



# SAKELIGA

SELFSTANDIGE SAKEGEMEENSKAP

16 September 2022

**TO:** Department of Justice and Constitutional Development  
**ATTENTION:** Ms A Botha  
**DELIVERED:** **By email:** AIBotha@justice.gov.za

To whom it may concern,

## SUBMISSION: UNLAWFUL ENTRY ON PREMISES BILL, 2022

The Unlawful Entry on Premises Bill contains provisions that on their face appear beneficial to the property rights regime in South Africa. These provisions ought to be welcomed.

Unfortunately, there are also provisions that could prove very harmful to private property, including potentially disallowing absent owners or concerned neighbours from rectifying intrusion on their or nearby property, and adding unnecessary bureaucracy to police responses to trespassing.

The Bill ought not be adopted before these and other defects have been comprehensively cured.

### About Sakeliga

Sakeliga is a not-for-profit business group and public benefit organisation with more than 11,000 members in various enterprises across South Africa. Sakeliga promotes a favourable business environment in the public interest, by means of its support for a market system and a sound constitutional order.

[www.sakeliga.co.za](http://www.sakeliga.co.za)

### Contributors

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## 1. Introduction

On 12 August 2022, the Department of Justice and Constitutional Development published the Unlawful Entry on Premises Bill (**the Bill**) for public commentary. It is for this purpose that Sakeliga makes this submission.

The Bill contains various welcome provisions that stand to improve the protection of property rights in South Africa. That being said, various problematic provisions in the Bill could cancel out any such positive effects. It is these problematic provisions that are focused upon in this submission.

## 2. Unlawful Entry on Premises Bill

### 2.1 Importance of ownership and property rights

The Bill has adopted a catch-all reference to “occupation,” without distinction between the owner, lawful occupiers, authorised holders, or possessors. While this is understandable given the purpose of the Bill, it is important that ownership – being the foundation of the very property rights the Bill intends to protect – be recognised separately from occupation. The owner’s authority transcends their physical presence or lack thereof on the property, and the Bill must leave no doubt about this fact.

The Bill’s attempt to narrowly define what is and is not a “premises” could become practically problematic. Section 25 of the Constitution protects property rights against deprivation, regardless of whether it qualifies as so-called “premises” as contemplated in the Bill. Whether land is enclosed or not enclosed must be immaterial to whether the owner enjoys legal protection of their property. The definition of premises must therefore be reconsidered and reformulated to provide full protection to the rights of owners.

### 2.2 Definitions of “lawful occupier” and “unoccupied premises”

Read together with the remedies and powers in the Bill when it comes to trespassing (clauses 3(3), 6(1), 7(1), 7(2)), the definitions of “lawful occupier” and “unoccupied premises” create a trespassing regime that precludes the owner of a premises who is not physically occupying the premises, from accessing the remedies in the Bill. On a reading of these definitions together with the operational parts of the Bill, an owner would only be able to have trespassers removed in respect of property in cases where either the owner or someone else (such as a tenant) occupies the property.

This problem arises because wherever remedies are created in the Bill, they can only be accessed by a “lawful occupier,” and a lawful occupier is defined as meaning “one or more persons *who physically occupies a premises* and includes the...”. Where a person or persons do not occupy a given premises at a given time, the owner of such premises appears to have, in terms of the Bill, no remedies or prospect of relief in the event of trespassing. Should such absurdities arise in practice

subsequent to the promulgation of the Bill in its current form, a court would have no choice but to interpret the Bill in such a manner to read-in remedies to the defect in the Bill.

A better course of action would however be to amend the Bill (underlined words are suggested imports) as follows:

*"Unlawful entry" means entry on a premises or part of a premises without the expressed or implied permission by the owner or a lawful occupier, and includes..."*

...

*3. (3) A person who has been directed, either orally or in writing, by ~~a~~ the owner, lawful occupier, or any other authorised person to leave the premises....*

...

*6. (1) No person, other than the owner, a lawful occupier, or an authorised person, may remove, alter or deface signs posted as referred to in of section 5.*

...

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

...

*7. (2) If the intruder or intruders does not leave the premises, or the owner, lawful occupier, or a person authorised by them, are threatened in any manner, ~~the lawful occupier, or authorised person must, without delay,~~ any person, including the owner, may request assistance from the authorised member of South African Police Service..."*

### 2.3 Inconsistency between the definition of "unlawful entry" and procedural prerequisites for the offence of unlawful entry

The definition of "unlawful entry" in the Bill reads:

*"Unlawful entry" means entry on a premises or part of a premises without the expressed or implied permission by the owner or a lawful occupier and includes..."*

In step with the Bill's objective to sustain the offence of unlawful entry/trespassing, clause 3(1) then provides in a straightforward fashion:

*"Every person who unlawfully enters a premises commits the offence of unlawful entry."*

Strangely, clause 3(3), then, provides:

*3. (3) A person who has been directed, either orally or in writing, by a lawful occupier or any other authorised person to leave the premises and —(a) does not leave the premises as soon*

*as practicable after receiving the direction; or (b) re-enters the premises, is guilty of the offence [own emphases].*

This is inconsistent with the definition of “unlawful entry” which requires mere entry onto a premises or part of premises without expressed or implied permission, regardless of whether any directions have been issued. Would a person prosecuted for entering a premises unlawfully, be able to raise as a defence that the lawful occupier did not direct them orally or in writing to leave the premises, and that they are therefore not guilty of the offence?

The Bill certainly creates this possibility, inconsistent with its own definition of “unlawful entry.”

Importing further defences for a potential unlawful intruder in the form of procedural requirements on the part of the lawful occupier is not necessary, as the Bill already provides for a defence in the event of mistake:

*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.*

## **2.4 Bureaucratic incapacity**

Clause 7(2) of the Bill has the potential to be damaging to the rights of lawful occupiers and to confidence in the SAPS. It provides that a lawful occupier of a premises requires the assistance of an “authorised member” of the SAPS when dealing with unlawful intruders. When intruders refuse to leave the premises, only “authorised members” of the SAPS may intervene.

The SAPS already suffers from a record of incompetence when it comes to providing general law-enforcement assistance to the public, without the burden of the additional bureaucratic requirements envisaged by the Bill. By adding more such burdensome bureaucracy, owners and lawful occupiers might have to wait for hours, perhaps days, before one of the small number of “authorised members” appointed by the National Police Commissioner become available to provide assistance.

While it could only be beneficial for members of the SAPS to receive training in dealing with cases of unlawful entry on premises, the Bill must be amended to allow any member of the SAPS to provide assistance to owners and lawful occupiers in need. More than that, private security personnel and owners themselves must be allowed to use proportional force to deal with unlawful intruders so as to safeguard their property and interests.

## **2.5 Duty to inform should not be prerequisite for removal of intruders**

Clauses 7(1) and (2) of the Bill preclude non-present owners, neighbours, or other concerned members of the public, from requesting assistance from the SAPS when unlawful entry occurs on a

premises. These provisions also create a duty to request intruders to leave and seem to elevate the duty to a prerequisite for being able to request assistance from the SAPS.

This is untenable on many scores. By way of illustration, the following unrelated case scenarios should be considered in the context of the Bill:

- Person A present on Premises X, which neighbours Premises Y, observes intruders climbing over the fence of Premises Y and erecting housing. The lawful occupiers of Premises Y are away on holiday, and Person A calls the owner/lawful occupiers of Premises Y to confirm that permission has not been granted to anyone to enter the premises and erect housing structures. On a reading of clauses 7(1) and (2) of the Bill, may Person A request assistance from SAPS? The answer seems to be no.
- Person B, the owner of the currently unoccupied Farm F, is overseas and receives a notification of a beam alarm having been triggered on Farm F. Person B observes live footage on his smart phone of intruders entering Farm F and erecting structures. May Person F call SAPS to request assistance? The answer seems to be no.
- Person C, the lawful occupier of Premises Z, wakes up at night in a bedroom on Premises Z and observes on their smart phone live CCTV footage of intruders climbing over the fence of Premises Z, making their way towards the house. After a few minutes, the intruders have made their way into the living room and are consuming food and drinks and damaging the property. They seem in no hurry to leave. Person C does not know whether the intruders are armed and wants to avoid confrontation. In order to request the intruders to leave, Person C would have to unlock and proceed through the bedroom door and security gate, as well as a security gate in the hall, to come within the intruder's hearing distance. Person C decides that it would be too much risk to unlock the security gates and request the intruders to leave and wants to instead request assistance from SAPS from the safety of their bedroom. May Person C request assistance from SAPS, having failed to request the intruders to leave? The answer seems to be no.

While in real, live scenarios, similar to the above, SAPS may decide to provide assistance although there are not strict and definitional requirements with the new Act, SAPS members may conceivably refuse to provide assistance. These untenable possibilities can be remedied proactively, by removing the requirement of requesting intruders to leave, and to provide that "... ***any person, including the owner, may request assistance from the authorised member of South African Police Service...***"