

Date Printed: 11/06/2008

JTS Box Number: IFES_7
Tab Number: 16
Document Title: Malawi: Strengthening Democratic
Institutions
Document Date: 1996
Document Country: Malawi
IFES ID: R01735



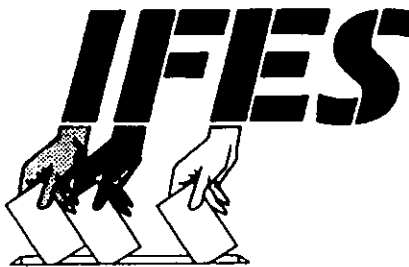
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MALAWI

**Strengthening Democratic
Institutions**

Final Activity Report

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INTERNATIONAL FOUNDATION FOR ELECTORAL SYSTEMS

MALAWI

Strengthening Democratic
Institutions

Final Activity Report
May 31, 1995

Laurie A. Cooper

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EXECUTIVE SUMMARY

The second IFES Technical Assistance Project in Malawi was conducted from January 1994 until March 1995. The project, under Grant #612-0243-G-00-3008-00, combined direct election assistance with election monitoring, training and legislative support to the Malawi National Electoral Commission. In the fourteen month-span of this project, IFES provided assistance in the pre-election, election day and post-election periods.

Narrative and financial information on the activities performed through the May 17, 1994 general elections is contained in the activity report for that period (issued in June 1994). This report focuses on the second phase of project activities and subsequently takes a global view of the IFES activities in Malawi from March 1993 to the present.

The second phase of project activity under this grant, entitled "Strengthening Democratic Institutions in Malawi", had as its goal the creation of a permanent, independent election administration organ, which would become part of the Malawian civil and governance sector. A permanent electoral body is a feature of most democratic countries, even within electoral systems where elections may be called following the dissolution of Parliament. The main purpose of such a body is to ensure preparedness for any electoral process, whether it is periodic or called. It may expand to perform the various tasks associated with a national election, or for another special effort.

From November 1994 to March 1995, IFES provided two advisors to the Electoral Commission: Leticia Martinez, the on-site Project Manager, and Michael Maley, a member of the Australian Electoral Commission. Martinez assisted the Commission in a number of areas. She first analyzed the internal structure of the Commission secretariat and worked with the Commissioners to develop a more efficient organization and work plan. Next, she examined the financial controls and accounting to determine where such functions would be placed in a permanent organization. As a mechanism for reaching a broader consensus on the Commission's plans for a permanent support staff and on its recommendations for changes to the electoral law, Martinez introduced the concept of a seminar, during which the members of the Commission would present their views on selected topics, and after which the Commission would have

a strengthened legitimacy to recommend changes in the electoral law and other election-related matters.

As the project developed, the seminar expanded to two events: a workshop/retreat for the Commissioners to refine their report topics and to prepare to discuss them, held from January 23-25; and a conference moderated by the Commissioners, which a number of senior level officials in the Malawian Government attended from February 14-16. Four topics emerged as the subjects of the workshop and conference: the permanence and independence of the Electoral Commission; local government elections; critical events in the electoral process calendar; and the role of political parties. Martinez was assisted in the preparation and organization of the two gatherings by Michael Maley. Program Officer Laurie Cooper traveled to Malawi to help with conference preparation. The conference, attended by a large number of international representatives, was a success. It represented the first time that majority and opposition politicians were gathered in a room with the National Electoral Commission since last year's election. Following the second meeting, Martinez and Cooper remained on-site to support the presentation of the Commission's findings at the Constitutional Conference. They began a dialogue with the Electoral Commission about its priorities for the coming year, as well as a discussion about the longer-term goals of the Commission.

IFES was honored to be present at the Malawi Constitutional Conference, held February 20-25 in Lilongwe. In addition to reviewing the current draft constitution (which enters into force on May 18, 1995) the assembly agreed to the creation of a second legislative house and declared (within its limited authority) that the designation of a Second Vice President, for any purpose, was not in keeping with the principles of the Constitution. The delegates also directly confronted the issue of women in positions of government as well as within Malawian society. Clearly, the persons who have been entrusted with the charting of Malawi's future are ready to discuss and take decisive action on issues which were taboo just three years ago. The Electoral Commission conference, which immediately preceded the Constitutional Conference, was able to take advantage of the spirit of compromise and consensus to present its issues in an important and historic forum.

Following the Constitutional Conference, the members of the Malawi National Electoral Commission worked to set priorities and to develop a task calendar for the coming 36 months. The Commission has

been charged with administration of the local government elections, the review of ward boundary delimitation, and the creation of a permanent voter registry. At the same time, the current Commission has set as a priority the creation and training of its own secretariat to administer national and local elections, to maintain the voter register, and to perform periodic election-related duties. The secretariat would be linked to the entire country via district-based election offices. The commissioners themselves would step back from the day-to-day operations to be more like a corporate board of directors.

The project activities and outcome exceeded the objectives in certain ways. Although the objectives of developing and enacting legislation related to the Electoral Commission are still in the development stage, the Commission is in a more effective position to clearly articulate its interests than it was in November. The seminar or conference which was planned as the opportunity for unveiling and ratifying the legislation evolved into a thoughtful debate on issues related directly and indirectly to the elections and to the future of democracy in Malawi. Given the changing political climate anchored by the constitutional process in which Malawi is involved, the timing and activities of the project have made an historic impact on the current and upcoming governance activities in Malawi.



I. INTRODUCTION

Two months following the May 17, 1994 elections, IFES hosted Mrs. Justice Anastasia Msosa, Chair of the National Electoral Commission, in Washington, D.C. During a meeting held with Justice Msosa, former USAID/Malawi Mission Director Carol Peasley, and IFES executive staff, the issue of the Commission's temporary status was a focus of conversation. In Malawi, despite the legal, permanent existence of an electoral support body (the secretariat of the Clerk of Parliament), the election processes conducted in the past two years were organized by personnel with relatively little experience in administering multiparty elections. In their emergence from a characteristically tense and occasionally violent dictatorship to a pluralistic society, Malawians have been open to and solicitous of information regarding democratic institutions and procedures used internationally. The National Electoral Commission reflected this desire in 1993 and 1994 by extending invitations to the international community to provide election assistance in areas such as voter registration, media, pollworker training, and equipment supplies. It was Justice Msosa's wish that this type of assistance continue, so that the Commission would be truly independent, non-partisan and professional in its work.

In response to that wish, IFES proposed an assistance project with the following objectives:

- Assist the Commission in defining its role, duties and envisioned structure, developing a written charter for the structure for review and consideration by Parliament;
- Coordinate consideration of the Commission charter by relevant actors as well as international advisors in a draft/discussion format, culminating in a conference to ratify the charter; and
- Assist in the implementation of the Commission charter in preparation for tasks of local election administration and voter registration reform as appropriate.

With endorsement from the Malawian Electoral Commission, and with funding from USAID, IFES undertook such an assistance project from November 1994 through March 1995.

This project and the events that took place around it would not have occurred without the support, dedication and encouragement of an excellent cast of characters. IFES would like to express its sincere gratitude to the members of the National Electoral Commission, some of whom were initially skeptical of the necessity and utility of a conference yet rose expertly to the occasion; to Cynthia Rozell, Andy Sisson,

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Tom Lofgren and Stephanie Funk of USAID/Malawi, for their continuous encouragement and helpful clarification on myriad issues since 1993; and to Linda Greenwood and Ted Sneed, both readily adaptable to changing circumstances and providing excellent support for almost two years. The National Democratic Institute on-site staff have been informative and cooperative throughout the IFES project period, and are well deserving of thanks. Michael Maley, Director of International Services and Special Projects at the Australian Electoral Commission, brought his outstanding writing, elocution and experiential skills to Malawi at exactly the right moment and provided the National Electoral Commission with a valuable resource that will be called upon again.

The credit for bringing this period of the IFES project to life goes largely to Leticia Martinez, the on-site Project Manager. Her clear and constant sight of the goal and her willingness to listen and direct at the appropriate intervals made an obvious, positive and permanent impression on the Commission. At the same time, she was able to reinforce their knowledge that this project and future IFES projects are team efforts, which buttressed the Commission's confidence in future planning.

II. HISTORICAL CONTEXT

The New Political Landscape

The May 1994 general elections completed the development of a presidentially-led plurality electoral system in Malawi. As with other elections in Africa, the choice of electoral system is related to the political developments after the election; the system may recognize political history or ethnic cleavages, and through that recognition either exacerbate the problems or attempt to create a new political tradition. Malawi's first-past-the-post seat allocation, combined with strongly regionalized political support, resulted in a Parliament whose members were almost directly proportional to the regional populations and historical political influence in Malawi (United Democratic Front with the largest number of seats, followed by the Malawi Congress Party and Aford). It also left the President several seats short of a clear majority. Tension between the victorious United Democratic Front (UDF) and the Northern Region-based Alliance for Democracy (Aford) was visible throughout the summer and fall of 1994. President Muluzi named a 45-member Cabinet (the world's largest) exclusively from his own party. Aford president Chakufwa Chihana responded by allying himself with the Malawi Congress Party (MCP). Political splintering also occurred within parties that did not obtain parliamentary seats, such as the MNDP (Malawi National Democratic Party).

The economic problems facing the UDF in the fall of 1994 created tension on the international and local levels. The MCP still controlled all of the parastatal industries in Malawi and showed no sign of voluntarily relinquishing them. The world price of tobacco fell precipitously, which further shook Malawi's single-export led economy. The Kwacha, which was allowed to float in early 1994, has lost value at a rate of more than 100% per year. At the time of the IFES team's arrival, the Malawi government announced that it would not be able to honor the checks that it had sent out to its local creditors. The seriousness of the situation contrasted unfortunately with the efforts that many new members of parliament and the President made to take several high-profile international trips, to secure new, expensive cars for themselves and, in the eyes of the public, to install themselves as comfortably as the MCP had.

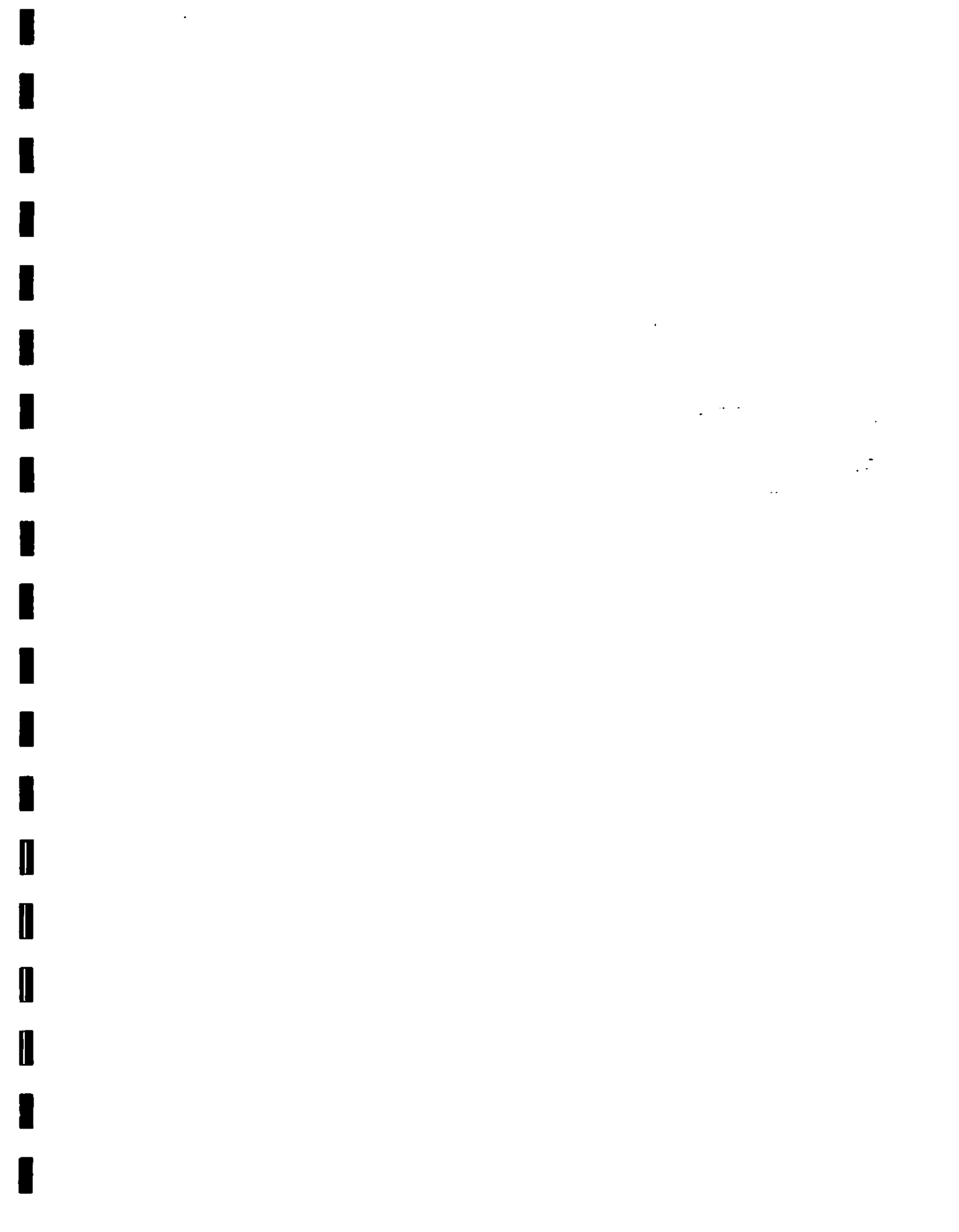
On December 23, Chakufwa Chihana was officially sworn in as Malawi's Second Vice President. This position, created solely to bring Aford back into the UDF fold, was decried as unconstitutional by the MCP

and other parties, and it cast some shadow over whether a new government really was in place in Malawi. The constitution itself was debated throughout the fall and winter of 1994, in anticipation of a constitutional conference in the spring, and ratification of the final draft by May 18, 1995.

A commission of inquiry appointed by President Muluzi to investigate the deaths of four Cabinet ministers in 1983 ruled that the ministers were ordered to be killed by former President Hastings Kamuzu Banda. In early January, Banda was placed under house arrest with John Tembo, his second-in-command, sent to jail in Blantyre. As of March, Tembo remained in jail without charge by the state. The proceedings of the investigation, and the circumstances of the arrests, mark more changes in the administration of justice in Malawi. On one hand, the arrest and expected trial of former political leaders suspected of ordering state-sponsored crime is a rarity in any newly-democratizing country. On the other hand, opponents of President Muluzi have accused him of introducing and ordering the inquiry to divert attention from the country's other problems.

The proceedings of the Constitutional Conference in late February provided further radical changes to Malawi's political framework. The salient decisions achieved in the conference were the suggestion that the office of the Second Vice President was unconstitutional and should therefore be abolished; that the number of Cabinet Ministers should not exceed 24; that the legislature should include a Senate; and that persons convicted of crimes who had served their sentences would be eligible to compete in elections. These provisions were to be discussed and ratified in parliamentary sessions before the May 18 deadline.

The IFES project took place during an ongoing era of change and adjustment in Malawi. The early November consultative meetings that IFES participated in indicated that it would be difficult at best to focus any government attention on the election process or in the activities of the Electoral Commission at this time, since the current debates were on a political rather than technical level. On the other hand, it could be argued that the examination of the role of the Electoral Commission and the future election processes took place propitiously in an atmosphere of high-profile activity among government officials, since this increased the visibility and awareness of the Commission's activities as well.



III. PROJECT DEVELOPMENT AND DESIGN

Background

The 1994 IFES project in preparation for the May 17 general elections was based on the activities performed in the previous year. In 1993, IFES provided advisors under the umbrella of the United Nations Electoral Assistance Secretariat to the National Referendum Commission in the areas of civic education and pollworker training, with four monitors to gather information during the registration and campaign periods. The January-May 1994 project assisted in different aspects of election preparation: the voter registry, the media and journalism in a democracy, and election administration. Observers for the registration and campaign periods also formed part of the activities of this project, and members of the IFES team took part in pollworker training exercises.

Because the timing of the second phase of activities of the 1994-95 project followed the general elections by several months, with no fixed date for local government elections, the work that IFES proposed was not as crisis-oriented as it had been in 1993 or early 1994. This circumstance provided an opportunity for IFES to concentrate in project design on issues that arise between elections, such as the status of the voter registry, the production and record of the final results of the elections, and the ways in which the level of professionalism demonstrated in the previous election could be transferred and improved upon for future elections.

Strengthening Democratic Institutions

In July 1994, Justice Anastasia Msosa visited the IFES offices in Washington, D.C. She described the National Electoral Commission's activities prior to and during the general elections, noting the summary fashion in which many of the Commissioners had been appointed. With six months between their appointment and the elections, there were few opportunities to devote attention to any specific areas. During this period, the Malawian Parliament was in session for a considerable amount of time prior to the elections. This meant that the Electoral Commission, which would have normally been free to call on support from members of the Clerk of Parliament's secretariat, ended up performing the tasks themselves.

In addition, Justice Msosa stated that the Commissioners, having been seconded from their current

employment, were most interested in continuing the work of the elections, but were also in danger of losing their jobs because they had been away for an extended time period. Furthermore, the transitory nature of their appointment and tenure affected each Commissioner’s commitment to the post-election process. The Electoral Law stated that the term of the Commissioners would be five years. However, the current Commission was created as a political compromise between the parties that were registered prior to the general elections. In addition, two new Commissioners were added to the body during the fall of 1994. No one knew whether the sitting Commissioners were to remain at their posts for the coming four years, or if they were supposed to facilitate the recruitment of other commissioners. Local elections scheduled for June 1995 provided a further complicating factor, as there was a question whether the Commission or the Ministry of Local Government was responsible for administration of those elections. During October, Parliament requested that the Commission prepare a report on its experiences conducting the May general elections, to be presented to Parliament in late 1994.

Using this information, IFES suggested that the Commission work to obtain a staff with legal standing as a permanent body. With control over its budget and with its own staff, the Electoral Commission could set priorities and schedules for tasks between elections, and it could make recommendations to Parliament regarding the amount of lead time (within the parameters of the Constitution) needed before a called election. A permanent body would enable the Commission to institutionalize the practice of regular, democratic elections.

To accomplish this goal, IFES proposed a three-phase series of activities to USAID/Malawi and to the National Electoral Commission in September 1994. First, a specialist in election commissions would travel to Malawi to work with the Commissioners to develop an internal structure and staff positions for a secretariat. Next, members of the Electoral Commission would obtain comparative information themselves on electoral commissions through participation in a colloquium for African election administrators, scheduled for mid-November in Zimbabwe. Third, the Commission and the IFES specialist would identify key members of Parliament, Cabinet and other relevant government officials to target as advocates of a permanent electoral body. From these actors, the Commission would learn how to prepare the appropriate legislation and activity proposals for the creation and financing of this body. IFES would send additional

international advisors as requested by the Commission to assist in the drafting of position papers and legislation in areas that the Commission wanted to emphasize. Thus the proposal defined, as stated previously, the following three objectives:

- Assist the Commission in defining its role, duties and envisioned structure, developing a written charter for the structure for review and consideration by Parliament;
- Coordinate consideration of the Commission charter by relevant actors as well as international advisors in a draft/discussion format, culminating in a conference to ratify the charter; and
- Assist in the implementation of the Commission charter in preparation for tasks of local election administration and voter registration reform as appropriate.

The expected time frame for the project was four months, using approximately \$200,000 remaining in the IFES budget from the January-May 1994 project. IFES applied for and received a no-cost extension of the project until June 30, 1995.

Evaluation and Impact Assessment Issues

The goal of this project differed in certain ways from the goals of previous IFES projects implemented in Malawi. The first and second project periods, both focused on the imminent election processes, were focused on the maximization of resources in a finite time frame. The quantitative method of analysis to evaluate those projects was appropriate; so many pollworkers trained, civic education materials distributed to every village in every district, observer reports over a certain number of days at a certain number of registration centers. The current IFES project evaluation involves more qualitative analysis; in addition, the project activities could have taken place during any non-sensitive time period.

One of IFES' primary concerns in the design of this project was the level of cooperation and collaboration between the Project Manager and the Electoral Commission. During the pre-election period, technical assistance in any form was useful as the process was labor intensive. However, the combined assistance projects of the United Nations, IFES and the Commonwealth Secretariat resulted in duplication of effort in at least two areas. Furthermore, the dynamics between the Electoral Commission and the international community were not conducive to open communication; discussions with Justice Msosa and other

members of the Electoral Commission after the general elections indicated that they were concentrating on too many tasks simultaneously to effectively coordinate the assistance of the donor countries. For this reason, the IFES project proposal integrated a requirement of consensus between its personnel and the Commission in one area before proceeding to the next. IFES envisioned that this method would ensure that the Commission received the assistance that it requested, and that both parties would remain committed to the success of the project.

Project Personnel

IFES selected Leticia Martinez as the on-site Project Manager for the first phase of this period of activities. Her previous experience with IFES includes logistics coordination of election observation in Angola and Honduras. She had assisted Robin Ludwig, the Electoral Assistance Coordinator of the United Nations Electoral Assistance Secretariat in Malawi, for four months prior to the June 1993 national referendum.

Martinez traveled to Malawi on November 5, joined by Laurie Cooper from November 6 through 12. During December, after a review of her performance, she was requested to remain on site as the Project Manager for the remainder of the project activities.

In response to a request by the Electoral Commission for an international consultant with election administration experience, IFES sent Michael Maley, Director of International Services and Special Projects for the Australian Electoral Commission. Although this was his first time working with IFES, Maley spent close to a year in Cambodia and several months in South Africa with the United Nations election operations in those countries. He arrived in Malawi on January 22 and remained until February 18, 1995.

IV. DETAIL OF PROJECT ACTIVITY

Project Implementation

Upon arrival in Malawi, Leti Martinez and Laurie Cooper met with USAID/Malawi Mission Director Cynthia Rozell, DECIDE Project Manager Andy Sisson, and Deputy Director Sam Scott. They learned that the priority issues in Malawi were in the areas of drought relief, AIDS control and severe economic crises. Of the friendly foreign governments involved in Malawi, interest in the election process was limited to the United States and the United Kingdom. Although the Constitution named the Electoral Commission as a permanent body, it did not include a code of regulations or activity guidelines. The latest reports from the Malawi Government were that local government elections would be held in June 1995. However, there were questions regarding the practicality of that month since preparations and campaigning for the elections might conflict with the ratification of the new Constitution. Next, Cooper and Martinez met with Roger Perry and Brent Preston of the National Democratic Institute for additional briefing. The team traveled to Blantyre on November 8 and met with the full Commission for a discussion on the role and structure of a permanent electoral body. The priority of the Electoral Commission in this period was the completion of the election report and preparation of a list of recommendations to be presented by the Commission to Parliament in December. During the discussion, it was determined that Leti Martinez would relocate from Lilongwe to Blantyre following the conclusion of the Zimbabwe Colloquium. The team verified that Commission Chair Msosa, Commissioner Mhone and David Bandawe, Senior Assistant to the Clerk of Parliament were on schedule to travel to Zimbabwe for the Colloquium for African Electoral Administrators during the following week.

During the initial three or four meetings between Martinez and the Commission, issues regarding the permanence of the Electoral Commission or supporting body were not given a considerable amount of weight. A number of changes had been made; for example, the Commission was expanded by adding two women members. It was presumed by the new Commissioners and the sitting Commissioners that their tenure and authority were equal, and that by extension, there did not need to be any special legislation or rules governing their performance of election tasks. However, a division within the Commission developed between more experienced and new members, making difficult decisions more contentious. As these

divisions surfaced, the appropriateness of an IFES-assisted transition process came into question for the first time. For Martinez, the first four weeks of the IFES project consisted of the following activities:

- meet with diplomatic representatives and other important actors resident in Lilongwe to brief them on the IFES project and to pass on information regarding the local government elections;
- assemble information on electoral commissions for reference of the Commission;
- work with the staff of the Commission to record the structure and functions of the Commission offices; and
- identify other individuals within the Malawi Government to provide information on the possible future of the Electoral Commission, as well as to study the internal procedures of bodies whose meetings she attended.

Colloquium for African Election Administrators

With part of the funding provided for this project, IFES financed the travel and participation of three representatives from the Malawi National Electoral Commission in a conference for African election administrators. IFES, the African-American Institute, the National Democratic Institute, and the United Nations Electoral Assistance Division co-sponsored a colloquium in Victoria Falls, Zimbabwe from November 15-18, 1994 which gathered election administrators, civic education and monitoring specialists, parliamentarians and electoral systems experts from 38 African countries to discuss topics related to the African electoral experience during the past four years. The participants were asked to consider the implications of their past experience for future elections, as many countries look toward a second round of multiparty elections within the next two years. The most important and provocative question arising from the discussions concerned how to handle future elections, given their importance in strengthening democracy, also given the probability of reduced foreign assistance. The consensus response to the question during the colloquium reinforced the value of productive, continuous information exchange among a country's electoral commission members as well as between election officials of different

countries; the response also emphasized the support that a permanent election commission can provide to that information exchange and to the African democratization process.

Identification of Responsibilities

Following the November 20 return of the Commissioners from the colloquium, Leti Martinez returned once again to the question of a permanent electoral body. After interviewing the secretaries, financial staff and the computer programmer, she prepared a series of questions for the Commission to consider. This process consisted of a review of the May 17 general election activities, the role of individual Commissioners, the positive and negative aspects of their work during that time, and suggestions that would improve the next general election process. Martinez then asked the Commission to describe their current priorities and duties, as well as their legal status. At least once every three days, she conducted meetings with the Commission to discuss scenarios for building an infrastructure to accomplish future election tasks. She asked the Commission members to think about their future roles, the roles of their support staff, and the possibility of assuming new tasks or transferring some of the current tasks to government ministries. With information gleaned from these meetings, Martinez reintroduced the concept of developing legislation that would codify at least the structure of an independent electoral body.

Internal Structure of the Electoral Commission

Administrative

Currently, the Electoral Commission employs 2 secretaries, one senior finance/management clerk, one messenger and one guard. A computer programmer works with the Commission on an as-available basis to assist the finance clerk and support staff in the preparation of copy-ready reports for the members of the Commission. All of the staff split their time between the Commission duties and their other employment, and all are civil servants. In the area of skill levels, Martinez found that the senior clerk possessed the most computer skills, while the secretaries' expertise was limited to typing and word processing. None of the

staff members had a written job description or an outline of his/her duties, and none was sure about his/her future within the Electoral Commission system.

Finance

The Finance Officer reported that he uses a fund accounting system to record the Commission’s expenses. However, he has only been keeping the records since his appointment in February 1994 and has had no access to previous records. He indicated an interest in November 1994 in closing the books on the election at the end of December, and to begin making new budget allocations at the beginning of 1995 (the start of the Commission fiscal year).

Because funds are allocated to the Electoral Commission through an act of Parliament, members of Parliament retain some control over the spending of those funds. However, Parliament is not obliged to report its expenditures of Commission funds to the Electoral Commission. Martinez was unable to ascertain just how much of the Commission’s budget was accountable to the Commission and how much of it was accountable within the Parliament. Similarly, all Commission checks are written and released by the Minister of Finance, but a recent KPMG audit report stated that it was difficult to come to any conclusions regarding the Ministry's account of the election without sufficient background information. At this point, the Commission has only nominal authority to design budgets, receive funding and incur expenses. This situation will continue as long as Parliament retains the authority to issue payments.

According to the Finance Officer, the Commission had several important issues to consider during the coming fiscal year:

- insufficient funding was budgeted for the general election;
- the Finance Officer was not involved in any of the expenditure decisions, even on an informative basis, during the general election preparation;
- last minute, unreported expenditures contributed significantly to “lost” money;
- while the Commission is more familiar with the typical line items of an election budget, they do not have realistic figures to conduct this exercise in the coming year;
- no one has estimated the costs of local or by-elections;

- according to the Electoral Act, the Commission finances and finance-related policy decisions are to be managed by an Administrator; however, the Commission has never employed or been consulted by such a person;
- only the current Finance Officer is familiar enough with the accounting system to teach it (incomplete though it is) to someone else should he retire; and
- no thought has yet been given to staff or equipment requirements for the eventual local government elections.

The Finance Officer made these recommendations for Martinez to pass on to the Commission:

- Accounting and budgeting system should be automated;
- Previous records should also be automated;
- Financial controls, expenditures and day-to-day budget items should be controlled by the Commission, not by Parliament;
- A procedures manual with a focus on simplifying the reconciliation should be developed ;
- A minimum of staff should be responsible for the accounting between elections;
- Finance Staff should be increased; and
- District-level election accounting should be instituted with a system that harmonizes with the Blantyre-based system

Members of the Electoral Commission

On November 11, 1994, the Malawi Gazette listed the following as members of the Malawi National Electoral Commission:

Justice Anastasia Msosa, Chair
Professor Chris Kamlongera (based in Zomba)
Clement Chilingulo
John Chipeta
Charles Joyah
Innocent Menyere
Rafael Mhone
Mundu Mwambetania
Georgina Chikoko
Sylvia Kambalametore

All of the Commissioners have tenure in effect from September 1994 through the next four years. At the time of the gazette, however, only two Commissioners had been notified of their appointments. This situation created conflicts between "old" and "new" commissioners, as well as between those commissioners who were able to devote more rather than less time to meetings and election-related tasks.

The Commissioners listed a number of issues that remained to be settled, which they conveyed to Martinez:

- The expected duties and authority of the Administrator, as mentioned previously, were unclear. The Commissioners expected that the Administrator would appoint general staff and chief financial officers, but there was no current definition of this position.
- The Electoral Act did not include a system of checks and balances between the Administrator and the Commission, or a decision making process.
- No provisions had previously been made for the Commissioners to make the transition from performing the day-to-day tasks of staff relative to the Administrator, nor had any plans been developed for the staff who would be hired to replace the Commissioners in these tasks. A procedures manual should be developed as soon as possible to deal with this issue.

Other Project Activities

In the last week of November, Martinez conducted in-house training on the existing Commission software with the support staff and the programmer; she also examined the current voter register and election results tabulation system. Martinez consulted with the computer programmer to determine the areas for expansion of the present automation of tasks. The first task was to transfer the existing data from its own programs to Lotus and WordPerfect, to facilitate potential system upgrades. The Commission was in possession of three 486-speed computers, one of which was used by Mr. Bandawe at the Parliament buildings in Zomba.

Cooper directed Martinez to investigate the possibility of securing donations of computer equipment to the Commission from the diplomatic representatives, as well as from the UNDP. Cooper and Martinez were aware that several units had been purchased for or made available to the UN Electoral Assistance

Secretariat during the 1993 referendum as well as the 1994 presidential election projects, and they considered that unless the equipment had been returned to the original countries, it could be applied to an ongoing election preparation and administration program. At IFES' request, Cynthia Rozell initiated contact with the donor community to discuss this issue.

Martinez also set up appointments for the Commission with Cynthia Rozell and Larry Garber of AID/W for a formal introduction and briefing about the Commission's future plans. On November 28, Mrs. Msosa and Ms. Martinez joined Rozell and Garber for the briefing. The meeting dealt with the role of the Commission in the coming months, and included an in-depth discussion of the IFES project in the area of developing an infrastructure for the Commission. It was agreed during that meeting that the assembly of a legislation proposal was essential to fortify and formally establish the election procedures and the duties of the Commission. In addition, the participants discussed the current election calendar. Mrs. Msosa indicated that since the election report was now due to be out by December 16, and was actually at the printing facility, the Commissioners were better prepared to focus their attention on the building of an infrastructure. She stated that she would assemble a drafting committee within the Commission to work with Martinez on the development of the proposal.

Seminar Development

Original Concept Identification

To settle the issues raised above, and to prepare the Commission for its presentation of goals and objectives to Parliament, Project Manager Martinez suggested that a conference or seminar would be an appropriate forum. Participants to the seminar would include members of Parliament and appropriate civil servants, those most directly concerned with the election process. To design the agenda for the seminar, the Commissioners would consolidate their ideas into subject areas, develop the subject areas into research topics, and prepare papers to be presented and commented on at the conference. The Commissioners would solicit feedback from the participants, and use the comments as well as their own research to produce a cogent plan of action for the length of their appointments. If certain elements of the action plan

were not covered in the current Electoral Act, the proceedings of the seminar would also provide useful material in the development of new legislation. Martinez proposed a late February or March date for the seminar. The Commissioners agreed with the suggestion in principle, but felt that February was too late for such an event, since the report was due in December. Furthermore, by-elections were tentatively scheduled for mid-January. The counterproposal was for the seminar to take place in late January.

As the Commission began to identify specific areas of interest, Cooper and Martinez began to work on the design of the seminar. They proposed that the Commission use a series of plenary sessions and small group discussions to draw information from the participants. They also suggested that the conference emphasize the participatory nature of its activities by rotating the roles of facilitators, moderators and speakers, and to use a consensus-building process to make decisions. In this way, the Commission would develop and cultivate advocates among the participants who could be encouraged in the coming months and years to bring the Commission’s issues to the appropriate discussion table.

Meeting Design and Preparation

On November 30, the Commission drafted a letter to the Secretary of the President and Cabinet to announce the production and recommendations of the election report, plans for the upcoming conference, and the drafting of a proposal for legal implementation of Commission election guidelines. Commissioners Joyah, Menyere, Chipeta and Leti Martinez were assigned to the drafting committee. The four topics that the Commission decided to concentrate on were:

- Legalization of a permanent Election Administration Secretariat
- Legalization of Electoral Commission control over its own budget
- Legislation regarding national and district-based Electoral Commission offices
- Legalization and institutionalization of the electoral process calendar

The Commissioners would use these topics as a basis for plenary sessions during the seminar. With different Commissioners moderating the sessions, each session would begin with an overview of the topic discussed, followed by a brief question-and-answer period. The participants would then split into

workshops for more intimate discussion of the topics. Each workshop would consider the legal implications of the topics, recommendations on the presentation or the concepts aired, necessary actions to be taken and definition of the required processes to achieve the goals of the topic.

After the workshops, a spokesperson from each working group would present the findings of his/her session at the seminar's final plenary. Using the feedback from the spokespersons as well as from the plenary sessions, the Commissioners would draft a formal recommendation for amendment to the current electoral legislation.

The total number of seminar participants would not exceed 40, excluding IFES staff and invited diplomats. Martinez and the subcommittee drafted a list of potential invitees, including Members of Parliament, the Cabinet and some nongovernmental organizations. Members of the press would be invited only to cover the opening and closing of the meeting.

The location of the seminar was to be chosen based not only on the capacity of the space to accommodate plenary as well as workshop sessions, but also on the distance from Malawi's two largest cities. The IFES team suggested that the Commissioners would have difficulty focusing the attention of the participants on the subject matter if they were able to return to their offices during the day or to their homes during the evenings. After visiting the districts of Salima (one hour away from Lilongwe) and Mangochi (two hours away from Blantyre), Martinez selected the Nkopola Lodge in Mangochi as the conference site.

As stated earlier, the subcommittee of commissioners felt that the seminar should take place as early in 1995 as possible, but that it should not interfere with the conduct of the upcoming by-elections. Although the election date was not yet set, the commissioners proposed that the seminar be held from January 24-27.

During the first week of December, Martinez presented the outline of the seminar and a list of participants to Cynthia Rozell and Andy Sisson. They reacted favorably to the work completed to this point, and expressed the hope that the invitees would follow through on their commitment to attend the seminar.

As the logistical preparations for the seminar began, the IFES budget for the project was adjusted to provide more resources for the seminar. In addition, Cooper requested that the subcommittee create a scope of work for any international participants who could assist in the conduct of the seminar. In terms of the other project activities, the development of a procedures manual was the only task that was specifically put off (consensually by Martinez and the Commissioners) during the preparation period. Nevertheless, the financial staff continued to use the information from the audit and final report to develop preliminary budgets for the local government elections as well as budget outlines for future presidential and parliamentary elections.

Although the preparations for the seminar continued in December, the full Commission was rarely present at scheduled meetings. This complicated the decision-making process, as the Chair was reluctant to make final decisions in the absence of one or two Commissioners. Persons who had been absent from previous meetings (the same persons tended to be absent at the same time) would question each decision made in those meetings and reverse some of the decisions. The division between old and new commissioners was also exacerbated during this period. As a result, the outlines for subject topics, the letters of invitation, the list of participants and confirmation of the seminar format were bogged down in individual disputes or linked to stalemate decisions. By the third week in December, the Commission agreed to a full meeting on December 28 to determine whether the conference should be held at all. The result of the meeting were major and minor changes in the seminar planning; the Commissioners who did present themselves for this meeting took back the responsibility for the preparation, format and execution of their seminar.

The commissioners who attended the meeting decided first that the seminar would be more effective and easier on the participants if it were shortened from the current four days. They also decided that they themselves were not ready to present papers on their selected topics. A final opportunity for refining the presentations and perhaps going through the motions of the seminar before the actual event would benefit the commissioners as well as the eventual participants. As a result, the commissioners present at the meeting decided that a first meeting (now designated as a workshop) would take place from January 11-13 in Mangochi. For this workshop, the commissioners would prepare draft papers on the selected topics and review them for issues that were relevant to the papers but not necessarily to the larger conference. (It was

also suggested that too much detail in the papers presented at the conference might encourage micro-management of previously resolved issues by the potential advocates.) The topics were amended as follows:

- Legalization of a permanent secretariat (with national and local offices)
- Local government elections (still scheduled for June 1995)
- Events in the electoral process calendar
- Political party issues

At the workshop, the Commissioners would also work through the agenda of the conference to ensure its efficiency. They would return to the development of their organizational structure, as well as financial issues confronting a future Electoral Commission Secretariat. Following the first workshop, the Commissioners would make the suggested changes to the papers. They would add a section to each paper which clearly stated the recommendations of the Commission on the issues.

The second conference, now to be held January 26-27, would be timed to give the commissioners an opportunity to strengthen their positions after receiving feedback from their peers. This meeting was also restructured so that participants would meet only in plenary to discuss the selected topics. After the paper presentation, the participants would be asked for consensus on the recommendations. In this way, the participants would have an opportunity to correct egregious problems in the Commission's approach or recommendations, but they would not easily be able to undermine the work of the Commission prior to the conference. The revised format would enable the Commission to maintain its authority over the conduct of the elections while reaching out to its supporters in the Malawian government for information on their recommendations and experiences.

Despite the general agreement on the subject of the meeting, the dates of the workshop and conference continued to change through the second week of January. It was apparent that the papers were still in the initial draft stages, with the first meeting scheduled two days later. By January 12, the workshop date had been adjusted to January 23-25, with the conference taking place during the first three days of February. This latter date was again moved to accommodate an early February heads-of-state meeting, to a February

10 date, which conflicted with the by-elections scheduled for that time as well. The conference was ultimately rescheduled for February 14-16, 1995.

With the dates more or less confirmed, the IFES team solicited a description of the role and duties of an international consultant at the workshop and conference. At this point in the development of the research papers, the Commission felt that the area where they were weakest was in local government election administration. Their ideal candidate would be a person who had extensive experience in conducting local government elections in his/her own country as well as international election administration experience. Furthermore, a background in electoral legislation was cited as an important characteristic. IFES proposed Michael Maley, a member of the Australian Electoral Commission as well as an occasional UN consultant in South Africa and Cambodia, who also had drafted several pieces of election legislation. Maley traveled to Malawi on January 21. Maley's role was specified as that of a resource person who could assist with the final drafting of the subject papers, providing an international perspective as appropriate. Plans were made for Cooper to travel on February 12 to assist with final conference preparation. In addition to Martinez, the support staff included Linda Greenwood, Ted Sneed, and Lexa Alimbahane. In order to enhance the independent nature of the workshop and conference, the IFES team stressed its role as a background network which would perform support functions. In this way, the events would be seen as entirely Commission-inspired and organized rather than as an example of international involvement in a national issue.

Following his arrival on January 22, Michael Maley reviewed the Constitution, the Parliamentary and Presidential Elections Act 1993, and the Commission's report on the elections. Next, he read through draft papers which the members of the Electoral Commission prepared for the workshop and conference.

Electoral Commission Workshop

The Legislation and Institutionalization of a Permanent Secretariat

The first topic of discussion, led by Georgina Chikoko, focused on the current electoral legislation. Section 75 of the Constitution provides for the removal of Commissioners on the basis of incompetence; however, no definition of incompetence is given. Furthermore, the Act does not define rules for the meetings or decision-making procedures of the Electoral Commission. Finally, the act focuses on Presidential and Parliamentary elections without giving adequate attention to local government elections.

The issue of the structure and the personnel levels of a permanent, independent secretariat was raised in this discussion as well. The current position paper, divided into general areas of finance, computer support and administrative offices, was amended at Michael Maley's suggestion to include a number of functional areas such as personnel matters, information and voter education, election policy and planning, boundary delimitation, different levels of election administration offices, and the legal divisions within the electoral commission.

The second topic, facilitated by David Bandawe, dealt with the staffing of the electoral commission. The group agreed to change the name of this paper to "The Permanence and Independence of the Electoral Commission." Again, the issue of how commissioners can be appointed by one body and removed by another body arose during this discussion. The group also felt that the Electoral Act should specifically define the duties of the Chair. In order to facilitate the independent image and activity of the commission, it was suggested that the Commissioners should receive a higher salary. Furthermore, the Commission should have control over its own bank account and budget. On the organizational level, the working group suggested that the Commission designate a Chief Electoral Officer, who would in turn be responsible for six departments within the Electoral Commission Secretariat: Administration, Finance, Legal, Investigation, Logistics and Data Processing. Permanent offices should be developed to assist with the conduct of local government elections.

Speaking for the third working group, Clerk of Parliament Roosevelt Gondwe posited that the commissioners would be better served by an act stating and defining the creation of an Electoral Commission Secretariat than by attempting to amend the Presidential and Parliamentary Elections Act. In addition, the question of whether the members of the Commission were expected to work part or full-time, and how the Commission should be financed, had not been discussed. This point was dwelt on effectively in this discussion. The participants discussed the tenure and employment status of the Commissioners. They considered the role of a secretariat in relation to the role of Commissioners.

The conversation then turned to the possibility of continuous voter registration. With four by-elections scheduled in 1995, a permanent registration system which can be updated is essential. It was suggested that the current method of periodic registration (where the sites are open for a period of two to three weeks) be extended to year-round, so that voters could present themselves at the sites when it was convenient for them. Briefly, the Commissioners dealt with the establishment of local election offices. It was decided that district election offices should be created.

Political Party Procedures and Requirements

Mr. Bandawe, opening the session for the second working group, presented three positions. First, he stated that the linkage between the Electoral Commission, the Army, and the Police should be clarified. Next, the political parties should publicly declare their funding sources during the campaign period. The group agreed to this suggestion, without making specific recommendations. Third, the Presidential and Parliamentary Elections Act should be amended with provisions designed to reduce cheating or bending of the rules by candidates. Mrs. Chikoko agreed with this position, and added that the party registration rules should prohibit the inclusion of a party based on ethnic origin. The discussion then moved more generally to the issues of candidate registration requirements, and how to strengthen the electoral law to clarify the eligibility of candidates.

The final two subjects during this session were the issues of political party nomination procedures and political media coverage. The group discussed the possibility of requiring political parties to present their

manifestos and constitutions for registration purposes to ensure that the internal procedures that each party followed were democratic. Regarding media coverage, the consensus was that whether or not the Commission appreciated the way that political events were covered in the media, the Commission’s assumption of the responsibility of regulating the media would bring the independence of the Commission into question; Michael Maley suggested that a separate body be created for this purpose.

Legislation and Institutionalization of the Electoral Process Calendar

In this session, the working groups dealt first with the issues of voter registration and ward and constituency boundaries. The consensus was that a number of topics within the electoral process calendar should be more clearly defined, such as special elections, voter registration, training procedures, voter education, election announcement, activation of additional staff and security, review of constituency boundaries, and a review of the balloting system. The focus here was on ensuring that the different tasks which must be completed are placed in order of logical priority; for example, boundary delimitation should precede registration. The commissioners were additionally of the view that the current four-year term for each of them is sufficient.

Local Government Elections

Mr. Lungu, Commissioner of Local Elections within the Ministry of Local Government and Rural Development came to the workshop to serve as a resource in an area where the Commission felt that it needed a good deal of assistance. The primary question from the Commission was which body (the Commission or the Ministry of local Government) had the authority, responsibility and financial liberty to conduct the local government elections. In addition, the members of the commission were concerned about the procedures used for delimitation of ward boundaries, which would number approximately 800, before the next election.

Mr. Lungu explained that in previous years the ward boundaries were mutable and were indeed frequently shifted by members of the Malawi Congress Party, village headmen, and traditional Authorities. Basically,

they are drawn on the basis of population size and geographic accessibility. He further stated that while it was his impression that the responsibility for conducting local elections fell to the Electoral Commission, he had no written proof of this designation. The Electoral Commission contended that the bill governing these elections was obsolete and should be rewritten.

The Commissioners and Mr. Lungu both were unsatisfied with the lack of clear legal direction regarding the authority over local government elections. The Commissioners requested that Mr. Lungu provide them with copies of the Local Government Bill, which they would use to develop a position paper advocating that the Commission be responsible for local government elections. In addition to the paper, the consensus was that further legislation was needed.

In addition to the revision of ward boundaries (which may lead to further revisions of the constituency boundaries), the group discussed requirements for candidacy within local government areas. They also briefly discussed the types of elective offices which would fall into this category. The workshop ended at the conclusion of this topic discussion.

After the Commissioners and IFES staff returned to Blantyre, Maley incorporated the comments gained from the workshop to the draft papers. Each paper, when completed, presented a discussion of the current situation, recommendations for improvement, policies which could be adopted, and specific steps to be taken. Martinez prepared for the logistics of the conference. On February 2, they met with Justice Msosa and the commission for a pre-conference meeting. The group approved the minutes from the workshop, reviewed the structure of the research papers, developed an executive summary for the papers, and assigned workshop facilitators and rapporteur. Justice Msosa requested that Martinez prepare a letter for the Ministry of Local Government on behalf of the Commission. The group also agreed that aside from the photo opportunity and coverage of the Vice President's speech, the Commission would not conduct a press conference; press releases would be issued at the beginning of the conference. The final task completed before the conference was to send copies of the papers to the participants one week in advance.

Electoral Commission Conference

On February 12, Laurie Cooper joined the IFES team in Mangochi to review the final arrangements for the conference. She was briefed upon arrival by Maley and Martinez. Together, they decided that their roles in this conference would be understated relative to the workshop, providing resource information only as needed. All invitations except for approximately five persons had been accepted. A final list of the participants and the conference agenda are attached as Appendix A.

During the afternoon and evening of February 13, the participants arrived. No activities were planned for the evening; Martinez and Cooper reviewed Michael Maley's notes for the moderators with the Commissioners and the latest version of the agenda.

The Right Honorable Justin Malewezi, First Vice President of Malawi, opened the conference on the morning of February 14 following an introduction by Justice Msosa. In setting the tone of the discussion, he remarked, "These meetings will address major legislative and constitutional issues in an open and consultative way. This will be in keeping with the view clearly embodied in the Constitution, that the legitimacy of the government flows from the will of the people. It is therefore particularly fitting that this 1995 'season of conferences' should commence with one on the role and the organization of the Electoral Commission." Honorable Malewezi thanked IFES and USAID for organizing and financially supporting the conference, and then welcomed the participants. Following the morning tea break, the First Vice President left the group and the participants began to review the subject of the first plenary.

Michael Maley served as the IFES rapporteur for the conference. His report on the proceedings and the decisions on the Commission's recommendations provided the follow-up documentation for the conference participants. The following narrative of the conference is taken from his report.

Permanence and Independence of the Electoral Commission

This paper sought to further discussion on the concept of a permanent secretariat, first elaborated in the Electoral Commission’s 1994 Parliamentary and Presidential Elections Report. The Government of Malawi expressed agreement in principle with the concept, and requested that the Commission develop a structure for such a secretariat for review. Conference participants were asked in the paper to consider a structure of a secretariat in which the Electoral Commission oversaw a Director of Elections, who with a Deputy Director, organized the activities of an Office Manager, an Information and Civic Education Branch, a Legal and Investigations Branch, Electoral Policy and Planning Branch, a Personnel Branch, a Computer Systems Branch, and a Finance Branch. On the district level, the Commission proposed to create District Secretariat offices, in which a District Elections Officer would report to the Deputy Director, and who would direct the activities of Assistant District Elections Officers. Roles and tasks for these offices were set out in the paper as well as an organizational chart.

Commissioner Clement Chilingulo served as the moderator and presenter for this paper. He outlined the problem in this situation as one of limited and inconsistent application of resources. The most salient example of this is the fact that the Clerk of Parliament under the current Electoral Law serves as the Chief Electoral Officer on an ad hoc basis. His responsibilities as Clerk of Parliament preclude him from devoting a significant amount of time to the Electoral Commission. Another example is the location of the secretariat of the Clerk of Parliament (which serves as the Electoral Commission Secretariat) at Zomba while the Electoral Commission is based in Blantyre.

The structure proposed in the Commission’s paper largely reflected the functions and duties conferred upon it by Parliament. It goes further by establishing the relationships between members of the Electoral Commission and their staff, and between the electoral body in general and the other branches of civil service.

Chilingulo concluded by reminding the participants that the proposed secretariat would require legislative changes in the Electoral Act; and that the issue of a budget controlled by the Electoral Commission was as relevant to this discussion as the other points raised.

Comments on this paper began with the current composition of the Commission, and several questions related to the manner in which the Commissioners were nominated were posed. The Commissioners responded that although their appointments were the direct result of nomination by the seven parties registered as of December 1994, it was the impartiality each Commissioner which guided their activities during the period prior to the general elections, and which guided their work to date. The group soon concluded that this was not the forum to discuss the political structure of the Commission.

The issue of whether a permanent secretariat would actually have enough work to justify its existence between elections was raised briefly, the Commissioners responded that the work that they had done since the 1994 elections was clear evidence of sufficient ongoing tasks to keep at least a core secretariat at work between elections.

Another point raised concerned the status of an Electoral Commission Secretariat relative to the other civil services. The concept of financial and physical independence of the secretariat struck some participants as too limiting to attract potential personnel. If the pay scale, rating and task descriptions differed significantly from similar positions elsewhere in the civil service, few persons would be interested in remaining with the secretariat.

The process by which a Director of Elections would assume that position was debated for a few minutes without a clear thought emerging from the group. Questions remained about whether the position should be salaried, appointed, political or linked to some other characteristic. Again, the plenary decided that the Conference was not the proper forum to flesh out this issue.

At the conclusion of the discussion, Commissioner Chilingulo called for consensus on the recommendations of the paper. While the plenary did not endorse all of the recommendations, it generally supported the idea and development of a permanent, independent Electoral Commission secretariat.

The paper and record of discussion are attached as Appendix B.

Local Government Elections

Sections 146-148 of the Constitution states that local government elections shall be "supervised" by the Electoral Commission. This statement is ambiguous enough to cause confusion between the Electoral Commission and the Ministry of Local Government over which body actually administers the elections, and which body (if any) has an oversight authority relative to the other in local government elections. This issue was raised during the workshop with Mr. Lungu of the Ministry of Local Government, who endorsed the Commission's responsibility for organizing and conducting local government elections, but as of the date of the conference, no formal opinion had been generated by the Ministry.

Commissioner Georgina Chikoko introduced this topic to the plenary. In addition to resolving the problem defined above, she raised the issue of local authority boundaries, which serve as the electoral districts in a local government election. According to the Constitution, a "ward" is the representational area of a councillor; a "local government authority" area is the jurisdiction of a council (group of councillors). The Commission is responsible for the delimitation of parliamentary constituency boundaries and local government ward boundaries. With the Constitution silent on the local government authority issue, she suggested that the Electoral Commission also be given the responsibility to draw local government authority boundaries.

A third issue related to local government elections was the procedure to be used. Clearly, the Constitution recommended a system that could be used with relative ease by Malawian voters which met international standards for fairness. She recommended that local government elections be conducted in the same way as the presidential and parliamentary elections were conducted, and that any changes in the general election

procedure be matched by changes in the local government election procedure. The rest of the paper followed this vein, with recommendations on the voting procedure, registration requirements, and other issues related to election administration.

The participants unanimously supported clarification of the Constitution which would grant the Electoral Commission the authority and responsibility to organize, conduct and supervise the local government elections; they further agreed that other sections of the Constitution related to this issue be reviewed for clarity as well. The discussion then moved to the accession of councillors and mayors, and the procedures for these appointments. While none of the recommendations were rejected outright, the process of coming to consensus on these points was much more difficult, possibly because the plenary was uncomfortable dealing with constitutional issues one week prior to the Constitutional Conference.

The recommendations of this paper and the decisions reached by the group are attached as Appendix C.

At this point in the afternoon, Justice Msosa recommended that the order of the final two papers be reversed, and that “The Role of Political Parties in the Electoral Process” be discussed as the last session for the day; the conference would wrap up the following morning with “Critical Events in the Electoral Process Calendar”. The suggestion was made because a number of participants had to leave Mangochi early the following morning. With the agreement of the plenary, the presentation of “The Role of Political Parties in the Electoral Process” was delivered by Commissioner Raphael Mhone.

The Role of Political Parties in the Electoral Process

To open discussion on this paper, Commissioner Mhone posited that the current electoral system uses polarized sets of requirements for candidate registration and political party representation. Furthermore, he suggested that the regulations regarding candidate and political party behavior, while codified in the Electoral Act, were so loosely drawn as to be unenforceable during the previous elections. The paper posed several alternatives for the group to consider.

Although the rules governing political party registration are fairly simple to comply with, the requirements for individual candidates are more stringent. The Commission recommended that the two sets of requirements be brought more in line with each other; that is, the Commission should be permitted either to relax the rules for candidate registration or tighten them for political party registration. The recent ruling of the High Court regarding the conduct of the elections in Mulanje cast doubt on the validity of the nominations required by the Electoral Act.

On a similar note, Commissioner Mhone mentioned that the requirement that campaign activity cease 48 hours prior to the election was not respected by political parties or candidates; this law should either carry more tangible sanctions (and be enforced) or it should be abolished.

The issue of rules regarding parties versus individuals surfaced a second time as the Commission suggested that political parties be held liable for the actions of individuals professing to be members of or acting on behalf of the parties. The subject paper further suggested that a clear definition of campaigning and campaign activities would make the previous two issues easier to resolve.

To address the problem of which citizens were ethically permitted to vote and which were not (a source of deep controversy during the 1994 general elections; the Inspector General of Police and the Army Commander instructed their troops not to register to vote, because casting a ballot would be seen as a political act), a Code of Conduct for government officials would spell out these and issues such as the ability of civil service workers to engage in other directly political activities.

Campaign finance, a source of interest in every electoral process, was a subject which arose at various times during the general election campaign period. The Commission proposed that a new rule requiring funds disclosure be adopted, as was the case in other countries.

A lively discussion ensued. Justice Msosa opened the debate by reminding the conference participants that while they had been invited to the meeting as representatives of their respective offices, each participant could use this forum to relate his or her experiences as a political party activist or candidate during the

general elections. This suggestion was at first greeted with mild indignation by the participants, argued that they were disproportionately represented, and indeed had not come to the conference as political party activists. Having said this, they turned to the issues of political party and candidate registration regulations. Some participants felt that the rules governing political parties were actually too stringent and should be relaxed; others suggested that any further restrictions on party formation would interfere with Malawians' constitutional freedom of assembly. At various points during the discussion, the view was expressed that the Electoral Commission was not necessarily the most appropriate body to make or offer decisions on the conduct of political parties; no alternative authority was mentioned.

On the subject of candidate eligibility, the issue of literacy and English proficiency tests was a sensitive area for the plenary. Currently, candidates are required to certify that they have passed the final secondary school examination. Some participants objected to this requirement on the grounds that there were a number of natural leaders, with good English speaking skills, who simply have not completed this level of formal education. Others argued that the requirement placed an undue burden on Malawian women, at least in the short term, because of the low (but increasing) female school population. This subject metamorphosed into a discussion regarding the proper language to be used in Parliament, with the idea that potential candidates must at least be proficient in reading, writing and speaking the language which will be spoken in the chamber. However, English is not the official language of Parliament. Malawi has seven major language groups; to choose one over the other six would do more harm on a regional and ethnic level than good.

The consensus was that the issue of language requirements went deeper than candidate eligibility, probably best dealt with at the Constitutional Conference or at a later date.

Considering the issue of guidelines of conduct for political parties, the participants expressed the view that the correlative issue of security during the campaign was one which could only be improved through continued voter education programs. The concern here was the numerous skirmishes between the political parties which occurred at several stages in the 1994 general election campaign. It was also suggested that

the rule on cessation of campaign activities two days before the election should be enforced rather than repealed.

On the topic of political party liability, Chief Justice Richard Banda opened the discussion by suggesting that while proof of connivance or intent to violate established campaign practices was difficult to obtain, it was possible for the regulation to be amended to make political parties liable across the board for the actions of their members. The suggestion raised a stir among the participants, who stated emphatically that political organizations should not suffer penalties for the actions of a few renegade or "unpolished" activists claiming to be active in one party or another.

At this point, Commissioner Kamlongera proposed that the argument was less over the ends (ensuring that political or election infractions are reduced through tighter sanctions) than the means (civil versus criminal liability of the political organization in question). He stated that the Commission would make more efforts at outreach in its civic education program; he also reminded the participants that political parties had similar obligations to inform constituents of changes in the election procedure.

With so many issues presented in this plenary, no consensus was achieved on the recommendations that followed. Most participants felt that these matters were better left to the Constitutional Conference. On this note, Justice Msosa pronounced the first day officially closed, with a promise to pick up with the final plenary session early on the morning of February 15.

A full report of the discussion and the recommendations on this plenary session is attached as Appendix D.

Critical Events in the Electoral Process Calendar

The final plenary session, "Critical Events in the Electoral Process Calendar," was presented by Commissioner John Chipeta. The focus of this paper was to bring to the group's attention a clear idea of the tasks that accompany each election process. With a philosophy similar to the paper advocating a

permanent secretariat, this paper conveyed the information that an effective election administration body works at its most effective when it receives sufficient time, resources and authority to prepare for an electoral event. While the paper dealt with the issues of constituency delimitation voter registration, candidate nomination and polling procedures, the discussion centered on three topics most relevant to the group:

- adoption of a process of continuous voter registration;
- issuing of photographic registration certificates; and
- a new form of balloting which uses only one ballot paper.

The Electoral Commission used the provisions of the 1993 Presidential and Parliamentary Elections Act to call for a new registration process between the 1993 multiparty referendum and the 1994 general elections. During the referendum registration period, some eligible voters used registration certificates from previous elections, while others turned up at registration sites for new or duplicate registration certificates. The ensuing confusion regarding the proper documentation was solved by the Referendum Commission when it determined that any registration documentation presented on referendum day would be accepted.

The Electoral Commission conducted a new registration process in March 1994. Under this process, everyone who was eligible to register was encouraged to do so. The Commission stressed that persons who did not register during this period and who arrived at polling places with only old registration certificates would not be allowed to vote.

The 1994 voter register was therefore the most current document on the registration process at the conclusion of the May elections. However, the prospects for updating the register as it stood were minimal, as the procedure on polling day directed polling place presidents to cross out the names of voters as their ballots were issued. The prospect and experience of a number of by-elections in 1994 and 1995 as well as upcoming local government elections reiterated the need for an updated register, an objective preferably achieved without the Commission requiring another registration process. In addition, the emphasis on free,

fair and periodic elections to which Malawi was now committed carries with it an ability to easily update the list of persons eligible to vote at any electoral event.

This paper proposed that the voter register be computerized. Without presenting specifics on the type of system to be used, the Commission envisioned a database which would provide a register for every new electoral event. Checks in the system would enable members of the Commission or secretariat to be alerted to registrations which were about to expire; voters in turn would be instructed on how to update information such as new addresses, names or knowledge of deceased persons with representatives of the Secretariat.

Next, the paper discussed the current Malawi voter registration certificate. This is a piece of paper on which the voter's name, address, polling station number and district are entered. Voters are required to sign or mark the certificate as verification that it is theirs. The certificate is printed on plain white paper.

The Commission expressed the concern that such plain, easily reproduced document would be easy to transfer between voters, and would facilitate the inclusion of non-eligible voters on the rolls. To counteract this problem, the Commission proposed that a photographic voter identification card be produced. The card would be imprinted with the information above; it would also be numbered for ease of data entry and updates.

The paper next treated the issue of candidate nomination and campaign deadlines. The current legal provision states that candidates may withdraw from an electoral race up to the day of the election. The Commission had to contend with a number of candidates who withdrew from the election; one as late as the day before the election. While the Commission is bound to provide this information to all of the voters, late withdrawals on the part of the candidate complicate the information process so much as to make it impossible for the Commission to get the news out throughout the country. Further, a late withdrawal affects the balloting process, as the ballots either must be altered before they are distributed to polling stations, or the voters must receive more information than polling staff have time to give regarding the modified voting procedure.

The Commission recommends that it be allowed to set a final day for candidate withdrawal from an election process. Ideally, the deadline would pass before ballot papers are printed and delivered. Furthermore, the Commission noted that there is no provision in the law for a candidate who withdraws from the race just prior to the election to resign if he or she is elected anyway.

Finally, the Commission encouraged the plenary to consider a change in the balloting procedure on the order of the changes that the Malawian ballot has undergone in the past two years. Prior to the 1993 referendum, voters were required to choose and then place one of two ballots in separate ballot boxes in full view of polling officials. The obvious opportunity for voter intimidation led to the Referendum Commission's acceptance of a procedural change. During the referendum, voters were issued one ballot which they were required to separate along its perforation inside a voting booth. The voter was then required to discard the ballot he or she did not want in a box placed inside the booth, to seal the desired ballot in an envelope, and to place the envelope into a single ballot box, in view of the polling officials. This system, while an improvement in terms of voter privacy protection, was nonetheless cumbersome and confusing to most voters.

In 1994, the Electoral Commission modified the new procedure slightly by producing security-paper ballots and switching to indestructible discard boxes. The ballot style was also altered to reflect the numerous candidates for each office. This procedure caused slightly more confusion among voters as the new, plastic discard box looked more like a ballot box than the actual metal box, which led voters to believe that they should vote into the discard box.

The paper suggested that the system of discard boxes, envelopes and separation of papers be eliminated altogether for the next elections. Instead, a voter would be issued a single ballot for each electoral process, which would be marked in private, folded and inserted into a ballot box. Having witnessed such systems in South Africa, Mozambique and Namibia, the Commission posited that Malawians would enjoy ease of voting as well.

Reaction to the suggestions posed above was mixed among the conference participants. On the issue of voter registration automation, the group was in favor of the proposition and little discussion ensued. However, the subject of the voter registration certificates was diverted slightly to deal with issues of national identification cards, cost implications of both kinds of cards, followed by questions of compulsory voting and civil registration.

The body also generally agreed that the Commission should have the right and responsibility to determine withdrawal deadlines. Turning to the issue of a single-ballot, no-envelope voting process, the group raised the issues of historical significance, voter ease of use, and the financial implications of continued use of envelopes. This discussion on historical significance represented another moment in the conference in which participants referred to the Banda regime and its effect on such procedures as voter privacy protection as well as tolerance for improved balloting procedures. Although some participants felt that a good deal of civic education would be required for voters to adjust to a new voting style by 1999, the consensus was that if the financial implications were better for a single ballot system than for the current system, then the new system should be adopted. The discussion and consideration of the Commission’s recommendations is attached as Appendix E.

The conference was concluded on Wednesday, February 15th. Justice Msosa thanked the participants for their spirited and informed contribution to the discussions. While not all of the Commission’s recommendations were endorsed, some of the topics would be reviewed in further detail at the Constitutional Conference.

Post-Conference Activities

Following the end of the conference, Michael Maley transcribed the notes from the discussion sessions, with records of decisions made on the Commissioners’ suggestions. He also prepared a summary report of the conference proceedings, attaching the details of the discussions to the individual papers. The reports were then prepared in a sample package for Justice Msosa to review for subsequent mailing to conference

participants. For future reference, Maley presented the Commission with documents regarding local government elections in Australia and throughout the Commonwealth countries.

In preparation for the Constitutional Conference to be held the following week, Maley prepared a presentation for Justice Msosa to deliver at the plenary session in a discussion on elections. During the conference, Cooper and Martinez revised the speech to Justice Msosa's specifications and produced copies of it for all of the conference participants. The speech, which Justice Msosa revised later, is attached as Appendix G.

Michael Maley's last activity under this project was completed following his departure from Lilongwe back to Australia on February 18. With the information assembled from the recommendations and proceedings of the Electoral Commission conference, he drafted a bill for consideration by the Electoral Commission during its final presentation to Parliament. The draft bill is attached as Appendix E.

During the Constitutional Conference, Cooper and Martinez met with Justice Msosa, Commissioner Chipeta and Commissioner Mhone to discuss the next activities of the Commission. Cooper and Martinez felt would not be necessary to wait for Parliament to approve the Commission legislation before the Commission could begin to organize itself along the lines that it had drawn in preparation for the workshop and conference. They encouraged the Commissioners to think about what the priorities would be in the remaining nine months of 1994 and beyond. With local government elections upcoming but not scheduled, there were a number of easily identifiable priorities which could be linked to an activity calendar.

The first priority identified was the internal organization of the Commission secretariat. The research conducted for the paper on legalizing a permanent secretariat underscored this need for the conference participants as well as for the Commission. Without a well-organized personnel structure, the secretariat would not be able to serve the function that the Commission desired. Instead of being able to move into positions of oversight as they envisioned, the Commissioners would continue to perform and manage routine tasks. The Commissioners stated their intention to find a candidate to work as the Director of Elections as soon as possible, and to brief current and incoming staff on the organization plan that had been

drawn up for the conference. In addition, some kind of examination of project design, development and implementation would be required to develop a consistent approach to the performance of tasks. A personnel and procedures manual, begun in November, would be completed and distributed to all election personnel.

In addition to identifying and placing staff, the Commission placed a priority on providing adequate training of the secretariat personnel in their tasks, management procedures, and the ways in which the tasks could be automated. Training would continue on a regional and district level once the Electoral Commission secretariat offices were established on those levels.

A second issue was that of ward boundary delimitation. The session on local government elections raised a number of questions regarding the responsibility of conducting the elections; the consensus was that the Electoral Commission would shoulder that responsibility. Within the district and constituency boundaries, Malawi is theoretically divided into approximately 800 wards. This system has been applied inconsistently throughout the country; and the difference between local authorities, traditional authorities and local government authorities is not clear. No review of the ward boundaries has taken place since the last census. The Commissioners felt that a delimitation process on the ward level would be a complement to the constituency process completed last year. In addition, the time period allotted for the previous process was too short. The Commissioners suggested that a delimitation process begin well before the election during the summer of 1995 and continue for at least three months. Certain districts whose ward boundaries were clearly identified would be used as models for the rest of the country. Members of the Commission who would be responsible for the ward delimitation would travel around the country with a delimitation specialist and representatives from the Ministry of Local Government and the Department of Statistics. The Commissioners expressed interest in automating this process as well. A corollary activity would be the enactment of legislation for a periodic review of all boundaries independent of when elections are called.

Civic education was also identified as a priority. The interest in non-presidential elections waned after June 1994. The poor turnout in the 1995 by-elections was a significant manifestation of voter apathy. Most

people felt after the referendum that they had made their decision, and that another election process would be unnecessary. In the eyes of the Commissioner, this attitude did not bode well for turnout in the local government elections. The continued duty of the Electoral Commission is to inform the voters of the rules for registration and voting as they change as well as the type of elections that are occurring and why. As with the constituency delimitation process, the Commissioners were constrained by the impending election process last year, which prevented them from initiating the kind of effective civic education activity that they might have preferred. They therefore suggested that a civic education program be designed to begin as soon as the boundary delimitation was completed. Again, this activity would begin several months before the local government elections.

Two additional tasks which were not directly connected to the local government elections were the development of a permanent, automated voter register, as discussed at the conference; and the piloting of several different types of ballots to determine the type of design best suited to the Malawian context.

On the basis of this information, Cooper and Martinez requested that the Commissioners identify the areas cited in more detail, that they develop a calendar of the expected beginning and completion of the tasks, and an indication of where international assistance might be needed. This calendar and detailed description of tasks would serve as the foundation for a proposal which the Commission could develop and present to the international community. The Commission agreed that John Chipeta would maintain contact with IFES following Martinez' departure to refine the proposal and to identify areas within the proposal where IFES could provide assistance. Given the positive response of the international representatives to the proceedings of the Electoral Commission conference, Cooper and Martinez urged the Commissioners to capitalize on the international community's interest.

V. RELATIONSHIPS WITH DONORS

The Electoral Commission conference provided an effective opportunity for the Commission as well as for IFES to enhance their relationship with the international community. The event also represented the transition of that community (with the obvious exception of the United States) from relative disinterest to active interest in the work of the Electoral Commission. At the start of this project, donor participation in the election process had been significantly reduced from the pre-election level. A number of missions sponsored by the UN Electoral Assistance Unit and the Center for Human Rights throughout the summer and fall of 1994 yielded little in the way of multilateral assistance projects. The consensus at the end of the summer was that activities would be conducted on a bilateral basis if at all, and that election assistance activities were not a priority. It was the IFES team's impression that this attitude developed as a result of the international representatives' witness to the political and economic changes that occurred within two months of the election. The country's financial reserves had been severely depleted by September, and the newspapers were full of articles detailing the excessive, expensive activities of the Muluzi administration. The donors were concerned about financing any further election activity.

Cynthia Rozell and Andy Sisson were extremely effective in bringing news of the Electoral Commission's activities to the international community via regular donor group meetings. In addition, they maintained the only link between the Electoral Commission and the international community through regular meetings with Justice Msoa and the Commissioners. Leti Martinez was also able to informally provide information to members of the international community as a result of her previous experience in Malawi in 1993.

In early December, Laurie Cooper encouraged Martinez to perform an informal inventory inquiry on the computer hardware and software which had been provided by the international community in support of the election observation and technical assistance efforts. Cynthia Rozell followed up on this inquiry with the donor group to determine if any equipment that remained could be formally presented to the Electoral Commission. Although this activity has not yet been completed, the South African government had agreed by mid-March to contribute a number of computers to the Commission based on the initial contact by the Commission.

As the preparations for the Electoral Commission conference continued, the IFES team encouraged the international representatives to plan to attend as observers. Their presence would demonstrate to the Commission their interest in the development of sound electoral processes in Malawi; it would demonstrate to the members of Parliament and Cabinet the continued international interest (and priority) in the democratic progress of Malawi. The response of the international representatives who attended the conference (from South Africa, France, the United Kingdom, the European Community and the United Nations Development Programme) was quite positive. The conference was important not only for the substantive issues that it covered, but also for the fact that so many high-level people capable of directly affecting the work of the Commission came and stayed together to discuss those issues. At the same time, the level of political pressure exerted by all players was low enough prior to and during the conference to keep the discussions limited to practical matters rather than political discourse. The experience of all participants was that a great deal of ground had been covered in an uncomplicated, politically neutral yet mutually supportive forum.

After the Electoral Commission conference, the international representatives invited Martinez to the regular meeting of the donor group subcommittee to discuss potential activities in support of local government elections. On March 10, she traveled to Lilongwe to attend the meeting. Among the items on the agenda were the schedule for local government elections, any ongoing or planned civic education programs, and the legislative timetable for the resolution of the Constitutional Conference issues. At this meeting, some donors expressed concern that the proposal of local government elections in June (this date had been discussed since September 1994 but never agreed) was too soon in light of the changes suggested in the Constitutional Conference. Other donors felt that the elections should be conducted in June so as not to lose the momentum of the democratic process. Martinez communicated some of the concerns that the Electoral Commission had with regard to local government elections in June, particularly that the Commission did not appear to be in control of the schedule and would therefore run the risk of conducting an election for which it was not prepared. The consensus of the group at that meeting was that the donors would encourage, through a commitment to support the election process, a later date for the elections, perhaps near the end of November 1995. In addition, the German members of the donor group announced their intention to support a local NGO in a civic education program. Martinez explained to the group that

the Electoral Commission was in the process of developing a task calendar for their activities through the rest of the year; the donor group expressed interest in supporting activities related to those tasks, and encouraged the Electoral Commission to finish the calendar as soon as possible. It was clear at the conclusion of this meeting that the international community’s support for and interest in the election process had increased significantly between November and March, and further, that this interest was directly related to the information on Commission activities that the community received on a regular basis from USAID/Malawi and the IFES team. It is important that the Electoral Commission keep this momentum going through regular communication to the international community, either directly or through its political advocates.

VI. RECOMMENDATIONS FOR THE COMMISSION

At the conclusion of their on-site project activity, Michael Maley and Leticia Martinez prepared final reports to IFES as part of their contractual responsibilities. The reports included recommendations to the Electoral Commission on immediate and future activities, and those recommendations are the basis of this section. These recommendations should be read in conjunction with the recommendations made in the conference research papers, as both individuals were involved in the drafting of the papers.

Direction and Management Issues

For any of the recommendations which were ratified by the February conference to be implemented, the Electoral Commission must develop the staffing capacity to act in each area. The Electoral Commission, with the expressed approval of the members of Parliament and the Cabinet who were present at the Commission Conference in Mangochi, has received approval to develop an internal structure to conduct elections. It is important that this process begin immediately. One of the first steps to be taken should be the appointment of a person who would serve as the Director of Elections, or the Chief Electoral Officer. This person could be Malawian or an international consultant, depending on the political implications of both options. The principal task of the Director would be to elaborate on the organizational structure, chain of authority, personnel descriptions and work plan developed by Leti Martinez in November. The immediately related tasks would be the development of management and project-related strategies for each area in which the Commission works. Currently, the Commission does not have a standard procedure for the performance of activities or the accomplishment of projects. Since the Commissioners all work part-time, it is difficult to gather everyone to implement the next activity. Consequently, each task takes a large amount of each Commissioner's time while the decisions regarding responsibility, method and activities are made. This pattern also limits the amount of tasks that the Commission can accomplish at one time. The Director of Elections would advise the Commissioners on the tasks which are to be performed by the secretariat, and report periodically on the progress of those tasks. In return, the Commissioners need to consolidate the information and experience that they have gained over the past two years in a coherent statement or philosophy by which the Director of Elections should be oriented. The result of this shifting of authority will be that the Commissioners may retain their part-time status, but will no longer be directly responsible (though indirectly accountable) for the day-to-day tasks related to the election process. In

addition, the temptation for all of the Commissioners to focus on one activity to the exclusion of other important activities will be eliminated, as the Director of Elections works to harmonize and set priorities for the projects that require attention.

As the organizational structure is defined, the Director of Elections would be responsible for identifying personnel to fill the positions described. In addition to finding the personnel, the Director should note the training needs that exist within the current Electoral Commission staff, and build into the position descriptions a training component. This process will strengthen the independence of the Commission and the Secretariat, and it will create an opportunity for the employees to enhance their own skills. The tasks which derive from this process include development of plans for the automation of the election process, accounting procedures, development of and training in district-level election offices, and other infrastructural responsibilities.

Legislation

The Electoral Commission should take the initiative in the development of legislation regarding the conference issues as well as any legislation pertaining to the conduct of elections. With the addition of a Senate as a new level of elective office, it is essential that the Commission ensure early on that there is consistency between all election-related laws and procedures. The Commission may direct the Solicitor-General as to the concepts and language of bills before they are drafted and it may review the bills prior to their reading in Parliament. The conference participants have demonstrated their willingness to support the Commission; it is important that the Commission respond to that willingness in a timely manner.

Public Information

Prior to the general elections in 1994, the Electoral Commission developed a mechanism for providing information on its ongoing activities through the work of a Public Information Officer. The Commission was able to produce public service announcements, to place articles in the newspapers, and to host events around the country to discuss the election process. This mechanism should be re-activated, so that

continuous information on the elections is provided. This will increase the effectiveness of intensive, election-focused civic education programs when they are implemented. In addition, the processes related to elections, such as the registration and redistricting processes, are complex issues that deserve more coverage.

Local Government Elections

The plenary of the Mangochi Conference, including the Ministry of Local Government, agreed that the Electoral Commission should be responsible for the conduct of local government elections. The collaboration between the Ministry and the Commission on the research paper prepared for the conference should be strengthened by continued cooperative activities, such as the delimitation of ward boundaries and the training of election workers. The Ministry can in turn ensure that the Commission is equipped to handle the election process in terms of infrastructure, personnel and finance.

Outreach and Maintenance of Contacts

The members of the Electoral Commission will be more able, with the appointment of a Director of Elections, to cultivate and strengthen the relationships that they have developed with the international community, with Parliament, the Cabinet, and the judiciary. It is incumbent upon the Commission to keep their advocates informed and enthusiastic about their activities. Continued communication between those groups will ensure that the Commission can implement the changes that it wants to without having to generate interest in the activity every time a new task arises. Beyond the Malawian community, the Commission should develop contacts with election professionals around the world to share information and to contribute to their own professional development.

VII. CONCLUSIONS

Review of Project Objectives

The implementation of this project demonstrated the complexity of the issues identified in the objectives. On an empirical level, two out of three objectives were achieved given the circumstances in which they were activated. On a qualitative level, significant progress was made in each of the target areas. This project was most useful in its identification of appropriate future directions for the Electoral Commission, the international community, and the relevant government officials.

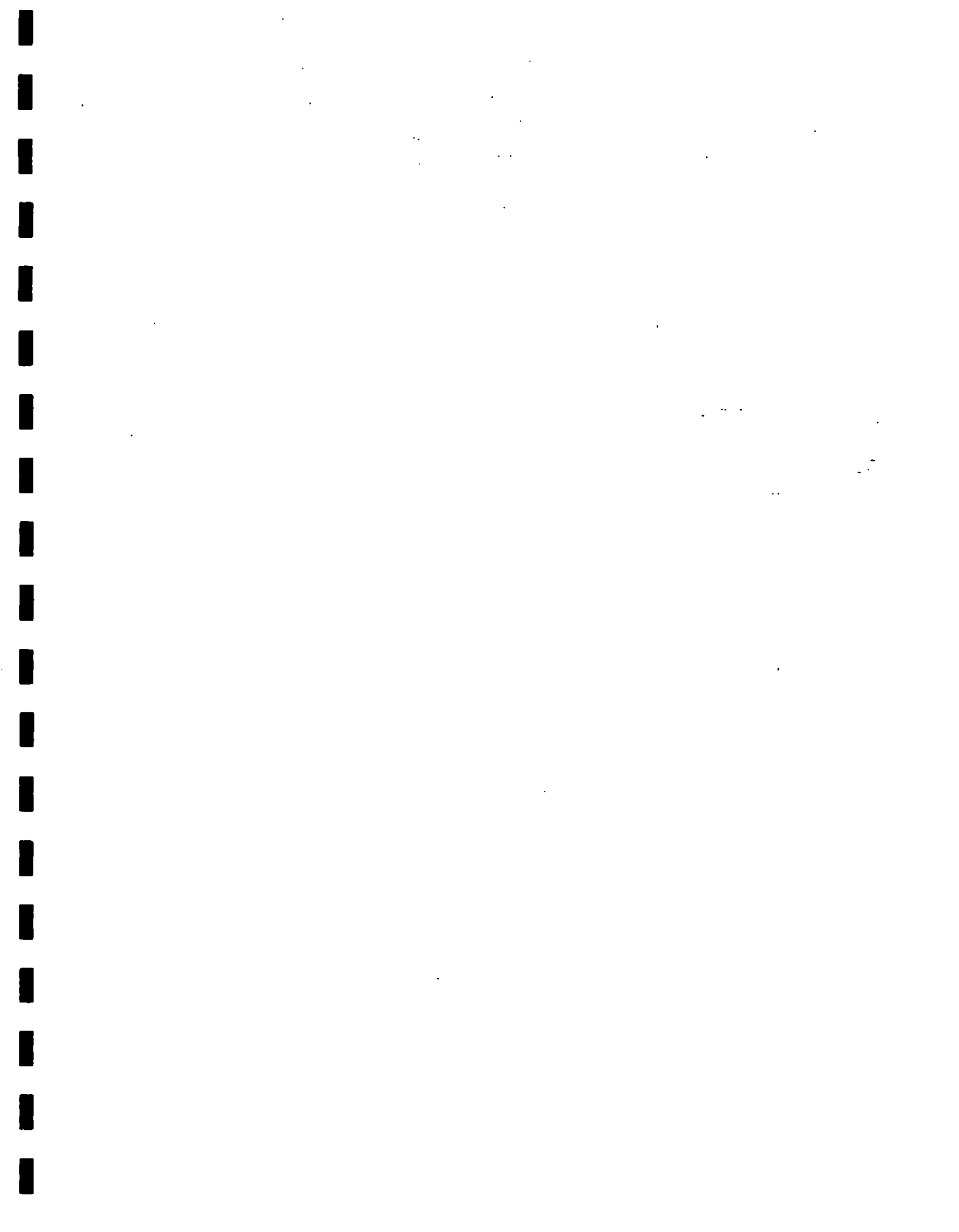
Assist the Commission in defining its role, duties and envisioned structure, developing a written charter for the structure for review and consideration by Parliament. Leti Martinez prepared a preliminary work plan for the Commission within one month of her arrival. She began work on an organigram based on her interviews with the Commission staff, and the organigram was later incorporated in the Commission's paper on the creation of a Commission secretariat. Although the document was not produced in the form of legislation, the Commission is now able to make personnel and initial management decisions with the information that has been assembled.

Coordinate consideration of the Commission charter by relevant actors as well as international advisors in a draft/discussion format, culminating in a conference to ratify the charter. Several modifications were made in the activities undertaken in pursuit of this objective. The initial concept of one conference was expanded effectively to two meetings, one of which served as a rehearsal. In addition, the concept of a basic charter was expanded to provide a genuine opportunity for discussion and reflection through the preparation of research papers on topics that the Commission wished to bring to the attention of its political advocates. Finally, the workshop and conference put the Commission in a better position to prepare legislation (and to have it accepted) than it would have been if the original plan of a conference to ratify legislation had been implemented. The success of the conference, as stated earlier, was due as much to the discussion and thorough examination of the Commission's recommendations as the fact that the Commission was able to assemble a group of people who were only marginally interested in the election process and generate informed discussion among them. The atmosphere of the conference was collegial

and equitable, providing each participant the opportunity to express his or her views with as much weight as any other participant.

Assist in the implementation of the Commission charter in preparation for tasks of local election administration and voter registration reform as appropriate. The local government elections, scheduled tentatively for June when this project was proposed and implemented, are no longer fixed. Several factors contributed to this situation, most significant of which were the recommendations from the Constitutional Conference that a new level of elected offices be established. However, the IFES team did assist the Commission with the identification of key issues related to the issue of local government elections, specifically by clarifying the responsibility of administration of the elections. Further, the IFES team helped the Commission to define the problems that existed with the current register and to begin to think about possible options to solve those problems.

During the discussions following the Constitutional Conference on the possible next steps for the Electoral Commission, the IFES team solicited a written evaluation from the Commission on the IFES project. To date, no evaluation has been received. However, the verbal responses that the team received from the Commission indicated that the project was completed successfully, and that the services of IFES can be effectively applied in future assistance activities. IFES reiterates its satisfaction and gratitude to the Electoral Commission and the USAID mission in Malawi for making this collaboration possible, and we look forward to continued cooperation.



Appendix A

THE ROLE OF THE ELECTORAL COMMISSION

AGENDA

February 14-15 1995

Nkopola Lodge, Mangochi, Malawi

Arrival of registered participants: not later than the afternoon of Monday 13 February.

There will be two sessions, a morning one and an afternoon one, on each day of the conference. On the first day of the conference, Tuesday 14 February, delegates should be seated not later than 7.45 am sharp for the official opening. After the official opening, the morning session will start at 8.30 am sharp, and end at noon. The afternoon session will start at 2.00 pm sharp and end at 6.00 pm. There will be ten minute tea breaks starting at 10.00 am and 4.00 pm. On the second day of the conference, Wednesday 15 February, the morning session will start at 8.00 am sharp, and will end at 12 noon, with a 10 minute tea break commencing at 10.00 am. The afternoon session will follow the same timetable as on the first day.

OPENING OF CONFERENCE

7.45 am, Tuesday 14 February

Delegates take their seats.

7.50 am

The First Vice President, the Rt. Hon. Justin Malewezi, arrives at the Leisure Centre, Nkopola Lodge and is met by Justice Mrs A.S.E Msosa, Chairperson of the Electoral Commission.

8.00 am - 8.10 am

Item (1) Welcoming remarks (Justice Mrs A.S.E. Msosa, Chairperson of the Electoral Commission)

In the audience: Press, Members of Parliament, Cabinet Ministers, Justices of the High Court, Principal Secretaries, Committee members and Diplomatic Community (for protocol only)

8.10 am - 8.30 am

Item (2) **Keynote Address: "The Electoral Commission and the Need for Legalisation of Structures"** (The Rt. Hon. Justin Malewezi, First Vice President)

SESSION ONE - AM, TUESDAY 14 FEBRUARY

8.30 am - 10 am, 10.10 am - 12 noon

Item (3) **The Permanence and Independence of the Electoral Commission**

(Moderator: Justice Mrs A.S.E. Msosa; Presenter: Commissioner Chilingulo; Rapporteur: Commissioner Kambalamctore)

- Introduction
- Powers and functions of the Electoral Commission
- Current position - legal basis of the Electoral Commission
- Current position - Election Officers (The Secretariat)
- Current position - funding and finances
- Rationale for a Permanent Independent Secretariat
- Administrative Structure of the Permanent Independent Secretariat
- Finances and resources of a Permanent Independent Secretariat
- Legal Framework for a Permanent Independent Secretariat
- Conclusion
- Review and consideration of recommendations

LUNCH

SESSION TWO - PM, TUESDAY 14 FEBRUARY

2.00 pm - 4.00 pm, 4.10 pm - 6.00 pm

Item (4) Local Government Elections

(Moderator: Commissioner Professor Kamlongela; Presenter: Commissioner Chikoko; Rapporteur: Commissioner Menyere)

- Introduction
- Current constitutional provisions, and mandate
- Possible mechanisms for local government elections
- Direct or indirect elections of senior local government officers
- Terms of office of local government officers, and timing of local government elections
- Local government boundaries
- Qualifications for voting
- Voter registration
- Qualifications for nomination
- The nomination process
- The polling process
- Information and Civic Education
- Budget for local government elections
- Review and consideration of recommendations

SESSION THREE - AM, WEDNESDAY 15 FEBRUARY

8.00 am - 10.00 am, 10.10 am - 12 noon

Item (5) Critical Events in the Electoral Process Calendar

(Moderator: Commissioner Mhone; Presenter: Commissioner Chipeta; Rapporteur: Commissioner Joyah)

- Introduction
- Demarcation of constituency boundaries
- Registration of voters
- Nomination of candidates
- Polling - hours of opening of the polls
- Polling - the method of voting
- Polling - procedure for conducting an election re-run
- Training
- Civic education

- Resource issues relating to critical events in the electoral process calendar
- Review and consideration of recommendations

LUNCH

SESSION FOUR - PM, 15 FEBRUARY 1994

2.00 - 4.00 pm, 4.10 pm - 5.30 pm

Item (6) The Role of Political Parties in the Electoral Process

(Moderator: Justice Mrs A.S.E. Msosa; Presenter: Commissioner Mhone; Rapporteur: Commissioner Mwambetania)

- Introduction
- Party registration
- Qualifications of candidates
- Security
- The campaign period
- Campaign meetings
- Unacceptable methods of campaigning
- Code of Conduct for political parties
- Code of conduct for Government officials
- Use of Government resources
- Disclosure of sources of funds
- Reasonable freedom to own and operate independent media
- The role of the Malaŵi Broadcasting Corporation
- Judicial remedies
- Review and consideration of recommendations

5.30 pm - 6.00 pm

Item (7) Closing Remarks

6.00 pm

Farewell Reception

LIST OF PARTICIPANTS

First Vice President, the Rt. Hon. Justin Malewezi

Chief Justice
Richard Banda

Mr. Rodwell Munyenembe
Speaker of Parliament

Mrs. Kapanda Phiri
Deputy Speaker of Parliament

Hon. Aleke Banda
Minister of Finance

Hon. W. Nakanga
Minister of Home Affairs

Hon. Dr. Chilumpha
Minister of Defense

Hon. P. Fatchi
Minister for Justice and Constitutional Affairs

Hon. Sam Mpasu
Minister of Education

Hon. Mrs. Eda Chitalo
Minister of Women and Children Affairs

Hon. Edward C.I. Bwanali
Leader of the House, UDF

Mr. Gwanda Chakuamba
Leader of Opposition, MCP

Mr. O.I. Mkandawire
Leader of Aford in Parliament

Clement Chilingulo
Commissioner, Electoral Commission

Mr. Mphepo
Member, Constitutional Affairs Committee

Dr. Nzunda
Member, Legal Affairs Committee

E. Chinthochi
Member, Educational Committee

General Chigawa
Army Commander

Mr. Feyani Chikosa
Inspector General of Police

Mr. W.J. Sani
Secretary for Defense

Mr. R. Kawonga
Representative of Secretary to the Treasury

Mr. S. P. Kachipande
Representative of Secretary of Education

Mr. Alfred Upindi
Secretary to the President & Cabinet

Mr. T.J. Mkwamba
Principal Secretary for District Administration
& Rural Development

Mr. Asani
Representative of Solicitor General and
Secretary for Justice

Justice Msosa
Chairperson, Electoral Commission

Professor Chris Kamlongera
Commissioner, Electoral Commission

John Chipeta
Commissioner, Electoral Commission

Charles Joyah
Commissioner, Electoral Commission

Innocent Menyere
Commissioner, Electoral Commission

Raphael Mhone
Commissioner, Electoral Commission

Mundu Mwambetania
Commissioner, Electoral Commission

Georgina Chikoko
Commissioner, Electoral Commission

Sylvia Kambalantore
Commissioner, Electoral Commission

Mr. R. Gondwe
Chief Elections Officer

Mr. D. Bandawe
Deputy to the Chief Elections Officer

Mr. Morgan Mayani
Press Officer

Mr. G.D. Mahamba
Representative of Commission, Local
Authorities

LIST OF INVITED GUESTS

His Excellency Mr. Michel Auchere
French Ambassador

His Excellency Mr. Peter R. Chaveas
American Ambassador

His Excellency Llewellyn Crewe-Brown
South African High Commissioner

Mr. Peter Christiansen
Commission Delegate
Delegation of the Commission of the European Communities

Mr. E. Bousfield
British High Commission

Mr. David Johnson
UNDP

Mrs. Cynthia Rozell
USAID/Malawi

Andrew Sisson
USAID/Malawi

LIST OF CONFERENCE STAFF

I.F.E.S STAFF

Ms. Lauric Cooper
Program Officer, Africa and Near East

Ms. Leticia A. Martinez
Project Manager, Malawi

Mr. Michael Maley
Project Consultant, Malawi

Mr. Ted Sneed
Special Assistant

Mrs. Lexa Alimbanane
Special Assistant

Ms. Linda Greenwood
Special Assistant

ELECTORAL COMMISSION STAFF

Mr. Winston Mwangomba
Assistant Chief Accountant

Mrs. Zitta Kampira
Special Assistant

Mrs. Angela Mjuweni
Special Assistant



**CONFERENCE ON THE ROLE OF THE ELECTORAL COMMISSION - NKOPOLA LODGE,
MANGOCHI, MALAWI, 14-15 FEBRUARY 1995 - EXECUTIVE SUMMARY OF PAPERS TO BE
PRESENTED**

Introduction

1. This Conference has been organised to bring together decision makers to consider critical issues concerning the way in which elections are to be administered in future in Malawi.
2. To facilitate this process the Electoral Commission has developed four papers containing recommendations for structures which could be established, policies which could be adopted, and specific steps which could be taken.

Scope of papers

3. The subject of the first paper is **The Permanence and Independence of the Electoral Commission**. One of the major recommendations made by the Electoral Commission in its 1994 Parliamentary and Presidential Elections Report is the establishment of a Permanent and Independent Secretariat to serve the Commission. The Government has indicated its acceptance in principle of this recommendation, and has requested the Commission to make specific proposals regarding the structure of such a Secretariat, identifying staffing levels and financial implications. The paper attempts to look at the reasons for the Commission's recommendation, the preferred structure of a Secretariat and the legal, financial and other implications of the proposal. It includes a detailed list of tasks to be performed by different functional areas of the proposed Secretariat.
4. The second paper deals with **Local Government Elections**. Its major arguments are that the Electoral Commission should be given the responsibility for the conduct of local government elections, and that those elections should be conducted using procedures as similar as possible to those applying at parliamentary and presidential elections.
5. The third paper is entitled **Critical Events in the Electoral Process Calendar**. It proposes a number of significant changes to certain aspects of the mechanics of the election process. Among its major arguments are that voters should be issued with a photographic voters registration certificate; that voters registers should be continuously updated; and that the method of voting should be changed so as to eliminate the need to give voters a multiplicity of ballot papers, one for each candidate.
6. The subject of the fourth paper is **The Role of Political Parties in the Election Process**. It addresses a series of essentially separate issues, all of which however relate in some way to political parties and their involvement in the election process. The matters dealt with are party registration; qualifications of candidates; security; the campaign period; campaign meetings; unacceptable methods of campaigning; a Code of Conduct for political parties; a Code of Conduct for Government officials; use of Government resources; disclosure of sources of funds; reasonable freedom to own and operate independent media; the role of the Malawi Broadcasting Corporation; and judicial remedies.

Summary of recommendations

7. The recommendations made in the various papers are as follows.

First paper - The Permanence and Independence of the Electoral Commission

- (1) That legislation be enacted to make it clear that the Electoral Commission has a continuous existence and exercises continuous functions. [Paragraph 9]
- (2) That the Secretariat be headed by a Director of Elections (DoE), appointed by the Commission, who will be the overall officer-in-charge and will report to the Commission. [Paragraph 18]
- (3) That the structures set out in Appendix I to the paper be endorsed. [Paragraph 19]
- (4) That a workload assessment to determine required staff numbers in the various branches of the Permanent Independent Secretariat be carried out as a matter of priority once issues relating to functions and mandates have been resolved. [Paragraph 19]
- (5) That the Director of Elections be empowered to appoint, in consultation with the Commission, a District Electoral Officer (DEO) and one or more deputies in respect of each district for the effective administration of the election. [Paragraph 20]
- (6) That the structures set out in Appendix II to the paper be endorsed. [Paragraph 20]
- (7) That resource issues associated with the implementation of the main recommendations of this paper be urgently addressed. [Paragraph 23]
- (8) That the establishment of the Permanent Independent Secretariat be effected by the enactment of new legislation. [Paragraph 24]
- (9) That the new legislation make specific provision for matters relating to the functioning of the Commission and the Permanent Independent Secretariat, as spelt out in paragraph 24 of the paper. [Paragraph 24]

Second paper - Local Government Elections

- (1) The Electoral Commission be given the function of organising and conducting the local government elections. [Paragraph 4]
- (2) If the preceding recommendation is accepted, section 147 of the Constitution be amended to make the Commission's role clear. [Paragraph 4]
- (3) If on the other hand it is decided that the elections should be organised and conducted by a body other than the Electoral Commission, there be a legislative clarification of the form which the supervision to be undertaken by the Electoral Commission under section 147 of the Constitution will take. [Paragraph 5]
- (4) Consideration be given to enacting legislation to confer on the Electoral Commission the function of determining local government authority boundaries. [Paragraph 7]
- (5) There be implemented for the local government elections arrangements which reflect as closely as possible those applying at parliamentary and presidential elections. [Paragraph 9]
- (6) The option of having a term of office for local government officers which differs from the five year term prescribed for Members of Parliament and for the President not be adopted. [Paragraph 16]
- (7) The process of drawing local government authority and ward boundaries commence as early as possible. [Paragraph 17]
- (8) The principle that ward boundaries should be constructed in such a way that no ward is split across two or more constituencies be enshrined in legislation as a guiding criterion in the boundary drawing process, with the proviso that the Electoral Commission should have the flexibility to achieve this objective by altering ward boundaries, or constituency boundaries, or both. [Paragraph 18]
- (9) The qualifications for voting at parliamentary and presidential elections as set out in section 77 of the Constitution apply *mutatis mutandis* at local government elections. [Paragraph 19]
- (10) The qualifications required of candidates for National Assembly elections, as set out in section 51 of the Constitution and subsection 38(1)(c) of the Parliamentary and Presidential Elections Act, 1993, form the basis for the prescribed qualifications for local government candidacy. [Paragraph 24]
- (11) If the Commission is made responsible for the conduct of local government elections, it have the authority to appoint returning officers. [Paragraph 29].
- (12) The changes to the Commission's financial arrangements, recommended in its 1994 Parliamentary and Presidential Elections Report, be reflected in any arrangements made for the financing of local government elections. [Paragraph 32]
- (13) That resource issues associated with the implementation of the main recommendations of the paper be urgently addressed. [Paragraph 34]

Third paper - Critical Events in the Electoral Process Calendar

- (1) That in future the review of constituency boundaries should start at least a year prior to a general election. [Paragraph 7]
- (2) That the scheme proposed in the paper for the continuous updating of the voters registers be adopted. [Paragraph 15]
- (3) That voters be issued with a photographic voters registration certificate. [Paragraph 17]
- (4) That the Commission be empowered to determine the last date on which candidates can withdraw from a race. [Paragraph 19]
- (5) That voting hours should be changed so that the voting starts at 6 a.m. and closes at 4 p.m., with the rest of the time being used for counting and documenting results while there is still daylight outside. [Paragraph 21]
- (6) That a new scheme of voting be adopted, embodying the elements spelt out in paragraph 25 of the paper. [Paragraph 25].
- (7) That the Act be amended to:
 - empower the Commission to order a re-run of an election where it has confirmed evidence that irregularities have occurred on such a scale that it cannot be guaranteed that the apparent result, if declared, will reflect the will of the electorate; and
 - clearly outline the procedure to be followed in conducting an election re-run. [Paragraph 27]
- (8) That a training needs assessment for Electoral Commissioners and senior Commission staff be conducted. [Paragraph 29]
- (9) That resource issues associated with the implementation of the main recommendations of the paper be urgently addressed. [Paragraph 37]

Fourth paper - The Role of Political Parties in the Election Process

- (1) That consideration be given to imposing additional requirements for the registration of political parties. [Paragraph 9]
- (2) That the language proficiency requirement in section 51 of the Constitution be replaced by a requirement that candidates possess the Malaŵi School Certificate of Education or an equivalent qualification. [Paragraph 11]
- (3) That the requirement that a candidate for a constituency be a registered voter in that constituency be replaced by a requirement that a candidate be a registered voter. [Paragraph 12]
- (4) That subsection 14(2)(b) of the Parliamentary and Presidential Elections Act, 1993 be strengthened so as to impose obligations to support the electoral process on the police force as a whole. [Paragraph 14]

- (5) That a study be undertaken with the view to developing guidelines for the policing of election campaign activity which will complement the independence that the police force has been given under the Constitution. [Paragraph 15]
- (6) That the situation which can arise where different meetings can be scheduled for the same venue at different times, but in circumstances which may nevertheless give rise to a potential for violence, be addressed in the legislation. [Paragraph 17]
- (7) That an appropriate definition of campaigning be inserted in the Parliamentary and Presidential Elections Act, 1993. [Paragraph 18]
- (8) That there be included in the Parliamentary and Presidential Elections Act, 1993 an appropriate prohibition on campaign activities which promote ethnic or religious division. [Paragraph 19]
- (9) That section 58 of the Parliamentary and Presidential Elections Act, 1993 be amended so that it applies to independent candidates as well as to parties. [Paragraph 20]
- (10) That section 61 of the Parliamentary and Presidential Elections Act, 1993 be amended to make it clear that the code of conduct is binding not only on a party but on all of its members, and that a breach of the code either by a party or its members shall constitute an offence. [Paragraph 21]
- (11) That the Parliamentary and Presidential Elections Act, 1993 provide that where such an offence is committed by a party member, the party shall also be liable for prosecution if the offence was committed with the connivance of the party. [Paragraph 21]
- (12) That the code of conduct include appropriate proscriptions of improper or undue interference in the campaign activities of other participants in the political process. [Paragraph 21]
- (13) That Party Liaison Committees be established for future elections. [Paragraph 22]
- (14) That those responsible for the administration of the civil service develop and publish widely a code of conduct for government officials. [Paragraph 24]
- (15) That appropriate guidelines on the proper use of government resources be developed, endorsed at the highest level, and widely published. [Paragraph 26]
- (16) That the introduction of a scheme for the disclosure of sources of party funds be endorsed in principle. [Paragraph 28]
- (17) That the right of political parties to establish and make use of independent electronic media organisations in future elections be stipulated in legislation. [Paragraph 30]
- (18) That the Malaŵi Broadcasting Corporation develop and publish clear policies regarding the issues spelt out in paragraph 31 of the paper. [Paragraph 31]
- (19) That the Parliamentary and Presidential Elections Act, 1993 and the Constitution be amended to resolve explicitly the issue of whether certain electoral issues can only be considered on appeal by the High Court, or whether there exists a further right of appeal to the Supreme Court of Malaŵi. [Paragraph 32]

- (20) That as part of the process of developing new legal provisions and operational procedures to effect changes to the process of voter registration recommended elsewhere, there be a full review of the complaint resolution and appeal processes which should form a part of the voter registration process. [Paragraph 33]
- (21) That the Parliamentary and Presidential Elections Act, 1993 be amended to permit election petitions to be lodged in respect of all elected offices. [Paragraph 34]

Electoral Commission

8 February 1995

CONFERENCE ON "THE ROLE OF THE ELECTORAL COMMISSION", NKOPOLA LODGE, MANGOCHI, MALAWI, 14-15 FEBRUARY, 1995 - RECORD OF PROCEEDINGS

Introduction

The Conference was organised by the Electoral Commission to bring together decision makers to consider critical issues concerning the way in which elections are to be administered in future in Malawi. Funding for the Conference and technical support were provided by the International Foundation for Electoral Systems.

Consideration of issues

To facilitate the deliberative work of the Conference the Electoral Commission developed four papers containing recommendations for structures which could be established, policies which could be adopted, and specific steps which could be taken. Those papers were provided to participants prior to the commencement of the Conference.

The subject of the first paper was **The Permanence and Independence of the Electoral Commission**. One of the major recommendations which had been made by the Electoral Commission in its 1994 Parliamentary and Presidential Elections Report was the establishment of a Permanent and Independent Secretariat to serve the Commission. The Government had indicated its acceptance in principle of this recommendation, and had requested the Commission to make specific proposals regarding the structure of such a Secretariat, identifying staffing levels and financial implications. The paper sought to look at the reasons for the Commission's recommendation, the preferred structure of a Secretariat and the legal, financial and other implications of the proposal. It included a detailed list of tasks to be performed by different functional areas of the proposed Secretariat.

The second paper dealt with **Local Government Elections**. Its major arguments were that the Electoral Commission should be given the responsibility for the conduct of local government elections, and that those elections should be conducted using procedures as similar as possible to those applying at parliamentary and presidential elections.

The subject of the third paper dealt with was **The Role of Political Parties in the Election Process**. It addressed a series of essentially separate issues, all of which however related in some way to political parties and their involvement in the election process. The matters dealt with were party registration; qualifications of candidates; security; the campaign period; campaign meetings; unacceptable methods of campaigning; a Code of Conduct for political parties; a Code of Conduct for Government officials; use of Government resources; disclosure of sources of funds; reasonable freedom to own and operate independent media; the role of the Malawi Broadcasting Corporation; and judicial remedies.

The fourth paper dealt with was entitled **Critical Events in the Electoral Process Calendar**. It proposed a number of significant changes to certain aspects of the mechanics of the election process. Among its major arguments were that voters should be issued with a photographic voters registration certificate; that voters registers should be continuously updated; and that the method of voting should be changed so as to eliminate the need to give voters a multiplicity of ballot papers, one for each candidate.

Summary of decisions - paper on Permanence and Independence of the Electoral Commission

The recommendations made in the paper, and the views reached by the Conference on them, were as follows.

Recommendation (1) - That legislation be enacted to make it clear that the Electoral Commission has a continuous existence and exercises continuous functions.

The Conference endorsed the recommendation.

Recommendation (2) - That the Secretariat be headed by a Director of Elections (DoE), appointed by the Commission, who will be the overall officer-in-charge and will report to the Commission.

The Conference endorsed the recommendation subject to the deletion of the words "appointed by the Commission", the view of the Conference being that the issue of how the Director of Elections is to be appointed can be further considered in other forums, including Parliament.

Recommendation (3) - That the structures set out in Appendix I be endorsed.

While endorsing the establishment of a Permanent Independent Secretariat, the Conference was of the view that the details of its structure should be elaborated further by the Electoral Commission.

Recommendation (4) - That a workload assessment to determine required staff numbers in the various branches of the Permanent Independent Secretariat be carried out as a matter of priority once issues relating to functions and mandates have been resolved.

The Conference endorsed the recommendation.

Recommendation (5) - That the Director of Elections be empowered to appoint, in consultation with the Commission, a District Electoral Officer (DEO) and one or more deputies in respect of each district for the effective administration of the election.

The Conference endorsed the recommendation, rephrased as follows:

"That the Electoral Commission be empowered to appoint, in consultation with the Director of Elections, a District Electoral Officer (DEO) and one or more deputies in respect of each district for the effective administration of the election."

Recommendation (6) - That the structures set out in Appendix II be endorsed.

While endorsing the establishment of a Permanent Independent Secretariat, the Conference was of the view that the details of its structure should be elaborated further by the Electoral Commission.

Recommendation (7) - That resource issues associated with the implementation of the main recommendations of this paper be urgently addressed.

The Conference endorsed the recommendation.

Recommendation (8) - That the establishment of the Permanent Independent Secretariat be effected by the enactment of new legislation.

The Conference endorsed the recommendation.

Recommendation (9) - That the new legislation make specific provision for matters relating to the functioning of the Commission and the Permanent Independent Secretariat, as spelt out in paragraph 24.

The Conference endorsed the recommendation.

Summary of decisions - paper on Local Government Elections

The recommendations made in the paper, and the views reached by the Conference on them, were as follows.

Recommendation (1) - The Electoral Commission be given the function of organising and conducting the local government elections.

The Conference endorsed the recommendation.

Recommendation (2) - If the preceding recommendation is accepted, section 147 of the Constitution be amended to make the Commission's role clear.

The Conference endorsed the recommendation.

Recommendation (3) - If on the other hand it is decided that the elections should be organised and conducted by a body other than the Electoral Commission, there be a legislative clarification of the form which the supervision to be undertaken by the Electoral Commission under section 147 of the Constitution will take.

The Conference endorsed the recommendation.

Recommendation (4) - Consideration be given to enacting legislation to confer on the Electoral Commission the function of determining local government authority boundaries.

The Conference endorsed the recommendation.

Recommendation (5) - There be implemented for the local government elections arrangements which reflect as closely as possible those applying at parliamentary and presidential elections.

The Conference endorsed the recommendation.

Recommendation (6) - The option of having a term of office for local government officers which differs from the five year term prescribed for Members of Parliament and for the President not be adopted.

The Conference was of the view that the issue of terms of office for local government officers should be decided by Parliament.

Recommendation (7) - The process of drawing local government authority and ward boundaries commence as early as possible.

The Conference endorsed the recommendation.

Recommendation (8) - The principle that ward boundaries should be constructed in such a way that no ward is split across two or more constituencies be enshrined in legislation as a guiding criterion in the boundary drawing process, with the proviso that the Electoral Commission should have the flexibility to achieve this objective by altering ward boundaries, or constituency boundaries, or both.

The Conference endorsed the recommendation, on the basis that the actions of the Commission should be guided by the law.

Recommendation (9) - The qualifications for voting at parliamentary and presidential elections as set out in section 77 of the Constitution apply *mutatis mutandis* at local government elections.

The Conference endorsed the recommendation, noting that it appeared in any case to be required under subsection 77(1) of the Constitution.

Recommendation (10) - The qualifications required of candidates for National Assembly elections, as set out in section 51 of the Constitution and subsection 38(1)(c) of the Parliamentary and Presidential Elections Act, 1993, form the basis for the prescribed qualifications for local government candidacy.

The Conference endorsed the recommendation, on the basis that the prescribed qualifications would be relaxed in a manner appropriate to local government elections, and, in particular, that the language

proficiency requirement set out in subsection 51(1)(b) of the Constitution would not apply at local government elections.

Recommendation (11) - If the Commission is made responsible for the conduct of local government elections, it have the authority to appoint returning officers.

The Conference agreed that the issue should be considered further by the Parliament.

Recommendation (12) - The changes to the Commission's financial arrangements, recommended in its 1994 Parliamentary and Presidential Elections Report, be reflected in any arrangements made for the financing of local government elections.

The Conference endorsed the recommendation, noting that the Minister for Finance had expressed his agreement in principle with it.

Recommendation (13) - That resource issues associated with the implementation of the main recommendations of the paper be urgently addressed.

The Conference endorsed the recommendation, on the basis that there would be further discussions regarding modalities between the Electoral Commission and the Ministry for Local Government and Rural Development.

Summary of decisions - paper on The Role of Political Parties in the Electoral Process

The recommendations made in the paper, and the views reached by the Conference on them, were as follows.

Recommendation (1) - That consideration be given to imposing additional requirements for the registration of political parties.

The Conference agreed that there should be no change to the current requirements for party registration.

Recommendation (2) - That the language proficiency requirement in section 51 of the Constitution be replaced by a requirement that candidates possess the Malaŵi School Certificate of Education or an equivalent qualification.

The Conference did not support the recommendation.

Recommendation (3) - That the requirement that a candidate for a constituency be a registered voter in that constituency be replaced by a requirement that a candidate be a registered voter.

The Conference endorsed the recommendation, while noting that recent litigation had suggested that the recommendation in any case reflected the current legal position..

Recommendation (4) - That subsection 14(2)(b) of the Parliamentary and Presidential Elections Act, 1993 be strengthened so as to impose obligations to support the electoral process on the police force as a whole.

The Conference agreed that the legal obligation for policing of election campaigns should be placed on the Inspector-General of Police rather than on local officers-in-charge.

Recommendation (5) - That a study be undertaken with the view to developing guidelines for the policing of election campaign activity which will complement the independence that the police force has been given under the Constitution. [Paragraph 15]

The Conference agreed that the Inspector-General of Police could determine whether guidelines of the type referred to are required.

Recommendation (6) - That the situation which can arise where different meetings can be scheduled for the same venue at different times, but in circumstances which may nevertheless give rise to a potential for violence, be addressed in the legislation.

The Conference endorsed the recommendation, on the basis that two or meetings should not occur at the same place on the same day.

Recommendation (7) - That an appropriate definition of campaigning be inserted in the Parliamentary and Presidential Elections Act, 1993.

The Conference endorsed the recommendation.

Recommendation (8) - That there be included in the Parliamentary and Presidential Elections Act, 1993 an appropriate prohibition on campaign activities which promote ethnic or religious division.

The Conference endorsed the recommendation, on the basis that the proposed prohibition should be extended to include a proscription of the promotion of regional division.

Recommendation (9) - That section 58 of the Parliamentary and Presidential Elections Act, 1993 be amended so that it applies to independent candidates as well as to parties.

The Conference endorsed the recommendation.

Recommendation (10) - That section 61 of the Parliamentary and Presidential Elections Act, 1993 be amended to make it clear that the code of conduct is binding not only on a party but on all of its members, and that a breach of the code either by a party or its members shall constitute an offence.

The Conference reached no consensus on the recommendation.

Recommendation (11) - That the Parliamentary and Presidential Elections Act, 1993 provide that where such an offence is committed by a party member, the party shall also be liable for prosecution if the offence was committed with the connivance of the party.

The Conference reached no consensus on the recommendation.

Recommendation (12) - That the code of conduct include appropriate proscriptions of improper or undue interference in the campaign activities of other participants in the political process.

The Conference endorsed the recommendation.

Recommendation (13) - That Party Liaison Committees be established for future elections.

The Conference endorsed the recommendation.

Recommendation (14) - That those responsible for the administration of the civil service develop and publish widely a code of conduct for government officials.

In the absence of a consensus on the recommendation, the Conference agreed that it should be referred to the Parliament.

Recommendation (15) - That appropriate guidelines on the proper use of government resources be developed, endorsed at the highest level, and widely published.

The Conference endorsed the recommendation, on the basis that the guidelines should be developed by a Committee of the Parliament.

Recommendation (16) - That the introduction of a scheme for the disclosure of sources of party funds be endorsed in principle.

The Conference agreed that the issue was one which ought to be decided by the Parliament.

Recommendation (17) - That the right of political parties to establish and make use of independent electronic media organisations in future elections be stipulated in legislation.

In the light of advice that the issue is one addressed in policies currently being developed, the Conference decided not to express a view on the recommendation.

Recommendation (18) - That the Malaŵi Broadcasting Corporation develop and publish clear policies regarding the issues spelt out in paragraph 31 of the paper.

In the light of advice that the issue is one addressed in policies currently being developed, the Conference decided not to express a view on the recommendation.

Recommendation (19) - That the Parliamentary and Presidential Elections Act, 1993 and the Constitution be amended to resolve explicitly the issue of whether certain electoral issues can only be considered on appeal by the High Court, or whether there exists a further right of appeal to the Supreme Court of Malaŵi.

The Conference endorsed the recommendation, on the basis that provision should exist for decisions of the High Court to be appealed to the Supreme Court.

Recommendation (20) - That as part of the process of developing new legal provisions and operational procedures to effect changes to the process of voter registration recommended elsewhere, there be a full review of the complaint resolution and appeal processes which should form a part of the voter registration process.

The Conference endorsed the recommendation.

Recommendation (21) - That the Parliamentary and Presidential Elections Act, 1993 be amended to permit election petitions to be lodged in respect of all elected offices.

The Conference endorsed the recommendation.

Summary of decisions - paper on Critical Events in the Electoral Process Calendar

The recommendations made in the paper, and the views reached by the Conference on them, were as follows.

Recommendation (1) - That in future the review of constituency boundaries should start at least a year prior to a general election.

The Conference endorsed the recommendation.

Recommendation (2) - That the scheme proposed in the paper for the continuous updating of the voters registers be adopted.

The Conference endorsed the recommendation.

Recommendation (3) - That voters be issued with a photographic voters registration certificate.

The Conference endorsed the recommendation.

Recommendation (4) - That the Commission be empowered to determine the last date on which candidates can withdraw from a race.

The Conference endorsed the recommendation.

Recommendation (5) - That voting hours should be changed so that the voting starts at 6 a.m. and closes at 4 p.m., with the rest of the time being used for counting and documenting results while there is still daylight outside.

The majority consensus of the Conference was that the hours of voting should not be changed.

Recommendation (6) - That a new scheme of voting be adopted, embodying the elements spelt out in paragraph 25 of the paper.

The Conference endorsed the recommendation.

Recommendation (7) - That the Act be amended to:

- empower the Commission to order a re-run of an election where it has confirmed evidence that irregularities have occurred on such a scale that it cannot be guaranteed that the apparent result, if declared, will reflect the will of the electorate; and
- clearly outline the procedure to be followed in conducting an election re-run.

The Conference endorsed the recommendation.

Recommendation (8) - That a training needs assessment for Electoral Commissioners and senior Commission staff be conducted.

The Conference endorsed the recommendation.

Recommendation (9) - That resource issues associated with the implementation of the main recommendations of the paper be urgently addressed.

The Conference endorsed the recommendation.

Conclusion

At the conclusion of the Conference, the Chairperson of the Electoral Commission, Justice Mrs A.S.E. Msosa, thanked all of the participants for their valuable contributions. She noted that many had been endorsed, some had been shelved, while others would be considered at the Constitutional Conference which was scheduled to take place shortly. She noted that elections played a most important part in the democratic process; that if leaders did not have popular support, the road to democracy could be difficult, and law and order could break down. She noted however that democracy is a process rather than an outcome. As an objective it is never perfectly achieved, but one must constantly strive for achievement nonetheless.

Finally, Justice Mrs Msosa paid tribute to the support which the Commission had received from IFES, specifically from the Program Manager Ms Laurie Cooper, the Project Manager Ms Leticia Martinez, and the Consultant Mr Michael Maley, all of whom were present; thanked all participants again for their

contributions; stated that it had been an honour to have had the support at the Conference of such distinguished participants; and wished all present a safe journey to their homes.

The Conference concluded at 12.20 pm on Wednesday 15 February 1995.

Appendix B

PERMANENCE AND INDEPENDENCE OF THE ELECTORAL COMMISSION

Introduction

1. One of the major recommendations made by the Electoral Commission in its 1994 Parliamentary and Presidential Elections Report is the establishment of a Permanent and Independent Secretariat to serve the Commission. The Government has indicated its acceptance in principle of this recommendation, and has requested the Commission to make specific proposals regarding the structure of such a Secretariat, identifying staffing levels and financial implications. This paper attempts to look at the reasons for the Commission's recommendation, the preferred structure of a Secretariat and the legal, financial and other implications of the proposal.

Issues

Powers and functions of the Electoral Commission

2. The extensive powers and functions of the Commission are set out in the Constitution and also the Parliamentary and Presidential Elections Act, 1993 (the Act). Subsection 76(1) of the Constitution provides that the Electoral Commission shall exercise such functions in relation to elections as are conferred on it by the Constitution or by Act of Parliament. Subsection 76(2) of the Constitution states *inter alia* that the duties and functions of the Commission include:

- "(a) to determine constituency boundaries impartially on the basis of ensuring that constituencies contain approximately equal numbers of voters eligible to register ...;
- (b) to review existing constituency boundaries at intervals of not more than five years and alter them in accordance with the principles laid down in subsection (2)(a);
- © to determine electoral petitions and complaints related to the conduct of any elections;
- (d) to ensure compliance with the provisions of this Constitution and any other Act of Parliament..."

The provisions are supplemented by section 5 of the Act, which states that:

"In addition to the broad functions conferred on the Commission by the Constitution, the Commission shall exercise general direction and supervision over the conduct of the general election in respect of which it is appointed and, without prejudice to the generality of such power, it shall have the following further functions -

- (a) subject to the Constitution, to determine the number of constituencies for the purposes of the general election in respect of which the Commission is appointed and to undertake or supervise the demarcation of boundaries of constituencies;
- (b) to organize and direct the registration of voters;
- © to devise and establish voters registers and ballot papers;

- (d) to print, distribute and take charge of ballot papers;
- (e) to approve and procure ballot boxes;
- (f) to establish and operate polling stations;
- (g) to take measures for ensuring that the election is conducted under conditions of complete freedom and fairness;
- (h) to establish security conditions necessary for the conduct of the election in accordance with this Act;
- (l) to promote through the media and other appropriate and effective means the civic education of the citizens concerning the election;
- (j) to ensure compliance with this Act and generally to adopt measures necessary to guarantee that the election is free and fair."

3. The Commission also has a role to play in local government elections. Section 147(1) of the Constitution states that:

"Local government authorities shall consist of local government officers who shall be elected by free, secret and equal suffrage under the supervision of the Electoral Commission by the registered voters in the area over which that local government authority is to have jurisdiction."

While this provision only refers to the "supervision" by the Electoral Commission of local government elections, the Commission has recommended elsewhere that it be given the function of organising and conducting local government elections.

4. Both the Commission and its individual members, when discharging their functions, are required by subsection 8(1) of the Act to act, and to strive to be seen to act, independently of:

- any public officer;
- any organ of the Government;
- any political party;
- any candidate; or
- any person whatsoever or organization whatsoever.

For the purpose only of accountability, the Commission is answerable to, and is required to report directly to, the President on the fulfillment of the functions of the Commission. Similar requirements apply to the individual members of the Commission.

Current position - legal basis of the Electoral Commission

5. The Commission is established under Section 75 of the Constitution of the Republic of Malawi, subsection (3) of which states *inter alia* that "... a person shall cease to be a member of the Electoral Commission ... at the expiration of four years from the date of his or her appointment, unless re-appointed to a new four-year term ...". The Parliamentary and Presidential Elections Act, 1993 ("the Act") also however addresses the question of Commissioner's terms. Subsection 4(1) of the Act provides *inter alia* that "The

Electoral Commission ... shall be appointed with respect to every general election ...", while section 7 of the Act provides *inter alia* that:

"A member of the Commission shall hold office from the date of his appointment to a date occurring thirty days after the publication in the Gazette of the national result of the general election but may sooner resign his office by notice in writing addressed to the President ...".

6. On the face of it there is an inconsistency between the relevant provisions of the Constitution and the Act. The Constitution clearly contemplates that the Electoral Commission will have a continuous mandate and existence, while the Act views the Commission as having functions only in relation to a specific general election.

7. In practice it would appear that the constitutional provisions are seen as paramount. Evidence for this can be found in the fact that in terms of Government Notice Number 532 of 1994 published in the Government Gazette of 11 November 1994, the members of the present Commission were appointed to serve four year terms with effect from 29 September 1994.

8. An examination of the functions of the Commission as described earlier in this paper also makes it clear that they are not limited to a specific general election. A number of them, notably those related to voter registration, constituency delimitation, civic education, the establishment of conditions conducive to free and fair elections, and local government, clearly have a long term dimension which requires work to be done outside the immediate time frame of a general election.

9. It is therefore highly desirable that the inconsistencies between the Constitution and the Act in relation to the permanent character of the Commission be removed, and the Commission recommends that legislation be enacted to make it clear that the Commission has a continuous existence and exercises continuous functions.

Current position - Election Officers (The Secretariat)

10. It is notable that while the Commission has extensive and permanent functions, it does not have any permanent operational staff. Instead, subsection 6(1) of the Act provides that the Clerk of Parliament and officers subordinate to him shall serve as election officers and shall be attached to the Commission and act in its service for the conduct of an election. Under subsection 6(2), there may be seconded to the Commission such number of other public officers as the Commission may request by writing to the Secretary to the President and Cabinet, and a public officer so seconded is obliged perform his duties in relation to the conduct of the election solely under the directions of the Commission. Subsection 6(3) provides that the Clerk of Parliament, while in the service of the Commission, is designated as Chief Elections Officer and, as such, is the Chief Executive Officer of the Commission and is required to supervise the Commission's affairs subject only to the general or special directions of the Commission.

11. During the tenure of the previous Commission, the following observations were made with regard to the Secretariat's performance:

- The Chief Elections Officer and his key staff were based at Parliament in Zomba while the Commission maintained offices in Blantyre (and, during the 1994 parliamentary and presidential elections, in Lilongwe as well). The position to date remains the same: the Commission's offices are in Blantyre, while the Chief Elections Officer commutes between Zomba or Lilongwe and Blantyre, depending on where he is at any given time. This arrangement proved unsatisfactory and very

expensive during the elections. Coordination of the Commission's activities was difficult. Large sums of money were spent on transport, duty allowances and subsistence allowances and accommodation of Secretariat staff. In addition, Commissioners became involved in administrative chores.

- The Secretariat was kept very busy because of Parliament's heavy duty schedule. As a result, the Secretariat was unable to serve the Commission with dedication and commitment as would otherwise have been the case. There was lack of attention to detail and it is the Commission's view that this might have contributed significantly to the over-expenditure on duty allowances and transport among other items.

Current position - funding and finances

12. Subsection 9(1) of the Act provides that the funds of the Commission shall consist of such sums as Parliament shall appropriate for purposes of the Commission and such other sums as may otherwise be received and accounted for by the Commission. The funds are stated by subsection 9(2) of the Act to be under the control of the Commission, and all expenditure of funds is supposed to be in accordance with its directions. The Commission may under subsection 9(3) of the Act direct to have its books of account audited at any time by a professional auditor appointed by the Commission.

13. It was observed during last year's parliamentary and presidential elections that there was within the Secretariat an overall lack of cost consciousness. This was compounded by the Ministry of Finance's silence on what, if any, the Commission's budget was. At the time the Commission was appointed, the Ministry of Finance had already prepared a budget of K38 million for the entire electoral process. This was grossly inadequate considering that Government had spent well over K52 million on the 1993 National Referendum. In contrast, the 1994 general election comprised two elections, parliamentary and presidential. The requirements in terms of activities, materials and other resources required were more than double those for the National Referendum. The Commission therefore prepared its own budget which showed that the elections would cost more than K77 million. Although this budget was submitted to the Ministry of Finance early last year, the Commission received no feedback. As a result the Commission could not effect any meaningful cost control. Indeed, despite repeated requests to the Secretariat to submit regular returns on expenditure in order to monitor the situation, none was forthcoming until a retired civil servant was hired to assist the Secretariat in accounting.

Rationale for a Permanent Independent Secretariat

14. Although Malawi has peacefully made the transition from one-party rule to multi-party democracy, this is only a first step. Now that democracy has been achieved, it must be nurtured. One of the major characteristics of multi-party democracy is the holding of regular elections, both at national and local level. Indications are that from now onwards not only general elections and local government elections but every by-election will be contested vigorously. Already there will be three by-elections in Mulanje South, Mangochi South and Mangochi South-east in February 1995. In addition, there are local government elections to be held, which will certainly require Commission involvement and which the Commission may, if a recommendation made elsewhere is accepted, be required to organise and conduct. The Commission's workload will therefore increase rather than diminish.

15. At the same time, the workload of the Clerk of Parliament and officers subordinate to him is substantial, and is likely to increase over time as Parliament's role in the overall structure of government

develops. For that reason alone, a continuation of the situation under which the Clerk of Parliament and his staff provide operational and administrative support to the Commission is untenable.

16. Since full authority for the conduct of parliamentary and presidential elections rests with the Commission, it is absolutely vital that the Commission be in a position to rely on personnel who are not only capable and experienced in the management of elections but also devoted and committed to the task. It must be appreciated that Commissioners are not full time employees. There is also a need to reinforce the independence of the Commission and this can be achieved by the establishing the Secretariat with efficient district offices responsible for organising the Commission's operations. By training this new staff and by drawing on the expertise of consultants from outside Malawi, it should be possible to create an administrative structure that is both effective and insulated from suspicion. There will still be a need for government personnel to be seconded to the Commission from time to time, especially during election periods.

17. The need for efficient financial management cannot be overemphasized. While last year's elections were one of the world's success stories, it is easy, in the euphoria, to forget that they cost a substantial amount of money, most of which came from donors. It cannot be taken for granted that donors will come to the rescue during future elections. Election funds will have to be spent carefully and accounted for to the last penny.

Administrative Structure of the Permanent Independent Secretariat

18. It is recommended that the Secretariat be headed by a Director of Elections (DoE) who will be appointed by the Commission. He or she will be the overall officer-in-charge and will report to the Commission. He or she will be assisted by support staff including a Finance Branch which will be responsible for preparing budgets, keeping proper books of account, preparing accounts for audit and generally managing and controlling the Commission's finances.

19. Appendix I sets out the proposed organisational structure of the Secretariat, and details the functions which would be performed by each of its areas. The Commission recommends that the structures set out in Appendix I be endorsed. It should be emphasised that they closely reflect the functions which have already been conferred upon the Commission. There are a number of points which should be noted in respect of the proposed structures.

- A position of Deputy Director of Elections is proposed primarily to ensure that there will be no serious disruption of administration in the event that the Director of Elections becomes ill at a critical period in the election process, or is for some other reason incapable of performing necessary tasks. The Deputy Director of Elections would provide general support to the Director of Elections on a day-to-day basis. It should be noted that under the current arrangements the Clerk of Parliament as Chief Elections Officer has received significant support from his Deputy.
- There are some functional activities which are not reflected in the proposed structure, simply because they involve a number of different areas of the Secretariat to such an extent that it would be preferable to address them by the creation of special project teams. A good example of such a functional activity is boundary delimitation. That process is a sporadic rather than continuous one, and it would not be necessary to have a Boundary Delimitation Branch full-time; but when delimitation is taking place, it would be supported by a team drawn from representatives of the Office Manager's Branch, the Voter Registration Branch, and the Computer Systems Branch.

- The basic structure of the Secretariat would remain in place at election time and at other times of peak activity, but it would be necessary for additional support staff to be taken on at those times to reflect the increased workload.
- No attempt has been made at this stage to assess the actual numbers of staff required in the various branches. Such an assessment would depend critically on decisions yet to be made on the extent of the Commission's future functions and mandate. It is **recommended** that once those issues have been resolved, a workload assessment be carried out as a matter of priority.

20. It is further **recommended** that the DoE be empowered to appoint, in consultation with the Commission, a District Electoral Officer (DEO) and one or more deputies in respect of each district for the effective administration of the election. All electoral officers and staff appointed by the DEO will be under the control and carry out the instructions of the DoE. The powers, duties and functions of each member of the Secretariat Main Office and the District Secretariat will be spelt out clearly in their job descriptions to be prepared by the Commission. Appendix II sets out the proposed organisational structure of the District Secretariat, and details the functions which it would perform. It is **recommended** that the structure set out in Appendix II be endorsed.

21. The Commission will develop Conditions of Service for the Secretariat which will include benefits such as a pension scheme, medical aid and allowances payable.

Finances and resources of a Permanent Independent Secretariat

22. The DoE will oversee the preparation of the administrative budget for the day to day running of the Secretariat as well as the budget for any forthcoming elections. Both budgets will be submitted to the Government for funding, and the disbursement of funds to the Commission will have to be agreed in advance with the Government.

23. Issues which will be significant in the critical review of the funding of the establishment of the Secretariat will include the following. The Commission **recommends** that these matters be urgently addressed.

- A study of all budget needs of the Main Office of the Secretariat, addressing questions of staffing, salaries, benefits, training and needs for systems for payroll and administration, will be required.
- A study will also be needed of the required budgets for the District Secretariats, and for the conduct of all other aspects of the electoral process.
- Office accommodation requirements and effective layouts will have to be assessed.
- An office procedures manual will have to be established, dealing among other things with the recruitment and training of all staff.
- There will have to be a proper expert study of the Commission's technological needs in the light of its operational plans. This study will have to address implementation issues, and specifically training.
- In the light of that study, offices will have to be supplied with appropriate office automation equipment, communications systems, specific election-related technology and programs, computers

and software, and general office equipment, in order to streamline and add efficiency to the running of all offices at every level.

- A study should also be undertaken of office procedures, filing, document management and archiving. Preparations should be made for the development of a legal and resources library or archive facility. This study should also address practical issues associated with the day-to-day running of an office.
- Security issues, particularly the development of a secure system for the storage of election equipment and documents, will have to be dealt with. The need for permanent warehousing in order to prevent repurchasing of expensive materials such as torches, polling booths etc. will have to be examined.
- There should be a study of in-house printing and procurement policies. Production of documents, manuals, forms etc. internally can, with the proper technology, prove to be cost effective in many cases. The purchase of vehicles and other heavy or costly materials should also be investigated to determine the cost effectiveness of such a course of action. Should in-house production of items not be prudent, procedures for selecting vendors, equipment etc. should be examined and updated on a continuous basis to ensure the most cost effective outcomes.

Legal Framework for a Permanent Independent Secretariat

24. The establishment of the Secretariat will require either the Act to be amended or new legislation to be enacted altogether. Subject to the advice of the Attorney-General, the latter option would appear to be better, since it will consolidate all provisions relating to the Commission in one Act, and that approach is therefore **recommended**. In addition to the current provisions of the Constitution, it is **recommended** that the new Act make provision as follows.

- The Commission should be established as a non-profit making corporation with perpetual succession and a common seal, capable of suing and being sued, of acquiring, holding, letting or otherwise disposing of land and of doing and performing such acts and things as bodies corporate may by law do and perform.
- Specific provisions in the Act should deal with:
 - the appointment of Commissioners;
 - the duties of Commissioners;
 - a Code of Conduct for Commissioners;
 - removal of Commissioners from office;
 - resignation of Commissioners;
 - the powers of Commissioners; and
 - the powers of the Chairperson.
- The Commission should be empowered from time to time to make standing orders providing for:

- the proper conduct of its business and meetings and the manner of convening such meetings;
 - the method of entering into contracts and the execution thereof;
 - the signing of cheques, bills of exchange and other similar instruments;
 - the constitution and procedure of any committee of the Commission; and
 - the management and administration of the Commission generally.
- The Commission should be empowered to appoint the DoE and such other staff of the Secretariat as may be necessary for the due and proper carrying out of its purposes or the appropriate exercise of its power; and to determine their conditions of service.
 - The Commission's finances should be specified as consisting of:
 - sums as may be appropriated by Parliament;
 - donations, grants and bequests as may be accepted by the Commission;
 - fees or other charges as may be paid to the Commission by parliamentary and presidential candidates; and
 - such other moneys as the Commission may lawfully obtain.

Conclusion

25. It is apparent from the foregoing that the Commission has a significant role to play in the current political dispensation, and its duties and functions are quite substantial. It is also generally agreed that the Commission must act and be seen to act impartially, independent of influence from any quarter. This is no easy task, especially considering that Commissioners are not employed full time by the Commission. There is therefore a clear need for a strong Permanent Independent Secretariat to assist the Commission in fulfilling its role and discharging its duties and functions as stated above.

Functions to be performed by the various areas of the Permanent Independent Secretariat

1. The functions to be performed by the various areas of the Permanent Independent Secretariat are set out below.

Office Manager's Branch

2. The Office Manager's Branch will perform the following functions.
- Provide day-to-day support to the Commission in the performance of its functions.

- Provide secretariat services and administrative support to the Commissioners. Prepare agendas for and minutes of Commission meetings.
- Manage, and ensure the effective functioning of, the main office of the Commission.
- Establish and maintain the Commission's document registry.
- Arrange travel, transport and telecommunications facilities for the Commissioners as necessary.
- In cooperation with the Computer Systems Branch, provide essential data processing facilities to the Commissioners.

Information and Civic Education Branch

3. The Information and Civic Education Branch will perform the following functions.
- Provide information on electoral matters to the public, the media, Members of Parliament, and other government authorities.
 - Prepare reports and other materials for publication.
 - Coordinate the dissemination of information throughout the Commission's structures, in particular to the Secretariats in the various Districts.
 - Devise and implement public awareness activities.
 - Design and coordinate advertising campaigns.
 - Develop, produce and distribute electoral education curriculum and promotional materials for universities, schools and colleges.
 - In close liaison with the Finance Branch, develop and update procedures for the preparation of accurate budget estimates for information and education programmes.
 - Oversee the activities of District Secretariats in the area of information and civic education, and provide them with assistance as necessary.

Electoral Policy and Planning Branch

4. The Electoral Policy and Planning Branch will consist of three sections: the Electoral Planning and Logistics Section; the Voter Registration Section; and the Training Section.

Electoral Planning and Logistics Section

5. The Electoral Planning and Logistics Section will perform the following functions.
- Develop policies, systems and procedures relating to the conduct of national and local government elections.

- Coordinate specific development projects requiring the involvement of other branches of the Secretariat.
- Develop contract specifications for materials to be purchased centrally. Establish appropriate stock control, warehousing and inventory systems.
- In close liaison with the Finance Branch, develop and update procedures for the preparation of accurate budget estimates for elections.
- Develop performance indicators for election processes, evaluating systems and coordinating their implementation on a national basis to achieve both consistency and efficient utilisation of resources.
- Develop and review forms prescribed or required by law, and other forms required for the effective conduct of elections. Maintain a register of approved forms.
- Oversee the activities of District Secretariats in the area of election planning and organisation, and provide them with assistance as necessary.

Voter Registration Section

6. The Voter Registration Section will perform the following functions.
- Develop policies, systems and procedures relating to the registration of voters.
 - Take overall functional responsibility for the integrity and accuracy of voter registers.
 - Coordinate specific development projects requiring the involvement of other branches of the Secretariat.
 - Develop contract specifications for materials to be purchased centrally. Establish appropriate stock control, warehousing and inventory systems.
 - In close liaison with the Finance Branch, develop and update procedures for the preparation of accurate budget estimates for voter registration.
 - Develop performance indicators for voter registration, evaluating systems and coordinating their implementation on a national basis to achieve both consistency and efficient utilisation of resources.
 - Develop and review forms prescribed or required by law, and other forms required for the effective conduct of voter registration. Maintain a register of approved forms.
 - In close liaison with the Finance Branch, develop and update procedures for the preparation of accurate budget estimates for all aspects of voter registration.
 - Oversee the activities of District Secretariats in the area of voter registration, and provide them with assistance as necessary.

Training Section

7. The Training Section will perform the following functions.

- Develop training policies, procedures and guidelines. Research, develop and implement effective training strategies.
- Develop materials for the administrative and operational training of permanent and casual staff employed by the Electoral Commission.
- Train staff of the Electoral Commission in effective training techniques.
- Monitor and report on the effectiveness of the Commission's training strategies.
- In close liaison with the Finance Branch, develop and update procedures for the preparation of accurate budget estimates for training.
- Oversee the activities of District Secretariats in the area of training, and provide them with assistance as necessary.

Legal and Investigations Branch

8. The Legal and Investigations Branch will perform the following functions.

- Review existing electoral legislation, recommending amendments and preparing detailed instructions for the drafting of new legislation.
- Advise the Commission and the Secretariat on legal aspects of statutory interpretation, prosecutions, election petitions and other forms of litigation.
- Maintain a register of legal advice obtained by the Commission, and of relevant case reports.
- Administer provisions of the law relating to party finance and the disclosure of party income.
- Investigate complaints made to the Commission regarding alleged breaches of the law, and report to the Commission on the outcome of such investigations. Maintain comprehensive records of investigations.
- Oversee investigations conducted by District Secretariats, and provide them with assistance as necessary.
- Provide support to the Commission in relation to the registration of political parties.

Computer Systems Branch

9. The Computer Systems Branch will perform the following functions.

- Advise the Commission on appropriate computerisation strategies.

- Develop computerised systems required by the Commission for the effective performance of its functions.
- Test, support and maintain systems.
- Develop, maintain and support software standards.
- Maintain system documentation.
- Develop contract specifications for hardware and software to be purchased.
- Ensure consistency and compatibility of hardware and software in use throughout the Secretariat.
- Provide advice on computer systems to the Commission and to other Branches of the Secretariat. Provide a "help desk" service.

Personnel Branch

10. The Personnel Branch will perform the following functions.
- Develop policy relating to the employment of the staff of the Secretariat.
 - Determine conditions of service, including those relating to pension schemes, medical aid and allowances payable.
 - Deal with any industrial relations issues affecting the Commission.
 - Manage all aspects of recruitment, redeployment, retirements and dismissals.
 - Manage the Secretariat's payroll system on a day-to-day basis. Provide a "help desk" service.

Finance Branch

11. The Finance Branch will perform the following functions.
- Manage the Commission's budget and accounts. Jointly with operational areas, develop guidelines for the development of accurate cost estimates.
 - Establish appropriate guidelines for the implementation of proper financial and purchasing practices, and monitor compliance with them.
 - Arrange for the prompt payment of accounts submitted to the Commission.
 - Liaise with the Commission's auditors.
 - Oversee the financial performance of District Secretariats, and provide them with assistance as necessary.

Functions to be performed by the District Secretariat

1. The District Secretariat will be responsible for the implementation in the District of all aspects of the Electoral Commission's mandate. The duties of the District Electoral Officer (DEO) will include the following.

- Take overall responsibility for the work of the staff of the Electoral Commission in the District. Supervise the staff of the District Secretariat. Supervise the work of constituency returning officers. Provide detailed advice to constituency returning officers on all aspects of the electoral process. Train staff.
- Perform any statutory functions conferred on the DEO by the Parliamentary and Presidential Elections Act, 1993 or any other law enacted in relation to elections.
- Manage on a day-to-day basis the technical aspects of the voter registration, polling and vote counting in the Province. Compile and monitor statistics relating to those processes. Manage resources used in those processes.
- Coordinate the civic education and training work of the Electoral Commission in the District.
- Monitor compliance within the District with the terms of the Parliamentary and Presidential Elections Act, 1993 and any other law enacted in relation to elections. Investigate and report upon complaints relating to the election process.
- Liaise with local representatives of the political parties on all aspects of the electoral process.
- In accordance with guidelines, provide timely budget estimates in relation to all activities to be undertaken by the Electoral Commission in the District.
- Efficiently manage resources allocated to the District Secretariat, and capital assets thereof.
- Report to the Director of Elections on all aspects of the operations of the Electoral Commission in the District.
- Perform other duties as directed by the Director of Elections.

2. The staff of the District Secretariat will assist the DEO in his performance of these duties.

Summary of recommendations

26. The recommendation made earlier in this paper are as follows.

- (1) That legislation be enacted to make it clear that the Electoral Commission has a continuous existence and exercises continuous functions. [Paragraph 9]
- (2) That the Secretariat be headed by a Director of Elections (DoE), appointed by the Commission, who will be the overall officer-in-charge and will report to the Commission. [Paragraph 18]
- (3) That the structures set out in Appendix I be endorsed. [Paragraph 19]

- (4) That a workload assessment to determine required staff numbers in the various branches of the Permanent Independent Secretariat be carried out as a matter of priority once issues relating to functions and mandates have been resolved. [Paragraph 19]
- (5) That the Director of Elections be empowered to appoint, in consultation with the Commission, a District Electoral Officer (DEO) and one or more deputies in respect of each district for the effective administration of the election. [Paragraph 20]
- (6) That the structures set out in Appendix II be endorsed. [Paragraph 20]
- (7) That resource issues associated with the implementation of the main recommendations of this paper be urgently addressed. [Paragraph 23]
- (8) That the establishment of the Permanent Independent Secretariat be effected by the enactment of new legislation. [Paragraph 24]
- (9) That the new legislation make specific provision for matters relating to the functioning of the Commission and the Permanent Independent Secretariat, as spelt out in paragraph 24. [Paragraph 24]

Electoral Commission

8 February 1995



Appendix C

LOCAL GOVERNMENT ELECTIONS

Introduction

1. The purpose of this paper is to raise specific issues, and make certain recommendations, in relation to the role to be played by the Electoral Commission in the area of local government elections.

Issues

Current constitutional provisions, and mandate

2. Local government elections are currently referred to in sections 146, 147 and 148 of the Constitution of the Republic of Malawi. The Electoral Commission wishes to draw attention to two issues which arise from the way in which those provisions are currently worded.

3. The first issue relates to subsection 147(1) of the Constitution, which states that:

"Local government authorities shall consist of local government officers who shall be elected by free, secret and equal suffrage under the supervision of the Electoral Commission by the registered voters in the area over which that local government authority is to have jurisdiction."

It is notable that this provision only refers to the "supervision" of local government elections by the Electoral Commission. It may be that the current wording was meant to imply that the elections would actually be organised and conducted by the Electoral Commission, but as it stands it also leaves open the possibility that the elections could be conducted by another body, with the Electoral Commission's role being limited to supervising that other body. The modalities of such supervision are unclear at present. The Commission has raised this issue in discussions with the Ministry of Local Government and Rural Development, and has sought a formal clarification of the role which that Ministry envisages the Commission will play in local government elections. While there has been a preliminary opinion expressed by a representative of that Ministry that it had been envisaged that the Electoral Commission would organise and conduct the local government elections, formal confirmation has not yet been received.

4. The Commission believes that it is the body best placed to undertake the organisation and conduct of the local government elections, and recommends that it be given that function, for the following reasons.

- The principle that elections are best conducted by a neutral, independent and respected body is as relevant in the case of local government elections as in the case of parliamentary and presidential elections.

- The Electoral Commission is the repository of the most comprehensive experience of all aspects of the organisation and conduct of multi-party elections in Malawi.

5. If the recommendation made in the preceding paragraph is accepted, it is further recommended that section 147 of the Constitution be amended to make the Commission's role clear. If on the other hand it is decided that the elections should be organised and conducted by a body other than the Electoral Commission, it is recommended that there be a legislative clarification of the form which the supervision to be undertaken by the Electoral Commission under section 147 of the Constitution will take.

6. The second issue arising from the current constitutional provisions regarding local government relates to the drawing of boundaries. It appears that in the immediate future there will be three types of boundaries which will have to be drawn and redrawn from time to time.

- Parliamentary constituency boundaries are under subsection 76(2) of the Constitution required to be determined by the Electoral Commission.
- Local government ward boundaries are also addressed in the Constitution: subsection 146(4) requires the Parliament to ensure that "the boundaries of each ward shall be designated by the Electoral Commission in accordance with section 148".
- At the moment, however, the Constitution makes different provision for the drawing of the boundaries for local government authorities: subsection 148(1) states that:

"Subject to the recommendations of the Electoral Commission, and in accordance with the principles laid down in this Constitution and any other law relating to national elections, there shall be drawn boundaries for local government authorities."

Section 148 of the Constitution does not specify the body responsible for drawing boundaries for local government authorities. The possibility that the Electoral Commission should be that body is neither stated nor excluded.

7. It is not clear what benefits might be achieved by having local government authority boundaries determined by one body while local government ward boundaries and parliamentary constituency boundaries are determined by another. On the other hand, an arrangement under which the same body determined all three types of boundaries would be administratively streamlined and cost effective (since common procedures and systems could be used for all three redrawing processes), and would enable anomalies to be solved by the flexible adjustment of constituency and/or local government authority and/or ward boundaries. It is therefore recommended that consideration be given to enacting legislation to confer on the Electoral Commission the function of determining local government authority boundaries. Such legislation should specify the criteria which are to guide the determination process in sufficient detail to ensure that due weight will be given to factors which relate specifically to the effective operation of local government. Under such an arrangement it is envisaged that the Electoral Commission would work closely with the Ministry of Local Government and Rural Development in the drawing of local government authority boundaries, so as to ensure that legitimate factors relating to the appropriate location of boundaries are properly taken into account.

Possible mechanisms for local government elections

8. It is clear that the mechanisms by which local government officials were elected under the previous dispensation in Malawi do not provide an adequate basis for the election of such officials under the new

multi-party regime. In addressing the issue of what new mechanisms might be adopted for the conduct of local government elections, the Electoral Commission has been guided by the following principles.

- The mechanisms must ensure that local government officers are elected by free, secret and equal suffrage as required by subsection 147(1) of the Constitution.
- The mechanisms should be simple for voters to understand and participate in.
- The mechanisms should be efficient and cost-effective.

9. In applying these principles the Electoral Commission has come to the conclusion, and **recommends**, that there should be implemented for the local government elections arrangements which reflect as closely as possible those applying at parliamentary and presidential elections. The following arguments can be advanced in support of such an approach.

- The procedures adopted for national elections have already been implemented successfully in Malaŵi; have been well accepted by political parties, candidates, voters, and national and international observers; and therefore constitute a proven model for the choice of representatives in a free and fair manner. In this regard it is important to note that the changes to national election procedures proposed elsewhere by the Electoral Commission, which should also be implemented at the local government level, will not affect in any way their fundamental democratic character.
- The adoption of consistent election procedures for all levels of government will ensure that voters will not face the confusing prospect of having to go through different steps to cast their votes at national and local elections.
- The crucial task of voter education will thereby be made significantly simpler.
- Training of polling officials will similarly be simplified, and the polling staff who work at parliamentary and presidential elections will be able to form the core of those required for local government elections.
- Essentially the same forms, and many of the same materials, will be able to be used for national and local elections. Costs will thereby be minimised.

10. A related issue, discussed in greater detail at paragraphs 12 to 16 below, is that of whether it would be feasible or desirable for local government, parliamentary and presidential elections to be held on the same day, as is the case for example in the United States of America. It need simply be noted at this stage that if local government election arrangements differed from those used for the parliamentary and presidential elections, the conduct of simultaneous elections for all three types of office would clearly be impossible.

Direct or indirect elections of senior local government officers

11. A significant issue which will have to be addressed is that of whether senior local government officials such as mayors should be elected directly by the people in a manner analogous to the election of the President, or whether they should rather be elected by councillors elected by the people. The Electoral Commission notes that arguments can be advanced in favour of each approach. Some would assert that direct election will make senior local government officials responsible to the voters in a way which would not be achieved by indirect election. Others would argue that the need for senior local government officials to work cooperatively with the councillors in their areas is paramount, and will best be guaranteed by arrangements under which the senior officials owe their positions to those councillors. The issue is a complex one, deserving of careful examination by Parliament, on which the Electoral Commission does not wish to make any recommendation.

Terms of office of local government officers, and timing of local government elections

12. There are a number of options for the timing of local government elections. These include:

- having a term of office for local government officers which differs from the five year term prescribed for Members of Parliament and for the President;
- having a five year term of office for local government officers, with local government elections being held at the same time as parliamentary and presidential elections; and
- having a five year term of office for local government officers, but with local government elections being held at a different time to parliamentary and presidential elections.

13. Under the first option, local government elections would from time to time come close to coinciding: if local government had a four year term, a local government election would fall within 6 months of a parliamentary and presidential election at least once in any 20 year period. The view of the Electoral Commission is that a close but not exact coincidence of election dates is something best avoided. When two separate elections are run within a comparatively short period of time, voter confusion and apathy frequently lead to a much lower turnout in the second election than in the first. Furthermore, it is administratively difficult to mount two electoral operations within a relatively short period of time.

14. Under the second option, there would be significant cost savings compared with the other options, since the major costs associated with obtaining polling staff, premises etc. would only have to be incurred once, rather than twice. It might even be possible under this option to use the same ballot box for parliamentary, presidential and local government elections, since the ballot papers for the different elections could readily be distinguished, for example by colour coding. Against this, the task of educating voters about the task of voting at local government, parliamentary and presidential elections would be significantly more complicated. Furthermore, it might be thought that voters will cast better informed votes if campaigns on local and national issues are clearly separated.

15. Under the third option, it would be possible to keep local government and parliamentary elections permanently separate, for example by providing that the local government elections would always fall a fixed length of time after (or, looked at from a different perspective, before) the parliamentary elections.

16. The Electoral Commission **recommends** that the first option not be adopted, but is of the view that the choice between the second and third options involves value judgements which it would be proper for the Parliament to make.

Local government boundaries

17. In the period immediately before the parliamentary and presidential elections the Electoral Commission reviewed constituency boundaries by analysing the state and statistical data on population available, and by visiting district centres and discussing the matter with traditional leaders, political parties and other interested groups in the area. A similar approach should be adopted to the drawing of local government authority and ward boundaries. Since there will be many more local government authorities and wards than parliamentary constituencies, it is **recommended** that this process commence as early as possible.

18. Both the maintenance of voter registers, and the task of ensuring that each voter knows for which authority, ward and constituency he or she is registered, are made much simpler if ward boundaries are constructed in such a way that no ward is split across two or more constituencies. It is **recommended** that this principle be enshrined in legislation as a guiding criterion in the boundary drawing process, with the proviso that the Electoral Commission should have the flexibility to achieve this objective by altering ward boundaries, or constituency boundaries, or both.

Qualifications for voting

19. The qualifications for voting at parliamentary and presidential elections are set out in section 77 of the Constitution, and it is **recommended** that the provisions of that section should apply *mutatis mutandis* at local government elections. Such an approach will give effect to the principle advocated at paragraph 9 above that consistent procedures should be implemented for local government, parliamentary and presidential elections, and will significantly simplify the task of maintaining local government voter registers.

20. In the past the local government franchise based on residence in a particular local government authority area has been supplemented by a right to vote given to property owners in the area. For example, under subsection 25(1)(b) of the Local Government (Urban Areas) Act, a person was entitled to register as a voter for a local authority election if he or she was the owner or occupier of property situated within the area of the local authority which had been assessed for rating at a value of not less than K1,500, with certain provisos applying in relation to jointly owned property and property owned by partnerships or companies. Under certain circumstances this provision enabled a person to be registered on two or more voters' rolls, or to be registered more than once on a given voters' roll.

21. The Electoral Commission is aware that provision of this kind for a "ratepayers" franchise can be found in other countries. At the same time, the Commission notes that there would seem to be a question of whether such provision would be consistent with the requirement of "equal suffrage" contained in section 147 of the Constitution. While the Commission does not recommend that provision be made for a separate right to vote for "ratepayers", it is of the view that the question is ultimately one of local government policy, which

should be decided by the Parliament. The introduction of a separate "ratepayers" franchise would complicate the maintenance of voter registers, but would certainly not make such maintenance impossible.

Voter registration

22. The Electoral Commission has recommended in its 1994 Parliamentary and Presidential Elections Report that voter registers should be computerised. In the local government context this would involve among other things having a computer system which would store information identifying the local government authority and ward for which each voter was registered. A significant amount of work has already been done on the development of a system which will similarly identify each voter's parliamentary constituency, and that system would form the basis for that required for the maintenance of local government registers.

23. In its Report, the Electoral Commission also recommended the introduction of a national voter identification system. Such a system, which would enable each voter to be provided with an identification card, would be able to be used at local government as well as at parliamentary and presidential elections. By using a common identification system for all types of elections, cost-effectiveness will be enhanced.

Qualifications for nomination

24. The qualifications required of candidates for National Assembly elections are set out in section 51 of the Constitution and subsection 38(1)(c) of the Parliamentary and Presidential Elections Act, 1993. The Commission recommends that those provisions form the basis for the prescribed qualifications for local government candidacy. There are, however, a number of issues arising from them which require careful consideration in the local government context.

25. The first relates to the place of residence of candidates. While subsection 38(1)(c) of the Parliamentary and Presidential Elections Act, 1993 requires a candidate to be a registered voter for the constituency he or she is contesting, there is no requirement that the candidate be resident in the constituency: he or she may have qualified for registration there by reason of having been born there, and may in fact be resident far away. This may not necessarily be a problem for National Assembly elections: the role of a Member of the National Assembly is to deal with national issues, rather than those unique to a particular area. This is not however the case with local government, and it can be argued that it would be impossible for a local government representative properly to fulfil his or her duties unless he or she was resident in the local government area. If this argument is accepted, there may be a case for limiting local government candidacy to residents of the local government area. The issue is not however one on which the Commission wishes to make a recommendation: it involves value judgements relating to local government policy which ought to be made by the Parliament.

26. The second issue relates to language skills, and specifically to the requirement set out in subsection 51(1)(b) of the Constitution that a candidate be able "to speak and to read the English language well enough to take an active part in the proceedings of Parliament". The Commission has elsewhere addressed the practical difficulties associated with giving effect to this requirement, and has recommended that it be replaced by a requirement that candidates for the National Assembly at the minimum possess the Malawi School Certificate of Education or meet an equivalent educational standard. Whether such a requirement ought to be implemented at the local government level is however a rather more difficult question, the answer to which depends very much on how the role of local government officers is perceived. On the one hand it might be argued that the quality of local government will be enhanced if local government officers are well

educated. Another view of the matter, however, is that in local government it is particularly important that representatives have the ability to relate to those they are representing, and that this might be limited if only a minority of the population are qualified to be local government officers. A further concern in this regard is that a disproportionately small number of women and older people would be qualified to be representatives. Taking all of these issues into account the Commission does not wish to make any recommendation on whether a language skill or other educational qualification should apply at local government elections, but believes that the issue is an important one which ought to be addressed by the Parliament.

The nomination process

27. Section 45 of the Parliamentary and Presidential Elections Act, 1993, requires that every nomination be accompanied by a monetary deposit, the size of which is fixed by the Electoral Commission. Any candidate who polls five per cent or more of the total valid votes in the constituency has his or her deposit refunded. The purpose of having a deposit is to reinforce in the minds of the candidates the seriousness of the electoral process, and to discourage those whose nominations may be of a frivolous nature. At the same time, it is not desirable to have a deposit so high as to exclude from the process persons with a serious desire to make a contribution to their community by serving as representatives, and this would seem to be a particularly important point to be taken into account when considering possible arrangements for local government elections.

28. The Electoral Commission has given consideration to a number of different possible arrangements for candidates' deposits for local government elections. These include setting a higher deposit for elections in urban areas than in rural areas, and making the deposit non-refundable in all cases, with the proceeds being used to support local government authorities; but other options abound. The Commission does not wish to make a recommendation on the matter at this stage, but would welcome the views of interested persons.

The polling process

29. In the past, the Town Clerks and other civil servants involved with local government have served as returning officers at local government elections. The Commission recommends that, if it is made responsible for the conduct of local government elections, it have the authority to appoint returning officers. The Commission would wish to retain the option of appointing civil servants as returning officers, but, as is noted elsewhere, would wish to see them seconded full-time to the Commission for the period of the election so that there would be no question of their being answerable in the performance of their functions to any person or body but the Commission. This is a particularly important consideration in the light of the fact that subsection 147(3) of the Constitution provides that administrative personnel of local government authorities shall be subordinate to local government officers.

30. The duties of election officials at local government elections would be essentially the same as at parliamentary and presidential elections, and would include the following.

- Make preparations for the polls by providing everything which is required for the purpose of the poll: polling stations and booths, ballot boxes, ballot papers, stamping instruments, copies of registers of voters, ink, etc.
- Appoint a presiding officer to preside at each polling station, and such other officers as may be necessary for taking the poll.

- Provide presiding officers, poll clerks and clerks for the counting of votes.
- Allot the voters to polling stations in a manner most convenient.
- Declare secrecy before the opening of the poll.
- At the close of the poll, receive from each presiding officer ballot boxes and other materials used at the poll.
- Prepare a report on polling results and conduct of polls.
- Ensure there is security at the polling stations.

Information and Civic Education

31. Voting for local government in the past was based on a one-party system of government. This time, voting will be based on a multi-party government system. It will therefore be necessary to educate the electorate on the voting process through various means, including the MBC, the print media, political party public meetings, film shows, and the Information Service.

Budget for local government elections

32. Subsection 9(1) of the Parliamentary and Presidential Elections Act, 1993 provides that funds of the Commission shall consist of such sums as Parliament shall appropriate for the purposes of the Commission and such other sums as may otherwise be received and accounted for by the Commission. The arrangement so prescribed is a flexible one which could readily accommodate an expansion of the Commission's functions to include the conduct of local government elections. In its 1994 Parliamentary and Presidential Elections Report, the Commission has proposed a number of changes to its financial arrangements, and it is recommended that these be reflected in any arrangements made for the financing of local government elections.

33. The overall cost of local government elections will only be able to be estimated with precision when the exact parameters within which those elections will be conducted are known. However, if the local government electoral arrangements closely reflect those for parliamentary and presidential elections, as recommended at paragraph 9 above, then the cost of the local government elections should be of the same order of magnitude as that of the parliamentary and presidential elections. In the budgeting process close attention will have to be paid to areas of difference. An example of such an area would be ballot paper printing, where typesetting will be a more onerous task for the local government elections than for the parliamentary elections, purely because there will be so many more wards needing separate ballot papers than there are constituencies.

34. Issues which will be significant in the critical review of the resourcing of local government elections include the following. The Commission recommends that these matters be urgently addressed.

- The Head Office of the Permanent Independent Secretariat will have to be established with all necessary equipment and technology to enable it to function effectively.
- Administrative procedures will have to be developed for implementation at both the national and local levels.

- Training manuals related to the job descriptions of all staff, as well as manuals for electoral processes such as civic education, polling etc. will have to be developed.
- All necessary systems and technology for the development of local government boundaries will have to be put in place.
- Systems for voter registration will have to be finalised, and all necessary equipment and premises will have to be obtained.
- Mechanisms for ensuring ready access to information needed by the Commission's officers, and by participants in the electoral process, will also have to be designed.

35. If the Commission's recommendation that it be given the responsibility of conducting the local government elections is accepted, it will prepare an operational plan and an associated budget as a matter of priority. Separate budgetary planning will be required in relation to local government by-elections.

Summary of recommendations

36. The recommendation made earlier in this paper are as follows.

- (1) The Electoral Commission be given the function of organising and conducting the local government elections. [Paragraph 4]
- (2) If the preceding recommendation is accepted, section 147 of the Constitution be amended to make the Commission's role clear. [Paragraph 5]
- (3) If on the other hand it is decided that the elections should be organised and conducted by a body other than the Electoral Commission, there be a legislative clarification of the form which the supervision to be undertaken by the Electoral Commission under section 147 of the Constitution will take. [Paragraph 5]
- (4) Consideration be given to enacting legislation to confer on the Electoral Commission the function of determining local government authority boundaries. [Paragraph 7]
- (5) There be implemented for the local government elections arrangements which reflect as closely as possible those applying at parliamentary and presidential elections. [Paragraph 9]
- (6) The option of having a term of office for local government officers which differs from the five year term prescribed for Members of Parliament and for the President not be adopted. [Paragraph 16]
- (7) The process of drawing local government authority and ward boundaries commence as early as possible. [Paragraph 17]
- (8) The principle that ward boundaries should be constructed in such a way that no ward is split across two or more constituencies be enshrined in legislation as a guiding criterion in the boundary drawing process, with the proviso that the Electoral Commission should have the flexibility to achieve this objective by altering ward boundaries, or constituency boundaries, or both. [Paragraph 18]

- (9) The qualifications for voting at parliamentary and presidential elections as set out in section 77 of the Constitution apply *mutatis mutandis* at local government elections. [Paragraph 19]
- (10) The qualifications required of candidates for National Assembly elections, as set out in section 51 of the Constitution and subsection 38(1)(c) of the Parliamentary and Presidential Elections Act, 1993, form the basis for the prescribed qualifications for local government candidacy. [Paragraph 24]
- (11) If the Commission is made responsible for the conduct of local government elections, it have the authority to appoint returning officers. [Paragraph 29].
- (12) The changes to the Commission's financial arrangements, recommended in its 1994 Parliamentary and Presidential Elections Report, be reflected in any arrangements made for the financing of local government elections. [Paragraph 32]
- (13) That resource issues associated with the implementation of the main recommendations of this paper be urgently addressed. [Paragraph 34]

Electoral Commission

8 February 1995

Appendix D

THE ROLE OF POLITICAL PARTIES IN THE ELECTORAL PROCESS

Introduction

1. The purpose of this paper is to address a series of essentially separate issues, all of which however relate in some way to political parties and their involvement in the election process. The matters dealt with are:

- Party registration;
- Qualifications of candidates;
- Security;
- The campaign period;
- Campaign meetings;
- Unacceptable methods of campaigning;
- Code of Conduct for political parties;
- Code of conduct for Government officials;
- Use of Government resources;
- Disclosure of sources of funds;
- Reasonable freedom to own and operate independent media;
- The role of the Malaŵi Broadcasting Corporation; and
- Judicial remedies.

Issues

Party registration

2. In many democratic countries laws are promulgated that facilitate the formation of political parties to allow for orderly organisation of the country's affairs. For countries in transition this may entail the review of existing legislation and the recognition of political parties as legal entities. Many countries require political parties to go through a formal registration process before they or their candidates can appear on the ballot paper. There are a number of possible approaches to party registration.

3. The minimalist approach imposes very few preconditions for registration, encourages a multiplicity of parties, and lays the foundation for the maximum representation of varied interest groups. A party might be required only to indicate its party name, symbol, and manifesto, and provide lists of its office bearers. The theory behind the minimalist approach is that the public and not the state should decide through elections which parties deserve due recognition, and that it is unnecessary or undemocratic to impose unduly onerous conditions for registration. In Malawi this model has been adopted and it specifies the following requirements for registration under the Political Parties (Registration and Regulation) Act.

- Any 100 people can register as a political party.
- The application form must be signed by the office bearers of the party and must be accompanied by
 - two copies of the constitution rules and manifesto of the party;
 - particulars of the registered office of the party;
 - list of names and addresses of the leader and often office bearers of the party;
 - list of names addresses of not less than 100 registered members of the party; and
 - such further information or document as the Registrar may require.
- The persons forming the party must be citizens of Malawi who have attained the age of 18.

4. A party may be refused registration if its application does not conform with requirements of the law; if its proposed name closely resembles that of another registered party or is provocative, indecent or contrary to some other law; or if the purpose or object of the party is unlawful. The Act defines "unlawful purposes or objects" as:

- seeking directly or indirectly, to further ethnic, racial or religious discrimination or discrimination on grounds of colour;
- advocating political change in the Republic through violence or unlawful means; and
- seeking to secede any part of the Republic from the Republic.

For the purpose of determining whether the political party has unlawful purposes or objects the Registrar may consider any document issued or statement made by or on behalf of the party or by an office bearer of the party.

5. The Act does not define the circumstances in which a party name might be deemed to be provocative or to offend against public decency. While some guidance on the question of decency might be able to be gained from the common law of obscenity, the degree to which the common law could define what is "provocative" is more doubtful. Should the question arise in practice, it may be necessary in future to define these terms explicitly in the Act.

6. Where the specified requirements have been satisfied the Registrar will issue a certificate of registration to be displayed at the party's registered office, and the Registrar must cause a notice to be published in the gazette notifying the public of the registration. This minimalist approach to registration

enabled a number of parties to register for the 1994 General Elections even though they had support only in one or two districts in a particular region.

7. The **maximalist** model or stringent approach makes party registration more difficult by requiring parties to meet various tests designed to determine their seriousness and viability, such as:

- providing names of a large number of party members; and/or
- demonstrating that the party has national support, for example by showing that the party has members in different regions of the country; and/or
- demonstrating a specified level of support at previous elections; and/or
- paying substantial registration fees; and/or
- presenting a detailed party manifesto.

8. The advocates of the maximalist approach argue that the minimalist approach can produce a proliferation of political parties, which may tend to confuse the electorate and make it very difficult to regulate the equitable distribution of media access time and public finance for campaign purposes. Romania, for example, has 250 parties. The maximalist approach on the other hand is said to enhance national unity, as it builds parties across regional and ethnic or tribal barriers, thereby making the development of a meaningful electoral process more viable.

9. The Electoral Commission is of the view that there is merit in some of the arguments put by advocates of the maximalist approach, and **recommends** that consideration be given to imposing additional requirements for the registration of political parties.

Qualifications of candidates

10. Under section 51 of the Constitution a person qualifies for candidacy if he or she:

- is a citizen of Malawi;
- is aged 21 or over;
- is able to speak and to read the English language well enough to take an active part in the proceedings of the Parliament; and
- is registered as a voter in a constituency.

11. The requirement that candidates be proficient in the English language gave rise to a number of problems at last year's elections. In the absence of any specific provision in the law governing how candidates' claims to be proficient in English are to be assessed in the absence of documentary evidence, the Commission in some cases administered its own tests. The Commission regards the need for such a procedure as inherently unsatisfactory, particularly in the light of the tight schedules which operate at election times. It therefore **recommends** that the language proficiency requirement in section 51 of the Constitution be replaced by a requirement that candidates possess the Malawi School Certificate of Education or an equivalent qualification.

12. Subsection 38(1)(c) of the Parliamentary and Presidential Elections Act, 1993 ("the Act") provides that a candidate for a constituency must be a registered voter for that constituency. This is a more restrictive rule than that which applies in many other democracies. The Commission notes that it may well prevent a highly qualified and effective candidate from nominating in a particular constituency and serving the nation in the Parliament. To the extent that it might be argued that the requirement ensures that representatives will be closely attuned to the interests of constituents, the Commission notes first that the role of the Parliament is to deal with national issues rather than purely parochial ones; and secondly that the voters will be able to make their own assessments of the qualities of a candidate, and indeed to vote him or her out of office if he or she has provided inadequate representation. The Commission therefore recommends that the requirement that a candidate for a constituency be a registered voter in that constituency be replaced by a requirement that a candidate be a registered voter.

Security

13. One of the duties of the Electoral Commission is the provision of such security conditions as are required to ensure freedom of the conduct of the elections. In doing this it is of course heavily dependent on support from the police. At present subsection 14(2)(b) of the Act provides that:

"It shall be the special duty of the officers-in-charge of police, in their respective areas of operation, to take all necessary measures for the maintenance of law and order and stability necessary for the conduct of an election and to protect and uphold the rights of all persons under this Act."

14. This subsection does not place obligations on the institution of the police force as constituted by the Constitution, but only on individual police officers who take their commands from the Inspector General. The Commission recommends that this provision be strengthened so as to impose obligations to support the electoral process on the police force as a whole.

15. There is a clear expectation under Malawi's new dispensation that the police should give equal protection to candidates and their supporters and should forestall any form of intimidation from any quarter to ensure public order and safe electioneering. At present that law does not spell out these duties in detail. The Commission recommends that a study be undertaken with the view to developing guidelines for the policing of election campaign activity which will complement the independence that the police force has been given under the Constitution.

The campaign period

16. Section 57 of the Act currently provides that:

"For purposes of this Act the period of campaigning in public by every political party under this Part shall be a period of two months closing forty-eight hours before the opening of the poll on the first polling day:

Provided that in the case of the first general election such period shall be of any duration closing forty eight hours before the opening of the poll on the first polling day."

Significant difficulties arose during last year's election in giving practical effect to this provision, particularly in relation to the media. Newspapers containing campaign material were distributed after the campaign had formally closed, and the former head of state also made a broadcast to the nation after the campaign time had

expired. One option to resolve the problem would be to eliminate the ban on campaigning in the 48 hour period preceding the opening of the polls. Another would be to provide enforcement procedures if the 48 hour limit is maintained, with carefully phrased restrictions for both the print and electronic media.

Campaign meetings

17. While under subsection 56(1) of the Act, the right of every political party to campaign is recognised, public activity is restricted by subsection 56(2) unless the party has notified the District Commissioner (D.C.) in writing, with a copy of such notification to the officer-in-charge of Police. To avoid political bickering subsection 56(4) specifically provides "where two or more political parties have given notification under subsection (2) to hold a public meeting at the same venue the political party whose notification was first received by the District Commissioner shall be the party entitled to hold the public meeting at such venue." This subsection however does not deal with the practical situation where different meetings can be scheduled for the same venue at different times, but in circumstances which may nevertheless give rise to a potential for violence. It is recommended that this situation be addressed in the legislation.

18. A possible unintended consequence of subsection 56(2) is that as it stands even a single person standing on the roadside distributing leaflets would be deemed to be campaigning, and would be liable to be punished unless the specified notice had been given to the District Commissioner. This could be solved by including in the Act an appropriate definition of campaigning, and the Commission recommends that such a provision be inserted.

Unacceptable methods of campaigning

19. Most electoral laws limit to some extent the freedoms associated with electoral campaigning in order to ensure that the campaign will be peaceful and orderly. For example, under section 61 of the Act no one can use language which is inflammatory, defamatory, or insulting. There is however no prohibition in the Act on campaign activities which promote ethnic and religious division, though the issue is addressed in the electoral Code of Conduct. This is somewhat anomalous, since, as is noted at paragraph 4 above, the Law regards the promotion of discrimination on ethnic, racial, or religious grounds, or on the grounds of colour, as an "unlawful purpose or object" which can prevent a political party from being registered. The Commission recommends that this issue be addressed by including in the Act an appropriate prohibition on campaign activities which promote ethnic or religious division.

20. Under the Act every political party is guaranteed equality of treatment. Section 58 states that:

"Every public officer and public entity or authority shall give and be seen to give equal treatment to all political parties to enable each political party to conduct its campaign freely."

This provision does not however give the same guarantee to independent candidates, even though their right to engage in political activity is recognised by section 40 of the Constitution. The Commission recommends that section 58 of the Act be amended so that it applies to independent candidates as well as to parties.

Code of Conduct for political parties

21. Subsection 61(2) of the Act provides that:

"The Commission may prescribe a code of conduct to be complied with by every political party in conducting its campaign in an election."

At the last General Elections a code of conduct was promulgated by the Commission after consultations with all political parties. Under the Act as it stands, however, a breach of the code of conduct does not constitute an offence against the Act, and is therefore not punishable. This limits the force of the code of conduct. The Commission recommends that section 61 be amended to make it clear that the code of conduct is binding not only on a party but on all of its members, and that a breach of the code either by a party or its members shall constitute an offence. It is furthermore recommended that where an offence is committed by a party member, the party shall also be liable for prosecution if the offence was committed with the connivance of the party. Finally, it is recommended that the code of conduct include appropriate proscriptions of improper or undue interference in the campaign activities of other participants in the political process.

22. In a number of countries, the establishment of Party Liaison Committees (however titled) has proven to be a valuable mechanism for conflict and dispute resolution, particularly when implemented in conjunction with a code of conduct. Such committees can be set up at the national, regional, district or constituency levels, as required. The Commission sees value in such Committees and recommends that they be established for future elections.

Code of conduct for Government officials

23. A question which often arises is that of how the role of civil servants as servants of the government is to be reconciled on the one hand with their right as individuals to engage in political activity, and on the other hand with their duty to engage in administration without political partiality. At the 1992 Kenyan election for example the whole district administration was perceived as favouring the ruling KANU Party, and the Electoral Commission had to replicate itself to the district level in an attempt to gain voter confidence. In the October elections in Mozambique most government employees and provincial governors (who were appointees of the Frelimo Party) campaigned for Frelimo even during their working time, and used government resources to do so. In Tanzania all district administrators are political appointees of the CCM Party and not professional administrators, and the same problems faced in Mozambique may easily surface there. Of late in Zimbabwe the ruling party has complained that the loyalty of civil servants seems questionable, in that some of them are campaigning for the opposition parties.

24. These examples suggest that there is a clear benefit in formulating a code of conduct for civil servants which clearly defines first the demarcation line between disloyalty to a ruling government and an individual's right to choose a political party of his choice, and secondly the limits which exist on the use of one's position to support a political point of view. The Commission recommends that those responsible for the administration of the civil service develop and publish widely such a code of conduct.

Use of Government resources

25. A closely related issue is that of the use of government resources for political ends. It has been the practice in most developing countries - but more so in Africa - for incumbent political parties to take advantage of access to government resources in order to enhance their electoral chances. Examples of ways in which this can be done include:

- the use of a candidate's government position to capture media and public attention for campaign purposes (as in the 1992 elections in Kenya);

- the use of government monies, telephones, faxes, vehicles and other equipment for campaign purposes, sometimes under the cover of the performance of "official" functions;
- the use of government programs such as drought relief food, public works such as roads and hospitals, job creation or social benefit programs to gain electoral advantage; and
- the use of government employees as campaigners while on government time and payroll, as was done in Cambodia in 1992-93.

26. It is now a well accepted principle that government resources should be recognized as belonging to the citizenry, and thus should not be used for the electoral advantage of one political party or candidate. To ensure that this principle is properly implemented, the Commission recommends that appropriate guidelines on the proper use of resources be developed, endorsed at the highest level, and widely published.

Disclosure of sources of funds

27. The Commission has noted that many democratic countries impose requirements on political parties to disclose the sources of their funds. Such a process ensures that voters will be able to make a proper assessment of party actions in the light of a full knowledge of any possible obligations which parties might feel to financial supporters, whether individuals or corporations, and tends thereby to discourage partial decision-making.

28. The Commission is of the view that Malawi would benefit from the introduction of such a disclosure scheme, and recommends that its adoption be endorsed in principle. The Commission has also noted, however, that the modalities of introducing a workable disclosure scheme are complex, and still require much detailed study.

Reasonable freedom to own and operate independent media

29. An important element of freedom to campaign is the freedom to set up independent media organisations, running radio, television or newspapers. In developing countries there has often been a struggle between the ruling party's desire to continue having a strong hold on public owned media and pressures to allow the operation of private media (particularly radio and television) over which it may have no control. Incumbent governments have often interpreted this struggle as one between sovereignty and loss of government control over the country. Whatever its merits or demerits freedom of ownership of media is one fundamental right that complements public ownership of such institutions as well.

30. Under the Constitution each political party is allowed to set-up its own mechanisms for disseminating its viewpoint through the print media. As the government intends to privatise the airwaves it would be worthwhile to stipulate in legislation the right of political parties to establish and make use of independent electronic media organisations in future elections; and the Commission recommends that this be done.

The role of the Malawi Broadcasting Corporation

31. Given its place in Malawian society, the national broadcaster has a particularly important role to play in the election process. The Commission therefore recommends that the MBC develop and publish clear policies regarding the following issues.

- **Balanced Coverage** - Under section 63(i) of the Act every political party has a right to have the substance of its campaign propaganda reported on radio news broadcasts of the MBC, with the proviso that the MBC must determine professionally the content of the news, and maintain neutrality in the manner of reporting campaign propaganda, and in the making of its own commentaries.
- **Small parties** - Such parties cannot expect parity of coverage with main-stream parties, but the broadcaster must take account of the fact that a small party may enjoy substantial support in a particular constituency.
- **Local elections** - Coverage of local government elections must achieve a semblance of balance over the period of the campaign. This may be achieved by summarising the policies of each political party or candidates in different regional structures or districts, with particular emphasis on the distinction between rural and urban settings.
- **Free Time, and equal or proportional time** - Subsection 63(3) of the Act provides that:

"The Commission may, by arrangements with the Malaŵi Broadcasting Corporation, allocate time on the radio during which political parties may be allowed to speak in campaigning for an election and the Commission shall allocate equal time to every political party."

The requirement that time be allocated equally only however applies when the Commission makes "arrangements" with the Malaŵi Broadcasting Corporation. Where there have been no such arrangements made, the allocation of time is a matter for the Malaŵi Broadcasting Corporation. A policy should be defined on whether in such cases political parties irrespective of size, following and regional biases will have the same air-time allocated to them; or whether some sort of "proportional time" scheme will be adopted. There are a number of possible schemes based on the notion of proportional time. Sometimes the composition of parliament can be used to determine allocations: time will be allocated on the basis of proportion of party representation in parliament. This was adopted as a starting point by the Namibian Broadcasting Corporation pending a review of policies of other public broadcasting authorities around the world. The same rule may be modified so as to allow an allocation of time only to those parties which scored 10% of the national vote, that being the cutoff point which the Constitution uses for political campaign financing.

- **Responsibilities of the public broadcaster** - The Malaŵi Broadcasting Corporation should make a critical assessment of the responsibilities which it as public broadcaster has to the election process.

Judicial remedies

32. At the moment there is some lack of clarity in the Act on the question of whether certain electoral issues can only be considered on appeal by the High Court, or whether there exists a further right of appeal to the Supreme Court of Malaŵi. At the moment it would appear that the intention is to limit appeals to the High Court only, but the matter is not free from doubt, and the Commission therefore **recommends** that the Act and the Constitution be amended to resolve the issue explicitly.

33. A further issue arises in relation to the voter registration process. While the Act clearly sets out the steps involved in registration, and rights of political parties, it fails to provide for a proper and clear mechanism for complaint resolution on registration. The Commission has elsewhere recommended substantial changes to the mechanisms for voter registration, including the computerisation and

decentralisation of voter registers. It further recommends that as part of the process of developing new legal provisions and operational procedures to effect those changes, there be a full review of the complaint resolution and appeal processes which should form a part of the voter registration process.

34. Yet another issue relates to election petitions. Under the Act the only election petition catered for is one which contests the election to the Office of the President. This is anomalous in the light of the fact that the legitimacy with which other public officials such as Vice Presidents and Members of the National Assembly can perform their functions is also critically affected by undue returns or elections. The Commission therefore recommends that the Act be amended to permit election petitions to be lodged in respect of all elected offices.

35. A final issue to be considered in the context of judicial remedies is the use of deprivation of the right to vote, or the barring of an offender from standing for elected office, as a penalty for electoral offences. At the moment there are certain legal provisions which impose such penalties for life. While such an approach reflects the seriousness of the offences in question, it could be argued that the penalties imposed are too severe, since a person may still be being penalised many years after having shown due repentance for the offence; and that a five-year period of disqualification might well suffice. This issue is not one on which the Commission wishes to make a recommendation, but it believes that the question is a significant one which ought to be considered by the Parliament.

Summary of recommendations

36. The recommendations made earlier in this paper are as follows.

- (1) That consideration be given to imposing additional requirements for the registration of political parties. [Paragraph 9]
- (2) That the language proficiency requirement in section 51 of the Constitution be replaced by a requirement that candidates possess the Malawi School Certificate of Education or an equivalent qualification. [Paragraph 11]
- (3) That the requirement that a candidate for a constituency be a registered voter in that constituency be replaced by a requirement that a candidate be a registered voter. [Paragraph 12]
- (4) That subsection 14(2)(b) of the Act be strengthened so as to impose obligations to support the electoral process on the police force as a whole. [Paragraph 14]
- (5) That a study be undertaken with the view to developing guidelines for the policing of election campaign activity which will complement the independence that the police force has been given under the Constitution. [Paragraph 15]
- (6) That the situation which can arise where different meetings can be scheduled for the same venue at different times, but in circumstances which may nevertheless give rise to a potential for violence, be addressed in the legislation. [Paragraph 17]
- (7) That an appropriate definition of campaigning be inserted in the Act. [Paragraph 18]
- (8) That there be included in the Act an appropriate prohibition on campaign activities which promote ethnic or religious division. [Paragraph 19]

- (9) That section 58 of the Act be amended so that it applies to independent candidates as well as to parties. [Paragraph 20]
- (10) That section 61 of the Act be amended to make it clear that the code of conduct is binding not only on a party but on all of its members, and that a breach of the code either by a party or its members shall constitute an offence. [Paragraph 21]
- (11) That the Act provide that where such an offence is committed by a party member, the party shall also be liable for prosecution if the offence was committed with the connivance of the party. [Paragraph 21]
- (12) That the code of conduct include appropriate proscriptions of improper or undue interference in the campaign activities of other participants in the political process. [Paragraph 21]
- (13) That Party Liaison Committees be established for future elections. [Paragraph 22]
- (14) That those responsible for the administration of the civil service develop and publish widely a code of conduct for government officials. [Paragraph 24]
- (15) That appropriate guidelines on the proper use of government resources be developed, endorsed at the highest level, and widely published. [Paragraph 26]
- (16) That the introduction of a scheme for the disclosure of sources of party funds be endorsed in principle. [Paragraph 28]
- (17) That the right of political parties to establish and make use of independent electronic media organisations in future elections be stipulated in legislation. [Paragraph 30]
- (18) That the Malaŵi Broadcasting Corporation develop and publish clear policies regarding the issues spelt out in paragraph 31. [Paragraph 31]
- (19) That the Act and the Constitution be amended to resolve explicitly the issue of whether certain electoral issues can only be considered on appeal by the High Court, or whether there exists a further right of appeal to the Supreme Court of Malaŵi. [Paragraph 32]
- (20) That as part of the process of developing new legal provisions and operational procedures to effect changes to the process of voter registration recommended elsewhere, there be a full review of the complaint resolution and appeal processes which should form a part of the voter registration process. [Paragraph 33]
- (21) That the Act be amended to permit election petitions to be lodged in respect of all elected offices. [Paragraph 34]

Electoral Commission

8 February 1995

Appendix E

CRITICAL EVENTS IN THE ELECTORAL PROCESS CALENDAR

Introduction

1. According to the current provisions of the Parliamentary and Presidential Elections Act, 1993 ("the Act"), the electoral process starts with the demarcation of constituency boundaries and ends with the declaration of results after polling. From a practical point of view the major tasks which have to be performed to ensure the proper conduct of an election can be seen as falling into the following phases:

- the demarcation of constituency boundaries;
- registration of voters;
- nomination of candidates; and
- polling.

In addition, there are certain major activities which arise in a number of different phases of the process, such as:

- security for elections;
- training; and
- civic education (including voter education).

2. The purpose of this paper is to highlight some of the constraints the Commission faced in undertaking its duties in relation to some of the aforementioned phases of the electoral process; to identify certain areas of the law which require review; and to propose solutions to problems encountered.

Issues

Demarcation of constituency boundaries

3. Subsection 5(a) of the Act gives the Electoral Commission power to determine the number of constituencies. Subsection 76(2) of the Constitution further empowers the Commission to demarcate their boundaries; lists the factors to be taken into account in the demarcation process; and specifies that a review of constituency boundaries must be undertaken at intervals of not more than five years.

4. Subsection 146(4) of the Constitution also provides that local government ward boundaries are to be designated by the Electoral Commission; and the Commission has recommended elsewhere that it also be given responsibility under section 148 of the Constitution for drawing boundaries for local government authorities.

5. It is virtually self-evident that the review of constituency or ward boundaries must constitute the first item in the election calendar for both general elections and local government elections. During previous elections the Electoral Commission reviewed the constituency boundaries by analysing the available state and statistical data on population, and by visiting District Centres and discussing the matter with traditional leaders, political parties and other interested groups in the area. In adopting such an approach, the Commission depends heavily on support from the National Statistical Office in respect of the gathering and analysis of data, and from the Surveys Department in respect of the mechanics of demarcating boundaries.

6. It is quite clear that within the one month allocated for the review of constituency boundaries prior to last year's election, the Commission was unable to study critically all the matters at hand so as to enable it to demarcate the boundaries properly.

7. The Commission therefore recommends that in future the review of constituency boundaries should start at least a year prior to a general election. A demarcation period of at least this length is required among other things to:

- ensure that proper consultation with interested parties and public input is facilitated;
- enable the most up-to-date statistics on population concentrations in different areas to be obtained and utilised;
- give the Surveys Department sufficient time to prepare precise descriptions of boundaries, and where necessary appropriate maps; and
- enable political parties, candidates, and most importantly voters to be informed about the locations of new constituency boundaries.

8. The Commission has recommended elsewhere, in respect of the local government elections planned for later this year, that the ward demarcation process commence as soon as possible.

Registration of voters

9. Registration of voters is dealt with in Part III of the Act. In many ways Part III operated quite effectively at last year's election, since it provided an adequate basis for the process of preparing completely new registers which the Commission had decided was necessary. The need for accurate registers of voters did not however end with last year's elections: a number of casual vacancies have arisen in the National Assembly, giving rise to a need for by-elections, and this trend seems likely to continue. Furthermore, registers will be required for the local government elections planned for later this year, and registers may thereafter be needed for local government by-elections. Any set of registers of voters prepared on a one-off basis starts to become inaccurate almost from the date of publication, as voters die, change constituencies or leave the country, and as people who are not on the registers turn 18 and become qualified to vote.

10. The Act makes some provision for the updating of the voters registers, but it is inadequate. Section 22 provides inter alia that:

"... the Commission ... may adopt existing voters registers which shall, as necessary be updated by registration officers with new registrations.";

while subsection 25(1) provides that:

"In updating a voters register the registration officer shall do so by -

- (a) adding the names and other prescribed particulars of the voters resulting from new registrations;
- (b) drawing a line, without affecting legibility, over the particulars of the persons who are known to be deceased or who have lost eligibility to vote and indicating in the margin the reasons therefor."

11. While these provisions might appear to provide a sufficient basis for the updating of voters registers, they are in fact problematical. It is not clear how the person responsible for updating the register will come to know that a particular person is deceased, or has lost eligibility to vote in a particular constituency. In particular, there is no clear mechanism for ensuring that a person who moves house and registers in a new constituency will be deleted from the register for the constituency which he or she has left. In the absence of such a mechanism, it appears likely that unless a whole new register is constructed from scratch for every election or by-election, voters registers will as time goes by become more and more inaccurate: and it needs to be understood that the presence on voters registers of the names of persons who are deceased or no longer resident in a constituency is notorious for opening the way to impersonation of voters and other forms of electoral fraud.

12. The cost of developing a new register from scratch for every general and by-election would however be considerable. For this reason, the Commission has given consideration to the development of a scheme for the continuous and effective updating of voters registers. The critical elements of such a scheme would be as follows.

- All existing voters registers would be computerised. The computerised registers would be able to be used for general elections, local government elections, and by-elections.
- A mechanism would be set up enabling voters to advise the Commission whenever their registration particulars had to be changed: for example, when they changed address, or, in the case of women, changed their names on marrying. This mechanism would be widely publicised.
- Computer programmes would be developed so that when a person moved to a new constituency, his or her former registration would automatically be deleted.
- The Electoral Commission would obtain relevant information, such as records of deceased persons, on a continuous basis from other government departments, and would use it to update the register.

13. Under such a scheme, the registers would be able to be maintained consistently in a relative accurate condition. This would not only ensure their integrity when used at elections, but would also enable accurate statistics on voter populations to be used in the boundary demarcation process, as contemplated by subsection 76(2)(a) of the Constitution.

14. The scheme proposed is by no means an unusual one. It has been used in a number of Commonwealth countries such as Australia and New Zealand, has been implemented in the Canadian

province of British Columbia, and is being considered for implementation at national elections in Canada. Its substance is also in operation in those many countries, particularly in Europe, which maintain voters registers as part of a broader national population registration scheme.

15. The Commission is concerned that if a scheme of this type is not adopted, it may prove very difficult in the long run to maintain a level of accuracy in voters registers consistent with the proper conduct of free and fair elections. For this reason, the Commission **recommends** that the proposed scheme for continuous updating of the voters registers be adopted.

16. A further defect in the current system of voter registration is that the voters registration certificate issued at the time of registration does not carry a photograph of the voter, and therefore can readily be used by a person other than the person to whom it was issued. While subsection 86(1) of the Act requires the polling station officers to "verify ... [the voter's] identity by examining the voters register", such an examination of the register does not in fact provide any worthwhile verification of the voter's identity. It might be possible for political party monitors or other observers to detect impersonation, but that is by no means guaranteed, since many people have difficulty even in identifying other people from their own locality. Even in rural areas, the problem of identifying voters is increasing with time as development projects are encouraging migration of people from place to place.

17. The situation would be significantly improved if voters were issued with a photographic voters registration certificate, and the Commission **recommends** that this procedure be implemented. Such a certificate could also carry a unique identification number for each registered voter, which would enable the use of such a certificate to be integrated with the proposed scheme for the continuous updating of voters registers.

Nomination of candidates

18. At present subsections 46(1) and 52(1) of the Act provide that a candidate can withdraw his nomination at any time before the polling day. This provision has led to problems in practice: in some cases, candidates have withdrawn only one day before polling day. Although subsections 46(4) and 52(2) require the Commission to publicise any withdrawal, in practice it is impossible to do so effectively when a candidate withdraws late in the process. Inadequately publicised late withdrawals can lead, and have led, voters to cast ballots for persons who are no longer candidates, thereby wasting their votes.

19. The Commission **recommends** that it be empowered to determine the last date on which candidates can withdraw from the race. This date must come before the commencement of the printing of ballot papers. After that date, a candidate would not be able to withdraw, but would be able to resign if elected. In such a case, a by-election would be held.

Polling - hours of opening of the polls

20. At present section 80 of the Act provides, among other things, that voting shall begin at 6 a.m. and close at 6 p.m. Under the present polling arrangements, which see voters allocated to polling stations so that approximately 1,000 people will vote at each station, it has become clear that if voting starts at the scheduled time of 6 a.m., voting stations are free normally by 1 p.m. The polling officers are normally idle during the afternoon. This is a waste of sunshine. With an earlier closing time, counting and documenting of results could take place in daylight, and results could be transported to the district headquarters early in the evening, when it would be much safer to travel with the sensitive information generated from polling stations.

21. The Commission therefore recommends that voting hours should be changed so that the voting starts at 6 a.m. and closes at 4 p.m., with the rest of the time being used for counting and documenting results while there is still daylight outside.

Polling - the method of voting

22. Section 76(1) of the Act provides for the production of ballot papers and accompanying envelopes as follows:

"(1) The Commission shall arrange for the printing in sufficient quantities of distinctly identifiable ballot papers for -

- (a) each candidate for election as member of Parliament;
and
- (b) each candidate for election as President,

on which shall be printed clearly and legibly his name or an abbreviation thereof and his election symbol or the election symbol of his political party and such other particulars as the Commission may determine to identify him distinctly from other candidates.

(2) In addition to the ballot papers as required under subsection (1), the Commission shall procure specially printed envelopes for use by voters in casting their votes in accordance with the requirements of Section 85."

It proved necessary at last year's election to manufacture a strip of ballots consisting of one ballot paper for each of the candidates, separated by perforations.

23. These ballot paper printing arrangements form the basis for the method of voting set out in section 86 of the Act, the provisions of which are substantially reflected section 87, which makes special provision for voting by blind and disabled persons. Among other things, section 86 provides as follows.

- The voter receives one ballot paper for each candidate and one specially printed envelope.
- The voter, while in the booth, is expected to enclose the ballot paper for the candidate of his or her choice in the envelope he or she received with the ballot papers, and discard the remaining ballot papers - those for the other candidates - in a container positioned in the voting booth. Thereafter, the voter must leave the voting booth and cast the envelope in ballot box placed in full view of the polling station and other officials present.
- A vote is null and void if the envelope is found to contain two or more ballot paper, or to contain a ballot paper torn into two or more parts.

24. This balloting scheme has a number of major deficiencies.

- It is expensive, since it requires the use of envelopes, and discard boxes which have to be placed in each voting booth.

- The type of ballot paper used is difficult for the mostly illiterate voters in Malawi to handle. To a significant extent, it assumes that voters will be familiar with the process of detaching postage stamps. It must be emphasised that the illiterate voter has to deal with selecting and detaching the ballot paper of his or her choice, and enclosing it in an envelope. Difficulties with the process can lead to voter confusion and frustration. Such confusion could lead voters to leave all their materials in the discard box, or spoil their ballots in other ways.
- Voters may leave unused ballots in the voting booth rather than placing them in the discard box, and this may influence the choices made by other voters - for example, if they notice that many of the ballot papers of a particular candidate have been discarded.
- It opens the way for a corrupt polling official to give voters incomplete sets of ballot papers, or to hand ballot papers to voters in such a way as to give deliberate emphasis to a candidate favoured by the polling official.
- It lends itself to fraud and particularly bribery, since voters can be encouraged to take their unused ballots from the voting booth so as to prove to their "sponsors" that they voted for the sponsor's favoured candidate (or at least, did not vote for any other candidate).
- Its undue complications lengthen the voting process unnecessarily. In particular, the need for voters to queue twice, once to vote in the National Assembly election and once to vote in the presidential election, is time consuming and tiring for voters, particularly those who are old or ill, or are looking after young children.

25. The Commission therefore **recommends** that a new scheme of voting be adopted, embodying the following elements.

- The voter will present his or her voters registration certificate to the polling staff, who will examine it, determine whether the voter is entitled to vote. If the voter is entitled to vote, his or her certificate and entry on the voters register will be marked.
- The voter's finger will be checked to determine whether he or she has voted, and if the voter has not previously voted, his or her finger will be inked.
- The voter will be given two ballot papers of different colours, one for the presidential election and the other for the parliamentary election. The ballot paper for the presidential election will have printed on it the names and symbols of all the candidates contesting the presidency, while the ballot paper for the parliamentary election will have printed on it the names and symbols of all the candidates standing in the constituency. A box will be printed against the name and symbol of each candidate.
- Before he or she proceeds to the voting booth, the voter will be told to mark his or her vote by placing a thumb print or an "X" in the box printed against his or her chosen candidate.
- The voter will enter the voting booth and mark each ballot paper.
- The voter will emerge from the booth and cast each ballot paper in the ballot box. (While separate ballot boxes could be used for the presidential and parliamentary elections, the colour coding of the ballot papers would also allow one large box to be used for both elections, rather than two smaller boxes.)

- The voter will leave the polling station.

26. The major elements of this voting scheme have been implemented successfully in many countries, including developing ones. Schemes along these lines were used at the 1989 Namibian elections, the 1994 elections in South Africa and Mozambique, and the 1993 Cambodian elections. The evidence from each case confirms that the scheme is simple, efficient, and easily understood by the voters. It avoids the problems set in paragraph 24 above. It should be noted that the Commission has recommended elsewhere that the procedures adopted for local government elections should reflect as closely as possible those used at parliamentary and presidential elections. The scheme described in paragraph 25 would operate with great effectiveness in the local government election context.

Polling - procedure for conducting an election re-run

27. At the moment the Act provides for the conduct of general elections as well as by-elections but makes no specific provision for an election re-run. Section 36 of the Act provides for the initiation of general elections and by-elections, and section 44 makes further provision with respect to by-elections, covering the case of a vacancy which exists in the National Assembly otherwise than by reason of a dissolution of Parliament. The responsibility for declaring such vacancy lies with the Speaker of the National Assembly. It should be noted that this provision is applicable once candidates have been elected to office, and not before. Where there are irregularities detected in the conduct of elections prior to the declaration of the poll, there is no explicit provision in the Act empowering the Commission to re-run an election when it discovers irregularities prior to the declaration of the poll. The Commission therefore recommends that the Act be amended to:

- empower the Commission to order a re-run of an election where it has confirmed evidence that irregularities have occurred on such a scale that it cannot be guaranteed that the apparent result, if declared, will reflect the will of the electorate; and
- clearly outline the procedure to be followed in conducting an election re-run.

Training

28. Given the decentralised nature of the election process, and the large number of officials who are involved, training is a critical issue for all aspects of electoral administration. Subsection 5(i) of the Act mandates the Electoral Commission to promote the civic education of the citizens concerning the election. This is a broad mandate, encompassing education not only on the mechanics of voting, but also broader issues of democracy and civil rights. Training programmes must be developed in a number of areas.

29. Electoral Commissioners and senior staff of the Commission need training. It is accordingly recommended that a training needs assessment for Electoral Commissioners and senior Commission staff should be conducted. This should take account of the mandate of the Commission, and should assess present knowledge and experience, and problems likely to be faced in the future given the likely responsibilities and duties of the Commission. Training could include any or all of the following:

- in-house workshops for discussing problems and defining solutions;
- local training courses conducted by international experts in the field of elections;

- study tours for Commissioners in the region and abroad to acquaint them with the electoral systems of others;
- short-term attachments to foreign organisations in the field of elections;
- participation in electoral processes of other countries as observers;
- networking in the region by participation in regional electoral organisations.

30. The effective training of polling staff is particularly important. The Commission should have direct responsibility for the training of polling staff up to the returning officer and District Secretariat levels. The training of returning officers should be in relation to the management of elections at the constituency level, and should be undertaken in accordance with guidelines established by the Commission. Such training might be conducted with technical assistance support, but the Commission should still take direct responsibility for it. The Commission should also be directly responsible for production of all training materials required. This approach will be facilitated by the recommendation made elsewhere for the establishment of a Training Section within the Commission's Permanent Independent Secretariat.

31. The training of polling staff should be assigned to returning officers with the support of other district election officials. The training should be closely supervised by the Electoral Commission, which would again be fully responsible for production of all materials required.

32. The training of candidates on the electoral process should be the direct responsibility of the Electoral Commission, though technical assistance support might be obtained from elsewhere.

33. The training of security personnel should be done by the Commission. The training should be phased. The first phase of training should focus on offences under the electoral law. This should take place following the publication of an order that elections will take place. The 2nd and last phase of the training should focus on the role of the security forces in relation to the polling process and declaration of the national results of elections.

Civic education

34. The Act currently gives the Commission a substantial mandate in the area of civic education, and this should be preserved. The Commission should however only play a facilitating and regulatory role in development and dissemination of civic education other than voter education for the citizens. The Commission can facilitate the development and delivery of civic education by:

- registering all organisations and individuals involved in civic education; and
- coordinating the programmes of civic education organisations.

35. The Commission should also play a regulatory role by:

- developing a code of conduct for all organisations involved in civic education;

- vetting materials produced by civic education organisations to ensure compliance with the code of conduct governing the civic education organisations as well as the electoral law;
- enforcing punitive measures on organisations that do not comply with the code of conduct and the electoral law; and
- setting a timetable of activities for guiding civic education programmes.

36. Responsibility for the development of materials and for the delivery of voter education should be with the Electoral Commission. Voter education should be conducted on a continuous basis using a diversity of media and forums. The Commission should be mandated to channel its voter education through:

- primary and secondary schools;
- adult education extension service organisations such as health extension, agriculture extension, forest extension and the Ministry of Community Development and Social Welfare; and
- the electronic and print media.

Resource issues relating to critical events in the electoral process calendar

37. A number of the issues dealt with in this paper have significant resource implications which will need to be addressed. Studies will be required in at least the following areas to enable a proper assessment of benefits and costs. The Commission recommends that these matters be urgently addressed.

- Effective systems for the support of the boundary drawing process will have to be identified. The possibility of utilising geographic information systems, perhaps integrated with a voter registration system, should be determined.
- The resources needed for the process of issuing of photographic voters registration certificates, including computer systems, photographic equipment, training, public education programmes and media campaigns, will have to be assessed.
- A study of the detailed modalities of the continuous updating of voters registers will be required. This will have to include an assessment of training and public education needs.
- The equipment needs associated with the new procedure of voting proposed in this paper will have to be determined. This study will have to cover the redesign of ballot papers and ballot boxes. Logistical and time-and-motion issues should also be covered.

Summary of recommendations

38. The recommendation made earlier in this paper are as follows.

- (1) That in future the review of constituency boundaries should start at least a year prior to a general election. [Paragraph 7]

- (2) That the scheme proposed in this paper for the continuous updating of the voters registers be adopted. [Paragraph 15]
- (3) That voters be issued with a photographic voters registration certificate. [Paragraph 17]
- (4) That the Commission be empowered to determine the last date on which candidates can withdraw from a race. [Paragraph 19]
- (5) That voting hours should be changed so that the voting starts at 6 a.m. and closes at 4 p.m., with the rest of the time being used for counting and documenting results while there is still daylight outside. [Paragraph 21]
- (6) That a new scheme of voting be adopted, embodying the elements spelt out in paragraph 25. [Paragraph 25].
- (7) That the Act be amended to:
 - empower the Commission to order a re-run of an election where it has confirmed evidence that irregularities have occurred on such a scale that it cannot be guaranteed that the apparent result, if declared, will reflect the will of the electorate; and
 - clearly outline the procedure to be followed in conducting an election re-run. [Paragraph 27]
- (8) That a training needs assessment for Electoral Commissioners and senior Commission staff be conducted. [Paragraph 29]
- (9) That resource issues associated with the implementation of the main recommendations of this paper be urgently addressed. [Paragraph 37]

Electoral Commission

8 February 1995



Appendix F

An Act to make provision with respect to the Electoral Commission and for matters ancillary thereto or connected therewith

ENACTED by the Parliament of Malawi as follows -

PART I - PRELIMINARY

Short title

1. This Act may be cited as the Electoral Commission Act, 1995.

Interpretation

2. (1) In this Act, unless the context otherwise requires:

“Acting Director of Elections” means a person appointed to act as Director of Elections under section 18;

“Acting Chairperson” means a person appointed to act as Chairperson under section 12;

“By-election” means the election of a member of the National Assembly to fill a seat in the National Assembly which has become vacant otherwise than by a dissolution of Parliament;

“Chairperson” means the Chairperson of the Commission;

“Commission” means the Electoral Commission referred to in section 75 of the Constitution;

“Constituency” means an area demarcated as such under section 76 of the Constitution and subsection 4 (1) (d) (I);

“Director of Elections” means the Director of Elections referred to in section 14;

“electoral matters” includes matters relating to parliamentary elections, Presidential elections and local government elections;

“General election” means an election consequent upon the dissolution of Parliament;

“Local government election” means an election by the voters of a local government officer;

“parliamentary election” means a general election or a by-election;

“parliamentary matters” includes matters relating to the role and functions of the Parliament; and

“ward” means an area demarcated as such under subsection 4 (1) (d) (iii).

(2) For the purposes of this Act, a person shall be taken to be a member of the staff of the Commission if he or she is:

- (a) the Director of Elections;

- (b) the Acting Director of Elections: or
- (c) a person appointed under section 20 or designated under section 21.

PART II - THE COMMISSION

Status of the Commission

3. The Commission is hereby declared to be a non-profit making corporation with perpetual succession and a common seal, which is capable of suing and being sued, of acquiring, holding, letting and otherwise disposing of land, and of doing and performing such acts and things as bodies corporate may by law do and perform.

Membership of the Commission

4. (1) The Commission shall consist of:
- (a) a Chairperson;
 - (b) nine other Commissioners appointed by the President by notice published in the Gazette.
- (2) The Commissioners shall hold office on a part-time basis.
- (3) The performance of the functions or the exercise of the powers of the Commission is not affected by reason only of there being one vacancy, or two, three or four vacancies, in the membership of the Commission.

Functions and powers of the Commission

5. (1) The functions of the Commission are:
- (a) to perform functions that are permitted or required to be performed by or under the Constitution;
 - (b) to perform functions that are permitted or required to be performed by or under this Act;
 - (c) to organise and conduct, and exercise general direction and supervision over parliamentary elections, presidential elections and local government elections;
 - (d) without prejudice to the generality of paragraph (c), to:
 - (i) determine, subject to the Constitution, the number of constituencies for the purposes of parliamentary elections and undertake the demarcation of boundaries of constituencies;
 - (ii) undertake the demarcation of the boundaries for local government authorities;
 - (iii) determine the number of wards for the purposes of local government elections and undertake the demarcation of the boundaries of wards;
 - (iv) organise and direct the registration of voters;
 - (v) devise and establish voters registers and ballot papers;
 - (vi) print, distribute and take charge of ballot papers;
 - (vii) approve and procure ballot boxes;
 - (viii) establish and operate polling stations;

- (ix) take measures for ensuring that elections are conducted under conditions of complete freedom and fairness;
 - (x) establish security conditions necessary for the conduct of elections in accordance with the law; and
 - (xi) ensure compliance with the law and generally adopt measures necessary to guarantee that elections are free and fair.
- (e) to consider, and report to the President on, electoral matters referred to it by the President and such other electoral matters as it thinks fit;
- (f) to promote public awareness of electoral and Parliamentary matters by means of the conduct of civic education and information programs and by other means;
- (g) to provide information and advice on electoral matters to the Parliament, the Government, Ministries, authorities and political parties;
- (h) to conduct and promote research into electoral matters and other matters that relate to its functions;
- (i) to publish material on matters that relate to its functions; and
- (j) to perform such other functions as are conferred on it by or under any law of Malawi.
- (2) The Commission may establish its own publicity machinery and shall be free to communicate openly and equally with each political party or any candidate, person or organization.
- (3) The Commission may at its discretion, and in a manner consistent with section 6, perform any of its functions in conjunction with one or more Ministries or authorities.
- (4) The Commission may do all things necessary or convenient to be done for or in connection with the performance of its functions.

Independence of the Commission

6. (1) In discharging the functions of the Commission, the Commission and every individual member thereof, and all staff of the Commission, shall act, and strive to be seen to act, independently of:

- (a) any public officer;
- (b) any organ of the Government;
- (c) any political party;
- (d) any candidate; and
- (e) any person whatsoever or organisation whatsoever.

(2) For the purpose only of accountability, the Commission and every member thereof shall, in relation to the overall fulfilment of the functions of the Commission, be answerable to, and shall report directly to, the President.

(3) Upon assuming his or her office or immediately thereafter, every member of the Commission shall take oath before the Chief Justice in the prescribed form.

Terms and conditions

7. (1) Commissioners shall hold office on such terms and conditions of service, including terms and conditions relating to remuneration and allowances, as shall from time to time be determined by the National Assembly.

(2) Subject to subsection (3), the terms and conditions of service of a Commissioner shall not without his or her consent be altered during his or her period of office.

(3) Any monetary payment due to a Commissioner pursuant to his or her terms and conditions of service shall be increased at intervals so as to retain its original value and shall be a charge upon the Consolidated Fund.

Leave of Absence

8. The Commission may grant a Commissioner leave of absence from a meeting of the Commission.

Resignation

9. A Commissioner may resign by delivering to the President a signed notice of resignation.

Disclosure of interests

10. (1) A Commissioner or an acting Commissioner who has a direct or indirect pecuniary interest in a matter being considered or about to be considered by the Commission shall, as soon as possible after the relevant facts have come to his or her knowledge, disclose the nature of his or her interest at a meeting of the Commission.

(2) A disclosure under sub-section (1) shall be recorded in the minutes of the meeting of the Commission and the Commissioner or acting Commissioner shall not -

(a) be present during any deliberation of the Commission with respect to that matter; or

(b) take part in any decision of the Commission with respect to that matter.

Termination of appointment

11. If a Commissioner:

(a) is absent, except on leave granted by the Commission in accordance with section 8, from three consecutive meetings of the Commission; or

(b) fails, without reasonable excuse, to comply with his or her obligations under section 10,

the President may remove the Commissioner from office.

Acting Chairperson

12. (1) The Commission may appoint a Commissioner to Act as Chairperson:
 - (a) during a vacancy in the office of Chairperson; or
 - (b) during any period, or during all periods, when the Chairperson is absent from duty or from Malawi or is, for any other reason, unable to perform the functions of the office.
- (2) The Commission may at any time terminate an appointment made under sub-section (1).
- (3) Where a person is acting as Chairperson in accordance with paragraph (1) (b) and the office of Chairperson becomes vacant while that person is so acting, that person may continue so to act until the Commission otherwise directs or the vacancy is filled, whichever first happens.
- (4) The appointment of a Commissioner to act as Chairperson ceases to have effect if the person delivers to the Commission a signed notice of resignation.
- (5) A Commissioner acting as Chairperson has, and may exercise, all the powers and shall perform all the functions of the Chairperson.
- (6) The validity of anything done by or in relation to a person purporting to act under sub-section (1) shall not be called in question on the ground that the occasion for the appointment had not arisen, that there is a defect or irregularity in or in connection with the appointment, that the appointment had ceased to have effect or that the occasion for the person to act had not arisen or had passed.

Meetings of the Commission

13. (1) The Chairperson may, at any time, convene a meeting of the Commission.
- (2) The Chairperson shall convene such meetings of the Commission as, in his or her opinion, are necessary for the efficient performance of its functions.
- (3) If there is delivered to the prescribed Commissioner a letter, signed by a majority of Commissioners, requesting him or her to convene a meeting of the Commission by a specified date, the prescribed Commissioner shall convene a meeting by that date.
- (4) The Chairperson or the prescribed Commissioner (as the case may be) shall take reasonable steps to ensure that all Commissioners are given adequate notice of any meetings of the Commission which he or she convenes.
- (5) The Commission may by resolution set a date and time for a meeting of the Commission.
- (6) At a meeting of the Commission, 5 Commissioners constitute a quorum.
- (7) The Chairperson shall preside at all meetings of the Commission at which he or she is present.

(8) If the Chairperson is not present at a meeting of the Commission, the Commissioners present shall elect one of their number to preside at that meeting.

(9) Questions arising at a meeting of the Commission shall be determined by a majority of the votes of the Commissioners present and voting.

(10) The person presiding at a meeting of the Commission has a deliberative vote, and, in the event of an equality of votes, also has a casting vote.

(11) The Commission may regulate the conduct of proceedings at its meetings as it thinks fit.

(12) In subsections (3) and (4), "prescribed Commissioner" means:

(a) the Chairperson; or

(b) if there is no Chairperson, any Commissioner.

(13) In this section, a reference to the Chairperson shall, if there is an Acting Chairperson, be construed as a reference to the acting Chairperson.

Committees of the Commission

14. (1) The Commission may appoint such Committees as it deems necessary for the performance of its functions.

(2) A Committee appointed under subsection (1) may consist of:

(a) Commissioners only;

(b) Commissioners and staff of the Commission;

(c) Commissioners and persons not staff of the Commission; or

(d) Commissioners and staff of the Commission and persons not staff of the Commission.

(3) A Committee may, subject to the directions of the Commission, determine its own procedures.

(4) The Commission may terminate the appointment of a Committee at any time.

Delegation by the Commission

15. (1) The Commission may by resolution delegate to a Committee of the Commission referred to in subsection 14 (2) (a) all or any of its powers.

(2) The Commission may by resolution delegate to:

(a) a Committee of the Commission referred to in subsection 14 (2) (b);

(b) the Director of Elections; or

(c) a member of the staff of the Commission,

all or any of its powers, other than those conferred on it by subsections 76 (2) (a), (b) and (c) of the Constitution and subsections 4 (1) (d) (i), (ii) and (iii).

(3) A certificate signed by the Chairperson stating any matter with respect to a delegation of a power under this section is prima facie evidence of that matter.

(4) A document purporting to be a certificate under subsection (3) shall, unless the contrary is established, be taken to be such a certificate.

Reports by the Commission

16. (1) The Commission shall, as soon as practicable after the end of each year, prepare and furnish to the President a report of the operations of the Commission during the year.

(2) The President shall cause a copy of a report furnished under sub-section (1) to be laid before each House of the Parliament within 15 sitting days of that House after the day on which he or she receives the report.

PART III - THE SECRETARIAT OF THE COMMISSION

Director of Elections

17. (1) There shall be a Director of Elections.

(2) The Director of Elections shall serve full-time, shall be the chief executive officer of the Commission and shall have such other functions, and such powers, as are conferred upon him or her by or under any law of Malawi.

(3) The Director of Elections shall exercise his or her powers and perform his or her functions subject to the direction, supervision and control of the Commission.

(4) The Director of Elections shall be answerable solely to the Commission for the manner in which he or she performs his or her tasks and exercises his or her powers, and shall not, in relation to the performance of those tasks or the exercise of those powers:

(a) be required to provide reports to; or

(b) seek or accept instructions from,

any person or body other than the Commission.

(5) The Director of Elections may give written directions to other staff of the Commission with respect to the exercise of their powers, and the performance of their functions, under this Act.

(6) The Director of Elections shall be appointed by the Commission by instrument in writing.

- (7) Prior to making an appointment of a person to the position of Director of Elections, the Commission shall seek the views of the Public Appointments Committee with regard to the person.
- (8) Subject to this Act, the Director of Elections shall hold office for such period, not exceeding 4 years, as is specified in the instrument of appointment, but shall be eligible for re-appointment.
- (9) The Director of Elections shall hold office on such terms and conditions of service, including terms and conditions relating to remuneration and allowances, as are specified in the instrument by which he or she was appointed.
- (10) The Director of Elections may resign by delivering to the Commission a signed notice of resignation.
- (11) The Commission may terminate the appointment of the Director of Elections in accordance with procedures specified in the instrument by which he or she was appointed.

Acting Director of Elections

18. (1) The Commission may by instrument in writing appoint a person to act as Director of Elections:
 - (a) during a vacancy in the office of Director of Elections, whether or not an appointment has previously been made to the office; or
 - (b) during any period, or during all periods, when the Director of Elections is absent from duty or from Malawi or is, for any other reason, unable to perform the functions of the office.
- (2) A Commissioner shall not be appointed to act as Director of Elections.
- (3) An Acting Director of Elections shall hold office on such terms and conditions of service, including terms and conditions relating to remuneration and allowances, as are specified in the instrument by which he or she was appointed.
- (4) The Commission may at any time terminate an appointment made under sub-section (1).
- (5) Where a person is acting as Director of Elections in accordance with paragraph (1) (b) and the office of Director of Elections becomes vacant while that person is so acting, that person may continue so to act until the Commission otherwise directs or the vacancy is filled, whichever first happens.
- (6) The appointment of a person to act as Director of Elections ceases to have effect if the person delivers to the Commission a signed notice of resignation.
- (7) A person acting as Director of Elections has, and may exercise, all the powers and shall perform all the functions of the Director of Elections.
- (8) A person acting as Director of Elections shall exercise his or her powers and perform his or her functions subject to the direction, supervision and control of the Commission.

(9) A person acting as Director of Elections shall be answerable solely to the Commission for the manner in which he or she performs his or her tasks and exercises his or her powers, and shall not, in relation to the performance of those tasks or the exercise of those powers:

- (a) be required to provide reports to; or
- (b) seek or accept instructions from,

any person or body other than the Commission.

(10) The validity of anything done by or in relation to a person purporting to act under sub-section (1) shall not be called in question on the ground that the occasion for the appointment had not arisen, that there is a defect or irregularity in or in connection with the appointment, that the appointment had ceased to have effect or that the occasion for the person to act had not arisen or had passed.

Delegation by Director of Elections

19. The Director of Elections may by signed instrument delegate to a Commissioner or to a member of the staff of the Commission all or any of the powers of the Director of Elections.

Staff of the Commission

20. (1) The Commission may appoint such staff as it deems necessary for the due and proper execution of its functions and the appropriate exercise of its powers.

(2) The Commission may from time to time determine the terms and conditions of service, including terms and conditions relating to remuneration and allowances, of staff appointed under subsection (1).

(3) Staff appointed under subsection (1) may include staff made available for secondment by a Ministry or authority.

(4) Staff appointed under subsection (1), including those made available for secondment under subsection (3) shall be answerable solely to the Commission for the manner in which they perform their tasks and exercise their powers as staff of the Commission, and shall not, in relation to the performance of those tasks or the exercise of those powers:

- (a) be required to provide reports to; or
- (b) seek or accept instructions from,

any person or body other than the Commission, a Commissioner, the Director of Elections, or a duly authorised member of the staff of the Commission.

(5) No candidate shall be appointed to the staff of the Commission, and a member of the staff of the Commission who becomes a candidate shall thereby vacate his or her office.

Designation of officers

21. (1) The Commission may designate from the staff of the Commission:

- (a) for each District, a District Electoral Officer;
 - (b) for each District, one or more Deputy District Electoral Officers;
 - (c) for each constituency, a returning officer;
 - (d) for each ward, a returning officer;
 - (e) for each polling station, a presiding officer; and
 - (f) such registration officers, polling officials, counting officers and other staff as are required for the purposes of this Act or any other law.
- (2) The Commission may consult with the Director of Elections prior to making designations under subsection (1).
- (3) A person may be designated under subsection (1) to be a returning officer for more than one constituency or for more than one ward.
- (4) Notwithstanding the provisions of subsection (1):
- (a) a presiding officer or a polling official for a polling station in any constituency or ward, or a registration officer, may, in a case of urgency, be designated by any District Electoral Officer or returning officer; and
 - (b) a polling official for any polling station may be designated by the presiding officer for such polling station.
- (5) Where two or more registration officers operate as a team, the Director of Elections, the District Electoral Officer of the District concerned, or the returning officer for the constituency or ward concerned, may designate one of them as the leader of the team, who shall, subject to the control of the District Electoral Officer or returning officer, be responsible for the organisation and control of the work of the team.

Conditions of designation

22. (1) The designation of any person under section 21 may be withdrawn, without prior notice to any person and without any person being entitled to a hearing, by any person or authority empowered to make a designation of the nature in question.
- (2) Any designation made under section 21 otherwise than in writing shall be confirmed in writing as soon as circumstances permit.

PART IV - FINANCES OF THE COMMISSION

Funds

23. (1) The funds of the Commission shall consist of such sums as Parliament shall appropriate for the purposes of the Commission and such other sums as may otherwise be received and accounted for by the Commission.

(2) The funds of the Commission shall be under the control of the Commission and all expenditure of the funds shall be in accordance with the directions of the Commission.

(3) No Ministry, authority or body external to the Commission, nor any person who is not a Commissioner or a member of the staff of the Commission, shall be permitted to incur expenditure from the funds of the Commission.

(4) The books of account of the Commission may be audited at any time as the Commission may direct by a professional auditor appointed by the Commission.

PART V - MISCELLANEOUS

Legal representation

24. (1) The Commission may obtain legal advice from any source it deems appropriate in relation to any matter relating to its functions.

(2) The Commission may be represented in any court proceedings to which it is a party by any duly admitted legal practitioner.

(3) Without prejudice to the generality of subsections (1) and (2), the Attorney General may, and at the request of the Commission shall:

(a) provide legal representation to the Commission in any court proceedings to which the Commission is a party; and

(b) provide general legal advice to the Commission.

Principal office of the Commission

25. The Commission shall publish a notice specifying:

(a) the location of its principal office; and

(b) its address or addresses, telephone numbers and other means of communication or contact with the Commission.

Duty to co-operate

26. (1) It shall be the duty of every relevant or competent public officer and public or private entity to co-operate with the Commission in its activities and to contribute towards the success of an election and not to do anything that might hinder such process.

(2) It shall be the special duty of:

(a) all District Commissioners, in their respective districts, to give the Commission and its officers the support and collaboration deemed by the Commission or its officers to be necessary for the execution of the activities connected with the conduct of an election; and

(b) the Inspector General of Police to take all necessary measures for the maintenance of law and order and stability necessary for the conduct of an election and to protect and uphold the rights of all persons under this Act.

PART VI - REPEALS AND SAVINGS

Amendments of the Parliamentary and Presidential Elections Act, 1993

27. The Parliamentary and Presidential Elections Act, 1993 is amended:

- (a) by deleting from section 3 the definition of “Chief Elections Officer”;
- (b) by deleting from the definition of “Commission” in section 3 the words “and appointed in accordance with section 4 of this Act”;
- (c) by deleting from the definition of “constituency” in section 3 the words “and section 5 (a) of this Act” and substituting the words “and subsection 4 (1) (d) (i) of the Electoral Commission Act, 1995”; and
- (d) by deleting Part II.

Savings

28. Notwithstanding any other provision of this Act, any appointment of a person to serve as a Commissioner which was in force at the time of the commencement of this Act continues to have full force and effect in accordance with its terms.

ELECTORAL COMMISSION ACT, 1995 - DRAFT OF 1 MARCH 1995 - SELECTIVE EXPLANATORY NOTES

Section 2 - Interpretation

Definition of “candidate” - This definition is included to clarify the meaning of the word as used in subsection 20(5).

Definition of “local government election” - This definition is deliberately broad enough to include both local government by-elections, and the election of a local government representative as part of a nationwide local government election.

PART II - THE COMMISSION

This Part does not purport explicitly to establish the Commission, since that is already done by section 75 of the Constitution.

Note that there is no provision made for there to be acting Commissioners; instead, subsection 4(3) explicitly states that the Commission can continue to operate with less than a full complement of Commissioners, unless the number of Commissioners drops below the quorum.

Section 3 - Status of the Commission

The text of this section is lifted directly from paragraph 24 of the Mangochi Conference paper on Permanence and Independence of the Electoral Commission.

Section 4 - Membership of the Commission

Power to enact this section flows from section 75(1) of the Constitution.

Section 5 - Functions and powers of the Commission

This is heavily based on the current section 5 of the Parliamentary and Presidential Elections Act, 1993. The agreed role for the Commission in relation to local government elections is made explicit. In addition, the Commission is empowered to report directly to the President on electoral matters, while the President is empowered to request a report from the Commission on electoral matters. The Commission is also empowered to publish material, and to provide information and advice on electoral matters to the Parliament, the Government, Ministries, authorities and political parties. This power makes it clear that the Commission's communication lines are not solely through the Government, a Minister or the President.

Subsection (2) is based on section 13 of the Parliamentary and Presidential Elections Act.

Subsection (3) empowers the Commission, but does not require it, to work in cooperation with Ministries or authorities.

Subsection (4) provides the Commission with a general power to do things necessary or convenient for the performance of its functions.

Section 6 - Independence of the Commission

This provision is based on section 8 of the Parliamentary and Presidential Elections Act.

Section 7 - Terms and Conditions

This provision is based on section 114 of the Constitution, which deals with the remuneration of the judiciary.

Section 10 - Disclosure of interests

This provision is based on a provision in the Commonwealth Electoral Act 1918 (Australia) which applies to most statutory bodies set up in Australia. It is a standard provision for avoiding conflicts of interest.

Section 13 - Meetings of the Commission

This provision is based (loosely) on some provisions in the Commonwealth Electoral Act 1918 (Australia) which have worked effectively for the last ten years.

Section 14 - Committees of the Commission

This provision draws a distinction between various types of Committees of the Commission. The reason for this is that section 15 provides for the Commission to be able to delegate its powers to Committees. Some powers, however, ought not to be delegated to Committees which have various categories of non-Commissioners on them, and section 15 identifies the powers which can be delegated to the various types of Committees identified in section 14.

Section 16 - Reports by the Commission

This provision not only sets up a line of accountability for the Commission, but also ensures that anything it says in its Annual Report will be published in Parliament.

PART III - THE SECRETARIAT OF THE COMMISSION

Except in relation to the Director of Elections and the Acting Director, this Part does not go into detail regarding the Secretariat's structures, but instead provides the Commission with ample general powers to employ people and to set up the structures it needs.

Section 17 - Director of Elections

Unlike section 18, this provision does not state explicitly that a Commissioner cannot be Director of Elections: however subsection 75(2) of the constitution probably would prevent a Commissioner from being the Director.

Subsection (7) provides for the Public Appointments Committee to be consulted about a proposed appointee to the position of Director of Elections, but the Committee will only be able to provide its views, not exercise a veto, and the Commission will still have the final say on any appointment. Possibly this could provide an acceptable compromise between the various views expressed in Mangochi.

Section 21 - Designation of officers

This provision is designed to provide the Commission with the maximum flexibility in the management of its staff. Note that the Commission is not required by subsection (2) to consult with the Director of Elections before making designations. Though such consultation was contemplated in the final decisions of the Mangochi Conference, it would be anomalous to require the Commission by law to consult with an official who is subordinate to it.

Section 23 - Funds

This provision is based on section 9 of the Parliamentary and Presidential Elections Act, 1993. Subsection (3) is a new one designed to reinforce the discrete nature of the Commission's budget.

Section 24 - Legal Representation

This provision is based on but expands on section 11 of the Parliamentary and Presidential Elections Act. It makes it clear that the Commission may if it chooses seek legal advice other than from the Attorney-General. This should strengthen the Commission's independence.

Section 25 - Principal office of the Commission

This provision is based on section 12 of the Parliamentary and Presidential Elections Act.

Section 26 - Duty to co-operate

This provision is based on section 14 of the Parliamentary and Presidential Elections Act, 1993, but imposes duties on the Inspector-General of Police rather than on less senior officers, as the Mangochi Conference agreed should be done.

Section 27 - Amendments of the Parliamentary and Presidential Elections Act, 1993

This provision deletes Part II of the Parliamentary and Presidential Elections Act, that Part having been superseded by the Electoral Commission Act, 1995; and makes certain consequential amendments.

Section 28 - Savings

This provision makes it clear that the enactment of the Electoral Commission Act, 1995 does not affect the terms of service of current Commissioners.

NOTES ON CONSTITUTIONAL PROVISIONS RELATING TO ELECTIONS

Subsection 51(2)(g)

This provision will have to be amended to prevent candidates who have committed electoral offences from being permanently disqualified.

Section 75

In terms of maintaining the status of the Commission it is useful to retain at least some reference to it in the Constitution, even if the bulk of the provisions relating to it are to be found in legislation. On that basis section 75 should be retained.

Subsection 75(4)

This provision enables a Commissioner to be removed from office on the recommendation of the Public Appointments Committee on the grounds of incapacity or incompetence. This gives rise to two issues.

The first is the precise meaning of the terms "incapacity" and "incompetence". At the moment they lack clarity, and it would be desirable to include at least an appropriate definition of functions of the office of Commissioner. "Competence" is a more elusive concept, which arguably should not be a ground of removal at all. The assessment of "competence" is a highly subjective process; and moreover the Commission is constituted as a collective body, and while it is of course highly desirable that Commissioners should all be "competent" at their work, it may well be that the risk associated with having retained a Commissioner who is not regarded as fully "competent" is less great than the risk that Commissioners' independence might be compromised by the retention of a ground for the casting of a possibly undue influence over a Commissioner's work.

A related issue is that of what sanctions should apply to a Commissioner who behaves improperly. It should be noted that this is addressed to a significant extent in section 10 of the draft Electoral Commission Act, 1995, which provides for the removal of Commissioners who fail to disclose a conflict of interest. It may well be necessary to include that proposed section 10 in section 75 of the Constitution.

The second issue is whether the Public Appointments Committee is an appropriate body to be involved in the removal process. If the grounds for removal are defined with sufficient clarity and objectivity, the possible role of the Public Appointments Committee would be greatly reduced. In such circumstances it may be better to remove the Public Appointments Committee from the process and instead require a competent court to make a finding as to incapacity or improper conduct before any decision on removal is made by the President.

Subsection 76(2)(a)

This provision should be amended to empower the Parliament to prescribe additional considerations to be taken into account in the drawing of constituency boundaries (such as, for example, the desirability of having ward and constituency boundaries which are coterminous).

Subsections 76(2)(c), (3) and (5)

Given the involvement of the Electoral Commission in cases such as that relating to the Mulanje by-election, it may well be better to eliminate the jurisdiction of the Commission to decide election petitions, and instead confer original jurisdiction on the High Court to deal with all election petitions.

Subsection 80(6)(g)

This provision will have to be amended to prevent candidates who have committed electoral offences from being permanently disqualified.

Subsection 147(1)

This provision will have to be amended to make it clear that the Electoral Commission will organise and conduct local government elections, not just supervise the conduct of the elections.

Subsection 148(1)

This provision should be amended to make it clear that the Electoral Commission will be drawing the boundaries for local government authorities. The criteria governing the drawing of those boundaries need not be spelt out in the Constitution, but can instead be included in an Act of Parliament dealing with local government elections.



CONSTITUTIONAL CONFERENCE - LILONGWE MALAWI, 20-22 FEBRUARY 1995 - ELECTIONS - PRESIDENTIAL, PARLIAMENTARY AND LOCAL GOVERNMENT

Generally an independent Electoral Commission is an essential element in the organisation of free and fair multiparty elections. This is because that body is often charged with the responsibility of organising and conducting the elections, and the efficient management of the electoral machinery is a major factor in achieving the conduct of a free and fair election. In practice the public perception of an Electoral Commission's independence depends largely on its constitutional status and particularly on the method of appointment to and removal of membership of the Commission.

It is important to maintain the integrity of an election process. This can only be achieved if the Electoral Commission is able to operate without any interference that would threaten to impair its independence and functional autonomy in organising an election. The Commission should be left to organise and conduct the elections without any interference by the Government of the day.¹

This Conference has been organised by the Constitution Committee pursuant to subsection 212(4)(b) of the Constitution. That provision is a somewhat unusual one by international standard, in that it represents an attempt to involve the people of the nation, and all elements of society, as extensively as possible in the process of constitutional development. Such a participative approach not only deserves to be highly commended, but also represents an extension of the principles which have underpinned Malawi's democratic development in the last several years.

Two of the major milestones in that development were of course the referendum held in June 1993, and the elections held in May last year. The Electoral Commission is the body which constitutionally has responsibility for the proper conduct of such electoral operations, and in the rest of my remarks today I wish to outline the processes of policy review in which the Commission has been engaged in recent months; to focus on those parts of the Constitution which relate to the activities of the Commission; and to propose some specific amendments.

In order to bring together decision makers to consider critical issues concerning the way in which elections are to be administered in the future in Malawi, the Commission organised a major conference on "The Role of the Electoral Commission", which was held last week in Mangochi. The Commission was honoured to have been joined at that Conference by many distinguished participants, including Ministers, Permanent Secretaries, the Heads of the Police Force and the Army, and representatives of political parties represented in Parliament.

To facilitate the deliberative work of the Conference the Electoral Commission developed four papers containing recommendations for structures which could be established, policies which could be adopted, and specific steps which could be taken.

The subject of the first paper was **The Permanence and Independence of the Electoral Commission**. One of the major recommendations which had been made by the Electoral Commission in its 1994 Parliamentary and Presidential Elections Report was the establishment of a Permanent and Independent Secretariat to serve the Commission. The Government had indicated its acceptance in principle of this recommendation, and had requested the Commission to make specific proposals regarding the structure of a Secretariat and the legal,

¹ Dimensions of Free and Fair Elections by Carl Dundas.

financial and other implications of the proposal. It included a detailed list of tasks to be performed by different functional areas of the proposed Secretariat.

The commission is established under Section 75 of the Constitution, subsection (3) of which states *inter alia* that "... a person shall cease to be a member of the Electoral Commission... at the expiration of four years from the date of his or her appointment, unless re-appointed to a new four-year term...". The Parliamentary and Presidential Elections Act, 1993 also however addresses the question of Commissioner's terms. Subsection 4(1) of the Act provides *inter alia* that "The Electoral Commission...shall be appointed with respect to every general election...", while section 7 of the Act provides *inter alia* that:

"a member of the Commission shall hold office from the date of his appointment to a date occurring thirty days after the publication in the Gazette of the national result of the general election but may sooner resign his office by notice in writing addressed to the President..."

On the face of it there is an inconsistency between the relevant provisions of the Constitution and the Act. The Constitution clearly contemplates that the Electoral Commission will have a continuous mandate and existence, while the Act views the Commission as having functions only in relation to a specific general election.

This issue was drawn to the attention of the Mangochi Conference. In response, the Conference endorsed the Commission's recommendation that "legislation be enacted to make it clear that the Electoral Commission has a continuous existence and exercises continuous functions."

The Conference further endorsed recommendations that the Commission be served by a Permanent and Independent Secretariat; that the establishment of the Permanent Independent Secretariat be effected by the enactment of new legislation; and that the new legislation make specific provision for matters relating to the functioning of the Commission and the Permanent Independent Secretariat, in a manner which was spelt out in the paper presented to the Conference.

Full details of the manner in which it is intended that the Commission will be constituted under the proposed new legislation are yet to be determined. I wish however to foreshadow now for the benefit of this Conference that it is possible that there will be a need as part of that new legislation for amendments to the current provisions of sections 75 and 76 of the Constitution.

The second paper dealt with **Local Government Elections**. Its major arguments were that the Electoral Commission should be given the responsibility for the conduct of local government elections, and that those elections should be conducted using procedures as similar as possible to those applying in parliamentary and presidential elections.

I now wish to turn some constitutional questions relating to local government elections. Those elections are currently referred to in sections 146, 147 and 148 of the Constitution. There are two issues which arise from the way in which those provisions are currently worded. The first issue relates to subsection 147(1), which states that:

"Local government authorities shall consist of local government officers who shall be elected by free, secret and equal suffrage under the supervision of the Electoral Commission by the registered voters in the area over which that local government authority is to have jurisdiction".

It is notable that this provision only refers to the "Supervision" of local government elections by the Electoral Commission. It may be that the current wording was meant to imply that the elections would actually be

organised and conducted by the Electoral Commission, but as it stands it also leaves open the possibility that the elections could be conducted by another body, with the Electoral Commission's role being limited to supervising that other body. The modalities of such supervision are unclear at present. This issue was raised at the Mangochi Conference, and in response the Conference endorsed recommendations that the Electoral Commission be given the function of organising and conducting the local government elections; and that section 147(1) of the Constitution be amended to make the Commission's role clear.

It is notable that at the Conference support was expressed for the recommendation by the Ministry for Local Government and Rural Development, and that the Conference was also informed that the recommendations had the support of the Association of Local Government Administrators of Malawi. Given the need for local government elections to be conducted in the near future, the recommendations endorsed by the Conference regarding local government were seen as being not only important, but also deserving of the most expeditious attention.

The second issue arising from the current constitutional provisions regarding local government relates to the drawing of boundaries. It appears that in the immediate future there will be three types of boundaries which will have to be drawn and redrawn from time to time.

Parliamentary constituency boundaries are under subsection 76(2) of the Constitution required to be determined by the Electoral Commission.

Local government ward boundaries are also addressed in the Constitution: subsection 146(4) requires the Parliament to ensure that "the boundaries of each ward shall be designated by the Electoral Commission in accordance with section 148".

At the moment, however, the Constitution makes different provisions for the drawing of the boundaries for local government authorities: section 148(1) states that:

"Subject to the recommendations of the Electoral Commission, and in accordance with the principles laid down in this Constitution and any other law relating to national elections, there shall be drawn boundaries for local government authorities."

Section 148 of the Constitution does not specify the body responsible for drawing boundaries for local government authorities. The possibility that the Electoral Commission should be that body is neither stated nor excluded.

At the conference, the view taken by the Commission and which was presented at the Conference was that the Commission should maintain the mandate of determining Parliamentary constituency boundaries as well as local government ward boundaries. However the Commission felt that the determination of local authority boundaries should be done by an appropriate body.

The subject of the third paper dealt with was **The Role of Political Parties in the Election Process**. It addressed a series of essentially separate issues, all of which however related in some way to political parties and their involvement in the election process. The matters dealt with were party registration; qualifications of candidates; security; the campaign period; campaign meetings; unacceptable methods of campaigning; a Code of Conduct for political parties; a Code of Conduct for Government officials; use of Government resources; disclosure of funds; reasonable freedom to own and operate independent media; the role of the Malawi Broadcasting Corporation; and judicial remedies.

An issue which has recently arisen, and which was addressed at the Mangochi Conference, relates to the prescribed qualifications for candidacy. At the moment subsections 51(1) and (2) of the Constitution

prescribe certain qualifications, while others are prescribed in section 38 of the Parliamentary and Presidential Elections Act, 1993. In particular, subsection 51(1)(c) of the Constitution requires a candidate to be registered as a voter in a constituency, while subsection 38(1)(c) of the Act goes further and requires a candidate for constituency to be a registered voter for that constituency. The suggestion is that the Conference should examine the provisions in the Constitution such as those dealing with qualifications for candidacy, e.g., should the minimum age remain at 35 years? Should there be upper age limit? What should be contained in the Constitution and what should go to an Act of parliament.

Another issue in the same area which I would like to raise for consideration by this Conference is the requirement in section 51 of the Constitution that candidates be proficient in the English language. That requirement gave rise to a number of problems at last year's elections, and in the light of them the Commission recommended to the Mangochi Conference that there be substituted a requirement that candidates possess the Malawi School Certificate of Education or an equivalent qualification. The Conference rejected the recommendation, but also noted that the general issue of language usage in parliament, and associated constitutional requirements, was one which could usefully be considered by this Conference.

A further issue raised at the Mangochi Conference concerns disqualifications from candidacy. At the moment, subsection 51(2)(g) disqualifies from election to Parliament any person who "has been convicted by any court of any violation of any law relating to election of the President or election of the members of Parliament under any Act of Parliament". Subsection 80(6)(g) makes similar provision in relation to candidates for the Presidency.

While such an approach reflects the seriousness of certain electoral offenses, it could be argued that the penalties imposed are too severe.

As they stand, they apply equally in relation to any conviction for a breach of the electoral law, and make no distinction between serious breaches involving major criminal intent, and the less serious or more technical breaches. Furthermore, they apply disqualifications for life, and therefore may be applying to a person many years after he or she has shown due repentance for the offence.

In the light of these arguments, the Commission noted in the paper it presented to the Mangochi Conference that a five-year period of disqualification might well suffice to achieve the intention underlying the constitutional provisions. The Commission made no recommendation in the paper, but expressed the view that the question was a significant one which ought to be considered by the Parliament. The Conference noted the points made, and also noted that the issue could be usefully considered by this Constitutional Conference. For that reason I raise it now.

The fourth paper dealt with was entitled **Critical Events in the Electoral Process Calendar**. It proposed a number of significant changes to certain aspects of the mechanics of the election process. Among its major arguments were that voters should be issued with a photographic voters registration certificate; that voters registers should be continuously updated; and that the method of voting should be changed so as to eliminate the need to give voters a multiplicity of ballot papers, one for each candidate.

I have raised a number of immediate issues of constitutional significance which have arisen from the policy review work recently undertaken by the Electoral Commission, and I would hope that these will be seriously addressed in the constitutional review process of which this Conference forms a most important part. I should however emphasise that the processes of electoral development and reform is an ongoing one. As Malawi gains further experience in electoral processes we can expect to identify further areas where legislative change is called for, and perhaps further needs for constitutional change. This pattern is one which

rises in all mature and developing democracies, and reflects the incremental nature of reform in general. The Commission for its part will continue to strive to perform its functions in such a way as to ensure that the constitutional rights of all Malawians to participate freely and openly in the government of the country are given full effect, and that our democratic traditions will thereby be nurtured.

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