

1. Introduction

Background and Purpose of this Study

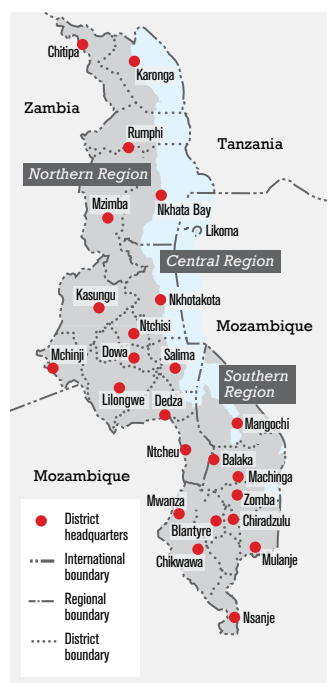
Penalisation policies reflect a serious misunderstanding of the realities of the lives of the poorest and most vulnerable and ignorance of the pervasive discrimination and mutually reinforcing disadvantages that they suffer... Asymmetries of power mean that persons living in poverty are unable to claim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

