



REPUBLIC OF MALAWI

**DIRECTORATE OF PUBLIC  
PROSECUTIONS  
GUIDELINES FOR PROSECUTORS  
ON  
NUISANCE-RELATED OFFENCES IN THE  
PENAL CODE**

## **Foreword**

**A prosecutor is expected to discharge his or her duties with professionalism, skill and integrity, and to operate within the framework of defined and clear prosecution policy guidelines.**

**The decision whether or not to prosecute an individual or entity is always a crucial one. It should only be taken after a prosecutor has fully evaluated the evidence and circumstances, and answered two questions in particular. First, is the evidence sufficient to justify instituting or continuing proceedings? Second, if it is, does the public interest require a prosecution to be pursued? In deciding where the public interest lies in a particular case, the prosecutor must consider the justice of the situation and examine all the factors.**

**A prosecutor, carrying out his or her role, is in a position to affect substantially the human rights of suspects, accused, victims, witnesses and other members of the public. As such, a prosecutor has an obligation to be aware of those rights, as well as their sources, and to respect and give effect to them as appropriate in criminal proceedings. In determining whether to prosecute a case or to continue prosecutions, account should be taken of the rights of an accused, and other parties to the proceedings.**

**These Guidelines are intended to assist all those persons whose function it is to enforce the criminal law by instituting and conducting criminal prosecutions in cases of minor nuisance-related offences. However, the Guidelines do not necessarily cover every decision that must be made by prosecutors in relation to the prosecution of minor nuisance-related offences.**

**These Guidelines will hopefully assist in:**

- Promoting consistency in prosecution practice, eliminating unwarranted disparity between cases;**
- Facilitating the exercise of discretion in a flexible and principled manner;**
- Ensuring the fair and effective exercise of prosecutorial responsibility;**
- Promoting confidence in the community and with accused persons that decisions will be made rationally and objectively on the merits of each case;**
- Providing reference points and guidance for prosecutors in prosecuting minor nuisance-related offences;**
- Assisting in the training of prosecutors; and**

- Ensuring the accountability of prosecution decision-making.

I accordingly take pleasure in issuing these Guidelines, which are intended to guide prosecutors in exercising their duties when prosecuting minor nuisance-related offences.

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Mary Dominica Kachale (Mrs.)  
DIRECTOR OF PUBLIC PROSECUTIONS

On this day the..... of October, 2017

## **Introduction**

The Penal Code<sup>1</sup> contains various nuisance-related offences. These Guidelines are hereby issued by the Director of Public Prosecutions under section 76(2) of the Criminal Procedure and Evidence Code to guide all prosecutors in the prosecution of such nuisance-related cases. These Guidelines are a living document and may be amended from time to time in keeping with relevant legal developments.

### **A- LEGAL INSTRUMENTS AND GENERAL PRINCIPLES**

1. In handling these cases prosecutors shall familiarise themselves with the following key documents, with particular attention to provisions that deal with fair trial, rights of accused persons, rights of suspects, the elements of the offences, criminal procedure, the role of prosecutors in the administration of justice, and diversion of such nuisance cases:

- The Constitution of Malawi;
- The Penal Code;
- The Criminal Procedure and Evidence Code;<sup>2</sup>
- The Code of Conduct for Prosecutors in Malawi 2009;
- Diversion Project: A Guide for Prosecutors 2012.

2. Prosecutors shall be guided by the following general principles:

- The decision to prosecute shall solely be based on evidence.
- Prosecution shall not proceed where elements of the offence are not satisfied.

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<sup>1</sup> Chapter 7:01 of the Laws of Malawi.

<sup>2</sup> Chapter 8:01 of the Laws of Malawi.

- The prosecutor shall consider the seriousness of the alleged crime, the harm done to the society and whether it is in the public interest to prosecute the matter.
- The prosecution shall consider alternatives to prosecution such as diversion- **see Diversion Project: A Guide for Prosecutors 2012.**
- In all cases involving first offenders and minors, the Prosecutor should first take into consideration the provisions of **Section 32A of the Criminal Procedure and Evidence Code**. A police officer of rank sub-inspector and above may orally or in writing caution the arrested person, and then release him/her where the offence that has been committed does not amount to a serious offence and that are not aggravated in degree.
- Prosecutors should take note that where the offence involves a child who voluntarily admits to the commission of an offence, that child may be released on caution if his parent or guardian consents to the disposal of the case and if that caution is administered in the presence of such a parent or guardian (S. 32A (3) of CP & EC).
- As provided for under section 32A (4) of the CP&EC, in exercising the discretion on whether to caution and release a person arrested for an offence, Prosecutors should bear in mind, among others, 'the petty nature of the offence, the circumstances in which it was committed, the views of the victim or complainant and the personal consideration of the arrested person, including age and physical or mental, infirmity, and in the case of a child his general character and family circumstances.'
- The prosecution shall take steps to ensure that all requirements for fair proceedings are adhered to.
  - The prosecution shall ensure respect of the following rights of a person, detained person and accused person:
    - The right to respect for human dignity;
    - The right not to be subjected to cruel, inhuman or degrading treatment or punishment;

- The right to freedom and security of person, which shall include the right not to be detained without trial;
- The right to be recognised as a person before the law;
- To be informed of the reason for his or her detention promptly, and in a language which he or she understands;
- To be detained under conditions consistent with human dignity, which shall include at least the provision of adequate nutrition and medical treatment at the expense of the State;
- To consult confidentially with a legal practitioner of his or her choice, to be informed of this right promptly and, where the interests of justice so require, to be provided with the services of a legal practitioner by the State;
- To be given the means and opportunity to communicate with, and to be visited by, his or her spouse, partner, next-of-kin, relative, religious counsellor and a medical practitioner of his or her choice;
- To challenge the lawfulness of his or her detention in person or through a legal practitioner before a court of law; and to be released if such detention is unlawful;
- To be promptly informed, in a language which he or she understands, that he or she has the right to remain silent and to be warned of the consequences of making any statement;
- As soon as it is reasonably possible, but not later than 48 hours after the arrest, or if the period of 48 hours expires outside ordinary court hours or on a day which is not a court day, the first court day after such expiry, to be brought before an independent and impartial court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be released;
- Not to be compelled to make a confession or admission which could be used in evidence against him or her;

- Save in exceptional circumstances, to be segregated from convicted persons and to be subject to separate treatment appropriate to his or her status as an unconvicted person;
- To be released from detention, with or without bail unless the interests of justice require otherwise;
- To public trial before an independent and impartial court of law within a reasonable time after having been charged;
- To be informed with **sufficient particularity** of the charge;
- To be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;
- To adduce and challenge evidence, and not to be a compellable witness against himself or herself;
- To be represented by a legal practitioner of his or her choice or, where it is required in the interests of justice, to be provided with legal representation at the expense of the State, and to be informed of these rights;
- Not to be convicted of an offence in respect of any act or omission which was not an offence at the time when the act was committed or omitted to be done, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;
- Not to be prosecuted again for a criminal act or omission of which he or she has previously been convicted or acquitted;
- To have recourse by way of appeal or review to a higher court than the court of first instance;
- To be tried in a language which he or she understands or, failing this, to have the proceedings interpreted at the expense of the State into a language which he or she understands;
- To be sentenced within a reasonable time after conviction.

3. Prosecutors shall take extra precaution when dealing with an unrepresented accused. The duty of fairness requires a prosecutor to ensure that the accused is appropriately informed of the prosecution's case and the course it will take. The court has an overriding duty to ensure that the proceedings are fairly conducted and the prosecutor should assist the court to do so by acting and responding appropriately during the course of the proceedings.
4. Prosecutors shall take into account the principles of legality when interpreting whether any acts fall within the ambit of a specific offence, including:
  - The requirement that penal statutes must be strictly construed, and that where they are vague or ambiguous, penal statutes should be interpreted in favour of accused's liberty; and
  - The requirement that the Constitution should be applied in the interpretation of all laws.
  - Mere suspicion against an accused person does not suffice for prosecution.
5. Prosecutions ought to be initiated or continued only where the prosecutor is satisfied that the **Test for Prosecution** is met. The Test for Prosecution is met if:
  - The evidence which can be adduced in court is sufficient to provide a reasonable prospect of conviction – the **Evidential Test**; and
  - Prosecution is required in the public interest – the **Public Interest Test**.
  - **Requirements for the Evidential Test:**
    - The evidence sufficiently identifies that a particular person is responsible;
    - There is credible evidence;
    - The evidence is available and legally admissible;
    - There is an objectively reasonable prospect of a conviction on the evidence;

- The evidence available to the prosecutor must be capable of reaching the standard of proof of “beyond reasonable doubt”; and
  - Each of the elements of the offence is established.
- **Requirements for the Public Interest Test:**
    - Once the prosecutor is satisfied that there is sufficient evidence to reasonably secure a conviction, the next consideration is whether the public interest requires a prosecution.
    - There will be circumstances in which, although the evidence is sufficient to provide a reasonable prospect of conviction, the offence is not serious and prosecution is not required for the public interest. Prosecutors for instance should positively consider the appropriateness of any diversionary option.
    - Public interest considerations against prosecution include where the court is likely to impose a very small penalty; where the loss or harm can be described as minor and as a result of a single incident; where the defendant has no previous convictions, is ill, elderly or a youth; where the offence is trivial, or obscure; or where alternatives to prosecution is available, such as a caution, warning or other acceptable form of diversion.
    - Where conduct does little harm to an individual person or the community as a whole it might be of too inconsequential a nature to pursue prosecution and definitely should not result in detention.

## **B- ELEMENTS OF NUISANCE-RELATED OFFENCES**

The charges must reflect the alleged conduct and the public interest in having appropriate convictions entered against the accused person.

### **6. Common Nuisance (section 168)**

## **Section 168**

*Any person who does an act not authorised by law or omits to discharge a legal duty and thereby causes any common injury, or danger or annoyance, or obstructs or causes inconvenience to the public in the exercise of common rights; commits the misdemeanor termed a common nuisance and shall be liable to imprisonment for one year.*

### **Elements of the offence**

- A person performs an act not warranted by law or a person omits to discharge a legal duty; and
- The effect of the act or omission is to **endanger the life, health, property or comfort of the public, or to obstruct the public in the exercise or enjoyment of their rights;**

### **Guideline**

- This offence applies to nuisances, which are so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take action on his own to put a stop to it.

The section should be invoked only when no other applicable statutory offence exists, where commission of the offence would have a sufficiently serious effect on the public, and/or where the defendant knew or should have known of the risk that his actions would result in a nuisance.

## **7. Conduct Likely to Cause a Breach of Peace (sections 181 and 182)**

### **Section 181**

*Every person who in any public place conducts himself in a manner likely to cause a breach of peace shall be liable to a fine of K50 and to imprisonment for three months.*

### **Elements of the offence**

- The conduct occurred in a **public place;**
- The conduct was of a sufficiently serious nature to cause harm or fear to another person.

### **Guidelines**

- **Public place** includes “any public way and any building, place or conveyance to which for the time being, the public are entitled or permitted to have access either without any condition or upon condition of making any payment, and any building or place which is for the time being used for any public or religious meetings or assembly or as an open court.”
- A suspect should only be charged in cases causing alarm or amounting to a threat of serious disturbance.

The section should not be unduly used to charge a suspect where there is lack of evidence or the prosecution is not sure with what offence to charge a suspect.

### **Section 182**

*Every person who uses insulting language or otherwise conducts himself in a manner likely to give such provocation to any person as to cause such person to break the peace or to commit any offence against the person shall be liable to a fine of K100 and to imprisonment for six months.*

#### **Elements of the offence**

- A person used **insulting language**; or conducts himself in a manner likely to give such provocation to any person; and
- This caused such person to break the peace or to commit any offence against the person.

## **8. Idle and Disorderly Persons (section 180)**

**Note: Prosecutors should take note that** there is no general offence of being an idle and disorderly person stipulated in section 180, it is a heading under which the offences are specified in each subsection with specific elements to each of these offences.

### **Section 180(a)**

*Every common prostitute behaving in a disorderly or indecent manner in any public place is deemed an idle and disorderly person.*

#### **Elements of the offence**

- The suspect is a “common prostitute”;

- The accused behaved in a **disorderly or indecent manner**; and
- The behaviour took place in **public**.

### **Guidelines**

- There should be proof that the accused has been found engaging in sex work-related offences in a disorderly manner. It is recommended that prosecutions under this section must be considered after the one to be charged has received a warning in the past, or proof of previous convictions for sex work-related offences. Prosecutors should note that rest houses or any private rooms do not constitute a public place and therefore a person arrested from therein cannot be charged of being an idle and disorderly person under this section.

### **Section 180(b)**

*Every person wandering or placing himself in any public place to beg or gather alms, or causing or procuring or encouraging any child or children so to do, is deemed an idle and disorderly person.*

### **Elements of the offence**

- A person wandering or placed himself in any **public place**; and
- With the intent of **begging** or gathering alms; or
- A person who **actively causes, procures or encourages** any child or **children to beg** in a public place.

### **Guidelines**

- A single act of asking for money does not amount to begging.
- The offence is targeted at persons who seek to make a living from begging and engage in it as a recurrent and frequent activity.
- It must be shown that the accused had adopted begging as a persistent activity.
- Prosecution under the offence is appropriate where the person begged in an aggressive or harassing manner.

Where children are involved in begging, caution must be taken in deciding how to proceed and it is advisable to consult a social worker to determine whether provisions under the Child Care Protection and Justice Act relating to a child in need of care and protection apply.

### **Section 180(c)**

*Every person playing at any game of chance not being an authorised lottery or a private lottery for the purposes of section 174, for money or money's worth in any public place, is deemed an idle and disorderly person.*

#### **Elements of the offence**

- The person played a **game of chance**; and
- It occurred in a **public place**.

#### **Guideline**

- The section is very broad but should not ordinarily be used against mere games of chance not aimed at making a profit and those that are not conducted through fraud or false pretences.

### **Section 180(d)**

*Every person who without lawful excuse publicly does any indecent act is deemed an idle and disorderly person.*

#### **Elements of the offence**

- A person **without lawful excuse**;
- Performed an **indecent** act;
- The act took place in and was observed by members of the **public**.

#### **Guidelines**

- Indecent act is not defined but should be interpreted in terms of the standards of the ordinary reasonable member of society.
- Whether an act is indecent is dependent upon the circumstances of each case.
- Prosecution should only proceed where the indecent conduct caused offence to a reasonable person.
- The prosecution is required to present evidence as to the harm, stress or nuisance caused by the conduct.
- Prosecution should only proceed where the words or conduct are sufficiently serious to warrant punishment.

- In deciding whether to proceed with prosecution, the prosecutor should consider the following factors:
  - The nature of the words or conduct;
  - The extent to which words or conduct were repeated;
  - The age or gender of the person who heard the words or witnessed the conduct;
  - Any previous relationship between the parties and the nature of the relationship;

The degree of offence caused to person who heard the words or witnessed the conduct.

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

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

#### **Elements of the offence**

- The person **solicited** a specific person;
- With an **immoral purpose**;
- In a **public place**.

#### **Guidelines**

- Soliciting refers to conduct which reflects more than a mere act of loitering – i.e. conduct amounting to an importuning of prospective customers; conduct extending into a public place.
- Includes enticing another person to do some act or thing, or seeking from them some response, so as to bring about an eventuality or state of affairs which is sexually immoral.
- Immoral purpose generally relates to some kind of sexual activity.

Prosecutors should determine whether the arresting officer's determination of 'immoral purposes' meets a reasonableness standard before proceeding with prosecution, as the arresting officer might have applied subjective criteria for determining "immoral purpose".

### **Section 180(f)**

*Every person wandering about and endeavouring by the exposure of wounds or deformation to obtain or gather alms, is deemed an idle and disorderly person.*

### **Elements of the offence**

- A person wandering about and **attempting to gather alms by the exposure of wounds or deformation.**

### **Guideline**

- Only persistent offences under this section which causes significant harm should be prosecuted or where the offence takes place in a harassing manner.
- Prosecutions under this offence should take care not to discriminate against persons with disabilities and should respect their dignity.
- Where it is apparent that the person has a disability and is unable to earn a living, referring the matter to a social worker might be more appropriate than prosecution.

## **9. Rogues and Vagabonds (section 184)**

### **Section 184(a)**

*Every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence, is deemed a rogue and vagabond.*

### **Elements of the offence**

- The person went about as a gatherer or collector of alms or charitable contribution; and
- Was dishonest or had a fraudulent intent.

### **Section 184(b)**

*Every suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of himself is deemed a rogue and vagabond.*

### **Elements of the offence**

- A person who is a suspect or reputed thief;
- The person has no visible means of subsistence; and
- The person cannot give a good account of himself.

### **Guidelines**

- Suspects should not be jointly charged under this section.
- 'Suspected person' or 'reputed thief' should be construed narrowly so as to refer to a person suspected of being guilty of criminal behaviour based upon previous conduct of which the prosecution is actually aware.
- The offence should apply only to a person found loitering in circumstances clearly suggesting a criminal purpose.
- The offence should not be used against those who are without any visible means of support and who have committed no other offence.
- It is not an offence for any person to enjoy the freedom, peace and calm of the country and walk about in public places be it aimlessly and without money.
- No offence is committed merely because a person is destitute and homeless.

### **Section 184(d)**

*Every person who, without the prior consent in writing in that behalf of the District Commissioner, collects or makes any appeal for subscriptions of money in any public place in such District Commissioner's District for any purpose, is deemed a rogue and vagabond.*

### **Elements of the offence**

- The person **collected or appealed for subscriptions of money**;
- In a **public place**;
- **Without the prior written consent** of the District Commissioner.

### **Guidelines**

- Public place does not include a place of religious gathering.

### **Section 184(e)**

*Every person who has collected money by subscription in any place in Malawi, who fails to produce correct accounts of any money received by such subscription, is deemed a rogue and vagabond.*

### **Elements of the offence**

- A person has **collected money by subscription** in any place in Malawi; and
- **Failed to produce correct accounts** of the money received by such subscription.

## **DRAFT CHARGE SHEETS**

### **Section 168 of the Penal Code**

**STATEMENT OF OFFENCE:**

Committing a common nuisance contrary to Section 168 of the Penal Code.

**PARTICULARS OF OFFENCE:**

A.B., on (or about) the ..... day of.....20.....at.....in the District of .....caused a common nuisance by.....(here state act complained of which nuisance the said A.B. committed).

### **Section 180(a) of the Penal Code**

**STATEMENT OF OFFENCE:**

Being an idle and disorderly person, contrary to Section 180(a) of the Penal Code.

**PARTICULARS OF OFFENCE:**

A.B., on (or about) the ..... day of.....20.....at.....in the District of ....., being a common prostitute, behaved in a disorderly (or indecent) manner in a public place, to wit.....(state place).

### **Section 180(b) of the Penal Code**

**STATEMENT OF OFFENCE:**

Being an idle and disorderly person, contrary to Section 180(b) of the Penal Code.

**PARTICULARS OF OFFENCE:**

A.B., on (or about) the .....day of .....20.....at..... in the District of....., in a public place to wit ....., wandered (placed himself) to gather alms.

OR

A.B., on (or about) the .....day of .....20.....at..... in the District of....., did (encourage/cause/procure) a child namely (specify the name of the child) to wander/place him or herself in a public place to wit .....(specify name of street or place) to gather alms.

**Section 180(c) of the Penal Code**

**STATEMENT OF OFFENCE:**

Being an idle and disorderly person, contrary to Section 180(c) of the Penal Code.

**PARTICULARS OF OFFENCE:**

A.B., on (or about) the ... day of ..... 20 ... at.....in the District of ....., in the public place, to wit .....was found gambling (playing at a game of chance for money)

**Section 180(d) of the Penal Code**

**STATEMENT OF OFFENCE:**

Being an idle and disorderly person, contrary to Section 180(d) of the Penal Code.

**PARTICULARS OF OFFENCE:**

A.B., on (or about) the ... day of.....20 ... at.....in the District of ....., in a public place, namely....., committed an indecent act (e.g. to wit indecently exposed his person) without lawful excuse.

**Section 180(e) of the Penal Code**

STATEMENT OF OFFENCE:

Being an idle and disorderly person, contrary to Section 180(e) of the Penal Code.

PARTICULARS OF OFFENCE:

A.B., on (or about) the ... day of .....20 ... at.....in the District of....., in a public place, namely....., solicited for immoral purposes (specify).

**Section 180(f) of the Penal Code**

STATEMENT OF OFFENCE:

Being an idle and disorderly person, contrary to Section 180(f) of the Penal Code.

PARTICULARS OF OFFENCE:

A.B., on (or about) the ... day of .....20... at.....in the District of ....., by the exposure of wounds (a deformity) wandered about, and endeavoured to obtain alms.

**Section 181 of the Penal Code**

STATEMENT OF OFFENCE:

Conducting oneself in a manner likely to cause a breach of the peace in a public place, contrary to Section 181 of the Penal Code.

PARTICULARS OF OFFENCE:

A.B., on (or about) the ... day of.....20 ... at.....in the District of....., in a public place, to wit.....conducted himself in a manner likely to cause a breach of the peace by (here follows details of conduct alleged e.g. “by abusing members of the public”).

**Section 182 of the Penal Code**

STATEMENT OF OFFENCE:

Using insulting language (conducting oneself) in such a manner as to provoke others to break or commit an offence against the person, contrary to Section 182 of the Penal Code.

PARTICULARS OF OFFENCE:

A.B., on (or about) the ... day of .....20 ... at.....in the District of....., used insulting language (conducted himself) in such a manner as to provoke another to break the peace or commit an offence against the person.

**Section 184(1) (a) of the Penal Code**

STATEMENT OF OFFENCE:

Being a rogue and vagabond, contrary to Section 184(1) (a) of the Penal Code.

PARTICULARS OF OFFENCE:

A.B., on (or about) the ... day of .....20 ... at.....in the District of....., gathered (attempted to gather) charitable contributions/alms by falsely and fraudulently pretending that (here state false and fraudulent pretence).

**Section 184(1) (b) of the Penal Code**

STATEMENT OF OFFENCE:

Being a rogue and vagabond, contrary to Section 184(1) (b) of the Penal Code.

PARTICULARS OF OFFENCE:

A.B., on (or about) the ... day of .....20 ... at.....in the District of....., being a suspected person (reputed thief) had no visible means of subsistence, and could not give a good account of himself.

**Section 184(1) (d) of the Penal Code**

**STATEMENT OF OFFENCE:**

Being a rogue and vagabond, contrary to Section 184(1) (d) of the Penal Code.

**PARTICULARS OF OFFENCE:**

A.B., on (or about) the ... day of .....20 ... at.....in the District of....., without the prior consent in writing in that behalf of the District Commissioner.....collected (made an appeal for) subscriptions of money in a public place, namely .....

**Section 184(1) (e) of the Penal Code**

**STATEMENT OF OFFENCE:**

Being a rogue and vagabond, contrary to Section 184(1) (e) of the Penal Code.

**PARTICULARS OF OFFENCE:**

A.B., on (or about) the ... day of .....20 ... at.....in the District of....., having collected money by public subscription, failed to produce correct accounts of such monies to a District Commissioner when called upon to do so.

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**Mary Dominica Kachale (Mrs.)**  
**DIRECTOR OF PUBLIC PROSECUTIONS**

**On this day the..... of October, 2017**