



African Policing Civilian Oversight Forum

Submission in response to the call for submissions by the City of Cape Town on the draft Street, Public Places and the Prevention of Noise Nuisances Amendment By-law, 2021

29 June 2021

1. Introduction

The African Policing Civilian Oversight Forum (APCOF) welcomes the opportunity to make this submission in response to the call for public comment on the Street, Public Places and the Prevention of Noise Nuisances Amendment by-law, 2021. We are a not-for-profit trust based in Cape Town, and work on issues related to policing, police accountability and access to justice in South Africa and across the continent.

We commend the City of Cape Town for inviting public comment in relation to this proposed by-law amendment, which has significant implications at the constitutional level, particularly the right of all persons to equality, non-discrimination, dignity, and freedom from arbitrary arrest and detention. Our submission sets out our concerns regarding the incompatibility of the by-law and its amendments with South Africa's constitutional and international human rights obligations, and recommends that the City consider the repeal, rather than amendment, of particular provisions related to the criminalisation of poverty and homelessness.

2. The incompatibility of the by-law and its amendments with South Africa's constitution, and international and regional human rights obligations

In the constitutional structure of South Africa, local governments play a pivotal role in the delivery of programmes and interventions that have an immediate and tangible impact on the lives and welfare of the public. However, in exercising their constitutional power to develop and enforce

African Policing Civilian Oversight Forum

Building 23B, Suite 16, Waverley Business Park, Wyecroft Road, Mowbray, Cape Town, 7925

PostNet Suite 63 Private Bag x11, Mowbray, 7705

Tel: +27 21 447 2415

www.apcof.org.za

Trust no. IT1900/2012

Trustees: C Heyns, P Tlakula, T Gandidze (Chair), E van der Spuy, G Cronje (Treasurer), A Van Wyk

laws to effectively administer local affairs and serve the public, local governments are mandated to act within the prescript of the Constitution, the regional legal and human rights framework, and the values that are foundational to its vision of a more equal society that is committed to social justice and the promotion of fundamental human rights. APCOF submits that compliance with this framework by the City of Cape Town is particularly important in light of South Africa's history of systemic inequality, exclusion and marginalisation, when laws were used as tools to design and enforce spatial segregation and social economic exclusion.

In addition to constitutional obligations on local governments to enact laws and administer local affairs within the framework of human rights, regional human rights norms have emerged to guide the development of legal rules and standards and ensure their compatibility with norms and values enshrined in key regional human rights instruments, such as the African Charter on Human and Peoples' Rights. In particular, the Principles on the Decriminalisation of Petty Offences in Africa (attached as **annexure 1** to this submission), as confirmed by a recent Advisory Opinion by the African Court on Human and Peoples' Rights (attached as **annexure 2** to this submission), are clear that the criminalisation of homelessness, poverty and status of individuals are contrary to international and regional human rights standards.

APCOF is concerned that the proposed amendments to the by-law will have the effect of increasing the powers of law enforcement officials to remove homeless people from public spaces, and confiscate their possessions. This proposal is contrary to South Africa's constitution, and the emerging normative standards, as described, that promote a rights-based, development and public health approach to poverty alleviation and community safety, rather than criminalising homelessness and poverty. This approach is also contrary to the City of Cape Town's obligations under the Municipal Systems Act, specifically section 23, which requires local government to use its available resources to promote and create a safe and healthy environment through developmentally-oriented planning ('IDP'), as required by Article 152 of the Constitution.

However, the by-law amendments mean that, in effect, and contrary to these constitutional imperatives, the City of Cape Town is holding the poor and homeless criminally responsible for their situation, and increasing resources available to enforce the law against them rather than addressing issues through the IDP process. This is a proudly concerning position to take in a country with such a recent history of systemic exclusion and discrimination.

Accordingly, APCOF recommends that rather than amending the by-law as proposed by the City of Cape Town, that aspects of the by-laws be repealed, and that resources allocated to law enforcement responses to homelessness and poverty be diverted to IDPs and the adoption of measures that address the conditions that cause, exacerbate and perpetuate poverty. We are particularly concerned about the impact of the following provisions of the by-laws on constitutionally guaranteed rights and safeguards.

3. Repeal of by-law provisions which violate constitutionally guaranteed rights and safeguards

APCOF recently published research that examined the impact and enforcement of particular sections of the by-laws on constitutionally guaranteed rights and freedoms, and provisions of other regional and international human rights instruments (attached as *annexure 3* to this submission). In particular, the research found the following provisions of the by-law to be contrary to recognised human rights protections: Sections 2(1)(a)(i)(ii), (b), (c); Sections 2(3)(c),(d)(i)(ii), (e), (l), (m); Sections 3(a)(b); Section 4; Section 7(a); Section 13(a); Section 14 and Sections 23(1) and (3).

We are concerned about the impact of these provisions on the right to dignity, equality and non-discrimination and freedom from arbitrary arrest and detention, as we explain below.

3.1. Inconsistency with the right to equality and freedom from unfair discrimination. (section 9 of the Constitution).

Although these sections of the by-law appear to have been formulated in neutral and objective language, APCOF and other stakeholders, including the African Commission on Human and Peoples' Rights and the African Court, have observed that they either target or have disproportionate impact on the poor and other historically marginalized groups. As the City may be aware, legal principles and provisions may appear neutral in their formulation but might be, in some instances, administered in a discriminatory manner, or their enforcement yields discriminatory consequences, which we note engenders indirect discrimination.

Accordingly, Iain Currie and Johan De Waal (2014), in their seminal work on our Bill of Rights, note that:

...the prohibition of indirect unfair discrimination is based on the realisation that, though the basis of differentiation may, on the face of it, be innocent, the impact or effect of the differentiation is discriminatory...any law which has an unfairly discriminatory effect or consequences or which is unfairly administered may amount to prohibited discrimination even if the law appears on the face of it to be neutral and non-discriminatory....a law may also be neutral on its face and in its impact but it is administered unfairly.¹

The African Court on Human and Peoples' Rights (the African Court), in a landmark Advisory Opinion delivered on 4 December, 2020 also ruled that these nature of laws are incompatible with the right to equality and non-discrimination on the basis that they criminalise the status of an individual and enable discriminatory treatment, re-affirming concerns raised by the African Commission on Human Peoples' Rights in the Principles.²

3.2. Inconsistency with the right to be treated with dignity (section 10 of the Constitution)

The right to be treated with dignity is one of the foundational tenets of our constitutional democracy, and is classified as a non-derogable right. APCOF notes that these sections of the by-law violate the right to be treated with dignity because they permit the treatment of the poor as objects that should be penalised and removed from public spaces. To fully understand the impact of the enforcement of municipal by-laws that create petty offences, APCOF, on 25 of July 2019, facilitated a roundtable discussion on decriminalisation of petty offences in South Africa, which was attended by, amongst others, those against whom enforcement measures are frequent. One recurrent complaint that we observed from the group was allegation that law enforcement officials regularly confiscate and destroy their property, as we highlight some of them below.

I lost my job and my accommodation. Law Enforcement officers and police keep 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.

One time, after SWEAT had sponsored us for groceries after our dwelling had burnt down, the groceries we bought from Spar were confiscated by Law Enforcement. We had done nothing wrong when they stopped us. When we deal with Law Enforcement they are not

¹ Ian Currie & Johan De Waal "The Bill of Rights Handbook" sixth edition, 2014. P 238.

² African Court on Human and Peoples' Rights. Request for Advisory Opinion by Pan African lawyers Union, 001/2018. Pages 17-20.

friendly to us. They are aggressive, and don't see us as people. They see us like animals. Law Enforcement abuse us in the mornings, waking us up at 5am, saying things like, "You're naaiers."

The place where I live with my daughter burned down. We moved to the green field near Spar. The first time we were seen by security, they swore at us, they took our IDs and our blankets.

As the City may be aware, in *Ngomane & others v City of Johannesburg Metropolitan*, the court held that the decision of Johannesburg Metropolitan Police Department to confiscate and destroy property belonging to homeless people resulted in the violation of their right to have their dignity respected and protected.³

Similarly, In *Port Elizabeth v Various Occupiers*, the court cautioned that:

*It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation.*⁴

The African Court also determined that petty by-laws deprive the poor and marginalised of their dignity by unlawfully interfering with their efforts to maintain or build a decent life, reinforcing observations made by the ACHPR in the Principles.⁵

3.3. Inconsistency with freedom from arbitrary arrest and detention (section 12 of the Constitution)

APCOF notes with disappointment that continued arrest and detention of the poor and marginalised, as a means of enforcing the by-law, is a disproportionate and unnecessary response to what are social-economic challenges.

Although South African Police Service (SAPS) crime statistics and records do not offer any specific detail in relation to arrest for infringement of by-laws, research has established that thousands of

³ *Ngomane and others v City of Johannesburg Metropolitan Municipality and Another* (2019)(SCA) 57 para21.

⁴ *Port Elizabeth Municipality v Various Occupiers* (2004) (ZACC) 7 para 18.

⁵ African Court on Human and Peoples' Rights. Request for Advisory Opinion by Pan African lawyers Union, 001/2018. Pages 21-22

arrests take place each year.⁶ Many arrests for violations of by laws that establish petty offences, it has been determined, are conducted for purposes of intimidation rather than prosecution.⁷

At the roundtable discussion on decriminalisation of petty offences in South Africa, we also observed complaints of arrests and imposition of fines to implement the by-law, as we summarize below.

One morning in 2017, while sleeping with my boyfriend on the streets of Observatory outside of Spar Supermarket, Law Enforcement officials fined me and my boyfriend R300 each for sleeping on the streets. One Law Enforcement official asked, "Who told you to sleep here?" I told him that it is not a criminal offence to sleep on the street, and I did not sign the fine form. My boyfriend signed the fine form.

Some instances of general arrests are when police would tell the homeless people that there was a curfew (11pm), and if you don't comply they will lock you up. Also, when you get arrested, you sign a charge sheet. On the sheet, there is a section to write down all of the possessions that have been confiscated from you. But the police do not document everything that they take from you.

In *Minister of Safety and Security v Sekhoto*, the court held that the decision to arrest must be based on the intention to bring the arrested person to justice.⁸ Our courts have also cautioned that where arrest is meant to frighten or harass persons, or where it is meant to punish the suspect by means of an arrest, or where the arresting official knows that the state will not proceed to prosecute, it is against the law because the official has used his power of arrest for ulterior purpose.⁹

The African Court, while also declaring these laws inconsistent with freedom from arbitrary arrest and detention, underlined that, since petty by-laws are incompatible with several human rights principles enshrined in the African Charter and other international human rights instruments, they cannot be the basis for lawful law enforcement activities.¹⁰

⁶ M Killander (2019). Page 86

⁷ Ibid. Page 87

⁸ Minister of Safety and Security V Sekhoto and Another (2011)(SCA) 1 para 30.

⁹ Ibid para 30-31.

¹⁰ African Court on Human and Peoples' Rights. Request for Advisory Opinion by Pan African lawyers Union, 001/2018. Page 28

Another serious concern about petty by-laws is that they are often vague and overly broad, and do not clearly and sufficiently set out all the elements of the offences and the reasons and circumstances under which arrest and detention are to be effected, giving wide discretion to law enforcement officials.

4. Recommendations and conclusion

APCOF recommends that the City of Cape Town:

- **Review and repeal** the sections of the by-laws highlighted above that have the effect of criminalising poverty and the performance of life-sustaining activities in public places, to give effect to South Africa's Constitutional rights guarantees of dignity, equality and freedom from arbitrary arrest and detention, and other regional and international human rights obligations. If the proposed amendments to the by-laws are adopted, which will have the effect of expanding the powers of law enforcement to criminalise and punish the poor and homeless for their situations, this will further increase the incompatibility between the current by-law and constitutionally guaranteed rights and freedoms.

- **Identify and address the social determinants of poverty and homelessness** in a developmental manner that is consistent with South Africa's domestic, regional and international human rights obligations. Law and policy in South Africa aim to address crime and violence through a framework for integration of the prevention and response to homelessness, including a specific mandate for municipalities. APCOF has set out that legislative framework and related policies that speak directly to the role of local government in addressing the factors relating to both homelessness and safety, and the intersection between the two of them (Part 3 of the attached **annexure 3** to this submission). This includes:
 - National Development Plan
 - The Municipal Systems Act
 - The Municipal Structures Act
 - The Integrated Urban Development Framework
 - The Integrated Social Crime Prevention Strategy

- The 2016 White Paper on Safety and Security.

APCOF recommends that the City of Cape Town address issues of homelessness and community safety within that existing legislative and policy framework, rather than making the poor criminally responsible for their situations, and further contributing to spacial segregation, discrimination and marginalisation of amongst the City's most vulnerable residents.

APCOF, again, commends the City of Cape Town for inviting public comment on the proposed by-law amendments. We are available to discuss our submission and its recommendations in more detail.

Submitted by:

Sean Tait
Director
African Policing Civilian Oversight Forum
E: sean@apcof.org.za
T: 021 447 2415