SOUTHERN AFRICA LITIGATION CENTRE

LEGAL MEMORANDUM

2 July 2013

Interpretation of Section 146 of the Malawi Penal Code

Introduction

The Southern Africa Litigation Centre (SALC) and Centre for Human Rights Education, Advice and Assistance are concerned that some police officers in Malawi operate as if the act of selling sex is criminalised in Malawi. In particular, police officers often incorrectly interpret section 146 of the Malawi Penal Code to mean that sex work is illegal in Malawi. Such an interpretation is then used to justify an arrest under section 184(c) of the Penal Code, which provides "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".

This memorandum sets out the history of section 146 of the Malawi Penal Code. The memorandum concludes that acts of exchanging sex for remuneration are not criminalised in Malawi, nor are possession and use of one's earnings as a sex worker. Any interpretation to the contrary is not supported by current provisions in the Penal Code or the rules of statutory interpretation.

Two sections in the Malawi Penal Code relate to living on the earnings of prostitution (sections 145 and 146):

> **Section 145. Male person living on earnings of prostitution or persistently soliciting**
> (1) Every male person who—
> (a) knowingly lives wholly or in part on the earnings of prostitution; or
> (b) in any public place persistently solicits or importunes for immoral purposes,
> shall be guilty of a misdemeanour. In the case of a second or subsequent conviction under this section the court may, in addition to any term of imprisonment awarded, sentence the offender to corporal punishment.
> (3) Where a male person is proved to live with or to be 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, abetting or compelling her prostitution with any other person or generally, he shall unless he shall satisfy the court to the contrary be deemed to be knowingly living on the earnings of prostitution.

> **Section 146. Woman aiding, etc., for gain prostitution of another woman**
> Every woman who knowingly lives wholly or in part on the earnings of prostitution, or who is proved to have, for the purpose of gain, exercised control, direction or influence over the movements of a prostitute in such a manner as to show that she is aiding, abetting or compelling her prostitution with any person, or generally, shall be guilty of a misdemeanour.

These two sections stem from the British Colonial Office Model Criminal Code and are exactly the same as those provisions adopted in the criminal codes of other colonies, including Fiji[1], Tanzania[2] and Kenya[3]. Thus, the actual provisions were never debated in the Malawian parliament and originate from debates in the English Parliament.

To understand the meaning of sections 145 and 146 of the Penal Code, we should accordingly look at their history, including the debates in the English Parliament, which motivated the creation of these offences.

History of the Prohibition of Living on the Earnings of Prostitution

The first English law referring to prostitution was the 1824 Vagrancy Act, which made it an offence for a "common prostitute" to behave in a riotous or indecent manner in a public place. A similar offence continues to exist under section 180(a) of the Malawi Penal Code, which refers to a "common prostitute" behaving in a disorderly manner as an idle and disorderly person. This section does not criminalise the act of selling sex or prostitution and is instead targeted at nuisance-related, disorderly behaviour in public. Thus, a sex worker who does not behave in a disorderly manner in public does not commit an offence in terms of this section.

The English laws changed in 1885 after the editor of the *Pall Mall Gazette* published a report about an alleged organised prostitution ring in London.[4] The 1885 law was intended to prevent the procurement and detention of women by third parties for the purpose of prostitution. The law prohibited the management of premises as a brothel and a tenant or landlord of such premises was liable to a fine or imprisonment.[5]

The prohibition on brothels limited the places where sex workers could work and increased their reliance on third parties, such as pimps and taxi drivers, to find customers for them. In turn, third parties increasingly exploited and abused sex workers.[6] Thus, in 1898 an amendment to the Vagrancy Act was passed that intended to protect sex workers by criminalising persons who made a living on the earnings of a prostitute.[7] Speaking about the object of the 1898 amendment, the Secretary of State for the Home Department noted that "it was intended for the purpose of bringing under the operation of the Vagrancy Act, 1824, as

[1] Sections 145 and 146 of the Malawi Penal Code are exactly the same as sections 166 and 167 of the Fiji Islands Penal Code.
[2] Sections 145 and 146 of the Malawi Penal Code are exactly the same as sections 145 and 146 of the Tanzanian Penal Code.
[3] Section 146 of the Malawi Penal Code is exactly the same as section 154 of the Kenya Penal Code.
[4] J Laite "Paying the Price Again: Prostitution Policy in Historical Perspective" (2006) available at http://www.historyandpolicy.org/papers/policy-paper-46.html (last accessed: 24 June 2013).
[5] *Id.*
[6] House of Commons Debate on the Criminal Law Amendment (White Slave Traffic) Bill, 10 June 1912, available at http://hansard.millbanksystems.com/commons/1912/jun/10/criminal-law-amendment-bill (last accessed: 24 June 2013). "Many of these measures which had been recently taken with regard to these unhappy women had had the effect of driving them into the arms of bullies."
[7] Laite *supra* note 4.

rogues and vagabonds, those men who lived by the disgraceful earnings of the women whom they consorted with and controlled."[8]

Section 1 of the Vagrancy Act of 1898 stated that "(1) Every male person who – a) knowingly lives wholly or in part on the earnings of prostitution; or b) in any public place persistently solicits or importunes for immoral purposes," shall be deemed a rogue and vagabond within the meaning of the Vagrancy Act of 1924, and may be dealt with accordingly. In terms of section (3), "where a male person is proved to live with or to be 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, abetting or compelling her prostitution with any other person or generally],[9] he shall, unless he can satisfy the court to the contrary, be deemed to be knowingly living on the earnings of prostitution." This wording mirrors that of section 145 of the Malawi Penal Code.

The origin of section 146 of the Malawi Penal Code can be traced back to 1912, when English lobbyists sought to deal with allegations of white women being trafficked to colonies for the purpose of prostitution.[10] These allegations led to debates in both Houses of the English Parliament on the Criminal Law Amendment (White Slave Traffic) Bill. At the time, considerable pressure was put on the English Parliament to pass the Bill on an urgent basis. On numerous occasions, however, the members of the House of Lords and House of Commons expressed their dismay at the manner in which this legislation was rushed through Parliament.

It is clear that the introduction of an offence of living on the earnings of prostitution was not aimed at sex workers, but rather at those who exploited them. Discussions in the House of Lords on the Bill emphasised that "immorality is not a crime in the eyes of the law, prostitution is not a crime in the eyes of the law, and this Bill does not seek to suppress either the one or the other . . . It merely seeks to amend in certain respects the law as it exists today".[11] The discussion in the House of Lords noted that the Bill was aimed at amending the crime of living on the earnings of prostitution: "With the immoral man and immoral woman the law is not concerned. But with the procurer, the kidnapper, the souteneur, the trafficker in

[8] House of Commons Debate on the Vagrancy Act Amendment Bill, 14 March 1898, Hansard, available at http://hansard.millbanksystems.com/commons/1898/mar/14/vagrancy-act-amendment-bill (last accessed: 24 June 2013).

[9] The phrase "proved to have exercised control…" was inserted by the Criminal Law Amendment (White Slave Traffic) Act in 1912, and replaced the phrase "and has no visible means of subsistence".

[10] Teresa Billington-Creig, during this period, attempted to ascertain the accuracy of the reports of white slavery. She noted that "the sudden clamour for legislation to which the Act was yielded was created almost entirely by the statement that unwilling, innocent girls were forcibly trapped . . . and finally transported to foreign brothels under the control of large vice syndicates" (428). She noted that many of the stories of such incidents were often variations of each other, appeared in short succession, were extraordinary in nature, were often repeated and were always second- or third-hand accounts. She interviewed the persons who made these statements, but they did not provide her with evidence for their allegations. In an interview with the Assistant Commissioner of the Central Authority in England for the Repression of the White Slave Traffic, he noted that he had not come across such cases and that he had tried in vain to establish the authenticity of stories that had appeared in the media. He concluded that the stories were generally exaggerations. T Billington-Greig, "The Truth About the White Slave Traffic" *The English Review*, June 1913, 428-446.

[11] House of Lords Debate on the Criminal Law Amendment (White Slave Traffic) Bill, 28 November 1912, Hansard, available at http://hansard.millbanksystems.com/lords/1912/nov/28/criminal-law-amendment-bill (last accessed: 24 June 2013).

human life, the person, man or woman, who fattens on the proceeds and earnings of another's degradation."[12]

Initially, the debate on the Bill in the House of Lords encouraged an amendment which would extend the provisions of the Vagrancy Act of 1898 to female persons living on the earnings of prostitution. An objection was raised that the effect would be to apply the crime to, for example, a disabled mother living on the earnings of her daughter.[13] Both Houses of Parliament concurred that the section was inserted only to impose penalties on women who commit acts analogous to the act of procuration—a crime for which male convicted persons could be punished by flogging—but the dilemma was that women had been excluded from flogging as a method of punishment since 1824.[14] For this reason, the House of Commons suggested the creation of a separate but similar offence applying to women that did not include the penalty of flogging or the presumptions relating to a person living with a prostitute.[15]

The inclusion of a new offence aimed at a woman who lived on the earnings of another woman's prostitution was not without criticism. Members of Parliament expressed concern about this new offence as it applied to women, and further complained about rushing through consideration of the offence.[16]

Despite the concerns regarding the wide ambit of the living-on-the-earnings provision, it is clear that the section was aimed at women who exploited sex workers, not at sex workers themselves. The application of the living-on-the-earnings offence to women was premised on stories circulating at the time about women's involvement in trafficking and procuring other women for the sex trade.[17]

The Vagrancy Act of 1898 was repealed in England and incorporated into the Sexual Offences Act in 1956, becoming section 30(1) and (2) of the new Act. Section 31 of the Sexual Offences Act of 1956 dealt with a "woman exercising control over a prostitute." In terms of this section it is an offence for a woman for purposes of gain to exercise control, direction or influence over a prostitute's movements in a way which shows she is aiding, abetting or compelling her prostitution. In effect, the same offence fell under different sections depending on whether the perpetrator was a man or a woman. In both cases, the offence related to a person living on the earnings of a sex worker and was intended as a measure to protect sex workers from exploitation. Both sections were eventually repealed in

[12] *Id.*
[13] House of Lords debate on the Criminal Law Amendment (White Slave Traffic) Bill, 9 December 1912, Hansard, available at http://hansard.millbanksystems.com/lords/1912/dec/09.criminal-law-amendment-bill (last accessed: 24 June 2013).
[14] House of Commons debate on the Criminal Law Amendment (White Slave Traffic) Bill, 11 December 1912, Hansard, available at http://hansard.millbanksystems.com/commons/1912/dec/11/clause-6-amendments (last accessed: 24 June 2013).
[15] *Id.*
[16] *Id.* "I do not think at this late hour it is possible for the House to properly consider this measure." "I ask the House to consider seriously before they make a new crime which will include more people even than the Amendment would have done as passed by the House of Lords. If you leave the Amendment so vague that anyone who is said to have any influence over a prostitute becomes liable to six months' imprisonment, I feel sure you will be likely to do great injustice to many people in this country."
[17] *Id.* "Now nearly all the stories which we know so well from letters to the papers or in columns of the sensational Press deal with women. It is the woman who decoys away for ever the girl who assists her when she faints. It is the woman who is waiting in her carriage at Euston station to catch the unwary servant girl, and take her away in her carriage and pair to a brothel in Soho."

England by the Sexual Offences Act of 2003 and replaced with a single provision dealing with any person exerting control for gain over a prostitute.

Sections 145 and 146 of the Malawi Penal Code, similar to historical English law, separate the offence of living on the earnings of prostitution into two offences: one pertaining to men and the other to women. The rationale for this differentiation was comparable to that which had applied in England, and therefore the Malawi Penal Code included corporal punishment as a punitive option for men under section 145, but not for women under section 146. Reference to corporal punishment in Malawi was eventually deleted by the Penal Code (Amendment) Act 1 of 2011. Thus, these offences in sections 145 and 146 are now essentially the same. Indeed, in many countries, "living on the earnings" offences were combined into one provision referring to "every person".[18]

Judicial Interpretation of the Phrase "Living on the Earnings of Prostitution"

The House of Lords in the case of *Shaw v Director of Public Prosecutions*[19]dealt with the meaning of the phrase "living in whole or in part on the earnings of prostitution". The court held that "a person may fairly be said to be living in whole or in part on the earnings of prostitution if he is paid by prostitutes for goods or services supplied by him to them for the purpose of their prostitution which he would not supply but for the fact that they were prostitutes". Thus, the judgment held that a doctor or grocer would not be guilty under this section for providing services to a sex worker, but a person selling sex work advertisements would be subject to punitive measures. The court held that a landlord would not always be subject to criminal penalties, and determination of guilt would depend on whether he was earning more than the normal rental rate from a sex worker who occupied the premises. Applying the mischief rule, the court concluded that "living on" refers to "living parasitically."[20] It is important to note that the court held that despite the existence of this offence, "prostitution [itself] is not an offence: it is not said that the woman or any man resorting to her is guilty of any offence".

In the Canadian case of *R v Grilo*,[21] the Ontario Court of Appeal considered a scenario in which the accused lived with a prostitute and was supported wholly or in part by her earnings; a rebuttable presumption applied that such a person was guilty of living on the earnings of prostitution. The court held that the presumption was intended to prosecute pimps who exercised control over prostitutes in situations where it was difficult for the sex worker to testify against them. It held that a court should ask itself in situations where the accused lived with the sex worker whether the relationship was an exploitative one. In cases where the

[18] Interestingly, Scottish Courts have recognised that the two sections relating to living on the earnings by men and by women related to the same offence. Thus, as notions of the gender neutrality of the law gained influence, it made sense that women could also be charged under the section referring to men and that a section referring exclusively to women had therefore become superfluous. *Lindsay Reid v Her Majesty's Advocate*, High Court of the Justiciary, 6 November 1998, available at http://www.scotscourts.gov.uk/opinions/Ljc1011.html (last accessed: 24 June 2013).

[19] 1961 UKHL 1, 1962 AC 220, available at http://www.bailii.org/uk/cases/UKHL/1961/1.html (last accessed: 24 June 2013).

[20] "The mischief is plain enough. It is well known that there were and are men who live parasitically on prostitutes and their earnings. They may be welcome and merely cohabit, or they may bully women into earning money in this way. They prey or batten on the women. Such men are clearly living on the earnings of prostitution: if they have or earn some other income then they are living in part on such earnings."

[21] 1991 2 OR (3d) 514.

accused did not live with the sex worker, the Ontario Court held that the issue was whether the person lived parasitically on the earnings of the sex worker.[22]

In *R v Downey*,[23] the Canadian Supreme Court confirmed that the prohibition of living on the earnings of prostitution is aimed at a person who lives parasitically off a prostitute's earnings. *Downey* rejected the presumption that a person living with or habitually being present in the company of prostitutes lives on another person's prostitution, and this rejection was referred to with approval in the Malawi High Court case of *Jumbe and Mvula v Attorney General*.[24]

The Court of Appeal for Ontario in the case of *Canada (Attorney General) v Bedford*[25] further confirmed that the prohibition of living on the avails[26] of prostitution was aimed at "preventing the exploitation of prostitutes and the profiting from prostitution by pimps". Despite the Canadian prohibition of living on the earnings of a person engaged in prostitution, the court observed that "Parliament has chosen not to criminalise prostitution. In the eyes of the criminal law, prostitution is as legal as any other non-prohibited commercial activity". The court held that the provision had been interpreted by courts "to apply generally to people who provide goods or services to prostitutes, because they are prostitutes. This interpretation includes, but is not restricted to, pimps". The court also noted that the section was grossly disproportionate to the extent that it criminalised even non-exploitative relationships between prostitutes and others that could have served to enhance sex workers' safety. The court chose to read by implication words of limitation into the statute, such that the prohibition related to living on the avails of prostitution *in circumstances of exploitation*; the court argued that such an approach cured its constitutional defect and aligned the language of the provision with its legislative goal.

It is clear that various courts have consistently sought to align the language of the living-on-the-earnings prohibition with its legislative objective, which was to protect sex workers from exploitation by others.

The Principles of Legal Interpretation Applicable in Malawi

Section 3 of the Malawi Penal Code expressly states that the Code is to be understood according to English criminal law and statutory interpretation.

English law is traditionally subject to three rules of statutory construction: the literal rule, the mischief rule and the golden rule.

The literal rule requires that a law is to be read exactly as written and should not divert from its ordinary meaning. According to this rule, where there is no definition in a statute, words must be given their plain, ordinary and literal meaning. Courts have imposed an absurdity limit on this rule, which states that a statute cannot be interpreted literally if it would lead to an absurd result. This recognition led to the development of the golden rule[27], which reflects a position that the intent of the law is more important than its text and that courts may depart from a literal meaning where it would lead to an absurd result.

[22] *R v Barrow* 2001 54 OR (3d) 417 at para 29.
[23] 1992 2 SCR 10.
[24] Constitutional cases numbers 1 and 2 of 2005, 21 October 2005.
[25] 2012 ONCA 186. This case referred with approval to *Shaw*.
[26] The word "avails" is used interchangeably with the word "earnings" by Canadian courts.
[27] *Grey v Pearson* 185 6 HL Cas 61, 106.

According to the mischief rule, a statute must be construed so as to suppress the mischief and advance the remedy, thus giving the courts considerable latitude in achieving the objective of the legislature despite any inadequacy in the language included in it.[28] The mischief rule was set out in *Heydon's Case*.[29] In that case, the court asked four questions:

1. What was the common law before the making of the Act?
2. What was the mischief and defect for which the common law did not provide?
3. What remedy had parliament resolved and appointed to cure the problem?
4. What was the true reason for the remedy?

The rule was accordingly seen to apply to legislation developed from common law.

These three rules of interpretation eventually evolved into the purposive interpretation approach. The purposive approach refers to situations in which courts utilise extraneous materials from the pre-enactment phase of legislation (including early drafts, Hansards,[30] committee reports, etc.). The English Law Commission proposed the adoption of the purposive approach in 1969, and it was eventually adopted in a House of Lords decision in *Pepper v Hart*.[31] The case established the principle that when primary legislation is ambiguous, courts may refer to statements made in the House of Commons or House of Lords in an attempt to interpret the meaning of the legislation.

When trying to interpret the meaning of statutory provisions, courts make use of both internal and external aids. Internal aids to statutory interpretation include the context, title, headings, interpretation clause and punctuation. External aids to statutory interpretation include the objects and reason of the Act, text books, dictionaries, international convention, legislative history, judicial interpretation of words, debates and proceedings of the legislature and the state of affairs at the time of the passing of the Bill.

There also exist various general principles of legality that a judge should follow. For example, a statute should be interpreted in a manner that avoids absurdity, and it is assumed that the legislature did not intend an absurd or manifestly unjust result. The principle of legality further requires certainty and specificity in the definition of crimes and assumes that if the legislature intended to criminalise conduct, it would have done so in express words. A statement of prohibited conduct must be clear and unambiguous and should leave no room for dispute or uncertainty as to whether particular conduct comes within the ambit of a proscription set out in the definition of the crime. The principle of legality further requires that penal statues must be strictly construed, and that where they are vague or ambiguous, penal statutes should be interpreted in favour of defendants' liberty.[32]

The principle of legality also requires that the Constitution should be applied in the interpretation of all laws. Section 10 of the Malawi Constitution provides that in the

[28] *Smith v Hughes* 1960 2 All ER 859.
[29] 1584 76 ER 637.
[30] Hansard is a substantially verbatim report (with repetitions and redundancies omitted and obvious mistakes corrected) of parliamentary proceedings.
[31] 1993 AC 593.
[32] This approach is also referred to as the Rule of Lenity, which requires that in construing an ambiguous criminal statute, the court should resolve the ambiguity in favour of the defendant. See also *McNally v United States* 483 US 350 (1987).

interpretation of all laws the provisions of the Constitution shall be regarded as the supreme arbiter and ultimate source of authority.

Thus, when section 42(f)(vi) of the Malawi Constitution provides that a person shall not be convicted of an offence in respect of any act that was not an offence at the time when the act was committed, the courts must be careful not to extend their interpretation of an offence beyond the meaning that has historically been applied to the offence.

The Meaning of Section 146 of the Malawi Penal Code

Based on the above principles and the history of the relevant offences, it is clear that section 146 of the Malawi Penal Code applies to women who live parasitically on the earnings of other sex workers, and not to sex workers themselves.

The heading of section 146 refers to a "Woman aiding, etc., for gain prostitution of another woman". Since the text of the section refers to "aiding, abetting, or compelling" it is clear that the word "etc." in the heading was intended to refer to the words "abetting or compelling". Thus, it is apparent that the offence applies to a woman who receives a benefit from the prostitution of *another* woman. It is further clear from the heading that section 146 does not apply to a sex worker herself; otherwise, the section would have explicitly stated so in order to respect the principle of legality as explained above.

The text in section 146 applies in two instances: 1) where a woman knowingly lives wholly or in part on the earnings of prostitution, or 2) where a woman is proved to have, for the purpose of gain, exercised control, direction or influence over the movements of a prostitute in such a manner as to show that she is aiding, abetting or compelling her prostitution with any person. The offence is targeted at those who exploit sex workers; however, the offence is phrased in two parts for ease of proof, such that it encompasses instances in which it can be proved that a person knowingly lives on the earnings and instances where it can be proved that the person exercised control over the prostitute for the purpose of gain but the actual earnings cannot be proved. "Living on the earnings" has been interpreted narrowly by a wide variety of courts as having a parasitic component, as noted above, meaning that sex workers are not prohibited from using their own earnings.

Interpreting the phrase "where a woman knowingly lives wholly or in part on the earnings of prostitution" to apply to and criminalise the earnings of a sex worker, would lead to an absurd result:

- A person who earns money surely knows that they are earning money. Thus, the inclusion of the word "knowingly" indicates that it refers to someone else, not the person earning money.
- The wording of section 146 is too vague and unclear to refer to sex workers themselves. If the intention was for section 146 to apply to sex workers, the provision would have stated "every woman who lives on *her* earnings from prostitution".
- The wording in section 146 referring to a woman living on the earnings of prostitution is the same as the wording in section 145 referring to a man living on the earnings of prostitution. Section 145 has never been interpreted to apply to male sex workers and section 146 should similarly not be interpreted to apply to female sex workers.

A purposive interpretation further requires consideration of the purpose of the provision, which was never aimed at criminalising the person engaged in prostitution, but rather sought to criminalise those exploiting that person. This reality is particularly clear from the 1912 House of Commons and House of Lords debates in which the offence of a woman living on the earnings or exercising control over a sex worker for the purpose of gain was first introduced.

An approach interpreting "where a woman knowingly lives wholly or in part on the earnings of prostitution" to apply to and criminalise the earnings of a sex worker violates the principle of legality because it broadens the offence beyond the plain meaning of its words and beyond the legislative intent of the section. Such an approach also violates the provisions of the Constitution requiring that a person not be convicted of an offence which clearly does not exist.

Concluding Remarks

No provision in the Malawi Penal Code criminalises the selling of sexual services by a sex worker. It is accordingly unlawful to apply sections of the Penal Code to a sex worker that were originally aimed at protecting sex workers from exploitation.

A sex worker, like any other person, has rights to dignity, freedom of person and personal privacy. These rights are protected by the Malawi Constitution and the regional and international conventions to which Malawi is a party.

The ease with which police apply the Penal Code provisions incorrectly to justify the arrest of sex workers violates sex workers' inherent right to dignity. As a threshold matter, the Malawi Constitution recognises that the dignity of all persons is inviolable.[33] A wide variety of regional and international bodies articulate the importance and profound significance of that right. The African Charter on Human and Peoples' Rights states that respect for the inherent dignity of a human being includes recognition of his or her legal status.[34] The International Convention on Civil and Political Rights also affirms the need to treat persons who have been deprived of their liberty with humanity and respect for their inherent dignity.[35]. Finally, Article 2 of the UN General Assembly Code of Conduct for Law Enforcement Officials[36] provides that "in the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons."

The unlawful arrests of sex workers, effected as a result of improper interpretations of sections 146 and 184 of the Penal Code, further constitute violations of sex workers' rights to personal liberty[37] and to personal privacy.[38] Such an unlawful interpretation and utilisation of

[33] Section 19(1) of the Malawi Constitution.
[34] Article 5 of the African Charter on Human and Peoples' Rights.
[35] Article 10 of the International Convention on Civil and Political Rights.
[36] Article 2 of the United Nations General Assembly Code of Conduct for Law Enforcement Officials, Resolution 34/169, 1979.
[37] Section 18 of the Malawi Constitution provides that "everyone has the right to personal liberty."
[38] Section 21 of the Malawi Constitution provides that "every person shall have the right to personal privacy, which shall not include the right not to be subject to searches of his person, home or property." Article 17 of the International Covenant on Civil and Political Rights further provides that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

arrest powers to that effect is neither reasonable nor justifiable in an open and democratic society.[39]

The phrase "living on the earnings of prostitution" in sections 145 and 146 of the Malawi Penal Code is aimed at protecting sex workers from exploitation by third parties, including pimps. It applies to persons who provide services, goods or accommodation to sex workers in a manner that is exploitative. The offence does not apply to situations where a person receives money from a sex worker for services aimed at protecting a sex worker from harm, or which are of a non-exploitative nature. Furthermore, these sections do not apply to sex workers themselves and do not prohibit sex workers from earning money through the provision of sexual services.

It is recommended that a directive is urgently passed by the Attorney General clarifying the meaning of section 146 and stating that no sex worker may be arrested under sections 146 or 184(c) of the Malawi Penal Code simply because of their status as a sex worker and because they earn money through the sale of sexual services.

[39] Section 44(2) of the Malawi Constitution provides that "no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognised by international human rights standards and necessary in an open and democratic society."