

EU ELECTION FOLLOW-UP MISSION

MALAWI 2017

FINAL REPORT

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1 Executive Summary

The EU deployed an Election Follow-up Mission (EFM) to Malawi to assess the current electoral reform process and the extent to which previous EU election-related concerns and recommendations have been addressed. The EU EFM was led by Ms. Birgitte Markussen, Director for Africa at the European External Action Service, who was in the country from 11-14 September 2017. During this period, she met a wide range of Malawian and international stakeholders, and held a roundtable and a press conference. The EFM was supported by two election experts, who were in Malawi from 23 August to 18 September 2017, during which time they also met a broad range of stakeholders in Lilongwe and Blantyre.

Malawi has been holding multi-party elections since 1994, and they have been characterised by a series of peaceful polls and the change of power through the ballot box. The legal framework for elections generally provides the conditions for competitive elections. The EU deployed Election Observation Missions to Malawi for both the 2009 and 2014 national elections. While both missions found many positive elements, they also identified a number of shortcomings which were common to both polls, indicating that some practices and legal procedures needed to be addressed in order to further strengthen the electoral process in the country.

The country is taking important steps to review the framework for elections and a broad range of reforms has been proposed, notably the six draft bills in the Law Commission report, which are currently with Government for consideration, and the draft Political Parties Bill, which awaits its second reading at the next session of Parliament. The proposed legal reforms, while not addressing all issues raised by the 2014 EU EOM, offer a number of improvements for the conduct of elections (see Section 2).

The reforms include a proposal for a change in the system for election of the president from a simple majority to an absolute majority system, with a possibility for a run-off round. The EU EOM of 2014 did not make any recommendation in this regard, in line with usual practice, but it is an issue which garners most attention in discussions on reform.

It is critical that deliberations on prospective reforms continue to be inclusive, that stakeholder confidence is maintained and that revisions to the framework are agreed in time to enable preparations for 2019 to commence. Crucial in this is the timely gazetting of reform bills to allow for publication 28 days prior to being tabled during the sitting of Parliament in November 2017. This would allow for sufficient scrutiny and deliberation and would help to maintain public confidence.

Based on the findings of the 2014 EU EOM, the main challenges in the conduct of the polls were related to voter registration, election day preparations and results management, as well as malpractices during the campaign, including abuse of state resources. Many of the EU EOM's recommendations could be addressed, to varying degrees, if the proposed legal reforms are adopted and the administrative reforms envisaged by MEC are implemented.

MEC has undertaken extensive planning towards the 2019 polls and has developed an Election Calendar. This includes timelines for voter registration and election day operations which are designed to avoid the delays in both processes observed in 2014. In undertaking voter registration, MEC is proposing to make use of the National ID Card, which should minimise errors in the list and reduce costs, which will be an important step. MEC's plans appear to provide for a more timely and effective management of these key processes. Going forward, it is critical that MEC develops comprehensive budgets, in collaboration with Government, to ensure that funding is made available on time and that required resources such as transportation are also agreed to.

The Law Commission report includes proposals to further enhance the independence of MEC, including through strengthening procedures for the appointment of Commissioners and the creation of an Election Fund, both of which are in line with international best practices.

The 2014 elections were peaceful, although there were tensions post-election, and key freedoms of association, expression, movement and assembly were provided for. The 2014 EU EOM observed the abuse of state resources during the campaign and recommended the introduction of requirements for parties to disclose sources of funding and details on campaign expenditure. The draft Political Parties Bill covers some of this, but does not contain adequate disclosure requirements on private funding of parties nor any requirements for disclosures on campaign spending. Further, prohibitions on the practice of ‘handouts’ by candidates, while included, are vague and there is still no clear mechanism to enforce the ban on misuse of state resources.

In both 2009 and 2014, EU EOMs reported overt bias on behalf of state media in its election coverage. While provisions in the law require media to provide fair and balanced coverage this is clearly not being adhered to nor enforced. No reforms have been forthcoming on this. In addition, further enhancement of the independence of the state broadcaster and the communications regulator is needed.

Problems in the tallying and transmission of results were a major problem and point of tension in 2014. MEC has introduced the use of words as well as figures for results sheets and also reiterated that they should be posted at the polling site. MEC will also create Constituency Tally Centres, to provide more localised centres for tabulation compared to previously. Looking ahead, it is critical that extensive efforts are made in the training of staff to enhance their understanding of how to complete the paperwork for results, to minimise any errors, and also for MEC to develop viable and deliverable systems for the transmission of results which are fully tested well before election day.

The number of women in parliament decreased in 2014 compared to 2009. There appears to be broad agreement that there should be greater participation of women in political life. There is a proposal for the creation of 28 district-level seats for women. While it is positive that a proposal on women’s representation has been put forward, this proposal is not without its challenges and was questioned by some interlocutors. The EFM concluded that if it is adopted, then it could be reviewed post-2019 to assess its effectiveness as a mechanism to truly increase women’s role in political life. More broadly it is important that parties mainstream gender equality within their structures and nominate women in good numbers as candidates.

There is a proposal in the reforms to extend the period for the swearing-in of the new president to a minimum of 30 days, to ensure there is ample time to resolve any post-election disputes potentially impacting upon the results. New Court Rules also provide revised timelines for the more-speedy determination of election petitions. With regard to other forms of electoral dispute resolution, MEC has created a new legal department, which should in future elaborate dispute resolution procedures.

The mission concluded that a significant number of the EU EOM’s 2014 recommendations could be addressed if the proposed legal reforms are adopted and particularly if the administrative reforms envisaged by MEC are implemented. Civil society also has an important role to play, in supporting the dissemination of information on the reforms, and in undertaking civic and voter education.

Priority Recommendations

- In order to ensure the effective management of the electoral process, it is important for MEC, in collaboration with Government, to develop a comprehensive budget covering potential electoral scenarios and possible contingencies. This will also enable the timely funding of MEC as required.

- Government needs to meet its responsibility to provide MEC with adequate transport to ensure electoral operations are timely and effective.
- In order to ensure that the will of the electors is respected and that the preparation of results is transparent and accountable, training of polling staff by MEC should include: a strong focus on results tallying and transmission, including the completion of results sheets; responsibilities in posting results at the polling place; and the provision of copies of the results to candidate representatives.
- While there is prevailing law which prohibits the misuse of state resources, and renewal of this prohibition is contained in the Political Parties Bill, there is an absence of any mechanism to monitor and enforce this. A means of scrutiny and enforcement should be created to support implementation of the law.
- Legal obligations should be created to require political parties to mainstream gender equality in party structures and to nominate women in good numbers as candidates for election.

2 Status of EU EOM 2014 Recommendations

No.	Purpose	Recommendation	Adopted / To Follow	Comment
1	To promote right of political representation and increase legal certainty	Inclusion of a clear definition of the term ‘public office’ into the electoral legislation would increase the legal certainty regarding the eligibility criteria for the nomination of candidates.	No	• The matter has been the subject of judicial interpretation but not all decisions are coherent. • A clear definition of “public office” in legislation is still needed.
2	To ensure consistency of legislation and increase legal certainty	Harmonisation of the timeframes relating to the dissolution of parliament, nomination of candidates, campaign period and election day would increase consistency in the legislation and ensure legal certainty regarding the right of incumbent parliamentarians to stand for election and regarding length of the campaign	No	• A legislative provision, clearly stipulating the right of sitting MPs to seek re-election, would be a better solution here. • There is no need to adjust any of the constitutional or legal rules on timeframes.
3	To promote increased transparency and public accountability in political party financing and to promote a more level playing field	Introduction of a legal requirement to disclose political party sources of financing and to report on campaign spending would improve transparency and public accountability of political financing	Proposed	• The Political Parties Bill, 2016 contains proposals which will address this somewhat. • Public funds – disclosure required • Private donations – disclosure to Registrar of Political Parties & party members only • Campaign spending – no regulation on disclosure
4	To promote a more level	Introduction of a clear and enforceable ban on the use of state resources for	Proposed in Part / To	• Existing laws already prohibit the misuse of state

	playing field for election contest	campaign purposes into the electoral legislation, together with an independent oversight mechanism to ensure that state resources for public office are not used for campaigning, in order to tackle undue advantages of incumbency	Follow	- resources - Proposed reforms reinforce these and make explicit reference to the prohibition on state agencies providing funds to parties - However, no enforcement mechanism is foreseen
5	To improve internal capacity and accountability	The MEC should conduct an internal review in light of its limited capacity in organizing these elections. The external expertise supplied by UNDP needs also to be assessed as part of this process	Yes	- MEC conducted a review after the 2014 polls - The UNDP programme has been designed, taking account of many observer recommendations - MEC plans for 2019 focus on many of the critical problems from 2014
6	To enhance the transparency and confidence of stakeholders in the process	Enhanced transparency measures in MEC external communication should be introduced to guarantee accountability	To Follow	- There was no indication of a change in approach - MEC will continue using the District-based Multi-Party Liaison Committees and the national-level mechanisms
7	To enhance internal capacity, communication and efficiency	Internal communication channels between different MEC departments at national and local levels should be reviewed and strengthened to ensure consistent, effective and regular communication in a timely manner across the country	No	- There was no indication that this has been improved - MEC officials emails are not working and the system only operates down to District level in any case
8	To enhance internal capacity and efficiency	More adequate distribution of available financial resources to MEC departments and to local levels according to financial needs	To Follow	- The creation of an Election Fund for MEC is proposed as part of the on-going reforms - This would be based on the electoral cycle and an annual budget, ensuring financial resources are available
9	To ensure sustainable capacity of MEC to deal with legal issues	The integration of the Complaints Handling Unit, currently under UNDP, into a permanent MEC structure and its transformation into a legal department	Ongoing/ To Follow	- Head of legal department recruited, due in post in Oct '17 - Paralegal undertaking professional development training - Legal Department to formally begin work in October
10	To ensure an accurate, inclusive and credible voters' register	The voter registration process, including verification, should be implemented in a timely manner	To Follow	- Draft MEC Election Calendar envisages recruitment of registration staff in March 2018 and - Registration of voters from April to September 2018 and

				- Public verification in November and December 2018 - On this plan, the voter register would be ready and available some 5 months prior to polling
11	To ensure transparency	Ensure that political parties and other stakeholders have access to the final voters register sufficiently in advance of the elections	To Follow	Based on the MEC draft calendar and the existing plan for voter registration, this would be achieved.
12	To ensure an accurate inclusive and credible voters' register	Review of the technology and training used for the voter register to ensure suitability and possible future use for civil register purposes. (Consideration could be given to use the Biometric Voter Registration)	To Follow	MEC is proposing to extract biometric data from National ID cards and the National Registration Bureau database, to minimize errors
13	To ensure effective exercise of political rights	Voter and civic education should be extended to the grass roots level and an adequate budget should be provided for these activities to be undertaken	Proposed / Ongoing	- Ministerial Regulations, to contain Code of Conduct for civic & voter education, proposed in Electoral Commission (Amendment) Bill Section 21 - Budget – EU is providing 9 million Euro to NICE (National Institute for Civic Education)
14	To promote political participation of persons with disability	Make civic and voter education available to persons with disability, namely the visually and hearing impaired	Ongoing/ To Follow	- NICE has signed MoU with FEDOMA (Federation of Disability Organisations in Malawi) & (MUB) Malawi Union of the Blind on needs of persons with disabilities - MEC to prepare new strategy on civic and voter education which will include the needs of persons with disabilities
15	To ensure that the public broadcaster remains independent and impartial	The director general and board members of MBC should be appointed by the National Assembly	No	- Communications Act, 2016 Section 112 the President appoints the board of MBC, subject to confirmation by Public Appointments Committee of Parliament. - Board appoints director general.
16	To ensure impartiality and independence of the broadcast regulatory body	The director and board of the Malawi Communications Regulatory Authority (MACRA) should be appointed by the National Assembly, from among professionals of the communications sector	No	Communications Act, 2016 Section 8 the President appoints the members of MACRA, subject to confirmation by Public Appointments Committee of Parliament.

				Board appoints director general.
17	To ensure that opinion polls published on election results are reliable	Introduce regulations for the conduct of opinion polls related to elections	No	To the best of our knowledge there has not been any new regulation in this regard
18	To promote greater participation of women in political life	Introduction of a legal requirement, such as mandatory quotas, for political parties to apply affirmative action gender policies within parties, in terms of integrating women into party structures and selecting women as party candidates	Proposed	- Constitution (Amendment) Bill - Special Law Commission - proposes amendment to Section 62 of the Constitution to provide for a reserved seat for women within each district. - Political Parties Bill, 2016, Section 3 (1) (d) proposes that political parties must comply with Gender Equality Act when appointing to party structures.
19	To promote greater participation in political life	The active role of civil society in Malawi should continue to be supported in respect to their election-related work. Civil society should continue to work together in observing elections	Unchanged	- There has not been any change in the law on CSOs and election observation. - Practice will be observed in advance of the next elections.
20	To ensure timely conduct of polling and credibility of the process	Logistical and operational arrangements for election day need to be thoroughly planned and put in place well in advance. Secure retrieval of sensitive material from polling stations to MEC warehouses after counting is essential	To Follow	- MEC is now planning to deliver materials at least two days before polling - This will be facilitated by a decentralized approach, whereby materials are sent out in advance to Districts - This will also be facilitated by the intention to print result sheets with ballots, thereby ensuring no delays and discrepancies in availability and distribution of results sheets
21	To ensure greater clarity and consistency in procedures applied on election day	Conduct effective and timely training of polling staff. Provisions for extra tallying staff, where necessary, to avoid errors due to tiredness, should be taken into account	To Follow	- MEC is planning to use Master Trainers instead of cascade training as previously used. - The intention is to improve the quality of training provided at all levels - There was no information on potential extra tallying staff
22	To ensure greater clarity and consistency in	Tallying procedures should be designed to ensure easy traceability from polling station results onwards, including for	To Follow	MEC has already introduced a change to tally sheets, which now

	procedures applied on election day	those cases where arithmetic corrections are needed due to reconciliation errors.		require that figures are represented in both numerals and words to minimize errors There was no information on procedures for the traceability of results from polling stations onwards, but see Recommendation 23 below
23	To ensure credibility of the election results	An adequate and reliable results management system should be designed to ensure integrity and reliability in the collection, aggregation and publication of results. The system should be thoroughly tested well in advance and an alternative option of results transmission should be put into place	To Follow	- MEC has proposed purchasing 5,000 handheld devices which can be used at each polling centre for the transmission of results for each polling stream direct to MEC - MEC has also proposed creating constituency level tally centres to facilitate the more timely delivery of results from local areas and to reduce congestion at District level - However, the purchasing of the handheld devices will cost some \$2.5 million and there is currently no budget for this. Also parties have yet to be presented with this plan, so is not sure there will be agreement - No back-up, alternative plan – beyond the existing delivery of paper to Constituencies and the later inputting and transmission – was presented
24	To ensure credibility and transparency of the election results	Announcement of progressive presidential election results evenly representing all districts during the tallying process could increase transparency and diffuse potential tensions during the period after elections	No	- No such plan was presented - In the view of the EFM this recommendation does not have great merit - The point of progressive results is that they are announced as they come in, in so-called “real time”. - However, it is important that parties and the public fully understand what the progressive results represent to avoid misunderstandings.
25	To protect secrecy	Ensure there is awareness about the use of	Commenced	(As 14 above) NICE has

	of the vote of persons with disability	tactile ballot guides among disabled voters		signed MoU with FEDOMA (Federation of Disability Organisations in Malawi) & (MUB) Malawi Union of the Blind on needs of persons with disabilities, including visual impairments, in civic education • MEC to prepare new strategy on civic and voter education which will include the needs of persons with disabilities
26	To provide better access to legal remedies	Introduction of mechanisms at district level to deal with complaints related to voter registration, in order to make access to legal remedies more accessible, especially in rural populations, including right of appeal to magistrate courts	No	• MPLCs at local level are expected to continue to operate as informal mechanisms; • No legislative change proposed; • Formal guidelines on procedures for dealing with complaints may emanate from MEC Legal Department in the future
27	Promote legal consistency and certainty	Harmonisation of the penalties for identical electoral offences set by election Acts	Proposed	• Part XI – Offences and Penalty – Presidential, Parliamentary & Local Government Elections Bill proposed by Special Law Commission achieves harmony in penalties.

3 Introduction

The EU deployed full Election Observation Missions (EU EOMs) to Malawi in 2004, 2009 and 2014. A Follow-Up Mission (EFM) was deployed to the country in 2012. A decision was made to deploy a further EFM, in preparation for the May 2019 polls, to assess progress made on electoral reform, the rule of law, human rights and the political system since the delivery of the Final Report of the 2014 EU EOM.

The Chief of Mission for the EFM was Brigitte Markussen, EEAS Director Africa, who was supported by two officials and two experts. The Experts were deployed from 23 August 2017 to 18 September 2017. The Chief of Mission was in Malawi from 11-14 September 2017. During this period, she held extensive meetings with national and international stakeholders, including the State President, Chair and Commissioners of the Malawi Electoral Commission, Minister of Foreign Affairs, Minister of Justice, Chief Justice, Speaker of the National Assembly, senior members of political parties, media representatives, civil society organisations, the EU Delegation, Ambassadors of EU Member States, United States and Norway, SADC and AU Heads of Mission, and the United Nations Resident Representative. A full list of meetings is contained as an Annex.

A roundtable was held in conjunction with MEC and also attended by a broad range of civil society organisations, at which a wide-ranging discussion on electoral reforms was held. The Chief of Mission held a press conference prior to departure from Malawi and the Press Release is contained as an Annex.

4 Political Background

The May 2019 elections will be the sixth general elections since the introduction of the multi-party system in 1994. The most recent national elections were the Tripartite Elections of 2014, for 462 elected seats across 35 Local Councils, the 193-seat parliament and for the office of president. It was the first time that Malawi had held all three levels of elections at the same time. The 2014 elections were largely peaceful, but the lead-up to the polls was fractious and there were post-elections tensions also.

Following the death of President Bingu wa Mutharika in April 2012 the sitting Vice-President Joyce Banda became president. However, by this stage she had formed a new party, the People's Party (PP), and was therefore no longer a member of the Democratic Progressive Party (DPP) of the late President.

In the 2014 elections Peter Mutharika (brother of the former president) stood as candidate of the DPP and won the presidency with 36.4%, defeating Lazarus Chakwera of the Malawi Congress Party (MCP) with 27.8%, the then-president Joyce Banda of the PP, with 20.2%, and Atupele Muluzi of the United Democratic Front (UDF) with 13.7%.

An analysis of the results indicates that whilst the main parties conducted national campaigns each candidate relied heavily on their respective regional identities for their support base, informing some of the subsequent debate regarding changes to the electoral system. For instance, analysis by the 2014 EU EOM pointed out that the Southern Region, with the exception of its eastern part, which is the most highly populated, voted primarily for Peter Mutharika of the DPP, Central Region for Lazarus Chekwera of MCP and the eastern part of Southern Region for Atupele Muluzi of UDF. Joyce Banda of PP secured most of her votes in the less populated Northern Region.

In the parliamentary elections¹, the DPP won 50 seats, MCP 48 seats, PP 26 seats and UDF 14 seats. However, the largest 'bloc' was independent candidates, of whom 52 were elected. Many of these had party affiliations and have since gravitated back to their respective party. The reliance on ethno-regional support was replicated for the parliamentary elections. For instance, MCP managed to secure 63% of the constituencies in its Central Region stronghold. Other parties also relied heavily on their strongholds, though fared slightly less well largely due to the preponderance of successful Independent candidates.

The fractious environment continued in the wake of the elections, exacerbated by organizational shortcomings on behalf of MEC adversely affecting the arrangement of the polls and the results process. Then-President Banda ordered the nullification of the process and called for new elections, citing fraud. However, the High Court ruled that the president did not have the power to make such a decision. MEC then announced its decision to recount all votes, but the court ordered that while it could do so, it had to do so within the eight-day period provided for the announcement of results. At this point the eight days had lapsed, and so MEC announced the results it had.

All candidates accepted the outcome, but some local disturbances were reported. Analysis by the EU EOM indicated that while there were problems with the tabulation of results the problems were spread across different areas, indicating human error and various anomalies, with no tendency in favour of any particular party. The reform process which is now underway was launched in the wake of these procedural and

¹ The election was not held in one constituency in Blantyre due to the death of the MCP candidate.

organisational shortcomings to seek to identify a series of legislative and administrative changes to strengthen the electoral process.

Following the election, former President Joyce Banda left the country. More recently, the UDF, which since 2004 had been a strong opponent of the DPP, has been in a form of alliance with the DPP, with its leader Atupele Muluzi (son of the country's first president in the multi-party era) currently serving as Minister of Health and Population in the DPP-led government. The leader of the MCP, Lazarus Chakwera, is now leader of the opposition and, as things stand, the MCP is positioned as the main contender to DPP in 2019. Six by-elections are scheduled for October 2017, and these, in the absence of reliable opinion polls, will be an important barometer for political parties regarding their respective levels of popularity.

Many commentators note that the build-up to the 2019 polls is already underway, with discussions about potential running mates – taking account of the ethno-political dimension – already prominent in the media and with parties and politicians seeking to raise their public profiles. The high level of awareness of the looming 2019 polls and posturing between parties and leaders may have an impact upon deliberations over the proposed reforms, notably on issues such as the electoral system, political party financing and bans on handouts during the campaign, among others. At the same time, any negative fall-out from the reform process may adversely affect the political environment for the 2019 polls.

5 Legal Framework and Overview of the Reform Process

Malawi is a State Party to most international legal instruments which relate to human rights and the conduct of elections. The instruments which it has ratified include the International Covenant on Civil and Political Rights (state party since 1993); the Convention on the Elimination of All Forms of Discrimination against Women (since 1987); the Convention on the Elimination of Racial Discrimination (since 1996); the International Covenant on Economic, Social and Cultural Rights (since 1993); the Convention on the Rights of the Child (since 1991); and the Convention on the Rights of Persons with Disabilities (since 2009). Malawi ratified the UN Convention against Corruption in December 2007. Malawi is not a party to the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

Malawi has also acceded to several relevant regional human rights treaties, including the African Charter on Human and People's Rights (ratified in 1989); the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (ratified in 2005); the African Union Convention on Preventing and Combating Corruption (ratified in 2007); and the African Charter on Democracy, Elections and Governance (ratified in 2012). It is also a state party to several legal instruments of the Southern African Development Community (SADC), most importantly the SADC Protocol on Gender and Development (since 2008) and the SADC Protocol against Corruption (since 2001), while the SADC Principles and Guidelines Governing Democratic Elections are also applicable to Malawi.

There was a widespread perception within Malawi that the conduct of the 2014 electoral process had been unsatisfactory. While most of the principal problems were administrative in nature, the broad legal framework also came under scrutiny, with a demand for reform emanating from civil society. This built upon similar dissatisfaction with previous elections, and culminated in a national conference on electoral reform in December 2014, which led to the creation of the National Task Force on Electoral Reforms (NTF). The reform process, including the later process under the Law Commission, were supported by development partners, including the EU.

The NTF was comprised of NGOs and other civil society actors, as well as MEC, government departments and institutions, and development partners. Their *Consolidated Issues and Recommendations for Electoral Reforms* document was published in July 2015. The reforms proposed were broad, ranging from a shift to

proportional representation and the implementation of a zebra procedure for the nomination of women, to the moving of the MEC headquarters to Lilongwe.

These outcomes were communicated to the Law Commission, a constitutional body with the power to review and make recommendations relating to the repeal and amendment of laws. This led to the convening of the special Law Commission on the Review of the Electoral Laws. The work of this special commission proceeded quite quickly, moving from the appointment of commissioners in April 2016 to the submission of a report (Law Commission Report No.32) to the Minister for Justice in April 2017. Urgency was cited repeatedly as the reason for the expedited process of review by the Law Commission, as elections are due in 2019. The period of time allocated to the Law Commission was particularly brief, in view of the mammoth task, of reviewing the law and practice in Malawi and elsewhere, of considering the views of stakeholders, and of drafting several pieces of legislation, which was undertaken.

There was an inherent flaw in the approach to electoral reform adopted by the Law Commission, in that it represented an attempt to reform the legislative framework in an ad hoc and piecemeal manner. The reforms have focussed on alterations to some specific elements of the law without a holistic approach to the whole. Reforms which required constitutional change were deliberately minimised. This approach is pragmatic, but not ideal. It reflects the approach to constitutional review which has been implemented since 1994, with minor amendments being frequently made while an overall constitutional review process (although a report was prepared by the Law Commission in 2007) has been eschewed by successive governments.

Proposals for legal reform are both numerous and disparate at present. Six bills have been proposed in order to achieve the recommendations of the Law Commission on the Review of the Electoral Laws. Additional elements of electoral reform are contained within the Political Parties Bill, 2016, while the Local Government (Amendment) (No.2) Bill 2015 contains some minor provisions which also deal with electoral reform, principally concerning the participation of women in local government. All eight Bills, when read together, offer a complete picture of the reforms which are under active consideration.

The Constitution (Amendment) Bill contains the two most controversial electoral reforms, principal of which is the change to the system of presidential election. It proposes a change from the current FPTP system to the requirement of a majority of more than fifty percent of the valid votes cast. The Bill also proposes that a reserved seat should be provided for women within each district. The Bill further proposes to alter the educational qualifications required for membership of the National Assembly and to be elected president; to alter the rules on the appointment and tenure of the members of the Electoral Commission; and to postpone presidential inaugurations until at least thirty days after the date of being elected.

This Constitution (Amendment) Bill, with its proposals to amend the Constitution, will, per Section 196 (c) of the Constitution, require a majority of at least two-thirds of the total number of National Assembly members entitled to vote to pass it. All of the other proposed reforms will require a simple majority in parliament. Standing Orders of the National Assembly require that bills must be published in the *Gazette* twenty-eight days in advance of the First Reading in Parliament, while copies must also be circulated to all Members of Parliament². These procedural steps are particularly important in advance of the November sitting of the National Assembly, as advance publication of all Bills proposed by the Minister for Justice will allow stakeholders to establish precisely which reforms are being advanced within which proposed Bill.

The EU EOM 2014 did not make any recommendation in relation to the electoral system for either the presidential or parliamentary elections. The assessment of the EOM was grounded in the international legal obligations of Malawi, as well as in domestic law. International law is largely silent on the choice of

² Waiver of the 28 day notice period is possible under Standing Order 126, when a Minister certifies that there are urgent grounds, of national consequence, justifying speed.

electoral system, as it is a matter of domestic sovereignty to choose an electoral system, with the requirements only of compliance with human rights principles. The EOM did, however, recommend the promotion of greater participation by women in political life. While no change to the electoral system was specifically recommended in that regard, it is clear that the proposal of reserved seats (see Participation of Women below) would represent an attempt to achieve this.

A proposal in the Constitution (Amendment) Bill to alter the educational qualifications for nomination to the National Assembly is contrary to the International Covenant on Civil and Political Rights³, to which Malawi acceded in 1993. At present Section 51 (b) of the Constitution requires that National Assembly members should be able to speak and read the English language well enough to take an active part in the proceedings of Parliament. The proposed amendment requires, in addition, the possession of a Malawi School Certificate of Education or its recognised equivalent. While this represents a formalisation of the existing practice of the MEC, the law would become more restrictive than it is at present. An educational requirement of a degree to run for the office of president is also proposed. The most recent Human Development Report⁴ indicated that education is inaccessible to many in Malawi, with a national average of just 4.4 years in education, meaning that these educational requirements would exclude a large proportion of otherwise eligible candidates from exercising their political rights and running for election.

The Electoral Commission (Amendment) Bill and the Elections Management Fund Bill together seek to enhance the independence and public credibility of the Electoral Commission, through both the removal of political parties from the appointment of commissioners, and the provision of greater independence and security of funding for the institution. The Referendum Bill proposes to fill a gap in the law, as there is no legislation in place should a referendum be required, such as in an attempt to amend entrenched provisions of the Constitution. The Assumption of Office of President (Transitional Arrangements) Bill proposes that transition teams be created to facilitate transfers of power following presidential elections.

The most substantial piece of legislation proposed is the Presidential, Parliamentary and Local Government Elections Bill (PPLGEB), which represents a welcome attempt to consolidate the similar provisions of the laws which at present govern presidential and parliamentary elections (Parliamentary and Presidential Elections Act, 1993), and, separately, local government elections (Local Government Elections Act, 1998). Existing laws will be repealed. There will be a few minor changes to the provisions of the current laws in order to ensure consistency between the rules and practices for all three elections, as well as alignment with the Constitution. The principal infelicities which are addressed include differing rules on voter registration and the right to vote, as well as the absence of rules on the use of public resources.

The proposed PPLGEB contains a proposal to harmonise legislative rules with the Constitution in the matter of registering to vote. The constitutional requirement that a person must be 18 years of age on registration has been adopted, where previously the electoral legislation had not respected this constitutional stipulation and had allowed registration where a person would be 18 by polling day. Depending upon the length of the period between the close of registration and the election day, many potential voters may be disenfranchised by this law. A constitutional amendment to allow registration in anticipation of reaching the age of 18 by election day would better protect the right to vote. The Bill, by contrast, liberalises legal rules on the exclusive requirement of citizenship of Malawi to vote, which had been contained in previous legislation.

³ UN Human Rights Committee, General Comment 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25) (1996) Para. 15 “Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education...”

⁴ UNDP Human Development Report 2016 – Human Development for Everyone – Malawi
http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/MWI.pdf

Again, a constitutional stipulation, here that a voter may be either a citizen of Malawi or have been ordinarily resident in the State for seven years, has been given precedence over earlier legislative provisions which required citizenship for both presidential and parliamentary elections.

The Bill also introduces new regulations on campaign finance and the use of public resources. While parties and candidates will be allowed to continue to solicit and receive donations from individuals, NGOs and private organisations both within and outside the State, they will not be allowed to receive any support, either in cash or in kind, from the State or from any organ of the State. Organs of the State, agencies and public officers are also explicitly forbidden to use public resources to support any candidate or political party. Candidates and political parties too are also subject to similar prohibitions on the use of public resources in campaigning. Public resources are defined as any property owned by the Government, an organ of the Government, a statutory corporation or body, or a company in which the Government has a controlling interest. Breach of these provisions amounts to an offence. These provisions are mirrored in the draft.

The Political Parties Bill 2016 was introduced to the National Assembly early in 2017. This Bill represents a welcome intention on the part of government to repeal and replace the Political Parties (Registration and Regulation) Act 1993. While some of the provisions of the Bill, such as the creation of the Office of Registrar of Political Parties, re-iterate the content of the earlier Act, there is much greater detail on party registration and operation. A crucial change is the intention to undertake some regulation of political party finance. There is also an attempt to address gender inequalities within political parties, with a requirement of compliance with the Gender Equality Act 2013, and an attempt to restrain handouts.

Entitlements to State funding are set out, as well as rules for the management of such funds. The Constitution, in Section 40 (2) already mandates the provision of funds to political parties which have secured “more than one-tenth of the national vote in elections to that Parliament” for the duration of the life of that National Assembly. While these funds are regularly disbursed to political parties, their operation is opaque. The Political Parties Bill will require that a separate bank account is to be maintained for this public money, which is to be audited annually, with accounts submitted to the Registrar, the Auditor General and the Clerk of the National Assembly.

Private donations are, by contrast, lightly regulated, with a requirement only that donations in excess of either K1 million from an individual, or K2 million from an organisation, be disclosed to the Registrar. While these private funds must be maintained in a separate account, there is no requirement of disclosure of the operation of the account to anyone beyond party members. This represents a significant reduction in the scrutiny of political finances from an earlier draft of the Bill which had contained identical provisions for the disclosure of both public and private funds. There is also no requirement of any disclosure of campaign spending, nor any attempt to impose limitations on such spending.

The Bill states that a political party shall not be eligible to receive donations from state owned corporations. While this would appear to already be the law, in that the Constitution prohibits the spending of State funds unless correctly appropriated and the Public Finance Management Act reiterates same, the inclusion of this provision in the Bill is particularly important symbolically. The Bill also prohibits handouts by candidates or political parties, with the intention being to end the practice of vote-buying. The debate of the Bill in the National Assembly led to a dilution of this provision, as the prohibition on handouts as currently drafted applies during the campaign period only, rather than being continuous. Requests for handouts are also prohibited. Campaign materials are excluded from these prohibitions.

The Local Government Elections Act of 2010 has been subsumed into the proposed Presidential, Parliamentary and Local Government Elections Bill, leaving the rules on the conduct of local government elections largely intact. A gender quota has been added to the rules for the conduct of parliamentary elections, but no such addition was discussed in the context of local government elections. The fact that a

review of the Local Government Act 1998 has been underway for several years appears to have influenced this, leaving the matter of the composition of local government councils to be determined by the Local Government (Amendment) (No. 2) Bill 2015. The substance of the review of the Local Government Act deals principally with issues such as the role of MPs within local councils, so the matter of elections is only tangential to the principal concerns of the Bill. Nonetheless, two minor clauses in the draft (considered subsequently in the context of the participation of women) relate to electoral reform.

EU EOM recommendations and proposed reforms

The EU EOM 2014 made two recommendations which related to the right to participate in political life and to run for election. The Constitution provides, in Section 80 (7) (e), that holders of public office and Members of Parliament are not eligible to be nominated as candidates in the presidential election. Section 51 (2) (e) provides that holders of any public office or appointment cannot be nominated to the National Assembly. There is no guidance in legislation as to how “public office” should be defined. As a consequence, MEC has rejected many potential election nominees, as quite a broad definition of “public office” was applied. Many of these decisions were subsequently overturned by the courts. The only guidance thus is to be found in judicial decisions, and these are not uniformly consistent. The EU EOM recommended that a clear and binding legislative definition of “public office” would serve to clarify the law in this area. The draft electoral reform Bills do not contain any such proposal.

The EU EOM 2014 also recommended that there should be a change in the rules relating to sitting Members of Parliament. They are constitutionally barred from competing in the presidential election. The law dealing with public office-holders has further been interpreted to exclude them from being nominated to the National Assembly itself. The EOM recommended that the ban on incumbent MPs should be reconsidered as it amounts to an infringement of the right to participate in political life, in violation of the International Covenant on Civil and Political Rights. There has not been any proposal made to alter the law in this regard.

The EU EOM 2014, in seeking to vindicate the rights of sitting MPs, recommended that the dates for the close of nominations and for the dissolution of parliament, and other related dates, might be revised in order to ensure that the nomination day would fall after the dissolution of parliament. This recommendation is subsidiary to the overall recommendation to vindicate the political rights of MPs. Legislative clarity on the rights of MPs would be a better outcome in this regard, as the principle should be clearly articulated in law, and scheduling will not suffice to address this.

6 Electoral System and Boundary Delimitation

The Electoral System

The existing electoral system for all layers of elected office is based on a simple majority, i.e. First Past the Post (FPTP).

The president, members of parliament and local councilors are elected for five year terms. There is a limit of two consecutive terms for the president. The vice-president is elected on the same ticket as the president.

For election of members of parliament, the country is divided into 193 single-member constituencies. Members of 35 local councils are elected in 462 single member wards.

EU EOM Recommendations and Proposed Reforms

The EU EOM did not comment on the electoral system and did not make any recommendations in this regard. It is noteworthy that after previous elections in 2004 and 2009 the subject was debated, usually with a

focus on some form of proportional representation for the election of the parliament, notably as this would facilitate a special arrangement for more balanced gender representation. So, a sense of questioning of the prevailing system does have some basis.

Following the 2014 elections the focus of much debate was on the system for election of the president and reserved seats for women (see Participation of Women below). The NTF considered the merits of a two-round system for election of the president, i.e. one requiring an absolute majority for victory, but chose not to recommend it, on the basis that, among other things, it would be difficult for Malawian institutions to organize it in such a short time frame and the cost factor.

The Law Commission, on the other hand, has made a specific proposal for a change to the system for the election of the president to one requiring an absolute majority (known as 50%+1) which was strongly advocated by civil society, though apparently without a consensus among parties on the issue. Under such a system, if no candidate receives an absolute majority of valid votes cast in the first round, then a run-off is held between the leading two candidates. Advocates of the system highlight that at present a president can win with just a small majority of votes (the current president won with some 36%). It is argued that the 50%+1 system would increase the legitimacy of the elected president as he/she would require a broader base of support beyond their own respective geographic base, thereby increasing their legitimacy in the eyes of the public. It is also pointed out that it is still a majority system and so the concept will be familiar and understandable to the general public.

The proposal for reserved seats for women is discussed in more detail below. However, in simple terms it foresees the creation of a single member constituency based on the country's 28 Districts. This is a rather odd construction in terms of electoral system design, but it would guarantee a minimum of 28 seats for women in the parliament, in addition to those women successful in any of the existing 193 constituencies. However, a number of interlocutors raised concerns regarding this proposal, including highlighting the lack of clarity as to how the District-level MPs would relate to Constituency-level MPs, notably in terms of development funds. Further, there was some concern that the creation of women-only seats may isolate those women and could also lead to a lack of support for women in other electoral contests, thereby possibly not resulting in any notable increase in the number of women in parliament.

In terms of election management, the change of system is fairly straight-forward. However, the prospect of a second round has a significant cost implication and would test the capacity of MEC and other institutions further.

Boundary Demarcation

According to the Constitution, MEC has the responsibility to determine constituency boundaries on the basis that constituencies contain “approximately equal numbers of voters eligible to register”⁵ and that such boundaries should be reviewed “at intervals of not more than five years”⁶. For local government wards, there are requirements that such wards must respect constituency boundaries and there are limits as to the number of wards per constituency, based on population density.

The EU EOM of 2014 reported that existing boundaries had not been reviewed since 1999 and that the prevailing boundaries did not provide for equal suffrage. It found that highly populated areas were under-represented in terms of seats in parliament compared to less populated constituencies.

⁵ Subject to considerations of population density, ease of communications and geographic features and existing administrative areas.

⁶ Article 76 of the Constitution

EU EOM Recommendations and Proposed Reforms

The 2014 mission did not make any recommendation in this regard, but the 2009 mission did recommend a review of constituency boundaries to ensure the reflection of population density and weighting in parliamentary representation. MEC informed the EFM that Local Government boundaries were reviewed in 2010, when the number of wards was decreased from 861 to 462 and ceilings were placed on the number of wards per constituency, but it has not subsequently engaged in any review.

In considering the matter of constituency and ward boundaries, the Special Law Committee acknowledged the significant variances in the number of voters in various constituencies and also reiterated that it remains part of MEC's mandate to conduct such reviews based on prevailing principles. The proposed reforms also focused on the relationship between Wards and Constituencies, with an end to the alignment of wards to constituencies proposed as it increases the risk of under- or over-representation.

MEC informed the EFM that it plans to undertake the next review of boundary demarcation in 2020, following the next national census of 2018 and the next elections of 2019. It is anticipated that this should be done on the basis of ensuring a greater respect for the principle of equal suffrage than is currently the case.

Such a review, ensuring a higher level of compliance with the need for equal suffrage, is important to maintain the integrity of future elections for the country's parliament.

7 Election Administration

The Constitution (Article 75) provides for the creation of MEC, consisting of a Chairperson, who shall be a judge, and not less than six other members. Members are appointed for a four-year term and can be re-appointed for a further term. Section 4 of the Electoral Commission Act provides that: "The President shall, subject to the Constitution, and in consultation with the leaders of political parties represented in the National Assembly, appoint suitably qualified persons to be members of the Commission ...". A member of MEC may be removed from office by the President on recommendation of the Public Appointments Committee on the grounds of incapacity or incompetence. Funding for MEC is through parliamentary appropriation. MEC can also receive grants, including from development partners.

Under the Commission is a Secretariat, headed by a Chief Elections Officer (CEO). The Secretariat includes various Departments, including Electoral Services Department, Civic and Voter Education, Media, as well as a number of Sections, such as Finance and ICT. For the purpose of administering the process there is a five-tier structure: MEC at the national level; three Regional Election Offices; 28 District Election Coordinators; 193 Constituency Returning Officers (often District-based); Polling Station Presiding Officers.

The Commission, its Secretariat and Regional offices are permanent staff. Constituency Returning Officers and Polling staff are temporary. District Election Coordinators are often drawn from among District Commissioners, who are permanent public officials.

MEC has broad responsibilities to provide direction and supervision over the conduct of presidential, parliamentary and local government elections, as well as by-elections and referenda. In addition, MEC is responsible for constituency boundaries, voter registration, the organisation of polling and counting and also civic and voter education.

In its final report on the 2014 elections, the EU EOM acknowledged that the holding of tripartite elections for the first time posed significant challenges for MEC. The mission found that MEC acted impartially and sought inclusive solutions, but at same time suffered from weaknesses in its structural capacity and suffered from a number of important organisational shortcomings, notably linked to delays and errors in voter

registration, delays and shortcomings in election day operations and failures in results procedures (see respective sections below).

Following the election, it should be noted that MEC suffered from the untimely deaths of its Chairperson, Justice Maxon Mbendera in August 2016 and its Acting CEO, Thandie Nkovele, in June 2017. Further, the institution suffered a series of allegations of misappropriation of funds and was closed down in August 2016 for a period pending a formal audit. MEC is also currently in a period of transition in that it is in the process of recruiting a new Chief Elections Officer, which is a critical management role. MEC is conducting six by-elections for local councils and parliament in October, and these will be an important test for the body.

EU EOM Recommendations and Proposed Reforms

In its recommendations of 2014, in addition to addressing issues relating to voter registration, election day operations and results processes (see respective sections), the EU EOM suggested that MEC conduct an internal review to improve its organisational capacity; enhance transparency through improved communications with stakeholders and the public; enhance internal communications particularly to decentralised officers; improve and enhance MEC financial management at central and district/constituency levels; create a MEC-led legal department.

MEC has conducted a review and this has informed its planning and procedures, notably with new plans for the critical areas of voter registration, election day operations and results processes (see respective sections). Other recommendations are yet to be addressed, but the UNDP-led support programme does include MEC communications and internal processes. MEC's legal capacity is also being enhanced through the creation of a legal department, a new head of which will assume office on October 14. MEC informed the EFM that it is seeking to improve its organisation and management of the process, with an emphasis on timelines. It has produced a draft Election Calendar covering the period up to and beyond the May 2019 polls and will also develop a Strategic Plan for the period 2018-2022.

In terms of planning, therefore, many of the recommendations proposed by the EU EOM have been addressed. However, as welcome as this is, it should be highlighted that as things stand, most of these issues remain plans, which are dependent upon funding, resources and capacity.

The Special Law Commission has recommended that there should be a designated Election Fund, which would be based on MEC's annual planning and the election cycle and would ensure increased MEC autonomy in its management of the process through its decreased vulnerability to the delay in funds being made available by government⁷. The reforms also propose the gradual decreased reliance on donor support and a move towards national funding of elections (in 2014 it was estimated that government covered 60% and development partners provided 40%). During the visit it was apparent that there remains a critical need for MEC, in collaboration with Government, to develop its full budget, taking account of all potential electoral scenarios, in order to ensure that funding can be available in a timely manner and that the institution has a high level of preparedness moving forward.

MEC has also undertaken a series of non-legal administrative reforms, including prioritising the early delivery of polling materials and forms and the requirement for results sheets to be in both figures and words to reduce errors. Some new procedures are being used in the October by-elections. From an organisational perspective MEC is also planning to enhance its training through the use of so-called Master Trainers,

⁷ For instance, the Head of Finance at MEC informed the EFM that for 2017-2018 the MEC budget was c. MWK 20 billion. Government had initially provided MWK 9 billion. This later increased to c. MWK 12.4 billion. He stated this reflected a broader national shortfall, but could create pressure in the next financial cycle. In addition, the by-elections scheduled for October 2017 were originally slated for earlier but postponed due to a lack of funds.

instead of the previous cascade training methodology in order to improve the quality and direct monitoring of training. Training of staff was a prime focus of EU EOM recommendations (see Voting, Counting and Results section) and hopefully this revised methodology can be helpful.

MEC will also establish Constituency Tally Centres, so that results do not have to be delivered to District Centres, which took too much time in some instances and which were prone to congestion, given that numerous Constituency Returning Officers could be based at the same location. This can be helpful.

The proposed reforms of the Law Commission relating to MEC largely focus on the independence and capacity of MEC, by suggesting, among other things, that in addition to the creation of an Election Fund, appointments of MEC Chair and Commissioners should be a more inclusive and transparent process, led by a Selection Panel⁸. The Special Commission has proposed that Chair and Commissioners shall be appointed by the President but following the open advertisement for applications and interviewing and recommendation of a balanced Selection Panel. The proposal on removal from office – for just cause - is that such a power should remain with the president.

It is also proposed that the maximum number of Commissioners be increased to seven, from the current six, and that their tenure should be for five years rather than four to ensure their tenure covers at least an electoral cycle. The proposal also resolved that the Selection Panel should take account of gender through the entire nomination process. The provision for a maximum two terms remains. There is also a proposal that to qualify as a Commissioner a person has to only be qualified to be a judge. The required capacities for a CEO are also addressed as is the requirement for an open recruitment process. All of these proposals are more in line with good practice and can help to enhance the capacity and effectiveness of MEC.

Critically, the proposal for an Election Fund and a more inclusive (i.e. non-political) and transparent appointment mechanism for MEC, are very positive in terms of best practices for the independence and capacity of an election management body.

8 Voter Registration and the Right to Vote

MEC is responsible for voter registration, but it has long been a source of consternation related to elections in the country, with parties regularly expressing a lack of confidence and making accusations of the lists being strewn with errors and omissions. In some respects, MEC is a victim of a lack of accurate demographic data, but at the same time repeated voter registration drives have been characterised by delays and mismanagement. The register of 2009 was heavily criticised due to its alleged inaccuracy and number of errors. MEC therefore undertook a brand-new voter registration for the 2014 polls. But this again was heavily criticised and lacked public and political confidence.

The original plan for the 2014 exercise was to use biometric technology but in the event MEC did not have adequate time or resources and so relied on its existing technology and methodology which was the use of optical mark recognition system (OMR), which was proven in 2009 to be error prone due largely to human error in transferring and inputting data.

Registration took place from July-December 2013, initially capturing some 7.53 million persons, an estimated 94% of those eligible according to MEC. However, the processing of data took longer than envisaged, the public verification exercise was delayed, public communications were poor, errors remained and preliminary and final registers were made available to parties very late. The final register contained some 7.47 million names.

⁸ The proposal is that the Panel should comprise: the Law Commissioner, Chairperson of the Human Rights Commission; a Judge of the High Court; two representatives of civil society nominated by the NGO Board.

EU EOM Recommendations and Proposed Reforms

The EU EOM acknowledged all of these problems as well as the contextual difficulties faced by MEC. However, the mission also stressed that the register was shared with parties, albeit late, and that while various errors and anomalies existed, they were not sufficient to put in doubt the integrity of the register. However, it is clear that MEC's failing in this regard again raised serious questions among parties and the public, as it had in 2009. In its recommendations, the EU EOM stressed that the process needs to be undertaken in a more timely manner; parties need access to the final register sufficiently in advance of the polls; and a review of the technology used for registration should be undertaken, with a view to considering biometric voter registration. In terms of planning at least these recommendations have been fully addressed.

MEC plans to undertake a new voter registration for the 2019 elections, on the basis that the law requires it to do so and also that registration as a voter is classified as a voluntary right. MEC's intention is that this time it will largely be based on the National ID Card, which is currently in the process of being rolled-out by the National Registration Bureau⁹. MEC will not use an extract of eligible persons based on the national ID register, but will require prospective voters to come forward to registration centres and present their ID cards. MEC will scan these using 'hand-held devices' in order to verify the information against the NRB's national database. The devices will be delivered to MEC for the uploading of data onto the MEC server. Photos will not be taken at the point of registration, but rather lifted from the NRB database. Registers can then be printed using verified information and photos, with, hopefully, none or very few errors. Such a system will require fewer staff than previously, will be quicker and will be less prone to mistakes.

In its draft Election Calendar MEC envisages that registration will take place in ten phases between April and September 2018. The public verification / inspection of the preliminary registers will take place in four phases in November and December 2018. As such, MEC hopes to have the voter register finalised some five months prior to the day of the election, if all goes to plan.

However, there are a number of challenges with regard to this plan.

- There will need to be significant funds made available for the purchasing of the hand-held devices and the envisaged national voter registration and public verification exercises¹⁰. For instance the Head of ICT at MEC informed us that the devices cost approximate \$500 each and MEC will require some 1,000, meaning an outlay of \$500,000¹¹.
- Staff will need to be recruited and trained. The Election Calendar envisages this occurring in March 2018, but this will require all funds to be in place, the devices to have been purchased and a comprehensive training plan to be in place.
- There will need to be exceptions to the provision of the national ID card as verification of eligibility for registration, as it is inevitable that not all persons eligible to be registered will have an ID card. There will need to be agreement as to which alternatives are acceptable, such as testimony of village head, passport etc, and how these will be handled administratively.
- Ultimately the plan is reliant on the successful distribution of ID cards (reports in this regard are largely positive) and also public awareness of the utility and link of ID cards vis-à-vis elections and, later, the need to still separately register to vote.

⁹ This exercise is targeting some nine million Malawians aged 16 and above and is expected to be undertaken between June-December 2017 over five phases nationwide.

¹⁰ Based on the earlier comment by Head of Finance to the EFM, the MEC budget is already under-funded by government for 2018/19.

¹¹ The same interlocutor also said that the plan is to purchase a further 4,000 of these so they can all be used later at Polling Centre to transmit the results to the central level. This would require a total budget of some \$2.5million.

The Law Commission recommended that MEC should consider using electronic methods and system for voter registration and should collaborate with other relevant institutions, such as the National Registration Bureau to benefit from specialized expertise and data from similar exercises. The Commission also recommended that, in order to provide for a more timely registration process, voter registration is approached as a continuous process, stopped at a suitable period for the time of an election (it did not specify what such a time period should be).

As outlined above, MEC is planning to cooperate closely with the NRB and to use its technology in terms of National ID cards and voter info being accessed from the NRB database. However, it could have been possible to have an even closer and more effective, and cost-effective, relationship, if the voter register was merely sourced as an extract from the NRB database, supplemented by small scale registration for the relatively small number of persons who will be eligible but without a National ID.

Arguments were made that voters should be free to come forward for registration or not and so lifting an extract was not appropriate, and also that MEC is required to register voters and to issue certificates to registered persons. The conduct of such a national registration also helps provide transparency, given that parties can monitor the process, thereby increasing political confidence. Further, such exercises can enhance public awareness and there by act as a form of civic education.

The Right to Vote

Unfortunately there is a contradiction between the Constitution and the PPEA regarding voter eligibility. Section 77(2) of the Constitution cites eligibility as a person who at the date of registration is: a citizen of Malawi, or a person ordinarily resident in the Republic for seven years; at least 18 years of age; ordinarily resident in the constituency or was born there or is employed there.

Section 15 of the PPEA defines eligibility as “Every citizen of Malawi residing in Malawi and who, on or before the polling day, shall have attained the age of 18 ...”. This restricts eligibility only to citizens but places the moment of attainment of 18 years more correctly as election day rather than date of registration.

Further, the LGEA states that eligibility applies to “Any person residing in Malawi and who on or before polling day shall have attained the age of 18 ...”. This is an even broader definition as does not require a voter to be a citizen.

In seeking to harmonise election legislation and the Constitution, the Special Law Commission has proposed that the Parliamentary and Presidential Election Act, which provides that to be eligible a voter, among other things, has to be at least 18 years on the day of the election, should be amended to be in line with the Constitution, which states that to be eligible a voter, among other things, has to be at least 18 years on the day of registration. It appears that this decision was based largely on the fact that it is easier to amend a law than it is to amend the Constitution. However, in this regard the right to vote as provided in the Parliamentary and Presidential Elections Act is far more in line with good practice than is the Constitution, which risks disenfranchising large numbers of persons who are 18 at the time of the election.

9 Political Parties, Political Party Financing and Election Campaign

The EU EOM of 2014 found that the legal provisions for the registration of parties in Malawi are reasonable and in line with international principles relating to freedom of association. The registration of parties falls under the authority of the Registrar of the Ministry of Justice, with limitations limited to parties whose purpose and object is unlawful, including ethnic, racial or religious discrimination. Parties require not less than 100 persons in each of the 28 Districts of the country.

In terms of campaign freedoms, the EU EOM found that the legal framework provides a reasonable basis for freedom of assembly, freedom of speech and the right to stand for election. A formal two-month campaign period is also foreseen in the law followed by a period of 48-hour campaign silence prior to the day of polling.

The 2014 elections were competitive, with presidential candidates nominated by 12 political parties and a total of 1,293 candidates contesting the parliamentary elections, representing 17 political parties and including 419 independent candidates¹². The 2014 EU EOM found that political parties were able to campaign freely and that the campaign was largely peaceful, reflecting also the positive trends of previous elections in this regard.

However, the mission also reported that the negative trends relating to the campaign and the conduct of parties from previous elections were also repeated, with abuse of state resources, offering of inducements (handouts) to voters and a weak regulatory framework relating to party and campaign finance. Other concerns raised included the overt bias of state media in favour of the ruling party and the relatively low level of female candidates. These are covered in sections on Media and Participation of Women respectively.

EU EOM Recommendations and Proposed Reforms

EU EOM recommendations in this area were for the introduction of a legal requirement to disclose political party sources of financing and to report on campaign spending and the introduction of a clear and enforceable ban on the use of state resources for campaigning purposes, together with an independent oversight mechanism to ensure state resources are not used for campaigning. These are two critical areas, yet the proposed reforms, discussed below, do not adequately address the matter.

The EU EOM highlighted that electoral legislation made no reference to a prohibition on the use of state resources for campaign purposes, leaving only a limited reference in the Constitution on the ban on civil servants using state resources to promote a political party. The Special Law Commission has proposed that the Presidential, Parliamentary and Local Government Elections Act should include, in Article 61, an explicit ban on a party or candidate receiving any contribution in cash or kind from “the State, any organ of the state or agency” and to prohibit any use of public resources to support a party’s campaign¹³. This is a positive reference, but there remains a lack of an explicit mechanism in order to monitor compliance.

The proposed reforms provide for political parties to receive state funds (for parties receiving 10% or more of the votes cast nationally in parliamentary elections) and also to solicit private donations either from national or foreign sources, which is quite a liberal funding mechanism. However, while disclosure requirements for the receipt and use of state funding by parties are outlined in detail, the disclosure requirement for private funding/donations is limited, with no explicit requirement for public disclosure or for an annual report (see Legal Framework section).

There are no proposals regarding a requirement for reporting on campaign spending (as recommended by the 2014 EU EOM) or for campaign spending limits (as recommended by the 2009 EU EOM). Regulations on campaign spending – in the context of a country where financial irregularities linked to the campaign have

¹² Many of the independent candidates had lost the primary in their respective party and decided to contest regardless, with 52 winning election.

¹³ Five CSOs recently threatened to take the DPP to court for alleged misuse of state resources, known locally as the “Blue Night” incident. During a DPP fundraiser in July 2017 they alleged that a number of parastatal agencies made financial contributions to the DPP, amounting to some MWK 13.5 million (c. EUR 16,000). This is symptomatic of the kinds of abuse widely reported in 2009 and 2014.

been rife, including misuse of state resources and funds – could have helped in creating increased accountability and transparency as well as a more level playing field. It could have been argued that as parties are recipients of public money they have a duty to establish they are financially accountable in all respects of their operations, be it reporting on private funding and also on campaign spending.

The draft Political Parties Bill includes a proposed ban on parties offering handouts during the campaign. However, this has proved contentious among political parties, and the current draft wording makes a careful distinction between prohibited items, defined as inducements, as opposed to regular handouts for campaigning purposes, such as caps and t-shirts and limiting prohibitions to the formal campaign period only. The Bill was put before parliament which returned it over this issue, leading the Legal Affairs Committee to suggest allowing expenditure on campaign materials and the facilitation of party meetings. While it is positive that the issue has at least been addressed in proposed legislation, the wording may result in a degree of vagueness, though, politically, possibly this is the best that could be agreed to in parliament.

The draft Political Parties Bill also contains a proposal for an extension of the conditions under which a party can be deregistered, namely where it has secured none of the following after two general elections: at least a seat in parliamentary elections; or at least five percent of national votes for parliamentary elections; or, at least two seats in local government elections or ten percent of total national votes in local government elections. In the Malawi context, while this may impact on some small parties, it does not represent an undue restriction or limitation on political rights.

The Right to Stand

The 2014 EU EOM stated that criteria for the right to stand are “generally reasonable and in line with the international commitments of Malawi”. Candidates can stand on behalf of a party or as an independent, and while candidates can only contest in one constituency/ward for a specific election type, they are at liberty, for example to contest for presidential, parliamentary and local council simultaneously. A fee to stand is required, and women receive a 25% reduction on this and candidates have to submit a number of supporting signatures of registered voters.

The Special Law Commission has proposed increasing the number of signatures required, though the number remains reasonable and should not be an impediment at all. For presidential candidates it is proposed to be 100/District; for parliamentary candidates it is proposed to be 100 for the constituency they intend to contest; and for local government, 20 signatures of registered voters from the relevant ward.

In addition, there is a proposal to add educational requirements for candidate eligibility, with a presidential aspirant required to hold a recognised degree or its equivalent, and parliamentary and local council aspirants required to be in possession of a Malawi School Certificate of Education or its recognised equivalent and be able to speak and read the English language well enough to take part in proceedings. Such requirements have been brought in elsewhere, such as Zambia and often enjoy popular support. They do not appear to be contentious in Malawi at all, with proponents arguing it supports the developmental agenda and raises the quality of debate and oversight in elected institutions. On the other hand, such a restriction on the right to stand is at odds with General Comment 25 (Para 15) of the Human Rights Committee, which states that “Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education”.

The EU EOM also highlighted that the ban on persons holding Public Office creates a formal legal obstacle to sitting members of parliament from being nominated, as the date for the dissolution of parliament falls after the nomination period. Formally speaking, this ‘arrangement’ also means that the campaign period for affected persons can be shortened. In practice, it seems that this is managed by MEC in a manner that the announcement of nominated candidates occurs after the dissolution of parliament and thus, de facto, the ban

has no effect, but remains a legal anomaly which could create legal uncertainty. The EU EOM recommended refining the definition of Public Office to end this uncertainty and to harmonise the timelines for the dissolution of parliament, nominations and the campaign, to ensure they are more coherent. But this has not been taken up by the reform committee and is not raised locally as a problem.

10 Media

The issue of the regulation of media coverage of the electoral process has long been a matter of controversy, principally regarding allegations of bias and partiality on the part of the Malawi Broadcasting Corporation (MBC). The Parliamentary and Presidential Elections Act confers on the MEC the duty and power to ensure that the MBC is neutral and equitable in reporting on the election campaign. It must also facilitate the provision of airtime for all political parties. It is widely perceived, however, that the MBC, in both its television and radio broadcasts, favours whichever is the ruling party, a perception borne out in EU EOM media monitoring. The MBC justifies its programming content on the basis of being the state broadcaster.

The NTF observed that the MEC had not been successful in enforcing equitable access to the MBC for all candidates and political parties. It recommended that the Malawi Communications Regulatory Authority (MACRA) should be given the legal powers of enforcement in this matter instead. The Law Commission reiterated the perceived failure of the MEC in regulating the practice of the MBC. For their part, the Law Commission determined that the prevailing legislative provisions are adequate to the task of achieving fairness, but that the MEC must assume and discharge its responsibility in this area, unlike currently. The Commission has also proposed that newspapers would no longer be subject to this area of regulation.

The Communications Act 2016 contains a clear stipulation of the public service obligations of the MBC, requiring that it function without political bias and that it provide balanced coverage of elections. As well as the MBC itself, both MEC and MACRA have obligations to ensure fairness in election campaign coverage. Consensus emerged from the electoral reform deliberations that there are adequate legal powers already in place, vested in both MEC and MACRA, to address the situation. There has, however, not been an adequate use of these powers.

EU EOM Recommendations and Proposed Reforms

The EU EOM 2014 made two very similar recommendations directed towards promoting the independence and impartiality of the media, in particular the state broadcaster MBC and the communications regulator. The recommendations were that the boards of both the MBC and MACRA should be appointed by the National Assembly, as should both of their directors general. The Communications Act, 2016, has altered the appointment process to both of these bodies, but in a minor way. The changes made are not adequate to guarantee the removal of political influence from the appointment process to either board.

Under the Communications Act, 1998, the Board of MACRA was appointed exclusively by the President, in his absolute discretion. Under this 1998 Act the President appointed the Chairperson of the Board of the MBC in his absolute discretion, while he appointed the other members of the MBC Board in consultation with the Public Appointments Committee of Parliament. The Communications Act 2016 provides that the President appoints all members of the boards of both the MBC and MACRA, subject to confirmation by the Public Appointments Committee. While it is in theory possible that there could be robust confirmation hearings, membership of both boards remains largely within the gift of the President.

Changes to the appointment processes for the directors general have also been made. Under the 1998 Act the Minister for Communications appointed the director general of MACRA, on the recommendation of the board. The Board of the MBC appointed its own director general. The Communications Act 2016 now allows both the MBC and MACRA to appoint their own directors general.

While the EOM 2014 recommended that the appointments of both boards and directors general of both MBC and MACRA should be made by the National Assembly, a more independent model for appointments to boards would be advisable too. The model of a selection board which has been used for other institutions, and is, for example, the model proposed in the Electoral Commission (Amendment) Bill for appointment to MEC, would be effective enough in promoting independence. Boards should then retain the power to appoint their own directors general.

The EU EOM 2014 raised concerns regarding the publication of opinion polls during the election campaign period. Their principal criticism was that the opinion polls published were unscientific in their methodologies, and used small sample sizes. The EOM recommended the introduction of regulations for the conduct of opinion polls related to elections. No action has been taken in this direction to date.

11 Civic and Voter Education

The Electoral Commission Act confers on the MEC the power to promote public awareness of electoral matters through the media and other appropriate and effective means, and to conduct civic and voter education. The responsibility includes voter information, voter education and civic education. The actual conduct of these activities has been delegated by the MEC to CSOs, which have been subject to administrative accreditation by the MEC and operate subject to a Code of Conduct.

Many obstacles to the effective implementation of civic and voter education emerged during the discussions on electoral reform. Funding for such activities has, of late, been sourced individually by accredited CSOs, as MEC itself was unable to secure adequate resources to channel to implementers. This was principally due to concerns about previous non-compliance with undertakings given, as well as failures in the accountability of service providers.

There were failures in the provision of civic and voter education during previous elections. One of the major factors behind this was the failure of many CSOs to implement the programmes which they had undertaken. In some instances, this was due to the CSOs being effectively “briefcase” or “phantom” CSOs that were created close to the elections with the primary intent of profiteering from the practice, without any real existence at the grassroots or any ability to deliver the work promised. Other CSOs, with sincerely good intentions, were unable to secure funding in order to conduct their planned educational activities. There were failures on the part of MEC in monitoring and evaluating the work, and an absence of adequate synchronisation between the accreditation of CSOs and the electoral cycle.

EU EOM Recommendations and Proposed Reforms

The EU EOM 2014 recommended that civic and voter education activities should be extended to the grassroots level, and that an adequate budget should be provided in order for these activities to be undertaken. Realisation of the proposals of the Law Commission would certainly comply with this recommendation, if they are implemented as proposed.

The Law Commission has proposed, in Section 21 of the Electoral Commission (Amendment) Bill, that the Minister should make Regulations to enable MEC to provide for continuous civic and voter education throughout the electoral cycle. The regulations would prescribe rules on the accreditation of CSOs, including issues such as the impartiality of the entity, its demonstrable financial capacity or ability to mobilise resources, and the requirement of due diligence on the part of the MEC. The accreditation process would be continuous, for the entire five-year period of the electoral cycle, the rationale being to have CSOs in place and working years in advance of the election date.

The regulations would provide for a legally binding code of conduct on the provision of civic and voter education. There would also be penalties for failure to comply with the conditions of accreditation or the code of conduct. It is clearly the aim of the proposals to ensure that civic and voter education would be extended to the grassroots level, complying with the EU EOM recommendation. On the face of it, the proposed accreditation requirements are, however, numerous and quite onerous to satisfy. It will be important that the freedom of civic space is protected and balanced against administrative practices.

The EU EOM also recommended that there be an adequate budget for the voter and civic education activities. The National Institute for Civic Education (NICE), a quasi-governmental body working through over 8,000 individuals nationwide, mandated to provide civic and voter education, is being provided with a budget of € 9 million by the EU.

The EU EOM also recommended that civic and voter education should be made available to persons with disabilities, particularly those with visual and aural impairments. Work has begun in order to ensure that appropriate civic education is made available to persons with disabilities. NICE has signed a Memorandum of Understanding with the Federation of Disability Organisations in Malawi (FEDOMA) and the Malawi Union of the Blind on ensuring that the needs of this community are met. The MEC has also stated that it is planning to draft a new strategy and guidelines on civic and voter education which will be responsive to the rights of persons with disabilities. It appears that efforts in line with the EU EOM recommendation are certainly underway.

12 Participation of Women

A government-mandated 50-50 campaign was conducted during the last three electoral cycles, with a wide range of stakeholders promoting the equal participation of women in public and political life. The outcome, however, was widely assessed to be disappointing, with a reduction in the number of women elected to the National Assembly in 2014 to 32, down from 42 in the previous election. Recommendations subsequently emanated from stakeholders, as well as from the EU EOM 2014, for affirmative action to increase the participation of women. Most recently, the African Commission on Human and People's Rights, in reviewing the compliance of Malawi with the African Charter on Human and People's Rights in 2015¹⁴, recommended the enactment of legislation to provide for female inclusion, including the stipulation of specific quotas for the representation of women. There is clear consensus that the under-representation of women is a problem in Malawi.

There is an absence of consensus, however, on the means to address this deficit. The NTF had proposed that the election system should be altered by the introduction of a "zebra proportional representation" system, which would allow for the promotion of women through the candidate nomination process. The Law Commission did not consider such an option to be feasible as it would have meant fundamental alterations to the design of the executive and the parliament, a course which they felt to be in excess of their authority.

The Law Commission has recommended the inclusion of a reserved seat for a woman within each of the 28 districts of Malawi. This would be effected through an amendment to section 62 of the Constitution, an element of the Constitution (Amendment) Bill. It appears that the proposal of reserved seats is compatible with domestic law, as well as with the international legal obligations of Malawi. The Convention on the Elimination of All Forms of Discrimination against Women, in particular, favours the adoption of temporary

¹⁴ African Commission on Human and People's Rights. 57th Session, November 2015, Concluding Observations and Recommendations on the Initial and Periodic Report of Malawi http://www.achpr.org/files/sessions/57th/conc-obs/1-1995-2013/concluding_observations_initial_combined_state_report_malawi.pdf

special measures to enhance the participation of women in political life¹⁵. While the Law Commission observed that a temporal limit on the utilisation of the reserved seats model might be expedient in copper-fastening the lawfulness of the proposal, no such time limit has been included in the proposed text. If adopted, a review of the implementation of the reserved seats would be prudent after the 2019 elections.

Reserved seats are proposed only for the National Assembly as part of the specific electoral reform proposals emanating from the Law Commission, without any consideration of the participation of women within local government. The Local Government Act 1988 and the Local Government Elections Act 2010 lack any specific provisions to promote gender equality within local government. Local elections in 2014 resulted in just 56 women being elected among a total of 457 council members. Reform of the Local Government Act began in 2014, proceeding through the establishment of a joint CSO/Government of Malawi Task Force, culminating in the drafting of the Local Government (Amendment) (No.2) Bill, 2015. This proposes that section 5 of the principal Act be amended to include a requirement that at least two of the five non-voting members appointed to local councils should be women. It is also proposed that women be included in the membership of service and other committees of local government. These measures do not, however, promote any greater participation of women as full council members.

EU EOM recommendations and proposed reforms

The EU EOM 2014 made a specific recommendation that political parties should be targeted to promote the greater participation of women in political life. They recommended that a legal requirement, such as mandatory quotas, should be introduced, requiring political parties to apply affirmative action gender policies within party structures and when selecting candidates.

The electoral reforms which have emanated from the NTF and the Law Commission have not addressed political parties, but have focussed instead on adjustments to the electoral system as their preferred means for securing greater female participation in political life. The Political Parties Bill 2016, however, does have a gender dimension to it. An initial draft required that political parties should “endeavour to achieve fair gender representation” when nominating candidates in all tri-partite elections. The draft published in early 2017 required that at least one-third of the membership of all party organs, bodies and committees should be female, while the most recent draft instead requires compliance with the Gender Equality Act (which mandates at least 40% of either sex in the public service) when appointing members to party organs and committees. There is no mention of candidate selection in this regard.

While the current reform proposals are not in accord with the recommendation of the EOM, it is clear that the intention behind the proposal to amend the electoral system is in line with the professed intention of the EOM recommendation, namely to promote the greater participation of women in political life. It is regrettable, however, that the opportunity to address political parties has not also been taken.

13 Persons with Disabilities

There is a significant catalogue of legal provisions in Malawi which protect the rights of persons with disabilities. Section 20 of the Constitution prohibits discrimination on the grounds of disability, while Section 40 acknowledges the political rights of all persons. The Convention on the Rights of Persons with Disabilities (CRPD) was ratified by Malawi in August 2009 and is binding upon the State under international law. As a dualist state, the requirements of any convention must be incorporated into domestic law before

¹⁵ Convention on the Elimination of All Forms of Discrimination against Women Art 4 “Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discriminatory..”

rights become actionable within Malawi. The Disability Act was enacted in 2012, replacing the Handicapped Persons Act of 1971.

The Disability Act contains several provisions dealing with the promotion and protection of the political rights of persons with disabilities. Under Section 17 the Government is obliged to put in place measures and policies to create “a conducive environment for persons with disabilities to effectively and fully exercise their political rights, directly or through their freely chosen representatives”. This must be done by ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use. The right to vote freely and in secret is included, as is the right to stand for election. Under Section 18 of the Act it is an offence for anyone to prohibit persons with disabilities from exercising their political rights.

The provisions of the Disability Act indicate that, as of right, persons with disabilities are entitled to special facilities to vindicate their right to vote. No corresponding duty, however, has been laid down by law specifically addressed to the MEC to ensure that the rights of persons with disabilities are fulfilled. The reality is that MEC has put in place some special measures to vindicate the rights of persons with disabilities, but not all have been successful.

EU EOM Recommendations and Proposed Reforms

The EU EOM 2014 noted that tactile ballot guides had been provided to enable secret voting for persons with visual impairments. However, these were frequently not used, as neither voters nor polling staff were familiar with their use. The EOM recommended that awareness of the use of tactile ballot guides should be ensured among voters with disabilities. Work to realise this recommendation has been initiated. NICE has signed a Memorandum of Understanding with FEDOMA and the Malawi Union of the Blind which includes the needs of voters with visual impairments. MEC has informed the EFM that they plan to develop a new plan and strategy on civic and voter education which will include addressing the needs of voters with visual impairments.

The EU EOM recommendation relating more generally to persons with disabilities and civic education has been addressed in the section on voter and civic education.

14 Polling, Counting and Results

The 2014 EU EOM reported that whilst election day was reasonably calm and electoral procedures were administered in an orderly and transparent manner, the process was beset by significant organisational shortcomings on behalf of MEC. Many polling places opened late, while many lacked the requisite materials, including results sheets. This resulted in various ad hoc solutions by staff in affected places, which later created inconsistencies and anomalies in the results tabulation process, which itself was affected by serious failures and delays. There were also many reports of the results not being posted at polling places, which is a critical transparency and confidence measure. The EU EOM highlighted MEC’s culpability in these failures, which largely resulted from poor planning, mismanagement, and a lack of training and capacity.

EU EOM Recommendations and Proposed Reforms

In addition to the recommendations already mentioned concerning a review of MEC, a revised approach to its funding and improved internal communications (see Election Administration section), the EU EOM recommended, among other things: the advance delivery of materials; effective and timely training, with a focus on the completion of results forms in polling centres; simplifying tallying procedures; and design and testing of a reliable results management system.

In response to these and other problems, MEC has undertaken a number of non-legal reforms and also revised its planning and operational strategy. Some of these aspects are already being implemented during the current series of by-elections, while many other aspects remain at the planning stage and are dependent on the level of financial and resource support MEC receives from the government, including vehicles, and from development partners. MEC informed the EFM of the changes it has already implemented, including:

- Transportation of polling materials two days before election day
- Checking of materials on the day before
- Results sheets to be completed in figures and words (Also proposed by the Law Commission)
- Polling station result sheet to be posted at the polling station (which was already foreseen in the law)
- Creation of constituency-level Tally Centres in addition to District-level Centres

In addition, in a meeting with MEC, the EFM was informed of other operational and planning reforms MEC is intending to make:

- Printing of results sheets with ballot papers to ensure simultaneous delivery of both
- Decentralise the packaging and distribution of materials
- Use Master Trainers to conduct training of staff, rather than cascade training to improve capacity of staff in polling centres to avoid the inconsistent practices of 2014¹⁶
- Use hand-held devices for scanning and transmission of results in addition to a paper-based printout
- Locate Returning Officers at Constituency level, to reduce congestion at District HQs
- Revise results transmission system to reduce blockages in the system during transmission

It remains to be seen if all of these reforms can be implemented, as they are dependent on, among other things, factors such as agreement by parties on the electronic transmission of results from the polling place, a budget for the purchasing of 5,000 hand-held devices and the provision of adequate transportation by government. In its report, the EU EOM of 2014 recommended that MEC has an alternative transmission system planned in case of a failure of its primary system. This recommendation remains pertinent.

Ultimately, the results system remains dependent on the source figures provided from each polling stream. Observer reports from 2009 and 2014 indicated that the poor conditions, including a lack of adequate light, the low capacity of staff and complex paper work, inevitably create a series of errors in results sheets which is hard to deal with in an automated system. As such, a main priority for MEC must be improving the quality of the management of results at the polling place level as well as ensuring adequate checks and balances as part of a realistic and viable system at higher levels.

15 Election Disputes

The issue of electoral dispute resolution forms just a minor element of the present electoral reform proposals. The EU EOM 2014 observed that there was a gap in the legislative framework in that there were few legal remedies available at the local level, and that access to the courts was both geographically difficult and expensive. Access to the courts is otherwise unproblematic at the national level, with both election petitions and judicial review proceedings involving the MEC frequently coming before the courts. Cases have occasionally, however, taken as long as two years to determine.

The NTF affirmed the absence of mechanisms providing for dispute resolution, apart from formal court proceedings. A special tribunal was proposed to deal with electoral disputes across the country, while it was also proposed that alternate dispute resolution, such as through local Multi-Party Liaison Committees, should

¹⁶ For example, in some instances results data by was correctly entered by polling stream, whereas in others it was collated by polling centre and thereby the numbers of voters far exceeded the total of 880 per polling unit tolerated in the results management system.

be institutionalised through subsidiary legislation applying to the MEC. There was also a recommendation that a prevailing judicial practice direction, that election petitions should be dealt with within fourteen days, should be transformed into law.

The Law Commission, however, has proposed that the legislative status quo in relation to electoral dispute resolution be maintained. Their assessment was that the current informal mechanisms, namely the Multiparty Liaison Committees and the National Elections Consultative Forum, were functioning well, while the prevailing legislation offered the MEC the scope to elaborate further in this area as necessary. They expressed confidence in the role of the Chief Justice in ensuring that election petitions would be dealt with within a (newly proposed) period of thirty days, while recommending that specific judges should be assigned to adjudicate upon petitions. This continued recourse to judicial practice directions, while useful, lacks the full force of legislation.

A new set of Courts (High Court) (Civil Procedure) Rules were, however, gazetted in June of this year, under Section 67 of the Courts Act Ch3:02, and they will overtake the practice directions. These rules instruct judges and lawyers as to how they must proceed in electoral matters, clarifying one of the procedural areas which had been the subject of practice directions previously. Part II of Order 19 lays down rules to ensure that electoral matters should be dealt with expeditiously by the courts. These rules require that, once an electoral matter has been initiated, the documents setting out the case must be submitted within seven days, followed by a period of three days for a response, and a further three days for a reply to this document. Decisions of the courts on election petitions are to be delivered within fourteen days of the conclusion of a hearing.

EU EOM Recommendations and Proposed Reforms

The EU EOM 2014 recommended that mechanisms should be introduced at the district level to deal with complaints, including a right of appeal to Magistrates' Courts. The rationale behind this was both to formalise the existing informal mechanism of the MPLC, while also making access to courts more readily available to people living at a great distance from one of the four seats of the High Court nationwide. This is not a matter which has been directly addressed in the reforms of the Law Commission. While there seems to be widespread consensus that the MPLCs are working well at the local level, the NTF had proposed some formalisation of the structures and procedures involved. It remains open to MEC and the Minister to draft subsidiary legislation to elaborate procedures which would apply to dispute resolution, further to Section 76 (2) (c) of the Constitution. The creation of a legal department within the MEC secretariat in October 2017 should facilitate this.

The EU EOM 2014 also proposed that there should be a harmonisation of the penalties which apply to identical electoral offences, which were treated differently in the prevailing electoral law. This recommendation has been comprehensively and affirmatively addressed in the proposal to consolidate the Parliamentary and Presidential Elections Act, and the Local Government Elections Act, into the single omnibus Presidential, Parliamentary and Local Government Elections Act.

Annex 1

Recommendations

No.	Purpose	Recommendation	Responsible Body
1	To enable timely and effective planning for electoral operations	It is important for MEC, in collaboration with Government, to develop a comprehensive budget covering potential electoral scenarios and possible contingencies. This will enable the timely funding of MEC as required.	Government and MEC
2	To enable MEC to implement its electoral plan effectively and in a timely manner	Government needs to meet its responsibility to provide MEC with adequate transport to ensure its electoral operations are timely and effective.	Government and MEC
3	To ensure that the will of the electors is respected and that the preparation of results is transparent and accountable	Training of polling staff by MEC should include: a strong focus on results tallying and transmission, including the completion of results sheets; responsibilities in posting results at the polling place; and the provision of copies of the results to candidate representatives.	MEC
4	To ensure that the right to stand for election is suitably applied, thereby ensuring that sitting members of parliament are not excluded from being nominated as a presidential or parliamentary candidate	Section 2 of the draft legislation should be amended to include a clear and binding legislative definition of “public office”. The bans on MPs contesting elections should be explicitly removed from the legislation and the Constitution, and replaced with a provision that MPs are entitled to run for election.	Government and Parliament
5	To ensure utmost transparency and accountability and ensure a more level playing field	Disclosure requirements for campaign spending should be considered for inclusion in the law	Government and Parliament
6	To prevent the misuse of state resources	A means of scrutiny and enforcement of the ban on misuse of state resources should be created to support implementation of the law banning such a malpractice	Government, Parliament and MEC
7	To ensure fairer media coverage of the election campaign	MEC has a responsibility, reiterated in Section 57 of the PPLGE Bill, to enforce the requirement that media provide equal and neutral coverage of the election campaign. It is important that this obligation is enforced	MEC
8	To ensure an increased level of	It is important that, should the	Government, Parliament

	representation of women in political life	proposal for 28 reserved seats for women be implemented, the outcome be reviewed post-2019 to assess whether or not it resulted in a meaningful increase in the level of participation of women in the National Assembly.	and Civil Society Organisations
9	To ensure an increased level of representation of women in political life	Legal obligations should be created to require political parties to mainstream gender equality in party structures and to nominate women in good numbers as candidates for election.	Government, Parliament and Political Parties
10	To promote more balanced media coverage and independent broadcasters	More inclusive and transparent appointment mechanisms for the national broadcaster (MBC) and the communications regulator (MACRA), should be considered, in line with the selection board model proposed for MEC in the Electoral Commission (Amendment) Bill.	Government and Parliament
11	Articles 12 and 29 of the Convention on the Rights of Persons with Disabilities now interpret blanket exclusions from voting rights on the grounds of mental disability to be disproportionate	Provisions in the Constitution should be reviewed to ensure against the deprivation of the vote from persons with mental disabilities	Government and Parliament

Annex 2



EU ELECTION FOLLOW-UP MISSION TO MALAWI

PRESS RELEASE

Malawi is at an important juncture in its electoral history. There is a moment of opportunity for the country to take positive steps to improving its electoral process to ensure inclusive, transparent and credible polls, which enjoy public and political confidence. The European Union (EU) stands ready to continue to support the country in this vitally important task. We fully support the Government to table the electoral reforms in November 2017 as they have undertaken to do so. The EU Follow-up Mission finds the electoral reforms important for Malawi to maintain positive momentum ahead of the 2019 election and meet the public expectation of timely parliamentary consideration of proposed changes.

The EU has deployed an Election Follow-up Mission (EFM) to Malawi to assess the current electoral reform process and the extent to which previous EU election-related concerns and recommendations have been addressed. The EU EFM, led by Ms. Birgitte Markussen, Director for Africa at the European External Action Service, has met a wide range of Malawian and international stakeholders, including H.E. the State President, the Minister of Justice and Constitutional Affairs, the Speaker of Parliament, a representative of the Chief Justice, the Malawi Electoral Commission (MEC), government representatives, political parties, Public Affairs Committee, civil society and the media.

Since the introduction of multi-party politics in 1994, Malawi is establishing a tradition of electoral democracy. Now, the country is taking some important steps to review the framework for elections and a broad range of reforms has been proposed. Going forward, it is critical that further deliberations on prospective reforms continue to be inclusive, that stakeholder confidence is maintained and that the revised framework is agreed in good time to enable preparations for 2019 to commence. Crucial in this is the timely gazetting of reform bills to allow for publication 28 days prior to being tabled during the sitting of Parliament in November 2017. This allows for sufficient scrutiny and deliberation.

Based on the findings of the EU EOM of 2014:

- The main challenges in the conduct of the polls in 2014 were related to voter registration, election day preparations and results management, as well as malpractices during the campaign, including abuse of state resources. Many of the EU EOM's recommendations could be addressed if the proposed legal reforms are adopted and the administrative reforms envisaged by MEC are implemented. Addressing the shortcomings observed in both 2009 and 2014 will be critical to strengthen Malawi's democratic process and maintain public confidence.
- If completed successfully, the introduction of a National ID Card will be a major step forward for the country. Identity cards will be of great benefit to Malawians in many aspects of their lives, including elections. In undertaking voter registration, MEC is proposing to make use of the National ID card, which should minimise errors and reduce costs. MEC envisages having this completed well in advance of May 2019. If achieved, this will be a major step forward for voter registration compared to previously, but MEC needs to ensure the system it decides upon is realistic, viable and deliverable.
- MEC also has new plans to ensure the delivery of election materials in advance of election day, and to ensure polling centres have all the materials required to open on time. It is critical that MEC, in

collaboration with Government, ensures adequate transportation is made available in a timely manner to ensure operational plans can be fulfilled.

- We very much hope that the system for results and tallying can be made more effective and reliable than in 2014. We note that MEC has made a positive change to how result sheets are completed and foresees the creation of constituency tally centres. It is also important that staff in polling centres are well trained on reporting results; results are posted at polling places; and that the system for the transmission of results is tried and tested well before election day.
- The EU EFM welcomes that there is consideration of how to increase the level of women's representation in the National Assembly, and we note that a proposal on women's representation has been made in the Law Commission's report. In view of the number of concerns expressed to the EU EFM, we propose that, if adopted, it may be prudent to conduct a review after the 2019 elections to assess how successful it was. More broadly, it is important that parties mainstream gender equality within their structures and nominate women in good numbers as candidates.
- Election campaigns in Malawi have been generally peaceful, and it is critical that in future all contestants are able to campaign freely without intimidation or hindrance and that there is a level playing field. In 2014, the EU EOM recommended the introduction of requirements for parties to disclose sources of funding and details on campaign expenditure. We welcome that some aspects of this have been proposed in the draft Political Parties Bill. However, the draft Bill does not contain adequate disclosure requirements on private funding of parties nor any requirements for disclosures on campaign spending, which could help to increase transparency and accountability. We note also that there is no clear mechanism to enforce the ban on misuse of state resources.
- The EU EOM observed bias in reporting by state media during both the 2009 and 2014 elections. There is a need to enforce the law which requires fair and balanced electoral coverage. In addition, independence of the state broadcaster and the communications regulator should be further enhanced.
- Accessible and effective systems of electoral dispute resolution are a crucial factor in ensuring peaceful elections. While no legal reforms have been proposed in this area, it is important that the new legal department of MEC elaborate dispute resolution procedures.

In terms of other matters proposed in the reforms:

- The EU EOM did not comment on the electoral system nor make any recommendations in this regard in 2014, in line with our standard practice. The choice of electoral system is a national decision. The prospects of any reform should be for the next election to be better than the previous one and thereby strengthen the democratic process in Malawi.
- Proposals by the Law Commission to increase the independence of MEC, including through strengthening procedures for the appointment of Commissioners and the creation of an Election Fund, are in line with international best practices and could make a meaningful contribution to further increasing public and political confidence in future elections. It is important for MEC, in collaboration with Government, to develop a budget covering all potential electoral scenarios to ensure a high state of preparedness, facilitating the timely funding of MEC as required.

Lilongwe, Malawi, 14 September 2017

Annex 3 List of Meetings

	Institution	Name and Position
1	Malawi Electoral Commission	Justice Jane Ansah, Chairperson & Commissioners
2	Centre for Multi-party Democracy	Kizito Tenthani, Executive Director
3	National Gender Co-ordination Network	Emma Kaliya, Chairperson
4	Public Affairs Committee	Robert Phiri, Executive Director, Rev. Dr. Felix Chingota, Chairperson & Members of the Board
5	National Initiative for Civic Education	Ollen Mwalubunju, Executive Director & Gray Kalindekafe, National Programmes Manager
6	Law Commission	William Msiska, Chief Law Reform Officer & Mike Liabunya
7	UNDP	Claire Medina, Deputy Resident Representative & Richard Cox, Chief Technical Adviser & Busekese Kilembe, Programme Analyst
8	UN Women	Clara M.W. Anyangwe, Country Representative
9	Centre for the Development of People	Gift Trapence, Director
10	Department for International Development (UK)	Adamson Kandwire, Governance Adviser
11	MEC	Henzily Munkhondya, Director of Electoral Services
12	MEC	Sangwani Mwafulirwa, Director of Media & Public Relations
13	MEC	Lydia Luwanika, Acting Director of Civic & Voter Education
14	MEC	Muhabi Chisi, Director of ICT
15	MEC	Khumbo A.R. Phiri, Director of Finance
16	MEC	Harris Potani, Acting Chief Elections Officer
17	Federation of Disability Organisations in Malawi	Naomie Kalua, Project Manager & Malonje Phiri & Phyllomina Zidana
18	Malawi Election Support Network	Andrew Kachaso, Chairperson & Steven Duwa, Executive Director
19	Centre for Human Rights and Rehabilitation	Timothy Mtambo, Executive Director, Thandizo Mphwiyo, Civic Education Co-ordinator & Michael Kaiyatsa, Acting Programmes Manager
20	Trocaire	Frances Wallace, Programme Manager & Tinkhani Khonje, Governance Adviser
21	Media Institute Southern Africa Malawi	Aubrey Chikungwa, Executive Director
22	UNDP	Fatuma Silungwe, Legal Analyst, Elections Project
23	Malawi Law Society	Khumbo Bonzoe Soko, President
24	UNDP	Mia Seppo, Resident Representative
25	Minister of Justice & Constitutional Affairs	Hon. Samuel Tembenu MP
26	State President	H.E. Peter Mutharika
27	President, UDF	Hon. Atupele Muluzi MP
28	SADC & AU Heads of Mission	AU Representative, African Development Bank, Mozambique, South Africa, Tanzania, Zambia, Zimbabwe
29	Representative of the Chief Justice	Justice Rezine Mzikamanda, Member, Supreme Court
30	Speaker, Malawi National Assembly	Hon. Richard Msowoya MP
31	Representative of Hon. Chakwera, MCP	Hon. Maxwell Tyolelan MP, National Director of Elections MCP, Chairperson Legal Affairs Committee of National Assembly
32	Debriefing with EU Member States +	EU Delegation, Germany, Ireland, UK, Norway, USA, United Nations.