

## 7. Use of Vagrancy Laws Against Sex Workers<sup>316</sup>

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

### Introduction

This chapter concerns “sex workers”, a group of individuals defined as female, male or transgender adults and young persons<sup>317</sup> who receive money or goods in exchange for sexual services on either a regular or occasional basis.<sup>318</sup> The chapter explores various issues relating to police arrest and abuse of sex workers in Blantyre. As a point of departure, it is useful to review recent relevant studies of the challenges that sex workers in Malawi face.

A recent study by the United Nations Population Fund (UNFPA) estimates that 3 614 sex workers<sup>319</sup> operate in Blantyre City alone, with an overall national estimate of 19 295 sex workers in Malawi.<sup>320</sup> In the UNFPA study, sex workers cited the following factors as having

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

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

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

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

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

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

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

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

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

## Laws Relating to Sex Work in Malawi

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

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

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321 *Id* 44.

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

323 *Id* 15.6.

324 Longwe *supra* note 322, 16.

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

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

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

### **Sex Work-Related Offences in the Malawi Penal Code**

#### ***Behaving in a Disorderly Manner***

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

#### ***Performing an Indecent Act in Public***

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

#### ***Soliciting for Immoral Purposes***

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

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

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

327 *Mwanza supra* note 69.

328 Interview with Kayira *supra* note 193.

329 *Id.*

### ***Living on the Earnings of Prostitution***

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

### ***Brothel-Keeping***

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

### ***Transmission of Disease***

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

### ***Procuring a Person for Prostitution***

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

### ***Transporting a Person for Prostitution***

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

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

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

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

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

## Sex Workers' Experience with Police and Courts in Blantyre

### Notes on Methodology

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

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

332 *Id* at para. 166.

333 *Id* at para. 190.

334 *Id* at para. 221.

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

336 Section 29 of the Malawi Constitution.

337 Section 44(2) of the Malawi Constitution.

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

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

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

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

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

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

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

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

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

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

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

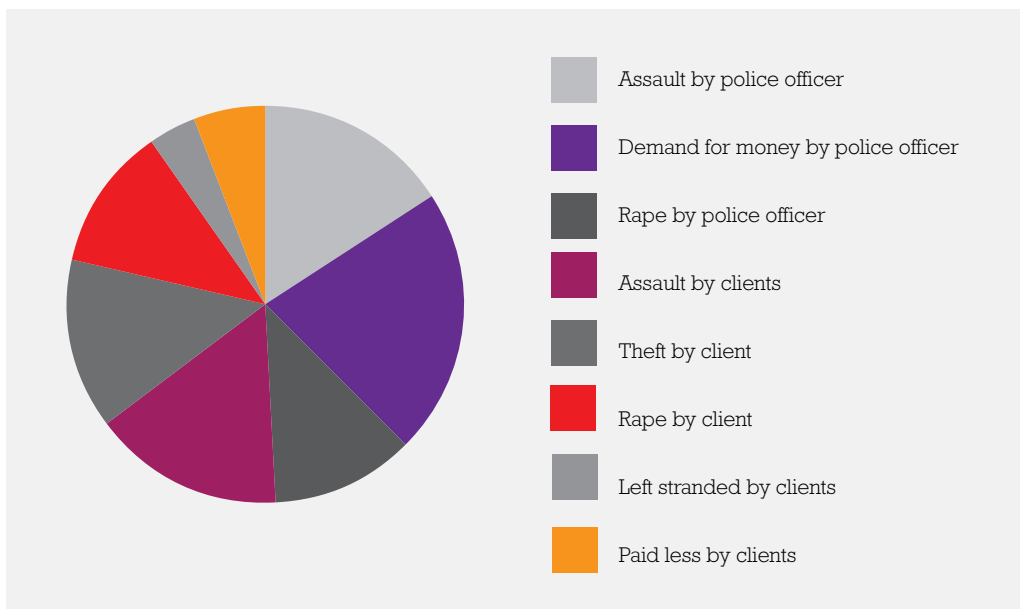
341 Interview with Anonymous Sex Worker 13 (22 June 2012).

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

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

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

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



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

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



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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

## Conclusion

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

*I would love to rather receive advice from police than be arrested.*<sup>352</sup>

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

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

### **Prevalence of Police Abuse of Sex Workers**

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

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

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

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

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

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

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

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

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

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

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

358 *Id* at para. 53.

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

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

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

### **Holding Police Accountable**

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

### **Promising Practices to Address Police Abuse of Sex Workers**

#### ***Theatre for a Change (TFAC)***

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

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

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

360 Annex to the *UNAIDS Guidance Note on HIV and Sex Work*, UNAIDS, April 2012, 4, [http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2009/JC2306\\_UNAIDS-guidance-note-HIV-sex-work\\_en.pdf](http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2009/JC2306_UNAIDS-guidance-note-HIV-sex-work_en.pdf) (last accessed: 2 June 2013).

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

362 *Id* annexure 7.

363 *Id* 13.

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

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

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

### **Police Corruption**

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

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

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

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

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

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

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

### **Decriminalisation of Sex Work-Related Activities**

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

### **Addressing Common Misconceptions**

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

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

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

368 *Id* Figure 12.

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

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

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

372 “In conservative Botswana, a push to legalise prostitution”, *The Citizen*, 8 November 2011, <http://www.citizen.co.za>.

addressing issues relating to sexual morality. The main “morality” arguments in favour of a continued criminalisation of sex work are that sex work attacks the institution of marriage and encourages extra-marital sex and sex outside relationships. No research substantiates these arguments and sexual relationships outside marriage exist irrespective of sex work. These arguments reflect a particular form of ‘morality.’ It can be argued that the denial of basic human rights to a specific group of persons and leaving them vulnerable to exploitation as a result of continued criminalisation of sex work is also immoral.

### **Legal Approaches to Sex Work**

Malawi follows a legal approach of partial criminalisation. Whilst neither the selling nor buying of sex is criminalised, the activities related to sex work are criminalised in Malawi. This is the legal situation throughout southern Africa, excluding South Africa. Since activities of living off the earnings, procurement, brothel keeping and soliciting are criminalised in Malawi, sex work in practice still takes place in a largely criminalised environment and sex workers remain a target of police enforcement.

#### **Legal approaches to sex work**

- Total criminalisation – The selling and buying of sexual services and all related activities are criminalised.
- Partial criminalisation – The buying of sexual services and some/all related activities are criminalised.
- Non-criminalisation/Decriminalisation – The selling and buying of sexual services and all related activities are decriminalised. Apply existing laws to sex work including labour laws and business regulations.
- Legalisation – The selling and buying of sexual services and some/all related activities decriminalised under certain conditions but sex work is subject to state regulation.

There have been various studies on the impact of partial criminalisation on sex workers. For example, sex work itself is not criminalised in Canada, but all related activities are. Research conducted by Professor John Lowman on the impact of the criminal laws in Canada, found that:<sup>373</sup>

- It contributes to legal structures that tend to make sex workers responsible for their own victimisation, whereby sex workers are seen to “deserve what they get”;
- It makes prostitution part of an illicit market and creates an environment in which brutal forms of manager-exploitation can take root;
- It encourages the convergence of prostitution with other illicit markets, such as the drug market;
- It institutionalises an adversarial relationship between sex workers and police and thus deprives sex workers of the full protection of criminal law when victims of crime;
- It leads to social and political marginalisation of sex workers and makes them targets for violence;
- It increases the isolation of street-based sex workers and increases their health and safety risks; and
- It has not suppressed street-based prostitution in most cities.

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373 J Lowman “Violence and the Outlaw Status of (Street) Prostitution in Canada” *Violence Against Women* (2000) 6(9): 987-1011.

Other research in Canada has shown that criminal law penalises sex workers for trying to earn a living.<sup>374</sup> Research has also shown that moving indoors increases sex workers' safety and the decriminalisation of indoor sex work is accordingly an important measure to ensure the health and safety of sex workers.<sup>375</sup>

Decriminalisation refers to an approach where no specific laws criminalise consensual adult sex work and related activities. Normal labour laws apply to sex work where sex workers work for an employer. In a decriminalised situation, child prostitution, trafficking and coerced prostitution remain criminalised. An example of a decriminalised approach to consensual adult sex work is New Zealand. Governments can also develop specific measures or guidelines to protect the rights and welfare of sex workers in consultation with sex workers. Specific prostitution supervisory bodies can be used to review the operation of legislation; advise government; develop regulations; provide information to sex workers; and develop exit strategies.

The UNAIDS and Inter-Parliamentary Union in their Handbook for Legislators on HIV/AIDS, Law and Human Rights<sup>376</sup> recommend that sex workers' rights should be protected under occupational health and safety legislation and that HIV testing should not be mandatory for sex workers or clients.

### **Criminalisation of Sex Work-Related Activities and HIV**

The criminalisation of sex work has a direct impact on the transmission of HIV in two ways:

- It impacts on sex workers' access to health services, including sexual and reproductive health and family planning services, and
- It creates the conditions for increased violence against sex workers and limits their ability to protect themselves from HIV infection.

Guideline 4 of the UNAIDS International Guidelines on HIV/AIDS and Human Rights states that criminal law should not impede provision of HIV prevention and care services to sex workers and their clients.<sup>377</sup>

The Committee on the Elimination of Discrimination Against Women (CEDAW) in its General Recommendation 24 on Women and Health advised that special attention should be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups, including women in prostitution. The Recommendation requires States to ensure without prejudice or discrimination the right to sexual health information, education and services to all women.<sup>378</sup>

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374 G Benoit & A Millar *Dispelling Myths and Understanding Realities: Working Conditions, Health Status and Exiting Experiences of Sex Workers* (2001).

375 A Krüsi et al "Negotiating Safety and Sexual Risk Reduction With Clients in Unsanctioned Safer Indoor Sex Work Environments: A Qualitative Study" *American Journal of Public Health* (2012), <http://www.cfenet.ubc.ca/news/releases/safer-sex-work-spaces-reduce-violence-and-hiv-risks-street-involved-women> (last accessed: 2 June 2013).

376 UNAIDS *Handbook for Legislators on HIV/AIDS, Law and Human Rights* (1999) [http://www.ipu.org/PDF/publications/aids\\_en.pdf](http://www.ipu.org/PDF/publications/aids_en.pdf) (last accessed: 2 June 2013).

377 UNAIDS *International Recommendations on HIV/AIDS and Human Rights* (2006) [http://data.unaids.org/Publications/IRC-pub07/jc1252-internguidelines\\_en.pdf](http://data.unaids.org/Publications/IRC-pub07/jc1252-internguidelines_en.pdf) (last accessed: 7 June 2013).

378 CEDAW *General Recommendation No. 24: Article 12 of the Convention (Women and Health)* (1999), A/54/38/Rev.1 <http://www.refworld.org/docid/453882a73.html> (last accessed: 7 June 2013).



Section 19 of Malawi's new Gender Equality Act of 2013, recognises the importance of access to sexual and reproductive health services, including every person's right to access sexual and reproductive, family planning and STI services. Section 20(1) of the Act requires that health officers respect the sexual and reproductive health rights of every person without discrimination and respect the dignity and integrity of every person accessing sexual and reproductive health services.

Research has shown that the loss of control over working conditions as a result of criminalisation exacerbates sex workers' risk of exposure to HIV.<sup>379</sup> In countries like Sweden, South Africa, South Korea, United States, China and Canada, where sex work or related activities are criminalised, research has shown that this impacts on sex workers who fear carrying condoms will be used as evidence against them.<sup>380</sup> In contrast, research has shown that better public health outcomes occur when sex work is decriminalised and health promotion and outreach programmes are properly resourced.<sup>381</sup> A study conducted in Kenya and the Ukraine noted an approximate 25 percent reduction in the incidence of HIV infections among female sex workers when physical or sexual violence was reduced.<sup>382</sup>

Thus, instead of using criminal law, the UNAIDS Advisory Group on HIV and Sex Work concluded that "effective approaches to HIV prevention in the context of sex work are those that recognise the realities of sex work and enable sex workers to protect themselves from the risk of HIV transmission".<sup>383</sup> This includes increasing awareness of risk prevention among the general population, including sex workers; increasing access to male and female condoms and water-based lubricants; and ensuring that treatment, care and support services are accessible to sex workers, who are often dissuaded from accessing health services due to stigma and discrimination.<sup>384</sup>

In conclusion, ample evidence exists linking the partial-criminalisation of sex work with unlawful police practices and police corruption. Whilst improved anti-corruption measures and human rights training of police might help, it is unlikely that such practices, which are prevalent in many jurisdictions where sex work is criminalised, will be eradicated in the current legal context.

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379 Pivot Legal Society, *The impact of criminalisation on the health status of sex workers* (2004).

380 Lee & Yung, "The Correlation Between New Prostitution Acts and Sexually Transmitted Diseases in Korea" *The Korean Journal of Policy Studies* (2009) 24(1) 111-125; PROS Network and Leigh Tamppert (Sex Workers Project), *Public health crisis: the impact of using condoms as evidence of prostitution in New York City* (2012), <http://sexworkersproject.org/downloads/2012/20120417-public-health-crisis.pdf> (last accessed: 2 June 2013); Dodillet & Ostergen, *The Swedish Sex Purchase Act: Claimed Success and Documented Effects* (2011).

381 B Donovan et al, "The sex industry in New South Wales" *Report to the NSW Ministry of Health, Kirby Institute for Infection and Immunity in Society* (2012) [www.kirby.unsw.edu.au](http://www.kirby.unsw.edu.au) (last accessed: 2 June 2013).

382 MR Decker et al, "Estimating the Impact of Reducing Violence Against Female Sex Workers on HIV Epidemics in Kenya and Ukraine: A Policy Modelling Exercise" *American Journal of Reproductive Immunology* 69 (Supp. 1) (2013) 122-132, 122. The authors in the article note that violence cannot directly cause HIV but "it influences risk through a complex set of proximal factors such as unprotected sex", 123.

383 Annex to the *UNAIDS Guidance Note on HIV and Sex Work*, UNAIDS (2012) 4, [http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2009/JC2306\\_UNAIDS-guidance-note-HIV-sex-work\\_en.pdf](http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2009/JC2306_UNAIDS-guidance-note-HIV-sex-work_en.pdf) (last accessed: 2 June 2013).

384 *Id.*