



Africa Criminal Justice Reform
Organisation pour la Réforme de la Justice Pénale en Afrique
Organização para a Reforma da Justiça Criminal em África



ACJR submission to the City of Cape Town

Proposed by-law amendments

May 2020

Contents

| | |
|--|---|
| 1. INTRODUCTION | 2 |
| 2. THE POWER TO LEGISLATE POLICING POWERS..... | 2 |
| 3. LIMITATION OF RIGHTS..... | 4 |
| 4. CONCLUSION | 5 |

1. Introduction

1. Africa Criminal Justice Reform (ACJR) is a project of the Dullah Omar Institute for Constitutional Law, Governance and Human Rights at the University of the Western Cape. ACJR seeks to carry out engaged research, teaching and advocacy on criminal justice reform and human rights in Africa.
2. Our work on democratic policing indicates that trust is key to successful democratic policing. Our concern is that not only are the proposed amendments likely to be unconstitutional, but that their very enactment undermines trust in the law enforcement agencies of the City of Cape Town. Without trust the success of such enforcement is likely to be undermined. The overzealous policing of less serious offences undermines trust in all policing agencies.
3. The kinds of societal problems ostensibly addressed by the nuisance by-laws cannot sustainably nor justifiably be addressed through policing processes, but require a whole-of-government approach.
4. ACJR is concerned that the proposed amendments are unconstitutional in that:
 - I. Procedurally, adequate consultation has been hampered by the current “lockdown” in terms of the regulations promulgated in terms of the Disaster Management Act. Those most likely to be severely affected by the proposed amendments, such as the homeless, are unable to engage with the proposed amendments in the current situation. The City has failed to answer correspondence pointing this out;
 - II. The Constitution does not empower municipalities to legislate for policing-type powers. Further, municipalities already have sufficient powers for the necessary performance of their functions;
 - III. The proposed invasive policing powers, which limit rights, do not pass the test of the limitations clause in that it has not been demonstrated that the limitation of rights is reasonable, rational and proportionate in relation to the harm being addressed, which in this case is the infringement of by-laws.
5. This submission will address points II and III above in more detail.

2. The power to legislate policing powers

6. The Constitution sets out the powers and functions of the tiers of government. While municipalities are not explicitly accorded powers of law enforcement, municipalities make by-laws and run law enforcement which enforces by-laws in terms of their incidental powers and functions referred to in section 156(5) of the Constitution. Such incidental power only extends to matters “reasonably necessary for, or incidental to, the necessary performance of their functions.”
7. 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.

8. The legislation provides for officials of enforcement or other agencies to be empowered in relation to peace officer powers by the national Minister of Justice, through section 334 of the Criminal Procedure Act, with the relevant notice setting out the precise ambit of the power accorded.
9. Various agencies, including Metro Police and Law Enforcement, have been accorded extensive powers by the national Minister in terms of section 334 of the Criminal Procedure Act, in 2002 and in 2018. While the 2002 Notice according powers to law enforcement omitted by-laws from their ambit, in 2018 extensive powers were accorded in relation to the enforcement of by laws.
10. Municipal Police Service (Metro Police) members have the Criminal Procedure Act (CPA) powers contained in section 21 (seizure under search warrant), section 22 (seizure of article used or intended to be used in an offence, or which is evidence of an offence, without a search warrant), section 26 (entering premises to obtain evidence), section 27 (power to use force against resistance to search), section 37 (power to take body-prints) and section 72 (release on warning), with the latter limited to the offence of failing to appear in court. There is no limitation of these powers to any offence type, and therefore they apply in relation to by-law offences.
11. Law enforcement officers of all municipalities were declared peace officers by the minister in 2002¹, with some powers in relation to by-law offences, as well as offences contained in various local-government related-laws in addition to liquor, drugs and firearm offences, and offences in Schedule 1 of the CPA such as murder, rape, robbery and theft.
12. These powers included the issuing of written notices in terms of section 341 (non-criminal driving offences, such as illegal parking) and notices in terms of section 56 (criminal offences) of the CPA; the execution of warrants of arrest in terms of section 44 (general power to execute a warrant) and section 55(2) (warrant for failure to appear) of the CPA; section 41(1) powers (power to call upon a person suspected of an offence or witness to an offence to provide an address); and some but not all of the powers of arrest without a warrant in relation to some circumstances and some offences, including Schedule 1 offences. Significantly, the power to arrest without a warrant in respect of by-law offences was, however, omitted. Law enforcement officers’ geographical jurisdiction was limited to the municipality concerned, save in respect of their power, under sections 44 and 55(2), to execute a warrant of arrest (after failure to appear on summons).
13. The powers of municipal law enforcement officers were expanded in significant ways in late 2018², primarily to assist municipal government with combating the destruction of their essential infrastructure. Powers of arrest without a warrant were expanded slightly and made applicable in respect of all offences for which law

¹ Government Gazette 23143 GNR R209 19 February 2002.

² Government Gazette 41982 GN 1114 19 October 2018.

enforcement have jurisdiction, including by-law offences. The CPA power to search an arrested person and seize any article used in the commission of an offence or as evidence (section 23) was appended, as was the power to arrest suspects or witnesses who fail give their name and address (section 41(1)).

14. The range of offences for all these powers was expanded to include tampering with or destroying essential infrastructure, failure to give account of possession of goods, and offences relating to the control of access to public premises and vehicles, while treason and sedition were excluded from among the Schedule 1 offences for which jurisdiction was previously accorded.
15. Geographical jurisdiction in which these powers may be exercised was extended to the whole of South Africa in relation to a shorter list of offences and a shorter list of powers. The shorter list of offences includes tampering with or destroying essential infrastructure; failure to give satisfactory account of possession of housebreaking implement or object; failure to give account of possession of goods; and the Schedule 1 offences excluding treason and sedition. The shorter list of relevant CPA powers in relation to these offences are the powers of arrest (section 40), power to search an arrested person and seize any article used in the commission of an offence (section 23), and the power to arrest a suspect or witnesses who fails give their name and address (section 41(1)).
16. 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. Such “move-along” type of offences conjures up notions of a privileged elite that do not want to see the realities of inequality in one of the most unequal societies in the world. 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.
17. In addition, the proposed amendments do not define “Authorised official” and it is unclear whether the intention is a class of person other than law enforcement may be so authorised.
18. The grounds for “entering” include the mere allegation of an offence, and not the higher standard of reasonable suspicion contained in the Criminal Procedure Act.

3. Limitation of rights

19. The powers which the proposed by-law amendment seeks to confer on “authorised officials” in relation to by-law offences are the power to enter, inspect and question; power to instruct to leave; power to issue a compliance notice; and power to search without a warrant with consent or where there are reasonable grounds and delay would result in harm; power to impound such articles.

20. The power to issue a compliance notice is relatively unobjectionable in that it does not limit rights. However, the remainder of the powers are cause for concern.
21. Policing powers such as arrest, search seizure, and instruction clearly infringe on constitutional rights, such as the 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, right to property (section 25).
22. Consequently, the proposed amendments as well as powers of search and seizure accorded in relation to by-law offences elsewhere via the Criminal Procedure Act, must pass the test of the limitations clause: are they reasonable and justifiable in democracy based on human dignity, equality, and freedom? Are they rationally related to the purpose? Are they proportionate to the harm being addressed by the limitation? Are they the least restrictive means of achieving the purpose served by the limitation of the right? Is the proposed amendment not resulting in over-reach – going beyond what is reasonably acceptable?
23. Recall that these powers are being sought in relation to by-laws in relation to nuisance offences, which are not the most serious offences plaguing the country. Is it proportional to deprive a person of rights in relation to by-law offences, which are better served via administrative processes? Furthermore, such offences are frequently policed against the least powerful members of society, such as the poor and homeless.
24. The seizure and impoundment relate to any item “concerned in” an offence, and presumably would also include, for example, washing being dried on fences on public roads, or mattresses used by the homeless to sleep in public places, as they are items “concerned in” by-law offences. It is highly likely that a court would rule these powers, and their impact, disproportionate to the harm being addressed by the nuisance offences.
25. Indeed, ACJR would argue that even the power to limit rights currently accorded via the Criminal Procedure Act are likely to be disproportionate to the harms being addressed, and are open to constitutional challenge.

4. Conclusion

26. ACJR is accordingly of the view that the proposed amendments, insofar as they seek to accord unidentified officials of the municipality invasive policing-type powers, are unnecessary and unconstitutional and should not be passed.

For further enquiries, please contact:

Prof L.M. Muntingh
ACJR Project Coordinator
Dullah Omar Institute
University of the Western Cape
lmuntingh@uwc.ac.za

Ms. J. Redpath
Researcher
Dullah Omar Institute
University of the Western Cape
jredpath@uwc.ac.za