

ANNEX 3

The Scope and Status of the Electoral Reform Bills

1. Background

On 3rd April 2017, the Law Commission published a Report on the Review of Electoral Laws and this was laid before Parliament in line with the constitutional requirement. The Report made recommendations for reform specifically on consolidation and harmonization of electoral laws, change in the electoral system for presidential elections, administration and management of elections, civic competence of citizens on electoral matters, campaign, polling, publication of results and handover and inauguration, dispute resolution and the development of legislation on referendum. These recommendations were contained in the following proposed Bills: Constitution (Amendment) Bill, Electoral Commission (Amendment) Bill, Elections Management Fund Bill, Presidential, Parliamentary and Local Government Elections Bill, Assumption of Office of President (Transitional Arrangements) Bill and Referendum Bill. The Cabinet made an analysis of the Bills as proposed by the Law Commission and came up with Bills that were to be presented before Parliament for adoption. The Elections Management Fund Bill was rejected at Cabinet level. The Bills that were presented to Parliament were the Constitution (Amendment)(No.2), Bill No. 27 of 2017, Presidential, Parliamentary and Local Government Elections Bill No. 28 of 2017, Electoral Commission (Amendment) Bill No. 23 of 2017, Referendum Bill No. 24 of 2017 and Assumption of Office of President (Transitional Arrangements) Bill No. 25 of 2017. This write up will highlight some of the key provisions in the Bills as presented to Parliament by the Minister of Justice and Constitutional Affairs. It will also make some general comments on these key provisions and give the current status of the proposed Bills.

2. KEY PROVISIONS IN THE BILLS

BILL	SOME KEY PROVISIONS IN THE BILLS	GENERAL COMMENT ON IMPACT IN ELECTION PROCESSES OR GOVERNANCE (AS APPLICABLE)
Constitution (Amendment) (No. 2) Bill No.27 of 2017 Object: To amend the constitutional provisions that affect the electoral process.	<ul style="list-style-type: none">• Introduces education requirement of Malawi School Certificate or its equivalent for eligibility for nomination or election as an MP.• Removes the seven-year period restriction on past convictions by a competent court of a crime	<ul style="list-style-type: none">• This will impact the eligibility criteria that the Electoral Commission will apply for the nomination of candidates.

	<p>involving dishonesty or moral turpitude and violation of any law relating to elections.</p> <ul style="list-style-type: none"> • Introduces a new system of electing members of the National Assembly and the President in that they shall be elected by a majority of more than 50% of the valid votes and where no such majority attained a second poll shall be held within 30 days after declaration of results for the two candidates who have obtained the highest and second highest number of votes cast in the first poll. • Reintroduction of recall provision which was repealed in 1995. The grounds for recall of an MP by a constituency are: certified physical and mental incapacity, misconduct or misbehavior by an MP that is likely to bring hatred, ridicule contempt or disrepute, or loss of confidence in the member by his or her constituency. 	<ul style="list-style-type: none"> • This provision bans ex-convicts from being considered as candidates for elections. The current law makes an allowance of a seven-year post-conviction period before one can participate in an election. • Considering the 193 constituencies in the country, introducing 50% +1 in the election of MPs is a costly exercise. Nonetheless, if adopted, the Electoral Commission should have a strategy in place for the conduct of second round elections. Equally, the Electoral Commission must have a strategy for the second round of presidential elections. • There was an outcry in 1995 when the recall provision was repealed. The reintroduction can enable the constituencies
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	<ul style="list-style-type: none"> • Opens the eligibility criteria for persons to be appointed Chairperson of the Commission to persons eligible to be appointed judges. • Extends the tenure of Commissioners from 4 years to five years. • Removes the role of the Public Appointments Committee in the appointment and removal of Commissioners. • Introduces the requirement of a first degree from a recognized institution for the nomination as a candidate for the position of President or First Vice President or for the appointment of First Vice President or Second Vice President. • Inclusion of the power to ensure free and fair elections as part of 	<p>to make their MPs accountable to them for fear of being recalled.</p> <ul style="list-style-type: none"> • Maintains the restriction of appointment of Chairperson to the legal profession. Expands the scope in that any person eligible to be appointed as a judge and not necessarily a practicing judge, can be appointed as Chairperson. • This is in line with the 5-year election cycle.
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	<p>the general powers and functions of the Electoral Commission.</p> <ul style="list-style-type: none"> • Providing that the swearing in of the President, First Vice President or Second Vice President shall be after 15 days but not later than 30 days. 	<ul style="list-style-type: none"> • The appointment and removal of Commissioners will lie in the Executive branch of Government, this may limit the oversight role of the legislature on such appointments. • This is in line with the Law Commission recommendation to include such educational qualifications requirement for nomination Presidential candidates. • This is an assumed role of any electoral body. Including this in the powers and functions of the Commission provides some legal emphasis to that role. • This is to provide some ample time to deal with electoral disputes before inauguration. Whether the 15 days is sufficient is debatable but it is better than the current situation whereby a President can be
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		<p>inaugurated a few hours after declaration of results.</p>
<p>Electoral Commission (Amendment) Bill No. 23 of 2017. Object: Is to strengthen the institution of the Electoral Commission and enhance its operational efficiencies.</p>	<ul style="list-style-type: none"> • Appointment of the Chairperson to the Commission to be by the President on the recommendation of Judicial Service Commission on terms and conditions to be determined by the Chief Secretary of Government. The Judicial Service Commission is to recommend not less than 3 names. • Appointment of Commissioners by the President on terms and conditions to be determined by the Chief Secretary to the Government. • Remuneration for the Commissioners may not be reduced without consent during the tenure of office. The increase will be determined by the National Remuneration Commission. 	<ul style="list-style-type: none"> • Under the current law the terms and conditions are determined by the Public Appointments Committee. The provision is relevant for the appointment of Commissioners in future elections. • The current law requires that appointment of Commissioners be done in consultation with leaders of political parties represented in the National Assembly. The proposed provision removes the requirement for such consultation. • Protection of the remuneration of the Commissioners during the Tenure of Office. The revision of remuneration will be determined by the Commission established for

	<ul style="list-style-type: none"> • Includes a 30-days' notice to the President for resignation of a Commissioner. • Includes grounds for disqualification for appointment of Commissioners as lack of citizenship, under the age of 35, an undischarged bankrupt, owing allegiance to a foreign country, unsound mind, conviction within 7 years on crime involving dishonesty or moral turpitude. • Inclusion of grounds for removal from office for a Commissioner. The grounds include incompetence, incapacity, bankruptcy and where a member is so compromised to the extend putting into question the ability to exercise their duties. • Clarifies the powers and functions of the Commission as follows: -removes the power of the Electoral Commission to 'supervise' the demarcation of boundaries and wards. 	<p>that purpose for the whole public sector.</p> <ul style="list-style-type: none"> • There is no such timeline under the current legislation • There is no exhaustive list on grounds for disqualification for appointment of Commissioners under the current law. • Expands on the provision on grounds for removal under the Constitution which are incapacity or incompetence. - Reinforces that the Electoral Commission is the only body with the
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	<ul style="list-style-type: none"> • The Appointment of the Chief Elections Officer should be through an, open, transparent and competitive process on terms and conditions to be determined by the Commission. The remuneration and allowances of the CEO to be determined by the National Remuneration Commission. • Clarifies the mandate of the CEO as being responsible for the day to day management of the Commission. • Inclusion of provisions for continuous voter education, procedure for accreditation to provide voter education, establishment of code of conduct for persons accredited to provide voter education, and procedure for cancellation of accreditation. 	<p>mandate to demarcate boundaries of constituencies and wards. There is therefore no requirement for supervisory powers.</p> <ul style="list-style-type: none"> • The current law does not provide for such a criterion. The remuneration to be determined by a body that will have mandate to consider such matters at the national level. • This is not provided for under the current law. • The provision adopts an electoral cycle approach whereby voter education will not be restricted to election period. It improves the regulation of the
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		<p>processes for accreditation of persons to provide civic voter education which is not available in the current law.</p>
<p>Presidential, Parliamentary and Local Government Elections Bill No. 28 of 2017 Object: Harmonize and consolidate laws regulating the Presidential, Parliamentary and Local Government Elections.</p>	<ul style="list-style-type: none"> • The proposed law would repeal the current Parliamentary and Presidential Elections Act and Local Government Elections Act and consolidate them into a single Act. • Aligns the voter registration age to the Constitution. Persons will be eligible to vote if 18 at the date of registration. • Aligns the requirement for citizenship or residency for voter registration to the provision of the Constitution. • The requirement of citizenship for candidature for Parliamentary and Local Government Elections. 	<ul style="list-style-type: none"> • This is to bring coherence and harmonization to the laws as these two pieces of legislation contain some common provisions. • There will be consistency in the applicable eligibility standard for voter registration. • There will be consistency in the applicable eligibility standard for voter registration. • Ensures consistency in the applicable standards for

	<ul style="list-style-type: none"> • Signatures for candidates -100 registered voters per district for Presidential Candidates, 100 registered voters per constituency for MP and 20 registered voters per ward for Councillor. • Past convictions or criminal record- the proposed law would prohibit a person convicted of a crime involving dishonesty or moral turpitude from contesting in any election. • Education requirements for eligibility to contest- first degree for President and Vice, MSCE for MP and Councillor. • The introduction of continuous voter registration. 	<p>candidacy for Parliamentary and Local Government Elections.</p> <ul style="list-style-type: none"> • The justification for the proposal is to ensure legitimacy of candidates for every level of election. • This raises the standard for eligibility for contesting in elections. • This raises the standard for eligibility for contesting in elections. • The Electoral Commission will have to stop periodic voter registration that is done prior to every election. This will ensure
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	<ul style="list-style-type: none"> • Introduction of a schedule for proof of eligibility for registration. • Increase in penalties for offences relating to voter registration from a fine of K50,000 to K 10 million. • Introduces the grounds for deregistration of voters i.e. person does not qualify to be registered, person not meeting eligibility criteria, person fraudulently registered or person is dead. • Reference to the Political Parties Act on the regulation of campaign financing. The proposed law further makes it an offence punishable by a fine of K20 million and 10 years imprisonment for a political party or candidate to use public resources for campaign. 	<p>that the Commission has an up to date voter register at any point in the election cycle.</p> <ul style="list-style-type: none"> • Under the current law documents for proof of eligibility to register are enlisted in the law i.e passport, driving license etc. The proposed law by putting them in the Schedule to the Bill and not in the Act, makes changes easier as a schedule can be amended at any time without following Parliamentary processes for amendment. • Enhanced penalties are considered deterrent to would be offenders. • There are no such grounds provided under the current law.
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	<ul style="list-style-type: none"> • The proposed law introduces Two Round System for Presidential, Parliamentary and Local Government Elections. A person who obtains more than 50% of the valid votes cast shall be declared a winner. Where such a majority has not been obtained, a second poll shall be held within 30 days after declaration of results in which two candidates who obtained the highest and second highest are candidates. • Introduction of 30-day period from the date of declaration of results within which courts can hear and determine an election petition or appeal. • Regulation of local observers under the proposed law. • General penalty provision increases the fine for electoral offences for which no fine has 	<ul style="list-style-type: none"> • There is a cross reference to the Political Parties Act in relation to campaign financing as it is anticipated that the Act will guide such matters. The stiffer penalties on use of public resources for campaign can be viewed as a deterrent. • The recommendation of the Law Commission was to have TRS for presidential elections only and maintain FPTP for parliamentary and local government elections. • The current law does not have timelines within which election petitions and appeals can be heard and determined. This has resulted in election petitions not being decided
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	<p>been specified to K10 million Kwacha and imprisonment for 5 years.</p> <ul style="list-style-type: none"> • Increase in the period for preservation of election materials by Clerk of Parliament from one year to two years. 	<p>on time. Some decisions being delivered years after the election.</p> <ul style="list-style-type: none"> • The current legislation has comprehensive regulation of international observers but does not have provision for local observers. The expansion of the scope of regulation makes local observers amenable to similar regulations as international ones. • The current fine for electoral offences for which no fine has been specified from K500,000 and imprisonment for 2 years. • The current law requires preservation of election materials for a period of one year.
Assumption of Office of President	<ul style="list-style-type: none"> • Establishes a transition team consisting of the Chief Secretary 	<ul style="list-style-type: none"> • The proposed law is more relevant for activities

<p>(Transitional Arrangements) Bill No. 25 of 2017. Object: The Bill seek to regulate the handover of power and the swearing-in of the President elect by providing for the establishment of a Transition Team and making provisions for its functions.</p>	<p>of Government as its Chairperson, the Secretary to the Treasury, the Solicitor General, the Commander of the Defence Forces, the Inspector General of Police, the Director General of National Intelligence Services, the Director General of State Residences, not more than 3 persons appointed by the incumbent President and not more than 3 persons appointed by the President elect.</p> <ul style="list-style-type: none"> • The proposed law sets out the general function of the transition team as to make comprehensive practical arrangements for the assumption of the office of the President and Vice President elect following a general or presidential election. • The specific functions include- <ul style="list-style-type: none"> - ensuring daily national security briefings for the President elect 	<p>following an election. A concrete transitional mechanism ensures that the incoming President and Vice President are well appraised on the state of nation prior to assumption of office. More importantly it ensures protection of national assets especially at the period prior to handover of power from one President to the next.</p>
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	<p>during the period before assumption of office.</p> <ul style="list-style-type: none">- Ensuring that the finances of the country are safeguarded and properly accounted for.- Oversee the activities relating to inauguration and taking oath of office of the President elect and the Vice President elect.- Ensuring orderly transfer of official assets and liabilities of the President, Vice President and Presidential staff of the new administration.- Undertake any other functions to enable the team to achieve the objectives of the Act.• The first meeting of the transition team shall not be later than 24 hours after the determination of the election result.	
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<p>Referendum Bill No. 24 of 2017. Object: The Bill seek to give operational effect to the constitutional mandate of the President to proclaim a referendum.</p>	<ul style="list-style-type: none"> • Provision of procedure for holding of a referendum i.e. the proclamation by the President, the framing of the referendum question, period for holding referendum, registration of referendum committees. The law provides that the referendum question shall be determined by a simple majority of the electorate voting in favour of the question. 	<ul style="list-style-type: none"> • Malawi has never had a legislation on referendum. The legislation fills in a gap that existed in the law as there were no procedures for the conduct of a referendum despite existing constitutional provisions mandating the President to call for a referendum in certain cases.
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3. CURRENT STATUS OF THE BILLS AFTER THE PARLIAMENTARY PROCESS.

- Electoral Commission (Amendment Bill) 2017, the Bill was referred to the Legal Affairs Committee of Parliament for further consideration.
- The Assumption of Office of President (Transition Arrangements) Bill No. 25 of 2017 was defeated on second reading. This means that the Bill has to be redrafted if it is to be presented to Parliament again.
- Presidential, Parliamentary and Local Government Elections Bill No. 28 of 2017 was defeated on second reading. This means that the Bill has to be redrafted.
- Constitution(Amendment) (No.2) Bill No.27 of 2017 was rejected on second reading. This means that the Bill has to be redrafted.

- Referendum Bill No. 24 of 2017. The Bill was passed and shall become operational upon being assented to by the President and being given a commencement date by the Minister of Justice.

At this stage, the only Bill that remains before Parliament is the Electoral Commission Amendment Bill. The Legal Affairs of Parliament will produce a report which will be considered before the bill can be subjected to parliamentary vote.