

## 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.<sup>67</sup> 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.<sup>68</sup>

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.<sup>69</sup>

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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.<sup>70</sup> 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.<sup>71</sup> Interference with the public's rights must be substantial and unreasonable.<sup>72</sup>

#### **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".<sup>73</sup> 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."<sup>74</sup>

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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.<sup>75</sup>

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.<sup>76</sup> 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.<sup>77</sup> 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.<sup>78</sup>

#### **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 place<sup>79</sup> 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.

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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.”<sup>80</sup>

In the English case of *R v Howell*,<sup>81</sup> 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.”<sup>82</sup>

In the Malawi High Court case of *Republic v Pitasoni*,<sup>83</sup> 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.

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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.

<b>Relevance, frequency of usage, and duplication?</b>	<b>Consistency with criminal law principles and burden of proof?</b>	<b>Implication for civil liberties and justification for limitation of rights?</b>
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. <sup>84</sup>	Section 180(a) violates the right to dignity, <sup>85</sup> and the right to equality since it discriminates based on status. <sup>86</sup> 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.<sup>87</sup> 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”.<sup>88</sup>

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.<sup>89</sup> 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”.<sup>90</sup>

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.<sup>91</sup>

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.

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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.<sup>92</sup> 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 place<sup>93</sup> to beg or gather donations.

English courts have held that a single act of asking for money does not amount to begging.<sup>94</sup> 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.<sup>95</sup>

Similar provisions have been repealed in other commonwealth countries, including New South Wales, New Zealand and the Australian Capital Territory.<sup>96</sup> 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.<sup>97</sup>

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.<sup>98</sup> 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.<sup>99</sup>

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.<sup>100</sup> This offence carries a possible sentence of ten years imprisonment.<sup>101</sup> 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.<sup>102</sup> 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.<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup>

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.

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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.<sup>106</sup></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.<sup>107</sup> 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.<sup>108</sup>

### **Section 180(e)**

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

<sup>106</sup> Sections 20(1) and 19(1) of the Malawi Constitution.

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

<sup>108</sup> 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.<sup>109</sup>

Section 32 of the Sexual Offences Act of 1956<sup>110</sup> 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.<sup>111</sup> 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.<sup>112</sup>

<b>Relevance, frequency of usage, and duplication?</b>	<b>Consistency with criminal law principles and burden of proof?</b>	<b>Implication for civil liberties and justification for limitation of rights?</b>
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. <sup>113</sup> 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. <sup>114</sup>

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”<sup>115</sup>;
- Conduct which requires physical presence on the part of the prostitute;<sup>116</sup>
- Conduct extending into a public place;<sup>117</sup>
- Conduct which were constituent of persistent<sup>118</sup> persuading, begging or entreating.<sup>119</sup>

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.<sup>120</sup> 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*.<sup>121</sup> 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.*<sup>122</sup>

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,

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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.<sup>123</sup>

In the Supreme Court of Canada case of *Hutt v the Queen*,<sup>124</sup> 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*.<sup>125</sup> 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*.<sup>126</sup> 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:

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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*,<sup>127</sup> 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."<sup>127</sup>
- In the Hong Kong High Court case of *HKSAR v Cen Zhi Cheng*,<sup>128</sup> 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 ...'"<sup>129</sup>

The phrase "immoral purposes" is vague. In the United States case of *Papachristou v City of Jacksonville*,<sup>130</sup> 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".<sup>131</sup> Similarly, in the case of *City of Chicago v Morales*,<sup>132</sup> the United States Supreme Court held that where a law contained no guidelines for the exercise of police discretion, it invited uneven police enforcement.<sup>133</sup> 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.<sup>134</sup> 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.<sup>135</sup>

<b>Relevance, frequency of usage, and duplication?</b>	<b>Consistency with criminal law principles and burden of proof?</b>	<b>Implication for civil liberties and justification for limitation of rights?</b>
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 <sup>136</sup> 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, <sup>137</sup> 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. <sup>138</sup> 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.

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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.<sup>139</sup> Each link in a chain of evidence must be unassailable and its cumulative effect must be inconsistent with any rational conclusion other than guilt.<sup>140</sup>

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.<sup>141</sup> 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.<sup>142</sup>

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.

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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.<sup>143</sup> 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.<sup>144</sup> 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.<sup>145</sup> 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.”

<b>Relevance, frequency of usage, and duplication?</b>	<b>Consistency with criminal law principles and burden of proof?</b>	<b>Implication for civil liberties and justification for limitation of rights?</b>
<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.<sup>146</sup> 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.<sup>147</sup>

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.”<sup>148</sup>

**“Every suspected person or reputed thief”:**

In the 1936 English case of *Ledwith v Roberts*,<sup>149</sup> 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*<sup>150</sup> 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.”<sup>151</sup> 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.”<sup>152</sup>

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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.<sup>153</sup> 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.<sup>154</sup>

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”.<sup>155</sup>

The Irish Supreme Court declared a similar offence unconstitutional in *King v the Attorney General and Director of Public Prosecutions*<sup>156</sup> 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.”<sup>157</sup> 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.”<sup>158</sup>

**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

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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.<sup>159</sup> 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.”<sup>160</sup>

The offence was also considered in the Malawi High Court in the case of *Stella Mwanza*.<sup>161</sup> 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.<sup>162</sup> 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.”<sup>163</sup>

The offence was also considered by the Malawi High Court in the case of *Republic v Foster*.<sup>164</sup> 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.<sup>165</sup>

**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.

<b>Relevance, frequency of usage, and duplication?</b>	<b>Consistency with criminal law principles and burden of proof?</b>	<b>Implication for civil liberties and justification for limitation of rights?</b>
<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)<sup>166</sup>**

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.<sup>167</sup> 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.<sup>168</sup> 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.

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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,<sup>169</sup> 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;<sup>170</sup>
- The right to dignity;<sup>171</sup>
- The right to personal liberty;<sup>172</sup>
- The right to freedom and security of person, which includes the right not to be detained without trial;<sup>173</sup>
- The right to freedom of movement;<sup>174</sup> and
- The right to not be discriminated against based on social status.<sup>175</sup>

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.”<sup>176</sup>

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”.<sup>177</sup> 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.<sup>178</sup>

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”.<sup>179</sup> 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.<sup>180</sup> Specifically, the UN Special Rapporteur has noted that economic justifications for penalisation fall outside the limitations permissible under human rights law.<sup>181</sup>

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*

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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.*<sup>182</sup>

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*.<sup>183</sup> 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.<sup>184</sup>

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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.

