**Inception Report**

**For**

**Phase 2**

**of**

**Provision of Legal Consultancy Services to**

**Produce Data Protection Legislation for**

**the Government of Malawi**

REF NO.: MW-PPPC-62396-CS-QCBS

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# Introduction

We are pleased to have successfully completed Phase 1 of the consulting services for *Provision of Legal Consultancy Services to Produce Data Protection Draft Legislation for the Government of Malawi*, resulting in delivery of a draft Data Protection Bill (the DPA Bill) and draft amendments to the Access to Information Act and Electronic Transactions and Cyber Security Act. In this Inception Report, we set out our approach to Phase 2 of the assignment.

# Scope of work

## Secondary instruments to be developed

We have considered what rules and guidelines that the Authority mandated under the DPA Bill, i.e., MACRA (we refer to it as the Authority in this Inception Report), might issue in addition to any regulations that might usefully be issued by the Minister. The main objective we think is to provide a framework for the Authority’s work to commence, and to address any immediately burning issues in the early phase of set up of the Authority’s data protection capability and preparation for the implementation of the DPA Bill. Below we set out the instruments we will be preparing in Phase 2.

### Rules on procedures for handling complaints and conducting investigations

Section 39(8) requires the Authority to “adopt rules and procedures . . . on handling complaints and conducting investigations.” These rules and procedures are critical to mobilizing the Authority’s enforcement capabilities. We will draft these rules and procedures to provide a means for individuals and entities to submit complaints to the Authority, for it to review such complaints, ask questions, notify organisations against which complaints are brought, initiate investigations, gather information and evidence, reach decisions and pursue enforcement. These are vital to ensure appropriate predictability and transparency of the Authority’s use of its powers under the DPA Bill.

### Rules on annual fees or levies

Section 38(1) permits the Authority to “prescribe annual fees or levies which shall be paid by data controllers and data processors of major importance.” We will draft rules prescribing such fees or levies. We will not ourselves propose the actual amounts of such fees or levies, which would be based largely on the Authority’s anticipated budget for data protection functions and the number of presumed data controllers and data processors of major importance. This will be more in the nature of operational set-up work. However, the draft rules will be ready to drop in the fee as soon as they are prepared. These rules will be vital to the funding of the Authority from inception of its responsibilities under the DPA Bill and ongoing financial stability of its data protection activities. They will enable the Authority to budget and will provide predictability for data controllers and data processors of major importance relating to the amounts they should anticipate paying annually.

### Guideline and checklist on compliance

We believe it will be useful for the Authority to issue a short easy-to-read guideline on compliance with the DPA Bill. This will be a relatively short summary of the key provisions and will provide practical instructions as to what implementing steps organizations should take and systems they should establish.

The document will be a starting point for organizations to learn about their obligations under the law. It will list compliance requirements and action items for organizations, such as:

* understanding the scope of the DPA Bill, and preparing for implementation;
* accountability under the new law;
* reporting requirements;
* the powers of the Authority;
* what lawful data processing encompasses;
* data subjects’ rights;
* restrictions on reuse of data;
* restrictions on transferring data outside Malawi; and
* fees and levies they may have to pay.

The checklist would also indicate whether required actions are relevant for data controllers or data processors or both. It would also identify the relevant teams that need to be involved in such actions, including:

* legal/compliance;
* technical/IT;
* communications;
* public relations; and
* human resources.

### Rules on reasonable measures when engaging a data processor

Section 25 of the DPA Bill requires controllers to take “reasonable measures” when engaging a data processor to ensure that the data processor will enable the controller to meet its obligations under the DPA Bill, including by means of a written agreement between the controller and the processor. Section 25(3) grants the Authority the power to “prescribe such measures in rules.”

We will draft rules that prescribe such “reasonable measures.” This will likely include setting out standard contractual terms that should be used in agreements between controllers and operators to ensure compliance with Section 25.

### Rule on registration of data controllers of major importance

The DPA Bill provides in Section 37(1) that data controllers and data processors of major importance shall register with the Authority. A registration process should be established, including a form for submission of information about these entities and their activities. This is important for the Authority’s ability to levy fees from such entities that will fund the its activities. We will draft rules that set out this registration process and provide a template submission form.

### Guideline on data protection notifications

Section 33 of the DPA Bill requires data controllers and data processors to notify the Authority and, in certain cases, data subjects where there is a data breach. This provides vital information to the Authority about the data protection threats facing the Malawi economy, helping it learn about the practical risks and vulnerabilities facing data controllers and processors under its purview. We will draft rules that provide guidance on how to determine when notification is required and how such notifications should be made. This will be important for data controllers and processors to understand their obligations to notify the Authority and data subjects, allowing them to prepare their systems for compliance.

## Our work plan

We propose to prepare the Phase 2 documents as set out below. The timing begins with the Phase 2 kick-off call with the Task Force.

### Period 1: Phase 2 kick-off

|  |  |
| --- | --- |
| *Timing:* | Week 1 |
| *Activities:* | Phase 2 commencement conference call or videoconference |
| *Deliverables:* | Kick-off call with the Task Force to confirm understanding of the scope of work |

We will discuss the project by conference call with the PPPC, MACRA and other relevant Task Force members to confirm our understanding of the work planned for Phase 2 as set out in this Inception Report, identify counterparts and communication procedures and confirm the timeline and payment schedule.

### Period 2: Drafting the documents

|  |  |
| --- | --- |
| *Timing:* | Weeks 2-8 |
| *Activities:* | Draft rules and regulations |
| *Deliverables:* | First drafts of the rules and regulations |

We will draft the secondary instruments listed above under Section 2.A. By the end of Period 2, we will deliver to the MICT the draft documents as a batch.

### Period 3: Task Force feedback

|  |  |
| --- | --- |
| *Timing:* | Weeks 9 |
| *Activities:* | Reviewing Task Force feedback; conference calls as needed to discuss feedback |
| *Deliverables:* | N/A |

We will hold conference calls as needed to discuss feedback and revisions to the draft rules and regulations. We will depend on the Task Force to coordinate any input required from relevant ministries, departments and agencies of the Government where their sectors are affected.

### Period 4: Revising drafts based on feedback

|  |  |
| --- | --- |
| *Timing:* | Weeks 10-11 |
| *Activities:* | Incorporate feedback |
| *Deliverables:* | Revised drafts |

We will incorporate any feedback received from the Task Force as well as from the relevant ministries and departments of the Government. We will do so one-by-one as feedback is received. At the end of Period 4, the Taskforce will have the revised drafts of the rules and regulations ready for acceptance and distribution to stakeholders for consultation.

### Period 5: Confirmation of acceptance of the draft rules

|  |  |
| --- | --- |
| *Timing:* | Week 12 |
| *Activities:* | Conference calls as needed to discuss revisions to the draft rules and regulations; prepare for the capacity building workshops |
| *Deliverables:* | Confirmation from the Task Force accepting the drafts |

Once the draft documents are accepted by the Task Force, we will prepare for the upcoming capacity building workshops and deliver workshop materials to be distributed to stakeholders. We will prepare a PowerPoint presentation setting out the context of the DPA Bill and its main provisions, and outlining the Phase 2 documents that have been prepared.

### Period 6: Capacity building workshops

|  |  |
| --- | --- |
| *Timing:* | Week 13 |
| *Activities:* | Lead capacity building workshops |
| *Deliverables:* | Capacity building workshops |

Rory Macmillan and/or Jason Blechman will provide capacity building workshops remotely. We expect that, subject to health restrictions, Steve Matenje will travel to Blantyre and Lilongwe to participate in the capacity building in person.

### Period 7: Preparation and submission of revised rules

|  |  |
| --- | --- |
| *Timing:* | Weeks 14-15 |
| *Activities:* | Prepare and submit revised rules and regulations |
| *Deliverables:* | Submission of report on summary findings from the validation and capacity building workshops and revised rules documents |

We will prepare a report on summary findings from the validation and capacity building workshops, and will revise the Phase 2 documents in light of this. At the end of Period 7, we will submit revised rules and regulations.

### Period 8: Confirmation of acceptance of the rules

|  |  |
| --- | --- |
| *Timing:* | Week 16 |
| *Activities:* | Conference calls as needed to discuss acceptance of the rules |
| *Deliverables:* | Confirmation of acceptance by the Task Force |

We will deliver a final report concluding the project with the final rules and regulations. Our assignment will conclude upon confirmation by the Task Force that the Phase 2 documents are accepted.

## Organization and staffing

The following sets out an organogram for each team member’s role followed by a table showing the key tasks for each team member.

| **Name** | **Role** | **Tasks** |
| --- | --- | --- |
| Rory Macmillan | Team Leader and Legal Expert | Overall quality control and team management; overseeing legal review and drafting of legislation and regulations; leading and presenting at workshops, as needed. |
| Jason Blechman | Supporting Legal Expert | Support in legal review and drafting of legislation and regulations; presenting at workshops, as needed. |
| Lale Tuzmen | Supporting Legal Expert | Support in legal review and drafting of legislation and regulations; presenting at workshops, as needed. |
| Steve Matenje | Legal Drafting Expert | Drafting legislation and regulations; support in legal review, attending workshops, as needed. |

# Our work schedule and planning for deliverables



# Payment schedule

The total Contract price for Phase 1 and 2 was **USD 245,917.65**. The total remaining Contract amount to be allotted to Phase 2 is 45% of that total Contract price, i.e., **USD 110,662.94.**

The Contract provided a schedule of payments that should apply to this remaining Contract amount allotted to the second phase, which we have adapted to fit the timeline of this Inception Report:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Payment | Percentage of remaining Contract amount | Amount of payment | Deliverable | Period |
| 1st | 10% | USD 11,066.29 | Submission and acceptance of an inception report | 1 |
| 2nd | 45% | USD 49,798.32 | Submission and acceptance of draft rules and regulations | 5 |
| 3rd | 30% | USD 33,198.88 | Submission and acceptance of summary findings of the validation and capacity building workshops | 7 |
| 4th | 15% | USD 16,599.44 | Submission and acceptance of a final rules and regulations report | 8 |