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**Comments on proposed  
Unlawful Entry on Premises Bill, 2022**

To:

**Director-General: Justice and Constitutional Development**

c/o Ms A Botha

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## Introduction

On 12 August 2022, the Department of Justice and Constitutional Development gazetted a notice<sup>1</sup> which invites interested parties to submit written comments on the proposed Unlawful Entry on Premises Bill, 2022 which is available on the Department's website.<sup>2</sup>

The Department's *Gazette* notice states that comments on the proposed measure must be submitted by 16 September.<sup>3</sup>

The Free Market Foundation comments on the proposed measure as follows.

(We refer to the measure as “the proposed Bill,” “the draft Bill” or “the Bill”.)

## Headline observations

The proposed Bill purports to prohibit only unlawful “*entry*” on premises. (In contrast, the current Trespass Act also prohibits unlawful *presence* on premises.)

But the text of the Bill reveals that it would criminalise, not only unlawful “*entry*”, but also unlawful *presence* on premises. The Bill would in effect create six offences.

The draft Bill published for comment is, with greatest respect, a fairly sketchy first attempt. Besides containing ungrammatical and ambiguous clauses, it includes some unconstitutional presumptions, and an undesirable insistence that the police must arrest alleged intruders who erect and occupy housing on the premises.

The Department of Justice has not published the required Socio-Economic Impact Assessment of the draft Bill.

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<sup>1</sup> Gen N 1219 of 2022 (*Gazette* 46705 of 12 Aug). Dept of Justice and Constitutional Development: “Invitation for public comments: Unlawful Entry on Premises Bill, 2022”.

<sup>2</sup> At <http://www.justice.gov.za> .

<sup>3</sup> I.e., by Friday 16 Sep 2022.

## Summary

Trespass is a wrong to possession, not to ownership. An action for trespass can be maintained by a person in lawful occupation or possession of the property.

At common law, mere trespass on its own was not a crime (but unlawful entry for an illicit purpose, such as to steal, was a crime).

Statutes prohibiting trespassing were enacted around the turn of the 19th century in the four colonies. The nature of the prohibition varied from jurisdiction to jurisdiction.

The Trespass Act, 1959 brought uniformity. It is said to have been derived from the Orange Free State enactment. The Trespass Act, 1959 stipulates that any person who enters or is on any land without permission of its lawful occupier, or of the owner or person in charge if the land is not lawfully occupied, is guilty of an offence unless he has lawful reason to enter or be there. A person convicted is liable to a fine of up to R2 000 or imprisonment for up to two years, or both. The court convicting him may order his ejection.

The proposed Unlawful Entry on Premises Bill, 2022 would repeal the Trespass Act, 1959. The Bill does not use the word “*trespass*”, but seeks to prohibit “*unlawful entry*.” It states that every person who unlawfully enters premises commits the offence of unlawful entry.

The Bill, ungrammatically, refers to “a premises,” as if the word “premises” is singular in number. But the word “premises” is always treated as plural in number.

The Bill refers to plural numbers of persons, unnecessarily. It stipulates that a lawful occupier means one “*or more persons*” who occupy premises, and includes a person “*or persons*” who reside on the premises. These references to plural numbers of persons are superfluous. Under the Interpretation Act, 1957, words in laws in the singular include plurals.

The Bill's definition of "*lawful occupier*" is confusing. It defines a lawful occupier as a person who physically "*occupies*" premises, but also that a lawful occupier includes "*the owner*." It is unclear if this includes an owner who does not occupy the premises.

The "lawful occupier" definition is also confusing in including persons who "*reside on*" the premises. It is unclear if residing on premises differs from occupying them and how. Including persons residing is wide enough to include persons residing without permission.

The definition is confusing in stating that a "lawful occupier" includes someone who has control over persons "*allowed to enter*". It is unclear if this includes someone who has control over persons "*not allowed to enter*".

The Bill creates six offences. First, a person who unlawfully enters premises commits the offence of unlawful entry. Second, a person "*found on or in*" premises without permission commits an offence. Third, a person directed by a lawful occupier to leave who does not do so commits an offence. Fourth, it is an offence to remove or alter a notice sign posted at a point of access to the premises. Fifth, failure to adhere to a police officer's order to leave is an offence. Sixth, erecting and occupying housing on the premises is an offence.

The Bill unconstitutionally presumes that a person found without permission on premises entered unlawfully. This means that a person without permission to be on premises (which, in terms of the Bill, is not an offence) is presumed to have committed the offence of unlawful entry. The effect is that innocent persons can be charged, brought before court and required to lead evidence to assert their innocence, in breach of the right to be presumed innocent. The Bill of Rights declares that an accused person has the right to be presumed innocent, to remain silent, and not to testify. This clause, that a person found on premises without permission is presumed to have unlawfully entered, should be deleted.

The Bill, likewise unconstitutionally, states that the police must arrest intruders who have erected and occupy housing on the premises, for unlawful entry on the premises. This means that someone who erected and occupies housing on the premises (which will not be an offence) is presumed to have committed the offence of unlawful entry on the premises. Such a person too may be required

to lead evidence to assert their innocence, in breach of the right to be presumed innocent. This clause (that intruders who erected and occupy housing on the premises must be arrested for unlawful entry) should be removed from the Bill.

Requiring the “*arrest*” of housing occupants violates their dignity and right to privacy. As said, if alleged intruders have erected and occupy housing on the premises, the police “*must arrest them.*” This insistence, that the police “*must arrest*” such persons, violates their fundamental rights to dignity, personal freedom and privacy enshrined in the Bill of Rights. The purpose of an arrest is to bring the person arrested before court for trial. But arrest is a serious inroad into the freedom and privacy of the person arrested, and should be sparingly exercised. When a matter is not urgent and the person charged has a fixed and known address, it is desirable instead for the prosecutor to secure a person’s attendance in court by issuing a summons to him or her to appear in the court. If the accused fails to appear in court, the court can then issue a warrant of arrest. This clause requiring the “*arrest*” of persons who erected and occupy housing on the premises should be deleted of the Bill.

The Bill’s use of the term “*intruder*” is circular and unnecessary. The Bill states that it applies to “*unlawful entry*” of premises “*by an intruder,*” whom it defines as a person who “*unlawfully enters*” premises. This is circular and means that the Bill applies to “*unlawful entry*” of premises by a person who “*unlawfully enters*” the premises. The Bill’s use of the term “*intruder,*” to refer to a person alleged to have unlawfully entered premises, is unnecessary. The Bill’s main provisions (which prohibit unlawful entry, list defences to a charge of unlawful entry, and provide for penalties) do not use the word “*intruder*”.

The proposed Bill is three times longer than the existing Trespass Act.

The Department of Justice has not published Socio-Economic Impact Assessment of the draft Bill. The Department of Planning, Monitoring, and Evaluation has outlined the procedure to develop SEIAs. If a state department frames a draft law, it should develop a Socio-Economic Impact Assessment evaluating the draft law’s likely costs, benefits and risks. The department concerned should then publish the draft law for comment together with that SEIA.

## Trespass a civil wrong

Trespass is essentially a wrong to possession, not to ownership as such. An action for trespass can be maintained by any person in lawful occupation or possession of the property at the date of the trespass. An action for damages for trespass is in effect an action in delict for damages arising out of the wrongful disturbance of another's possession of<sup>4</sup> property. The trespass usually consists<sup>5</sup> of unlawful entry on property in possession of someone else.<sup>6</sup>

An action for damages for trespass may be brought, not only by the owner of the property in respect of any damages sustained by him as a result of such trespass, but also by the lawful possessor and occupier of the property in so far as he may have suffered damages as a result of the alleged trespass.<sup>7</sup>

## Whether trespass a common-law crime

At common law, mere trespass on its own was not a crime.<sup>8</sup> Trespass *per se* was not a criminal offence.<sup>9</sup>

(However, unlawful entry *for an illicit purpose*, such as to steal, was treated as a crime in Roman and Roman-Dutch law.<sup>10</sup>)

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<sup>4</sup> Movable or immovable.

<sup>5</sup> As regards immovables.

<sup>6</sup> *Van Rensburg's Estate v Fischat* 1938 EDL 65 at 69 per Gane J, Gutsche J concurring.

<sup>7</sup> *Smith v Saipem* [1973] 4 All SA 371 (T) 374–375 per Trengove J.

<sup>8</sup> *The Queen v Tamplin and others* (1886-1887) 4 HCG 241.

<sup>9</sup> *The King v Oss* (1903) 17 EDC 19 per Sheil J at 21.

<sup>10</sup> *R v Schonken* 1929 AD 36 at 45 per De Villiers ACJ (Curlewis and Stratford JJA and Hutton AJA concurring).

## **Statutes preceding 1959 Trespass Act**

Statutes prohibiting trespassing were enacted around the turn of the 19th century in the Cape of Good Hope, Natal, Orange Free State and Transvaal.<sup>11</sup>

The nature of the prohibition varied from jurisdiction to jurisdiction.<sup>12</sup>

The series of statutes at the turn of the century explicitly penalising trespass on land has been attributed to increased vagrancy and squatting resulting from people being dispossessed of land through conquest.<sup>13</sup>

## **Trespass Act, 1959**

The Trespass Act, 1959<sup>14</sup> brought uniformity.

The substance of the 1959 Act is said<sup>15</sup> to have been derived from the Orange Free State enactment,<sup>16</sup> which prohibited entry or presence on land without lawful reason and without the knowledge or consent of the owner.

The Trespass Act, 1959 stipulates<sup>17</sup> that any person who, without the permission of —

- (a) the lawful occupier of any land;<sup>18</sup> or

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<sup>11</sup> Cape of Good Hope: Police Offences Act 27 of 1882 s 7(12), Trespassers Act 23 of 1906 ss 1–4, 7; Natal: Law with regard to Trespass on Private Lands 13 of 1874, Act to amend the law w.r.t. trespass 6 of 1897; OFS: Wet op Overtreding op Privaat Eigendom 11 van 1899, Police Offences Ordinance 1902 s 24(13); Transvaal: Crimes Ordinance 26 of 1904 s 9.

<sup>12</sup> JLR Milton “Trespass” in Milton and Cowling *South African Criminal Law and Procedure* vol III “Statutory Offences” par J1-2 Juta 1988 (cited in P Hathorn “The policy implications of amending or abolishing the Trespass Act 6 of 1959” 30 Nov 1992 (South African History Online, <https://www.sahistory.org.za/sites/default/files/archive-files2/mem19921130.037.033.003.pdf>).

<sup>13</sup> JLR Milton “Trespass” in Milton and Cowling *South African Criminal Law and Procedure* vol III “Statutory Offences” par J1-2 supra (cited in P Hathorn “The policy implications of amending or abolishing the Trespass Act 6 of 1959” 30 Nov 1992 (supra).

<sup>14</sup> Trespass Act 6 of 1959.

<sup>15</sup> P Hathorn “The policy implications of amending or abolishing the Trespass Act 6 of 1959” (supra).

<sup>16</sup> Wet op Overtreding op Privaat Eigendom 11 van 1899.

<sup>17</sup> Trespass Act, 1959 s 1(1).

<sup>18</sup> Or any building or part of a building.

(b) the owner or person in charge of any land<sup>19</sup> that is not lawfully occupied by any person, enters or is upon such land<sup>20</sup> is guilty of an offence unless he has lawful reason to enter or be upon such land.<sup>21</sup>

A person convicted of the offence is liable to a fine not exceeding R2 000, or imprisonment for a period not exceeding two years, or both.<sup>22</sup>

The Act states that a court which convicts any person of the offence may make an order for the summary ejection of that person from the land concerned.<sup>23</sup>

### **Proposed Unlawful Entry on Premises Bill, 2022**

The proposed Unlawful Entry on Premises Bill, 2022 would repeal the Trespass Act, 1959.<sup>24</sup>

The Bill does not employ the word “trespass”, but seeks instead to prohibit “unlawful entry” on premises.<sup>25</sup>

The Bill states that every person who unlawfully enters a premises commits the offence of unlawful entry.<sup>26</sup>

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<sup>19</sup> Or any building or part of a building.

<sup>20</sup> Or enters or is in such building or part of a building.

<sup>21</sup> Or enter or be in such building or part of a building.

<sup>22</sup> Trespass Act, 1959 s 2(1).

<sup>23</sup> Trespass Act, 1959 s 2(2).

<sup>24</sup> Proposed Bill cl 11(1).

<sup>25</sup> Proposed Bill *Long title*.

<sup>26</sup> Proposed Bill cl 3(1).

### **Bill refers ungrammatically to “a premises”**

The Bill, ungrammatically, refers throughout to “a premises,” as if the word “*premises*” is singular in number. For example, the Bill speaks of “a premises which *is* physically occupied,”<sup>27</sup> “entry on a premises,”<sup>28</sup> “enters a premises,”<sup>29</sup> “found on or in a premises”<sup>30</sup> and the like.

We submit, with the greatest respect, that the word “*premises*”, as meaning land and any buildings on it, is always treated as being plural in number.<sup>31</sup>

The offending expressions in the Bill (“a premises which *is* physically occupied,” “entry on a premises,” “enters a premises,” “found on or in a premises” and the like) should instead state “premises which *are* physically occupied,” “entry on premises,” “enters premises” and “found on or in premises” and so forth.<sup>32</sup>

### **Bill’s references to plural numbers of persons are redundant**

The Bill, superfluously, refers to plural numbers of persons.

For example, the Bill stipulates<sup>33</sup> that a lawful occupier means one “*or more persons*” who physically occupy premises and includes a person “*or persons*” who reside on the premises or have responsibility for and control over the condition of the premises, etc.

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<sup>27</sup> Proposed Bill cl 1 svv “lawful occupier”.

<sup>28</sup> Proposed Bill cl 2(1).

<sup>29</sup> Proposed Bill cl 3(1).

<sup>30</sup> Proposed Bill cl 3(2).

<sup>31</sup> *Shorter Oxford English Dictionary* sv “premises” par 4.

<sup>32</sup> As the case may be.

<sup>33</sup> As mentioned.

These, and the Bill's other references to plural numbers of persons, are superfluous. The Interpretation Act, 1957<sup>34</sup> declares that, in every law,<sup>35</sup> “words in the singular number include the plural.”<sup>36</sup>

### **Definition of “lawful occupier” confuses in adding “owner”**

The Bill's definition of “lawful occupier” is confusing.

The definition of “lawful occupier” states—

**“lawful occupier”** means one or more persons who physically occupies a premises and includes the—

- (a) the owner;
- (b) a person or persons who reside on the premises;
- (c) a person or persons who has the responsibility for and control over—
  - (i) the condition of the premises;
  - (ii) the activities carried out on the premises; or
  - (iii) control over persons allowed to enter the premises,but does not include an employee of the lawful occupier.<sup>37</sup>

This is confusing. On the one hand, the definition states that a lawful occupier is a person who “*physically occupies*” premises. On the other hand, it states that a lawful occupier includes “*the owner*”.<sup>38</sup>

It is not clear from this whether “the owner” is treated as someone who “physically occupies” the premises, even if the owner does not physically occupy them.

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<sup>34</sup> Interpretation Act 33 of 1957.

<sup>35</sup> Unless the contrary intention appears.

<sup>36</sup> And words in the plural number include the singular. Interpretation Act, 1957 s 6(b).

<sup>37</sup> Proposed Bill cl 1 svv “lawful occupier”.

<sup>38</sup> Proposed Bill cl 1 svv “lawful occupier” par (a).

### **Definition of “lawful occupier” confuses in adding persons who “reside” on premises**

Moreover, the Bill’s definition of “lawful occupier” is confusing in stating on the one hand that a “lawful occupier” is a person who “*physically occupies*” premises, but on the other hand that a “lawful occupier” includes a person or persons who “*reside on*” the premises.<sup>39</sup>

It is not clear whether the notion of *residing on* premises is intended to differ from the notion of *physically occupying* the premises and, if so, in what way.

If the notion of residing on premises is *not* intended to differ from the notion of physically occupying the premises, then it is redundant for the definition of “lawful occupier” to state that a lawful occupier includes a person who resides on the premises.<sup>40</sup>

The Bill’s definition of “lawful occupier,” in including persons who “*reside on*” the premises,<sup>41</sup> is wide enough to include persons who reside there without the permission of the occupier, owner or person in charge of the premises.

### **Unclear if “lawful occupier” includes person with control over those not allowed to enter**

The Bill’s definition of “lawful occupier” is confusing in stating that a “lawful occupier” includes a person who has “*the responsibility for and control over persons allowed to enter the premises*”.<sup>42</sup>

It is not clear if a person who has responsibility for and control over *persons allowed to enter* also has responsibility for and control over *persons who are not allowed to enter*.

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<sup>39</sup> Proposed Bill cl 1 svv “lawful occupier” par (b).

<sup>40</sup> Proposed Bill cl 1 svv “lawful occupier” par (b).

<sup>41</sup> Proposed Bill cl 1 svv “lawful occupier” par (b).

<sup>42</sup> Proposed Bill cl 1 svv “lawful occupier” par (c)(iii).

## Bill creates six offences

As mentioned, the Bill states (in one subsection<sup>43</sup>) that every person who unlawfully enters a premises commits the offence of unlawful entry.

The Bill then stipulates (in a second subsection<sup>44</sup>) that a person “*found on or in*” premises who is not a lawful occupier<sup>45</sup> and who does not have the<sup>46</sup> “*permission by a lawful occupier*” (presumably, to be “*on or in*” the premises) is presumed to have “*unlawfully entered*” them.

These provisions (i.e., these two subsections<sup>47</sup>) create two different offences, in that each has essential elements which differ from the essential elements of the other. (In a prosecution, it is for the State<sup>48</sup> to prove all the essential elements or necessary averments of an offence.<sup>49</sup>)

Indeed, the Bill (in referring to “*a charge under subsections (1) or (2)*”)<sup>50</sup> contemplates that those two subclauses create separate offences.

The Bill then appears to create a third offence (in the provision’s subclause (3)<sup>51</sup>). The Bill states that a person who has been directed<sup>52</sup> by a lawful occupier<sup>53</sup> to leave the premises “*and does not leave the premises as soon as practicable after receiving the direction*” is guilty of “*the offence*”.<sup>54</sup>

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<sup>43</sup> Proposed Bill cl 3(1).

<sup>44</sup> Proposed Bill cl 3(2).

<sup>45</sup> Or employee of a lawful occupier.

<sup>46</sup> Expressed or implied.

<sup>47</sup> Proposed Bill cl 3(2).

<sup>48</sup> As a rule.

<sup>49</sup> *Woolmington v Director of Public Prosecutions* [1935] All ER Rep 1 (HL); *R v Ndhlovu* 1945 AD 369 at 382; *Bratty v Attorney General for Northern Ireland* [1961] 3 All ER 523 (HL) at 531.

<sup>50</sup> Proposed Bill cl 3(4).

<sup>51</sup> Proposed Bill cl 3(3)(a).

<sup>52</sup> Either orally or in writing.

<sup>53</sup> Or any other authorised person.

<sup>54</sup> Proposed Bill cl 3(3)(a).

That subclause<sup>55</sup> (despite referring to “*the offence*,” as if there were only one offence) appears to create a third and separate offence, of not leaving premises as soon as practicable after receiving a direction to do so from a lawful occupier.<sup>56</sup>

The Bill also creates a fourth offence, in stipulating that no person<sup>57</sup> may remove, alter or deface any notice sign posted at or near an ordinary point of access to the premises.<sup>58</sup>

Fifth, the Bill states that, on arrival at occupied premises, an authorised member of the Police Service must obtain the attention of the “intruders”<sup>59</sup> and<sup>60</sup> order them to disperse and leave the premises within a time specified taking any items brought on the premises, and inform them that “*failure to adhere to the order will result in them being arrested.*”<sup>61</sup> This clause implicitly creates an offence of failure to adhere to an order by an authorised police officer to leave premises in a specified time with items brought by them onto the premises.

And sixth, the Bill states that, “*if intruders [have] already erected any form of housing on the premises and already occupy the erected housing, the authorised member [...] must arrest them for unlawful entry on [...] premises.*”<sup>62</sup> Despite the language of this clause that intruders who erect and occupy housing on the premises should be arrested for “*unlawful entry*”, it in effect creates the offence of *the erecting and occupying of housing by intruders on premises*.

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<sup>55</sup> Proposed Bill cl 3(3)(a).

<sup>56</sup> Or any other authorised person.

<sup>57</sup> Other than a lawful occupier or an authorised person.

<sup>58</sup> Such that, in daylight and under normal weather conditions, from the approach to the ordinary point of access, the sign is clearly visible, and any writing or graphic representation thereon is clearly legible or visible as the case may be. Proposed Bill cl 6 read with cl 5(1)(b).

<sup>59</sup> Also referred to as “*participants*” in the Bill’s provision concerned.

<sup>60</sup> In a loud voice.

<sup>61</sup> Proposed Bill cl 8(3).

<sup>62</sup> Proposed Bill cl 8(4).

## **Bill unconstitutionally presumes that person found on premises entered unlawfully**

As mentioned, the Bill states that every person who unlawfully enters premises commits the offence of unlawful entry.<sup>63</sup>

And, as also mentioned, the Bill stipulates that “a person found on or in” premises who is not a lawful occupier,<sup>64</sup> and who does not have a lawful occupier’s permission<sup>65</sup> (presumably, “to be on or in the premises”), is “presumed to have unlawfully entered.”<sup>66</sup>

This means that a person found on or in premises without permission (which, in terms of the Bill, will not be an offence<sup>67</sup>) is presumed to have committed the offence of unlawful entry.

The effect of the presumption is that an innocent person, against whom there is no evidence suggestive of criminal conduct (*i.e.*, a person who is merely found on or in premises) may be charged, brought before court and required to lead evidence to assert their innocence, in breach of the right to a fair trial and to be presumed innocent.<sup>68</sup>

The Bill of Rights in the Constitution declares that every accused person has a right to a fair trial, which includes<sup>69</sup> the right to be presumed innocent, to remain silent, and not to testify during the proceedings.<sup>70</sup>

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<sup>63</sup> Proposed Bill cl 3(1).

<sup>64</sup> Or employee of a lawful occupier.

<sup>65</sup> Expressed or implied.

<sup>66</sup> Proposed Bill cl 3(2).

<sup>67</sup> In contrast, the Trespass Act, 1959 created two offences, an offence of entry, and an offence of presence. The Trespass Act lays down, not only that a person commits an offence who without permission “enters” the land or building concerned, but also that a person commits an offence who without permission “is upon” such land or “is in” such building.

<sup>68</sup> See the parallel reasoning in a case about gambling laws, *Scagell v Attorney-General of the Western Cape and others* 1996 (11) BCLR 1446 (CC) pars [11]–[20] per O’Regan J, the other members of the Court concurring. See also *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* vol 65 2002 pp 147–165, C R M Dlamini SC “Presumptions in the South African law of evidence (3)” at 161–162.

<sup>69</sup> *Inter alia*.

<sup>70</sup> *Constitution of the Republic of South Africa*, 1996 Ch 2 (Bill of Rights) s 35(3)(h).

It is submitted that this clause of the draft Bill (that a person found on premises without permission is presumed to have unlawfully entered) is therefore unconstitutional and should for that reason be removed from the Bill.

### **Person who erects and occupies housing on premises deemed to have entered unlawfully**

As mentioned, the Bill states that if intruders have already erected any form of housing on the premises and already occupy the erected housing, the authorised member must arrest them for unlawful entry on premises.

This means that someone who erected housing on the premises and occupies it (which will not be an offence) is presumed to have committed the offence of unlawfully entry on premises.

The result of this implied presumption is that a person who erected and occupies housing may be charged with unlawful entry on the premises, brought before court and required to lead evidence to assert their innocence, in breach of the right to a fair trial and to be presumed innocent.<sup>71</sup>

As mentioned above, the Bill of Rights in the Constitution declares that every accused person has a right to a fair trial, which includes<sup>72</sup> the right to be presumed innocent, to remain silent, and not to testify during the proceedings.<sup>73</sup>

It is submitted that this clause of the draft Bill (that intruders who have erected and occupy housing on the premises must be arrested for unlawful entry onto the premises) is therefore unconstitutional and should for that reason be removed from the Bill.

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<sup>71</sup> As mentioned above, a case about gambling laws uses parallel reasoning, *Scagell v Attorney-General of the Western Cape and others* 1996 (11) BCLR 1446 (CC) pars [11]–[20] per O’Regan J, the other members of the Court concurring.

And, as mentioned, see also *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* vol 65 2002 pp 147–165, C R M Dlamini SC “Presumptions in the South African law of evidence (3)” at 161–162.

<sup>72</sup> *Inter alia*.

<sup>73</sup> *Constitution*, 1996 Ch 2 (Bill of Rights) s 35(3)(h).

## **Requiring the arrest of housing occupants violates their dignity and right to privacy**

As said, the Bill states that if (alleged) intruders have erected any form of housing on the premises and occupy the housing, the police “*must arrest them*” for unlawful entry on the premises.<sup>74</sup>

This clause, insisting that the police “*must arrest*” an alleged intruder who erected and occupies housing on the premises violates that person’s fundamental rights of dignity, personal freedom and privacy.

The Bill of Rights in the Constitution declares that everyone has inherent dignity and the right to have their dignity respected and protected.<sup>75</sup> The Bill of Rights also declares that everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause.<sup>76</sup> And, declares the Bill of Rights, everyone has the right to privacy.<sup>77</sup>

The primary purpose of an arrest is to bring the person who is arrested before court for trial. This consideration must be at the centre of the decision to arrest. Arrest is a serious inroad into the freedom and privacy of the person arrested and must be sparingly exercised.<sup>78</sup> When the matter is not urgent and the person charged has a fixed and known address, it is desirable instead for the prosecutor to secure the attendance by the accused in the magistrate’s court by issuing to the person a summons to appear in the court.<sup>79</sup>

If the accused fails to appear in court at the place at the time on the date specified in the summons, or fails to remain in attendance at the proceedings, the court may then issue a warrant for his or her arrest.<sup>80</sup>

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<sup>74</sup> Proposed Bill cl 8(4).

<sup>75</sup> Constitution, 1996 Ch 2 (Bill of Rights) s 10.

<sup>76</sup> Constitution, 1996 Ch 2 (Bill of Rights) s 12(1)(a).

<sup>77</sup> Constitution, 1996 Ch 2 (Bill of Rights) s 14.

<sup>78</sup> *Law of South Africa* vol 12 (3 ed) D Smythe et al “Criminal Procedure” (sub tit ‘Securing attendance at court’) par 67.

<sup>79</sup> See Criminal Procedure Act 51 of 1977 s 54(1).

<sup>80</sup> Criminal Procedure Act 51 of 1977 s 55(2).

This clause of the draft Bill that, if intruders erected and occupy housing on the premises then the police “*must arrest them*” for unlawful entry, should be deleted from the Bill.

### **Bill’s allusions to “intruders” are circular and unnecessary**

The Bill’s use of the term “*intruder*” is circular and unnecessary.

The Bill states that it applies to “*unlawful entry*” of premises “*by an intruder,*”<sup>81</sup> and defines an “*intruder*” as a person who “*unlawfully enters*” premises.<sup>82</sup>

This is circular: It means that the Bill applies to “*unlawful entry*” of premises by a person who “*unlawfully enters*” the premises.

The Bill uses the same circular language in stipulating that the lawful occupier must request “*the intruder [...] unlawfully on the premises*” to leave.<sup>83</sup>

The draft Bill’s use of the term “*intruder*” is unnecessary to refer to a person alleged to have unlawfully entered any premises.

The Bill’s principal provisions (which prohibit unlawful entry on premises,<sup>84</sup> list defences to a charge of unlawful entry on premises,<sup>85</sup> and provide for penalties for a person guilty of an offence envisaged in the Bill<sup>86</sup>) do not use the word “*intruder*”.

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<sup>81</sup> Proposed Bill cl 2(1).

<sup>82</sup> Proposed Bill cl 1 sv “*intruder*”.

<sup>83</sup> Proposed Bill cl 7(1).

<sup>84</sup> Proposed Bill cl 3. See also cls 4 and 5.

<sup>85</sup> Proposed Bill cl 8.

<sup>86</sup> Proposed Bill cl 9.

## **Bill is three times longer than current Trespass Act**

The proposed Bill is three times longer than the current Trespass Act, 1959.

The draft Bill contains 1,656 words, whereas the Trespass Act contains only 541 words.

## **Justice Department did not publish Socio-Economic Impact Assessment with draft Bill**

The Department of Justice, when it gazetted the notice<sup>87</sup> on 12 August 2022 (inviting interested parties to submit comments on the proposed Unlawful Entry on Premises Bill, 2022 available on the Department's website<sup>88</sup>), did not gazette a Socio-Economic Impact Assessment (SEIA) of the Bill.

The Department's *Gazette* notice does not state that any such SEIA was available on its website. Nor does the Department's *Gazette* notice invite comments on any SEIA which might exist, or indeed refer to a Socio-Economic Impact Assessment at all.

The SEIA Unit of the Department of Planning, Monitoring, and Evaluation outlined the procedure to develop SEIAs. If a state department frames a draft law to address a perceived problem, it should also develop a Socio-Economic Impact Assessment evaluating the draft law's likely costs, benefits and risks. The department concerned should then publish the draft law for public comment together with the SEIA.<sup>89</sup>

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<sup>87</sup> Gen N 1219 of 2022 (*Gazette* 46705 of 12 Aug). Dept of Justice and Constitutional Development: "Invitation for public comments: Unlawful Entry on Premises Bill, 2022".

<sup>88</sup> At <http://www.justice.gov.za> .3999333999999399

<sup>89</sup> Department of Planning, Monitoring, and Evaluation: "Socio-Economic Impact Assessment System Guidelines," May 2015.