

No Justice for the Poor:
A Preliminary Study of the Law
and Practice Relating to Arrests
for Nuisance-Related Offences
in Blantyre, Malawi

June 2013



SALC & CHREAA REPORT

No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre, Malawi

© 2013 Southern Africa Litigation Centre and Centre for Human Rights Education, Advice and Assistance

ISBN

Print: 978-0-620-57135-7

Digital: 978-0-620-57136-4

Cover Photograph: Lance Bellers via iStock

About the Southern Africa Litigation Centre

The Southern Africa Litigation Centre (SALC), established in 2005, aims to provide support – both technical and financial – to human rights and public interest initiatives undertaken by domestic lawyers in southern Africa. SALC works in Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Zambia and Zimbabwe. Its model is to work in conjunction with domestic lawyers in each jurisdiction who are litigating public interest cases involving human rights or the rule of law. SALC supports these lawyers in a variety of ways, as appropriate, including providing legal research and drafting, training and mentoring, and monetary support. SALC's objectives include the provision of training and the facilitation of legal networks within the region.

About the Centre for Human Rights Education, Advice and Assistance

The Centre for Human Rights Education, Advice and Assistance (CHREAA) has as its vision a Malawian society that upholds human rights, justice and the rule of law. Its mission is to promote and protect human rights by assisting vulnerable and marginalised persons in Malawi to access justice through civic education, advocacy and legal assistance. CHREAA's activities include provision of Paralegal Services in seven prisons of the southern region of Malawi on a daily basis, working with communities to empower them to participate in the delivery of justice in Malawi, protecting sex workers from police abuse and conducting voter and civic education in all prisons in Malawi and other selected constituencies.

Authorship and Acknowledgement

This report was researched and written by Anneke Meerkotter from SALC and Victor Mhango, Nora Khonje, Siphwe Malihera, Joyness Dziwani, Melonisa Kachimanga, McDonald Kaipa, Ruth Kaima and Lusako Phambana from CHREAA. It was reviewed by Priti Patel, SALC's deputy director and HIV programme manager, and Chikosa Banda, Deputy Dean of Law, Chancellor College, University of Malawi. The chapter on children was reviewed by Justice Edward Twea. Caroline James, a project lawyer from SALC, Kristen Rau, a SALC intern, and Jack McCracken, a CHREAA intern, provided additional comments and assisted with editing. The report was designed by Nicework.

We want to thank the police officers, magistrates and women who participated in the interviews and shared their experiences with us for this report. We gratefully acknowledge the assistance of Senior Deputy Commissioner of Police, Dr George Kainja, and Assistant Commissioner of Police Noel Kayira, for their support during the research process and their invaluable comments and discussion with the researchers. We further want to acknowledge the assistance of Rhoda Ndovie from Theatre for a Change who shared her experience of working with police and sex workers with us. This research was made possible through the generous support of the Open Society Initiative for Southern Africa and the United Nations Democracy Fund.

Southern Africa Litigation Centre

Second Floor, President Place, 1 Hood Avenue, Rosebank, Johannesburg, South Africa, 2196

e: info@salc.org.za, t: +27 (0) 11 587 5065, f: +27 (0) 11 587 5099

www.southernafricalitigationcentre.org, twitter: @follow_SALC

Centre for Human Rights Education, Advice and Assistance

P.O. Box 30250, Blantyre, Malawi

e: chreaa@sdpn.org.mw / info@chreaa.org, t: +265 1 880770 / +265 999 952 256

www.chreaa.org

For hard copies of the report, please contact the Southern Africa Litigation Centre or the Centre for Human Rights Education, Advice and Assistance. Electronic copies of this report can be found at www.southernafricalitigationcentre.org and www.chreaa.org.

Table of Contents

Executive Summary	1
Research Findings	2
Key Recommendations	7
Acronyms and Abbreviation	8
1. Introduction	9
Background and Purpose of this Study	9
<i>Research Conducted in Blantyre</i>	10
Methodology	11
<i>Literature Review</i>	11
<i>Field Research in Blantyre</i>	11
<i>Methodology</i>	11
Limitations of Study	12
<i>Structure of the Report</i>	13
2. A Short History of English Vagrancy Laws	15
Introduction	15
The Origin of English Vagrancy Laws	16
The Vagrancy Act of 1824	18
Conclusion	20
3. The Persistence of Colonial Vagrancy Laws in Southern Africa	23
Introduction	23
<i>The Introduction of Uniform Criminal Codes in Africa</i>	23
The Legacy of British Colonial Penal Codes	25
The Application of Vagrancy Offences in Africa	26
Conclusion	28
4. Vagrancy Laws in Malawi	29
Introduction	29
Nuisance-Related Offences in the Malawi Penal Code	30
<i>Common Nuisance (section 168)</i>	30

<i>Conduct Likely to Cause a Breach of Peace (sections 181 and 182)</i>	31
<i>Idle and Disorderly Persons (section 180)</i>	32
<i>Rogues and Vagabonds (section 184)</i>	44
<i>Removal Orders</i>	52
Conclusion	54
5. Implementation of Vagrancy Laws in Blantyre, Malawi	57
Nuisance-Related Arrests in Blantyre	57
<i>General Findings</i>	57
<i>Arrests for the Offence of Being a Rogue and Vagabond</i>	61
Police Officers' Interpretation of the Offence of Being an Idle and Disorderly Person (section 180) and the Offence of Being a Rogue and Vagabond (section 184)	62
Magistrates' Interpretation of Sections 180 and 184	67
Conclusion	71
6. Law and Practice Relating to the Arrest of Children for Nuisance-Related Offences	73
Laws Relating to the Arrest of Children	73
<i>The Constitution of Malawi</i>	73
<i>The Criminal Procedure and Evidence Code</i>	74
<i>The Bail (Guidelines) Act</i>	74
<i>The Child Care, Protection and Justice Act</i>	74
Arrests of Children for Nuisance-Related Offences	77
<i>Notes on Methodology</i>	77
<i>Documented Cases of Arrests of Children for Nuisance-Related Offences</i>	77
<i>Police Use of Section 184 Offences in Cases Involving Children</i>	78
<i>Police Procedures During Arrest and Detention of Children</i>	80
<i>Magistrates' Responses to Children Charged with Section 184 Offences</i>	81
Conclusion	82
<i>Alternative Approaches to Child Arrests</i>	82
<i>Respecting the Rights of Children</i>	82
7. Use of Vagrancy Laws Against Sex Workers	85
Introduction	85
Laws Relating to Sex Work in Malawi	86
Sex Workers' Experience with Police and Courts in Blantyre	89
<i>Notes on Methodology</i>	89
<i>Sex Workers' Experiences with Police: Exploitation, Violence, and Arrest Practices</i>	90
Conclusion	94
<i>Prevalence of Police Abuse of Sex Workers</i>	94
<i>Holding Police Accountable</i>	95
<i>Police Corruption</i>	96
<i>Decriminalisation of Sex Work-Related Activities</i>	97
<i>Criminalisation of Sex Work-Related Activities and HIV</i>	99

8. Vagrancy Laws and Touts	101
Introduction	101
Police Arrest Practices Relating to Touts in Blantyre	103
<i>Notes on Methodology</i>	103
<i>Research Findings</i>	103
Conclusion	105
9. Arrest and Detention	107
Introduction	107
Summary of the Laws Relating to Arrest and Detention	108
<i>Constitution</i>	108
<i>Criminal Procedure and Evidence Code</i>	109
<i>Bail (Guidelines) Act</i>	111
<i>Child Care, Protection and Justice Act</i>	111
Are Persons Arrested for Nuisance-Related Offences Falling Through the Cracks?	111
Conclusion	113
10. Alternatives to Arrest for Nuisance-Related Offences	115
Introduction	115
Purpose and Scope of Policing	116
Limits of Preventive Justice	117
Community Policing and Alternative Responses to Arrests for Nuisance-Related Behaviour	118
<i>Police Practices on Street-Level</i>	119
<i>Developing Individualised Solutions</i>	120
Alternative Approaches to Arrests	121
<i>Cautions or Warnings</i>	121
<i>Move-On Power</i>	122
<i>Recording of Names</i>	122
<i>Administrative Fines</i>	122
<i>Public Awareness and Community Consultation</i>	123
Conclusion	123
11. Recommendations	125
Reviewing Laws Relating to Nuisance-Related Offences	125
Improving the Manner in which Nuisance-Related Offences are Enforced	126
Respecting the Rights of Children During Arrests	126
Respecting the Rights of Sex Workers During Arrests	127
Respecting the Rights of Touts During Arrests	127
Ensuring Proper Implementation of Laws Relating to Arrest and Detention	127
Developing Alternatives to Arrest	128
Annexure 1	129
Demographics of Sex Workers Who Were Interviewed	129

Executive Summary

The use of outdated Penal Code provisions and abuses by police against poor persons and sex workers specifically has caused some concern among many working on legal and human rights issues in Malawi. This research emanates from concerns by the Southern African Litigation Centre (SALC) and Centre for Human Rights Education, Advice and Assistance (CHREAA) specifically regarding the use of the Penal Code provisions relating to idle and disorderly persons and rogues and vagabonds in Malawi:

1. The provisions relating to idle and disorderly persons and rogues and vagabonds in the Penal Code are dated and vague in formulation. To apply such offences in their current form is unfair and constitutes an abuse of the rights of those arrested on such charges.
2. Arrests for offences relating to idle and disorderly persons and rogues and vagabonds often violate the requirements for a lawful arrest. In addition, such arrests contribute to overcrowding in police cells and are often used without any consideration of alternatives to an arrest.
3. The arrest of persons for minor nuisance-related offences is often applied disproportionately to the poor in society, who are more likely to be assumed to violate such offences, and are more likely to be found in circumstances that could lead to such arrests and who are less able to assert their rights and access legal support to dispute unlawful arrests.

Despite the existence of laws and constitutional provisions which seek to protect rights, little has been done to ascertain the actual experiences of community members, especially of vulnerable groups, when confronted with police enforcement of idle and disorderly and rogue and vagabond offences. As such this research is original, but also shows that further enquiry is needed to determine the impact of these laws on the poor in Malawi.

The purpose of this research was to ascertain the extent of police's enforcement of offences relating to idle and disorderly persons and rogues and vagabonds. Research was conducted in Blantyre, Malawi and focused on the arrest practices of Blantyre and Limbe police stations. Over a four month period, the researchers collected information on the number of arrests effected at these police stations for nuisance-related offences. Researchers interviewed ten police officers and five magistrates to understand the reasons for such arrests and the courts' approach to persons who appeared before them on nuisance-related charges. The researchers were aware that sex workers were often targeted by police through the use of offences relating to idle and disorderly persons and rogues and vagabonds. However, the data obtained from police stations did not shed light on the number of such arrests made by police officers. For this reason, the researchers also interviewed fifteen sex workers to better understand their experiences with the police.

Chapters 1 to 3 provide a background to the research and set out the history of the offences of being an idle and disorderly person and rogue and vagabond from their roots in the English vagrancy laws to their incorporation into the Malawi Penal Code.

Chapter 4 outlines the manner in which these offences should legally be interpreted and the extent to which the offences violate the Malawi Constitution. This provides the basis for understanding the research findings, contained in Chapters 5 to 8, which show that the offences of being an idle and disorderly person or rogue and vagabond are often applied in a manner which is inconsistent with the law.

Chapter 9 explains the importance not only of complying with the Penal Code provisions, but also of applying the laws relating to arrest in a manner which recognises that detention should be a final option and that arrested persons' rights should be respected. Chapter 10 discusses the necessity of developing alternatives to arrest. The key recommendations flowing from this report are summarised in Chapter 11.

Research Findings

Sections 180 and 184 of the Malawi Penal Code Require Urgent Revision

Chapter 4 outlines the history of the offences of being an idle and disorderly person and rogue and vagabond, and illustrates (through legal analysis of each of the subsections of sections 180 and 184), that these laws are outdated and that their continued application has the potential to violate a range of human rights.

The main concerns relating to some of the offences dealing with idle and disorderly persons and rogues and vagabonds are summarised in the table below. The concerns are broken down into the relevance of the offence, its consistency with criminal law principles and the extent to which it potentially violates the rights enshrined in the Malawi Constitution:

Relevance, frequency of usage, and duplication?

Consistency with criminal law principles and burden of proof?

Implication for civil liberties and justification for limitation of rights?

Section 180(a): Every common prostitute behaving in a disorderly or indecent manner in any public place is deemed an idle and disorderly person.

Section 180(a) is a duplication of existing offences dealing with breach of peace and public indecency.

Section 180(a) is status-based and uses past conduct or reputation as an element of the offence. The stigma attached to the offence violates the presumption of innocence principle.

Section 180(a) violates the right to dignity and the right to equality since it discriminates based on status. Since the offence duplicates existing offences its limitation of the above rights is neither necessary nor reasonable.

Section 180(b): Every person wandering or placing himself in any public place to beg or gather alms, or causing or procuring or encouraging any child or children to do so, is deemed an idle and disorderly person.

Persistent begging can be addressed under the offences of breach of peace or common nuisance. The exploitation of children by forcing them to beg can be dealt with under provisions of the Child Care, Protection and Justice Act. Criminalisation of this offence is ineffective since a sentence of imprisonment or a fine is likely to increase hardship.

Section 180(b) is overly broad since it is not limited to cases of persistent begging and thus criminalises acts arising from poverty.

Because section 180(b) potentially criminalises persons who have no choice but to beg, it constitutes a violation of their right to dignity. Such limitation would be justifiable only where the offence deals with persistent acts of begging and where the State can show that it has put in place social measures to address the causes of begging.

Relevance, frequency of usage, and duplication?

Consistency with criminal law principles and burden of proof?

Implication for civil liberties and justification for limitation of rights?

Section 180(e): Every person who in any public place solicits for immoral purposes is deemed an idle and disorderly person.

Section 180(e) dates from an era which sought to criminalise acts which ran contrary to Victorian notions of morality. It is a supplantation of section 145(1)(e) of the Penal Code which makes it an offence for a male person to “in any public place persistently solicit or importune for immoral purposes”.

The term “immoral purpose” is vague since it does not give sufficient information about the conduct which is prohibited. Because of its vagueness, the provision encourages arbitrary police enforcement.

Section 180(e) encourages arbitrary enforcement, which risks the infringement of a range of rights including the right to dignity and freedom of expression.

Section 184(b): Every suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of himself is deemed a rogue and vagabond.

The reality is that many persons in Malawi have no “visible means of subsistence” and the section is invariably skewed against the poor. It is not appropriate to revert to criminal law to deal with problems of poverty, unemployment and urban migration. Where a person is suspected of criminal behaviour, that person should be charged under the appropriate section in the Penal Code.

Section 184(b) is vague and overly broad. There is a substantial risk that the section would be applied arbitrarily and not within the narrow confines suggested by the courts. Section 184(b) is contrary to the principles of criminal law, in that a person can be targeted by police purely on the basis of the person’s appearance or failure to engage in any immediate productive activity.

Section 184(b) violates the right to dignity, the right not to be discriminated against based on social status, and the right to freedom of movement. It has not been shown that the limitation of these rights is reasonable or necessary in a democratic society.

Section 184(c): Every person found in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose, is deemed a rogue and vagabond.

The objective of section 184(c) would be better dealt with under section 319 of the Penal Code which deals with criminal trespass. The section is invariably used against the poor who do not make use of private transport.

Section 184(c) is vague and overly broad and creates a risk of arbitrary enforcement. The offence violates criminal law principles in that it subjects someone to arrest who has not been shown to have any criminal intent.

Section 184(c) violates the right to dignity, the right not to be discriminated against based on sex or social status, and the right to freedom of movement. It has not been shown that the limitation of these rights is reasonable or necessary in a democratic society.

Linked to the offence of being a rogue and vagabond, section 185 of the Penal Code allows for a removal order to be issued against a person who has been convicted of an offence under section 184 or against a person who has no regular employment or other reputable means of livelihood and cannot give a good account of him or herself. Removal orders violate various rights entrenched in the Malawi Constitution: these include the right not to be subjected to cruel, inhuman or degrading treatment or punishment; the right to dignity; the right to personal liberty; the right to freedom and security of person, which includes the right not to be detained without trial; the right to freedom of movement; and the right to not be discriminated against based on social status.

The persistence of removal orders and the above vagrancy provisions in Malawian law undermine the very principles upon which Malawian courts are built, creating harmful fissures in the stability and integrity of Malawi's legal system. The authors recommend that sections 180, 184 and 185 be repealed in their entirety – the various provisions have been shown to be vague, overly broad, arbitrary and contrary to criminal law principles.

Arrests for Minor Nuisance-Related Offences are Often Unwarranted

The findings of the field research, contained in Chapter 5, shows that persons arrested for minor nuisance-related offences at times remain in custody for more than a day, before being released. In addition, the immediate release of persons arrested for minor nuisance-related offences is common and also a cause for concern. This suggests that individuals were arrested in the absence of probable cause and there was often no intention by the arresting officer that the person be brought before a court or prosecuted for the offence. Such arrests are unlawful and there appears to be insufficient monitoring of the manner in which police apply their discretion to arrest.

Field research documented cases where arrests in terms of section 184 occurred during so-called sweeping exercises. The lack of guidelines for police on the conduct of sweeping exercises creates a situation in which such operations are likely to include arrests of persons who have not committed an offence or suspicious activity.

Arrests for being a rogue and vagabond in terms of section 184 of the Penal Code often occur at night, which in effect means that the provisions have a more onerous effect on persons who are poor and do not utilise private transport.

Police (and Magistrates) Apply Sections 180 and 184 of the Penal Code Inconsistently

Interviews with police and magistrates illustrate that sections 180 and 184 of the Penal Code are often applied in circumstances which fall outside of the provisions of these sections. For example, police officers would arrest a person under section 180 for being drunk, urinating in public, kissing in public, loitering without purpose or engaging in prostitution, when section 180 does not cover such activities.

Similarly, section 184 was inconsistently interpreted by police officers. Police officers who were interviewed expressed an entitlement to arrest persons who stood on the road without doing anything, or who were outside late at night, or who did not carry proper identification. The research further identified inconsistencies in magistrates' interpretation of sections 180 and 184 of the Penal Code.

Section 184 of the Penal Code is Used Arbitrarily Against Street Children, Sex Workers and Minibus Touts

Field research highlighted concerns relating to the police's attitude towards street children, sex workers and touts. These findings are set out in Chapters 6, 7 and 8 respectively. Police officers who were interviewed had a particularly negative attitude towards street children, who were often presumed to be guilty of an offence.

The Arrest and Detention of Children are at Times Contrary to the Law

Research findings contained in Chapter 6 reveal that police continue to arrest children for minor-nuisance related offences, despite the insistence in the laws of Malawi that the arrest and detention of children are measures which should be utilised sparingly. Some children who were found in custody during the research did not have access to food. In the case of Blantyre police station, children were not separated from adults in detention. These findings show that the provisions relating to the Child Care, Protection and Justice Act of 2010 are not implemented in full in practice and many police officers are unaware of the content of this Act.

Police Abuse of Sex Workers is Endemic in Malawi

Findings of interviews with sex workers, contained in Chapter 7, suggest that police abuse of sex workers is rampant in Malawi: eight out of fifteen respondents reported assaults by the police in the past year; eleven out of fifteen respondents reported police extorting money from them; and six out of fifteen respondents reported being raped by police officers in the past year.

Violence Against Sex Workers is Rife and Access to Justice and Health Services Should be Improved

Sex workers reported a high rate of abuse from clients but a reluctance to report such abuse to the police due to their negative experiences of the police service. The high rates of violence experienced by sex workers and the criminalisation of activities related to sex work, further hampers HIV prevention efforts.

Civil Society Organisations Should Collaborate to Hold Police Accountable for Abuse

It is important for civil society organisations to work together to identify patterns of police abuse and develop concrete mechanisms to address it. Violence towards sex workers can be reduced where there is cooperation between law enforcement agencies, the judiciary, health

services, sex worker organisations and other civil society groups. By working to establish effective complaints mechanisms, which would also require extensive outreach efforts to reach sex workers, non-profit organisations, and the Malawian government can together address one of the most basic reasons that police abuses persists: lack of accountability.

Abuse of Power and Corruption by Police Flourishes in the Context of Criminalisation of Sex Work-Related Activities

The research findings illustrate a discrepancy between sex workers' account of police arrests and the number of arrests of sex workers recorded in the police records. Sex workers who were interviewed indicated that they would often pay a bribe to police in order to be released prior to their arrest or appearance in court.

The prevalence of police abuse of power and corruption reported by sex workers is a serious cause for concern and requires urgent intervention. This research suggests that the criminalisation of activities related to sex work contributes to the police's ability to abuse sex workers.

The Rights of Persons Who Have Been Arrested but Not Charged are Neglected

Chapter 9 notes that Malawi has made significant progress in developing laws which curb the extent of pre-trial detention, in particular the recent amendments to the Criminal Procedure and Evidence Code. However, this research finds that persons arrested for minor nuisance-related offences and who are not brought before a court do not benefit from these protections. Such persons might not be detained for more than 48 hours, but their detention is often accompanied by a violation of their rights, including being detained in abject conditions without food, and experiencing physical or sexual abuse. The harsh effect of arrests for minor nuisance-related offences is felt most by poor persons who typically do not have access to legal representation or family resources. It is for this reason that it is pertinent, as explained in Chapter 10, that police officers are encouraged to consider alternatives to an arrest.

Key Recommendations

Based on the findings of the research, this report has two key recommendations:

1. That the Malawi Penal Code provisions relating to idle and disorderly persons and rogues and vagabonds be reviewed in order to ensure that these provisions do not unfairly target the poor and contribute to unlawful arrests or human rights abuses;
2. That the abuse by police of their powers to arrest persons for minor nuisance-related offences is monitored on an ongoing basis to ensure that they do not unfairly target and violate the rights of poor and marginalised groups.

Detailed recommendations relating to each of the areas covered above are set out in Chapter 11.

Acronyms and Abbreviations

African Commission	African Commission on Human and Peoples' Rights
CEDAW	UN Committee on the Elimination of Discrimination Against Women
CHREAA	Centre for Human Rights Education, Advice and Assistance
CUC	Court Users Committee
HIV	Human Immunodeficiency Virus
NCJF	National Child Justice Forum
NSO	National Statistical Office
OSISA	Open Society Initiative for Southern Africa
PASI	Paralegal Advisory Services Institute
PPJA	Promoting Pre-trial Justice in Africa
SADC	Southern Africa Development Community
SALC	Southern Africa Litigation Centre
STI	Sexually Transmitted Infection
TFAC	Theatre for a Change
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNDP	United Nations Development Programme
UNFPA	United Nations Population Fund
UNODCCP	United Nations Office for Drug Control and Crime Prevention
VSU	Victim Support Unit
WLSA	Women and Law in Southern Africa

1. Introduction

Background and Purpose of this Study

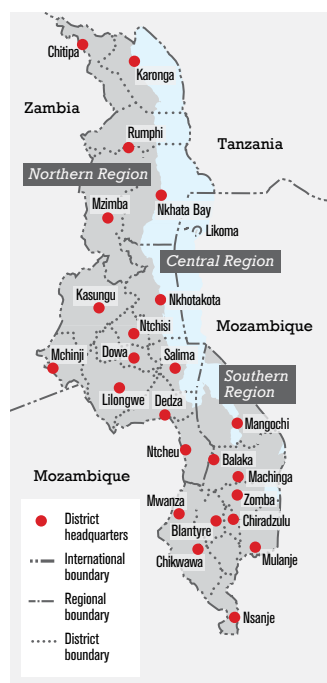
Penalisation policies reflect a serious misunderstanding of the realities of the lives of the poorest and most vulnerable and ignorance of the pervasive discrimination and mutually reinforcing disadvantages that they suffer... Asymmetries of power mean that persons living in poverty are unable to claim rights or protest their violation.

UN Special Rapporteur on Extreme Poverty and Human Rights¹

Globally, there has been an increase in the implementation of laws which limit the behaviour, actions and movements of persons in public spaces.² This greatly impedes the lives and livelihoods of those living in poverty.³ The laws further perpetuate discrimination and stigma towards the poorest and most vulnerable in society.

In Malawi, Penal Code offences such as being an idle and disorderly person (section 180) and being a rogue and vagabond (section 184) are sometimes used indiscriminately to arrest persons, contributing to overcrowding in police cells and placing a strain on resources in the criminal justice system. These laws tend to give law enforcement officials a wide discretion in application, which increases the vulnerability of persons living in poverty to violence and harassment.

Although progress has been made in recent years, Malawi is still one of the poorest countries in the world, ranking 170 on the UN Human Development Index (out of 187



Map of Malawi

1 UN General Assembly, Report by Special Rapporteur on Extreme Poverty and Human Rights, 66th session, 4 August 2011, A/66/265, 5, <http://www.ohchr.org/Documents/Issues/Poverty/A.66.265.pdf> (last accessed: 2 June 2013).

2 *Id* 10.

3 *Id* 5, 10.

countries).⁴ Malawi has a population of 13.1 million of whom 85 percent live in rural areas.⁵ Almost half the population is under fifteen years of age and 25 percent of households are female-headed households.⁶ An estimated 39 percent of the population lives below the poverty line (14 percent in urban areas and 43 percent in rural areas).⁷ The country has been hard-hit by the HIV/AIDS epidemic, with a national prevalence of 10 percent.⁸

It is in this context that this report assesses the relevance to Malawi of offences relating to idle and disorderly persons, and rogues and vagabonds.

This report has two objectives: first, to summarise the history and content of vagrancy-related offences and second, to conduct a rapid assessment of the use of these offences by police in Blantyre to arrest and detain persons. The findings in this report are of a preliminary nature only and intend to guide the future work of organisations working in this area.

Research Conducted in Blantyre

Blantyre is the commercial capital of Malawi and is located in its Southern Region. Blantyre City has an estimated population of 661 256, whilst the rural areas surrounding the city are home to an additional population of 340 728.⁹

The Paralegal Advisory Services Institute (PASI) and the Centre for Human Rights Education, Advice and Assistance¹⁰ (CHREAA) have worked in Blantyre for several years to reduce the number of pre-trial detainees in police custody and prisons.

In 2012, CHREAA partnered with the Southern Africa Litigation Centre (SALC) to conduct research regarding the use of outdated vagrancy laws to arrest and detain persons in Blantyre.

The objectives of this research were to determine the types of nuisance-related offences for which persons are most often arrested, patterns of such arrest practices and the interpretation of police and magistrates regarding nuisance-related laws. CHREAA and SALC obtained permission from the Malawi police headquarters to conduct this research.

4 UNDP, *International Human Development Indicators* (2012), <http://hdrstats.undp.org/en/countries/profiles/MWI.html> (last accessed: 2 June 2013).

5 Malawi National Statistical Office (NSO) *Gender Report* (2010) based on data from the 2008 Population and Housing Census, Malawi, 1–107, <http://www.nso.malawi.net> (last accessed: 2 June 2013).

6 Malawi National Statistical Office, *National Welfare Monitoring Survey 2009* (2010), 1–145, <http://www.nso.malawi.net> (last accessed: 2 June 2013).

7 *Id.*

8 UNAIDS data for Malawi available on <http://www.unaids.org/en/regionscountries/countries/malawi/> (last accessed: 2 June 2013).

9 Malawi National Statistical Office, *2008 Population and Housing Census Report* (2008).

10 The Centre for Human Rights Education, Advice and Assistance (CHREAA) currently provides paralegal services to pre-trial detainees, particularly women and children, at local police stations in Blantyre. CHREAA has been conducting this work for several years and has established a toll-free line between local police stations and CHREAA paralegals to ensure that child-arrestees receive speedy assistance to secure their release. CHREAA is collaborating with local police stations to ensure that the constitutional rights of pre-trial detainees are met and to reduce the number of people in pre-trial detention. For more information, see the CHREAA website at www.chreaa.org.

Methodology

Literature Review

Researchers conducted a literature review for this report which covers the history of vagrancy offences; the application of such offences by courts; and the various discussions concerning the relevance of such offences by law reform commissions in various jurisdictions. This literature review is referred to primarily in Chapters 2, 3 and 4.

In order to put arguments in context, researchers also make reference, in the chapters relating to sex work, touting and alternatives to policing, to various authors whose work added value to the discussion in that chapter.

Field Research in Blantyre

Methodology

From 1 May to 12 September 2012, seven CHREAA paralegals conducted field work at Limbe and Blantyre police stations. These two police stations were specifically identified by CHREAA for research because they are the main police stations in the Southern Region. Furthermore, their high-volume caseload meant these stations were well-positioned to provide an illustrative overview of arrests in relation to the range of nuisance-related offences contained in the Penal Code.

Using datasheets, paralegals collected regular quantitative information on the number of arrests made by police for nuisance-related offences. They collected this data from the police station custody book which documents the name, date, police station, place of arrest, time of arrest and offence. The date of release was not always recorded. Where individuals arrested for nuisance-related offences were still in custody when the researchers visited a police station, researchers interviewed the detainees through a structured questionnaire in order to determine the circumstances under which arrests were made.¹¹ This particular study was pre-emptive in nature and sought to assess the number of persons arrested for nuisance-related offences. This information will enable SALC and CHREAA to plan the focus of their work. The researchers did not attempt to track cases as they passed through the criminal justice system, as this would have required a more structured research intervention over a longer period of time.

During the collection of information on nuisance-related Penal Code offences, the researchers also documented a number of arrests for “touting” in terms of section 8B of the Road Traffic (Construction, Equipment and Use) Regulations. Such arrests were, however, not the main focus of the study and the results described in Chapter 8 are accordingly of an introductory nature.

11 Because few individuals remained in custody when researchers arrived at the station, the use of the questionnaire did not reveal much useful information regarding the circumstances surrounding arrests. An attendant difficulty with these interviews was that persons in custody were interviewed in the presence of police officers and therefore may not have felt willing or able to disclose problems relating to police treatment during arrest and detention. Police officers insisted upon being present during detainee interviews, meaning that some interviews with suspects in police custody did not proceed if the police were otherwise occupied. Moreover, individuals also did not express trust in the researchers and were reluctant to give personal information about the circumstances surrounding their arrests.

In addition to data collection, paralegals conducted structured interviews with police officers (10), magistrates (5) and sex workers (15).¹² Interview questions contained both open-ended and yes/no questions. Sex workers' views were specifically sought since both SALC and CHREAA's programmatic work relates to sex workers. In addition, the limited data available at police stations regarding arrest practices relating to sex workers necessitated such interviews.

In October 2012, paralegals interviewed six police officers from Blantyre police station and four police officers from Limbe police station. The police officers interviewed were those who were directly in contact with the accused as arresting or custody officers. Interviews lasted approximately thirty minutes. Limbe police officers had eight to 21 years of experience as police officers, four to eight years of which involved being stationed at that specific location. All officers attested to dealing with at least one to two cases per week of idle and disorderly persons and one to two cases of rogues and vagabonds. Blantyre police officers had two to 22 years of experience as police officers, one to eight years of which involved being stationed at that specific location. The frequency of arrests for being idle or disorderly or for being a rogue and vagabond varied widely, with some Blantyre officers reporting daily arrests on those bases and others having conducted such arrests only about fifteen times per year or during sweeping exercises.

Also in October 2012, researchers conducted five interviews with magistrates from Limbe (1), Chisenjere¹³ (2) and Blantyre (2). The magistrates were selected for interviews based on whether they had attended to sections 180 and 184 cases and the interviews lasted approximately thirty minutes. The interviewees' experience as magistrates ranged from three to twelve years. The magistrates interviewed heard slightly more cases of rogues and vagabonds per month as opposed to cases of idle and disorderly persons.

These interviews were qualitative in nature and sought an in-depth appreciation of police officers' and magistrates' application of sections 180 and 184 offences. The nature and content of these offences, broadly described here and in the Penal Code as "nuisance-related" offences, are treated in greater detail in Chapter 4.

Paralegals from the CHREAA interviewed fifteen sex workers in Blantyre on 22 June 2012 in the areas of Manase (8), Ndirande (2) and Zingwangwa (5) using questionnaires. All sex workers were asked to sign a consent form agreeing to their participation in the study. The sex workers interviewed were all female within an age range of eighteen to 39 years, as a result of which the findings do not reflect on the experiences and needs of male sex workers. These interviews were conducted as preliminary research to identify some of the challenges facing sex workers requiring additional research, and they were primarily used to verify and interpret data on police officers' arresting practices previously obtained at the police stations.

Limitations of Study

Due to the fact that the number of participants was low, these findings do not provide a representative view of police, magistrates or sex workers in Blantyre, or in Malawi in general. Nor are these findings statistically significant. Nevertheless, they provide a sound starting point for further research and furnish informative anecdotal evidence of police and magistrate practice in the area and sex workers' experience thereof.

12 The analysis of the interviews with sex workers is presented in Chapter 7.

13 This court deals with cases from rural areas within Blantyre.

The researchers had some difficulty obtaining updated versions of legislation, particularly copies of the Police Act, 12 of 2010, and the full version of the Penal Code (Amendment) Act, 1 of 2011.

This report does not deal with the issue of street vending. The UN Special Rapporteur on Poverty and Human Rights has noted that street vending is often the only means of support available to persons living in poverty to support their family and that States which “impose bans, onerous licences or strict restrictions on street vendors ... severely undermine the rights of persons in poverty to gain a living”.¹⁴

Structure of the Report

The report consists of three sections:

The first section of the report, Chapters 2 to 4, provides an introduction to the nuisance-related offences in the Malawi Penal Code, and describes in particular detail the history and interpretation of the offences relating to idle and disorderly persons and rogues and vagabonds. This section of the report queries the relevance and constitutionality of some of the idle and disorderly and rogue and vagabond provisions in the Malawi Penal Code.

In the second section of the report the authors discuss the findings of the field research conducted in Blantyre, and assess arrest practices relating to nuisance-related offences. Chapter 5 relates to the general findings of the research, identifying for which offences arrests are commonly made and noting the police and magistrates’ interpretation of these offences, focusing on arrests relating to idle and disorderly persons and rogues and vagabonds. Chapters 6, 7 and 8 deal with specific findings relating to children, sex workers and minibis tous.

The third section shifts focus. Chapter 9 addresses the specific problems relating to how arrests are made, and the extent to which this violates provisions in the Constitution and Criminal Procedure and Evidence Code (some of this discussion also occurs in a previous chapter relating to children). Chapter 10 questions the failure to use alternative measures instead of arrest for nuisance-related offences. Finally, Chapter 11 summarises the recommendations of the report in relation to the relevance and application of vagrancy laws in Malawi.

14 *Report by Special Rapporteur on Extreme Poverty and Human Rights, supra note 1, 12-13.*

2. A Short History of English Vagrancy Laws

Early English vagrancy laws created a climate unsympathetic to the plight of the poorest and most marginalised persons in society. These laws continue to resonate in the domestic laws of various states around the world. In this chapter the authors examine the origin of vagrancy laws in England and reflect on the extent to which the rationale underlying these laws is appropriate in modern-day constitutional democracies.

Introduction

Many nuisance-related offences in Malawi originate from English vagrancy laws. English vagrancy laws were rooted in a variety of motivations and produced a myriad of negative effects for the most marginalised members of English society. In countries such as Malawi, where the majority of the population is poor, the effect on society of incorporating English vagrancy laws into its Penal Code is profound and requires consideration.

The Oxford English Dictionary defines a vagrant as “a person without a settled home or regular work who wanders from place to place and lives by begging”. The history of English vagrancy laws reveals little concern for the actual plight of vagrants, though it may rather suggest various economic and cultural concerns regarding indigent persons and their place in a rapidly-industrialising English society. Sociologists have suggested three main purposes for English vagrancy laws:

- To curtail the mobility of persons and criminalise begging, thereby ensuring the availability of cheap labour to land owners and industrialists whilst limiting the presence of undesirable persons in the cities;
- To reduce the costs incurred by local municipalities and parishes to look after the poor; and
- To prevent property crimes by creating broad crimes providing wide discretion to law enforcement officials.¹⁵

The development of English vagrancy laws was by no means an objective or democratic exercise. Essentially, vagrancy laws amounted to the exercise of control over a marginalised group in society by a more privileged class, primarily for its own interests and based on

15 W Chambliss “A Sociological Analysis of the Law of Vagrancy” (1960) 12 *Social Problems* 67-77.

its own notions of the bounds of appropriate social behaviour.¹⁶ Indeed, the terminology employed in vagrancy laws and government reports of the period reveals contempt for and disdain towards vagrants. Vagrancy laws over centuries have typically featured a characterisation of targeted individuals as indolent, lazy, worthless, unwilling to work, or as habitual criminals, outcasts or morally depraved individuals.¹⁷ The development of vagrancy laws generally did not consider the rights of individuals to freedom of movement, human dignity, equality, fair labour practices or a presumption of innocence. Early English vagrancy laws reflected these trends and indeed reinforced such attitudes.

This chapter and those succeeding it illustrate the fact that vagrancy laws had been and continue to be used in an arbitrary and discriminatory manner against the poorest and most marginalised members of society.

The Origin of English Vagrancy Laws

The first official English vagrancy statute, the Statute of Labourers, was passed in the context of feudalism in 1349.¹⁸ The statute made it an offence to give alms to anyone able to work. At the time, a severe labour shortage was created by the plague and the migration of peasants to urban areas in search of improved living conditions.¹⁹ The law was intended to force anyone who was able to work to do so. In 1360, the statute was amended to further curtail the movement of potential labourers.

According to sociologist William Chambliss, “[t]here is little question that these statutes were designed for one express purpose: to force labourers (whether personally free or unfree) to accept employment at a low wage in order to ensure the landowner an adequate supply of labour at a price he could afford to pay.”²⁰ Chambliss explains that the vagrancy laws were an urgent attempt by lawmakers to reverse a social process that was underway – i.e. “to curtail mobility of labourers in such a way that labour would not become a commodity for which the landowners would have to compete.”²¹ Despite their potential significance for the English economy, however, over the next 150 years vagrancy laws were initially amended to increase penalties,²² but then gradually diminished in importance due to their overall inefficiency.²³

16 *Id* 77; L Sebba “The Creation and Evolution of Criminal Law in Colonial and Post-Colonial Societies” (1999) 3 *Crime, Histoire et Sociétés*, at para. 4.

17 P Ranasinghe “Reconceptualising Vagrancy and Reconstructing the Vagrant: A Socio-Legal Analysis of Criminal Law Reform in Canada, 1953-1972” (2010) 48 *Osgoode Hall LJ* 55-94, 60-61.

18 Chambliss *supra* note 15, 68.

19 *Id* 69; F Bradshaw *A Social History of England* 2 ed (1921).

20 Chambliss *supra* note 15, 69.

21 *Id* 70. See for example section 5 of the Elizabethan Poor Law of 1572 which defined as a rogue and vagabond “all common labourers refusing to work for such reasonable wages as is commonly given in such parts”. “The Elizabethan Poor Law (1572)” in A Esdaile (ed) *The Age of Elizabeth (1547-1603)* (1915) 37-40, 38.

22 For example, the Vagabonds and Beggars Act provided that “vagabonds, idle and suspected persons shall be set in stocks for three days and three nights and have none other sustenance but bread and water and then shall be put out of Town.”

23 Chambliss *supra* note 15, 71.

In 1530, dormant vagrancy laws were revived to serve the additional purpose of curtailing criminal activities. New laws sought to punish ambiguously-defined persons, such as “someone who is merely idle and gives no reckoning of how he makes his living”²⁴ or those considered to be “rogue[s]”²⁵. Penalties for such offences were increasingly severe and included having an ear cut off, being whipped until bloody, or even facing the death penalty.²⁶

Under these evolving vagrancy statutes, “persons who had committed no serious felony but who were suspected of being capable of doing so could be apprehended”.²⁷ The ability to make arrests without proof of the actual commission of an offence was a blunt response by lawmakers to the need to protect the interests of emerging industries, which were producing a significant flow of valuable goods throughout England.²⁸ Sentences were severe and reflected an increased emphasis on imprisonment.

As examined more fully in subsequent chapters, the prohibitions in these early laws were notably similar to those that continue to exist today. For example, section 5 of the 1572 law prohibited idle persons from participating in games of chance or unauthorised begging.²⁹ Not dissimilarly, many modern laws also seek to regulate these activities, associating them with immoral and unproductive social behaviour. At this stage it suffices to recognise that the earliest vagrancy laws continue to echo in those of the modern day.

Legislators acted in ways that discriminated against the poor with no regard for their human rights. From the 1500s to 1700s, laws provided for various ways of marking paupers (using a “P” applied to the clothes) or branding rogues, vagabonds and slaves (using an “R”, “V” or “S” burnt on the skin with a hot iron).³⁰ Law enforcement imposed slavery on persistent offenders. During the 1600s, war and famine displaced many persons and led to the enactment of laws allowing parishes to evict from their district strangers potentially requiring assistance from the parish. Essentially, lawmakers were crafting the tools by which law enforcement and private citizens alike were able to trample upon the human rights of the poorest in society.

In 1743, vagrancy offences were extended to new categories of persons, including those collecting money under pretence and “all persons wandering abroad and lodging in ale houses, barns, out-houses or in the open air, not giving good account of themselves”.³¹ Offenders were forced into workhouses.

The laws had little effect in reducing the number of vagrants because they did not address the underlying causes of vagrancy. In 1821, a report from the Select Committee on the Existing Laws Relating to Vagrants noted the increasing number of vagrants and observed

24 For example, the Poor Law Act tried to regulate the manner in which poor, aged and infirm people could receive alms and the ways in which vagabonds and beggars could be punished.

25 Chambliss *supra* note 15, 74.

26 *Id.* 72.

27 *Id.*

28 *Id.*

29 “The Elizabethan Poor Law (1572)” in A Esdaile (ed) *The Age of Elizabeth (1547-1603)* (1915) 37-40, 38.

30 See Chambliss *supra* note 15, 73.

31 Rogues, Vagabonds and other Idle and Disorderly Persons Act of 1744.

that the expense of administering the existing laws was significant.³² The report further noted that the procedure of sending vagrants back to their municipalities of origin was onerous and ineffective.³³ The Committee recommended that, instead of sending vagrants back home, they should be imprisoned for longer periods to dissuade them from vagrancy.³⁴

Several vagrancy laws influenced and even facilitated the development of a culture of police corruption.³⁵ For example, parishes were required to reward anyone apprehending a beggar. The Committee observed that such provisions promoted bribery between vagrants and constables. Not only were vagrancy laws diserving the indigent population, but featuring in an emerging culture of police corruption, they began to undermine the integrity of the legal system for all English citizens.

Observers have described English vagrancy laws as eclectic, seeking to deal with a range of concerns (labour, crime, popular morality, entertainment, religion and public health) through prosecution of the offences of idleness, disorderly conduct, or status as a rogue or vagabond.³⁶ English vagrancy laws responded to social problems and concerns through a combination of punishment and welfare – i.e. by allowing some categories of persons to beg and by promulgating a wide range of laws regulating poor relief.³⁷ It is no surprise, then, that vagrancy laws throughout history, both in England and elsewhere, are part of a dynamic process of social attitudes and change. In many developed states, for example, changes in vagrancy laws and the repeal or narrower application of some laws have coincided with increased acceptance of socio-economic rights such as the right to social welfare.

The Vagrancy Act of 1824

The Vagrancy Act of 1824 (the 1824 Act) was enacted “for the more effectual suppression of vagrancy and punishment of idle and disorderly persons” in England. The Vagrancy Act repealed all previous statutes on the subject, amended the definitions of idle and disorderly persons, rogues and vagabonds and set out powers to search persons and premises.

The 1824 Act retained many of the traditional vagrancy offences whilst including new categories, such as offences of a kind that only “professional” criminals might commit (e.g. loitering with intent to commit an arrestable offence) and offences against public decency and morality (e.g. offensive behaviour by prostitutes and indecent exposure). Repeat offenders were deemed incorrigible rogues and could be whipped and incarcerated.³⁸

The English Home Office in 1974 remarked that the 1824 Act had reduced the penalties related to these offences but “it was nonetheless basically a repressive measure.”³⁹ For some of the offences in the 1824 Act the option of imprisonment was removed in 1982. It was only recently that the Criminal Justice Act, 44 of 2003, removed the possibility of

32 House of Commons *Report from the Select Committee on the Existing Laws Relating to Vagrants* (1821).

33 *Id* 4.

34 *Id* 5.

35 *Id* (“The abuses tolerated and the frauds practised under these laws have been unquestionably proved by the evidence which has been taken before your Committee, and are in fact but too general and notorious”).

36 Ranasinghe *supra* note 17, 59.

37 *Id* 66 (“Poor relief was to be provided alongside the threat of punishment to ensure that only those deemed ‘deserving’ were relieved”).

38 The offence of being an incorrigible rogue was repealed in Britain by the Criminal Justice Act 44 of 2003.

39 English Home Office *Working Party on Vagrancy and Street Offences Working Paper* (1974) at paras. 4 and 13.

imprisonment for the remaining offences relating to being an idle and disorderly person or rogue and vagabond in Britain.

Examples of Offences in the Original Vagrancy Act of 1824

Idle and disorderly persons (section 3):

- Every common prostitute wandering in the public streets or public highways, or in any place of public resort, and behaving in a riotous or indecent manner (removed from Vagrancy Act in 1989);
- Every person wandering abroad, or placing himself or herself in any public place, street, highway, court or passage, to beg or gather alms, or causing or procuring or encouraging any child or children so to do (option of imprisonment for this offence removed in 1982);
- Every person who in any public place solicits for immoral purposes (added to Vagrancy Act in 1898 and finally repealed from sexual offences legislation by the Sexual Offences Act, 42 of 2003).

Rogues and vagabonds (section 4):

- Every person playing or betting in any street, road, highway or other open and public place, at or with any table or instrument of gaming, at any game or pretended game of chance (repealed in 1948);
- Every person wilfully, openly, lewdly and obscenely exposing his person in any street, road or public highway, or in view thereof, or in any place of public resort, with intent to insult any female (repealed in 2003);
- Every person wandering abroad, and endeavouring by the exposure of wounds or deformities to obtain or gather alms (repealed);
- Every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence (option of imprisonment removed in 1982);
- Every suspected person or reputed thief, frequenting any river, canal ... or any street, highway or avenue leading thereto, or any place of public resort, with intent to commit a felony (repealed in 1981);
- Every person wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or wagon, not having any visible means of subsistence and not giving a good account of himself or herself (reference to "visible means of subsistence" removed in 1935, option of imprisonment removed in 1982);
- Every person being found in or upon any dwelling house, warehouse, coach-house, stable or outhouse or in any enclosed yard, garden or area, for any unlawful purpose.

Conclusion

The Vagrancy Act of 1824 has lost much of its power in Britain over the years as its various provisions were repealed or narrowed in line with changing notions of fairness and justice. In a number of states where the English Vagrancy Act provisions have been incorporated into domestic law, there has also been movement toward either abolishing vagrancy provisions entirely or ensuring that offences specifically relate to a suspect's activities rather than his or her status.

The Canadian Criminal Code, for example, removed some offences during the 1950s from their classification of "idle and disorderly" and inserted them elsewhere in the criminal code, seeking to address and ameliorate the stigma of being accused and/or convicted of a vagrancy crime. Offences were also redrawn to require criminal intent.⁴⁰ In 1970 when considering vagrancy provisions in Canada, the Royal Commission on the Status of Women noted: "The criminal law in Canada is built upon a nineteenth century philosophy of the role of punishment in the control of anti-social behaviour. Behaviour that was considered a threat to society in the nineteenth century and accordingly subjected to the criminal law and its sanctions is not necessarily, in the mid-twentieth century, the kind of behaviour that should be subject to criminal sanctions."⁴¹ Furthermore, in 1972 Canada repealed the provisions which prohibited begging in a public place, wandering abroad without an apparent means of support and not giving a good account of his or her presence, and being a common prostitute who is found in a public place and does not give good account of herself. These repeals were premised on five factors: that vagrants were no longer seen as a threat to the social or moral order of the nation; that there was a need to make the criminal law more modern, compassionate and remedial; that the law was unevenly applied between different classes of persons; that criminal law was seen as too punitive a measure to rely on; and that the provisions were too vague for the purpose of criminal law.⁴²

United States courts have further held that the state "may not make it an offence to be idle, indigent, or homeless in public places."⁴³ These amendments and conceptual shifts reflect the recognition that the original vagrancy laws are archaic and anachronistic. Furthermore, the changes to and repeal of vagrancy laws reflect in part different cultures' evolving views on indigence, dignity, and respect for human rights.

Kimber wrote an interesting article documenting the policing of vagrants in New South Wales in the early 1900s which sets out some of the history of vagrancy laws and their application in British colonies.⁴⁴ She points out that by-laws were often applied hypocritically and inconsistently - "...the attractiveness of vagrancy provisions in smaller localities lay less in their ability to maintain social order, and more in their ability to provide a convenient legal mechanism to remove, exclude, brand and punish those deemed offensive"⁴⁵:

40 *Id* 68.

41 Ranasinghe, *supra* note 17, 85 (quoting Royal Commission on the Status of Women *Report of the Royal Commission on the Status of Women in Canada* (1970).

42 *Id* 87-88.

43 *Jones v City of Los Angeles* 444 F.3d 1118, 1137 (9th Cir. 2006), vacated on other grounds in *Jones v City of Los Angeles* 505 F.3d 1006, 1006 (9th Cir. 2007).

44 J Kimber (2010) "A Nuisance to the Community': Policing the Vagrant Woman" *Journal of Australian Studies* 2010 34(3): 275-293.

45 *Id* 279.

Those deemed not to fit the dominant moral codes were reminded on a daily basis that their existence in the town was not tolerated. The ideology of localism provided a panacea for some of the problems associated with poverty: new, non-local offenders were either goaled or told that 'their sort wasn't wanted'. When faced with their 'own problems', this localism worked to disassociate 'offenders' from others by a constant commentary reported in the newspapers which scorned 'deviant' behaviour and by persistent harassment by police when they became too visible. These moral frameworks, in both their application and in consequent resistance to them, highlight the narrowness of localism, the 'tyranny' of closed societies and the power embedded in mechanisms of social control.⁴⁶

It is in this context that we should also consider the manner in which the English Vagrancy Act provisions found their way into many Penal Codes in Africa. Having moved from colonialism to independent democratic states, countries like Malawi might well want reconsider whether these vagrancy laws should continue to have any currency.

46 *Id* 281.

3. The Persistence of Colonial Vagrancy Laws in Southern Africa

The English legal system has been transported to many African states through colonial rule. In addition, the British Empire deliberately shaped the content of Penal Codes in African states. It is therefore no accident that some provisions in such Penal Codes closely resemble the English vagrancy laws. These vagrancy provisions were used as a deliberate and convenient method of social control in African states where colonial policies had already caused significant poverty and dislocation.⁴⁷ This chapter outlines the incorporation of the English Vagrancy Act of 1824's provisions into the Penal Codes of many African states.

Introduction

British colonialism resulted in the application of English criminal law to all areas and territories under the control of Great Britain. Thus, by the late 1800s, English criminal law applied in many areas under colonial control. Because of this broad geographical scope, Britain sought to ensure uniformity in the application of its criminal laws and the development of Model Criminal Codes by the Colonial Office. Two hundred years later, post-colonial African states continue to utilise criminal codes that remain very similar to the laws imposed by British colonialists, despite the passage of time and the advent of independence.

The Introduction of Uniform Criminal Codes in Africa

The British legal system is rooted in common law, statutes and judicial precedent. Whilst Britain has historically resisted codification of its criminal laws, British colonial administrators saw the benefit of applying a comprehensive uniform criminal code to their colonies, which would render the application of English criminal law much easier in those areas.⁴⁸ This trend led to a wide array of legislative drafting initiatives aimed at developing a comprehensive and simplified code of English criminal law.

47 S Coldham "Criminal Justice Policies in Commonwealth Africa: Trends and Prospects" (2000) 44 *Journal of African Law* 223.

48 Britain itself did not adopt a codified criminal law, nor did Ireland. The reluctance to do so dates back to the debates between legal scholars Jeremy Bentham and Sir William Blackstone regarding the merits of a formal codified system versus a more flexible common law system. B Wright "Criminal Law Codification and Imperial Projects: The Self-Governing Jurisdiction Codes of the 1890's" (2008) 12 *Legal History* 21-22.

Legal scholar Barry Wright has observed⁴⁹ that a number of factors contributed to the use of codified criminal law in the colonies:

- It had proved difficult to simply introduce English criminal laws into colonised settings with existing legal systems or less-experienced judicial benches and/or legal professionals
- The colonies had very limited access to legal materials and case law;
- There was increasing pressure from the Colonial Office for the implementation of criminal codes;
- The codification of criminal law assisted with some of the problems of colonial governance, for example by lessening reliance on the military to maintain control;
- In some jurisdictions, codified criminal laws provided a solution to the problem of the overly-complex mixture of English criminal law and colonial legislation;
- The criminal codes were considered a way to restrain abuses on power exercised by powerful judges in the colonies. In the absence of constitutions in the colonies, criminal codes did include useful, albeit idealistic, provisions to prevent corruption and abuse of office.⁵⁰

Other observers have noted that the use of a uniform code also proved administratively useful where officials moved between colonies.⁵¹ In such situations, institutional knowledge was applied in different geographical and cultural contexts to render more consistent the experience of colonial administration.

Figure 1 below illustrates how different versions of English criminal codes influenced penal codes in Africa, including the Indian Penal Code, the Queensland Criminal Code⁵² and its derivatives, the Nigerian Criminal Code and the second Colonial Office Model Code.⁵³ The Indian Penal Code, widely hailed for its simplicity, was originally adopted in some African states, but these countries later adopted the more bureaucratic Queensland model.⁵⁴ Irrespective of the version adopted, the Codes were based on English law and many included a provision that they be read according to the English principles of legal interpretation.⁵⁵

49 Wright *supra* note 48, 24-30.

50 Wright notes, “[the] Macaulay and the Colonial Office successor models represented imposed codification, written by British imperial administrators, using English laws and involving little by way of local or indigenous input.” He contrasts this with the Canadian, New Zealand and Queensland contexts in which voluntary codifications were adopted through relatively democratic processes. Wright *supra* note 48, 9.

51 *Id*; L Sebba “The Creation and Evolution of Criminal Law in Colonial and Post-Colonial Societies” (1999) 3 *Crime, Histoire et Sociétés*, at para. 36.

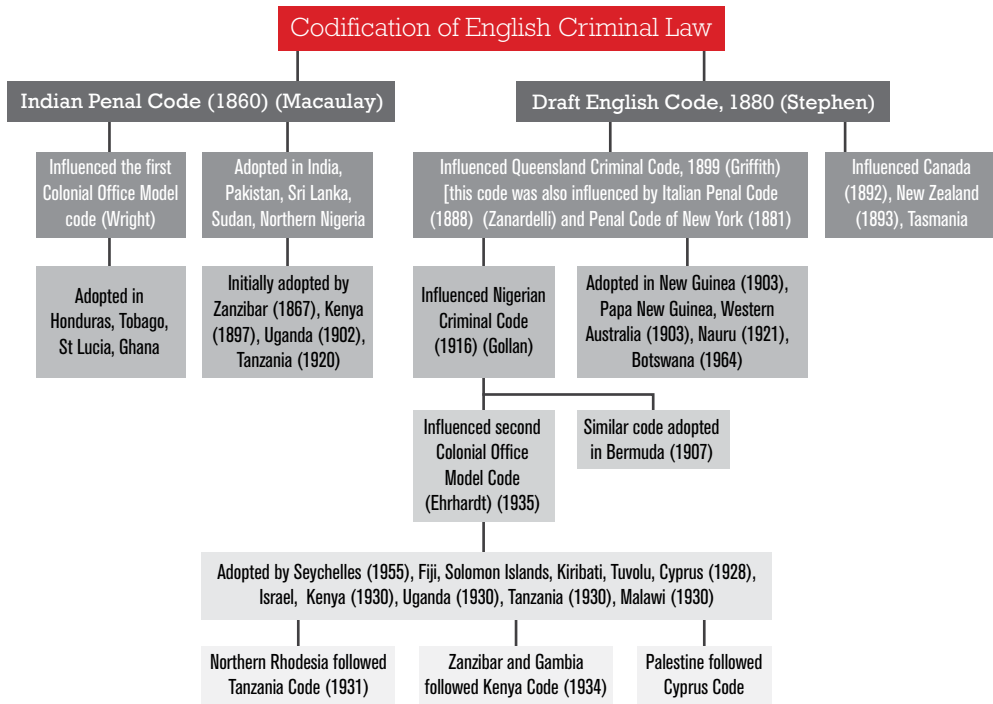
52 H Gibbs “The Queensland Criminal Code: From Italy to Zanzibar” *Address at Opening of Exhibition, Supreme Court Library* (19 July 2002).

53 This and other model codes discussed in this chapter should not be confused with the American Model Penal Code.

54 Coldham *supra* note 47, 219 fn 4.

55 *Id* 219 fn 5; Sebba, *supra* note 51 at para. 50. The Malawian Penal Code, for example, provides that it shall be interpreted in accordance with the principles of legal interpretation obtaining in England and that expressions used in it shall be presumed to be used with the meaning attached to them in English criminal law. Malawi Penal Code, section 3.

Figure 1: The Development of Criminal Codes in Africa During British Colonialism, 1860 – 1964



The above figure is interesting in that it shows the breath of English law’s influence in Africa. It further shows how instrumental the British Empire was in crafting Penal Codes for the colonies which were similar to their own laws, but also addressed their particular needs when administering these colonies.

The Legacy of British Colonial Penal Codes

Despite the persistence of British codes and those heavily influenced by British practice, there exists widespread concern that some of the offences contained in these uniform laws are static or outdated.⁵⁶ Rising condemnation of sexual and domestic violence, for example, has produced a variety of amendments in various Criminal Codes to alter and update the definitions of some sexual crimes and to include provisions relating to trafficking. Lawmakers have made similar changes to terrorism and money-laundering offences. However, despite dramatic changes in societies’ understandings of vagrancy-related offenses, there has been little movement in Africa to amend or repeal vagrancy offences. The reform of vagrancy laws is long overdue in a context where national constitutions increasingly incorporate human rights and where social systems ostensibly seek to uplift the poor.

⁵⁶ Coldham *supra* note 47, 225 (“The Codes are showing their age, they need to be rewritten in more accessible language and the principles of responsibility and the definitions of offences should be reformulated to reflect the requirements of contemporary African Societies.”).

Over time, troubling provisions in the English Vagrancy Act of 1824 have been amended or repealed (discussed *supra* in Chapter 2). This trend has not, however, emerged with regard to similar provisions contained in African criminal codes. For example, the following offences, based on English criminal law of past centuries and Model Criminal Codes, are still operational in their original wording in some countries in the Southern African Development Community (SADC):

Table 1: Offences of Rogue and Vagabond and Idle and Disorderly in SADC:

Country	Law	Rogue and Vagabond	Idle and Disorderly
Botswana	Penal Code, 1964	Section 182	Section 179
Malawi	Penal Code, 1930	Section 184	Section 180
Mauritius	Criminal Code (Supplementary) Act, 1870	Section 28	Section 26
Seychelles	Penal Code, 1952	Section 174	Section 173
Tanzania	Penal Code, 1930	Section 177	Section 176
Zambia	Penal Code, 1930	Section 181	Section 178

Historically, vagrancy-related offences have often been vague, over broad and arbitrarily applied by police in order to target persons whose existence or actions are deemed undesirable.⁵⁷

The Application of Vagrancy Offences in Africa

Provisions in colonial penal codes, though classifying certain crimes as nuisance-related offences, sought primarily to keep public order. As legal scholar Simon Coldham explains, “these were authoritarian states, concerned particularly with maintenance of law and order; sentencing was based on the principles of retribution and general deterrence and there was a marked reluctance to take into account customary notions of compensation and restitution.”⁵⁸

Repressive colonial states fostered environments in which vagrancy laws were applied in practice in violation of basic legal notions such as being innocent until proven guilty. Similarly, the post-colonial period has also witnessed the application of vagrancy laws in contravention of fundamental principles of human rights. Vagrancy provisions contained in modern, British-influenced uniform codes are almost universally applied in ways allowing broad police discretion and ignoring the principle that arrest amounts to a deprivation of liberty and should be considered a last resort. Convictions based on these offences often

57 Sebbas *supra* note 51, at para. 22. Sebbas notes that the imposition of criminal laws was “reminiscent of the vagrancy laws in early English history; the vagueness of which has been seen as providing a legal basis for the control of populations perceived as dangerous to the establishment”.

58 Coldham *supra* note 47, 219.

occur without the due process accorded to other offences. This reality continued to be exacerbated by a general practice dating from the British colonial penal system favouring imprisonment, which results in severe overcrowding.⁵⁹

The reasons for which post-colonial governments would retain legislation imposed on its citizens by a former imperial power may not be immediately apparent.⁶⁰ Such laws may have created normative attitudes in subsequent generations, resulting in a situation where persons in post-colonial states accept these laws and the values they reflect as being normal.⁶¹ Such a normative development may have precluded the return to pre-colonial social values or the modern evolution of culturally independent norms, hindering a reformulation of vagrancy laws in post-colonial states.⁶²

British-influenced uniform vagrancy laws, which primarily target poor and marginalised groups, undoubtedly continue to be useful to the wealthier propertied classes in the post-independence context. In addition, lawyers, bureaucrats and law enforcement officials familiar with these laws are unlikely to argue for their repeal or reform.⁶³

Whatever the reason for the continued existence of vagrancy laws contained in uniform codes, the supremacy of national constitutions and human rights in current national, regional and international legal frameworks demand a revision of all laws developed in a period and context in which the universality of human rights was undervalued.

Vagrancy laws, influenced by British colonial rule, impact on different marginalised populations in overlapping and compounding ways. The UN Special Rapporteur on Extreme Poverty and Human Rights has noted the disproportionate effect of nuisance laws on the poor. Such laws:

- Undermine the right to an adequate standard of physical and mental health;
- Constitute cruel, inhuman and degrading treatment;
- Deny life-sustaining measures to the poorest (e.g. by burdening the ability of the poor to engage in activities such as street-vending);
- Lead to harassment or bribery by police, especially of vulnerable groups;
- Impose fines on the poor, the enforcement of which is inefficient and reflects a waste of state financial and administrative resources, contributing to perpetuating social exclusion and economic hardship;
- Force street children into dangerous and abusive situations by barring their engagement in street-vending, touting and begging; and

59 *Id* 220.

60 Sebba *supra* note 51 at para. 47.

61 *Id* at para. 54.

62 Coldham *supra* note 47, 223. (“The penal policies of independent African governments show a remarkable continuity with those of their colonial predecessors. In spite of the stress that many governments place on African values, African traditions, African socialism and the like, there has been little attempt to incorporate these values in the penal system. Penal policies continue to be characterised by their harshness, by their emphasis on retribution and general deterrence rather than on the individualisation of penalty and the rehabilitation of offenders.”)

63 Sebba *supra* note 51 at para. 56.

- Lead to arrest, which affects the poor particularly negatively because indigent populations are frequently detained for longer periods of time than their more affluent counterparts and do not have access to legal representation.⁶⁴

In July 2012, the Global Commission on HIV and the Law recommended that States “ensure that existing civil and administrative offences such as ‘loitering without purpose’, ‘public nuisance’, and ‘public morality’ are not used to penalise sex workers”.⁶⁵ Similarly, the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation observed that the criminalisation of relatively neutral acts effectively criminalises entire populations as a result of stigma – for example, laws targeting public urination, whilst seemingly neutral, disproportionately affect homeless persons in the absence of public facilities available for their use.⁶⁶

Conclusion

Ultimately, it is clear that the legacy of colonial laws characterised by British influence continues to negatively impact on marginalised communities. Vagrancy laws derived from colonial-era codes may not reflect modern, post-colonial states’ values and appreciation for the principles of international human rights norms. By identifying and discussing the origins of such laws, governments are better able to determine their continued utility or the lack thereof.

64 *Report by the Special Rapporteur on Extreme Poverty and Human Rights supra note 1.*

65 *Global Commission on HIV and the Law HIV and the Law: Risks, Rights and Health (2012) 99.*

66 *UN General Assembly Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation: Stigma and the Realisation of the Human Rights to Water and Sanitation 21st Session of the Human Rights Council (2012) 11.*

4. Vagrancy Laws in Malawi

This chapter illustrates the problems involved in how sections 180, 184 and 185 of the Malawi Penal Code are framed. It shows that the offences of being an idle and disorderly person or a rogue and vagabond stem from efforts to exclude from view persons purely on the basis of being deemed of a lower social status, thus contributing to the marginalisation of poor and vulnerable groups in society. Such provisions have no place in Malawi, where they have the effect of exposing persons who are poor to a harsh criminal justice system.

Introduction

In 1902, English law became effective in Malawi through the British Central African Order in Council.⁶⁷ English criminal laws were thus introduced in Malawi, altering the existing customary legal methods of dealing with crime. These criminal offences were later included in the Malawi Penal Code of 1930, which provided that it was to be interpreted in accordance with English principles of legal interpretation and that expressions used in it should be presumed to be used with the meaning attaching to them in English criminal law.⁶⁸

Currently, Chapter 17 of the Malawi Penal Code addresses various nuisance-related offences, including common nuisances (s168); gaming and betting offences (s169-177); idle and disorderly persons (s180); conduct likely to cause a breach of the peace (s181); use of insulting language (s182); nuisances by drunken persons (s183); and rogues and vagabonds (s184). Many of these offences reflect fundamental defects of vagueness, over breadth, disproportionality, and arbitrariness in application. Some create a reverse onus, forcing the accused to prove his or her innocence, whilst others define an offence based upon the status of a person instead of upon their actions.

Some vagrancy offences are applied indiscriminately and their interpretation by police and courts is often improper. Malawian courts have expressed concern, for example, that the charge of being a rogue or vagabond could be used to target non-criminal indigent persons, meaning that imprisonment could be based upon mere poverty, homelessness or unemployment.⁶⁹

67 MJ Nkhata "Malawi" (2011) Lecturer, Faculty of Law, University of Malawi 2.

68 Malawi Penal Code, section 3.

69 *Republic v Lawanja and Others* [1995] 1 MLR 21; *Republic v Balala* [1997] (2) MLR 67; *Stella Mwanza and 12 Others v Republic* [2008] MWHC 228; 7. In *Lawanja*, the High Court reflected that "a person might be poor, with holes in his pocket; but this unfortunate state of affairs and often without choice, does not make them criminals."

In this chapter, the authors outline Malawian law relating to four offences: common nuisance (section 168); conduct likely to cause breach of peace (section 181); the offence of being an idle and disorderly person (section 180); and the offence of being a rogue and vagabond (section 184). The chapter also provides a description of removal orders, an outdated sanction applied in tandem with section 184 offences. Comparative references to legal precedent and methods of interpretation derived from the British legal tradition, provide the necessary depth to a contextualised analysis.

Nuisance-Related Offences in the Malawi Penal Code

Common Nuisance (section 168)

Section 168

Any person who does an act not authorised by law or omits to discharge a legal duty and thereby causes any common injury, or danger or annoyance, or obstructs or causes inconvenience to the public in the exercise of common rights; commits the misdemeanour termed a common nuisance and shall be liable to imprisonment for one year.

History of Offence

This offence originates from the English common law offence of public nuisance. Under common law, a person who a) performs an act not warranted by law, or b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property or comfort of the public, or to obstruct the public in the exercise or enjoyment of their rights, is guilty of a public or common nuisance.⁷⁰ Under common law, an individual act causing nuisance to another may be liable for performing a private nuisance for which civil action is appropriate, but it does not amount to a criminal public nuisance.⁷¹ Interference with the public's rights must be substantial and unreasonable.⁷²

Interpretation and Commentary

Section 168 specifically states that it is immaterial that the act or omission complained of is "convenient" to a larger proportion of the public than to whom it is "inconvenient", and further provides that if the act or omission facilitates the lawful exercise of their rights by a part of the public, a defendant may show that it is not a nuisance to any of the public.

Section 168 is clearly aimed at nuisances affecting the public at large. English jurist Lord Denning held that a "public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large".⁷³ Similarly, English jurist Charles Romer has noted that "it is not necessary in my judgment to prove that every member of the class has been injuriously affected; it is sufficient to show that a representative cross-section of the class has been so affected for an injunction to issue."⁷⁴

70 J Richardson (ed) *Archbold: Criminal Pleading, Evidence and Practice* (2010) 2864.

71 D Ormerod et al (eds) *Blackstone's Criminal Practice* (2008) 658.

72 JC Smith & B Hogan *Smith and Hogan Criminal law* 9 ed (1999) 755.

73 *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169.

74 *Id*; *Archbold supra* note 70, 2865. *R v Goldstein* [2004] 2 All ER 589 at [3]; *R v Johnson* [1996] 2 Cr App R 434.

For this offence to satisfy international human rights standards, observers contend that it should be invoked only in rare circumstances, such as when no other applicable statutory offence exists, where commission of the offence would have a sufficiently serious effect on the public, and/or where the defendant knew or should have known of the risk that his actions would result in a nuisance.⁷⁵

In terms of the Criminal Procedure and Evidence Code, the offence can be tried by a third or fourth grade magistrate, but a person shall not be arrested without a warrant.

Conduct Likely to Cause a Breach of Peace (sections 181 and 182)

Section 181

Every person who in any public place conducts himself in a manner likely to cause a breach of peace shall be liable to a fine of K50 and to imprisonment for three months.

Section 182

Every person who uses insulting language or otherwise conducts himself in a manner likely to give such provocation to any person as to cause such person to break the peace or to commit any offence against the person shall be liable to a fine of K100 and to imprisonment for six months.

History of Offence

Breach of peace was historically considered riotous behaviour disturbing the peace of the King.⁷⁶ Breach of peace was not traditionally a criminal offence in England insofar as proceedings under that charge did not lead to a conviction and the offence was not punishable by imprisonment or a fine.⁷⁷ Police in England were, however, allowed to arrest a suspect in order to prevent a breach of peace. This power could only be exercised where the police officer believed on reasonable grounds that a breach of peace, involving violence, was about to occur.⁷⁸

Interpretation and Commentary

Conduct likely to cause a breach of peace constitutes an offence under the Malawi Penal Code. As such, the normal rules of criminal procedure apply. Under the Code, the offence must be committed in a public place⁷⁹ and the suspect's conduct must be of a sufficiently serious nature to cause harm or fear to another person.

The courts in other commonwealth jurisdictions have narrowly interpreted a breach of peace to mean that a suspect should only be charged in cases causing alarm or amounting to a threat of serious disturbance.

75 *R v Rimmington* [2006] 1 AC 459.

76 Justices of the Peace Act 1361, 34 Edw 3 c 1.

77 *R v County of London Quarter Sessions Appeals Committee, ex parte Metropolitan Police Commissioner* [1948] 1 KB 670; *Williamson v Chief Constable of West Midlands Police* [2004] 1 WLR 14.

78 Community Law Reform Committee of the Australian Capital Territory, "Preventative Justice" in *Report on Street Offences*, CLRC 15 (1993).

79 The Penal Code defines a "public place" as including "any public way and any building, place or conveyance to which for the time being, the public are entitled or permitted to have access either without any condition or upon condition of making any payment, and any building or place which is for the time being used for any public or religious meetings or assembly or as an open court."

Scottish courts have defined breach of peace as “conduct severe enough to cause alarm to ordinary persons and threaten serious disturbance to the community.”⁸⁰

In the English case of *R v Howell*,⁸¹ the Court of Appeal held that “there is a breach of peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance. Agitated or excited behaviour, not involving any injury or threat of injury, or any verbal threat, is not capable of amounting to a breach of peace.”⁸²

In the Malawi High Court case of *Republic v Pitasoni*,⁸³ Justice Kapanda held that the sentence to be imposed was one of a fine or a maximum imprisonment of three months. He emphasised that the court should not rush into imposing imprisonment and should seriously consider all the other sentencing options available.

It is further an anomaly that the offence of insulting or provoking someone in a manner likely to cause a breach of peace, in terms of section 182, incurs a higher sentence than that provided for in section 181. Thus, an act which is likely to but which has not actually caused a breach of peace, can receive a higher sentence than an act which actually caused a breach of peace.

In terms of the Criminal Procedure and Evidence Code the offence can be tried by a third grade magistrate. A person shall not be arrested without a warrant unless the offence is committed in the presence of a police officer.

Idle and Disorderly Persons (section 180)

The offence of being an idle and disorderly person is divided into sub-categories listing various acts bringing a person within the ambit of the statute. If found to be an idle and disorderly person, a person is liable for a fine of K20 and may be sentenced to three months’ imprisonment if a first-time offender, and for a subsequent offence to a fine of K50 and six months’ imprisonment.

Each offence listed in section 180 is discussed separately below. The discussion sets out the history of the offence and how some of its elements have been interpreted by Malawian and other Commonwealth courts. In addition, a table analyses the offence as to its relevance to contemporary Malawian society, its consistency with criminal law principles and its implications for civil liberties. Where a section potentially violates any right in the Malawi Constitution, there is a short discussion on whether such a limitation is justifiable. Section 44(2) of the Malawi Constitution provides that constitutional rights may not be limited except where the limitation is prescribed in law, reasonable, recognised by international human rights standards and necessary in an open and democratic society.

In terms of the Criminal Procedure and Evidence Code, these offences can be tried by third and fourth grade magistrates and do not require a warrant for an arrest to take place.

80 *Smith v Donnelly* [2002] JC 65; *Jones v Carnegie* [2004] SLT 609.

81 [1982] QB 416.

82 *Jarrett v Chief Constable of West Midlands Police* [2003] All ER (D). English courts have further held that there had to be an incident of violence for an arrest to be justified on the basis that actual breach of peace had taken place. *Archbold supra* note 70, 2739-40.

83 [2001] MWHC 58.

Section 180(a)

Every common prostitute behaving in a disorderly or indecent manner in any public place is deemed an idle and disorderly person.

History of Offence

This offence originated in the English Vagrancy Act of 1824, and the same offence was included in the second Colonial Office Model Code, from which the Malawi Penal Code was derived.

Relevance, frequency of usage, and duplication?	Consistency with criminal law principles and burden of proof?	Implication for civil liberties and justification for limitation of rights?
Section 180(a) is a duplication of existing offences dealing with breach of peace and public indecency. It is recommended that section 180(a) be repealed.	Section 180(a) is status-based and uses past conduct or reputation as an element of the offence. The stigma attached to the offence violates the presumption of innocence principle. ⁸⁴	Section 180(a) violates the right to dignity, ⁸⁵ and the right to equality since it discriminates based on status. ⁸⁶ Since the offence duplicates existing offences its limitation of the above rights is neither necessary nor reasonable.

Interpretation and Commentary

The elements of the offence that need to be proved are:

- That the accused is a “common prostitute”;
- That the accused behaved in a disorderly or indecent manner; and
- That such behaviour took place in public.

Whilst there is no statutory definition for the term “common prostitute” the term is understood in other jurisdictions to refer to persons who “habitually ply the trade of a prostitute” as opposed to those who occasionally engage in prostitution.⁸⁷ The evidentiary standard requires the submission of proof that the accused had been found engaging in sex work-related offences in the past and received warnings for so doing, or proof of previous convictions for sex work-related offences.

The disparaging reference to “common prostitute” means that any person arrested under this offence is already tainted by a defamatory label upon their appearance in court and is likely to face improper prejudice as a result thereof. This concern was highlighted in the United Kingdom, and the Policing and Crime Act of 2009 accordingly removed the word “common prostitute” in a similar offence, and inserted the word “persistently”.⁸⁸

84 This principle is entrenched in section 42(2)(f) of the Malawi Constitution which deals with the rights of accused persons to a fair trial.

85 Section 19(1) of the Malawi Constitution.

86 Section 20(1) of the Malawi Constitution.

87 M Cowling & JRL Milton *South African Criminal Law and Procedure III* 2 ed (1988) E3-136.

88 Section 16 of the Policing and Crime Act of 2009.

A person who sells sex but does not engage in disorderly or indecent conduct in a public place is not guilty of this offence merely by virtue of being a sex worker.

Essentially, the offence does not deal with soliciting others for the purpose of prostitution, but is rather a public order provision aimed specifically at sex workers based on the outdated assumption that sex workers as a group are more likely to engage in disorderly behaviour.⁸⁹ Thus, the offence is status-based, rendering it archaic and obsolete. Equivalent provisions have been abolished in South Australia, the Australian Capital Territories, New South Wales and New Zealand.

In Ireland, the Supreme Court has held it unconstitutional to attribute criminal conduct to a person purely because of their status: the court found it unconstitutional that the ingredients of an offence and the mode by which its commission might be proved were related to “rumour or ill-repute or past conduct” and were “indiscriminately contrived to mark as criminal conduct committed by one person in certain circumstances when the same conduct when engaged in by another person in similar circumstances would be free of the taint of criminality”.⁹⁰

The Canadian Royal Commission on the Status of Women noted in 1970 that the vagrancy laws which applied to prostitutes were discriminatory and counter-productive: “Young [and marginalised] girls move from rural areas to the urban centres alone and without money . . . and ill-equipped to find a job. In many cases, they are picked up by the police on vagrancy charges and may consequently acquire the stigma of a criminal record.” The Royal Commission’s report highlighted the problems associated with the way women were charged, as well as the fact that this practice was inherently gender biased.⁹¹

The offence is particularly ill-suited to modern Malawi, where the act of exchanging sex for money or other remuneration is not illegal.

Section 180(b)

Every person wandering or placing himself in any public place to beg or gather alms, or causing or procuring or encouraging any child or children so to do, is deemed an idle and disorderly person.

History of Offence

This offence existed prior to the English Vagrancy Act of 1824, and its current wording is the same as that found in section 3 of the Vagrancy Act of 1824.

89 Law Reform Commission of Western Australia *Project 85: Police Act Offences, Report* (1992) 91.

90 *King v Attorney General* [1981] I.R. 233.

91 The Commission noted that the vagrancy provision pertaining to prostitution failed to “respect the liberty of the individual to move about in freedom. Furthermore it opens the door to arbitrary application of the law by the police and it favours setting up traps, sometimes using police officers as agent provocateurs to arrest so-called prostitutes.” P Ranasinghe *supra* note 17.

Relevance, frequency of usage, and duplication?	Consistency with criminal law principles and burden of proof?	Implication for civil liberties and justification for limitation of rights?
<p>Persistent begging can be addressed under the offences of breach of peace or common nuisance. The exploitation of children by forcing them to beg can be dealt with under provisions of the Child Care, Protection and Justice Act. Criminalisation of this offence is ineffective since a sentence of imprisonment or a fine is likely to increase hardship. It is recommended that section 180(b) be repealed.</p>	<p>Section 180(b) is overly broad since it is not limited to cases of persistent begging and thus criminalises acts arising from poverty.</p>	<p>Because section 180(b) potentially criminalises persons who have no choice but to beg because of poverty, it constitutes a violation of their right to dignity.⁹² Such limitation would be justifiable only where the offence deals with persistent acts of begging and where the State can show that it has put in place social measures to address the causes of begging.</p>

Interpretation and Commentary

To constitute an offence within the meaning of the statute, the prosecution must demonstrate that the accused acted in a public place⁹³ to beg or gather donations.

English courts have held that a single act of asking for money does not amount to begging.⁹⁴ The offence is targeted at persons who seek to make a living from begging and engage in it as a recurrent and frequent activity; it must be shown that the accused had adopted begging as a persistent activity. Notably, courts view street entertainers in general as offering a service in return for the money given by passers-by, and will not therefore be regarded as beggars.⁹⁵

Similar provisions have been repealed in other commonwealth countries, including New South Wales, New Zealand and the Australian Capital Territory.⁹⁶ In other countries, the offence has been amended to refer only to an act of persistent begging or to acts of begging in which the suspect failed to heed warnings to stop the activity.⁹⁷

Critics have offered several justifications for repealing this offence. It has been argued, for example, that the general prohibition of begging need no longer exist where instances of

92 Section 19(1) of the Constitution of Malawi.

93 See note 79.

94 *R v Dalton* [1982] Crim. L. R. 375.

95 *Gray v Chief Constable of Greater Manchester* [1983] Crim. L. R. 45.

96 Law Reform Commission of Western Australia, *supra* note 89, 156.

97 Section 65(3) of the Western Australia Police Act.

disruptive begging can be addressed under other offences related to disorderly conduct.⁹⁸ Similarly, the Irish Law Reform Commission supports the repeal of offences relating to begging by noting that criminalising begging amounts to the inappropriate penalisation of poverty; that no serious nuisance results in most cases of begging; and that it is neither efficient nor effective to impose fines as punishment when an offender is destitute, and that imprisonment serves only to create hardship on the family of the accused.⁹⁹

The Child Care, Protection and Justice Act, 22 of 2012 in section 23(k) includes as a child in need of care and protection, a child who is allowed to be on the streets or at a place for the purpose of begging or receiving alms and as a result becomes a habitual beggar. This section could address children who are forced to beg. Section 80 of the Child Care, Protection and Justice Act prohibits subjecting a child “to a social or customary practice that is harmful to the health or general development of the child”. Whilst this section’s heading refers to “harmful cultural practices”, the government has referred to it in the context of begging by children.¹⁰⁰ This offence carries a possible sentence of ten years imprisonment.¹⁰¹ The government has acknowledged that children might beg for different reasons, but has nevertheless warned that parents and guardians who send their children to beg will be prosecuted.¹⁰² It appears that the government’s prosecution of parents who encourage their children to beg, is aimed at the protection of the rights of these children.

Section 23(5) of the Malawi Constitution provides that children are entitled to be protected from economic exploitation or any treatment, work or punishment that is, or is likely to (a) be hazardous; (b) interfere with their education; or (c) be harmful to their health or to their physical, mental or spiritual or social development. However, it should be noted that such criminalisation might result in additional hardship for the children. The Malawi Constitution has recently been amended to include in section 23(4) a provision that “all children shall be entitled to reasonable maintenance from their parents, whether such parents are married, unmarried or divorced, and from their guardians; and, in addition, all children, and particularly orphans, children with disabilities and other children in situations of disadvantage shall be entitled to live in safety and security and, where appropriate, to State assistance”. Prosecuting parents might interfere with children’s right to maintenance and support.

Section 180(f)

Every person wandering about and endeavouring by the exposure of wounds or deformation to obtain or gather alms, is deemed an idle and disorderly person.

History of Offence

In the English Vagrancy Act of 1824 this offence can be found in the statutory provision dealing with rogues and vagabonds.

98 Law Reform Commission of Ireland *Report on Vagrancy and Related Offences* (1985) 51 and 63. The Irish Law Reform Commission recommended that the offence not fall under the “pejorative terminology of ‘rogues and vagabonds’”. The Commission further recommended drawing a distinction between begging in public, door-to-door begging and aggressive begging causing annoyance, fear or the obstruction of passers-by.

99 *Id* 61.

100 Principal Secretary for Gender, Children and Social Development, Dr Mary Shawa, quoted in “Street begging remains banned, Malawi government to flush out street beggars - Official” *Nyasa Times*, 30 December 2012.

101 Section 83 of the Child Care, Protection and Justice Act.

102 Dr Mary Shawa *supra* note 100.

Relevance, frequency of usage, and duplication?	Consistency with criminal law principles and burden of proof?	Implication for civil liberties and justification for limitation of rights?
<p>Section 180(f) attracts a lesser penalty than it did under the English Vagrancy Act of 1824 but it remains a concern that the act would criminalise behaviour arising from poverty and disability in the absence of a comprehensive social welfare system which would be able to support individuals to engage in more productive activities. It is recommended that section 180(f) be repealed.</p>	<p>Section 180(f) is overly broad since it applies to both public and private places and is not limited to persistent acts which cause a nuisance.</p>	<p>Because section 180(f) potentially criminalises persons who have no choice but to beg because of poverty and inability to work, it constitutes a violation of their right to dignity. Such limitation would be justifiable only where the offence deals with persistent acts of begging and where the State can show that it has put in place social measures to deal with the causes of begging and to assist persons with serious disabilities to obtain work or benefit from social services.</p>

Interpretation and Commentary

This particular offence is not restricted to begging in a public place.¹⁰³ The prosecution must show that the accused person attempted to obtain donations by exposing their wounds or deformities.

The reality is that begging in terms of this subsection or the previous subsection is often so prevalent that criminalising such behaviour can be of symbolic value only. It is unlikely that police in developing states would ever have sufficient resources to enforce such provisions on a scale that would deter such behaviour.

Section 180(c)

Every person playing at any game of chance not being an authorised lottery or a private lottery for the purposes of section 174, for money or money's worth in any public place, is deemed an idle and disorderly person.

History of Offence

This offence was criminalised prior to the English Vagrancy Act of 1824. Participating in a game of chance qualified a person as a rogue and vagabond under section 4 of the Vagrancy Act of 1824. This offence was repealed in England as early as 1888.¹⁰⁴ Similar provisions, however, continued to be included in the penal codes enforced in British colonies.

103 *Smith v McCabe* (1912) Q.B.D 306.

104 Statute Law Revision (No 2) Act 1888, 51 & 52 Vict c 57.

Relevance, frequency of usage, and duplication?	Consistency with criminal law principles and burden of proof?	Implication for civil liberties and justification for limitation of rights?
To the extent that section 180(c) seeks to regulate activities in a public space it would be better placed in municipal by-laws. It is recommended that section 180(c) be repealed.	Section 180(c) is overly broad as it includes games of chance which are not aimed at making a profit or defrauding a person.	Section 180(c) potentially violates the right to dignity in that it imposes a criminal sanction on a person who takes part in an activity which does not cause harm to anyone.

Interpretation and Commentary

The offence is limited to games of chance that take place in public, excluding lotteries that are governed by Malawi’s Lotteries Act, 9 of 2003. Gaming, betting houses and lotteries are also addressed in other sections of the Penal Code. The offence is aimed at persons taking part in such unauthorised games of chance, whilst the offences in the Lotteries Act focus on persons who manage or arrange such games of chance.¹⁰⁵

This offence is overly broad, as it includes in its ambit mere games of chance not aimed at making a profit and those that are not conducted through fraud or false pretences.

Section 180(d)

Every person who without lawful excuse publicly does any indecent act is deemed an idle and disorderly person.

History of Offence

The original English Vagrancy Act of 1824 referred to two separate rogue and vagabond offences related to indecency: the first was the offence of wilfully exposing indecent material in public, and the second was the offence of wilfully, openly, lewdly and obscenely exposing the male body in public with the intent of insulting a female. The subsection on exposure of indecent material was repealed by the Indecent Displays (Control) Act in 1981, whilst the Criminal Justice Act of 1925 initially broadened the offence of exposing oneself with the intent to insult a female by removing the requirement that the offence had to occur in public. Both these rogue and vagabond offences in the Vagrancy Act were repealed by the Sexual Offences Act, 42 of 2003, which specifically concerned the act of intentionally exposing one’s genitals to cause distress to another person.

105 Act 9 of 2003. Section 47(2)(g) of the Act provides that any person who conducts, organises, promotes, derives or manages any scheme, plan, competition, arrangement, system, game or device which directly or indirectly provides for betting, wagering, gambling, or any other game of risk on any outcome of any lottery unless authorized by or under this Act or any other law, commits an offence. Section 48(1)(a) states that any person who advertises or offers the opportunity to participate in a lottery, promotional competition or game of another description and who gives, by whatever means, a false indication that it is a lottery, competition or game forming part, or is otherwise connected with, the National Lottery commits an offence.

Relevance, frequency of usage, and duplication?	Consistency with criminal law principles and burden of proof?	Implication for civil liberties and justification for limitation of rights?
<p>Whilst case law provides some guide on the interpretation of the term “indecent act” it is important to recognise that contemporary Malawian society does not have a uniform view on what constitutes an “indecent act”. The offence remains relevant in contemporary society provided that it is not applied in a discriminatory manner. This section would be better placed as an individual section in the chapter dealing with offences against morality. It is recommended that section 180(d) be repealed.</p>	<p>The term “indecent act” is not defined in the Penal Code and this creates the risk that the offence is applied arbitrarily and in instances where the indecent behaviour has not caused distress to any person. The term “indecent act” is vague and does not provide sufficient information for a person to know what behaviour would be unlawful. The offence does not differentiate between acts done with a sexual motivation, sexual acts in public and nudity.</p>	<p>If section 180(d) is applied in a discriminatory manner, e.g. targeting displays of affection between same-sex couples and not opposite sex couples, it can potentially violate the right to equality and dignity.¹⁰⁶</p>

Interpretation and Commentary

The prosecution must demonstrate that the accused performed an indecent act that could be seen by a member of the public. The onus is on the accused to prove that he or she performed the act with a lawful excuse.

The term “indecent act” is not defined in the Malawi Penal Code and should be interpreted in terms of the standards of the ordinary reasonable member of society.

It has been held by courts in Commonwealth countries that nudity itself is not obscene, but rather that such a determination is dependent upon the circumstances of a particular case.¹⁰⁷ The English Criminal Law Revision Committee in 1984 recommended that it should be an offence to commit sexual acts in public only in circumstances where the act is likely to be seen by members of the public or where the conduct was reckless as to that fact.¹⁰⁸

Section 180(e)

Every person who in any public place solicits for immoral purposes is deemed an idle and disorderly person.

106 Sections 20(1) and 19(1) of the Malawi Constitution.

107 For an brief overview of Western Australian case law on this subject, see Law Reform Commission of Western Australia, *supra* note 89, 60.

108 United Kingdom Criminal Law Revision Committee *Fifteenth Report: Sexual Offences* (1984), Part X, at para. 10.

History of Offence

A similar offence was included in the English Vagrancy Act in 1898 which contained an offence prohibiting a male, in any public place, from persistently soliciting or importuning another for immoral purposes; the law similarly targeted males who lived off the earnings of female prostitution.¹⁰⁹

Section 32 of the Sexual Offences Act of 1956¹¹⁰ replaced this Vagrancy Act provision and stated that it was an offence for a man to persistently solicit in a public place for immoral purposes. In 2000 the United Kingdom Home Office published a review of sexual offences in which they noted that, although the provision was originally intended to deal with men approaching female prostitutes, it was being used almost exclusively against men soliciting other men.¹¹¹ The Home Office found that the application of the section targeted homosexual men, and recommended that it be repealed. The section was repealed in Britain by the Sexual Offences Act of 2003.¹¹²

Relevance, frequency of usage, and duplication?	Consistency with criminal law principles and burden of proof?	Implication for civil liberties and justification for limitation of rights?
Section 180(e) dates from an era which sought to criminalise acts which ran contrary to Victorian notions of morality. Specific acts of sexual impropriety are already covered under other sections of the Penal Code e.g. section 145(1) (e) makes it an offence for a male person to “in any public place persistently solicit or importune for immoral purposes”. It is recommended that section 180(e) be repealed.	The term “immoral purpose” is vague since it does not give sufficient information about the conduct which is prohibited.	Section 180(e) encourages arbitrary enforcement, which risks the infringement of a range of rights including the right to dignity and freedom of expression. ¹¹³ Courts in comparative jurisdictions have sought to narrowly interpret the section to limit its vagueness and arbitrariness. If the section is used in a manner which targets specific sections of the population, e.g. based on a person’s sexual orientation, it also violates the right to equality. ¹¹⁴

109 The exact wording of the 1898 vagrancy offence is now section 145(1) of the Malawi Penal Code, showing that section 180(e) is redundant.

110 Available at <http://www.legislation.gov.uk/ukpga/Eliz2/4-5/69/section/32> (last accessed: 2 June 2013).

111 British Home Office, *Setting the Boundaries: Reforming the Law on Sexual Offences*, (2000).

112 Available at <http://www.legislation.gov.uk/ukpga/2003/42/schedule/7> (last accessed: 2 June 2013).

113 Sections 19(1) and 35 of the Malawi Constitution.

114 Section 20(1) of the Malawi Constitution.

Interpretation and Commentary

English courts have interpreted the word “soliciting” to mean:

- Conduct reflecting more than a mere act of loitering;
- “Conduct amounting to an importuning of prospective customers”¹¹⁵;
- Conduct which requires physical presence on the part of the prostitute;¹¹⁶
- Conduct extending into a public place;¹¹⁷
- Conduct which were constituent of persistent¹¹⁸ persuading, begging or entreating.¹¹⁹

To constitute soliciting in a public place, it is not necessary that a sex worker be physically present in the public place itself, meaning that a place seen by the public (such as a window or doorway) sufficed for the purposes of the statute.¹²⁰ A sex worker would not, however, be committing this offence in the privacy of her room.

The definition of “soliciting” in terms of the specific offence of soliciting for an immoral purpose was discussed in the Hong Kong High Court case of *HKSAR v Cen Zhi Cheng*.¹²¹ In this case, the appellant was convicted of soliciting in public for an immoral purpose after approaching an under-cover police officer and seeking to engage in acts of prostitution in exchange for money. In evaluating the appellant’s contention that the evidence at hand was insufficient to establish the solicitation of the police officer, the court cited the Shorter Oxford English Dictionary. In dismissing the appeal, the High Court stated:

*The Shorter Oxford English Dictionary defines the word ‘solicit’ in a number of ways. The most apt of these definitions would appear to involve an individual seeking to obtain something or some response from another, or to persuade them to do something. In my view to solicit someone for an immoral purpose within the terms of [the applicable law, which parallels that at issue in our case] would include enticing or persuading that person to do some act or thing, or seeking from them some response, so as to bring about an eventuality or state of affairs which is sexually immoral.*¹²²

The British Wolfenden Committee, in its 1957 report on offences relating to homosexuality and prostitution, noted that the section on soliciting persistently for an immoral purpose in a public place, applied to solicitation of males by males for purpose of homosexual acts,

115 JC Smith & B Hogan *Smith and Hogan Criminal Law* 4 ed (1978) 434.

116 *Weisz and Another v Monahan* [1962] 1 All ER 664 (holding that soliciting involved the physical presence of the prostitute and conduct on her part amounting to importuning of prospective customers).

117 *Behrendt v Burridge* [1977] 1 WLR 29 (holding that the conduct of a scantily-clad woman sitting in a window with a red light amounted to soliciting because, even though she did not actively approach customers, her presence at the window sought to attract prospective clients for the purpose of prostitution).

118 The Canadian Supreme Court has held that to “solicit” is synonymous with the act of accosting or importuning in a manner that is pressing or persistent. *R v Hutt* (1978) 2 SCR 476 at para. 17.

119 *Weisz and Another v Monahan* [1962] 1 All ER 664.

120 In the English case of *Smith v Hughes* (1960) 2 All ER 857, the court held that where sex workers had not been physically present in the street, but rather solicited clients from a window, doorway or balcony, the sex worker was guilty of soliciting because she had actively sought to attract the attention of prospective clients.

121 [2008] 2 HKCFI 142.

122 *Id* at paras 13-14.

solicitation of males by males for purpose of immoral relations with females and solicitation of females by males for immoral purposes.¹²³

In the Supreme Court of Canada case of *Hutt v the Queen*,¹²⁴ the Court considered the offence of soliciting for the purpose of prostitution in the Criminal Code. The case concerned a sex worker who had smiled at an officer and then voluntarily got into his car. The Supreme Court noted that the offence was located under the section Disorderly Houses, Gaming and Betting, and considered that this means the section dealt with “offences which do contribute to public inconvenience or unrest and again I am of the opinion that Parliament was indicating that what it desired to prohibit was a contribution to public inconvenience or unrest. The conduct of the appellant in this case cannot be characterised as such.” The Supreme Court held that the word “solicit” carries with it an element of persistence and pressure and that there was no evidence of such an element in the evidence presented of the appellant’s activities.

In some jurisdictions, this offence is limited to prostitution, and the prosecution must prove that the accused person attempted to or obtained money in a public place for the purpose of performing an act of prostitution.

Two Hong Kong cases considered the definition of a “public place” specifically related to the offence of soliciting for immoral purposes. Although both cases extended the definition of a “public place” to places to which the public have access, the cases are interesting because they still show that the courts viewed the offence as applying to acts which engaged directly with persons from the public.

- *HKSAR v Mok Yu Ming, Wong Wai Fun and Lau Cheung Wai*.¹²⁵ The third appellant, a masseuse accused of engaging in prostitution in a massage parlour room, was convicted of soliciting for an immoral purpose in a public place. Upholding the conviction, the High Court found the massage room to be a public place, but noted that certain sections of the parlour (such as the management office or the staff changing room) were private areas.
- *HKSAR v Wong Yiu Wah and Others*.¹²⁶ Several appellants were convicted of soliciting for immoral purposes in a public place. The High Court observed that the magistrate erred in interpreting “public place” according to the Interpretation and General Clauses Ordinance, rather than the Crimes Ordinance and the Public Order Ordinance (see the Zambian equivalents below). Dismissing the appeal, the court concluded that, because the club at issue was open to the public rather than was a private building, it was a public place. It did not matter whether they were admitted as licensees or invitees, or whether the occupier would have had the power to refuse entry to anyone based upon any reason.

Two comparative commonwealth cases support a position that “immoral purposes” necessarily involve actual sexual activity:

123 Wolfenden, *Report of the Committee on Homosexual Offences and Prostitution* (1957) at para. 238.

124 [1978] 2 SCR 476.

125 [2001] HKCFI 980.

126 [2002] 1 HKCFI 789.

- In the English case of *R v Kirkup*,¹²⁷ the appellant appealed against his conviction under section 32 of the Sexual Offences Act for persistently soliciting in a public place for immoral purposes. Police officers had observed the appellant acting in such a way as to suggest he was soliciting public sexual activity in a men’s restroom. In finding that the definition of “immoral purposes” necessarily implicates sexual activity (thus tacitly recognising that it does not contemplate the exercise of free speech), the court offered: “The law in this court is that an immoral purpose in section 32 must be some kind of sexual activity. Nobody disputes that. But once that hurdle or gateway is passed, it is for the judge to rule whether a particular purpose is capable of being immoral, and for the jury to decide whether it is.”¹²⁷
- In the Hong Kong High Court case of *HKSAR v Cen Zhi Cheng*,¹²⁸ the appellant was convicted of soliciting in public for an immoral purpose after approaching an undercover police officer and offering to engage in acts of prostitution in exchange for money. In dismissing the appeal, the court echoed and reprinted the sentiments of the lower court: “In my view by making such a clear and unambiguous offer he was soliciting [the police officer] for the purpose of prostitution. There was no real suggestion before me that such a purpose could not be found to be immoral and I agree with the magistrate’s comment: ‘Immoral purpose must refer to some kind [of] sexual activity. It is a matter for the tribunal of fact by applying the standards of the community. I take judicial notice that prostitution, i.e. exchange of money for sexual favour, is an act society in general (especially in a predominately Chinese community such as Hong Kong) considers immoral ...’”¹²⁹

The phrase “immoral purposes” is vague. In the United States case of *Papachristou v City of Jacksonville*,¹³⁰ the Supreme Court held that a vagrancy ordinance was void for vagueness, “both in the sense that it ‘fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the Statute’ . . . and because it encourages arbitrary and erratic arrests and convictions”.¹³¹ Similarly, in the case of *City of Chicago v Morales*,¹³² the United States Supreme Court held that where a law contained no guidelines for the exercise of police discretion, it invited uneven police enforcement.¹³³ Similarly, the terminology used in the Malawi Penal Code to describe this offence does not provide a clear indication of the conduct that is prohibited.

Section 180(g)

Every male person who wears the hair of his head in such a fashion as, when he is standing upright, the main line of the bottom of the mass of hair (other than hair growing on his face or on the nape of his neck) lies below an imaginary line drawn horizontally around his head at the level of the mouth, shall be deemed an idle and disorderly person.

127 [1993] 2 All ER 802.

128 [2008] 2 HKCFI 142.

129 *Id* at para. 23.

130 405 US 156 (1972).

131 *Id* at para. 162.

132 527 US 41 (1999). See also *NAACP Anne Arundel County Branch v City of Annapolis* 133 F Supp 2d 795 (D Md 2001).

133 See also *Commonwealth of Pennsylvania v Asamoah* 809 A 2d 943 (Pa Super Ct 2002).

History of Offence

This offence is unique to Malawi.¹³⁴ The offence was inserted into the Penal Code by Act, 11 of 1973 and stemmed from the dress code introduced by Dr Hastings Banda immediately after he declared himself President for Life. Malawian law similarly prohibited women from wearing pants or short skirts under the Decency of Dress Act, which was repealed in the early 1990s when Malawi began to democratise.¹³⁵

Relevance, frequency of usage, and duplication?	Consistency with criminal law principles and burden of proof?	Implication for civil liberties and justification for limitation of rights?
Section 180(g) has fallen into disuse. It is recommended that section 180(g) be repealed.	Since section 180(g) is not used often, it is likely that many persons in Malawi are unaware of its existence. This would add an element of unfairness and arbitrariness to its enforcement.	Section 180(g) violates the right to dignity ¹³⁶ of a person in that it ignores a person's individuality and right to make choices about their appearance. Section 180(g) also violates the right to equality, ¹³⁷ in that it is likely to discriminate against persons from certain groups and religions who grow their hair for religious or cultural purposes. This could also violate the right to freedom of conscience, religion and belief. ¹³⁸ The section is also discriminatory since it only applies to men. These violations are not justified as being necessary or reasonable in Malawi.

Interpretation and Commentary

The offence was specifically aimed at long hair and facial hair. At airports, visitors who had long hair were prohibited from entering the country unless they had a haircut. The offence appears not to be enforced and should be repealed.

134 Presumably the offence was also in part a response to the influence of the hippie movement on dress codes during this time.

135 Nkhata *supra* note 67, 6.

136 Section 19(1) of the Malawi Constitution.

137 Section 20(1) of the Malawi Constitution.

138 Section 33 of the Malawi Constitution.

Rogues and Vagabonds (section 184)

The various acts determining whether a person is deemed a rogue and vagabond are set out below. In order to be found guilty of being a rogue and vagabond, the prosecution must prove all the elements contained in one of the subsections below. Malawian courts have held that mere suspicion against an accused person will not suffice and cannot form the basis of a conviction.¹³⁹ Each link in a chain of evidence must be unassailable and its cumulative effect must be inconsistent with any rational conclusion other than guilt.¹⁴⁰

A person deemed a rogue and vagabond under section 184 shall be guilty of a misdemeanour and may be sentenced for the first offence to six months' imprisonment and for every subsequent offence to eighteen months' imprisonment. The Malawi High Court has before questioned the logic of imposing a fine where the accused has been found to be indigent.¹⁴¹ The High Court has also held that the means of an accused's family is not relevant in determining a fine, and further that it is inadvisable to order a fine when poverty was a factor contributing to the offence.¹⁴²

Each offence listed in section 184 is discussed separately below. As with the discussion of section 180, this discussion also sets out the history of the offence and how some of its elements have been interpreted by Malawian and other Commonwealth courts. In addition, a table analyses the offence as to its relevance to contemporary Malawian society, its consistency with criminal law principles and its implications for civil liberties. Where a section potentially violates any right in the Malawi Constitution, there is a short discussion on whether such a limitation is justifiable.

In terms of the Criminal Procedure and Evidence Code these offences can be tried by a third grade magistrate and do not require a warrant prior to arrest.

Section 184(a)

Every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence, is deemed a rogue and vagabond.

History of Offence

Although this type of offence existed prior to 1824, its current wording originates from section 4 of the English Vagrancy Act of 1824.

139 *Mtama v R* 10 MLR 15.

140 *Jailosi v R* 4 ALR (Mal), 494.

141 *Mwanza supra* noted 69, 4.

142 *Luwanja supra* note 69.

Relevance, frequency of usage, and duplication?	Consistency with criminal law principles and burden of proof?	Implication for civil liberties and justification for limitation of rights?
Section 184(a) is a duplication of section 319 of the Penal Code which deals with obtaining anything capable of being stolen through false pretences. It is recommended that section 184(a) be repealed.	Since section 319 and section 184(a) are similar, section 184(a) is more likely to be used to obtain a quick conviction where a thorough investigation has not been done. This would be contrary to the principles of criminal law.	The offence does not violate any constitutional rights.

Interpretation and Commentary

The offence is closely linked to the provisions of sections 184 (d) and (e) requiring consent to seek charitable contributions. The main purpose of section 184(a) is to prevent the fraudulent solicitation of money.

Section 184(b)

Every suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of himself is deemed a rogue and vagabond.

History of Offence

The original version of this offence, which existed prior to the English Vagrancy Act of 1824, sought to punish non-propertied persons who were idle and refused to work. Similar provisions date back to 16th century England.

The current formulation of this offence is a hybrid stemming from two distinct legal provisions in the English Vagrancy Act of 1824 – one targeted at dissuading persons from engaging in vagrancy in towns, the other targeted at preventing crime:

- Section 4 of the English Vagrancy Act of 1824 deemed “every person wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or [wagon], not having any visible means of subsistence and not giving a good account of himself or herself,” a rogue and vagabond.¹⁴³ The 1835 Vagrancy Act repealed reference to the term “not having any visible means of subsistence”, requiring as an element of the crime either persistent wandering or damage to property.¹⁴⁴ This offence was a so-called “sleeping rough” offence because of the obvious implications of homelessness. In May 1981 a Select Committee of the House of Commons recommended that the “sleeping rough”

143 This specific offence dates back to England’s 1743 vagrancy law.

144 Section 1(3) of the Vagrancy Act of 1935 required that the prosecution demonstrate:

- That an accused had been directed to a reasonably accessible place of shelter and refused or failed to go there;
- That an accused had persistently wandered; or
- That an accused had caused damage to property, infection with vermin or other offensive consequences as a result of his lodging.

offence should be retained, but that it should cease to be crime for which imprisonment was a possible punishment.¹⁴⁵ The Criminal Justice Act of 2003 further stated that any fine imposed for this offence would be at a much lower level than for other Vagrancy Act offences.

- Section 4 of the English Vagrancy Act of 1824 further deemed a rogue and vagabond to be any “suspected person or reputed thief” found in a public place with the intent to commit a crime. This provision in the English Vagrancy Act was eventually repealed by the Criminal Attempts Act of 1981. Prior to reform, the United Kingdom Select Committee on Home Affairs had observed in its 1980 report that it was “satisfied that it is not in the public interest to make behaviour interpreted as revealing criminal intent, but equally open to innocent interpretation, subject to criminal penalties.”

Relevance, frequency of usage, and duplication?	Consistency with criminal law principles and burden of proof?	Implication for civil liberties and justification for limitation of rights?
<p>The reality is that many persons in a developing country have no “visible means of subsistence” and the section is invariably skewed against the poor. It is not appropriate to revert to criminal law to deal with problems of poverty, unemployment and urban migration. Where a person is suspected of criminal behaviour, that person should be charged under the appropriate section in the Penal Code. It is recommended that section 184(b) be repealed.</p>	<p>Section 184(b) is vague and overly broad. There is a substantial risk that the section would be applied arbitrarily and not within the narrow confines suggested by various courts. Section 184(b) is contrary to the principles of criminal law, including the presumption of innocence, in that a person can be targeted by police under this section purely on the basis of the person’s appearance or failure to engage in any immediate productive activity.</p>	<p>Section 184(b) violates the right to dignity, the right not to be discriminated against based on social status, and the right to freedom of movement.¹⁴⁶ It has not been shown that the limitation of these rights are reasonable or necessary in a democratic society.</p>

Interpretation and Commentary

The elements of this offence have been considered by various Commonwealth courts in the context of similar offences. The elements are, however, unacceptably vague and therefore likely to be interpreted arbitrarily by law enforcement officials.

The Hong Kong Court of Appeal has held that, in order to ensure due process, it is important to prove all elements of the offence, which include that the accused is a suspected person or reputed thief; that the accused has no visible means of subsistence; and that the accused, when asked to do so, could not give a good account of himself.¹⁴⁷

145 Law Reform Commission of Ireland *supra* note 98, 28 (citing Third Report from the Home Affairs Committee *Vagrancy Offences*, 1981). Such an amendment was enacted by section 70 of the Criminal Justice Act of 1982.

146 Sections 19(1), 20(1) and 39(1) of the Malawi Constitution.

147 *Attorney-General v Tse Kam-Pui* [1980] HKLR 338.

The Hong Kong Court of Appeal has also held that suspects should not be jointly charged under this section, noting that “suspected persons, who are asked to give an account and explanation, are likely to do so in dissimilar terms. It would be the duty of the police officer to direct his attention to each account and explanation separately and form a separate view as to whether or not arrest is necessary.”¹⁴⁸

“Every suspected person or reputed thief”:

In the 1936 English case of *Ledwith v Roberts*,¹⁴⁹ the court held that “suspected person” referred to a class of persons who were, apart from the particular occasion, within the description of suspected persons. The Court observed that the reference to a “suspected person or reputed thief” in section 184(b) should be construed similarly narrow so as to refer to one whom law enforcement officers suspects of being guilty of criminal behaviour based upon previous conduct of which they are actually aware. According to *Ledwith*, “any other view would put the reasonable person loitering in a street for a reasonable cause at the mercy of any constable who knew nothing about him except that he was loitering, and therefore chose to suspect him of loitering for the purpose of committing a felony or misdemeanour.” The Hong Kong Privy Council in *Attorney-General of Hong Kong v Sham Chuen*¹⁵⁰ further confirmed that a similar section should be read to apply only to one loitering in circumstances clearly suggesting a criminal purpose.

“Who has no visible means of subsistence”:

Australian courts have interpreted this phrase as limited to “a person whose means of support so far as they are lawful are insufficient for the way he is living [who] may fairly be regarded as belonging to a class of persons likely to resort for their support to activities from which society needs to protect itself.”¹⁵¹ The Australian courts have deliberately not interpreted the offence to be aimed at vagrants, though the offence’s origins stem from vagrancy laws: “It is not or should not be a criminal offence per se to sleep on a river bank nor to adopt a lifestyle which differs from that of the majority.”¹⁵²

148 *Attorney-General v Chan Chin-hung and Others* [1980] HKLR 737.

149 [1936] 3 All ER 570.

150 [1986] 1 AC 887 (“Obviously a person may loiter for a great variety of reasons, some entirely innocent and others not so. It would be unreasonable to construe the subsection to the effect that there might be subjected to questioning persons loitering for plainly inoffensive purposes, such as a tourist admiring the surrounding architecture. The subsection impliedly authorises the putting of questions to the loiterer, whether by a police officer or by any ordinary citizen. The putting of questions is intrusive, and the legislation cannot be taken to have contemplated that this would be done in the absence of some circumstances which make it appropriate in the interests of public order. So their Lordships conclude that the loitering aimed at by the subsection is loitering in circumstances which reasonably suggest that its purpose is other than innocent.”).

151 *Zanetti v Hill* [1962] HCA 62. In his minority opinion, Menzies J, 449, noted that “the section associated, as it always has been, with vagrancy is concerned with those unsettled and insubstantial persons whose means of livelihood, such as they are, are seemingly outside the law rather than with those who are simply poverty stricken.” In *Zanetti*, an unemployed person was charged with the offence since he was able to make renovations on his house when it was unclear where his money came from. The majority held that even though he did not give good account of where he obtained his money, that in itself was not enough to raise a presumption that the defendant’s means had been unlawfully obtained, there had to be evidence that his means of support was obtained unlawfully.

152 *Moore v Moulds* [1981] 7 QL 227, quoted by G Lyons “*Moore v Moulds* (vagrancy conviction appeal against sentence – desirability of legal representation – proper interpretation of the offence of vagrancy)” (1982) *Aboriginal L Bulletin* 1, 3.

“And cannot give a good account of himself”:

It remains unclear what exactly is required by this phrase. The Hong Kong Court of Appeal has held that the suspect should have been afforded an opportunity to give a good account of himself or herself and upon which the suspect fails to give a satisfactory account to the requesting police officer.¹⁵³ The Australian High Court has held that the term “failure to give a good account of himself” does not describe an element of the offence, but rather a condition which must be fulfilled before a defendant can be convicted.¹⁵⁴

The elements of the offence are vague and capable of giving rise to arbitrariness of enforcement. The Irish Law Reform Commission Report on Vagrancy and Related Offences commented that the offence appears to discriminate against the impoverished and to be “out of keeping with the basic concept inherent in our legal system that a man may walk abroad in the secure knowledge that he will not be singled out from his fellow-citizens and branded and punished as a criminal unless it has been established beyond reasonable doubt that he has deviated from a clearly prescribed course of conduct”.¹⁵⁵

The Irish Supreme Court declared a similar offence unconstitutional in *King v the Attorney General and Director of Public Prosecutions*¹⁵⁶ for over-breadth, vagueness and arbitrariness.

The potentially wide geographic scope of this section, the application of which is not confined to particular public spaces, is particularly concerning.

The Law Reform Commission of Papua New Guinea recommended the repeal of an equivalent offence, observing that while “urban drift and unemployment are indeed serious problems, ... retaining this offence, even in a different form, will not help solve them. Using the criminal law to control social and economic problems is not only ineffectual but also inappropriate and unnecessary.”¹⁵⁷ The Law Reform Commission further argued that vagrancy laws have not halted rural-urban migration, that cases involving vagrancy offences consume valuable court resources, that sentences of imprisonment are not rehabilitative, and that in general the criminal law “should not be used against those who are without any visible means of support and who have committed no other offence.”¹⁵⁸

Section 184(c)

Every person found in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose, is deemed a rogue and vagabond.

History of Offence

In terms of section 4 of the English Vagrancy Act of 1824, “every person being found in or upon any dwelling house, warehouse, coach-house, stable or outhouse, or in any enclosed

153 *Attorney-General v Tse Kam-Pui* [1980] HKLR 338.

154 *Lee Fan v Dempsey* [1907] HCA 54; *Zanetti v Hill* [1962] HCA 62. (“There is to be no conviction, however strong the prosecution’s evidence may be, unless it is supported by a failure on the part of the defendant to give a good account and satisfactory account after being allowed a specific opportunity of disclosing what the means of his support really are.”)

155 Law Reform Commission of Ireland *supra* note 98, 26.

156 [1981] IR 233.

157 Law Reform Commission of Papua New Guinea *Report on Summary Offences* (1975), 3.

158 *Id* 4.

yard, garden, or area, for any unlawful purpose” was deemed a rogue and vagabond. The Irish Law Reform Commission recommended the repeal of an equivalent section, since it could be dealt with under the Trespass Act instead.

Relevance, frequency of usage, and duplication?	Consistency with criminal law principles and burden of proof?	Implication for civil liberties and justification for limitation of rights?
<p>The objective of section 184(c) would be better dealt with under section 319 of the Penal Code which deals with criminal trespass. The section is invariably used against the poor who do not make use of private transport. It is recommended that section 184(c) be repealed.</p>	<p>Section 184(c) is vague and overly broad and creates a risk of arbitrary enforcement. The offence violates criminal law principles in that it subjects someone to arrest who has not been shown to have any criminal intent.</p>	<p>Section 184(c) violates the right to dignity, the right not to be discriminated against based on sex or social status, and the right to freedom of movement.¹⁵⁹ It has not been shown that the limitation of these rights is reasonable or necessary in a democratic society.</p>

Interpretation and Commentary

The Malawi High Court has held that “it is not an offence for any person to enjoy the freedom, peace and calm of the country and walk about in public places be it aimlessly and without a penny in the pocket. One does not commit an offence by simply wandering about.”¹⁶⁰

The offence was also considered in the Malawi High Court in the case of *Stella Mwanza*.¹⁶¹ The matter concerned thirteen women arrested as guests of rest-houses during a police sweep. The Court held that the convictions were improper, as there had been no indication from the facts that the women were there for a disorderly purpose.¹⁶² In *Mwanza*, the judge noted that the English definition of a rogue is a dishonest or unscrupulous person, whilst a vagabond is one with no fixed home living an unsettled and errant life. The Court commented that “surely the law could not have intended to criminalise mere poverty and homelessness more especially in a free and open society. It could never be a crime for a person to be destitute and homeless. And if a person is homeless he or she is bound to roam around aimlessly. One would have thought it becomes State responsibility to shelter and provide for such persons than condemn them merely on account of their lack of means.”¹⁶³

The offence was also considered by the Malawi High Court in the case of *Republic v Foster*.¹⁶⁴ The twelve accused were arrested at three different places and accused in one charge. The Court held this to be a misjoinder. The Court held that the acceptance of guilty pleas can only be made where each accused person admitted all essential elements of the charge.

159 Sections 19(1), 20(1) and 39(1) of the Malawi Constitution.

160 *Luwanja supra* note 69.

161 *Mwanza supra* note 69.

162 *Id.* (“Perhaps they were hoping for some stray and weak-minded men to come around and spend the night with them. But what offence would that be on their part? As a matter of fact this was an invasion of privacy on the part of the police officers.”)

163 *Id.*

164 *Republic v Foster and Others* [1997] 2 MLR 84 (HC).

The English courts have held that reference to “illegal or disorderly purpose” implies the purpose of committing an offence, such a burglary. Attempting to evade police is not one such purpose.¹⁶⁵

Section 184(d)

Every person who, without the prior consent in writing in that behalf of the District Commissioner, collects or makes any appeal for subscriptions of money in any public place in such District Commissioner’s District for any purpose, is deemed a rogue and vagabond.

Section 184(e)

Every person who has collected money by subscription in any place in Malawi, who fails to produce correct accounts of any money received by such subscription, is deemed a rogue and vagabond.

History of Offence

In terms of section 15 of the English Vagrancy Act of 1824, a magistrate who visits a prison could give a person who would be discharged a certificate to allow him to beg for alms on route to his home town. This section was repealed in England in 1950.

Section 16 of the English Vagrancy Act of 1824 established an offence for asking for relief based on a certificate to which one was not entitled to. A person begging in this way would be declared an idle and disorderly person. This section was repealed by the Theft Act in 1968.

Relevance, frequency of usage, and duplication?	Consistency with criminal law principles and burden of proof?	Implication for civil liberties and justification for limitation of rights?
<p>It is important that subscriptions of money are regulated in a clearer manner than simply placing it under the section relating to rogues and vagabonds. It is recommended that sections 184(d) and (e) be repealed and that the behaviour which these sections seek to address be dealt with in the chapters in the Penal Code relating to theft, fraud, obtaining by false pretences and impersonation.</p>	<p>Section 184(d) which refers to “any purpose” is too broadly worded and might lead to the criminalisation of innocent persons seeking funds for a specific cause. Section 184(e) essentially deals with the issue of fraud or theft and labelling the person a “rogue and vagabond” seems an inappropriate response to the problem.</p>	<p>These sections do not violate any constitutional rights.</p>

Interpretation and Commentary

Reference to collection of money in a “public place” does not include a place of religious worship. The sections are broader than their historical origins, and apply not only the

165 *L v CPS* [2007] EWHC 1843.

money solicited for benefit of the individual, but also money solicited for any other purpose. The District Commissioner may grant permission to collect money subject to certain conditions. Failure to comply with such conditions would amount to a violation of section 184(d).

Sections 184 (d) and (e) do not apply in cases where an organisation has received consent from the Inspector General of Police to collect, or make any appeal for, subscriptions of money for religious or charitable purposes. The sections also do not apply to one authorised by law to collect money.

Removal Orders

Section 185(4)¹⁶⁶

A removal order may be made on any of the following grounds—

- (a) That a person has been convicted of an offence under section 184;
- (b) That he has no regular employment or other reputable means of livelihood and cannot give a good account of himself;
- (c) That he has been convicted of an offence against the person or in relation to property.

History of Section

Under section 20 of the English Vagrancy Act of 1824, a person convicted under the Act “shall be liable to be removed to the Parish of his or her last legal Settlement, by the Order of Two Justices of the Peace of the Division or Place in which such Person shall reside”. The section was repealed by the Poor Law Act in 1927.

Application of Removal Orders

Section 185(4) anticipates three instances in which removal orders may be made: first and second, where one is convicted of an offence under section 184 or a property-related offence, and third, where the person committed no offence but is unemployed and unable to give good account of him or herself.

The Malawian Penal Code elaborates that, before a removal order is made, a person must be informed of the possibility that such order may be made and provided with an opportunity to show why such order should not be made.

Under section 187, any person against whom a removal order is proposed may be detained without a warrant for a period of fifteen days, enabling the magistrate to make the necessary inquiries.¹⁶⁷ Further, a person against whom a removal order is made shall be provided with an allowance in cash or kind to enable him to reach his district.

The person against whom a removal order has been made can appeal to the Chief Justice, who may suspend the execution of the order upon receipt of the notice of appeal.¹⁶⁸ A person against whom a removal order has been made may also after six months apply to a magistrate for a review of the order, which may then be cancelled.

166 This provision was previously numbered section 185(3), but was changed to subsection (4) by the Penal Code Amendment Act, 1 of 2011.

167 In the past, authorities could detain an accused for 30 days, but the permissible period was changed to fifteen days by the Penal Code Amendment Act, 1 of 2011.

168 Historically, the accused was required to submit his or her appeal to the High Court, but this requirement was changed by the Penal Code Amendment Act 1 of 2011.

Commentary

Removal orders continue to be granted in Malawi magistrate courts. Sections 185(3) and 187 are outdated and should be reviewed in the context of the rights enshrined in the constitution.

In terms of section 187, a person who committed no offence or a very minor offence of which the sanction is minimal can be detained for a month pending the issuance of a removal order. Because a person found guilty under section 184 is frequently unemployed and/or is unlikely to have access to funds for legal representation, the use of this section quite clearly produces an overrepresentation of indigent persons among those incarcerated for the offence. This result is contrary to existing criminal law principles and the Constitution of Malawi. These laws persist despite their anachronistic nature because the poor is often not in a position to advocate for their change.

Where one has committed an offence, section 185(3) steps beyond the ambit of criminal law by imposing a sanction out of proportion to the offence committed. Where no offence has been committed but a person is unemployed, section 185(3) clearly fails to take account of international human rights law and policy.

In addition to violating the presumption of innocence principle and the right to remain silent entrenched in the Malawi Constitution,¹⁶⁹ removal orders violate a wide range of rights guaranteed by the Malawi Constitution:

- The right not to be subjected to cruel, inhuman or degrading treatment or punishment;¹⁷⁰
- The right to dignity;¹⁷¹
- The right to personal liberty;¹⁷²
- The right to freedom and security of person, which includes the right not to be detained without trial;¹⁷³
- The right to freedom of movement;¹⁷⁴ and
- The right to not be discriminated against based on social status.¹⁷⁵

Accordingly, targeting individuals for special condemnation on the basis of economic status and involuntarily exporting them from their chosen community violates fundamental values of dignity, equality, personal integrity and autonomy recognised in Malawi. In a variety of ways, the persistence of removal orders and other vagrancy provisions in Malawian law undermines the very principles upon which Malawian courts are built, creating harmful fissures in the stability and integrity of Malawi's legal system. There is no basis on which it can be argued that such limitation of rights are justifiable in terms of section 44(2) of the Malawi Constitution for being either reasonable or necessary. Removal orders further violate the basic international human rights standards to which Malawi adheres.

It is recommended that section 185 be repealed.

169 Section 42(2)(f)(iii).

170 Section 19(3) of the Malawi Constitution.

171 Section 19(1) of the Malawi Constitution.

172 Section 18 of the Malawi Constitution.

173 Section 19(6) of the Malawi Constitution.

174 Section 39(1) of the Malawi Constitution.

175 Section 20(1) of the Malawi Constitution.

Conclusion

The authors recommend that sections 180, 184 and 185 be repealed in their entirety – the various provisions have been shown to be vague, overly broad, arbitrary and contrary to criminal law principles.

Many offences under sections 180 and 184 allow law enforcement officials too much discretion and enforcement powers. The UN Special Rapporteur on Extreme Poverty and Human Rights has noted that these powers “increase the exposure of persons living in poverty to abuse, harassment, violence, corruption and extortion by both private individuals and law enforcement officials.”¹⁷⁶

Placing a number of disparate offences under the umbrella of idle and disorderly and rogue and vagabond offences, also creates a concern regarding fair labelling. Ashworth has noted that “out of fairness to the individual and in order to ensure accuracy in our penal system, therefore, the legal designation of an offence should fairly represent the nature of an offender’s criminality”.¹⁷⁷ In a recent United States Court of Appeal case, *Jones v City of Los Angeles*, it was held that the prohibition of cruel and unusual punishment prohibits a City from punishing involuntary sitting, lying or sleeping on public sidewalks that is an unavoidable consequence of being human and homeless.¹⁷⁸

In addition to being vague and contributing to arbitrary law enforcement, many provisions under sections 180 and 184 also violate basic human rights which are protected in the Malawi Constitution. The UN Special Rapporteur on Extreme Poverty and Human Rights has noted that some penalisation measures directly or indirectly discriminate against persons living in poverty, “with the effect of nullifying or impairing the enjoyment or exercise of their human rights and fundamental freedoms”.¹⁷⁹ In this regard, there is a burden on States to demonstrate that the restrictions on the exercise of rights by those living in poverty comply with human rights law, are non-discriminatory, are legitimate, reasonable and proportionate to the aim sought.¹⁸⁰ Specifically, the UN Special Rapporteur has noted that economic justifications for penalisation fall outside the limitations permissible under human rights law.¹⁸¹

Referring to the common law offence of common nuisance, Lord Bingham identified the following general principles that should be applicable to laws:

The offence must be clearly defined in law ... and a norm cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen to foresee, if need be with appropriate advice, the consequences which a given course of conduct may entail ... It is accepted that absolute certainty is unattainable, and might entail excessive rigidity since the law must be able to keep pace with changing circumstances, some degree of vagueness is inevitable and development of the law is a recognised feature of common law courts ... But the

176 UN General Assembly *supra* note 1, 11.

177 Ashworth quoted in J Chalmers & F Leverick, “Fair Labelling in Criminal Law” (2008) 71 *Modern Law Review* 217-246, 218. Chalmers and Leverick note that “if the name of the offence does not accurately reflect the degree or nature of the wrongdoing, then the offender could be unfairly stigmatised”.

178 *Jones v City of Los Angeles supra* note 43.

179 UN General Assembly *supra* note 1, 6.

180 *Id* 8.

181 *Id*.

*law-making function of the courts must remain within reasonable limits ... existing offences may not be extended to cover facts which did not previously constitute a criminal offence. The law may be clarified and adapted to new circumstances which can reasonably be brought under the original concept of the offence ... But any development must be consistent with the essence of the offence and be reasonably foreseeable ... and the criminal law must not be extensively construed to the detriment of an accused, for instance by analogy.*¹⁸²

The Ontario Court of Appeal has refined the inquiry regarding vagueness, over breadth and constitutionality in the case of *Attorney General v Bedford and Others*.¹⁸³ The Court of Appeal argued that the three principles of fundamental justice are that laws must not be arbitrary, overly broad or grossly disproportionate: Arbitrariness refers to whether the challenged law bears no relation to or is inconsistent to its legislative objective; over breadth refers to whether the challenged law deprives a person of rights more than is necessary to achieve a legislative objective; and gross disproportionality refers to whether deprivation of rights are so extreme as to be per se disproportionate to any legitimate government interest.

In addition, the Constitution of Malawi requires the State to protect and advance human rights. Where Penal Code provisions are imprecise, it risks limiting fundamental rights. In the case of *Fantasy Enterprises CC t/a Hustler the shop v Ministry of Home Affairs and another*, the Namibian High Court held that words used in penal provisions which limit the exercise of fundamental freedoms must enable a person to understand the nature of the act which is prohibited.¹⁸⁴

182 *Rimmington supra* note 75.

183 *Canada (Attorney General) v Bedford* 2012 ONCA 186, 26 March 2012. This case has since been appealed.

184 Case number A159/96.

5. Implementation of Vagrancy Laws in Blantyre, Malawi

Outdated Malawi Penal Code provisions relating to idle and disorderly persons and rogues and vagabonds continue to be used to arrest persons in Malawi. This chapter documents the main findings of the field research relating to the use of such nuisance-related offences in Blantyre, Malawi. The research finds that police do not have a clear understanding of the application of sections 180 and 184 of the Penal Code and that arrests for such offences might in many instances be unlawful.

Nuisance-Related Arrests in Blantyre

The main findings of the field research conducted on the implementation of nuisance-related offences in Blantyre are contained in this chapter, whilst additional findings related to children, sex workers and touts are contained in subsequent chapters.

General Findings

From 9 May 2012 to 5 September 2012, researchers recorded 166 nuisance-related arrests at Blantyre police station and 65 nuisance-related arrests at Limbe police station.

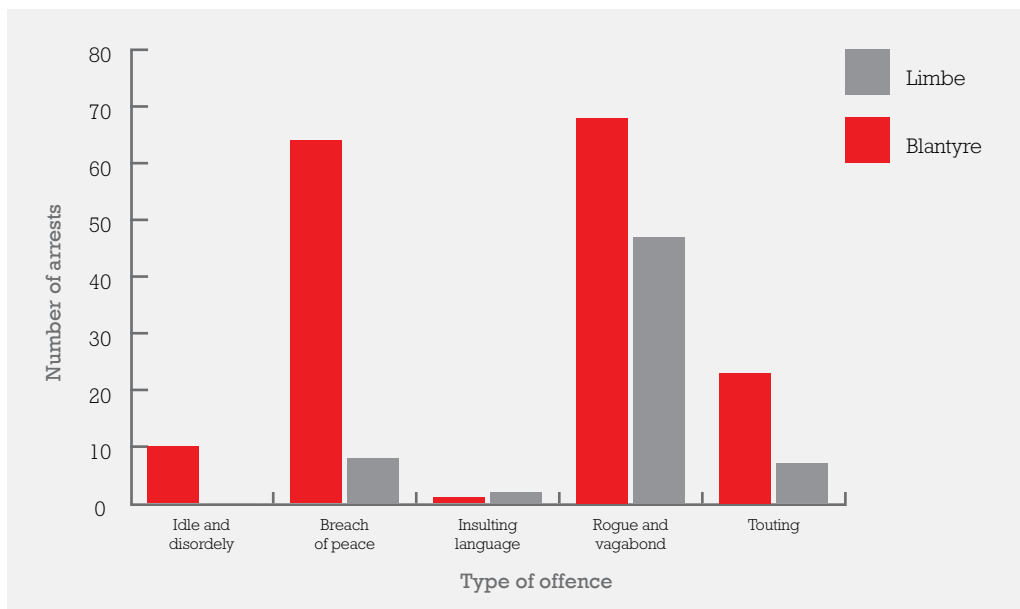
The chart below illustrates that these nuisance-related arrests related to the following offences: the offence of being an idle and disorderly person (section 180);¹⁸⁵ conduct likely

185 Section 180 of the Malawi Penal Code: “The following persons—

- (a) every common prostitute behaving in a disorderly or indecent manner in any public place;
- (b) every person wandering or placing himself in any public place to beg or gather alms, or causing or procuring or encouraging any child or children so to do;
- (c) every person playing at any game of chance not being an authorised lottery or a private lottery for the purposes of section 174, for money or money’s worth in any public place;
- (d) every person who without lawful excuse publicly does any indecent act;
- (e) every person who in any public place solicits for immoral purposes;
- (f) every person wandering about and endeavouring by the exposure of wounds or deformation to obtain or gather alms; and
- (g) every male person who wears the hair of his head in such a fashion as, when he is standing upright, the main line of the bottom of the mass of hair (other than hair growing on his face or on the nape of his neck) lies below an imaginary line drawn horizontally around his head at the level of the mouth,

shall be deemed idle and disorderly persons, and shall be liable for the first offence to a fine of K20 and to imprisonment for three months and for a subsequent offence to a fine of K50 and to imprisonment for six months.”

Chart 1: Number of Arrests According to Offence Type, Blantyre and Limbe Police Stations (9 May – 14 September 2012):



to cause a breach of peace (section 181);¹⁸⁶ use of insulting language (section 182); the offence of being a rogue and vagabond (section 184);¹⁸⁷ and touting.¹⁸⁸

From the above chart, it is notable that Limbe police did not effect an arrest for the offence of being an idle and disorderly person during the research period. There were no arrests

186 Section 181 of the Malawi Penal Code: “Every person who in any public place conducts himself in a manner likely to cause a breach of the peace shall be liable to a fine of K50 and to imprisonment for three months.”

187 Section 184 of the Malawi Penal Code: “(1) The following persons—

- (a) every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence;
- (b) every suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of himself;
- (c) every person found in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose;
- (d) every person who, without the prior consent in writing in that behalf of the District Commissioner, collects or makes any appeal for subscriptions of money in any public place in such District Commissioner’s District for any purpose;
- (e) every person who has collected money by subscription in any place in Malawi, who fails to produce to a District Commissioner or to publish in a newspaper named by a District Commissioner, correct accounts of any money received by such subscription and of the disposal thereof, when called upon so to do by such District Commissioner,

shall be deemed to be a rogue and vagabond, and shall be guilty of a misdemeanour and shall be liable for the first offence to imprisonment for six months, and for every subsequent offence to imprisonment for eighteen months”.

188 Touting is discussed in greater detail in Chapter 8.

for nuisances caused by intoxicated persons under section 183¹⁸⁹ made by officers of either police station.

Blantyre police officers arrested a relatively large number of persons on Fridays and Saturdays. Researchers documented a total of 51 individuals arrested by Blantyre police on Fridays during the period of study for offences relating to breach of peace (11), the offence of being an idle and disorderly person (2), touting (4) and the offence of being a rogue and vagabond (34). During the same period, researchers observed a total of 19 individuals arrested by Blantyre police on Saturdays for offences relating to breach of peace (5), the offence of being an idle and disorderly persons (2), touting (3) and the offence of being a rogue and vagabond (9). However, the data available to us does not show that this trend actually resulted in the detention in police custody of these individuals over a weekend. Police officers appear to have often simply released persons from custody (with or without bail) on the same day as their arrest.

Although baseless detention and detention of unnecessary duration are typically of greatest concern in the context of nuisance-related offences, the immediate release of persons after arrest is also troubling because it suggests that individuals were arrested in the absence of probable cause or where there was never an intention of pursuing a case judicially. This practice, then, amounts to an unlawful deprivation of their liberty, even if only for a few hours. This violation of the right to liberty may indeed produce negative consequences in practice: while it is unrealistic to think that one with criminal intent would be deterred by the mere experience of arrest and release, many innocent persons have their lives turned upside down by such actions. In cases of minor nuisance-related offences, the conduct often does not warrant the extent to which rights will be infringed through an offence. Alternative measures such as warning or cautioning a person might be more time and cost-efficient for the police whilst being less invasive on the rights of persons.

In 33 nuisance-related cases at the Blantyre police station, those arrested were still in custody when a paralegal visited the cells. These cases suggest that persons who committed minor nuisance-related offences sometimes remained in custody for more than one day at Blantyre police station:

- Of the seven arrests for rogue and vagabond offences on the weekend of 25 and 26 August 2012, all those arrested were only released on the Monday, 27 August 2012.
- Two individuals arrested under section 180 on 15 May 2012 at Blantyre DHL for urinating in public remained in custody the following day.
- Eight individuals arrested for touting remained in custody the following day.
- One individual arrested under section 184 on 5 May 2012 remained in custody on 7 May 2012.¹⁹⁰ Similarly, an individual arrested on 27 June 2012 under section 184 remained in custody the next day.¹⁹¹

189 Section 183 of the Malawi Penal Code: "(1) Every person found drunk and incapable in any public place, or on any premises licensed under the Intoxicating Liquor Ordinance, may be arrested without warrant and shall be liable to a fine of K20, and on a second or subsequent conviction shall be liable to a fine of K40. (2) Every person who, in any public place or on any premises licensed under the Intoxicating Liquor Ordinance, is guilty while drunk or riotous or disorderly behaviour or who is drunk when in possession of any loaded fire-arm, may be arrested without warrant and shall be liable to a fine of K50 and to imprisonment for three months."

190 This individual reported to researchers that he had been on his way to the market at 4h30 to purchase potatoes when he was arrested. He further alleged that he had been beaten during this arrest.

191 This individual reported to researchers that he had been arrested while waiting for a relative at 21h00.

Chart 2: Age of Individuals Arrested for Nuisance-Related Offences, Blantyre and Limbe Police Stations (1 May – 14 September 2012):

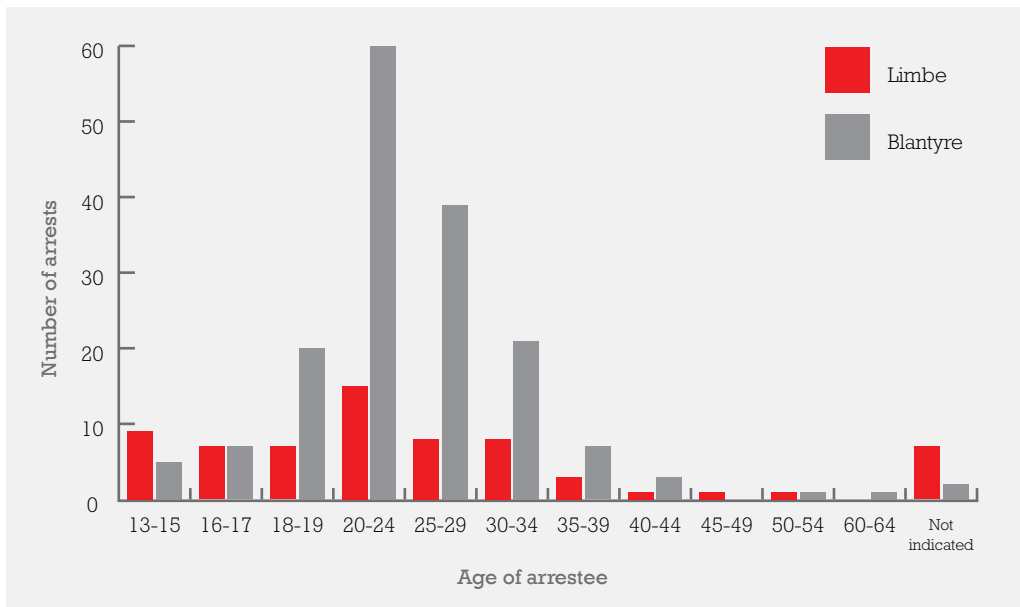
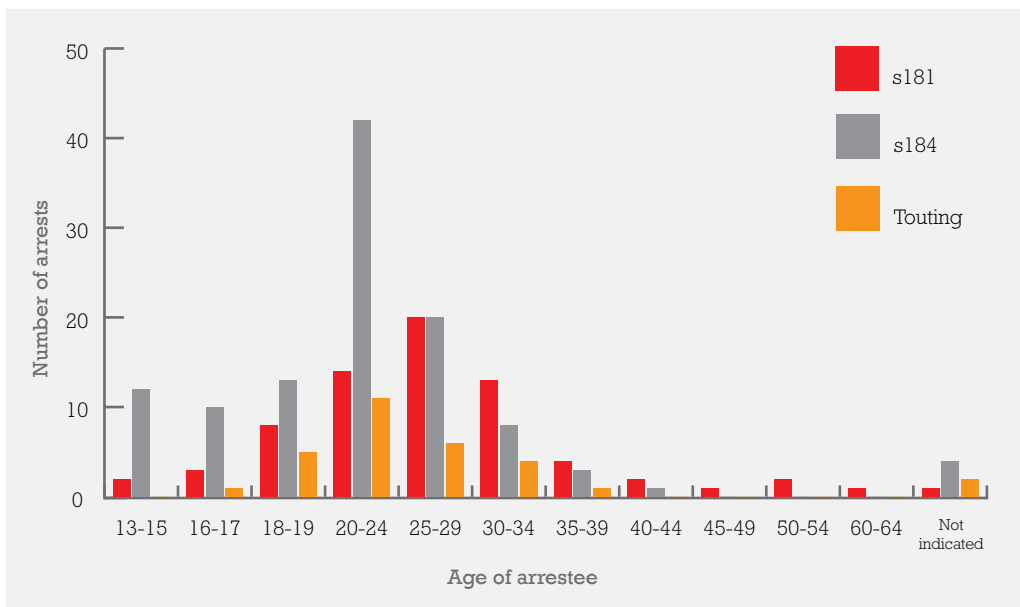


Chart 3: Age of Arrestee by Offence Type, Blantyre and Limbe Police Stations (1 May – 14 September 2012):



- An individual arrested under section 184 for going to Queen Elizabeth Central Hospital outside visiting hours on 22 June 2012 remained in custody on 25 June 2012.

Most arrests documented by the researchers from police records during the research period related to individuals in their twenties, irrespective of the type of offence. The ages of those arrested for nuisance-related offences at Limbe police station (67) and Blantyre police station (166) are indicated in the charts below.

Arrests for the Offence of Being a Rogue and Vagabond

Since the vast majority of arrests for nuisance-related offences were effected under section 184 of the Penal Code relating to the offence of being a rogue and vagabond, the circumstances surrounding these arrests are discussed in more detail below. Individuals arrested for such offences tended to be arrested either as the result of an individual arrest or during a sweeping exercise.

Of the 47 individuals arrested by the Limbe police under section 184 for being a rogue and vagabond, information about the date of arrest was available for 42 cases and time of arrest for 40 cases. Times of arrests were not documented at Blantyre police station, by contrast. Arrests for rogue and vagabond offences in Limbe took place mostly at night (33) as opposed to during the day (7).¹⁹² It is important to note that night-time arrests for being a rogue and vagabond (which are by definition not targeted at a specific crime) have the practical effect of targeting the poor: pedestrians who walk in the streets after daylight hours usually do so because they do not own cars, nor are they able to access public transport. Those who own cars and drive after nightfall, however, are not targeted for arrest for this offence. Arrests in Blantyre for the offence of being a rogue and vagabond tended to peak in the last weeks of July and August 2012.

During the period under review, sweeping exercises appear to have been conducted twice by Limbe police officers. The first operation on 6 August 2012 netted eleven arrests of which two were effected at 18h00 and nine at 21h40. The second operation on 21 August 2012 netted nine arrests at 19h00. Of those arrested in the Limbe sweeps, the majority was male. A sweeping exercise also appears to have been conducted by Blantyre police on 27 July 2012, netting eleven men and four women arrested for being rogue and vagabond and taken to court on the same day.

The arrest of individuals for the offence of being a rogue and vagabond during sweeping exercises raises several concerns. Such exercises are often conducted as a learning tool for young police recruits, a strategy with the potential of producing unnecessary arrests for training purposes. Police stations must develop clear criteria and objectives for arrests during sweeping exercises. Typically, sweeping exercises have only very general objectives, meaning that persons are arrested, for example, for being on the street at night, even when they have not committed a specific offence or engaged in suspicious activity.¹⁹³ There is no overarching policy on sweeping exercises, a fact that accordingly gives police relative freedom to arrest persons without having to follow procedures or conduct thorough investigations.¹⁹⁴

192 By contrast, all idle and disorderly arrests in Limbe took place during the day.

193 Interview with N Kayira, Deputy Head of Community Policing, Malawi Police Headquarters (9 November 2012). Transcript on file with author.

194 *Id.*

There is a need for additional research on the issue of whether sweeping exercises as currently executed serve a valid public purpose in arresting criminals and deterring the commission of serious crimes, and how best to balance those benefits with suspects' constitutional rights.¹⁹⁵

Police Officers' Interpretation of the Offence of Being an Idle and Disorderly Person (section 180) and the Offence of Being a Rogue and Vagabond (section 184)

Research suggests that police officers employ the offences of being an idle and disorderly person or of being a rogue and vagabond as catch-all categories by which to address a number of different types of behaviour, only some of which suggests possible criminal circumstances. The ten police officers interviewed from Limbe and Blantyre police stations, listed the following reasons for arresting an individual on a charge of being idle and disorderly (section 180):

- When part of a sweeping exercise or operation planned by the police;¹⁹⁶
- When an individual is drunk, as a result of which he or she uses abusive language, loiters or urinates in public;¹⁹⁷
- When an individual urinates in a public place;¹⁹⁸
- When a male touches a female without her consent;¹⁹⁹
- When individuals are discovered kissing or engaging in sexual intercourse in a public place, including a motor vehicle;²⁰⁰
- When an individual is loitering with no discernible purpose and the police suspects he or she seeks to commit crimes, or the individual is unable to provide convincing reasons for his or her presence when demanded to do so by police;²⁰¹

195 *Id.*

196 Interview with Anonymous Police Officer 1, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 3, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 4, Limbe police station (11 October 2012).

197 Interview with Anonymous Police Officer 2, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 3, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 4, Limbe police station (11 October 2012).

198 Interview with Anonymous Police Officer 1, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 5, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 6, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 7, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 8, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 9, Blantyre police station (10 October 2012).

199 Interview with Anonymous Police Officer 5, Blantyre police station (10 October 2012).

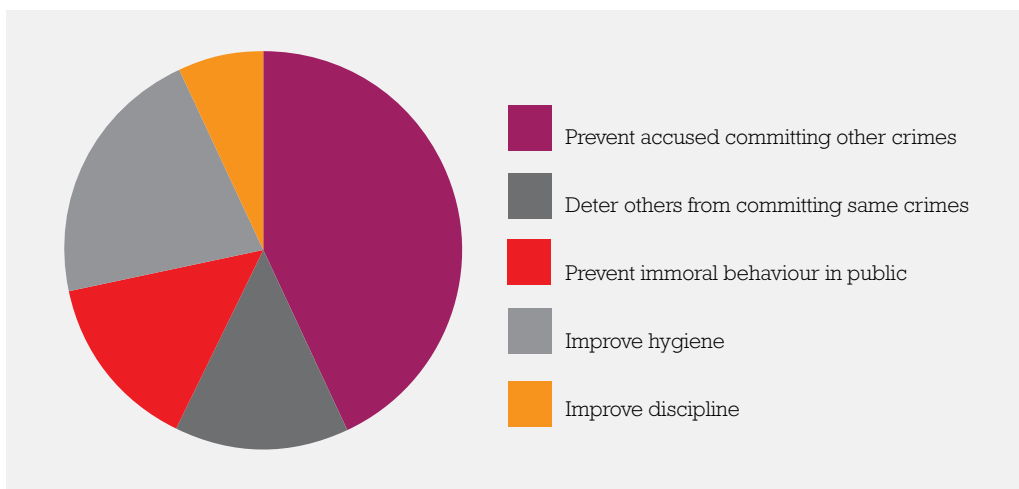
200 Interview with Anonymous Police Officer 4, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 6, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 7, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 8, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 9, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 10, Blantyre police station (10 October 2012).

201 Interview with Anonymous Police Officer 3, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 9, Blantyre police station (10 October 2012).

- When an individual engages in prostitution in public;²⁰²
- When an individual has done something wrong and resists arrest.²⁰³

Half of the police officers interviewed equated the commission of immoral, ill or indecent acts with acts such as urinating, kissing and having sex.²⁰⁴ According to the above-described research, police officers interviewed suggested that the purpose of section 180 is to address a range of problems.

Chart 4: Police Perception of the Purpose of Section 180 of the Penal Code:



Interviewees' explanations of the use of section 180 suggest an insufficient understanding of what this section actually targets. It is furthermore clear that many police officers are not conversant with the laws they are charged with enforcing.²⁰⁵ Inadequate understanding of the content of these laws as revealed by the research demands proper training and orientation of police officers, as well as civic education for the public regarding the type of conduct that amounts to an offence and the circumstances in which arrest is unlawful.

The explanations provided by police officers regarding the applicability of section 180²⁰⁶ raise several key concerns.

First, facilitation of training for new police recruits cannot be the sole basis for conducting a sweeping exercise; rather, police must conduct investigations as per their assumed duties.

202 Interview with Anonymous Police Officer 1, Limbe police station (11 October 2012).

203 Interview with Anonymous Police Officer 5, Blantyre police station (10 October 2012).

204 Interview with Anonymous Police Officer 2, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 4, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 6, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 8, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 9, Blantyre police station (10 October 2012).

205 Interview with Kayira, *supra* note 193.

206 Refer to Chapter 4 for a more detailed explanation of each of the offences falling within section 180.

Second, arrest under these sections must be effected according to the proper offence. For example, an individual appearing in public who is intoxicated and who subsequently commits a nuisance should be arrested under section 183 (nuisances by drunken persons), not under section 180 (idle and disorderly persons).

Third, police seem to understand public urination as an indecent act under section 180(d), but such an interpretation has not been the historical purpose of that section. Further, an arrest for public urination may be a disproportional response to arrest someone for urinating where such activity is not explicitly proscribed by the law and where arrest for that activity amounts to a serious charge.

Fourth, police seem to have a broad interpretation of indecent behaviour, including kissing. As a result, police officers may be effecting arrests according to their interpretation of immoral or inappropriate, though not criminal, behaviour. Sitting in judgment in such a way is not among a police officer's duties and results in misapplication of the public law. Sexual offences relating to lack of consent are not appropriately dealt with under section 180.

Fifth, the act of not doing anything and being suspected of wanting to engage in crime does not fall under section 180 and such arrests in terms of this section would be unlawful.

Sixth, section 180 does not criminalise prostitution, it criminalises a "common prostitute" who behaves in a disorderly manner [section 180(a)] or a person soliciting for an immoral purpose [section 180(e)], so the only reasonable scenarios in which arrests for prostitution should take place in terms of section 180, are if there was disorderly behaviour, active soliciting for prostitution or actual sex in public.

Finally, section 180 is not the appropriate offence in terms of which to charge someone who resists arrest.

Similar to those arrests effected under section 180, police explained that arrests on the charge of being a rogue and vagabond (section 184) took place as part of planned sweeping exercises. In contrast to section 180 arrests, however, the police officers interviewed attempted to base section 184 arrests on their understanding or knowledge of sections 184(b) and 184(c) of the Penal Code, though they did not always accurately do so. In general, section 184(b) relates to a suspected person or reputed thief who has no visible means of subsistence and cannot give good account of himself. Section 184(c) concerns individuals found in a public place at such time and under such circumstances as to lead to the conclusion that such an individual is there for an illegal or disorderly purpose.

Police often displayed a broader interpretation of section 184(b) and (c), however, often leaving out some elements of these offences and using various terms to justify arrests:

- Loitering: "We conduct a sweeping exercise to arrest all those that have nothing to do but just wander in the towns;"²⁰⁷ "Standing along the road doing nothing;"²⁰⁸ "When

207 Interview with Anonymous Police Officer 2, Limbe police station (11 October 2012).

208 Interview with Anonymous Police Officer 6, Blantyre police station (10 October 2012).

they have nothing to do in a public place i.e prostituting – standing along the road;”²⁰⁹
“When a person fails to account for his presence properly at the place we have found him;”²¹⁰

- Night-time Presence in the Vicinity: “When a person has been found at an odd hour at night;”²¹¹ “Someone found walking around during the night with no genuine reasons;”²¹² “When people are moving at midnight;”²¹³ “When a person is found at a place and fails to identify himself properly;”²¹⁴ “If a person is found at an awkward place and awkward hour that person is arrested;”²¹⁵
- Lack of Documentation: “Moving without a proper document at night;”²¹⁶ “When people have no proper documents;”²¹⁷
- Suspicion of Criminal Intent: “We suspect him to be a thief who has no other means of living;”²¹⁸ “Waiting for prostitute customers;”²¹⁹ “If someone is found with weapons deemed to be used to commit crime;”²²⁰
- Failure to Justify Presence Upon Police Request: “If a person is found at a place that has a high criminal rate and fails to justify his presence he is also arrested.”²²¹

Before effecting an arrest, five out of ten officers interviewed required, not only that the person be found loitering at night or outside banks or in town, but that the person must also not be able to give a convincing answer when asked to justify his presence.²²² However, in some instances police appeared to feel themselves entitled to question anyone regardless of their (in)activity and arrest them (e.g. One police officer explained, “if the person is found in a road or town doing nothing and he cannot explain what he is doing, then we arrest him”).²²³

209 Interview with Anonymous Police Officer 10, Blantyre police station (10 October 2012)

210 Interview with Anonymous Police Officer 8, Blantyre police station (10 October 2012).

211 Interview with Anonymous Police Officer 5, Blantyre police station (10 October 2012).

212 Interview with Anonymous Police Officer 9, Blantyre police station (10 October 2012).

213 Interview with Anonymous Police Officer 10, Blantyre police station (10 October 2012).

214 Interview with Anonymous Police Officer 8, Blantyre police station (10 October 2012).

215 Interview with Anonymous Police Officer 6, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 7, Blantyre police station (10 October 2012).

216 Interview with Anonymous Police Officer 6, Blantyre police station (10 October 2012).

217 Interview with Anonymous Police Officer 10, Blantyre police station (10 October 2012).

218 Interview with Anonymous Police Officer 4, Limbe police station (11 October 2012).

219 Interview with Anonymous Police Officer 6, Blantyre police station (10 October 2012).

220 Interview with Anonymous Police Officer 9, Blantyre police station (10 October 2012).

221 Interview with Anonymous Police Officer 7, Blantyre police station (10 October 2012).

222 Interview with Anonymous Police Officer 1, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 2, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 3, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 4, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 8, Blantyre police station (10 October 2012).

223 Interview with Anonymous Police Officer 4, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 5, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 10, Blantyre police station (10 October 2012).

All police officers interviewed felt that the main purpose of section 184 arrests was to reduce crime rates, particularly robberies.²²⁴ In section 184 cases, the police saw those arrested as prospective criminals.²²⁵ The police felt that such arrests brought peace to communities,²²⁶ protected those communities from unseen danger²²⁷ and improved discipline in communities.²²⁸ Moreover, all interviewed officers reported feeling that the arrests of persons under sections 180 and 184 reduced the above-described problems, and that these arrests were particularly effective for deterring others from committing similar offences, as well as for punishing arrestees.

Police generally reported that arrests under sections 180 and 184 were useful tools of law enforcement. Four out of ten police officers interviewed felt that sweeping exercises and arrests were the most efficient ways of addressing the problems cited.²²⁹ According to one officer, “When we have this sweeping exercise we arrest a lot of them and the crime rate reduces. And we also end up recovering stolen items from some of those people arrested on charges of being rogue and vagabond and they were on the wanted list by the police on other charges.”²³⁰ Another added, “It is good to arrest them because once they are arrested, the crime rate reduces and their lives are protected from harm or abuse and the arrest also brings fear in them hence they don’t repeat the same offence”.²³¹

However six out of the ten police officers interviewed acknowledged that there were other ways to address these problems apart from arresting persons, including:

- Counselling sessions for the public;²³²
- Giving advice;²³³

224 Interview with Anonymous Police Officer 1, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 2, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 3, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 4, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 5, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 6, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 7, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 8, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 9, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 10, Blantyre police station (10 October 2012).

225 Interview with Anonymous Police Officer 5, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 6, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 7, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 8, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 9, Blantyre police station (10 October 2012).

226 Interview with Anonymous Police Officer 9, Blantyre police station (10 October 2012).

227 Interview with Anonymous Police Officer 10, Blantyre police station (10 October 2012).

228 Interview with Anonymous Police Officer 8, Blantyre police station (10 October 2012).

229 Interview with Anonymous Police Officer 1, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 2, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 3, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 4, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 6, Blantyre police station (10 October 2012).

230 Interview with Anonymous Police Officer 1, Limbe police station (11 October 2012).

231 Interview with Anonymous Police Officer 6, Blantyre police station (10 October 2012).

232 Interview with Anonymous Police Officer 5, Blantyre police station (10 October 2012).

233 Interview with Anonymous Police Officer 10, Blantyre police station (10 October 2012).

- Facilitating radio programmes;²³⁴
- Sensitising the public about the content of the law and what behaviour is prohibited through posters, flyers and meetings;²³⁵
- Communicating to the public the need not to walk at night, to carry proper identification and not to frequent places with high criminal rates;²³⁶
- Providing civic education;²³⁷
- Cautioning suspects or offering warnings prior to an arrest;²³⁸
- “Providing awareness to drinking joint owners on good time of closing;”²³⁹ and
- “Conduct[ing] what we call an ambush exercise, where we go to the extent of going into rest houses and searching for those who have no proper reasons for being found there or are involved in other illegal acts. This is done at odd hours at nights.”²⁴⁰

Only one police officer commented critically on the practice of arrests under section 184 and noted, “[i]n rogue and vagabond cases sometimes it is unfair, especially to those arrested in the afternoon e.g. one can stand somewhere waiting for his relatives, and if one can’t properly explain will be arrested. And at night, sometimes we arrest people who maybe sought shelter at a certain rest house but may not have any proper identification (especially those from rural areas) and they are arrested as rogues and vagabonds.”²⁴¹

Magistrates’ Interpretation of Sections 180 and 184

The five magistrates who were interviewed differed in their views regarding the ease with which prosecutors could prove all section 180 and section 184 elements so as to demonstrate an offender’s guilt beyond a reasonable doubt. During interviews, those magistrates who had been practicing for longer demonstrated greater comfort with finding that the elements of these crimes had been proved. According to one magistrate, his finding was based less on proof provided by the prosecutor than on a determination that a suspect’s defence was inadequate: “Most of the time accused persons fail to justify why they were found in such places”.²⁴² Of the magistrates interviewed, those magistrates who held the position for less than two years appeared more reluctant to find that these cases had been proved beyond a reasonable doubt. One such magistrate offered, “This offence is difficult to prove, section 184 of the Penal Code is inconsistent with the Constitution. It restricts the movement

234 Interview with Anonymous Police Officer 5, Blantyre police station (10 October 2012).

235 Interview with Anonymous Police Officer 2, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 4, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 5, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 6, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 7, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 8, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 9, Blantyre police station (10 October 2012).

236 Interview with Anonymous Police Officer 7, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 9, Blantyre police station (10 October 2012).

237 Interview with Anonymous Police Officer 10, Blantyre police station (10 October 2012).

238 Interview with Anonymous Police Officer 10, Blantyre police station (10 October 2012).

239 Interview with Anonymous Police Officer 8, Blantyre police station (10 October 2012).

240 Interview with Anonymous Police Officer 2, Limbe police station (11 October 2012).

241 Interview with Anonymous Police Officer 2, Limbe police station (11 October 2012).

242 Interview with Anonymous Magistrate 4 (10 October 2012).

of people at any time in a free country”²⁴³. Another noted, “It would be difficult to prove beyond reasonable doubt all the elements of the crime because the nature of the categories of the crime is complicated and somehow rare.”²⁴⁴

Whilst some magistrates insisted that they would only convict persons under sections 180 and 184 if the prosecution proved his or her guilt beyond reasonable doubt,²⁴⁵ the actual responses of some magistrates to interview questions revealed that such a path nonetheless poses challenges. “A magistrate must warn himself or herself against convicting on such offences . . . What should be done as the best solution, is to discharge a person under section 337 of the Criminal Procedure and Evidence Code, this is where a person pleads guilty.”²⁴⁶ Only where there is proof beyond reasonable doubt and where it is clear from the facts that a person was criminally wrong, then a conviction can be entered and this would be in very rare circumstances.”²⁴⁷ Magistrates may thus recognise the importance of finding guilt under section 180 and section 184 where appropriate, though they may not always follow this practice.

Two magistrates referred to the need to prove intent to commit a crime and the difficulty in so showing in section 180 and 184 cases.²⁴⁸ By contrast, another magistrate placed the onus on the accused, saying a conviction is suitable if the accused “failed to justify why they were arrested”.²⁴⁹ The fact that magistrates did not show a harmonised view of intent under sections 180 and 184 presents a serious concern, suggesting that the application of these sections is inconsistent and selective, potentially infringing on the constitutional rights of accused persons.

Magistrates further indicated that, in general, they would discharge or acquit an accused on charges under sections 180 and 184 in certain circumstances, for example:

- “Where it has been established that the act itself was not so serious and (not) intended to cause public alarm;”²⁵⁰
- “[Where] the accused person clearly denies the offence, and he/she explains the reasons, s/he was found at such an hour;”²⁵¹
- “[Where] he/she has provided enough evidence to justify his/her reasons for being found idling;”²⁵²

243 Interview with Anonymous Magistrate 2 (9 October 2012).

244 Interview with Anonymous Magistrate 1 (9 October 2012).

245 Interview with Anonymous Magistrate 1 (9 October 2012); Interview with Anonymous Magistrate 3 (8 October 2012); Interview with Anonymous Magistrate 5 (3 October 2012).

246 Section 337 of the Malawi Criminal Procedure and Evidence Code provides that, in any trial for an offence, where the court thinks that the charge is proved but is also of the opinion that it is inexpedient to convict the offender because of the youth, old age, character, antecedents, home surroundings, health or mental condition of the accused, or to the fact that the accused has not previously committed an offence, or to the nature of the offence, or to the extenuating circumstances in which the offence was committed, the court may dismiss the charge after cautioning the offender or convict the offender and discharge him with or without a probation order or conditions (conditional discharge).

247 Interview with Anonymous Magistrate 1 (9 October 2012).

248 Interview with Anonymous Magistrate 2 (9 October 2012); Interview with Anonymous Magistrate 3 (8 October 2012).

249 Interview with Anonymous Magistrate 4 (10 October 2012).

250 Interview with Anonymous Magistrate 1 (9 October 2012).

251 Interview with Anonymous Magistrate 2 (9 October 2012).

252 Interview with Anonymous Magistrate 4 (10 October 2012).

- “[Where] in my view the accused person present in such a place did not intend to commit any offence;”²⁵³ or
- “[Where] the accused person is a first offender or the State failed to offer evidence.”²⁵⁴

Magistrates tended to impose the same length of imprisonment or amount of fine for offences under section 180 as for offences under section 184. This trend is of interest, as the Penal Code provides for imprisonment of three months or a fine in section 180 cases and imprisonment of six months in section 184 cases. The following table reflects typical sentencing patterns among responding magistrates:

Table 2: Self-reported Sentencing Patterns Among Responding Magistrates:

	Offence of Being an Idle and Disorderly Person (s180)	Offence of Being a Rogue and Vagabond (s184)
Magistrate 1	Mostly discharge after conviction, fine not exceeding K1000 (USD \$2.52) or suspended sentence	Usually K500 or K1000 (USD \$1.26 to USD \$2.52), sometimes suspended sentence or discharge
Magistrate 2	1 month imprisonment or K500 fine (USD \$1.26)	1 month imprisonment or K500 fine (USD \$1.26) or suspended sentence
Magistrate 3	At least K1000 fine (UD \$2.52) or suspended sentence	Suspended sentence or community service or K1000 (USD \$2.52) fine
Magistrate 4	Fine or 1 month imprisonment or community service if address of arrestee available	1 month imprisonment or suspended sentence
Magistrate 5	Community service or suspended sentence	Suspended sentence or community service

Among those magistrates interviewed, cases related to idle and disorderly persons and cases related to rogues and vagabonds posed the same difficulties. Some magistrates felt that the offences served the purpose of apprehending common criminals likely to have been involved in other offences. This latter view was evident among more seasoned magistrates. Such an attitude potentially reflects a lack of faith in the criminal justice system and its ability to apprehend individuals for offences which they actually did commit; as a result, these magistrates may value sections 180 and 184 because they facilitate the arrest of prospective criminals:

- “In most cases these people are thieves (pickpockets), some are engaged in forgery. The offence of being idle and disorderly in public places deters people from conducting their business transactions freely.”²⁵⁵
- “My concern is that the public lives in total insecurity because at one time I had a case

253 Interview with Anonymous Magistrate 5 (3 October 2012).

254 Interview with Anonymous Magistrate 3 (8 October 2012).

255 Interview with Anonymous Magistrate 5 (3 October 2012).

of this nature and the suspect denied the offence, I adjourned the matter for hearing and it was discovered that the suspect escaped from lawful custody at Zomba maximum prison for the offence of robbery as a prisoner.” “These people are the ones who commit other crimes during the night.”²⁵⁶

- “I take this as a good law because it prevents diseases and criminal acts. It deters the prostitutes from spreading diseases. However, some people are victimised by the law because some people have valid reasons. The police sometimes abuse the law and the other problem is that many accused are advised by the police to plead guilty to facilitate their speedy release.”²⁵⁷

By contrast, others felt that the offences were improperly vague and had the potential to violate the rights of innocent persons:

- “My concerns are that these offences, especially the categories are vague and complicated, as such it is difficult for the prosecution to make out cases from these charges, as well as in courts. It is very involving to deal with such cases because there is always a danger of coming up with a wrong decision.”²⁵⁸
- “My major concern regarding these offences is that it breaches the constitutional right of an accused person, the right to freedom of movement. The law seeks to attack only those persons who are underprivileged or poor. These cases seem to target those that are poor, for example rich people or those using cars at night cannot be caught by these cases in the Penal Code. Simply, the law is discriminatory.”²⁵⁹
- “Sometimes they arrest wrong people despite their justification, they are told that the court will have a final say. The State most of the time fails to prove the elements of the offence.”²⁶⁰
- “Most of the time police abuse sweeping exercises by arresting people, especially women from rest houses.”²⁶¹
- “I am of the view that concerns should be raised and recommended to the law commission to ensure that laws regarding offences of idle and disorderly persons and being rogue and vagabond should be looked into critically and then come up with an easier and straightforward provision in the Penal Code. This would help both prosecutors and courts to make reasonable and proper decisions, which will also be just according to the circumstances of each individual case that comes up at any point.”²⁶²
- “At times some of the people who are arrested are not offenders and in most cases they enter a plea of guilty so that they should be given a fine or released other than remaining in custody awaiting trial. And at times they discriminate against women, police arrest only women despite that during the arrest they were together with men. For example in rest houses and bottle [liquor] stores.” “Much as the police sweeping exercises curb criminal activities, the police should not be taking advantage to abuse the

256 Interview with Anonymous Magistrate 3 (8 October 2012).

257 Interview with Anonymous Magistrate 4 (10 October 2012).

258 Interview with Anonymous Magistrate 1 (9 October 2012).

259 Interview with Anonymous Magistrate 2 (9 October 2012).

260 Interview with Anonymous Magistrate 4 (10 October 2012).

261 Interview with Anonymous Magistrate 4 (10 October 2012).

262 Interview with Anonymous Magistrate 1 (9 October 2012).

law by arresting people anyhow just to punish them.”²⁶³

Conclusion

While there is no doubt that some advantages are seen by those involved with law enforcement and the criminal justice system in retaining section 180 and section 184 offences as they currently exist, the police officers’ and magistrates’ comments reflect an awareness of the need for reform.

Additional research should be conducted on the implementation of section 180 and section 184 offences which extends beyond the ambit of this report and considers the implementation of such offences within and across the different classes of police stations in Malawi.²⁶⁴

As an initial step, it would be important for more in-depth research to be conducted on practices relating to the arrest and conviction of persons for nuisance-related offences and the extent to which these practices comply with constitutional and legal requirements.

It would be important for police to develop specific directives or guidelines explaining to police officers the scenarios in which arrests for sections 180 and 184 offences would be appropriate. The Office-in-Charge should ensure that all officers are aware of these directives and that arrests are effected only when necessary to do so.²⁶⁵

Despite the perceptions of police officers on the benefit of sweeping exercises, no research has been conducted to establish whether such exercises lead to a significant reduction in crime.

The interviews with police reflected an inadequate understanding of Penal Code provisions. No doubt this is exacerbated by a shortage of copies of the laws at police station level and a shortage of prosecution skills within police stations.²⁶⁶

In addition, there is a need for specific guidelines on how sweeping exercises should be conducted by police.²⁶⁷ Sweeping exercises are sometimes conducted unlawfully, especially against non-citizens, and there is a need for increased supervision and monitoring of sweeping exercises.²⁶⁸

To ensure consistency in the implementation of Penal Code provisions by magistrates, the process of sending proceedings to the High Court for review is important. This report did not assess the strength of the current process, but there have been reports that such review

263 Interview with Anonymous Magistrate 5 (3 October 2012).

264 Interview with N Kayira and G Kainja, Malawi Police Service Headquarters, Malawi (29 April 2013).

265 Police stations are headed by an Office-in-Charge and assisted by a Station Officer who handles day-to-day operations.

266 Open Society Initiative of Southern Africa (OSISA) (2011) *Pre-trial Detention in Malawi: Understanding Caseflow Management and Conditions of Incarceration*, Open Learning, 24.

267 Interview with Kayira and Kainja *supra* note 264.

268 *Id.*

proceedings do not occur as often as they should.²⁶⁹ Section 15 of the Criminal Procedure and Evidence Code requires that where a sentence of more than K1000 is imposed, the High Court should “immediately” be sent a record of the proceedings for review and the High Court must confirm such order before it can be given effect. The same should happen where a Third or Fourth Grade Magistrate imposes a sentence of more than six months, or a Second or First Grade Magistrate imposes a sentence of more than a year.²⁷⁰ The responsibility of ensuring that cases are sent to the High Court for review lies with the Resident Magistrate²⁷¹ and the High Court is also able to call for such records for review if it has not received any.²⁷²

There ought to be a detailed prosecutorial policy which enables a prosecutor to make an objective decision when to prosecute nuisance-related cases based on the available evidence.²⁷³

269 OSISA *supra* note 266, 29.

270 Section 15(1)(b) of the Criminal Procedure and Evidence Code, as amended by Act 14 of 2010.

271 Section 361 of the Criminal Procedure and Evidence Code.

272 Section 360 of the Criminal Procedure and Evidence Code.

273 OSISA *supra* note 266, 32.

6. Law and Practice Relating to the Arrest of Children for Nuisance-Related Offences

Whilst Malawi's laws now demonstrate a concern for the proper handling of children who have been arrested, the new legal framework has not yet translated into practice. This chapter outlines several legal provisions dealing with the special needs and situations of children who are suspected of having committed an offence. In addition, the chapter highlights the findings of field research on the police's use of these laws in cases where children are suspected of having committed minor nuisance-related offences in Blantyre, Malawi.

Laws Relating to the Arrest of Children

Malawi has a comprehensive set of laws relating to the arrest of children and their diversion away from the criminal justice system. These include the Constitution; the Criminal Procedure and Evidence Code and the Child Care, Protection and Justice Act.

The Constitution of Malawi

Section 23(1) provides that all children, regardless of the circumstances of their birth, are entitled to equal treatment before the law, and the best interests and welfare of children shall be a primary consideration in all decisions affecting them. For the purpose of section 23, a child is defined as a person under the age of sixteen years.²⁷⁴ Section 20(1) of the Constitution provides that all persons are entitled to equal treatment.

Section 42(2)(g) of the Constitution provides that if an arrested or accused person is a person under the age of eighteen years,²⁷⁵ he or she is entitled to treatment consistent with the special needs of children, which shall include the following rights:

- i. Not to be sentenced to life imprisonment without possibility of release;
- ii. To be imprisoned only as a last resort and for the shortest period of time;
- iii. To be separated from adults when imprisoned, unless it is considered to be in the child's best interest not to do so, and to maintain contact with the child's family through correspondence and visits;

²⁷⁴ Section 23(6) of the Malawi Constitution.

²⁷⁵ This section was recently amended to make it clear that the section applies to persons under the age of eighteen years.

- iv. To be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces respect for the rights and freedoms of others;
- v. To be treated in a manner which takes into account the child's age and the desirability of promoting the child's reintegration into society to assume a constructive role; and
- vi. To be dealt with in a form of legal proceedings that reflects the vulnerability of children while fully respecting human rights and legal safeguards.

Section 42(2)(h) has recently been inserted into the Constitution to provide that, in the case where an arrested or accused person has a disability, he or she should be held in separate accommodation where possible in recognition of his or her particular vulnerability. This section appears to apply to both adults and children.

The Criminal Procedure and Evidence Code

The circumstances under which an individual may be arrested without a warrant are specified in the Criminal Procedure and Evidence Code. Section 20D of the Criminal Procedure and Evidence Code provides that, where a child or young person is arrested, "such steps as are necessary shall be taken to ascertain the identity of a person responsible for his welfare". The person identified must be informed as soon as practicable that the child or young person has been arrested, the reasons for the arrest and the place where the person is being held.²⁷⁶

Section 32A(3) of the Criminal Procedure and Evidence Code provides that where a child voluntarily admits commission of a non-serious offence, the child may be released on caution if the parent or guardian consents to the disposal of the case in this manner.

The Child Care, Protection and Justice Act requires, however, that in addition to the procedures outlined in the Criminal Procedure and Evidence Code, due regard must be had to the best interests of the child and the guidelines set out in the Child Care, Protection and Justice Act for dealing with suspected child offenders.

The Bail (Guidelines) Act

The Bail (Guidelines) Act, 8 of 2000 provides in section 5 that where an accused is a child, the court must consider the welfare of the child, whether it is necessary in the interests of the child to remove him or her from any undesirable persons and whether the release of the child will defeat the ends of justice.

The Child Care, Protection and Justice Act

Part III of the Child Care, Protection and Justice Act, 22 of 2010 deals with children suspected of having committed criminal offences. The Act defines a child as a person under the age of sixteen and introduced a new method of dealing with children in conflict with the law. Under section 86, for example, the words "finding of guilt", "conviction" and "sentence" may not be used with respect to any child defendant subject to court proceedings. Section 88 provides that a court, when adjudicating a matter involving a child defendant, shall take steps to remove the child from undesirable surroundings and ensure provision is made for his or her nutrition and education. Moreover, the court must give primary consideration to the rights of the child as set out in the Convention on the Rights of the Child.

Any police officer arresting a child must have due regard to the best interests of the child and effect the arrest in accordance with the Act.

²⁷⁶ Section 20D(2) and (3) of the Criminal Procedure and Evidence Code, inserted by Act 14 of 2010.

Rights of Children During Arrest, Section 90 of the Child, Care Protection and Justice Act

A police officer or any person executing the arrest of a child shall ensure that:

- a) The child has been informed of his or her rights in relation to the arrest or detention and the reasons for the arrest in a manner appropriate to the age and understanding of the child;
- b) There is no harassment or physical abuse of the child;
- c) The child is provided with medical attention where necessary;
- d) There is no use of handcuffs, except if the child is handcuffed to the arresting police officer or the person effecting the arrest;
- e) The child is not mixed with adults;
- f) The child is provided with nutritious food;
- g) The child is accompanied by a parent, guardian or appropriate adult as far as it is practicable to do so;
- h) A parent, guardian or appropriate adult is informed immediately after the arrest if such parent, guardian or appropriate adult was not present at the time of the arrest;
- i) In serious offences, the child is provided with legal representation; and
- j) The child has been provided with counselling services where possible.”²⁷⁷

According to section 93, a child who has been arrested must be referred to a probation officer for an assessment in order to establish the possibility of diverting the case; to determine whether the child is in need of care and protection; to estimate the child’s age and to formulate recommendations regarding release or to evaluate bail. Section 93(4) further requires that the probation officer submits the assessment report with recommendations to the relevant prosecutor. The prosecutor may, upon consideration of the recommendations, release the child with or without bail; release the child into the care of a parent, guardian or other appropriate adult; or detain the child. Where it is not possible to refer the child to a probation officer or where such a referral may cause unnecessary delays, the prosecutor handling the matter may arrange transportation for the child to a place of safety and arrange for a preliminary inquiry within forty-eight hours. Alternatively, the prosecutor may opt to release the child.

A police officer holding the rank of sub-inspector (or above) may caution a child offender against the repetition of the crime and release the child with or without conditions, provided the offence alleged to have been committed is not serious; that there is enough evidence to warrant prosecution in the case; and that the child voluntarily admits responsibility for the offence.²⁷⁸ A police officer imposing a condition under this section shall take into account the best interests of the child and the condition shall not be penal in nature.²⁷⁹

According to section 95(1), no child shall be detained before a court issues a finding against

277 Section 90 of the Child Care, Protection and Justice Act, 22 of 2010.

278 Section 94(1) of the Child Care, Protection and Justice Act.

279 Section 94 of the Child Care, Protection and Justice Act further states that the caution and release of a child shall be administered in the presence of a parent or guardian, or an appropriate adult or a probation officer, unless the police officer considers it to be in the best interests of the child to dispense with this requirement. A police officer shall, when cautioning and releasing a child, take into account the circumstances in which the offence was committed; the views of the victim or complainant; personal conditions of the arrested child (including age, physical or mental infirmity, general character and family circumstances) and the views of the parent or guardian of the child.

him or her unless the Director of Public Prosecutions, in writing or upon hearing, satisfies the inquiry magistrate or court that the prosecutor wishes to charge the child with a serious offence in respect of which there is sufficient evidence to prosecute; it is necessary in the interest of such child to remove him or her from undesirable circumstances; or the prosecutor has reason to believe that the release of such child would defeat the ends of justice.

Where a child is detained pending a preliminary inquiry, such detention must take place in a place of safety and authorities must either bring the child before a court within 48 hours or release him or her. An officer-in-charge of a police station or prosecutor can apply to a magistrate for an alternative order if it is not feasible to detain the child at a place of safety.

Where a child is released and cannot be brought before a magistrate, the officer-in-charge of the police station shall release the child into parental custody with or without sureties, unless the child is alleged to have committed a serious offence punishable with imprisonment exceeding seven years.

The Child Care, Protection and Justice Act moreover contemplates the diversion of children away from the criminal justice system. Section 112 provides that the court or the prosecution will consider a child-defendant for diversion if the child admits responsibility for the alleged offence without undue influence; the child understands the right to remain silent; there is sufficient evidence to prosecute the child; the diversion options have been explained to the child and his/her parents or guardian and the offence is not one specified in Schedule 4.²⁸⁰

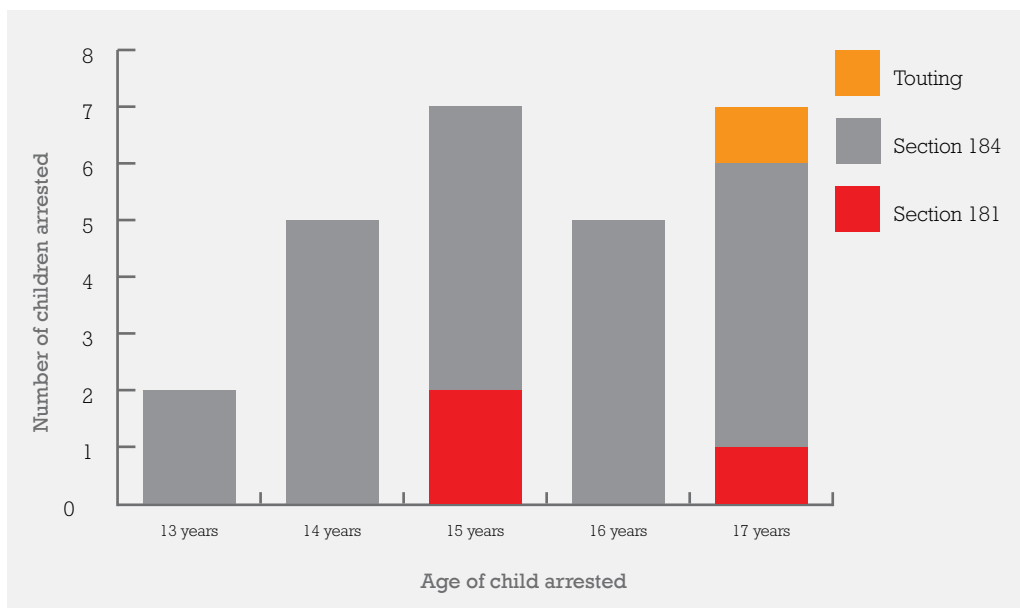
Options to Divert Children Away from the Criminal Justice System

Diversion is an individualised process that should by its nature consider the needs of each child, is available after the child admits commission of an offence and may occur in one of two ways:

- Informal diversion of children involves a prosecutor at the police station withdrawing the charge and referring the child to the Victim Support Units (VSUs), where the child is counselled by the Child Protection Officer, informed of various problems relating to the offence and cautioned. Such an approach works well in non-serious cases. VSU officers also have a role in visiting police cells and transferring children discovered in custody to the VSU or police prosecutor for diversion. Diversion is an individualised process and should consider the needs of the child.
- Formal diversion of children involves a child appearing before the inquiry magistrate with a probation officer or paralegal arguing his or her case for diversion. Formal diversion options include probation; warning; bond of good behaviour during prescribed time; reparations for damaged property, compensation; victim-offender mediation; specific diversion programmes; or compulsory education. A diversion may involve individualised options best suited for the child.

280 Schedule 4 of the Child Care, Protection and Justice Act, 22 of 2010 lists offences for which diversion is not possible. These offences include rape; attempted rape; abduction; defilement of a girl and attempted defilement; defilement of a person with a mental disability; manslaughter; murder; attempted murder; infanticide; killing an unborn child; disabling in order to commit a felony or misdemeanour; stupefying by overpowering drug or thing with intent to commit a felony or misdemeanour; robbery with violence; attempted robbery with violence; house-breaking and burglary; arson; offences against aircraft; offences against motor vehicles or trains; conspiracy to murder; aiding suicide; acts intended to cause grievous harm or prevent arrest; preventing escape from a wreck; maliciously administering poison with intent to harm; intentionally endangering safety of persons travelling by railway; and accessory after the fact to murder.

Chart 5: Number of Child-Arrestees According to Offence:



Arrests of Children for Nuisance-Related Offences

Notes on Methodology

In the period May to September 2012, paralegals from the Centre for Human Rights Education, Advice and Assistance (CHREAA) conducted field work at Limbe and Blantyre police stations. Using datasheets, paralegals collected regular quantitative information on the number of child arrests made by police for nuisance-related offences. Due to insufficient record-keeping by police, however, it was not always possible to establish the outcome of individual cases. In addition, qualitative interviews were conducted with police (10) and magistrates (5). The interviews were of an exploratory nature only. The interviews with magistrates did not include magistrates from the Child Justice Courts.

For the purpose of this chapter, the reference to “children” includes those up to and including the age of seventeen, which corresponds with the UN Convention on the Rights of the Child definition of a child. Under the Child Care, Protection and Justice Act, by contrast, a child is defined as one under the age of sixteen. Nevertheless, children aged sixteen and seventeen who come into contact with the law remain entitled to the rights listed in section 42(2)(g) of the Constitution.

Documented Cases of Arrests of Children for Nuisance-Related Offences

During the research period, interviewers documented twelve cases of child arrests by Blantyre police for nuisance-related offences. During the same period, there were fourteen documented cases of child arrests by Limbe police for the same category of offences.

All child arrests in Limbe were effected on charges relating to section 184 (rogue and vagabond offences), whilst the arrests of children in Blantyre were based upon charges under section 181 (conduct likely to cause breach of peace), section 184 and for touting. These specific offences are explained in more detail in chapter 4.

Arrests tended to occur during the day, apart from a sweeping exercise conducted in Limbe on 6 August 2012 in the early evening and the arrest of one seventeen year-old female at midnight. Aside from the arrest of that single female, all other child arrestees were male. Children in custody at the time of the researchers' visits to the police station typically reported that they had been arrested on their way to or from the market.

Data was not available regarding the length of time children spent in custody or the outcome of pending cases. Nevertheless, the evidently frequent practice of keeping child arrestees in custody was experienced first-hand by researchers, suggesting that at least some cases involving child arrests are not properly dealt with according to the new Child Care, Protection and Justice Act and the Constitution, which discourages the detention of children except in serious cases.

Examples of Arrest and Detention of Children at Blantyre and Limbe Police Stations

The following detentions of child-arrestees were observed in Limbe police station:

- Two children aged fourteen and seventeen years were arrested on Sunday 5 August 2012 and were still in custody on Wednesday 8 August 2012. They were first-time offenders.
- Three children aged thirteen, fourteen and sixteen years were arrested on Tuesday 14 August 2012 midday outside a restaurant in terms of section 184 and were still in custody on Thursday 16 August 2012. They complained that they had no food for two days.
- Two children aged fourteen were arrested alongside seven adults on Monday 6 August 2012 as part of a sweeping exercise. The children were first-time offenders. The one child was still in custody on 8 August, and the other was still in custody on 15 August 2012. The latter child complained that he did not have access to food and was not informed of the reasons for his arrest and detention.

The following detentions of child-arrestees were observed in Blantyre police station:

- A child aged fifteen who was arrested under section 181 on Friday 6 July 2012 was still in custody on Sunday 9 July 2012.
- A child aged seventeen who was arrested for touting on 4 July 2012 was still in custody the following day.

The direct observations of researchers call into question the procedures followed by police officers and their willingness to abide by the limitations on law enforcement capacities that apply in cases of child suspects.

Police Use of Section 184 Offences in Cases Involving Children

Specific concerns relating to the interpretation and application of section 184 offences are dealt with in detail in Chapter 4. Within the context of this research, all but one of ten police officers interviewed had at some point arrested a child on the charge of being a rogue and vagabond. Six police officers interviewed explicitly stated that the children arrested on

rogue and vagabond charges were street children found loitering in town.²⁸¹ The rationale behind these arrests was the assumption that street children are generally involved in crimes such as pick-pocketing, robbery and rape. The arrests themselves, however, were not linked to specific crimes. Police sought to explain their arrest practices relating to street children in particular:

- “Most of them are street kids who end up stealing or pick-pocketing”;²⁸²
- “Usually we arrest street kids that are mostly used by adults in conducting other crimes”;²⁸³
- “It is usually street kids who are involved in crimes like pick-pocketing or robbery. If they are just found loitering for no proper reason we arrest them”;²⁸⁴
- “Mainly these are street kids who loiter around in town with no place of abode”;²⁸⁵
- “Most children arrested on charges of rogue and vagabond are street kids and are usually arrested walking around in town at night”;²⁸⁶
- “Mainly street kids who rob and rape people”.²⁸⁷

Police also cited other reasons for arresting children under section 184 not limited to street children:

- “Most of them we found them that they are about to commit a crime. Sometimes you find that those children are drunk and they end up disturbing people”;²⁸⁸
- “Children are arrested on charges of [being a] rogue and vagabond once they have been found at odd hours which can result in them engaging themselves in robberies, gambling and other offences”;²⁸⁹
- “Normally because children are just loitering at times they go as far as raping women and robbing other people”.²⁹⁰

The terminology used by police is informative; only two officers asserted that the street children arrested had actually been engaged in crime, whereas others employed words such as “end-up”, “at times”, “can result”, “are about to”. Thus, officer interviews suggest that children are being arrested, not when there exists evidence of the commission of specific crimes, but rather when there exists a mere possibility for criminal activity.

281 Interview with Anonymous Police Officer 1, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 2, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 3, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 6, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 9, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 10, Blantyre police station (10 October 2012).

282 Interview with Anonymous Police Officer 1, Limbe police station (11 October 2012).

283 Interview with Anonymous Police Officer 2, Limbe police station (11 October 2012).

284 Interview with Anonymous Police Officer 3, Limbe police station (11 October 2012).

285 Interview with Anonymous Police Officer 6, Blantyre police station (10 October 2012).

286 Interview with Anonymous Police Officer 9, Blantyre police station (10 October 2012).

287 Interview with Anonymous Police Officer 10, Blantyre police station (10 October 2012).

288 Interview with Anonymous Police Officer 4, Limbe police station (11 October 2012).

289 Interview with Anonymous Police Officer 5, Blantyre police station (10 October 2012).

290 Interview with Anonymous Police Officer 8, Blantyre police station (10 October 2012).

Police Procedures During Arrest and Detention of Children

*We do not follow any procedure when we arrest them and when they are brought to the police station. Then we take their statement, that is, when we know that it is a child, when they tell you their age and then we put them in a different cell from an adult. And at court they are supposed to go to child justice court but most of them we give them police bail and they do not go to court.*²⁹¹

Six police officers out of ten said that they separated children from adults for the purposes of detention in police cells.²⁹² One officer from Blantyre police station said that “normally, they are just arrested as any other person and put in the adult cells because there are no children cells”.²⁹³ There was no mention during police interviews of a need to separate children from adults during transport to the police station, and the procedure for arrest did not differentiate between adults and children.²⁹⁴ One officer noted that street children were treated as dangerous criminals in cases of arrests in terms of section 184: “at the time of the arrest we handcuffed them because most of these street kids are dangerous and not cooperative”.²⁹⁵ This contravenes section 90 of the Child Care, Protection and Justice Act, which states that a police officer effecting arrest shall ensure that handcuffs are not used on children and that the child is not mixed with adults.

Five police officers indicated that children would be taken to the Child Justice Court or magistrate designated as a child court magistrate after arrest.²⁹⁶ This prescribed practice, however, was not followed in all cases: “They are supposed to go to the child justice court but in most cases they don’t, we just give them police bail.”²⁹⁷ There can be various reasons for this difference between the provisions of the law and their application in practice. Additional research is required to determine the exact reasons why the provisions of the Child Care, Protection and Justice Act are not adhered to.

291 Interview with Anonymous Police Officer 4, Limbe police station (11 October 2012).

292 Interview with Anonymous Police Officer 1, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 2, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 3, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 4, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 6, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 9, Blantyre police station (10 October 2012).

293 Interview with Anonymous Police Officer 8, Blantyre police station (10 October 2012). The same officer recommended that more children’s cells should be built “because mixing children and adults in cells only worsens the children’s minds in criminal activities”.

294 Interview with Anonymous Police Officer 1, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 3, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 4, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 8, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 9, Blantyre police station (10 October 2012).

295 Interview with Anonymous Police Officer 9, Blantyre police station (10 October 2012).

296 Interview with Anonymous Police Officer 2, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 3, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 6, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 8, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 10, Blantyre police station (10 October 2012).

297 Interview with Anonymous Police Officer 1, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 4, Limbe police station (11 October 2012).

With regard to statements taken from child-detainees after their arrest, one officer indicated that at least this aspect of the arrest procedure would be executed in the presence of parents, if they were available.²⁹⁸ Only one police officer indicated that special police officers were dedicated to deal with children: “When arresting children, we usually follow the children procedures, whether during arrest, at the police station and court. The procedures are that we have special police officers who are designated to deal with children issues.”²⁹⁹ Another police officer indicated that there would be a special officer responsible for prosecuting child cases “if the case needs court intervention”.³⁰⁰ However, few police officers have been trained on child justice.

One police officer pointed out that arrested children were sometimes counselled prior to their release. “On arresting the children, it is like once they have been arrested on these charges, and are brought here at the police, it has proved that counselling has done a great job because when they have been released at some point, other children have changed their behaviour and others became child ambassadors”.³⁰¹ The reference to counselling and special officers dealing with children’s cases suggests that at least some police officers appreciate the value of intervention by the Victim Support Units (VSUs) after arrests for section 184 offences, even if these procedures are not frequently or consistently followed.

Magistrates’ Responses to Children Charged with Section 184 Offences

Magistrates who were interviewed noted that they had encountered children charged in terms of section 184. A magistrate in Blantyre noted that such cases often concern girls involved in prostitution.³⁰²

The responses of magistrates to cases in which children had been arrested for section 184 offences varied greatly. Only one magistrate referred to the need to treat children in accordance with the provisions of the Child Care, Protection and Justice Act.³⁰³ Another magistrate said he would refer such cases to the Child Justice Court.³⁰⁴ Yet another noted that children were often charged jointly with adults in terms of section 184, but that there was a need to treat the children differently in such cases.³⁰⁵ Two magistrates, however, felt that in child offender cases, the court’s primary responsibility was to consider the evidence and protect the public.³⁰⁶ The absence of a common philosophy regarding the role and procedure of these offences in the context of children who come into conflict with the law is cause for concern.

298 Interview with Anonymous Police Officer 2, Limbe police station (11 October 2012).

299 Interview with Anonymous Police Officer 5, Blantyre police station (10 October 2012).

300 Interview with Anonymous Police Officer 9, Blantyre police station (10 October 2012).

301 Interview with Anonymous Police Officer 5, Blantyre police station (10 October 2012).

302 Interview with Anonymous Magistrate 5 (3 October 2012).

303 Interview with Anonymous Magistrate 1 (9 October 2012).

304 Interview with Anonymous Magistrate 4 (10 October 2012).

305 Interview with Anonymous Magistrate 5 (3 October 2012).

306 Interview with Anonymous Magistrate 2 (9 October 2012); Interview with Anonymous Magistrate 3 (8 October 2012).

Conclusion

Alternative Approaches to Child Arrests

Police interviews reflect a key problem in the management of children who come in conflict with the law. All police stations in Malawi have dedicated Victim Support Units (VSUs) as a component of the Community Policing Services Branch. These VSUs include Child Protection Officers who are trained in child counseling and appreciate the need to divert children away from the standard criminal justice system. Unfortunately, there is little coordination between the VSUs who counsel children and the police officers who arrest children. Children thus continue to encounter police officers unaware of the protective provisions of the new Child Care, Protection and Justice Act.

Respecting the Rights of Children

It is unacceptable that some children are labeled “street children” whose rights deserve little respect, when each child’s case should be attended to on an individual basis. The arrest and release of children who live on the streets is not a sustainable or effective measure to prevent crime. The UN Special Rapporteur on Extreme Poverty and Human Rights has noted that street children are vulnerable to penalization measures, e.g. the prohibition of begging and the stigma that they carry as being “criminal” reduce the avenues available to them to escape the abusive situations they face on the street.³⁰⁷

The practice of diversion presents possible solutions, as well as troubling limitations. One problem is that children may be intentionally or unintentionally pressured by police into admission of an offence; moreover, a default assumption frequently operates that if a child has been arrested, he or she must be guilty. This reality suggests that the due process protection relating to adults, i.e. the right to be presumed innocent until proven guilty, is not always afforded to children.

Infrastructural limitations also pose continued problems – many police holding facilities are not custom built, are old and have not been maintained.³⁰⁸ Whilst police interviewed said that children were kept apart at police stations, this practice is not always followed. At some stations, including Blantyre police station, children continue to be detained alongside adults. This problem has been noted on numerous occasions and stem from the fact that the entire police station has been intended for temporary use only.³⁰⁹ Elsewhere, children might be held in a cell next to adults, but during the day cell doors are open and children mingle freely with adults. Accordingly, there is very little privacy in police cells, and the potential for children to be negatively influenced or abused by adult prisoners is very real.

In addition, the law adds to the confusion. Section 97³¹⁰ of the Child Care, Protection and Justice Act allows for children to be transported and detained with adults where they were jointly charged with such adults. This provision ignores the potential for abuse that may occur, even instances where adults and children know each other. Police seem to have

307 *Report by Special Rapporteur on Extreme Poverty and Human Rights supra* note 1, 13.

308 OSISA *supra* note 266, 55-60, African Policing Civilian Oversight Forum *Policing and Human Rights: Assessing Southern African Countries' Compliance with the SARPCCO Code of Conduct for Police Officials* (2012) 67.

309 OSISA *supra* note 266, 55 and 62.

310 Section 97 of the Child Care, Protection and Justice Act provides that “no child, while in detention in a safety home or reformatory centre or while being conveyed to or from any court or while awaiting before or after attending a criminal court, shall be permitted to associate with an adult, not being a relative, who is charged with an offence other than the offence with which the child is jointly charged with the adult.”

taken this provision to also mean that children can be conveyed with adults where they are rounded up for similar offences, even if they are not jointly charged. This is often the case where sweeping exercises are conducted and both adults and children are arrested on charges of contravening section 184 of the Penal Code. Section 97 is contrary to section 42(g)(iii) which requires that children under eighteen be kept separate from adults. This demonstrates the difficulties in interpretation created by the variance in ages in the Child Care, Protection and Justice Act and the Constitution. At all times, the best interests of the child should prevail. This also means that there will be instances when older children should not be kept with younger children due to the risk of abuse.³¹¹

The fact that children cannot access food whilst in custody is similarly unacceptable and a clear violation of the provisions of the Child Care, Protection and Justice Act, as well as various international standards. The UN Standard Minimum Rules for Treatment of Prisoners require that every prisoner be provided by the administration at usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served.³¹² Relying on non-governmental organisations (NGOs) to provide food to persons in custody is also not a sustainable way to address this concern.

From the above research, it is apparent that there has not been enough of an effort to educate and sensitise police and magistrates about new laws concerning child arrest and detention. Arrests effected for crime-prevention purposes are unacceptable. It is worrying that researchers consistently discovered children in custody. More training is needed to communicate the facts and spirit of reformed laws affecting child-offenders.

More recently, the police have been training officers as part of a diversion pilot programme in Blantyre and Limbe. The focus of this programme is to divert children from the criminal justice system by cautioning the child first. It is only in the case of repeat offenders where children should then be arrested and taken to a place of safety.³¹³ It is important to monitor the progress of this intervention.

When it comes to the problems relating to the arrest of children for nuisance-related offences under section 184 of the Penal Code, it is important that stakeholders continue collaboration to ensure that the provisions of the Child Care, Protection and Justice Act are enforced.

The National Child Justice Forum (NCJF) seeks to establish a fair and human juvenile justice system based on the principles of restorative justice. The immediate purpose of the NCJF is to ensure that detention is a last resort, of the shortest possible time and takes into account the interests of the victim and child offender. The NCJF is a programme of the judiciary involving the police; the Ministry of Gender; the Ministry of Justice; the Ministry of Health and NGOs. The NCJF specifically works to strengthen existing structures that respect the rights of children in conflict with the law and other vulnerable children.

The Paralegal Advisory Services Institute (PASI) employs paralegals who are often the only resource for legal consultation with which child-offenders have contact. These paralegals visit police detention facilities and help to hold police accountable where individuals have

311 Interview with Kayira and Kainja *supra* note 264.

312 Rule 20 of the UN Standard Minimum Rules for the Treatment of Prisoners (1955).

313 Interview with Kayira *supra* note 193.

been detained for longer than 48 hours.³¹⁴ Paralegals can furthermore explain the legal process to children and assist them in locating and contacting their parents or guardians. To a certain extent, PASI fills a gap in government services where neither the police, nor legal aid, nor social workers are available to adequately attend to the needs of children.

The judiciary is responsible for convening Court User Committees (CUCs), which bring together a range of stakeholders to discuss challenges relating to the criminal justice system, particularly as they relate to women and children in prison and pre-trial detention. A CUC Taskforce exists at the national level to guide the development of performance standards for dealing with individuals who have been arrested or imprisoned. CUCs are an important intervention to improve the provision of services at a district level and to improve coordination between service providers. The Lay Visitors' Scheme is also an important tool to regularly monitor conditions in police detention facilities.³¹⁵

Together, these and other stakeholders can approach different aspects of the situation of child-offenders and work together to address the myriad challenges posed by this area of Malawi's criminal law.

314 The Centre for Human Rights Education, Advice and Assistance (CHREAA) in Blantyre houses the PASI paralegal programme in the district and screens all women and children at the six police stations in Blantyre.

315 Interview with Kayira and Kainja *supra* note 264.

7. Use of Vagrancy Laws Against Sex Workers³¹⁶

Sex workers continue to face serious challenges as they navigate Malawi's criminal laws and law enforcement policies, even as they struggle to generate the income needed to support themselves and their families. By understanding the abuses to which sex workers are all too frequently exposed, stakeholders are better positioned to address their needs and work alongside members of this community to improve their situation. This chapter sets out the laws relating to sex work in Malawi, contains the findings of interviews conducted with sex workers on their experiences with police, and highlights the impact of partial criminalisation on sex workers.

Introduction

This chapter concerns “sex workers”, a group of individuals defined as female, male or transgender adults and young persons³¹⁷ who receive money or goods in exchange for sexual services on either a regular or occasional basis.³¹⁸ The chapter explores various issues relating to police arrest and abuse of sex workers in Blantyre. As a point of departure, it is useful to review recent relevant studies of the challenges that sex workers in Malawi face.

A recent study by the United Nations Population Fund (UNFPA) estimates that 3 614 sex workers³¹⁹ operate in Blantyre City alone, with an overall national estimate of 19 295 sex workers in Malawi.³²⁰ In the UNFPA study, sex workers cited the following factors as having

316 This chapter refers to sex work and sex workers out of respect for the dignity of people involved in sex work. The term “prostitution” is often stigmatised within society and, as such, this document employs the term “sex work” when referring to commercial sexual activities taking place between consenting adults. The term “sex worker” is used to describe the provider of sexual services and the term “client” refers to the buyer of these services.

317 Young people in this context pertain to those aged 18-24. Joint United Nations Programme on HIV/AIDS (UNAIDS) *UNAIDS Guidance Note on HIV and Sex Work* (2012) 3.

318 *Id.* It should be noted that sexual contacts are fluid in nature and it is often quite difficult to distinguish between sex worker and transactional sex or sexual relationships engaged in in exchange for some material benefit.

319 That is, sex workers aged sixteen years and up.

320 United Nations Population Fund (UNFPA) *Counting the Uncatchables: Report of the Situation Analysis of the Magnitude, Behavioural Patterns, Contributing Factors, Current Interventions and Impact of Sex Work in HIV Prevention* (2011) 40.

led to their engagement in sex work: need for income (26,8%); orphanhood (14,6%); loss of marriage (13,8%); peer pressure (10%) and alcohol and substance abuse (4,8%).³²¹ The UNFPA study concluded that poverty, often exacerbated by a death in the family, is the key determining factor for an individual resorting to sex work.

The above-cited UNFPA study noted that there are various categories of perpetrators of abuse against sex workers, including clients of sex workers (66%), bouncers (8,3%), thugs (10,8%), members of the Malawi Police Service (12,4%) and owners of places of entertainment that sex workers frequent (2,5%). Only 16,7 percent of these cases of abuse were reported to the police. Indeed, some of the abuse reported by sex workers originated from police officers. Of the abuse experienced as a result of exposure to police officers, sex workers mentioned experiencing disturbance of the sex trade (73,6%), finding themselves subject to unwarranted arrest (12,8%), being raped (9,9%), being forced to pay bribes in exchange for escaping arrest (2,6%), having cell phones confiscated (0,5%) and receiving stiffer penalties in court as a result of police influence (0,2%).

A study conducted by Theatre for a Change (TFAC) in Malawi documented human rights abuses faced by sex workers in Lilongwe.³²² The study noted that female sex workers feared abuse from their clients (43%), police (27%), their partners (14%) and fellow sex workers (16%).³²³ Female sex workers further identified dark, secluded places and bars as dangerous places in which most abuses occur.³²⁴

Building upon these observations, this chapter outlines some of the ways in which police harassment and abuse of sex workers violate their human rights and contribute to their marginalisation. This trend requires urgent effort by a range of stakeholders to deal with the endemic police abuse perpetrated against sex workers.

Laws Relating to Sex Work in Malawi

Sex workers are most often arrested in terms of section 184(c) of the Penal Code, which states that “every person found in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose, is deemed a rogue and vagabond.” The problems related to the legal interpretation of this offence are discussed in greater detail in Chapter 4. Indeed, the use of this offence by police is often in response to the difficulties associated with proof required to charge sex workers with sex work-specific offences.

In addition to the concerns addressed in Chapter 4, arrests of sex workers pose various problems. Where police arrest a sex worker without proof of an offence having been

321 *Id* 44.

322 G Longwe *Sex Workers – Human Rights Abuses Faced* (2012) Theatre for a Change Malawi, OSISA.

323 *Id* 15.6.

324 Longwe *supra* note 322, 16.

committed, for example, they effect an unlawful arrest.³²⁵ Women and Law in Southern Africa (WLSA) Malawi has conducted research on women in prison, noting that many arrests and convictions under section 184(c) are irregular; that is, the actions of arrested women simply did not correspond to the definition of a crime under section 184(c).³²⁶ The Malawi High Court has also expressed concern at the incorrect and discriminatory use of section 184 offences by police officers.³²⁷

However, according to the police, it is the courts' continued engagement with such charges that encourage arrest: "Police continue to arrest women because the court gives them an ear – courts should stop entertaining such cases and fining prostitutes since this encourages police to continue to arrest people without proof".³²⁸ In addition, it has been suggested that, because of the likelihood that courts will entertain section 184 charges, police are able to ask for bribes to stop a case from going to court - "Most cases go to court, huge fines are paid by sex workers. Police know sex workers will pay fine, so they ask for money before, which leads to corruption".³²⁹

Section 184 of the Penal Code, though frequently employed by police and enforced by the courts, is not the only charge under which a sex worker can be prosecuted. It should be noted that the Penal Code (Amendment) Act, 1 of 2011 has lengthened the sentences of other possible offences, suggesting that public policy in Malawi is increasingly disposed to prosecute and punish sex workers.

Sex Work-Related Offences in the Malawi Penal Code

Behaving in a Disorderly Manner

Section 180(a) of the Penal Code provides that "every common prostitute behaving in a disorderly or indecent manner in any public place is deemed an idle and disorderly person." See Chapter 4 for a discussion of this offence and problems relating to its enforcement.

Performing an Indecent Act in Public

Section 180(d) of the Penal Code deems "every person who without lawful excuse publicly does any indecent act" an idle and disorderly person. See Chapter 4 for a discussion of this offence and problems relating to its enforcement.

Soliciting for Immoral Purposes

Section 180(e) of the Penal Code deems "every person who in any public place solicits for immoral purposes" an idle and disorderly person. Section 145(1)(b) further prohibits a male person from publicly persistently soliciting for immoral purposes. This section is similar to the new section 147A(1)(c) which states that "any person who solicits another person to patronise a prostitute shall be guilty of an offence and shall be liable to imprisonment for 14 years."

325 In the South African case of *SWEAT v Minister of Safety and Security and Others* 2009 (6) SA 513 (WC), the applicants sought to interdict police from unlawfully arresting sex workers only to harass, punish or intimidate them or for any other ulterior purpose. Because sex workers were released the day after their arrest without prosecution of the case, the judge concluded that the arrests were unlawful, as police had not arrested the sex workers for the purpose of bringing them before a court.

326 S White et al, a *Poor, Invisible and Excluded: Women in State Custody Malawi* (2010) 38.

327 *Mwanza supra* note 69.

328 Interview with Kayira *supra* note 193.

329 *Id.*

Living on the Earnings of Prostitution

Section 145(1)(a) prohibits a male person from knowingly living, wholly or in part, on the earnings of prostitution. Section 145(3) provides that a male person who lives with or is habitually in the company of a prostitute or is proved to have exercised control, direction or influence over the movements of a prostitute in such a manner as to show that he is aiding her engagement in prostitution, shall be deemed to live off the earnings of prostitution unless he can satisfy the court to the contrary. Similarly, section 146 makes it an offence for a woman to be living on the earnings of prostitution. The section does not prohibit a sex worker from selling sex, and only prohibits others from living off her earnings.

Brothel-Keeping

Section 147 of the Penal Code makes it an offence to keep a house, room or place of any kind for the purpose of prostitution. This offence was historically a misdemeanour, but was amended by the Penal Code (Amendment) such that it currently carries a penalty of 7 years' imprisonment. Section 147A(1)(a) states that "any person who owns, controls, manages, supervises or otherwise keeps a house of business for prostitution shall be guilty of an offence and shall be liable to imprisonment for fourteen years." The section was inserted by the Penal Code (Amendment) Act and contradicts the section 147 provision providing for a seven year penalty for the same offence. Section 147A(1)(e) goes even further, directing the same penalty of fourteen years for one who "rents or permits any place to be regularly used for prostitution or promotion of prostitution". Section 143 provides that the detention of a woman or girl against their will in a brothel is a misdemeanour. The proliferation of criminal offences covering the same type of behaviour leads to confusion in application of the law and a lack of clarity for police, courts and potential defendants of the consequences of an arrest.

Transmission of Disease

Section 192 provides that "any person who unlawfully, negligently or recklessly does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life" shall be guilty of an offence and shall be liable to imprisonment of fourteen years. The penalty was upgraded from a misdemeanour to one of imprisonment of fourteen years by the Penal Code (Amendment) Act.³³⁰

Procuring a Person for Prostitution

Section 147A(1)(b) provides that "any person who procures, encourages, induces or otherwise purposely causes another person to become or remain a common prostitute, shall be guilty of an offence and shall be liable to imprisonment of fourteen years". This section was inserted by the Penal Code (Amendment) Act and contradicts sections 140(b) and 140(c) criminalising the procurement of a woman or girl to become a common prostitute or an inhabitant of a brothel. The latter offence is only classified as a misdemeanour.

Transporting a Person for Prostitution

Section 147(1)(d) of the Penal Code, inserted by the Penal Code (Amendment) Act, states that "any person who transfers or transports any person into or out of or within Malawi with the purpose to engage that other person in prostitution" shall be guilty of an offence and shall be sentenced to fourteen years' imprisonment.

A key concern with the criminalisation of activities related to sex work, is that it does not recognise the reality in which many women (and men) find themselves, where sex work might be their only viable means of income.

330 The problems inherent in the criminalisation of HIV transmission are discussed in UNDP, *Assessment of the Legal, Regulatory and Policy Environment for HIV and AIDS in Malawi* July 2012, 121-124.

A recent Canadian Court decision, *Attorney General and Another v Bedford and Others*³³¹ highlights the contradictory nature of some of the offences in the Penal Code relating to sex work. In that case, the Court of Appeal for Ontario considered a similar situation as Malawi, where the selling or buying of sex was not illegal, but related activities were. The Court concluded that the offence of living off the earnings of prostitution should apply in circumstances of exploitation only, whilst it ruled that the prohibition against bawdy-houses was unconstitutional. The Court held that these offences violated the right to security of person in that they prevented a sex worker from taking measures to protect herself against possible harm. The Court then considered whether the violation of this right was justifiable. In considering whether the violation interfered with the principles of fundamental justice (that an offence should not be arbitrary, overly broad or grossly disproportionate), the Court held that the offences infringed on a person's security of person more than was necessary to achieve a legislative objective. The Court's finding was based on the fact that sex work itself is legal – “we cannot treat as a crime that which the legislature has deliberately refrained from making a crime”.³³² Whilst the objective of the bawdy-house offence was held not to be arbitrary, the Court found it to be overly broad in that it prevented a single sex worker from working discreetly on her own premises, and it was grossly disproportionate since it did not allow sex workers to work indoors, which was shown to be safer, thus directly impacting on their right to security of person. The Court held that the objectives of the bawdy-house provisions “are rooted in English common law and relate to nuisance and affront to public decency, not modern objectives of dignity and equality”.³³³ Similarly the Court found that living on the avails of prostitution is grossly disproportionate “to the extent that it criminalised non-exploitative commercial relationships between prostitutes and others and particularly those who may enhance prostitutes’ safety”.³³⁴

A similar argument can be made in Malawi, that some of the offences have the effect of violating the rights to dignity, personal liberty and security of person,³³⁵ as well as the right to “freely engage in economic activity, to work and to pursue a livelihood anywhere in Malawi”.³³⁶ It can be argued that a restriction of these rights which increases the risk of violence faced by sex workers, is not reasonable, recognised by international human rights standards or necessary in an open and democratic society.³³⁷

Sex Workers' Experience with Police and Courts in Blantyre

Notes on Methodology

Paralegals from the Centre for Human Rights Education, Advice and Assistance (CHREAA) interviewed 15 sex workers in Blantyre on 22 June 2012 in the areas of Manase (8), Ndirande (2) and Zingwangwa (5) using questionnaires. The interviews were intended as preliminary research to identify some of the challenges facing sex workers requiring additional research, and they were primarily used to verify and interpret data on police

331 2012 ONCA 186, 26 March 2012. The judgment has been appealed.

332 *Id* at para. 166.

333 *Id* at para. 190.

334 *Id* at para. 221.

335 Section 19(1), 18 and 19(6) of the Malawi Constitution.

336 Section 29 of the Malawi Constitution.

337 Section 44(2) of the Malawi Constitution.

officers' arresting practices previously obtained at the police stations. The demographics of the sex workers who were interviewed is summarised in Annexure 1.

Sex Workers' Experiences with Police: Exploitation, Violence, and Arrest Practices

*The police behaviour is not good because what usually happens is that they can arrest you and also ask for a bribe and even sexual favours when you are in their hands.*³³⁸

*Mine is just a concern that [the police] should stop harassing sex workers because they are innocent people. They keep on arresting them instead of going out there arresting real culprits.*³³⁹

*The problem is that when we have money it is snatched during arrest, when we do not have [money] they simply arrest us to which in my view all they are interested in is our money not to end prostitution.*³⁴⁰

*I feel so very bad about our job because of police. In most cases when they arrest us all they want is our money and when you don't have it simply means you'll be locked and taken to court as persecution and subsequently when you are at court the court will fine you and if you don't have money it means your relative will suffer in hunt of money to rescue you from court.*³⁴¹

When asked whether they had experienced any violence as a result of sex work, fourteen out of the fifteen respondents answered in the affirmative. Respondents mentioned that they had experienced various types of abuse from both police and clients during the past year. According to interviews, clients and police seemed to pose an equal risk of abuse to sex workers.³⁴² Whilst the interviews with sex workers were of an exploratory nature only, they show the spectrum of violence that sex workers experience:

- Eight respondents had been assaulted by police in the past year. In the year preceding her interview, one respondent had been assaulted nine times by police and another seven times.
- Eleven out of the fifteen respondents reported police extorting money from them in the preceding year.
- Six respondents reported being raped by police in the preceding year; one was raped four times and another three times.
- Eight respondents reported assault by clients, with one respondent noting that she had been assaulted eleven times by clients in the preceding year. One respondent reported that a client had hacked her in the forehead.
- Seven respondents reported that clients had stolen money from them. Such abuse occurred frequently, with one respondent noting twelve incidents of client theft in the preceding year and two others reporting seven incidents of client theft in the preceding year.

338 Interview with Anonymous Sex Worker 2 (22 June 2012).

339 Interview with Anonymous Sex Worker 12 (22 June 2012).

340 Interview with Anonymous Sex Worker 15 (22 June 2012).

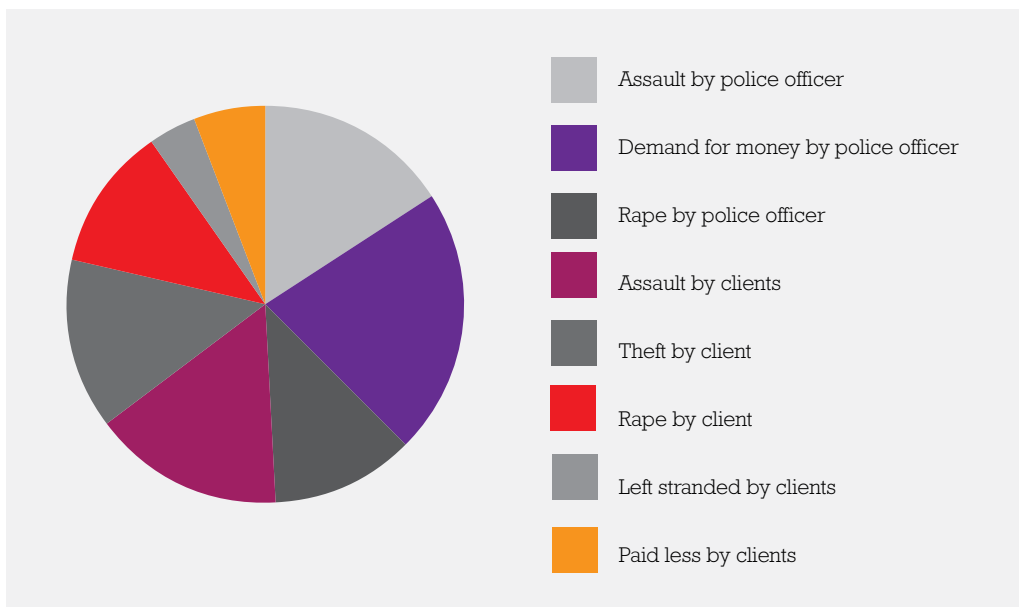
341 Interview with Anonymous Sex Worker 13 (22 June 2012).

342 These findings differ from the results of studies performed by both the UNFPA and Theatre for a Change, which noted a lower percentage of police abuse compared to client abuse. Regardless of the disparity, it is clear that the rates of police abuse in all studies are unacceptably high.

- Six respondents reported having been raped by clients: one reported twelve occurrences of rape by clients in the preceding year, and another reported being raped five times by clients in the preceding year.
- Three respondents reported being paid less by clients than had been agreed upon, and two reported being left stranded by clients.
- Two respondents reported being stabbed by thieves as a result of their insecure work environment.

Additional research on the violence and abuse faced by sex workers in Malawi is crucial to enable organisations and government to respond adequately to the needs of this neglected sector of the population.

Chart 6: Type of Abuse Experienced by Sex Workers in the Year Preceding Interview:



The above chart notes the types of abuse experience by sex workers in the preceding year, with the perpetrators of abuse divides almost equally between police and clients.

Interviewers also asked specific questions regarding access to condoms, as well as the extent to which police confiscated condoms or used them to substantiate arrests and police testing for sexually transmitted infections. Thirteen respondents observed that police had never taken condoms away from them, and only two indicated that police had confiscated

condoms on arrest.³⁴³ None of the respondents interviewed had ever been tested for HIV by the police.³⁴⁴

Three respondents described their relationship with the police as “good”, and twelve as “bad”. Eleven respondents said that police had harassed or intimidated them for being sex workers,³⁴⁵ with such occurrences ranging from one to twenty times over the course of the year. When describing the various ways in which they experienced police harassment, ten out of fifteen respondents reported having previously been stopped and searched by police. One reported having been stripped naked by police. Others reported having suffered threats of harm, rape, baseless detention, assault, and the confiscation of money or mobile telephones.

Thirteen of the fifteen respondents described being arrested by police in the past year, all on charges of being a rogue and vagabond. When asked how they had been treated during the arrest, four responded that their experience had been relatively without incident. By contrast, eleven respondents indicated that their treatment had been unfair, “bad,” or “violent”.

When asked to reflect upon their experience of police detention facilities, most referred to police custody as a “bad experience”, “bad and stinking place” (3), “very bad place” (2) or “bad environment” (2). Other references to conditions in detention included it being “hazardous”, “very cold”, “tough going at times”, “filthy and inhumane”, with “food problems” and “lice and skin diseases”.

After arrest, respondents claimed that they would either be released by police the same day if they had money to pay a fine, or the next day if they were without such funds. According to interviews, respondents would occasionally be transported to court proceedings, at which time they would plead guilty and pay a fine of K1000 to K3000. Five respondents said that police would release them rather than transporting them to court upon payment of a bribe.

Twelve respondents indicated that they had in the past been asked by a police officer to pay money. Reflecting on the year preceding the interview, respondents said the number of times police officers had requested bribes varied from one to fifteen times, with the majority of interviewees having been asked for a bribe one to four times in the preceding year. Respondents said that police generally asked for a bribe to facilitate their release (10), whilst some officers also had other reasons: “[police] say they know I made money, [and that I] must give it to them”, “[police] say [they] cannot leave their jobs and keep on arresting sex workers”, “punishing us”. The respondents noted that the police officers who asked for bribes were from Blantyre, Soche, Nyambadwe and Chilimba police stations.

343 Police using condoms as evidence does not appear to be a problem in Malawi to the extent indicated in other countries. See, e.g. Sex Workers Project *Public Health Crisis: The Impact of Using Condoms as Evidence of Prostitution in New York City* (2012); Open Society Foundations *Criminalising Condoms: How Policing Practices Put Sex Workers and HIV Services at Risk in Kenya, Namibia, Russia, South Africa, the United States, and Zimbabwe* (2011).

344 In 2011, women in Mwanza district sued the Malawi police and health services for the mandatory HIV testing of sex workers. Information on the case is available at <http://www.southernafricalitigationcentre.org/cases/ongoing-cases/malawi-mandatory-hiv-testing-of-alleged-sex-workers/> (last accessed: 2 June 2013). Similar instances of HIV testing without consent on arrest have been reported in Mzimba. See UNDP *Assessment of the Legal, Regulatory and Policy Environment for HIV and AIDS in Malawi* (2012) 34.

345 Interview with Anonymous Sex Worker 1 (22 June 2012).

When asked whether they had ever lodged a complaint against police officers, thirteen respondents said “no”, whilst two respondents said the question was not applicable. When interviewers asked the thirteen respondents why they did not complain, they mentioned the following reasons:

- One respondent said that it was “not a major concern”.
- Three respondents seemed to have little faith in the process, asserting, for example, that they “assume nothing can work for me”, that they are “used to sleeping in custody”, and that they know the procedures “cannot assist”.
- Three respondents did not know how to assert their rights or assumed they did not have enough information to do so, noting that they “[didn’t] know which agency to complain to”, “[didn’t] know names of police who abused me”, or “[didn’t] know where to go”.
- Six respondents did not take up complaints due to fear or insecurity, noting that if they pursued a complaint they would be “afraid [to] be arrested” (3) and that they had “no courage” or felt “shy”. One respondent acknowledged conflicting feelings toward police officers who were supposed to protect the public, but then acted out of self-preservation, stating that she was “afraid because sometimes [police] help me, [and I] don’t want to upset them”.

Individuals who want to report police abuse can report to the Malawi Police Service and the Office of the Independent Complaints Commission.³⁴⁶ Complaints can also be made to the Malawi Human Rights Commission or Ombudsman.³⁴⁷ It should be noted that these institutions are not widely accessible - the Malawi Human Rights Commission is based in Lilongwe and has limited resources to reach persons in the districts, whilst the Office of the Ombudsman is only located in Blantyre, Lilongwe and Mzuzu.³⁴⁸

When asked whether they would go to the police if they have been a victim of crime, twelve respondents said “yes”, and two said that they would not take a case to the police because they were afraid of the perpetrators of crime or afraid they would be harassed by police and not be taken seriously.³⁴⁹ These findings are unusual as the Malawi government’s baseline justice survey showed that only 18 percent of respondents had reported crime, citing lack of confidence in the police to deal with crimes reported, fear of embarrassment and police corruption.³⁵⁰

346 Provided for in the Police Act, 12 of 2010.

347 African Policing Civilian Oversight Forum *supra* note 308, 59.

348 UNDP (2012) *Assessment of the Legal, Regulatory and Policy Environment for HIV and AIDS in Malawi* (2012) 103.

349 Similar responses were reported elsewhere. See *Id* 106.

350 Government of Malawi/United Nations Development programme, *Malawi Justice Baseline Survey 2010* (2011) xiv, 118-120.

Conclusion

*Police do abuse us but we don't know where we can lodge complaints.*³⁵¹

*I would love to rather receive advice from police than be arrested.*³⁵²

*I would rather want the police to create a good relationship and not to abuse or harass us whenever they come across us.*³⁵³

*I feel that to us it's a trade and government simply has to legalise it because apart from this there is no other trade that helps ourselves sustain our lives it's just like any other trade.*³⁵⁴

Prevalence of Police Abuse of Sex Workers

Police abuse against sex workers is not limited to Malawi. Nicholls summarises some of the ethnographic studies of sex workers in which violence by police were reported: "Police are generally not the protectors of sex workers and there is evidence to suggest that some police officers exploit and victimise sex workers directly".³⁵⁵

Police's abuse of sex workers is not simply the result of the difficulties related to the enforcement of anti-prostitution laws, explained in the previous section. Police also exercise power on a more pervasive level when dealing with sex workers:

*As men dealing with women; as members of a higher socio-economic category (relative to women) dealing with those of a lower class (or caste); as law enforcers dealing with criminals, albeit petty criminals; as powerful men dealing with women made weak by lack of social support, the police used the tool-kit of public nuisance charges to exercise the many axes of power to prevent powerless women from behaving in ways considered morally offensive and a threat to the normative, and gendered, social order.*³⁵⁶

The extent to which police engage in the unlawful arrest and abuse of sex workers was recently brought to light in the South African court case of *SWEAT v The Minister of Safety and Security and Others*.³⁵⁷ The High Court judgment noted that the general method for dealing with sex workers seem to be that sex workers are arrested and detained overnight in police cells, where after they are taken to the magistrates' court cells, detained for a few hours and then released. The judge granted an interdict on the basis that "the reasonable inference to be drawn from the evidence before the court, is that arrests of sex workers by the South African Police Service and the City Police, without the required lawful object or purpose, namely to ensure the prosecution of the sex workers, will probably continue in the future".³⁵⁸ The court held that unlawful arrests violated the applicants' rights to dignity and security of person.

351 Interview with Anonymous Sex Workers 3 and 4 (22 June 2012).

352 Interview with Anonymous Sex Worker 8 (22 June 2012).

353 Interview with Anonymous Sex Worker 11 (22 June 2012).

354 Interview with Anonymous Sex Worker 14 (22 June 2012).

355 A Nichols "Dance Ponnaya, Dance! Police abuses against transgender sex workers in Sri Lanka" *Feminist Criminology* (2010) 5:195-222, 198.

356 M Biradavolu et al "Can sex workers regulate police? Learning from an HIV Prevention Project for Sex Workers in Southern India" *Social Science & Medicine* (2009) 68:1541-1547, 1546.

357 *SWEAT v The Minister of Safety and Security supra* note 325, Applicant's court papers.

358 *Id* at para. 53.

The Police Act of 2010 provides that one of the general functions of the police is to protect property and fundamental rights of the individual.³⁵⁹ Yet, women who engage in sex work to provide for their families generally have negative experiences with the police and the criminal justice system.

Using criminal laws against sex workers has created a culture of police abuse and corruption which is endemic to the police force. UNAIDS has noted that “there is very little evidence to suggest that any criminal laws related to sex work stop demand for sex or reduce the number of sex workers. Rather, all of them create an environment of fear and marginalisation for sex workers, who often have to work in remote and unsafe locations to avoid arrest of themselves or their clients.”³⁶⁰

The unlawful use of section 184 of the Penal Code to arrest women presumed to be sex workers is similarly problematic. UNAIDS notes that vagrancy laws “give police wide latitude to arrest and detain sex workers. Even if they do not generally result in long periods of detention, they contribute to an atmosphere of fear and marginalisation”.³⁶¹

Holding Police Accountable

UNAIDS has emphasised the need for governments to hold police accountable for the abuse and corruption perpetrated against sex workers. This includes ensuring access to legal services for sex workers, providing information to sex workers regarding the content and exercise of their rights and encouraging the formation of sex worker organisations.³⁶² It is further important for civil society organisations to work together to identify patterns of police abuse and develop concrete mechanisms to address it. Violence towards sex workers can be reduced where there is cooperation between law enforcement agencies, the judiciary, health services, sex workers organisations and other civil society groups.³⁶³ By working to establish an effective complaints mechanism, which would also require extensive outreach efforts to reach sex workers, non-profit organisations, supranational entities, and the Malawian government can together address one of the most basic reasons that police abuses persist: lack of accountability.

Promising Practices to Address Police Abuse of Sex Workers

Theatre for a Change (TFAC)

The Theatre for Change in Malawi seeks to challenge the adversarial model in which police and sex workers currently co-exist by facilitating mutual education and collaboration. The organisation has used a number of innovative approaches to the problem of police abuse:

- The organisation works with sex workers to provide them with knowledge of their rights, provide psycho-social support, and provide strategic referral to service providers. Sex workers who have been trained on their rights have felt empowered enough to complain to police when their colleagues have been arrested and to assert their rights.

359 Section 4(1) of the Police Act, 12 of 2010.

360 Annex to the *UNAIDS Guidance Note on HIV and Sex Work*, UNAIDS, April 2012, 4, http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2009/JC2306_UNAIDS-guidance-note-HIV-sex-work_en.pdf (last accessed: 2 June 2013).

361 *UNAIDS Guidance Note on HIV and Sex Work* (2012) 3, annexure 4.

362 *Id* annexure 7.

363 *Id* 13.

- The organisation documents cases of police abuse reported to them by sex workers.
- The organisation has held interactive theatre performances with senior police in Lilongwe to highlight the abuse faced by sex workers at the hands of police.
- The organisation supports a newly formed alliance of sex workers in Malawi.³⁶⁴
- The organisation has developed a referral system in collaboration with Victim Support Units (VSUs) in Lilongwe. Sex workers who experience abuse are encouraged to report cases to the VSUs instead of directly to police stations.³⁶⁵
- The organisation presents a regular radio programme on Zodiac Radio Station which airs personal stories of sex workers and provides space for police and sex workers to call into the programme. Guests to the radio programme include police officers and persons from organisations speaking about the services they offer and the need to report police abuse. Senior police have also encouraged police officers to tune into the radio programme when it is on air.
- The organisation facilitates police listeners clubs in all Lilongwe police stations, as well as listeners clubs for female sex workers. The listeners clubs are encouraged to take up initiatives in their local police stations and communities.
- The organisation further provides behaviour change programmes for police, including issues relating to HIV, human rights, gender-based violence and sex workers. Such sessions are attended by police officers three times per week over a two month period and trained sex workers and police officers are used as facilitators
- Some police officers at each police station in Lilongwe have been trained as trainers to ensure that the programme reaches more police officers.

Centre for Human Rights Education, Advice and Assistance (CHREAA)

CHREAA is currently implementing a project Called Protecting Sex Workers from Police Abuse. This project aims to provide redress for the sex workers who are abused at the hands of the police when arrested for nuisance-related offences. CHREAA has a toll-free number, 80000333 which the sex workers can call 24/7 whenever they have been abused by the police in any way in order to receive assistance. Apart from the number, the sex workers are encouraged through training and education materials to report such abuse directly to the nearest magistrate's court or Senior Police Officer and to CHREAA's offices for assistance.

Police Corruption

It is significant that Malawi has a range of laws which prohibit acts of bribery involving police officers. The Malawi Corrupt Practices Act, 17 of 2004 includes in the definition of a corrupt practice "the offering, giving, receiving, obtaining or soliciting of any advantage to influence the action of any public officer or any official or any other person in the discharge of the duties of that public official, or official or other person".³⁶⁶ The soliciting of a bribe in lieu of arrest is also prohibited by sections 90 to 92 of the Penal Code as a felony which attracts a sentence of five to twelve years. Section 125 of the Penal Code makes it an offence

364 A nation-wide alliance of sex workers in Malawi was formed on 7 November 2012 in Lilongwe with the support of the Pakachere Institute of Health and Development Communication (PIHDC), Theatre for a Change and the UNFPA. See "Malawi Sex Workers [to] Form Alliance" *Nyasa Times* (25 October 2012), <http://www.nyasatimes.com/malawi/2012/10/25/malawi-sex-workers-fo-form-alliance/> (last accessed: 2 June 2013).

365 In a focus group discussion with sex workers from Lilongwe they reported that they received good treatment from the VSUs. UNDP *supra* note 348, 98.

366 Anti-Corruption Bureau of Malawi, <http://www.anti-corruptionbureau.mw/about/definition-of-corruption/> (last accessed: 2 June 2013).

to solicit a public officer not to carry out his duties, attracting a five year sentence. Police officers can also be charged for bringing the uniform in contempt in terms of section 191(2) of the Penal Code.

The research conducted for this report shows that sex workers are resigned to the fact of corruption by police officers. Similarly, the Malawi Governance and Corruption Survey of 2010 noted that a number of citizens (25%) and public officials (22%) had observed corrupt acts but did not report them.³⁶⁷

The Malawi governance and corruption survey noted that public officials rated low salaries as a significant factor causing public sector corruption.³⁶⁸ The link between police bribery of sex workers and low salaries has also been noted in other countries.³⁶⁹ This was confirmed in interviews with the police who noted that the general conditions of service of police were so poor that their salary was insufficient to meet their cost of living requirements.³⁷⁰ For Gould, this problem is reinforced by the criminalisation of sex work which “creates conditions within which police corruption and abuse are not only possible, but almost inevitable”.³⁷¹

Decriminalisation of Sex Work-Related Activities

*Decriminalising sex work does not mean encouraging it, but it would rather pave way for policies that protect those who have been forced into the trade... They will be able to report men who forcibly put them at risk of contracting the virus, and in turn men who seek their services will no longer abuse them as might be the situation now.*³⁷²
Festus Mogae, Head of Botswana National AIDS Council

Addressing Common Misconceptions

Discussions in this report about decriminalisation refer to consensual adult sex work and accordingly do not address issues related to child prostitution and trafficking, for which criminalisation is the only legal option. Child prostitution and trafficking are both coercive and exploitative, which makes them criminal and distinguishes them from consensual adult commercial sex work. The authors argue that, as long as consensual adult commercial sex work remains illegal, it provides the space for criminals to engage in child prostitution and trafficking without fear of persecution – this is because the sex industry operates largely underground, and because sex workers, who witness these crimes, are not able to report them for fear of persecution by the police or criminals.

Discussions on laws criminalising sex work are often informed by arguments on morality. Morality is in fact a complex issue and criminal laws are seldom an appropriate avenue for

367 B Chinsinga et al *Final Report of the Governance and Corruption Survey 2010*, Centre for Social Research, University of Malawi, 13.

368 *Id* Figure 12.

369 Biradavolu studied the policing of sex work in a town in southern India during 2006 where sex workers were usually charged under public nuisance laws. Biradavolu paints the picture of a poorly paid police force who often bribes sex workers in exchange for avoiding arrest. Biradavolu *supra* note 356, 1544. See also J Steinberg *Thin Blue: Unwritten Rules of Policing South Africa* (2008) 107.

370 Interview with Kayira and Kainja *supra* note 264.

371 C Gould *Selling sex in Cape Town: Sex Work and Human Trafficking in a South African City*, Institute of Security Studies (2008), 61.

372 “In conservative Botswana, a push to legalise prostitution”, *The Citizen*, 8 November 2011, <http://www.citizen.co.za>.

addressing issues relating to sexual morality. The main “morality” arguments in favour of a continued criminalisation of sex work are that sex work attacks the institution of marriage and encourages extra-marital sex and sex outside relationships. No research substantiates these arguments and sexual relationships outside marriage exist irrespective of sex work. These arguments reflect a particular form of ‘morality.’ It can be argued that the denial of basic human rights to a specific group of persons and leaving them vulnerable to exploitation as a result of continued criminalisation of sex work is also immoral.

Legal Approaches to Sex Work

Malawi follows a legal approach of partial criminalisation. Whilst neither the selling nor buying of sex is criminalised, the activities related to sex work are criminalised in Malawi. This is the legal situation throughout southern Africa, excluding South Africa. Since activities of living off the earnings, procurement, brothel keeping and soliciting are criminalised in Malawi, sex work in practice still takes place in a largely criminalised environment and sex workers remain a target of police enforcement.

Legal approaches to sex work

- Total criminalisation – The selling and buying of sexual services and all related activities are criminalised.
- Partial criminalisation – The buying of sexual services and some/all related activities are criminalised.
- Non-criminalisation/Decriminalisation – The selling and buying of sexual services and all related activities are decriminalised. Apply existing laws to sex work including labour laws and business regulations.
- Legalisation – The selling and buying of sexual services and some/all related activities decriminalised under certain conditions but sex work is subject to state regulation.

There have been various studies on the impact of partial criminalisation on sex workers. For example, sex work itself is not criminalised in Canada, but all related activities are. Research conducted by Professor John Lowman on the impact of the criminal laws in Canada, found that:³⁷³

- It contributes to legal structures that tend to make sex workers responsible for their own victimisation, whereby sex workers are seen to “deserve what they get”;
- It makes prostitution part of an illicit market and creates an environment in which brutal forms of manager-exploitation can take root;
- It encourages the convergence of prostitution with other illicit markets, such as the drug market;
- It institutionalises an adversarial relationship between sex workers and police and thus deprives sex workers of the full protection of criminal law when victims of crime;
- It leads to social and political marginalisation of sex workers and makes them targets for violence;
- It increases the isolation of street-based sex workers and increases their health and safety risks; and
- It has not suppressed street-based prostitution in most cities.

373 J Lowman “Violence and the Outlaw Status of (Street) Prostitution in Canada” *Violence Against Women* (2000) 6(9): 987-1011.

Other research in Canada has shown that criminal law penalises sex workers for trying to earn a living.³⁷⁴ Research has also shown that moving indoors increases sex workers' safety and the decriminalisation of indoor sex work is accordingly an important measure to ensure the health and safety of sex workers.³⁷⁵

Decriminalisation refers to an approach where no specific laws criminalise consensual adult sex work and related activities. Normal labour laws apply to sex work where sex workers work for an employer. In a decriminalised situation, child prostitution, trafficking and coerced prostitution remain criminalised. An example of a decriminalised approach to consensual adult sex work is New Zealand. Governments can also develop specific measures or guidelines to protect the rights and welfare of sex workers in consultation with sex workers. Specific prostitution supervisory bodies can be used to review the operation of legislation; advise government; develop regulations; provide information to sex workers; and develop exit strategies.

The UNAIDS and Inter-Parliamentary Union in their Handbook for Legislators on HIV/AIDS, Law and Human Rights³⁷⁶ recommend that sex workers' rights should be protected under occupational health and safety legislation and that HIV testing should not be mandatory for sex workers or clients.

Criminalisation of Sex Work-Related Activities and HIV

The criminalisation of sex work has a direct impact on the transmission of HIV in two ways:

- It impacts on sex workers' access to health services, including sexual and reproductive health and family planning services, and
- It creates the conditions for increased violence against sex workers and limits their ability to protect themselves from HIV infection.

Guideline 4 of the UNAIDS International Guidelines on HIV/AIDS and Human Rights states that criminal law should not impede provision of HIV prevention and care services to sex workers and their clients.³⁷⁷

The Committee on the Elimination of Discrimination Against Women (CEDAW) in its General Recommendation 24 on Women and Health advised that special attention should be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups, including women in prostitution. The Recommendation requires States to ensure without prejudice or discrimination the right to sexual health information, education and services to all women.³⁷⁸

374 G Benoit & A Millar *Dispelling Myths and Understanding Realities: Working Conditions, Health Status and Exiting Experiences of Sex Workers* (2001).

375 A Krüsi et al "Negotiating Safety and Sexual Risk Reduction With Clients in Unsanctioned Safer Indoor Sex Work Environments: A Qualitative Study" *American Journal of Public Health* (2012), <http://www.cfenet.ubc.ca/news/releases/safer-sex-work-spaces-reduce-violence-and-hiv-risks-street-involved-women> (last accessed: 2 June 2013).

376 UNAIDS *Handbook for Legislators on HIV/AIDS, Law and Human Rights* (1999) http://www.ipu.org/PDF/publications/aids_en.pdf (last accessed: 2 June 2013).

377 UNAIDS *International Recommendations on HIV/AIDS and Human Rights* (2006) http://data.unaids.org/Publications/IRC-pub07/jc1252-internguidelines_en.pdf (last accessed: 7 June 2013).

378 CEDAW *General Recommendation No. 24: Article 12 of the Convention (Women and Health)* (1999), A/54/38/Rev.1 <http://www.refworld.org/docid/453882a73.html> (last accessed: 7 June 2013).

Section 19 of Malawi's new Gender Equality Act of 2013, recognises the importance of access to sexual and reproductive health services, including every person's right to access sexual and reproductive, family planning and STI services. Section 20(1) of the Act requires that health officers respect the sexual and reproductive health rights of every person without discrimination and respect the dignity and integrity of every person accessing sexual and reproductive health services.

Research has shown that the loss of control over working conditions as a result of criminalisation exacerbates sex workers' risk of exposure to HIV.³⁷⁹ In countries like Sweden, South Africa, South Korea, United States, China and Canada, where sex work or related activities are criminalised, research has shown that this impacts on sex workers who fear carrying condoms will be used as evidence against them.³⁸⁰ In contrast, research has shown that better public health outcomes occur when sex work is decriminalised and health promotion and outreach programmes are properly resourced.³⁸¹ A study conducted in Kenya and the Ukraine noted an approximate 25 percent reduction in the incidence of HIV infections among female sex workers when physical or sexual violence was reduced.³⁸²

Thus, instead of using criminal law, the UNAIDS Advisory Group on HIV and Sex Work concluded that "effective approaches to HIV prevention in the context of sex work are those that recognise the realities of sex work and enable sex workers to protect themselves from the risk of HIV transmission".³⁸³ This includes increasing awareness of risk prevention among the general population, including sex workers; increasing access to male and female condoms and water-based lubricants; and ensuring that treatment, care and support services are accessible to sex workers, who are often dissuaded from accessing health services due to stigma and discrimination.³⁸⁴

In conclusion, ample evidence exists linking the partial-criminalisation of sex work with unlawful police practices and police corruption. Whilst improved anti-corruption measures and human rights training of police might help, it is unlikely that such practices, which are prevalent in many jurisdictions where sex work is criminalised, will be eradicated in the current legal context.

379 Pivot Legal Society, *The impact of criminalisation on the health status of sex workers* (2004).

380 Lee & Yung, "The Correlation Between New Prostitution Acts and Sexually Transmitted Diseases in Korea" *The Korean Journal of Policy Studies* (2009) 24(1) 111-125; PROS Network and Leigh Tamppert (Sex Workers Project), *Public health crisis: the impact of using condoms as evidence of prostitution in New York City* (2012), <http://sexworkersproject.org/downloads/2012/20120417-public-health-crisis.pdf> (last accessed: 2 June 2013); Dodillet & Ostergen, *The Swedish Sex Purchase Act: Claimed Success and Documented Effects* (2011).

381 B Donovan et al, "The sex industry in New South Wales" *Report to the NSW Ministry of Health, Kirby Institute for Infection and Immunity in Society* (2012) www.kirby.unsw.edu.au (last accessed: 2 June 2013).

382 MR Decker et al, "Estimating the Impact of Reducing Violence Against Female Sex Workers on HIV Epidemics in Kenya and Ukraine: A Policy Modelling Exercise" *American Journal of Reproductive Immunology* 69 (Supp. 1) (2013) 122-132, 122. The authors in the article note that violence cannot directly cause HIV but "it influences risk through a complex set of proximal factors such as unprotected sex", 123.

383 Annex to the *UNAIDS Guidance Note on HIV and Sex Work*, UNAIDS (2012) 4, http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2009/JC2306_UNAIDS-guidance-note-HIV-sex-work_en.pdf (last accessed: 2 June 2013).

384 *Id.*

8. Vagrancy Laws and Touts

In 2006 the Malawi Government decided to prohibit the practice of being a minibus tout. This chapter notes that touts continue to be arrested by police. The authors argue that funnelling touts through the criminal justice system is not a sustainable solution to the problems associated with touting including theft or pick-pocketing. Additional research is required to determine the rationale behind and impact of this prohibition.

Introduction

Minibuses are a familiar sight in many African cities, where they are cheaper and more accessible than traditional public transport systems. Much can be written about the minibus industry, the need for tighter regulation and the challenges faced by employees and users of minibus services.

Minibus-calling is an informal income-generating activity in urban areas in Malawi. “Touts” (or minibus “callboys”) earn money by attracting passengers to board minibuses. Touts typically work for an informal employer or individual who retains a portion of the money they earn.

Despite the prevalence of this activity, however, little information exists about the extent to which touts currently operate in Malawi, though there is some general evidence regarding the ways in which touts have historically functioned. Touts, for example, are traditionally paid by a minibus conductor the amount equivalent to the minibus fare of one passenger per trip.³⁸⁵ The minibus industry has traditionally been highly competitive, with minibus owners benefitting from the use of touts to secure passengers. There have been reports that minibus touts initially organised themselves into informal associations charged with disciplining members who stole from passengers or engaged in illegal activity.³⁸⁶

In January 2006, the Malawian government declared minibus-calling illegal, asserting that it violated various municipal by-laws.³⁸⁷ The offence of touting has its origins in English law,

385 R Tambulasi & H Kayuni “Can the State Perpetuate the Marginalisation of the Poor? The Socio-Economic Effects of the State’s Ban on Minibus ‘Callboys’ in Malawi” (2008) 25(2) *Development Southern Africa* 220. See also S Chirombo, “Passengers should stand firm for minibus fares – PAWA, Malawi News Agency, 16 November 2012 <http://www.manoonline.gov.mw/index.php/business/item/1213-passengers-should-stand-firm-to-fight-for-minibus-fares-pawa> (last accessed: 2 June 2013).

386 Tambulasi & Kayuni *supra* note 385, 221.

387 *Id* 215.

where it dealt with soliciting of customers for unlicensed taxis – in contrast, the offence in Malawi is aimed at the act of soliciting or pestering potential clients, without an inquiry into the validity of the licence of the minibus itself.³⁸⁸ In Malawi, the offence of touting is now contained in section 8B of the Road Traffic Act, Road Traffic (Construction, Equipment and Use) Regulations.³⁸⁹ Section 8B provides that “no owner, member of the crew or any passenger acting on behalf of the owner, member of the crew or on his own behalf on a public service vehicle shall make any noise or sound any instrument in order to attract the attention of the public or of a possible manager, or by troublesome or frequent demands, or by persistent following, hold out the vehicle for hire to the public, or attempt to induce any person to become a passenger therein.” The Act similarly prohibits the “harass[ment of] a passenger or a member of the crew of a public service vehicle.”³⁹⁰ The terminology used in sections 8B and 8C seem to target the persistent, noisy or harassing behaviour involved in touting. The use of the word “induce” in section 8B similarly suggests behaviour which seeks to tempt or persuade a person to get into one minibus as opposed to another. The manner in which the sections are framed clearly indicates that it was targeted against competitive behaviour which sought to engage customers in a direct and persistent manner. However, there might be forms of touting that are less confrontational and encourage customers to use a minibus, which might not be categorised as persistent, annoying, noisy or harassing. Because the heading of section 8B states that “touting is prohibited” it appears that such behaviour would also fall foul of section 8B.

Procedurally, police appear to also act on the touting ban by charging suspected touts under sections 180 and 184 of the Malawi Penal Code, which respectively address the offence of being an idle and disorderly person and the offence of being a rogue and vagabond.³⁹¹

The prohibition of touting in Malawi was welcomed by some members of the community associating touts with disorder and theft, and by minibus owners feeling that their profits were drained by touts.³⁹² Passengers have also complained that the presence of touts tends to escalate the cost of minibus fares.³⁹³

Research conducted on the subject of touting in Zomba and Blantyre in 2007 revealed that touts were often marginalised young men struggling to obtain employment due to low levels of education.³⁹⁴ Touts interviewed by Tambulasi and Kayuni indicated that they had previously received income as thieves, beggars, small-scale vendors, subsistence village farmers or houseboys, but had not been able to earn a sustainable living from these activities.³⁹⁵ Touts described their work as providing a stable income, assisting them in their attempts to feed and support the education of their dependants.³⁹⁶ The touting ban reportedly had a negative impact on their economic viability of the young men who practiced

388 Promoting Pre-trial Justice in Africa “Glossary of Criminal Offence Terms” <http://ppja.org/ppja-publications/glossary-unusual-criminal-offence-terms> (last accessed: 2 June 2013).

389 Section 8B of the Malawi Road Traffic Act, Road Traffic (Construction, Equipment and Use) Regulations G.N. 18/2000, 40/2004.

390 *Id* section 8C.

391 Section 180 and 184 of the Malawi Penal Code.

392 Tambulasi & Kayuni *supra* note 385, 222.

393 Chirombo *supra* note 385.

394 Tambulasi & Kayuni *supra* note 385, 218.

395 *Id* 219.

396 *Id* 221.

touting, exacerbating their social vulnerability.³⁹⁷ After the ban, some touts reported that they continue the trade illegally, accepting that they would be arrested or required to bribe police officers. Some former touts reported that they now resorted to other illegal activities like theft, begging, loitering or charcoal-making.³⁹⁸

Police Arrest Practices Relating to Touts in Blantyre

Notes on Methodology

Paralegals for the Centre for Education, Advice and Assistance (CHREAA) in Blantyre conducted quantitative research at several police stations in order to determine the extent to which police arrest individuals for nuisance-related offences. In particular, CHREAA researchers sought to understand the frequency and effect of police efforts to utilise sections 180 and 184 of the Penal Code. The research was conducted from 1 May to 5 September 2012 using datasheets to collect information from police registers and conversations with suspects in police cells. During the collection of information on section 180 and 184 arrests, the researchers also documented a number of arrests for “touting” in terms of section 8B of the Road Traffic (Construction, Equipment and Use) Regulations. Such arrests were not the main focus of the study and the results described below are accordingly of a preliminary nature.

Research Findings

Researchers identified a total of 24 cases of touting arrests in Blantyre police station records during the research period. Researchers further identified a total of seven recorded cases of arrests for touting in Limbe police station records from May to June 2012. For one of the June arrests in Limbe, the suspect had been arrested for touting but was charged under section 184. This suggests an inconsistency in the operationalisation of the touting ban, with the police using section 184 as a default when uncertain about an offence.

All of those arrested in Limbe for touting were male, and all but one of those touting suspects arrested in Blantyre were male. This suggests that touting as a predominantly male occupation.

As indicated in the chart below, the ages of individuals arrested in Blantyre and Limbe for touting ranged from seventeen to 35 years.

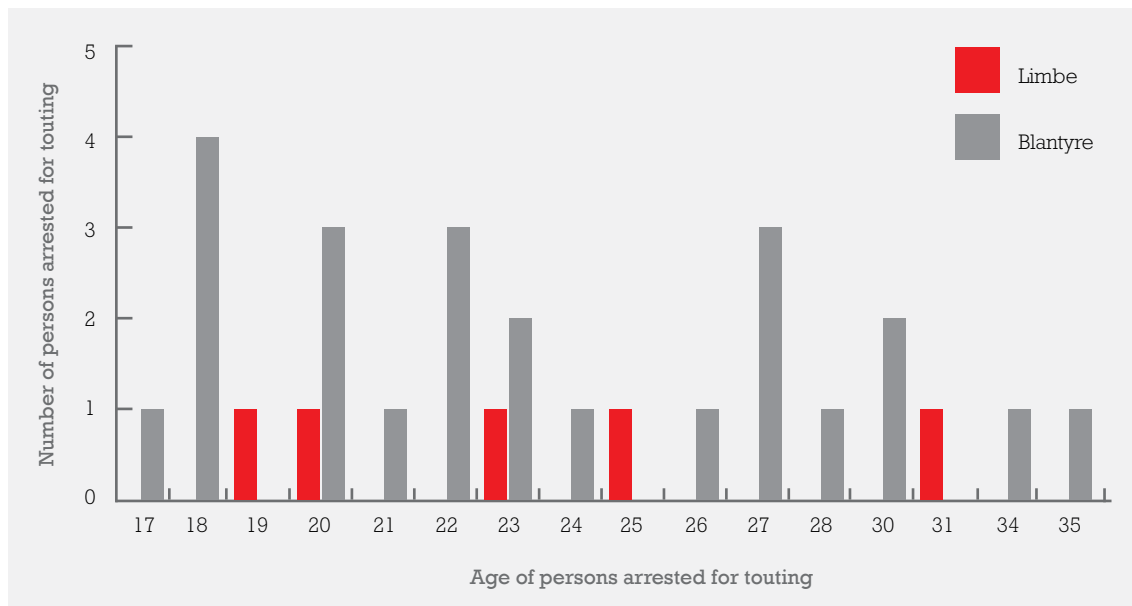
It is concerning that those arrested for touting sometimes spent at least one night in custody before their release. Of the eleven individuals still in custody when researchers visited the police station, indeed, five had spent at least one night in custody:

- At Limbe police station, a person arrested on 13 June 2012 for touting was still in custody on 14 June 2012;
- At Blantyre police station –
 - Two persons who were arrested in the afternoon on 15 May 2012 for calling passengers, were still in custody the next day;
 - One person arrested at 8am on 16 May 2012 for touting was still in custody on 17 May 2012; and
 - One person arrested at 11am on 4 July 2012 for touting was still in custody on 5 July 2012.

397 *Id* 223.

398 *Id* 223-5.

Chart 7: Ages of Persons Arrested for Touting:



The police's use of detention in the context of rather typical, low-level, non-violent offences, suggests that the use of arrest as a last resort is not respected.

Researchers also observed detainees' socio-economic circumstances, which further suggested the vulnerable situation of touts, whose profession has now been rendered illegal in Malawi. Of ten suspects in custody at Blantyre police station when visited during the research, eight were married, and seven had children; detention obviously had a negative impact on dependants of touts in custody. Furthermore, six suspects admitted to having been previously arrested on a similar charge, indicating that criminalisation of touting may not have a deterrent impact, but rather consume valuable police time and resources. Finally, eight detainees noted that they did not have access to a lawyer, though most of those detained had had a statement recorded by police, and were able to identify someone able to act as a surety for them. As such, the law appears to disproportionately impact low-income individuals without access to legal resources or the ability to post bail, indicating that the law in its application may threaten the availability of due process without regard to wealth or status.

Conclusion

Six years after the banning of minibus touting, it is clear that the activity persists despite its recently proclaimed illegality. Funnelling touts through the criminal justice system is not a sustainable solution to the problems associated with touting. Whilst it might seem a tempting solution, it is not an efficient or effective response to the problems of theft or pick-pocketing. By contrast, existing laws merely target an already-marginalised group of persons for arrest, deprive them of their only source of income and fail to address the concerns motivating the legislation in the first place.

Critics of the touting ban further note the government's failure to facilitate access to viable income-generating alternatives for those who were engaged in this work.³⁹⁹ Observers recommend that the government should instead have tried to find way to better regulate the activity of touting, which would likely have been a more effective way of dealing with the problems associated with the industry.⁴⁰⁰

Promoting Pre-trial Justice in Africa (PPJA) has noted that, given the harsh conditions in detention, touting might be better dealt with through other interventions than criminalisation and imprisonment.⁴⁰¹

This research report focuses primarily on the police and courts' use of sections 180 and 184 of the Penal Code. Arrests based on formal charges of touting under the Road Traffic Regulations were noted by paralegals, but the rationale for these arrests was not interrogated in interviews with police or magistrates.

Additional research is required to assess the extent to which the Road Traffic Regulations pertaining to touting are implemented and the effect this has had on the practice of touting and those involved in this sector.

399 *Id* 225.

400 Interview with Kayira *supra* note 193; see also Tambulasi & Kayuni *supra* note 385, 225.

401 Promoting Pre-trial Justice in Africa *supra* note 388.

9. Arrest and Detention

From the research findings outlined in Chapters 5 to 8, it is clear that the manner in which persons are arrested for minor nuisance-related offences in practice is often not in line with the legal requirements for a lawful arrest. In this chapter we outline some of the legal requirements which should be present for an arrest to be lawful and discuss the specific concerns relating to persons who are arrested for nuisance-related offences but never charged.

Introduction

The preceding chapters have identified a number of areas of concern relating to the arrest of persons for nuisance-related offences:

- Persons continue to be arrested for conduct which does not comply with the offence with which they are charged. For example, the arrest of touts under section 184 or the arrest of intoxicated persons under section 180 instead of section 183.
- The fact that persons arrested for nuisance-related offences are often released immediately after their arrest, suggests that there was often no probable cause for the arrest and no intention to pursue the case judicially at the time when the arrest was made. This appears to be an abuse of arrest procedures.
- Arrest and detention is often not proportionate to the conduct of the person arrested. For example, arresting someone for public urination.
- Persons continue to be detained for longer than a day for what is a very minor offence.
- Arrests at night tend to disproportionately target the poor.
- Sweeping exercises risk arrests without proper procedures or probable cause for arrest.
- Alternatives to arrest such as cautioning, public awareness, communication and counselling would often be a more appropriate response to minor nuisance-related offences.
- In the case of children who have been arrested and detained a range of provisions in the Child Care, Protection and Justice Act are sometimes ignored. For example, providing children with nutritious food and counselling; separating them from adults and not using handcuffs; treating them with dignity and taking account their age.
- Section 184 is often used to arrest sex workers when their conduct did not fall within the terms of section 184. This practice continues despite the High Court in Malawi having cautioned against this.

- Sex workers report that during arrest police would rape or assault them, steal from them and solicit bribes.
- Conditions in detention often do not comply with international standards, including being unhygienic, lack of food, risk of transmission of diseases due to overcrowding and lack of hygiene, and cold.

These concerns highlight the myriad of problems that arise when police use their powers of arrest in practice.

Summary of the Laws Relating to Arrest and Detention

The law relating to arrests and detention can be found in the Malawi Constitution, 1995, the Criminal Procedure and Evidence Code as amended in 2010, the Penal Code, as amended in 2010 and the Police Act, 12 of 2010.

Constitution

The Malawi Constitution entrenches a range of rights relating to arrests:

- The right to respect for human dignity;⁴⁰²
- The right not to be subjected to cruel, inhuman or degrading treatment or punishment;⁴⁰³
- The right to freedom and security of person, which shall include the right not to be detained without trial;⁴⁰⁴
- The right to be recognised as a person before the law;⁴⁰⁵ and
- The various rights pertaining to arrested and detained persons.⁴⁰⁶

Rights of Arrested Persons in terms of the Malawi Constitution

Section 42(1) provides that every person who is detained shall have the right:

- a.) “to be informed of the reason for his or her detention promptly, and in a language which he or she understands;
- b.) to be detained under conditions consistent with human dignity, which shall include at least the provision of reading and writing materials, adequate nutrition and medical treatment at the expense of the State;
- c.) to consult confidentially with a legal practitioner of his or her choice, to be informed of this right promptly and, where the interests of justice so require, to be provided with the services of a legal practitioner by the State;
- d.) to be given the means and opportunity to communicate with, and to be visited by, his or her spouse, partner, next-of-kin, relative, religion counsellor and a medical practitioner of his or her choice;

402 Section 19(1) of the Malawi Constitution.

403 Section 19(3) of the Malawi Constitution.

404 Section 19(6) of the Malawi Constitution.

405 Section 41(1) of the Malawi Constitution.

406 Section 42 of the Malawi Constitution.

- e.) to challenge the lawfulness of his or her detention in person or through a legal practitioner before a court of law; and
- f.) to be released if such detention is unlawful.”

Section 42(2) provides that every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right:

- a.) “promptly to be informed, in a language which he or she understands, that he or she has the right to remain silent and to be warned of the consequences of making any statement;
- b.) as soon as it is reasonably possible, but not later than 48 hours after the arrest, or if the period of 48 hours expires outside ordinary court hours or on a day which is not a court day, the first court day after such expiry, to be brought before an independent and impartial court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be released;
- c.) not to be compelled to make a confession or admission which could be used in evidence against him or her;
- d.) save in exceptional circumstances, to be segregated from convicted persons and to be subject to separate treatment appropriate to his or her status as an unconvicted person;
- e.) to be released from detention, with or without bail unless the interests of justice require otherwise;
- f.) as an accused person, to a fair trial, which shall include the right –
 - i. to public trial before an independent and impartial court of law within a reasonable time after having been charged;
 - ii. to be informed with sufficient particularity of the charge;
 - iii. to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;
 - iv. to adduce and challenge evidence, and not to be a compellable witness against himself or herself;
 - v. to be represented by a legal practitioner of his or her choice or, where it is required in the interests of justice, to be provided with legal representation at the expense of the State, and to be informed of these rights;
 - vi. not to be convicted of an offence in respect of any act or omission which was not an offence at the time when the act was committed or omitted to be done, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;
 - vii. not to be prosecuted again for a criminal act or omission of which he or she has previously been convicted or acquitted;
 - viii. to have recourse by way of appeal or review to a higher court than the court of first instance;
 - ix. to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her, at the expense of the State, into a language which he or she understands; and
 - x. to be sentenced within a reasonable time after conviction.

Criminal Procedure and Evidence Code

The Criminal Procedure and Evidence Code has been amended by Act 14 of 2010 to provide for increased protection of persons who have been arrested.

Section 20 of the Criminal Procedure and Evidence Code prohibits the use of greater force than was reasonable to apprehend a suspect.

Section 20A provides that an arrest is unlawful where the person arrested was not informed of the reason for the arrest at the time of, or as soon as practicable after, the arrest.⁴⁰⁷ In addition, section 20A(6) provides that, once a person is arrested, “the police officer shall promptly inform him that he has the right to remain silent, and shall warn him of the consequences of making any statement”.

Section 26, which was amended by Act 14 of 2010, requires that, where necessary to search a woman, a search must be made by another woman and with strict regard to decency and the powers to search do not authorise police to require a person to remove clothes in public.

Section 28 provides for those circumstances under which a police officer may arrest a person without a warrant, including any person whom he suspects upon reasonable grounds of having committed an arrestable offence, a person who commits breach of peace in his presence, and any person whom he finds lying or loitering in any highway, yard or place during the night and whom he suspects upon reasonable grounds of having committed or being about to commit a felony; and any person who is about to commit an arrestable offence or whom he has reasonable grounds of suspecting to be about to commit an arrestable offence. It is important that police are appropriately trained to assess what would amount to “reasonable grounds” in this section. It is unfortunate that police arrest persons even if they have not committed a felony or arrestable offence as required by the section.

In terms of section 29(a), a police officer may arrest “any person within the limits of such station who cannot give a satisfactory account of himself.” It is encouraging that this section was amended by Act 14 of 2010 which removed reference to “no ostensible means of subsistence”. This suggests that the legislature is increasingly aware of the problems relating to such a provision, and it is hoped that this will eventually lead to the repeal of section 184(b) of the Penal Code.

Section 31 has been amended to deal with non-arrestable offences. The section now allows a police officer to arrest someone for a non-arrestable offence if the person refuses to give his or her name or residence or if the officer has reason to believe that the person would not be found.

Section 32 was amended by Act 14 of 2010 and provides that a police officer making an arrest without a warrant shall, without reasonable delay and in any event within 48 hours, take or send the person arrested before a magistrate or traditional or local court having jurisdiction in the case. Section 32A has been inserted to provide that the police may caution and release an arrested person. Section 32A(4) provides that a police officer must, when exercising his or her discretion to caution and release an arrested person, bear in mind the following: the petty nature of the offence, the circumstances in which it was committed, the views of the victim or complainant, and personal consideration of the arrested person, including age or physical and mental infirmity. Section 32A(5) provides that the Chief Justice may issue guidelines to police on the exercise of the power to caution and release.

407 This section was inserted by Act 14 of 2010.

Section 35 provides that where a person has been arrested without a warrant, he must either be brought to a court within 48 hours, or released on police bail, or released by the police officer in charge of the station when after due police inquiry, insufficient evidence is disclosed on which to proceed with the charge.

Bail (Guidelines) Act

The Bail (Guidelines) Act, 8 of 2000 deals with the circumstances in which bail is granted. It provides that a senior police officer must release someone unconditionally where it appears that there is insufficient evidence.

Child Care, Protection and Justice Act

Part III of the Child Care, Protection and Justice Act, 22 of 2010 deals with the arrest and detention of children suspected of having committed offences. These provisions are dealt with in more detail in Chapter 6.

Are Persons Arrested for Nuisance-Related Offences Falling Through the Cracks?

International law permits detention before a trial for limited circumstances only. A key principle is that pre-trial detention may be ordered only if there are reasonable grounds to believe that a person was involved in the commission of the offence and that there is a danger of the person absconding or committing further serious offences and that the course of justice will be jeopardised if the person is released.⁴⁰⁸ Based on the UN Standard Minimum Rules for Non-Custodial Measures, pre-trial detention should be used as last resort only, for the shortest time period necessary and should be administered with respect for the inherent dignity of the person detained.

The fairness and equity of the criminal justice system has often been brought into question because pre-trial detainees are more likely to be poor and unable to afford a legal representative or bail.⁴⁰⁹ Many pre-trial detainees will eventually be released or convicted of a minor sentence which does not carry a prison sentence, a clear indication that their detention was without cause. The negative impact of pre-trial detention on public resources, detainees, and their families has also been well documented.⁴¹⁰ There is increasing recognition at a regional and international level that the decriminalisation of minor offences such as loitering or vagrancy would assist in reducing the number of pre-trial detainees.⁴¹¹ In some instances, the costs incurred in employing reactive penalisation measures outweigh the costs that would be incurred in developing measures to prevent nuisance-related behaviour.⁴¹²

Malawi has made significant progress in dealing with the problems relating to pre-trial detention - e.g. the Criminal Procedure and Evidence Code has been amended by Act 14 of

408 Principle established at the 8th UN Congress on Prevention of Crime and Treatment of Offenders, Havana, 1990 and included in the UN Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules), adopted by the General Assembly 14 December 1990.

409 M Shaw "Reducing the Excessive Use of Pre-Trial Detention" *Justice Initiatives*, Open Society Justice Initiative, (2008), 1-10, 2. *Report by Special Rapporteur on Extreme Poverty and Human Rights supra* note 1, 19-20.

410 M Schönsteich "The scale and consequences of pre-trial detention around the world" *Justice Initiatives*, *Open Society Justice Initiative* (2008), 11-43.

411 Open Society Foundations *Pre-trial Detention and Torture: Why Pre-Trial Detainees Face the Greatest Risk*, A Global Campaign for Pre-trial Justice Report (2011), 13.

412 *Report by Special Rapporteur on Extreme Poverty and Human Rights supra* note 1, 8.

2010 to include a range of pre-trial custody time limits, which will greatly assist in caseflow management and a reduction in prison overcrowding.⁴¹³

Significantly, arrested persons who have not yet appeared in front of a judicial officer for determination on whether to be released or detained awaiting trial are generally not included in the definition of pre-trial detainees.⁴¹⁴ Thus, all those persons who have been arrested for nuisance-related offences, detained at a police station and subsequently released, often fall outside the ambit of discussion on the challenges relating to pre-trial detention. The period between arrest and when a person is brought before the court for the first time should be less than two days, but is sometimes much longer. There is little information about the number of days spent in detention by this group of persons before they were released or charged. Similarly, for this report researchers found the data on when persons arrested for nuisance-related offences were released to be incomplete. It is hoped that section 32A of the Criminal Procedure and Evidence Code which allows for the caution and release of arrested persons will reduce the time spent in custody for minor nuisance-related offences.

However, even if detention was only for a short period, the harm done to the individual and his or her family is unacceptable. An Open Society Initiative for Southern Africa (OSISA) survey of five police stations in 2010 noted that police stations provided little or no food to persons in custody, and conditions are often unhygienic and hazardous.⁴¹⁵ The burden that such arrests place on families who have to spend scarce resources to visit the police station, bring food and pay bail is not acknowledged.⁴¹⁶ Such families and detainees often have no information on when the person will be brought before court or released. In essence, persons arrested for nuisance-related offences are treated as if they are guilty and their detention serves as punishment, even though they have not been formally charged or brought before a court. The conditions in custody also sometimes lead to a person pleading guilty so that they can be released even if they did not commit an offence.

In such circumstances, the use of paralegals who visit persons who are in police custody are invaluable.⁴¹⁷ Such paralegals are often the only ones who can insist on the person's release if they have been detained for more than 48 hours or who can facilitate contact between them and their families.⁴¹⁸ The presence of paralegals at a police station could also act as a deterrent for the abuse perpetrated against persons in custody by police.⁴¹⁹ Due to the high rate of pre-trial detention in Malawi, the needs of persons arrested for minor offences who are likely to be released the same or following day are not prioritised. It is accordingly important to also focus on changing the police practice of arresting persons for minor nuisance-related offences and considering alternatives to arrest. This is discussed in more detail in the following chapter.

413 Sections 161A-J of the Criminal Procedure and Evidence Code.

414 Schönteich *supra* note 410, 12.

415 L Muntingh "Survey of conditions in detention in police cells" in Open Society Initiative of Southern Africa (2011) *Pre-trial Detention in Malawi: Understanding Caseflow Management and Conditions of Incarceration*, 52-65.

416 African Policing Civilian Oversight Forum *supra* note 308, *Report by Special Rapporteur on Extreme Poverty and Human Rights* *supra* note 1.

417 Plan of Action of Ouagadougou Declaration on Acceleration of Prison and Penal Reforms in Africa (2002).

418 C Msiska (2008) "On the Front Lines: Insights from Malawi's Paralegal Advisory Service" *Justice Initiatives*, Open Society Justice Initiative (2008) 70-85.

419 *Id* 80.

The use of Court User Committees (CUC) in districts in Malawi to discuss challenges experienced by different stakeholders with the criminal justice system, provides an important opportunity for paralegals and organisations to raise concerns about unnecessary police arrests for minor nuisance-related offences.⁴²⁰

Conclusion

It is of concern that persons who are arrested unlawfully are not aware of their rights and continue to “suffer in silence”.⁴²¹ One of the roles of the Community Policing Section of the Malawi Police Service is to inform community members about their rights. The police however have limited resources to do so on a sustained basis. In addition to the need for donor support to conduct civic education, it would make sense for civil society organisations and the police to join forces when conducting civic education on the rights of arrested persons.⁴²²

It has been argued that most police officers are aware of the procedures for arrest outlined in the Criminal Procedure and Evidence Code and the Police Act, but might choose not to follow them due to various factors including “overzealousness” or the possibility of gaining some benefit from those arrested.⁴²³ The findings of the research do not support this view, and it is unlikely that many police officers would be familiar with recent amendments to the Criminal Procedure and Evidence Code and the Penal Code.

Over the past two decades, there have been increasing calls for the repeal of outdated offences. The main argument for this has been that many persons in pre-trial detention in Africa are detained for being poor, homeless or a “nuisance”. This was the argument made in the Ouagadougou Declaration and Plan of Action on Accelerating Prisons’ and Penal Reforms in Africa.⁴²⁴ The OSISA report points out the dire effect of pre-trial detention on society – it estimates that the actual yearly exposure of the population in Malawi to prison on remand may be as high as 1 in 100.⁴²⁵ The OSISA report notes that some behaviour which leads to detention in Malawi, such as touting and rogue and vagabond offences, are not even considered crimes in other countries. The OSISA report emphasises the urgency of reviewing the Penal Code in the context of Malawi’s human rights obligations and the burden of remand detention on the poor.⁴²⁶

There have also been recommendations that the police training curriculum should be reviewed to ensure that human rights standards are upheld throughout a person’s contact with the police, including during arrest, interrogation and custody.⁴²⁷

420 *Id* 75-76. The Malawi Police Service’s *Strategic Development Plan July 2012 to June 2017* recognises the need to strengthen Court Users Committees, 27.

421 Interview with Kayira and Kainja *supra* note 264.

422 *Id.*

423 *Id.*

424 Second Pan-African Conference on Prison and Penal Reform in Africa, held in Ouagadougou, Burkina Faso between 18-20 September 2002.

425 OSISA (2011) *Pre-trial Detention in Malawi: Understanding Caseflow Management and Conditions of Incarceration*, 4.

426 *Id.*

427 Muntingh *supra* note 415, 63.

The Malawi High Court has also expressed support for an interpretation of vagrancy laws which does not unfairly discriminate against the poor.⁴²⁸

Various jurisdictions have further emphasised that the purpose of arrest must be to bring a suspect before court to face prosecution not to frighten or harass a person.⁴²⁹

The problem of unlawful arrest does not only lie with the police and the courts must also bear responsibility for the overuse of vagrancy-related offences.

Arrests for vagrancy-related offences are a reflection of the State and society's failure to devise community-based alternatives to arrest and detention for nuisance-related offences. This chapter highlighted that, although arrest should be used as last resort only, it is still often utilised in cases of minor nuisance-related offences. This next chapter looks at the question whether arrest should even be an option for such offences.

428 *Mwanza supra* note 69; *R v Balala* 1997 2 MLR 67.

429 *Ex parte Minister of Safety and Security: In re S v Walters* 2002 (4) SA 613 (CC); *Tsose v Minister of Justice* 1951 (3) SA 10 (A); *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) (An arrest is unlawful if the arrestor has no intention of bringing the arrestee before a court.)

10. Alternatives to Arrest for Nuisance-Related Offences

The arrests of persons for minor nuisance-related offences raise a number of complex questions: What should the scope of policing be in Malawi? Is it an appropriate response to arrest and detain a person for a minor, nuisance-related offence when this not only affects the rights of the accused, as discussed in the previous chapter, but also diverts considerable police resources away from investigating more serious crimes? Where do we draw the line between criminal, restorative justice, primary justice, municipal regulation and social development responses to concerns around inappropriate nuisance-related behaviour in public spaces? What are alternatives to the arrest of persons suspected of committing minor nuisance-related offences? This chapter starts exploring some of these questions through a cursory literature review.

Introduction

The African Commission on Human and Peoples' Rights has noted its concern at the abusive use of police custody and pre-trial detention in Africa which severely infringes on the rights of individuals in custody.⁴³⁰ As explained in the previous chapters, this report suggests that some nuisance-related offences in the Penal Code should be repealed and do not warrant police enforcement. However, it is accepted that there are some offences which would be retained, but for which the police should not be exercising their powers of arrest. It is for this reason that we think it is pertinent to also consider alternatives to the arrest of persons suspected of having committed nuisance-related offences. The problems associated with such arrests are explained in the previous chapter.

The Australian Law Reform Commission in its report on Criminal Investigation stated the concerns as follows:

Our society rightly puts a premium on freedom of movement. Arrest is the complete negation of freedom. As a result it casts a considerable onus on those who would justify it. Further, arrests cost the state a considerable amount of money, both in terms and as compared to other ways of bringing people to court. Innumerable man-hours are spent transporting,

⁴³⁰ Resolution of the African Commission on Human and Peoples' Rights meeting adopted at its 52nd Ordinary Session in Yamoussoukro, Cote d'Ivoire, 9 to 22 October 2012. Subsequent to this, the African Union released a discussion document on draft Guidelines on the Use and Conditions of Police Custody and Pre-Trial Detention in Africa, 21 February 2013.

*guarding and processing the arrestee. American experience suggests that an arrest costs the state on average five times the cost of a summons. As well, American, Canadian, English and Australian studies have all shown the eventual outcome of a case is markedly affected according to whether or not the accused is in custody before the trial or come to court by way of release on bail or a summons proceeding. A partial causal connection at least has been claimed. One further disadvantage of arrest which it is appropriate to mention is the fact that there is strong disapproval, in many parts of society, of anyone who has an arrest record.*⁴³¹

Purpose and Scope of Policing

The Malawi Police Service's Strategic Development Plan (July 2012 to June 2017) has identified as one of its roles the prevention of crime. The strategy for preventing crime includes increased visibility and accessibility by police, and deployment based on crime analysis. The assumption is that the increased presence of officers in uniform will deter the commission of crime.⁴³² The anticipated activities include the introduction of street duty units in urban areas; deployment of police officers from support and administrative functions to frontline policing; conduct of intelligence driven patrols and operations including sweeping operations; and increased deployment of police officers in public places.⁴³³

The police must assert its role to address crime in a manner which respects existing laws and the rights of citizens, whilst it also addresses the specific concerns of communities. From previous chapters it is clear that police who engage with the public and are involved in arresting accused should be fully conversant with the laws of Malawi, including recent amendments.

Terpstra notes that the police hold important symbolic power as a source of "some powerful, efficacious collective representations about community, order, the distinction between good and evil, and about security and protection."⁴³⁴ According to Terpstra, the legitimacy of police has both a normative and social aspect:⁴³⁵

- Social legitimacy is not static and requires that citizens understand the authority of police, accept that police determine their behaviour, trust the motives of police and believe in their capacity to protect them.
- Normative legitimacy is based on the values of democratic policing and requires police officers to adhere to rule of law, observe human rights, be externally accountable and be responsive.

However, there is often an assumption about what the concerns of the communities really are and additional research and consultations should be conducted with communities to

431 Report 1, 1975 at para. 28 quoted in Law Reform Commission of Western Australia, Project 85, *Police Act Offences*, Report (1992) 168.

432 Interview with Kayira and Kainja *supra* note 264.

433 Government of Malawi, Malawi Police Service, *Strategic Development Plan 1 July 2012 to 30 June 2017*, Lilongwe, 6.

434 J Terpstra "Two theories on the police – The Relevance of Max Weber and Emile Durkheim to the Study of the Police" (2011) *Int Journal of Law, Crime and Justice* 1 – 11, 7.

435 *Id* 8.

find out what role they perceive for the police. In many countries, the police struggle to maintain a balance between respect for human rights and rule of law. This results in police practices which are either partisan, corrupt or which are prone to excessive force. Thus, it is not always clear whether communities accede to the power of police because they view such power as legitimate, or whether it is rather a case of communities being too unequal to assert their rights. In many instances, individuals might have become so used to abusive police powers that it is accepted as a norm. This was suggested by interviews with sex workers during the research. However, in the context of a democratic society, it is the responsibility of government to ensure that its police force is publicly accountable to the citizenry.

Marx defines democratic policing as “a publicly accountable police force subject to the rule of law embodying respect for human dignity which can intervene in citizens’ lives only under limited and carefully controlled conditions in an equitable fashion.”⁴³⁶ For Marx, the term police neutrality refers to the “equal enforcement of the law focusing on the behaviour of the suspect, regardless of irrelevant characteristics such as ethnicity, gender, class and life style, or the personal attitudes of the enforcer”.⁴³⁷ Thus, it is the responsibility of the government to ensure equitable enforcement of laws by police and to address current concerns regarding the legitimacy of police.

In general, only 18 percent of victims of crime in Malawi report crimes to the police.⁴³⁸ Under-reporting of cases is a reflection on general public confidence in the ability, accountability and responsiveness of the police. A recent survey indicates that 31 percent of respondents were of the opinion that the police were “fast”, 32 percent felt that they were “professional”, 35 percent viewed them as “fair” and 20 percent felt that they were not “corrupt”.⁴³⁹ The survey further revealed a low police visibility, especially in rural areas and a police population ratio in the rural areas of 1:6485 compared to the urban the ratio of 1:266.⁴⁴⁰ Much can be done to improve the public’s perceptions of the police, especially if less police resources are spent on futile and abusive arrests of persons for minor nuisance-related offence.

Limits of Preventive Justice

The police have always had a role in preventing crimes from taking place. Thus, the criminal procedure laws allow police to arrest someone without a warrant if they have a reasonable suspicion that a crime will be committed. Whilst such preventive justice is often taken for granted, there are also some critiques with regard to the extent to which government should empower police where no crime has yet taken place.

Punitive prevention measures have historically been used on occasions when a person has already committed a crime and shown some recidivist tendencies. So, for example, a person’s

436 GT Marx “Police and Democracy” in Amir, M and Einstein, S (eds) *Policing, Security and Democracy: Theory and Practice* (2001) Office of the Int. Crim. Justice, 8, <http://web.mit.edu/gtmarx/www/dempol.html> (last accessed: 2 June 2013).

437 *Id.*

438 National Statistical Office (NSO) *Malawi Justice Baseline Survey 2010* (2011) UNDP & Government of Malawi.

439 *Id.* 129.

440 *Id.* 16.

sentence could be lengthened if there is a risk of reoffending. Some vagrancy provisions contained in the English vagrancy laws and incorporated in Malawi's Penal Code contain an element of punitive preventive justice – for example, allowing police to arrest someone where the person has no explanation for their whereabouts or means of subsistence.⁴⁴¹

Some preventive policing practices have come under specific scrutiny – e.g. order-maintenance practices, which assume that minor disorder, left unattended, will cause serious crime (commonly referred to as “broken-windows” policing).⁴⁴² Harcourt notes that the empirical basis for broken-windows policing has not been justified – “the alleged correlation between disorder and serious crime fails to take into account other factors that may contribute to the deterioration of a neighbourhood”.⁴⁴³ If we look at the police responses to the use of sections 180 and 184 of the Penal Code, the police officers argue that these sections provide an important tool to prevent more serious crimes from being committed. However, there is no evidence that this is in fact the case.⁴⁴⁴ Even the argument that minibuses should be banned on the basis of the crimes committed by some minibuses lacks veracity in this context since there are many other related factors contributing to the crimes committed against public transport passengers. Sampson and Raudenbush suggest that “attacking public disorder through tough police tactics may thus be a politically popular but perhaps analytically weak strategy to reduce crime”.⁴⁴⁵ Harcourt further criticises preventive searches and profiling or labelling of some persons as more likely to commit crimes.⁴⁴⁶

Where police are able to work with social services personnel to address underlying causes of behaviour, there have been significant benefits – including diversion from the criminal justice system and reduced costs associated with the incident of arrest, more appropriate use of prison facilities and police time, improved relationships between police and communities and improvement of police morale.⁴⁴⁷

Community Policing and Alternative Responses to Arrests for Nuisance-Related Behaviour

The community policing movement is described by criminologists as a gradual adoption of a change in philosophy in an attempt to “re-legitimise” the police.⁴⁴⁸ Community policing encourages the police to work closer with communities in addressing crimes and to develop problem-solving strategies. The community policing approach focuses on more democratic decentralised policing, placing more discretion and responsibility in the hands

441 Section 184(b) of the Penal Code.

442 BE Harcourt “Punitive Preventive Justice: A Critique” *Chicago Institute for Law and Economics Working Paper* No. 599 (2012), 10 (forthcoming in A Ashforth & L Zedner (eds) *Preventive Justice*, Oxford University Press).

443 *Id* at fn 28.

444 Harcourt *supra* note 442 at fn 31 (“There are no statistically significant relationships between disorder and purse-snatching, physical assault, burglary or rape when other explanatory variables are held constant.”)

445 Quoted in Harcourt *supra* note 442, 14.

446 *Id* 17.

447 United States Interagency Council on Homelessness *supra* note 447, 27.

448 JP Crank, “Institutional Theory of Police: A Review of the State of the Art” (2003) *Policing: An Int Journal of Police Strategies & Management* 26(2):186-207, 189.

of uniformed police officers, encouraging more flexible leadership styles and partnership with communities which focuses on community needs, values and problems.⁴⁴⁹ For Marx, community policing is “based on the assumption that policing will be more effective if it has the support of, and input from the community and if it recognises the social service and order maintenance aspects of the police role.”⁴⁵⁰

The Malawi Police Service’s Strategic Development Plan includes as an output the training of all police officers on values and principles of community policing activities.⁴⁵¹

This report does not attempt to evaluate the Malawi Police Service’s community policing strategy. The report does seek to raise questions about whether measures could be employed within the community policing concept to develop alternative approaches to nuisance-related concerns which communities have, which does not involve criminalisation of, or arrest for, minor offences.

A problem which could arise is the extent to which all police officers embrace the notion of community policing. Walsh critiques the community policing model on similar grounds:⁴⁵²

- Community policing as a philosophy is often not wholly adopted and implemented by departments, relegating it to specific units;
- The organisational change needed to support the community policing model and strategies is “often incomplete”; and
- Operationally, implementation depends on patrol officers who are inexperienced.

Thus, there is a need for the notion of and principles underlying community policing to be taught to and applied by police officers in all branches of the Malawi Police Service.

Police Practices on Street-Level

According to Biradavolu, “criminologists have shown that everyday policing – the socially messy arena of regulating daily life in public places – is not guided by clearly delineated laws but emerges from what Shearing and Ericson call the ‘craft of policing’”.⁴⁵³

This ‘craft of policing’ is determined by three elements of institutional organisation:

- As an institutional organisation, the police serves its constituents and its “behaviour and structure reflects the values in its institutional environment”.⁴⁵⁴
- Organisations loosely couple formal practices with actual behaviour. Thus there is a distinction between the rules of professional policing and the practices on street-level.⁴⁵⁵
- Since the police functions on ‘good faith’, it is sometimes difficult to supervise and “critically evaluate on-going organisational practices”.⁴⁵⁶

449 WF Walsh, “Compstat: An Analysis of an Emerging Police Managerial Paradigm” (2001) *Policing: An Int Journal of Police Strategies & Management* 24(3) 347-362, 351.

450 Marx *supra* note 436, 4.

451 Government of Malawi *supra* note 433, 10.

452 Walsh *supra* note 449, 351.

453 Biradavolu *supra* note 356, 1543.

454 Crank *supra* note 448, 187.

455 *Id* 188.

456 *Id*.

A further important consideration is the difference between police officers within the same institutional structure. Cochran and Bromley, in their research on the existence of police sub-culture in the United States, note that there are three types of police officers: adherents to a policing sub-culture (16%), a new sub-culture of police officers who emphasise a community-service orientation (25-30%), and average deputies (50%).⁴⁵⁷ Their classification of police services into two sub-cultures: the negative, cynical police sub-culture outlined above, and a newer community oriented police culture, is similar to findings of other studies which distinguish between police officers who focus on crime fighting and those who are service oriented.⁴⁵⁸ Paoline, Myers and Worden support claims that there have been changes in police culture based on two developments, the paradigm shift to community policing and the increased diversity within the police force.⁴⁵⁹

It is important to consider the various factors which contribute to the police's use of arrest as opposed to alternative measures in response to nuisance-related behaviour.

Developing Individualised Solutions

An aspect of community policing is where police officers are allocated to particular areas with the goal of becoming familiar with local inhabitants. Such community policing seeks to present an innovative solution to persistent crime-related problems. Crime prevention efforts should always involve the community, including street children, in view of the rights of children recognised in the Child Care, Protection and Justice Act. For example, a dedicated officer who befriends street children and acts as a resource for positive change in their lives could well reflect a more effective way to address the causes of crime than arrests of street children. Another option is to locate the guardians of children to ensure that they take responsibility for the care of the children before or after criminal conduct occurs.

Whilst Malawi's social development services are immensely underfunded, there have also been creative solutions to divert persons from the criminal justice system, for example through the use of primary justice interventions at community level or Victims Support Units (VSUs) at police stations which adopt a more individualised approach:

- Currently there are VSUs based in all police formations in Malawi. This includes main district police stations as well as sub-stations. VSUs are a component of the Community Policing Services Branch and their key functions include: Counselling; First Aid; advice; referral; interviewing of complainants in cases of sexual abuse, rape, defilement, indecent assault and other offences that require privacy and confidentiality; dealing with cases of domestic violence; helping victimised children; and conducting general sensitisation on human rights and policing.⁴⁶⁰
- Chiefs' functions are currently informed by the Chiefs Act of 1967, which relate to "preservation of public peace, the carrying out of traditional functions in accordance with customary law and operating under directions given by the district commissioner". The Government of Malawi has indicated its commitment to ensuring that the informal

457 JK Cochran & ML Bromley "The Myth of the Police Sub-Culture" (2003) *Policing: An Int Journal of Police Strategies & Management* 26(1):88-117, 109.

458 *Id.*

459 EA Paoline et al "Police Culture, Individualism and Community Policing: Evidence from Two Police Departments" (2000) *Justice Quarterly* 17(3) 575-605.

460 Malawi Human Rights Resource Centre *Guidelines for the Support and Care of Victims of GBV and HIV/AIDS related abuses*, Malawi Police Service, Community Policing Services, Victim Support and Child Protection.

legal system “is accessible, efficient and equitable”.⁴⁶¹ Currently, the informal or primary justice system is generally more accessible to ordinary persons, particularly in rural areas where 84 percent have used it at some point, compared to 16 percent in urban areas.⁴⁶² Despite their shortcomings, traditional courts are popular with 73 percent of Malawians saying that they prefer to settle disputes through informal channels.⁴⁶³ One of the key advantages of the system is its affordability - 87 percent of those who use the informal system find it affordable.⁴⁶⁴ However, perceptions vary concerning the ability of chiefs to deliver justice fairly - 67 percent of Malawians surveyed in 2008 thought that chiefs are corrupt.⁴⁶⁵

The United Nations Office for Drug Control and Crime Prevention (UNODCCP) highlights the potential benefits of a more informal procedure where parties can take “an active part in deciding on the appropriate outcome, all underlying circumstances can be considered, and social pressure can often be exerted on the offender to comply with the decision”.⁴⁶⁶

Alternative Approaches to Arrests

Apart from the informal options referred to above, implemented by VSUs and informal justice mechanisms, as alternatives to arrest, additional alternatives to arrest are briefly discussed below.

Cautions or Warnings

It is suggested that the police should first caution a person and instruct them to cease particular conduct, before exercising their power to arrest the person.⁴⁶⁷ A police officer could also issue a formal caution as opposed to arrest. Arrests should really be a last option because they take up significant police time.⁴⁶⁸ The law requires that the police should only proceed with arrest when a summons would not be effective to bring the person before the court. It appears that police often fail to give adequate consideration to the option of a summons. It can be argued that any form of custody should be avoided unless the safety of the community is at stake.

The United Kingdom has been making use of a non-statutory “prostitutes caution” for many years. In terms of this procedure, a person who falls foul of the provision of soliciting in public for the purpose of prostitution would not be prosecuted until at least two cautions have been given.⁴⁶⁹ The police are also encouraged, where they find someone soliciting for the first time in a three month period, to direct the person to a non-criminal justice intervention.

461 Government of Malawi, *Malawi Growth and Development Strategy 2006-2011* (2006) 68.

462 National Statistical Office, *supra* note 438, 94.

463 *Id* 107.

464 *Id* 87.

465 MG Tsoka & B Chinsinga, *Malawi Round 4 Afrobarometer Survey* (2008) Afrobarometer.

466 United Nations Office for Drug Control and Crime Prevention (UNODCCP) *Handbook on Justice for Victims: on the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1999) 1-126, 41.

467 Community Law Reform Committee of the Australian Capital Territory, *Report on Street Offences*, CLRC 15 (1993), 5.

468 *Id* 6.

469 Home Office Circular (1959).

Section 32A of the Criminal Procedure and Evidence Code now allows caution and release procedures to take place after an arrest, but we would argue that caution should also be considered a viable option in lieu of the arrest of a person.⁴⁷⁰

Move-On Power

The police's ability to order persons to move on has been suggested by some as an alternative to arrest in cases of minor offences. This would definitely be less resource intensive on the police. Whilst such powers would be good to use in a case where there is a disturbance, it could potentially violate the rights of persons when they are told to move on when they have not committed any offence. There have accordingly been objections to the police's use of move-on powers against, for example, homeless persons.⁴⁷¹

A move-on power for police might be more appropriate than an arrest where the police officer has reasonable grounds for believing that the person is likely to commit an offence. So, a police officer could ask a person to explain his or her presence and if the person does not give an explanation, ask the person to leave the vicinity. Such a power for police could be more useful than the offence in section 184 of failing to give account of oneself. Thus, a person would only commit an offence where he or she does not abide by the police's order to move on.

Recording of Names

Another option instead of arrest is the recording of a person's name. If the person committed a minor offence, the taking of the person's name, instead of arresting the person, might well act as a deterrent. However, if the person has not committed any offence, the taking of names could cause tension between the police and the community.⁴⁷² Some jurisdictions have held that a police officer is not permitted to seek a person's name and address unless the officer suspects that the person has committed an offence or may be a witness to the commission of an offence.⁴⁷³ Section 31 of the Criminal Procedure and Evidence Code allows the police to arrest someone who does not give his or her name when requested to do so.

Administrative Fines

On-the-spot fines or administrative fines are used in some jurisdictions and would discharge a person from further criminal process. Such fines are usually only applied in minor cases relating to traffic or environmental violations. Such fines should be limited to minor offences where there is little scope for a court to find that the offence was not committed. However, where police corruption is prevalent, the introduction of such fines is likely to increase police harassment of vulnerable groups such as sex workers.

The imposition of a fine does not mean that the person has to pay immediately. It would therefore be important to ensure sufficient civic education that persons know their rights in relation to such fines and know that payment of such fines can be deferred to a local government office or can be contested through a simple procedure. This would reduce the risk of corruption. Payment of the fine would mean that the person does not have a criminal conviction. Such fines should not be imposed on children.⁴⁷⁴

470 OSISA *supra* note 425, 40.

471 Community Law Reform Committee of the Australian Capital Territory *supra* note 469, 4.

472 *Id.*

473 Law Reform Commission of Western Australia, *Police Act Offences*, Report (1992) 181.

474 Community Law Reform Committee of the Australian Capital Territory *supra* note 469, 9.

The problem with administrative fines is that the amount is not tailored to the individual offender, the tendency is to lower the standard of proof in such cases and it would not work where the police are not able to identify the offender and thus not able to enforce non-payment.⁴⁷⁵ A significant problem in Malawi is that many persons would be unable to pay such fines, thus again resulting in the criminal justice process being applied to the poor in particular. An administrative fine would only be appropriate in cases where the community is aware of the exact nature of the offence and the penalty involved.

Public Awareness and Community Consultation

The police officers interviewed for this study have noted a range of interventions which could be used to engage communities to discuss nuisance-related behaviour and find solutions for such behaviour which would not involve arrest. These would include public sensitisation through pamphlets and radio programmes, civic education, and public meetings.

Conclusion

The reality is that many of the offences listed in sections 180 and 184 of the Penal Code relate to poverty. Thus, sweeping exercises or police interventions which seek to arrest persons who beg, sleep in a public place, urinate in public or frequent public areas without any particular purpose tend to target the poor almost exclusively. Such criminalisation of human activities does not address the underlying causes of such behaviour.⁴⁷⁶ It is not surprising that Coldham noted that punishment has historically played such a central role in the fight against crime in Africa that there is no interest in devising alternative strategies to combatting crime.⁴⁷⁷

It is clear that alternatives to arrest exist. In addition, it would be possible to craft specific additional alternatives to arrest which are situated within the Malawian context. Such measures should be developed through both research and community consultation.

The UN Special Rapporteur on Extreme Poverty and Human Rights has noted that penalisation measures should not be designed and implemented without a meaningful dialogue with persons living in poverty.⁴⁷⁸

475 *Id.* 10.

476 United States Interagency Council on Homelessness, *Searching out Solutions: Constructive Alternatives to the Criminalisation of Homelessness* (2012) 7.

477 S Coldham "Criminal Justice Policies in Commonwealth Africa: Trends and Prospects" *Journal of African Law* (2000) 44: 218-238, 230.

478 *Report by Special Rapporteur on Extreme Poverty and Human Rights supra* note 1, 9.

11. Recommendations

Based on the findings of the research, this report has two key recommendations: Firstly, that the Malawi Penal Code provisions relating to idle and disorderly persons and rogues and vagabonds require urgent revision in order to ensure that these provisions do not unfairly target the poor. Secondly, that the abuse by police of their powers to arrest persons for minor nuisance-related offences requires ongoing monitoring to ensure that they do not unfairly target and violate the rights of poor and marginalised groups in Malawi. Addressing these findings will require a multi-stakeholder approach to ensure that the problems identified in the research are addressed swiftly, appropriately and comprehensively. This chapter encapsulates the key recommendations which flow from the discussions in Chapters 4 to 10.

Reviewing Laws Relating to Nuisance-Related Offences

The Malawi Law Commission should review the nuisance-related offences in the Penal Code and consider the following:

- The need to repeal obsolete and archaic offences, particularly those based upon status rather than criminal activity and those that are overly elastic and provide law enforcement with too much discretion;
- The defects of vagueness, over-breadth, and disproportionality present in sections 180 and 184 of the Malawi Penal Code relating to idle and disorderly persons and rogues and vagabonds;
- The need for stakeholder consultation, including with lawmakers, law enforcement, legal practitioners, members of the academic community, and local communities, to identify those laws which continue to resonate with Malawian values in the post-colonial period, and those which are rooted in the outdated colonial past;
- The need to repeal laws that are not currently enforced to serve the interests of efficiency and clarity of criminal law;
- The need to rectify anomalous laws (e.g. where two similar offences result in vastly different levels of punishment); and
- The removal of imprisonment or detention as a punishment or administrative consequence of removal orders and non-serious nuisance-related offences.

Improving the Manner in which Nuisance-Related Offences are Enforced

In general, more work needs to be done to disseminate information to the public and to the police on the actual content of laws, the types of behavior that are prohibited, and the resources available in cases of the abuse of fundamental rights.

Key recommendations include that the Malawi Police Service should:

- Establish consistent practices for police record-keeping and arrest procedures (e.g. all police officers should record relevant details such as date/time of arrest and protective measures applied). The Malawi Police Service should further ensure that all police officers record the results of all cases of detention, such as the outcome of a court proceeding or plea agreement, in order to serve the interests of transparency and accountability. Record-keeping could be improved through the issuing of directives requiring increased supervision of record-keeping practices at police station level.
- Develop specific directives for police officers that set out the scenarios in which arrests for section 180 and 184 offences would be appropriate and those where they are not. Guidelines on the exercise of sweeping should also be developed for police officers.
- Ensure that all police officers have been trained on the provisions of the Penal Code, Police Act, Child Care, Protection and Justice Act and the recent amendments to the Criminal Procedure and Evidence Code. This should not be limited to including such topics in the general police training curriculum. The Malawi Police Service could, for example, require the officers-in-charge at each police station to report on a regular basis on the training and seminars that have been held at the police station on the new laws and amendments.
- Conduct research on practices relating to the arrest and conviction of persons for nuisance-related offences and the extent to which these practices comply with constitutional and legal requirements. Such research should also consider the benefit, and unintended consequences of sweeping exercises and how it should be exercised.

The judiciary should ensure that the process of sending proceedings to the High Court for review is strengthened and monitored.

Respecting the Rights of Children During Arrests

Both the Malawi Police Service and judiciary should ensure that detention, particularly of children, should not be used as a tool of crime prevention or of protection for the detainee. If protection of the detainee is a concern (for example, if the detainee is a child), government funds must be directed toward establishing and monitoring proper facilities. Additional training is required for police officers and magistrates at all levels to communicate the facts and spirit of reformed laws affecting child-offenders.

Alternative measures should be developed to address concerns relating to the behavior of street children. For example, a dedicated officer who befriends street children and acts as a resource for positive change in their lives would perhaps be a more effective way to address the causes of crime. Additional resources are required to strengthen the reach of non-governmental organisations that provide social development and diversion services to children.

The Malawi Police Service, in collaboration with development aid partners, should take urgent measures to improve the infrastructure of police stations which do not have sufficient space to separate adults from children in detention. Stakeholder collaboration, including Court User Committees and the Lay Visitors' Scheme should be sustained and improved as important tools to monitor conditions in police detention facilities.

The Malawi Law Commission and Malawi Police Service should address the confusion relating to section 97 of the Child Care, Protection and Justice Act through law reform or directives.

Respecting the Rights of Sex Workers During Arrests

The Malawi Law Commission should review all Penal Code provisions relating to sex work to address possible violations of constitutional rights and inconsistencies in current provisions relating to sex work.

Additional research on the violence and abuse faced by sex workers in Malawi is crucial to enable organisations and government departments to respond adequately to the needs of this marginalised and often abused sector of the population.

The Malawi Police Service should conduct training with all its police officers on the rights of sex workers. Such training should emphasise the penalties of police abuse of power and corruption. The training should further emphasise that HIV testing of sex workers is unlawful. The training should clarify the misconception that section 146 of the Penal Code criminalises the selling of sex for reward or the earning of an income by a sex worker herself - these acts are not criminalised in Malawi.

Funding should be sought to extend promising practices on collaborating with police to reduce abuse of the sex workers to all districts in Malawi (For example, the currently operating training methods of Theatre for a Change to change the attitude of police towards sex workers; and the helpline and paralegal support provided to sex workers by CHREAA).

It is important that organisations working on the police abuse of sex workers in Malawi coordinate and collaborate, and also work with government departments and services such as One-Stop Centres and Victim Support Units, to ensure more comprehensive services for sex workers and other marginalised communities.

Respecting the Rights of Touts During Arrests

Additional research is required to assess the impact of the prohibition of touting on unemployment and the criminalisation of young men. The offence of touting should either be repealed and touting should be regulated, or alternative options should be put in place for income generation for former touts.

Ensuring Proper Implementation of Laws Relating to Arrest and Detention

There should be sustained investment in the provision of paralegal services to improve access to justice for persons who have been arrested. In addition, the Malawi Police Service should ensure that the police training curriculum is reviewed to guarantee that human rights standards are upheld during and after arrests for nuisance-related offences.

The judiciary should emphasise in its training of magistrates that there is a responsibility on the courts to scrutinise the cases where persons are brought before them whose arrests appear to have been unlawful or without probable cause.

Developing Alternatives to Arrest

The Malawi Police Service, in collaboration with other stakeholders, should devise community-based alternatives to arrest and detention for minor nuisance-related offences. In this respect, the Community Policing Services Branch should play a prominent role in working with local communities to address specific nuisance-related concerns in a manner which does not involve the criminalisation of individuals or arrests.

In the case of minor nuisance-related offences, the police need to be encouraged to first caution a person and instruct them to cease the particular conduct, before exercising their power to arrest the person. A police officer could also issue a formal caution as opposed to arrest. Such options should be included in specific directives drafted by the Malawi Police Service on the manner in which police should respond to section 180 and 184 offences in the Penal Code.

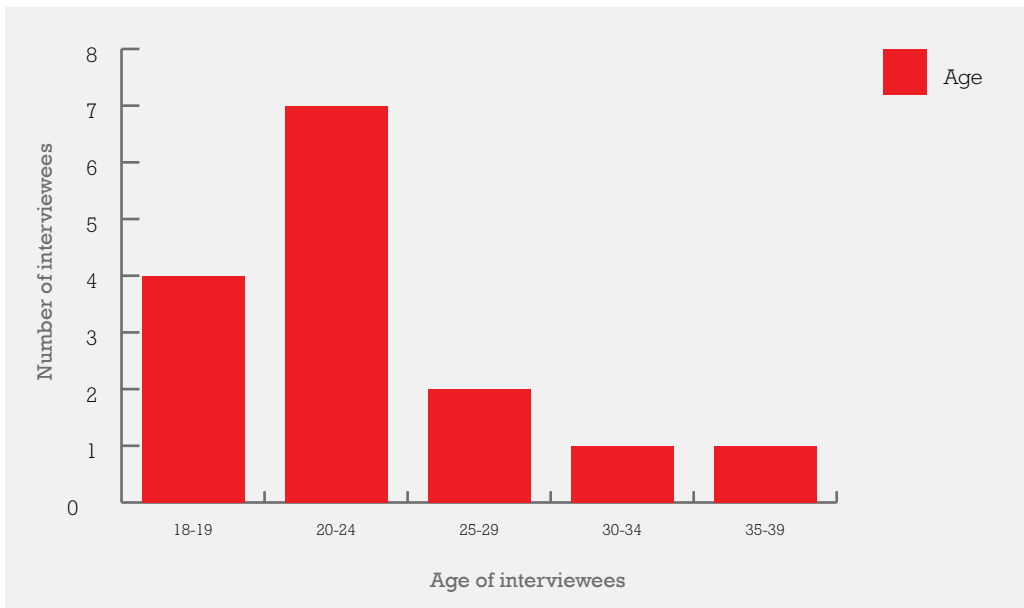
The Malawi Police Service, in collaboration with non-governmental organisations, should develop educational materials to make communities aware that administrative fines could be imposed in lieu of arrest for certain offences, and their rights in relation to such fines including that such fines need not be paid immediately.

Annexure 1

Demographics of Sex Workers Who Were Interviewed

The group of sex workers interviewed came predominantly from the 20-24 year old age group. This can partly be explained because some of the sex workers who were interviewed identified their friends who were also sex workers for interviews.

Chart 8: Demographics of Sex Workers Interviewed, Blantyre (22 June 2012):



As noted above, all of the interviewed sex workers were female. Thirteen of the women interviewed were single, whilst one was divorced and one was widowed. Eleven of the women who were interviewed reported having children. Nine of these women had one child and two of them had two children.

The number of participants who had attended secondary education was quite high. Of the fifteen women interviewed, twelve had completed some level of secondary education. This

trend is partly explained by the fact that the study was conducted in a city, rather than a rural area. In addition, there are different education levels for women per age group, with women in their twenties more likely to have benefitted from educational opportunities than older women.⁴⁷⁹

Table 3: Education levels of respondents:

Year and level of schooling completed	
Primary education	3
Standard 5	1
Standard 7	1
Standard 8	1
Secondary education	12
Form 1	2
Form 2	3
Form 3	1
Form 4	5
Not specified	1
Total	15

Seven of the sex workers interviewed had been engaged in sex work for three to four years, whilst four had been engaged for one to two years and four for six to ten years. All of those interviewed noted that they mostly engaged in sex work indoors, in local bars or in liquor stores.

The weekly earnings of sex workers varied between K2000 and K13000 per week, with 5 participants earning more than K10000 (USD \$25.81) in the previous week. Most sex workers interviewed, however, earned approximately K3000 to K4000 in the previous week (6). It should be noted that, since the interviews were conducted in June 2012, the Malawian Kwacha has continued to lose value against major currencies, leading to rapid inflation in the price of basic commodities.⁴⁸⁰

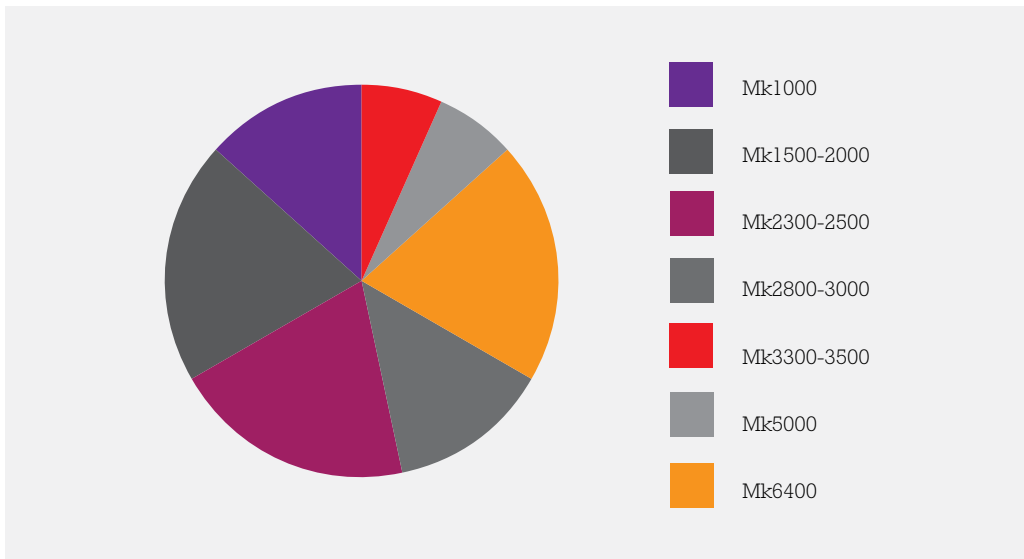
479 Women's access to education is not uniform in Malawi and is dependent on a wide range of factors.

Currently, female literacy is 67,6 percent and male literacy is 81 percent. Malawi National Statistics Office *Demographic and Health Survey 2010* (2010) 29-31. According to the report, "[t]he patterns of men's literacy are similar to those among women. However, there are marked differences between the sexes in the literacy levels across the age groups. Eighty percent of men aged 45-49 are literate compared with 45 percent of women in the same age group. Similarly, marked disparities are observed between women and men across the wealth quintiles, as 64 percent of men in the poorest households are literate compared with 48 percent of women in the same quintile." *Id* 29.

480 In June 2012, 1 US Dollar was equivalent to 275 Malawian Kwacha. On 16 April 2013, 1 US Dollar was equivalent to K410. It is not clear whether the prices charged by sex workers would have changed much. Rapid inflation would have increased the need of sex workers to increase their prices, but clients would also have been affected by inflation and might not be willing to pay increased rates.

Sex workers were asked what their earnings were for the past week and the number of clients seen. From this information it was possible to infer the average rate each sex worker charged per sexual act. It is clear that the average rate per sexual act varied greatly between sex workers.

Chart 9: Average Rate Per Sexual Act Based on Number of Clients Seen in Past Week and Total Amount Earned.⁴⁸¹



Of the fifteen respondents, eleven did not have any other income apart from sex work, whilst four engaged in small business enterprises (e.g., selling second-hand clothes, cooking oil and producing charcoal). None of the respondents received any services or support from the government or any non-governmental organisations.

All respondents reported having dependants who relied on the income derived from their activities as a sex worker. Eight respondents had one or two dependants, four respondents had three to five dependants, and three respondents had six dependants.

⁴⁸¹ These rates are much higher than those reported in a representative and in-depth UNFPA study. See UNFPA, *supra* note 320, 55. SALC’s study did not enquire into whether the rates were for sex with or without condoms, which the UNFPA study shows will result in different rates per sex act. It should be noted that, unlike the UNFPA study, SALC’s study was conducted after the government’s devaluation of the Kwacha in 2012, which might partly explain the difference in rates. Finally, the study reported here was also based in an urban area, where sex workers are likely to charge higher rates than in rural areas.