

LAW REFORM PROCESS

2. LAW REFORM PROCESS

The law reform process undergoes the following phases:

2.1 Phase I: *Identification of Law Reform Area*

There are basically two methods through which a law reform area is identified. An area can be identified through submissions received from public or private individuals or bodies. An area may also be identified by the Commission, on its own initiative in trying to implement Government policies or in trying to implement or domesticate the country's obligations under international conventions or indeed in response to social changes. Further, the Attorney General on behalf of Government may request the Commission to consider any matter of law that is considered to require reform or any area that is considered to require development of legislation.

2.2 Phase II: *Investigation*

Once the area of law reform is identified, the process takes the following phases:

- (a) Law Reform Officers are assigned to the programme as Programme Officers. The Programme Officers conduct preliminary research work on the subject under reform and on the status of the law; and
- (b) Programme Officers then carry out literature review and develop working papers. Working papers outline issues which may guide proposals for reform. These papers include Issues Paper, Discussion Paper, Consultation Paper and Research Paper.

(i) Issues Paper

In order to guide the reform process, the Commission, at an early stage, investigates what issues obtain in the area of law proposed for reform or development. It then publishes the issues in an Issues Paper. The Issues Paper also serves to announce an investigation into a particular area of law under reform or development and to clarify the aim and scope of the process.

(ii) Discussion Paper

When the issues have been identified, the Commission makes further inquiry into the practices elsewhere with a view to providing a range of proposals for reform. The result is published as a Discussion Paper. The Discussion Paper stimulates discussion of the issues under consideration by a special Law Commission, which is empanelled under each law reform programme.

(iii) Consultation Paper

The Consultation Paper may precede or succeed the Issues Paper. It is normally a compilation of the views of the public on various issues arising from the area under reform. As such, a Consultation Paper may be developed based on issues outlined in the Issues Paper or it may raise issues which form the basis of an Issues Paper.

(iv) Research Paper

A Research Paper is often published with a view to documenting desk or initial research related to a particular area under consideration. A Research Paper also determines authoritatively the existing legal position and identifies the shortcomings or deficiencies that need rectification. This Paper may contain empirical data on which the deliberations of the special Law Commission would be founded and justified.

2.3 Phase III: *Appointment of Commissioners*

Persons with relevant expertise on the subject matter under consideration are appropriately identified and appointed by the Law Commissioner in consultation with the Judicial Service Commission. The persons appointed serve as Commissioners, on a particular law reform programme.

The work methodology for a programme is agreed upon by the Commissioners. The work is done through meetings in plenary where Commissioners meet and deliberate. This may include field visits and comparative study visits to other jurisdictions. See Appendix 2 for a list of Commissioners serving on law reform programmes in 2010.

2.4 Phase IV: *Consultations*

Consultations are done with stakeholders and members of the public on the subject matter. These consultations may include sending out Working Papers for responses and comments. Invariably, workshops and focus group discussions are held to seek views prior to or on the recommendations of the special Law Commission.

2.5 Phase V: *Report and Draft Bill*

The special Law Commission then prepares a Report for publication. The Report sets out the problem areas, the status of the law in Malawi including international instruments and the special Law Commission's findings and recommendations for reform, taking into account its own research findings, submissions received from stakeholders, relevant Government policies, legislative trends in comparable foreign and regional jurisdictions. For all reports that have been produced by the Commission see Appendix 3.

The Report containing a proposed legislation is submitted to the Minister of Justice for its publication in the *Gazette* under the Minister's hand and the published Report is laid in Parliament by the Minister. The Minister also submits the Report to Cabinet and if

Cabinet adopts the recommendations of the Commission, the proposed legislation is adopted as a Government Bill and presented before Parliament for enactment.

After the Law Commission submits its Reports to the Ministry of Justice, its mandate ends there. It is important to note that the Law Commission only makes recommendations and it is only after Cabinet has approved the recommendations that they are presented to Parliament in the form of a Bill. At this stage, the Bill is a Government Bill. Cabinet is however at liberty to send the draft legislation back to the Law Commission if does not approve it, and unless this is done, the Law Commission shall have discharged its mandate in full.