

15 May 2020

**Attention: Mr Leon Wentzel**

City of Cape Town

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Dear Mr Wentzel,

**RE: COMMENT ON THE CITY'S STREETS, PUBLIC PLACES AND THE  
PREVENTION OF NOISE NUISANCES AMENDMENT BY-LAW**

The above matter has reference.

1. The Women's Legal Centre is an African Feminist legal organisation that was established in 1998 to advance the substantive rights of womxn through strategic litigation, advocacy, legal advice, and rights-based education. Its object is to develop feminist jurisprudence and policies that considers the lived realities of womxn through an intersectional and substantive equality lens. The Centre drives a feminist agenda that appreciates the impact that discrimination has on women within their different classes, race, ethnicity, sexual orientation, gender identity and disability.
2. The WLC works with five strategic programmes, namely, violence against womxn, relationship rights, sexual reproductive and health rights, access to land

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and housing and women in work which focuses on women's rights to work in just and favourable conditions.

3. The WLC welcomes this opportunity to engage with the City of Cape Town on its draft Amendment to the Streets, Public Places and the Prevention of Noise Nuisances By-law. We note with some reservation however that this call for public comment and consultation is taking place during a period where our country and City is in stage 4 of the National Disaster declaration. This has serious impact on civil societies ability to engage with the draft and its impact on them. We would therefore encourage the City to extend or pause the process of amendment to allow for proper engaged public participation.
4. The WLC works with several civil society organisations, community-based organisations as well as social movements. These submissions are therefore informed by the womxn who approaches the Centre for legal support, advice and representation.
5. These submissions are divided into four parts:
  - (a) Part 1 seeks to provide the City with a gender lens through which to assess the Draft Amendment and which we submit the City is obligated to consider in terms of its Constitutional duty to respect, protect and promote the rights of all of the people who live in it.
  - (b) Part 2 deals with the proposed Amendment and the lawful purpose which it seeks to meet.



(c) Part 3 speaks to the purpose and role of Law Enforcement and their mandate in respect of the Constitution and the laws related to criminal justice.


(d) Part 4 sets out WLC concerns specific to the proposed Amendment and why we consider it to be an unjustified infringement of rights in the Constitution.

## PART 1

### Intersectionality:

6. South Africa remains one of the most unequal societies in the world with black womxn as the face of poverty, violence, and discrimination. Womxn who are poor and from disadvantaged background and communities are subjected to intersecting forms of discrimination as they face barriers of access to health, sanitation, policing services, adequate shelter, and food.
7. Women, depending on where they are situated in respect of their identity will experience the discrimination very differently. Government therefore has a duty to ensure that where laws are enacted those laws speak to the lived reality and intersecting forms of discrimination that womxn are subjected to. Laws cannot merely be enacted to provide formal equality, but it is essential that given our past our laws recognise, realise, and protect womxn's substantive equality rights.



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8. The majority of the womxn who seek services from the WLC come from impoverished communities across the country. They face multiple challenges and often find that their rights are not protected within our legal framework. Many of these are womxn found living in the informal settlements along the urban periphery and on the cape flats in the Western Cape.
  
  9. The Western Cape local government has inherited and systemically continued to drive an apartheid styled spatial segregation in respect of urban development and planning. This has meant that the City Hub, surrounding areas and Atlantic Seaboard has remained predominantly affluent areas while people of colour remain living on the urban periphery and outskirts. It has promoted the gentrification of previously disadvantaged areas to further force persons of colour out of the CBD and push poor people out of the City and its surrounds.
  
  10. The Streets, Public Places and the Prevention of Noise Nuisances Amendment By-law has been controversial since its adoption by the City and faced much objection and litigation since 2007. The criticism levelled against the City and the By-law has been largely focused on the use of the By-law to ensure that people of colour are removed from white and affluent areas in and around the City CBD and other suburbs across the Southern Metro and Tygerberg areas. The By-laws have been described as anti-poor and seeking to maintain the status quo of promoting the rights of privilege over the rights of others.





## PART 2

### The Draft Amendment

11. The Streets, Public Places and the Prevention of Noise Nuisances By law 2007 in its preamble states that the City has the authority to make and administer by laws for the effective administration of such matters as the control of public nuisances, municipal roads, public places, traffic and parking. It goes on to say that the City administration finds aggressive, threatening, abusive or obstructive behaviour or persons in public as unacceptable. The by-law therefore makes such behaviour an offence for which someone can be prosecuted. The preamble implies that there is a legal basis as well as lawful purpose for the By-law and the offences created.


12. The current draft of the Amendment seeks to amend s22 of the by-law dealing with when the City may act and recover costs. It is worth noting at the outset that the draft Amendment goes much further than what is contained in the current section or envisaged through the wording of the heading.

13. S22 is currently worded as:

*(1) "Notwithstanding any other provision of this By-law, the City may –*

*(a) Where permission of the City is required before a person may perform a certain action or build or erect anything, and such permission has not been obtained; and*






*(b) Where any provision of this By-law is contravened under circumstances in which the contravention may be terminated by the removal of any structure, object, material or substance, serve a written notice on the owner of the premises or the offender, as the case may be, to terminate such contravention, or to remove the structure, object, material or substance, or to take such other steps as the City may require to rectify such contravention which the period stated in such notice.*

*(2) Any person who fails to comply with a notice in terms of subsection (1) shall be guilty of an offence, and the City may without prejudice to its powers to take action against the offender, take the necessary steps to implement such notice as the expense of the owner of the premises or the offender, as the case may be.”*

14. The draft Amendment is expansive and seeks to include several provisions under when the City may act and when costs may be recovered. The proposed amendments seek to cover:

- (a) The power to enter and search any business, premise or vehicle without a warrant or question any person found on such premises if the authorised official has reasonable grounds for believing that a provision of this By-law has been contravened;
- (b) The power to instruct a person who is in contravention of this By-Law to leave and remain out of an area where a contravention of the By-law;
- (c) The power to serve a written notice on a person if there are reasonable grounds for believing that the person is in contravention of this By-Law or



where there has been an allegation that the person has contravened a provision of this By-law;

(d) Impound items, goods, equipment, vessels or vehicles without a warrant if the officer has reasonable grounds to believe that there is a commission of an offence in terms of this By-Law and where perishable goods are impounded by the City they may resell or dispose of them if deemed to be unfit for human consumption.

15. The City has stated that the purpose of the proposed amendments are to add and streamline procedural aspects of the existing By-law that support and enable necessary law enforcement, including, effectively resolving complaints and situations relating to noise, and reducing risk to the City, individuals and land owners by ensuring that these processes/actions are supported by legislation.

16. It is therefore important to note some of the offences that the existing By-law creates so as to measure the offence against the procedure that the City now wishes to implement. The existing offences in terms of conduct in public places include: blocking or interfering with safe passage of a pedestrian or motor vehicle<sup>1</sup>; no person shall in a public place urinate or defecate, except in a toilet<sup>2</sup>, no person shall in a public place bath or shower<sup>3</sup>, no person shall in a public place sleep overnight or camp overnight or erect any shelter, unless in an area designates for this<sup>4</sup>. Some of the offences related to noise include: no person shall in a public place permit noise from a private residence or business to be

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<sup>1</sup> Section 2(1)(a)(i)

<sup>2</sup> Section 2(3)(c)

<sup>3</sup> Section 2(3)(ii)

<sup>4</sup> Section 2(3)(m)





audible in a public place, except for the purposes of loudspeaker announcements for public meetings or due to the actions of street entertainers<sup>5</sup>. The By-law also deals with creating offences of drying or washing on fences or boundary walls<sup>6</sup>. We list these as examples of random offences created by the By-law.

17. Should the amendment related to the draft s2(1)<sup>7</sup> come into effect, it would in effect authorise a law enforcement official when dealing with the offence related noise enter a home of a private resident and instruct that individual to leave their home and remain outside of the home or the area of the home because they have contravened the by-law related to creating a noise in public. By authorising a law enforcement official with the powers to effectively effect an eviction from a private dwelling for contravening a By-law is a harsh procedural consequence of the By-law and in many ways non-sensical.

18. We can therefore only deduce that draft amended s22(2)(1) is not intended to cover all of the By-laws, but only some and that because no guidance is given this arbitrary procedure and whether to implement it or not will fall completely at the discretion of the Law Enforcement Official. The alternative way in which to view the application is that it is very much intended to authorise Law Enforcement from ordering “unsavoury” persons to leave a particular “affluent” area should they be viewed as contravening the by-law. So instead of Law Enforcement only being able to fine homeless persons who are “loitering” on the streets they are

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<sup>5</sup> Section 3(b)

<sup>6</sup> Section 14

<sup>7</sup> The draft proposes that: “An authorised official may instruct a person who is in contravention of this By-law to leave and remain outside of an area where a contravention of the By-law has commenced...”







now able to lawfully order persons to leave certain areas and not return to such areas.

19. We draw attention to the young black woman who was arrested in Sea Point in May 2019 after she was found to be suspicious as a black woman to be sitting on a bench in an affluent area. She was taking pictures of herself and waiting to go to a job interview. S 22(2) would be a handy tool in the arsenal of a law enforcement official seeking to ensure that only certain people fitting a particular profile is able to move around, sit in and enjoy access to public spaces in affluent areas across Cape Town. In this very real example, the By-law was abused to enforce a particular privilege.


20. This amendment is clearly overbroad, and the City provides us with no justifiable reason why without obtaining a Court order Law Enforcement official are being given powers to interdict and restrict the Constitutional right of persons to freedom of movement. The draft amendment requires no Court to be satisfied that legal requirements to interdict Constitutional rights have been met but leaves the test up to the discretion of a law enforcement official.

21. The City also seeks to amend S22 to allow for Inspections, which under circumstances the City may justify. If they needed to enter a premise in order to inspect whether an overhanging tree branch is in fact causing obstruction<sup>8</sup> or whether someone is using their veranda for the purposes of cleaning or washing

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<sup>8</sup> Section 8 currently deals with trees causing an interference or obstruction





items<sup>9</sup>. The draft section however also authorises the questioning of any person without clearly stating that the person has certain Constitutional rights in respect of due process under our criminal law statutes. The section does not deal with instances where someone refuses to be interrogated and whether such refusal amounts to a further offence and what that offence would be.

22. The examples made above seeks to illustrate the arbitrary and illogical implications that the draft amendments will have on the lives of everyday people. At the most extreme it risks seriously violating the rights of some of our most vulnerable citizens in the City.

### PART 3 LAW ENFORCEMENT OF BY- LAWS

#### Womxn's experience of law enforcement


23. Through working with sex workers and sex work organisations over the past 10 years, the Women's Legal Centre has documented human rights abuses and violations by law enforcement officials in the Western Cape who purport to act in accordance with the Streets, Public Places and the Prevention of Noise Nuisances By-Law.

24. Our experience of the discretion of Law Enforcement officials are that they will most often target womxn standing on street corners or in streets issuing fines for solicitation even though no such offence had taken place. Womxn have been forced to have their photographs taken against their will by Law Enforcement

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<sup>9</sup> Section 13 currently makes it an offence to wash, clean or dry any object on a veranda where the veranda extends over the boundary wall.





officials in efforts to profile sex workers under the guise of the very By-law under discussion. Womxn like the woman in Sea Point in 2019 find that they are often profiled because of their race and socio-economic status even when they are not committing an offence in the By-Law.

25. LBT womxn have reported severe harassment and foul behaviour by law enforcement officials who swear at them and call them derogatory names and terms because of their gender identity. These womxn specifically note the difference in treatment they receive from officials when compared to the treatment of people who appear to be in the gender binary.

26. Based on the above experiences and the draft amendment seeking to increase the powers of law enforcement officials under the By-law it is perhaps worth reflecting on the purpose and reason for municipalities across the country opting to establish Law Enforcement Units or Municipal Police Services.

27. Many of our more resourced and capacitated municipalities across the country have specialised law enforcement units for the purposes of enforcing municipal by-laws. As is the case with the City of Cape Town their powers are restricted to securing the assets of the municipality, ensuring compliance with its by-laws and enforcing traffic rules and regulations. In certain instances, they are visible as inhibitors of crimes. It is critically important to emphasise however that they are not criminal investigators and they do not have the powers to detain individuals. Their role is useful in deterring crimes, but once a criminal offence has been



committed, they do not have investigative powers. Those powers and authority rests with the South African Police.

28. Because investigative powers rests with the SAPS in terms of criminal procedures and processes the Criminal Procedure Act 51 of 1977 has been adopted and it sets out such processes and procedures. What is relevant in respect of criminal procedure to these submissions are that the CPA Act sets out the rules and regulations related to SAPS members conducting search in *Bernstein v Bester* noted that the right to privacy shrinks once a person operates in public spaces and relations that are outside of their personal realm.<sup>10</sup> This indicates that the right to privacy is protected against: being searched, having one's property searched and possessions seized.<sup>11</sup> Hence, the limitation of the right to privacy must be justified in terms of section 36 of the Constitution which provides that the frustration of the right must be necessary in that it serves a valuable public purpose, proportionate means must be used in doing so, and it must be in terms of law of general application.<sup>12</sup>

29. Our Courts have imposed safeguards such as prior judicial authorisation, and reasonable grounds.<sup>13</sup> In *Rajah v Chairperson: North West Gambling Board* the court held that for a search and seizure to be valid in terms of s 21 of the Criminal Procedure Act "a warrant may only be issued by a magistrate or judicial officer


<sup>10</sup> *Bernstein v Bester* 1996 4 BCLR 449 (CC) para 65. <http://www.saflii.org/za/cases/ZACC/1996/2.pdf>

<sup>11</sup> Basdeo V. 'A CONSTITUTIONAL PERSPECTIVE OF POLICE POWERS OF SEARCH AND SEIZURE IN THE CRIMINAL JUSTICE SYSTEM' (2009). Published Masters Thesis: University of South Africa, Pretoria. Pg. 2. <https://core.ac.uk/download/pdf/43166635.pdf>

<sup>12</sup> Price A. 'Search and Seizure without Warrant' (2016). Constitutional Court Review. Pg. 246. <http://www.saflii.org/za/journals/CCR/2016/12.pdf>

<sup>13</sup> Basdeo V. 'THE CONSTITUTIONAL VALIDITY OF SEARCH AND SEIZURE POWERS IN SOUTH AFRICAN CRIMINAL PROCEDURE' (2009) 12:4. PER. Pg. 315/360. <http://www.scielo.org.za/pdf/pelj/v12n4/a10v12n4.pdf>





where it appears from information on oath that there are reasonable grounds for believing that an article is in possession or under the control of or at a premises within the area of jurisdiction of that particular officer."<sup>14</sup>

30. There may be deviation where exigent circumstances are present that include the imminent danger of the loss, removal, destruction or disappearance of evidence should the search be delayed to obtain prior authorisation.<sup>15</sup>

31. Law Enforcement in the City of Cape Town are not without powers to act. It is important to raise that as peace officers they already have the powers in terms of Section 64F of the SAPS Act states that municipal police officers may exercise the powers conferred upon peace officers within their jurisdiction. The Declaration of Peace Officers in terms of section 334 of the CPA's schedule further stipulate the powers of peace officers which are inclusive of:

- (a) Issuing written notices as a method of securing attendance of accused in magistrate's court.<sup>16</sup>
- (b) Issuing fines in accordance with contraventions to by-laws and compounding certain minor offences.<sup>17</sup>
- (c) The power to search and seize the possessions of a person arrested by a peace officer.<sup>18</sup>

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<sup>14</sup> Basdeo V. 'THE CONSTITUTIONAL VALIDITY OF SEARCH AND SEIZURE POWERS IN SOUTH AFRICAN CRIMINAL PROCEDURE' (2009) 12:4. PER. Pg. 315/360. <http://www.scielo.org.za/pdf/pelj/v12n4/a10v12n4.pdf>

<sup>15</sup> Basdeo V. 'A CONSTITUTIONAL PERSPECTIVE OF POLICE POWERS OF SEARCH AND SEIZURE IN THE CRIMINAL JUSTICE SYSTEM' (2009). Published Master's Thesis: University of South Africa, Pretoria. Pg. 111. <https://core.ac.uk/download/pdf/43166635.pdf>

<sup>16</sup> In terms of section 56 of the Criminal Procedure Act of 1977.

<sup>17</sup> In terms of section 341 of the Criminal Procedure Act of 1977.



(d) The powers conferred to a peace officer in accordance with s40(1) of the CPA.<sup>19</sup>

(e) The powers of a peace officer to call upon any person to assist with furnishing the address and details of someone that is suspected of committing an offence.<sup>20</sup>

(f) The power executes warrants of arrests.<sup>21</sup>

32. These powers are however limited and restricted as outlined and the powers can be executed in very special circumstances. It is curious why the City would seek to extend upon the provisions already enabling the action of Law Enforcement officials and seeking to extend the powers and authority beyond the purpose for which Law Enforcement exists.

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<sup>18</sup> In terms of section 40(1) of the Criminal Procedure Act of 1977.

<sup>19</sup> "(1) A peace officer may without warrant arrest any person-

(a) who commits or attempts to commit any offence in his presence.

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.

(c) who has escaped or who attempts to escape from lawful custody.

(d) who has in his possession any implement of housebreaking or car breaking as contemplated in section 82 of the General Law Third Amendment Act, 1993, and who is unable to account for such possession to the satisfaction of the peace officer.

(e) who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing.

(f) who is found at any place by night in circumstances which afford reasonable grounds for believing that such person has committed or is about to commit an offence.


(h) who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition.

(j) who wilfully obstructs him in the execution of his duty."

<sup>20</sup> In terms of section 41(1) of the Criminal Procedure Act of 1977.

<sup>21</sup> In terms of section 44 of the Criminal Procedure Act of 1977.





33. The Constitutional case is clear that search and seizure can only take place under very strict circumstances where it must be necessary in that it serves a valuable public purpose, proportionate means must be used in doing so, and it must be in terms of law of general application.<sup>22</sup>

34. The enforcement of minor offences set out in a Municipal by-law which regulates whether someone is allowed to urinate or spit in public cannot justify the intrusion and violation of the right to privacy and it does not meet the definition of the law of general application. We would submit that there is no legal basis provided for the infringement of Constitutional rights of those residing in Cape Town whether in homes in the leafy suburbs or her streets.

#### PART 4 THE CONSTITUTION

##### The Bill of Rights


35. The Constitution is the cornerstone of democracy in South Africa and all laws created should be done in line with the spirit and ambit of the Constitution to progressively realise the rights as contained therein.

36. Chapter 2 of the Constitution contains the Bill of Rights which sets out the basic human rights which are applicable to everyone within the republic of South Africa. The rights which are important to set out for the purposes of this submission include the following but are not limited to:

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<sup>22</sup> Price A. 'Search and Seizure without Warrant' (2016). Constitutional Court Review. Pg. 246. <http://www.saflii.org/za/journals/CCR/2016/12.pdf>



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- (a) The right to Equality as contained in s9;
  - (b) The right to Human Dignity as contained in s10;
  - (c) The right to Freedom and Security of the person as contained in s12;
  - (d) The right to Privacy as contained in s14;
  - (e) The right to Freedom of movement and residence as contained in s21;
  - (f) The right to Property as contained in s25;
  - (g) The right to Housing as contained s26;
  - (h) The right to Access the Courts as contained in s34; and
  - (i) The right to a Fair Trial as contained in s35 of the Constitution.


37. Chapter 7 of the Constitution further provides for the operation and purpose of local government and sets out the object and duties of local governments and municipalities in s152 which include ensuring the provision of services to communities in a sustainable manner and to promote a safe and healthy environment.

38. Section 153 further provides that a municipality **MUST** structure and manage its administration processes to give priority to the basic needs of the community and to promote the social and economic development of the community. These are enabling provisions which places obligations on the municipality to recognise, protect and realise rights.

39. There is a particular duty to attend to the needs of the most vulnerable and the previously disadvantaged. We would submit that womxn and homeless womxn








are vulnerable in our society. In South Africa explanations for homelessness range from the structural causes of apartheid influences, uncoordinated planning and a lack of coherent socio-economic policies and programmes. The causes are also political, social and economic in nature. Cape Town has its own unique history in terms of displacement of people of colour to the periphery of the city, where they were required to provide labour, but live in abject poverty because of the colour of their skin. Womxn remain at the centre of this discrimination and suffer multiple forms of discrimination as a result.

40. When the City designs and adopts policies and process these are the people that need to be taken into account as to ensure that they are not more burdened by policies and laws. Most of these womxn who then find themselves living on the street are womxn of colour who complain about the conduct of law enforcement officials who abuse and harass them, violating their basic rights to human dignity and equality.

41. The amendments which allow for officials to search and impound property without a valid court order will effectively result in the unlawful eviction and forced removal of womxn who have sought and found shelter in the street. Their private property will be disposed of at the permit of the City and its officials without the necessary oversight and supervision. This is a direct violation of the Constitutional rights to dignity, privacy, freedom of security of the person, freedom of movement and residence, property and housing. The proposed amendments further risk violating the right to a fair trial and access to courts.



42. Officials having the authority to impound possessions will allow them to unlawfully confiscate a homeless person's materials used for shelter and closest personal items which officials could disregard as insignificant. This will place womxn at a high risk and vulnerability of violence while on the streets. Homelessness requires a multifaceted intervention strategy by the City and reinforcing policing powers will not address the problem.

43. It is our submission that any By-Law administered by the local government and our municipality must be in line with the spirit and purport of the Constitution and the rights as set out in this section. The current legal framework of the By-law we submit lacks the enabling spirit and focus of what the municipality is enabled by the Constitution to do. Instead the focus in the By-law itself and the draft amendments appear focused on realisation for some while militaristically policing others.

44. Based on the submissions as outlined above, the Women's Legal Centre does not support the draft amendments of the Streets, Public Places and the Prevention of Noise Nuisances By-Law and objects to it on the basis that the amendments are unconstitutional and irrational and will allow for the unlawful and apartheid style conduct of law enforcement officials and local government.

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