



**Submission to City of Cape Town
on the
Draft Amendments to the
*Street, Public Spaces and the Prevention of Noise Nuisance By-law***

17 May 2020

1. Introduction

This submission is made on behalf of the Decriminalisation of Petty By-Laws in South Africa Campaign. We are a coalition of organisations advocating for the decriminalisation of poverty-related by-laws in South Africa. We are dedicated to promoting and protecting the rights and wellbeing of those groups of people who are some of the most marginalised people in society, including homeless people, sex workers, drug users, migrants and informal traders. Our coalition joins other civil society networks on the continent under the ‘Decriminalising and Reclassifying of Petty Offences in Africa’ campaign,¹ which foundationally relies on the *Principles on the Decriminalisation of Petty Offences in Africa* adopted by the African Commission on Human and Peoples’ Rights (ACHPR) in 2017. More information on the Campaign is provided in **annexure 1**.

We welcome the opportunity to provide comments on the City of Cape Town’s proposed amendments to the *Streets, Public Places and the Prevention of Noise Nuisances By-law, 2007 (the ‘By-law’)*. Many of our constituents are disproportionately impacted by this specific By-law, including direct and indirect discrimination in its enforcement. We are concerned not only about the over-reach of the proposed amendments in terms of existing legislative frameworks, but at how the proposed amendments will aggravate the discrimination, and rights violations, already experienced by our constituents if passed by the City. We also have significant concerns regarding the process for consultation on the amendments, which effectively and functionally exclude the voices of those most impacted by the proposals.

Our submission will focus on the following three aspects of the proposed amendment:

- procedural issues regarding the City’s approach to the amendment and period for comments;

¹ www.pettyoffences.org

- substantive issues of law; and
- anecdotal evidence reflecting the personal experiences of those disproportionately impacted by the existence, enforcement and proposed amendment of the By-law.

2. Procedural Issues

We have three primary procedural concerns relating to the call for comments on the amendments to the By-law. These issues were raised in advance in a letter sent to the City of Cape Town on 29 April 2020 (*annexure 2a and b*). At the time of writing, we had not received a substantive response to our letter.

2.1. Insufficient comment period

In the current context of the extended Covid-19 lockdown and the far-reaching implications of the proposed amendments for the poor, marginalised and indigent, the comment period of one month, from 17 April to 17 May 2020, imposed an unreasonably short time frame to meaningfully consult with the constituencies and communities that we represent. Their voices need to be heard and the deadline made meaningful consultation and comment extremely difficult.

There is significant community interest in the proposed amendments, but the capacity of organisations to meet, consult and organise, and on individuals' access to the tools (such as data, computers and printers) to allow participation, is significantly constrained. For those who experience by-law enforcement acutely, such as homeless people and sex workers, their participation is further challenged by the City's efforts to remove them from their usual places of living and work, which hinders the capacity of support services and our Campaign to include their voices and experiences in formal submissions to the City.

Furthermore, the City's call for comments is silent on the process for consideration of public comments, and does not indicate whether there will be scheduled public hearings. We also note the disregard for meaningful public participation in the comment process and absence of public engagement with directly affected communities.

We therefore question whether this comment period has indeed reflected a democratic, transparent, fair and participatory process.

2.2. Unclear drafting of amendment

We are concerned by the irregular drafting of the amendment. It does not follow the expected conventions when asking for public comment on amendments to law and regulation. As a result, there is confusion as to how the proposed amendment will affect the existing 'parent' By-law. The amendment alludes to clause 20 of the By-law, but it is unclear how this clause will be amended exactly: will the amendments be inserted into or replace the existing provisions?

This issue must be clarified by the City, with a further opportunity for public comment in relation to that clarification, if the process for amending the By-law is to be open, fair and transparent.

2.3. Power of the City to legislate policing power

We endorse the concerns raised by Campaign members Africa Criminal Justice Reform in their submission regarding the powers of the City to legislate policing power (attached as **annexure 3**).

The submission points out that the legislation on policing is a national function, although provinces may legislate in relation to their limited oversight function as set out in Chapter 11 of the Constitution. Thus national legislation in terms of the *Criminal Procedure Act* as well as the *South African Police Service Act* provide for policing-type powers of arrest, search and seizure, to be exercised by police officials and “peace officers”. As such powers limit rights, the legislation sets out the circumstances in which these powers may be exercised.

Consequently, powers which the City seeks to accord to ‘authorised officials’ in relation to by-law offences via its proposed amendment differ slightly from those already accorded, with the power to enter, inspect and question being a lesser power than the power to search; power to instruct to leave being a new power and power to issue a compliance notice being a variation on other powers to issue notices. It is unclear why existing powers are insufficient for the purposes of by-law enforcement, and why it is necessary for the City to attempt to pass such legislation.

3. Substantive issues

We have a number of concerns regarding the content of the proposed amendment, including as they relate to the Constitution of South Africa, the *Criminal Procedure Act*, the ‘instruction to leave’ power, the definition of those granted certain powers,

We submit the following:

- The proposed amendments to the By-laws are an unjustifiable limitation on the rights to privacy and dignity, enshrined in the Constitution at sections 14 and 10, respectively. We are concerned that the limitations on rights imposed by the proposed amendments are neither reasonable nor justified in an open and democratic society based on human dignity, equality and freedom, in accordance with section 36 of the Constitution. This is set out in paragraph 3.1, below.
- The proposed amendments are inconsistent with sections 22 (CPA).
- The power to exclude persons from public spaces based on ongoing contraventions of the By-law through ‘instruction to leave’ provisions are unjustifiable and discriminatory.

We endorse the submission made by Campaign members, National Association of Democratic Lawyers (NADEL), who provided the analysis in relation to our constitutional concerns, below. Their submission is attached as **annexure 4**.

3.1. Constitutional concerns

The proposed amendment to the By-law seeks to introduce additional powers for enforcement that include search and seizure with and without a warrant (section 4), inspection of premises (section 1)

and impounding (section 5). The existing By-law protects public space that has come into existence as a result of centuries of violence and land dispossession for the financial gain and profit of the few, to the exclusion of the many. The By-law, as it exists, protects this segregated and racist public space, in order to keep it profitable and private. The conduct that the By-law seeks to prohibit does not threaten the safety of the public, nor does it contribute to criminal enterprise.

What follows are our concerns regarding the constitutionality of increased powers of enforcement for a By-law whose validity is already contentious.

Nature of the Right

Section 14 of the Constitution, governing the right to privacy, explicitly protects the expectation not to have home or person searched, not to have property searched, and not to have possessions seized. The proposed amendments make all three of these invasions possible when City officials enforce the By-laws.

The proposed amendment patently breaches the right to privacy,² and we contend that these amendments do not constitute a justifiable limitation of this right for the purposes of section 36 of the Constitution.

In *Bernstein and Others v Bester NO and Others (CCT23/95) [1996] ZACC 2*, the court made it clear that derogation from the very core of the right – such as those captured explicitly in s14(a)-(d) – requires exceptional justification. The decision in *Bernstein* also incorporated human dignity into the protection of privacy. When considering the purpose of the state and its interest in securing public peace and visual order, the human dignity of people who have been economically excluded from South African life, and fall foul of these regulations as a result of their actions in surviving and living, is paramount. In some cases, the dignity of an individual is not implicated – such as for failing to display a street number correctly – while in others, there are huge ramifications, such as the impounding of wares sold by an informal trader.

Importance and purpose of the limitation

The purported purpose of the draft amendment is crime prevention. By claiming the use of powers that exist under the CPA, the City is suggesting that it should be able to handle these regulatory offences in the same way it does the commission of crimes.

In the context of regulatory search and seizure, the courts have allowed² this in an instance where the right to privacy may be limited. In both *Gaertner and Others v Minister of Finance and Others [2013] ZACC 38* and *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others [2014] ZACC 3*, the courts considered the constitutionality of search and seizure provisions for the regulation of specific industries. The courts found the wide powers of regulatory inspection in both these matters too broad, and limited accordingly. While the City may have an interest in the regulation of commercial space

² See: continuum of privacy expectations set down in *Bernstein and Others v Bester NO and Others (CCT23/95) [1996] ZACC 2*.

for compliance, the type of regulatory search allowed in section 1 of private individuals and vehicles is not permitted.

When considering the constitutionality of search and seizure provisions in an alternative context, the Constitutional Court held in *Magajane v Chairperson, North West Gambling Board [2006] ZACC 8* that there must be a 'substantial state interest' to justify the limitation. In *Minister of Police and Others v Kunjana [2016] ZACC 21*, the Court was asked to consider the constitutionality of search and seizure provisions that permitted conduct without a warrant under the *Drugs and Drug Trafficking Act*. The serious nature of offences under that legislative scheme meant that the limitations were justified on the basis of the importance of the purpose. What this suggests is that the corollary will also be true. A less important social interest will not be able to diminish the invasiveness of the searches taken.

In determining the justifiability of a limitation of a right, the purpose and importance of its limitation must be of significant weight when balanced against the nature of the right. As the amendments are meant to improve the enforcement of the By-law, the purpose of the By-law and its import must be able to justify the increased powers that the City seeks to create.

When the By-law is taken as a whole, it is evident that its purpose has to do with regulating public spaces in the City. The City is exerting its power to regulate public spaces in such a way that it is acceptable to it. The powers that are contained in the proposed amendment to the By-law are already subject to Constitutional scrutiny for their ability to perpetuate racialised exclusion in the City spaces that exist as a result of dispossession and discrimination. These amendments seek to make that enforcement more robust.

When the proposed amendment is considered together with the By-law as a whole, it becomes clear that its aim is to preserve a visual peace and uniformity in city spaces – preventing overhanging trees, requiring street numbers to be visible, and regulating expected comportment of people in public spaces. Those provisions that relate to conduct that is dangerous and threatens public safety are singled out in the section governing offences and penalties, as it is covered by the provisions of the criminal law for sentencing purposes (s2(3)(g)-(k)). This indicates that the rest of the By-law does not regulate conduct that is criminal and dangerous – violation of the By-law is a regulatory offence, rather than one that threatens public safety.

The importance of the By-law is related to the need of the City to regulate its spaces. While the terms in which the proposed amendment has been introduced suggest that it is for the purpose of crime control and public safety, scrutiny of the By-law reveals that it does not serve these goals. Rather, the purpose of the By-law is the protection of public space, the functioning and efficacy of the city space, and privileges the desire of those tasked to control the spaces in the ease of exercising their duty. The importance of the amendments specifically aids City officials in controlling public spaces, it expands their powers and allows for actions to be taken immediately without intervention of oversight bodies. These purposes cannot be considered of such great importance that they justify the search of homes and bodies in both provisions 1 and 4 of the proposed amendments.

Nature and extent of the limitation

The proposed amendment seeks to make use of existing powers that are given to police officials in order to execute their duties of crime prevention, detection, and investigation to help preserve the order of public spaces. It seeks to limit the right to privacy by allowing officials the power to search people and property, with and without a warrant. In effect, it is attempting to establish that these regulations of public space are as necessary and important as the policing and investigation of criminal acts. This allows for:

- searches in circumstances where an individual has used a skateboard in a public road or allowed a tree to overhang a boundary wall;
- inspection of both businesses and premises to be entered to determine compliance with the By-law that entirely concerns public space – this would provide for immediate access to any home or building that was making too much noise;
- seizure of property that has been used in the violation of the By-law, which may include items that obstructed a sidewalk or road. They provide the City officials with extensive powers for questioning, physically searching bodies and property, for the violation of prohibitions on roller-skating in the street or hanging washing on road boundary walls.

These powers, which the courts have held with extreme caution and scrutiny in the past on matters dealing with criminal investigation, are now being applied to regulatory By-laws most often enforced against the poor, marginalised, and vulnerable in the City of Cape Town.

The amendments also seek to introduce the power to search and seize in situations of urgency, as contained in the CPA. It is difficult to imagine any situation in which a search or seizure should be allowed to go ahead without a warrant based on the regulations contained in the By-law. The passage of time is necessary to secure the warrant will either see the failure to comply ended – as desired – or the situation unchanged. It is crucial to note the purpose of punishment within this regulatory scheme. It is used as a coercive mechanism for failure to comply with the rules. It is not because the conduct is inherently criminal, and therefore in need of the collection of evidence and prosecution once an individual ceases violation.

The relationship between the limitation and its purpose

Both the cases of *Magajane* and *Kunjana* require that a law allowing the violation of an individual or business's right to privacy must have a rational connection to the stated purpose of the law. The purpose of the legislation must be linked to the means it makes use of. In terms of *Kunjana*, drug crimes involve clandestine behaviour and harmful substances that could be moved or destroyed and prevent criminal prosecution. The belief the punishment acts as a deterrent to harmful conduct helps justify the need to investigate and put together sufficient evidence for a successful prosecution. Even though the court found the connection between the purpose and the means, it failed the limitations analysis as giving powers that were too broad.

In terms, then, of the relationship that exists between the interest the City in regulating public spaces, and its decision to use criminal investigative techniques, we are concerned that there is a fundamental incompatibility between the proposed amendment and the City's purpose. As the By-law regulates public spaces, any contravention would be occurring publicly. This means that there is no purpose in the use of search provisions in the By-law, because a contravention should be patent. Aside from the section regarding noise, none of the prohibitions in the By-law involve conduct that occurs in private. Allowing for search provisions that permit the violation of privacy is inherently irrational as the offences do not amount to the contravention of regulatory rules, they do not involve physical evidence of a dangerous nature (such as the *Drugs Act* does).

Furthermore, the conduct prohibited is not inherently harmful and does not constitute criminal activity. It does not contravene the bone mores of society to skateboard in the road, sleep in a car, or sell goods on the sidewalk. This conduct may challenge the basic running of the City to maximum capitalist profitability, but it does not cause harm. The erection of structures in public places allows people a place to live when they have no other option. This event is an indication of a social failing on the society in which it occurs, rather than the moral failing of the people who do so. As such it is inappropriate to allow such incredibly coercive and violent powers in enforcing this By-law.

Less restrictive means to achieve the purpose

The By-law currently contains less restrictive means of enforcement. That even this has been subject to extensive litigation suggests that more robust enforcement with extensive powers that are connected to the policing of crime and promoting public safety is untenable.

Regulatory offences that occur within the public domain are not urgent. It is not the purpose of the legislation to punish people for blocking a road, but to make it possible to stop them from doing it. The provisions in the proposed amendment would allow for the impounding of goods used to violate the regulations – the blocking of roads or sidewalks. These materials are not inherently harmful which makes impounding them fail to provide a reasonable connection to the purpose of maintaining order in a public space. A notice requiring the owner to comply with the By-law would achieve that purpose without violating the right.

Section 3 of the proposed amendment creates more extensive guidance for the issue of compliance notice and consequences of the failure to adhere. This draft amendment alone would constitute a sufficiently well-tailored increase in enforcement powers that matches the purpose of the By-law. It prevents the creation of on-the-spot criminals and involves official documentation and judicial intervention to govern the interactions between those in contravention and those enforcing the By-law.

3.2. Inconsistencies with the Criminal Procedure Act

Section 22 of the CPA provides for the circumstances in which search and seizure without a warrant is permitted. The standards set in the CPA have been instructive to the courts as they examine other legislative regimes that allow for a search without a warrant. The crucial features that emerge from the jurisprudence is that there must be clear legislative guidelines on when such a search may be

performed that are narrow enough to prevent abuse. What is evident is the need for a restrictive regime for the use of searches without a warrant that favour the official being required to obtain one in the majority of circumstances. It is necessary that only in the most urgent situations, and for the pursuit of legitimate regulatory or investigatory ends.

The proposed amendment provides two separate means of entering and searching a property without a warrant: section 1, section 4(2) and section 4(3)(a) and (b). The powers the draft amendment seek to confer in section 4(3)(a) and (b) align with those in the CPA allowing for a warrantless search if there is an urgency and reasonable grounds to believe they would be granted a warrant. The irrational contention that anything within the By-law could be of such urgency or necessitate the issuing of a warrant is dealt with under the constitutional challenge to the By-law in section 3.1 of this submission, above. Suffice it to say that the offences within the By-law occur after failing to comply with issued notices. They are not live and dangerous, and they occur in public spaces.

However, the By-law provides powers considerably more extensive than those granted in section 22 of the CPA through the section 1 powers of inspection, as well as section 4(2). These ‘anytime – anywhere inspections’ are exactly of the broad and unfettered nature that the Constitutional Court took issue with in the case of *Minister of Police and Others v Kunjana* and *Estate Agencies Affairs Board v Auction Alliance (Pty) Ltd and Others*. An inspection of any premises at any time for the violation of section 3 of the By-law regulating noise nuisance is an impermissible limitation of the right to privacy. This kind of invasion extends far beyond the purpose of the By-law and the kinds of powers appropriate for the ills it is aimed at.

3.3. Instruction to leave

The proposed amendment seeks to introduce additional powers for authorised officials to exclude persons from public spaces based on an ongoing contravention of the By-law. The intention of this power is to exclude ‘undesirable people’ on the discretion and authority of the official tasked with policing a public nuisance. In the context of the unequal application and enforcement of these By-laws against our constituents, who are largely marginalised and economically excluded (see section 4 of this submission, below), this power would add to those who protect the City as a space in which the wealthy may pursue the freedoms to the exclusion of all others.

This power is *sui generis* – it does not exist in other legislative schemes that restrict movement for the purposes of public safety. As this By-law does not even deal with the threat of harm, to have such a limiting provision is extraordinary, and speak to the right to freedom of movement in section 21 of the Constitution.

In considering the purpose of this legislative innovation, the history of space in South Africa must be borne in mind. There is a clear mismatch between the nature and tenor of the By-law and this proposed enforcement provision, which speaks directly to the City’s desire to remove people who have made homes in public spaces without having to adhere to the stringent conditions of the *Prevention of Illegal Eviction and Unlawful Occupation Act* (the PIE Act). That a City official with little to no oversight could determine whether a person is forced to leave an area allows for wide discretion

and is reminiscent of the ways in which the movements of black people were controlled through passbook system during apartheid.

There is no justification within the By-law for a power this extreme based on the conduct it is attempting to regulate. It does not pose an immediate risk to public health and safety, and as such the delayed procedure involved in approaching the courts and seeking an interdict (as was done in the V & A case) is a necessary safeguard for the vulnerable and economically excluded citizens of Cape Town.

3.4. Definitional issues

Section 4 of the proposed amendment assign powers and functions to ‘authorised officials’, without providing a definition of who an authorised official will be. It is common practice for municipalities to use the services of private security companies to enforce by-laws, and it is crucial that the City define who an ‘authorised official’ is and whether they intend to confer such powers on private security.

4. Impact of the By-law and its proposed amendment

The existence and enforcement of the By-law, and the additional powers the proposed amendment seeks to provide City officials in terms of their enforcement, pose a significant challenge to the right of all persons to equality and non-discrimination. While the purpose of the By-law, as per the preamble, is the control of public spaces, part of its effect is to criminalise certain forms of conduct that are connected to the necessary performance of life sustaining activities in public places. The powers to enforce the By-law have both a targeted and disproportionate impact on homeless persons and other marginalised groups for whom sleeping on a park bench, begging, failing to have a permanent address, or washing in a public bathroom, are necessarily connected to their socio-economic status. Members of the Campaign, and their constituents, have previously detailed the targeted use of the By-law against sex workers, drug users, beggars, transgender persons, car guards, amongst others, and abuses by officials conducting enforcement activities. The experiences of Campaign members were captured in a report of a meeting held on 25 July 2019 in Cape Town to discuss the By-law and its impact, and it is attached as **annexure 5** of this submission.

Accordingly, the City’s proposal to increase the coercive powers of officials to enforce the By-laws raise significant concerns amongst Campaign partners, given the challenges already experienced in relation to enforcement under existing law. The proposed amendment will have the effect of further undermining the dignity of affected persons, and deepening the City’s law enforcement response to socio-economic challenges that should rather be dealt with in the context of a developmental safety paradigm under section 23 of the *Municipal Systems Act*.

Campaign member U-turn has been working with the homeless in Cape Town since 1997. Over that time, it has found that through a long term rehabilitation journey, it is possible to support someone to leave the streets for good, rebuilding their social support structures and a means to earn an income. Criminalising homelessness through the By-law is completely ineffective and actually makes rehabilitation harder and increases the likelihood of chronic homelessness.

If a lack of money and employment is a reason for being on the street, giving someone a criminal record makes it even harder to get a job. If trauma and abuse is the reason for being on the street, the anxiety and trauma faced receiving a fine and then being taken to court makes it even harder to work with someone rehabilitatively. Fining people who have no job and no money and therefore no means to pay is completely counterintuitive. Having a By-law that means that homeless people can be fined and criminalised for being destitute, assumes that they have a choice on whether to comply with the By-law or not. They do not have the power to modify the manner in which they exist. If a person speeds in their car and receives a fine, they have a choice about whether or not to do it again. They can modify their behaviour and actions so as not to receive another fine. But if a person is homeless and needs to sleep in the corner of a park, and receives a fine, they have no other choice than just to move to a different place. They cannot suddenly put a roof over their head in response to the fine. To live on the street is not a choice – there is no alternative. There are approximately 2500 shelter beds within the City, but there are at least 6000 street homeless people in the City. If there was at least one shelter bed per person then we could possibly argue that there was a choice about whether to be homeless or not. This is patently not the case.

The proposed by-law amendments would take the existing by-law which is already negatively impact homeless persons and would exacerbate this further. For example, the power to order a person to leave an area as proposed in section 2(1) is deeply problematic. The By-law applies to the whole city, within which homeless people are fined for sleeping on a pavement. This amendment would effectively mean that all street homeless people who are residents of the City and subject to an order to leave are effectively ‘criminals’ whilst in the confines of the City. Where would they move to? Wherever they move to they will again be contravening the by-law and can be moved again. This will lead to increased harassment of the street homeless and will make it even harder to work with them in a rehabilitative manner, thus increasing the number of chronic homeless people on the streets in Cape Town.

Section 4(2), which proposes to allow search and seizure without a warrant is already felt that homeless people are unfairly targeted with By-law enforcement. Having an ability to stop and search without a warrant could easily lead to a greater harassment of the street homeless population. This targeting will also increase the number of chronic homeless people on the streets in Cape Town.

Section 5(2), which allows for the seizure, without a warrant, of anything connected to the commission of an offence under the By-laws is similarly concerning as it allows for the property of street homeless people in Cape Town to be removed and disposed of, as is frequently the practice of the City under the existing By-law framework anyway. The report details concerns by affected persons of law enforcement increasingly targeting, confiscating and destroying their property. One participant explained how law enforcement officials targeted her property as part of enforcement measures: ‘Law enforcement officers and police kept harassing us where we live in Observatory. They raid us and take our personal possessions. During one raid, they stood on my dentures and broke them. I reported it to the police station, but they said they don’t see any need for me to have dentures. Having dentures can get me work and food’. This practice was found to be unconstitutional in *Ngomane and Others v City of Johannesburg Metropolitan Municipality and Another (734/2017) [2019] SASCA 57*.

5. Conclusion

The protection of the most marginalised persons in society is paramount. Laws should be reflective of this. The Campaign exists for this precise reason: to advocate against laws that have a discriminatory impact on certain groups of vulnerable people, to the extent that their livelihood and right to live with dignity are seriously compromised. The proposed amendments to the By-law in no way ameliorate the harmful impact of the existing By-law, and in fact we are concerned that they may exacerbate it by:

- Criminalising the existence of street homeless people in the City of Cape Town through the proposed 'instruction to leave' power;
- Legalising the search and seizure of homeless persons' property;
- Unconstitutionally interfering with a persons' right to privacy and dignity; and
- Entrench the City's law enforcement approach to homelessness, rather than addressing the root causes, and taking a developmental approach to addressing this aspect of community safety.

Finally, we must reiterate the challenge in presenting submissions on this issue that includes the voices of people who are most impacted, due to the short comment period during lockdown. We call on the City to have public hearings to ensure that these crucial voices can be heard.

We thank the City for the opportunity to make this submission. We would like to note our availability and willingness to give an oral submission during any future public participation processes. Please direct any queries or requests for additional information to the contact persons whose details appear below.

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