**Malawi**

ECPAT International has developed [a legal checklist](https://ecpat.org/wp-content/uploads/2021/09/SECTT-Checklist_ENG-1.pdf) for governments providing guidance for legal interventions and measures to adopt in order to improve their national legal frameworks. This will help to effectively address the crime of sexual exploitation of children in travel and tourism, including its online elements.

The legal checklist was developed based on the recommendations of the first [Global Study](https://ecpat.org/wp-content/uploads/2021/08/Global-Report-Offenders-on-the-Move.pdf) on sexual exploitation of children in the context of travel and tourism. Following the development of this legal checklist, ECPAT International conducted country legal analysis for Malawi and other countries in Africa, as well as Southeast Asia, Asia and the Americas.

The country analysis serves as a baseline to indicate and track the implementation status of the legal interventions within and across the four regions. It provides governments with clear directions for improving their actions with respect to child protection against sexual exploitation in the context of travel and tourism, including its online elements.

The table below allows easy assessment of existing legislation against the 24 measures of the legal checklist. It will be updated as the laws and policies change. An [explanatory note](https://ecpat.org/wp-content/uploads/2021/08/SECTT-Checklist_ENG_Explanatory-note.pdf) and an [assessment matrix](https://ecpat.org/wp-content/uploads/2021/09/Assesment-Matrix_2021SEP_ENG_v2.pdf) can be consulted for further reference.

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Recommendations** | **Implemented** | **Legislation** |
| 1. | Establish by law **extra-territorial jurisdiction**, within the parameters of Article 4 OPSC, for all offences of sexual exploitation of children, including those occurring in the online environment. | Partially | Article 5 of the Penal Code establishes that when an act which, if wholly done within the jurisdiction of the court, would be an offence against the Penal Code, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or takes any part in such act may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction. Article 6 specifies that any Malawi citizen being a person employed in the public service of Malawi who commits, in any other country, when acting or purporting to act in the course of his employment, any offence which, if committed in Malawi, would be punishable in Malawi, shall be guilty of an offence of the same nature, and subject to the same punishment, as if the offence had been committed in Malawi. In addition, a person may be proceeded against, charged, tried and punished for an offence against this section in any place in Malawi in which he is apprehended or is in custody as if the offence had been committed in that place; and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place.  The Penal Code doesn’t include dispositions for passive extraterritorial jurisdiction.  The Trafficking in Persons Act (article 3) applies to a natural or a legal person where the offence:   * is committed wholly or partly within Malawi; * is committed outside Malawi and the trafficked person is a citizen of Malawi; * is committed outside Malawi by a citizen of Malawi or a person who is resident in Malawi; * is committed outside Malawi with a view to the commission of an offence under this act within Malawi; or * involves an organized criminal group.   The Electronic Transactions and Cyber Security establishes, in its article 83, that a court may, on application by a cyber inspector, issue a search warrant, where:  “*(a) an offence has been committed in Malawi; or*  *(b) the subject of an investigation is:*  *(i) a Malawian or a person ordinarily resident in Malawi;*  *(ii) present in Malawi at the time when the warrant is applied for; or*  *(iii) information relevant to an investigation is accessible from within the area of jurisdiction of the court*”. |
| 2. | Include in extradition treaties the sexual exploitation of children as **extraditable offences** and apply when appropriate the rules of article 5 OPSC, regardless the nationality of the (alleged) offender. | No | The Extradition Act establishes that extraditable offences are offences which, however described in the law of the country concerned, fall within any of the descriptions set out in the Second Schedule to this Act, and are punishable under that law with imprisonment for a term of twelve months or any greater punishment. In addition, the act or omission constituting the offence, or the equivalent act or omission, has to constitute an offence against the law of Malawi if it took place in Malawi or, in the case of an extra-territorial offence, in corresponding circumstances outside Malawi.  However, the Second Schedule to this Act doesn’t contain any SEC-related offence.  It is therefore necessary to refer to each international treaty to which Malawi is a party to determine if extradition applies to crimes related to the sexual exploitation of children. |
| 3. | Do NOT require the principle of **double criminality** for proceeding with extraterritorial jurisdiction or extradition for sexual offences against children. | Partially | The principle of double criminality doesn’t apply in cases of extra-territorial jurisdiction.  The national legislation does not provide detailed information on the application of the double criminality principle in extradition cases. |
| 4. | Abolish **statutory limitations** for the prosecution of ALL offences of sexual exploitation of children. | Yes | In Malawi, national provisions on statutory limitations only exist for offences punishable with less than three years of imprisonment (article 261 and 302A of the Criminal Procedure and Evidence Code).  No offences of sexual exploitation of children are sentenced with less than three years of imprisonment in Malawi. |
| 5. | Set up **conditions for any travel** by persons convicted of sexual exploitation of children. | No | Article 4 of the Immigration Act defines as prohibited immigrant any person who, not having received a free pardon, has been convicted of any offence prescribed by the Minister as an offence.  This provision is not explicit enough to determine if foreigners convicted of sexual exploitation of children would be denied entry of the territory.  No provisions on the prohibition of persons convicted of sexual exploitation of children to leave the country have been found. |
| 6. | Ensure **consistency in the definition of a ‘child’** as anyone under the age of 18 for all crimes of sexual exploitation, regardless of the age of sexual consent. | No | The Penal Code (article 160A) and the Child Care, Protection and Justice Act (article 2) define “child” as any person under the age of sixteen years.  The Trafficking in Persons Act (article 2) and The Electronic Transactions and Cyber Security Act (article 2) define “child” as any person under the age of eighteen years.  The Penal Code criminalises any person who, with intent to commit an offence, shows, sells, or exposes offensive material to a child (article 160D).  Article 160 E criminalises any person who:  “*(a) causes or permits a child to be engaged in a prohibited sexual act or simulation of such act if the person knows or has reason to know or intends that the prohibited act may be photographed, filmed, reproduced, or reconstructed in any manner or may be part of an exhibition or performance;*  *(b) photographs or films a child in a prohibited sexual act or in the simulation of such an act or uses any device to reproduce or reconstruct the image of a child in a prohibited sexual act or in the simulation of such an act;*  *(c) knowingly receives for the purpose of selling or knowingly sells, procures, manufactures, gives, provides, lends, trades, mails, delivers, sends, transfers, publishes, distributes, circulates, disseminates, presents, exhibits, advertises, offers or agrees to offer any photograph film, videotape, computer programme, video game or any other reproduction or reconstruction which depicts a child engaging in a prohibited sexual act*  *or in the simulation of such act;*  *(d) knowingly possesses or knowingly views any photograph, film, video tape, computer programme, video game or any other reproduction or reconstruction which so depicts a child”*.  The Child Care, Protection and Justice Act criminalises the trafficking of children, the recruitment, transaction, transfer, harbouring or receipt of a child for the purposes of exploitation (article 79).  The Trafficking in Persons Act criminalises the trafficking of children (article 15).  The Electronic Transactions and Cyber Security Act, article 85, criminalises anyone who:  “ *(a) produces pornographic material for the purpose of its distribution through a computer system;*  *(b) reproduces pornographic material for the purpose of its distribution through an information system;*  *(c) offers or makes available any pornographic material through an information system;*  *(d) exposes a child to pornographic material through an information system;*  *(e) distributes or transmits any pornographic material through an information system;*  *(f) procures any pornographic material through a computer system for oneself or for another person; or*  *(g) possesses any child pornographic material in a computer system or on a computer data storage medium”*. |
| 7. | Ensure that the **age of sexual consent** for both males and females is 18 and a close in age exemption (up to 3 years) is provided for consensual sexual relationships between adolescents in order to allow voluntary, well-informed and mutual sexual contact between close in age peers and to prevent criminalization of young people in willing sexual relationships. | No | The age of sexual consent is set up at 16 for girls Section 137 (2) of the Penal Code. No age is identified for boys nor any close-in-age exemption. |
| 8. | Have a law or regulation establishing a **mechanism for centrally registering sex offenders** that has been implemented/setup. | No |  |
| 9. | Establish **bail conditions** that prohibit individual accused of sexual offences against children from traveling outside of the country. | No | Article 118 of the Criminal Procedure and Evidence Code states that any person can be released on bail, with or without guarantors, if the person is not accused of an offence punishable with death or arrested with a warrant.  In Malawi, none of the SEC-related offences are punishable with death. |
| 10. | Provide in law that the **mere attempt** to commit a crime of sexual exploitation of children is criminalised. | Yes | Article 400 and 401 of the Penal Code define and state that anyone who attempts to commit a felony or misdemeanor shall be guilty of an offence, which, unless otherwise stated, is a misdemeanor. In addition, article 142 specifies that any person who attempts to commit a felony of such a kind that a person convicted of it is liable to the punishment of imprisonment for a term of fourteen years or upwards, with or without other punishment, shall be guilty of a felony, and shall be liable, if no other punishment is provided, to imprisonment for seven years.  imprisonment (article 15). The attempt of trafficking is penalised with the same sentence (article 21). An enforcement officer has the right to seize anything which may be used as evidence (article 32).  For offences related to child sexual abuse material as covered by the Electronic Transactions and Cyber Security Act, the attempt is criminalised with a sentence of a penalty not exceeding one half of the maximum penalty imposable by the provision creating the complete offence (article 93). |
| 11. | Impose more severe sentences for **reoffending** in case of sexual exploitation against children, e.g. by defining reoffending as an aggravating circumstance, regardless of whether the crimes were perpetrated abroad or in-country. | No |  |
| 12. | Provide for **mandatory reporting** for particular professions that have likelihood to have contact with kids who might disclose. | Partially | Article 22 of the Trafficking in Persons Act states that any person who knows or suspects a case of trafficking must report. The person who fails to report will be liable to a fine of K500,000 (approx. US$662 as of October 2020) and imprisonment for one year.  The Child Care, Protection and Justice Act, article 75, establishes a duty to report infringement of a child’s right to the local government authority of the area. |
| 13. | Establish obligatory government-regulated child protection standards for the tourism industry for example, attach responsibility to an appropriate regulatory authority and/or implement industry specific **national codes for child protection** as a legal requirement for the travel and tourism industry to operate. | No |  |
| 14. | Ensure the liability of travel and tourism businesses (in operations and supply chains) for criminal conduct including:   * Organising travel arrangements or transportation that are explicitly or implicitly meant to create or facilitate opportunities to engage (involve) children in sexual activities; * Procuring, aiding or abetting the exploitative sexual conduct with a child; * Advertising or promoting sexual exploitation of children; * Benefitting, by any means, from any form of sexual exploitation of a child (or children) in the context of their travel and tourism business. | No | Although there are no specific laws ensuring the liability of the private travel and tourism sector for SECTT, some provisions exist within the national legislation to ensure the liability of legal entities in cases of SEC-related offences.  The Trafficking in Persons Act criminalises anyone who benefits from the exploitation of a trafficked child with five years of imprisonment (article 20). Article 23 establishes the liability of the legal person where the offence has been committed and the conviction of the responsible person.  In addition, any person who produces, prints, broadcasts or distributes by any means including the use of information technology or the internet, any brochure, flyer or any other communication material that promotes trafficking is liable to fourteen years of imprisonment (article 25). |
| 15. | Criminalise the **grooming of children for sexual purposes** (often called ‘solicitation’ in law) including through Internet and other communication technologies to facilitate either online or offline sexual exploitation. | No |  |
| 16. | Establish legislation requiring for a **criminal background check** for every person (national or non-national) applying for work with or for children or who is currently working with or for children. Introduce legislation prohibiting convicted sex offenders to hold positions involving or facilitating contact with children. | No | It doesn’t seem mandatory in Malawi to provide a criminal record before starting any employment.  However, article 18 of the Trafficking in Persons Act prohibits for seven years a person convicted for the offence of trafficking of children to work with children. |
| 17. | Regulate and monitor the use of volunteers (including in **‘voluntourism’**) in settings and activities that involve direct contact with children, particularly prohibiting visits to orphanages/residential care settings in favour of redirecting the industry towards solutions that support community-based care. | No |  |
| 18. | Ratify and implement relevant **regional and international instruments** related to child’s rights and sexual exploitation of children. | Partially | * Convention on the Rights of the Child - Ratified in 1991 * Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography - Ratified in 2009 * Optional Protocol to the Convention on the Rights of the Child on a Communication Procedure - Not ratified * ILO Convention on the Worst Forms of Child Labour (No. 182) - Ratified in 1999 * UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and children - Ratified in 2005 * The United Nations’ World Tourism Organisation’s (UNWTO) Framework Convention on Tourism Ethics - Not ratified * Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) - Not Ratified * Council of Europe Convention on Cybercrime (Budapest Convention) - Not Ratified * African Union Charter on the Rights and Welfare of the Child - Ratified in 1999 * African Union Convention on Cyber Security and Personal Data Protection - Not ratified |
| 19. | Establish **protection measures** for child victims at any stage of the legal process against the suspected offender. | No | The Trafficking in Persons Act allows at any time, a trafficked victim to ask to be placed under protection (article 48). The law does not make explicit difference between national and non-national child victims, but it does not even clearly state if relevant provisions would be applied to non-nationals.  Protection measures should be mandatory for child victims of any type of sexual exploitation at any stage of the legal proceedings. |
| 20. | Establish **child-friendly interviewing practices by professionally trained police.** | Partially | The Trafficking in Persons Act contains Guidelines Principles for Conducting Screening Interviews for the Identification of Trafficked Persons, in the First Schedule (article 44). Those Guidelines include a section related to child victims. Hence, the following principles are included:   * Child should feel safe during the interview; * Girls and younger boys should be interviewed by female interviewer; * Presence of a familiar adult during the interview; * Informal settings; * The interview should include the narration of the story by the child.   The Child Care, Protection and Justice Act states that proceedings of a child justice court shall be informal (article 145).  However, these provisions are not sufficient to ensure appropriate interview methods for child victims and mostly apply to victims of trafficking. |
| 21. | Ensure that national legislation provides the **right for child victims to receive support in their recovery and rehabilitation**, including accessing re-integration services. | No | The Child Care, Protection and Justice Act establishes a Child Case Review Board that shall facilitate the designing and implementation of rehabilitation programmes and curriculum for the proper reintegration of children into society.  These provisions are not enough to ensure that child victims have access to tailored rehabilitation and reintegration programmes. |
| 22. | Establish a **national reporting mechanism (e.g. hotline)** that coordinates access to services, and helps to overcome reluctance to report sexual exploitation of children. | Yes | YONECO, an organisation in Malawi, launched in 2006 a child helpline, to report cases of abuse and exploitation, which was transformed to become the National Child Helpline in March 2011 under the Ministry of Gender, Children and Social Welfare. The Helpline’s toll free number is the International Child Helpline’s short code of 116. The helpline is accessible to subscribers from all telecommunication networks free of charge.  In addition, in 2018, the Internet Watch Foundation launched a reporting portal to allow Malawians to anonymously report child sexual abuse imagery they may stumble across online, using a web-based form, so that any illegal images and videos of children can be removed. |
| 23. | Create **data retention and** preservation laws, regulations and procedures, to ensure the retention and preservation of digital evidence and enable cooperation with law enforcement which applies to ISPs, mobile phone companies, digital social media and communication companies, cloud storage companies, based in/operating in national jurisdiction. | Yes | The Electronic Transactions and Cyber Security Act establishes that in cases mentioned in point 12 (article 30 of the Act), an intermediary service shall maintain and preserve the data that permits the identification of any person who contributed to the creation of all or part of the unlawful content (article 29). |
| 24. | Ensure that national legislation provides the **right for all child victims of sexual exploitation to seek compensation** in national courts from convicted perpetrators who harmed them and/or through state-managed funds. | Yes | The Penal Code states that any person who is convicted of an offence may be adjudged to make compensation to any person who has suffered personal injury or loss of property by such offence (article 32).  The Trafficking in Persons Act gives the right to any trafficked person to institute civil proceedings against any person to seek compensation, restitution and recovery (article 40). The Trafficking in Persons Act establishes the Anti-Trafficking Fund which helps to finance the provision of care, assistance and support to victims as well as their repatriation (article 52).  The law does not make explicit difference between national and non-national child victims, but it does not even clearly state if relevant provisions would be applied to non-nationals. |

**Malawi - Legislation**

[Penal Code](https://www.malawilii.org/akn/mw/act/1929/22/eng%402014-12-31#part_II__chp_XV__sec_132)

[Child Care, Protection and Justice Act](https://malawilii.org/mw/legislation/act/2010/7)

Trafficking in Persons Act [Pages 1-10 ;](https://www.ilo.org/dyn/natlex/docs/MONOGRAPH/99187/118283/F-139474004/MWI99187%201.pdf) [Pages 10-20 ;](https://www.ilo.org/dyn/natlex/docs/MONOGRAPH/99187/118398/F1656922895/MWI99187%202.pdf)  [Pages 21-33](https://www.ilo.org/dyn/natlex/docs/MONOGRAPH/99187/118399/F-898244126/MWI99187%203.pdf)

[Criminal Procedure and Evidence Code](https://malawilii.org/mw/consolidated_legislation/801)

[Extradition Act](http://www.vertic.org/media/National%20Legislation/Malawi/MW_Extradition_Act.pdf)

[Electronic Transactions and Cyber Security Act 2016](https://malawilii.org/mw/legislation/act/2016/33)

[Immigration Act](https://www.refworld.org/docid/3ae6b4f58.html)