

**EXECUTIVE SUMMARY OF:
JOINT SUBMISSION ON THE HOUSING BILL
BY
HOUSING RIGHTS AND GENDER WORKING
GROUP**

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EXECUTIVE SUMMARY

The purpose of the Housing Bill, 1997 is to give content to the constitutional right of access to adequate housing by defining this right and by creating a strategy to be adopted by all levels of government to implement such a right according to defined and applicable principles for its full realisation.

A primary failing of this Bill is that its provisions appear to be gender-neutral and in a society where discrimination against women is ingrained, such provisions contribute to and deepen the discrimination.

We submit that substantive (real and effective) gender equality should be an integral principle of the Bill, and that in its current construction, the Bill denies women, especially vulnerable and disadvantaged women, full and equal access to housing.

We suggest that the Bill's failure stems from the failure of White Paper to undertake a gendered analysis of South African housing allocation processes and to develop policy options to overcome gender inequalities prevalent in these processes.

We undertake a short gender analysis of the housing allocation process and illustrate with the use of various case studies how unequal gender relations undermine women's ability to access housing equally and militate against their full and effective participation in the housing development process.

We propose that policy and legislation should redress this imbalance given the legal imperatives on the State which flow from the Constitution and its international law obligations.

Our submission then proceeds to make concrete recommendations for the attainment of the constitutional guarantees of both substantive gender equality and adequate housing to be included in the provisions of the Housing Bill.

Finally our submission addresses an omission of the Bill which is to provide for a regulatory framework in which evictions will be allowed given the Constitutional right contained in section 26(3) which prohibits unfair and arbitrary evictions.

OVERVIEW OF KEY ISSUES ADDRESSED

1. Access to adequate housing is a socio-economic right which is fully realised through the flexible implementation of a variety of options such as provision of a government subsidy, access to credit and state provision of rental stock. Individually these options do not amount to the promotion of the right.

The Bill is unclear and unspecific about the definition of the right and the principles governing its progressive realisation. The definition should conform to Constitutional and international law obligations with regard to this right.

2. The Bill must create a framework for the housing delivery process to be participatory and inclusive. Whilst the Bill promotes the policy of “people’s housing”, the housing delivery process is not transformative due to the Bill’s lack of proposals of formal mechanisms to facilitate consultation with different groups of women, most especially different rural women’s groups.
3. The Bill does not guarantee representivity of women on the institutional mechanisms which it identifies. Specifically, the Housing Boards and Housing Code must reflect gender equality in their composition.
4. In order for the Bill to provide a framework for the progressive realisation of the right to adequate housing, it must set core minimum standards for its implementation. This will entail detailing the obligations of State, private and other institutions involved in housing planning and delivery to meet the standards set in the Bill.
5. Provision for the disaggregation of data along gender lines must be incorporated into the Bill.

GENDERED CONTEXT OF HOUSING

Current policy and draft legislation ignores the fact that housing provision carries a historical legacy of both racism and sexism : policies which curtailed women’s property rights and limited their mobility negatively impacted on their access to housing in certain areas.

Unequal gender relations continue today to mediate women’s access to and control over housing resulting in discrimination at all levels : social, political and economic. The discrimination is compounded by the gendered nature of the division of labour which renders housing as a site for residence and production for many women. Planning and design of housing needs must take cognisance of this social reality as well as issues of security and privacy.

A case study on the West Coast reveals that the current subsidy system, in the absence of a variety of mechanisms to facilitate access to housing, may lock women into relationships against their choice. The once-only registration on the National Housing Data Base rule, albeit with a partner, vitiates the opportunity for further assistance if and when the relationship breaks down. Recovery of their share of the asset through legal redress for many women is improbable due to ignorance of their rights and poor access to the legal machinery.

Informal and formal polygamy have and do also militate against women independently accessing their right to housing. Housing policy and legislation must acknowledge customary practices and law (especially with regard to inheritance and property) as constitutionally articulated: with the guarantee of gender equality.

Women’s marginalised position in the macro and formal economy creates specific gendered needs with regard to accessing housing finance.

Legal obstacles such as discriminatory subsidy provisions which negate the constitutional

guarantee of 'Everyone' enjoying the right to housing must also be addressed. The exclusion of single people and parents under the age of 21 can have a disproportionately negative impact on single mothers who are most likely credit- and leverage-starved and may not be justifiable in an open and democratic society.

Women are not a homogeneous group. They and their housing needs differ. Partners of migrant workers, women living under traditional forms of tenure, the elderly, disabled, those living with HIV/AIDS, as marginalised entities all require specific attention.

Rural housing needs, the transformation of hostels to homes and the provision of secure housing to farm dwellers are all absent from current policy and legislative considerations. An intersectoral collaboration with the Department of Land Affairs to dovetail with their tenure reform initiatives in order to ensure that provision of housing on farms and in the rural areas in general, are of an adequate standard, is appropriate.

Institutional obstacles ranging from the lack of gender structures in the Housing ministry, a lack of gender policy objectives and indicators in the Housing White paper, to the lack of gender sensitivity and representivity at all tiers of government, on traditional authorities and on statutory bodies translate into women having very little decision-making power within structures of governance. This is exacerbated at a community level by women's lack of power within the private and commercial sphere and hence their weak bargaining position and inability to mobilise partnerships with state initiatives. The oft cited example of Victoria Mxenge Housing Saving Scheme is a manifestation of a success story in spite of and outside of the institutional obstacles that are prevalent.

LEGAL OBLIGATIONS

The Bill is informed by two important legal imperatives :

The South African Constitution has as a foundational value the achievement of equality and non-sexism. The Bill of Rights, entrenches the right to substantive equality and guarantees to every individual the full and equal enjoyment of all rights and freedoms. However positive measures targeting groups which have been disadvantaged by unfair discrimination are permitted to promote the achievement of equality. Section 9 prohibits direct or indirect discrimination against anyone on the basis of either race, gender, sexual orientation, pregnancy and marital status.

These provisions must inform the right of access to adequate housing guaranteed to everyone in s26(1) of the Constitution which places an obligation on the state to take "reasonable legislative and other measures, within its available resources, to achieve progressive realisation of this right." Women are also entitled to benefit equally from subsidies or rights of participation extended in the housing sphere. Legal provisions must be structured to take account of the gendered context of housing outlined above, without entrenching or perpetuating gender stereotypes, and without ignoring the differentiated needs of women.

The State is also bound by its international human rights law obligations, and in this context, by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which it has ratified, The International Covenant on Economic, Social and Cultural Rights which it has signed, The Istanbul Declaration on Human Settlements, The Beijing Declaration and Platform for Action and the UN resolution on "Women and the right to adequate housing and to land and property".

ANALYSIS OF THE PARTICULAR SECTIONS OF THE BILL

The particular proposals, which we make to integrate the principle of substantive gender equality throughout the Bill, can be summarised as follows:

1. The Preamble

The reference to “housing, as adequate shelter...” is unfortunate and an understatement of the constitutional guarantee, which is access to adequate housing and not simply adequate shelter.

We note that in the general principles applicable to housing development, in s 2(1)(g)(I) all tiers of government must respect, protect, promote and fulfil the rights in the Bill of Rights in the administration of any matter relating to housing development. However, we believe that it is appropriate to include in the preamble that it is an overarching duty of all organs of state to respect, protect, promote and fulfil the right of access to adequate housing.

The preamble should acknowledge that women are vulnerable, disadvantaged and constrained from enjoying their constitutional right to housing and state that a fundamental objective of the Act is to secure full and equal enjoyment of secure and adequate housing for women.

Housing is described as “a product and a process” in the preamble. What it must also emphasise is that equal participation by women and other groups in vulnerable and disadvantaged circumstances is crucial to the housing delivery process at all levels.

2. Definitions

The key elements of “adequate housing” must be defined. There is an attempt to incorporate some components of the right which are recognised in international instruments in the definition of “housing development”, but in a way which is confusing and which does not clarify the scope of such right.

“Viable households and communities” should be deleted to make housing development consistent with the constitutional guarantee directed at ‘everyone’.

The phrase “residential environment” is too restrictive since the home is a site of economic activity for many women and should be reformulated.

The introduction of the concept of ‘privacy’ in subparagraph (a) can have unintended negative consequences for women who need protection from domestic violence inside their homes. We propose that the concepts of ‘habitability’ and ‘adequate space’ be substituted instead.

We propose the insertion of the definition of “adequate housing” to include all of the core elements of the right to adequate housing which have been accepted in international law as follows:

- “Adequate housing” as referred to in section 26(1) of the Constitution means housing that-
- (a) provides residents with a secure, safe place to live, legal security of tenure, sufficient space to ensure privacy, and protection against the elements;
 - (b) is located in areas that are not harmful to the health or well-being of residents, and allows convenient access to employment, economic opportunities, transport facilities, health care, child care, educational and other social facilities;
 - (c) provides residents with access to potable water, adequate sanitation, waste disposal, site

- drainage, domestic electricity supply and emergency services;*
- (d) *is appropriately designed and constructed to meet the diverse cultural and physical needs of different residents;*
- (e) *is affordable particularly to groups living in vulnerable and disadvantaged circumstances.*

We propose that “*housing development processes*” be defined as “*the establishment and maintenance of equitable and participatory processes by all levels of government and other relevant organs of state through which everyone’s right to have access to adequate housing can be realised.*”

3. Application of the Bill

We endorse the Legal Resources Centre submission that the scope of application of the Bill should be extended to persons who are refugees or migrant workers, including their families.

4. Part I: General principles applicable to housing development

There is a welcome inclusion of a commitment to respect, protect, promote and fulfil the rights in the Bill of Rights in the administration of any matter relating to housing development contained in s2(1)(g)(i) in the latest version of the Bill which was missing from the original draft. However, a clear commitment to substantive gender equality in all aspects of the housing development process must still be included as a principle.

The obligation on all tiers of government contained in section 2(1)(a) to “give priority needs to the poor in housing development” should be redrafted. It should reflect that unequal gender relations result in poverty, which specifically impact on women and different groups of women.

Although we welcome and acknowledge the inclusion of the important principle contained in s2(1)(d)(v) in the latest draft, we propose that the section be expanded to include an obligation on all tiers of government to:

- a) Prioritise the housing needs of poor women requiring redress due to past discriminatory laws and practices;
- b) Adopt special measures to address the housing needs of particularly marginalised groups of women such as women living on farms and in rural areas, most notably, the former homeland areas;
- c) Accommodate the special needs of groups in vulnerable circumstances such as homeless children, the elderly, the disabled and persons living with HIV/AIDS.

Section 2(1)(d)(iii) which obliges the different levels of government to promote the provision of community and recreational facilities in residential areas should be expanded to incorporate the promotion of access to health care services, child-care facilities and schools.

The provision in section 2(1)(j) states that all levels of government must “use public money available for housing development in a manner, which stimulates public sector investment.” In subparagraph (l) government must “encourage and support individuals to fulfil their own housing needs.” These provisions may have an indirect discriminatory impact on women in the absence of

anti-discriminatory legislation and minimum standards for housing delivery, given the pervasive discrimination against women by such private institutions as banks and developers.

The obligation in section 2(1)(k) on government to “facilitate active participation of all relevant stakeholders in housing development” must be expanded to include an express duty to ensure the full and equal representation and participation by women in the process.

We propose that the sub-paragraph that related to the transfer of skills which was present in the previous draft be re-inserted and be made specific to women throughout all phases of the housing development process (i.e. the planning phase, design, management and construction). By doing so, policy and legislation recognises and will begin to redresses the unequal gender relations present at all levels of the housing development process.

4. **Part 2: Role of national government in housing development**

Equal access by women to housing should be specifically incorporated as a housing delivery goal binding on all levels of government in national government’s obligation to set national housing delivery goals and to monitor performance against such goals and budgetary goals [section 3(2)(b) and (c)].

We welcome the fact that in the latest draft of the Bill in ss 3(2)(f) and (g) a peremptory duty has been placed on national government to promote consultation between various stakeholders in housing development, including representatives of civil society. In the previous draft only a subjective discretion was conferred on the Minister to do so. However, we submit that it is necessary for National Government to undertake in addition a specific obligation to ensure equal and effective participation of women in the consultation process, given their under-representation on decision-making and governance structures.

We note with concern that an obligation for National Government to set uniform national norms and minimum standards applicable to housing development throughout South Africa is missing from the latest draft of the Bill. This is an important duty of national government if the Bill is to provide a framework for the progressive realisation of the right to adequate housing. We submit also that the fundamental principle of gender equality should explicitly constitute a uniform national norm and minimum standard applicable to housing development throughout South Africa.

The power conferred on national government in s 3(3)(j)(ii) to take reasonable steps to “promote effective functioning of the housing market should be extended to include equitable functioning. It should specifically be directed in order to prevent all forms of prohibited unfair discrimination as set out in section 9(4) of the Constitution.

The qualitative criteria of measuring racial and gender equality in the allocation and distribution of housing are missing from national government’s power to evaluate performance in the housing sector. In s 3(3)(i) this power is limited to evaluating performance “against set goals and effectiveness parameters.” These should be incorporated as primary evaluative criteria and measurable targets that will facilitate accountability.

We propose that the current “housing assistance measures” referred to in s 3(4) as forming part of the national housing programmes be expanded and reformulated to include:

- a) The Housing Subsidy Scheme;
- b) The Guidelines for the Discount Benefit Scheme to promote Home Ownership, subject to

- section 17;
- c) The Hostels Redevelopment Programme: Policy for the Upgrading of Public Sector Hostels;
 - d) *Measures to facilitate the extension of housing credit to disadvantaged groups;*
 - e) *Measures to ensure the adequate supply of affordable rental stock;*
 - f) *Measures that facilitate access to housing through a variety of appropriate tenure forms;*
 - g) *Measures to facilitate the provision of technical assistance and training in relation to all phases of the housing development process;*
 - h) *Legislation which prohibits unfair discrimination in the private housing sector;*
 - i) The Criteria and Procedures governing the Allocation of the Bulk and Connector Infrastructure Grant until it is phased out on a date determined by the Minister in consultation with the Minister for Provincial Affairs and Constitutional Development.

5. National Housing Code - Section 4

The scope and purpose of the National Housing Code has been curtailed in the latest draft of the Bill. It is now envisioned that the Code will set policy, policy directives, and administrative guidelines for the implementation and application of national housing development policy, which will be binding on all levels of government. The important component for National Housing Code to set uniform norms and minimum standards is missing. Thus the opportunity to specify that the principle of substantive gender equality should constitute one of the primary uniform norms and standards binding on all levels of government and those private sector institutions involved in housing delivery is also lost. To this extent the legislation fails to provide adequate core content of the constitutional right of access to housing. Furthermore, a criterion for evaluating the attainment of housing delivery goals should be the degree to which women, especially disadvantaged women enjoy access to housing.

6. South African Housing Board - Section 5

Women's representation on this Board must be guaranteed and to this end we recommend a minimum of 33 %, which should include women representatives of all sectors involved in housing delivery, including professional planners, the construction industry, developers and civil society. This must be complemented with gender training related to women's housing needs.

7. National Housing Data Bank and Information System - Section 6

The Bill empowers the Director General to establish and maintain a national housing data bank and information system in order to record and to provide reliable information for the planning, development, implementation and monitoring of the national housing development policy and process and also to provide macro-economic related information for the integration and co-ordination of housing policy with macro-economic and fiscal policy and related activities.[s 6(2)(a) - (d)].

The Bill must in addition, specifically require that the collection of data and statistics be disaggregated by gender, race, age and geographical location. This is to enable the effective monitoring of the attainment of substantive gender and racial equality in all aspects of the housing delivery process by both government and civil society. The generation and dissemination of gender disaggregated data is a commitment undertaken by the South African Government in the Beijing Declaration and Platform for Action (1995) and the provision of such information and other disaggregated data will also facilitate the monitoring function of the South African Human Rights

Commission prescribed in section 184(3) of the Constitution.

8. Role of Provincial Government in Housing Development - Part 3

Since Provincial government is bound by the principles contained in section 2 and by the National Housing Code, the commitment to substantive gender equality must be incorporated as a core principle and as a criteria for evaluation in the provisions of this chapter.

The obligation on Provincial Government contained in section 7(2)(f) to assume local government responsibilities and duties under the Act, when such local government is incapacitated, should also apply to incapacity related to ensuring women's equal participation in the housing delivery process and equal access to housing. It must be noted that provincial government intervention must be made in accordance with s 139 of the Constitution, which requires action to "...maintain national standards or meet established minimum standards for rendering of a service." In the absence of national government setting such standards, it will be difficult for provincial government to assess whether to intervene and the extent of its interventions.

9. Role of Local Government in Housing Development - Part 4

The Bill assigns a key role to local government in housing delivery, but by limiting its responsibilities to "access to adequate housing opportunities" in s 9(1)(a)(i) renders the responsibility inconsistent with the earlier definition of 'housing development' and amounts to a non-fulfilment of its constitutional obligation.

The obligation for setting housing delivery goals in its jurisdiction assigned in s 9(1)(b) must be made consistent with the principles set out in section 3 of the Development Facilitation Act, 1995. The goals must include equal access by women to adequate housing and ensuring equal and effective participation of women and their organisations in all decisions affecting housing delivery, such as design, location, tenure provisions etc. Women should also be targeted as beneficiaries of training programmes and housing service centres.

Local Government should be expressly obliged in its competence for designating land, setting of health and safety standards for housing, housing design and the provision of associated services to ensure that these are appropriate to the needs of women and that women are properly consulted in the planning, execution and co-ordination of any housing development project [s 9(1)(a) - (f)].

Insofar as Local Government may participate in any national housing programme by "facilitating and supporting the participation of other role players in the housing development process" as it is empowered to do in s 9(2)(a)(vi), it must be expressly obliged to facilitate equitable participation by women in the housing development process.

The Bill inadequately regulates the capacity and accountability of local government to deliver adequate housing in accordance with national uniform norms and minimum standards. Specific mechanisms and criteria for increasing such accountability and fulfilling its obligations can be harnessed from sections 15, 16 and 17 of the current Housing Act No 4 of 1966, which should be amplified to provide for appropriate intervention in the case of a failure by local government to respect racial and gender equality in the housing development process. The Bill should also specify the obligations of national and provincial government to support local government in fulfilling its housing development responsibilities such as allocation of adequate financial resources and insisting that councillor training programmes focus on gender sensitive project planning.

OMISSIONS FROM THE BILL

The Bill fails to give content to the concept of secure tenure as a key element of the right to adequate housing and to give content to section 26(3) of the Constitution, which prohibits unfair and arbitrary evictions.

A chapter of the Bill should seek to define the “relevant circumstances” that should be taken into account by a court before ordering an eviction of persons or the demolition of their homes. There should be a regulatory framework which guarantees security of tenure in a way that is consistent with the provisions of The Extension of Security of Tenure Bill 47 of 1997 and international law requirements.

CONCLUSION

The Housing Bill must provide a legal framework which clearly defines the right to adequate housing in line with Constitutional and international human rights obligations. It should prescribe minimum national standards for the realisation of the right, which includes women’s full and equal access to adequate housing. Given that unequal gender relations impact on the right, policy and legislation should promote a range of mechanisms through which women can gain access to adequate housing appropriate to their particular needs. The principle of substantive gender equality should be integrated at all levels of the housing development process, and should be a key criterion for evaluating the achievement of housing delivery goals.

KEY RECOMMENDATIONS

1. The Bill must define adequate housing in a way which conforms with Constitutional and international human rights obligations.
2. The Bill must include as a principle applicable to housing development the achievement of substantive gender equality, which should also be a key criterion for evaluating the achievement of housing delivery goals.
3. The Bill must oblige national government to set uniform national norms and minimum standards applicable to housing development, which should include ensuring women's full and equal access to adequate housing.
4. The Bill should be made gender-specific by imposing obligations on all tiers of government to take special measures in its housing development processes and policies to guarantee substantive equality for women in respect of the right of access to adequate housing.
5. The Bill must guarantee representivity of women on the institutional mechanisms which it defines such as the South African Housing Board, by setting quotas for women's representation coupled with gender training of women's housing needs.
6. Provision for the disaggregation of data along gender lines must be incorporated into the section setting up a national housing data bank and information system.
7. The Bill must give content to secure tenure as a key element of the right of access to adequate housing as contained in section 26(3) of the Constitution by providing a regulatory framework of the relevant circumstances a court must take into account before ordering the eviction of someone from their home or to have their home demolished.

JOINT SUBMISSION ON THE HOUSING BILL, 1997

BY

THE HOUSING RIGHTS AND GENDER WORKING GROUP

16 September 1997

The following organisations are represented on the Housing Rights and Gender Working Group:

- * **Community Law Centre (University of the Western Cape)**
- * **Centre for Rural Legal Studies**
- * **Legal Resources Centre (Cape Town)**
- * **Surplus Peoples' Project**
- * **Development Action Group**
- * **African Gender Institute (UCT)**

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I. INTRODUCTION

One of the primary purposes of the Housing Bill, 1996 is to give substance to the right of everyone to have access to adequate housing enshrined in section 26 of the Bill of Rights (1996 Constitution). It provides a framework for the realisation of this right, particularly the respective roles and responsibilities of the three levels of government. It also sets out the key principles applicable to the realisation of the right. The Bill is thus to be welcomed as it provides the essential legislative basis for the full realisation of the right to adequate housing in South Africa.

In this submission we comment on substantive (real and effective) gender equality as a key principle which should be integrated in all aspects of the Bill. We argue that the Bill does not go far enough in facilitating full and equal access to housing by women in South Africa, particularly those women in vulnerable and disadvantaged circumstances.

The failure of this legislation to integrate substantive gender equality reflects the broader failure of the White Paper on Housing (1994) to undertake a gendered analysis of the various processes by which housing is allocated in the South African context, and to develop appropriate policy to overcome gender inequalities in these processes.

The advancement of substantive gender equality in the South African context is integrally connected to the full realisation of the right of access to adequate housing. This in turn requires the creation of accessible processes and institutions for the fulfilment of this right¹. A strong Housing Act is vital to the successful implementation of this constitutional right.

¹ For an account of violations of housing rights under apartheid and their consequences, see the submission of the Community Law Centre (UWC), the Legal Resources Centre, Development Action Group entitled *Submission to the Truth and Reconciliation on the Relevance of Economic, Social and Cultural Rights to the Commission's Mandate*, 18 March 1997. Copies of this submission are obtainable from the Community Law Centre (UWC) - tel: (021) 959 2950; fax: 959 2411

This submission makes recommendations with a view to providing a stronger foundation for the advancement of substantive gender equality and the right to adequate housing through the provisions of the Housing Bill.²

OVERVIEW OF KEY ISSUES ADDRESSED

1) The socio-economic right to adequate housing

The right to housing is a socio-economic right, closely linked to the other socio-economic rights. This right may be realised through the flexible implementation of a variety of options or mechanisms, such as the provision of a government subsidy, credit facilities and state provision of rental stock. None of these measures can alone be deemed as a sufficient condition for the promotion of this right.

The Bill needs to provide more specific guidance with regard to the definition of access to adequate housing, and the principles governing the progressive realisation of this right. This definition should conform to Constitutional and international obligations with regard to this right.

2) An inclusive and participatory process

There is a need for the Bill to create an enabling framework for an inclusive and participatory housing delivery process. This Bill, while promoting a policy of 'people's housing', fails to identify the formal mechanisms that will promote consultation with different groups of women and ensure that the process of delivery itself is transformative for women. Of particular concern are the needs of different groups of women living in rural areas.

3) Institutional mechanisms

The institutional mechanisms identified in the Bill do not make provision for ensuring equality in terms of gender representation. There is a need for the composition of the Housing Boards and the Housing Code to specifically accommodate the issue of gender equality.

² This submission endorses the comments of the Legal Resources Centre (Cape Town) on the draft Housing Bill dated 25 November 1996. The comment was formally submitted to the Director General of Housing, the Minister of Housing and the Director General of Land Affairs]

4) **Minimum standards**

The Bills needs to provide a framework for the progressive realisation of the right to adequate housing. This includes setting core minimum standards for the implementation of this right. The obligations of all organs of State, the private sector and other institutions involved in housing planning and delivery to comply with these provisions needs to be clearly stated.

5) **Disaggregation of data**

Provision for the disaggregation of data along gender lines needs to be incorporated into the Bill.

II. **THE GENDERED CONTEXT OF HOUSING**

Current housing policy and legislation in South Africa fails to acknowledge that housing provision was historically not only racially structured, but it was also structured along gender lines. Patriarchal, colonial and apartheid based policies affected women's access to housing, restricting their ownership of property in their own right as well as limiting their mobility and hence access to housing in certain areas.

Gender relations structure women's relationship to housing in two, inter-linked ways. Firstly, it shapes the way in which they experience the availability and provision of housing. At all levels of social, political and economic relations, unequal gender relations mediate women's access to and control over housing and result in gender discrimination.

At the level of the *HOUSEHOLD* women lack security of tenure within their households as title deeds are, in most instances, registered in a male partner or relative's name.

Within the *COMMUNITY*, under-representation on decision-making structures impacts on women's participation in decision-making, especially in group schemes. Many women lack information about their rights and have poor access to legal machinery.

At the level of the *MARKET* and financial institutions women are excluded due to lack of access to credit and lack of economic power.

At the *LOCAL, PROVINCIAL and NATIONAL GOVERNMENT* level under-representation, combined with institutional mechanisms and structures that are not gender-sensitive hamper women's effective representation and participation in governance.

Secondly, gender relations also structure women's relationship to housing in an additional, more complex way. The historically gendered nature of the sexual division of labour both within the labour market and external to it, results in women being viewed as responsible for household nutrition and health, childcare and all domestic work .

These responsibilities place women at the nexus of social, economic, political and environmental planning. For them, access to adequate housing is inextricably linked to access to a variety of services upon which their tasks are dependent. These include access to health care services, income generation, transport, schooling and recreational facilities for their children. The high incidence of violence against women also results in many women having particular needs for shelter and safe housing.

Housing is not only a residential site but for many women it is also the site of production. Planning and design of housing needs to take these socially prescribed roles into account.

A **CASE STUDY** of 35 rural towns on the West Coast in the Western Cape highlights this integrated nature of socio-economic rights. As part of the Department of Land Affairs Pilot Land Reform Programme District Planning, Surplus People Project, an NGO working within the land and rural development sector, undertook research on communities' development needs. In almost all cases, both men and women's groups listed housing as their most urgent need, as overcrowding has reached extreme proportions.

However, the women's groups prioritised transport, employment opportunities and lack of recreational facilities for their children as integrally linked to their need for adequate housing. For example, many groups stated that health care was not readily available and to take their children to a doctor, most care-givers must travel great distances at significant cost.

Access to, and control over housing in their own right has a particular significance for women due to the prevalence of gender violence. For many women their houses provide a measure of protection from some forms of violence whilst the nature of gender relations within the household makes them vulnerable to others.

The gendered nature of the issues of security and privacy also requires attention.

Women in Namaqualand appear to favour formal brick houses as opposed to other alternatives such as reed houses, which appear to be more environmentally appropriate given the weather conditions. Their reasons relate to security: brick houses provide a much better barrier against unwanted intrusion.

Many of the women in the West Coast and Namaqualand state that their houses are not big enough to accommodate their adult children who do not qualify for housing subsidies. These children often share the same room as their parents

(Surplus People Project, 1997).

The current subsidy system, in the absence of a variety of mechanisms that facilitate access to housing, may lock women into relationships against their choice.

A case study undertaken in a number of hostels in fishing towns on the West Coast reveals that some women forge and remain in relationships as a means of securing their housing needs (Surplus People Project, 1997).

Once these women's names have been entered into the National Housing Data base as having received the subsidy, albeit together with a partner, they are unable to apply for any further assistance. Should their relationship breakdown it is highly unlikely that their male partner would be in a position to pay them their share of the asset. The policy assumes

that these women will be protected by the legal system. Many women lack knowledge of their legal rights and have poor access to legal machinery. Reports of male hostel dwellers accessing the subsidy with a women partner in the urban area and then bringing a wife from the rural areas to live with him and forcing the 'urban partner' out have been reported (Development Action Group, 1997). In this way, both formal and informal polygamy may limit some women's ability to access their right to housing independently. Insufficient attention has been paid to the customary and social practices which mediate women's abilities to realise their right to adequate housing. Further research is needed in order to identify the policy and legislative mechanisms that will promote women's right to substantive equality in housing provision.³

Economic Obstacles

Women's marginalised position within the macro-economy mediates their access to housing in several ways. The distribution of income is substantially skewed along gender lines. This impacts on the effective demand for housing from women. Women's position within the formal economy further hampers their ability to participate equally within the housing market. Their dominance within the informal economy creates specific gendered needs with regard to accessing housing finance. Women's low income levels impact on their abilities to save, and this in turn affects their ability to participate within the banking sector.

Legal Obstacles

Discriminatory provisions within customary law and common law with regard to ownership and inheritance practices persist and affect women's equal access to housing. As noted above, further research is required in order to explore the many ways in which women's ability to access adequate housing is constrained by customary and common law. The Constitution states that 'everyone' has the right to access adequate housing. The current subsidy provisions exclude single men and women and only make provisions for those in a relationship or those with dependants. It also excludes parents with children if they are under the age of 21. This provision may have the unintended consequence of

³ Sunde and Hamman (1996) suggest the use of prescriptions on state transferred assets to ensure gender equality in titling practices, for example, the policy could insist that inheritance of the asset was bilinear.

excluding large numbers of young mothers who are particularly at risk in that they are highly unlikely to have access to credit or other means of leveraging resources.

Marginalised groups

The fact that women are not a homogenous group results in different groups of women having specific housing needs. Partners of migrant workers, women farm dwellers, women living under traditional forms of tenure, elderly women, disabled and chronically ill women require specific attention.

Rural Housing Needs

Part 1, Section 2 (d) (iv) of the Housing Bill states that National, Provincial and Local government shall promote the process of social, economic and physical integration in urban and rural areas. The Bill fails to give content to this principle, to identify how the needs of particularly marginalised groups living in these areas will be accommodated or how this integration will take place. It also fails to identify how urban and rural sectors will be integrated.

This reflects a failure in the White Paper on Housing Policy to address the issues of rural housing, the transformation of hostels to homes or the provision of secure housing to farm-dwellers. The Department of Housing recognises the need to integrate rural housing needs into the current policy. It is acknowledged that many rural dwellers do not own their own land and therefore the Department of Housing is currently developing mechanisms that will accommodate the tenure systems operating within rural areas and on farms to ensure that these dwellers are able to access the housing subsidy. These policy provisions need to take cognisance of the particular position of women living in the former homeland areas where communal tenure is the norm. Customary land tenure practices in these areas mitigate against women gaining access to land in their own right.

Similarly, the nature of tied housing on farms and the practice of not regarding a woman farm dweller as an occupier in her own right, needs to be addressed.

The Housing Bill needs to clearly state the obligation of the relevant levels of government to facilitate the development of on- and off-site housing developments for rural dwellers currently occupying private property. There is a need for intersectoral collaboration with

Department of Land Affairs to ensure security of tenure and that minimum standards governing adequate housing apply to housing developments in rural areas.

Institutional Obstacles

The absence of strong gender structures within the Ministry of Housing and the lack of gender policy objectives and indicators within the White Paper on Housing results in an inadequate conceptualisation of the gendered nature of housing provision.

Lack of gender sensitivity and effective representation of women on all levels of government and statutory bodies, but particularly local government level, hampers women's ability to participate in policy making as well as implementation. In the traditional tenure areas this is most extreme with women having very little power within structures of governance.

Communal ownership of property, whether administered by a tribal authority structure or a Communal Property Association, places women at risk of not participating equally in processes of decision-making about housing because of existing unequal gender relations at the level of the household and at the community level.

Mechanisms for ensuring that women achieve substantive equality in these systems need to be developed and enforced. Women's relative lack of power within the private and commercial sector adds to their weak bargaining position and inability to mobilise this sector in partnership with state initiatives.

Experience of the current measures for housing delivery, most notably, the housing subsidy to the value of R15 000.00 suggest that this subsidy, and the processes involved in applying for the subsidy are extremely cumbersome and do not take the reality of people's lives and household relationships into consideration.

The oft-cited example of the Victoria Mxenge Housing Scheme in Cape Town provides a useful example of the need for flexibility. This grouping has successfully applied to the Department to waive certain subsidy application procedures because they were inappropriate.

The group have lobbied for a special group institutional application to ensure that their members are eligible and have altered the eligibility criteria of the department. The department accepts that most women have a dependent, even if this is not a dependent in the legal sense.

One of the other factors that appears to have contributed to the success of this group in the building of houses is the fact that a large sum of money (R10 million) was made available to them so this group has not had the difficulties accessing credit experienced by many other groups.

It needs to be noted that this project's success also depends on the availability of labour within the group. The women have built their own houses. This model thus rests on the assumption that women have labour time or the money to buy labour.

III. LEGAL OBLIGATIONS AND COMMITMENTS

The Constitution

The achievement of equality and non-sexism are among the foundational values of the South African Constitution (s 1). The Bill of Rights specifically entrenches the right to substantive equality in which every individual has the right "to equal protection and benefit of the law". 'Equality' is specifically defined as including "the full and equal enjoyment of all rights and freedoms." Positive measures targeting groups who have been disadvantaged by unfair discrimination are permitted "to promote the achievement of equality". Direct or indirect discrimination against anyone on one or more grounds including race, gender, sex, pregnancy and marital status is prohibited [s 9].

These provisions must be read in conjunction with the right of access to adequate housing which the Constitution guarantees to everyone [s 26(1)]. The state is obliged to take "reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right." All legislative and other measures adopted by the State to achieve access to housing must respect the right to substantive gender equality entrenched in s 9.

Any direct or indirect discrimination (policy or law which in apparently neutral, but which has a discriminatory impact on certain individuals or groups) in the availability and allocation of housing to women would violate these constitutional provisions. Moreover women are entitled to benefit equally from any benefits such as subsidies or rights of participation extended in the housing sphere.

The state must ensure that women enjoy full and equal access to adequate housing. It is not enough for law and policy to guarantee identical treatment to women. In fact, “insisting upon equal treatment in circumstances of established factual inequality may well result in the entrenchment of that inequality.” [per O’Regan J in The President of the Republic of South African and another v. Hugo, CCT 11/96, *unreported*, at para. 87]. Legal provisions should be structured to take account of the real imbalance of power between men and women which is frequently sourced in the gendered division of roles and responsibilities in the household. As noted by Justice O’Regan,

“The responsibility borne by mothers for the care of children is a major cause of inequality in our society...The unequal division of labour between fathers and mothers is therefore a primary source of women’s disadvantage in our society.”
[The President of the RSA v Hugo, *supra*, para. 110]

While housing legislation and policy should not entrench or perpetuate gender stereotypes, special measures designed to assist women in overcoming the particular barriers they encounter in gaining and maintaining access to decent housing should be adopted.

A commitment to substantive equality also requires a contextual tailoring of legal provisions to be responsive to the varying housing situations and needs of different groups of women: e.g. rural women, women who are migrant workers or partners of migrant workers, women who are subject to domestic violence, women living with HIV/AIDS, women with disabilities, the young and elderly etc.

Finally, section 26(3) provides that “no-one may be evicted from their home, or have demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

International human rights law

a) The Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW)

The following provisions of CEDAW are legally binding on the South African government under international law as a result of its ratification of this treaty in January 1995:

Article 1 - definition of the term 'discrimination against women' - substantive equality, extension of state responsibility to the 'private sphere';

Article 2 - obligation on the State to eliminate discrimination in all spheres of life, including "discrimination against women by any person, organisation or enterprise"

Article 3 - obligation to ensure the full development and advancement of women)

Article 4 - provision for the adoption of special measures to increase *de facto* equality between men and women;

Article 13 - obligation on the state to eliminate discrimination against women in other areas of economic and social life in order to ensure to women equal rights to (amongst others) bank loans, mortgages and other forms of financial credit);

Article 14(2)(h) - obligation on the state to ensure adequate living conditions for rural women, particularly in relation to housing, sanitation, electricity and water supply, transport and communications; and

Article 16(1)(h) - no discrimination regarding rights to marital property).

b) The International Covenant on Economic, Social and Cultural Rights (1966)

This Covenant was signed by the President on behalf of South Africa on 3 October 1994, but not yet ratified.

These relevant provisions are:

Article 2(2) - guarantee of protected rights without discrimination on grounds of sex etc.;

Article 3 - undertaking of State to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the Covenant

Article 11 - the right of everyone to an adequate standard of living, including adequate food, clothing and housing, and the continuous improvement of living conditions.

c) The Istanbul Declaration on Human Settlements (June 1995)

The relevant provisions of the Declaration include:

Para. 8 - the commitment to active participation at all levels to ensure legal security of tenure, protection from discrimination and equal access to affordable adequate housing for all persons and their families.

Para. 9 quinquiens - acknowledging that women face particular constraints in obtaining adequate shelter and in fully participating in decision-making related to sustainable human settlements, including the persistent and increasing burden of poverty of women and discrimination against women. The empowerment of women and their full and equal participation in political, social and economic life, the improvement of health, and the eradication of poverty are essential to achieving sustainable human settlements.

Para. 24 - “We reaffirm our commitment to the full and progressive realisation of the right to adequate housing, as provided in international instruments.”

Para. 43 - “Adequate shelter means more than a roof over one’s head. It also means adequate privacy; adequate space; physical accessibility; adequate security; security of tenure; structural stability and durability; adequate lighting, heating and ventilation; adequate basic infrastructure such as water-supply, sanitation and waste-management facilities; suitable environmental quality and health related factors; and adequate and accessible location with regard to work and basic facilities: all of which should be at an affordable cost. Adequacy should be determined together with the people concerned, bearing in mind the prospect for gradual development. Adequacy often varies from country to country, since it depends on specific cultural, social, environmental and economic factors. Gender specific and age-specific factors, such as the exposure of children and women to toxic substances, should be considered in this context.”

Para. 44 - “...Within the overall context of an enabling approach, Governments should take appropriate action in order to promote, protect and ensure the full and progressive realization of the right to adequate housing.

These actions include, but are not limited to:

(a)

(b) Providing legal security of tenure and equal access to land among all, including women and those living in poverty, as well as effective protection from and redress for forced evictions that are contrary to the law, taking human rights into consideration, bearing in mind that homeless people should not be penalized for their status.”

d) Beijing Declaration and Platform for Action (1995)

Critical area of concern - Women and poverty

Strategic objective A1: “Review, adopt and maintain macroeconomic policies and development strategies that address the needs and efforts of women in poverty.

Actions to be taken by government:

Par. 60(n) - “Enable women to obtain affordable housing and access to land by, among other things, removing all obstacles to access, with special emphasis on meeting the needs of women, especially those living in poverty and female heads of household.”

e) Resolution of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (1997/19) on ‘Women and the right to adequate housing and to land and property’ [E/CN. Sub.2/1997/L.11/Add.1]

“...Recognising that women face particular constraints in securing and maintaining their right to housing because of the continued existence of gender-biased laws, policies, customs and traditions which exclude women from acquiring land, security of tenure and inheritance rights to land and property, and owing to women’s reproductive role, and that these constraints are particularly acute for women who also face discrimination on one or more of the other grounds, including race, ethnicity, creed, disability, age, socio-economic status and marital status...

1. Reaffirms the universal nature and existence of the right to adequate housing in terms of its relevance to all human rights with respect to women;
2. Encourages Governments to comply fully with all their international and regional obligations and commitments concerning the legally recognised rights of women to land, property, inheritance, adequate housing including security of tenure, an adequate

standard of living and the continuous improvement of living and housing conditions and to create opportunities for women to acquire training, education and information in all matters related to these rights;...”

IV. ANALYSIS OF PARTICULAR SECTIONS OF THE BILL

1. THE PREAMBLE

The Preamble commences with a recognition of the right of everyone to have access to adequate housing enshrined in section 26 of the Constitution. This is both welcome and appropriate. The Housing Bill seeks to give content to this right by defining its core constituent elements in greater detail as well as the roles and responsibilities of the various levels of government in giving effect to the right. However, in the second paragraph of the preamble housing is described as “adequate shelter” [that] fulfils a basic human need. This is inconsistent with section 26 of the Bill of Rights which refers to the right of access to “adequate housing”. It is accordingly recommended that, in line with the Constitution, the sentence be amended to read:

“Adequate housing fulfils a basic human need.”

In line with the Bill of Rights we also suggest that the preamble refer to the duties of all organs of the state to “*respect, protect, promote and fulfil*” the right of access to housing [see section 7(2), Bill of Rights]. Although this framework of duties is contained in section 2(1)(g)(i) of the Bill, it applies only to “the administration of any matter relating to housing development.” [Part I on ‘General Principles’]. Section 7(2) of the Bill of Rights is broader and applies to all conduct of the state as well as legislative and other measures taken by it. It is appropriate therefore that this fundamental framework of state duties also appear in the preamble.

The preamble should also acknowledge that disadvantaged women in South Africa face multiple constraints in gaining access to adequate housing. This fact inhibits the attainment of substantive gender equality in South Africa. Securing women’s full and equal enjoyment of secure and adequate housing is one of the fundamental objectives of this Act.

The preamble describes housing as “a product and a process” Equal participation by women and other groups in vulnerable and disadvantaged circumstances is vital to the housing delivery process at all levels.

2. DEFINITIONS

The Housing Bill provides an opportunity to define more precisely the scope and content of the right to have access to adequate housing enshrined in section 26 of the Constitution, and to provide an institutional framework for the realisation of this right. As noted above this socio-economic right is also integrally related to the right to equality in section 9 [see part III on ‘The Constitution’].

a. Critique of the present definitions

We accordingly submit that it is critical that the ‘definitions’ section of the Bill seek to define the key elements of ‘adequate housing’ in section 26. Some components of the right to ‘adequate housing’ recognised in international instruments are contained in the definition of ‘housing development’. However, this definition is convoluted and problematic, and does not clarify the scope of the right to adequate housing.

It is not clear what the phrase, ‘viable households and communities’ as used in this definition is meant to signify. ‘Households’ vary substantially both in the form they take, and in their composition over time. Often the interests of individual women are not sufficiently protected when the household or even communities are used as the unit for allocating rights and benefits in the housing process. It is therefore questionable whether this phrase is necessary or appropriate in the context of this definition. It would be preferable if the definition of housing development was more directly tied to the right of ‘everyone’ to have access to adequate housing as recognised in section 26 of the Constitution.

The phrase, ‘residential environments’ is unduly limiting. For example, housing is also frequently the site of productive activity for many women who work from home. ⁴

⁴ J. Theron, ‘On Homeworkers’ Occasional Paper 1/1996, Institute of Development and Labour Law, University of Cape Town

The significance of the distinction made between ‘public’ and ‘private’ residential environments is also unclear. The introduction of the concept of ‘privacy’ in the context of sub-paragraph (a) may also have negative implications for the protection of women against domestic violence committed in their homes. It would be preferable if the concepts of ‘habitability’ and ‘adequate space’ for inhabitants were substituted.

Core elements of the right to adequate housing

As noted by the Legal Resources Centre (Cape Town) in their comments on the Bill (25 November 1996) certain of the core elements of the right to adequate housing identified by the UN Committee on Economic, Social and Cultural Rights are missing from this definition. These elements were identified by the Committee in interpreting the scope of article 11 of the International Covenant on Economic, Social and Cultural Rights. [General Comment No. 4).⁵

The drafting of section 26 of the SA Constitution is closely based on this section. The courts and other bodies are enjoined by s 39(1)(c) to consider international law when interpreting the Bill of Rights. Seven core elements are identified.

These are -

- a) legal security of tenure;
- b) availability of services, materials, facilities and infrastructure;
- c) affordability;
- d) habitability;
- e) accessibility;
- f) location; and
- g) cultural adequacy.

These elements have substantive gender implications as set out below.

⁵ Sixth session, 1991, UN doc. E/1992/23, para. 8

The core elements as elaborated by the Committee missing from the definition of '*housing development*' are:

- *Accessible housing:*

Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources, and should be ensured some degree of priority consideration in the housing sphere.

Housing law and policy should take fully into account the special housing needs of these groups. Within many States parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal. In the South African context Black women constitute a disadvantaged group due to the intersection of both racial and gender-based discrimination. The State should identify women's access to land and housing as an area of priority consideration. Legislation and policy should also take into account the special housing needs of women in different circumstances. This also gives effect to s 9(2) of the Constitution.

- *Location of housing:*

Adequate housing must be in a location which allows access to employment options, health-care services, schools, child-care centres and other social facilities. Policy need to acknowledge the sexual division of labour whilst seeking mechanisms for challenging women's marginalisation and relegation to this realm. Planning and design of housing needs to take these socially prescribed roles into account.

- *Affordable housing:*

Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic need are not threatened or compromised. Steps should be taken by States to ensure that the percentage of housing-related costs is, in general, commensurate with income levels. This is obviously a critical factor affecting women's access to decent housing in South Africa. The increasing burden of poverty on women, particularly in female-headed households, is a key barrier impeding equitable access to housing by women.⁶

⁶ According to the World Bank/SALDRU study on Key Indicators of Poverty in South Africa de facto female-headed households have nearly a 70% poverty rate compared to 43,7% among families with a resident male head: October 1995 at p. 13

- *Culturally adequate housing:*

The way housing is constructed, the building materials used and the policies supporting these must be appropriate to the diverse lifestyles and cultural practices of South African women.

'Progressive realisation' of the right to have access to adequate housing

The state is under an obligation to take “reasonable legislative and other measures, within its available resources to achieve the progressive realisation” of the right of everyone to have access to adequate housing [Section 26(2), Constitution]. This obligation is binding on all levels of government, and all other relevant organs of state. The relevant organs of state are not obliged to achieve access to adequate housing by everyone overnight, and are afforded a degree of flexibility in the measures adopted to fulfil this right. However, they must be able to demonstrate that they are making reasonable progress in advancing access to housing by everyone. In order to do so, it is essential that an appropriate framework of rights and responsibilities for the various levels of government is clearly defined. In addition, the Bill should entrench the principle of an inclusive and participatory housing development process at all levels. The performance of all levels of government should be evaluated not only in terms of the number of housing units delivered. Of critical importance is the extent to which the process of delivery has been equitable and participatory, and whether groups in vulnerable and disadvantaged circumstances are guaranteed equal access to adequate housing. A high priority should be the full and equal participation of disadvantaged women in housing delivery processes.

The South African Human Rights Commission has a constitutional mandate to require relevant organs of state to provide it with information annually on the measures that they have taken towards the realisation of the socio-economic rights in the Bill of Rights, including housing - section 184(3).

The UN Committee has commented that “measures designed to satisfy a State party’s obligations in respect of the right to adequate housing may reflect whatever mix of public and private sector measures considered appropriate.” In essence the primary obligation on the state is to adopt “enabling strategies” that will ensure effective and equitable access to housing within the shortest possible period of time. [General Comment No. 4, para. 14].

The measures adopted by the state could include passing legislation which prohibits unfair discrimination in the private housing sector, the provision of incentives encouraging private financial institutions to extend credit to poor women, ensuring an adequate supply of affordable rental housing stock, the adoption of housing subsidy schemes, the provision of technical assistance and training in relation to housing construction, the upgrading of hostels etc.

In short, the state's role in ensuring access to adequate housing is not limited to the provision of housing subsidies. It implies the creation of a variety of institutions and mechanisms which enable individuals to gain access to housing that is appropriate to their particular needs and context.

b. Suggested amendments to the definitions section

In the light of the above, it is suggested that the definition section of the Bill be adapted as follows:

Insert definition of "adequate housing" along the following lines:

"Adequate housing" as referred to in section 26(1) of the Constitution means housing that -

- a) provides residents with a secure, safe place to live, legal security of tenure, sufficient space to ensure privacy, and protection against the elements;*
- b) is located in areas that is not harmful to the health or well-being of residents, and allows convenient access to employment, economic opportunities, transport facilities, health care, child care, educational and other social facilities;*
- c) provides residents with access to potable water, adequate sanitation, waste disposal, site drainage, domestic electricity supply and emergency services;*
- d) is appropriately designed and constructed to meet the diverse cultural and physical needs of different residents;*
- e) is affordable particularly to groups living in vulnerable and disadvantaged circumstances.*

This definition seeks to capture the seven core elements of adequate housing referred to above.

As the Legal Resources Centre argue in their commentary, the qualifications relating to progressive realisation and resource constraints are more appropriately incorporated in the sections of the Bill which define the precise nature of the obligations on the various levels of government [p. 12].

Insert a suggested definition of ‘housing development processes’

“Housing development processes” means the establishment and maintenance of equitable and participatory processes by all levels of government and other relevant organs of state through which everyone’s right to have access to adequate housing can be realised.

c. The scope of application of the Bill

Finally, it should be noted that the definitions and obligations imposed by the Bill limits access to housing to ‘citizens and permanent residents.’ This amounts to a limitation of the constitutional right of ‘everyone’ in s 26(1) to have access to adequate housing. This blanket exclusion does not appear to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom (s 36(1)).

The State should be under a duty to provide some form of housing assistance to persons who are refugees or migrant workers, including their families. The obligation to respect the right to gender equality remains applicable in this context.⁷

⁷ In this regard, we endorse the views expressed in this regard by the Legal Resources Centre in their Comments on the Bill of 25 November 1996, at paras. 22 - 28, pp. 6-7

3. GENERAL PRINCIPLES APPLICABLE TO HOUSING DEVELOPMENT - PART I

It is essential that this principle includes a clear commitment to substantive gender equality in all aspects of the housing development process.

The first obligation binding national, provincial and local government is to “give priority to the needs of the poor” [s 2(2)(a)]. The poor are an important disadvantaged group. However, ‘the poor’ are not a homogenous group. Unequal gender relations means that poverty has a differential impact on men and women.

Poverty also has differential impact on different groups of women - young women, elderly women, women with disabilities, women living with HIV/AIDS and female-headed households. In addition, access to adequate housing under the apartheid regime was historically racialised and gendered. This principle should therefore include an obligation to adopt special measures to address the housing needs of poor women, but taking into account the particular needs and circumstances of different groups of women.

It is recommended that section 2(1)(a) is amended to read as follows:

National, Provincial and local government must

- a) *Give priority to the needs of the poor in respect of housing development*
- b) *Ensure that the principle of substantive gender equality is reflected in all housing policies and programmes*
- c) *Prioritise the housing needs of poor women requiring redress due to past racially discriminatory laws or practices*
- d) *Adopt special measures to address the housing needs of particularly marginalised groups of women such as women living on farms and in rural areas, most notably, the former homeland areas.*
- e) *Accommodate the special needs of groups in vulnerable circumstances such as homeless children, the elderly, the disabled and persons living with HIV/AIDS*

Section 2(1)(d)(iii) places an obligation on the different levels of government to promote the provision of community and recreational facilities in residential areas. Access to health care services, child-care facilities and schools should also be promoted.

Many of the principles in this section should be examined more closely to expose their hidden gender implications. For example, sub-paragraph (j) commits all levels of government to “use public money available for housing development in a manner which stimulates private investment in, and the contribution of individuals to housing development” and (l) “encourage and support individuals to fulfil their own housing needs”. Women make up the majority of the poor and the pervasive discrimination against women by private institutions - banks, developers etc. is well-documented. This principle may therefore have an indirect discriminatory impact on women, particularly as anti-discrimination legislation is not yet in place. Without proper regulation and minimum standards for delivery set by government, women will continue to be disadvantaged in their access to housing.

Sub-paragraph (k) obliges all levels of government to “facilitate active participation of all relevant stakeholders in housing development”. Government should be placed under an express duty to ensure the full and equal representation and participation by women in the process. The housing development process should be designed in such a way that it recognises and redresses unequal gender relations at all levels of the process.

Paragraph (q) of the draft Housing Bill, 1996 (published in Govt. Gazette 17321, 12 July 1996) has been removed. It is recommended that a sub-section be reinserted that refers to the transfer of skills to women through all the phases of the housing development process (i.e. the planning phase, design, management and construction). Women are very poorly represented in the construction industry. It is imperative that programmes aimed at transferring skills specifically target women. It is only through a process which consciously addresses unequal gender relations that women will be ‘empowered’.

4. ROLE OF NATIONAL GOVERNMENT IN HOUSING DEVELOPMENT -PART II

Section 3(1) and (2) (a)(b) and (c) place an obligation on national government to set broad national housing delivery goals, to facilitate the setting of provincial and local government housing delivery goals and to monitor performance against “housing delivery goals and budgetary goals.” Equal access by women to housing should be specifically incorporated as a housing delivery goal binding on national, provincial and local governments.

We note with concern that the obligation for National Government to set uniform national norms and minimum standards applicable to housing development throughout South Africa is missing from the latest draft of the Bill (this provision was contained in section 3(d) of the draft Housing Bill, 1996). This is an important duty of National Government if the Bill is to provide a framework for the progressive realisation of the right to adequate housing. We submit also that the fundamental principle of gender equality should explicitly constitute a uniform national norm and minimum standard applicable to housing development throughout South Africa.

One of the powers allocated to national government is the power to “promote the effective functioning of the housing market” [s 3(3)(j) (ii)]. This power should also include the equitable functioning of the housing market, specifically the power to prevent and prohibit all forms of unfair discrimination on the grounds of race, gender, disability etc. (see section 9(4) of the Constitution).

The power to evaluate the performance of the housing sector is limited to “set goals and effectiveness parameters” [s 3(3)(i)]. Once more the qualitative criteria of measuring racial and gender equality in the allocation and distribution of housing are missing. These should be incorporated as primary evaluative criteria and measurable targets that will facilitate accountability.

The Minister of Housing has the power “to promote consultation on matters regarding housing development between the national government and representatives of civil society.” [s 3(2)(f)(i)]. A specific commitment to ensuring the equal participation of women in the consultation process is required to counteract women’s under-representation on decision-making structures at a number of levels: household, community, market, local

government [see the Introductory section above]. We would also prefer that consultation with civil society is treated as an indispensable element of the housing development process.

Section 3(4) refers to housing assistance measures which are deemed to be national housing programmes. We submit that the concept of a '*housing assistance measure*' should also be expanded to include the full range of measures adopted by the state to facilitate access to housing, particularly by vulnerable and disadvantaged groups. Apart from the measures listed under sub-paragraphs (a) to (d) of the definition, the following should be added:

"Housing assistance measure" any legislative or other measure which is designed to promote and advance access to adequate housing, including -

- a) measures to facilitate the extension of housing credit to disadvantaged groups;*
- b) measures to ensure an adequate supply of affordable rental stock;*
- c) measures that facilitate access to housing through a variety of appropriate tenure forms...*

5. NATIONAL HOUSING CODE - Section 4

The scope and purpose of the National Housing Code has been curtailed in the latest draft of the Bill. It is now envisioned that the Code will set policy, policy directives and administrative guidelines for the implementation and application of national housing development policy, which will be binding on all levels of government.

The important component for National Housing Code to set uniform norms and minimum standards is missing. Thus the opportunity to specify that the principle of substantive gender equality should constitute one of the primary uniform norms and standards binding on all levels of government and those private sector institution involved in housing delivery is also lost. As argued in the preceding section, the principle of substantive gender equality should constitute one of the primary uniform norms and standards binding on all levels of government. It should also bind those elements of the private sector involved in housing delivery.

To this extent the legislation fails to provide adequate core content to the constitutional right of access to housing..

It is accordingly recommended that the Bill specify that the National Housing Code must contain clearly defined norms and minimum standards that are applicable to the country as a whole. These minimum standards should include the attainment of substantive gender equality in all phases of the housing development process. A key criterion for evaluating the attainment of housing delivery goals should be the degree to which women, especially disadvantaged women enjoy access to housing

6. SOUTH AFRICAN HOUSING BOARD - Section 5

In order to ensure the representation of women on this Board it is recommended that a minimum of 33% of the members of the Board are women.

It is strongly recommended that this 33% should include women representatives from all sectors involved in housing delivery, including: professional planners, the construction industry, developers and civil society. Noting that numerical representation does not guarantee that gender issues will be addressed it is recommended that this provision be complemented with gender training on women's housing needs.

7. NATIONAL HOUSING DATA BANK AND INFORMATION SYSTEM - Section 6

The Bill obliges the Director-General to establish and maintain a housing data bank and associated therewith, a national housing information system. The objects of the data bank are -

- a) to record data for purposes of the development, implementation and monitoring of national policy in respect of housing development;
- b) to provide reliable information for purposes of planning for housing development;
- c) to enable the department to effectively monitor any aspect of the housing development process; and

- d) to provide macro-economic and other information for purposes of integrating housing policy with macro-economic and fiscal policy and the co-ordination of housing development with related activities and,
 - e) serve and promote housing development and related matters
- [s 6(2) (a) -(e)].

It is critical that the Bill specifically require the collection of data and statistics that are disaggregated by gender, race, age and geographical location. Access to this information is indispensable to enabling both the government and civil society to effectively monitor the attainment of substantive gender and racial equality in all aspects of the housing delivery process. It can also be anticipated that the South African Human Rights Commission will require disaggregated statistics and information from the Department of Housing in exercising its monitoring function in terms of section 184(3) of the Constitution.⁸

One of the commitments made by the South African government in the Beijing Declaration and Platform for Action (1995) is to “generate and disseminate gender-disaggregated data and information for planning and evaluation.” In terms of the Platform governments commit themselves to take the following specific actions -

- to “ensure that statistics related to individuals are collected, compiled, analysed and presented by sex and age and reflect problems, issues and questions related to women and men in society.” [para 209(a) under strategic objective H - Institutional mechanisms for the advancement of women]; and
- to “use more gender-sensitive data in the formulation of policy and implementation of programmes and projects” [para 210(d)].

⁸ Section 184(3) reads as follows:

“Each year, the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing [and other socio-economic rights].”

8. **ROLE OF PROVINCIAL GOVERNMENT IN HOUSING DEVELOPMENT - PART 3**

As provincial government is bound by the principles referred to in section 2 and by the National Housing Code it is essential, as argued above, that the commitment to substantive gender equality is incorporated both as a core principle and a criteria for evaluation in these provisions.

A provincial government must “when a municipality cannot or does not perform a duty imposed by this Act, intervene by taking any appropriate steps in accordance with section 139 of the Constitution to ensure the performance of such duty” (s 7(2) (f)). This obligation should also apply when local governments do not have the requisite capacity to ensure women’s equal participation in the housing delivery process and equal access to housing. The existence of minimum national standards incorporating the principle of substantive gender equality are also essential in this context.

9. **ROLE OF LOCAL GOVERNMENT IN HOUSING DEVELOPMENT - PART 4**

The Bill assigns local government a key role in housing delivery. As noted by the Legal Resources Centre in their comments on the Bill, the phrase “access to adequate housing opportunities” in section 9 (1)(a)(i) is inconsistent with the earlier definition of ‘housing development’ and with the constitutional obligation to ensure access to adequate housing [Comments of 25 November 1996, para. 33 - 34, pp. 9-10].

Local government is required to set housing delivery goals in respect of its area of jurisdiction [s 9(1)(b)]. These goals need to be consistent with the principles set out in Section 3 of the *Development Facilitation Act, 1995*. Relevant principles include:

- policy, administrative practice and laws should promote efficient and integrated land development
- development should promote the availability of residential and employment opportunities in close proximity to or integrated with each other
- development should be environmentally sustainable

- members of communities affected by land development should actively participate in the process of land development
- land development should result in security of tenure, provide for the widest possible range of tenure alternatives, including individual and communal tenure
- in cases where land development takes the form of upgrading an existing settlement, such development should not deprive beneficial home occupiers of homes or land, or where it is necessary for land or homes occupied by them to be utilised for other purposes, their interests in such land or homes should be reasonably accommodated in some other manner.

These goals must include equal access by women to adequate housing. Local government should also be under a specific obligation to ensure that women and their organisations participate fairly effectively in all decisions affecting housing delivery: e.g. design of housing, location, tenure provisions etc. Training programmes and housing service centres should also specifically target women as beneficiaries.

In terms of section 9(1)(a) of the Bill Local government must

- a) “ensure that -
- (i) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;
 - (ii) conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are prevented or removed;
 - (iii) services in respect of water, sanitation, electricity, roads, stormwater drainage and transport are provided in a manner which is economically efficient;”

Local government should be expressly obliged to ensure that the designation of land, the setting of health and safety standards for housing, the design of housing and the provision of services is appropriate to the needs of women in the community. A process of proper consultation with women affected by a housing development project is an essential pre-requisite to ensuring that the project is responsive to, and reflects their specific needs (e.g. in respect of security, location, fuel, water etc.).

Any municipality may participate in a national housing programme in accordance with the rules applicable to such programme by, *inter alia*, “promoting a housing development project by a developer” [s 9 2 (a) (i)] Echoing what has been argued above, it is important that the Bill expressly state that any municipality should facilitate equitable participation by women in the housing process and ensure that developers adhere to minimum standards with regard to the participation of women.

Key issues that should be addressed further in the Bill is that of the capacity and accountability of local government to deliver adequate housing in accordance with national uniform norms and minimum standards. Consideration should be given to mechanisms and criteria for increasing the accountability of local government in fulfilling its responsibilities. For example, there is no provision in the Bill for dealing with the failure by a municipality to timeously carry out a programme for which it has responsibility (see, for example, sections 15, 16 and 17 of the current Housing Act No. 4 of 1996 [the “current Act”]). Section 15 of the current Act provides, *inter alia*, that if the municipality fails to commence the carrying out of a scheme or construction of a dwelling within six months, the Minister may direct that the Commission may subsume the role of the municipality at the municipality’s expense. Section 16 provides mechanisms for recovery of money from a municipality which has not utilised all of the money advanced to it for the purposes for which it was made, failed to make reasonable progress or failed to comply with the approved details of the scheme. Section 17 of the current Act deals with access by the Department to relevant information held by the municipality.⁹ These mechanisms should also provide for appropriate intervention in the case of a failure by local government to ensure respect for the principle of racial and gender equality in the housing development process.

Finally, the Bill should clearly spell out the obligations of provincial and national government to assist and support local government in fulfilling their responsibilities in respect of housing development within their area of jurisdiction. This includes the

⁹ See Comments by the LRC on the Bill, 25 November 1996, paras. 44 - 47, p. 13 and 14

allocation of adequate financial resources and a shift in the focus of counsellor-training programmes towards gender sensitive project planning .

10. OMISSIONS FROM THE BILL

Evictions

The Bill should give further content to the concept of secure tenure as a key element of the right to adequate housing and to give effect to the constitutional guarantee in s 26(3). We thus recommend that the Bill include a chapter dealing with protection against arbitrary and unfair evictions.

This chapter should seek to define the “relevant circumstances” that should be taken into account by a court before ordering an eviction of persons from their homes or the demolition of homes [s 26(3) of the Constitution]. There should also be legislation which guarantees protection from arbitrary and unfair evictions similar to the Extension of Tenure Security Act. This legislation should also be consistent with relevant international law standards: see, for example, General Comment (No. 7) of the UN Committee on Economic, Social and Cultural Rights adopted under the Covenant on Economic, Social and Cultural Rights on 16 May 1997. The General Comment recognises that women are particularly affected by forced evictions “given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless.” (paragraph 11).

The expert guidelines further stipulate that:

“States should secure by all appropriate means, including the provision of security of tenure, the maximum degree of effective protection against the practice of forced evictions under its jurisdiction. In this regard special protection should be given to the rights of indigenous people, children and women, particularly female-headed households and other vulnerable groups. These obligations are of an immediate nature and are not qualified by resource related considerations”

11. CONCLUSION

The Housing Bill needs to provide a legislative framework that clearly defines the right to adequate housing in line with Constitutional and international human rights obligations. It should also set national standards for the realisation of the right, including ensuring women's full and equal access to adequate housing.

Unequal gender relations impact on the realisation of the socio-economic right to adequate housing in a number of ways and on several different levels. The experiences of women within some of the existing housing and development projects suggest that the emphasis on one policy mechanism, that is, the subsidy allocated to a household, results in the failure of the policy to accommodate the varying needs and circumstances of different groups of women. Policy and legislation should promote a range of mechanisms through which women can gain access to adequate housing appropriate to their particular needs. Finally, the principle of substantive gender equality should be integrated at all levels of the housing development process, and should be a key criteria for evaluating the achievement of housing delivery goals.

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