



# African Policing Civilian Oversight Forum

## Submission in response to the call for submissions by the City of Cape Town on Draft Unlawful Occupation By-law.

6 August 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 Draft Unlawful Occupation By-law. We commend the City of Cape Town (the City) for inviting public comment in respect of this draft By-law. We are encouraged by the City's emphasis, in the preambular paragraphs of the draft by-law, to promote the objectives of the by-law in a manner that is consistent with the requirements of section 26(3) of the Constitution that no one may be evicted from their homes or have their homes demolished without an order of court.

Our submission sets out our concerns regarding the proposed definition of the term 'authorised official' and weak regulatory provision on the use of force, and recommends that the City consider the review and amendment of these two aspects of the draft by-law.

### 2. Deficiency in the definition of the term authorised official

APCOF is concerned that the proposed definition of the term 'authorised official' is overly broad and vague, and raises a number of challenges, each of which is discussed in turn below.

#### 2.1. Conferment of law enforcement powers on City employees

The proposed definition has the effect that it might confer law enforcement powers on City employees, who are not trained and equipped – in accordance with the relevant national educational standards and training designed for law enforcement officials – with specialized skills and strategies that are integral to the execution of policing functions. APCOF submits that there are serious challenges associated with utilising untrained City employees to implement the by-law. In particular, we are concerned about its implication on the obligation to respect and protect human dignity and promote the exercise of basic human rights and freedom, such as the right to equality and freedom from discrimination, as embodied in domestic, regional and international human rights laws that are legally binding on South Africa.

The significance of training and education programmes to the provision of policing functions in a professional and rights-centred is recognised in our constitutional framework. In this regard, APCOF draws the City's attention to the provision of section 199(5) of the Constitution which stipulates that:

### 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](http://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

*The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.*

## **2.2. Oversight and accountability concerns**

In view of the proposed plan to confer law enforcement powers on City employees, APCOF is concerned about the potential impact on accountability mechanisms and programmes. As presently formulated, the draft by-law does not indicate to whom, if at all, these employees will be accountable. We observe that this omission is incompatible with South Africa's constitutional and other regional and international law binding obligation to provide accountable and transparent law enforcement services.

As the City is aware, within the framework of democratic policing, the exercise of law enforcement powers must be subjected to a system of internal and external checks and balances aimed at ensuring that law enforcement officials perform the functions expected of them to a high standard and are held responsible if they fail to do so. The objective of this system includes preventing the officials from misusing their powers, precluding political authorities from misusing their control over law enforcement officials, and most importantly, to strengthen public confidence and legitimacy.<sup>1</sup>

The Constitution requires the provision of security services to be subjected to independent and effective oversight mechanism, to give effect to the principles of transparency and accountability. These principles also form part of the basic norms and values governing public administration in South Africa.<sup>2</sup>

In addition, within continental human rights system, the African Commission on Human and Peoples' Rights, the premier human rights organ on the Continent has also underlined that:

*accountability and the oversight mechanisms for policing forms the core of democratic governance and is crucial to enhancing rule of law and assisting in restoring public confidence in police; to develop a culture of human rights, integrity and transparency within the police forces; and to promote a good working relationship between the police and the public at large.*<sup>3</sup>

## **2.3. Use of City employees to enforce the by-law is disproportionate approach**

APCOF is further concerned that the proposal to grant City employees the power to enforce the by-law is unnecessary and disproportionate approach to the issue. We note that the City is mandated to utilize law enforcement officials, who are better trained and equipped with problem-solving skills, for this purpose.

## **3. Weak regulatory provision on the use of force**

APCOF is concerned that section 9(5)(ii) of the draft by-law proposes to empower City employees to use force in the implementation of the objectives of the by-law. In our view, the use of City employees who are untrained in the policing of the public, crowd management and relevant human rights standards on the use of force is problematic and violates the City's obligations to

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<sup>1</sup> UNODC Handbook on police accountability, oversight and integrity, page 9

<sup>2</sup> Sections 199(8) and 195(1)(e)-(g) of the Constitution

<sup>3</sup> African Commission on Human and Peoples' Rights, Resolution on police reform accountability and civilian police oversight in Africa.

provide law enforcement services that is strictly within the framework of the law, as required by section 198(c) of the Constitution. \

APCOF is also concerned that the draft by-law does not reflect the constitutionally recognised and internationally established principles applicable to the use of force in all conditions – namely necessity, precaution, proportionality and non-discrimination. In particular, we are concerned about the impact that the omission of these principles will have on strengthening accountability for arbitrary and excessive use of force, and the obligation on the City to ensure investigation and punishment of all incidents of excessive use of force and provide access to remedies of violations of human rights.

#### **4. Recommendations and conclusion**

APCOF recommends that the City of Cape Town:

- Review and amend the proposed definition of the term ‘authorised official’ that confers law enforcement powers on City employees, and ensure that the enforcement of the by-law is strictly reserved for professionally trained law enforcement officials. This will give effect to the City’s obligations under the constitution and other regional and international law instruments to provide accountable and transparent policing services that is compliant with human rights standards.
- Review and amend section 9(5)(ii) of the draft by-law and ensure that general principles on the use of force are reflected in the by-law, to promote professional use of force. In this regard, the City can draw reference from relevant regional and international instruments that are binding on South Africa. This includes General Comment No. 3 on the African Charter on Human and Peoples’ Rights on the right to life, Resolution 474 on the Prohibition of Excessive Use of Force by Law Enforcement Officers in African States, UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and UN Code of Conduct for Law Enforcement Officials.

For more information please contact;

Sean Tait  
Director  
APCOF  
021 4472415