Submission to the Portfolio Committee on Rural Development and Land Reform on

Extension of Security of Tenure Bill of 2015

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28 January 2016

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1. Introduction

1.1. The Institute for Poverty, Land and Agrarian Studies (PLAAS) welcomes the initiative to amend the Extension of Security of Tenure Act, 62 of 1997.

1.2. PLAAS is a constituent unit of the School of Government at the University of the Western Cape. PLAAS engages in research, training, policy development and advocacy in relation to land and agrarian reform, rural governance and natural resource management. PLAAS aims for rigour in its scholarship, excellence in its training, and effectiveness in its policy support and advocacy. It strives to play a critical yet constructive role in processes of social, economic and political transformation.

1.3. PLAAS has read and considered the implications of the Extension of Security of Tenure Bill of 2016, and submits the following comments and recommendations to the Portfolio Committee on Rural Development and Land Reform.

1.4. Our submission is informed by 21 years of research at PLAAS on land reform and tenure security challenges and responses in South Africa, including the following research projects and programmes:

- **Evaluating Land and Agrarian Reform in South Africa** (2002-3) funded by the European Union Foundation for Human Rights
- **Policy Options for Land and Agrarian Reform in South Africa** (2005-8) funded by ICCO
- **Review of Progress towards the Realisation of the Socio-economic Rights of Farm Dwellers** (2007) commissioned by the Department of Land Affairs
- **Tenure, Livelihoods and Social Justice: Farm Workers and Farm Dwellers in South Africa** (2009-2012) funded by the Norwegian Centre for Human Rights

1.5. Our submission is also informed by the following published research:

A Critical Response to Government's Farm Worker Proposals - 'Strengthening the Relative Rights of People Working the Land'. Workshop report. Cape Town, South Africa: PLAAS, University of the Western Cape, 2014.

Farm Workers and Farm Dwellers in Limpopo Province, South Africa: Struggles over Tenure, Livelihoods and Justice. Wisborg, Poul, Ruth Hall, Shirhami Shirinda and Phillan Zamchiya. Cape Town: PLAAS, University of the Western Cape, 2013.

Farm Workers' Living and Working Conditions. Kleinbooi, K. Workshop report. Cape Town: PLAAS, University of the Western Cape, 2013.

'Farm workers and farm dwellers in Limpopo province, South Africa.' Hall, Ruth, Poul Wisborg, Shirhami Shirinda and Phillan Zamchiya. Special issue on Re-thinking land reform, agrarian change and rural poverty in South Africa, edited by Henry Bernstein, Ben Cousins, Bridget O'Laughlin and Pauline Peters. *Journal of Agrarian Change* 13(1): pp 47-70, 2013.

'Hierarchies, Violence, Gender: Narratives from Zimbabwean Migrants on South African Farms'. Hall, Ruth, in Bill Derman and Randi Kaarhus (eds) *In the Shadow of a Conflict: Crisis in Zimbabwe and its Effects in Mozambique, South Africa and Zambia.* Harare: Weaver Press, 2013.

'Rights without Illusions: The potential and limits of rights-based approaches to securing land tenure in rural South Africa.' Hall, Ruth and Cousins, Ben, in Malcolm Langford, Ben Cousins, Jackie Dugard and Tshepo Madlingozi (eds.). Symbols or Substance? The role and impact of socio-economic rights strategies in South Africa. Cambridge: Cambridge University Press: 157-186, 2013.

Foreclosing on new identities and new social relations: Media framing of the 2012 Western Cape farmworkers' strike. Pointer, Rebecca. Cape Town: PLAAS, University of the Western Cape, 2013.

Different Realities and Narrow Responses in a Shifting Agricultural System. Kleinbooi, K. (ed). Umhlaba Wethu 1, Cape Town, South Africa: PLAAS, University of the Western Cape, 2013.

Another countryside? Policy options for land and agrarian reform in South Africa. Hall, Ruth (ed.). Cape Town, South Africa: PLAAS, University of the Western Cape, April 2009.

Sour grapes. Theron, Jan and Bamu, Pamhidzai. Cape Town, South Africa: PLAAS, University of the Western Cape, March 2009.

Land and agrarian reform in Integrated Development Plans. Hall, Ruth; Isaacs, Moenieba; Saruchera, Munyaradzi. Cape Town, South Africa: PLAAS, University of the Western Cape, 2007.

Farm tenure. Hall, Ruth. Cape Town, South Africa: PLAAS, University of the Western Cape, 2003.

Rural settlement. Bannister, Sue. Bellville, Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape, 2003.

Land Reform in South Africa: Is it meeting the challenge? Lahiff, Edward. Cape Town, South Africa: PLAAS, University of the Western Cape, September 2001.

The fruits of modernity: Law, power and paternalism on Western Cape farms. du Toit, Andries. Cape Town, South Africa: PLAAS, University of the Western Cape, 1996.

2. Background

2.1. The White Paper on South African Land Policy of 1997 noted that:

> *'A major cause of instability in rural areas are the millions of people who live in insecure arrangements on land belonging to other people. They had and have simply no alternative place to live and no alternative means of survival. The evicted have nowhere else to go and suffer terrible hardships. The victims swell the ranks of the absolute landless and the destitute. They find themselves at the mercy of other landowners for refuge. If no mercy is shown, land invasion is an unavoidable outcome. Because the root cause of the problem of insecurity of tenure under these circumstances is a structural one it requires a structural solution'* (DLA 1997:33).

2.2. This constitutes the basis for farm tenure policy and for the promulgation of ESTA.

2.3. ESTA creates a category of 'occupier', namely a person who resides on a farm with the consent of the owner. Should this consent be revoked, this terminates the right of residence of the occupier, but does not entitle the owner to evict the occupier. Instead, the owner must apply for a court order to effect an eviction. ESTA prohibits the eviction of any occupier unless this is in terms of a court order. In essence, ESTA does four things.

2.4. Firstly, **ESTA defines the tenure rights of occupiers.** Provided that they occupy land with the consent of the owner, farm dwellers are 'ESTA occupiers' and have the legal right to continue to live on and use the land. This right extends to services such as electricity, water and sanitation. Occupiers are entitled to live with their families and enjoy a family life that is in keeping with their culture. Occupiers over the age of 60 years who have resided on the farm for at least ten years or who are disabled or unable to work as a result of sickness are termed 'long-term occupiers' and may only be evicted if alternative accommodation is provided or if they have violated the terms of their occupation. A 2001 amendment to ESTA created an explicit right of occupiers, in accordance with their religion or cultural beliefs, to be buried on the farms where they lived and to bury their relatives there, if this was established practice on the farm (RSA 2001: Sections 6 and 7). Relatives may also visit and maintain family graves on a farm even if they no longer live there.

2.5. Secondly, **ESTA places duties on occupiers.** Occupiers must abide by the terms of their tenancy. This means that, should an occupier violate a condition of tenure,

his/her tenure may be ended through eviction. Such violations include damage to property or causing harm to other occupiers or assisting people to build dwellings on the farm without the owner's consent.

2.6. Thirdly, **ESTA stipulates when and how an occupier may be evicted.** Eviction may only happen in terms of an eviction order issued by a court. Any other eviction is illegal. An owner seeking an eviction order must demonstrate that consent for occupation has been withdrawn. Consent may be revoked if an occupier has violated a condition of tenure or if the owner can demonstrate that the eviction is necessary for the operational requirements of the farm. If the occupier's rights of residence arose solely as the result of an employment relationship, these rights may be terminated on resignation or dismissal. In addition, right of residence may be terminated for any other reason provided that the termination is 'just and equitable'. In considering an eviction matter, the court must take into account all relevant factors including the potential hardship to be caused to the occupiers, if evicted, or to the owner, if the occupier remains.

2.7. Fourthly, **ESTA creates opportunities for occupiers to acquire long-term rights to land.** Occupiers are entitled to apply for, but are not guaranteed, grants with which to purchase land. Farm dwellers may use the grants to upgrade their rights on the land they occupy through subdivision and purchase of a portion of a farm, as long as the owner agrees to sell, or to seek long-term tenure security through the purchase of alternative land off the farm. In practice, the grant initially provided for this purpose was the Settlement/Land Acquisition Grant (SLAG), originally set at R15 000 and later increased to R16 000 per household, though in later years funds were provided via the Land Redistribution for Agricultural Development (LRAD) and Settlement Planning Land Acquisition Grant (SPLAG) at much higher levels. Courts may also order alternative accommodation to be made available for evicted occupiers, which requires the agreement of local municipalities.

3. Limitations and challenges in law and implementation

3.1. We welcome the initiative to amend ESTA, in view of the widespread violations of this law, as well as loopholes in its procedural requirements and weak framing of substantive rights. However, as we will explain, we disagree that the Bill in its current form lives up to the promise of strengthening rights, tightening procedures and strengthening implementation.

3.2. Since its inception, the limitations of ESTA in achieving the intentions of the law-makers relate among other things to:

- The absence of adequate awareness-raising on ESTA rights
- The weakness of rural advice offices
- The discontinuation of training of magistrates
- The absence of ESTA violations on the SAPS database
- The discontinuation of training of prosecutors

- The failure to ensure legal representation
- The absence of a programmatic approach to implementing Section 4
- The discontinuation of dedicated ESTA officers in the Department
- The absence of a dedicated budget for ESTA implementation.

3.3. The 'Green Paper' of 2011 describes ESTA implementation as due to 'total system failure'. We agree that this is a largely accurate characterisation of the situation.

3.4. While there are several limitations in the law itself, especially with regards to procedural safeguards, we argue that the limited effectiveness of ESTA in creating conditions of tenure security for farm workers and farm dwellers is largely due to the shortcomings in implementation, as itemised above. Areas of the Act that need strengthening largely relate to eviction procedures, including the need for the involvement of the Department and of municipalities as parties in each eviction application that is heard by a court so that all relevant facts can be put to the court, including probation reports as required by Section 9(3).

3.5. We further argue that, in order to address the profound and systemic problems with realising the goals of farm tenure security and implementing ESTA fully through reformed institutional arrangements (including new institutions), what is needed is a coherent national policy framework to guide land reform as a whole. Such a framework does not exist.

3.6. In the absence of such **a coherent national policy framework for land reform** – ie. a White Paper on South African Land Policy – the creation of new institutions, amendment to the content of tenure rights and their application, and changes to procedural requirements through the ESTA Amendment Bill is likely to aggravate institutional duplication and inconsistency in the definition of tenure rights and procedures to respect, protect, promote and fulfil these rights, as required by the Constitution.

4. Purpose of the Bill

4.1. The memorandum to the Bill explains the purpose of the Bill as follows:

4.1.1. To address aspects of the Act 'that make it easier for farm dwellers to be evicted', **however the Bill does not address this**;

4.1.2. To address the concept of residence, **though it does not say why this needs to be addressed or what the Bill aims to achieve by defining the concept**;

4.1.3. To address the fact that the Act gives 'no clear and adequate obligation on providing alternative accommodation for those that have been evicted', **however the Bill does not provide such a clear and adequate obligation;**

4.1.4. To address shortcomings in institutional arrangements and capacities for enforcement of the Act through the creation of a Land Rights Management Board and Land Rights Management Committees, **however the Bill does not explain how these will address the limited capacity for enforcement in the existing duty-holder, ie. the Department.**

4.2. Our understanding therefore, based on close analysis of the Bill and its Memorandum, is that there is no coherent vision of what the Bill aims to achieve, nor is there evidence that its provisions will in fact achieve this.

5. Dependants

5.1. The Bill establishes a definition of 'dependant' whereas the Act contains no such definition. Section 1(b) defines a dependant as 'a family member to whom the occupier has a legal duty to support'.

5.2. First, this is <u>not</u> the meaning of dependant in South African common law, which includes recognition of dependants to whom a person has no legal duty. Key among these are children who have reached the age of majority (ie. after 18 years or older) who are not employed, as well as other extended relatives and non-relatives with whom a person lives and who may depend on that person for a place to stay and food and other things – even in the absence of a legal obligation.

5.3. Second, this provision infringes on the right to family life, especially in the context of extended households including relatives other than spouses, parents and children and grandchildren.

5.4. Third, what is the purpose of defining 'dependant'? The purpose appears to be to exclude (a) non-relatives who live with occupiers on farms and (b) relatives including adult children who live with occupiers on farms. In the course of our research, we have found that many landowners object to the adult children of farm occupiers continuing to live on the farm with their families. Indeed, there have been calls from organisations representing farm owners calling for restrictions on who may reside on farms.

5.5. Fourth, this provision therefore seems to serve the purpose of excluding a category of people living on farms from the protections provided in ESTA. If enacted, this would disproportionately affect poor and unemployed young adults, and especially young women.

5.6. <u>Recommendation: we propose that this definition be removed.</u>

6. Reside

6.1. The Bill establishes a definition of the verb to 'reside' whereas the Act contains no such definition. Section 1(h) inserts this definition as being 'to live at a place permanently; and "residence" has a corresponding meaning'.

6.2. First, this is a restrictive definition which excludes those who primarily reside on a farm but spend periods of time elsewhere, for instance for work. Migration, and especially temporary and oscillating migration, is a salient feature of life for many, and especially the poor, in South Africa. Just like many South Africans have a primary home somewhere but live elsewhere – for instance in cities – at certain stages of their lives, so do people who reside on farms. Living elsewhere whether for work or for education or for any other purpose does not negative a person's right to reside somewhere. The effect of this amendment to the Act would be to restrict the application of ESTA only to those occupiers who reside permanently, and to exclude those who reside there sometimes.

6.3. Second, the Land Claims Court has already interpreted the concept of residence in its judgement in the case of Mathebula & Another v Harry and noted that 'the term "reside" is not limited to the mere physical presence at a particular place at a given point in time.' While physical presence is one element of residence, it need not be continuous, and similarly absence should not imply that an occupier has terminated her/his residence. Instead, to 'reside' is defined by the Court as 'an intention – exhibited by conduct – to return on a permanent basis to one's residence'. To reside is therefore to have this intention.

6.4. Recommendation: We propose that the definition of 'reside' be removed.

7. Occupier

7.1. The Bill alters the definition of an 'occupier' by removing the words 'has or'. We fail to understand why this is being proposed. This leaves the term 'occupier' applying only to those who had rights as of 4 February 1997, not those who do now. Its apparent effect is to remove the application of ESTA from those who have permission to occupy but did not have this permission in 1997. We presume this must be a mistake.

7.2. The amended definition of occupier retains the restriction in the original Act which excludes a person who has an income in excess of the prescribed amount', but does not adjust the 'prescribed amount'. This was set at R5,000 a month in 1997, the rationale being that those earning a higher amount were not in need of tenure protection. However, failure to adjust this threshold upwards over the past 19 years means that it has the unintended effect of excluding people who do need tenure protection. A simple inflationary adjustment from 1997 to 2016 should be put into place. For example, at an average of 6% inflation per annum, the figure of R5,000 in 1997 translates into R15,128 in 2016.

7.3. Why does the government wish to reduce the number of farm dwellers who are protected by ESTA? We presume that both the removal of 'has or' and the failure to adjust the income threshold are mistakes – and believe they can be easily rectified.

7.4. Recommendation: we propose that the excision of the words 'has or' be removed, and that the income threshold increased to a 2016 Rand value and thereafter increased annually based on a national Consumer Price Index.

8. Tenure grants

8.1. The Bill proposes to rename the 'subsidies' provided for in Section 4 and to call these 'tenure grants'. More significant than this semantic change is the proposal that these tenure grants be made available 'to compensate owners or person in charge for the provision of accommodation and services to occupiers and their families'. In other words, the subsidies for securing and upgrading the tenure rights of farm dwellers are to be extended to farm owners.

8.2. The nature of payments are undefined, and the Bill does not specify the criteria for eligibility; levels of service delivery; or monitoring and evaluation. What quality of services will the state pay for, and which will it not? How will the state determine that

8.3. Why does the government wish to divert scarce public money available for land reform towards landowners?

8.4. We understand this proposal as emerging from discussions and debates over many years about the role of farm owners as 'service delivery agents' in a context where indigent people living on privately-owned land are entitled to the same free basic services as other indigent people. However, municipalities are not willing and able to deliver such services onto private land, not only due not only to legal constraints but also due to the costs involved. In few cases have they registered servitudes in order to deliver services.

8.5. Recognising farm owners as service delivery agents who often provide water and sanitation, and sometimes electricity, is a legitimate position. However, whether or on what basis and through what mechanisms the state should pay them for delivering these services is not clarified in the Bill, the Memorandum, the RIA – nor in existing policies of the Department. This would need to be clarified, as would the likely cost of such payments – potentially across more than 30,000 commercial farming units – and the costs of state regulation and departmental monitoring of such payments.

8.6. Further, the institutional arrangements for such payments need clarification. Municipalities pay for basic services in urban areas, and allocation of 'equitable shares' from National Treasury to municipalities is made to enable municipalities to

carry out this function. The Department of Rural Development and Land Reform is not the appropriate institution to manage and pay for such services.

8.7. The notion of the state paying farm owners for providing accommodation to farm dwellers, and especially to farm workers, is entirely different. Providing accommodation to those who work for you is part of the cost of labour and therefore an operating cost. State payments to mines or farms for accommodating their own workers amounts to a state subsidy to these industries. We disagree entirely that the state should pay this portion of the cost of operating private enterprises.

8.8. In addition, the proposal to amend Section 4(e) to compensate owners for the provision of accommodation conflicts with the Department of Human Settlement's National Housing Programme for Rural Residents of 2008 and, within this, the Farm Worker and Occupier Housing Assistance Programme (FHAP). Extensive negotiations on the roles and responsibilities of the two departments concluded that supporting housing development for farm workers – including housing stock – is the proper responsibility of the Department of Housing (now Human Settlements) rather than Land Affairs (now Rural Development and Land Reform). Any initiative to compensate owners for accommodation provided would need to be coordinated on a joint database to ensure avoiding double-payment in situations where the DRDLR pays owners for providing housing on farms, the construction of which was subsidised either by Human Settlements (or previously the Rural Foundation).

8.9. Both proposals – to pay for accommodation and to pay for services – need to be considered in light of budget realities. There is no budget line for farm dwellers or for ESTA implementation. Provision of subsidies under Section 4 of ESTA is done under the 'Land Reform Grants' budget. In less than five years, this budget line has declined from R3.03 billion in 2011 to R1.87 billion in 2015 (as adjusted in the Medium Term Budget 2015). This declining amount is the total capital budget for the Agricultural Landholding Account (ie. land redistribution) as well as the Recapitalisation and Development Programme.

8.10. We recommend that the provision for providing tenure grants to owners or person in charge, as proposed in the addition of subsection (e) to Section 4, be removed in its entirety.

9. Maintenance

9.1. The Bill introduces a new obligation on occupiers 'to take reasonable measures to maintain the dwelling occupied by him or her or members of his or her family' (Section 6(dB)).

9.2. While the Bill proposes that the state pays land owners for providing accommodation and services to occupiers, it proposes that occupiers maintain their dwellings at their own cost. There are two problems with this.

9.3. First, this imposes an unfair requirement of occupiers, who are typically poor. It presumes that the occupier has the means with which to conduct this reasonable maintenance. This may not be the case. For those employed on the farm where they reside, living there is part of their employment contract, and so similarly maintenance is the responsibility of their employer.

9.4. Second, where owners or a person in charge construct dwellings for occupiers, this is fixed property, and any maintenance and improvement accrues ultimately to the owner. Paying for maintenance is an additional cost to the occupier, while the value of this maintenance would accrue to the owner on the departure of the occupier – for whatever reason. As with the proposed amendment to make available tenure grants to owners (see below), farms that provide or require on-site workers are enterprises that, like mines, need to pay the full cost of this labour, including its accommodation and maintenance thereof.

9.5. Recommendation: we propose that Section 6(dB) be amended to provide occupiers the right to maintain and improve their dwellings but not to impose a duty on them to do so.

10. Cultural rights and rites

10.1. The Bill introduces a new right, which is that 'any person shall have the right to…. erect a tombstone on, mark, place symbols or perform rites' on family graves on land belonging to someone else (Section 6(4).

10.2. This extends the burial rights which were affirmed in the ESTA Amendment Act of 2001. Now, not only farm occupiers or former occupiers, but any person has the right to visit, mark and perform rites at family graves on farms. The amendment is an extension of the burial rights, and in keeping with cultural traditions, which value not only burial at places of significance to the deceased and surviving family, but also to maintain and return to these sites for cultural purposes.

10.3. The sensitivity to custom and tradition, and to the right to live according to one's culture, is well expressed in this section – unlike the narrow definition of 'dependant', as discussed above.

10.4. Recommendation: we propose that this provision in Section 6(4) be retained in the Bill.

11. Land Rights Management Board

11.1. The Bill establishes a Land Rights Management Board with an expansive set of functions as set out in Section 15C(1)(a – k).

11.2. The functions of the LRMB are already the responsibilities of the DRDLR. It is unclear why the Bill proposes to outsource these departmental responsibilities to a nine-person national board. The Department is already responsible for implementation of ESTA, including monitoring, identifying tenure disputes, intervening in them, providing legal assistance and support to occupiers, as well as creating a database of occupiers. In our view, the proposal to outsource DRDLR responsibilities to a LRMB needs to be carefully thought through.

11.3. The functions of the LRMB are not consistent with its composition. A nine-person board is to take on nearly the full spectrum of responsibilities of the Department.

11.4. The powers, limitations on power, lines of accountability and reporting of the LRMF are unclear. We cannot understand from the Bill, the Memorandum or the RIA from what source the LRMB will derive its powers, and what mechanisms of accountability will be created, and whether these will be legally valid and politically acceptable.

11.5. The Memorandum to the Bill describes the LRMB as a 'stakeholder forum' but this is inconsistent with its executive powers described in Section 15(C)(1).

11.6. The Bill proposes to amend Section 21 to indicate that the Director-General may refer disputes to the Board for mediation or arbitration. In principle, we strongly support the emphasis on mediation and arbitration as forms of alternative dispute resolution. However, this requires that the Board is suitably constituted and skilled to undertake mediation and arbitration. This contradicts the purpose of establishing the board as a 'stakeholder forum'.

11.7. The responsibilities allocated to the LRMB overlap with those of the Land Rights Management Facility (LRMF). The relationship between the two is not clear, nor is the manner and circumstances in which each might refer matters to one another.

11.8. The scope of the work and powers of the LRMB are inconsistent with the application of ESTA as a whole – ie. commercial farming areas. Section 15C(1)(a) says that the Board shall address 'tenure security matters in respect of commercial farming areas, rural freehold and communal areas'. This would mean tenure issues in all rural areas, including ex-Bantustans and also on land redistribution and restitution projects (ie. land held under Communal Property Associations and other legal entities). We respectfully submit that this is incorrect, and that the mandate of the Board and its powers and composition are not consistent with a task of this scale.

11.9. At the same time, a national body that includes non-state representation which has an oversight role regarding land tenure matters is worthy of consideration. Any such decision would need to be taken in conjunction with consideration of all existing and proposed legislation – eg. Communal Property Association Amendment Bill, Communal Land Tenure Bill, Regulation of Landholdings Bill, etc. However, Parliament is not in a position to debate the merits of such a Board in isolation from these wider legislative and policy changes.

11.10. This again shows the urgent need for policy clarity on land reform as a whole, and the danger of proceeding with creating institutions in an ad hoc manner in the absence of a new White Paper on South African Land Policy.

11.11. Without policy clarity, and an overarching design (across all areas of land reform) and of institutional requirements nationally (across all tenure types), we respectfully submit that this policy clarity does not exist. Without it, the creation of additional institutions may create an additional layer of bureaucracy and additional costs to the state without effective impact.

11.12. Recommendation: Revise the proposal for a Land Rights Management Board in view of a national policy framework outlining the institutional arrangements for implementation across land restitution, land redistribution, land tenure reform in the communal areas and land tenure reform in commercial farming areas.

12. Land Rights Management Committees

12.1. The Bill empowers the Minister, on the recommendation of the Board, to establish Land Rights Management Committees (LRMCs). These may or may not be at district level; their areas of operation are to be determined by the Minister.

12.2. The functions of the LRMCs are those that are already functions of the Department, but there is no mention of remuneration of the members of the LRMCs. With broad membership, the function of such committees cannot be to 'manage' land rights, but rather to support and coordinate the functions of their own organisations – as civil society and state institutions – with the DRDLR which has line function responsibilities. We submit that it is inappropriate for such a body take on these executive functions.

12.3. The Memorandum to the Bill describes the LRMCs as a means to 'strengthen participation in land reform and rural development processes'. This is the purpose of District Land Reform Committees which are in the process of being established. Such bodies do not require legislative definition.

12.4. Area-based planning as an implementation approach to land reform, to support proactive measures, to broaden participation, to secure support from local government and to integrate land reform and rural development processes, was proposed and resolved at the National Land Summit in 2005, piloted in 2006, rolled out further in 2007, and failed to take root. See the national review of Area-Based Planning, dated 2012, which was commissioned by the DRDLR.

12.5. It is unclear why the Department now wishes to establish two parallel local committees to participate in land reform processes: District Land Reform Committees and Land Reform Management Committees. These will likely aim to have the same membership, yet having two such structures would likely dilute participation and duplicate functions. Why not have one local land forum?

12.6. The powers and authority of the LRMCs are unclear. As unremunerated representatives of diverse state and civil society organisations, it is unclear on what basis and with what authority they can resolve disputes, nor on what basis they can be required by law to assist the LRMB, which is a proposed statutory body.

12.7. The relationship of the LRMCs to the Land Rights Management Facility is unclear. The Bill only refers to the responsibilities of the LRMCs to the LRMB.

12.8. The application and scope of the committees is undefined, unlike the LRMB. The Minister is to determine their area of operation. At the same time, the composition of the LRMCs suggests that they will address tenure issues in commercial farming and on land reform projects, as they will include occupiers, labour tenants, communal property associations, various land owners, and others. There is no mention of communal areas or traditional leaders. The scope of the LRMB and the composition of the LRMCs are inconsistent. No reason is given for this apparent difference.

12.9. Recommendation: Revise the proposal for Land Rights Management Committees and consider integrating some of their proposed functions in the terms of reference of District Land Reform Committees.

13. Evictions

13.1. Every review of ESTA, and each major inquiry, and resolutions of numerous national summits have all agreed that the primary failing of ESTA is in enforcement of the provisions regarding eviction and responses to illegal evictions, as well as the widespread failure to use Section 4 proactively. The Amendment Bill unfortunately does not address certain constraints to dealing effectively with threatened or actual evictions.

13.2. Stronger procedural safeguards are needed to address the problem, as noted in the Memorandum to the Bill, that it is too easy to evict occupiers.

13.3. First, the Bill does not address the uncertainty about appeals against eviction orders, pending the automatic review at the Land Claims Court. One of the problems observed is where the Land Claims Court upholds eviction orders on review while appeals are underway, with the result that occupiers might win an appeal against an eviction order that is already approved. We submit that the Bill ought to stipulate that any eviction order cannot be approved on review at the Land Claims Court until any appeal process in another court is completed and the eviction order upheld.

13.4. Second, the Bill does not address the prosecution of persons who evict occupiers without a court order. Illegal evictions (ie. without a court order approved on review by the Land Claims Court) and other infringements of occupier rights, are criminal offences, according to Section 23(1) of the Act. The failure of the South African Police Service (SAPS) to charge and of the National Prosecuting Authority (NPA) to prosecute those who violate ESTA has led to a situation where criminal acts attract no sanction. Based on available survey data (eg. Nkuzi Development and Social Surveys, 2005, as cited in the RIA), this means that probably tens of thousands of criminal acts have gone unprosecuted. SAPS should be able to charge persons with contravention of Section 23 of ESTA on the national database, and personnel from both SAPS and the NPA trained in its provisions.

13.5. Third, the Bill does not address Sections 8(2) and 8(3) to as to distinguish any termination of employment, labour dispute or matter heard in the CCMA – as governed by the Labour Relations Act – from the status of tenure. An eviction application on the basis of termination of employment requires that that termination was fairly executed. Fair, in this context, requires that an occupier was fully aware, at the CCMA, that any settlement on a labour dispute would constitute grounds for an application for an eviction order. Yet courts hearing eviction matters have not required any such proof. Further, some notice periods in eviction matters have run concurrently with notice periods required under labour law. These matters were both addressed at the National Land Tenure Conference in 2001, and action to maintain this distinction between labour and tenure rights was promised by the Department. This requires amendment to these two sections.

13.6. <u>Recommendation: First, amend the Bill to stipulate that the Land Claims Court can only uphold an eviction order on review after any appeal process in another court is complete and the eviction order uphold. Second, the Bill should add to Section 23(1) further provisions which require SAPS to respond to charges of illegal eviction and other infringements of occupiers' rights under ESTA, and the NPA to prosecute these. Third, amend Sections 8(2-3) to require that a court hearing an eviction application must require proof that an occupier was aware that resolution of a labour dispute at the CCMA would constitute grounds for an application for an eviction order, and any notice periods should not run concurrently.</u>

14. Alternative accommodation

14.1. There are two crucial opportunities in the legally prescribed process for the Department to intervene affectively to threatened evictions.

14.2. Firstly, the Department should respond to owners' notification that they intend to seek eviction orders (Section 9(2)(d) notices). These notices must be sent to the occupier/s, the Department and the local municipality two months before court proceedings may commence.

14.3. Secondly, Department probation officers are required to write reports for the courts to consider when hearing eviction applications (Section 9(3) reports). These must summarise all 'relevant circumstances' affecting the occupier/s and owner and assess the likely hardship that would be caused to the occupier should the eviction be granted and to the owner if it is denied. These reports must also include a comment on the availability of alternative accommodation for the occupiers.

14.4. In practice, many occupiers treat the Section 9(2)(d) notice as a notice of eviction rather than as a notice of intention to institute proceedings towards obtaining an eviction order. This contributes to the disparity between the number of notices issued and the number of cases that go to court. In many instances, occupiers vacate the farms in this interim period. The notice period makes possible various interventions before the case goes to court, such as initiating negotiations to avert an eviction, securing legal representation for the occupier/s, planning by the Department and the municipality to provide alternative accommodation and preparing a probation officer's report in terms of Section 9(3). Though provincial offices of the Department keep records of cases in which they are involved, they do not keep records of each ESTA eviction case.

14.5. Frequently, the DRDLR does not respond to Section 9(2)(d) notices but waits for a request for a Section 9(3) report or to be notified of an eviction order. Likewise, municipalities usually do not respond to these notices and simply file them – even though the onus to plan for future settlements and services for evictees lies with the municipality.

14.6. ESTA officers were in the past expected to to act as probation officers and prepare Section 9(3) reports to the court, but they are overwhelmed with cases and are unable to respond to each one. There have been conflicting judgments about whether these reports are mandatory. Though required by law, in practice they are often unavailable and the courts frequently proceed without them. LCC judgments have confirmed that a Section 9(3) report is not compulsory, but have stated that the court should allow a 'reasonable period' for the Department to produce this report. In some magistrates' courts this 'reasonable period' has been interpreted to mean three weeks. Instead of ensuring that all relevant circumstances are brought to the court's attention, then, Section 9(3) has had the effect of delaying court processes for three

weeks, following which proceedings may, and do, continue in the absence of this report.

14.7. In practice, magistrates' courts have not insisted on a Section 9(3) report before issuing an eviction order, and the LCC has not considered the absence of such a report to be a miscarriage of justice. In his judgment in Westminster Produce (Pty) Ltd t/a Elgin Orchards v. Simons and Another, Judge Gildenhuys argued that the law makers could not have intended that no court matter could proceed without a Section 9(3) report where there are no grounds to believe that its contents would affect the decision of the court. In other words, a report is not compulsory in all situations. However, a few judgments have indicated that the LCC takes these reports sufficiently seriously to set aside an eviction order if a magistrate has not requested or obtained a report, as long as there are grounds for believing that its contents could sway a decision. In Vinceremo (Pty) Ltd v. Visagie and Mitchell, Judge Moloto set aside an eviction order on the grounds that no probationary report was presented to the court and that the court therefore had not been able to fully consider the availability of alternative accommodation to the occupiers or the impact of eviction on the constitutional rights of the children to education. Similarly, in Valley Packers Co-operative Limited v. Dietloff and Another in 2000, Judge Moloto overturned the eviction order because, without a Section 9(3) report, the magistrate had not taken into account the issue of alternative accommodation and the potential impact of eviction on the children. Despite this, magistrates hearing eviction applications continue to issue orders, and the Land Claims Court is not required to set aside orders approved, in the absence of a Section 9(3) report.

14.8. We propose therefore that the Bill should be amended to require the involvement of the Department and of municipalities as parties in each eviction application that is heard by a court so that all relevant facts can be put to the court, including probation reports as required by Section 9(3). Magistrates should require these reports prior to delivering their findings.

14.9. The Draft Land Tenure Security Bill of 2010 cited eight limitations on eviction which constitute additional legal safeguards to ensure procedural fairness. These have been removed in the 2015 version.

14.10. <u>Recommendation: insert an amendment to the Bill, requiring that Section 9(3) reports be presented to any court that hears an application for an eviction under ESTA, and reinstate the eight limitations that were contained in Section 20(10) of the Draft Land Tenure Security Bill of 2010.</u>

15. Former occupiers

15.1. The Bill expands the scope of the Act by making tenure grants available to 'former occupiers' without providing an adequate definition of these.

15.2. At present, 'former occupier' implies any person who 'on 4 February 1997, had consent or another right in law' to reside on a farm and who no longer does so. This is far broader a category than those who were displaced or evicted. The circumstances of leaving the farm are of central relevance to the provision of public funds to provide tenure grants.

15.3. Farm dwellers have been the target of post-apartheid dispossession, at the very time when the state is focused on redressing the injustices of apartheid dispossession. This amendment in the current Bill appears to aim to address this, and make state support available to this substantial population.

15.4. If, as seems possible on the basis of available survey data, as many as 3 or 4 million people (including evicted and not evicted) have left farms since 1994, and perhaps 3 million between 1997 and the present, then this provision potentially opens up a restitution-type process of significant scale. We cannot see that either the capital cost (of providing tenure grants to former occupiers) or the current cost (of investigating eligibility on the basis of being a former occupier and the rest of the restitution-like process) have been taken into account in the RIA. This is just one of the significant omissions from the RIA.

15.5. In fact, there is no clear rationale why former occupiers – for instance people who left a farm 15 years ago – should acquire tenure via Section 4 of ESTA, rather than via the land redistribution process, a policy which explicitly prioritises farm workers and dwellers on the basis of their experience in farming.

15.6. Recommendation: Develop a clear definition of 'former occupiers', and develop eligibility and prioritisation criteria, as well as conduct a costing to determine the potential scale of such applications – and consider prioritising former occupiers in land redistribution.

16. Consultation on the Bill

16.1. It is extremely unfortunate that the government has not consulted farm workers and farm dwellers on this Bill that will affect their rights and introduce new obligations on them.

16.2. Farm workers and farm dwellers have repeatedly expressed their misgivings about the failings of ESTA – both limitations in the law and in its implementation and enforcement. Similarly, trade unions, rural advice offices, non-governmental organisations, human rights lawyers and academic researchers have repeatedly contributed in dialogues with government and with representatives of the farming industry.

16.3. We see no evidence that the main concerns which have been raised repeatedly at these many engagements between government and citizens are reflected in this Bill.

16.4. Key events and processes during which amendments to ESTA were discussed, and proposals made (and in some cases resolutions agreed upon) were:

- National Land Tenure Conference, 26-30 November 2001
- SA Human Rights Commission Farm Worker Inquiry 2003
- National Land Summit, 26-31 July 2005
- SA Human Rights Commission Farm Worker Inquiry 2007
- National Farm Worker and Vulnerable Workers Summit, 30-31 July 2010
- National Land Tenure Summit, 3-5 September 2015

16.5. All these events have been well documented, and the resolutions of each demonstrate the frustrations of both farm dwellers and farm owners. These resolutions provide the best available framework for revising the legislation. Some excerpts relevant to ESTA are attached as Appendix 1.

16.6. Further, we have participated in several processes initiated by the Department in order to provide considered input on the basis of our research to strengthening the implementation of ESTA and to identify areas requiring institutional changes and legal amendment. These include:

- National Task Team, 2002 (after National Land Tenure Conference 2001)
- Post Land Summit Steering Committee, 2006
- Farm Dweller Situation Analysis, 2007
- Alternative Dispute Resolution Reference Group, 2003-2004

16.7. In addition, we have responded to a series of draft bills and policies aiming to alter the regulation of tenure on commercial farms including:

- ESTA Amendment Bill, 2003 (not tabled in Parliament)
- Land Tenure Security Bill, 2010
- Land Tenure Security Policy for Commercial Farming Areas, 2013
- Strengthening the Relative Rights of People Working the Land, 2013 & 2014

17. Regulatory Impact Assessment

17.1. We note that the RIA was conducted on the basis of the 2013 version of the ESTA Amendment Bill.

17.2. The RIA presents two options: (a) do nothing or (b) enact the Amendment Bill in its current form. Alternative scenarios were ruled out. It then presents a cost-benefit analysis for the two options, presenting calculations of the potential impacts of each for the national GDP and employment opportunities.

17.3. Option 2, however, implies that 'a comprehensive law is passed to realise the 2011 Green Paper's vision in which the majority of South Africans have adequate and equal opportunities to gain access to land for residential and various productive uses, and where the nation is satisfied that historical racial injustices in landholding have been reversed'. However, that it not the purpose or content of the ESTA Amendment Bill.

17.4. For this reason, the Social Accounting Matrix and the multipliers for the national economy and for employment opportunities that the RIA presents refer not to the potential impact of this Amendment Bill but rather to that scenario – ie. if a comprehensive law to promote access to land were promulgated and effectively implemented to achieve the outcomes mentioned in the quote above.

17.5. The calculations of the cost of implementing the Bill appear not to account for the 374 new posts in the Department that are planned, according to the RIA. We would like access to the costing for these new posts, and clarity on the responsibilities of these new officials, and how this relates to the proposed new institutional arrangements (ie. creation of the LRMB and LRMCs) and to the new departmental responsibilities (ie. compensating owners for accommodation and services, compensating past evictees) in addition to the normal work of ESTA implementation.

17.6. We disagree with the basis for the costing of the Land Rights Management Board. Taking the Ingonyama Trust Board as an example is not a valid method for estimating these costs, especially given the national remit of the LRMB.

17.7. The RIA is based on a Legislative Review and a Socio-Economic Impact Assessment. We request access to these, as we cannot assess the findings without reviewing the methodologies and analysis in these two documents.

17.8. <u>Recommendation: Make the Legislative Review and Socio-Economic Impact Assessments, and the costing for the 374 new posts, publicly available as part of the consultation on this Bill.</u>

18. Summary of proposed changes and recommendations

We provide below a summary of the key themes of the Bill, how this differs from the existing law, and our recommendations.

	ESTA 1997	ESTA AB 2015	Recommendation
Reside	Not defined	Defined in a retrogressive manner to exclude occupiers from coverage under ESTA	Remove definition from AB
Occupier	Defined	Definition amended to remove words 'has or'…. Which has the effect of excluding ALL current occupiers from the ambit of ESTA.	This appears to be a technical drafting mistake. Remove this amendment.
Dependant	Not defined	Defined in a retrogressive manner to exclude dependants to whom the occupier has no legal duty of support	Remove definition from AB
Subsidies vs tenure grants	The Minister shall make available…. Subsidies… to enable long-term security of tenure [quote]	Converts 'subsidies' to 'tenure grants' and makes these available to landowners to compensate for accommodation and services provided to occupiers	Remove provision of state funds to landowners; terminology does not matter
Compensation of former occupiers	Subsidies available to farm dwellers facing, or following, eviction	Makes tenure grants available for former occupiers as well as current occupiers.	Define 'former occupiers' and assess the potential scale of such applications and their processing.
Tenure grants for	Not allowed	Diverts public	Remove provision

landholders		money away from land reform and tenure security towards landowners.	for paying landowners
Land Rights Management Board	None	Establishes a 9-member national LRMB to perform functions that are already the responsibilities of the DRDLR.	Rethink roles, functions, powers and jurisdiction, probably overlapping with functions of DRDLR, the Land Rights Management Facility and the proposed Land Management Commission
Land Rights Management Committees	None	Empowers the Minister to establish LRMCs and determine their area of operation, to perform some of the DRDLR functions of monitoring and intervening in disputes and gathering information needed for a database.	Rethink its relation to the LRMB, given its function as a stakeholder forum, and probably overlaps with functions of the District Land Reform Committees

National Land Tenure Conference
2001

Resolutions

Existing legislation (White Farm Areas)

- ESTA/LTA/PIE to be consolidated and strengthened to include long-term tenure;
- Improvement of enforcement mechanisms;
- Improved monitoring of enforcement including ending culture of impunity of violators;
- Farm dwellers to be integrated into the farming sector as producers;
- Ceiling on land ownership;

Institutional arrangements

- All systems must be accessible and accountable to stakeholders
- The department of Land Affairs (DLA) must establish effective mechanisms for co-ordination and co-operation among all government departments and units at all levels
- There is strong support for decentralisation in the interest of access
- Relations between institutions of traditional authorities, local government structures and other land administration bodies must be clearly defined and established
- Establishment of Land Boards was considered, there was a variety of opinions about their desirability

Capacity building

- Establish co-ordinate support for decentralised land administration involving the DLA, traditional authorities, stakeholders, law enforcement agencies, alternative dispute resolution mechanisms (ADR) and other government departments / institutions
- Provide ongoing monitoring and evaluation of land administration system

Systems and procedures

- Strengthen and integrate role of local government in land refo rm planning and implementation
- Enhance monitoring and evaluation systems and procedures, e.g. of land rights and violations gender issues
- Develop and expedite cheap, efficient and empowering systems and procedures for registration of rights in communal lands
- Upgrade justice systems and procedures to protect and enforce rights of farm workers and dwellers

Information dissemination

- A comprehensive information dissemination strategy is key in consultation as well as implementation
- Must target both primary and secondary stakeholders

- Forms a cornerstone of the overall implementation strategy of all land reform programmes
- Information must be simple and accessible
- Media must use all official languages

Land rights and forms of tenure

- Strengthen long term rights, with real substance, which are legally enforceable
- Rights need ‘teeth’ - practical measures for implementation and enforcement
- Strengthen ‘development’ rights to land for residence and production
- Create independent rights for women

Women and land

- Separate, holistic and integrated policy framework to protect this vulnerable group in land matters
- Empower and capacitation of women, e.g. education, skills development
- Participation of women in decision making process
- Education of both rural men and women on the rights of women
- Promotion of women’s access to land
- Strengthening the rights of women in land
- Recognition of women as heads of households

National Land Summit
2005

Resolutions

THEME 4: Security of Tenure on commercial farms and in communal areas

Urgent Actions

- A moratorium on all evictions until new legislation and programmes are in place to properly defend farm dwellers. (Not supported by AgriSA: legal evictions should still be possible, and municipalities should have programmes to accommodate those affected)
- A Presidential Commission of Enquiry into the situation of farm dwellers, including review of previous evictions and other violations of people rights on farms.
- Government must in partnership with civil society, develop a coherent and proactive strategy to secure farm dweller's rights, with a large and dedicated budget, and dramatically increase its capacity to both protect rights and secure independent land for farm dwellers.

Enforcing the laws

- Department of Land Affairs, Department of Labour and Home Affairs (due to the abuse of illegal immigrants on farms), police, prosecutors, courts and the Legal Aid Board must commit themselves to enforcing people's rights (land rights, protection of livestock, access to graves, visitors rights, freedom of movement) and providing free legal services to farm dwellers, with immediate effect.
- Farm dwellers must be allowed to participate in Community Policing Forums on equal terms with farmers and other stakeholders, and get time off work to do so.
- The abuse of the Trespass Act to evict farm dwellers must end, as it no longer applies to farm dwellers – it has been amended by ESTA.
- Department of Land Affairs needs new powers for enforcement of tenure laws and the human resources to use these powers, as do other departments such Department of Labour.
- Farm dwellers should not be forced to pay rent for living on and /or using the land for livestock and other purposes.
- Transformation and monitoring of the police is urgently needed, to overcome their bias against farm dwellers and ensure immediate action against farmers that violate the law (and in particular tenure laws).
- Department of Land Affairs and the criminal justice system must ensure prosecution and suitable sentences for violators of tenure rights.

Amending the laws

- Government must amend and amalgamate Extension of Security Tenure Act and Labour Tenants Act by the end of this financial year, with the full involvement of all stakeholders. (AfriSA supports review of ESTA and LTA provided that an inclusive consultative process is followed).

- Amendments to LTA and ESTA should strengthen the rights of farm dwellers, including the following:
- _ the current definition and rights of long term occupiers under ESTA is not good enough, therefore create a class of long term non-evictable occupiers with a revised definition (that is such people cannot be evicted regardless of crimes or violation of agreements)
- separate tenure rights from labour arrangements- dismissal should not lead to a person losing their home.
- Create a direct legal route for farm dwellers to have their tenure security (and other rights such as the right to visitors) confirmed.
- End the discrimination against women that positions them as minors whose land rights are dependent on a male household head.
- Create enforceable rights to service provision.
- Ensure protection of farm dweller's livestock and proper valuation and compensation for these.
- Ensure strong burial rights and access to graves in accordance with people's culture. (AgriSA cannot support the proposed amendments without careful consideration; it could never agree to the seperation of tenure rights from labour arrangements. It will make inputs on an Amendment Bill)

Land

- Government must proactively acquire land, using expropriation where necessary, for the creation of sustainable settlements for farm dwellers and to give long-term recognition of their rights within commercial farming areas. (AgriSA in favour of off-farm rather than on-farm solutions and expropriations should be a measure of last resort).
- To enable access to land of their own for farm dwellers the following are recommended:
- Review the property clause;
- One person one farm rule;
- Limitations of farm size;
- The subdivision of large farms;
- The end of willing buyer/willing seller approach. (Agri SA's view is that the property clause is a critically important part of the democratic compromise and should not be tampered with).

Development

- Land that farm schools are on needs to be expropriated in order to secure their future, and the state must provide adequate resources and support to ensure that children on farms receive a high quality education.
- Include farm dwellers settlements are part of Integrated Development Plans and ensure service provision as part of municipalities responsibility for the defence of farm dwellers rights and support for the development of long term solutions.
- All development projects, particularly those requiring approvals from departments of Environment and Tourism, must not be allowed to proceed without first securing the

rights and getting the agreement of any farm dwellers on affected land. (AgriSA felt that farm dwellers should be consulted only if their rights are directly affected by the proposed development).

Empowerment

- Government and civil society must implement well-resourced programmes to build farm dweller organization and capacity, including education to defend their rights and engage effectively in development planning and in driving their own development.
- Farm dwellers must have complete freedom of association to join unions and other organizations that can inform their of their rights and help defend those rights.
- Specific programmes are needed to empower women on farms and support them in asserting their rights.

Accountability

- A statutory structure must be created at the local level in order to monitor and enforce the implementation of the law; this should include all law enforcement agencies and farmers, who must play a more active role in finding solutions and ensuring respect for people's rights.
- Stakeholders, government and farmers must subscribe to a code of conduct and be held accountable.
- Farmers who abuse workers and illegally evict farm dwellers must be expropriated. (Agri-SA did not agree to expropriation as a penalty).

National Farm Worker and Vulnerable Workers Summit
2010

Resolutions

Tenure security

- ESTA provisions to be reviewed and strengthened.
- Moratorium to be placed on farm evictions.
- Tenure rights will be secured for workers and associated with that subsidized houses will be provided.
- Workers should have access to land to support their livelihoods and economic activities – Agri-villages to be promoted.
- National Land Summit of 2005 resolutions to be implemented.
- The "willing buyer – willing seller" principle be reviewed and the nationalisation of land be considered.