

**Comments**

to the

**Speaker of the National Assembly**

on the

**Prevention of Illegal Eviction from And Unlawful Occupation of Land  
Amendment Bill, B 6—2023**

**12 May 2022**

**Thandeka Kathi**

Attorney and Head of Programme  
Home, Land and Rural Democracy  
Centre for Applied Legal Studies  
Email: [thandeka.kathi@wits.ac.za](mailto:thandeka.kathi@wits.ac.za)

**Sheena Swemmer**

Attorney and Head of Programme  
Gender Justice  
Centre for Applied Legal Studies  
Email: [Sheena.Swemmer@wits.ac.za](mailto:Sheena.Swemmer@wits.ac.za)

**Nangamso Alicia Sosibo**

Intern  
Home, Land and Rural Democracy  
Centre for Applied Legal Studies  
Email: [Alicia.Sosibo@wits.ac.za](mailto:Alicia.Sosibo@wits.ac.za)

## **Table of Contents**

### **Contents**

Introduction .....	3
Comments on Proposed Bill.....	5
The Objectives of the Bill.....	5
Comment on the content of the Bill.....	7
Main Issues with the Bill – From A Gendered Perspective .....	11
The maximum time of imprisonment from 2 years to five – the criminalisation and feminisation of poverty.....	11
The inclusion of the unlawful occupiers' financial means, health, and previous living arrangements .....	13
Conclusion .....	16

## **Introduction**

1. The Centre for Applied Legal Studies ("CALs") would like to thank the Speaker of the National Assembly and Ms EL Powell for the opportunity to comment on the Prevention of Illegal Eviction from And Unlawful Occupation of Land Amendment Bill, B 6—2023.
2. CALS is a civil society organisation based at the University of the Witwatersrand School of Law. CALS is also a law clinic registered with the Legal Practice Council of South Africa. As such, CALS connects the worlds of both academia and social justice.
3. Our vision is a society where historical and social justice is achieved, state institutions are strengthened, and powerful entities are held to account by marginalised actors. In working towards this vision, we are guided by four key pillars, namely: expanding the agency of marginalised actors; developing a critical partnership with the state; ensuring horizontal application of the Constitution and taking an intersectional and gendered approach to human rights violations.
4. CALS operates across various areas, including Civil and Political Rights; Business and Human Rights; Gender Justice; Home, Land and Rural Democracy; and Environmental Justice.
5. Our Home, Land and Rural Democracy Programme ("HLRD") aims to advocate for access to land and the extension of the definition of home and rural democracy to align with the rights framework under the Constitution and its promise for each person to live a quality and dignified life by ensuring impoverished people have access to land, adequate public participation, a safe home and basic services. The HLRD programme has contributed to numerous judgments pertaining to access to adequate housing for decades.

6. Our Gender Justice Programme ("GJ") focuses on protecting the rights of people of all gender identities and expressions. GJ's work primarily centres on gender-based violence, particularly the trauma and structural violence people face when they are failed by the very systems meant to protect them. This can include their treatment in the criminal justice system, their responses to reports of sexual harassment in the workplace, how instances of sexual violence in schools are handled, and the conditions and management of domestic violence shelters.
7. Given the gendered nature of the Bill and its implications on impoverished people's access to a safe home, CALS is of the view this joint submission by its GJ and HLRD programmes may add value to the Bill.
8. If the amendments were to stand, it would adversely affect the Constitutional Court's jurisprudence on the right to access to adequate housing, unfairly put the burden of the housing crisis at the feet of the unlawful occupiers without placing the crisis with the state, both the apartheid state as well as the democratic state are to blame for the housing crises facing South Africa.

## **Comments on Proposed Bill**

### ***The Objectives of the Bill***

9. CALS is concerned with the statement made from the Memorandum on the Introduction and Objects of the Bill. It reads as follows:

*"The issue of orchestrated and unlawful land occupation has become a crisis across South Africa, placing immense financial and logistical burdens on all major metropolitan municipalities".*

10. This statement suggests that the people who occupy land unlawfully do so having an option to do otherwise. The idea that people orchestrate unlawful occupation cannot be further from reality. A person who occupies land and/or property without the land/property owners' consent has not had the freedom to plan and execute an unlawful occupation; they are merely reacting to a basic need to feel safe and sheltered in a place they can call home. Therefore, to imply that there was freedom of choice is careless and misleading. The actual cause of the "immense financial and logistical burdens on all major metropolitan municipalities" is the lack of action from our government to provide adequate housing for people.

11. Furthermore, the statement fails to point out that the causes of unauthorised occupation stem from an unrealised duty to provide adequate housing. It is noted that although the statement purports to provide an "inclusive approach", the part that avers that "this has led to lengthy delays in the removal of unlawful occupiers, which comes at a great cost to the property owners" clearly reveals that the Bill aims to ensure that the landowner's rights trump the rights of those that are homeless. The proposed amendments seem to provide ways that corner an unlawful occupier into being evicted under the guise of protecting property owners' rights.

12. The Bill, in its entirety, ignores the historical context that has led to the Housing Crisis.

13. It is trite that section 26 of the Constitution directly responded to apartheid spatial injustices, a fact that the Bill seems to ignore. The restrictions imposed by the Bill have the effect of amending section 26 of the Constitution without going through a proper Constitutional amendment process. Section 26 states the following:
- "(1) everyone has the right to have access to adequate housing.
  - (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
  - (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary eviction."
14. The Constitutional Court in the Grootboom case correctly identified our past as the cause of the housing crisis by stating that "[the] acute housing shortage lies in apartheid. A central feature of that policy was a system of influx control that sought to limit African occupation of urban areas".<sup>1</sup> The Bill tries to escape obligations under section 26 of the Constitution. The Bill puts an unfair burden on the unlawful occupier in the absence of a comprehensive policy from the state to address the housing crisis. In fact, the Bill goes against the Constitution's transformative agenda.
15. Respectfully, this Bill is a regression from the progressive realisation jurisprudence from the courts on the right to adequate housing. The Bill effectively reverts us to the apartheid-era legislation. It does so by giving more weight to the common law rights of the landowner without considering the socio-economic factors that lead to unauthorised occupation. What PIE has been able to do is shift the focus from the unlawful occupier to the person who seeks to evict them.
16. Cohen states that "the Constitution, given its transformative nature, emphatically demands attention to history and the existing socio-economic context when

---

<sup>1</sup> Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46.

interpreting and applying its rules".<sup>2</sup> Therefore any proposed legislation that directly applies to individuals who were historically disadvantaged and are still living under depressed socio-economic conditions should attempt to achieve the transformative demand of the Constitution, in this case, the struggle of the poor and vulnerable seeking a place to live in, should be at the forefront.

17. Cohen further reminds us that "the Constitution, given its transformative nature, emphatically demands attention to history and the existing socio-economic context when interpreting and applying its rules".<sup>3</sup> Therefore any proposed legislation that directly applies to individuals who were historically disadvantaged and are still living under depressed socio-economic conditions should attempt to achieve the transformative demand of the Constitution, in this case, the struggle of the poor and vulnerable seeking a place to live in, should be at the forefront.

### ***Comments on the content of the Bill***

#### ***Clause 1***

18. Clause 1 of the Bill seeks to amend Section 3 of PIE by inserting the following:

- (1) "No person may—
  - (a) incite, arrange or organise for a person to occupy land without the consent of the owner or person in charge of that land; ...
- (2) Any person who contravenes a provision of subsection (1) is guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding [two] five years, or to both such fine and such imprisonment."

19. The additional requirement to seek consent from the owner before one can "incite, arrange or organise for a person to occupy land" seems strange as, by definition, an unlawful occupier occupies land without the consent of the owner or the person in charge. In fact, the PIE Act defines an unlawful occupier as: "a person who occupies

---

<sup>2</sup> Cohen E et.al (2020) Constitutional Law for Students. Available at: <https://openbooks.uct.ac.za/uct/catalog/book/25>

<sup>3</sup> Ibid.

land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land,". Another unintended consequence of the amendment is that if a family member, particularly the parents, arrange or organise for other family members to occupy the land; they may fall within clause 1 and thus stand to be criminalised.

20. The criminalisation of people who arrange for the occupation of the land without the consent of the owner is contrary to the objective of section 3, which criminalises people who unlawfully profit from third parties who occupy land that is not their own. As it stands, the proposal goes beyond this objective and criminalises anyone who "incites, arranges or organises for a person to occupy land without the consent of the owner or person in charge of that land".
21. Furthermore, increasing the imprisonment sentence from 2 to 5 years is excessive and amounts to the criminalisation of poverty. The amendments to s 3 of the PIE Act are unnecessary and are vehemently opposed.

**Clause 2**

22. Clause 2 of the Bill aims to amend section 4 by extending the considerations that a court has to consider. It reads as follows:

"Section 4 of the principal Act is hereby amended—

- (a) by the substitution for subsection (6) of the following subsection:

"(6) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances

including—

- (a) the unlawful occupier's financial means, health, and previous living arrangements;
- (b) the intention of the unlawful occupation;
- (c) the rights and needs of [the] any affected elderly persons, children or disabled persons; and



(d) the rights and needs of any affected households headed by women."

23. It is unclear why the health of the unlawful occupier or their previous living arrangements is essential in determining whether the person currently needs a home. We discuss this issue in detail in paragraphs pertaining to the gendered impact of the Bill.

24. The word "intention" in s 4(6)(b) is problematic; how will an applicant correctly prove the intention of the unlawful occupier without misconstruing the intention of the unlawful occupier to the applicant's advantage? It is also difficult to ascertain how an enquiry into the intention of the unlawful occupier improves the s 4 inquiry. Seeking the intention of the unlawful occupier will further complicate the hearings and potentially unnecessarily lengthen the court proceedings. The determination of intention of the unlawful occupier, as proposed in s 4 of the Bill, should not be included as a relevant circumstance in granting an eviction order. Alternatively, the word "intention" should be defined as it pertains to the Act.

### **Clause 3**

25. Clause 3 of the Bill seeks to amend section 6 of the Act. It reads as follows:

"Section 6 of the principal Act is hereby amended—

(a) by the substitution for subsection (3) of the following subsection:

"(3) In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to—

(a) the circumstances, [under which] including the intention, of the unlawful occupier when he or she occupied the land and erected the building or structure;

(b) the period the unlawful occupier and his or her family have resided on the land in question; [and]

(c) the availability to the unlawful occupier of suitable alternative accommodation or land within the area of the municipality's jurisdiction; and

(d) the resources of the municipality or any organ of state."

26. The proposed section 3 brings into question issues around the duration of occupation, but we have seen that the jurisprudence has moved away from this inquiry and to one of whether the person in question considered the place as their home. The Supreme Court of Appeal in *Barnett & others v Minister of Land Affairs & others*<sup>4</sup> defined a home as the dwelling in which one habitually lives, the fixed residence of a family or household, and the seat of domestic life and interests.
27. The inquiry into the home is essential in eviction cases because, as the Court in *Port Elizabeth Municipality v Various Occupiers*<sup>5</sup> brilliantly pointed out, "Section 26(3) evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people, in particular) is a turbulent and hostile world. Forced removal is a shock for any family, especially for one that has established itself on a site that has become its familiar habitat."
28. Additionally, the proposed s 6(3A) is problematic in that it does not provide for a solution where the period of temporal alternative accommodation or land has expired. Therefore, we recommend that this section of the Bill should also propose a clear indication of what happens to the unlawful occupiers in terms of living arrangements.

---

<sup>4</sup> 2007 (6) SA 313 (SCA) para 38.

<sup>5</sup> 2005 (1) SA 217 (CC) para 17.

**Main Issues with the Bill – From A Gendered Perspective**

***The maximum time of imprisonment from 2 years to five – the criminalisation and feminisation of poverty***

29. The criminalisation of poverty is a term which refers to a trend by governments to criminalise activities associated with impoverishment rather than addressing the root causes of poverty.<sup>6</sup> Examples of the criminalisation of impoverishment include criminalising homelessness, loitering and begging. The criminalisation of poverty predominantly affects black individuals in South Africa, as they remain the disproportionate number of economically disadvantaged members in our communities.

30. The criminalisation of impoverishment fails to deal with the systemic and structural issues related to and causing poverty and traps individuals in a cycle of poverty. When individuals cannot, for example, pay fines for their 'transgressions', they may face imprisonment. When people are imprisoned, they are placed in a more precarious position when released. They can experience collateral damage, including losing their income or homes or facing stigmatisation around imprisonment.

---

<sup>6</sup> P Edelman, 'The criminalisation of poverty and the people who fight back', *Georgetown Journal on Poverty Law and Policy*, 26.2 (2019).

31. The prison sentence for the unlawful occupation of land is already an altogether inappropriate method for dealing with the issues related to unlawful occupation and its intersection with homelessness. The proposition to increase the sentence from two to five years shows the lack of comprehension of the consequences of the criminalisation of poverty and a disregard for the lives of economically disadvantaged individuals.

32. The criminalisation of poverty becomes a gendered issue as poverty disproportionately affects women and particularly black women in South Africa. The feminisation of poverty means that social and economic factors often keep women economically disadvantaged.<sup>7</sup> South Africa's labour market favours men; in 2021, 32,4% of men experienced unemployment compared with 36,8% of women. Black women had the highest unemployment rate, with 41%.<sup>8</sup>

33. Women, particularly black women, disproportionately experience poverty and can find themselves without homes for reasons including a lack of work availability, lower levels of education and escaping violence in the home. With women being the primary caregivers to children and older individuals, women not only bear the effects of homelessness personally but also have further obligations to try and care for their families while experiencing homelessness.

---

<sup>7</sup> S Ali 'Feminization of Poverty', *The Borgen Project*. Available at <https://borgenproject.org/tag/feminization-of-poverty/#:~:text=The%20%E2%80%9Cfeminization%20of%20poverty%E2%80%9D%20is,on%20the%20rise%20among%20women.>

<sup>8</sup> StatsSA, "South African labour market is more favourable to men than women" (2021). Available at <https://www.statssa.gov.za/?p=14606>.

34. The suggested criminalising of actions which incite, arrange or organise 'unlawful occupation' have a direct and devastating effect on women (and the children and older persons that women care for). Where a woman 'organises' or 'arranges' for her family to move onto an empty lot or plot of land and build a home, she can be criminalised for protecting and providing for her family.

35. Once criminalised, the compounding challenges to exiting a state of economic disadvantage increase significantly. The individual woman may lose her job or piecemeal work, and where she supports her family, they will be unfairly burdened by her imprisonment. Women-headed households comprise 38% of households in the country or approximately 6.1 million homes in South Africa.<sup>9</sup> Importantly, when we criminalise poverty, we criminalise women and their entire families due to the feminisation of poverty. Thus, attaching sanctions to the 'occupation of land' or 'occupation for survival' locks women and families in the cycle of poverty.

***The inclusion of the unlawful occupiers' financial means, health, and previous living arrangements***

36. The proposed inclusion of subsection 6 under section 4 of PIE, to include a consideration of the occupier's financial means, health and previous living arrangements if they have stayed on the land for less than 6 months, creates more barriers for the occupier. This opposes the essence of section 26 of the Constitution

---

<sup>9</sup> B Perry, 'What South African women told us about being the main breadwinner', *The Conversation* (2020). Available at <https://theconversation.com/what-south-african-women-told-us-about-being-the-main-breadwinner-147059>.

and PIA Act which exists to break away from the mass evictions of communities of people of colour during the apartheid era.

37. If enacted, the suggested amendment will create further barriers for women and their families to retain their homes. It will require the women to 'perform poverty'. Performing poverty is a process whereby the individual will be required to show or perform the level of poverty they suffer, and in this instance, it will require the woman to show a court that she is 'poor enough' to stay in her home.

38. Naturally, performance of poverty is a traumatic and undignified position to place an individual. Thus, adding criteria such as the financial means of an occupier, once again due to the feminisation of poverty, places women in the spotlight of having to 'perform' how economically disadvantaged they are in order to be permitted to stay in their home and take care of their families.

39. The suggested addition of 'previous living arrangements' once again places women in a situation where they must *prove* the harm they have suffered. For example, many women may have left abusive partners and subsequently come to settle on an empty lot. With statistics showing that up to one-third of women in South Africa have experienced either physical or sexual abuse by their intimate partner, it is easily

conceivable that a significant number of women facing evictions due to 'unlawful occupation' may be survivors of violence in the home.<sup>10</sup>

40. The assertion that many women facing eviction are also survivors of intimate partner violence is bolstered by the fact that South Africa currently does not have enough gender-based violence shelters for these women and their children. For example, Vetten shows in her study, 'What is Rightly Due? Costing the Operations of Domestic Violence Shelters', in KwaZulu Natal alone, approximately 5 403 require shelter accommodation. Nevertheless, there are only shelters collectively with space for 267 women.<sup>11</sup> Thus, only 4,94% of women who require assistance through domestic violence shelters can be accommodated in the province. Where do the rest of the survivors go?

41. Many women may return to violent intimate partners; others may seek assistance from families and friends. Many women without these options may face homelessness or the 'unlawful occupation' of land.<sup>12</sup>

---

<sup>10</sup> E Brits, 'South Africa's staggering intimate partner violence states aren't shifting – here's what we can do about it', *Daily Maverick* (2022). Available at <https://www.dailymaverick.co.za/article/2022-06-14-intimate-partner-violence-in-s-africa-the-staggering-stats-and-the-solutions/>.

<sup>11</sup> L Vetten, 'What is rightfully due? Costing the operations of Domestic Violence Shelters' (2018). Available at [https://www.researchgate.net/publication/328802955\\_WHAT\\_IS\\_RIGHTFULLY\\_DUE\\_COSTING\\_THE\\_OPERATIONS\\_OF\\_DOMESTIC\\_VIOLENCE\\_SHELTERS\\_RESEARCH\\_REPORT\\_2018](https://www.researchgate.net/publication/328802955_WHAT_IS_RIGHTFULLY_DUE_COSTING_THE_OPERATIONS_OF_DOMESTIC_VIOLENCE_SHELTERS_RESEARCH_REPORT_2018).

<sup>12</sup> S Swemmer, 'Women are being evicted from shelters onto the streets', *Ground Up* (2019). Available at <https://www.groundup.org.za/article/women-are-being-evicted-shelters-street/>.

42. Ultimately the above-proposed amendments to the PIE Act disproportionately affect women and can be seen as being inherently discriminatory towards women. By enacting these amendments, women will have a compounded negative experience of poverty and homelessness.

### **Conclusion**

11. CALS notes that some of the proposed changes of the PIE Act are progressive at face value. However, we are of the view that the overall proposed changes are not progressive. Instead, they contradict section 26 of the Constitution of South Africa.

Therefore, the following recommendations are made:

- a) Recommendation 1: Amendments to the PIE Act must be made using a gendered lens that seeks to correct historical injustices, ensuring that the impoverished and vulnerable of our society are prioritised.
- b) Recommendation 2: Intentional engagements with social movements that work in the housing sector should be held to propose amendments that address systematic failures encountered when applying the current PIE Act.

12. Thank you for providing the opportunity to provide input. For queries and further information, please contact Thandeka Kathi at [Thandeka.Kathi@wits.ac.za](mailto:Thandeka.Kathi@wits.ac.za) or [Sheena.Swemmer@wits.ac.za](mailto:Sheena.Swemmer@wits.ac.za). CALS would welcome any opportunity for further engagement on the Bill, including the opportunity to make oral representations.