recommends that if any party is aggrieved by the decision of the Disciplinary Committee, the party can commence proceedings in the High Court to review the decision. The Commission noted that there is need for the law to specify that all members of the Disciplinary and Complaints Committees shall take an oath of secrecy with respect to information that comes to the members in the course of their work as members.

Section 37 (5) of the Act provides that if the Disciplinary Committee finds a complaint to be frivolous and vexatious, it may direct the complainant to pay the costs of the inquiry, including the expenses of attendance of the legal practitioner against whom the complaint was made. However, it was the view of the Commission that the provision would not work in the proposed regime since it is the Complaints Committee that shall be screening complaints and would find a

complaint frivolous or vexatious. All frivolous and vexatious matters would have already been determined as such by the Complaints Committee and dismissed accordingly. Even if the Complaints Committee would have erred in finding that there was a *prima facie* case, the Commission held a firm view that it would be unfair and defeating the noble course of justice to punish an innocent complainant. Therefore it recommended that subsection (5) should be deleted.

The Commission further recommends that since the Complaints Committee and the Disciplinary Committee are committees of the Society, they should be financed by the Society and as such, the Society must ensure that funds are available for meetings of the Committees.

The Commission therefore recommends the adoption of the following part on Discipline as follows:

PART ...

DISCIPLINE

Application
to all legal
practitioners

...— Every legal practitioner shall be subject to the jurisdiction of the High Court, the Complaints Committee and the Disciplinary Committee on matters of discipline.

Saving
powers of the
court

...— Nothing under this Part shall supercede, lessen or interfere with the powers vested in the Chief Justice or any judicial officer to deal with misconduct or an offence committed by a legal practitioner.

Disciplinary
powers of the
High Court

...—(1) The High Court, either of its own motion and after such inquiry as it deems fit, or on an application made by the Attorney General, may make an order suspending any legal practitioner, or striking a legal practitioner off the Roll, or may admonish a legal practitioner, where the legal practitioner—

(a) takes instructions in any cause or matter except from the party on whose behalf he is retained, or from some person who is an agent or representative of the party;

(b) is found guilty of fraudulent or improper conduct in the discharge of his professional duty or has misled the Court, or allowed it to be misled in a manner as to cause the Court to make an order which he knew or ought to have known to be wrong and improper;

(c) makes or agrees to make any payment or consents to the retention of the whole or any part of any fee paid or payable to him for his services, in consideration of any person procuring or having

procured the employment, in any legal business, of himself or any other legal practitioner;

(d) directly or indirectly, procures or attempts to procure the employment of himself as a legal practitioner through or by the intervention of any person to whom any remuneration for obtaining the employment is given by him, or agrees or promises to be so given;

(e) without the previous written consent of the Society, makes any charges for professional services (where the charges are prescribed) other than those which are prescribed as scale charges, or less than those prescribed as minimum charges;

(f) is adjudged bankrupt;

(g) continues to practice after being warned in writing by the Society that he has no valid licence;

(h) is convicted of an offence punishable with a term of imprisonment without an option of a fine;

(i) is guilty of conduct tending to bring the profession of the law into disrepute;

(j) directly or indirectly, applies or seeks instructions for professional business or does or permits, in the carrying out of his practice, any act or thing which can reasonably be regarded as touting or advertising or as calculated to attract business unfairly;

(k) embezzles money belonging to his client or held on behalf of another person in the course of his duty;

(l) corrupts or attempts to corrupt a judicial officer;

(m) acts in a manner that poses, is likely to pose or appears to pose a conflict of interest or breach of confidentiality;

(n) engages himself to represent a person without receiving instructions from the person;

(o) discharges himself from a client without due notice to the client and, where applicable, to the court;
or

(p) fails to comply with any provision of this Act or any subsidiary legislation made under this Act.

(2) If the court, on an application under subsection (1),

is satisfied that a legal practitioner is guilty of dishonesty in connexion with his practice as a legal practitioner or in connexion with any trust for which he is a trustee, the court may order that no payment shall be made without the leave of a judge by any banker named in the order out of any banking account in the name of the legal practitioner or his firm.

(3) Where a legal practitioner is struck off the Roll or suspended under subsection (1), the court may give such directions as it considers proper regarding the possession and control of deeds, wills, documents evidencing title to any property, books of account, records, vouchers or other documents in the possession or control of the legal practitioner or relating to any trust for which he is a trustee.

(4) Any application to the court made under this section shall be heard by the Chief Justice sitting alone, or sitting together with another judge as he may direct, but no order shall be made suspending or striking off the Roll any legal practitioner without the legal practitioner being given a reasonable opportunity to be heard and to call witnesses.

Establishment
of the
Complaints
Committee

...—(1) There is hereby established a Complaints Committee of the Society.

(2) The Attorney General shall appoint members of the Complaints Committee which shall consist of—

(a) six (6) legal practitioners nominated by the Society; and

(b) six (6) members of the public of good standing in society and who are not legal practitioners.

(3) In appointing members of the public, the Attorney General shall have regard to—

(a) residence of the proposed nominee;

(b) the number of legal practitioners practising in a particular area;

(c) the personal conduct of the proposed nominee;

(d) the person's interest and knowledge of legal matters and the legal profession; and

(e) any other matter that the Attorney General considers makes the proposed nominee a fit and proper person.

(4) The members shall elect, from among their number, the chairperson of the Committee who shall preside over the meetings of the Committee.

(5) In the absence of the chairperson, members present at any meeting of the Committee shall elect one of their number, to preside over the meeting of the Committee.

Functions and duties

... The Complaints Committee shall inquire into the conduct of legal practitioners—

(a) at the request of a court; or

(b) on submission of a complaint to the Society.

Tenure and vacancy

...—(1) A person appointed to the Complaints Committee shall hold office for a period of two (2) years, unless he—

(a) sooner resigns;

(b) is removed from office; or

(c) ceases to have the qualification necessary as a prerequisite to appointment.

(2) At the expiry of a member's term of office, he may be eligible for re-appointment for a maximum of two (2) terms of office.

(3) A member of the Complaints Committee may be removed by the Attorney General from office on grounds of—

(a) incapacity arising from physical or mental infirmity;

(b) misconduct;

(c) bankruptcy;

(d) absence, without valid excuse, from three (3) consecutive meetings of the Committee of which he has had notice; or

(e) conviction for an offence punishable with a term of imprisonment without an option of a fine.

(4) In case of a vacancy in the membership of the Complaints Committee, the vacancy shall be filled by a person appointed by the Attorney General until the expiry of the period from the date of appointment of the Committee:

Provided that if the remaining period is less than six (6) months, the Attorney General may not fill the vacancy until the expiry of the period.

...—(1) Subject to this Act, the Complaints Committee may regulate its own procedure.

(2) The Complaints Committee shall receive and consider complaints referred or submitted to it, as the case may be, by a court or any person, regarding the conduct of a legal practitioner, or a firm of legal practitioners, or a member or an employee of a legal practitioner or a firm of legal practitioners.

(3) Where it appears to the Complaints Committee that there is—

(a) no substance in the complaint, it shall reject the complaint forthwith;

(b) substance in the complaint and the matter complained of constitutes or appears to constitute a disciplinary offence, it shall immediately refer the matter to the Disciplinary Committee for appropriate action;

(c) substance in the complaint but that it does not constitute a disciplinary offence, the Complaints Committee shall immediately notify the legal practitioner or firm against whom the complaint has been made of the particulars of the complaint and call upon the legal practitioner or firm to answer the complaint within fourteen (14) days; or

(d) substance in a complaint but that the circumstances of the case do not disclose a disciplinary offence which the Disciplinary Committee can appropriately deal with and that the Complaints Committee itself should not deal with the matter but that the proper remedy for the complainant is to refer the matter to a court for appropriate action, the Complaints Committee shall advise the complainant accordingly.

(4) Upon the expiration of the period as specified under subsection (3) (c), if the summoned party has not appeared before it, the Complaints Committee shall proceed to investigate the matter and for that purpose, it shall have power to summon witnesses and to require the production of any documents as it may deem necessary.

(5) The Complaints Committee shall examine witnesses on oath and generally take all steps as it may consider

proper and necessary for the purpose of its inquiry and shall, after hearing any submissions made to it or on behalf of the complainant and the legal practitioner or firm against whom the complaint was made, refer the matter to the Disciplinary Committee.

(6) The Complaints Committee shall—

(a) dispose of and conclude any matter brought before it within a period of twenty-eight (28) days; and

(b) inform the complainant of its decision within seven (7) days.

(7) The Complaints Committee may, upon giving good and justifiable reasons, extend any period under subsection (6) for a period not exceeding fourteen (14) days.

(8) If the Complaints Committee fails to dispose of a complaint within the time limit stipulated in this section, a complainant may refer the matter to the Disciplinary Committee.

(9) Any three (3) members of the Complaints Committee, one (1) of whom shall be a legal practitioner, shall constitute a quorum and may proceed to hear and consider a complaint.

Establishment of the Disciplinary Committee

...—(1) There is hereby established a Disciplinary Committee of the Society.

(2) The Disciplinary Committee shall consist of—

(a) the Solicitor General, who shall be the Chairperson;

(b) three (3) legal practitioners of not less than ten (10) years standing at the Bar elected by the Society; and

(c) two (2) members of the public of good standing in society and who are not legal practitioners, appointed by the Attorney General.

Functions and duties

... The Disciplinary Committee shall—

(a) receive complaints referred to it by the Complaints Committee or a court;

(b) investigate all complaints brought before it;

(c) conduct hearings on any disciplinary matter; and

(d) impose any penalty specified under section

Minutes of meetings

... The Committee shall keep minutes of the proceedings of every meeting of the Committee.

Tenure and vacancy

...—(1) A person appointed to the Disciplinary Committee shall hold office for a period of two (2) years, unless he—

(a) sooner resigns;

(b) is removed from office; or

(c) ceases to have the qualification necessary as a prerequisite to appointment.

(2) At the expiry of a member’s term of office, he may be eligible for reappointment for a maximum of two (2) terms.

(3) A member of the Disciplinary Committee may be removed from office by the Attorney General on grounds of—

(a) physical or mental incapacity;

(b) misconduct;

(c) bankruptcy;

(d) absence, without valid excuse, from three (3) consecutive meetings of the Committee of which he has had notice; or

(e) conviction for an offence punishable with a term of imprisonment without an option of a fine.

(4) In case of a vacancy in the membership of the Disciplinary Committee, the vacancy shall be filled by a person appointed by the Attorney General until the expiry of the period from the date of appointment of the Committee:

Provided that if the remaining period is less than six (6) months, the Attorney General may not fill the vacancy until the expiry of the period.

Proceedings of the Disciplinary Committee

...—(1) Subject to other provisions of this Act, the Disciplinary Committee may regulate its own procedure.

(2) The Disciplinary Committee may make rules for regulating the making, hearing and determination, by the Committee, of applications or complaints under this Part.

(3) The Committee shall meet for the transaction of business at a time and at a place determined by the Committee.

(4) Half of the members shall form a quorum of any meeting of the Committee.

(5) At any meeting of the Disciplinary Committee, the Committee shall, in the absence of the Chairperson, elect one of its number to act as Chairperson.

Time limits

...—(1) The Disciplinary Committee shall dispose of any matter before it within ninety (90) days.

(2) The Disciplinary Committee may, upon giving good and justifiable reasons, extend the period for disposing of any matter for a period not exceeding thirty (30) days.

(3) The Disciplinary Committee shall, upon reaching a decision on a matter before it, inform the complainant of its decision within seven (7) days of the decision.

(4) If the Disciplinary Committee fails to dispose of a complaint within the time limits specified under this section, a complainant may refer the matter to the Chief Justice.

Penalties

...—(1) The Disciplinary Committee, upon being satisfied that a legal practitioner is responsible for misconduct, may—

(a) recommend to the Chief Justice that the legal practitioner be struck off the Roll;

(b) suspend the legal practitioner;

(c) impose a fine on the legal practitioner;

(d) admonish the legal practitioner; or

(e) advise the Director of Public Prosecution to institute criminal proceedings against a legal practitioner.

(2) In addition to a penalty imposed under subsection (1), the Disciplinary Committee may order the legal practitioner to—

(a) pay costs of the disciplinary proceedings; or

(b) pay compensation to the complainant.

(3) A person aggrieved by a decision of the Disciplinary Committee may, within thirty (30) days of the decision, commence judicial review proceedings against the decision, at the High Court.

- Striking off** ... A legal practitioner whose name has been struck off the Roll shall not practice the profession of the law in Malawi.
- Suspension** ...—(1) A legal practitioner who has been suspended by an order made under section ... shall not practice the profession of the law in Malawi during the period of suspension.
- (2) A legal practitioner shall not be suspended from practising the profession of the law for a period exceeding two (2) years.
- Practising while struck off or suspended** ... A legal practitioner who practises the profession of the law while he has been struck off the Roll or has been suspended commits an offence and shall, upon conviction, be liable to a fine of five million Kwacha (K5,000,000) and imprisonment for seven (7) years.
- Publication of names of legal practitioners struck off or suspended** ... The Society shall publish, in the *Gazette* and in at least two (2) newspapers with the widest circulation, names of legal practitioners who have been struck off the Roll or have been suspended and, in the case of suspension, the period of suspension.
- Re-admission** ...—(1) A legal practitioner whose name has been struck off the Roll may, after the expiry of five (5) years, apply to the Chief Justice for re-admission to practice.
- (2) On receipt of an application for re-admission, the Chief Justice may,—
- (a) re-admit the applicant;
- (b) refuse to re-admit the applicant; or
- (c) order that the applicant shall not be re-admitted unless the applicant—
- (i) enrolls at the Institute and successfully passes the Malawi Law Examination; or
- (ii) is supervised by a legal practitioner of not less than ten (10) years standing at the Bar for a period not exceeding one (1) year.
- Disclosure of interest** ...—(1) If a member of any committee established under this Part is present at a meeting of the committee at which any matter which is the subject of consideration is a matter in which the member or his immediate family member or his professional or business partner is directly or indirectly interested in a private or professional capacity, he shall, as

soon as is practicable, after the commencement of the meeting, disclose his interest.

(2) Unless the Committee otherwise directs, the member referred to in subsection (1), shall not take part in any consideration or discussion of, or vote on, any question touching on the matter.

(3) A disclosure of interest shall be recorded in the minutes of the meeting at which it is made.

Evidence

...—(1) A person who—

(a) has been summoned before any committee under this Part, and—

(i) refuses or fails, without justifiable cause, to attend and give evidence relevant to the inquiry at the time and place stated in the summons;

(ii) refuses to be sworn or affirmed; or

(iii) refuses or fails, without justifiable cause, to produce any book, record, document or thing which he has been requested in the summons or otherwise to produce; or

(b) appears before a committee and refuses to answer or to answer fully or satisfactorily to the best of his knowledge and belief, any question lawfully put to him,

commits an offence and shall, upon conviction, be liable to a fine of two hundred and fifty thousand Kwacha (K250,000) and imprisonment for six (6) months.

(2) Any person who at an inquiry under this Part, gives false evidence on oath, knowing such evidence to be false or not knowing or believing it to be true, commits an offence termed perjury and shall, upon conviction, be liable to the penalties provided under law for perjury.

Right to legal representation

... A legal practitioner against whom a complaint is made and has been brought before the Disciplinary Committee, is entitled to legal representation.

Oath of secrecy

... Every member of any committee established under this Part shall, on appointment, take an oath of secrecy prescribed under this Act.

Allowances

... A member of a committee established under this Part

shall be paid allowances determined by the Society from time to time.

NEW PROVISIONS

ORGANIZATION AND ADMINISTRATION OF THE SOCIETY

The Commission noted the proposal of the Society with respect to the organization and administration of the Society. The Commission also noted that there is need for making provision for the establishment of a secretariat of the Society. The Commission considered that it is necessary for the proposed law to provide for a secretariat (headed by the Executive Director) and its functions. Similarly, there is need for provision for staff of the secretariat. The Commission also took note of the proposal by the Society that the Society should have Chapters within the administrative regions of Malawi. The Commission had no objection to this proposal and recommends that the proposed law should empower the General Assembly to establish Chapters of the Society, details of which should not be contained in the principal legislation. The Commission further considered that the proposed law should make provision for meetings of the Society including the Annual General Meeting of the Society which shall be attended by all members of the Society including members from the Chapters.

In light of the foregoing, the Commission recommends the adoption of the following Part on organization and administration of the Society as follows—

PART ...

ORGANIZATION AND ADMINISTRATION OF THE SOCIETY

Chapters of the Society ...—(1) **The Society may, from time to time, establish chapters of the Society.**

(2) The chapters of the Society shall comply with the provisions of this Act.

Executive Committee ...—(1) **There is hereby established an Executive Committee of the Society.**

(2) The Executive Committee shall be an independent organ of the Society and shall consist of the Chairperson and such other officers as the Society may determine.

(3) Members of the Executive Committee shall be elected at the Annual General Meeting of the Society.

Tenure and vacancy ...—(1) **A member of the Executive Committee shall hold office for a period of one (1) year.**

(2) A member elected in accordance with subsection (1)

may be eligible for re-election for another one (1) year term but the office of that member shall become vacant, if the member—

(a) dies;

(b) resigns, upon giving one (1) month's notice to the Society;

(c) becomes bankrupt;

(d) becomes physically or mentally incapacitated;
or

(e) fails to attend, without valid excuse, three (3) consecutive meetings of the Committee of which he has had notice.

(3) On vacation of office by a member, the vacancy shall be filled by a person elected to fill the vacancy by the Society:

Provided that if the remaining period is less than three (3) months, the Society may not fill the vacancy until the expiry of the period.

Meetings of
the Society

...—(1) The Society shall meet for the transaction of business at least once every month at a place and at a time, the Chairperson may determine.

(2) An Annual General Meeting of the Society shall be called by the Chairperson, before the 31st day of March, upon written notice of not less than seven (7) days to all members of the Society.

(3) Where a third of the membership of the Society requests the Chairperson for the holding of an extraordinary meeting of the Society, the Chairperson shall convene the meeting within the number of days specified in the request.

(4) At the Annual General Meeting, the Society shall—

(a) receive the Chairperson's report;

(b) receive audited accounts of the Society;

(c) elect members of the Executive Committee or any other committee of the Society; and

(d) transact any other business the Society deems fit.

(5) The provisions under this section shall apply *mutatis mutandis* to the chapters of the Society.

Secretariat ... The Secretariat of the Society shall consist of the Executive Director and other members of staff of the Society appointed under this Part.

Executive Director ...—(1) There shall be the office of the Executive Director of the Society, who shall be the chief executive officer of the Society.

(2) The Executive Director shall be appointed by the Society, on terms and conditions determined by the Society.

(3) The Executive Director shall be a person who has a qualification in law and has actually practiced the profession of law for at least five (5) years.

(4) The Executive Director shall hold office for a period of three (3) years and may be re-appointed.

Duties of the Executive Director ... Subject to the general and special directions of the Society, the Executive Director shall be responsible for the day to day management of the Society and shall exercise executive and administrative control over the staff of the Society.

Removal of Executive Director ...—(1) The Society may remove the Executive Director from office, on the following grounds—

(a) misconduct;

(b) incompetence;

(c) physical or mental incapacity;

(d) bankruptcy; or

(e) where he is otherwise unable or unfit to discharge the functions of the Executive Director.

(2) The Society shall only remove the Executive Director from office upon giving him a reasonable opportunity to be heard.

Staff ...—(1) The Society may appoint other officers of the Society, subordinate to the Executive Director, as the Society considers necessary for the proper discharge of the functions of the Society under the Act.

(2) The Society may, by directions in writing, delegate to the Executive Director, the appointment of junior officers at the Secretariat as specified in the directions.

(3) The Executive Director shall report to the Society, at its regular meetings or as the Society may request, every appointment made pursuant to subsection (2).

FINANCIAL PROVISIONS FOR THE SOCIETY

The Commission conducted preliminary consultations with some key stakeholders including the Malawi Law Society on this matter and learnt that the Society, despite being a statutory body, does not receive funding from Government. It learnt that this is deliberate as the Society would want to maintain its independence. Then the Commission had recourse to the position in other comparable jurisdictions and found out that law societies in these jurisdictions are sponsored by the members themselves. In Zambia, for example, the Association raises its own funds from the membership fees and selling of its publications. It also conducts seminars and workshops from which it makes some revenue. Another source of funding is from local organizations, businesses, foreign and international law associations.

In Kenya, the main source of funding for the Society is subscriptions from its membership. Currently, the Kenyan Law Society has about 7,000 registered members and there are two categories of subscription: high and low. Advocates of at least five years standing at the Bar are in the first category whilst those of less than five years standing are in the second category. Advocates in the first category pay KSH16,000 (about \$205) per annum. Advocates in the second category pay KSH10,000 (about \$128) per annum. It was said that the subscriptions are enough to enable the Society carry out its activities.

However, the Commission observed that unlike in the other countries where membership of the law societies is enormous, in Malawi there are few legal practitioners. Therefore the Society cannot rely on the subscriptions alone for its funding. At the time of the review, the total population of members paying subscription to the Malawi Law Society was around 300 legal practitioners paying K80,000 (about US\$320) annually. The Commission noted that the fees and subscriptions alone cannot sustain the operations of the Society. It therefore considered if the law would provide other sustainable means of funding the Society. The Commission deliberated on this matter at length and considered two options which, if incorporated in the law, would generate funds for the Society. It was pointed out that legal practitioners collect a lot of income for Government in form of Value Added Tax (VAT). The Commission considered whether the law should mandate the Society to be allocated one per centum of the VAT that its members collect on behalf of Malawi Revenue Authority (MRA). The members then would remit VAT less one per centum to the MRA. The other option would be that the legal practitioners should levy one per centum over and above their fees which they would in turn remit to the Society as its income.

The Commission observed that the first option would be difficult to implement since VAT is determined by the Minister of Finance in the Budget. The

Commission therefore resolved that the law should mandate the legal practitioners to put a one per centum levy over and above their legal fees as a source of income for the Society. The Commission observed that one per centum levy would not make legal services too expensive. It was observed, however, that even though the one per centum levy is minimal, it would still effectively finance the operations of the Society in the long run. This proposal supports the view that the Society members should be funding their organisation as it is the practice worldwide.

The Commission therefore recommends the adoption of the following provisions—

- | | |
|---|--|
| Funds of the Society | <p>...—(1) The funds of the Society shall consist of—</p> <ul style="list-style-type: none"> (a) subscription fees; (b) a Society Levy paid pursuant to section ...; and (c) any money raised by way of fees, charges, gifts, donations, materials or fines paid to the Society. <p>(2) The Society shall apply its funds for the purposes of its functions and may invest any surplus of its funds in a manner approved by the General Assembly of the Society.</p> |
| Society Levy | <p>... —(1) A legal practitioner shall charge and levy on every matter on which he has presented a bill to a client, and payable to the Society, a levy to be known as the “Society Levy” (in this Act otherwise referred to as the “Levy”).</p> <p>(2) The Levy shall be the sum of money equal to one per centum (1%) of the fees charged to a client.</p> <p>(3) The Minister may, on the recommendation of the Society, by order published in the Gazette, revise the percentage of the Levy.</p> <p>(4) The Levy shall be paid monthly to the Society and where the Society informs a legal practitioner that the Levy is due, payment shall be made within thirty (30) days from the date of notification.</p> |
| Penalty upon failure to pay levy | <p>... —(1) Where a legal practitioner who, under this Act, is liable to pay the whole or any part of the Levy, fails to pay the whole or any part of such Levy in accordance with section ..., an additional sum of twenty per centum (20%) of the unpaid Levy shall become due and be payable by the legal practitioner as a penalty.</p> <p>(2) Any sum payable as penalty under this section shall, for the purposes of this Act, be deemed to be a Levy and shall</p> |

be collected and recoverable accordingly.

(3) The Minister may, on the recommendation of the Society, by order published in the *Gazette*, revise the quantum of punitive percentage.

Exemption from levy ... The Minister may, on the recommendation of the Society and by order published in the *Gazette*, exempt a legal practitioner from the provisions of section

Accounting and auditing ... —(1) The Society shall keep and maintain proper books and records of account of its funds, property, assets and liabilities.

(2) The accounts of the Society shall be examined and audited annually as at 31st January in every year by an auditor appointed by the Society in general assembly.

(3) The auditor referred to in subsection (2) shall personally present the audit report to the Society at the Annual General Meeting.

PART VIII—MISCELLANEOUS

SECTION 38 [*Ex-officio legal practitioner*]

This section provides for *ex-officio* legal practitioners. These persons are entitled to practice as legal practitioners so long as they hold the office that qualified them as such.¹⁵⁵ The other category of *ex-officio* legal practitioners is that of persons appointed by the Attorney General to appear on behalf of the Government in any cause or matter.¹⁵⁶ These legal practitioners are also deemed legal practitioners but for the purpose of such cause or matter.

The Commission took note of the deliberations of its sister Commission on the Review of the Legal Education and Legal Practitioners Act in 2002 regarding the emergence of new constitutional institutions such as the Office of the Ombudsman, the Human Rights Commission and the Law Commission, and noted that officers from these institutions may apply to the Chief Justice for admission to practice as legal practitioners.¹⁵⁷ Having recommended that all those aspiring to practice the profession of law in Malawi should first enrol with the Institute and then be admitted to practice law only after passing the Malawi Law Examination, the Commission was of the view that this section falls away. The Commission, however, indicated that it does not expect a person without a valid practice licence, even if appointed to the high office of the Attorney General, to have audience before the courts.

The Commission therefore recommends deletion of this provision.

¹⁵⁵ Subsection (1).

¹⁵⁶ Subsection (2).

¹⁵⁷ Section 11 (1) (b)

SECTION 39 [*Legal practitioner is officer of Court*]

This section confers upon every legal practitioner the status of an officer of the High Court. The Commission observed that this provision restricts the status of legal practitioners as officers of the High Court only. Under the General Interpretation Act, “court” means any court of the Republic of competent jurisdiction while “High Court” means the High Court of Malawi established under the Constitution. The Commission deliberated on why the provision has in light of the definitions above restricted the status to the High Court. The Commission considered that the duties a legal practitioner owes to the High Court apply across all tiers of courts and that an officer of the High Court ought to exercise himself or herself with equal diligence, integrity and professionalism before any other court.

The Commission recommends amendment of section 39 by deleting the words “High Court” and replacing them with the word “**court**”.

SECTION 40 [*Legal practitioners not to practice in certain courts except in accordance with the Traditional Court Act, etc*]

This provision bars legal practitioners from practising as such in the Traditional Court except in accordance with the Traditional Courts Act¹⁵⁸ or any Act replacing or amending it. The Commission took cognizance of the fact that Traditional Courts were abolished and are no longer operational. They were abolished or integrated into magistracy in 1993.¹⁵⁹ However, the Commission was mindful of the recommendation of its sister special Law Commission on the Review of the Traditional Courts Act that recommended that traditional courts should be reintroduced styled as Local Courts.¹⁶⁰ The Commission took further notice of the fact that that special Law Commission recommended that legal representation should be allowed in criminal matters before local courts.¹⁶¹

The Commission further observed that this section provides that legal representation in Traditional Courts would not be allowed *except in accordance with the Traditional Courts Act or any Act amending or replacing it*. As observed above, the proposed Local Courts Act that will replace the old Traditional Courts Act would allow legal representation in criminal matters before Local Courts. Therefore the Commission recommends that this section should be deleted.

SECTION 41 [*Order of precedence*]

The section stipulates the precedence of legal practitioners. The order of precedence is as follows—

(a) the Attorney General;

¹⁵⁸ Cap. 3:03

¹⁵⁹ See also Law Commission Report 17: Report of the Special Law Commission on the Review of the Traditional Courts Act pages 12-13.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid* at 31-33.

(b) the Solicitor General; and then

(c) seniority according to the date a practitioner signed or is deemed to have signed the Roll.

The Commission observed that although the President confers the honour of Senior Counsel on legal practitioners or members of the Bench, this section does not recognize this distinct category of legal practitioners in terms of precedence. The Commission noted that not all legal practitioners who signed the Roll earlier have been conferred the honour of Senior Counsel but that it would be absurd for counsel who has not been conferred this honour to enjoy precedence before Senior Counsel. The Commission felt there is need for amendment of this section in order to include Senior Counsel immediately after the Attorney General and Solicitor General. The Commission further proposes that the Chairperson of the Society also needs to take precedence for as long as they are in office. However, the Commission opposed the proposal by the Malawi Law Society that a person who formerly held the offices of the Attorney General and the Solicitor General should also take precedence. The Commission was of the view that a former Attorney General or Solicitor General can take precedence if he or she was conferred the status of Senior Counsel.

In Zambia, precedence of legal practitioners is exactly the same as that being proposed by the Commission except that a former Attorney-General or Solicitor-General are also recognised in that order immediately after the incumbent Attorney-General and Solicitor-General respectively in order of the dates of their appointments to such offices.¹⁶² However the President and Vice President of the Association are not included on the list.

The Commission therefore recommends the amendment of section 41 as follows—

Order of
precedence

... Legal practitioners shall take precedence in the following order—

(a) the Attorney General;

(b) the Solicitor General;

(c) Senior Counsel, according to the date of their conferment;

(d) the Chairperson of the Society;

(e) legal practitioners according to the date they signed, or are deemed to have signed, the Roll.

SECTION 42 [*Legal practitioners list*]

Subsection (1) hereof mandates the Registrar to publish in the *Gazette*

¹⁶² Section 20 of the Legal Education Act

appearing before 31st March in each year a list of all legal practitioners licensed to practice during that year. Subsection (2) stipulates the details to be included in the publication.

The Commission observed that this is a very critical provision in ensuring that the public is informed about those legal practitioners who do not possess valid practising licences for a particular year. The Commission further observed that this provision would encourage compliance with requirements on fees and subscriptions to the Society, the proposed mandatory contribution to the Fidelity Fund, mandatory indemnity insurance cover, mandatory *pro bono* services and mandatory continuing legal education. This is so because a legal practitioner would only renew his licence after complying with those conditions.

However, the Commission noted that the *Gazette* has limited circulation and therefore recommends that the legal practitioners list should be published in at least two newspapers of highest circulation within the country.

The Commission was also mindful of its recommendation that practising licences shall be renewed by the Society. The Commission was of the view that it would be easier for the licensing authority to release the list of legal practitioners licensed to practice the profession of law within a given year as it would have the data at hand. It noted that the current scheme where the Registrar publishes the legal practitioners list is ideal only to a case like the present where the Registrar is the issuing authority of the practising licence. It was therefore resolved that subsection (1) should be amended accordingly.

The Commission also considered that it might benefit the public in general and a prospective client in particular to know the academic qualifications of a legal practitioner they are interested in. Therefore the Commission recommended the retention of reference to biographical information of a legal practitioner.

The Commission therefore recommends the amendment of section 42 as follows—

Legal
practitioners'
list

... —(1) **The Society shall publish, soon before or after 31st March, in the *Gazette* and in at least two (2) newspapers of the widest circulation each year, a Legal Practitioners List (in this Act otherwise referred to as the “List”) of all legal practitioners licensed to practice the profession of the law during that year.**

(2) The List shall include, with respect to a legal practitioner, the following information—

(a) a name and address;

(b) the year in which he was admitted to practice in Malawi; and

(c) other biographical information on his legal and educational background.

SECTION 43 [*Clerks to legal practitioners*]

Under this section, the Attorney General is empowered to make an application to the High Court for an order against a clerk of a legal practitioner suspected of fraud or embezzlement of money or property held by or in custody of a legal practitioner by whom he is employed. This is an order barring any legal practitioner from employing that clerk without written consent of the Attorney General. However the person against whom the application is made must be given an opportunity of being heard and an opportunity of calling witnesses.¹⁶³ A judge has jurisdiction over such application and the order from the judge has to be filed with the Registrar and be open to inspection by any legal practitioner without payment.¹⁶⁴

It was the Commission's considered view that this provision is very crucial in enforcing discipline of legal practitioners. It made two pertinent observations though. The first one was that this issue is directly linked to that of management of legal practice. The Commission was mindful of its recommendation that the proposed legislation should provide for management and dissolution of legal practice. It therefore recommends that this provision should be brought over under that Part.

Secondly, the Commission noted that the reference to the Attorney General is not *in tandem* with its recommendation that the Society should take the pivotal role on issues of discipline of legal practitioners. The Commission observed that the office of the Attorney General is very busy and that the Attorney General is far removed from the majority of the legal practitioners to competently effect the object of the provision. It therefore recommends that reference to the Attorney General in subsection (1) should be replaced by that of the Society. The Commission therefore recommends the amendment of section 43 (1) by deleting the words "Attorney General" and replacing them with the word "**Society**".

The Commission recommends retention of subsections (2) and (3).

The Commission found that the word "filled" under subsection (4) distorts the meaning of the provision considering that its use is a result of a typographical error and that the correct word in its place is "filed". The Commission therefore recommends that the spelling of filed under subsection (4) should be corrected by deleting the word "*filled*" and replacing it with the word "**filed**".

In respect of subsection (5), the Commission observed that the words "**be entitled to**" imply that the subject of the provision¹⁶⁵ has a right to be employed by legal practitioners. The Commission therefore recommends that the words

¹⁶³ Subsection (2)

¹⁶⁴ See subsections (3) and (4)

¹⁶⁵ A clerk to a legal practitioner in respect of whom an order is made under the current section 43

should be deleted. It was further observed that words “**in respect of his practice**” create an ambiguity. It is not clear if the practice referred to here is that of the clerk or the legal practitioner. Therefore to dispel all doubts, the Commission recommends the amendment of subsection (5) as follows—

(5) A clerk in respect of whom an order under subsection (1) has been made shall not be employed in the practice of any legal practitioner until the order expires or is revoked.

SECTION 44 [Rules]

Subsection (1) mandates the Minister in consultation with the Chief Justice to make rules for the better carrying of the Act. Subsection (2) details some rules that may be made by the Minister, while subsection (3) protects the powers granted under various provisions to make rules or govern procedure or give directions. Subsection (4) gives powers to the Minister to make rules regarding specific areas while subsection (5) details the powers of the High Court to make an order towards implementation or enforcement of rights conferred on the Society or its committee. The Chief Justice may also make rules for purposes of subsection (5).

The Commission observed that under this section, the Minister in consultation with the Chief Justice is mandated to make rules prescribing both the scale charges and the minimum charges that may be levied by a legal practitioner. During preliminary consultations, members of the Society complained that the charges are not revised often nor in response to the economic or financial changes in society. As such the charges become too low thereby creating a danger of encouraging non-compliance.

The Commission observed that there are two types of costs that legal practitioners levy: party and party costs as regulated by Order 62 of the Rules of the Supreme Court and solicitor-client costs that are regulated by the rules made under section 44 of the Act. The former are costs that in most cases the losing party pays the successful one after the court has pronounced its ruling on issue of costs. The latter are costs that a legal practitioner charges his client. The Commission was informed that the Judiciary in conjunction with the Society has engaged a consultant to develop rules that would replace Order 62 of the Rules of the Supreme Court.

The Commission observed that in other jurisdictions like Kenya, the Law Society in consultation with the Chief Justice promulgate the rules regulating the legal practitioners’ fees.¹⁶⁶ In Zambia, there is a Remuneration Committee consisting of five practitioners nominated by the Association which recommends to the Chief Justice remuneration of legal practitioners.¹⁶⁷

The Commission recommends that the Chief Justice should be empowered

¹⁶⁶ See section 44 (1) of the Advocates Act of Kenya

¹⁶⁷ See section 70 of the Legal Practitioners Act of Zambia

to make rules in consultation with the Society on matters listed under section 44. The Commission further adopted the Society's proposal that there should be a new provision creating a Remuneration Committee of the Society which shall have power to choose its Chairperson during its first meeting. The Remuneration Committee would be mandated to consult the Chief Justice on all matters regarding remuneration of legal practitioners including the rules and revision of the scale charges. The tenure for members of the Remuneration Committee shall be two years.

The Commission was informed that sometimes clients think that the scale and minimum charges include tax which the client is obliged to pay with respect to the fees charged. The Commission was further informed that this sometimes makes the legal practitioner lose revenue since he cannot always negotiate the fees in the absence of a clear provision to that effect. The Commission therefore recommends that the proposed law should expressly provide that the prescribed scale charges are exclusive of Value Added Tax (VAT).

The Commission considered whether or not both the rules prescribing both scale charges and minimum charges and the rule providing for the taxation of costs and remuneration of legal practitioners contravene the Competition and Fair Trade Act (Cap.48:09). The Commission resolved that the rules do not contravene the Competition and Fair Trade Act as they are provided for under law. The Commission also considered whether an agreement between a legal practitioner and his client regarding fees payable would contravene the Competition and Fair Trade Act. The Commission, having noted the proposal of the Society and what obtains in Kenya, resolved that a legal practitioner and his client may agree on the fees payable as long as it is done in line with the provision of the Competition and Fair Trade Act and the fees do not infringe the Legal Practitioner (Scale and Minimum Charges) Rules obtaining at that time. The Commission therefore recommends that the law should be amended to provide that a legal practitioner and a client may agree the quantum of costs before or after the practitioner renders his services to the client as long as such agreement should not contravene the Competition and Fair Trade Act and the Legal Practitioner (Scale and Minimum Charges) Rules.

The Commission also deliberated on the length of time after which a legal practitioner may commence an action to recover costs from a client. The Commission, taking into account the economic realities in this country, recommends that the period should be three months. The Commission further observed that the Second Schedule (of the Act or under regulation 3) is obsolete. It therefore recommends that it should be repealed accordingly.

The Commission therefore recommends the introduction of a new provision as follows—

Powers of the Minister ... **The Minister may, on recommendation of the Society,—**
(a) make regulations for the better carrying out of

this Act; and

(b) amend any Schedule to this Act.

In light of its recommendations above, the Commission recommends the adoption of new provisions on remuneration of legal practitioners as follows—

**Remuneration
for lawyers**

... —(1) **There shall be a Remuneration Committee of the Society which shall consist of five (5) legal practitioners, two (2) of whom shall be Senior Counsel, elected by the Society at the Annual General Meeting.**

(2) The Remuneration Committee shall advise on and recommend to the Chief Justice all matters regarding remuneration of legal practitioners.

(3) The Chief Justice shall, on recommendation of the Remuneration Committee, by rules:

(a) prescribe both scale and minimum charges that may be levied by legal practitioners; and

(b) provide for the taxation of costs and the remuneration of legal practitioners.

(4) The members of the Remuneration Committee shall hold office for a period of two (2) years and may be eligible for re-election.

(5) The Scale and Minimum Charges prescribed under this section are exclusive of tax.

The Commission further recommends introduction of the following provisions—

**Agreement
with respect
to fees**

... —(1) **Subject to section ... or any other written law, a legal practitioner and his client may, before, after or in the course of any contentious business make an agreement in writing fixing the amount of the legal practitioner's remuneration in respect thereof and the agreement shall be binding on the parties, where it is signed by both parties.**

(2) A party to the agreement under subsection (1) may, within six (6) months after execution of the agreement, apply to the Registrar to have the agreement set aside or varied on the ground that it is harsh, unconscionable, exorbitant or unreasonable.

(3) The Registrar may, after hearing an application made under subsection (2), order that—

(a) the agreement be upheld;

(b) the agreement be varied by substituting the amount of remuneration fixed by the agreement for an amount that the Registrar may deem just;

(c) the agreement be set aside; or

(d) the amount in question be taxed.

(4) Where, after a legal practitioner has performed part of the business to which the agreement made under this section applies, the legal practitioner dies or becomes incapable of acting, or the client changes his legal representative, any party, or the personal representatives of any party to the agreement, may apply to the Registrar to have the agreement varied or set aside.

(5) An application made under subsection (4) shall be dealt with in accordance with subsection (2).

Action for
recovery of
fees

... —(1) A legal practitioner may not bring an action for the recovery of costs due to him or his firm until expiry of three (3) months after the bill of costs has been delivered to the client.

(2) Where a legal practitioner has reasonable belief that his client is likely to leave Malawi before the expiry of three (3) months, the legal practitioner may, with leave of the court, commence the action referred to in subsection (1) before the expiry of three (3) months.

In respect of subsection (3) the Commission observed that reference to section 42 (2) (*which empowers the Chief Justice to give certain directions in connection with preparation of legal practitioners list*) is no longer necessary considering that it has recommended that the said list be prepared and released by the Society. It therefore recommends that the said reference should be deleted.

The Commission examined the contents of subsection (4) and recommend retention.

The Commission also recommends retention of subsection (5).

In light of the foregoing, the Commission recommends the introduction of a new Part on Legal Practice to incorporate some recommendations made under Part VI as follows—

PART ... —

LEGAL PRACTICE

Annual
licence

... —(1) Every legal practitioner shall on admission, pay the admission fee prescribed in the Schedule and shall, in the year of his admission, and annually thereafter, take out

an annual licence for which he shall pay the fee specified in the Schedule therein.

(2) Every licence to practice shall expire on 31st January next following the date of its issue, and every legal practitioner desirous of practising thereafter shall renew his licence.

(3) A legal practitioner shall not be entitled to practice unless he has had issued to him a current licence to practice.

(4) The Society shall not issue a licence to practice to a legal practitioner, unless the legal practitioner has—

(a) paid the annual subscription to the Society;

(b) performed the full hours prescribed for the annual mandatory *pro bono* work as determined by the Society from time to time;

(c) attained the minimum number of units of continuing legal education;

(d) paid an annual contribution to the Fidelity Fund;

(e) a valid annual indemnity insurance cover; and

(f) where applicable, complied with penalties imposed under this Act.

(5) Where a legal practitioner does not renew his licence to practice for a period of six (6) months after its expiry, such a licence shall only be renewed with the consent of the Chief Justice, upon application for renewal by the legal practitioner and the application shall be supported by affidavit stating the reasons why the licence was not renewed on time.

(6) Subject to subsection (2), every legal practitioner shall annually deliver to the Society an accountant's certificate in accordance with the Legal Practitioners (Accountants' Certificates) Rules.

(7) Subsections (4)(b), (d) and (e) shall not apply to legal practitioners in the public service.

Unlawfully
acting as a
legal
practitioner,
etc., an
offence

... —(1) A person who is not, or who has ceased to be, entitled to practice as a legal practitioner by virtue of this Act or any other written law, and who, unless he proves that the act was not done in expectation of any fee, gain, reward, either directly or indirectly, does any of the following acts—

(a) commences, carries on or defends any action, suit or other proceedings in the name of any other person or in his own name, or does any act required by law to be done by a legal practitioner in any court;

(b) draws or prepares any instrument relating to real or personal estate or any proceeding in law or draws or prepares any document or caveat relating to land registration;

(c) does any other work in respect of which scale or minimum charges are laid down by the Legal Practitioners (Scale and Minimum Charges) Rules, or by any other rules for the time being in force prescribing or relating to charges for any services to be performed by a legal practitioner,

commits an offence and shall, upon conviction, be liable to a fine of five million Kwacha (K5,000,000) and imprisonment for ten (10) years.

(2) The Society may prosecute a person who contravenes this section but shall not prosecute a person for an offence under this section—

(a) without the written consent of the Director of Public Prosecutions; or

(b) for any work restricted by this section which is regulated by an Act of Parliament.

(3) This section shall not extend to—

(a) any public officer drawing or preparing instruments in the course of his duty; or

(b) any person employed merely to engross any instrument or proceeding.

(4) For the purpose of this section, the expression “instrument” does not include—

(a) a letter or power of attorney under seal;

(b) a transfer of stock containing no trust or limitation thereof;

(c) a letter written for the purpose of collection of monies;

(d) an undefended trademark or patent application; and

(e) a passport application.

(6) Nothing in this section shall be deemed to limit the right of any person to appear on his own behalf before any court in any proceedings to which he is a party.

Legal practitioner is officer of court

... Every legal practitioner shall be deemed to be an officer of the court.

Order of precedence

... Legal practitioners shall take precedence in the following order—

(a) the Attorney General;

(b) the Solicitor General;

(c) Senior Counsel, according to the date of their conferment;

(d) the Chairperson of the Society; and

(e) legal practitioners according to the date they signed, or are deemed to have signed, the Roll.

Legal practitioners' list

... —(1) The Society shall publish, soon before or after 31st March, in the *Gazette* and in at least two (2) newspapers of the widest circulation each year, a Legal Practitioners List (in this Act otherwise referred to as the “List”) of all legal practitioners licensed to practice during that year.

(2) The List shall include, with respect to a legal practitioner, the following information—

(a) his name and address;

(b) the year in which he was admitted to practice in Malawi; and

(c) other biographical information on his legal and educational background.

Setting up legal practice

... A legal practitioner shall not establish a legal firm, whether as sole practitioner or in partnership with other legal practitioners, unless—

(a) the legal practitioner has been practising the profession of the law for at least five (5) years; and

(b) the principal office of the firm and any every branch thereof complies with the Legal Practitioners Practice Rules.

Client's
account

... —(1) A legal practitioner shall not hold or receive client's money without first opening a client's account at a bank in his name or the name of his firm in which name, the word "client" appears.

(2) Every legal practitioner shall, immediately upon receipt of client's money and without delay, deposit the client's money or any money that he elects to pay into a client's account, into the client's account.

Accounting
for client's
money

... —(1) Every legal practitioner shall, at all times, keep proper books of accounts as necessary—

(a) to show all his dealings with regard to—

(i) client's money held, received or paid by him; and

(ii) any other money dealt with by him through a client's account; and

(b) to distinguish such money held, received or paid by him on account of each separate client and to distinguish money from other money held, received, or paid by him on any other account.

(2) Every legal practitioner shall preserve for at least seven (7) years from the date of the last entry therein all accounts, books, ledgers or records kept by him under this Part.

(3) A legal practitioner who contravenes this section shall be liable to disciplinary action.

Embezzlem-
ent

... —(1) Where it is proved to the satisfaction of the court that a legal practitioner has, in the course of carrying out his duties, received or has in his custody or under his control any money or other property on behalf of another person, whether it is his client or not, and the legal practitioner is unable to produce to the client or the other person on whose behalf he holds the money or property or make due account for the money or property, the legal practitioner shall, unless he satisfies the court to the contrary, be presumed to have embezzled the money or other property.

(2) A legal practitioner who contravenes this section commits an offence and shall, upon conviction, be liable to imprisonment for ten (10) years.

Remuneratio
n for lawyers

... —(1) There shall be a Remuneration Committee of the Society which shall consist of five (5) legal practitioners, two

of whom shall be Senior Counsel, elected by the Society at the Annual General Meeting.

(2) The Remuneration Committee shall advise on and recommend to the Chief Justice all matters regarding remuneration of legal practitioners.

(3) The Chief Justice shall, on the recommendation of the Remuneration Committee, by rules,—

(a) prescribe both scale charges and minimum charges that may be levied by legal practitioners; and

(b) provide for the taxation of costs and the remuneration of legal practitioners.

(4) The members of the Remuneration Committee shall hold office for a period of two (2) years and may be eligible for re-election.

(5) The Scale and Minimum Charges prescribed under this section are exclusive of tax.

Agreement
with respect
to fees

... —(1) Subject to section ... or any other written law, a legal practitioner and his client may, before, after or in the course of any contentious business make an agreement in writing fixing the amount of the legal practitioner's remuneration in respect thereof and the agreement shall be binding on the parties where it is signed by both parties.

(2) A party to the agreement under subsection (1) may, within six (6) months after execution of the agreement, apply to the Registrar to have the agreement set aside or varied on the ground that it is harsh, unconscionable, exorbitant or unreasonable.

(3) The Registrar may, after hearing an application made under subsection (2), order that—

(a) the agreement be upheld;

(b) the agreement be varied by substituting the amount of remuneration fixed by the agreement for an amount the Registrar may deem just;

(c) the agreement be set aside; or

(d) the amount in question be taxed.

(4) Where, after a legal practitioner has performed part of the business to which the agreement made under this section applies, the legal practitioner dies or becomes

incapable of acting, or the client dies or changes his legal representative, any party, or the personal representatives of any party to the agreement, may apply to the Registrar to have the agreement varied or set aside.

(5) An application made under subsection (4) shall be dealt with in accordance with subsection (2).

Action for
recovery of
fees

... —(1) A legal practitioner may not bring an action for the recovery of fees due to him or his firm until the expiry of three (3) months after the bill of costs has been delivered to the client.

(2) Where a legal practitioner has reasonable belief that his client is likely to leave Malawi before the expiry of the three (3) months, the legal practitioner may, with leave of the court, commence the action referred to in subsection (1) before the expiry of three (3) months.

Pro bono
work

... (1) The Society shall allocate *pro bono* work to every legal practitioner annually.

(2) When allocating the *pro bono* work, the Society shall have regard to *pro bono* work that a legal practitioner already undertook on his own in that particular year and any outstanding *pro bono* work that a legal practitioner may have.

(3) Where a legal practitioner informs the Society that he is not be able to perform the *pro bono* work, he shall pay to the Society an amount of money, determined by the Society, with which the Society shall hire services of another legal practitioner to perform the work.

(4) A legal practitioner who contravenes this section shall be liable to disciplinary action.

(5) This section shall not apply to legal practitioners employed in the public service.

Clerks to
legal
practitioner

... —(1) Where—

(a) a person who is or was a clerk to a legal practitioner, has been convicted of an offence involving fraud or of any other offence in respect of any money or property belonging to, held or controlled by the legal practitioner by whom he is or was employed or any client of the legal practitioner; or

(b) it appears to the Society that a person who is or was a clerk to a legal practitioner, has been a party to any act or default of the legal practitioner in respect of

which an order has been made under section ..., the Society may make an application, by summons returnable in chambers, to the High Court for an order directing that, as from a date specified in the order, any legal practitioner shall not, in connexion with his practice as a legal practitioner, take or retain the clerk in his employment, or remunerate the clerk, without the written consent of the Society.

(2) The High Court shall have power to make an order referred to in subsection (1), and to order the payment of costs by any party, but the order shall not be made against any person without giving him an opportunity of being heard and of calling witnesses.

(3) An application under this section may be heard by any judge.

(4) Every order under this section shall be filed with the Registrar, and the file shall be open to inspection by any legal practitioner without payment but shall not be open to inspection by any person other than a legal practitioner.

(5) A clerk, in respect of whom an order under subsection (1) has been made, shall not be employed in the practice of any legal practitioner until the order expires or is revoked.

Client's rights
and interests

... —(1) A legal practitioner who is struck off the Roll or is suspended from practice shall, within twenty one (21) days from the date of striking off or suspension, as the case may be, make arrangements for availing to his clients or another legal practitioner instructed by his clients or himself—

(a) all deeds, wills or testamentary documents, documents constituting or evidencing title to any property, papers, books of account, records, vouchers and other documents in his or his firm's possession or control, or relating to any trust of which he is a sole trustee, or co-trustee with one or more of his partners, clerks or servants; and

(b) all sums of money due from him or his firm or held by him or his firm on behalf of his clients or subjected to any trust as aforesaid.

(2) Where the legal practitioner struck off the Roll fails to comply with subsection (1), the Society shall order him to produce or deliver documents or property referred to in subsection (1), to a legal practitioner appointed by the

Society within a period prescribed by the Society.

(3) A person who has possession or control of the documents or property referred to in subsection (1) and does not comply immediately with the requirements under this section, commits an offence and shall, upon conviction, be liable to a fine of five hundred thousand Kwacha (K500,000) and six (6) months imprisonment.

(4) A legal practitioner appointed by the Society under subsection (2) shall make inquiries to ascertain who the owner of the documents or property is and shall deal with those documents or property in accordance with the directions given to him by the owner.

(5) The Society shall also exercise its powers *mutatis mutandis* under subsection (2) in relation to a legal practitioner who—

(a) dies;

(b) abandons his practice;

(c) is adjudged bankrupt or makes a composition or arrangement with his creditors; or

(d) is prevented, for any other reason, from performing his functions as a legal practitioner,

and where the Society is satisfied that his clients are likely to suffer due to his failure to make suitable arrangements as referred to in subsection (1).

(6) A legal practitioner who is struck off or is suspended is entitled to receive fees for work done in good faith before the striking off or suspension.

SECTION 45 [*Savings*]

The Commission observed that this is a transitional clause. It vests in the Society all assets and liabilities of the Nyasaland Law Society upon coming into force of the Act. It also gave effect to powers that were exercised under the previous Act before coming into force of the Act.

The Commission noted that subsections (1) and (2) are obsolete as they refer to the transition of the Society from Nyasaland Law Society of the colonial times to the current Malawi Law Society. It therefore recommends that they should be deleted. The Commission also found reference to the Commissioners for Oaths and Notaries Ordinance, 1960 also obsolete. The Commission therefore recommends amendment, subject to retention of subsections (4) and (5), as follows—

Repeals and savings

... —(1) The Legal Education and Legal Practitioners Act is hereby repealed.

(2) A person admitted to practice the profession of the law under the Legal Education and Legal Practitioners Act repealed under subsection (1) shall be deemed to have been admitted to practice under this Act.

(3) A person entitled to practice as a notary public under the Legal Education and Legal Practitioners Act repealed under subsection (1) shall be deemed to have been admitted to practice as a notary public under this Act.

(4) All rights, entitlements, conferments and grants made under the Legal Education and Legal Practitioners Act repealed under subsection (1) shall be deemed to have been made in accordance with this Act.

(5) Any subsidiary legislation made under the Legal Education and Legal Practitioners Act repealed by subsection (1), in force immediately before the commencement of this Act—

(a) shall remain in force unless in conflict with this Act and shall be deemed to be subsidiary legislation made under this Act; and

(b) may be replaced, amended or repealed by subsidiary legislation made under this Act.

NEW PARTS AND CONSEQUENTIAL PROVISIONS

1. THE MALAWI INSTITUTE OF LEGAL EDUCATION

In Malawi, the admission process as laid down under Part III of the Act is what would be termed as a one-tier process. Acquisition of an academic qualification in law entitles the holder to apply for conditional admission to practice as a legal practitioner. The Commission noted that the earlier review of the Act on admission to practice was initiated by persons who had obtained their legal qualifications from other countries notably, the former Soviet Union and had applied for admission to practice in Malawi and their applications were thrown out. Matters of the legal system under which a person is trained and whether qualifications obtained under such legal systems would enable that person to practice as a legal practitioner in a different legal system arose at that time. Those applicants for admission who pushed for a review of the Act, claimed that as Malawians, they were entitled to practice in Malawi, their home country irrespective of where they were trained.

The Commission also took note of the fact that, the public has been questioning the level of competence and expertise of lawyers who are admitted to practice after qualifying from Malawi's sole law school at Chancellor College of the University of Malawi. Lack of practical legal skills and experience have often been cited as likely factors that compromise the quality of service rendered to the public in the absence of specialist training for new graduates.

The Commission observed that other jurisdictions have introduced centres where graduates in law proceed for practical training before they are admitted to practice in court. In Zambia, the law has established an Institute of Advanced Legal Education.¹⁶⁸ The Zambian Institute is regulated by a Council of the Zambia Institute of Advanced Legal Education which is a body corporate¹⁶⁹ and comprises eleven members¹⁷⁰ under the Chairmanship of the Attorney General.¹⁷¹ The Council exercises management, control, and regulatory powers over the Institute as the Council is responsible for appointing the Director of the Institute of Advanced Legal Education¹⁷² as well as the Deputy Director for the Institute.¹⁷³ The Council members meet four times annually. But if there are issues to be handled with expediency, the Director informs the Council members and they normally meet to discuss such issues.

Further, the Council approves all applications for admission to practice of students with law degrees equivalent to the law degree offered by the University of Zambia,¹⁷⁴ as well as those applications from students with foreign qualifications.¹⁷⁵ The Council is also responsible for assessing and approving qualifications of foreign lawyers, who come to Zambia temporarily to represent clients, for admission purposes.

The Zambian Institute exercises delegated powers of the Council and is the centre for the provision of post-graduate legal studies and training in legislative drafting and also the Institute has no separate powers under the Act apart from those of the Council.¹⁷⁶

In terms of its core functions the Institute provides courses leading to the minimum educational qualifications required for persons to be admitted to legal practice; it sets and holds examinations for candidates for admission as legal practitioners and also provides post-graduate Diploma course in legislative drafting to practicing Advocates who possess three years minimum experience. In order to enrol with the Institute, one must have the law degree obtained from the University of Zambia or from other universities within and outside Zambia as

¹⁶⁸ The Zambia Institute of Advanced Legal Education Act of 1996. See Part II

¹⁶⁹ *Ibid.* section 3 of the Act

¹⁷⁰ *Ibid.* section 5 (1) of the Act

¹⁷¹ *Ibid.* section 5 (2) of the Act

¹⁷² *Ibid.* Section 14 (1) of the Act

¹⁷³ *Ibid.* section 14 (2) of the Act

¹⁷⁴ *Ibid.* section 4 (2) (e) of the Act

¹⁷⁵ *Ibid.* section 4 (2) (d) of the Act

¹⁷⁶ See section 4 of the Act.

long as these degrees have been approved by the Institute to be equivalent to the law degree offered by the University of Zambia.¹⁷⁷

The Institute offers ten minimum compulsory courses which are a prerequisite for admission to practice.¹⁷⁸ These courses are offered within a period of one year. A student is given four chances to write and pass the qualifying Law Examination. After the fourth attempt if the student fails to pass he or she is barred from writing the examinations for a period of five years. Teaching staff at the Institute are sourced from practicing lawyers and judges on a part time basis. Judges are mainly assessors. They do not teach instead they play the role that is similar to that of an external examiner. They assess the examinations before they are administered to see if they cover the whole syllabus or not and after marking to see whether the examinations were fairly marked.

In terms of finances, the Institute does not have a separate fund independent of the Council's in that at the end of the year, the Council submits an annual report to the Minister who lays it before the National Assembly.¹⁷⁹

In Kenya, an applicant for admission must have enrolled with and passed bar examinations administered by the Kenya School of Law. At the Kenya School of Law, students undergo training for twelve months. Thereafter they are attached for six months to an advocate of not less than five years standing at the Bar. Whilst on attachment a supervisor from the school monitors a student's training by making periodic visits. At the end of the attachment, the advocate forwards to the Kenyan Law School, a confidential report on the performance of the pupil. He also issues a certificate to the student which the latter files with the school. Thereafter the student may apply for admission to the Chief Justice. The application must be accompanied by evidence of the legal qualification, certificate from the Kenya Law School certifying that the candidate passed the bar examination, a certificate of good conduct signed by two advocates and a certificate from the criminal investigation department absolving the candidate of any criminal record.

The Commission noted that the practical courses for graduates in law are offered in the final year at the Law School at Chancellor College. The Commission, however, was aware that there are existing and emerging centres where legal qualifications up to degree level would be taught. The Commission noted that the emergence of other law schools has given rise to the need for regulation of the quality of legal practitioners that are admitted to practice law. As already discussed above, the Commission recommends that Council of Legal Education should be mandated to accredit, monitor and regulate such institutions.

¹⁷⁷ Section 4 (2) (e) and (f) of the Zambia Institute of Advanced Legal Education Act.

¹⁷⁸ These courses are as follows: Professional Conduct and Ethics; Bookkeeping and Accounts; Conveyancing and Legal Drafting; Probate and Succession; Commercial Transactions; Company Law and Procedure; Civil Procedure I - High Court; Civil Procedure II - Subordinate Court; Domestic Relations; Criminal Procedure; and Evidence and Practice. Previously the Institute used to offer an additional course known as Forensic Medicine but this was discontinued.

¹⁷⁹ Section 20 of the Zambia Institute of Advanced Legal Education Act

The Commission therefore recommends that an Institute be established for purposes of providing postgraduate legal studies in practical courses for graduate lawyers. The Commission recommends that the Institute shall be styled the “**Malawi Institute of Legal Education**” and shall be answerable and report to the Malawi Council of Legal Education which is also established under the Act.

The Commission was aware of the initiatives by Government to increase the number of lawyers graduating from the law school at Chancellor College such as increasing the capacity of the law school to increase intake. The Commission considered that these initiatives, however, would not benefit other institutions as they are restricted to a public institution. As such, the number of beneficiaries from such initiatives would be restricted. The Commission considered further that in order to achieve quality legal education across the board, taking into account the emerging law schools, lack of supervision of graduate lawyers in some cases, the need to establish and pursue continuing legal education for all lawyers, the establishment of the Institute is the ideal path to take.

With respect to the issue of the syllabus offered by the University of Malawi at Chancellor College for the Bachelor of Laws degree, the Commission observed that the subjects that shall be offered at the Institute are some of those that are being offered in the final year at Chancellor College. In case, a student graduates from Chancellor College and proceeds to the Institute, the student would be repeating some of the subjects he has already been offered at graduate level. The Commission noted that it would be wrong to premise the content of course at the Institute on what one law school is offering for its degree. The Commission was of the view that the Institute shall operate independent of any law school in terms of content of its programme and in case of duplication of subjects, it is up to each individual institution to re-align its syllabus rather than for the Institute to suit a particular law school.

The Commission also recommends that the objectives of the Institute shall be laid down by law. One of the notable elements of the functions of the Institute is on continuing legal education. The Commission was of the view that the Institute cannot monopolize administration of continuing legal education but since undertaking these courses is linked to renewal of a practising licence, there is need for the Institute to take the role of a co-ordinating body on this matter. In this role, the Institute shall ensure that only those courses recommended by the Institute go towards accumulation of points that would enable a legal practitioner to renew his practice licence.

The Commission also recommends that the proposed law should provide for officers of the Institute and make financial provisions for the Institute. The relationship between the Institute and the Council shall also be detailed in the proposed law.

The Commission therefore recommends adoption of the following Part:

PART ...

THE MALAWI INSTITUTE OF LEGAL EDUCATION

Establishment of the Malawi Institute of Legal Education

... —(1) There is hereby established an institute of legal education to be styled “the Malawi Institute of Legal Education” (otherwise referred to as the “Institute”).

(2) The Institute shall be subject to the general or special directions of the Council in carrying out its functions.

Functions of the Institute

... —(1) The functions of the Institute shall be to provide practical legal training in courses approved by the Council for purposes of the practice of law in Malawi, and the training shall be at post-graduate level.

(2) Without prejudice to the generality of subsection (1), the functions of the Institute shall be to—

(a) set minimum education entry qualifications, approved by the Council, for persons seeking enrollment at the Institute;

(b) set and conduct, on behalf of the Council, the Malawi Law Examinations;

(c) organize and conduct courses—

(i) of instruction for the acquisition of legal knowledge and professional skills by persons seeking to be admitted as legal practitioners in Malawi;

(ii) in legislative drafting;

(iii) for public officers with a view to promoting their better understanding of the law;

(iv) for paralegals as prescribed by the Council; and

(v) for continuing legal education;

(d) hold seminars and conferences on legal matters;

(e) award certificates, fellowships, scholarships, bursaries and other awards as prescribed by the Council; and

(f) perform any other functions as directed in writing by the Council, from time to time.

Fees and charges

... —(1) The Institute may charge and receive fees and other

charges as approved by the Council, for any courses, training programmes or activities offered by the Institute.

(2) All persons enrolled with the Institute for any course or attending any programme or activity offered by the Institute shall be liable to pay to the Institute, fees or charges for the course, programme or activity, and for any services or facilities offered by the Institute.

Director ... —(1) There shall be the office of the Director of the Institute, which shall be a public office.

(2) The Director shall be appointed by the Council, on terms and conditions determined by the Council.

(3) The Director shall be a person who has a qualification in law and has continually practiced the profession of law for at least ten (10) years.

(4) The Director shall hold office for a period of three (3) years and may be re-appointed.

Duties of the Director ... Subject to the general and special directions of the Council, the Director shall be responsible for the day to day management of the Institute and shall exercise executive and administrative control over the other staff of the Institute.

Removal of Director ... —(1) The Council may remove the Director from office, on the following grounds—

(a) misconduct;

(b) incompetence;

(c) incapacity;

(d) bankruptcy; and

(e) where he is otherwise unable or unfit to discharge the functions of the Director.

(2) The Council shall only remove the Director from office upon giving him an opportunity to be heard.

Staff ... —(1) The Council may appoint other staff of the Institute, subordinate to the Director, as the Council considers to be necessary for the proper discharge of the functions of the Institute under the Act.

(2) The officers referred to in subsection (1) shall be officers in the public service and appointed on terms and conditions determined by the Council.

(3) The Council may, by directions in writing, delegate

to the Director, the appointment of junior officers of the Institute as specified in the directions.

(4) The Director shall report to the Council, at its regular meetings or as the Council may request, every appointment made pursuant to subsection (3).

Consultants
and
instructors of
the Institute

... —(1) The Council may engage persons to serve as consultants or instructors to the Institute on terms and conditions as determined by the Council.

(2) The Council shall engage persons as consultants or instructors to the Institute under subsection (1) on account of their knowledge, experience or competence in relation to the work of the Institute and shall assign to the consultants tasks for the discharge of the functions of the Institute.

Funding for
the Institute

... The Institute shall be adequately funded by the Council and may raise money by way of fees, donations, subscriptions, gifts or charges.

Accounting
and auditing
Cap. 37:02

... (1) The Institute shall keep and maintain proper books and records of account of its funds and shall in every respect comply with the Public Finance Management Act.

(2) The accounts of the Institute shall be examined and audited annually by auditors appointed by the Council, but the Council may direct that the accounts of the Institute be examined and audited at any time.

2. FIDELITY FUND

The Commission observed that both the fidelity fund and indemnity insurance are measures that are meant to protect the consumer public from loss of money or other resources that come to a legal practitioner in the course of his or her practice. A fidelity fund is one which is established as such to provide for compensation for clients who have suffered loss in the event of dishonest failure to account or default by a legal representative. This fund may be established by law as in Australia where the Solicitors' Fidelity Fund is established under the Legal Profession Act¹⁸⁰. The Fidelity Fund is administered by the Law Society's Fidelity Fund Department. In England, there are both the Fidelity Fund and Indemnity Fund in place and solicitors mandatorily contribute to both since if the victim cannot claim from the Indemnity Fund, then he or she can claim from the Fidelity Fund. Indemnity insurance cover is an insurance policy which a legal practitioner would take out with a view of creating protection against loss for any person on whose behalf he acts as a result of professional misconduct or otherwise.

¹⁸⁰ Act No. 112 of 2004

In England, dishonest failure to account includes misappropriation of trust money for the solicitor's own purposes. In some cases, failure to account may arise where client's money is paid to a third party as a loan from a legal firm where the payment is contrary to the first client's instructions and the solicitor's conduct was dishonest. In relation to dishonest failure to account, dishonesty may be established if there is a criminal conviction or if the Law Society itself makes a finding of dishonesty. In fact, in most cases, the Society makes its own finding of dishonesty as soon as possible so as to avoid delay in determination of claims which may arise if the outcome of criminal proceedings is awaited. The compensation which the Fidelity Fund may pay in relation to dishonest failure to account is the amount which was misappropriated or for which the solicitor failed to account, together with interest. Interest can be paid at least from the date the claim is lodged with the Society. In addition, there is provision for payment of the claimant's costs arising from the failure to account.

Dishonest default is another area covered by the Fidelity Fund. Where there has been a dishonest act or omission by a solicitor after 1 July 1994 and a judgment is obtained against the solicitor, the amount of the judgment may be paid by the Fund, if the solicitor does not make payment. Payments of successful claims in relation to failure to account and dishonest default may be subject to ceilings (maximum aggregate amounts) determined by the Council of the Law Society from time to time.¹⁸¹

The Fidelity Fund is financed by annual contributions by solicitors and may be supplemented by allocations from the Public Purpose Fund. The Society also takes all possible steps to recover money from a solicitor in relation to whom claims have been paid by the Fidelity Fund and from other persons to whom the misapplied funds can be traced or who are otherwise liable, e.g. where a bank has converted a cheque.

In other jurisdictions the enabling legislation provides for the said fund.¹⁸² In Zambia, the Compensation Fund is also established by law.¹⁸³ Contributions to the Fund are included in members' annual subscription fee. It is administered by the Law Association in that it is the Law Association's Council that has the discretion to determine what type of payment or grants to be made out of the Fund in order to relieve or mitigate losses resulting from the dishonesty or other loss occasioned by any practitioner or clerk or servant of any practitioner which relates to that practitioner's practice as a practitioner or to any trust of which the practitioner was a trustee.¹⁸⁴ The underlying principle for paying out of the Compensation Fund is to protect the integrity of the profession. Hence payment is made out of the Fund despite the fact that the legal practitioner in question did not have a practising certificate in force. Particularly where the dishonesty was discovered or complained of, after the practitioner had died or has had his name

¹⁸¹ Sections 89 and 90 of the Legal Profession Act

¹⁸² In Zambia it is called the Compensation Fund. In Namibia it is called the Fidelity Fund. Actually in Namibia they have a Fidelity Fund Act, 1990.

¹⁸³ Section 40 of the Legal Practitioners Act

¹⁸⁴ *Ibid.* Section 40

removed or struck off the Roll or may have ceased to practice or been suspended from practice.¹⁸⁵

The Association deducts a certain amount of money from members' annual subscription fees and then pays into the Compensation Fund.¹⁸⁶ Where there is an issue that needs to be settled out of the Compensation Fund, the Legal Practitioners' Committee receives the complaint and presents in writing the particulars of the claim to the Council which has the final say as to whether indeed the same should be settled out of the Fund or not. Sometimes the Council decides that the claim should not be settled out of the Compensation Fund, in such a case the claim is settled out of the practitioner's estate. The Law Association has made a proposal that all legal practitioners in private practice should subscribe to an Indemnity Fund but this proposal has not yet been adopted.

In Namibia, an attorney cannot practice if he or she does not hold a current Fidelity Fund certificate.¹⁸⁷

In these jurisdictions, the funds operate in such a way that legal practitioners pay a prescribed sum to the Fund. Normally, this payment is a condition precedent to issuance of their practising licenses or certificates.

The Commission observed that the Act does not provide for a fidelity fund. In case a legal practitioner has embezzled or misappropriated client's money and fails to pay back the victim, the Society cannot compensate the victim because it has no funds for that purpose. It has been observed that the Malawi Law Society does not adequately assist the public in relieving or mitigating loss resulting from dishonest dealings of its members or their employees. It has been suggested by various stakeholders that the Act should be amended so as to establish this Fund.¹⁸⁸

The Commission noted that the Society proposed that the law should provide for a mandatory professional indemnity insurance cover for practitioners and a Fidelity Fund. The Commission, in light of the numerous claims made by the public regarding embezzlement and misappropriation of funds, recommends that the law should provide for both the professional indemnity insurance cover and Fidelity Fund. It further resolved that both measures should be mandatory. Therefore, proof of subscription to the Fund and existing professional indemnity insurance cover would be conditions for a legal practitioner to renew a practicing license. So too for one to start a new practice he would be required to put up the professional indemnity insurance cover first.

The Commission took note of the suggestions made by the Society that the Society should be mandated to require a legal practitioner to increase his

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.* Section 40 (3).

¹⁸⁷ Sections 7 and 20 of Legal Practitioners Act, 1995 of Namibia.

¹⁸⁸ See the proposed Draft Legislation by the Malawi Law Society and section 6 of the proposed Act (Amendment) Bill, 2006, presented by Hon. Billy Kaunda, MP as a Private Members Bill.

insurance cover after having regard to ‘the apparent volume of work being handled by such a practitioner’. The Commission, however, was against mandating the Society to call for claims as suggested by the Society. The Commission was of the view that such a call would open floodgates to bogus claims. The Commission further recommends that the Fidelity Fund should be established as a trust fund with the Society as a trustee. Therefore payment of the annual contributions for the purposes of the Fund should be paid to the Fund and not the Society. As such, claims for compensation would have to be made against the Administrator of the Fund. The Administrator should be the Society as it is a body corporate mandated to protect the public against improper conduct in the legal profession.

The Commission also recommends that foreigners admitted to practice in a particular matter should only contribute to the Fidelity Fund. The Commission resolved that some details regulating the administration of the Fund and indemnity insurance cover should be put in subsidiary legislation as the principal legislation would be changed only through amendments.

The Commission therefore recommends adoption of a new Part on the Fidelity Fund as follows—

PART ...

FIDELITY FUND

Establish-
ment of
Fidelity Fund

... (1) There is hereby established a fund to be known as the Fidelity Fund (in this Act otherwise referred to as the “Fund”), which shall be administered and managed by the Society.

(2) The Fund shall be administered for the purpose of this Act in accordance with policies and procedures determined by the Society.

(3) The Society may, from time to time, invest any surplus funds which are not immediately required for the objects specified in this Act.

Objects of the
Fund

... (1) The Fund shall be applied for the purpose of compensating persons who suffer pecuniary loss as a result of theft committed by a legal practitioner, his clerk or employee, of money or other property entrusted by or on behalf of the persons to the legal practitioner or to his clerk or employee in the course of the legal practitioner’s practice or while acting as executor or administrator in an estate of a deceased person or as a trustee or in any other similar capacity.

(2) Without prejudice to the generality of subsection (1),

money of the Fund shall be applied for the following purposes—

(a) settlement of all claims, including costs and interest, payable under section ...;

(b) at the discretion of the Society, making a contribution towards expenses incurred by a claimant in establishing his claim;

(c) paying legal expenses incurred in legal proceedings involving the Fund;

(d) paying expenses incurred in the administration of the Fund, including investigations by the Society or its committees in respect of matters which concern the Fund;

(e) at the discretion of the Society, paying the premium or any portion thereof payable in respect of a professional indemnity group insurance policy taken out in favour of legal practitioners; or

(f) paying other expenses which are payable or may be paid from the Fund in accordance with this Act.

Sources of funds

... The sources of funds for the Fund shall consist of—

(a) annual contributions paid by legal practitioners as determined by the Society, from time to time;

(b) money given or advanced to the Fund by the Society;

(c) interest paid to the Fund;

(d) revenue obtained, from time to time, from the investment of the Fund;

(e) money received on behalf of the Fund from any insurance company; and

(f) money paid to the Fund, by way of grants, donations, gifts or charges from a source within or outside Malawi.

Insurance contracts for purposes of indemnification

... (1) The Society may enter into a contract with any person offering professional fidelity insurance cover where Society shall, through the Fund, be indemnified to the extent and in the manner provided for in the contract, against liability to pay claims arising under this Part.

(2) A contract referred to in subsection (1) shall be

entered into in respect of legal practitioners generally.

(3) A claimant against the Society shall not have—

(a) a right of action against any person offering fidelity insurance cover to the Society under this section, in respect of the contract; or

(b) a right to any money paid by the insurer in accordance with the contract.

(4) Money paid by the insurer in accordance with such contract shall be paid into the Fund for appropriation by the Society.

Possession of
Fund
Certificates

... (1) A legal practitioner shall not practice or act as a legal practitioner on his own account or in partnership unless he is in possession of a Fidelity Fund Certificate.

(2) A legal practitioner who practises or acts in contravention of subsection (1) shall not be entitled to any fee, reward or disbursement in respect of anything done by him while so practising or acting.

(3) Notwithstanding the provisions of this section, the Society may exempt any legal practitioner from the provisions of subsection (1):

Provided that the legal practitioner shall not be entitled to accept, receive or hold any trust money.

Application
for and issue
of Fidelity
Fund
Certificate

... —(1) A legal practitioner intending to practice the profession of the law in Malawi, shall, unless he is exempt under section ... and has paid a contribution prescribed under this Part, apply in the prescribed manner to the Secretary of the Society, for a Fidelity Fund Certificate.

(2) Upon receipt of the application referred to in subsection (1), the Secretary of the Society shall, if he is satisfied that the applicant has paid the contribution as prescribed and that the applicant has complied with any other lawful requirement of the Society, issue to the applicant, the prescribed Fidelity Fund Certificate.

(3) A Fidelity Fund Certificate shall be valid until 31st January of the year next from the date it was issued.

(4) A Fidelity Fund Certificate issued contrary to the provisions of this Part shall be null and void and shall, on demand by the Society, be returned by the legal practitioner to whom it was issued to the Society within a period specified by the Society.

Contributions to the Fund by legal practitioner

... (1) Subject to this section, every legal practitioner intending to practice the profession of the law, shall on making an application for the Fidelity Fund Certificate, pay a contribution as may, from time to time, be determined by the Society.

(2) A legal practitioner who intends to commence practice on or after 1st July shall, in respect of the year, pay half of the contribution due.

(3) All contributions payable under this section shall be paid to the Society, and the Society shall remit the contributions to the Fund within thirty (30) days of receipt thereof.

Payment from the Fund

... If the amount of the Fund, including the assets thereof, is less than fifty per centum (50%) of the total income of the Fund for the previous year, the Society may, at its discretion, refuse to pay or may postpone the payment of any amount in respect of the purposes referred to in section

Limitation on liability

... (1) The Fund shall not be liable to pay any amount in respect of loss suffered by—

(a) any person as a result of theft committed by a legal practitioner while the legal practitioner is employed by a person who is not a legal practitioner;

(b) a spouse of a legal practitioner as a result of any theft committed by the legal practitioner;

(c) any legal practitioner as a result of theft committed by a partner or employee of the legal practitioner or a partnership in which he is a partner;

(d) any legal practitioner as a result of theft committed by a member or employee of a company of which he is a member;

(e) any person as a result of theft committed by a legal practitioner whose fidelity has been guaranteed by another person, either in general or in respect of a particular transaction to the extent to which it is covered by the guarantee; or

(f) any person as a result of theft committed by a legal practitioner after the person has received a notification in writing from the Secretary of the Society warning him against the employment or continued

employment of the legal practitioner.

(2) Only the balance of a loss suffered by a person after deduction from the loss of the amount or value of all money or other benefits received or receivable by the person from a source other than the Fund, may be recovered from the Fund.

Claims
against the
Fund

... (1) A person shall not make a claim against the Fund in respect of theft referred to in section ... unless—

(a) written notice of the claim is given to the Society within three (3) months after the claimant becomes aware of the theft or by the exercise of reasonable care should have become aware of the theft; and

(b) within six (6) months after a written demand is sent to him, the claimant furnishes the Society with the proof that the Society may reasonably require.

(2) If the Society is satisfied, having regard to all the circumstances, that a claim or the proof required by the Society has been lodged or furnished as soon as practicable, it may, at its discretion, extend any period referred to in subsection (1).

Actions
against the
Fund

... (1) A claimant shall not institute an action against the Fund, unless he exhausts all available legal remedies against the legal practitioner or his estate, in respect of whom the claim arose and against all other persons liable in respect of the loss suffered by the claimant.

(2) An action against the Fund in respect of loss suffered by a person as a result of theft committed by a legal practitioner or his clerk or employee, shall be instituted within one (1) year of the date of a notification directed to the person intending to commence the action or his legal representative by the Society informing him that the Society rejects the claim to which the action relates.

(3) In any action against the Fund, all defences which would have been available to the person against whom the claim arose, shall be available to the Fund.

Subrogation

... On paying money out of the Fund in settlement in whole or in part of a claim under this Act, the Fund shall be subrogated to the extent of the payment to all the rights and legal remedies of the claimant against a legal practitioner or a person in relation to whom the claim arose, or in the event

of his death or insolvency or other legal disability, against any person having authority to administer his estate.

Exemption of Fund from certain laws

... (1) The revenue of the Fund shall be exempt from the provisions of any law relating to payment of income tax or any other tax or levy by the State.

(2) Any law relating to insurance, other than a law relating to the compulsory insurance of employees, or the provision of security in connection therewith, shall not apply to the Fund.

Indemnification in respect of certain acts in good faith

... A person shall not institute an action for damages—

(a) against the Society or a member, an official or an employee of the Society in respect of anything done in good faith in the exercise or performance of powers and duties under this Act; or

(b) against the Society, any member of the Executive Committee of the Society or officer or employee thereof, in respect of a notification issued in good faith for purposes of section

Management and auditing of the Fund

...(1) The Society shall maintain, with a bank determined by the Executive Committee, a designated account into which all the money payable into the Fund shall be paid.

(2) The Society shall cause to be kept proper books of accounts of the payments made into and out of the Fund.

(3) The accounts relating to the Fund shall be audited annually by an auditor appointed by the Society in general assembly.

3. SENIOR COUNSEL

The honour of Senior Counsel is a designation to recognize members of the Society who have distinguished themselves in various fields related to the law. The title, Senior Counsel, therefore, is given to a barrister or advocate in some countries, especially in current or former Commonwealth countries or jurisdictions in which the British monarch is no longer head of state, such as Hong Kong, Ireland, South Africa, Singapore, Guyana and Trinidad and Tobago. It replaces the title Queen’s Counsel (or in times with a male sovereign, King’s Counsel). Other jurisdictions have adopted similar titles such as *Senior Advocate* in India, Bangladesh and Nigeria and President’s Counsel in Sri Lanka.

The rank of Senior Counsel has also been introduced in Australia and New Zealand. The title may even be introduced in the United Kingdom itself, the change of title reflecting appointment by the profession, rather than moves towards abolition of the monarchy in favour of republicanism. The title, Queen’s

Counsel (QC) only emerged into eminence and integrity in the early 1830s, prior to when they were relatively few in number. The QC became the standard means of recognizing that a barrister was a senior member of the legal profession.¹⁸⁹ It became of greater professional importance to become a QC, as the earlier title of Sergeants-at-Law gradually declined. The QCs inherited not merely the prestige of the sergeants, but enjoyed priority before the courts.

Queen's Counsel were prohibited, at least from the mid-nineteenth century, from drafting pleadings alone nor appearing in Court without a junior barrister. From the beginning, they were not allowed to appear against the Crown without a special licence, but this was generally given as a formality. This was particularly important in criminal cases, which are mostly brought in the name of the Crown, with the result that, until 1920 in England and Wales, King's and Queen's Counsel had to have a licence to appear in criminal cases for the defence. These restrictions made the taking of silk something of a professional risk, because the appointment abolished, at a stroke, some of the staple work of the junior barrister; they made the use of leading Counsel more expensive, and therefore ensured that they were retained only in more important cases, and they protected the work of the junior bar, which could not be excluded by the retention of leading Counsel. By the end of the twentieth century, however, all of these rules had been abolished one by one, so that appointment is now a matter of status and prestige only without formal disadvantages.

Queen's Counsel were traditionally selected from barristers, rather than from lawyers in general. This was because they were counsel appointed to conduct court work on behalf of the Crown. Although the limitations on private instruction were gradually relaxed, they continued to be selected from barristers, who had the sole right of audience in the higher courts. However, in 1994, solicitors of England and Wales were entitled to gain rights of audience in the higher courts. In 1995, these solicitors alone became entitled to apply for appointment as Queen's Counsel and the first one of such was appointed in March 1997.

The appointment of Queen's Counsel was suspended in 2003 and it was widely expected that the system would be abolished, although existing QCs were not affected by the suspension. However, a vigorous campaign was mounted in defence of the system, including those who supported it as an independent indication of excellence valued by outsiders (especially foreign commercial litigants) who did not have much else to go on,¹⁹⁰ and those who contended in a letter to *The Times* in London that it was a means whereby the most able barristers from ethnic minorities could overcome prejudice.

The Government's focus then switched from abolition to reform and, in particular, reform of the much-criticized "secret soundings" of Judges and other establishment legal figures upon which the old system was based, which was said to be inappropriate and unfair given the size of the modern profession, a possible

¹⁹⁰ "Building on Strength: The response of the Commercial Bar Association" (PDF). 2003-11-03. page 15ff in the PDF file.

source of improper Government patronage (since the final recommendations were made by the Lord Chancellor, who is a member of the Government) and discriminatory against part-time workers (especially women) and ethnic minorities.

In November, 2004, after much public debate in favour of and against retaining the title, it was announced that appointments to the title of Queen's Counsel in England would be resumed but that future appointees would not be chosen by the Government but by a nine-member panel, chaired by a lay person, which would include two barristers, two solicitors, one retired judge and three non-lawyers.

Formally, however, the appointment remains a royal one made on the recommendation of the Secretary of State for Justice, but he no longer comments on the individual applications put forward by the independent panel, and merely supervises the process and reviews the recommendations in general after satisfying himself that some people have since been appointed QC *honoris causa*.¹⁹¹ The successful candidates were to make a declaration and receive their Letters Patent from the Lord Chancellor. Further, appointments from January, 2008 will be made, from time to time, depending on how much time the panel needs to make its recommendations. Unlike the previous practice, there is no guarantee of appointments being made annually.

The practice in Malawi is that both members of the Bench and the Bar are appointed as Senior Counsel. The Commission took cognizance of the fact that there are some guidelines for the appointment of Senior Counsel. However, the Commission established that these Guidelines were neither promulgated nor are they easily accessible to interested parties. It is noteworthy to point out that, among other things, the Guidelines for Appointment of Senior Counsel require that the applicant for this honour 'must be a legal practitioner who has exercised, and is entitled to exercise, full rights of audience and appears regularly in the Malawi Supreme Court of Appeal, High Court and the courts subordinate' thereto. It also confers automatic qualification for appointment as Senior Counsel persons appointed to the following public offices:

- (a) Chief Justice of Malawi;
- (b) Judge of the Malawi Supreme Court of Appeal
- (c) Attorney General; and
- (d) Solicitor General.

However, in case of the latter two, they must have served in that office for at least two continuous years.

The Commission observed that while this is the highest accolade that can be

¹⁹¹ "Honorary QC nominations". Announcements 2007. http://www.justice.gov.uk/news/announcement_130807_a.htm. (visited on 8 March 2009).

offered to a legal practitioner, the Act is silent on this matter. As such, there is no provision on the authority vested with powers to confer the honour nor are there guidelines for the appointing authority in assessing who deserves the honour. The Commission noted that, for instance, the Attorney General, by virtue of being the head of the Bar takes precedence over other legal practitioners at the Bar and as such, if the incumbent is not Senior Counsel, the precedence enjoyed by the Attorney General may only be limited to the period during which the incumbent is Attorney General. In England, the Attorney General and Solicitor General were King's Counsel in Ordinary. The Commission noted that the law in other jurisdictions such as Kenya and Zambia, where the Commission conducted study visits, provides for the appointment process of Senior Counsel.

In Zambia, a similar honour is conferred on State Counsel.¹⁹² The procedure for appointment is that any legal practitioner wishing the rank and dignity of a State Counsel for Zambia to be conferred upon him submits his application accompanied by recommendations of two State Counsel to the Attorney-General.¹⁹³ Upon receipt of an application, the Attorney-General consults with the Chief Justice and makes recommendation to the President, the President may upon consideration of the recommendation and in exercise of his discretion reject or appoint such a legal practitioner.¹⁹⁴ Qualification for appointment is based on whether a person qualifies for appointment as a puisne Judge of the High Court.¹⁹⁵ The Society has also proposed that procedure be set out for appointing Senior Counsel in Malawi.

The Commission noted that the history from which the notion of conferring an honour to practitioners of distinction has evolved, and now presents a jurisdiction like Malawi a need to have carefully crafted provisions which outline the process of appointment of Senior Counsel. Having discussed the matter at length, the Commission recommends the following Part on Senior Counsel—

PART ...

SENIOR COUNSEL

**Conferment
of Senior
Counsel**

... (1) The President may, on recommendation of the Honours Committee, confer on a legal practitioner the honour of Senior Counsel.

(2) A legal practitioner may apply, in a prescribed manner, to the Attorney General for letters patent entitling him to be conferred the honour of Senior Counsel, if the legal practitioner—

¹⁹² Section 16 of the Legal Practitioners Act

¹⁹³ *Ibid.* section 17 (1) of the Act

¹⁹⁴ *Ibid.* section 17 (2) of the Act

¹⁹⁵ *Ibid.* section 19 (1) of the Act

(a) is of irreproachable character;

(b) has been practising the profession of the law for a period of or for periods in all amounting to at least fifteen (15) years whether in public service or otherwise; and

(c) has made significant contribution towards the development of the law in Malawi.

(3) Subject to subsection (2), the Honours Committee may, of its own motion, recommend to the President that a legal practitioner be conferred the honour of Senior Counsel.

Subsistence of the honour

... (1) The honour of Senior Counsel shall subsist for life.

(2) A person who has been conferred the honour of Senior Counsel shall be entitled to add the words “Senior Counsel (SC)” after his name.

(3) If circumstances arise which would otherwise disqualify a person from being conferred the honour of Senior Counsel, the Honours Committee shall recommend to the President to withdraw the conferment of the honour of Senior Counsel from the person.

Functions of Senior Counsel

... A Senior Counsel shall, upon conferment of the honour, become an advisor to the President on any matter pertaining to the Constitution or any law, at the request of the President.

Number of Senior Counsel

... Where the President is conferring the honour of Senior Counsel, the number of Senior Counsel being conferred shall not exceed four (4) legal practitioners during one (1) calendar year:

Provided that the number of four (4) shall not include a serving Attorney General or Solicitor General, as the case may be.

Attorney General, Solicitor General

... Notwithstanding section ..., the President may confer the honour of Senior Counsel on a sitting Attorney General or Solicitor General who has served in that office for at least two (2) years.

Honorary Senior Counsel

... The President may, after consultation with the Honours Committee, confer on any person, as he deems fit, the honour of Senior Counsel *honoris causa* if the person consents to the conferment.

- Honours Committee** ... (1) There shall be an Honours Committee which shall consist of—
- (a) the Chief Justice, who shall be the Chairperson;
 - (b) the Attorney General;
 - (c) the Solicitor General, who shall be the Secretary;
 - (d) two (2) Senior Counsel, nominated by the Society;
 - (e) the Chairperson of the Society; and
 - (f) a Dean of Law at a public University.
- Tenure and vacancy** ... (1) The members of the Honours Committee, other than *ex-officio* members, shall hold office for a term of three (3) years and may be re-appointed once.
- (2) A vacancy in the office of an elected member shall occur, if the member—
- (a) dies;
 - (b) is adjudged bankrupt;
 - (c) is sentenced for an offence against any written law to a term of imprisonment without an option of a fine;
 - (d) is absent from three (3) consecutive meetings of the Honours Committee of which he has had notice;
 - (e) is physically or mentally incapacitated; or
 - (f) resigns from office in accordance with subsection (3).
- (3) An elected member may, at any time, resign his office by giving one (1) month written notice to the Society.
- (4) A person elected to fill the vacancy shall serve for the remainder of the term but a person shall not be so elected where the remainder of the term is a period of less than six (6) months.
- Meetings of the Honours Committee** ... (1) The Honours Committee shall meet, at least twice annually, at a place and at a time determined by the Chairperson.
- (2) An ordinary meeting of the Honours Committee

shall be convened upon giving a written notice of at least fourteen (14) days to the members.

(3) The Chairperson—

(a) may, at his own instance; or

(b) shall at the written request of three (3) or more members and within seven (7) days of the request,

convene an extraordinary meeting of the Honours Committee, at a place and at a time appointed by him.

Procedure and quorum

... (1) The Honours Committee shall regulate its own procedure.

(2) Half of the members of the Honours Committee shall form a quorum.

(3) The validity of any of the proceedings of the Honours Committee shall not be affected by a vacancy in the membership of the Honours Committee or by a defect in the appointment of a member, or by reason that a person not entitled to do so took part in any proceedings.

Disclosure of interest

... (1) If a member of the Honours Committee is present at a meeting of the Committee at which any matter which is the subject of consideration is a matter in which the member or his immediate family member or his professional or business partner is directly or indirectly interested in a private or professional capacity, he shall, as soon as is practicable, after the commencement of the meeting, disclose his interest.

(2) Unless the Committee otherwise directs, the member referred to in subsection (1), shall not take part in any consideration or discussion of, or vote on, any question touching on the matter.

(3) A disclosure of interest shall be recorded in the minutes of the meeting at which it is made.

Powers of the Chief Justice

... The Chief Justice may make rules for the better carrying out of this Part.

4. PARALEGALS

When the Commission drew its Terms of Reference, it considered addressing the issue of paralegals. The thinking of the Commission at its inception was that since paralegals have a right of audience before lower courts especially in magistrate’s courts at times, there is need for establishing statutory regulation for paralegals. The Commission also considered whether regulation of paralegals

should be made under the proposed law or should be done by a separate statute. The Commission deliberated on this matter at length and resolved that paralegals are not legal practitioners and as such, it would not be proper to include their regulation under an Act that regulates legal practitioners. The Commission observed that legislation regulating other professions such as the Medical Practitioners and Dentists Act¹⁹⁶ has in its subsidiary legislation provided for paramedicals. However, the Medical Practitioners and Dentists Act has only made provision for training issues and not how they practice under the Paramedicals and Allied Health Professionals (Training) Rules.

The Commission observed that matters regulating paralegals go beyond issues of training and may also extend to regulate their right of audience before certain courts. Notwithstanding the Medical Practitioners and Dentists Act provision under subsidiary legislation, the Commission resolved that the regulation of paralegals should be left to an entirely separate statute which shall be enacted upon the carrying out of thorough consultations with interested parties.

The Commission therefore recommends that a special Law Commission to develop legislation on paralegals be established.

5. LONG TITLE

The Commission examined the long title to the Act and observed that while it is comprehensive with respect to what is provided for under the Act, there is need to add reference to the new Parts that have been proposed for inclusion under the proposed law. The Commission also considered that the wording of the long title should be re-arranged in order to reflect the proposed arrangement of the Parts under the proposed law. The Commission therefore recommends the adoption of the following new long title:

An Act to establish a Council of Legal Education and to provide for its functions and management; to establish an Institute of Legal Education and to provide for its functions and management; to establish criteria for admission of persons to practice as legal practitioners in Malawi; to provide for the regulation of legal practice in Malawi; to make comprehensive provision for notaries public and Senior Counsel; to provide for the professional discipline of legal practitioners; to provide for the establishment, organization and administration of the Malawi Law Society; to establish a Fidelity Fund and for matters incidental thereto and connected therewith

APPENDIX I

LEGAL EDUCATION AND LEGAL
PRACTITIONERS BILL, 20...

LEGAL EDUCATION AND LEGAL PRACTITIONERS BILL, 20...
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**LEGAL EDUCATION AND LEGAL PRACTITIONERS
BILL, 201...**

A B I L L

entitled

An Act to establish a Council of Legal Education and to provide for its functions and management; to establish an Institute of Legal Education and to provide for its functions and management; to establish criteria for admission of persons to practice as legal practitioners in Malawi; to provide for the regulation of legal practice in Malawi; to make comprehensive provision for notaries public and Senior Counsel; to provide for the professional discipline of legal practitioners; to provide for the establishment, organization and administration of the Malawi Law Society; to establish a Fidelity Fund and for matters incidental thereto and connected therewith

ENACTED by the Parliament of Malawi as follows—

PART I—PRELIMINARY

Short title and
commence-
ment

1. This Act may be cited as the Legal Education and Legal Practitioners Act, 20... and shall come into force on a date to be appointed by the Minister, by notice published in the *Gazette*.

Interpretation

2. In this Act, unless the context otherwise requires—

“client” means any person on whose account a legal practitioner holds or receives client’s money;

“Council” means the Council of Legal Education established under section 3;

“Institute” means the Institute of Legal Education established under section 19;

“legal practitioner” means a person—

(a) who has been admitted to practice the profession of the law before a court; and

(b) whose name has been inscribed upon the Roll;

“Malawi Law Examination” means examination in the local laws, legal practice and procedure of Malawi set by the Institute, from time to time, in accordance with section 33;

“Registrar” means the Registrar of the High Court;

“Roll” means the Roll of Legal Practitioners maintained by the Registrar on which is inscribed the name of every person admitted to practice as a legal practitioner;

“Society” means the Malawi Law Society established under section 71.

PART II—THE MALAWI COUNCIL OF LEGAL EDUCATION

3. There is hereby established a council of legal education which shall be a body corporate to be styled “the Malawi Council of Legal Education” with perpetual succession and a common seal, with power to hold land, to sue and be sued in its corporate name.

Establishment
of Council of
Legal
Education

4.—(1) The object and purpose for which the Council is established is to exercise general supervision and control over legal education in Malawi and to advise the Government in relation to all aspects of legal education.

Object and
functions of
the Council

(2) Without prejudice to the generality of subsection (1), the functions of the Council shall include to—

(a) administer, regulate, manage and control the Institute;

(b) make rules for the syllabus and curriculum of legal education, and for attendance at law schools, in Malawi;

(c) advise and make recommendations to the Minister generally on matters relating to legal education and the requisite qualifications for the admission and enrollment of legal practitioners;

(d) set criteria for accrediting institutions offering or intending to offer legal education;

(e) accredit schools and colleges offering or intending to offer legal education in Malawi;

(f) approve qualifications of persons with law degrees obtained from other countries; and

(g) perform such other functions and deal with such matters relating to legal education as the Minister may, in writing, from time to time, direct.

5.—(1) The Council shall consist of the Chief Justice or a serving Judge appointed by the Chief Justice, who shall be Chairperson of the Council, and the following other members—

Members of
the Council

(a) the Attorney General or his designated representative;

(b) a serving Judge appointed by the Chief Justice;

(c) a magistrate appointed by the Chief Justice;

(d) the Chairperson of the Malawi Law Society;

(e) two (2) legal practitioners in the public service appointed by the Minister;

(f) two (2) legal practitioners of at least ten (10) years standing

at the Bar nominated by the Society and appointed by the Minister; and

(g) two (2) law lecturers in Malawi appointed by the Minister.

(2) The Council shall elect, at its first meeting, from among its members, a Vice-Chairperson.

(3) The Executive Director of the Council shall be the Secretary to the Council.

Tenure and
vacancy

6.—(1) A person appointed to the Council, other than an *ex-officio* member, shall hold office as a member of the Council for a period of four (4) years and may be eligible for reappointment for one (1) more term.

(2) A vacancy in the office of an appointed member shall occur, if the member—

(a) dies;

(b) is adjudged bankrupt;

(c) has physical or mental incapacity;

(d) is sentenced under any written law to a term of imprisonment without an option of a fine;

(e) ceases to possess the qualification necessary as a prerequisite to appointment;

(f) is absent from three (3) consecutive meetings of the Council, of which he has had notice; or

(g) resigns in accordance with subsection (3).

(3) An appointed member may at any time resign his office by giving one (1) month written notice to the Minister.

(4) An appointed member may be removed from office by the Minister before the expiration of his term of office, on the following grounds—

(a) incompetence; or

(b) misconduct.

(5) A vacancy in the membership of the Council shall be filled, for the remainder of the term, by the appointment of a new member:

Provided that if the remaining period is less than six (6) months, the vacancy may not be filled until the expiry of the period.

Invited
persons

7. The Council may, in its discretion at any time and for any period, invite any person to attend any meeting of the Council and

take part in the deliberations of the Council, but the invited person shall not be entitled to vote at any meeting.

8.—(1) The Council shall meet, at least once every three (3) months, at a place and at a time determined by the Chairperson. Meetings of the Council

(2) An ordinary meeting of the Council shall be convened upon giving a written notice of at least fourteen (14) days to the members.

(3) The Chairperson—

(a) may, at his own instance, or

(b) shall at the written request of three (3) or more members and within seven (7) days of the request,

convene an extraordinary meeting of the Council, at a place and at a time appointed by him.

9.—(1) The Council may regulate its own procedure. Procedures of the Council

(2) The quorum of the Council shall be five (5) members.

(3) The validity of any of the proceedings of the Council shall not be affected by a vacancy in the membership of the Council or by a defect in the appointment of a member, or by reason that a person not entitled to do so took part in any proceedings.

10. For the better performance of its functions, the Council shall have power to— Powers of the Council

(a) establish committees and delegate to any of the committees any of its functions as the Council considers necessary;

(b) enter into a contract or agreement;

(c) raise money by way of loans or overdrafts;

(d) receive donations of money or other property from any person or body of persons for the furtherance of its functions;

(e) publish, from time to time, professional or other information which it deems necessary or expedient for the performance or exercise of the functions of the Council; and

(f) to do any act, matter or thing it deems necessary for fulfilling the functions of the Council.

11. Members of the Council shall be paid an allowance determined by the Minister from time to time. Remuneration

12. The Secretariat of the Council shall consist of the Executive Director and other members of staff of the Council appointed under this Act. Secretariat of the Council

Executive
Director

13.—(1) There shall be the office of the Executive Director of the Council who shall be the chief executive officer of the Council and shall perform duties assigned to his office by the Council from time to time.

(2) The Executive Director shall be appointed by the Council, on terms and conditions determined by the Council.

(3) The Executive Director shall be a person who has a qualification in law and has practiced the profession of the law for at least ten (10) years.

(4) The Executive Director shall hold office for a period of three (3) years and may be re-appointed.

Duties of the
Executive
Director

14.—(1) Subject to the general and special directions of the Council, the Executive Director shall be responsible for the day to day management of the Council and shall exercise executive and administrative control over the staff of the Council.

(2) The Executive Director or any other officer of the Council that the Executive Director may designate, shall attend meetings of the Council or of any committee of the Council and may address the meetings but shall not vote on any matter.

(3) A person presiding at any meeting referred to in subsection (2) may, for good reason, require the Executive Director or the officer referred to in that subsection, to withdraw from the meeting.

Removal of
Executive
Director

15.—(1) The Council may remove the Executive Director from office, on the following grounds—

(a) misconduct;

(b) incompetence;

(c) physical or mental incapacity;

(d) bankruptcy; or

(e) where he is otherwise unable or unfit to discharge the functions of his office.

(2) The Council shall only remove the Executive Director from office upon giving him a reasonable opportunity to be heard.

Staff

16.—(1) The Council may appoint other staff of the Council, subordinate to the Executive Director, as the Council considers necessary for the proper discharge of its functions.

(2) The Council may, by directions in writing, delegate to the Executive Director, the appointment of junior officers of the Council as specified in the directions.

(3) The Executive Director shall report to the Council, at its regular meetings or as the Council may request, every appointment made pursuant to subsection (2).

17.—(1) The funds of the Council shall consist of—

Funding of the Council

(a) sums appropriated by Parliament for purposes of the Council; and

(b) money raised by the Council by way of fees, donations, subscriptions, gifts or charges.

(2) The Council shall apply its funds for the purposes of its objectives and may invest any surplus of its funds.

18.—(1) The Council shall keep and maintain proper books and records of account of its funds and property and shall in every respect comply with the Public Audit Act.

Accounting and auditing Cap. 37:01

(2) The accounts of the Council shall be examined and audited annually by the Auditor General or an auditor appointed by the Council and approved by the Auditor General, but the Minister may direct that the accounts of the Council be examined and audited at any time.

PART III—THE MALAWI INSTITUTE OF LEGAL EDUCATION

19.—(1) There is established an institute of legal education to be styled “the Malawi Institute of Legal Education” (otherwise referred to as the “Institute”).

Establishment of the Institute of Legal Education

(2) The Institute shall be subject to the general or special directions of the Council in carrying out its functions.

20.—(1) The functions of the Institute shall be to provide practical legal training in courses approved by the Council for purposes of the practice of law in Malawi, and the training shall be at post-graduate level.

Functions of the Institute

(2) Without prejudice to the generality of subsection (1), the functions of the Institute shall be to—

(a) set minimum education entry qualifications, approved by the Council, for persons seeking enrollment at the Institute;

(b) set and conduct, on behalf of the Council, the Malawi Law Examinations;

(c) organize and conduct courses—

(i) of instruction for the acquisition of legal knowledge and professional skills by persons seeking to be admitted as legal practitioners in Malawi;

- (ii) in legislative drafting;
- (iii) for public officers with a view to promote their better understanding of the law;
- (iv) for paralegals as prescribed by the Council; and
- (v) for continuing legal education;
- (d) hold seminars and conferences on legal matters;
- (e) award certificates, fellowships, scholarships, bursaries and such other awards as prescribed by the Council; and
- (f) perform any other functions as directed in writing by the Council, from time to time.

Fees and charges

21.—(1) The Institute may charge and receive fees and other charges as approved by the Council, for any courses, training programmes or activities offered by the Institute.

(2) All persons enrolled with the Institute for any course or attending any programme or activity offered by the Institute shall be liable to pay to the Institute, fees or charges for the course, programme or activity, and for any services or facilities offered by the Institute.

Director

22.—(1) There shall be the office of the Director of the Institute, which shall be a public office.

(2) The Director shall be appointed by the Council, on terms and conditions determined by the Council.

(3) The Director shall be a person who has a qualification in law and has continually practiced the profession of law for at least ten (10) years prior to his appointment.

(4) The Director shall hold office for a period of three (3) years and may be re-appointed.

Duties of the Director

23. Subject to the general and special directions of the Council, the Director shall be responsible for the day to day management of the Institute and shall exercise executive and administrative control over the other staff of the Institute.

Removal of Director

24.—(1) The Council may remove the Director from office, on the following grounds—

- (a) misconduct;
- (b) incompetence;
- (c) incapacity;
- (d) bankruptcy; or

(e) where he is otherwise unable or unfit to discharge the functions of the Director.

(2) The Council may only remove the Director from office upon giving him an opportunity to be heard.

25.—(1) The Council may appoint other officers of the Institute, Staff subordinate to the Director, as the Council considers necessary for the proper discharge of the functions of the Institute under the Act.

(2) The officers referred to in subsection (1) shall be officers in the public service and appointed on terms and conditions determined by the Council.

(3) The Council may, by directions in writing, delegate to the Director, the appointment of junior officers of the Institute as specified in the directions.

(4) The Director shall report to the Council, at its regular meetings or as the Council may request, every appointment made pursuant to subsection (3).

26.—(1) The Council may engage persons to serve as consultants Consultants and instructors of the Institute or instructors to the Institute on terms and conditions as determined by the Council.

(2) The Council shall engage persons as consultants to the Institute under subsection (1) on account of their knowledge, experience or competence in relation to the work of the Institute and shall assign to the consultants tasks for the discharge of the functions of the Institute.

27.—(1) The Institute shall be adequately funded by the Council Funding of the Institute and may raise money by way of fees, donations, subscriptions, gifts or charges.

28.—(1) The Institute shall keep and maintain proper books and records of account of its funds and shall in every respect comply with the Public Finance Management Act. Accounting and auditing Cap. 37:01

(2) The accounts of the Institute shall be examined and audited annually by the auditors appointed by the Council, but the Council may direct that the accounts of the Institute be examined and audited at any time.

PART IV—ADMISSION TO PRACTICE

29.—(1) A person shall not practice as a legal practitioner in Malawi, unless he has been admitted to practice in accordance with this Act. Admission to practice

(2) A person shall not apply for admission to practice as a legal

practitioner, unless he qualifies for admission in accordance with section 30.

(3) An application for admission to practice as a legal practitioner shall be made by petition, to be verified by an affidavit of the petitioner and shall be heard by the Chief Justice in open court.

(4) The Chief Justice may make rules generally regulating the procedure for the admission to practice of any person and more particularly concerning the form of any petition, the affidavit or other annexures required to be filed with any petition, and their form, the procedure on the hearing of a petition, the order to be made after a hearing, the oath or oaths to be taken by any person admitted to practice.

Qualifications
for admission
to practice

30.—(1) A person may be admitted to practice as a legal practitioner if he is a citizen of Malawi at the date of the filing of his petition for admission, and if he holds—

(a) a degree in law awarded by an institution accredited to offer legal education by the Council; or

(b) a foreign law qualification as defined in subsection (4),

and has enrolled with the Institute for a period of not less than one (1) year and has passed the Malawi Law Examination.

(2) If a citizen of Malawi has been admitted to practice as a legal practitioner in a country which applies, as its prevailing system of law,—

(a) the Common Law or a legal system founded wholly or in part on the Common Law; or

(b) the Roman-Dutch Law, as practiced in Southern Africa, he may, upon passing the Malawi Law Examination, apply to the Chief Justice, for admission to practice as a legal practitioner.

(3) A citizen of Malawi who holds a foreign law qualification shall not be eligible to be admitted to practice, unless—

(a) the foreign law qualification was obtained from a jurisdiction that applies, as its prevailing basic system of law,—

(i) the Common Law or a legal system founded wholly or in part on the Common Law; or

(ii) Roman-Dutch law as applied and practiced in countries of Southern Africa;

(b) in the jurisdiction from which the foreign law qualification was obtained, he is either—

(i) admitted to practice the profession of law and is not under any disciplinary charge for professional misconduct; or

(ii) eligible to practice the profession of law, unless, although otherwise eligible, he is denied such eligibility solely on the ground that he is not a citizen or a resident of, or does not owe allegiance to, or solely to, the country or territory of that jurisdiction; and

(c) he has passed the Malawi Law Examination.

(4) For the purpose of this Part, a “foreign law qualification” is an undergraduate degree in law, taught in the English language, comprising subjects specified by the Council from time to time and obtained from a jurisdiction other than Malawi, and—

(a) was obtained pursuant to a course of undergraduate study, with a University or similar institution, that is designed to last at least three (3) academic years;

(b) is, as assessed by the Council, comparable in scope to the undergraduate degree in law awarded by a public University in Malawi, designated for that purpose by the Council or otherwise to be of the appropriate scope for the training of a person to qualify him to practice the profession of law; and

(c) constitutes qualifying training towards eligibility for admission to practice the profession of law in the jurisdiction from which it was obtained.

(5) In assessing a foreign law qualification for purposes of its recognition, the Council shall consider—

(a) the subjects of law studied;

(b) the content and duration of the courses of study that led to the award of the law degree;

(c) the basic system of law applied in the jurisdiction from which the degree was obtained;

(d) whether the applicant was admitted to practice the profession of law in the jurisdiction from which the qualification was obtained, and, if not, whether he fulfilled all the eligibility requirements for admission to practice the profession of law in that jurisdiction save only as otherwise provided in section 30 (3)(b)(ii); and

(e) other matters of proficiency as may appear relevant to the Council.

(6) On presentation of a petition for the application to be admitted

to practice the profession of the law in Malawi, an applicant shall pay an admission fee prescribed in the First Schedule.

(7) For purposes of this Part, “Southern Africa” includes countries listed in the Second Schedule.

Admission to
practice of
legally
qualified
public officers

31.—(1) A person who—

(a) has been admitted to practice as a legal practitioner in a country, other than Malawi, which applies, as its prevailing system of law,—

(i) the Common Law or a legal system founded wholly or in part on the Common Law; or

(ii) the Roman-Dutch Law, as practiced in Southern Africa; and

(b) has been in active employment, in a judicial or legal capacity in public service, performing legal duties on behalf of the Government for a period of at least one (1) year, may, on making an application to the Chief Justice in that behalf, be admitted by the Chief Justice, after consultation with the Council, to practice as a legal practitioner.

(2) Every application under subsection (1) shall be by petition addressed to the Chief Justice and verified by affidavit of the applicant and shall be made within ninety (90) days from the date of completing the qualifying period specified under subsection (1).

(3) The Chief Justice may hear an application made out of time upon good cause being shown, by affidavit of the applicant, as to why the application was not made within the prescribed period.

Admission to
practice in a
specific cause

32.—(1) The Chief Justice may, without formality, admit to practice as a legal practitioner for the purpose of a specific cause or matter, any person who, in the opinion of the Chief Justice—

(a) has sufficient legal knowledge and qualifications;

(b) is of good character;

(c) has come to Malawi for the purpose of appearing in the specific cause or matter;

(d) has paid a fee to the Society as prescribed in the First Schedule; and

(e) has paid a contribution to the Fidelity Fund, as determined by the Society.

(2) A person admitted to practice in accordance with this section shall for purposes of this Act, be deemed to be a legal practitioner for the period he is required to appear in the cause or matter.

33.—(1) Except as otherwise provided under this Act, a person who seeks to be admitted to practice law in Malawi shall be required to take the Malawi Law Examination.

Malawi Law
Examination

(2) A petition for admission shall not be heard, unless the Institute has certified in writing to the Registrar that the applicant has passed the Malawi Law Examination.

(3) The Malawi Law Examination shall be set, conducted and managed by the Institute, and for that purpose the Institute shall—

(a) develop a syllabus in respect of which candidates shall be examined and shall make the syllabus generally available; and

(b) make available to every candidate, at least thirty (30) days before the date of the examination, a copy of the syllabus for the examination.

(4) The Institute shall review the syllabus from time to time.

(5) The Institute may enlist the services of any person, body or institution with relevant expertise to assist it with the development of the syllabus referred to in subsection (3) and the setting, conduct or management of the Malawi Law Examination.

(6) A candidate of the Malawi Law Examination shall, before taking the examination,—

(a) produce the original copy of his qualification for recognition by the Institute; and

(b) pay to the Institute such fees, as may be prescribed.

(7) Any examination fee paid by a candidate shall not be refundable whether the candidate passes or fails the examination.

(8) A candidate who fails the Malawi Law Examination and disputes the results may appeal to the Council to have his answers re-marked and the Council, if satisfied with the reasons in support of the appeal, shall direct that the answers be re-marked within a reasonable time by any other competent person appointed by the Institute for that purpose.

(9) A candidate who fails the Malawi Law Examination may re-take the examination for a maximum of four (4) times subsequent to the first attempt.

34.—(1) A person applying for admission to practice as a legal practitioner shall serve the petition on the Attorney General and the Society.

Attorney
General and
Society party
to proceedings

(2) The Attorney General or the Society may reply to any matter

raised in the petition and shall be given an opportunity to be heard at the hearing of any application by any person, for admission to practice as a legal practitioner.

Applicant to
make full
disclosure

35.—(1) In an application for admission to practice as a legal practitioner, the applicant shall make full disclosure of all material facts that would affect the outcome of his application.

(2) If the applicant does not make full disclosure of all material facts in his application, the Attorney General or the Society may, at any time that the material facts come to their knowledge, apply to the Chief Justice to nullify the admission.

(3) The Attorney General or the Society may, in addition to the application under subsection (2), institute disciplinary or legal proceedings against the applicant.

Oath and
affirmation
before
admission

36.—(1) A person who applies to be admitted to practice the profession of law in Malawi, shall, before he is admitted, take an oath or affirmation prescribed in the Third Schedule, that he shall—

(a) uphold the Constitution of the Republic of Malawi;

(b) uphold the interests of their clients; and

(c) maintain the integrity of the profession of law.

(2) The Registrar shall administer the oath or affirmation prescribed under this section.

PART V—LEGAL PRACTICE

Annual
licence

37.—(1) Every legal practitioner shall on admission, pay the admission fee prescribed in the First Schedule and shall, in the year of his admission, and annually thereafter, take out an annual licence for which he shall pay the fee specified therein.

(2) Every licence to practice shall expire on 31st January next following the date of its issue, and every legal practitioner desirous of practising thereafter shall renew his licence.

(3) A legal practitioner shall not be entitled to practice unless he has had issued to him a valid licence to practice.

(4) The Society shall not issue a licence to practice to a legal practitioner, unless the legal practitioner has—

(a) paid the annual subscription to the Society;

(b) performed the full hours prescribed for the annual mandatory *pro bono* work as determined by the Society, from time to time;

(c) attained the minimum number of units of continuing legal

education;

(d) paid an annual contribution to the Fidelity Fund;

(e) a valid annual professional indemnity insurance cover; and

(f) where applicable, complied with penalties imposed under this Act.

(5) Where a legal practitioner does not renew his licence to practice for a period of six (6) months after its expiry, such a licence shall only be renewed with the consent of the Chief Justice, upon application for renewal by the legal practitioner and the application shall be supported by affidavit stating the reasons why the licence was not renewed on time.

(6) Subject to subsection (2), every legal practitioner shall annually deliver to the Society, an Accountant's Certificate in accordance with the Legal Practitioners (Accountants' Certificates) Rules.

(7) Subsections (4)(b), (d) and (e) shall not apply to legal practitioners in the public service.

38.—(1) A person who is not, or who has ceased to be, entitled to practice as a legal practitioner by virtue of this Act or any other written law, and who, unless he proves that the act was not done in expectation of any fee, gain, reward, either directly or indirectly, does any of the following acts—

Unlawfully acting as a legal practitioner, etc, an offence

(a) commences, carries on or defends any action, suit or other proceedings in the name of any other person or in his own name, or does any act required by law to be done by a legal practitioner in a court;

(b) draws or prepares any instrument relating to real or personal property or any proceeding in law or draws or prepares any document or caveat relating to land registration; or

(c) does any other work in respect of which scale or minimum charges are laid down by the Legal Practitioners (Scale and Minimum Charges) Rules, or by any other rules for the time being in force prescribing or relating to charges for any services to be performed by a legal practitioner,

commits an offence and shall, upon conviction, be liable to a fine of five million Kwacha (K5,000,000) and imprisonment for ten (10) years.

(2) The Society may prosecute a person who contravenes this section but shall not prosecute a person for an offence under this section—

(a) without the written consent of the Director of Public Prosecutions; and

(b) for any work restricted by this section which is regulated by an Act of Parliament.

(3) This section shall not extend to—

(a) any public officer drawing or preparing instruments in the course of his duty; or

(b) any person employed merely to engross any instrument or proceeding.

(4) For the purpose of this section, the expression “instrument” does not include—

(a) a letter or power of attorney under seal;

(b) a transfer of stock containing no trust or limitation thereof;

(c) a letter written for the purpose of collection of monies;

(d) an undefended trademark or patent application; or

(e) a passport application.

(5) Nothing in this section shall be deemed to limit the right of any person to appear on his own behalf before any court in proceedings to which he is a party.

Legal
practitioner is
officer of
court

39. Every legal practitioner shall be deemed to be an officer of the court.

Order of
precedence

40. Legal practitioners shall take precedence in the following order—

(a) the Attorney General;

(b) the Solicitor General;

(c) Senior Counsel, according to the date of their conferment;

(d) the Chairperson of the Society; and

(e) legal practitioners according to the date they signed the Roll.

Legal
practitioners
list

41.—(1) The Society shall publish, soon before or after 31st March, in the *Gazette* and in at least two (2) newspapers with the widest circulation each year, a Legal Practitioners List (in this Act otherwise referred to as the “List”) of all legal practitioners licensed to practice the profession of the law during that year.

(2) The List shall include, with respect to a legal practitioner, the following information—

- (a) his name and address;
- (b) the year in which he was admitted to practice in Malawi; and
- (c) other biographical information on his legal and educational background.

42. A legal practitioner shall not establish a legal firm, whether as sole practitioner or in partnership with other legal practitioners, unless—

Setting up legal practice

- (a) the legal practitioner has been practising the profession of the law for at least five (5) years; and
- (b) the principal office of the firm and any branch thereof complies with the Legal Practitioners Practice Rules.

43.—(1) A legal practitioner who receives or is due to receive client’s money, shall not hold or receive client’s money without first opening a client’s account at a bank in his name or the name of his firm in which name, the word “client” appears.

Client’s account

(2) Every legal practitioner shall, immediately upon receipt of client’s money and without delay, deposit the client’s money or any money that he elects to pay into a client’s account, in to the client’s account.

(3) A legal practitioner may keep as many client’s accounts as he thinks fit.

(4) A legal practitioner who receives or is due to receive client’s money shall comply with the Legal Practitioners Accounts Rules.

44.—(1) Every legal practitioner shall, at all times, keep proper books of accounts, as necessary—

Accounting for client’s money

- (a) to show all his dealings with regard to—
 - (i) client’s money held, received or paid by him; or
 - (ii) any other money dealt with by him through a client’s account; and

(b) to distinguish the money held, received or paid by him on account of each separate client and to distinguish that money from other money held, received, or paid by him on any other account.

(2) Every legal practitioner shall preserve for at least seven (7) years from the date of the last entry, all accounts, books, ledgers or records kept by him under this Part.

(3) A legal practitioner who contravenes this section shall be liable to disciplinary action.

Embezzlement

45.—(1) Where it is proved to the satisfaction of the court that a legal practitioner has, in the course of carrying out his duties, received or has in his custody or under his control any money or other property on behalf of another person, whether it is his client or not, and the legal practitioner is unable to produce to the client or the other person on whose behalf he holds the money or property or make due account for the money or property, the legal practitioner shall, unless he satisfies the court to the contrary, be presumed to have embezzled the money or other property.

(2) A legal practitioner who contravenes this section commits an offence and shall, upon conviction, be liable to imprisonment for ten (10) years.

Remuneration
for lawyers

46.—(1) There shall be a Remuneration Committee of the Society which shall consist of five (5) legal practitioners, two (2) of whom shall be Senior Counsel, elected by the Society at the Annual General Meeting.

(2) The Remuneration Committee shall advise on and recommend to the Chief Justice all matters regarding remuneration of legal practitioners.

(3) The Chief Justice shall, on the recommendation of the Remuneration Committee, by rules,—

(a) prescribe both scale charges and minimum charges that may be levied by legal practitioners; and

(b) provide for the taxation of costs and the remuneration of legal practitioners.

(4) The members of the Remuneration Committee shall hold office for a period of two (2) years and may be eligible for re-election.

(5) The Scale and Minimum Charges prescribed under this section are exclusive of tax.

Agreement
with respect to
fees

47.—(1) Subject to section 46 or any other written law, a legal practitioner and his client may, before, after or in the course of any contentious business make an agreement in writing fixing the amount of the legal practitioner's remuneration in respect thereof and the agreement shall be binding on the parties, where it is signed by both parties.

(2) A party to the agreement under subsection (1) may, within six (6) months after execution of the agreement, apply to the Registrar to have the agreement set aside or varied on the ground that it is harsh, unconscionable, exorbitant or unreasonable.

(3) The Registrar may, after hearing an application made under

subsection (2), order that—

(a) the agreement be upheld;

(b) the agreement be varied by substituting the amount of remuneration fixed by the agreement for an amount that the Registrar may deem just;

(c) the agreement be set aside; or

(d) the amount in question be taxed.

(4) Where, after a legal practitioner has performed part of the business to which the agreement made under this section applies and the legal practitioner dies or becomes incapable of acting, or the client changes his legal representative, any party, or the personal representatives of any party to the agreement, may apply to the Registrar to have the agreement varied or set aside.

(5) An application made under subsection (4) shall be dealt with in accordance with subsection (2).

48.—(1) A legal practitioner may not bring an action for the recovery of costs due to him or his firm until expiry of three (3) months after the bill of costs has been delivered to the client. Action for recovery of fees

(2) Where a legal practitioner has reasonable belief that his client is likely to leave Malawi before the expiry of the three (3) months, the legal practitioner may, with leave of the court, commence the action referred to in subsection (1) before the expiry of three (3) months.

49.—(1) The Society shall allocate *pro bono* work to every legal practitioner annually. Pro bono work

(2) When allocating the *pro bono* work, the Society shall have regard to *pro bono* work that a legal practitioner already undertook on his own in that particular year and any outstanding *pro bono* work that a legal practitioner may have.

(3) Where a legal practitioner informs the Society that he is not able to perform the *pro bono* work, he shall pay to the Society an amount of money, determined by the Society, with which the Society shall hire services of another legal practitioner to perform the work.

(4) A legal practitioner who contravenes this section shall be liable to disciplinary action.

(5) This section shall not apply to legal practitioners employed in the public service.

50.—(1) Where—

Clerks to legal practitioners

(a) a person who is or was a clerk to a legal practitioner, has been convicted of an offence involving fraud or of any other offence in respect of any money or property belonging to, held or controlled by the legal practitioner by whom he is or was employed or any client of the legal practitioner; or

(b) it appears to the Society that a person who is or was a clerk to a legal practitioner, has been a party to any act or default of the legal practitioner in respect of which an order has been made under section 99, the Society may make an application, by summons returnable in chambers, to the High Court, for an order directing that, as from a date specified in the order, any legal practitioner shall not, in connexion with his practice as a legal practitioner, take or retain the clerk in his employment, or remunerate the clerk, without the written consent of the Society.

(2) The High Court shall have power to make an order referred to in subsection (1), and to order the payment of costs by any party, but the order shall not be made against any person without giving him an opportunity of being heard and of calling witnesses.

(3) An application under this section may be heard by any judge.

(4) Every order under this section shall be filed with the Registrar, and the file shall be open to inspection by any legal practitioner without payment but shall not be open to inspection by any person other than a legal practitioner.

(5) A clerk, in respect of whom an order under subsection (1) has been made, shall not be employed in the practice of any legal practitioner until the order expires or is revoked.

Client's rights
and interests

51.—(1) A legal practitioner who is struck off the Roll or is suspended from practice shall, within twenty one (21) days from the date of striking off or suspension, as the case may be, make arrangements for availing to his clients or another legal practitioner instructed by his clients or himself—

(a) all deeds, wills or testamentary documents, documents constituting or evidencing title to any property, papers, books of account, records, vouchers and other documents in his or his firm's possession or control, or relating to any trust of which he is a sole trustee, or co-trustee with one or more of his partners, clerks or servants; and

(b) all sums of money due from him or his firm or held by him or his firm on behalf of his clients or subjected to any trust as aforesaid.

(2) Where a legal practitioner struck off the Roll fails to comply with subsection (1), the Society shall order him, to produce or deliver documents or property referred to in subsection (1) to another legal practitioner appointed by the Society within a period prescribed by the Society.

(3) A person who has possession or control of the documents or property referred to in subsection(1) and does not comply immediately with requirements imposed under this section, commits an offence and shall, upon conviction, be liable to a fine of five hundred thousand Kwacha (K500,000) and six (6) months imprisonment.

(4) A legal practitioner appointed by the Society under subsection (2) shall make inquiries to ascertain the ownership of the documents or property and shall deal with those documents or property in accordance with the directions given to him by the owner.

(5) The Society shall also exercise its powers *mutatis mutandis* under subsection (2), with necessary modifications, in relation to a legal practitioner who—

(a) dies;

(b) abandons his practice;

(c) is adjudged bankrupt or makes a composition or arrangement with his creditors; or

(d) is prevented, for any other reason, from performing his functions as a legal practitioner, and where the Society is satisfied that his clients are likely to suffer due to his failure to make suitable arrangements as referred to in subsection (1).

(6) A legal practitioner who is struck off or suspended is entitled to receive fees for work done prior to and notwithstanding the striking off or suspension.

PART VI—NOTARIES PUBLIC

52.—(1) A legal practitioner holding a licence to practice the profession of law and who has been so practising for at least ten (10) years may apply to the Chief Justice for a certificate entitling him to practice as a notary public. Appointment
of notary
public

(2) In considering the application for the certificate referred to in subsection (1), the Chief Justice shall have regard to the requirements of the public for notarial services and the number of notaries public already practising in the district in which the applicant resides.

(3) The granting of a certificate to practice as a notary public shall be in the sole discretion of the Chief Justice and the certificate shall not be granted to a legal practitioner who has not held a licence to practice for three (3) years prior to his application, unless the Chief Justice for good reason thinks fit so to do.

(4) The Registrar shall maintain a Register for Notaries Public which shall include—

- (a) the name of the notary public;
- (b) the date of appointment to practice as a notary public; and
- (c) the location and address of the notary public.

Functions of a
notary public

53. The functions of a notary public shall include—

- (a) attesting to the signature and execution of documents;
- (b) authenticating execution of documents;
- (c) authenticating the contents of documents;
- (d) administering oaths and declarations;
- (e) attending upon the drawing up of bonds;
- (f) drawing deeds, sales or purchases of property, wills and other legal documents for use abroad;
- (g) authenticating documents to deal with the administration of the estate of people who are abroad, or own property abroad;
- (h) authenticating personal documents and information for immigration or emigration purposes, or marriage applications or for purposes of working abroad;
- (i) authentication of translations from foreign languages to English and vice versa;
- (j) taking evidence in Malawi as a Commissioner for Oaths for foreign courts;
- (k) provision of notarial copies;
- (l) preparing and witnessing powers of attorney, corporate records, contracts for use in Malawi or other countries;
- (m) authenticating company and business documents and transactions;
- (n) conducting international domain name transfers; and
- (o) any other function prescribed by an Act of Parliament.

Certificate to
practice as a
notary public

54.—(1) A certificate to practice as a notary public shall be in the form set out in Part I of the Fourth Schedule hereto and shall entitle the person named on it, upon payment of a fee set out in the First

Schedule hereto, to practice as a notary public until the 31st March next following the date of issue and to levy fees in accordance with Part II of the Fourth Schedule hereto.

(2) Every such certificate shall, on the expiry of its validity, be renewed by the Chief Justice for a period of one year, by endorsement thereon by the Registrar of the High Court, upon the application of the person named therein, and upon payment of the fees set out in the First Schedule hereto.

(3) The granting of every certificate under this section and every renewal thereof shall be recorded in the Register.

(4) When a certificate granted under the section has been lost, destroyed or damaged, it shall be replaced by a fresh certificate upon the application by the person named on it and upon payment of the fee set out in the First Schedule hereto.

(5) The Registrar shall keep a separate Register for renewal of certificates of notaries public.

55. A notary public before whom an oath, affidavit, declaration or acknowledgement is taken or made shall state truly in the jurat or attestation at what place and on what date the oath, affidavit, declaration or acknowledgement is taken or made. Jurat to state where and when oath, etc. is taken

56. The Chief Justice may— Suspension or cancellation

(a) suspend or cancel a certificate granted under section 54, if a notary public ceases to be entitled to practice as a legal practitioner; or

(b) cancel a certificate granted under section 54, if, in the opinion of the Chief Justice, the notary public fails to carry out his duties as a notary public satisfactorily.

57.—(1) A person shall not hold himself out to be a notary public or receive a fee or reward as a notary public without being entitled to practice as or perform duties of a notary public. Unlawfully acting as a notary public

(2) A person who contravenes this section commits an offence and shall, upon conviction, be liable to a fine of two hundred and fifty thousand Kwacha (K250,000) or for a subsequent offence to a fine of five hundred thousand Kwacha (K500,000) and imprisonment for six (6) months.

(3) Nothing in this section shall be construed so as to exempt a person from any prosecution under any other law to which he would otherwise be liable so long as the person shall not be punished twice for the same offence.

Powers of the
Chief Justice

58. The Chief Justice may make rules for the better carrying out of this Part.

PART VII—SENIOR COUNSEL

Conferment of
Senior
Counsel

59.—(1) The President may, on recommendation of the Honours Committee, confer on a legal practitioner the honour of Senior Counsel.

(2) A legal practitioner may apply, in a prescribed manner, to the Attorney General for letters patent entitling him to be conferred the honour of Senior Counsel, if the legal practitioner-

(a) is of irreproachable character;

(b) has been practising the profession of the law for a period of or for periods amounting in all to at least fifteen (15) years whether in public service or otherwise; and

(c) has made significant contribution towards the development of the law in Malawi.

(3) Subject to subsection (2), the Honours Committee may, of its own motion, recommend to the President that a legal practitioner be conferred the honour of Senior Counsel.

Subsistence of
the honour

60.—(1) The honour of Senior Counsel shall subsist for life.

(2) A person who has been conferred the honour of Senior Counsel shall be entitled to add the words “Senior Counsel (SC)” after his name.

(3) If circumstances arise which would otherwise disqualify a person from being conferred the honour of Senior Counsel, the Honours Committee shall recommend to the President to withdraw the conferment of the honour of Senior Counsel from the person.

Functions of
Senior
Counsel

61. A Senior Counsel shall upon conferment of the honour become an advisor to the President on any matter pertaining to the Constitution or any law, at the request of the President.

Number of
Senior
Counsel

62. Where the President is conferring the honour of Senior Counsel, the number of Senior Counsel being conferred shall not exceed four (4) legal practitioners during one (1) calendar year—

Provided that the number of four (4) shall not include a serving Attorney General or Solicitor General, as the case may be.

Attorney
General,
Solicitor
General

63. Notwithstanding section 62, the President may confer the honour of Senior Counsel on a sitting Attorney General or Solicitor General who has served that office for at least two (2) years.

64. The President may, after consultation with the Honours Committee, confer on any person, as he deems fit, the honour of Senior Counsel *honoris causa* if the person consents to the conferment.

Honorary
Senior
Counsel

65. There shall be an Honours Committee which shall consist of—

Honours
Committee

- (a) the Chief Justice, who shall be the Chairperson;
- (b) the Attorney General;
- (c) the Solicitor General, who shall be the Secretary;
- (d) two (2) Senior Counsel, nominated by the Society;
- (e) the Chairperson of the Society; and
- (f) a Dean of Law at a public University.

66.—(1) The members of the Honours Committee, other than *ex-officio* members, shall hold office for a term of three (3) years and may be re-appointed once.

Tenure and
vacancy

(2) A vacancy in the office of an elected member shall occur if the member—

- (a) dies;
- (b) is adjudged bankrupt;
- (c) is sentenced for an offence against any written law to a term of imprisonment without an option of a fine;
- (d) is absent from three (3) consecutive meetings of the Honours Committee, without reasonable cause, of which he has had notice;
- (e) is physically or mentally incapacitated; or
- (f) resigns from office in accordance with subsection (3).

(3) An elected member may, at any time, resign his office by giving one (1) month written notice to the Society.

(4) A person elected to fill the vacancy shall serve for the remainder of the term but a person shall not be so elected where the remainder of the term is a period of less than six (6) months.

67.—(1) The Honours Committee shall meet, at least twice annually, at a place and at a time determined by the Chairperson.

Meetings of
the Honours
Committee

(2) An ordinary meeting of the Honours Committee shall be convened upon giving a written notice of at least fourteen (14) days to the members.

(3) The Chairperson—

(a) may, at his own instance; or

(b) shall, at the written request of three (3) or more members and within seven (7) days of the request,

convene an extraordinary meeting of the Honours Committee at a place and at a time appointed by him.

Procedure and
quorum

68.—(1) The Honours Committee shall regulate its own procedure.

(2) Half of the members of the Honours Committee shall form a quorum.

(3) The validity of any of the proceedings of the Honours Committee shall not be affected by a vacancy in the membership of the Honours Committee or by a defect in the appointment of a member, or by reason that a person not entitled to do so took part in any proceedings.

Disclosure of
interest

69.—(1) If a member of the Honours Committee is present at a meeting of the committee at which any matter which is the subject of consideration is a matter in which the member or his immediate family member or his professional or business partner is directly or indirectly interested in a private or professional capacity, he shall, as soon as is practicable, after the commencement of the meeting, disclose his interest.

(2) Unless the Committee otherwise directs, the member referred to in subsection (1), shall not take part in any consideration or discussion of, or vote on, any question touching on the matter.

(3) A disclosure of interest shall be recorded in the minutes of the meeting at which it is made.

Powers of the
Chief Justice

70. The Chief Justice may make rules for the better carrying out of this Part.

PART VIII—ESTABLISHMENT OF MALAWI LAW SOCIETY

Establishment
of Malawi
Law Society

71. There is established a body corporate to be known as the “Malawi Law Society” with perpetual succession and a common seal, with power to hold land, to sue and be sued in its corporate name.

Objects of
Society

72.— The objects for which the Society is established are to—

(a) represent, protect and assist legal practitioners regarding conditions of practice and otherwise;

(b) present generally the views of legal practitioners and to sustain and preserve their rights and status;

(c) protect and assist the public in Malawi on all matters

touching, ancillary or incidental to the law;

(d) promote research towards the development of the law;

(e) advise Government on all matters affecting legislation and the administration and practice of the law in Malawi;

(f) regulate the setting up, management and dissolution of legal practice; and

(g) do all other things that are incidental or conducive to the attainment of the foregoing objects or any of them.

73. The Society shall have powers to—

Powers of the Society

(a) engage in formal or informal activities designed to foster and extend the study of the law, and for the benefit both of members of the Society or of other persons interested in the profession of the law;

(b) acquire, hold, develop or dispose of properties, whether movable or immovable, and to derive capital or income therefrom, for all or any of the objects of the Society;

(c) raise or borrow money for all or any of the objects of the Society in a manner and on security determined by the Society, from time to time;

(d) invest or deal with money of the Society not immediately required in a manner as may be determined by the Society; and

(e) do all other things that are incidental or conducive to the attainment of the objects of the Society or any of them under the Act or of any objects under any other written law.

74. The membership of the Society shall consist of the following—

Membership of the Society

(a) all legal practitioners who are members by reason of section 75 (1);

(b) all persons admitted to membership of the Society under section 75 (4); and

(c) all persons elected as honorary members of the Society under section 76.

75.—(1) A person whose name is inscribed on the Roll shall, without election or appointment, become a member of the Society from the date on which his name was inscribed upon the Roll.

Every legal practitioner to be member of Society

(2) A member of the Society by reason of subsection (1) shall remain a member until his name is removed, whether at his own request or otherwise and upon approval by the Society, from the Roll.

(3) A member of the Society by reason of subsection (1), and who—

(a) is suspended from practising; or

(b) has not paid subscription fees to the Society,

shall not be entitled during the period of such suspension or non-payment, to any of the rights and privileges of membership.

(4) The Society may, from time to time, confer membership on any other person resident in Malawi who possesses legal qualifications acceptable to the Society and applies for membership.

Honorary
members

76. The Society may confer honorary membership, either for life or for any period as it may deem appropriate, on any person it deems fit and who consents to the election.

Fees and
subscription

77.—(1) A member of the Society shall pay fees and subscription to the Society, as prescribed by the Minister, on recommendation of the Society.

(2) An honorary member shall not be required to pay subscription.

Resignation
and expulsion

78.—(1) A member of the Society by virtue of section 75 (1) may not resign from the Society while his licence to practice is in force.

(2) A member of the Society, who is a member other than by virtue of section 75 (1), may be expelled from the Society, if the member—

(a) is adjudged or declared bankrupt;

(b) ceases to hold a qualification enabling him to become a member; or

(c) conducts himself in a manner that brings the Society into disrepute, after having been given a reasonable opportunity to be heard.

Cessation of
membership

79. Any member of the Society, other than an honorary member, who ceases to qualify for membership shall automatically cease to be a member of the Society.

Election

80. An annual election shall be held by the Society not later than 31st March in every year, where the Society shall elect officers or committees from its members, as may be deemed necessary.

Delegation of
powers

81.—(1) The Society may, from time to time, delegate any of its powers or functions to any one or more of its officers or to any committee of the Society.

(2) For purposes of this section, “an officer” means an elected member and the Executive Director of the Society.

82.—(1) The Society may make rules prescribing anything which under this Part may be or is to be prescribed, and generally for the better carrying out of the purposes of this Part and the objects for which the Society is established. Society's powers to make rules

(2) Without prejudice to the generality of subsection (1) and subject to section 77, the Society may make rules for—

- (a) the annual and other subscriptions of the Society;
- (b) the manner of application for membership of the Society;
- (c) standards of professional conduct with which every legal practitioner shall comply;
- (d) criteria for conferment of honorary membership to the Society;
- (e) the grounds for expulsion of members of the Society and the procedure relating thereto;
- (f) the resignation of members;
- (g) the regulation of powers exercisable by any committee of the Society, and delegation of the powers;
- (h) the manner of convening meetings of the Society and of committees, and quorums thereof, and the procedure relating thereto;
- (i) the manner in which, and the conditions subject to which, any member not present at a general meeting may vote by proxy on any resolution before that meeting;
- (j) the manner of election, removal and replacement of officers of the Society;
- (k) the design, custody and use of the common seal;
- (l) the regulation on setting up, running and dissolution of a legal practice;
- (m) the classes of resolutions at meetings of the Society and their effect;
- (n) the manner in which members shall fulfill the requirement to undertake annual continuing legal education;
- (o) the requirements relating to the Fidelity Fund and indemnity insurance cover; and
- (p) any other matter the Society deems necessary for the proper conduct and regulation of its affairs.

(3) The High Court shall have jurisdiction to make any order it deems necessary or appropriate for the implementation or

enforcement of any of the rights conferred upon the Society or any committee thereof, as the case may be, by rules made under this section.

PART IX—ORGANIZATION AND ADMINISTRATION OF THE SOCIETY

Chapters of
the Society

83.—(1) The Society may, from time to time, establish chapters of the Society.

(2) The chapters of the Society shall comply with the provisions of this Act.

Executive
Committee

84.—(1) There is hereby established an Executive Committee of the Society.

(2) The Executive Committee shall be an independent organ of the Society and shall consist of the Chairperson and such other officers as the Society may determine.

(3) Members of the Executive Committee shall be elected at the Annual General Meeting of the Society.

Tenure and
vacancy

85.—(1) A member of the Executive Committee shall hold office for a period of one (1) year.

(2) A member elected in accordance with subsection (1) may be eligible for re-election for another one year term but the office of that member shall become vacant, if the member—

(a) dies;

(b) resigns, upon giving one (1) month's notice to the Society;

(c) becomes bankrupt;

(d) becomes physically or mentally incapacitated; or

(e) fails to attend, without valid excuse, three (3) consecutive meetings of the Committee of which he has had notice.

(3) On vacation of office by a member, the vacancy shall be filled by a person elected to fill the vacancy by the Society—

Provided that if the remaining period is less than three (3) months, the Society may not fill the vacancy until the expiry of the period.

Meetings of
the Society

86.—(1) The Society shall meet for the transaction of business at least once every month at a place and at a time, the Chairperson may determine.

(2) An Annual General Meeting of the Society shall be called by the Chairperson, before the 31st day of March, upon written notice of not less than seven (7) days to all members of the Society.

(3) Where a third of the membership of the Society requests the

Chairperson for the holding of an extraordinary meeting of the Society, the Chairperson shall convene the meeting within the number of days specified in the request.

(4) At the Annual General Meeting, the Society shall—

- (a) receive the Chairperson’s report;
- (b) receive audited accounts of the Society;
- (c) elect members of the Executive Committee or any other committee of the Society; and
- (d) transact any other business the Society deems fit.

(5) The provisions under this section shall apply mutatis mutandis to the chapters of the Society.

87. The Secretariat of the Society shall consist of the Executive Director and other members of staff of the Society appointed under this Part. Secretariat of the Society

88.—(1) There shall be the office of the Executive Director of the Society who shall be the chief executive officer of the Society. Executive Director

(2) The Executive Director shall be appointed by the Society, on terms and conditions determined by the Society.

(3) The Executive Director shall be a person who has a qualification in law and has actually practiced the profession of law for at least five (5) years.

(4) The Executive Director shall hold office for a period of three (3) years and may be re-appointed.

89. Subject to the general and special directions of the Society, the Executive Director shall be responsible for the day to day management of the Society and shall exercise executive and administrative control over the staff of the Society. Duties of the Executive Director

90.—(1)The Society may remove the Executive Director from office, on the following grounds— Removal of Executive Director

- (a) misconduct;
- (b) incompetence;
- (c) physical or mental incapacity;
- (d) bankruptcy; or
- (e) where he is otherwise unable or unfit to discharge the functions of the Executive Director.

(2) The Society shall only remove the Executive Director from office upon giving him a reasonable opportunity to be heard.

Staff

91.—(1) The Society may appoint other officers of the Society, subordinate to the Executive Director, as the Society considers necessary for the proper discharge of the functions of the Society under the Act.

(2) The Society may, by directions in writing, delegate to the Executive Director, the appointment of junior officers at the Secretariat as specified in the directions.

(3) The Executive Director shall report to the Society, at its regular meetings or as the Society may request, every appointment made pursuant to subsection (2).

Funds of the Society

92.—(1) The funds of the Society shall consist of—

(a) subscription fees;

(b) a Society Levy paid pursuant to section 93; and

(c) money raised by way of fees, charges, gifts, donations, materials or fines paid to the Society.

(2) The society shall apply its funds for the purposes of its functions and may invest any surplus of its funds in a manner approved by the General Assembly of the Society.

Society Levy

93.—(1) A legal practitioner shall charge and levy on every matter on which he presents a bill to a client, and payable to the Society, a levy to be known as the “Society Levy” (in this Act otherwise referred to as the “Levy”).

(2) The Levy shall be the sum of money equal to one per centum (1%) of the fees the legal practitioner charges a client.

(3) The Minister may, on the recommendation of the Society, by order published in the Gazette, revise the percentage of the Levy.

(4) The Levy shall be paid monthly to the Society and where the Society informs a legal practitioner that the Levy is due, the legal practitioner shall make payment to the Society within thirty (30) days from the date of notification.

Penalty upon failure to pay Levy

94.—(1) Where a legal practitioner who, under this Act, is liable to pay the whole or any part of the Levy, fails to pay the whole or any part of the Levy in accordance with section 93, an additional sum of twenty per centum (20%) of the unpaid Levy shall become due and payable by the legal practitioner as a penalty.

(2) Any sum payable as a penalty under this section shall, for the purposes of this Act, be deemed to be part of the Levy and shall be collected and recoverable accordingly.

(3) The Minister may, on the recommendation of the Society, by order published in the *Gazette*, revise the quantum of the punitive percentage under this section.

95. The Minister may, on the recommendation of the Society and by order published in the *Gazette*, exempt a legal practitioner from the provisions of section 93. Exemption from Levy

96.—(1) The Society shall keep and maintain proper books and records of account of its funds, property, assets and liabilities. Accounting and auditing

(2) The accounts of the Society shall be examined and audited annually as at 31st January in every year by an auditor appointed by the Society at a General Assembly.

(3) The auditor referred in to subsection (2) shall personally present the audit report to the Society at an Annual General Meeting.

PART X—DISCIPLINE

97. Every legal practitioner shall be subject to the jurisdiction of the High Court, the Complaints Committee and the Disciplinary Committee on matters of discipline. Application to all legal practitioners

98. Nothing under this Part shall supercede, lessen or interfere with the powers vested in the Chief Justice or any judicial officer to deal with misconduct or an offence committed by a legal practitioner. Saving powers of the court

99.—(1) The High Court, either of its own motion and after such inquiry as it deems fit, or on an application made by the Attorney General, may make an order suspending any legal practitioner, or striking any legal practitioner off the Roll, or may admonish any legal practitioner, where the legal practitioner— Disciplinary powers of the High Court

(a) takes instructions in any cause or matter except from the party on whose behalf he is retained, or from some person who is an agent or representative of the party;

(b) is found guilty of fraudulent or improper conduct in the discharge of his professional duty or has misled the court, or allowed it to be misled in a manner as to cause the court to make an order which he knew or ought to have known to be wrong and improper;

(c) makes or agrees to make any payment or consents to the retention of the whole or any part of any fee paid or payable to him for his services, in consideration of any person procuring or having procured the employment, in any legal business, of himself or any other legal practitioner;

(d) directly or indirectly, procures or attempts to procure the

employment of himself as a legal practitioner through or by the intervention of any person to whom any remuneration for obtaining the employment is given by him, or agrees or promises to be so given;

(e) without the previous written consent of the Society, makes any charges for professional services (where the charges are prescribed) other than those which are prescribed as scale charges, or less than those prescribed as minimum charges;

(f) is adjudged bankrupt;

(g) continues to practice after being warned in writing by the Society that he has no valid licence;

(h) is convicted of an offence punishable with a term of imprisonment without an option of a fine;

(i) is guilty of conduct tending to bring the profession of the law into disrepute;

(j) directly or indirectly, applies or seeks instructions for professional business or does or permits, in the carrying out of his practice, any act or thing which can reasonably be regarded as touting or advertising or as calculated to attract business unfairly;

(k) holds himself out or allows himself to be held out, directly or indirectly, and whether or not by name as being prepared to do professional business in contentious matters at less than the scale fixed by Rules of Court and in non-contentious matters at less than the scale of charges (if any) fixed by the Legal Practitioners (Scale and Minimum Charges) Rules or prescribed by any other written law;

(l) embezzles money belonging to his client or held on behalf of another person in the course of his duty;

(m) corrupts or attempts to corrupt a judicial officer;

(n) acts in a manner that poses, is likely to pose or appears to pose a conflict of interest or breach of confidentiality;

(o) engages himself to represent a person without receiving instructions from the person;

(p) discharges himself from a client without due notice to the client and, where applicable, to the court; or

(q) fails to comply with any provision of this Act or any subsidiary legislation made under this Act.

(2) If the Court, on an application under subsection (1), is satisfied that a legal practitioner is guilty of dishonesty in connexion with his

practice as a legal practitioner or in connexion with any trust for which he is a trustee, the court may order that no payment shall be made without the leave of a judge by any banker named in the order out of any banking account in the name of the legal practitioner or his firm.

(3) Where a legal practitioner is struck off the Roll or suspended under subsection (1) the court may give such directions as it considers proper regarding the possession and control of deeds, wills, documents evidencing title to any property, books of account, records, vouchers or other documents in the possession or control of that legal practitioner or relating to any trust for which he is a trustee.

(4) Any application to the Court made under this section shall be heard by the Chief Justice sitting alone, or sitting together with another judge as he may direct, but no order shall be made suspending or striking off the Roll any legal practitioner without the legal practitioner being given a reasonable opportunity to be heard and to call witnesses.

100.—(1) There is hereby established a Complaints Committee of the Society. Establishment
of the
Complaints
Committee

(2) The Attorney General shall appoint members of the Complaints Committee which shall consist of—

(a) six (6) legal practitioners nominated by the Society; and

(b) six (6) members of the public of good standing in society and who are not legal practitioners.

(3) In appointing members of the public, the Attorney General shall have regard to—

(a) residence of the proposed nominee;

(b) the number of legal practitioners practising in a particular area;

(c) the personal conduct of the proposed nominee;

(d) the person's interest and knowledge of legal matters and the legal profession; and

(e) any other matter that the Attorney General considers makes the proposed nominee a fit and proper person.

(4) In the absence of the Chairperson, members present and forming a quorum at any meeting of the Committee shall elect one of their number, to preside over the meeting of the Committee.

101. The Complaints Committee shall inquire into the conduct of Functions and
duties

legal practitioners—

- (a) at the request of a court; or
- (b) on submission of a complaint to the Society.

Tenure and
vacancy

102.—(1) A person appointed to the Complaints Committee shall hold office for a period of two (2) years, unless he—

- (a) sooner resigns;
- (b) is removed from office; or
- (c) ceases to have the qualification necessary as a prerequisite to appointment.

(2) At the expiry of a member's term of office, he may be eligible for reappointment for a maximum of two (2) terms of office.

(3) A member of the Complaints Committee may be removed by the Attorney General from office, on grounds of—

- (a) incapacity arising from physical or mental infirmity;
- (b) misconduct;
- (c) bankruptcy;
- (d) absence, without valid excuse, from three (3) consecutive meetings of the Committee of which he has had notice; or
- (e) conviction for an offence punishable with a term of imprisonment without an option of a fine.

(4) In case of a vacancy in the membership of the Complaints Committee, the vacancy shall be filled by a person appointed by the Attorney General until the expiry of the period from the date of appointment of the Committee:

Provided that if the remaining period is less than six (6) months, the Attorney General may not fill the vacancy until the expiry of the period.

Proceedings of
the
Complaints
Committee

103.—(1) Subject to this Act, the Complaints Committee may regulate its own procedure.

(2) The Complaints Committee shall receive and consider complaints referred or submitted to it, as the case may be, by a court or any person, regarding the conduct of a legal practitioner, or a firm of legal practitioners, or a member or an employee of a legal practitioner or a firm of legal practitioners.

- (3) Where it appears to the Complaints Committee that there is—
- (a) no substance in the complaint, it shall reject the complaint forthwith;

(b) substance in the complaint and the matter complained of constitutes or appears to constitute a disciplinary offence, it shall immediately refer the matter to the Disciplinary Committee for appropriate action;

(c) substance in the complaint but that it does not constitute a disciplinary offence, the Complaints Committee shall immediately notify the legal practitioner or firm against whom the complaint has been made of the particulars of the complaint and call upon the legal practitioner or firm to answer the complaint within fourteen (14) days; and

(d) substance in a complaint but that the circumstances of the case do not disclose a disciplinary offence which the Disciplinary Committee can appropriately deal with and that the Complaints Committee itself should not deal with the matter but that the proper remedy for the complainant is to refer the matter to a court for appropriate action, the Complaints Committee shall advise the complainant accordingly.

(4) Upon the expiry of the period as specified under subsection (3)(c), if the summoned party has not appeared before it, the Complaints Committee shall proceed to investigate the matter and for that purpose, it shall have power to summon witnesses and to require the production of such documents as it may deem necessary.

(5) The Complaints Committee shall examine witnesses on oath and generally take all steps as it may consider proper and necessary for the purpose of its inquiry and shall, after hearing any submissions made to it or on behalf of the complainant and the legal practitioner or firm against whom the complaint was made, refer the matter to the Disciplinary Committee.

(6) The Complaints Committee shall—

(a) dispose of and conclude any matter brought before it within a period of twenty-eight (28) days; and

(b) inform the complainant of its decision within seven (7) days.

(7) The Complaints Committee may, upon giving good and justifiable reasons, extend any period under subsection (6) for a period not exceeding fourteen (14) days.

(8) If the Complaints Committee fails to dispose of a complaint within the time limit stipulated in subsection (6) (a), a complainant may refer the matter to the Disciplinary Committee.

(9) Any three (3) members of the Complaints Committee, one (1) of whom shall be a legal practitioner, shall constitute a quorum to

hear and consider a complaint.

(10) The members shall elect, from among their number, the Chairperson of the Committee who shall preside over the meetings of the Committee.

Establishment
of the
Disciplinary
Committee

104.—(1) There is hereby established a Disciplinary Committee of the Society.

(2) The Disciplinary Committee shall consist of—

(a) the Solicitor General, who shall be the Chairperson;

(b) three (3) legal practitioners of not less than ten (10) years standing at the Bar, elected by the Society; and

(c) two (2) members of the public of good standing in society and who are not legal practitioners appointed by the Attorney General.

Functions and
duties

105. The Disciplinary Committee shall—

(a) receive complaints referred to it by the Complaints Committee or a court, as the case may be;

(b) investigate all complaints brought before it;

(c) conduct hearings on disciplinary matters; and

(d) impose any penalty specified under section 110;

Minutes of
meetings

106. The Committee shall keep minutes of the proceedings of every meeting of the Committee.

Tenure and
vacancy

107.—(1) A person appointed to the Disciplinary Committee shall hold office for a period of two (2) years, unless he—

(a) sooner resigns;

(b) is removed from office; or

(c) ceases to have the qualification necessary as a prerequisite to appointment.

(2) At the expiry of a member's term of office, he may be eligible for reappointment for a maximum of two (2) terms.

(3) A member of the Disciplinary Committee may be removed from office, by the Attorney General, on grounds of—

(a) physical or mental incapacity;

(b) misconduct;

(c) bankruptcy;

(d) absence, without valid excuse, from three (3) consecutive meetings of the Committee of which he has had notice; or

(e) conviction for an offence punishable with a term of imprisonment without an option of a fine.

(4) In case of a vacancy in the membership of the Disciplinary Committee, the vacancy shall be filled by a person appointed by the Attorney General until the expiry of the period from the date of appointment of the Committee:

Provided that if the remaining period is less than six (6) months, the Attorney General may not fill the vacancy until the expiry of the period.

108.—(1) Subject to other provisions of this Act, the Disciplinary Committee may regulate its own procedure.

Proceedings of the Disciplinary Committee

(2) The Disciplinary Committee may make rules for regulating the making, hearing and determination, by the Committee, of applications or complaints under this Part.

(3) The Committee shall meet for the transaction of business at a time and at a place determined by the Committee.

(4) Half of the members shall form a quorum of any meeting of the Committee.

(5) At any meeting of the Disciplinary Committee, the Committee shall, in the absence of the Chairperson, elect one (1) of its number to act as Chairperson.

109.—(1) The Disciplinary Committee shall dispose of any matter before it within ninety (90) days.

Time limits

(2) The Disciplinary Committee may, upon giving good and justifiable reasons, extend the period for disposing of any matter for a period not exceeding thirty (30) days.

(3) The Disciplinary Committee shall, upon reaching a decision on a matter before it, inform the complainant of its decision within seven (7) days of the decision.

(4) If the Disciplinary Committee fails to dispose off a complaint within the time limit specified under this section, a complainant may refer the matter to the Chief Justice.

110.—(1) The Disciplinary Committee, upon being satisfied that a legal practitioner is responsible for misconduct, may—

Penalties

(a) recommend to the Chief Justice that the legal practitioner be

struck off the Roll;

(b) suspend the legal practitioner;

(c) impose a fine on the legal practitioner;

(d) admonish the legal practitioner; or

(e) advise the Director of Public Prosecution to institute criminal proceedings against a legal practitioner.

(2) In addition to a penalty imposed under subsection (1), the Disciplinary Committee may order the legal practitioner to—

(a) pay costs of the disciplinary proceedings; or

(b) pay compensation to the complainant.

(3) A person aggrieved by a decision of the Disciplinary Committee may, within thirty (30) days of the decision, commence judicial review proceedings against the decision, at the High Court.

Striking off

111. A legal practitioner whose name has been struck off the Roll shall not practice the profession of the law in Malawi.

Suspension

112.—(1) A legal practitioner suspended by an order made under section 99 shall not practice the profession of the law in Malawi during the period of suspension.

(2) A legal practitioner shall not be suspended from practising the profession of the law for a period exceeding two (2) years.

Practising while struck off or suspended

113. A legal practitioner who practises the profession of the law while he has been struck off the Roll or has been suspended, commits an offence and shall, upon conviction, be liable to a fine of five million Kwacha (K5,000,000) and imprisonment for seven (7) years.

Publication of names of legal practitioners struck off or suspended

114. The Society shall publish, in the *Gazette* and in at least two (2) newspapers with the widest circulation, names of legal practitioners who have been struck off the Roll or have been suspended and, in the case of suspension, the period of suspension.

Re-admission

115.—(1) A legal practitioner whose name has been struck off the Roll may, after the expiry of five (5) years, apply to the Chief Justice for re-admission to practice.

(2) On receipt of an application for re-admission, the Chief Justice may—

(a) re-admit the applicant;

(b) refuse to re-admit the applicant; or

(c) order that the applicant shall not be re-admitted unless the applicant—

(i) enrolls at the Institute and successfully passes the Malawi Law Examination; or

(ii) is supervised by a legal practitioner of not less than ten (10) years standing at the Bar for a period not exceeding one (1) year.

116.—(1) If a member of any committee established under this Part is present at a meeting of the committee at which any matter which is the subject of consideration is a matter in which the member or his immediate family member or his professional or business partner is directly or indirectly interested in a private or professional capacity, he shall, as soon as is practicable, after the commencement of the meeting, disclose his interest. Disclosure of interest

(2) Unless the Committee otherwise directs, the member referred to in subsection (1), shall not take part in any consideration or discussion of, or vote on, any question touching on the matter.

(3) A disclosure of interest shall be recorded in the minutes of the meeting at which it is made.

117.—(1) A person who—

Evidence

(a) has been summoned before any committee under this Part, and

(i) refuses or fails, without justifiable cause, to attend and give evidence relevant to the inquiry at the time and place stated in the summons;

(ii) refuses to be sworn or affirmed; or

(iii) refuses or fails, without justifiable cause, to produce any book, record, document or thing which he has requested in the summons or otherwise to produce; or

(b) appears before a committee and refuses to answer or to answer fully or satisfactorily to the best of his knowledge and belief any question lawfully put to him,

commits an offence and shall, upon conviction, be liable to a fine of two hundred and fifty thousand Kwacha (K250,000) and imprisonment for six (6) months.

(2) Any person who at an inquiry under this Part, gives false evidence on oath, knowing such evidence to be false or not knowing or believing it to be true, commits an offence termed perjury and shall, upon conviction, be liable to the penalties provided under law for perjury.

118. A legal practitioner against whom a complaint is made and Right to legal representation

has been brought before the Disciplinary Committee is entitled to legal representation.

Oath of
secrecy

119. Every member of any committee established under this Part shall, on appointment, take an oath of secrecy as may be prescribed under this Act.

Allowances

120. A member of a committee established under this Part shall be paid allowances as determined by the Society.

PART XI—FIDELITY FUND

Establishment
of Fidelity
Fund

121.—(1) There is hereby established a fund to be known as the Fidelity Fund (in this Act, otherwise referred to as the “Fund”), which shall be administered and managed by the Society.

(2) The Fund shall be administered for the purpose of this Act in accordance with policies and procedures determined by the Society.

(3) The Society may, from time to time, invest any surplus funds which are not immediately required for the objects specified in this Act.

Objects of the
Fund

122.—(1) The Fund shall be applied for the purpose of compensating persons who suffer pecuniary loss as a result of theft committed by a legal practitioner, his clerk or employee, of money or other property entrusted by or on behalf of the persons to the legal practitioner or to his clerk or employee in the course of the legal practitioner’s practice or while acting as executor or administrator in an estate of a deceased person or as a trustee or in any other similar capacity.

(2) Without prejudice to the generality of subsection (1), money of the Fund shall be applied for the following purposes—

(a) settlement of all claims, including costs and interest, payable under subsection (1);

(b) at the discretion of the Society, making a contribution towards expenses incurred by a claimant in establishing his claim;

(c) paying legal expenses incurred in legal proceedings involving the Fund;

(d) paying expenses incurred in the administration of the Fund, including investigations by the Society or its committees in respect of matters which concern the Fund;

(e) at the discretion of the Society, paying the premium or any portion thereof payable in respect of a professional indemnity group insurance policy taken out in favour of legal practitioners; or

(f) paying other expenses which are payable or may be paid from the Fund in accordance with this Act.

123. The sources of funds for the Fund shall consist of—

Sources of funds

(a) annual contributions paid by legal practitioners;

(b) money given or advanced to the Fund by the Society;

(c) interest paid to the Fund;

(d) revenue obtained, from time to time, from the investment of the Fund;

(e) money received on behalf of the Fund from any insurance company; and

(f) money paid to the Fund by way of grants, donations, gifts or charges from a source within or outside Malawi.

124.—(1) The Society may enter into a contract with any person offering professional fidelity insurance cover where the Society shall through the Fund, be indemnified to the extent and in the manner provided for in the contract against liability to pay claims arising under this Part.

Insurance contracts for purposes of indemnification

(2) A contract referred to in subsection (1) shall be entered into in respect of legal practitioners generally.

(3) A claimant against the Society shall not have-

(a) a right of action against any person offering fidelity insurance cover to the Society under this section, in respect of the contract; or

(b) a right to any money paid by the insurer in accordance with the contract.

(4) Money paid by the insurer in accordance with such contract shall be paid into the Fund for appropriation by the Society.

125.—(1) A legal practitioner shall not practice or act as a legal practitioner on his own account or in partnership unless he is in possession of a Fidelity Fund Certificate.

Possession of Fund Certificates

(2) A legal practitioner who practises or acts in contravention of subsection (1) shall not be entitled to any fee, reward or disbursement in respect of anything done by him while so practising or acting.

(3) Notwithstanding the provisions of this section, the Society may exempt any legal practitioner from the provisions of subsection (1):

Provided that the legal practitioner shall not be entitled to accept, receive or hold any trust money.

Application
for and issue
of Fidelity
Fund
certificates

126.—(1) A legal practitioner intending to practice the profession of the law in Malawi on his own account or in a partnership, shall, unless he is exempt under section 125 (3), and has paid a contribution prescribed in the First Schedule, apply in a manner prescribed under the Fifth Schedule, to the Secretary of the Society for a Fidelity Fund Certificate.

(2) Upon receipt of the application referred to in subsection (1), the Secretary of the Society shall, if he is satisfied that the applicant has paid the contribution as prescribed and that the applicant has complied with any other lawful requirement of the Society, issue to the applicant a Fidelity Fund Certificate prescribed under Part II of the Fifth Schedule.

(3) A Fidelity Fund Certificate shall be valid until 31st January of the year next from the date it was issued.

(4) A Fidelity Fund Certificate issued contrary to the provisions of this Part shall be null and void and shall, on demand by the Society, be returned by the legal practitioner to whom it was issued to the Society within a period specified by the Society.

Contributions
to Fund by
legal
practitioners

127.—(1) Subject to this section, every legal practitioner intending to practice the profession of the law, shall on making an application for the Fidelity Fund Certificate, pay a contribution as may, from time to time, be determined by the Society.

(2) A legal practitioner who intends to commence practice on or after 1st July shall, in respect of the year, pay half of the contribution due.

(3) All contributions payable under this section shall be paid to the Society, and the Society shall remit the contributions to the Fund within thirty (30) days of receipt thereof.

Payment to
the Fund

128. If the amount of the Fund, including the assets thereof, is less than fifty per centum (50%) of the total income of the Fund for the previous year, the Society may, at its discretion, refuse to pay or may postpone the payment of any amount in respect of the purposes referred to in section 122.

Limitation on
liability

129.—(1) The Fund shall not be liable to pay any amount in respect of loss suffered by—

(a) any person as a result of theft committed by a legal practitioner while the legal practitioner is employed by a person who is not a legal practitioner;

(b) a spouse of a legal practitioner as a result of any theft committed by the legal practitioner;

(c) any legal practitioner as a result of theft committed by a partner or employee of the legal practitioner or a partnership in which he is a partner;

(d) any legal practitioner as a result of theft committed by a member or employee of a company of which he is a member;

(e) any person as a result of theft committed by a legal practitioner whose fidelity has been guaranteed by another person, either in general or in respect of a particular transaction to the extent to which it is covered by the guarantee; or

(f) any person as a result of theft committed by a legal practitioner after the person has received a notification in writing from the Secretary of the Society warning him against the employment or continued employment of the legal practitioner.

(2) Only the balance of a loss suffered by a person after deduction from the loss of the amount or value of all money or other benefits received or receivable by the person from a source other than the Fund, may be recovered from the Fund.

130.—(1) A person shall not make a claim against the Fund in respect of theft referred to in section 129 unless—

Claims against the Fund

(a) written notice of the claim is given to the Society within three (3) months after the claimant becomes aware of the theft or by the exercise of reasonable care should have become aware of the theft; and

(b) within six (6) months after a written demand is sent to him, the claimant furnishes the Society with the proof that the Society may reasonably require.

(2) If the Society is satisfied, having regard to all the circumstances, that a claim or the proof required by the Society has been lodged or furnished as soon as practicable, it may, at its discretion, extend any period referred to in subsection (1).

131.—(1) A claimant shall not institute an action against the Fund unless he exhausts all available legal remedies against a legal practitioner or his estate, in respect of whom the claim arose and against all other persons liable in respect of the loss suffered by the claimant.

Actions against the Fund

(2) An action against the Fund in respect of loss suffered by a person as a result of theft committed by a legal practitioner or his clerk or employee, shall be instituted within one (1) year of the date of a notification directed to the person intending to commence the action or his legal representative by the Society informing him that

the Society rejects the claim to which the action relates.

(3) In any action against the Fund, all defences which would have been available to the person against whom the claim arose shall be available to the Fund.

Subrogation

132. On paying money out of the Fund in settlement in whole or in part of a claim under this Act, the Fund shall be subrogated to the extent of the payment to all the rights and legal remedies of the claimant against a legal practitioner or a person in relation to whom the claim arose, or in the event of his death or insolvency or other legal disability, against any person having authority to administer his estate.

Exemption of Fund from certain laws

133.—(1) The revenue of the Fund shall be exempt from the provisions of any law relating to payment of income tax or any other tax or levy by the State.

(2) Any law relating to insurance, other than a law relating to the compulsory insurance of employees, or the provision of security in connection therewith, shall not apply to the Fund.

Indemnification in respect of certain acts in good faith

134. A person shall not institute an action for damages—

(a) against the Society, or a member, an official or an employee of the Society in respect of anything done in good faith in the exercise or performance of powers and duties under this Act; or

(b) against the Society, any member of the Executive Committee of the Society or officer or employee thereof, in respect of a notification issued in good faith for purposes of section 129 (1) (f).

Management and auditing of the Fund

135.—(1) The Society shall maintain, with a bank determined by the Executive Committee, a designated account into which all the money payable into the Fund shall be paid.

(2) The Society shall cause to be kept proper books of accounts of the payments made into and out of the Fund.

(3) The accounts relating to the Fund shall be audited annually by an auditor appointed by the Society in general assembly.

PART XII—MISCELLANEOUS

Powers of the Minister

136.—(1) The Minister may, on recommendation of the Society,—

(a) make regulations for the better carrying out of this Act; and

(b) amend any schedule to this Act.

(2) The Minister may, on the recommendation of the Society, make rules—

(a) as to the opening and keeping by legal practitioners of

accounts at banks for client's money;

(b) as to the keeping by legal practitioners of accounts containing particulars and information as to moneys received, held or paid by them for or on account of clients;

(c) requiring the production by a legal practitioner of his books of accounts, bank passbooks, bank statements, statements of account, vouchers and any other necessary documents at any time on request by an officer of the Society for the inspection of a person nominated by the Society or by the disciplinary committee constituted under section 104;

(d) as to the regular audit of the accounts to be kept by legal practitioners and the furnishing of reports thereof; and

(e) for the purposes of protecting the interests, affairs or property of any person in the event of any legal practitioner bound by any professional duty or responsibility in respect of such interest, affairs or property, becoming precluded, or absenting himself, from the practice of his profession without having performed or discharged such duty or responsibility and having made no adequate provision for the performance or discharge thereof.

(3) Without derogation from the generality of the foregoing, the rules may confer, on the Society or any committee thereof, rights of access to, and production and possession of, things as may be specified in the rules and may provide for the delegation of any of the rights, powers or duties of the Society or of such committee, to any member of the Society, or of such committee, any Law Officer or any nominee of any Law Officer.

(4) The High Court shall have jurisdiction to make any order it deems necessary or appropriate for the implementation or enforcement of any of the rights conferred upon the Society or any committee thereof, as the case may be, by rules made under this subsection; and the Chief Justice may, from time to time, make rules of court for the purposes of this subsection.

Repeals and
savings

137.—(1) The Legal Education and Legal Practitioners Act is hereby repealed.

(2) A person admitted to practice the profession of the law under the Legal Education and Legal Practitioners Act repealed under subsection (1) shall be deemed to have been admitted to practice under this Act.

(3) A person entitled to practice as a notary public under the Legal Education and Legal Practitioners Act repealed under subsection (1)

shall be deemed to have been admitted to practice as a notary public under this Act.

(4) All rights, entitlements, conferments and grants made under the Legal Education and Legal Practitioners Act repealed under subsection (1) shall be deemed to have been made in accordance with this Act.

(5) Any subsidiary legislation made under the Legal Education and Legal Practitioners Act repealed by subsection (1), in force immediately before the commencement of this Act—

(a) shall remain in force unless in conflict with this Act and shall be deemed to be subsidiary legislation made under this Act; and

(b) may be replaced, amended or repealed by subsidiary legislation made under this Act.

SCHEDULES

FIRST SCHEDULE

s.30, 32, 37, 126

FEES

	K	t
1. On admission to practice as legal practitioner	30,000	
2. On admission to practice in a specific cause	1,000,000	
3. Annual licence to practice	15,000	
4. On the granting of a certificate to practice as a notary Public	15,000	
5. On annual renewal of a Notary Public certificate	5,000	
6. On replacement of lost, destroyed or mutilated Certificates	10,000	
7. On application for a Fidelity Fund Certificate	2,500	

SECOND SCHEDULE

s.30

COUNTRIES IN SOUTHERN AFRICA

- | | |
|-----------------------------------|-------------------|
| (a) Angola; | (h) Namibia; |
| (b) Botswana; | (i) Seychelles; |
| (c) Democratic Republic of Congo; | (j) South Africa; |
| (d) Lesotho; | (k) Swaziland; |
| (e) Madagascar; | (l) Tanzania; |
| (f) Mauritius; | (m) Zambia; and |
| (g) Mozambique; | (n) Zimbabwe. |
| (h) Namibia; | |
| (i) Seychelles; | |

THIRD SCHEDULE

s.36

OATH OR AFFIRMATION ON ADMISSION

“I freely accept the honour and privilege, duty and responsibility of practising the profession of the law in the Republic of Malawi. I solemnly swear to protect and defend the rights and interests of the people that shall employ me; and conduct all cases truthfully, faithfully and to the best of my ability. I shall not neglect anyone’s interest and shall faithfully serve and diligently represent the best interest of my client. I shall not refuse causes of complaint reasonably founded, nor shall I promote suits upon frivolous pretences. I shall not pervert the law to favour or prejudice anyone, but in all things, I shall conduct myself honestly and with integrity and civility. I shall seek to promote and ensure access to justice and legal services. I shall seek to improve the administration of justice. I shall champion the rule of law and safeguard the rights and freedoms of all persons. I shall strictly observe and uphold the ethical standards that govern my profession. I impose upon myself this voluntary obligation without any mental reservation or purpose of evasion. All this I do swear or affirm to observe and perform to the best of my skill, knowledge and ability. So help me God.”

FOURTH SCHEDULE

s.54

PART I

HIGH COURT OF MALAWI

CERTIFICATE TO PRACTICE AS A NOTARY PUBLIC IN MALAWI

It is hereby certified that..... has this day been admitted to practice as a notary public in Malawi from the date hereof to the 31st March next.

Dated this day of, 20.....

.....
Chief Justice

Renewed until the, 20.....

Fee paid:..... 20.....

.....
Registrar

PART II
FEES FOR NOTARIAL ACTS

	K	t
1. For all protests, including drawing, engrossing and execution of protest and duplicate, copies of bills, attending to stamping and all incidental work, but excluding out-of-pocket expenses	25,000	00
2. For noting any bill, including all attendances, drawing fees and notarial signatures	7,500	00
3. For administering an oath, or receiving a declaration or acknowledgement, with or without attestation of signature	5,000	00
4. For every exhibit to an affidavit, declaration or acknowledgement	1,000	00
5. For each signature attested by a notary public in any document not otherwise provided for	5,000	00
6. For certifying to a copy of any document or part of a document if not exceeding 100 words	1,000	00
7. For every additional 100 words or fraction thereof, if the document or part of a document exceeds 100 words	500	00
8. For affixing notary’s signature and seal if required to any document not otherwise provided for in this table	15,000	00
9. For every notaries public seal affixed to a document, packet or article, when no signature is required	15,000	00
10. For any other notarial act not specified in this Table	15,000	00

FIFTH SCHEDULE

s.126

PART I—

MALAWI LAW SOCIETY

FIDELITY FUND CERTIFICATE APPLICATION FORM

Year ending 31 DECEMBER 20.....

PLEASE COMPLETE IN BLOCK LETTERS IN BLACK INK.

1. Full Names of the applicant:
2. Name of firm:

3. Physical address at which practice will be carried on (i.e. your principal place of practice):.....

.....
.....

4. Contact details:

Postal address:
.....
.....

Residential address:
.....
.....

Telephone (business):
Telephone (home):
Fax:
E-mail:

5.—(a) Any other physical address at which practice will be carried on:

.....
.....
.....

5.—(b) Name of practitioner in control at such place or places:

.....
.....
.....

6. Full names of partners, if any:

.....
.....
.....

7. If no Fidelity Fund Certificate was obtained for the current year, state date on which the applicant will begin to practice for own account or in Partnership or as a member of incorporated practice:

.....

8. If applicant ceased to practice for own account or in partnership or as a member of an incorporated practice and intends to resume practicing, state:

(a) name and address of former practice:

.....

.....
.....
.....

(b) when applicant ceased to practice:

.....
.....
.....

10—(c) Does the practice purchase insurance cover to protect against the possibility of misappropriation of trust money or property?

.....

If yes, what is the extent of such cover?

..... per annum.

10—(d) Trust current banking account details: (Use annexures if there is more than one account)

(i) Bank:
.....
.....

(ii) Branch:
.....
.....

(iii) Branch code:

(iv) Account no:

(v) Credit interest rate on banking account as at:

(a) 31st March: _ and

(b) 30th September:.....

(vi) Bank service fee formula:

.....

I hereby authorize the above bank/s to provide the Fidelity Fund with changes in the above information, from time to time, as requested by the Fund.

I hereby authorize the Fidelity Fund to negotiate with my bankers the terms relating to interest accruing on, and bank charges levied against, my trust current banking accounts.

SIGNED ON THIS day of, 20.....
at in the presence of the undersigned witnesses:

s.37

LEGAL PRACTITIONERS (ACCOUNTANTS' CERTIFICATES) RULES
under s.37

- Citation **1.** These Rules may be cited as the Legal Practitioners (Accountants' Certificate) Rules.
- Interpretation **2.** In these Rules, unless the context otherwise requires—
 “Accountant” means a person qualified in accordance with the provisions of rule 7 to give an accountant's certificate;
 “Committee” means the Disciplinary Committee of the Society constituted under section 104;
 “practice year” means the period of twelve months ending on the 31st December in each year;
 “public officer” means an officer holding one of the offices to which rule 6 applies;
 “Secretary” means the Secretary for the time being of the Society.
- Accountant's Certificate to be delivered annually by every legal practitioner **3.** Except in the circumstances in which rule 10 applies, every legal practitioner shall once in each practice year deliver to the Society a certificate (hereinafter referred to as an “Accountant's Certificate”) in accordance with the provisions of these Rules .
- Accounting period for purposes of Accountant's Certificate **4.** Subject to rules 11 and 12, the accounting period for the purposes of an Accountant's Certificate shall—
 (a) begin at the expiry of the last preceding accounting period for which an Accountant's Certificate shall have been delivered;
 (b) cover a period of not less than six (6) months;
 (c) terminate not more than six (6) months before the date of delivery of the Accountant's Certificate to the Society; and
 (d) so far as practicable consistently with paragraphs (a), (b) and (c), correspond to a period or consecutive periods for which the accounts of the legal practitioner or his firm are ordinarily made up.
- Evidence of delivery of Accountant's Certificate **5.** A written notification of receipt or of non-receipt of an Accountant's Certificate under the hand of the Secretary shall be *prima facie* evidence that a legal practitioner has or has not, as the case may be, delivered to the Society an Accountant's Certificate.

6. Where a legal practitioner is employed as a public officer— Lawyers in the public service

(a) nothing in these Rules shall apply to him unless he takes out a licence to practice;

(b) an Accountant’s Certificate shall not, in his case, deal with any books, accounts or documents kept by him in the course of his duties as a public officer or by his employer; and

(c) no examination under rule 8 shall be made of his books, accounts and documents.

7.—(1) Subject to this rule, an accountant shall be qualified to Provisions as to the qualification of accountants to prepare and deliver certificates prepare and deliver an Accountant’s Certificate only if he is engaged in the practice, in Malawi, of the profession of public accountant and is a member of the body regulating the profession of accountants in Malawi.

(2) Subject to rule 14, an Accountant’s Certificate shall not be accepted by the Society if given by an accountant who either has been at any time during the accounting period, or subsequently, before giving the certificate, has become a clerk or servant of the legal practitioner to whom the certificate relates or of any partner of the legal practitioner.

(3) If the Committee is satisfied that a legal practitioner has not complied with the Legal Practitioners’ Accounts Rules in respect of matters not specified in an account’s certificate and that the accountant concerned was negligent in giving such certificate, the Committee may require the Secretary to give notice to the accountant that the accountant’s certificate signed by him after a date to be specified in the notice will not be accepted for the purposes of these Rules, and after the accountant shall have been so notified, unless and until the notice has been withdrawn by a further notice given by the Secretary on the instructions of the Committee, an Accountant’s Certificate so signed by that accountant shall not be accepted by the Society for the purposes of these Rules:

Provided that, before requiring the Secretary to act, the Committee shall have furnished a reasonable opportunity for the giving of any observations or explanations by the accountancy body of which he is a member and shall have given any such observations or explanations due considerations.

8.—(1) With a view to the signing of an Accountant’s Details of work to be done by accountant Certificate, an accountant shall not be required to do more than carry out the following examination—

(a) make a general test of the accuracy of the books of account of the legal practitioner;

(b) ascertain whether any client's account is kept;

(c) make a general test of the accuracy of the bank passbooks and statements kept in relation to the legal practitioner's practice;

(d) make a comparison as at not fewer than two dates, selected by the accountant, between—

(i) the liabilities of the legal practitioner to his clients as shown by his books of accounts; and

(ii) the balances standing to the credit of the relevant client's account; and

(e) obtain such information and explanations as he may consider necessary for the purposes of the requirements of paragraphs (a) to (d) inclusive.

(2) If, after making the examination required by subrule (1), it appears to the accountant that there is evidence of any breach of the Legal Practitioner's Accounts Rules, he shall make such further examination as may be necessary to enable him to sign the Accountant's Certificate, and if, after making such further examination, or if for any other reason, he feels unable to sign the certificate, he shall notify the Secretary in writing stating in detail his reasons.

Form of
certificate

9. An Accountant's Certificate delivered by a legal practitioner under these Rules shall be in the form set out in the Schedule.

Delivery of
certificate
unnecessary in
certain cases

10. The delivery of an Accountant's Certificate is unnecessary, and the Committee shall not require evidence of that fact, in the case of any legal practitioner who—

(a) holds, or who in the immediately preceding practice year was holding, his first licence to practice;

(b) after having ceased for twelve months or more to hold a licence to practice, holds his next licence to practice;

(c) has ceased to be the holder of a licence to practice and has delivered an Accountant's Certificate in respect of the accounting period ending on the date upon which he ceased to hold or receive client's money;

(d) has not, at any time since the commencement of these Rules, held or received client's money; or

(f) either has been admitted to practice in pursuance of section 31(1) (b), or has been admitted to practice for a specific

cause under section 32.

11.(1) In any practice year —

Special
accounting
periods

(a) where a legal practitioner—

(i) becomes under an obligation to deliver his first Accountant’s Certificate; or

(ii) having been exempt by reason of rule 10 from the necessity of delivering an accountant’s certificate in the immediately preceding practice year, becomes under an obligation to deliver an Accountant’s Certificate,

the accounting period shall begin on the date upon which he commenced to hold or receive client’s money, and may cover a period less than twelve months, but shall in all other respects comply with the requirements of rule 4; and

(b) where a legal practitioner retires from practice and he, having ceased to hold or receive client’s money, is under an obligation to deliver his final Accountant’s Certificate, the accounting period shall end on the date upon which he ceased to hold or received client’s money and may cover a period less than twelve months, but shall in all other respects comply with the requirements of rule 4.

(2) In any practice year, where a legal practitioner—

(a) was not exempt by reason of rule 10 from delivering an Accountant’s Certificate in the immediately preceding practice year; and

(b) since the end of the accounting period covered by such accountant’s certificate, has become or ceased to be a member of a firm of legal practitioners,

the accounting period may cover a period less than twelve months but shall in all other respects comply with the requirements of rule 4.

(3) Where a legal practitioner has two or more places of business—

(a) a separate accounting period covered by a separate Accountant’s Certificate may be adopted in respect of each place of business so long as each accounting period complies with the relevant requirements of these Rules;

(b) every Accountant’s Certificate delivered by him to the Secretary in each practice year shall cover all client’s moneys held or received by him during the appropriate accounting period.

Notices

12. Every notice given by the Secretary under rule 7 (3) or 13 shall be in writing and signed by him.

Waiver

13. The Committee shall have power in any particular case, by notice given by the Secretary, to waive any of the requirements of these Rules other than those of rule 7 (3).

SCHEDULE

Rule 9

ACCOUNTANT’S CERTIFICATE

Note: In the case of a firm with a number of partners, carbon copies of this certificate may be delivered if paragraph 1 below has been completed on each copy with the name of the partner to whom it relates.

- 1. Legal practitioner’s full name:
- 2. Name of firm (if any):
- 3. Business address:
.....
.....
- 4. Accounting period(s):

In compliance with the Legal Practitioners (Accountants’ Certificate) Rules, I have examined the books, accountants and documents produced to me relating to the above-named and I hereby certify that from my examination and from the explanations and information given to me pursuant to rule 8, I am satisfied that—

- *(a) during the accounting period(s) specified above he has complied with the provisions of the Legal Practitioners Accounts Rules except so far as concerns—
 - (i) any trivial breach thereof due to clerical errors or mistakes in bookkeeping duly rectified after discovery which I am satisfied has not resulted in any loss to a client;
 - (ii) any matters set out on the reverse side of this certificate;

*(b) having retired from practice as a legal practitioner on the day of 20... the said, , ceased to hold client’s money on the , 20...

Particulars of the Accountant certifying—

- Full name
- Qualifications
- Name of firm (if any)

Address

.....

Signature

Date, 20

To the Secretary,
 Malawi Law Society

*Delete paragraph not applicable

s.42

LEGAL PRACTITIONERS PRACTICE RULES

under s.42

1. These Rules may be cited as the Legal Practitioners Practice Citation Rules.

2. In these Rules, unless the context otherwise requires— Interpretation
 “legal practitioner” includes a firm of legal practitioner;

3. A legal practitioner shall not agree with any person not being Sharing profits
 a legal practitioner or other duly qualified legal agent practicing in with unqualified
 granting similar reciprocal arrangements his profit costs in respect persons
 of any business either contentious or non-contentious:

Provided always that—

(a) a legal practitioner carrying on practice on his own
 account may agree to pay an annuity or other sum out of profits
 to a retired partner or predecessor or the dependants or legal
 personal representative of a deceased partner or predecessor;

(b) a legal practitioner who has agreed in consideration of
 a salary to do the legal work of an employer who is not a legal
 practitioner may agree with such employer to set off his profit
 costs received in respect of contentious business from the
 opponents of such employer by third parties in respect of non-
 contentious business against:

(i) the salary so payable to him; and

(ii) the reasonable office expenses incurred by such
 employer in connection with such legal practitioner (and
 to the extent of such salary and expenses).

4.—(1) A legal practitioner shall not join or act in association Restrictions in
 with any organization or person (not being a practicing legal acting in personal
 practitioner) whose business or any part of whose business is to injury claims, etc.
 make, support or prosecute (whether by action or otherwise and
 whether by a legal practitioner or agent or otherwise) claims arising
 as a result of death or personal injury, including claims under the

Cap. 55:03

Workmen's Compensation Act or any statutory modification or re-enactment thereof in circumstances that a person or organization solicits or receives any payment, gift or benefit in respect of claims, nor shall a legal practitioner act in respect of any such claim for any client introduced to him by the person or organization.

(2) A legal practitioner shall not with regard to any such claim knowingly act for any client introduced or referred to him by any person or organization whose connection with such client arise from solicitation in respect of the cause of any such claim.

(3) It shall be the duty of a legal practitioner to make reasonable inquiry before accepting instructions in respect of any such claim for the purpose of ascertaining whether the acceptance of such instructions will involve a contravention of subrule (1) or (2).

Supervision of
principal office
and branch
offices

5. A legal practitioner who has established a legal firm, whether as a sole practitioner or in partnership with other legal practitioners, shall ensure that the principal office of his firm and every branch office thereof is, and can at all times be seen to be, properly supervised in accordance with the following minimum requirements, that is to say—

(a) that every such office is managed by a legal practitioner who—

(i) holds a currently valid practice certificate;

(ii) is unconditionally admitted to practice;

(iii) has practiced the profession of the law for at least five (5) years; and

(iv) by reason of proximity of his place of residence, is able to be in regular attendance at that office during the hours it is open to the public;

(b) that the staff employed at every such office are supervised, directed and controlled, and so appear, as to portray to the public a respectable image and the due dignity of the legal profession; and

(c) that at every such office there are adequate requisite facilities for consultation with clients and that there is an ample collection of law books and other reference materials for legal research as will enable the legal practitioner readily to render appropriate professional service to his clients.

s.43

LEGAL PRACTITIONERS' ACCOUNTS RULES

under s.43

1. These Rules may be cited as the Legal Practitioners Citation Practice Rules.

2. In these Rules, unless the context otherwise requires— Interpretation

“client’s account” means a current or deposit account at a bank in the name of the legal practitioner in the title of which the word “client” appears;

“client’s money” means money held or received by a legal practitioner on account of a person for whom he is acting in relation to the holding or receipt of such money either as a legal practitioner or, in connection with his practice as a legal practitioner, agent, bailee, stakeholder or in any other capacity:

Provided that the expression “client’s money” shall not include—

(a) money held or received on account of the trustees of a trust of which the legal practitioner is legal practitioner trustee, or

(b) money to which the only person entitled is the legal practitioner himself or, in the case of a firm of legal practitioners, one or more of the partners in the firm;

“Committee” means the Disciplinary Committee constituted under section 104 of the Act;

“legal practitioner” includes a firm of legal practitioners;

“legal practitioner trustee” means a legal practitioner who is a sole trustee or who is a co-trustee only with a partner, clerk or servant of his or with more than one of such persons;

“trustee money” means money held or received by a legal practitioner which is not client’s money and which is subject to a trust of which the legal practitioner is a trustee whether or not he is legal practitioner trustee of the trust.

3. There may be paid into a client’s account—

Money to be paid into client’s account

(a) trust money;

(b) money belonging to the legal practitioner necessary for the purpose of opening or maintaining the account;

(c) money to replace any sum which may, by mistake or accident, have been drawn from the client’s account in contravention of rule 7(2); and

(d) a cheque or draft received by the legal practitioner, which under rule 5 he is entitled to split but which he does not split.

Cheques including client's money of one or more trusts

4. Where a legal practitioner holds or receives a cheque or draft which includes client's money or trust money of one or more trusts—

(a) he may, where practicable, split the cheque or draft, and if he does so, he shall deal with each part thereof as if he had received a separate cheque or draft in respect of that part; or

(b) if he does not split the cheque or draft, he shall, if any part thereof consists of client's money, and may in any other case, pay the cheque or draft into a client's account.

Money not to be paid into client's account

5. No money other than money which, under the foregoing rules, a legal practitioner is required or permitted to pay into a client's account shall be paid into a client's account, and it shall be the duty of the legal practitioner into whose client's account, any money has been paid in contravention of this rule to withdraw the same without delay on discovery.

Drawings from client's account

6. There may be drawn from a client's account—

(a) in the case of a client's money—

(i) money properly required for a payment to or behalf of the client;

(ii) money properly required for or towards payment of a debt due to the legal practitioner from the client or in reimbursement of money expended by the legal practitioner on behalf of the client;

(iii) money drawn on the client's authority;

(iv) money properly required for or towards payment of a legal practitioner's costs where there has been delivered to the client, a bill of costs or other written intimation of the amount of the costs incurred and it has thereby or otherwise, in writing, been made clear to the client that money held for him is being or will be applied towards or in satisfaction of the costs;

(v) money which is thereby transferred into another client's account;

(b) in the case of trust money—

(i) money properly required for a payment in the execution of the particular trust; and

(ii) money to be transferred to a separate bank account kept solely for the money of the particular trust;

(c) money, not being money to which either paragraph (a) or paragraph (b) applies, as may have been paid into the account under rule 3 (b) or (d); and

(d) money which may by mistake or accident have been paid into the client’s account in contravention of rule 5:

Provided that in any case under paragraph (a) or paragraph (b), the money so drawn shall not exceed the total of the money held for the time being in the account on account of the client or trust.

7.—(1) Money drawn from a client’s account under rule 6 (a) Drawings by cheque or transfer to bank account (ii), 6(a) (iv), by cheque or 6(c) or 6(d) shall not be drawn except by—

(a) a cheque drawn in favour of the legal practitioner; or

(b) a transfer to a bank account in the name of the legal practitioner not being a client’s account.

(2) No money other than money permitted by rule 6 to be drawn from a client’s account shall be so drawn unless the Society upon an application made to them by the legal practitioner, specifically authorizes, in writing, its withdrawal.

8.—(1) Notwithstanding these Rules, a legal practitioner shall No obligation to pay certain client’s money into account not be under obligation to pay into a client’s account, client’s money held or received by him—

(a) which is received by him in the form of cash, and is without delay paid in cash in the ordinary course of business to the client or, on his behalf, to a third party;

(b) which is received by him in the form of a cheque or draft which is endorsed over in the ordinary course of business to the client or on his behalf to a third party and is not passed by a legal practitioner through a bank account; or

(c) which he pays into a separate bank account opened or to be opened in the name of the client or of some person designated by the client in writing or acknowledged by the legal practitioner to the client, in writing.

(2) Notwithstanding these Rules, a legal practitioner shall not pay into a client’s account money held or received by him—

(a) which the client, for his own convenience, requests the legal practitioner to withhold from the account, the request being either in writing from the client or acknowledged by the legal practitioner to the client in writing from the client or in reimbursement of money expended by the legal practitioner on behalf of the client; or

(b) which is received by him for or towards payment of a debt due to the legal practitioner;

(c) which is expressly paid to him, either—

(i) on account of costs incurred in respect of which a bill of costs or other written intimation of the amount of the costs incurred has been delivered; or

(ii) as an agreed fee (or on account of an agreed fee) for business undertaken or to be undertaken.

(3) Where a cheque or draft includes other client's money as well as money of the nature described in subrule (2), the cheque or draft shall be dealt with in accordance with rule 4.

(4) Notwithstanding these rules, the Society may, upon an application made to them by a legal practitioner, specifically authorize him, in writing, to withhold any client's money from a client's account.

No sums to be transferred from account of one client to that of another

9. No sum shall be transferred from the ledger account of one client to that of another client except in circumstances in which it would have been permissible under these Rules to have withdrawn from the client's account the sum transferred from the first client and to have paid into client's account the sum so transferred to the second client.

Production of books and accounts on request of Society

10.—(1) In order to ascertain whether these Rules have been complied with, the Society may, acting either—

(a) on its own motion; or

(b) on a written complaint lodged with it by a third party,

require any legal practitioner to produce, at a time and place to be fixed by the Committee, his books of account, bank passbooks, loose leaf bank statements, statements of account, vouchers and any other necessary documents for the inspection by the Committee and shall be directed to prepare for the information of the Committee, a report on the result of the inspection.

(2) Upon being required so to do, a legal practitioner shall produce books of account, bank passbooks, loose leaf bank statements, statements of accounts, vouchers and documents at the time and place fixed.

(3) Before instituting an inspection on a written complaint lodged with them by a third party, the Committee shall require *prima facie* evidence that a ground of complaint exists, and may require the payment by the party to the Committee of a reasonable sum to be fixed by them to cover the costs of the inspection, and the cost of the legal practitioner against whom the complaint is made.

(4) The Committee may deal with any sum paid under sub-rule (3) in a manner as it may think fit.

Form of requirement of Committee

11. Every requirement, to be made by the Committee, of a legal practitioner, under these Rules, shall be made in writing under the hand of the Chairperson of the Committee and sent by registered post to the last address of the legal practitioner appearing on the Roll and when so made and sent shall be deemed to have been received by the legal practitioner within one (1) week of the time of posting.

Saving of rights

12. Nothing in these Rules shall deprive a legal practitioner of any recourse or right, whether by way of lien, set-off, counter claim, charge or otherwise, against money standing to the credit of a client's account.

Right to be heard

13. In any matter referred to in these Rules for decision by the Society, any legal practitioner affected shall have the right to be heard but not to vote unless the matter affects all practitioners similarly.

s.46

LEGAL PRACTITIONERS (SCALE AND MINIMUM CHARGES) RULES under s. 46

Citation

1. These Rules may be cited as the Legal Practitioners (Scale and Minimum Charges) Rules.

Tariff of fees

2. The charge for any services specified in the Schedule and performed by a legal practitioner after the coming into operation of these Rules shall be in accordance with the tariff of fees prescribed in the Schedule.

SCHEDULE

PART I

SCALE CHARGES (EXCLUDING DISBURSEMENTS) TO BE MADE BY LEGAL PRACTITIONERS

TABLE 1

Nature of Work

Scale Charges

The Scale Charges are prescribed below plus where applicable—

- (1) negotiation fees of 2 percent of the amount involved; and
(2) K10,000 stamping and registration of each document;

Scale, Purchases, first and subsequent Mortgages (including Debentures and further charges), Leases (including Rights of Occupancy and Subleases), Agreements for Leases (including Agreements for Rights of Occupancy and Agreements for Subleases) when no further document is to be executed, and Tenancy Agreements other than Leases, Agreements for Leases and Tenancy Agreements.

Provided that when acting for both parties the charge shall be Scale Charge when acting for the Vendor, Mortgagor, Lessor or Landlord, as the case may be, plus 50 per cent where applicable—

- (1) negotiation fees of 2 percent of the amount involved; and
(2) K10,000 stamping and registration of each document—

(a) for acting for one party in matters other than those specified in subparagraph (b) below—

(i) where the consideration does not exceed K500,000	K10,000 plus 2 per cent of the consideration
(ii) where the consideration exceeds K500,000 but does not exceed K1,000,000	K20,000 plus 1½ per cent of the consideration
(iii) where the consideration exceeds K1,000,000 but does not exceed K5,000,000	K30,000 plus 1 per cent of the consideration
(iv) where the consideration exceeds K5,000,000	K50,000 plus 1 per cent of the consideration
(b) for acting for one party in the case of Leases (including Rights of Occupancy and Subleases, Agreements for Rights of Occupancy and Agreements for Subleases), when no further document is to be executed, and Tenancy Agreements other than Leases, Agreements for Leases and Tenancy Agreements ..	K25,000 plus 3 per cent of annual rent

TABLE 2

Reconveyance of Mortgage where acting for one party or both parties and chargeable only by the Mortgagor's Legal Practitioners, the Mortgagor not being liable for any charges of the Mortgagee's Legal Practitioners	(1) K50,000 or 10 per cent of the amount secured subject to a maximum of K150,000 (2) plus in each case, where applicable K10,000 for stamping and registration of the reconveyance.
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TABLE 3

Equitable Charges and Equitable further Charges	K50,000 or 10 per cent of the amount secured subject to a maximum of K150,000
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TABLE 4

Releases of Equitable Charges and Releases of Equitable Further Charges ..	K50,000 or 10 per cent of the amount secured subject to a maximum of K150,000
--	---

TABLE 5

Nature of Work

Scale Charges

Deeds of Arrangement requiring registration under the Deeds of Arrangement Act, including all incidental work	If the total estimated amount of the Debtor's property included in the Deed, as sworn to in pursuance of section 7 of the Act—	
..	(a) does not exceed K5,000,000	K150,000
	(b) exceeds K5,000,000	K150,000 plus 3 per cent of such total estimated amount in excess of K5,000,000

TABLE 6

Collection of Monies, Solicitor and own client charge on collecting monies to be charged on receipt of monies	If the amount collected—	
..	(a) does not exceed K10,000	K500
	(b) exceeds K10,000 but does exceed K25,000	K2,500
	(c) exceeds K25,000 but does exceed K50,000	K5,000
Where proceedings are commenced, there shall be additional charge for party and party costs:	(d) exceeds K50,000 but does exceed K100,000	K10,000
Provided that the 15 per cent costs shall also be recoverable from the debtor whether proceedings are commenced or not and where proceedings are commenced, it shall be recoverable as part of the judgment debt.	(e) exceeds K100,000 but does exceed K250,000	K15,000
	(f) exceeds K250,000 but does exceed K500,000	K25,000
	(g) exceeds K500,000 but does exceed K1,000,000	15 per cent on the collected
	(h) exceeds K1,000,000	15 per cent on the first K1,000,000 then 10 per cent on the next K1,000,000, and 3 per cent on the balance collected.

TABLE 7

Trade Marks, Patents and Designs ..	Charges prescribed in the Tariff of Charges for the time being in force for patent agents under legislation on patents.
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TABLE 8

Probate and administration of deceased person's Estates including all work done in order to obtain and obtaining the issue of a grant including completion of assessment of gross value and obtaining final discharge from Estate Duty Commissioners	5 percent of the gross value of the property
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TABLE 9

*Nature of Work**Scale Charges*

Attending to the stamping of any document at the Registrar General's Office

K10,000 to be made in addition to any other charges prescribed hereunder.

TABLE 10

Attending to the stamping and registration of document

K10,000 to be made in addition to any other charges prescribed hereunder.

TABLE 11

Formation of Companies to include all work up to date of Certificate of Incorporation except such work as is included in other Tables in this Schedule

Minimum charge of K50,000 for any company that does not exceed K1,000,000 nominal capital plus 5 per cent the nominal capital if it exceeds K1,000,000.

TABLE 12

Application for Naturalization

K50,000 provided that if husband and wife are applying simultaneously then K75,000 to cover both applicants

TABLE 13

Cap. 46:02

Registration of particulars under the Business Names Registration Act

(1) Registration of new Application K25,000
(2) Registration of Cessation of Business K20,000
(3) Registration of change in particulars .. K20,000

TABLE 14

Cap. 46:02

Application for Passports

If first application for or renewal of a Passport K15,000

TABLE 15

Cap. 48:03

Bill of Sale (other than Absolute Bills of Sale) requiring registration under the Bills of Sale Act, including attending to stamping and incidental matters ..

The Scale prescribed under Table 1.

TABLE 16

<i>Nature of work</i>	<i>Scale charges</i>
Conveyance of Assignments by deed of any property by way of gift	The Scale prescribed under Table 1.

PART II

MINIMUM PROFESSIONAL CHARGES (EXCLUDING DISBURSEMENTS) TO BE MADE BY LEGAL PRACTITIONERS

TABLE 1

<i>Nature of Work</i>	<i>Minimum Charge</i>
Initial Partnership Deeds and Initial Partnership Agreements Minimum Charge	K25,000 plus K10,000 for attending to stamping at Registrar General’s Office where applicable.

TABLE 2

Powers of Attorney under Seal	K15,000 plus K10,000 for attending to stamping and registration or K10,000 for attending to the stamping only, where applicable.
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TABLE 3

Employment Agreements	K25,000
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PART III

1. Wherever scale charges are not applicable, the legal practitioner can charge a sum that is fair and reasonable having regard to all the circumstances of the case and in particular to—

- (a) the complexity of the matter or the difficulty or novelty of the questions raised;
- (b) where money or property is involved, its amount or value;
- (c) the importance of the matter to the client;
- (d) the skill, labour, specialized knowledge and responsibility involved therein on the part of the legal practitioner;

- (e) the number and importance of the documents prepared or perused, without regard to length;
 - (f) the place where the circumstances in which the business or any part thereof is transacted; and
 - (g) the time expended by the legal practitioner.
2. The client may apply to the Taxing Master for taxation of costs.

s.82

MALAWI LAW SOCIETY RULES

under s.82

Citation 1. These Rules may be cited as the Malawi Law Society Rules.

Subscription 2.—(1) In each year an annual subscription shall be payable to the Society by each member thereof in the amount relevant to such member as set out in sub-rule (2).

(2) The annual subscription payable under sub-rule (1) shall be—

K t

(a) for the first three years after the date on which the Member acquired the basic qualification enabling him to obtain admission as a legal practitioner in Malawi 80, 000 00

(b) for each succeeding year after (a) above 80,000 00

(3) Each subscription shall become due on the first day of January in the year to which it relates and shall be payable either—

(a) in one (1) sum on or before the first day of February in that year; or

(b) in two (2) equal instalments, each amounting to one-half of the relevant annual subscription, before the first day of February and before the first day of July, respectively, in that year.

Resignation 3. A member of the Society who is not governed by section 75 (1) may resign from the Society at any time by giving notice of his resignation in writing to the Secretary.

Election of officers 4. At the Annual General Meeting, the Society shall elect a Chairperson, a Deputy Chairperson, a Secretary, a Treasurer and a number of Executive Committee Members, not exceeding three, as the Society may deem fit.

5. (1) In the event of the Chairperson, by reason of illness, absence from Malawi or other causes, being unable to exercise his functions, the Deputy Chairperson shall act as Chairperson. Casual vacancies in offices of Chairperson and Secretary

(2) In the event of the Secretary, by reason of illness, absence from Malawi or other causes, being unable to exercise his functions, the Treasurer shall act as Secretary.

6. The Chairperson shall preside at all meetings of the Society but, in the event of his absence from a meeting or of a vacancy in his office, the Deputy Chairperson shall preside at that meeting and in the absence of both the Chairperson and Deputy Chairperson from any meeting, the members present shall appoint one of their number to preside at that meeting. Presiding at meetings

7. The Society may, by general resolution, delegate to a committee of the Society, any of its powers and functions for a length of time and subject to any conditions specified in the resolution. Delegation of power

8. The Society may, from time to time, appoint committees and may similarly delegate to the committees any of its powers, by general resolution, subject to conditions for a time as specified in the resolution. Appointment of sub-committees

9. (1) The Secretary may at any time with the consent of the Chairperson of the Society convene a meeting of the Society. Calling of meetings

(2) Not less than four (4) days' notice of a meeting shall be given to all members of the Society.

(3) The failure of any member to receive notice shall not invalidate the proceedings at any meeting.

10. (1) A meeting of the Society shall be convened within fourteen (14) days of the receipt by the Secretary of a requisition convening a meeting signed by not less than four (4) members of the Society. Requisition for meetings

(2) The quorum at all meetings of the Society shall be six (6).

(3) The quorum at any meeting of any committee established under the Society shall be two (2).

11. (1) Nominations for any office in the Society may be made in writing signed by the proposer and seconder within seven (7) days of the date of the meeting at which the election is to take place or alternatively may be made orally at the meeting at which the election is to take place. Nominations for office

(2) A candidate for election must either consent to his nomination at the meeting at which the election is to take place or

signify his consent in writing to accepting the nomination.

(3) In the event of there being more than one (1) candidate for any office in the Society, a poll shall be recorded by secret ballot under the direction of the Chairperson or other person presiding at the meeting.

(4) The candidate receiving the majority of votes cast at the poll shall be deemed to be the candidate elected.

Filling of
vacancies

12. Casual vacancies occurring among the officers of the Society in the course of the year shall be filled as soon as practicable after the vacancy occurs.

Removal from
office

13. Any officer of the Society or any member of the executive Committee or any committee may be removed from office if a vote of censure upon that person is passed by a special resolution of the Society.

Common seal

14. The Secretary shall have the custody of the common seal of the Society which shall be affixed to documents by the Secretary in the presence of the Chairperson or any member of the Executive Committee who shall subscribe their names as witness to the placing of the common seal.

Resolution

16.—(1) Resolutions of the Society shall be either general or special.

(2) A general resolution shall be deemed to be passed if the majority of those present and voting support it.

(3) A special resolution shall not be moved at any meeting of the Society unless at least fourteen (14) days' notice thereof has been given to the members of the Society and a special resolution shall not be deemed to have been passed unless two-thirds of the members present and voting shall vote in favour thereof.

APPENDIX II

DEBT COLLECTORS BILL, 20...

DEBT COLLECTORS BILL, 20...
ARRANGEMENT OF SECTIONS

SECTION

PART I—PRELIMINARY

1. Short title and commencement
2. Interpretation

PART II—DEBT COLLECTION COUNCIL

3. Establishment of Debt Collection Council
4. Functions of the Council
5. Powers of the Council
6. Composition
7. Chairperson
8. Tenure and vacancy
9. Invited persons
10. Meetings of the Council
11. Procedure and quorum
12. Committees of the Council
13. Meetings of committees
14. Allowance
15. Disclosure of interest
16. Protection of members
17. Prohibition of publication or disclosure of information by unauthorized persons
18. Funds of the Council
19. Accounting and auditing

PART III—REGISTRATION

20. Application for registration
21. Register
22. Persons eligible to be registered as debt collectors
23. Annual licence
24. Annual publication of list of debt collectors
25. Persons registered entitled to recover charges
26. Documents to be signed by debt collector
27. Remuneration for debt collectors

PART IV—DISCIPLINE

28. Application to all debt collectors
29. Establishment of the Disciplinary Committee
30. Chairperson
31. Functions and duties
32. Tenure and vacancy
33. Minutes of meetings

- 34. Procedure and quorum
- 35. Time limits
- 36. Right to legal representation
- 37. Allowances
- 38. Retention of client’s money
- 39. Unregistered persons prohibited from practicing debt collection
- 40. Limitations to practice
- 41. Misconduct
- 42. Penalties
- 43. Cancellation of registration
- 44. Suspension
- 45. Practicing while de-registered or suspended
- 46. Publication of names of debt collectors de-registered or suspended
- 47. Re-registration
- 48. Evidence

PART V—MISCELLANEOUS

- 49. General offences
- 50. Regulations
- 51. Rules

SCHEDULES

A B I L L

entitled

An Act to establish the Debt Collection Council; to provide for the registration and discipline of debt collectors; to control and regulate debt collection; and for matters incidental thereto and connected therewith.

ENACTED by Parliament of Malawi as follows—

PART I—PRELIMINARY

1.—(1) This Act may be cited as the Debt Collectors Act, 20... and shall come into operation on a date appointed by the Minister, by notice published in the *Gazette*.

Short title and commencement

2. In this Act, unless the context otherwise requires—

Interpretation

“Council” means the Debt Collection Council established under section 3;

“debt collector” means a person who,—

(a) other than a legal practitioner, his employee or a party to a factoring arrangement, collects debts owed by one person on

behalf of another person, for reward;

(b) other than a party to a factoring arrangement and in the course of his regular business, takes over debts referred to in paragraph (a) in order to collect them for benefit or reward;

(c) as an agent or employee of a person referred to in paragraph (a), collects the debts on behalf of the person, excluding an employee whose duties are purely administrative, clerical or otherwise subservient to the actual occupation of debt collector;

“Disciplinary Committee” means the Committee established under section 29;

“factoring arrangement” means an arrangement between a creditor and financier in terms of which the creditor, in exchange for funding, either sells or offers as security, claims against his debtors:

Provided that the claims are not bad nor doubtful at the time they are sold or offered as security and that no overdue debt or claim for which a demand has been made, is part of such a factoring arrangement;

“Minister” means the Minister responsible for Justice;

“Register” means the Register of Debt Collectors provided for under section 21;

“Society” means the Malawi Law Society established under the Legal Education and Legal Practitioners Act.

Cap. 3:04

PART II—DEBT COLLECTION COUNCIL

Establishment
of Debt
Collection
Council

3. There is hereby established a body to be known as the Debt Collection Council (in this Act otherwise referred to as the “Council”) which shall be a body corporate with perpetual succession and a common seal, with power to hold land, to sue and be sued in its corporate name.

Functions of
the Council

4.—(1) The Council shall be the sole registering authority of all persons required to be registered under this Act.

(2) Notwithstanding the generality of subsection (1), the Council shall—

(a) enforce discipline and control of persons registered under this Act and practicing debt collection in Malawi;

(b) prescribe a surety bond for debt collectors;

(c) enforce a code of conduct for debt collectors;

(d) advise the Minister on any matters falling within the scope of this Act; and

(e) do any act necessary, incidental or conducive to the better carrying out of its functions under this Act.

5. For the better performance of its functions, the Council shall, Powers of the Council subject to the provisions of this Act, have power to—

(g) enter into a contract or agreement;

(h) publish reports of the complaints the Council has dealt with;

(i) raise money by way of loans or overdrafts;

(j) receive donations of money or other property from any person or body of persons for the furtherance of its functions;

(k) publish, from time to time, professional or other information which it deems necessary or expedient for the promotion of the functions of the Council; and

(l) to do any act, matter or thing it deems necessary for fulfilling the functions of the Council.

6.—(1) The Council shall consist of the following members to be Composition appointed by the Minister—

(a) two (2) debt collectors;

(b) two (2) legal practitioners nominated by the Society;

(c) one (1) banker nominated by a representative body;

(d) one (1) accountant nominated by a representative body;

(e) one (1) auditor nominated by a representative body; and

(f) one (1) member nominated by the Malawi Confederation of Chambers of Commerce and Industry.

(2) The Executive Director of the Society shall be the Secretary of the Council.

(3) The Minister shall publish names of all members of the Council as first constituted and every change of membership in the *Gazette*.

(4) Members of the Council shall not be employed on a full time basis and shall not be considered employees within the public service.

7.—(1) The Chairperson shall be elected by the Council from Chairperson among its members at their first meeting.

(2) If the Chairperson is absent or unable to carry out any of his

functions under this Act, a member of the Council shall exercise, during the absence of the Chairperson, such functions of the Chairperson as the Council may designate.

(3) The Chairperson shall preside at any meeting of the Council.

(4) In the absence of the Chairperson,—

(a) the Chairperson may designate any member of the Council to preside; or

(b) a member elected by members present and forming a quorum from among their number shall preside.

Tenure and
vacancy

8.—(1) A member of the Council, other than an *ex-officio* member, shall hold office as a member of the Council for a period of three (3) years and may be eligible for re-appointment for one (1) more term.

(2) A vacancy in the office of an appointed member shall occur, if the member—

(a) dies;

(b) is adjudged bankrupt;

(c) is incapacitated by reason of physical or mental infirmity;

(d) is sentenced for an offence under any written law to a term of imprisonment without an option of a fine;

(e) if he ceases to possess the qualification enabling him to be appointed a member of the Council;

(f) is absent, without valid reason, from three consecutive meetings of the Council, of which he has had notice; or

(g) resigns in accordance with subsection (3).

(3) An appointed member may at any time resign his office by giving one (1) month written notice to the Minister.

(4) A vacancy in the Council shall be filled, for the remainder of the term, by the appointment of a new member:

Provided that if the remaining period is less than six (6) months, the vacancy may not be filled until the expiry of the period.

Invited persons

9. The Council may, in its discretion at any time and for any period, invite any person to attend any meeting of the Council and take part in the deliberations of the Council, but the invited person shall not be entitled to vote at any meeting.

Meetings of the
Council

10.—(1) The Council shall meet for the transaction of business, at least once every three (3) months, at a place and at a time determined

by the Chairperson.

(2) An ordinary meeting of the Council shall be convened upon giving a written notice of at least fourteen (14) days to the members.

(3) The Chairperson—

(a) may, at his own instance and upon giving seven (7) days notice; or

(b) shall, at the written request of three (3) or more members and within seven (7) days of the request,

convene an extraordinary meeting of the Council at a place and at a time appointed by him:

Provided that if the urgency of any particular matter does not permit the giving of such notice, a special meeting may be called upon giving a shorter notice.

11.—(1) Subject to the other provisions of this Act, the Council may regulate its own procedure.

Procedure and quorum

(2) Half of the members shall form the quorum of any meeting of the Council.

(3) The decision of the Council on any matter at any meeting shall be that of the majority of the members present and voting at the meeting and, in the event of an equality of votes, the person presiding shall have a casting vote in addition to his deliberative vote.

12.—(1) The Council may, for the purpose of performing its functions under this Act, establish other committees and delegate to any such committees any of its functions as the Council considers necessary.

Committees of the Council

(2) The Executive Director of the Society shall be Secretary to every committee of the Council.

(3) The Council may appoint as a member of a committee established under subsection (1), a person who is not a member of the Council and the person shall hold office for a period determined by the Council.

(4) The person appointed under subsection (2) shall be appointed based on—

(a) ability and experience in debt collection; or

(b) legal, finance or other relevant professional qualifications.

(5) Subject to any specific or general direction of the Council, a committee established under subsection (1) may regulate its own

procedure.

Meetings of committees

13. The Executive Director of the Society shall, on the instructions of the Chairperson of any committee, convene a meeting of the committee.

Allowance

14. Members of the Council or a committee thereof shall receive an allowance approved by the Annual General Meeting of registered debt collectors, from time to time.

Disclosure of interest

15.—(1) If a member is present at a meeting of the Council or any committee of the Council, at which any matter which is the subject of consideration is a matter in which that person or his immediate family member or his professional or business partner is directly or indirectly interested in a private or professional capacity, he shall, as soon as is practicable after the commencement of the meeting, disclose his interest and, unless the Council or the committee otherwise directs, that person shall not take part in any consideration or discussion of, or vote on, any question touching on the matter.

(2) The disclosure of interest under subsection (1) shall be recorded in the minutes of the meeting at which it is made.

Protection of members

16. An action, suit or other proceedings shall not be brought or instituted personally against any member of the Council or a committee thereof in respect of an act done in good faith in the course of carrying out the provisions of this Act.

Prohibition of publication or disclosure of information by unauthorized persons

17. A person shall not, without the consent in writing given by or on behalf of the Council, publish or disclose to any person, otherwise than in the course of his duties, contents of any document, communication or information which relates to, and which has come to his knowledge in the course of his duties under this Act.

Funds of the Council

18.—(1) The funds of the Council shall consist of—

- (a) registration and annual licence fees;
- (b) money paid to the Council by way of grants or donations;
- (c) money raised by way of loans;
- (d) money paid to the Council as penalties; and
- (e) money otherwise vesting or accruing to the Council.

(2) The Council may invest in a manner it thinks fit, any funds it does not immediately require for the performance of its functions.

Accounting and auditing

19.—(1) The Council shall keep and maintain proper books and records of account of its funds in accordance with internationally accepted accounting standards.

(2) The accounts of the Council shall be examined and audited annually by auditors appointed by registered debt collectors in general assembly, but the Council at a General Assembly may direct that the accounts of the Council be examined and audited at any time.

PART III—REGISTRATION

20.—(1) A person who wishes to be registered as a debt collector shall apply to the Council in a prescribed form.

Application for registration

(2) The prescribed form shall be accompanied by—

(a) a registration fee the Council may, from time to time, determine; and

(b) other information the Council may require.

(3) Where the Council is of the opinion that the provisions of this Act have been complied with in respect of an application referred to in subsection (1), the Council shall register the applicant as a debt collector and issue to him a certificate as prescribed in the Fourth Schedule which shall entitle him to practice as a debt collector.

21.—(1) The Council shall keep a Register of Debt Collectors in which the Secretary shall enter the name, address, qualifications and date of registration of every debt collector.

Register

(2) The Council shall publish in the *Gazette* the name, address and date of registration of every debt collector within thirty (30) days of the date of registration.

22. A person shall not be eligible for registration as a debt collector, unless he—

Persons eligible to be registered as debt collectors

(a) is a citizen of Malawi;

(b) satisfies a surety bond requirement as prescribed by the Council under the First Schedule;

(c) has sufficient knowledge of debt collection; and

(d) is a fit and proper person to be registered.

23.—(1) A person shall, on registration as a debt collector, pay a prescribed fee and shall, in the year of his registration and annually thereafter, take out an annual licence as prescribed in the Fifth Schedule for which he shall pay prescribed fees.

Annual licence

(2) The annual licence shall expire on the 31st day of January next following the date of issue and may be renewed.

(3) The Council shall not renew a licence of a debt collector, unless the debt collector—

(a) has not been found guilty of misconduct in the execution of his duties as a debt collector;

(b) has filed an Accountant's Certificate with the Council; and

(c) operates a separate account for client's money.

(4) A debt collector shall not collect debts unless he has a valid licence to practice.

(5) A debt collector shall apply to the Council for renewal of the licence, ninety (90) days before the expiry of the existing licence.

Annual
publication of
list of debt
collectors

24.—(1) The Council shall, before 31st March each year, publish in the *Gazette* list containing the names of all persons registered to collect debts in accordance with this Act.

(2) An entry in the list published in the *Gazette* under this section shall be *prima facie* evidence that any person named therein is a registered debt collector.

Persons
registered
entitled to
recover charges

25.—(1) A debt collector registered under this Act shall be entitled to collect debts and to demand, sue for and recover in any court reasonable charges for professional aid, advice, visits and the value of any service supplied by him.

(2) The debt collector shall not be entitled to recover in any court any charge for professional service supplied to the client in connection therewith unless he was, at the relevant time, registered under this Act.

Documents to
be signed by
debt collector

26. A document which is required to be signed by a registered debt collector shall not be valid unless signed by a person registered under this Act.

Remuneration
for debt
collectors

27. The Minister shall, on recommendation by the Council, set rates of remuneration of debt collectors prescribed in the Second Schedule.

PART IV—DISCIPLINE

Application to
all debt
collectors

28. Every debt collector shall be subject to the jurisdiction of the High Court and the Disciplinary Committee with respect to matters of discipline.

Establishment
of the
Disciplinary
Committee

29.—(1) There is hereby established a Disciplinary Committee of the Council.

(2) The Disciplinary Committee shall consist of—

(a) one (1) member of the Council elected at the General Assembly of registered debt collectors;

(b) one (1) legal practitioner nominated by the Society;

(c) three (3) other members who are not members of the Council, based on their expertise and experience in debt collection elected by the General Assembly.

30.—(1) The Disciplinary Committee shall, at its first meeting, elect one (1) of its number to be the Chairperson. Chairperson

(2) The Chairperson of the Disciplinary Committee shall preside over all meetings of the Disciplinary Committee.

(3) In the absence of a Chairperson of the Disciplinary Committee, members present at any meeting of the Disciplinary Committee and forming a quorum, may elect one (1) of their number to chair a meeting of the Disciplinary Committee.

31.—(1) The Disciplinary Committee shall— Functions and duties

(a) receive complaints referred to it by any person;

(b) investigate all complaints brought before it;

(c) conduct hearings on disciplinary matters; and

(d) impose an appropriate penalty prescribed under section 42.

(2) Before exercising any function under subsection (1)(c) and (d), with respect to a person against whom an allegation is made, the Disciplinary Committee shall accord the person an opportunity to be heard, and to this end, the Disciplinary Committee shall-

(a) serve the person with a notice setting out the allegations against him; and

(b) advise him of his right to legal representation.

32.—(1) A member of the Disciplinary Committee shall hold office for a period not exceeding two (2) years, unless he— Tenure and vacancy

(a) sooner resigns;

(b) is removed from office; or

(c) ceases to have the qualification necessary as a prerequisite to appointment.

(2) At the expiry of a member’s term of office, he may be eligible for reappointment for a maximum of two (2) terms.

(3) A member of the Disciplinary Committee may be removed from office, by the Council, on grounds of-

(a) incapacity arising from physical or mental infirmity;

(b) misconduct;

(c) bankruptcy;

(d) absence, without valid excuse, from three (3) consecutive meetings of the Committee of which he has had notice; or

(e) conviction for an offence punishable with a term of imprisonment without an option of a fine.

(4) In case of a vacancy in the membership of the Disciplinary Committee, the vacancy shall be filled by a person appointed by the Council until the expiry of the period from the date of appointment of the Committee:

Provided that if the remaining period is less than six (6) months, the Council may not fill the vacancy until the expiry of the period.

Minutes of meetings

33. The Disciplinary Committee shall keep minutes of the proceedings of every meeting.

Procedure and quorum

34.—(1) Subject to other provisions of this Act, the Disciplinary Committee may regulate its own procedure.

(2) The Disciplinary Committee may make rules for regulating the making, hearing and determination, by the Committee, of applications or complaints under this Part.

(3) The Committee shall meet for the transaction of business at a time and at a place the Chairperson of the Disciplinary Committee may determine.

(4) Half of the members shall form a quorum of any meeting of the Committee.

Time limits

35.—(1) The Disciplinary Committee shall dispose of any matter before it within ninety (90) days.

(2) The Disciplinary Committee may, upon giving reasons, extend the period for disposing of any matter for a period not exceeding thirty (30) days.

(3) The Disciplinary Committee shall, upon reaching a decision on a matter before it, inform the complainant of its decision within seven (7) days of the decision.

(4) If the Disciplinary Committee fails to dispose of a complaint within the time limits stipulated in subsections (1) and (2), a complainant may refer the matter to the Council.

Right to legal representation

36. A debt collector against whom a complaint is made and brought before the Disciplinary Committee, may be represented by a legal practitioner.

Allowances

37. The Council shall, from time to time, determine allowances payable to members of the Disciplinary Committee.

Retention of client's money

38. A debt collector shall not retain client's money for more than fourteen (14) days after the date of receipt of the client's money.

39.—(1) A person shall not—

- (a) collect debts; or
- (b) hold himself out or allow himself to be held out as a debt collector,

Unregistered persons prohibited from practising debt collection

unless he is registered under this Act.

(2) A person who contravenes the provisions of this section commits an offence and is liable, upon conviction, to a fine of two million Kwacha (K2,000,000) and imprisonment for five (5) years.

40. A person shall not be licensed to collect debts, if he—

- (a) is insolvent;
- (b) fails to comply or is not capable of fully complying with judgment or order, including an order for costs, given against him by a court of law in a civil case;
- (c) has been convicted of an offence of which violence, dishonesty, extortion or intimidation is an element;
- (d) is of unsound mind;
- (e) is below the age of twenty-one (21) years;
- (f) fails to account for client’s money;
- (g) does not permanently reside in Malawi; or
- (h) is found guilty of misconduct by the Disciplinary Committee.

Limitations to practice

41.—(1) A debt collector misconducts himself, if he or a person for whom he is vicariously liable,—

- (a) uses force or threatens to use force against debtor or any other person of whom a debtor has family ties or a personal relationship;
- (b) acts towards a debtor or any other person with whom the debtor has family ties or a personal relationship in an excessive or intimidating manner; or
- (c) makes use of fraudulent or misleading representations including—
 - (i) simulation of legal procedures;
 - (ii) use of simulated official or legal documents;
 - (iii) impersonation of a Police officer, sheriff, officer of court or a similar person; or
 - (iv) making of unjustified threats to enforce rights;
- (d) is convicted of an offence of which violence, dishonesty,

Misconduct

extortion or intimidation is an element;

(e) spreads or threatens to spread false information concerning creditworthiness of a debtor;

(f) contravenes or fails to comply with a provision of this Act; or

(g) behaves or acts in any manner that the Council may deem improper.

Penalties

42.—(1) The Disciplinary Committee, upon being satisfied that a debt collector is responsible for misconduct, may—

(a) recommend to the Council to cancel his registration;

(b) suspend him;

(c) impose a fine;

(d) impose conditions it deems fit;

(e) admonish him; or

(f) caution him.

(2) In addition to a penalty imposed under subsection (1), the Disciplinary Committee may order the debt collector to:

(a) pay costs of the disciplinary proceedings; or

(b) pay restitution to the complainant.

(3) A person aggrieved by a decision of the Disciplinary Committee may, within thirty (30) days, commence judicial review proceedings against the decision at the High Court.

(4) If the Disciplinary Committee considers that allegations against a registered debt collector have not been established, it shall dismiss the allegations and in such a case, the Council may, if it is of the opinion that the allegations were frivolous or vexatious, order the complainant to pay the costs of the inquiry.

Cancellation of registration

43. A debt collector whose registration is cancelled shall not collect debts or work for a debt collector in Malawi.

Suspension

44.—(1) A debt collector who has been suspended under section 42 shall not collect debts or work for a debt collector in Malawi during the period of suspension.

(2) A debt collector shall not be suspended for a period exceeding two (2) years.

Practising while de-registered or suspended

45. A debt collector who collects debt or is employed by a debt collector while his registration is cancelled or he is under suspension, commits an offence and shall, upon conviction, be liable, to a fine of two million Kwacha (K2,000,000) and imprisonment for five (5)

years.

46. The Council shall publish, in the *Gazette* and in two (2) newspapers with widest circulation, names of debt collectors whose registration is cancelled or are suspended and, in the case of suspension, the period of suspension.

Publication of names of debt collectors de-registered or suspended

47.—(1) A debt collector whose registration is cancelled may, after the expiry of five (5) years, apply to the Council for re-registration.

Re-registration

(2) On receipt of an application for re-admission, the Council may—

- (a) re-register the debt collector;
- (b) refuse to re-register the debt collector; or
- (c) order that the debt collector shall not be re-registered unless the debt collector complies with any conditions the Council may impose.

48.—(1) A person who—

Evidence

(a) has been summoned to attend before the Disciplinary Committee and—

- (i) refuses or fails without sufficient cause to attend and give evidence relevant to the inquiry at the time and place stated in the summons;
- (ii) refuses to be sworn or affirmed; or
- (iii) refuses or fails, without sufficient cause, to produce any book, record document or thing which he has been required in the summons or otherwise to produce; or

(b) attends as a witness before the Committee but refuses to answer or to answer fully and satisfactorily to the best of his knowledge and belief any question lawfully put to him,

commits an offence and shall, upon conviction, be liable, to a fine of one hundred thousand Kwacha (K100,000) and imprisonment for six (6) months.

(2) Any person who at an inquiry, gives false evidence on oath, knowing such evidence to be false or not knowing or believing it to be true, commits an offence termed perjury and shall, upon conviction, be liable, to the penalties provided by law for perjury.

PART V—MISCELLANEOUS

49. Any person who contravenes a provision of this Act for which no specific penalty has been prescribed commits an offence and shall,

General offences

upon conviction, be liable, to a fine of one million Kwacha (K1,000,000) and imprisonment for three (3) years.

Regulations

50.—(1) The Minister, in consultation with the Council, may—

- (a) make regulations for the better carrying of this Act; and
- (b) amend any Schedule to this Act.

(2) Without derogating from the generality of subsection (1) (a), such regulations may—

- (a) prescribe the fees payable on—
 - (i) registration;
 - (ii) acquiring an annual licence; and
 - (iii) re-admission to a register;
- (b) provide for remuneration of debt collectors;
- (c) prescribe the forms required to be prescribed under this Act;
- (d) make provisions for the conduct and supervision of debt collectors and other matters relating thereto.

Rules

51.—(1) The Council may make rules relating to—

- (a) the opening and keeping by a debt collector of an account at a bank for client's money;
- (b) the keeping by a debt collector of accounts containing particulars and information as to money received, held or paid by them for or on account of clients;
- (c) the requirement of the production by a debt collector of his books of account, bank passbooks, bank statements, statements of account, vouchers and any other necessary documents at any time on request by the Council;
- (d) regulation of the audit of an account kept by a debt collector and furnishing of reports thereof; and
- (e) purposes of protecting the interests, affairs or property of any person against a debt collector bound by any professional duty or responsibility.

FIRST SCHEDULE

s. 20, 22, 23 and 47

FEES

	K	t
1. Registration fees	15,000	00
2. Annual licence	5,000	00
3. Re-registration	25,000	00
4. Surety bond requirement	2,000,000	00

SECOND SCHEDULE

s.27

CHARGES

Collecting debt	10 percent of the sum collected from the client.
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THIRD SCHEDULE

s.20 (1)

APPLICATION FOR REGISTRATION TO PRACTICE AS A DEBT COLLECTOR

(to be completed in duplicate for each applicant)

TO: The Chairperson
 Debt Collection Council
 (Postal Address)

PART A—TO BE COMPLETED BY THE APPLICANT

1. Full name:
2. Address:
3. Date of Birth:
4. Nationality:
5. Occupation:
6. Educational qualification:
7. Name of employer:
8. Address of employer:
9. List of attachments:
10. Applicant recommended by:
 - (1) Name:
 - Address:
 - Occupation:
 - Signature:
 - (2) Name:
 - Address:

Occupation:

Signature:

Recommenders should be persons who have knowledge in debt collection or have expertise in legal or financial matters.

DECLARATION:

I hereby apply for a certificate to practice as a debt collector, and I declare that the statements made above are true and complete in all respects.

Date: Signature:

PART B—FOR OFFICIAL USE

Comments of the Council:

Application for the issue of a certificate to practice as a debt collector is / is not approved. †

Date:..... Signature:

Certificate No.: Date:

† Delete whichever is inapplicable

FOURTH SCHEDULE

s.20 (3)

DEBT COLLECTION COUNCIL

CERTIFICATE TO PRACTICE AS A DEBT COLLECTOR

It is hereby certified that..... has this day been admitted to practice as a debt collector in Malawi.

Dated this day of, 20.....

.....
Chairperson

.....
Secretary

FIFTH SCHEDULE

s.23

ANNUAL DEBT COLLECTOR’S LICENCE

(Issued under Debt Collectors Act)

I hereby certify that of
.....
.....
is licensed to act as Debt Collector in Malawi until the 31st January, 20....

Issued at on, 20.....

Date stamp
Chairperson



LAW COMMISSION

**REPORT OF THE LAW COMMISSION
ON THE REVIEW OF THE LEGAL EDUCATION
AND LEGAL PRACTITIONERS ACT**

May, 2013

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