

FLAWED PROCESS OP-ED

New white paper on human settlements threatens a core constitutional right

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The white paper's threat to cut back on constitutional housing protections fails to reckon with what the Constitution and Prevention of Illegal Eviction and Unlawful Occupation of Land Act were attempting to achieve.

Thirty years ago, the Housing White Paper was one of the first post-apartheid policies to be released. It was the culmination of a process of multi-stakeholder negotiation in the National Housing Forum (NHF).

The NHF process was not without its problems, which resulted in, among other things, an unrealistic vision of what the private sector can deliver to the poorest in our country.

After many years of intermittent development and high expectations, a new policy was finally released for public comment on 18 December 2023. This time, both the process and the socioeconomic rights positioning have been flawed, despite 30 years of democracy and, in the case of housing rights, 14 years of case law since the seminal [Grootboom judgment](#).

The public was given an end-of-January 2024 submission deadline, which was considerably reduced in practice due to the holiday period. The White Paper revision process has been a long and arduous road, so it was hard to understand an eleventh-hour rush.

Human Settlements Minister Mmamoloko Kubayi extended the deadline to the end of February due to the pressure from civil society organisations, and then again to mid-March. While the second extension gave time to review it more meaningfully, it did not afford the opportunity to consult with members and constituents for many in civil society.

In addition to time, consultation would have required accessible documentation, including availability in additional South African languages.

A team has been convened to work on the critical public comments that were submitted. Instead of rushing the White Paper through Cabinet, the minister now has an opportunity to engage meaningfully with comments, especially those which require substantial changes or even overhaul.

However, a gap persists: online consultations assume that people have access to smartphones, laptops and the internet, and some of the public consultations required that people provide their own transport. The department appears not to have considered the socioeconomic conditions facing people in informal settlements.

Even with the extensions, the people who matter could not have their voices heard as they do not have access to technology or resources to cover travel costs.

Further, civil society and other stakeholders should be properly consulted on the revisions. The White Paper is the foundation for the legislation — and it appears, other instruments — that are to follow. We need the strongest foundation possible.

Right to housing and PIE Act

Aside from these procedural concerns, a series of problems exist with the manner in which the White Paper addresses the right to housing.

Promisingly, the White Paper begins with general principles that confirm the constitutional mandate, but by the end, it contains a recommendation that the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (PIE Act) should be reviewed. More worrying still is the manner in which the statement lies buried in a section to which it appears not to belong:

“Unlawful development must be discouraged severely. This entails reviewal (sic) of the PIE Act which requires alternative accommodation for illegal occupation of land.”

In between a promising start and a deeply problematic recommendation towards the end, the White Paper exhibits a wavering or inconsistent, commitment to housing rights.

The PIE proposal displays a fundamentally flawed understanding of the origins and purposes of the act, and the section of the Constitution to which it gives effect.

Dispossession and forced removals were a cornerstone of the colonial and apartheid eras. The apartheid state used the common law and the Prevention of Illegal Squatting Act of 1951 in service of its racial vision, effecting countless evictions, removing black African people to small reserves and barring land ownership outside of them.

The Constitution brought about a number of far-reaching changes with respect to evictions, entrenching the right of access to adequate housing in section 26. Section 26(3) prohibits arbitrary evictions by requiring that evictions be authorised by a court order made after having regard to “all the relevant circumstances”.

The PIE Act gave effect to section 26(3), requiring that the eviction of an unlawful occupier be “just and equitable”, having regard to a range of factors, including whether alternative accommodation could be made available by the state.

The act was intended to protect the millions of South Africans in urban areas who had no common law entitlement to the land on which they lived. Previously, property owners, including the state, could evict quickly and effortlessly. The PIE Act signalled a shift to preventing illegal evictions.

Now, unlawful occupiers have substantial protections: no eviction can occur without an order of court and a court cannot grant an eviction order unless it is “just and equitable”. The White Paper’s threat to cut back on constitutional housing protections fails to reckon with what the Constitution and PIE Act were attempting to achieve.

Housing rights are one of the most frequently litigated rights in the country. As a result, a wealth of case law has developed, providing a set of new legal principles to which the state is bound. One of these is alternative accommodation if people being evicted were to become homeless as a result of the eviction. There are others, such as meaningful engagement, office-bearer accountability for contempt, and municipal joinder.

Over the years, municipalities have consistently attempted to undermine PIE through the (unsuccessful) use of blanket interdicts and by using Anti -anti-land invasion units to unlawfully evict.

As the 30 years of democracy commemorations abound, we might imagine that more progress would have been made on the desperate need for housing and land faced by a large proportion of the population.

Instead, we have a draft White Paper that threatens a core constitutional right.