

## 11. Recommendations

*Based on the findings of the research, this report has two key recommendations: Firstly, that the Malawi Penal Code provisions relating to idle and disorderly persons and rogues and vagabonds require urgent revision in order to ensure that these provisions do not unfairly target the poor. Secondly, that the abuse by police of their powers to arrest persons for minor nuisance-related offences requires ongoing monitoring to ensure that they do not unfairly target and violate the rights of poor and marginalised groups in Malawi. Addressing these findings will require a multi-stakeholder approach to ensure that the problems identified in the research are addressed swiftly, appropriately and comprehensively. This chapter encapsulates the key recommendations which flow from the discussions in Chapters 4 to 10.*

### Reviewing Laws Relating to Nuisance-Related Offences

The Malawi Law Commission should review the nuisance-related offences in the Penal Code and consider the following:

- The need to repeal obsolete and archaic offences, particularly those based upon status rather than criminal activity and those that are overly elastic and provide law enforcement with too much discretion;
- The defects of vagueness, over-breadth, and disproportionality present in sections 180 and 184 of the Malawi Penal Code relating to idle and disorderly persons and rogues and vagabonds;
- The need for stakeholder consultation, including with lawmakers, law enforcement, legal practitioners, members of the academic community, and local communities, to identify those laws which continue to resonate with Malawian values in the post-colonial period, and those which are rooted in the outdated colonial past;
- The need to repeal laws that are not currently enforced to serve the interests of efficiency and clarity of criminal law;
- The need to rectify anomalous laws (e.g. where two similar offences result in vastly different levels of punishment); and
- The removal of imprisonment or detention as a punishment or administrative consequence of removal orders and non-serious nuisance-related offences.

## Improving the Manner in which Nuisance-Related Offences are Enforced

In general, more work needs to be done to disseminate information to the public and to the police on the actual content of laws, the types of behavior that are prohibited, and the resources available in cases of the abuse of fundamental rights.

Key recommendations include that the Malawi Police Service should:

- Establish consistent practices for police record-keeping and arrest procedures (e.g. all police officers should record relevant details such as date/time of arrest and protective measures applied). The Malawi Police Service should further ensure that all police officers record the results of all cases of detention, such as the outcome of a court proceeding or plea agreement, in order to serve the interests of transparency and accountability. Record-keeping could be improved through the issuing of directives requiring increased supervision of record-keeping practices at police station level.
- Develop specific directives for police officers that set out the scenarios in which arrests for section 180 and 184 offences would be appropriate and those where they are not. Guidelines on the exercise of sweeping should also be developed for police officers.
- Ensure that all police officers have been trained on the provisions of the Penal Code, Police Act, Child Care, Protection and Justice Act and the recent amendments to the Criminal Procedure and Evidence Code. This should not be limited to including such topics in the general police training curriculum. The Malawi Police Service could, for example, require the officers-in-charge at each police station to report on a regular basis on the training and seminars that have been held at the police station on the new laws and amendments.
- Conduct research 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. Such research should also consider the benefit, and unintended consequences of sweeping exercises and how it should be exercised.

The judiciary should ensure that the process of sending proceedings to the High Court for review is strengthened and monitored.

## Respecting the Rights of Children During Arrests

Both the Malawi Police Service and judiciary should ensure that detention, particularly of children, should not be used as a tool of crime prevention or of protection for the detainee. If protection of the detainee is a concern (for example, if the detainee is a child), government funds must be directed toward establishing and monitoring proper facilities. Additional training is required for police officers and magistrates at all levels to communicate the facts and spirit of reformed laws affecting child-offenders.

Alternative measures should be developed to address concerns relating to the behavior of street children. For example, a dedicated officer who befriends street children and acts as a resource for positive change in their lives would perhaps be a more effective way to address the causes of crime. Additional resources are required to strengthen the reach of non-governmental organisations that provide social development and diversion services to children.

The Malawi Police Service, in collaboration with development aid partners, should take urgent measures to improve the infrastructure of police stations which do not have sufficient space to separate adults from children in detention. Stakeholder collaboration, including Court User Committees and the Lay Visitors' Scheme should be sustained and improved as important tools to monitor conditions in police detention facilities.

The Malawi Law Commission and Malawi Police Service should address the confusion relating to section 97 of the Child Care, Protection and Justice Act through law reform or directives.

## Respecting the Rights of Sex Workers During Arrests

The Malawi Law Commission should review all Penal Code provisions relating to sex work to address possible violations of constitutional rights and inconsistencies in current provisions relating to sex work.

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

The Malawi Police Service should conduct training with all its police officers on the rights of sex workers. Such training should emphasise the penalties of police abuse of power and corruption. The training should further emphasise that HIV testing of sex workers is unlawful. The training should clarify the misconception that section 146 of the Penal Code criminalises the selling of sex for reward or the earning of an income by a sex worker herself - these acts are not criminalised in Malawi.

Funding should be sought to extend promising practices on collaborating with police to reduce abuse of the sex workers to all districts in Malawi (For example, the currently operating training methods of Theatre for a Change to change the attitude of police towards sex workers; and the helpline and paralegal support provided to sex workers by CHREAA).

It is important that organisations working on the police abuse of sex workers in Malawi coordinate and collaborate, and also work with government departments and services such as One-Stop Centres and Victim Support Units, to ensure more comprehensive services for sex workers and other marginalised communities.

## Respecting the Rights of Touts During Arrests

Additional research is required to assess the impact of the prohibition of touting on unemployment and the criminalisation of young men. The offence of touting should either be repealed and touting should be regulated, or alternative options should be put in place for income generation for former touts.

## Ensuring Proper Implementation of Laws Relating to Arrest and Detention

There should be sustained investment in the provision of paralegal services to improve access to justice for persons who have been arrested. In addition, the Malawi Police Service should ensure that the police training curriculum is reviewed to guarantee that human rights standards are upheld during and after arrests for nuisance-related offences.

The judiciary should emphasise in its training of magistrates that there is a responsibility on the courts to scrutinise the cases where persons are brought before them whose arrests appear to have been unlawful or without probable cause.

## Developing Alternatives to Arrest

The Malawi Police Service, in collaboration with other stakeholders, should devise community-based alternatives to arrest and detention for minor nuisance-related offences. In this respect, the Community Policing Services Branch should play a prominent role in working with local communities to address specific nuisance-related concerns in a manner which does not involve the criminalisation of individuals or arrests.

In the case of minor nuisance-related offences, the police need to be encouraged to first caution a person and instruct them to cease the particular conduct, before exercising their power to arrest the person. A police officer could also issue a formal caution as opposed to arrest. Such options should be included in specific directives drafted by the Malawi Police Service on the manner in which police should respond to section 180 and 184 offences in the Penal Code.

The Malawi Police Service, in collaboration with non-governmental organisations, should develop educational materials to make communities aware that administrative fines could be imposed in lieu of arrest for certain offences, and their rights in relation to such fines including that such fines need not be paid immediately.