



SOUTH AFRICAN HUMAN RIGHTS COMMISSION

Submission to the Portfolio Committee on Environment, Forestry and Fisheries

Climate Change Bill [B9 – 2022]

June 2022

1. Introduction

The South African Human Rights Commission (Commission) welcomes the opportunity by the Portfolio Committee on Environment, Forestry and Fisheries (Committee) to provide comments on the Climate Change Bill [B9 – 2022] (Bill).

The objective of the Commission is to fulfil its responsibilities and mandate to promote, monitor, and promote the protection of human rights in terms of the Constitution of the Republic of South Africa, 1996 (Constitution) and the South African Human Rights Commission Act, 40 of 2013 (SAHRC Act). According to the SAHRC Act:

13(1)(a) the Commission is competent and is obliged to-

- (i) make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of human rights within the framework of the Constitution and the law, as well as appropriate measures for the further observance of such rights.

Section 13(1)(b) of the SAHRC Act further provides that the Commission:

- (v) must review government policies relating to human rights and may make recommendations;

(vi) must monitor the implementation of, and compliance with, international and regional conventions and treaties, international and regional covenants and international and regional charters relating to the objects of the Commission.

To this end, the Commission commends the Minister of Forestry, Fisheries and the Environment (Minister) and the Department of Forestry, Fisheries and the Environment (Department) on the tabling of the Bill for comment. The SAHRC accordingly submits its general comments on the procedural and substantive elements related to the Bill.

2. Comments regarding procedure

2.1. Broad Engagement

Given the severity and far-reaching impacts currently experienced, together with the anticipated adverse impacts of climate change, broad public engagement is required on the Bill. Country-wide consultations should be conducted, particularly in areas where the impacts of industrial activities and / or climate change are being experienced, rural areas included.

Preceding these consultations, notice thereof should be widely circulated via all forms of media, including social media, with communication on how the public can access relevant information. Additional targeted efforts are required to include marginalised or disadvantaged people, such as *inter alia*, women, the youth, and people with disabilities, in these consultations. Translators and sign-language interpreters must attend each consultation and every effort must be made to ensure that technical information is easily conveyed to be understood by all those attending the consultations. These consultations must be conducted with the aim of engagement, not just dissemination – so that voices are heard, and inputs are closely considered for appropriate responses in the Bill, where necessary.

2.2. Finalisation of the Bill

The tabling of the Bill is urgent to all South Africans, especially the poor and vulnerable who, without state assistance, will not be able to withstand the effects of climate change. The Commission notes that the Bill has been in development for some time. The Committee is

reminded that the state is foundationally obligated to create and implement measures to curb climate change. In this regard, the Commission highlights Section 237 of the Constitution which states that, “all constitutional obligations must be performed diligently and without delay” sets the conditions for this action.” The Bill should therefore be given the priority it deserves to meet the standard of urgency envisaged in the Constitution.

To this end, the Commission urges the Committee to expedite the finalisation of this Bill and all associated legislation, without compromising public engagement efforts.

2.3. Presidential Climate Change Committee

As a result of the enormity of the challenge of climate change, and the need to ensure that laws and policies that are designed to deal with climate change, are human rights-based, the Commission believes that all spheres of the State must collaborate with Chapter 9 institutions. In reference to Clause 10 of the Bill, which refers to the Presidential Climate Commission, it is recommended that the clause be expanded to specifically provide for the participation of the Commission in this mechanism.

3. General Comments on the Bill

3.1. Constitutional Grounding

The Commission commends the Department, at the outset, for making the distinction between natural and anthropogenic climate change – the latter of which poses a threat to humankind and the natural environment. However, the main and significant criticism of the Bill is the missed opportunity to firmly declare the human rights centred philosophy to which it ought to be directed, including an expression of commitment to the founding values of the Constitution.

Climate change is first and foremost a human rights issue. According to the United Nations Environment Programme (UNEP), “anthropogenic climate change is the largest, most pervasive threat to the natural environment and human rights of our time.”¹ A myriad studies and reports,

¹ UNEP ‘Climate Change and Human Rights’ (2015): https://wedocs.unep.org/bitstream/handle/20.500.11822/9530/-Climate_Change_and_Human_Rights%3Ahuman-rights-climate-change.pdf.pdf?sequence=2&%3BisAllowed=.

including the fifth assessment report of the Intergovernmental Panel on Climate Change (IPCC), have detailed the devastating impact that climate change will have on the natural environment, ecosystems, the lives of millions of people and the infrastructure, on which people depend.² This includes impacts on water, food land, human settlements, and ultimately life. Clearly, climate change is an economic, social, and environmental justice issue.

Given this backdrop, it is concerning that the Bill is not framed from a human rights-based perspective nor on the prerogatives of the Constitution (which include the founding principles of the Bill of Rights – the rights to equality, dignity, and life). In failing to centre climate change as a human rights issue, the Bill confines climate change to science and the abstract, frequently viewed as a non-human-related concept, which is the antithesis of what the Bill ought to achieve.

It should be noted that similar shortcomings were noted in relation to the rights of persons with disabilities at the global level. In response, previously preferred medical models to interact with the rights to of persons with disabilities, were realigned and expanded to include social, rights-based approaches to the global instruments and mechanisms which set human rights norms and standards for the rights of persons with disabilities. The current Bill will therefore vastly benefit if the rights approach is adopted in its framing. This aspect is returned to below.

Finally, the Bill is not grounded in international, regional, and other domestic legislation, policies, and programmes. By way of example, the Commission notes with concern that, there is no mention of the National Development Plan and Sustainable Development Goals, with which the Bill should work in tandem.

3.2. A Human Rights-Based Approach

When seeking to understand societal, state and community challenges and to design and implement policies and programmes to solve such challenges, it is essential to understand and address the systemic issues of barriers to development, such as poverty, inequality, and discrimination. According to the Office of the High Commissioner for Human Rights (OHCHR):

² IPCC 'Climate Change 2014: Impacts, Adaptation, and Vulnerability, Contribution of the Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change' (2014): <https://www.ipcc.ch/report/ar5/wg2/>.

“Under a human rights-based approach, the plans, policies and processes of development are anchored in a system of rights and corresponding obligations established by international law. This helps promote the sustainability of development work, empowering people themselves – especially the most marginalised – to participate in policy formulation and hold accountable those who have a duty to act”.³

One of the most significant difficulties facing civil society organisations and communities in the environmental field, is the lack of a human rights-based approach to development and planning. This is evidenced by the lack of access to information leading to a lack of transparency and a lack of adequate engagement with stakeholders. Of particular concern, are the poor levels of the voluntary disclosure of information, which should ordinarily be provided proactively in the public domain.

The lack of transparency and access to information, limits the potential for community-based organisations and communities to engage in citizen-based monitoring, which is particularly important for accountability. In the South African context such controls and participation are especially important, given the high levels of corruption, extreme poverty, and inequality; less than optimum implementation and enforcement of laws; and dependency on extractive industries. Poor or limited information flows lend significantly to decreased transparency, and accountability, and increased violations to the environment, and the law.

It is important to reiterate that because of the extent and severity of the impacts of climate change, engagement, access to information and transparency are essential, not just to the success of this Bill, but to the success of all climate change response, mitigation and adaptations strategies – nationally and globally.

3.3. Education, Awareness and Training

While the principles of the Bill speak to “the enhancement of public awareness of climate change causes and impacts and the promotion of participation and action at all levels” it provides no

³ OHCHR ‘Frequently asked questions on a human rights-based approach to development cooperation’ (2006) 15 <http://www.ohchr.org/documents/publications/faqen.pdf>.

specifics on how education and awareness at ‘all levels,’ particularly of communities, will be conducted. The sixth assessment report of the IPCC is instructive in this regard, and states that:

Enhancing knowledge on risks, impacts, and their consequences, and available adaptation options promotes societal and policy responses. A wide range of top-down, bottom-up and co-produced processes and sources can deepen climate knowledge and sharing, including capacity building at all scales, educational and information programmes, using the arts, participatory modelling and climate services, Indigenous knowledge and local knowledge and citizen science.⁴

Education and awareness are not confined to ‘humanising’ climate change, but is vital to the promotion of knowledge sharing, innovation; and the development of policy which is relevant to evolving and emerging concerns. This element is particularly beneficial at a local level for a robust and inclusive response to the many complexities and challenges posed by climate change. Education and awareness further enhance community buy-in to projects and programmes. As such, the Bill requires greater detail on how awareness programmes will be rolled out and sustained. Furthermore, details on the empowerment and training of public sector employees and others in the country, particularly in vulnerable communities, ensuring broad gender and cultural representation is also required.

3.4. Vulnerability and Vulnerable Groups

The Bill inadequately recognises the devastating impacts that climate change will have on the people of sub-Saharan Africa, particularly those that are already impoverished. While vulnerable groups of people are specifically referred to in the Principles of the Bill, the disproportionate impact on groups like women, rural dwellers, people with disabilities and the poor, requires specific mention in the preamble of the Bill and additional policy focus to ensure targeted interventions to assist such individuals and groups of people. The Bill should also take cognisance of the fact that some people have multiple vulnerabilities – such as Black women, living in rural or outlying areas of South Africa.

⁴ IPCC ‘Climate Change 2022: Impacts, Adaptation and Vulnerability (Summary for Policymakers), Contribution of the Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change’ (2022): https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf.

The wording around vulnerability to the impacts of climate change is better articulated in South Africa's National Climate Change Response White Paper, which states that:

South Africa is extremely vulnerable and exposed to the impacts of climate change due to our socio-economic and environmental context. Climate variability, including the increased frequency and intensity of extreme weather events, will disproportionately affect the poor. South Africa is already a water-stressed country, and we face future drying trends and weather variability with cycles of droughts and sudden excessive rains. We have to urgently strengthen the resilience of our society and economy to such climate change impacts and to develop and implement policies, measures, mechanisms and infrastructure that protect the most vulnerable.⁵

3.5. Emission Targets and Timeframes

According to the sixth assessment report of the IPCC, “global surface temperature will continue to increase until at least the mid-century under all emissions scenarios considered. Global warming of 1.5°C and 2°C will be exceeded during the 21st century unless deep reductions in carbon dioxide (CO₂) and other greenhouse gas emissions occur in the coming decades.”⁶ In addition, the report states that “human-induced climate change is already affecting many weather and climate extremes in every region across the globe. Evidence of observed changes in extremes such as heatwaves, heavy precipitation, droughts, and tropical cyclones, and, in particular, their attribution to human influence, has strengthened since [assessment report five].”⁷

Given the extreme urgency and commitment required to limit global warming to a level of 2°C, the Bill is inadequate in a) setting out a concrete and clear plan to curb emissions; b) setting sector-specific emission targets; and c) setting timeframes for the achievement of targets. In addition, the Bill does not make explicit reference to the Paris Agreement, to which South Africa is a signatory. The Paris Agreement has a goal of limiting the increase in the global average temperature to below 2 °C above pre-industrial levels and further, to attempt to limit temperature increase to 1.5 °C above pre-industrial levels.⁸

⁵ National Climate Change Response White Paper (2012):

https://www.gov.za/sites/default/files/gcis_document/201409/nationalclimatechangeresponsewhitepaper0.pdf.

⁶ IPCC 'Climate Change 2021: The Physical Science Basis (Summary for Policymakers), Contribution of the Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change' (2021):

https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf.

⁷ Ibid.

⁸ Article 2(1)(a), Paris Agreement.

The Commission is aware that the Bill provides for the Minister to set the national greenhouse gas (GHG) emissions trajectory and to determine a GHG emission threshold at an undisclosed time. However, the Interim National Greenhouse Gas Emissions Trajectory as outlined in Schedule 3 of the Bill is aligned with South Africa's 2015 Nationally Determined Contribution (NDC) – also known as “peak plateau and decline.” According to the Climate Action Tracker, this NDC is “inadequate,” which indicates that “South Africa's commitment is not in line with interpretations of a “fair” approach to reach a 2°C pathway. This means it is not consistent with limiting warming to below 2°C. If most other countries were to follow South Africa's approach, global warming would exceed 3°C – 4°C.”⁹

Given that South Africa released its revised NDC in 2021, the Bill should, at the very least, reflect this updated information as targets for 2025 and 2030.¹⁰ South Africa revised its target range for 2025 to 398 to 510 and for 2030 to 350 – 420 Metric tons of CO₂ equivalent (Mt CO₂-eq).¹¹ According to the Department, the 2030 target range is consistent with South Africa's fair share and represents a 28% reduction in GHG emissions from the 2015 NDC targets.¹²

However, independent studies have shown that it is just the lower limit of the 2030 target that is close to being compatible with a 1.5°C and that the upper level barely meets the 2°C target increase.¹³ While it is understood that South Africa's NDC is based on fair distribution conditions, including the fact that South Africa is a developing country, South Africa is also one of the top fifteen GHG emitters in the world¹⁴ and “on the global warming scale, an increase of 2°C of the global average temperature will translate to 4°C for South Africa.”¹⁵ Therefore, even a 1.5°C increase in the global temperature will be calamitous for South Africa.

Considering the above, the Bill remains underdeveloped in terms of stringent and committed targets for the reduction of GHG emissions, and timeframes for the achievement of these targets. A revision of the Bill is required with details of how reductions per sector will be allocated and how the revised targets meet the requirements of the Paris Agreement.

⁹ <https://climateactiontracker.org/countries/south-africa/>.

¹⁰ https://www.dffe.gov.za/mediarelease/creecy_indc2021draftlaunch_climatechangecop26.

¹¹ <https://www.gov.za/speeches/statement-virtual-cabinet-meeting-14-september-2021-20-sep-2021-0000>.

¹² Ibid.

¹³ See for example <https://climateactiontracker.org/countries/south-africa/> and <https://cer.org.za/wp-content/uploads/2021/05/NDC-vs-fair-share-memo-v04-corrected-version.pdf>.

¹⁴ <https://www.climate-transparency.org/wp-content/uploads/2021/10/CT2021SouthAfrica.pdf>.

¹⁵ <https://www.ndcequitytracker.org/south-africa>.

3.6. Penalties and Offsets

The provision for penalties is extremely limited in the Bill. According to section 32 of the Bill, a penalty is applicable when a “person commits an offence if that person fails to prepare and submit a greenhouse gas mitigation plan to the Minister in terms of section 24(4).” Given the trend of non-state actors to violate regulations, there is a clear and convincing need for a broader range of penalties, including the option for the relevant Minister to revoke an operating licence if an emitter exceeds carbon budgets and/or fails to adhere to mitigation plans.

Simply stated, one of the main objectives of the Bill is to reduce national GHG emissions. This is an urgent imperative according to the country’s commitments with the Paris Agreement and the survival of the human species. This can only be achieved if emitters are required by law to reduce their emissions and if there are consequences for a failure to do so. In the absence of such penalties there is no incentive to adhere to regulations – and the urgent and necessary GHG emission reductions will not be achieved.

In relation to carbon offsetting, the United Nations states that:

Although carbon offsets are often presented as emissions reductions, they do not actually reduce emissions. At best, they move reductions to where it is cheapest to make them, which normally means a shift from Northern to Southern countries. Greenhouse gas emissions continue to be made at one location on the assumption that an equivalent savings will happen elsewhere.¹⁶

Additionally, the UNEP states that, “carbon offset projects will never be able to curb the emissions growth, while reducing overall emissions, if coal power stations continue to be built and petrol cars continue to be bought, and our growing global population continues to consume as it does today.”¹⁷ As such, carbon offsetting should not be considered a solution, but rather one small strategy in an arsenal of solutions to the global emissions problem. The Commission warns against over-reliance on carbon offsetting as a tool for reducing emissions, given its limited capacity to achieve this.

¹⁶ <https://www.un.org/en/chronicle/article/beyond-carbon-markets>.

¹⁷ <https://www.unep.org/news-and-stories/story/carbon-offsets-are-not-our-get-out-jail-free-card>.

3.7. Capacitation of Local Government

Local government is charged with the ensuring access to basic services at a local level, including environmental management. Local government plays an essential community-facing role in government but is beset with severe and myriad systemic challenges. According to the 2021 State of Local Government Report by the Department of Cooperative Governance and Traditional Affairs, 64 out of 278 municipalities across the country are dysfunctional, 111 are at medium risk, and only 16 are stable.¹⁸ This dysfunction is rooted in poor governance, weak institutional capacity, poor financial management, corruption, and political instability.¹⁹

Local government is a key sphere for the realisation of the Bill and in the management and mitigation of and adaptation to climate change and will bear the greatest burden of the impacts of climate change. The recent devastation from flooding along the coast of KwaZulu-Natal and the Eastern Cape provinces, clearly illustrates the need for effective local government action. While it is imperative that local government be adequately capacitated (with financial and human resources), the Bill remains silent on this need. Greater emphasis on the role of local government is required in the Bill, including ways in which the State will capacitate local government, as a first responder, to deal with the impacts of climate change. In addition, municipalities must have individually developed climate change response strategies – which will aid with the identification of gaps in resources.

3.8. Climate Change Mainstreaming

According to the sixth IPCC report, “ministries of environment are often appointed as de facto agents of coordination but have been hampered by their limited regulative authority and ability to engage in intra-governmental bargaining with ministries with larger budgets and political heft.”²⁰ This clearly illustrates that climate change is not the responsibility of a single State department, sphere of government or sector. The Bill does not adequately deal with the mainstreaming of climate change to ensure a concise and coordinated response strategy.

¹⁸ Report is available at <https://pmg.org.za/committee-meeting/33432/>

¹⁹ Ibid

²⁰ IPCC (note 2 above).

The Bill indicates that:

Every organ of state must coordinate and harmonise the policies, plans, programmes and decisions of the national, provincial and local spheres of government that exercise functions that effect or are affected by climate change or are entrusted with powers and duties aimed at the achievement, promotion, and protection of a sustainable environment, in order to -

(a) ensure that the risks of climate change impacts and associated vulnerabilities are taken into consideration; and

(b) give effect to the national adaptation and mitigation objectives set out in this Act.

However, the details of how this will be achieved is vague. The Commission therefore recommends that that climate change response strategies must be mainstreamed into the strategic plans, annual performance plans and operational plans of all relevant State departments at all spheres of government. This will ensure that climate change strategies are not just perfunctory additions to department planning, but that it is part of the core work of the public sector and that resources are allocated to ensure the implementation of programmes and plans.

3.9. Externalities

The Bill refers to the socio-economic impacts of introducing sectoral emissions targets, and imposing carbon budgets but not the socio-economic impacts of not achieving net zero emissions. Externalities, which are side-effects imposed on a third-party, are not stated in the Bill. The Bill should make provision for the calculation of costs to the State and State departments including to *inter alia* the Departments of Health, Water and Sanitation, cooperative Governance and Traditional Affairs, and Human Settlements, of not limiting GHG emissions.

According to the Worldwide Fund for Nature, “in an effort to correct market failure, so that producers and consumers make these side-effects part of the decision-making process, governments must encourage producers and consumers to internalise the true cost of a particular

activity,”²¹ for example, through carbon taxation. In this case, the State must begin to evaluate the costs of not reducing GHG emissions to the State and the cost in terms of human lives.

3.10. Inherent Right to Exist

The environment is essential to human life, both current and future generations. The rights of individuals “to dignity, life and an environment that is not harmful to their health and well-being,” is unequivocal. However, it is important at the outset for the Bill to recognise the inherent right of nature to exist. The natural environment has a right to be protected, in and of itself, regardless of whether it is of use to human beings. If States see human beings as part of a living system as opposed to stewards of it, human responsibility to protect the environment from human-induced damage will come more naturally than the opposite.

4. One Environmental System

While this section does not constitute a comment on the provisions of the Bill itself, it would be remiss of the Commission not to raise the pertinent issue of the lack of synergy between environmental and other related legislation, which has far-reaching implications for the environment and human rights in South Africa. The Commission recognises that amendments to the National Environmental Management Act (NEMA), the Mineral and Petroleum Resources Development Act (MPRDA), and the development of the One Environmental System (OES) in 2014, were aimed at streamlining the mining applications process and ensuring collaboration between the relevant departments.

However, grave challenges persist in the OES, as evidenced by the myriad mining-related complaints received by the Commission and civil society organisations on systemic human rights violations in mining areas and to mining communities. In its 2016 report from the ‘National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa,’ the Commission found that “discrepant approaches in the application of environmental management laws and limited oversight of environmental management across multiple sectors

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https://www.africa-awsassets.panda.org/downloads/pricing_ghg_and_air_pollution_externalities_in_south_africa_policy_brief_28_april2020.pdf?31121/Pricing-greenhouse-gas-and-air-pollution-externalities-in-South-Africa.

were a cause for concern.”²² The Commission accordingly found that the Department of Mineral Resources and Energy,²³ was not the appropriate authority for granting and enforcing environmental authorisations with respect to mining.

In a colloquium on the OES held in 2018, the Portfolio Committee on Environment, Forestry and Fisheries was briefed by relevant state departments and stakeholders. The Chairperson of the Portfolio Committee introduced the colloquium by stating that:

The aim of the colloquium was first to get information about the OES before beginning to critique. From the presentations and the subsequent discussion, it was glaringly obvious that the three key Departments – the DEA, the DMR and the Department of Water and Sanitation (DWS) - were beginning to have less commitment towards the OES. This was evidenced by the no-show of the DWS, which had a crucial role to play. Even in the presentation of DEA, the institutional mechanism that had been set up to support this OES was shown to be not functioning very well.²⁴

Likewise, the vast array of legislation associated with the NEMA and other environmental-related legislation, as well as the fragmentation of environmental administration with various state departments (and within different spheres of government), are often confusing and conflicting and leads to poor regulation and compliance. Thus, the proposed Bill should clearly articulate how it will operate in relation to the NEMA, given that both Acts will be significant environmental legislation. The Bill must also be framed in relation to existing legislation to ensure harmony and synchronicity.

While the South African legislative framework may have been streamlined over the years, it has not strengthened environmental compliance or assisted in reducing systemic environmental and human rights violations. The Commission therefore urges the Committee to ensure that all environmental legislation is streamlined to enable improved working processes between State departments and different spheres of government. Furthermore, to ensure more effective allocation of roles and responsibilities to the relevant authorities to improve environmental regulation and compliance. Capacitation of local government to ensure environmental

²² <https://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL.pdf>.

²³ Previously Department of Mineral Resources.

²⁴ <https://pmg.org.za/committee-meeting/27570/>.

management must also be prioritised. Ultimately, a failure by the State to manage the natural environment and human rights violations in the environmental sector, does and will continue to have dire implications for climate change.

5. Conclusion

The Commission thanks the Committee for this opportunity to comment on the Bill and hopes that the Bill will be workshopped extensively with all members of society, particularly vulnerable communities. While the Bill is a positive first step in the promulgation of legislation on climate change, more stringent GHG emission-reduction targets and penalties for violators is required. Additionally, climate change targets must be mainstreamed into all State department plans and programmes, and into the work of different sectors in the country. This must be accompanied by capacitation and resource provision, particularly at local government.

The Commission remains committed to working with the State, civil society organisations and communities on the realisation of the right to a healthy environment and associated rights, through the Commissions promotion, protection, and monitoring mandates, to ensure the impacts of climate change on life, equality and dignity, are minimised.

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