

**Submission by the Dullah Omar Institute to the Department of  
Co-operative Governance on the Standard Draft By-laws for  
Township Economies issued in terms of the Local Government:  
Municipal Systems Act, 2002 (Act 32 of 2002)**

**30 June 2024**

1. The Dullah Omar Institute for Constitutional Law, Governance and Human Rights (Dullah Omar Institute) is based at the University of the Western Cape (UWC) and engages in research, teaching and advocacy on governance and human rights in Africa.
2. We thank the Department of Cooperative Governance for the opportunity to comment on the Draft By-laws for Township Economies. It has to be noted that the draft was available at short notice, allowing only 30 days for comment. The issues raised in the draft are weighty and complex, affecting a wide range of stakeholders in civil society, but also 257 municipalities as well as national and provincial departments. There is similarly great diversity across the country in respect of economic development, the size and scope of the informal sector, and the competence and effectiveness of local governments. We therefore submit that more time should have been provided for interested stakeholders to provide more in-depth comments to the standard draft by-laws.
3. Demarcating township economies as distinct in law has firstly the odour of *apartheid* era legislation. Secondly, township economies have changed substantially in the past 30 years and it cannot be assumed that it has been untouched.
4. The draft standard attempts to integrate three separate issues, being business development, local government and immigration. The implications of this can be significant and it seems that the wider implications are deserving of further study and analysis.
5. The overall foci of this submission are to: (1) highlight distinct challenges faced by informal workers, especially within disadvantaged areas such as townships (2) encourage municipalities to be less reliant on law enforcement to address, in particular, traders in the informal sector, (3) to highlight key-principles for inclusive policy/legislative development at local level.
6. The high levels of poverty and unemployment in South Africa and other African countries has forced many to turn to the informal economy for survival.<sup>1</sup> Moreover, those working within the informal economy are generally vulnerable people such as women, migrants, poor and homeless persons who depend on it for survival.<sup>2</sup> It is commonly accepted that the overwhelming majority of informal traders are women and that they have the dependent children, as well as other family members. Women traders face a constant threat of harassment and abuse by law enforcement officials as they are more likely to be solicited for extortive bribes. Furthermore, women traders face gender discrimination which can be manifested both explicitly and implicitly.<sup>3</sup> The standard draft by-laws must therefore have as a central objective creating a safe and inclusive environment for all traders, and particularly women traders that would not rely on over regulation and enforcement, and rather emphasize inclusivity and progressive compliance with standards.
7. The draft by-law also makes reference to foreign nationals with either asylum seeker documentation for business licences. Foreign nationals or migrants also form part of vulnerable people seeking to survive within the informal economy. The challenges faced by some migrants, especially those making use of temporary asylum-seeker permits, is that it requires regular renewal, restricting their ability to obtain relevant trading permits from local government, limiting their access to banking loans and financial services.<sup>4</sup> The reality is that many migrants operating within the informal economy and in townships are

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<sup>1</sup> J Mangwanda and K Petersen, "Factsheet 28: Sub-National Governance and the Plight of People Working in Public Spaces." (Dullah Omar Institute, 2023), <https://dullahomarainstitute.org.za/acjr/overview/factsheet-28-subnational-governance-and-the-plight-of-people-working-in-public-spaces.pdf/view>.

<sup>2</sup> Mangwanda and Petersen.

<sup>3</sup> Mangwanda and Petersen.

<sup>4</sup> Mangwanda and Petersen.

generally undocumented and face the ever-present fear of harassment, deportation and arrest by law enforcement officials for not having appropriate documentation. This limits migrant traders' chances of securing demarcated spaces in markets, forcing them to operate in spaces not demarcated for trade, for example, on street corners which further exposes them to law enforcement and criminalisation.<sup>5</sup> In general, there is a need to problematize and rethink the conventional notions of work in the informal economy owing to the distinct challenges that those working in it encounter and the significant contribution that they provide to the socio-economic development of the country.

8. Much of what is proposed in the draft concerns the regulation of the informal sector, particularly within townships, namely relying to a large extent on the issuance of licenses or permits. Regulation on the scale and intensity being proposed runs a more than substantial risk of having the well anticipated consequence of encouraging extortion and corruption rather than encouraging economic development. One can conceive of this situation as a mathematical formula, in the sense that monopoly of the power to enforce plus discretion minus accountability equals corruption:

(Monopoly to enforce +discretion) - Accountability = Corruption.

9. Note is furthermore taken of the objectives set out in clause 2 and drawing particular attention to clause 2(d) reading "support small businesses to grow and participate in mainstream economic activities". There is, however, little in what follows to give expression to the objective in clause 2(d). Instead, what is emphasized are detailed standards with the seemingly overarching purpose to enforce, exclude and control. It is submitted that clause 2(d), namely to support small businesses to grow should perhaps be the primary objective and that the other objectives there listed are means to this end. In short, municipalities should use their powers in an accommodating and inclusive manner to increase employment and sustainable livelihoods instead of monitoring compliance for the sake of compliance.
10. From this it follows that enforcement ought to be a measure of last resort. It is typically the case in many African jurisdictions and within South Africa that even when they have powers of arrest, there is little regard by sub-national law enforcement officials to uphold rights-based treatment particularly when dealing with vulnerable groups such as those living and those performing life sustaining activities in public spaces.<sup>6</sup> Persons working within the informal economy often find themselves at the mercy of law enforcement officials who enforce a combination of formal penalties (fines, confiscation of goods, arrest and detention) and informal penalties (the solicitation of bribes, extortions, etc.). Municipalities should rather place the emphasis on encouraging and supporting participation in the informal economy through a range of support measures, such as training and infrastructure development.
11. We submit further that regardless of what the approved requirements of a business are, that the municipality should place as the central thrust of its policy to encourage and include participation in the economy and that punitive measures should truly be a measure of last resort. For example, the range of measures listed under clause 6(8) seems overly harsh, reactive, and unnecessarily punitive to simply say that if a person has not complied within 30 working days there will be an automatic closure of the business. This is an inflexible position and not recognizing the often-precarious nature of people active in the informal economy. It would be preferable if there is indeed substantial non-compliance, that the duty is on the municipality to inquire as to the reasons for the non-compliance, what corrective measures can be taken and what the municipality can do to bring the business in compliance.

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<sup>5</sup> Mangwanda and Petersen.

<sup>6</sup> J Mangwanda, "Fact Sheet 27: Sub-National Law Enforcement and Oversight in Four African Countries: Kenya, Ghana, Nigeria, and Zambia" (Dullah Omar Institute, October 2023), 2, <https://dullahomarainstitute.org.za/acjr/acjr-publications/acjr-factsheet-01-2023.pdf/view>.

12. Clause 5 lists a number of proactive steps to be undertaken by municipalities to ostensibly support economic development. What follows in clauses 6, 7 and 8 have the central thrust to restrict access through a system of licensing that is strongly linked to citizenship. The restrictions are also seemingly a "one shoe fits all approach" and the bureaucratic processes appear to be arduous which may unintentionally put off potential traders in the township. The draft by-law seems to visualise the informal economy as a physical market area with designated stalls and this may be true in some regards. The informal sector is, however, diverse and many traders do their business on foot, for example, in the case of street traders, and seasonal fluctuations as well as local and international events may attract more activity within the informal economy in some seasons more than in 'quieter' seasons. It should also be recognized that people active in the informal economy may find themselves in difficult and fluid personal circumstances. The insistence, for example, in clause 6(4)(c) that the physical and postal address of the business must be recorded as a condition for a license is perhaps not recognizing these characteristics of the people active in the informal economy and the fact that their living conditions may constantly change. It is a general observation that instead of creating an enabling environment and providing favourable conditions for informal trade, municipal by-laws and policies governing informal trade tend to restrict people working in public spaces.
13. Clause 6(7) refers to municipalities registration and permitting of business activities. It is important to highlight that although set at a standard price, trading permits may be unaffordable and inaccessible to some. It is therefore important that municipalities keep costs as low as possible particularly because workers in the informal economy are low-income earners that tend to live from hand-to-mouth. Moreover, in some instances, issued permits are limited for the sale of particular goods or services; meaning that a person who is issued a permit for selling food items may not also sell textile products, and vice-versa. In municipalities that do not require informal traders to pay for trading permits, they may be required to undergo the arduous bureaucratic process of registering for one, even if there are no costs involved.<sup>7</sup>
14. Clause 9 deals with hygiene and waste removal and there is in principle no objection to having such standards. However, there are existing standards and problems often arise as to the quality of waste removal services as well as the accessibility of ablution facilities and running water in public spaces. It is submitted that municipalities should provide the necessary waste removal services, install the necessary infrastructure to ensure a clean environment and safe space for all, especially women, and that the emphasis must be on information sharing and risk management where it concerns hygiene and public health.
15. At clause 9(2) it reads "The owner of the property where business activities take place must ensure there is appropriate infrastructure including ablution facilities". It is submitted, firstly, that where this occurs on municipal land or other state land, that responsibility rests with the municipality or department. The standards should therefore indicate what are the minimum requirements in that regard, such as access to water, the minimum number of toilets, as well as an appropriate area where food can be cleaned and prepared. Where it concerns private land, the land owner should preferably in partnership with the municipality develop the required infrastructure.
16. Clause 9(1)(e) reads that the person operating a business must "ensure that no smoke, fumes or other substance, odour or noise, emanating from his or her business activities, pollution of any kind". This is simply overbroad and it is near inevitable that any business activity will result in some form of pollution. Would this include a food preparation stall selling 'pap en wors' using a wood fire? The question is rather how that is managed and whether there are reasonable steps taken. If the drafters had something

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<sup>7</sup> Mangwanda and Petersen, "Factsheet 28: Sub-National Governance and the Plight of People Working in Public Spaces."

specific in mind it is advised to specify it here.

17. Clauses 11 and 12 deal with the offences and penalties as well as law enforcement. There is increasing evidence that by-law enforcement is biased, extortionist and punitive. A recent report by the *UN Special Rapporteur on extreme poverty and human rights* draws attention to unwarranted criminalisation and harsh and discriminatory enforcement against people active in the informal economy.<sup>8</sup> The report notes as follows: “There is a growing international consensus that criminalizing life-sustaining activities in public spaces is not acceptable. This consensus is reflected in the New Urban Agenda, the Guiding Principles on Extreme Poverty and Human Rights, the Guidelines on the Implementation of the Right to Adequate Housing, resolutions of the Human Rights Council, reports by the United Nations Secretary-General, recommendations of United Nations human rights mechanisms, the United Nations System Common Position on Incarceration, and principles issued by the International Commission of Jurists.”<sup>9</sup>
18. The issue calls for much broader consultation to unpack the current practices and to establish the appropriate protective mechanisms for people who are suspected of by-law infringement. The Dullah Omar Institute forms part of a Global Campaign to Decriminalise Poverty and Status<sup>10</sup> and it is noted that it is in particular by-laws and other administrative offenses where there is no clear victim that are being targeted for decriminalization and declassification. The Campaign pays particular attention to people especially women, in the informal sector working in urban public spaces.
19. The Campaign is not blind to problematic behaviour but advocates for a progressive approach. When assessing particular behaviour, one should therefore ask:
  - What is the particular act or behaviour?
  - Is this act or behaviour unlawful?
  - Was or is a crime about to be committed as a result of this behaviour?
  - Was this crime committed with the intent to commit a crime?

See Appendix 1: *Assessing the prospects for the decriminalisation and declassification of petty offences.*

20. It is further submitted that the quality of public policy is highly dependent on the process of policy making. It is necessary that the views of all stakeholders impacted by policy are included in the policy-making process. In light of the draft by-laws, we would like to emphasize the following fundamental principles to good policy-making:
  - Policies should be designed around outcomes.
  - The decisions of policy-makers should be based on the best available evidence.
  - The policy and the policy-making process should be inclusive. Consultations should take place with those affected by the policy and authorities should seek feed-back on law or policy from the public.
  - The policy-making process should consider varied influencing factors (nationally, regionally and internationally), draw on experience in other countries or localities and be assessed against a country’s international and regional commitments to key human rights treaties.
  - The policy-making process should be flexible and innovative.

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<sup>8</sup> UN Special Rapporteur on extreme poverty and human rights, “Breaking the Cycle: Ending the Criminalization of Homelessness and Poverty” (New York, 2024).

<sup>9</sup> UN Special Rapporteur on extreme poverty and human rights, para. 8.

<sup>10</sup> “Campaign to Decriminalise Poverty & Status,” n.d., <https://decrimpovertystatus.org/>.

- The policy-making process must look beyond departmental boundaries and identify inter-departmental solutions to cross cutting issues.
- The existing or established policy should constantly be reviewed to ensure it is really dealing with problems it was designed to solve.
- Systemic evaluation of the effectiveness of policy should be built into the policy-making process.
- Good policy-making learns from experience of what works and what does not.<sup>11</sup>

17. We thank you for the opportunity to provide comment on this draft. We are open to further engage on this issue.

Prof L M Muntingh  
Director: Dullah Omar Institute  
University of the Western Cape  
South Africa  
[lmuntingh@uwc.ac.za](mailto:lmuntingh@uwc.ac.za)

Ms. J Mangwanda  
Researcher: Dullah Omar Institute  
[jmangwanda@uwc.ac.za](mailto:jmangwanda@uwc.ac.za)

Prof Tinashe Chigwata  
Project Head: Multi Level Government  
University of the Western Cape  
South Africa  
[tchigwata@uwc.ac.za](mailto:tchigwata@uwc.ac.za)

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<sup>11</sup> K Petersen, "Public Spaces & Informal Work: Principles and Approaches to Law & Policy-Making" (Dullah Omar Institute, September 2023), <https://dullahomarinate.org.za/acjr/acjr-publications/acjr-factsheet-01-2023.pdf/view>.

# Assessing the prospects for the decriminalisation and declassification of petty offences

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**By**

**LM Muntingh**

**Oct 2019**

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# Assessing the prospects for the decriminalisation and declassification of petty offences

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## Introduction

The purpose of this document is to guide a critical and thorough assessment of the decriminalisation and declassification of so-called petty offences. From existing case law and research, it is evident that certain offences are outdated, offensive and discriminatory (e.g. being a rogue and vagabond) and that such offences need to be removed from the statutes. There are, however, other offences that may fall in the proverbial grey area – they may have, or had, some purpose but that purpose may have been forgotten and the law has been repurposed, or there are numerous problems with its enforcement to the extent that is discriminatory or it is used extensively for extortion or the prescribed sanctions are excessive. It may also be the case that for certain of these offences arrests and custody is used almost as a default action without the behaviour posing any notable threat to public safety and good order. The questions raised below aim to guide a factual enquiry into the merits of petty offences,<sup>1</sup> their enforcement and whether they still serve a purpose for the greater public interest, or whether they have been repurposed (i.e., captured) to serve a different purpose.

In most African jurisdictions it is the ordinary uniformed police that enforce these laws although there are examples of other types of law enforcement officials who are also actively involved in their enforcement such as traffic police and municipal police. In the context of policing, a distinction is made between regime policing (the police protect the regime and a narrow elite) and democratic policing, i.e. the police uphold the rule of law; the police are accountable for their actions, and the police work in service of the public in a manner that is procedurally fair. If the overall result being sought is a legitimate police service, then it requires democratic policing and this has a direct bearing on what laws are enforced and how they are enforced by whom. There is ample evidence that petty offence laws are misused by police agencies across the continent and this is therefore further motivation for a critical enquiry along the line of questioning set out below.

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<sup>1</sup> In terms of the African Commission on Human and Peoples' Rights, Principles on the Decriminalization of Petty Offences in Africa (ACHPR/Res. 366 (EXT.OS/XX1), 2017) petty offences are minor offences for which the punishment is prescribed by law to carry a warning, community service, a low-value fine or short term of imprisonment, often for failure to pay the fine. Examples include, but are not limited to, offences such as being a rogue and vagabond, being an idle or disorderly person, loitering, begging, being a vagrant, failure to pay debts, being a common nuisance and disobedience to parents; offences created through by-laws aimed at controlling public nuisances on public roads and in public places such as urinating in public and washing clothes in public; and laws criminalising informal commercial activities, such as hawking and vending.

## 1. What is the problem?

Some public behaviour may present an obvious problem, such as a particular area being used as an informal toilet and most people would agree that it poses public health risks and is unpleasant for passers-by. However, walking at night from point A to point B is less clear as to what constitutes problem behaviour, yet in many countries people are arrested for loitering or being a rogue and vagabond when walking at night. From a legal perspective, one can then ask: What are the elements of the crime? Common law of criminal liability in Anglophone countries recognizes four separate and distinct elements or requirements, namely; (i) an act (*actus reus*); (ii) which is unlawful (unlawfulness); (iii) causing the crime (causation); and (iv) committed with the necessary intent or *culpa (mens rea)*. The doctrine of common purpose concerns only the element of causation.<sup>2</sup>

When assessing particular behaviour, one should therefore ask:

- What is the particular act or behaviour?
- Is this act or behaviour unlawful?
- Was or is a crime about to be committed as a result of this behaviour?
- Was this crime committed with the intent to commit a crime?

Using the examples of being suspected of being a “rogue and vagabond”, the question then becomes: What is the act being perpetrated? Even if it is on the statutes, it does not follow that it’s meaning and thus application is clear. For example, the Malawi Penal Code provided that: “Every person found in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose, shall be deemed a rogue and vagabond, and shall be guilty of a misdemeanour and shall be liable for the first offence to imprisonment for six months, and for every subsequent offence to imprisonment for eighteen months.”<sup>3</sup>

Although this section has been declared unconstitutional, it provides a good example of how overly broad an act can be defined to include almost any possible behaviour under its ambit and criminalising it. The section provides no guidance on how the conclusion must be or can be drawn that a person was therefore for an illegal or disorderly purpose. Moreover, it assumes that the police officer can make a reliable prediction into the future that a crime is about to be committed and that such a crime will have a significant impact on public safety.

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<sup>2</sup> *Mzwempi v S*, Eastern Cape High Court: Mthatha, Case nr. 284/04, Date delivered: 28 April 2011, para 44.

<sup>3</sup> Section 184(1)(c).

## 2. On whom is this behaviour impacting?

Behaviour becomes problematic when it impacts on other people and the environment. However, not all problem behaviour is criminal in nature. It is therefore required to undertake a closer examination of particular behaviour to assess whether it is indeed criminal in nature and whether it requires a criminal justice response. We can therefore ask four questions:

- Who is affected by the behaviour? Is it a person, an interest group or the state?
- What is the behaviour exactly?
- Who is behaving in this manner?
- What is the impact of this behaviour?

Table 1

What is the act?	Who is doing it?	Who is affected?	What is the impact?
Urinating outside shop entrance	Homeless people sleeping in front of shop at night.	Shop owner	Health Hygiene Commercial Losing customers Owner spends money to clean up.
Homeless person talks to patrons in parking lot in front of restaurant. He is smelly and some people think he is begging and feel intimidated.	One particular elderly homeless man.	Restaurant owner	Nuisance What is the harassment threshold?

It is also important to consider whether a behaviour has a direct or indirect impact on the affected person as this may help to determine the level or extent to which a behaviour should be penalised or not. Acts or behaviours that directly impact on a third person are different from acts that have an indirect or peripheral impact. For example, if a person is found urinating outside a shop entrance, the direct impact on the shop owner may be health and hygiene related as well as a commercial impact. However, in a case where a person urinates in an open field next to a road, there may not really be a direct impact on the affected party. From this one should be able to conclude whether or not the behaviour in question is indeed problematic and that it has a recognisable adverse impact on somebody or the environment.

### **3. What is the intention behind the law?**

If there is a specific law aimed at prohibiting certain behaviour or a more general law (e.g. rogue and vagabond) that is used in particular cases, we need to examine the purpose of that law in order to come to a better understanding of whether it is effective and being used in the intended way. The following are then some questions to ask:

- What is the legislation trying to achieve?
- Is the legislation aimed at preventing some specific behaviour?
- What is the link between the undesirable behaviour and the intention of the legislation?
- Is the link between the legislation and the problem behaviour rational (i.e. it is based on evidence)?
- Can the problem behaviour be regulated or prevented in a different way than through legislation creating an arrestable offence? For example, dumping rubbish in certain places may be illegal, but it doesn't create a criminal offence for which arrest is mandated. It creates a fine.
- Is this old or new legislation and if old, has it been updated to reflect contemporary trends and values?

If the purpose of the law is to maintain a healthy environment, promote economic development or provide safety and security, one need to attest whether there is a link between the law and the behaviour being committed. For example, does the act of being rogue and vagabond undermine a law seeking to promote economic development? By asking these questions, it forces one to consider if the intention of the law is being met; and if not, whether the law can be enforced in a different way.

Furthermore, it is important to consider whether or not the law has been updated to deal with population growth and other macro changes within the country. The problem in many African countries is that outdated colonial laws are still being enforced, although these laws have long been repealed in European countries. Most countries on the continent have been independent for more than 50 years, yet their post-independence governments have not updated or repealed laws which are no longer suitable for the current political, social or economic environment. It is therefore important that the intention of the law deals with the current realities facing the country.

### **4. What is the impact of its enforcement?**

The enforcement of legislation can have intended and unintended consequences. It may be illegal in terms of law to do many things, but only in some instances are criminal offences created. Further, only

in some instances is arrest without a warrant allowed. Fines are mostly not processed by way of arrest nor imposed by courts.

It is important to know both intended and unintended consequences. This is particularly the case with arrest. The purpose of arrest is to secure the attendance of someone at trial, but there are other ways in which this can be achieved. The purpose is not to ‘punish, scare or harass such person’.<sup>4</sup> It is because an arrest ‘constitutes one of the most drastic infringements of the rights of an individual,’ a law enforcement official should therefore regard it as a measure of last resort.<sup>5</sup> Across Africa it is generally the case that conditions of detentions in police cells and prisons leave much to be desired. Detention for even a relatively short period can have dire consequences for people, especially if they are vulnerable to exploitation, violence or health risks.

- Who is the target of enforcement (e.g. poor people, homeless, drunks, street traders etc)?
- Is arrest used with the real intention to prosecute?
- Is arrest or warnings used to secure suspects’ attendance at court?
- Are fines imposed?
- Are the fines paid?
- Are there allegations that law enforcement officials harass homeless people or other people making a living in public spaces?
- Are officials trained to work with people living on the streets and making a living in public places?
- Are officials aware of resources (e.g. shelters) for homeless people and people making a living in public spaces?

## **5. What has been achieved through the enforcement of this law?**

The existence and enforcement of a law will have consequences and the issue is whether it is having the desired consequences in changing people’s behaviour. Even if people know that something is against the law, they may still engage in particular behaviour because they do not have an alternative.

- Is enforcement achieving the objective?

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<sup>4</sup> SAPS Standing Order (G) 341 para 4(1).

<sup>5</sup> ACHPR Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (para 2(b)); General Comment 35, Human Rights Committee, CCPR/C/GC/35; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Adopted by General Assembly resolution 43/173 of 9 December 1988; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; Communication 339/2007: *Patrick Okiring and Agupio Samson (represented by Human Rights Network and ISIS-WICCE) v. Republic of Uganda; Raduvha v Minister of Safety and Security and Another* [2016] ZACC 24, SAPS Standing Order (G) 341, para 3(1).

- How do we know this?
- What are the performance indicators for this (e.g. a cleaner and safer environment)?
- How many people are affected by enforcement (e.g. number of warnings, fines and arrests)?
- Is the number of arrests (or fines issued etc) regarded as a performance indicator for law enforcement?
- Can people complain if they feel they have been unfairly subjected to enforcement?

## 6. What are the risks (negative consequences) associated with the enforcement of this law?

When laws are enforced, not everyone may be satisfied with it. Some people may feel that the law discriminates against them, or that it is used to harass people, or that it is used to raise revenue for government. It is necessary to unpack this and determine if there are negative consequences when this law is enforced.

- What is the impact on police – community relations? Reference is, firstly, made here to groups that are frequently subjected to enforcement such as homeless people, sex workers, street traders etc. The perceptions that these groups hold of police and law enforcement officers should also be taken into account. Secondly, there may be others who are in favour of strict and rigorous enforcement and from their perspective enforcement will have a positive impact on police-community relations.
- Has enforcement had a negative impact on the level of trust in the police, courts or government?
- What is the economic development and socio-economic impact of enforcement?
- Is the enforcement of this legislation used to extort bribes to avoid arrest?
- What is the burden placed through enforcement on the criminal justice system (e.g. number of people appearing in court)?

## 7. Is the enforcement of this law more beneficial than the negative impact?

To determine if the enforcement of this law is more beneficial than its negative consequences, a cost benefit analysis can be done. The data below is fictional and is presented as an example.

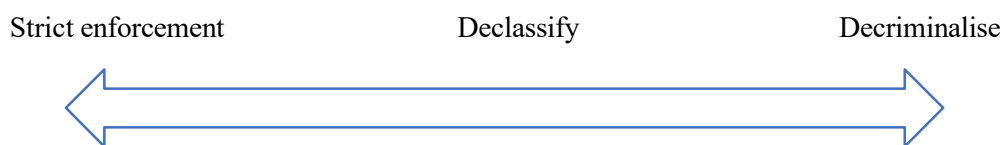
Table 2

	Financial		Non-Financial	
	Cost	Benefit	Cost	Benefit

<b>Government</b>	5 law enforcement officials at \$20 000 per year = \$100 000	\$80 000 raised in fines and licencing fees, thus \$20 000 loss.	Protests by street traders resulting in very negative publicity for the City Council.	Street traders are generally not trading in the CBD where they caused an obstruction on some pavements.
<b>Citizens</b>	Municipal rates have to make up the shortfall. Street traders lost significant income when arrested and goods confiscated.	None could be identified.	Some people working in the CBD find the street traders very convenient to buy household goods, meals and other items from. Their intermittent presence due to arrests and fines is inconvenient to these shoppers who now have to go further to formal grocery stores and cafes.	Shop owners who have complained about street traders stealing their business are more satisfied when arrests take place and goods are confiscated from street traders.

**8. Can the problem be addressed in a different way that does not result in criminalisation?**

Figure 1



Upon analysis of the answers to the preceding set of questions (1-7), one should then consider the spectrum above (Fig. 1) in deciding whether or not to strictly enforce the law, to declassify the offence, or to decriminalize 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 decriminalize 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. Declassification could be a useful response if it is found that there is a need for the particular crime but that the consequences of enforcement need to be adjusted. 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.

Suggestions for alternative solutions should question whether the proposed solution will:

- be sustainable over a period of time?
- support a rights-based approach?
- strengthen social cohesion?
- advance access to economic participation?
- strengthen non-discrimination?
- promote dignity?
- promote fairness and equality before the law?
- create a safer environment?
- protect vulnerable groups?
- come at low or no cost?
- invest in infrastructure with the broadest possible benefit?
- promote harm reduction
- present an innovative answer to a long-standing problem?



**Appendix – Worksheet**

**1. What is the problem?**

(a) Please describe in as much detail possible the (problem) behaviour that you observed, or was reported to you?

(b) Who was behaving in this manner?

(c) Where did they do this?

(d) When did they do this?

(e) Is this a frequent occurrence? If so, how frequently does it happen? Is it more frequent at certain times of the day, week, or month?

(f) Is this act or behaviour illegal and defined in law?

(g) Was a crime committed or was a crime about to be committed as a result of this behaviour?

(h) If “yes” to Question 1(g), was the crime committed with the intent to commit a crime?

**2. On whom is this behaviour impacting?**

(a) Who is affected by the behaviour? Is it a person, an interest group or the state?

(b) How is this behaviour impacting on these individuals/groups/state?

(c) Have there been any complaints lodged about this behaviour, and if so, to whom? What has been the response?

**3. What is the intention behind the law?**

(a) What is the legislation regulating this behaviour trying to achieve?

(b) What criteria were used to determine that this behaviour was undesirable?

(c) What is the link between the undesirable behaviour and the intention of the legislation?

(d) Is the link between the legislation and the problem behaviour rational (i.e. it is based on evidence)?

(e) Does the legislation and its enforcement achieve its objective in the least intrusive manner?

(f) Can the problem behaviour be regulated or prevented in a different way than through legislation creating an arrestable offence, i.e. in a less intrusive manner?

(g) Is this old or new legislation and if old, has it been updated to reflect contemporary trends and values?

**4. What is the impact of its enforcement?**

(a) Does the law target a particular group or category of people in society?

(b) Is the enforcement of this law concentrated at a particular time (time of day, week or month)?

(c) Is there a group or category of people that frequently fall foul of this law?

(d) Is arrest used with the real intention to prosecute? Are suspects arrested? Are they charged?

(e) Are arrests or warnings used to secure suspects' attendance at court?

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(f) Are fines imposed?

(g) Are the fines paid?

(h) What are the consequences of not paying a fine?

(i) Are there allegations that law enforcement officials harass certain categories of people? To whom are such allegations reported?

(j) Have officials received recent training on how to work with people living on the streets and making a living in public places?

(k) Are there any resources (e.g. shelters) available for homeless people and people making a living in public spaces? Are officials aware of these resources?

**5. What has been achieved through the enforcement of this law?**

(a) Is enforcement achieving the objective of the law? See 3(a)

(b) How do we know this?

(c) Are records kept of enforcement (e.g. number of warnings, fines and arrests in a week, month or year)?

(d) What are the complaints mechanism available to people if they feel they have been unfairly subjected to enforcement?

**6. What are the risks (negative consequences) associated with the enforcement of this law?**

(a) What is the impact on police – community relations? This may be positive or negative for different interest groups.

(b) Has enforcement had a positive impact on the public’s level of trust in the police, courts and/or government?

(c) Does the law and its enforcement have a positive impact on economic development?

(d) Is the enforcement of this legislation used to extort bribes (e.g. to avoid arrest or money or anything else)?

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(e) What is the burden placed on the criminal justice system (e.g. number of people appearing in court, court infrastructure, administrative support) through enforcement?

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**7. Is the enforcement of this law more beneficial than the negative impact?**

	Financial		Non-Financial	
	Cost	Benefit	Cost	Benefit
<b>Government</b>				
<b>Citizens</b>				
<b>Other:</b>				
<b>Other:</b>				

**8. Can the problem be addressed in a different way that does not result in criminalisation?**

Suggestions for alternative solutions should question whether the proposed solution will:

	Yes	Partially	No	Unknown
be sustainable over a period of time?				
support a rights-based approach?				
strengthen social cohesion?				
advance access to economic participation?				
strengthen non-discrimination?				
promote dignity?				
promote fairness and equality before the law?				
create a safer environment?				
protect vulnerable groups?				
come at low or no cost?				
invest in infrastructure with the broadest possible benefit?				
promote harm reduction				
present an innovative answer to a long-standing problem?				