

# 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The use of outdated Penal Code provisions and abuses by police against poor persons and sex workers specifically has caused some concern among many working on legal and human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

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