

## 5. Implementation of Vagrancy Laws in Blantyre, Malawi

*Outdated Malawi Penal Code provisions relating to idle and disorderly persons and rogues and vagabonds continue to be used to arrest persons in Malawi.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

### Nuisance-Related Arrests in Blantyre

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

#### General Findings

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

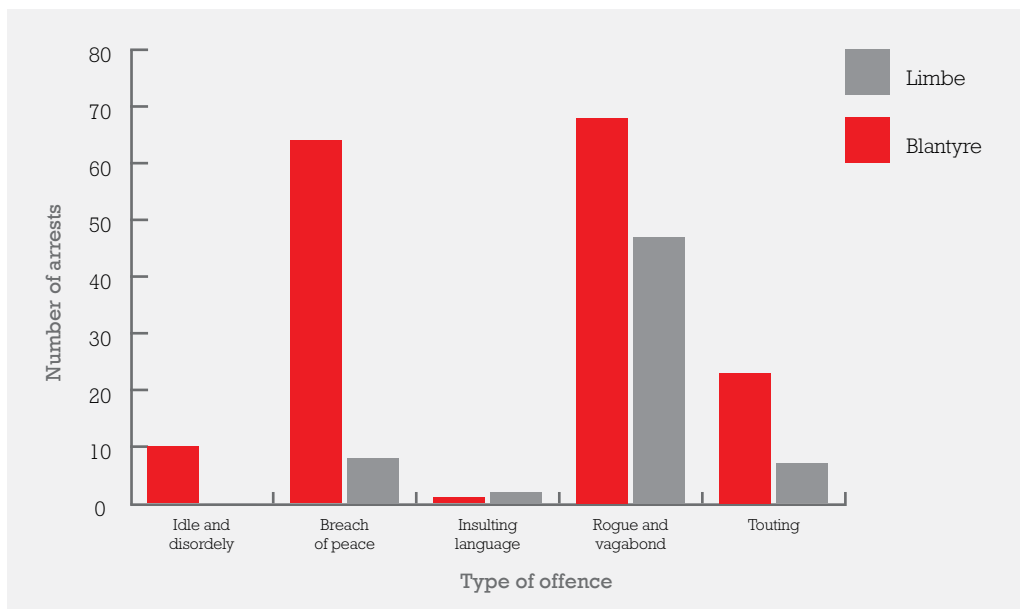
The chart below illustrates that these nuisance-related arrests related to the following offences: the offence of being an idle and disorderly person (section 180);<sup>185</sup> conduct likely

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

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

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

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



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

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

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

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

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

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

188 Touting is discussed in greater detail in Chapter 8.

for nuisances caused by intoxicated persons under section 183<sup>189</sup> made by officers of either police station.

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

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

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

- Of the seven arrests for rogue and vagabond offences on the weekend of 25 and 26 August 2012, all those arrested were only released on the Monday, 27 August 2012.
- Two individuals arrested under section 180 on 15 May 2012 at Blantyre DHL for urinating in public remained in custody the following day.
- Eight individuals arrested for touting remained in custody the following day.
- One individual arrested under section 184 on 5 May 2012 remained in custody on 7 May 2012.<sup>190</sup> Similarly, an individual arrested on 27 June 2012 under section 184 remained in custody the next day.<sup>191</sup>

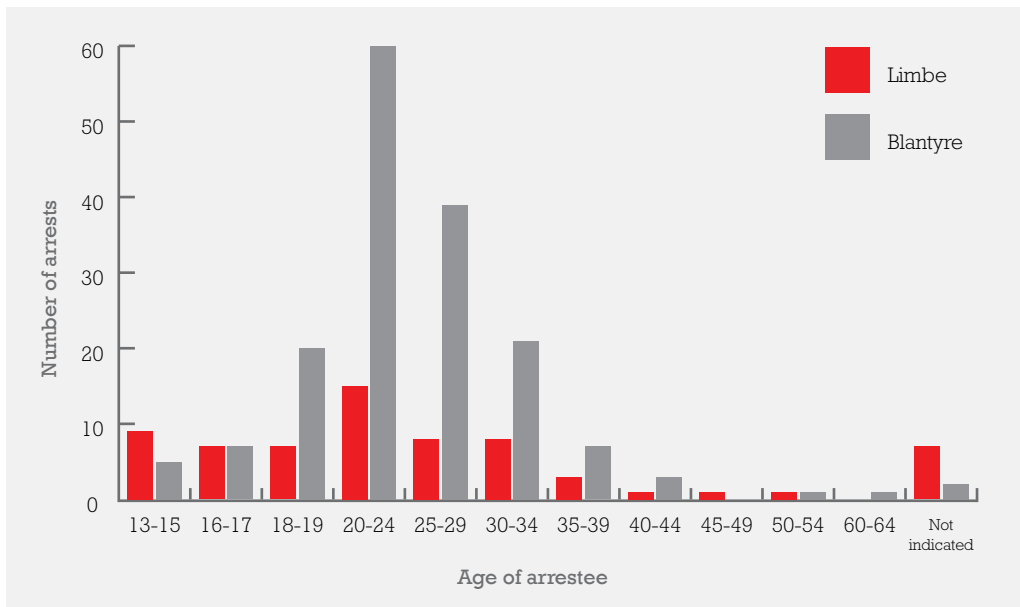
---

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

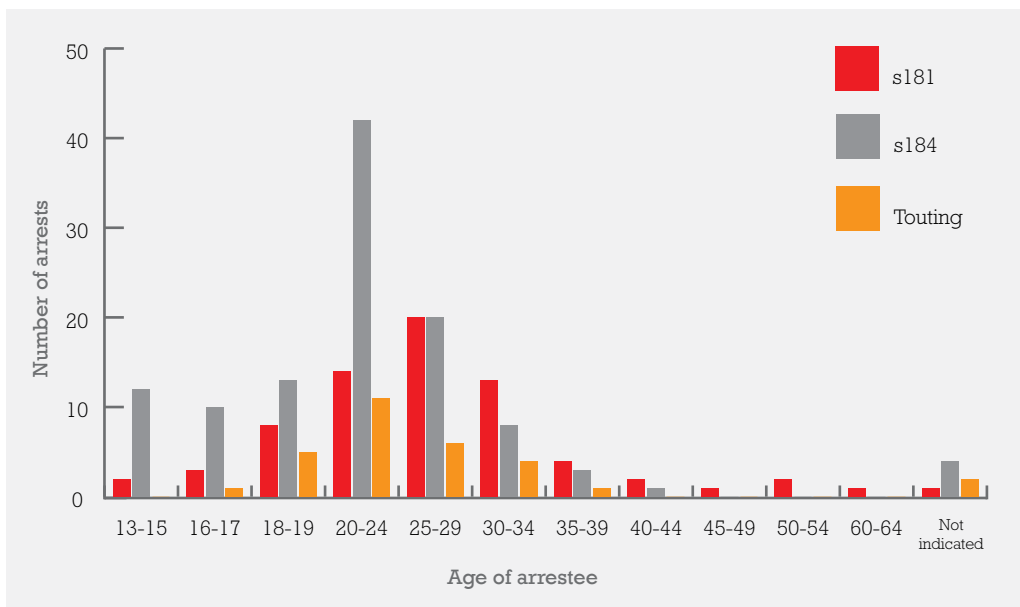
190 This individual reported to researchers that he had been on his way to the market at 4h30 to purchase potatoes when he was arrested. He further alleged that he had been beaten during this arrest.

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

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



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



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

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

### **Arrests for the Offence of Being a Rogue and Vagabond**

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

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

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

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

---

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

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

<sup>194</sup> *Id.*

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

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

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

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

---

195 *Id.*

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

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

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

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

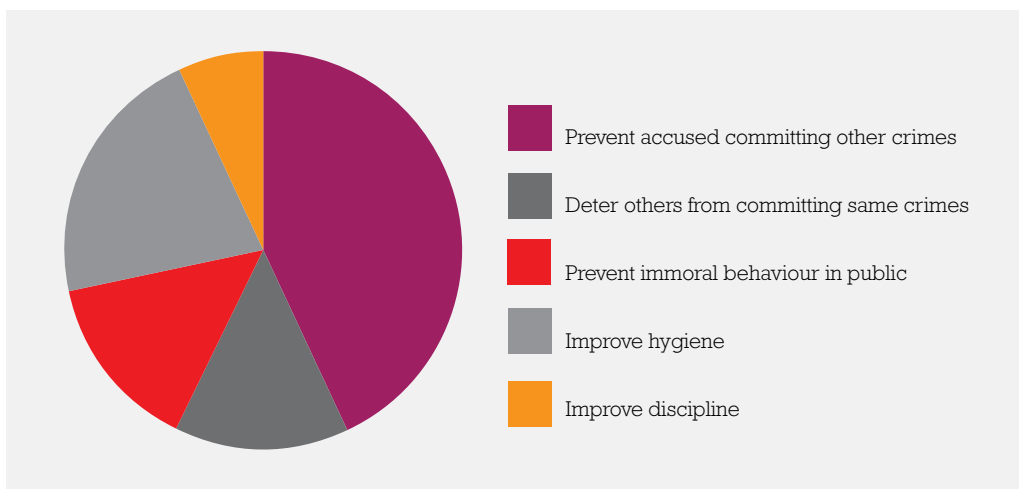
200 Interview with Anonymous Police Officer 4, Limbe police station (11 October 2012); Interview with Anonymous Police Officer 6, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 7, Blantyre police station (10 October 2012); Interview with Anonymous Police Officer 8,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

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

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

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

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



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

The explanations provided by police officers regarding the applicability of section 180<sup>206</sup> raise several key concerns.

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

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

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

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

205 Interview with Kayira, *supra* note 193.

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

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

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

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

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

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

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

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

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

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

---

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

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



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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

All police officers interviewed felt that the main purpose of section 184 arrests was to reduce crime rates, particularly robberies.<sup>224</sup> In section 184 cases, the police saw those arrested as prospective criminals.<sup>225</sup> The police felt that such arrests brought peace to communities,<sup>226</sup> protected those communities from unseen danger<sup>227</sup> and improved discipline in communities.<sup>228</sup> Moreover, all interviewed officers reported feeling that the arrests of persons under sections 180 and 184 reduced the above-described problems, and that these arrests were particularly effective for deterring others from committing similar offences, as well as for punishing arrestees.

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

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

- Counselling sessions for the public;<sup>232</sup>
- Giving advice;<sup>233</sup>

---

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

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

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

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

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

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

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

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

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

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

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

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

## Magistrates’ Interpretation of Sections 180 and 184

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

law by arresting people anyhow just to punish them.”<sup>263</sup>

## Conclusion

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

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

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

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

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

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

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

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

---

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

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

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

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

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

268 *Id.*

proceedings do not occur as often as they should.<sup>269</sup> Section 15 of the Criminal Procedure and Evidence Code requires that where a sentence of more than K1000 is imposed, the High Court should “immediately” be sent a record of the proceedings for review and the High Court must confirm such order before it can be given effect. The same should happen where a Third or Fourth Grade Magistrate imposes a sentence of more than six months, or a Second or First Grade Magistrate imposes a sentence of more than a year.<sup>270</sup> The responsibility of ensuring that cases are sent to the High Court for review lies with the Resident Magistrate<sup>271</sup> and the High Court is also able to call for such records for review if it has not received any.<sup>272</sup>

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

---

269 OSISA *supra* note 266, 29.

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

271 Section 361 of the Criminal Procedure and Evidence Code.

272 Section 360 of the Criminal Procedure and Evidence Code.

273 OSISA *supra* note 266, 32.