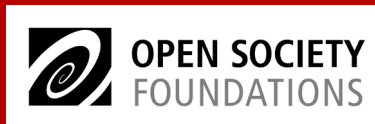


# South Africa National Consultation Meeting on Decriminalisation of Petty Offences

*In-country report  
for the South African Human Rights Commission*



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**ISBN: 978-9966-1765-2-3**

This report is published by: The Network of African National

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# South Africa National Consultation for the Decriminalisation of Petty Offences



**South African  
Human Rights Commission In-country Report  
February, 2019**

## About the Network of African National Human Rights Institutions

The Network of African National Human Rights Institutions (NANHRI) is a not-for-profit-organisation that brings together 44 National Human Rights Institutions (NHRIs) in Africa. The Secretariat of the Network is hosted by the Kenya National Commission on Human Rights in Nairobi, Kenya.

The Network supports the establishment and strengthening of the NHRIs across the continent in addition to facilitating coordination, cooperation amongst members and linking them to other key human rights actors at the regional and international level.

### Vision

A continent with effective NHRIs; contributing to an enhanced human rights culture and justice for every African.

### Mission

To support, through national, regional and international co-operation, the establishment and strengthening of NHRIs to more effectively undertake their mandate of human rights promotion, protection, monitoring and advocacy.

### Values and Guiding Principles

To achieve its mission and vision, NANHRI is committed to the following:

- Transparency
  - Accountability
  - Openness
  - Cooperation
  - Professionalism and
  - Gender Equality
- 
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## Table of contents

<b>List of abbreviations and acronyms.....</b>	<b>vii</b>
<b>I. Introduction.....</b>	<b>2</b>
Objective of the National Consultation.....	2
Expected results.....	2
Participants .....	3
Meeting format.....	5
<b>II. Pre-consultation evaluation.....</b>	<b>5</b>
<b>III. Executive Summary.....</b>	<b>10</b>
Welcoming remarks by Commissioner Jonas Ben Sibanyoni.....	10
Remarks by Ms. Maureen Bwisa.....	10
<b>IV. Highlights from the Presentations.....</b>	<b>11</b>
1. Presentation by NANHRI’s Consultant, Ms. Josiane S. Tapsoba /Koné...11	
2. Presentation from Southern Africa Litigation Center (SALC) by Anneke Meerkotter.....	15
<b>Campaign on the Decriminalisation of Petty Offences .....</b>	<b>15</b>
3. Presentation from African Policing Civilian Oversight Forum (APCOF) by Chumile Sali .....	15
4. Presentation from South African Informal Traders Forum (SAITF) by Brian Phaaloh.....	16
5. Presentation from Sex Workers Education and Advocacy Task Force (SWEAT) by Rene Anthony .....	17
6. Presentation from the Department of Justice and Correctional Services (DJCS) by Matome Modiba.....	18
7. Presentation from the Judicial Inspectorate for Correctional Services (JICS) by Solomon Molefe.....	18
8. Presentation from the South Africa Police Services (SAPS) by GJJ Alberts .....	19
<b>V. Highlights from the discussions     (questions, answers, and contributions) .....</b>	<b>20</b>
<b>VI. Highlights from the Group Work .....</b>	<b>23</b>
<b>V. Post-consultation evaluation .....</b>	<b>24</b>
<b>VI. Way Forward.....</b>	<b>29</b>

**VII. Report of the Visit to the Prison of Kgosi Mampuru, Pretoria,  
November 23, 2018.....29**

i. Introduction.....29  
ii. General information about the prison .....30  
iii. Overcrowding in the prison and its consequences.....30  
iv. Prisoners’ food .....31  
v. Healthcare facility in the prison.....31  
vi. Way forward.....31

**ANNEXES:**

**Overall objective of the Plan:** To decriminalise petty  
offences in South Africa.....33

**Objective 1:** To conduct human rights education and  
research on the State of petty offences in South Africa .....33

**Objective 2:** To put in place mechanisms to follow-up  
on the implementation of the Action Plan .....34

**Objective 3:** To popularise the ACHPR Principles on the  
decriminalisation of petty offences in Africa.....35

**Objective 4:** To effectively monitor and visit all detention places in  
South Africa to ascertain the conditions of and state of  
petty offenders within the criminal justice system.....36

**Objective 5:** To create enabling environment on laws, policies and  
administrative measures on petty offences in South Africa .....37

**Objective 6:** Develop landmark jurisprudence to foster the  
decriminalisation of petty offences .....37

**Objective 7:** To forge strategic collaboration and partnership with  
Treaty Bodies- UN And ACHPR - in promoting national  
initiatives for the decriminalisation of petty offences.....38

**Principles and strategy in the implementation of the plan:.....39**

## List of abbreviations and acronyms

<b>ACHPR</b>	African Commission on Human and Peoples' Rights
<b>ACJR</b>	Africa Criminal Justice Reform
<b>APCOF</b>	African Policing Civilian Oversight Forum
<b>BLASC</b>	Black Lawyers Association Student Chapter
<b>CALS</b>	Centre for Applied Legal Studies
<b>CSOs</b>	Civil Society Organisations
<b>DJCS</b>	Department of Justice and Correctional Services
<b>IPID</b>	Independent Police Investigative Directorate
<b>JICS</b>	Judicial Inspectorate for Correctional Services
<b>LASA</b>	Legal Advice South Africa
<b>LRSA</b>	Law Reform South Africa
<b>NANHRI</b>	Network of African National Human Rights Institutions
<b>NHRIs</b>	National Human Rights Institutions
<b>NICRO</b>	South African National Institute for Crime Prevention and the Reintegration of Offenders
<b>OPSC</b>	Office of the Public Service Commission
<b>PANSALB</b>	Pan South African Language Board Reintegration of Offenders
<b>SAHRC</b>	South Africa National Human Rights Commission
<b>SAIRR</b>	South African Institute for Race Relations
<b>SAITF</b>	South African Informal Traders Forum
<b>SALC</b>	Southern Africa Litigation Center
<b>SALGA</b>	South African Local Government Association
<b>SAPS</b>	South Africa Police Services
<b>SWEAT</b>	Sex Workers Education and Advocacy Task Force
<b>TB</b>	Tuberculosis

**Principles on the  
Decriminalisation of  
Petty Offences in Africa**

**Principes relatifs à la  
Dépénalisation des Infractions  
mineures en Afrique**

**Princípios sobre la  
descriminalização de infracções  
menores em África**



AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS  
COMMISSION AFRICAINE DES DROITS DE L'HOMME & DES PEUPLES  
COMISSÃO AFRICANA DOS DIREITOS HUMANOS E DOS POVOS



# Introduction



*Participants of the South Africa in-country National Consultation Meeting during a group discussion. Photo: Secretariat.*

## I. Introduction

On November 22, 2018, the South Africa National Human Rights Commission (SAHRC) in partnership with the Network of African National Human Rights Institutions (NANHRI), organised a National Consultation on the Decriminalisation of Petty Offences. The meeting was held in Pretoria, South Africa.

The meeting was held within the framework of a project lead by NANHRI on “**Enhancing the Role of National Human Rights Institutions (NHRIs) in the Decriminalisation of Petty Offences in Africa**”. The project aims at strengthening the capacity of five NHRIs to undertake national and regional level interventions in the decriminalisation of petty offences. SAHRC is part of the five NHRIs selected for the Pilot project.

The first step of the implementation of the Pilot project was to organise an Inception Meeting with the five selected NHRIs in order to strengthen their capacity to lead the process of decriminalising petty offences in accordance with regional and international standards through a peer-to-peer exchange. The Inception Meeting was effectively held from September 9-20 2018, in Johannesburg, South Africa.

The second step of the pilot project was to organise a national consultation in each of the five selected countries to bring relevant stakeholders together to reflect on the decriminalisation of petty offences in their respective countries and find the way forward.

The South Africa National Consultation was complemented by a visit to the prison of *Kgosi Mampuru II* in Pretoria by five SAHRC staff, one NANHRI staff and a consultant, with the aim of assessing the condition of detention of petty offenders. The findings from this visit are in Annex 2 of this Report.

### **Objective of the National Consultation**

The aim of the consultation was to engage with state and non-state actors such as the Department of Justice and Correctional Services, the National Prosecuting Authority and the South African Police Service, Judiciary, and civil society on the principles and the human rights imperatives of finding alternatives to arrest and detention for petty offences.

### **Expected results:**

The results expected from the National Consultation were to:

- 1) Adopt a National Action Plan for the Decriminalisation of Petty Offences in South Africa and;
- 2) Develop draft a submission for the South Africa Parliament to seek review of laws, policies and administrative measures criminalising petty offences in accordance with the regional and international standards.

## **Participants**

The following institutions were represented during the National Consultation:

- 1) South African Human Rights Commission (SAHRC)
- 2) Network of African National Human Rights Institutions (NANHRI)
- 3) Southern Africa Litigation Center (SALC)
- 4) African Policing Civilian Oversight Forum (APCOF)
- 5) Centre for Applied Legal Studies (CALS)
- 6) South African Informal Traders Forum (SATIF)
- 7) Sex Workers Education and Advocacy Task Force (SWEAT)
- 8) Department of Justice and Correctional Services (JICS)
- 9) South African Police Services (SAPS)
- 10) Independent Police Investigative Directorate (IPID)
- 11) Black Lawyers Association Student Chapter (BLASC)
- 12) Law Reform South Africa
- 13) Pan South African Language Board (PANSALB)
- 14) South African Institute for Race Relations (SAIRR)
- 15) Legal Advice South Africa (LASA)
- 16) Office of the Public Service Commission (OPSC)
- 17) South African National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)

# Pre-Consultation Evaluation

Kindly elaborate your understanding of the following terms:

❖ Petty Offences: **NON SERIOUS, MINOR**

❖ Decriminalisation of petty offences:

Photo: Secretariat

## Meeting format

The Consultation meeting was managed in an interactive manner, which included presentations, watching a short video, group discussions followed by plenary discussions.

## II. Pre-consultation evaluation

Prior to the National Consultation, the 23 participants filled a Pre-Consultation Evaluation Form with the aim of assessing their knowledge on the subject matter, getting an idea of the activities they already carried out with respect to the decriminalisation of petty offences and their expectations from the meeting. The analysis below summarises responses provided by the participants.

### How do you rate your level of knowledge on decriminalization of petty offences?

Ten participants indicated they have a very good knowledge on the decriminalisation of petty offences; four indicated their level is good; seven indicated their level is fair and two indicated that they have no knowledge on the matter.

### Kindly briefly elaborate your understanding of the following terminologies:

- **Petty offences:** non serious, minor or trivial offences that date back from colonial time and need to be abolished; offences that can be diverted from the criminal system; offences which are usually punished through fines of small value or short term imprisonment usually for failure to pay a fine; offences that target the poor; offences that are drafted and passed by the municipal administration to regulate the administration of the city; metro city by laws and, minor offences that will not harm the State or any citizen. Participants cited the following examples of petty offences- being idle, disorderly and hawking, urinating or bathing in public, drinking in public and prostitution.
- **Decriminalisation of petty offences:** having petty offences abolished; legally declare that they are not criminal offences or amend the law in that regard; process of removing criminal liability for minor offences, removing the laws targeting marginalised persons. A participant also considered that decriminalisation of petty offences refers to a campaign of 15 CSOs and NHRIs in Africa calling for the decriminalisation of petty offences in Africa especially the laws targeting marginalised persons.

### **Have you ever worked on matters related to Criminal Justice Reforms in South Africa with a focus on decriminalisation of petty offences?**

Eight participants indicated they have already worked on matters related to Criminal Reforms in South Africa with a focus on the decriminalization of petty offences while 14 have not. One participant indicated that they worked on the decriminalisation of petty offences, but in Southern Africa.

### **Before being invited for this Consultation, were you aware of the existence of the Principles on the Decriminalisation of Petty Offences in Africa adopted by the African Commission on Human and Peoples' Rights (ACHPR)?**

Nine participants indicated that before being invited for the Consultation, they were aware of the ACHPR Principles on the Decriminalisation of Petty Offences in Africa while 14 were not. Three participants did not respond to this question.

### **Are you aware of the process of adopt soft laws by the ACHPR?**

Five participants indicated that they are aware of the process by which the ACHPR adopts soft laws while 15 were not. Three participants never responded to the question.

### **Do you know about the campaign for the decriminalisation of petty offences in Africa?**

Five participants indicated they know about the campaign; among them, two said their organisations are part of the campaign. Ten participants do not know about the campaign. Eight participants never responded to the question.

### **Are you familiar with the type of petty offences criminalised in South Africa?**

Eighteen participants indicated they are familiar with the petty offences criminalised in South Africa. Examples of those offences include: hawking, drinking in public, being idle, loitering, urinating in public, prostitution, municipal by-laws targeting informal traders, street gambling, public disorder, prostitution, smoking in public and erection of shelters in undesignated places.

Two participants were not familiar with the petty offences criminalised in South Africa. Three participants never responded to the question.

### **Have you ever visited or met petty offenders in any detention center in South Africa?**

Seven participants indicated that they have visited or met petty offenders in detention centers in South Africa, while 12 have not. Four participants never responded to the question.



## **In your opinion, why should we decriminalise petty offences in South Africa?**

Decriminalising petty offences is one of the means of reducing overcrowding in prisons and its negative consequences on the enjoyment of human rights; it will protect the vulnerable groups from police harassment; the laws criminalising petty offences are too vague and broad, they do not satisfy the principle of legality and constitutionality; petty offences are in conflict with Section 9 of South Africa Constitution; the criminalisation of petty offences further marginalises the poor; petty offences date back to colonial time; decriminalising petty offences will release the State from unnecessary expenditure and allow law enforcement officials to deal with serious offences.

However, a participant indicated that not all petty offences should be decriminalised.

## **How can your organization assist the SAHRC in decriminalising petty offences in South Africa?**

Participants indicated that their organizations can undertake the following activities to assist the SAHRC in the decriminalisation of petty offences: make written submissions and attending advocacy activities, review submission, undertake promotion and awareness raising activities related to the decriminalisation of petty offences, provide technical support, carrying out research in correctional centers, undertake studies, provide reports, providing data and information related to sex-workers, encourage the conjugation of State and non-state actors for the decriminalisation of petty offences, assist to identify the petty offences; translate the relevant documents in accessible languages, working towards legislative change, participate in the consultations organised by SAHRC, undertake strategic litigation and prepare reports/recommendations to regional and international bodies.

## **What are your expectations from this meeting?**

Participants indicated that they have the following expectations from the meeting: learn and better understand how to apply the ACHPR Principles in South Africa; understand SAHRC approach in the decriminalisation of petty offences and its future work plans; provide inputs in the discussions related to petty offences, get a better understanding of the terminologies related to the decriminalisation of petty offences; understand how SAHRC will use this consultation to develop actions that will impact the negative effect of municipal by-laws on the poor and marginalised group; get a commitment from SAHRC, CSOs and government to decriminalise petty offences in South Africa; make sure what has been discussed will be published for everyone to know; make realistic laws; be empowered to continue with the campaign on the decriminalisation of petty offences; understand more about the specific context of the decriminalisation of petty offences in South

Africa.

**Kindly briefly provide us with any other comment you feel was not addressed by this Pre-Consultation Evaluation Form.**

More people affected by the subject matter should have been aware of the consultation; the local community is not aware about petty offences and SAHRC should deal with that issue; there is a need to translate the relevant documents into others languages; the consultation needed to be public.



# Executive Summary and Presentations



*SAHRC Commissioner Jonas Ben Sibanyoni delivers opening remarks during the Decriminalisation of Petty Offences National Consultation Meeting in Pretoria, South Africa. Photo: Secretariat.*

### III. Executive summary

The consultation was held in the Ditsong Museums of South Africa in Pretoria. On behalf of Commissioner Andrew Christoffel Nissen, who was in Ghana, SAHRC Commissioner Jonas Ben Sibayoni officiated the meeting with opening remarks. NANHRI Programme Officer Maureen Bwisa also made her remarks.

#### **Welcoming Remarks by Commissioner Jonas Ben Sibanyoni**

In his remarks, Commissioner Sibanyoni, appreciated the work of NANHRI in developing and implementing the pilot project on decriminalising petty offences in Africa in collaboration with other partners. He also thanked the participants of the meeting.

He recalled the adoption of the Principles on the Decriminalisation of Petty Offences in Africa<sup>1</sup> (The Principles or the ACHPR Principles) adopted by the ACHPR during its 61<sup>st</sup> Ordinary Session held from November 1-13, 2017. The ACHPR Principles were officially launched on October 25, 2018 during its 63<sup>rd</sup> Ordinary Session in Banjul, The Gambia. He said this key instrument sets out principles and standards of which State Parties may adhere to in the decriminalisation of petty offences.

Commissioner Sibanyoni further explained that criminalising petty offences has a negative impact on the criminal justice system as it contributes to overcrowding in detention centers. He insisted that criminalising petty offences results in criminalising poverty because the poor and marginalised people are, in practice, the most affected.

In conclusion, Commissioner Sibanyoni emphasised the importance of the meeting for South African State and non-state actors, and more crucially, steps in realising the implementation of the ACHPR Principles will be paramount.

#### **Remarks by Ms. Maureen Bwisa**

In addition to thanking the participants for attendance, Ms. Bwisa extended her gratitude to the Commission for convening the consultation and the continued commitment in the campaign towards the decriminalisation of petty offences in South Africa.

Ms. Bwisa provided the participants with a snapshot of NANHRIs project, *“Enhancing the Role of National Human Rights Institutions (NHRIs) in the Decriminalisation of Petty Offences in Africa”* which aims at strengthening the capacity of five NHRIs to undertake actions for the decriminalisation of petty offences.

Being one of the five NHRIs implementing the project, Ms. Bwisa said SAHRC is key to the success of the implementation of the ACHPR Principles at national level, through

<sup>1</sup> [http://www.achpr.org/files/instruments/decriminalisation-petty-offences/principles\\_on\\_the\\_decriminalisation\\_of\\_petty\\_offences\\_efpa.pdf](http://www.achpr.org/files/instruments/decriminalisation-petty-offences/principles_on_the_decriminalisation_of_petty_offences_efpa.pdf)



*NANHRI Programme Officer Maureen Bwisa gives a snapshot on the Decriminalisation of Petty Offences project during the National Consultation meeting in South Africa. Photo: Secretariat.*

development of a National Action Plan for the decriminalisation of petty offences as well as a Memorandum or Submission (in the context of South Africa) to be presented to respective Parliament (s) seeking review of the laws, policies and administrative measures in contravention of the ACHPR Principles.

The Programme Officer also shared the findings from NANHRI's Baseline Assessment Report on enhancing the role of NHRIs in the Decriminalisation of Petty Offences. Copies of the report were distributed.

## IV. Highlights from the presentations

### 1. Presentation by NANHRI's Consultant, Ms. Josiane S. Tapsoba /Koné

The ACHPR Principles have been adopted by in accordance with Article 45 (1) (b) of the African Charter on Human and Peoples' Rights<sup>2</sup> (the Charter), which authorises the ACHPR to: "formulate and lay down, principles and rules aimed at solving legal

<sup>2</sup> <http://www.achpr.org/instruments/achpr/>

problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation".

Participants were given a detailed hierarchy leading to the adoption of the Principles, which entailed the following chronology of events:

- 1) Adoption by the ACHPR of a Resolution 366 mandating the Special Rapporteur on Prisons Conditions of Detention and Policing in Africa to develop the Principles<sup>3</sup>;
- 2) Development of the Zero Draft Principles;
- 3) Organisation of technical and consultative meetings by the African Commission;
- 4) Call for public contribution through an online call;
- 5) Review of the Zero Draft Principles; and
- 6) Adoption of the Principles after the second round examination by the African Commission in Banjul at its 61<sup>st</sup> Ordinary Session held from November 1-13, 2017.

The Principles are part of soft law, however, this should not undermine the need to implement for the mere fact that they stand as interpretations of key provisions of the Charter.

Notwithstanding, below are justifiable reasons for the implementation of the Principles at national level:

- 1) Petty offences laws are outdated, dating back to colonial era;
- 2) Petty offences laws are often vague and broad;
- 3) Petty offences laws targets the most vulnerable people in society;
- 4) Enforcement of petty offences laws leads to disproportionate punishment: disproportionate for the petty offender and for the family members, and society in general;
- 5) Detaining petty offenders contributes to overcrowding in prisons;
- 6) The regional soft law is the first attempt to fill a legal vacuum in addressing the issue of decriminalisation of petty offences in Africa.

In a bid to illustrate how the criminalisation of petty offences can be discriminatory

<sup>3</sup> <http://www.achpr.org/sessions/21st-ao/resolutions/366/>

and negatively affect the poor, a short Campaign Video entitled “Punished for Being Poor”<sup>4</sup> was played. The video illustrates the linkages between social justice and criminal justice for petty offenders and the ripple effect to society. The video deals with the fictional case of John, a 32 year old street vegetable trader, who was arrested for a petty offence during a swoop by city *askaris*<sup>5</sup>. John was exposed to two months of deplorable conditions of detention. As a result his detention, his daughter dropped out of school due to lack of school fees, and the family lost the rented room.

### **The Principles, contain six parts as follows:**

**Part A provides a definition for the key terms used in the Principles.** It defines petty offences as “*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*”; and decriminalisation as “*The process of removing an act that was criminal, and its associated penalties, from the law*”. Part A further provides few examples of petty 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;

**Part B explains the purpose of the adoption of the Principles** which is to guide States on the decriminalisation of petty offences, establish standards for the assessment of laws and promote the adoption of measures that prevent discrimination in the criminalisation of the offences;

**Part C highlights the inconsistency of petty offences with Article 2** (freedom from discrimination), **3** (equality before the law) and **18** (protection of the vulnerable groups such as women, children, persons with disabilities) of the **African Charter**;

**Part D highlights the inconsistency of petty offences with Article 5** of the Charter which guarantees the right to dignity and freedom from torture, cruel, inhuman or degrading punishment and treatment;

<sup>4</sup> *The video is accessible from the following webpage: <https://www.youtube.com/watch?v=jQdF-PNRkqr0>*

<sup>5</sup> *A city askari may be defined as a police officer enforcing law and order at the municipality level*



**Part E points out the fact that Petty offences are inconsistent with Article 6 of the Charter, which guarantee the right to liberty and security of the person and freedom from arbitrary arrest and detention. Part E has extremely important provisions as it sets out criteria that should be followed by the States. It provides that when enacting, making interpretation or enforcing petty offences laws; State parties should: Comply with the rule of law (the Law should be clear, concise and accessible), respect the principles of legitimacy, necessity and proportionality, ensure compliance with the international and regional standards in particular the principles of equality before the law and non-discrimination;**

**Part F of the Principles calls upon States to take the necessary measures that will give effect to the Principles including decriminalising the offences (especially laws that criminalise conduct in broad, vague and ambiguous or criminalise the status of a person or their appearance), providing alternatives to detention for those which are not decriminalised under the Principles, combatting poverty and marginalisation.**

It was proposed to participants, for the successful implementation of the Principles the following initiatives and activities should be considered:

- 1) Disseminate and promote the Principles
- 2) Sensitise and provide training on the Principles and human rights to key actors including law enforcement officials
- 3) Lobby law-makers to repeal and amend the relevant laws
- 4) Carry out research and provide statistics on the situation of petty offenders
- 5) Participate and provide inputs during the preparations of State reports to the international and regional human rights bodies
- 6) Report to the regional and international human rights bodies especially the African Commission by submitting shadow and activity reports highlighting the State of petty offences
- 7) Submit strategic litigation cases to get jurisprudence favorable for the decriminalisation of petty offences

## 2. Presentation from Southern Africa Litigation Center (SALC) by Anneke Meerkotter

Ms. Meerkotter commenced her presentation by alluding to the fact that a discussion on petty offences must go hand in hand with a conversation on police and their role in enforcement of laws criminalising petty offences.

Subsequently, she stated that when laws are vague and broad, police exercise discretionary powers in undertaking arbitrary arrests targeting the poor and most vulnerable in society. This strains correctional centres as numerous people serve terms due to exorbitant bail terms that they cannot meet.

The South Africa criminal justice system has a variety of options in terms of diversion from penal prosecutions unlike other countries in Africa. Moreover, petty offences are prescribed in by-laws and it is difficult to keep track of them, as municipalities often amend or repeal their by-laws frequently.

**TAKE AWAY:** Given that there is no brief, which explicitly identifies the by-laws in South Africa criminalising petty offences, research needs to be undertaken immediately to inform content of Submission to Parliament to effect amendment or repeal of laws which are in contravention with the ACHPR Principles.

### Campaign on the Decriminalisation of Petty Offences

Several civil society organisations in Africa came together in 2014 and currently its membership has 12 Partners. The Campaign focuses on advocacy, research and litigation where possible with the aim of decriminalizing petty offences in Africa.

In advancing arguments for the decriminalisation of petty offences, the conversation should gear towards addressing the root causes of poverty and inequality in society, programmes that can divert petty offences from the criminal system and the role of social workers, development of guidelines for municipalities to enable them know what can or cannot be legislated in by-laws; and guidelines for prosecutors.

## 3. Presentation from African Policing Civilian Oversight Forum (APCOF) by Chumile Sali

APCOF is part of the Campaign which seeks to advocate for decriminalisation of petty offences in Africa.

As part of the progress made in other countries for the decriminalisation of petty

offences, Malawi High Court generated a landmark jurisprudence in its decision on the case of *Mayeso Gwanda vs. the State*. In this case, the applicant was detained for being rogue and vagabond. The High Court determined that Section 184 (1) (c) of the Penal Code, which was the basis of arrest and detention of Mayeso, was too broad, unconstitutional and contrary to the international human rights standards.

Moreover, the adoption of the Principles by the ACHPR, establishment and Gazettement of the National Council of Administration of Justice by Kenya's Chief Justice, and lastly a Campaign website: [www.pettyoffences.org](http://www.pettyoffences.org) are a few notable achievements of the campaign.

#### **4. Presentation from South African Informal Traders Forum (SAITF) by Brian Phaaloh**

In South Africa, there is a misunderstanding and misinterpretation of petty offences amongst actors in the criminal justice system. More often are times when the enforcement of by laws by the Metro police is open to abuse through arbitrary arrests. In such a context, informal trading should be decriminalised, as these hawkers are unfairly targeted by law enforcement agencies.

Most by-laws in South African municipalities are “copy and paste” and they do not take the context of the particular city into account. A recent incident involving the Mayor of the City of Johannesburg illustrates the lack of decisions based on the context. In this case, the Mayor made a ‘citizen’s arrest’ of a trader, who was transporting cow heads in a trolley. The incident turned from an alleged infringement of by-laws, to the trader being arrested because he was a foreigner. Such a situation gives the impression that politicians are implementing their parties will without caring about the people’s needs and interests.

There is also a lack of recognition of informal traders as contributors to the economy. Nigeria for instance, allows informal trading. The by-laws in South Africa need to be revised to reflect the modern day realities. Entrepreneurs and informal traders do the same thing; the only difference may be the level of education – yet there is no support from the State in the form of policies for informal trade.

Informal traders may be ignorant of the content and their rights in these laws. In South Africa, there are numerous organisations dealing with informal trading; they are approaching the private sector to get support to sensitise and educate informal traders. As part of the efforts to address this issue, a booklet has been developed.





*Brian Phaaloh of SAITF makes a presentation challenges of promoting and protecting the rights of petty offenders in South Africa. Looking on is Princess Ka-Siboto of SAHRC. Photo: Secretariat.*

SAITIF has successfully been involved in litigation in the case of ***South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others (CCT 173/13 ; CCT 174/14) [2014] ZACC 8; 2014 (6) BCLR 726 (CC); 2014 (4) SA 371 (CC) (4 April 2014)***. In these cases, the Constitutional Court of South Africa ordered the City of Johannesburg to allow informal traders to return to their stalls in the city where they had been evicted from.

In conclusion, it will be vital for the Commission and other key stakeholders to ensure the successful implementation of the ACHPR Principles at national level.

## **5. Presentation by Sex Workers Education and Advocacy Task Force (SWEAT) by Rene Anthony**

SWEAT's work is primarily to advocate for the respect of the rights of sex workers and decriminalisation of their activities. In that regard, SWEAT has carried out research on human rights violations sex workers face at the hands of law enforcement officials, sensitised them on their rights and offered legal assistance.

Law enforcement officials in the City of Johannesburg and the City of Cape Town use by-laws relating to noise and public decency, to abuse, harass and persecute sex workers. These by-laws are too broad and vague and they do not satisfy the principles of legality as they accord law enforcement officials unfettered discretion through arbitrary arrests and denial of the right to a fair trial.

Loitering is a common petty offence, which sex workers are charged with, as prescribed in by-laws open to abuse. A case was reported of a woman who was arrested by police on her way to a food store. She was strip searched for drugs. They never found anything but she was detained over the weekend then released without being charged with any offence. Sex workers face similar and more other harassments.

It was suggested that as part of the initiatives to decriminalise petty offences, it is important to consider reviewing the Sexual Offences Act, which criminalises sex work. There is a need to keep in mind that most persons, who engage in sex work do not have alternatives to livelihood. The socio-economic contexts of men and women in sex work need to be taken into account.

SWEAT has prepared a Report on Cape Town's Municipal By-Law on Streets, Public Places, and the Prevention of Noise Nuisance 2007, which supports the initiative to decriminalise petty offences.

## **6. Presentation from the Department of Justice and Correctional Services (DJCS) by Matome Modiba**

To commence his presentation, Mr. Modiba said there are a number of key State actors involved in the reviewing and amending of the Criminal Procedure Act, which is under review, and these processes take time.

It is not the role of the DJCS to change laws as this is vested in another arm of Government, the Law Reform Commission. However, DJCS can support the process of decriminalisation of petty offences by receiving petitions backed by empirical evidence as a conversation starter.

## **7. Presentation from the Judicial Inspectorate for Correctional Services (JICS) by Solomon Molefe**

Petty offences must comply with the laws and it is the duty of the municipalities to ensure that the by-laws are in conformity with the Constitution.

JICS mission is to monitor and oversee the correctional system in place. In that regard, it assesses compliance of correctional services with respect to the legal provisions for the treatment of inmates in these facilities.

The discussion on decriminalisation of petty offences can happen within the framework of the Justice, Crime Prevention & Security Cluster. SAHRC is a member of the Cluster and can use this avenue to its advantage.

## 8. Presentation from the South Africa Police Services (SAPS) by GJJ Alberts



According to the Institute for Security Studies (ISS), conducting more arrest does not decrease crime rate; but police perceive that increasing arrests is commendable in reducing crime. This results in arbitrary arrests of even petty offenders.

Subsequently, numerous complaints against the police for arbitrary arrests and detention were filed in court. Data showed that SAPS has to pay more than ZAR 16 million a month following complaints of unnecessary detention. This led to a change in the way police effected arrests, by upholding the constitutional provision of detaining a petty offender beyond 48 hours without a charge preferred against them.

Hatfield Community Courts largely deals with diverting petty offenders into suitable programmes of finding alternatives to imprisonment. Unlike the Metro- Police, SAPS does not have options of spot fines. Section 33(4) (1) of the Traffic Act needs to be reviewed to allow for police to provide spot fines for traffic offences.

## V. Highlights from the Discussions (Questions, answers, and contributions)

During plenary, participants were given the opportunity to seek clarifications or share comments on the various presentations. This interaction generated relevant proposals, information and reflection as highlighted below:

1. The ACHPR Principles provide for a broad definition of petty offences. There is need to define what constitutes a petty offence in the context of South Africa, and this needs to be clarified to differentiate between petty offences and petty crimes;
2. It is crucial to engage with the Councils of Municipalities as they are the authors of by- laws;
3. In South Africa, the Metro police are the Municipalities Police Service in charge of law enforcement at municipal level. In that regards, they are in charge of enforcing the by-laws which criminalise petty offences. The discussion and initiatives on the decriminalisation of petty offences should, therefore, involve them;
4. With respect to informal trade workers, the rigorous process and requirements for securing formal employment is difficult and, therefore, the influx of hawkers;
5. Discrimination in criminalising sex-work fails to punish the 'clients';
6. It is paramount to address the underlying causes of poverty, not only the symptoms;
7. SWEATs research is yet to be made available for the public as the launch date is yet to be set;
8. The Police need continuous human rights training, and should refrain from enforcing arbitrary arrests for the sake of hitting performance targets;

9. South Africa's campaign should also consider interacting with persons with disabilities by considering availing a braille version of the Principles;
10. The initial title of the ACHPR Principles was "Principles on the Decriminalisation and Declassification of Petty offences in Africa" but as part of a strategy to insist on the need to decriminalize, the ACHPR in the final version decided to remove the word "Declassification" and emphasize the need to decriminalize. Albeit the principles do provide for alternatives to imprisonment by use of non- custodial sentences;
11. In trying to determine whether an offence is petty or not, there is a need to ask the following questions: Is the law criminalizing the offence in compliance with the Rules of law (is it clear, concise and accessible)? Is it legitimate (necessary and proportionate)? Does it comply with the international and regional human rights standards particularly the principles of equality before the law and non-discrimination? It is particular key to find out if the law is criminalising life sustaining activity; if it does not only target the poor and marginalized groups.
12. If there is a synergy of actions, the decriminalization of petty offences can be effective;
13. The Commission should collaborate with the Correctional facilities to obtain statistics on the number of petty offenders within the criminal justice system;
14. In terms of rehabilitation, prisoners are rehabilitated according to the type of offence committed. For the rehabilitation, the work is done with members of society. Despite the efforts for rehabilitation, some inmates come out of prison better, some come out worse;





# Highlights from the Group Work and Evaluation



*Participants of the South Africa in-country National Consultation Meeting during a group discussion. Photo: Secretariat.*

## **VI. Highlights from the Group Work**

As part of the inter-active approach of the Consultation, the participants were divided into two groups in order to develop national action plans that can serve as a guide for the activities for the decriminalisation of petty offences in South Africa. The two groups discussed and in a plenary Session, they shared their proposals which were incorporated and merged to obtain the Attached National Action Plan for the Decriminalisation of Petty Offences in South Africa (Annex 1).

It is expected that the Plan will be submitted to SAHRC for adoption and approval, and thereafter all key stakeholders to undertake activities identified herein.

The Plan suggest as a starting point, the need for SAHRC to undertake a study on the laws, policies and administrative measures which criminalise petty offences in South Africa, thereafter, series of actions be done based on the findings and following consultations with stakeholders.

Apart from developing the National Action Plan, it was expected that participants would develop a Draft Submission to the Parliament to seek the review of laws in accordance with the ACHPR Principles and others regional and international human rights standards.

However, the development of such a submission was suspended for now as identification of the varying by-laws criminalising petty offences in South Africa is yet to be carried out. The proposed National Action Plan suggests as a first step, identification of such by-laws urgently to inform the content of the submission to the Parliament.

## VII. Post-Consultation Evaluation Process

At the end of the consultations, participants were requested to fill-in the post consultation evaluation form to assess whether their expectations were met, know their comments and their suggestions for future initiatives related to the decriminalisation of petty offences in South Africa.

Sixteen participants filled the form, the analysis below summarises the various responses.

### a) Kindly rate the following on the general administration of the consultation

	Excellent	Very Good	Good	Fair	Poor
General organization of the meeting	3	7	4	2	
Time keeping		5	5	5	1
Presentations	4	8	3	1	
Documentation and back-ground reading	4	5	6	1	
Methodology used	2	5	7	2	

### Presentations on the subject matter

#### b) How would you rate your level of understanding of the topics at the end of this Consultation?

Session No.	Topic	Excellent	Very Good	Good	Fair	Poor	No Response
1.	Content of the ACHPR Principles	3	7	5			1
2.	Definition of petty offence	3	4	5	4		



3.	Decriminalisation of petty offences	5	5	2	4		
4.	Type of petty offences in South Africa	1	6	3	5		1
5.	The initiative of South Africa Human Rights Commission in the decriminalisation of petty offences in Africa	1	8	5	2		
6.	The Campaign to decriminalize and declassify petty offences	2	4	7	1	1	1

**c) Which of the Session(s) did you find to be most relevant to you? Kindly elaborate your answer**

- Decriminalization of petty offences
- Presentation by SAPS, APCOF, SALC, SAITF
- Presentation made by the Department of Justice and Correctional Services
- Introduction to the Principles

**d) Which of the Session(s) did you find to be least relevant to you? Kindly elaborate your answer**

If you found all presentations relevant, kindly indicate that all topics were relevant to you.

Most participants indicated that the presentations were relevant. However, two participants indicated that the presentation of the Department of Justice and Correctional Services was not relevant; one of them specifically said it was not relevant because it seemed unprepared. Another participant mentioned that the discussion on education and advocacy for sex workers was not a relevant topic for them.

**e) In your opinion, which other relevant strategy or action do you feel was not highlighted during the discussion of the National Action Plan?**

- Increasing the public awareness
- Clarifying the difference between asylum seekers and refugee
- How data will be collected for unregistered non-citizens
- All stakeholders should have been present. For instance, South African Statistics Associations (because it has relevant data) and the municipalities should also be part of the discussion
- The Action Plan needs to schedule a meeting once quarterly
- Identification of the petty offences in South Africa
- The Action Plan objectives should also include changing the mindset of people

**f) Taking into account the discussions during this consultation, kindly indicate the type of actions you think your organization can undertake to support SAHRC in the decriminalization of petty offences?**

- Engage with others stakeholders on the subject matter
- Assist in gathering evidences and submissions for legislative reforms
- Raise awareness and educate people on petty offences
- Organize relevant workshops in the provinces
- Conduct research and advocacy programs, outreach programs and assist people in the communities to understand petty offences
- Provide relevant information
- Provide statistics on arrest
- Provide technical support
- Promote alternative sentences and diversion of petty offences from the criminal justice system
- Put in place a mechanism to report cases of detention for petty offences



*A group photo of the participants of the South Africa in-country National Consultation Meeting follow proceedings. Photo: Secretariat.*

### **Overall evaluation of the consultation**

#### **g) Has your overall expectation of the consultation been met?**

Fourteen participants indicated that their expectations were met while one was dissatisfied because the purpose of the meeting was not clear at the beginning. One other participant never provided any response to that question. Among the participants whom expectations were met, one indicated that they would have appreciated knowing how the information from the meeting will be taken forward.

#### **Was the discussion useful to you?**

Fifteen participants indicated that the discussion was useful while one never responded.

**In addition, as part of additional comments, some participants highlighted the following:**

- There is a need to obtain follow-up updates from the meeting
- Municipalities must be informed, involved and invited to participate in future meetings because they deal with most of the issues of petty offences.
- More attention needs to be given to the definition of petty offences in the South African context
- The legislative arm of the government, should be part of the discussion
- Involve the South African Local Government Association (SALGA) in future discussions related to petty offences
- The action plan details was useful to each participant for their own planning.

# Way Forward and visit to Kgosi Mampuru Prison



*SAHRC and NANHRI staff during a detention monitoring visit of Kgosi Mampuru Prison, Pretoria.  
Photo: Secretariat.*

## VIII. Way Forward

The next steps from the consultation meeting will be for SAHRC to consider and adopt the proposed National Action Plan for the Decriminalisation of Petty Offences in South Africa and work towards its implementation. In doing so, SAHRC should consider building synergies by involving the relevant key stakeholders for the effective implementation of the plan.

### Report of the visit to the Kgosi

Mampuru Prison, Pretoria, November 23, 2018

#### I. Introduction

On November 23, 2018, following the National Consultation on the Decriminalisation of Petty Offences in South Africa, SAHRC and NANHRI staff, visited Kgosi Mampuru II Central facility, a Prison in Pretoria.

The following persons were part of the visit:

- 1) Princess Ka-Siboto – SAHRC
- 2) Thenjiswa Jonas – SAHRC
- 3) Phillip Molekoa – SAHRC
- 4) Jackson Mzila – SAHRC
- 5) Kwanele Pakati – SAHRC
- 6) Maureen Bwisa – NANHRI
- 7) Tapsoba Josiane Somdata – NANHRI Consultant

The objective of the visit was to monitor the conditions of petty offenders and learn more about the reasons for detention and the sentence.

## II. General information about the prison

Kgosi Mampuru was established in 1890, as a medium facility with an official holding capacity of 5,400 inmates, but is overcrowded holding 7,000 inmates. However, there are some 335 detainees who should be housed in maximum facilities.

The centre categorises offenders in the following centres:

- 1) Medium A: maximum temporary centre;
- 2) Medium B and C: holding detainees waiting to be transferred and those who have additional charges on going in court.

There are five correctional centers that fall within the jurisdiction of Kgosi Mampuru including:

- 1) C Max – [currently not in use]
- 2) Female
- 3) Central
- 4) Local
- 5) Atteridgeville – referral centre for petty offenders awaiting transfer to a correctional centre to serve their term. There is an intake of petty offenders daily, but they are ordinarily transferred to Atteridgeville Centre and not housed at the centre.
- 6) Audi – [which used to be part of the North West Province]

## III. Overcrowding in the prison and its consequences

The capacity of the centre is 5 400, but as of November 23, 2018, the prison population stood at 7, 000, thus overcrowded, with the highest concentration of inmates being housed at central. Thus, given the fact that the prison does provide for single and general population cells, majority of the single cells are converted to house two offenders.

Due to the overcrowding, the prison officers are few to offer adequate rehabilitation to the inmates. There are 400 officials at the facility contrary to the applied ratio of one official to 50 offenders.

As part of the efforts to rehabilitate prisoners, the facility has a library, a chapel, sport programmes and a school. The prisoners are screened and profiled when entering the facility and assigned the necessary **Offender Rehabilitation Package and Sentence**



**Plan.** These range from therapy, adult basic education, vocational training, drug abuse, anger management, cross road, changing lanes, amongst others

However, it was highlighted that the society plays a key role in the rehabilitation of prisoners and reintegration back into society. However, given the stigma for incarceration, some offenders end up back in prison due to lack of jobs, rehabilitation and other forms of support.

#### IV. Prisoners' food

The facility has a dining hall, but given the number of prisoners, it does not serve the purpose as it is not meet international standards. Thus prisoners are served by 55 prisoners working in the kitchen. They get served three meals in their respective cells as follows: breakfast at 6:30 a.m., lunch at 12:00 p.m. and diner at 4:30 p.m.

The offenders working in the kitchen are overseen by prison officials and supervised by BOSASA officials.

The facility takes a dietary considerations for different individuals such as Buddhists, Muslims, Jewish, Rastafarians, vegetarians and special cases for medically ill prisoners.

#### V. Healthcare facility in the prison

With respect to healthcare, the facility has three clinics in Medium A, B and C which offer comprehensive treatment. There are approximately 540 inmates who are on ARV's and less than 30 on TB treatment; prisoners with TB are isolated during contagious stage.

During our visit, the facility housed approximately 89 psychiatric patients, who ideally should be admitted at a mental institution, but due to unavailability of beds, they are on a waiting list.

The clinic caters for all; a dentist and psychiatrist visit once a month, a general practitioner is available daily, and there is a nurse on standby on after hours. The facility also relies on peer counsellors to assist in ensuring inmates take their medication regularly.

In the event that a prisoner is in critical condition, they are transferred to a nearby public facility accompanied by a prison official for medical attention.

#### VI. Way forward

As a follow up to the teams' visit to the facility, it was agreed that SAHRC visits other detention centres for data collection and monitoring petty offenders and their condition.

**ANNEXES:**

**Annex 1**

***National Action Plan for the  
Decriminalisation of Petty Offences in South Africa***

**Annex 2**

***Report of the visit to Kgosi Mampuru***



**OVERALL OBJECTIVE OF THE PLAN:  
TO DECRIMINALISE PETTY OFFENCES IN SOUTH AFRICA**

**OBJECTIVE 1:  
TO CONDUCT HUMAN RIGHTS EDUCATION  
AND RESEARCH ON THE STATE OF PETTY OFFENCES IN SOUTH AFRICA**

<b>Time-line</b>	<b>Expected result</b>	<b>Activity</b>	<b>Target group</b>	<b>Comments</b>
One year	A national wide research on the state of petty offences in South Africa	SAHRC in partnership with the Institute for Security Studies (ISS) and the African Policing Civilian Oversight Forum (APCOF), the Africa Criminal Justice Reform (ACJR) conduct a research on petty offences and publish an Annual Report on the state of petty offences in South Africa  Development of Submission to effect policy reviews of laws in South Africa that are contrary to the ACHPR Principles on the decriminalisation of petty offences	CSIR  Communities  Informal Traders  Municipalities  Security and Criminal Justice Cluster  Civil Society (CSOs)	Sex Workers Education and Advocacy Taskforce (SWEAT) and ACJR already have relevant research that need to be consulted.

**OBJECTIVE 2:**  
**TO PUT IN PLACE MECHANISMS TO**  
**FOLLOW-UP ON THE IMPLEMENTATION OF THE ACTION PLAN**

Time-line	Expected Result	Activity	Target group	Comments
Jan – Feb, 2019	A Committee of two or three persons is put in place within the SAHRC to monitor and follow-up on the implementation plan.	Selection of members internally at SAHRC identified, and will produce quarterly progress reports.	SAHRC	<p>It is suggested that the SAHRC Committee on Policing and Torture takes the lead in this initiative</p> <p>It is crucial that the Committee agree on a monitoring and assessment timeline to ensure pre, mid-and post-plan evaluation of the implementation of this National Plan –</p> <p>The reports from these evaluation should be forwarded to NANHRI</p>
Jan-Mar 2019	Enhanced capacity of SAHRC key technical staff to work towards the decriminalisation of petty offences	Training on the ACHPR Principles on the Decriminalisation of Petty Offences in Africa facilitated by APCOF or ACJR.	<p>SAHRC employees</p> <p>Human rights advocacy officers within SAHRC</p>	<p>The training will happen after the Committee on Torture has included petty offences in its work</p> <p>Ensure that the training also focuses on detention monitoring of petty offences</p>
2019	Petty offences Subcommittee created within the Criminal Justice Cluster	Lobby to ensure the issue of petty offences is included in the Cluster agenda	Cluster members	Identify who in the SAHRC sits in the Cluster

**OBJECTIVE 3:**  
**TO POPULARISE THE ACHPR PRINCIPLES ON THE  
DECRIMINALISATION OF PETTY OFFENCES IN AFRICA**

Timeline	Expected result	Activity	Target group	Comments
Ongoing from the time the SAHRC staff is trained	Principles disseminated and awareness raised	Produce information, education and communication materials (IEC materials)	Communities State institutions Non- State actors CSOs	It is suggested as part of the campaign activities to publish the Principles on the SAHRC website, to produce flyers, have slots in community radios,  Use social media platforms,  Simplify the Principles to local languages  Focus on petty offences during the Human Rights Day and Pre-trial detention Day (April 25 <sup>th</sup> )
January 2020	State and non-State actors are made aware on the issue of petty offences in South Africa  Declaration and Action Plan for the Decriminalisation of Petty Offences in South Africa are adopted	Re-convene a National Consultation with relevant stakeholders on Petty Offences  Create awareness on the Principles through social media, interviews,  Disseminate research findings in Objective 1	Communities  State Actors  Non- State Actors	It is suggested that a Submission to the Parliament should be made in order to seek the review of laws and by-laws in South Africa.  During the National Consultation, the kind of material that should be disseminated should focus on by-laws criminalising petty offences.

**OBJECTIVE 4:**

**TO EFFECTIVELY MONITOR AND VISIT ALL DETENTION**

**PLACES IN SOUTH AFRICA TO ASCERTAIN THE CONDITIONS OF AND**

**STATE OF PETTY OFFENDERS WITHIN THE CRIMINAL JUSTICE SYSTEM**

<b>Time-line</b>	<b>Expected result</b>	<b>Activity</b>	<b>Target group</b>	<b>Comment</b>
Three months	The Commission has a list of the relevant detention facilities to monitor	Identify the relevant detention facilities responsible for detaining petty offenders	Department of Justice and Correctional Services  South African Police Services  National Prosecuting Authority	Comply with the Standard Procedures on Police Detention Facilities.  It is suggested to link the APCOF Project to petty offences work
Ongoing	Places of Detention visited and monitored	The SAHRC undertakes to monitor the identified detention facilities regularly  SAHRC should continue with the Lay Visitors Scheme in partnership with APCOF in 2019.	Detention facilities	Develop the monitoring tool for petty offences

**OBJECTIVE 5:**

**TO CREATE ENABLING ENVIRONMENT ON LAWS, POLICIES AND  
ADMINISTRATIVE MEASURES ON PETTY OFFENCES IN SOUTH AFRICA**

Time-line	Expected result	Activity	Target group	Comment
Two years	Relevant institution/ committees undertake the initiation of review of laws	The Commission makes submission to South Africa Local Government Association (SALGA)	The Criminal Justice Cluster  Law Reform Commission	Success in this phase of the project is the actual initialisation of review of laws by relevant institution/ committee

**OBJECTIVE 6:**

**DEVELOP LANDMARK JURISPRUDENCE TO  
FOSTER THE DECRIMINALISATION OF PETTY OFFENCES**

Time-line	Expected result	Activity	Target group	Comment
Ongoing	Landmark jurisprudence on petty offences is obtained	The Commission complaint handling procedure is used to address issues of human rights violations related to petty offences	Petty offenders	Internal bureaucracy may jeopardise the effectiveness of filling time sensitive cases

**OBJECTIVE 7:**

**TO FORGE STRATEGIC COLLABORATION AND PARTNERSHIP WITH  
TREATY BODIES- UN AND ACHPR - IN PROMOTING NATIONAL  
INITIATIVES FOR THE DECRIMINALISATION OF PETTY OFFENCES**

Timeline	Expected result	Activity	Target group	Comment
Ongoing	<p>SAHRC provides the relevant information to the treaty bodies</p> <p>Treaty bodies undertake actions at the regional level to support the national initiatives for the decriminalisation of petty offences</p>	<p>SAHRC Reports to treaty bodies should include a section on Decriminalisation of Petty Offences in South Africa.</p> <p>SAHRC takes the opportunity to make statements on the situation of petty offences during the Sessions and forums of treaty bodies</p> <p>Forge partnership with the treaty bodies relevant mandate holders</p>	<p>ACHPR</p> <p>UN</p>	<p>Treaty bodies can submit urgent appeals, participate in national meetings, make relevant concluding observations following Periodic State Report, among others.</p> <p>SAHRC needs to adhere to the reporting time lines.</p>



## **PRINCIPLES AND STRATEGY IN THE IMPLEMENTATION OF THE PLAN:**

- Target and involve all relevant stakeholders (State and non-state actors; Municipal, National, Regional and International actors)
- Ensure that all three States actors are targeted in the activities (Legislative, Executive, and Judiciary); particularly ensure that Municipal representatives are involved in.
- Build Synergy and partnerships between the actors
- Prioritise advocacy, discussion, negotiation
- Ensure participation and ownership of the initiatives by the key stakeholders.

*The Project of Decriminalisation of Petty Offences in Africa  
is financially supported by the Open Society Foundation Human Rights Initiative.*

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**This report is published by:**

The Network of African National Human Rights Institutions

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