

ACJR submission to the City of Cape Town on the draft Streets, Public Places and the Prevention of Public Noise Nuisances Amendment By-law, 2021.

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Introduction

1. Africa Criminal Justice Reform (ACJR) welcomes the opportunity to provide comment on the *Streets, Public Places and the Prevention of Public Noise Nuisances Amendment By-law, 2021*. ('proposed amendments')
2. ACJR is a project of the Dullah Omar Institute in the Faculty of Law at the University of the Western Cape. We engage in high-quality research, teaching and advocacy on criminal justice reform and human rights in Africa. Our work supports targeted evidence-based advocacy and policy development promoting good governance and human rights in criminal justice systems. Our work is anchored in international, regional and domestic law. We promote policy, law and practice reform based on evidence. We have a particular focus on effective oversight over the criminal justice system, especially in relation to the deprivation of liberty.
3. To this end, the submission raises issues derived from our work as a member of the regional campaign on *Poverty is not a crime in Africa*.¹
4. In 2020, ACJR raised concerns about the proposed amendments to the Streets, Public Places and the Prevention of Public Noise Nuisances Amendment By-law, 2007 (Streets by-law),² and their incompatibility with the Constitution, with particular reference to the right to dignity, right to freedom and security of the person, the right to privacy, right to freedom of movement and the right to property.³ We believe that the 2021 proposed amendments, albeit different, give rise to similar concerns as it seeks to enhance the enforcement powers of 'authorised officials' for the purposes of enforcing the Streets by-Law.
5. The proposed amendments would mandate 'authorised officials' to:
 - i. instruct a person to leave and remain out of a specified public place;⁴
 - ii. issue a written compliance notice on a person contravening the By-Law;⁵
 - iii. issue notices in terms of section 56 (issue a written notice to appear in court) and section 341 (compounding of certain minor offences) of the Criminal Procedure Act for contravening the by-law;⁶

¹ See <https://pettyoffences.org/>

² Africa Criminal Justice Reform Submission to the City of Cape Town Proposed by-law amendments, May 2020, Available at [acjr-submission-to-the-city-of-cape-town-on-proposed-by-law-amendments-15-may-2020.pdf](#)

³ Constitution of South Africa. Right to dignity (section 10), right to freedom and security of the person (section 12), the right to privacy (section 14), right to freedom of movement (section 21), right to property (section 25)

⁴ Section 2 (1) (a) (iii), CoCT Streets, Public Places and the Prevention of Public Noise Nuisances Amendment By-law, 2021.

⁵ Section 2 (1) (b), CoCT Streets, Public Places and the Prevention of Public Noise Nuisances Amendment By-law, 2021.

⁶ Section 2 (1) (c), CoCT Streets, Public Places and the Prevention of Public Noise Nuisances Amendment By-law, 2021.

- iv. arrest a person without a warrant, who commits an offence in terms of section 2(3)(m) of the Streets by-law (which deals with sleeping, camping and erecting shelter in a public place) and, if necessary, search the person arrested in terms of section 23 of the Criminal Procedure Act;⁷
 - v. impound materials and personal items of the arrested persons;⁸
 - vi. request personal and identification particulars from a person they reasonably suspect of committing an offence or person who can provide interest⁹
 - vii. The power to arrest a person sleeping, camping and erecting shelter in a public place may only be exercised if the person has refused to accept an offer of alternative shelter.¹⁰ Moreover, the person convicted for this contravention may only be sentenced to imprisonment if it is proved that the person refused an offer of alternative shelter by the CoCT.¹¹
6. It is, in overview, our submission that these proposals target poor, marginalised and homeless people and criminalises poverty and homelessness. The submission below briefly highlights our concerns.
7. Policing in Africa has its roots in the colonial era, placing particular emphasis on policing urban areas and to a large extent who belongs there and who does not, and whether their actions there constitute an infringement on the colonial order. The aim was not primarily to detect crimes, solve them and refer for prosecution and thus enhance public safety (the Crime Control Model of policing), but rather something else that appears to have more to do with social discipline than the rule of law. This model was also observed in colonial Australia, which Weber called ‘patrolling the boundaries of belonging’, with indigenous Australians as an out-group the primary targets in being excluded from public spaces through arrest and moving-on offences.¹² The question then arises as to the extent to which current African police are still ‘patrolling the boundaries of belonging’ and who is targeted for ‘not belonging’?¹³

⁷ Section 2 (1) (d), CoCT Streets, Public Places and the Prevention of Public Noise Nuisances Amendment By-law, 2021.

⁸ Any materials used for the making of transient structures or camping overnight. Section 2 (1) (e), CoCT Streets, Public Places and the Prevention of Public Noise Nuisances Amendment By-law, 2021.

⁹ Section 2 (1) (f), CoCT Streets, Public Places and the Prevention of Public Noise Nuisances Amendment By-law, 2021.

¹⁰ Section 2 (2), CoCT Streets, Public Places and the Prevention of Public Noise Nuisances Amendment By-law, 2021.

¹¹ Section 3(b), CoCT Streets, Public Places and the Prevention of Public Noise Nuisances Amendment By-law, 2021.

¹² Weber L (2011) ‘‘It sounds like they shouldn’t be here’’: Immigration Checks on the Streets of Sydney’ *Policing and Society: An International Journal of Research and Policy* 21(4), 464.

¹³ Muntingh, L. (2015) *Arrested in Africa: An exploration of the issues*, Bellville: ACJR, pp. 27.

8. Whatever the context, it appears that people around the world who are perceived to have less power are particularly at risk of arrest without a warrant. The problem is enabled on the one hand by a myriad of seemingly antiquated laws, municipal by-laws and petty, and on the other hand, notions of social order that have their roots in the colonial era. Where the police have the power to arrest, but lacks the integrity to uphold the law, extortion is commonly practiced as a way of avoiding arrest; but those with the least power are frequently unable to avoid arrest or draw attention to unlawful and arbitrary arrest. Moreover, it is difficult to find evidence to support reasonable suspicion and the enforcement of these laws has little bearing on overall public safety.¹⁴

Adequate consultation to address amendments to the Streets by-law

9. We are concerned that the limited consultation period 29 May to 30 June 2021 will deny citizens the right to be heard in a meaningful way. Given the COVID-19 pandemic, and the realities facing most people impacted by these amendments, such as people living on the streets, we believe that the one-month period provided for public submissions is inadequate; as those most likely to be affected by the proposed amendments are unable to meaningfully engage with it within this time-frame.

Criminalisation an inadequate response to poverty and homelessness

10. The Streets by-law prohibits certain actions including, amongst other things, to beg, stand, sit or lie, urinate, bath or wash, sleep overnight or erect any shelter in a public space. Presently, penalties in the form of a fine, or imprisonment not exceeding six months, or both a fine and imprisonment can be imposed on persons contravening the Streets by-law.
11. It is clear that the type of offending behaviour the Streets by-law seeks to punish are actions ostensibly performed by poor and marginalised people living on the streets.
12. ACJR is of the view that the Streets by-law generally targets poor and homeless persons and that the powers which the new amendment seeks to confer on 'authorised officials' in relation to by-law offences such as the instruction to leave, to issue a compliance notice, to arrest, search a person sleeping in public or erecting shelter, impound his or her personal property, further seeks to strengthen control and power over poor and homeless people and perpetuate criminalisation.

¹⁴ Muntingh, L. (2015) *Arrested in Africa: An exploration of the issues*, Bellville: ACJR, pp. 32-33.

13. There have been various calls from international human rights institutions to review and repeal laws, policies or measures that discriminate directly or indirectly against poor or homeless people and make it illegal to pursue life-supporting activity in public spaces (such as sleeping and camping).¹⁵ These institutions have also raised concerns about the lack of appropriate state interventions to address the root problems of homelessness and marginalisation.¹⁶
14. In 2017, the African Commission on Human and Peoples' Rights issued Principles on the Decriminalisation of Petty Offences in Africa which calls upon governments to decriminalise offences including those relating to performing life-sustaining activities in public places (i.e. begging and sleeping in public, etc) and to address the root causes of poverty and marginalisation.¹⁷
15. In December 2020, the African Court on Human and Peoples' Rights issued an Advisory Opinion, noting that vagrancy laws and related by-laws are incompatible with the African Charter on Human and Peoples' Rights and the African Charter on the Rights and Welfare of the Child and the Maputo Protocol on the Rights of Women.¹⁸ The African Court also noted that States Parties to the African Charters (to which South Africa is a party) have positive obligations to repeal or amend their vagrancy laws and/or by laws to conform with the rights protected thereunder.
16. Fundamentally we must ask: what is the purpose of these laws and their enforcement? How do they contribute to making society safer and what is the evidence for this? Can the problem be resolved in a different way without breaching fundamental rights of persons and without criminalisation? Is it necessary for arrest and detention to be the default action without the behaviour posing any notable threat to public safety and good order?
17. The ACJR assessment tool for assessing the prospects of decriminalisation and declassification certain offences, of the kind contained in the Streets by-law. The assessment tool raises eight questions:
 - What is the problem?

¹⁵ Report of the Special Rapporteur on extreme poverty and human rights on the penalization of people living in poverty (2011) A/66/265. United Nations Special Rapporteur on Adequate Housing (2015) Report of the United Nations Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context. A/HRC/31/54; In the matter of a Request by the Pan African Lawyers Union (PALU) for an Advisory Opinion on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and other Human Rights Instruments applicable in Africa, Request for Advisory Opinion No. 1 of 2018; Principles on the Decriminalisation of Petty Offences in Africa – ACHPR/Res. 366 (EXT.OS/ XX1) 2017.

¹⁶ A/66/265; A/HRC/31/54; Request by PALU for an Advisory Opinion on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and other Human Rights Instruments applicable in Africa, Request for Advisory Opinion No. 1 of 2018; ACHPR/Res. 366 (EXT.OS/ XX1) 2017.

¹⁷ Principles on the Decriminalisation of Petty Offences in Africa – ACHPR/Res. 366 (EXT.OS/ XX1) 2017.

¹⁸ In the matter of a Request by the Pan African Lawyers Union (PALU) for an Advisory Opinion on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and other Human Rights Instruments applicable in Africa, Request for Advisory Opinion No. 1 of 2018.

- On whom is this behaviour impacting?
 - What is the intention behind the law?
 - What is the impact of its enforcement?
 - What has been achieved through the enforcement of this law?
 - What are the risks (negative consequences) associated with the enforcement of this law?
 - Is the enforcement of this law more beneficial than the negative impact?
 - Can the problem be addressed in a different way that does not result in criminalisation?
18. It should be emphasised that this needs to be a factual, rational and objective enquiry that should be inclusive in nature. Anecdotal evidence, broad (if not unfounded) generalisations and not treating people as equals before the law has no place in such an assessment. Upon analysis of the answers, one should consider whether or not to strictly enforce the law, to declassify the offence, or to decriminalise it altogether. At the one extreme, strict enforcement needs to take place if it is found upon analysis that the behaviour is proven to be truly problematic; negatively impacts on others; the law is well-intentioned, and that the risk of negative consequences of not having the law is high. On the other end of the spectrum is the option to decriminalise the law, especially if we find that the law is not having the desired impact and/or there are significant adverse consequences, and other solutions need to be looked at. Such solutions need to be based on certain principles to ensure that they advance multi-stakeholder interests and work in general towards the greater public good.
19. Instead of criminalising the poor, homeless and marginalised, the CoCT with other spheres in government should come up with workable solutions to address the problems facing people living on the street and to take positive steps to ensure that the by-law is in line with international human rights.

Constitutionality of proposed enforcement powers to authorised officials

20. ACJR is accordingly of the view that the proposed by-law amendments, insofar as they seek to accord “authorised officials” of the CoCT invasive policing-type enforcement powers, (i.e. the instruction to leave, to issue a compliance notice, to arrest, search a person sleeping in public or erecting shelter, impound his or her personal property) are unnecessary and unconstitutional and should not be passed.¹⁹

¹⁹ CoCT Streets, Public Places and the Prevention of Public Noise Nuisances Amendment By-law, 2021.

21. The proposed amendment introduces a new type of offence that does not exist in the Criminal Procedure Act (or any other Act), which empowers authorised official to instruct a person to leave and remain out of a specified public place.²⁰ This type of ‘move along orders’ are reminiscent of colonial times as they aim to exclude “undesirables” (poor and marginalised) who pose no threat of harm, from certain public spaces that are protected for the privileged elite that do not want to see the realities of inequality in one of the most unequal societies in the world. Such move along orders gives individuals who are already vulnerable and marginalised a sense of not belonging and infringes their fundamental rights to human dignity and freedom of movement.²¹
22. Furthermore, the proposed amendments criminalise the sleeping, camping and erecting a shelter in a public place as it empowers officials to arrest, impound personal items and material, and ‘if necessary’ search the arrested person -only if they refuse to accept an offer of alternative shelter.²² The new amendment proposes imprisonment as a punishment for contravening the by-law if it is proved that the person refused an offer of alternative shelter by the CoCT.²³ These provisions hold poor and vulnerable persons ransom to accepting whatever shelter the CoCT presents them with otherwise they face arrest, detention and conviction. The blanket provisions are inhumane, goes against constitutional rights and freedoms of poor and homeless people as it fails to interrogate or accommodate the reasons why people are living on the street and treats them like their views and experiences don’t matter. The causes of people living on the street are complex and multifaceted and require a comprehensive coordinated response that address societal, health and economic issues. People are often pushed onto the streets and are rendered homelessness by a range of socio-economic drivers (e.g. eviction), mental health issues (e.g. psychosocial and intellectual disabilities), displacement, substance abuse disorders, rejection, and so forth. In a country with high levels of poverty and inequality, many people in South Africa are forced to beg and live on the streets, it is unbelievable that such behaviour is criminalised.²⁴
23. It is therefore our submission that the policing powers (i.e. arrest, search, and move-along orders) infringe on constitutional rights, such as the right to dignity, right to freedom and

²⁰ Section 2 (1) (a) (iii), CoCT Streets, Public Places and the Prevention of Public Noise Nuisances Amendment By-law, 2021.

²¹ Sections 10 and 21, Constitution of South Africa.

²² Section 2(d), (e), 2(2), CoCT Streets, Public Places and the Prevention of Public Noise Nuisances Amendment By-law, 2021.

²³ Section 3 (b), CoCT Streets, Public Places and the Prevention of Public Noise Nuisances Amendment By-law, 2021.

²⁴ Magnus Killander ‘Criminalising Homelessness and survival Strategies through municipal by-laws: colonial legacy and constitutionality,’ (2019) 35 South African Journal on Human Rights 1. 8

security of the person, the right to privacy, right to freedom of movement and the right to property.²⁵ The powers being sought in relation to nuisance offences which are frequently policed against the least powerful members of society, such as the poor and homeless, and it is highly likely that a court would rule these powers, and their impact, are disproportionate to the harm being addressed by the nuisance offences.

Policing powers afforded to ‘authorised officials’

24. The proposed amendment replaces “peace officer” with “authorised official” sections 2(1), 2(2), and 7 as the official responsible for enforcing the by-law. The requirements associated with a ‘peace officer’ bring a certain legal status and certainty, and this certainty is important for the purposes of how such a peace officer conducts him or herself, but also how they are held accountable.
25. It is also the case at present that SAPS officials and Metro-police officials are subject to the investigative mandate of the Independent Police Investigative Directorate (IPID).²⁶ Officials granted policing or policing -like powers need to be subject to oversight and this would then apply to the officials intended to enforce the by-laws as well.
26. An “authorised official” is defined as ‘an employee of the City responsible for carrying out a duty or function or exercising any power in terms of this By-Law and includes any employee delegated to carry out or exercise the duty, function or power.’²⁷
27. There is a lack of legal certainty as to who an ‘authorised person’ is as the amendment describes this person broadly. It is unclear whether the intention is a class of person other than law enforcement or traffic officials of the CoCT. We are concerned that the proposed amendment may be unlawful and unconstitutional as it seeks to delegate policing powers to any CoCT employee who are not peace officers or duly authorised officials to perform by-law enforcement functions in terms of the Constitution and enabling legislation.

Conclusion

28. ACJR is of the view that the policing powers (i.e., arrest, search, and move-along orders) proposed for ‘authorised officials’ are evasive, unnecessarily disproportionate and infringe on the constitutional rights of poor and marginalised persons.²⁸ If these powers are accorded, it

²⁵Sections 10, 12, 14 21 and 25, Constitution of South Africa.

²⁶ Section 2(b) IPID Act 1 of 2011.

²⁷ Section 1, CoCT Streets, Public Places and the Prevention of Public Noise Nuisances Amendment By-law, 2021.

²⁸ Sections 10, 12, 14, 21 and 25, Constitution of South Africa.

would not meet the constitutional muster of being reasonable and justifiable in democracy based on human dignity, equality, and freedom.

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