South African Institute of Race Relations NPC

Submission to the
Department of Justice and Correctional Services,
regarding the
Unlawful Entry on Premises Bill of 2022,

Johannesburg, 16th September 2022

Table of Contents **Page**

Introduction

The Department of Justice and Correctional Services (the Department) has invited interested parties to submit written comments on the Unlawful Entry on Premises Bill of 2022 (the Bill) by 16th September 2022.

This submission is made by the South African Institute of Race Relations NPC (IRR), a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial

goodwill. Its current objects are to promote democracy, human rights, development, and reconciliation between the peoples of South Africa.

The importance of proper public consultation

The Constitutional Court has repeatedly stressed that proper public participation in the law-making process is a vital aspect of South Africa's democracy. Relevant rulings here include *Matatiele Municipality and others* v *President of the Republic of South Africa and others*;[1] *Doctors for Life International* v *Speaker of the National Assembly and others*;[2] and *Land Access Movement of South Africa and others* v *Chairperson of the National Council of Provinces and others*.[3]

In these judgments, the Constitutional Court has elaborated on what is needed for proper public consultation. According to the court, citizens must be given 'a meaningful opportunity to be heard in the making of laws that will govern them'. They must also be given 'a reasonable opportunity to know about the issues and to have an adequate say'.[4]

A proper socio-economic impact assessment (SEIA) report on a proposed bill, as required by the SEIA system introduced in 2015 (see below), offers a particularly important way of helping the public to 'know about the issues', as the way that the Constitution requires. Yet no SEIA report has been attached to the Bill, making it more difficult for the public to understand the risks the Bill is attempting to counter and to make informed comments on its content. In the absence of a SEIA report, the time allowed for public consultation on the Bill has also been inadequate and too short to pass constitutional muster.

No proper SEIAS assessment

Since September 2015, all new legislation in South Africa has had to be subjected to a 'socio-economic impact assessment' before it is adopted. This must be done in terms of the Guidelines for the Socio-Economic Impact Assessment System (SEIAS) developed by the Department of Planning, Monitoring, and Evaluation in May 2015. The aim of this system is to ensure that 'the full costs of regulations and especially the impact on the economy' are fully understood before new rules are introduced.[5]

According to the Guidelines, SEIA analysis must be applied at various stages in the policy process. Once new legislation has been proposed, 'an initial assessment' must be conducted to identify different 'options for addressing the problem' and making 'a rough evaluation' of

[1] [2006] ZACC 12
[2] 2006 (6) SA 416 (CC)
[3] [2016] ZACC 22
[4] *Matatiele Municipality and others* v *President of the Republic of South Africa and others*; [2006] ZACC 12; *Doctors for Life International* v *Speaker of the National Assembly and others*; [2006 (6) SA 416 (CC)] and *Land Access Movement of South Africa and others* v *Chairperson of the National Council of Provinces and others*. [2016) ZACC 22; *Minister for Health and another* v *New Clicks South Africa (Pty) Ltd and others*, [2005] ZACC 14, at para 630
[5] Sections 1(c), 2, Constitution

their respective costs and benefits. Thereafter, 'appropriate consultation' is needed, along with 'a continual review of the impact assessment as the proposals evolve'.[6]

A 'final impact assessment' must then be developed that 'provides a detailed evaluation of the likely effects of the [proposed law] in terms of implementation and compliance costs as well as the anticipated outcome'. This final assessment, with its comprehensive assessment of likely economic and other costs, must be attached to a bill when it is published 'for public comment and consultation with stakeholders'.[7]

However, as earlier noted, no SEIA assessment of the Bill has seemingly been carried out. Nor has a final SEIA report been appended to the Bill to help inform the public and so empower it to 'know about' the issues raised by the Bill – and so have a reasonable opportunity to influence the decisions to be made on it.

This is despite the unprecedented number of land invasions that have been reported since 2020 (see *Ramifications of the Bill*, below). Increasingly, these land invasions threaten the rights of some 11.5 million homeowners, roughly 9.6 million of whom are black; the informal customary title enjoyed by millions more black families; and the ownership and other rights to land-based assets of untold numbers of natural and juristic persons.

That no SEIA report has been published makes it difficult to evaluate the adequacy of the Bill's provisions against a mounting threat. As earlier noted, the absence of a SEIA report also underscores the inadequacy of the public consultation process in relation to this Bill.

The Content of the Bill

Not all provisions of the Bill can be given full consideration in the limited period that has been allowed for public comment. Hence, only the most important and problematic clauses are highlighted below.

Clause 1: Definitions

"enclosed land": The definition provided may not adequately cater for mining land, including subterranean tunnels, and should be amended to bring such land within the ambit of the Bill. This is particularly important because, in many instances, the only crime for which illegal miners can be arrested and convicted is trespassing. [8]

"lawful occupier": This definition needs to be amended to include, at point (b), 'a person or persons who *lawfully* reside on the premises' (emphasis supplied by the IRR). Without the addition of the word 'lawfully', land invaders who have set up structures and start living in them could have the same protection against trespass as owners and others with legal rights of residence.

[6] *SEIAS Guidelines* p7
[7] Ibid
[8] Sibanye-Stillwater, 'Combating illegal mining', Fact Sheet 2020, p1

"premises": Again, this definition may not adequately cover mining land or portions of buildings and needs more thought. There is merit in the simple but comprehensive wording of the current Trespass Act of 1959, which prohibits people from entering 'any land or any building or part of a building' without the permission of the owner or lawful occupier.

Much of the language used in Clause 1 is ungrammatical and needs to be corrected: for example, "unoccupied premises" means a (sic) premises which is (sic) not physically occupied…

Clause 2: Application of the [Bill]

Clause 2(1): 'This [Bill] applies throughout the Republic with regards to the unlawful entry on a premises by an intruder, irrespective if the intruder, after unlawful entry, occupies the premises.'

Though this sub-clause is sometimes ungrammatical, it is otherwise reasonable. It is also important in that it seeks to clarify the (often controversial) relationship between its prohibition of unlawful entry on to premises and the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act of 1998 (the PIE Act).

As the title of the PIE Act confirms, this statute was intended not only to bar illegal and unjust evictions but also to prevent the unlawful occupation of land. However, since it came into force some 25 years ago, its provisions on illegal evictions have been very broadly interpreted – to the point where they now encourage illegal land invasions – while its limited provisions on the prevention of unlawful occupations have largely been disregarded.

The Bill offers a valuable means of strengthening the prohibition of unlawful occupation in the PIE Act. However, it needs more careful drafting to make sure that it achieves this objective, while the PIE Act itself also needs to be amended in various ways to counter the increasing incidence of land invasions (see *Ramifications of the Bill*, below).

Clause 2(1)(c): Under this sub-clause, the Bill does not apply to 'any labour tenant contemplated in the Land Reform (Labour Tenants) Act [of] 1996'.

In combination with the proposed repeal of the present Trespass Act of 1959, this wording would exempt labour tenants from the offence of unlawfully entering on to any private or public premises anywhere in the country. Such an outcome would be absurd.

It would also be absurd if the Bill were to exempt labour tenants from any offence if they were, for example, to enter unlawfully on to the private residences of their fellow labour tenants, or on to the private residence of the owner of the farm on which they live and work.

Striking the appropriate balance requires far more thought than the current wording of the Bill evinces. The Bill should thus be amended to make it clear that labour tenants have 'lawful reason' to access and be present on the land they have expressly been granted the right to use for residential, agricultural, or other purposes – but not on other land or premises.

Clause 2(1)(d): Under this sub-clause, the Bill does not apply to 'an occupier contemplated in (sic) Extension of Security (sic) Tenure Act [Esta] of 1997'.

Essentially, the same considerations apply, as this wording would likewise exempt Esta occupiers from any offence of unlawful entry on any private or public property anywhere in South Africa. Again, this would be an absurd result. In addition, a more appropriate balance needs to be struck between the rights and obligations of Esta occupierss vis-à-vis their fellow Esta occupiers and relevant farm owners.

Again, the Bill should be amended to make it clear that Esta occupiers have a 'lawful reason' to access and be present on the land they have expressly been granted the right to use for residential, agricultural, or other purposes – but not on other land or premises.

The other exemptions from the application of the Bill set out in Clause 2 need more careful evaluation too. The two examples outlined above (regarding labour tenants and Esta occupiers) have an obvious absurdity, but the other exemptions require an in-depth evaluation of the consequences, both intended and unintended, they are likely to generate. This evaluation is all the more necessary because no comprehensive SEIA report has been made available.

Clause 3: Unlawful entry on premises prohibited

As a general comment on the various sub-clauses contained in Clause 3, all need to be recast to some extent to avoid grammatical errors.

Sub-clauses 3(1) and 3(3) seem acceptable as they are, but sub-clause 3(2) needs a small amendment.

Clause 3(2) states: 'Any person found on or in a premises who is not a lawful occupier, or employee of a lawful occupier, and who does not have the express or implied permission by a lawful occupier is presumed to have unlawfully entered the premises.'

The main problem here lies in the reference to the '*implied*' permission of a lawful occupier. The word 'implied' introduces great uncertainty for it is sure to be interpreted in different ways at different times and may in practice make the sub-clause largely unenforceable. The word 'implied' should therefore be deleted.

The general common law rule is that no one may enter on to land or other premises without the express permission of the owner or lawful occupier, or without a warrant issued by the courts on due cause shown. The Bill should not contradict or undermine this core principle.

Clause 3(4): 'It is a defence to a charge under subsections (1) or (2) that the person charged reasonably believed that they had title to, or an interest in the premises that entitled them to enter the premises.'

This wording may be seen as incorporating an objective element, in that the person charged must have 'reasonably believed' he had some 'title' or an 'interest' in the premises that entitled him to enter them. However, it also introduces considerable subjectivity and vagueness, generating a real risk that the sub-clause will in practice be interpreted in different ways at different times. Such conflicting interpretations would contradict the doctrine against vagueness of laws and undermine the rule of law. This in turn would breach the founding provisions of the Constitution, which guarantee the 'supremacy' of the rule of law.

The Bill seeks to transform the objective test of a 'lawful reason', as contained in the current Trespass Act, into the inherently subjective test of a perceived 'interest' or 'title' in the premises that 'entitles' entry. These vague terms will greatly complicate the application of the Bill and make it difficult for the police to arrest trespassers who claim an 'interest' in the premises. They will also put a significant strain on the judiciary and make it hard for the courts to develop a coherent body of precedent on these issues.

Sub-clause 3(3) is also likely to incentivise yet more land invasions – even though these are already occurring at an extraordinarily damaging level and needs to be curtailed, not further encouraged.

Sub-clause 3(3) should therefore be deleted. Instead, the Bill should follow the current Trespass Act in stating that anyone who enters on to premises without the permission of the owner or lawful occupier is guilty of an offence 'unless he has lawful reason' for entering or being on the premises in question.

The test of whether he or she has 'lawful reason' is an objective one and can more easily be assessed in the light of the surrounding circumstances.

A practical example may help illustrate the point. Under the current Trespass Act, a trespasser is guilty of an offence 'unless he has lawful reason to enter' the relevant premises. If, for example, the premises are on fire and someone enters them without the permission of the owner to extinguish the fire, it will be a defence against the charge of trespassing to show that this was his reason for entry and that it was lawful.

The Bill must, however, be amended to take account of the Labour Tenants (Security of Tenure) Act and the Extension of Security of Tenure Act (Esta). The Bill should do so in the manner earlier outlined: by acknowledging that labour tenants and Esta occupiers have a

'lawful reason' to access or be present on the land they have expressly been granted the right to use for residential, agricultural, or other purposes – but not on other land or premises.

The PIE Act, as earlier noted, must also be amended to strengthen its provisions aimed at preventing unlawful occupations. In the interim, the Bill's important provisions mandating the police to arrest land invaders and other illegal intruders, even if they have erected housing structures and are occupying them, should be strengthened in the various ways outlined in this submission.

Clause 5: Methods of giving notice

The wording of this clause is reasonable in that it requires, not a plethora of notices that may in practice be difficult to afford or maintain, but rather 'a sign posted at near an ordinary point of access to the premises so that in daylight and normal weather conditions…[it] is (i) clearly visible…and clearly legible', whether by means of writing or graphic representation.

Clause 7: Duty to inform intruder of unlawful entry

Clause 7(1) states: 'As soon as it (sic) comes to the attention of the lawful occupier of premises, or an authorised person, they must request the intruder or intruders, unlawfully on the premises, to leave the premises immediately.'

Apart from its grammatical flaws, this sub-clause is impracticable and potentially dangerous to lawful occupiers and should be deleted.

Requiring a lawful occupier to announce himself or herself to the intruder 'as soon as' the intrusion 'comes to [his or her] attention' imposes an irrational and unreasonable burden on the lawful occupier.

Suppose, as is common, that the lawful occupier sees, from the footage of cameras mounted on the outside walls of a house, that armed intruders are moving through the garden. The lawful occupier's will naturally want to protect him- or herself in the best way possible, not make an announcement to the intruders that will draw attention to his or her presence and increase the risk that they will see him or her as a witness to be eliminated. Alternatively, the lawful occupier may choose to flee the premises by a back gate without ever having requested the intruders to leave.

The Bill seeks to rob property defenders of many reasonable steps they may prefer to take and pressurises them to put themselves in harms' way. This is neither rational nor reasonable.

Sub-clause 7(1) is unnecessary too. Sub-clause 3(3) already provides that 'a person who has been directed, either orally or in writing, by a lawful occupier…to leave the premises' and does not do so is guilty of an offence. The notice that must be given under Clause 5 is sufficient to inform intruders that their incursion is unlawful – and the lawful occupier should not be obliged to repeat this orally, at risk to his or her safety. In addition, police officers who

'go to the premises to remove the intruders' (under sub-clause 8(2) of the Bill) must start by 'calling upon the intruders to leave the premises…within a time specified', so intruders will in any event be informed of their need to leave before an arrest is carried out.

Clause 7(2): 'If the intruder or intruders does not leave the premises, or the lawful occupier or a person authorised by them are threatened in any manner, the lawful occupier, or authorised person must, without delay, request assistance from the authorised member of South African Police Service, as contemplated in Section 8(1), informing them of unlawful entry, the address of the premises, and the approximate number of intruders.'

The obligation to inform the police 'without delay' is irrational and unreasonable. The lawful occupier faced with intruders who either do not leave on request, or are threatening towards him or her, will generally want to take other immediate steps: including fleeing to a safe room or calling on security services or a neighbourhood watch for help. The Bill's requirement that he or she should phone the police instead is likely to add to the risk of his or her being attacked, injured, or even killed.

In addition, the Bill ignores the poor record of the South African Police Service (SAPS) in responding to phone calls. Recent research by the Official Opposition, the Democratic Alliance (DA), has found that only 44% of the 270 police stations that the DA phoned answered their phones at all. Another 40% of these 270 stations had faulty numbers or inoperable telephone lines, while the remaining 15% did not answer even after two minutes of ringing. What this means, in the words of Andrew Whitfield, DA shadow minister of police, is that 'desperate people in urgent need of their local police are being left to fend for themselves'.[9]

The situation is even worse in some provinces and in some particularly dangerous precincts. In the Eastern Cape, for instance, it was impossible to get through to 73% of the 70 stations the DA tested. In addition, nine of the stations the DA called appeared on the top ten list for murder by station. Yet 'six of them (66.6%)', adds Whitfield, 'either did not answer their phones or did not have a working phone line'. [10]

The obligation under the Bill for the lawful occupier to 'request assistance from the *authorised member*' of the SAPS (emphasis supplied by the IRR) is also irrational and unreasonable. Phoning 10111, where this is feasible, and telling the first police officer to pick up the call that a crime is taking place at a particular address should be enough – but it will not suffice under the current wording of the Bill.

Instead, the lawful occupier will have to wait to be put through to the (single) 'authorised member' empowered to respond to the unlawful entry under the Bill. All this while the

[9] https://www.politicsweb.co.za/documents/when-10111-just-rings-and-rings--andrew-whitfield

[10] Ibid

intruders are still present and the lawful occupier may be under threat of physical attack. This places an extraordinary and absurd burden on the lawful occupier, which is likely to be made even worse by the complex provisions of sub-clause 8(1) of the Bill.

Clause 8: Powers of police

This clause is best assessed under two sub-headings: the role of the authorised or designated member, and the Bill's instructions on the police response.

The role of the authorised or designated member

Clause 8(1)(a) states: 'For purposes of this section, "authorised member" means a suitably qualified and experienced member of the South African Police Service, authorised thereto by the National Commissioner…to perform, in addition to their normal functions and duties, such functions as are conferred or imposed on them by this [Bill], and shall notify all local authorities…concerned of every such authorisation, and of the name, rank and address of the authorised member concerned.'

Clause 8(1)(b) adds: 'If an authorised member is or becomes unable to perform…the functions of the Bill, the National Commissioner or a person authorised thereto, shall forthwith designate another member of the South African Police Service to act in their stead, either in general or in a particular case, and the member so designated shall be deemed to have been authorised in terms of paragraph (a) for the purposes contemplated in the said paragraph: Provided that after the designation of a member in terms of this paragraph, no further designation shall be made, except with the approval of the responsible member concerned.'

The wording of sub-clause 8(1)(a) is sometimes ungrammatical, while the requirements set out in sub-clause 8(1) as a whole are complex and difficult to interpret. To take but one example, it is not clear who must 'notify' all local authorities of each authorisation.

The implication, however, is that only a single police officer may be authorised under sub-clause 8(1) and that, if this individual is unavailable (say, because he or she is already busy with another matter), the police cannot respond to a call for help under the Bill until another member has instead been designated. If that designated member is also busy or otherwise unable to help, 'no further designation' can be made 'except with the approval of the responsible member concerned'.

Who is the 'responsible member' to which sub-clause 8(2) refers? The member first 'authorised', or the member thereafter 'designated'? Why should the approval of either member be needed before a further designation can be made and before the police can provide help against unlawful intruders under the Bill?

These clauses unduly limit the police response to unlawful intrusion under the Bill. If the authorised or designated member is not available but other active-duty police officers are on

hand, the Bill's current wording prevents the latter from responding to a call from a victim of an unlawful intrusion.

This wording must be changed to remove this limitation. All active-duty police officers should be trained and equipped to respond to unlawful intrusions so that lawful occupiers do not have to wait for help in the way the Bill currently envisages.

The Bill's instructions on the police response
Section 8(2) states: 'As soon as an authorised member or members are informed of the unlawful entry, they must without delay go to the premises to remove the intruders.'

Section 8(3) states: 'On arrival an authorised member must call upon the intruders to leave the premises, by obtaining their attention and in a loud voice order the participants to disperse and leave the premises within a time specified, taking with them any items brought on the premises and inform them that failure to adhere to the order will result in them being arrested.'

Section 8(4) states: 'If intruders already erected any form of housing on the premises and already occupy the erected housing, the authorised member or members must arrest them for unlawful entry on a premises.'

Though the grammar used sometimes needs correction, these provisions provide a welcome clarity on the relationship between the Bill and the PIE Act. They also make it clear that intruders cannot escape arrest and conviction for their unlawful entry simply by erecting shacks or other structures on the premises and moving into them.

Provided that National Instruction 7 of 2017, as issued by the SAPS (the Instruction), is either withdrawn or suitably amended to bring it into line with these sub-clauses, the Bill should put an end to current confusion among police officers as to how they must respond to unlawful entry.

The Instruction has contributed to this confusion by enjoining the police to guard against overzealous or unlawful intervention against unlawful intrusion. Such intervention, the document says, puts the SAPS 'at risk not only regarding civil claims resulting from injury to persons or damage to property,…but also negative publicity and loss of public confidence'.[11]

The Instruction nevertheless reminds police officers that trespassers must be arrested as soon as possible after a complaint of trespassing has been lodged. But it also enjoins them to ensure that the rights of a person charged with trespass are not protected by other legislation, including Esta and the PIE Act. And it simultaneously reminds police officers that they 'must

[11] Agri SA, Trespassing and Unlawful Occupation of Private Land, Guidelines, https://forestry.co.za/agri-sa-guidelines-on-trespassing-and-unlawful-occupation-of-private-land/

not misuse the mentioned legislation to avoid complying with their responsibilities in accordance with the Trespass Act'. [12]

Not surprisingly, this Instruction has significantly muddied the waters and hobbled the SAPS response to escalating land invasions and other unlawful intrusions on premises.

Clauses 8(2) to 8(4) of the Bill could greatly enhance the role the SAPS in limiting or putting an end to land invasions and other unlawful intrusions because these sub-clauses expressly provide that police officers 'must' go 'without delay to the premises to remove the intruders', that they 'must' call on the intruders to leave within a specified time or face arrest, and that they 'must arrest' intruders who nevertheless remain, even if those intruders have 'already erected any form of housing on the premises and already occupy the erected housing'.

These clauses could thus greatly help to give effect to the original purpose of Esta, which is to prevent farm labourers and other farm residents from being unjustly evicted from land they have expressly been granted the right to live on and use for various purposes. They could also help buttress the original purpose of the PIE Act, which is not only to prevent illegal and unjust evictions – but also to prevent unlawful occupations.

However, the current weaknesses in the wording of the Bill will prevent the measure from serving these purposes. Among other things, the Bill's insistence that only an authorised or designated member (as set out in sub-clauses 8(1)(a) and (b)) may respond to a call for help against intruders will mean that most police officers will be barred from responding – and will have to turn a deaf ear to urgent calls for their assistance under the Bill.

Most police officers, not being the 'authorised' or 'designated' member, will also be barred from acting on the Bill's instruction that intruders who have already erected housing structures and are occupying them must be arrested.

In short, there is a real risk that the positive changes the Bill seeks to introduce will be negated by provisions that are irrational, unreasonable, and impracticable.

Clause 9: Defences

Clause 9 states: 'A person may not be convicted of an offence under this [Bill] if the person's action or inaction, as applicable to the offence, was with –

(a) the consent of a lawful occupier of the premises or an authorised person;
(b) other lawful authority; or
(c) they reasonably believed that they had titled to or an interest in the premises that entitled them to enter the premises.'

[12] Ibid

This clause is again badly phrased, while sub-clause 9(b) is both meaningless and unnecessary. As regards sub-clause 9(c), the same considerations apply as earlier described in the context of sub-clause 3(4).

As earlier noted, this wording may be seen as incorporating an objective element, in that the person charged must have 'reasonably believed' he had some 'title' or an 'interest' in the premises that entitled him to enter them. However, it also introduces considerable subjectivity and vagueness, generating a real risk that sub-clause 9(c) will also be interpreted in different ways at different times, thereby eroding the rule of law.

As earlier warned, these vague terms will greatly complicate the application of the Bill and make it difficult for the police to arrest trespassers who claim an 'interest' in the premises. They will also put a significant strain on the judiciary and make it hard for the courts to develop a coherent body of precedent on these issues.

In addition, sub-clause 9(c), like its counterpart in sub-clause 3(3), is likely to incentivise yet more land invasions, even though these are already occurring at a high level and need urgently to be curtailed.

Sub-clause 9(c) should therefore be deleted. Instead, the Bill should follow the current Trespass Act in stating that anyone who enters on to premises without necessary permission is guilty of an offence 'unless he has lawful reason' for entering or being on the premises in question.

Suitable provisions to take account of labour tenants and Esta occupiers must again be included in the Bill, as earlier described. In addition, as earlier noted, the PIE Act must be suitably amended to achieve its key goal of 'preventing' unlawful occupation. In the interim, the Bill's provisions allowing the arrest of intruders – even if they already erected housing structures and are occupying them – must be applied in full, shorn of the various clauses in the Bill that would limit or prevent the police from fulfilling this obligation.

Clause 10: Penalties

Clause 10 states: 'A person who is guilty of an offense under this [Bill] is on conviction liable to a fine or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.'

These penalties are reasonable in general, provided the PIE Act is suitably amended to introduce far greater penalties for those who encourage unlawful occupation and land invasions – and even harsher penalties still for those (often criminal syndicates) who seek to profit from land invasions by purporting to 'sell' plots on invaded land.

Clause 11: Repeal of laws and transitional arrangements

Clause 11(1) states: 'The Trespass Act of 1959 is hereby repealed.'

This sub-clause is reasonable, as are sub-clauses 11(2) and 11(3).

However, additional sub-clauses should be added to confirm, for the avoidance of doubt, that the Bill does not in any way remove or weaken the lawful occupiers' rights to use reasonable force in self-defence and to call in the help against intruders of security firms, neighbours (whether organised in neighbourhood watches or not), relatives, friends, or anyone else of the lawful occupiers' choice.

These additional clauses should also clearly state that the Bill does not in any way amend the laws governing all relevant common law or statutory offences, including house-breaking, robbery, theft, assault, rape, and murder.

Ramifications of the Bill

The Bill is being drawn up in the context of spiralling land invasions over the past two years in particular, coupled with a mounting risk that invasions will increase even further in the light of other pending legislation and a recent short-sighted decision of the Cape Town high court.

The magnitude of land invasions in recent years

Between July 2020, when numerous unlawful land invasions commenced, and mid-May 2021, there were 1 177 attempted land invasions of state-owned land in the City of Cape Town alone. The Western Cape provincial administration had to spend R400m in protecting its property – revenues that might otherwise have funded the construction of 2 400 Breaking New Ground (BNG) houses.[13]

Before then, according to then mayor Dan Plato, the City of Cape Town had already lost some 360 hectares of land – the equivalent of 200 football fields – to land invasions over the previous two years.[14] In the Western Cape province, more than 2.5 billion rands' worth of public property was lost to illegal land invasions between 2020 and August 2022.[15]

In much the same period, more than 50 more informal settlements sprang up in the City of Cape Town, with much the same phenomenon evident in many other cities across the country. In Cape Town alone, as *Business Day* reports, 'between 30,000 and 40,000 new shacks sit on top of sand dunes, in winter wetlands, on railway reserves, on and between the tracks themselves, in nature reserves,…on land reserved for bulk sewerage works…and sandwiched into small pockets of public land adjoining public buildings and churches'.[16]

[13] https://www.gov.za/speeches/western-cape-human-settlements-land-invasion-24-may-2021-0000
[14] Anthea Jeffery, Paving the way for a land-grab free-for-all, *The Daily Friend*, 26 August 2022
[15] https://www.politicsweb.co.za/politics/govt-must-admit-it-has-no-plan-to-solve-illegal-la

[16] https://www.businesslive.co.za/bd/national/2021-04-12-fight-for-land-spills-out-of-cape-towns-backyards/?u

In addition, by December 2021 (when Cape Town was preparing for the summer tourist season), some 12 000 street people had erected tents and shacks along the city's highways and byways and on its sidewalks in some 350 'hot spots'. These numbers, though in the thousands, were small, however, compared to the hundreds of thousands of people involved in setting up new informal settlements.[17]

The national department of public works and infrastructure has also been badly affected, with around 1 300 government-owned buildings around the country illegally occupied, as minister Patricia de Lille said in answer to a parliamentary question in November 2021. Her department continues to pay rates and taxes on these properties but cannot raise revenue from them or use them in the way the state desires.[18]

Some of the cities affected by these illegal occupations include Bloemfontein (40 properties), Cape Town (134), Durban (540), Johannesburg (109), Kimberley (68), Mmabatho (117) Mthata (23), Mbombela (110), Polokwane (32), Gqeberha (101) and Pretoria (56).[19]

'It is very worrying that the amount of government properties that are illegally invaded is actually increasing on a day-to-day basis,' said Ms De Lille.[20]

The impact of land invasions

Land invasions in the City of Cape Town are often large and well organised. Stands are quickly pegged off, shacks are speedily put together, and sometimes pre-built structures are brought in and dropped directly on to the land. Some invasions have also led to violence, with 46 law enforcement officers injured and 17 official vehicles damaged by people resisting eviction in a four-week period starting in mid-July 2020.[21]

The City says it sympathises with the plight of the homeless but cannot tolerate land invasions, especially when these are so frequent, large, and orchestrated. These invasions threaten vital housing and infrastructure projects. They allow unlawful occupants to elbow aside law-abiding citizens waiting patiently on housing lists. They generate shack settlements so crowded – and often built on such unsuitable land – that services cannot easily be provided and water pollution is common. They also erode the value of land and deter the investments vital to growth and jobs.[22]

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[17] https://www.businesslive.co.za/fm/fm-fox/2021-12-02-the-homeless-cape-towns-unwanted-visitors/
[18] https://www.businesslive.co.za/bd/national/2021-11-21-de-lille-in-bid-to-reclaim-illegally-occupied-government-properties/
[19] https://www.businesslive.co.za/bd/national/2021-11-21-de-lille-in-bid-to-reclaim-illegally-occupied-government-properties/
[20] https://www.businesslive.co.za/bd/national/2021-11-21-de-lille-in-bid-to-reclaim-illegally-occupied-government-properties/

[21] Anthea Jeffery, Paving the way for a land-grab free-for-all, *The Daily Friend*, 26 August 2022
[22] Ibid

Under the PIE Act, owners and other lawful occupiers may seek court orders authorising the eviction of land invaders – but in practice such orders are difficult and costly to obtain. For the courts may order the eviction only if this is 'just and equitable' in all the circumstances. This in turn depends on the likely impact of the eviction on women, children, and the elderly – and often too on whether alternative accommodation is available for the occupiers.[23]
Dominic Steyn, What to do in the face of syndicated land invasions, Business Day 14 July 2022

According to Dominic Steyn, a partner in a law firm: 'These legally mandated considerations result in a logistical nightmare for the court, the property owner, and the relevant municipality. If there is no alternative accommodation readily available, the unlawful occupiers may not be evicted until it somehow becomes available.'[24]

Organised syndicates have learned to take advantage of PIE. Their business model, says Mr Steyn, is to 'force their way into occupied or vacant properties, forcibly evict tenants or owners, and put in place tenants of their choice'. This brings PIE into play and allows the syndicates to garner significant income from their illegal tenants while the ousted owners remain responsible for rates and other municipal charges.[25]

The syndicates brief lawyers to oppose the eviction applications brought before the courts and can drag the process out for many years. In Mr Steyn's experience, 'legal costs for the property owner can easily exceed R800 000 and are seldom recoverable'.[26]

The syndicates have long focused on hijacking buildings in central business districts, where they have pushed many owners into abandoning their assets. More recently, they have also begun hijacking residential properties in Pretoria – generally when owners are away.[27]

Even if eviction orders can be obtained from the courts, they are not always enforced – generating further intractable problems for owners or other lawful occupiers.

Residents of Macleantown near East London in the Eastern Cape, for example, allege that municipal officials and councillors are among the 'wealthy people' who are involved in grabbing land granted to them via a 1996 land claim – and that these officials are also now ignoring two eviction orders issued by the courts.

The original residents, who were removed under the Group Areas Act, won their land claim in the 1990s. As one of these residents, Twoboy Ngxota, recounts, claimants then returned to their land with the help of RDP houses provided by the state and financial compensation of

[23] Dominic Steyn, What to do in the face of syndicated land invasions, Business Day 14 July 2022
[24] Ibid
[25] Ibid
[26] Ibid
[27] Ibid

R23 000. Now, however, newcomers – people who were not among the original claimants – are fencing off large plots and building houses on them. Two court orders instructing their eviction have been obtained, but neither order has been enforced.[28]

The first court order was granted in January 2017 by the Eastern Cape High Court (Makhanda). But the Buffalo City Metro did not enforce the order, so the original residents went to court again after yet more dwellings were erected on their land. In August 2021 the Makhanda high court instructed the City to enforce the 2017 order, but by February 2022 this had not been done. Though the City denies this, the original residents claim the court orders are being overlooked because officials and municipal councillors are involved in the land grab and are among the owners of the illegally acquired plots.[29]

To cite another example, an eviction order handed down by the Eastern Cape High Court (Gqeberha) in September 2021 was ignored by residents of the Bayland informal settlement, who had built directly under power lines and thereby created a significant safety hazard. The court ordered the sheriff, with the help of the police, to evict the residents after 14 days and demolish their shacks – but the occupiers responded that 'they were going nowhere'. They claimed the court judgment was unfair, as it did not provide clarity as to why the community had to vacate the land. But the political head human settlements in the metro, Masixole Zinto, said Bayland residents were simply intent on 'ignoring the law and were continuing to build shacks, despite the order to stop'.[30]

Given the difficulty in obtaining (and sometimes enforcing) court orders, it is important that the common law also provides a remedy against land invasions through the rules of 'counter-spoliation'. These rules allow people to take back their property without a court order, but only while the process of dispossession is still under way. They must act quickly, thus, and before those busy taking their property have completed or 'perfected' their unlawful possession.[31]

In July 2022, however, the Western Cape High Court (Cape Town) handed down a judgment which narrowed the window during which counter-spoliation may be used. According to this ruling, the City of Cape Town may use counter spoliation to turn land invaders away from municipal land which they are still 'seeking to unlawfully occupy'. But once the invaders have 'gained access to the land unlawfully and are in the process of erecting structures' on it, whether counter-spoliation is still available depends on how far their construction has got. [32]

[28] Legalbrief 4 February 2022
[29] Ibid
[30] https://legalbrief.co.za/diary/legalbrief-today/story/bayland-occupiers-vow-to-fight-eviction-order/
[31] Anthea Jeffery, A high court judgment that invites more land invasions, *The Daily Friend*, 28 July 2022
[32] Ibid; see also https://www.saflii.org/za/cases/ZAWCHC/2022/173.html

If the unlawful occupiers are 'merely putting pegs in the ground', their possession is not yet perfected. But if they are 'putting on the last wall and/or roof', then the taking of possession has been completed and counter spoliation is no longer available.[33]

The high court reiterated that counter spoliation is valid and constitutional in 'narrow' circumstances. However, said the court, it can never be used to evict land invaders or to demolish their informal structures, whether these are occupied at the time or not. [34]

The ramifications of these rules

In severely limiting the counter spoliation remedy, the Cape Town high court seemed to think it was acting in the best interests of the poor and marginalised. But its ruling effectively ignores the constitutional guarantee of property rights and brushes away the 'supremacy of the rule of law' as a founding value of South Africa's democracy.

It also gives short shrift to the roughly 11.5 million families – some 9.6 million of whom are black – that own formal houses, as well as the millions more black households with informal title to customary plots, mainly in former homeland areas.

Yet the great majority of these individuals cannot afford costly court cases to obtain eviction orders under PIE. The Cape Town high court ruling reduces their options even further and is likely to leave most with no remedy at all against the land invasions that the venal and unscrupulous, in particular, will be encouraged to intensify.

Under the rules, as they now stand, land and housing could increasingly pass to those most willing to use force against existing owners and occupiers. In this situation, the poor will find themselves particularly vulnerable to the destructive effects of this descent into lawlessness.

The incremental erosion of property rights in South Africa is already a key factor in rising joblessness and attendant poverty. Without secure property rights, the country cannot attract direct investment, speed up growth, or expand employment.

Nor can South Africa hope to join the ranks of those nations that strongly uphold property rights, limit the dirigiste interventions of the state – and have average incomes, even among the poorest 10% of their populations, that are more than eight times higher than the paltry incomes of the poorest 10% in countries where property rights have little meaning.[35]

According to the Fraser Institute's *Economic Freedom of the World: 2022 Annual Report*: [36]

> Nations in the top quartile of economic freedom had an average per-capita GDP of $48,251 in 2020, compared to $6,542 for nations in the bottom quartile (PPP constant 2017, international $). In the top quartile, the average income of the poorest 10% was

[33] Ibid
[34] Ibid
[35] https://www.fraserinstitute.org/sites/default/files/economic-freedom-of-the-world-2022-exec-summary.pdf
[36] Ibid

> $14,204, compared to $1,736 in the bottom quartile (PPP constant 2017, international $)…. In the top quartile, 2.02% of the population experience extreme poverty (US$1.90 a day) compared to 31.45% in the lowest quartile. Life expectancy is 80.4 years in the top quartile compared to 66.0 years in the bottom quartile.

These latest findings confirm a low-established pattern in which the value of property rights in promoting prosperity for all – and limiting the incidence of extreme poverty – is clearly apparent.

Further risks from two pending bills

Under the Expropriation Bill of 2020, currently before the portfolio committee on public works and infrastructure for adoption, 'nil' compensation may be paid on the expropriation of land which the owner has 'abandoned…by failing to exercise control over it'.[37]

This provision will incentivise corrupt cadres – like those fingered in the Macleantown land grab, for example – to promote land invasions which the municipality (in its capacity as an 'expropriating authority') can then use to expropriate the invaded land for 'nil' compensation on the basis that the owners (in this case, the successful land claimants earlier dispossessed under the Group Areas Act) have 'failed to exercise control over it'.

The Expropriation Bill must also be read in conjunction with the Land Court Bill of 2021, also currently before Parliament.

The Land Court Bill is intended to oust the jurisdiction of the ordinary courts over all land-related disputes, including (in time) those arising under the Expropriation Bill. Whereas the ordinary courts must apply long-established rules of evidence and civil procedure aimed at ensuring impartial adjudication based on tested and reliable evidence, the Land Court is instructed by the Bill to circumvent those rules.

This Bill also empowers the state to intervene in every dispute, which undermines the principle of equality before the law and is likely to add to the costs and complexities of Land Court cases. In addition, the Bill effectively allows Land Court judges to refer disputes to compulsory arbitration before decision-makers not of the parties' choosing and potentially not sufficiently impartial.

In cases heard by the Land Court itself, two lay assessors may be appointed not simply to advise the presiding judge, but to override his or her decisions on questions of fact (though not questions of law). Questions of fact could include whether a land invasion has indeed resulted in a 'failure to exercise control', which would then warrant 'nil' compensation on its expropriation.

[37] Clause 12(3)(c), Expropriation Bill of 2020

In combination with PIE requirements and the Cape Town high court's narrowing of the window for counter spoliation, the Expropriation Bill and the Land Court Bill will increase the scope for criminal syndicates to abuse the rules. They will also incentivise land invasions still further and greatly increase the risk, as Ms de Lille has said, that 'the amount of government – [and other] – properties that are illegally invaded [will continue to] increase on a day-to-day basis'.[38]

The way forward

Given the already high number of land invasions in the country – and the risk that these will escalate once the Expropriation Bill and the Land Court Bill come into operation – the Unlawful Entering on Land Bill of 2022 is potentially an important countervailing measure against the current trend.

As earlier noted, subclauses 8(2) to 8(4) of the Bill are an important step forward and could significantly enhance the role of the police in countering land invasions. These sub-clauses remove potential confusion about police powers by expressly providing that police officers who are called on to deal with an unlawful intrusion: [Clauses 8(2) to 8(4), Bill]

- 'must' go 'without delay to the premises to remove the intruders',
- 'must' call on the intruders to leave within a specified time or face arrest, and
- 'must arrest' intruders who nevertheless remain, even if those intruders have 'already erected any form of housing on the premises and already occupy the erected housing'.

These important provisions should not be contradicted or undermined by other instructions to the police. It is thus vital, as earlier noted, that Instruction 7 of 2017 should be rescinded or amended to remove any confusion about the obligations resting on the SAPS under sub-clauses 8(2) to 8(4) of the Bill.

Another apparent obstacle will also need to be removed. As Mr Steyn has pointed out, the SAPS has confronted so many civil claims for unlawful arrest that it has now issued a standing directive limiting arrests to serious (Schedule A) offences. Trespass currently does not qualify, as it is a minor (Schedule B) offence.

According to Mr Steyn, the police will now act on a trespass complaint only if the lawful occupier obtains a court order directing them to carry out their duties and effectively indemnifying them from future damages claims.

Even where such court orders have been issued, moreover, police officers often find excuses not to intervene, saying they lack the capacity to assist. Some who respond in this way may be afraid of retaliation by the syndicates often behind land invasions. Some, says Mr Steyn,

[38] https://www.businesslive.co.za/bd/national/2021-11-21-de-lille-in-bid-to-reclaim-illegally-occupied-government-properties/

are ‘simply colluding with the property hijackers’. This points to how greatly police discipline and probity have deteriorated in recent years.

Police discipline and probity must therefore be restored, while the directive that limits arrests to serious (Schedule A) offences must be withdrawn.

There are also major problems in the wording of the Bill, all of which – as earlier identified in this submission – must be addressed before the measure proceeds. All grammatical errors must be corrected, while the following clauses, in particular, must be amended or deleted:

- sub-clause 7(1), requiring lawful occupiers to request intruders to leave, must be deleted since this obligation could put people in danger and is unnecessary, for the reasons earlier outlined;

- sub-clause 8(1) must be amended, so that all active-duty police officers – not merely authorised or designated members – may respond to unlawful intrusions in the way set out in sub-clauses 8(2) to 8(4) and are trained, authorised, and equipped to do so;

- sub-clauses 3(4) and 9(3) must be amended so that the defence available to unlawful intruders is not a vague ‘belief’ in their ‘title’ or ‘interest’ but rather a ‘lawful reason’ to enter the premises. As earlier noted, appropriate wording will be needed here to make it clear that labour tenants and Esta occupiers have a ‘lawful reason’ to access or be present on the land they have been granted the right to use, but not on other land or premises. The PIE Act must also be amended to strengthen its provisions aimed at preventing unlawful occupations and ensuring that those in breach of these clauses are not seen as having ‘a lawful reason’ to enter on the premises in issue.

In addition, given widespread public concern that the Bill will require people to give their burglars ‘tea and bikkies’ while they call the police and everyone (supposedly) waits quietly for the SAPS to arrive,[39] the Bill must expressly state that it does not remove the right to use reasonable force in self defence, that it allows lawful occupiers to call in the help of security firms and anyone else, and that it does not in any way alter existing common law and statutory rules against robbery, theft, assault, murder and other crimes.

South African Institute of Race Relations (NPC) **16th September 2022**

[39] https://www.politicsweb.co.za/opinion/the-make-your-burglar-some-tea-and-bikkies-bill