Centre *for* Environmental Rights
Advancing Environmental Rights in South Africa

The Honourable Minister Edna Molewa
Minister of Environmental Affairs

For the attention of:

Ms Dineo Ngobeni
Environment House
473 Steve Biko Street
Arcadia
Pretoria
By email: climate@environment.gov.za

Copied to:

Mr Tlou Ramaru
Chief Directorate: Climate Change Adaptation
Department of Environmental Affairs
By email: tramaru@environment.gov.za

Deborah Ramalope
Chief Director: Climate Change Mitigation
Department of Environmental Affairs
By email: dramalope@environment.gov.za

Our ref: NL/RH/SR
8 August 2018

Dear Minister

COMMENTS ON THE CLIMATE CHANGE BILL, 2018

1. We address you on behalf of groundWork[1] and Earthlife Africa,[2] and represent the Life After Coal/Impilo Ngaphandle Kwamalahle Campaign ("the Campaign"),[3] a joint campaign by Earthlife Africa, groundWork, and the Centre for Environmental Rights[4] in making these comments. The Campaign aims to discourage the development of new coal coal-fired power stations and mines; reduce emissions from existing coal infrastructure and encourage a coal phase-out; and enable a just transition to sustainable energy systems for the people.

2. We refer to the Climate Change Bill, 2018 ("the Bill", also referred to, interchangeably, as "the Act" when making reference to the Climate Change Act to be promulgated in future) published on 8 June 2018 (GN 580 in Government Gazette 41689) for 60 days comment, with the stipulated comment deadline being 8 August 2018.

3. We submit below our comments on the Bill, in the following format:

[1] See http://www.groundwork.org.za/.
[2] See http://earthlife.org.za/.
[3] See https://lifeaftercoal.org.za/.
[4] See https://cer.org.za/.

Cape Town: 2nd Floor, Springtime Studios, 1 Scott Road, Observatory, 7925, South Africa
Johannesburg: 9th Floor, Southpoint CNR, 87 De Korte Street, Braamfontein, 2001, South Africa
Tel 021 447 1647 (Cape Town) | Tel 010 442 6830 (Johannesburg)
Fax 086 730 9098
Email info@cer.org.za, www.cer.org.za

3.1. comments on the procedural issues relating to the comment and stakeholder engagement process for the Bill;

3.2. general and overarching comments and concerns in relation to the Bill;

3.3. more detailed comments on, and recommended changes to, specific provisions of the Bill; and

3.4. concluding remarks.

Procedural Issues

4. We note that public meetings in respect of the Bill were hosted in numerous locations throughout South Africa. In relation to the meetings, we point out and recommend the following:

4.1. The Eastern Cape meetings were held in Umtata on 12 June 2018 (2 business days after the Bill was published), and Port Elizabeth on 14 June 2018 (4 business days after the Bill was published).[5] Although it is not clear from the Department of Environmental Affairs' (DEA) website when the invitations were published (the invitation links appear to be faulty) this is an unacceptably-short timeframe from the publication date of the Bill (8 June 2018), and would not have allowed stakeholders sufficient time to read and consider the Bill or to make the necessary travel and other arrangements to attend the workshops. We recommend that the workshops in the Eastern Cape be held again, this time with more advance notice and sufficient time to consider the Bill.

4.2. The meetings have only been held in major cities in some provinces. The communities and municipalities in the most polluted and water-scarce parts of the country – which will be most severely impacted by climate change and greenhouse gas-emitting activities - have been excluded from the stakeholder engagement process. We suggest that meetings be held in: Delmas; eMalahleni; Middelburg; Vanderbijlpark; Colenso; and Lephalale.

5. We submit that, in the interests of procedural fairness and the obligations of the state to adequately consult with stakeholders, in accordance with section 33 of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), the above recommendations should be followed.

General Comments on the Bill

6. We support and commend the DEA on the publication of the Bill. Nevertheless, we are highly concerned that the Bill, in its current form, does not go far enough to address the severity and urgency of the threat of climate change. Instead of responding urgently to the need to address climate change, and making adequate provision for reducing greenhouse gas (GHG) emissions and for holding emitters and government accountable, the Bill's focus is on creating a bureaucracy of government bodies, plans, and processes.

7. We therefore request and recommend that the Bill be substantially amended in line with the comments and suggestions herein, and that these amendments take place as soon as possible, as it is imperative that effective climate change legislation be enacted without delay.

8. This Bill is necessary, not only to give domestic effect to the 2015 Paris Agreement on Climate Change ("the Paris Agreement"), which South Africa ratified in November 2016, but also to address South Africa's own vulnerability to the impacts of climate change and its contributions to, and exacerbation of, those impacts.

9. South Africa's own National Climate Change Response White Paper ("the White Paper"), and now also the Bill, acknowledge that South Africa is vulnerable to the impacts of climate change. The country's Nationally

[5] https://www.environment.gov.za/events/department_activities/climatechange_billprovincial_publicparticipation_workshops.

Determined Contribution (NDC) states that a 2°C global temperature increase translates to a 4°C increase for South Africa.[6] The NDC confirms that "*near zero emissions are required in the second half of the century to avoid even greater impacts that are beyond adaptation capability*".[7]

10. At present, South Africa is not on track to meeting the Paris Agreement target of holding the increase in the global average temperature to well below 2 °C above pre-industrial levels, and to pursue efforts to limit the temperature increase to 1.5 °C.[8] This means that South Africa is continuing to expose itself and its people to devastating temperature increases and other climate impacts that will cause irreversible harm, as acknowledged in the White Paper and NDC. This is not consistent with the Bill of Rights in the Constitution, in particular, the rights to life,[9] dignity,[10] access to food and water,[11] and to an environment not harmful to health or well-being.[12]

11. It is important to note that, in terms of South Africa's NDC commitments, and the abovementioned 2°C target, there is very limited carbon space for further emissions, if South Africa intends to comply with the 2 °C target.[13] It is simply not an option for South Africa to use all of its fossil fuel reserves, nor is it economically desirable, given the increased risks of such projects becoming stranded assets. There is a growing international movement towards leaving coal and oil resources undeveloped.[14]

12. South Africa has a long way to go to ensure that we can sufficiently reduce GHG emissions and avoid the most devastating impacts of climate change, and also to ensure compliance with the Paris Agreement targets. If we do not take steps now to avoid these impacts (such as water scarcity, increased extreme weather events, and temperature increases) they will be severe for all of us, particularly the poor and marginalised communities of South Africa – which will exacerbate the already-prevalent environmental and social injustice in South Africa.

13. Government needs to prioritise the most efficient, cost-effective, and feasible means to ensure rapid and significant emission reductions, and at the same time promote labour-intensive and localised opportunities to ensure a just transition to a low-carbon society. We submit that measures for increased energy efficiency and energy demand management[15] would be a low-hanging fruit in this regard.[16] This would have additional co-

[6] P1, NDC.
[7] P1, NDC.
[8] Article 2(1)(a) of the Paris Agreement. South Africa's Paris commitments, as set out in the NDC, are regarded as "highly insufficient" (in the global context) to meet the 1.5°C to (maximum) 2°C target set in the Paris Agreement, with drastic implications for South Africans. See https://climateactiontracker.org/countries/south-africa/.
[9] S11, the Constitution.
[10] S10, the Constitution.
[11] S27, the Constitution.
[12] S24, the Constitution.
[13] The ERC Report, at p 16 & 17 states that "*South Africa can meet the upper range of the PPD to 2050 if it implements a least-cost energy system to 2050; that is, one that excludes new coal-fired power plants, achieves high levels of energy efficiency and continues to invest in renewables. However only achieving the upper PPD range would not be an adequate contribution to limiting warming to below 2°C (PRIMAP, 2018)*." Available at https://cer.org.za/wp-content/uploads/2018/05/ERC-Coal-IPP-Study-Report-Finalv2-290518.pdf.
[14] See, for example, the following reports: "Boom and Bust 2018: Tracking the Global Coal Plant Pipeline" at https://www.greenpeace.de/sites/www.greenpeace.de/files/publications/boomandbust_2018_coalreport.pdf and "No country for coal gen – Below 2°C and regulatory risk for US coal power owners" at https://www.carbontracker.org/reports/no-country-for-coal-gen-below-2c-and-regulatory-risk-for-us-coal-power-owners/.
[15] Primary energy demand for coal-based power production and hydrocarbon and coal-based liquid transportation fuels (petrol and diesel) is responsible for more than 50% of South Africa's GHG emissions. A successful rapid transition to a low carbon economy requires not only the replacement of fossil fuels as primary energy sources with renewable energy, but extensive measures to address the more efficient use of energy, allowing for a reduction in aggregate energy demand simultaneously with overall economic growth.
[16] The replacement of conventional geysers with solar water heaters (SWH) is usually the single most cost effective and significant intervention to reduce household energy demand, to reduce aggregate demand and shift load away from peak demand. The installation of 5 million SWHs (IEP2016 'Cleaner Pastures' scenario, 30% of households) would reduce annual

benefits of alleviating energy poverty, reducing household air pollution, job creation, and stimulating a small business sector. The current programme to roll-out domestic solar water heaters would serve as a good example of such an opportunity; however this programme has stalled. The Bill should make provision for resuscitating and invigorating this energy demand intervention.

14. Furthermore, locking South Africa into GHG-emitting infrastructure, which will be obsolete and unusable in the future (due to high costs and international obligations) will also have severe economic implications, resulting in: stranded assets; expensive electricity; and water and food insecurity for the people of South Africa.

15. In summary, our main concerns with the Bill, are the following:

    15.1. **Express provision needs to be made for full mandatory disclosure and public access to all reports, assessments, and records provided for in the Bill**. The Bill currently provides for only some of these documents to be gazetted. Carbon budgets, GHG mitigation plans, and annual reports on compliance with carbon budgets, for example, would not be required, by the Bill, to be published or disclosed. Information concerning GHG emissions and their management affects us all and **must** be publicly-accessible. Peru's climate law, the Framework Act on Climate Change, has detailed provisions on access to information. Its law states at the outset the following "Principle of transparency:" "*The State has the duty to make available all public information related to climate change, respecting the right of every person to access adequate and timely information without the need to invoke justification or interest that motivates such requirement, reducing the asymmetries of information...*".[17] In Guatemala, much of the country's climate change information can be found online, on a government website,[18] as all public and private entities are legally required to provide information directly related to climate change. There is no reason why the records under the Bill cannot be expressly made publicly available, particularly given the public interest in this information. The Bill must provide for public access to all records and information as the default position.

    15.2. **The urgent need to curb emissions and a clear target and strict emissions trajectory are not adequately set out in the Bill.** The new legislation cannot be effective unless there is absolute certainty on what the goal is. The Bill must make explicit reference to the Paris Agreement goal of holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels.[19] Furthermore, the Bill provides for the Minister of Environmental Affairs ("the Minister") to set the national GHG emissions trajectory and to determine a GHG emission threshold at an undisclosed time. Instead, the Bill should immediately confirm both the trajectory and the threshold. The country's current emissions trajectory (as set out in the White Paper[20] and NDC) is a broad peak plateau decline (PPD) trajectory range between 398 and 614 Mt CO2–eq, for the period 2025 to 2030. As the current trajectory is broad and has been classified as being "highly insufficient" (in the global context) to meet the 1.5°C to (maximum) 2°C target set out in the Paris Agreement,[21] the Bill should explicitly set out a strict trajectory that reflects, **at minimum** (meaning in the worst case), the lowest range of the PPD (although we dispute that even the low PPD is consistent with the 2 °C Paris Agreement target), with an express requirement for further ambition (ratcheting).[22]

---

demand by about 6 TWh or 3%. A longer term SWH roll-out programme to all 16 million South African households would be highly beneficial.

[17] Peru, Framework Act on Climate Change, article 2.5. Available at http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2018/04/1638161-1.pdf.

[18] See http://sgccc.org.gt/informacion-general/.

[19] Article 2(1)(a), Paris Agreement.

[20] P27, White Paper.

[21] See https://climateactiontracker.org/countries/south-africa/.

[22] See p17, ERC report, which confirms the uncertainty regarding whether low PPD is consistent with the 2°C target, It acknowledges that the future meeting of 2 °C potentially requires reducing emission below the low-PPD trajectory. Available at https://cer.org.za/wp-content/uploads/2018/05/ERC-Coal-IPP-Study-Report-Finalv2-290518.pdf. See also DEA 2014, DERO Explanatory Note no. 1: The application of the "Peak, Plateau, Decline" national benchmark range in setting DEROs.

15.3. **The Paris Agreement commitments are not expressly set out as being legally binding on all organs of state.** We recommend that the Bill make express provision for South Africa's NDC (and subsequent NDCs) to be legally binding. Peru's 2018 Framework Act on Climate Change, for example, identifies the country's NDCs as "*binding and mandatory*" for competent authorities.[23] Peru's Minister of the environment must also, in terms of the Bill, submit annual reports to Parliament on, among other things, progress with meeting the NDC targets.[24] We recommend that similar provisions be added to the Bill.

15.4. **The Bill places a large burden on municipalities, provinces, sector departments, and the Minister, without making adequate provision for capacity-building and funding**. Financial support, technology development, skills transfer, and capacity-building are key aspects of the Paris Agreement,[25] yet these issues – which are crucial for the effective functioning of climate change mitigation and adaptation measures - are entirely absent from the Bill. It is unclear how many municipalities, provinces, and sector departments, which are already failing to fulfil obligations in relation to air quality, water, and waste management - for example - will have the necessary capacity and resources to carry out the obligations that will be imposed by the Act. The implementation of the planning and reporting obligations under the Bill will require considerable funds and skilled capacity – which many spheres of government do not have. The Bill must make provision for the coordination and provision of funds and support. We have reason to believe that the Minister and DEA are also facing capacity and budget constraints, and this Bill places extensive obligations on the Minister alone, such as the approvals of sectoral emission reduction plans (SERPs) and GHG mitigation plans and deciding of all appeals of decisions taken under the Bill by delegated authorities. Furthermore, unless there is proper **oversight and monitoring** - and funding for this - we are concerned that many of these functions, duties and obligations will go unfulfilled, or simply be heavily delayed – as often happens with burdensome requirements - with no practical recourse for those most impacted.

15.5. **The Bill does not go far enough to ensure a reduction of GHG emissions or to hold accountable those who contribute significantly to and/or exacerbate the impacts of climate change**. The only enforceable mitigation measures in the Bill are carbon budgets; but the Bill makes provision for extensions for compliance with carbon budgets, and much of the important detail around carbon budgets has been deferred or left vague. This is unacceptable and creates opportunities for delays and for historical polluters to carry on with business-as-usual. The threat of climate change does not allow such leniency. In the air quality context, we have seen compliance postponements; with some of the country's biggest polluters – including Eskom and Sasol – being granted generous extensions of time to meet air emission standards, despite devastating health impacts. Unless companies are strictly held to their carbon budgets, there is little hope that these will bring about meaningful emission reductions. The provision for extensions for compliance with carbon budgets must be deleted. The current penalties in the Bill - a R5 million fine and/or 5 years' imprisonment on a first conviction - are woefully inadequate and will not deter non-compliance. What's more, securing a criminal conviction is a difficult and lengthy process; instead, the Bill should provide for administrative penalties linked, for example, to turnover. Missing entirely from the Bill is any recognition of the duty of care or climate justice. Companies that knowingly contribute to and exacerbate the impacts of climate change must be held accountable and should also be liable to compensate those who suffer these impacts. The Bill must explicitly prohibit "grandfathering" (allowing established GHG emitters to carry on with business-as-usual). Furthermore, the Bill must provide for, acknowledge and address loss and damage arising from climate change impacts, which is relevant for impacted, vulnerable sectors of society, National Treasury (and ultimately the taxpayer), as well as the insurance industry, which would need to cover the costs of climate damages.

---

[23] Peru, Framework Act on Climate Change, article 12 ("*Los instrumentos de gestión integral para el cambio climático son vinculantes y de cumplimiento obligatorio para las autoridades competentes, debiendo ser considerados en sus presupuestos institucionales*.") Available at http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2018/04/1638161-1.pdf.

[24] *Ibid*., article 6.2.

[25] Articles 9, 10 and 11 of the Paris Agreement.

15.6. **The Bill fails to stipulate clear guiding principles for decision-making under the Bill, and fails to provide for assessments of climate change impacts**. This Bill provides an excellent opportunity for the development of clear and unique principles to guide all decision-making under the Bill and ensure that adequate and meaningful consideration is, in fact, given to the need to urgently reduce GHG emissions and address climate change impacts. Guiding principles would strengthen the hand of government decision-makers and also enable decisions that do not meet the principles to be challenged. In paragraph 35 below, we have recommended some principles to guide decision-making under the Act. Unfortunately, the Bill's principles are not ambitious enough, nor are they adequately aligned with the Paris Agreement and South Africa's own climate change challenges. Furthermore, provision should be made for the assessment of climate change impacts in all decision-making processes under the Bill. This is required vaguely in s7(a) of the Bill, in the context of alignment of the Bill with other laws and policies, but more detail is required and this obligation must expressly apply to all decisions taken under the Act. The case of *Earthlife Africa Johannesburg v the Minister of Environmental Affairs and Others*[26] confirmed that climate change impacts are relevant factors that must be considered,[27] and that taking decisions without proper prior consideration of climate change impacts is prejudicial to the rights of interested and affected parties – and unlawful.[28] The Bill should at least make express provision for consideration of: (1) a particular decision's impact on climate change from a GHG emissions perspective; (2) the way in which the decision might exacerbate the impacts of climate change by increasing vulnerability or impacts on climate resilience; and (3) the way in which the decision itself might be impacted by climate change.

15.7. **The Bill does not adequately provide for strong institutional structures to regulate, implement, and monitor and verify implementation of the Bill**. The Bill provides a good opportunity for the establishment of strong institutional structures to take on functions to regulate, verify, and oversee climate adaptation and mitigation. The structures proposed in the Bill, such as the Ministerial Committee on Climate Change, are unlikely to sufficiently address the challenges posed by climate change. Below, at paragraph 48, we recommend that the Bill provide for, *inter alia*, the establishment of an independent specialist advisory body, a climate change monitoring and enforcement authority, and an appeal authority. This also links with the concern about the lack of adequate capacity and resources for municipalities, provinces, and sector departments to carry out the obligations imposed on them by the Bill. Without sufficient oversight, monitoring, and verification of actions – and adequate funding for this - there can be little hope or assurance that these issues will be addressed and necessary steps taken to remedy the concerns.

15.8. **The Bill should make provision for GHG inventories and the keeping of and regular reporting on GHG and other relevant climate change data and information**. Linked with the obligation to make records publicly available (see paragraph 15.1 above) is also the obligation to ensure that the records and information are sufficiently detailed, structured to facilitate the monitoring of GHG emission trajectories at both the sectoral and individual facility level, and properly reported. We are aware that currently this is regulated under the National Greenhouse Gas Reporting Regulations, 2017 ("GHG Reporting Regulations") under the National Environmental Management: Air Quality Act, 2004 (AQA); however, GHG inventories and data are such a crucial facet of climate change regulation that it would be remiss for this legislation not to make even the broadest mention of an emissions inventory (although it is briefly mentioned in s13(6) in relation to carbon budgets) and GHG reporting. We recommend that the Bill make express provision for a GHG inventory: that goes beyond South Africa's international reporting obligations; that is structured to facilitate the monitoring of sectoral and facility level emissions; and that requires much more regular and comprehensive reporting, including on meeting the country's GHG trajectory. Section 20 of the Philippines' Climate Change Act, for example, requires annual reporting to the President and both Houses of Parliament "*giving detailed account of the status of implementation of [the] Act*."[29]

[26] Case no 65662/16, [2017] 2 All SA 519, (8 March 2017).
[27] Para 78.
[28] Para 119.
[29] Philippines Climate Change Act, section 20.

We have raised numerous concerns with the DEA in relation to the current GHG Reporting Regulations and inventory system,[30] and we repeat our call for this system and process to be reviewed and amended, in particular to provide for **detailed facility-level reporting, transparent auditing and verification of data,** and public access to GHG emission data. The failure to do so affects the integrity of the entire data and reporting system.

15.9. **The Bill does not adequately empower communities and individuals to respond to the impacts of climate change and to hold those responsible (government and emission-intensive industry) accountable**. According to the socio-economic impact assessment for the Bill, prepared by the Department of Planning, Monitoring and Evaluation ("the SEIA"), "*the Bill seeks to introduce measures which will empower citizens to respond to the potential impacts of climate change and related extreme events. Further, citizens will be prepared to plan for potential extreme events associated with climate change*."[31] Yet it is not clear, from the current provisions of the Bill, how this is the case, particularly as the Bill mainly provides for the establishment of more government structures with little provision for adequate transparency, monitoring, and accountability. The public participation process in the Bill only applies in limited instances (the provisions relating to implementation plans to be developed by municipalities and provinces, for example, do not require any public participation, which is unacceptable) and requires substantial amendment. The public participation process also needs to make more provision for education, awareness-raising, and empowerment of communities, as addressed below at paragraph 102.

15.10. **The Bill currently has large gaps and ambiguities, which will pose substantial problems for implementation and legal certainty**. In many sections of the Bill, provisions are left open or ambiguous in terms of various obligations. For example, sections: 9 (climate change response), 10 (adaptation to climate change impacts), 12 (sectoral emission targets) and 13 (carbon budgets) contain numerous gaps, as explained below, which will make implementation and enforcement of these provisions difficult and inconsistent.

16. Unless the Bill can at least address the above concerns, and the recommendations listed below, and be implemented with the rigour and urgency that climate change demands, it runs the risk of being not only ineffective and obsolete, but also unconstitutional.

17. The Bill speaks of coordination among the various government spheres and alignment and harmonisation of laws and policies with the Bill. Yet, in order for all policies to be adequately aligned with the Bill, many government policies will have to radically change. For example, if an adequate trajectory and adequate sectoral emission targets (SETs) are set in terms of the Bill, many government plans and policies – such as the Coal Baseload Independent Power Producer (IPP) Procurement Programme – would require drastic reconsideration. However, decisions are currently being taken (even by the DEA) that will lock South Africa into high GHG emissions well beyond 2050, and jeopardise any climate action being taken now or in the future. The proposed unnecessary, and highly GHG-emission intensive IPP coal-fired power stations - Thabametsi and Khanyisa, which are at "preferred bidder" stage – are examples of this, as they would render many of the DEA's climate change mitigation efforts redundant, as confirmed by a recent report by the Energy Research Centre ("the ERC report").[32] It is worth pointing out that Khanyisa and Thabametsi are just two of some 12 proposed IPP coal-fired power stations, which hope to bid under the Coal Baseload IPP Procurement Programme.

[30] See or letter of 19 January 2018, at https://cer.org.za/wp-content/uploads/2018/01/CER-letter-re-GHG-Regulations_19-January-2018.pdf.

[31] See P5, SEIA for the Climate Change Bill.

[32] Available at https://cer.org.za/wp-content/uploads/2018/05/ERC-Coal-IPP-Study-Report-Finalv2-290518.pdf.

18. If the Bill (which must include the 2°C target of the Paris Agreement) is to be taken seriously, the Department of Energy's Integrated Resource Plan for Electricity (IRP) should not make provision for **any** new coal-fired power capacity - all credible modelling shows that this is not necessary or least-cost,[33]

19. Furthermore, government should seriously reconsider plans and policies that promote wide-spread terrestrial and offshore oil and gas exploration and production.[34]

20. Section 24 of the Constitution confirms the right to an environment not harmful to health or wellbeing, and to have the environment protected for the benefit of present and future generations. This, and the other fundamental human rights in our Constitution must serve as a basis for the enactment and implementation of any climate legislation.

21. We also note that the sections in the Bill are very lengthy and often numerous separate issues are addressed as subsections within one section. For example, section 10 deals with the National Adaptation Strategy, national adaptation objectives; adaptation scenarios; sector department climate change response implementation plans; and synthesis reports to be compiled by the Minister. We recommend that the different issues be separated into separate sections for ease of reference and reading. This will render these sections less complicated and, by implication, easier to understand and implement.

22. Below, we address each chapter of the Bill, highlighting our more detailed concerns and recommended changes.

23. **Please note that where changes to the Bill's text are recommended**, the suggested deletions are within **[square brackets in bold]** and suggested additions are **underlined and in bold**.

Comments and Recommended Changes to the Provisions of the Bill

Preamble

24. In relation to the Bill's Preamble, we recommend that:

    24.1. the references to Constitutional provisions in the Preamble be broadened so as to refer to additional relevant Constitutional rights - given the broad nature of climate change; at the very least, the right of access to food and water[35] should be explicitly included;

    24.2. as section 24 of the Constitution is not qualified by economic or social development considerations, the reference to economic and social development should be removed from this paragraph in the Preamble;

    24.3. the Preamble should acknowledge – as the White Paper does[36] - that a substantial majority of South Africa's GHG emissions are caused by the energy sector and energy use;

    24.4. the vulnerability to climate change impacts be unqualified and not only linked with impacts that require urgent adaptation responses, as the Preamble currently states. We do not yet know what all the climate impacts will be, and it is unlikely that all climate change impacts can be resolved through adaptation responses – thus mitigation of the impacts is crucial;

[33] See http://meridianeconomics.co.za/wp-content/uploads/2017/11/Eskoms-financial-crisis-and-the-viability-of-coalfired-power-in-SA_ME_20171115.pdf and https://cer.org.za/wp-content/uploads/2018/05/ERC-Coal-IPP-Study-Report-Finalv2-290518.pdf.
[34] For instance, the offshore oil and gas focus area Operation Phakisa.
[35] S27 of the Constitution.
[36] P26, the White Paper.

24.5. emphasis be placed on the need for climate justice, in that the impacts of climate change disproportionately affect the poor; and

24.6. more detail be added to the impacts of climate change and what this means for South Africa specifically.

25. The wording around vulnerability to the impacts of climate change should be aligned with the 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*."[37]

26. Some of our proposed changes, in line with the above comments, as well as some grammatical/non-substantive proposed amendments are reflected on the wording of the Preamble as follows:

> "*WHEREAS everyone has the Constitutional right to dignity, life,* ***access to food and water****, and an environment that is not harmful to their health and well-being, and to have the environment protected for the benefit of present and future generations* ***[while allowing justifiable environmentally sustainable economic and social development]****;*
>
> *AND WHEREAS anthropogenic climate change represents an urgent threat to human societies and the planetary environment and requires an effective,* ***urgent, just,*** *progressive and incremental response*;
>
> "*AND WHEREAS the Republic - (a) is an emitter of the greenhouse gases,* ***with the majority proportion of emissions being caused by the energy sector****,* ***[identified by the international community]*** ***confirmed by science*** *as the primary drivers of anthropogenic climate change, and for which the implementation of appropriate mitigation responses are urgently required; (b) is especially vulnerable to* ***[those]*** ***the*** *impacts of climate change* ***[that require urgent and appropriate adaptation responses]****; and …*
>
> *AND WHEREAS anticipated domestic climate change impacts have the potential to undermine many of the gains made in meeting the Republic's developmental goals,* ***[while]*** *implementing an effective national climate change response, set out in the White Paper on National Climate Change Response and South Africa's Nationally Determined Contribution communicated to the United Nations* ***Framework*** *Convention on* ***[Combating]*** *Climate Change secretariat will (a) contribute to the realisation of significant macro-economic, socio- economic and environmental benefits, in a manner that is****:*** *driven and customised in [****the****] light of national circumstances; developmental; transformational;* ***equitable and just****; empowering and participatory; dynamic and evidence-based;* ***based on best available science****; balanced and cost effective; and integrated and aligned; and (b) support a just transition to a climate resilient, equitable and internationally competitive lower carbon economy and society, that takes into account the economic, employment and societal risks and opportunities that are expected to arise as a consequence of implementing the national climate change response;*
>
> *AND WHEREAS responding to climate change raises unique challenges to effective governance as its impact****s*** *transcend****[s]*** *and challenge****[s]*** *traditionally sectoral governance approaches which require a nationally driven,* ***just and ambitious****, coordinated and cooperative legal and administrative response that acknowledges the centrality of the provincial and municipal spheres* ***and the public*** *in achieving its objectives, thus making it desirable to develop a legislative framework for the implementation of the Republic's national climate change response in order to address these matters;*

[37] P8, White Paper.

*AND WHEREAS climate change policy need**s** to be implemented in the context of **the Constitution of the Republic of South Africa, this Act and best available science on climate change [an environmentally sustainable development framework that integrates environmental economic and social development as well as employment objectives to achieve national development goals.]** …"*

Chapter 1: Interpretation, Objectives and Application

27. We recommend, as per our paragraph 15.6 above, that a section dealing with climate change impact assessments for decisions to be made under the Act, be added to this chapter, or at least to s3 (principles) of the Bill.

Definitions (section 1)

28. We object to the following definitions and recommend their amendment:

    28.1. "adaptation" – we suggest that this be aligned with the Intergovernmental Panel on Climate Change (IPCC) definition;[38]

    28.2. "ecosystem" – we recommend that this be aligned with the existing definition of "ecosystem" in the National Environmental Management: Biodiversity Act, 2004 (NEMBA), which states, "*ecosystem" means a dynamic complex of animal, plant and micro-organism communities and their non-living environment interacting as a functional unit*";

    28.3. "mitigation" – this definition is too narrow and should be broadened to include prevention or avoidance of emissions (not only positive interventions to reduce emissions), as well as anticipation of the risks or harm. In other words, mitigation should also entail instances of following the so-called "no go" option and not doing anything – and not only positive interventions – for example: decisions not to build new power stations or mines; or measures to improve energy efficiency and energy demand management – measures that will avoid emissions. Such measures and decisions should also be defined as mitigation and aligned with the need to mitigate climate change impacts;

    28.4. "resilience" - this definition is too vague, as it is not clear what is meant by "disturbances" and "stress and change"; particularly with no contextual references to climate change impacts;

    28.5. "this Act" – this definition should also expressly state that the national framework dealt with in s6 of the Bill, which we recommend be named the "National Climate Change Framework", is included in the definition of "this Act" and forms part of the Act; and

    28.6. "vulnerability" – this definition is too narrow, in that it refers only to the susceptibility to the impact of "hazards", and it is also not clear what is meant by "hazards".

29. We recommend that definitions for the following terms, which appear in the Bill, but which are not defined, be added:

    29.1. "best available mitigation options", referenced in s12(1)(a)(iii) in relation to the SETs;

    29.2. "just transition", referenced in s3 - we recommend that this be defined as "*a transition to a low emissions, climate resilient and equal society that protects the most vulnerable communities, workers, and households*";

[38] IPCC, Fifth Assessment Report.

29.3. "carbon", referenced throughout the Bill - we note that "carbon", "low carbon" and "carbon budgets" may be used to refer to carbon dioxide ("CO_2") or, more broadly, to all GHGs (not only CO_2). We suggest that a definition be included to make clear that references to "carbon", in this context do not **only** refer to CO_2, but also other GHGs as CO_2 equivalents;

29.4. "priority sector", referenced in s9(2)(d) – we recommend that a definition for this should **at least** include the energy, transport, and mining sectors; and

29.5. "South Africa's Nationally Determined Contribution", referenced in s8(6)(a) – we recommend that this definition should specify that South Africa's NDC refers to the current/latest NDC and includes all successive NDCs submitted under the Paris Agreement, which must be a progression beyond the present NDC and represent South Africa's highest ambition. In other words it is not necessarily the NDC in force at the time of promulgation of the Act, but must be interpreted as the NDC applicable at the time, as submitted and adopted in terms of the Paris Agreement.

30. Some of our proposed changes, in line with the above comments, as well as some grammatical/non-substantive proposed amendments are reflected on the wording of the section as follows:

> *"'adaptation"* ***[in relation to natural, human, social and ecological systems, means the process of adjustment to actual or expected climate change and its effects, in order to moderate harm or exploit beneficial opportunities; in relation to natural systems, the process of adjustment to actual climate change and its effects] means adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities****;* …
>
> *"mitigation" means a human intervention to reduce****, prevent or avoid*** *the emissions of greenhouse gases by sources or enhancing their removal from the atmosphere by sinks*; …
>
> "resilience" means the ability of a social, economic or ecological system to absorb **stresses imposed on it by climate change [disturbances],** while retaining the same basic structure and ways of functioning**;** the *capacity for self organization****;*** *and the capacity to adapt to* ***and be better prepared for future climate change impacts [stress and change]****; …*
>
> *"this Act" includes the Schedule to this Act,* ***the Climate Change Framework*** *and any regulations or notices issued under this Act[.];*
>
> "*vulnerability" means the conditions determined by physical, social, economic and environmental factors or processes, which increase the susceptibility of a system to* ***adverse effects and reduce its capacity for adaptation [the impact of hazards]****.*"

Objects of the Act (section 2)

31. The objects of the Bill could be much more ambitious, acknowledging specifically the **urgent** need to:

31.1. hold the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognising that this would significantly reduce the risks and impacts of climate change – this would be aligned with the object of the Paris Agreement;[39]

31.2. significantly reduce South Africa's GHG emissions by: taking urgent steps now to ensure near zero emissions before 2050 and a just transition to a low-carbon economy; and enlarging land use sinks,

[39] Article 2(1)(a), Paris Agreement.

particularly through agro-ecology and other conservation agriculture practices - both for mitigation and adaptation;

31.3. adapt to the impacts of climate change and build South Africa's resilience to those impacts, particularly the resilience of vulnerable people and communities; and

31.4. to protect and preserve the climate and environment and reduce climate impacts for present and future generations.

32. We object to subsection 2(c); in particular the reference to "*a fair contribution to the global effort to stabilize GHG emissions*" within a timeframe and in a manner that "*enables economic, employment, social and environmental development to proceed in a sustainable manner*", because, *inter alia*:

32.1. it is not clear what constitutes a "fair contribution". The main and primary objective should **always** be to uphold the rights in the Constitution and to protect the people of South Africa and the environment from the threats of climate change, even if this requires a higher ambition than what might be regarded as "fair" in the global context;

32.2. in any event, our current commitments have been criticised as being highly insufficient in the global context. How will it be determined whether our contribution is fair and for whom?; and

32.3. the qualification of enabling employment and economic development implies that economic considerations must take precedence and that all decisions must be in the best interests of the economy – this does not adequately acknowledge the existential crisis and enormous threat posed by climate change. The economy, jobs, our health, and continued existence all depend on a healthy climate and environment; this must therefore be the primary consideration in all matters.

33. Some of our proposed changes, in line with the above comments, are reflected on the wording of this section as follows:

"2. The objects of the Act are to-

(a) provide for the ***urgent, ambitious, equitable****, coordinated and integrated response to climate change and its impacts by all spheres of government****,*** *in accordance with the principles of cooperative governance****, and by all persons****;*

(b) provide for the effective management of ***[inevitable]*** ***unavoidable*** *climate change impacts through enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change****, particularly for those communities and persons that are most vulnerable to the impacts of climate change,*** *with a view to building social, economic, and environmental resilience and an adequate national adaptation response in the context of the global climate change response;*

[(c) make a fair contribution to the global effort to stabilize greenhouse gas concentrations in the atmosphere at a level that avoids dangerous anthropogenic interference with the climate system within a timeframe and in a manner that enables economic, employment, social and environmental development to proceed in a sustainable manner]

(c) significantly reduce greenhouse gas emissions within the Republic, in order to reach near zero emissions before the second half of the century and hold the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognising that this would significantly reduce the risks and impacts

<u>of climate change and seek to protect and promote the rights in the Bill of Rights of the Constitution of the Republic of South Africa; and</u>

<u>(d) protect and preserve the climate and environment and reduce climate impacts for present and future generations, and to ensure a just transition to a low carbon and climate-resilient society.</u>"

<u>Principles (section 3)</u>

34. We are of the view that this section provides a valuable opportunity to develop a set of unique principles – focused specifically on climate change – which should guide the implementation of this Act, the framework, and any regulations to be promulgated, in addition to the National Environmental Management principles in s2 of the National Environmental Management Act, 1998 (NEMA).

35. We recommend that the following principles apply in addition to the existing s3 principles in the Bill, as amended below, to guide the interpretation and application of the Act:

    35.1. the risks associated with the impacts of climate change; including impacts on the environment, human health, society, the economy, and displacement related to the adverse impacts of climate change must be fully assessed, averted, minimised, and addressed;

    35.2. the combustion of fossil fuels must be urgently phased out, with the aim of reaching near zero emissions before 2050;

    35.3. South Africa's mitigation efforts must, at least, be aligned with the objects and requirements of international climate change commitments; including the obligation to hold the increase in the global average temperature to well below 2 °C above pre-industrial levels and pursue efforts to limit the temperature increase to 1.5 °C;

    35.4. South Africa's natural and biological resources, including ecosystems, habitats, landscapes, and seascapes; particularly those which are increasingly vulnerable to the impacts of climate change and those which function as carbon sinks and which are essential to our resilience and survival, must be protected, preserved, restored, and rehabilitated, and their preservation, protection, and restoration incentivised and prioritised;

    35.5. all decision-making by all organs of state must take into consideration short and long-term climate change impacts; including the potential for decisions to exacerbate South Africa's vulnerability to climate change;

    35.6. those who knowingly and deliberately contribute to climate change through significant GHG emissions are obliged to cease and urgently reduce their emissions and should be held accountable for the loss and damages caused by those emissions;

    35.7. climate justice must be pursued, so that adverse climate impacts shall not be distributed in such a manner as to unfairly discriminate against any person; particularly vulnerable and disadvantaged persons;

    35.8. all decisions in relation to, and which have impacts for, climate change must be participatory, and transparent, and decision-makers must be accountable;

    35.9. limited "emission space" must be carefully allocated, with minimal (with the objective of zero) allocations to sectors where technologically feasible and affordable mitigation and emission-reducing alternatives are available - historical polluters should not be permitted to continue with business-as-usual;

35.10. many decisions and steps taken today will have far-reaching and long-term climate impacts, with irreversible impacts for future generations. Lock-in to harmful and/or risky infrastructure or commitments should be avoided at all costs;

35.11. the enduring benefits of ambitious and early action, including major reductions in the cost of future mitigation and adaptation efforts must be recognised;

35.12. the vital link between oceans and climate change is recognised, including the role of marine and coastal ecosystems in carbon sequestration, heat storage, temperature regulation, and improving resilience to climate impacts; and the concomitant vulnerability of marine and coastal ecosystems to climate change;

35.13. the inextricable link between mitigation and adaptation, and the need to integrate responses is recognised;

35.14. climate science is accepted and decisions must always be based on best available science; and

35.15. the co-benefits of urgently reducing GHG emissions for, for example, human health, the environment, society, and the economy are recognised.

36. We recommend that consideration also be given to the Mary Robinson Foundation – Climate Justice "*Principles of Climate Justice*"[40] when amending and reconsidering the s3 principles.

37. In addition to the above suggested principles to be added to s3, we recommend the following changes to the existing provisions of s3:

> *"3. The interpretation and application of this Act must be guided by the-*
>
> *(a) national environmental management principles set out in section 2 of the National Environmental Management Act* ***and the Bill of Rights of the Constitution****;*
>
> *(b) principle that the climate system should be protected for the benefit of present and future generations of humankind* ***and the environment****;*
>
> *(c) principle that acknowledges international equity* ***[and each country's common but differentiated responsibilities and respective capabilities, in light of different national circumstances]****; and*
>
> *(d) need to ensure a just transition for all towards an environmentally sustainable,* ***climate change resilient and equitable*** *economy and society* ***[In the light of national circumstances and developmental goals]****."*

Application of Act (section 4)

38. We note that the Act is explicitly binding on all organs of state. We recommend that express provision be made for the Act to be binding on persons as well, to the extent applicable.

Conflict with other legislation (section 5)

39. We support the provision for this Act to prevail in the event of a conflict with other legislation. We, however, recommend that the caveat of "*specifically relating to climate change*" be removed or at least that "*specifically*" be deleted from this provision, as this would unduly narrow the interpretation and application of this provision. S5 should also address instances of conflict between the Act and other legislation, not necessarily specifically

[40] https://www.mrfcj.org/principles-of-climate-justice/.

relating to climate change, but which may have impacts for climate change mitigation and/or adaptation more broadly, and which would conflict with the objects and principles of this Act.

40. We are also concerned that because the principles and provisions of the Bill are currently so vague and broad, it is not entirely clear which circumstances would constitute a conflict – in other words, there is a risk that contradictory laws would not be read so as to prevail over the Act, even if their impact would be to have significant climate change impacts. For this reason, it is important that firmer obligations and principles be incorporated into the Bill.

41. We also confirm that, although this is intended to be a stand-alone Act, independent of NEMA, this does not mean that the provisions of NEMA; in particular: the s28 duty of care, provisions on environmental impact assessments, and other relevant provisions in NEMA concerning environmental protection, no longer apply to issues of climate change. We confirm that NEMA is still applicable to environmental issues, even if these issues concern climate change.

Chapter 2: Policy Alignment and Institutional Arrangements

National framework (section 6)

42. We recommend that the provision for the adoption of a national environmentally sustainable development framework ("the Framework") be substantially amended. We submit that the "*mechanisms, systems and procedures*" to achieve the objects of the Bill and to give effect to the Republic's obligations in terms of international climate change related agreements, would be more suitably placed in the Act itself than in the Framework. A framework should simply **guide the implementation of existing measures** and provisions in the Act.

43. We are also concerned that leaving much of the Bill's implementation detail to a framework document, which is arguably policy and not enforceable, will expose the Act to weakening and abuse. Indeed this has been the case with the National Framework for Air Quality Management adopted under the AQA, which is not regarded as binding (even though AQA expressly states that it is and that it falls under the definition of "this Act" in AQA) and is, in our experience, in many instances, not strictly complied with. We recommend, above and below, that the Framework be expressly included in the definition of "this Act", so as to form part of the Act.

44. If the Framework provision is not substantially changed as per the recommendations at paragraph 42 above, we recommend, at the very least, that:

    44.1. the name of the framework be changed to the "National Climate Change Framework";

    44.2. a provision be included in s6 to confirm that the framework is binding and that the framework be included in the definition of "this Act" as recommended above;

    44.3. the 2 year time period for the development of the framework be deleted, and replaced with 6 months. A 2 year timeframe for establishing the framework is unacceptable, given that it is supposed to guide much of the implementation of the Act; in particular if the provision for the framework to contain the measures to achieve the Act's objects and our international commitments remains. The 2 year time period would bring about substantial delays for the implementation of the Act and for necessary climate change action; and

    44.4. the draft framework be **made available for a reasonable comment period (of at least 60 days) as soon as possible, to be considered alongside the Bill** and promulgated (after public participation, and after making the necessary amendments) simultaneously with the Act.

Alignment of laws and policies (section 7)

45. As indicated above, the proper and meaningful alignment of laws and policies is a great concern. This is particularly so as there are currently many decisions being taken which are already locking the country in to many years of high GHG emissions and climate change impacts, which would contradict the objects of this Bill. As further set out above, **drastic law and policy changes are required** in order to properly and holistically address climate change.

46. We make the following recommendations in relation to this section:

    46.1. The title of this section is "alignment of **laws** and policies"; yet the content of the section only places an obligation to coordinate and harmonise "*policies, plans, programmes and decisions …*". The provision should be amended to expressly include "laws" in the list.

    46.2. The Bill should set out specific principles so as to provide clarity on what constitutes alignment with the Bill. The principles recommended for s3 of the Bill, as set out in paragraph 35 above, would serve as a good basis for this.

    46.3. We note that s7(b) requires that effect be given to the "*national adaptation and mitigation objectives*". However, the adaptation objectives provided for in s10(1) are merely discretionary, and the Bill does not make provision for mitigation objectives, unless this refers broadly to the trajectory, SETs, and carbon budgets. These discrepancies and ambiguities must be addressed.

    46.4. For clarity and certainty, we recommend that the framework or a schedule to the Act provide a list of some of the laws and policies that **conflict** with the Act and need to be amended, such as, policies or laws that: call for new coal-fired power generation, coal mines, or oil and gas extraction; facilitate offshore petroleum (oil and gas) extraction; otherwise support the fossil-fuel industry; or allow for wasteful, water-intensive industries, logging and deforestation, or afforestation with industrial timber plantations, for example.[41] This will remove any uncertainty and also expedite the necessary amendment process.

Institutional arrangements for coordination (section 8)

47. We support the establishment of the Ministerial Committee on Climate Change ("Ministerial Committee") and the Provincial Committee on Climate Change ("Provincial Committee"), although we are concerned that these committees will not have the institutional capacity and expertise needed for the implementation of this climate legislation.

48. We refer again to our recommendation above at paragraph 15.7, for the establishment of independent, fully-funded and resourced institutions to give effect to the Bill. We recommend:

    48.1. an independent body/panel of scientists and experts to make recommendations to government on decisions to be taken under this Act, to provide support to local and provincial authorities, and, in particular, to continuously consider and review South Africa's vulnerability, adaptation, and mitigation potential based on the best available science and technologies;

    48.2. a climate change authority to oversee decisions and steps taken by government and persons under the Act. In particular, the authority must fulfil a monitoring, verification, and enforcement function;

[41] We provide the following examples of legislation that would need significant reworking and alignment with this Act: The Spatial Planning and Land Use Management Act, 2013; the National Energy Act, 2008; the National Electricity Regulation Act, 2006; the Conservation of Agricultural Resources Act, 1983; the National Water Act, 1998; the National Forests Act, 1998; and the Framework Planning Bill; CARA; NWA; National Forest Act; and the Integrated Planning Framework Bill.

48.3. climate change forums, committees, or other open institutional structures comprised of stakeholders from*, inter alia*, government departments, community-based organisations, unions, the private sector, conservation management agencies, not-for-profit organisations, and academia. The provisions establishing and regulating the functioning of Coastal Committees in the National Environmental Management: Integrated Coastal Management Act, 2008 (NEM: ICMA)[42] serve as a good model for provisions dealing with the establishment and functioning of multi-stakeholder committees; and

48.4. an independent appeals body that has jurisdiction over climate change disputes and may hear appeals against decisions made by responsible authorities in terms of this Act, in an accessible and cost-effective manner. The importance of internal or administrative appeals was highlighted by the Constitutional Court in the matter of *Koyabe and others v Minister for Home Affairs and Others*.[43] In that matter, the Constitutional Court found that appeal mechanisms provide for immediate and cost-effective relief and that issues to be decided on may sometimes require specialised knowledge which may be of a technical and/or practical nature.[44] The provisions establishing and regulating the functioning of the Water Tribunal in the National Water Act, 1998 (NWA)[45] are a good model for provisions dealing with the establishment and functioning of an independent appeal authority. The relevant provisions of the NWA, that should be applicable to an appeals authority under this Bill, include the following aspects:

48.4.1. the establishment of a tribunal that consists of members that are independent, committed to the objects of the Act and have the requisite expertise and experience to decide on issues that may arise;

48.4.2. the operation of the tribunal, including the funding for such a tribunal;

48.4.3. the jurisdiction of the tribunal;

48.4.4. the suspension of decisions pending the outcome of an appeal; and

48.4.5. timeframes for appeals and a provision authorising the Minister to publish a set of rules regulating the procedure followed for tribunal matters.

49. Some examples of institutional arrangements for climate change in other countries are the following:

49.1. Guatemala's Framework Law on Climate Change (*Ley Marco Para Regular La Reducción De La Vulnerabilidad, La Adaptación Obligatoria Ante Los Efectos Del Cambio Climático Y La Mitigación De Gases De Efecto Invernadero*) created the National Council on Climate Change (NCCC), which must include representatives of government ministries from national and sub-national levels, representatives of several civil society organisations and sectors, representatives of indigenous peoples' organisations, trade associations, and academic institutions.[46] The Law tasks the NCCC with regulating and monitoring the implementation of actions arising out of the law, including the design and implementation of climate change policies, strategies, plans, programmes, and mitigation and adaptation measures.[47]

49.2. Finland's climate change legislation requires that the government appoint a scientific and independent expert body to support the planning of climate change policy and the related decision-making.[48] The body's task is to collect and itemise research data on the mitigation of climate change and adaptation for

[42] See Chapter 5 of the ICMA.
[43] 2009 (12) BCLR 1192 (CC); 2010 (4) SA 327 (CC).
[44] *Ibid,* at para 35.
[45] See Chapter 15 of the NWA.
[46] Guatemala Framework Law on Climate Change, Article 8, Decreto 7-2013.
[47] *Ibid*.
[48] Finland Climate Change Act, section 16.

the planning and monitoring of climate change policy. The expert body can also carry out other tasks concerning the generation of basic information on climate change.

49.3. The Philippines' Climate Change Act of 2009 creates the Climate Change Commission, which serves as an "*independent and autonomous body*" attached to the Office of the President, and "*shall have the same status as that of a national government agency.*"[49] The Commission is "*the sole policy-making body of the government which shall be tasked to coordinate, monitor and evaluate the programs and action plans of the government relating to climate change pursuant to the provisions of this Act*."[50] The President is the Chairperson of the Commission, and he must appoint 3 additional Commissioners who must have at least 10 "*years of experience on climate change*" through their educational background, training and experience.[51] The Act also creates an advisory board to the Commission, which must include as members: the Secretary of most government agencies, provincial and municipal government leaders, and representatives from academia, non-governmental organisations, and the business sector.[52] The Act sets out 16 different powers and functions for the Commission, including to: coordinate and synchronise climate change programmes of national government agencies; formulate a Framework Strategy on Climate Change to serve as the basis for a programme for climate change planning, research and development, extension, and monitoring of activities on climate change; formulate strategies on mitigating GHG and other anthropogenic causes of climate change; in coordination with the Department of Foreign Affairs, represent the Philippines in the climate change negotiations; oversee the dissemination of information on climate change, local vulnerabilities and risks, relevant laws and protocols and adaptation and mitigation measures; and recommend legislation, policies, strategies, and programmes on and appropriations for climate change adaptation and mitigation and other related activities.

49.4. Mexico's Climate Change Law establishes the Inter-Secretarial Commission of Climate Change as a permanent body to be chaired by the President, who may delegate this function to the Minister of the Interior or Minister Environment and Natural Resources.[53] The body must include the heads of several national agencies, and must convene a broad range of stakeholders to carry out its functions, including other governmental agencies, local government, and representatives from the "*public, social and private sectors.*"[54] The Law grants the Commission several powers, including to promote and coordinate climate change actions; approve the National Strategy on Climate Change; and formulate national policies for mitigation and adaptation.[55] The Law also requires the Commission to have work groups dealing with adaptation policies, mitigation, reducing emissions from deforestation, and on international negotiations on climate change, among others.[56]

49.5. On June 2, 2018, Nigeria's Senate passed the national Climate Change Bill,[57] which is now awaiting signature of the president ("Nigeria's Climate Change Bill").[58] Nigeria's Climate Change Bill would create the National Council on Climate Change to be chaired by the Vice-President, with the Minister of Environment serving as Vice-Chairman.[59] Other members would include Ministers of several government departments, one representative of "*the leading organizations representing the private sector*" and a

[49] Philippines Climate Change Act 2009, section 5, http://www.ifrc.org/docs/IDRL/RA209729.pdf
[50] *Ibid*.
[51] *Ibid*, section 6.
[52] *Ibid*.
[53] Mexico General Law of Climate Change, article 45.
[54] *Ibid*, article 46.
[55] *Ibid*, article 47.
[56] *Ibid*, article 49.
[57] http://placbillstrack.org/view.php?getid=3049.
[58] The full title for this bill is the "Bill for an Act to Provide a Legal Framework for the Mainstreaming of Climate Change Responses and Actions into Government Policy Formulation, Implementation and the Establishment of the National Council on Climate Change; and for Related Matters." Nigeria's House of Representatives introduced the bill first and passed it on 11 August, 2017. Available at: http://placbillstrack.org/view.php?getid=2704.
[59] *Ibid*, section 2.

"*representative of the Nigerian non-governmental organizations, appointed by the President on recommendation of the Minister*."[60] The law would also establish a National Climate Change Agency, "*which shall be the operations arm of the Council*" and, among other things, advise the Council; be responsible for the development of climate change policies and regulations in the public and private sectors of the economy; provide guidelines for the implementation of all national policies and international climate change agreements; serve as a national knowledge and information management center for information on climate change; and identify low carbon development strategies and coordinate related measurement, reporting and verification.[61]

49.6. Australia has a climate change authority,[62] which "*provides independent, expert advice on climate change policy*", in particular it "*plays an important role in the governance of Australia's mitigation policies, undertaking reviews and making recommendations on: the Carbon Farming Initiative, and the National Greenhouse and Energy Reporting System. Reviews are undertaken on other matters as requested by the Minister responsible for climate change or the Australian Parliament*. *The Authority conducts and commissions its own independent research and analysis*."

50. We recommend that these be considered as examples for potential independent, expert climate change institutions and structures, which could (in alignment with the recommendations at paragraphs 15.7 and 48) be established by the Act.

51. We submit that there would be much value in having a **well-resourced independent, expert climate change authority and scientific institution** that could, *inter alia*: review the mitigation targets contained in South Africa's successive NDCs every 5 years and the trajectory, and make recommendations to the Ministerial Committee in this regard; review adaptation plans and strategies, SERPs, and GHG inventory reports, and also fulfill a monitoring and verification role.

52. Under the present wording of the Bill, it is simply within the discretion of the Ministerial Committee to establish an advisory committee in terms of s3A of NEMA to "*assist the committee in the performance of its functions*". If the above recommended institutions are not established, then the Act must at least provide for the **mandatory establishment of the advisory committee** and provide more detail on the required qualifications and experience committee members should have. We are concerned, however, that the establishment of a committee under s3A NEMA would unduly limit the scope and functions of such a committee to environmental issues only; whereas climate change requires much broader consideration and expertise.

53. We also recommend that the Ministerial Committee have the responsibility of ensuring that climate change action, both adaptation and mitigation, are adequately resourced (in terms of capacity, skills, and finances). This is one potential way to ensure that the concerns raised above at paragraph 15.4 can be addressed.

54. As it is vital that a broad range of Ministers be included in the Ministerial Committee; we recommend below that the schedule of functional areas (sectors) be expanded to include other sectors (not only those that would be directly responsible for reducing emissions under s12), such as education and international relations and cooperation. In the event that the schedule is not amended, we recommend that, at least, s8(1) be amended to expressly include the Ministers of: International Relations and Cooperation; Basic Education; and Higher Education and Training.

55. We point out that conflicts of decisions on aspects that can be decided both by the Ministerial Committee and by the Minister individually could arise. Given that the Minister responsible for planning, monitoring and evaluation in the Presidency will have the deciding vote in the event of a tie in decisions being taken by the Ministerial Committee, this might create a conflict in jurisdiction between the Minister and the Ministerial Committee, on,

[60] *Ibid.*
[61] *Ibid*, section 4.
[62] See http://www.climatechangeauthority.gov.au/about-cca.

for example, decisions regarding the coordination of efforts across all sectors taken by the committee, and the various matters that the Minister is obliged to decide on individually, such as the promulgation of the National Adaptation Strategy. This should be addressed in the Bill.

56. We note that the Ministerial Committee (unlike the Provincial Committee) is not required to report to anyone or to record meetings – this must be addressed in more detail in the Bill. Furthermore, it should not only be the Minister that is empowered to convene meetings, but also the Minister responsible for planning, monitoring, and evaluation in the Presidency; particularly in the event that the Minister (of Environmental Affairs) fails to convene a meeting.

57. Given that at least 6 members of the Ministerial Committee (excluding MECs) constitute a quorum under s8(5), it is not clear whether a quorum for the Ministerial Committee can exist without **any** MECs responsible for the environment present. Presumably there would be a quorum in such instances, but we suggest that provision should be made for a minimum number of MECs to be present for a quorum as well. Furthermore, this section should specify that the Minister of Environmental Affairs or the Minister for planning, monitoring and evaluation in the Presidency must always be present in order for there to be a quorum.

58. In relation to the Provincial Committee, provision should be made for a co-chair of that committee as well, or an alternative chair and convenor, in the event that the MEC is unable or otherwise fails to fulfil those functions.

59. This section should include a mechanism for members of the public to bring issues to the attention of Ministerial, Provincial and advisory committees and/or to the authority(ies) recommended above, and for meetings, decisions and processes of the committees and institutions to be open and accessible to the public. Provision should also be made for the minutes and records of such meetings, and progress reports (if any) to be publicly available.

60. Some of our proposed changes, in line with the above comments, as well as some grammatical/non-substantive proposed amendments are reflected on the wording of the section as follows (although these amendments alone would not address the broader concerns listed above):

> *"8.(1) The Ministerial Committee on Climate Change is hereby established comprising of the Minister responsible for planning, monitoring and evaluation in the Presidency, the Minister, the Ministers responsible for the Functional Areas listed in* ***the*** *Schedule …*
>
> *…*
>
> *(3) The Minister is responsible for convening the Ministerial Committee on Climate Change.* ***The Minister responsible for planning, monitoring and evaluation in the Presidency may also convene the Committee.***
>
> *…*
>
> *(6) The Ministerial Committee on Climate Change must- (a) coordinate efforts across all sector departments and spheres of government towards a* ***just*** *transition to a climate resilient and low****er]*** *carbon economy and society in accordance with the White Paper on the National Climate Change Response and South Africa's Nationally Determined Contribution; … (****c) ensure that climate change action, both adaptation and mitigation, are adequately resourced****.*
>
> *(7) The Ministerial Committee on Climate Change* ***[may] must*** *invite contributions from other relevant departments or stakeholders, to inform the coordination of efforts towards a* ***just*** *transition to a climate resilient and lower carbon economy and society.*
>
> *(8) The Ministerial Committee on Climate Change [****may****]* ***must*** *establish an advisory committee …*

…

*(13) The Provincial Committee on Climate Change must - (a) coordinate climate change response actions in the relevant province towards a **just** transition to a climate resilient and lower carbon economy and society in accordance with the White Paper on National Climate Change Response and South Africa's Nationally Determined Contribution, as may be varied from time to time; (b) recommend any climate change matter to the Ministerial Committee on Climate Change; and (c) provide progress reports on climate change response actions in the relevant province to the Ministerial Committee on Climate Change. **The progress reports must be publicly available**."*

Chapter 3: Climate Change Response: Provinces and Municipalities

Climate change response (section 9)

61. We support the provision for climate needs and response assessments by all municipalities and provinces. However, as stated above at paragraph 15.4, we wish to emphasise the need for urgent provision to be made in the Bill for the capacitation, funding, support, and oversight of municipalities and provinces so that they can comply with these obligations.

62. Notably, the Bill should specifically mention the need to address regulatory barriers that restrict municipal climate mitigation and adaptation responses, such as the restriction on the purchasing of renewable energy or entering into power purchase agreements for new generation capacity.[63]

63. The Bill should at least lay the foundation for the processes and mechanisms that would allow municipalities and provinces to access and manage funding and finances for their obligations under the Act. It should be aligned with the requirements of the Paris Agreement and legislation such as the Public Finance Management Act, 1999, Municipal Finance Management Act, 2003, and the Division of Revenue Act, 2017. Further, the Bill could provide that existing fiscal transfer mechanisms, such as Municipal Infrastructure Grants (MIG), should, at a minimum, consider potential climate impacts of municipal infrastructure plans.

64. The Bill should specifically require integration of municipal climate change response implementation plans in Integrated Development Plans (IDPs) and Spatial Development Frameworks (SDFs).

65. Express provision should be made for the reporting, monitoring, and verification of the steps taken and information provided in the implementation plans and reports. This is something that the Ministerial and Provincial Committees, or a separate independent institutional authority, as recommended above (at paragraph 48) should be responsible for, and it should be expressly regulated in the Bill.

66. In relation to the wording of s9, some of our concerns are the following:

    66.1. It is not explicitly clear from the wording of s9(1)(a) that this obligation applies to all municipalities **and** all provinces, given the reference to "*an MEC responsible for the environment **or** a mayor*" (emphasis added), and the inclusion of "*as the case may be*". We presume, however, that it is intended to apply to all provinces and municipalities. We recommend that this wording be amended to remove any ambiguity.

    66.2. Provision is made for the publication of provincial or municipal climate change response implementation plans every 5 years, but it is not clear where and how these must be published. In addition, s9(1)(b) does

[63] For a comprehensive analysis of such regulatory barriers see for instance SACN, 2013, "Consolidation of Lessons Learnt for Energy Efficiency and Renewable Energy Initiatives within Cities, Development of a Roadmap for Future Uptake" at http://www.sacities.net/wp-content/uploads/2013/10/FINAL-REPORT-SACN-EE-and-RE-Lessons-Learnt.pdf; and SALGA, 2013, "Local Government Energy Efficiency and Renewable Energy Strategy" available at https://www.sustainable.org.za/uploads/files/file100.pdf/.

not expressly require publication of the first climate change response implementation plan (it simply states that it must be developed and implemented). This should be clarified, and the Bill must ensure that these plans will be continuously available and easily accessible publicly.

66.3. The Bill also does not make provision for the climate change needs and response assessments to be made publicly available; this must be addressed.

66.4. No provision is made for consultation and public participation, either in terms of s16 and s17 of the Bill, or otherwise, for the climate change needs and response assessments or the climate response implementation plans. Public participation **must** be expressly provided for in relation to these documents and processes.

66.5. The 2 year period for developing and implementing a climate change response implementation plan is too long and should be changed to 1 year, and the review period for the climate change needs and response assessment and implementation plans of 5 years is too long and should be shortened to 2 years.

66.6. It is not clear what the "*national sector plans*" in s9(2)(c) refer to. If these are the climate response implementation plans referred to in s10(9), then this must be clearly stated. Although we note that the s10(9) plans presumably only relate to adaptation, and not mitigation.

66.7. It is not clear what a "*priority sector*", referenced in s9(2)(d), is. This must be defined and clarified. We refer to our recommendation above at paragraph 29.4 in this regard.

66.8. S9(3) should be redrafted. As it provides for an "assessment", there must be **consideration of** the SETs, as well as the GHG emissions trajectory, in order to ensure that there is alignment, instead of simply being "*aligned with*" an analysis of the nature and characteristics of the province or municipality and the identification and establishment of measures and mechanisms to manage and implement the required climate change response. Furthermore, it is not clear what the analysis of the "*nature and characteristics*" of a province or municipality refers to, particularly in the mitigation context (as subsection (3) is intended to deal with mitigation, with subsection (4) addressing adaptation). This must be clarified and specified in much more detail.

66.9. Similarly in s9(4), vagueness and ambiguities need to be addressed. The reference to "*adaptation considerations and options*" as a minimum requirement that must be considered in an assessment is vague. The section should explain what "*adaptation considerations and options*" are.

67. As indicated above, many of the subsections purporting to set out the detail and requirements for the assessments and implementation plans are vague and unclear. More specificity would assist municipalities and provinces to comply with their obligations and to conduct useful assessments and plans. It would also assist in holding municipalities and provinces accountable if their assessments and plans do not meet the requirements.

68. While we suggest that the entire section be revisited to address the above concerns, some of our proposed changes, in line with the above comments, are reflected on the wording of the section as follows (although these amendments alone would not address the broader concerns listed above):

> *"9.(1) **the** **[an]** MEC responsible for the environment **in each province** **[or]** **and** a Mayor of **[a]** **each/every** municipality, **[as the case may be]** must- (a) within one year of the coming into operation of this Act, undertake **and publish** a climate change needs and response assessment for the province or municipality, as the case may be, and such climate change needs and response assessment must be reviewed at least once every **[five]** **two** years **and must be publicly available**; and (b) within **[two]** **one** year**[s]** of the coming into operation of this Act, develop**, publish** and implement a climate change response implementation plan which must be**: publicly available; and** informed by the climate change needs and response assessment as*

*contemplated in paragraph (a) and review and publish the provincial or municipal climate change response implementation plans, as the case may be, every **[five] <u>two</u>** years.*

…

*(3) In relation to mitigation, the climate change needs and response assessment, contemplated in subsection (1)(a), must be aligned with **<u>and consider</u>** relevant national sectoral emission targets **<u>and the greenhouse gas emissions trajectory. The assessment must include[ing]-</u>** (a) an analysis of the nature and characteristics of the province or municipality, as the case may be, and the particular and unique climate change needs and risks that arise as a result of such nature and characteristics …*

*(4) In relation to adaptation, the climate change needs and response assessment, contemplated in subsection (1)(a) must **[address] <u>meet</u>** the following minimum requirements …*

*(5) A provincial or municipal climate change response implementation plan, contemplated in subsection (1)(b), must be integrated and must inform provincial or municipal development planning processes and instruments**<u>, including Integrated Development Plans and Spatial Development Frameworks</u>**…"*

Chapter 4: National Adaptation to Impacts of Climate Change

<u>Adaptation to climate change impacts (section 10)</u>

69. We note that this is a particularly lengthy and varied section dealing with, *inter alia*, national adaptation objectives, scenarios and a national adaptation strategy; implementation plans for sectors; and synthesis reports. As stated above at paragraph 21, we recommend, for ease of reference, interpretation, and implementation, that this section be broken up and the various issues dealt with in separate sections.

70. We note further that this chapter should be substantially redrafted to provide for, *inter alia*:

    70.1. as a starting point, a number of relevant considerations and requirements, which must be taken into account and form the basis of adaptation planning. First and foremost, accepted and best available science must serve as the foundation for adaptation planning; thereafter the vulnerabilities of South Africa and its regions must be considered and articulated, and in determining the vulnerabilities, consideration must also be given to current and planned developments and infrastructure that could have the effect of exacerbating the impacts of climate change – water-intensive projects or projects that could impact on land and food security for example (we refer again to our recommendations regarding climate change impact assessments at paragraph 15.6 above); and then the response to these vulnerabilities must be outlined in an adaptation strategy;

    70.2. a national adaptation strategy as the central adaptation planning document – the proposed adaptation objectives and scenarios must form part of the adaptation strategy and should not be separate documents and processes; and

    70.3. the strategy should conform to South Africa's international commitments under the United Nations Framework Convention on Climate Change's (UNFCCC) Technical Guidelines for the National Adaptation Plan Process.[64]

71. In relation to the more specific detail and wording of s10, we submit the following:

[64] See http://unfccc.int/files/adaptation/cancun_adaptation_framework/national_adaptation_plans/application/pdf/naptechguidelines_eng_low_res.pdf.

71.1. Regarding the "national adaptation objectives" of s10(1):

71.1.1. it is arbitrary that the Minister's power to set national adaptation objectives is discretionary, particularly when other provisions of the Bill require reliance on the national adaptation objectives. S10(5) states that the National Adaptation Strategy ("the Strategy") **must** include an outline of the national adaptation objectives; this means that if national objectives are not adopted, the Strategy will not be able to comply with legal requirements. We recommend that the Bill make the setting of national adaptation objectives mandatory;

71.1.2. it is not clear what is meant by "periodically reviewed" – timeframes for the review of the objects should be specified; particularly if these are made mandatory as recommended; and

71.1.3. it is also not clear what the objectives are required to do. The wording, "*guide the Republic's adaptation to climate change impacts, the development of resilience and the Republic's contribution to a sustainable development agenda*", is vague and ambiguous. What is the "*sustainable development agenda*"?

71.2. S10(2) states that "*climate change adaptation within the Republic must be managed in a coherent and coordinated manner and in accordance with a National Adaptation Strategy*", but then the Strategy is only introduced in s10(3). This is arbitrary and s10(2) should rather follow on from s10(3).

71.3. It is not clear when the first Strategy is required to be published. We submit that this should be within 6 months – at most 1 year - of the Bill being promulgated.

71.4. The review of the Strategy on a 5 yearly basis only is inadequate. Given the variable nature of climate impacts and the importance of proper and up-to-date plans to address these impacts, provision must be made for the review to take place on a more frequent basis. We submit that this should take place, at least, every 2 years.

71.5. The development of the Strategy must be subject to public participation and must follow the consultation process set out in s16 and 17 of the Bill.

71.6. While we support the list in subsection (5) on what the Strategy must include, it should be more ambitious and should elevate the urgency and significance of the country's climate vulnerability.

71.7. We recommend that the provision for the adoption of climate change scenarios be mandatory instead of discretionary. Again, the Bill, in other subsections (10(4)(b), 10(5)(b) and 10(8)), presupposes, and is dependent on, the adoption of scenarios, even though they are discretionary. It is also necessary that a deadline be provided for the development of the scenarios.

71.8. With regard to the mapping of risks and vulnerabilities and climate response implementation plans to be undertaken by the Minister of each sector department and each state-owned entity for which the department is responsible, it is not clear:

71.8.1. whether this mapping must be repeated and reviewed to address changing circumstances or whether one once-off mapping within 2 years of the Act's promulgation is all that is required - we submit it should be the former;

71.8.2. where and how the climate change response implementation plan must be published;

71.8.3. whether the climate response implementation plan referred to here is the same plan referenced in s9(2)(c) of the Bill (see paragraph 66.6 above);

71.8.4. whether the mapping under s10(9)(a) is to be publicly available – we submit that it must be; and

71.8.5. in relation to the progress reports that must be submitted every 4 years, to whom these reports should be submitted, whether these reports will be publicly available (we submit that they must be), and how the 4 year intervals will align with the 5 year climate response implementation plan review and publishing intervals.

71.9. The time periods in s10(9) for the identification and mapping of risks; development of implementation plans; and reporting by sector departments are, in any event, too long and must be shortened to require more frequent mapping, planning, and reporting.

71.10. In relation to the Minister's obligation to collate, compile, and synthesise information (as required in s10(11)), it is not clear:

71.10.1. how the Minister will fulfil her obligation to collate, compile, and synthesise information relevant to the achievement of the national adaptation objectives, if no adaptation objectives are adopted (since this is currently discretionary under s10(1));

71.10.2. exactly what should be included in the Synthesis Adaptation Report (this provision is currently very vague), and what the aim of the report is;

71.10.3. what the difference is (if any) between the "Synthesis Adaptation Report" that must go to Cabinet for consideration, and the "Synthesis Report on Climate Change Adaptation" to be used in the national and international reporting processes. If there is no distinction between the reports then – for clarity and consistency purposes - the references to the report should be the same. If they are different and separate reports, which appears currently to be the case, given the use of the word "and" when referring to both reports, the Bill must clarify how (if at all) they are different and also how they are connected and aligned; for example, whether one is supposed to inform the other, and what the separate objectives and processes for each are; and

71.10.4. when these reports must be published.

71.11. Express provision must be made for both Synthesis Reports (or the single report, if they are indeed one and the same) to be publicly available.

72. All of the issues highlighted above **must, at least**, be clarified and addressed in the Bill to avoid uncertainty, but we reiterate our recommendation, in paragraphs 21, 69 and 70 above, that chapter 4 be substantially restructured and redrafted, and that the adaptation objectives, scenarios, and strategy all form part of an adaptation strategy.

73. Some of our proposed changes, in line with the above comments, as well as some grammatical/non-substantive proposed amendments are reflected on the wording of this section (noting that these amendments alone would not address the broader concerns listed above) as follows:

"*Adaptation to climate change [**I**]**i**mpacts*

*10.(1) the Minister **[may] must**, in consultation … (c) – determine a date by which the national adaptation objectives should be incorporated into all relevant national planning **[instalments] instruments**, policies, and programmes …*

…

*(3) The Minister must, in consultation with the sector departments**, municipalities** and provinces, develop and**, within six months of the coming into operation of this Act,** publish by notice in the Gazette: (a) a National Adaptation Strategy; and (b) review the National Adaptation Strategy at least once every **[five] two** years.*

*(4) The National Adaptation Strategy will be aimed at achieving the following- (a) a reduction in the vulnerability of society, the economy and the environment to the effects of climate change, strengthening resilience of the socio-economic and environmental system and enhancing the adaptive capacity of the national environment**, society** and economy to the impacts of climate change; (b) minimising the risk and vulnerabilities to current and future climate scenarios; (c) **[achieving] meeting the** national adaptation objectives; (d) providing a strategic and policy directive for adaptation to the impacts of climate change; and (e) providing an integrated and coordinated approach to managing adaptation measures to the impacts of climate change by organs of state in all spheres of government, and **[where relevant should] must** also include non-governmental organisations, the private sector and local communities.*

*(5) The National Adaptation Strategy must include, but not be limited to, the following minimum components- (a) an outline of the national adaptation objectives and priorities to inform an adaptation response in the Republic; (b) a consideration of the Republic's current and future climate change scenarios as informed by the adaptation scenarios developed in terms of this Act; (c) an assessment of the Republic's vulnerability to climate change and related risks at a sectoral, cross-sectoral, and geographic level, including a consideration of relevant national disaster risk assessments in terms of the Disaster Management Act **and an assessment of the ways in which the vulnerability and risks could be exacerbated by existing and planned infrastructure, industrial and/or other developments in the Republic**; and (d) an outline of adaptation options available to reduce identified vulnerabilities by building adaptive capacity and resilience, in the context of actual or anticipated social, economic and environmental costs.*

*(6) The Minister **[may] must within six months of the coming into operation of this Act**, in consultation with the sector departments,**[and]** provinces **and municipalities**, develop **and publish** adaptation scenarios which anticipate the likely impacts of climate change in the Republic over the short, medium and longer term. **The scenarios must be reviewed every two years and any amendments thereto must be published.***

*(7) The adaptation scenarios must include a consideration of - (a) a systematic observation of the climate system and early warning systems; (b) the anticipated impacts of climate change on the environment of the Republic and associated vulnerabilities; **(c) the ways in which those impacts are or could be exacerbated by existing and planned infrastructure, industrial and/or other developments in the Republic; [(c)] (d)** the socio-economic implications of the impacts of climate change within the Republic and associated vulnerabilities; and **[(d)] (e)** the adaptation response options available to respond to the anticipated impacts of climate change*

…

*(9) A Minister responsible for a sector department and any State Owned Entity for which a sector department is responsible must- (a) identify and map, within the sphere of operations of the relevant Functional Area, **current and future anticipated** risks and vulnerabilities, areas, ecosystems, communities and households [**that will arise and**] that are vulnerable to the impacts of climate change; and **identify** [**identification**] and **establish** [**establishment of**] measures and mechanisms to manage and implement the required response; and within **[two] one** year**[s]** of the coming into operation of this Act, develop and implement a climate change response implementation plan which must be informed by the assessments undertaken pursuant to paragraph (a) and be reviewed and published every **[five] two** years**, with the identification and mapping under subsection (9)(a) to be repeated every two years**.*

*(10) A Minister responsible for a sector department must submit **and publish in the Gazette**, every **[four] two** years of the coming into operation of this Act, reports on the progress made in relation to the implementation of the climate change response implementation plan…"*

Chapter 5: GHG Emissions and Removals

74. We recommend that a section dealing the GHG emissions inventory and GHG emission reporting be added to this chapter, as per our recommendations above in paragraph 15.8.

National GHG emissions trajectory (section 11)

75. As we currently have a trajectory range under the White Paper and the NDC, we recommend that reference be made to the current GHG emissions trajectory, preferably in the Bill, or in a notice to be promulgated simultaneously with the Act to reaffirm the current trajectory, subject to any reviews in terms of s11(3). We also strongly recommend, as stated above at paragraph 15.2, for purposes of ensuring adequate GHG mitigation and sufficiently stringent commitments: that, **at a minimum** (meaning in the worst case), the lower PPD range be used for the trajectory (although we dispute that even the low PPD is sufficient to meet the 2 °C Paris Agreement target), with an express requirement for further ambition (ratcheting) and that the Bill explicitly require the trajectory to be consistent with the Paris Agreement goal of limiting the global rise in temperature to less than 2 °C (pursuing efforts for a 1.5 °C) temperature increase.

76. Setting the national target in the Act itself, and requiring a trajectory that is aligned with the 2 °C Paris Agreement target, would be aligned with many climate change laws around the world:

    76.1. Mexico's General Climate Change Law of 2016 sets a preliminary GHG emissions reduction target for 2020 and 2050, which the law requires to be reviewed when the government publishes the National Climate Change Strategy.[65]

    76.2. Finland's Climate Change Act of 2015 sets as a binding target "*that the total anthropogenic emissions of greenhouse gases into the atmosphere is reduced in Finland by at least 80 per cent by 2050 compared to 1990 levels*."[66]

    76.3. Scotland's Climate Change Act of 2009 incorporates interim targets, so the country can assess its progress and adapt appropriately to meet its long-term targets. The Act sets a target for the reduction of GHG emissions for the year 2050, an interim target for the year 2020, and provides for annual targets.[67] Although we do not regard these as sufficiently ambitious, by way of example: for 2050, Scotland seeks to ensure emissions accounts are at least 80% lower than the baseline, which it has set as 1990 for carbon dioxide, methane and nitrous oxide, and 1995 for hydrofluorocarbons, perfluorocarbons, and sulphur hexafluoride.[68] Scotland also sets an interim target of a 42% reduction from the baseline for 2020, which the relevant Scottish Ministers related to climate change had to reassess as soon as possible after the Act came into effect.[69] Section 3 of the Act also requires the Scottish Ministers to set annual reduction targets: "*(1) The Scottish Ministers must— (a) for each year in the period 2010-2050, set a target for the maximum amount of the net Scottish emissions account; and (b) ensure that the net Scottish emissions account for*

[65] Mexico General Climate Change Law of 2016: http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2018/03/leyclimatico.pdf.
[66] Finland Climate Change Act of 2015, section 6(3), unofficial English translation at: https://www.finlex.fi/en/laki/kaannokset/2015/en20150609.pdf.
[67] Scotland Climate Change Act 2009, part 1. http://www.legislation.gov.uk/asp/2009/12/pdfs/asp_20090012_en.pdf
[68] *Ibid*, sections 1 and 11.
[69] *Ibid*, section 2.

each year in that period does not exceed the target set for that year." The annual targets must be set at an amount that would allow the 2020 and 2050 targets to be met.

76.4. Switzerland, in addition to setting a target, also notes that its emissions reduction contribution will aim to be consistent with limiting the global rise in temperature to less than 2 °C. The Swiss Federal Act on the Reduction of CO_2 Emissions ("CO_2 Act") of 2013 aims to reduce GHG emissions with the "*aim of contributing to limiting the global rise in temperature to less than 2 degrees Celsius*."[70] It requires: "*Domestic greenhouse gas emissions must be reduced overall by 20 per cent as compared with 1990 levels, by 2020. The Federal Council may set sector-specific interim targets*."[71] The CO_2 Act also allows the Federal Council to increase the reduction target to 40 % in order to comply with international agreements.

77. We submit that the approach of setting the trajectory and targets **in** the Act must be preferred to making provision for setting the trajectory in future, and a general statement of contributing a "fair share" to stabilise GHG concentrations - as in s2 of the Bill - should be avoided, and replaced with a **firm reduction commitment,** as recommended in paragraphs 15.2 and 75 above. This would provide much-needed legal certainty.

78. As indicated above, South Africa's current NDC commitments (including the trajectory) have been criticised as being highly insufficient and would result in a 4 °C temperature increase – far from the necessary 1.5 °C (maximum 2 °C) limit. In order to avoid the trajectory being challenged as being insufficient, we reiterate that even the low PPD range is not consistent with the 2 °C target, as such, it should only serve as a starting point with an **express and urgent requirement for further downward ratcheting of the trajectory**.

79. In relation to the content of s11, and in addition to the recommendations made above, we recommend that:

79.1. the trajectory be called the "*greenhouse gas emission **reduction** trajectory*", given that the overall and long-term aim of the trajectory must be to **reduce** South Africa's emissions – and not provide for an increase in GHG emissions;

79.2. a time period be set within which the national GHG trajectory should be determined - although we first and foremost request that the trajectory be specified in the Act - and when it must be reviewed;

79.3. the provision for the review of the trajectory must be aligned with the provisions of the Paris Agreement, which requires that South Africa communicate and maintain successive NDCs and that these successive commitments must be a progression **beyond** South Africa's then current commitment and must reflect its **highest possible ambition**.[72] In other words, the trajectory **must be regularly reviewed and updated** and a review of the trajectory in terms of s11(3) can only result in the trajectory becoming stricter or (at the very least) remaining the same – it cannot result in regression or in the trajectory becoming more lenient;

79.4. the trajectory should not only be informed by the total current and projected volumes of GHGs emitted in the Republic (s11(1)(b)), but also that it should be informed by current and projected **global** emissions, given the transboundary nature of climate change and South Africa's extreme vulnerability to its impacts; and

79.5. all decisions taken by all organs of state and persons, to the extent applicable, must consider, and be aligned with, the trajectory.

80. Some of our proposed changes, in line with the above comments (noting that these amendments alone would not address the broader concerns listed above), are reflected on the wording of this section as follows:

[70] Swiss (CO_2 Act), article 1.
[71] *Ibid*, article 3.
[72] Article 4(2) and (3), Paris Agreement.

"(1) The Minister must, in consultation with the Ministerial Committee on Climate Change, by notice in the Gazette ***and as soon as possible within six months of the coming into operation of this Act****, determine a national greenhouse gas emissions* ***reduction*** *trajectory for the Republic of South Africa, which must- (a) specify a national greenhouse gas emissions reduction* ***target*** ***[objective]*** *through quantitative descriptions of volumes of greenhouse gas emissions* ***that may*** ***[expected to]*** *be emitted over a specified period in the Republic; (b) be informed by relevant and up to date information regarding the total current and projected volumes of greenhouse gases emitted in the Republic* ***and globally****; and be consistent with the objectives of this Act and the Republic's international obligations,* ***in particular the commitment to limit global temperature increase to well below 2 degrees Celsius above pre-industrial levels, while pursuing efforts to limit the temperature increase*** **to** ***1.5 °C above pre-industrial levels.***

(2) The national greenhouse gas emissions ***reduction*** *trajectory binds all organs of state in all spheres of government, and all persons to the extent applicable.* ***All decisions must consider and be aligned with the national greenhouse gas emissions reduction trajectory.***

(3) The national greenhouse gas emissions ***reduction*** *trajectory* ***[may]*** ***must*** *be reviewed* ***every five years, and any changes to the trajectory must be a progression beyond the current trajectory and must reflect South Africa's highest possible ambition.***

(4) Before publishing the national greenhouse gas emissions ***reduction*** *trajectory, or any amendment thereto, the Minister must follow a consultative process in accordance with sections 16 and 17."*

Sectoral emission targets (SETs) (section 12)

81. In relation to the SETs, we point out (as in relation to s9, at paragraph 61 above) that sector departments will require significant support in the form of additional resources (both financial and human resources), expertise, and capacity to properly and effectively carry out these functions of developing and implementing SERPs to meet their SETs, and to report on compliance with the SETs. This must be addressed.

82. We also recommend that the Bill integrate more detailed climate change-related goals and actions for various sectors (not only targets relating to GHG emission reductions). For example, other countries go much further by integrating entire sections on education, waste, energy, transportation, or other issues, per sector, into their climate change legislation requirements.

    82.1. France's First Grenelle Act is a law that details the climate-related policy commitments that the French National Assembly made in October, 2007. In this Act, France sets various sectoral targets, principally for the construction and transportation sectors. For example, the building sector must meet an energy consumption target of 50 kilowatt hours per square meter per year and a 38% energy consumption reduction by 2020, assisted by the state's renovation of 4000,000 housing units each year from 2013.[73] Buildings owned by the state have higher energy efficiency goals of 40% energy consumption reduction and 50% reduction of GHG emissions from those buildings. France also sets a target for its transportation sector to reduce GHGs by 20% by 2020 to bring them back to the level they reached in 1990.[74] To meet this goal, France aims to increase the share of non-road, and non-air transportation of freight from 14% to 25% by 2020.[75] Energy targets aim for renewables to meet 23% of the country's needs by 2020.[76] Lastly, France sets out targets for the waste sector, aiming for a 15% reduction of waste going into incineration or storage by 2012.[77]

[73] France, First Grenelle Act Article 5.
[74] *Ibid.* at Article 10.
[75] *Ibid.* at Article 11 § I.
[76] *Ibid.* at Article 19 § II.
[77] *Ibid.* at Article 46.

82.2. The Philippines Climate Change Act of 2009 has a section requiring the Department of Education to integrate climate change in its educational curriculum. Section 15 states "*Role of Government Agencies. – To ensure the effective implementation of the framework strategy and program on climate change, concerned agencies shall perform the following functions: (a) The Department of Education shall integrate climate change into the primary and secondary education curricula and/or subjects, such as, but not limited to, science, biology, sibika,*[78] *history, including textbooks, primers and other educational materials, basic climate change principles and concepts;…".*[79]

82.3. Guatemala's Framework Law on climate change specifically addresses the land use and forestry sector in a separate section, and states that the country's National Council on Protected Areas will develop a plan for sustainable development of forestry resources, including environmental services that reduce GHGs.[80] The Framework Law also has a small section on transportation that requires various governmental ministers to come up with a plan within 24 months that will reduce the GHG emissions of the public and private transportation sector.[81]

82.4. South Korea's Framework Act is similar to South Africa, in that it requires the government to develop sectoral targets in a subsequent process. However, the Act also requires the government to establish a basic plan for the energy sector every 5 years and specifically addresses the transportation and traffic sector.[82] The goal of the 5 year energy plan is to better understand domestic and overseas demand and supply of energy, how to secure a stable supply of energy, and how to better use environmentally-friendly energy sources.[83] With respect to the transportation sector, the Act requires that: "*Any person who intends to manufacture means of transportation, such as automobiles, shall prepare a scheme for reducing greenhouse gases emitted from such transportation means and shall actively endeavor to conform with the international competition system for reducing greenhouse gases*." However, the Act does not define the international competition system for reducing GHGs. The Act also requires that: "*The Government shall establish standards for the efficiency of average energy consumption of automobiles and standards for allowable emission of greenhouse gases from automobiles respectively to promote energy saving by improving average energy consumption efficiency of automobiles and to maintain a pleasant and appropriate atmospheric environment by reducing greenhouse gases in exhaust gases from automobiles, but shall allow auto makers (including importers) to choose one of such standards to avoid double regulation and shall ensure that measuring methods do not overlap*".[84] The Act, however, does not provide further details.

82.5. The Swiss CO_2 Act specifies "technical" measures to reduce CO_2 emissions from buildings and passenger vehicles.[85] The Act also creates a CO_2 levy on the production, extraction and import of thermal fuels.[86] The levy is used to, among other things, finance measures to reduce CO_2 emissions from buildings, including through the promotion of renewable energy sources;[87] guarantee loans to companies for developing and marketing equipment and processes to reduce GHG emissions; facilitate the use of renewable energies;[88] encourage the economical use of natural resources; and redistribute to funds to the public.[89]

---

[78] The study of the rights and duties of citizens and of how government works.
[79] Available at http://www.ifrc.org/docs/IDRL/RA209729.pdf.
[80] Guatemala Framework Law, Article 20.
[81] *Ibid*, article 21.
[82] South Korea, Framework Act on Low Carbon, Green Growth Article 41.
[83] *Ibid.*
[84] *Ibid.* at Article 47.
[85] Swiss CO_2 Act, articles 9-11, unofficial English translation at: https://www.admin.ch/opc/en/classified-compilation/20091310/201801010000/641.71.pdf.
[86] *Ibid*, article 29.
[87] *Ibid*, article 34.
[88] *Ibid*, article 35.
[89] *Ibid*, article 36.

83. In addition to the above recommendations, we make the following comments and recommendations in relation to the content and wording of this section:

83.1. In order for the minimum requirements for the SETs under s12(1) to give rise to useful SETs, we recommend that: clarity be provided on what is meant by "*best available mitigation options*" - this should be defined in the Bill; the recommendations above regarding the need for the emissions trajectory to be reflected in the Act, to be ratcheted further and to make express provision for the 2°C Paris Agreement target, be incorporated in this provision as well, to ensure alignment; the Minister also be required to consider the social and environmental implications in determining a SET; and (as recommended above) SETs should not only reflect a sector's emission-reduction objectives, but also broader sectoral objectives to address climate change.

83.2. The provision for the review of the SETs (s12(2)) must expressly state that the SETs cannot be made weaker – only stricter. In other words, it must provide for a ratchet mechanism in line with the Paris Agreement and as recommended for the trajectory (s11(3)).

83.3. In relation to the SERPs:

83.3.1. express provision must be made for a comprehensive consultation process in terms of sections 16 and 17;

83.3.2. we support the provision for SERPs to be gazetted, and recommend that express provision be made for any reviews and/or updates in accordance with s12(5) to be gazetted as well, or to otherwise be made publicly available;

83.3.3. it is not clear who is responsible for the review of the SERPs – presumably it is the Minister responsible for the sector, but this should be clarified;

83.3.4. the wording of s12(4) is ambiguous, and it is not clear whether a SERP must be developed within 5 years of the SET being published, or whether a SERP is required to show how the SET will be met over the 5 year period. The latter interpretation should be preferred; however, s12(4) must then provide a timeframe within which the SERP must be published;

83.3.5. the annual progress reports for the SERPs must be publicly available; and

83.3.6. the minimum requirements for the content of SERPs should be set out in the Bill in s12(9) - there is no need or reason to postpone the determination of these requirements as the Bill currently does.

83.4. The Bill states that the implementation of the SETs must be monitored and reported on by the Presidency, but it is not clear who the Presidency must report to, how often, and when. This must be clarified, and should provide for reporting to the public and Parliament.

83.5. It should be clarified whether the SERP synthesis report of the Minister (s12(8)) is the same synthesis report required in s10(11).

83.6. S12(10) states that the MEC and mayor must support SETs with a climate change response implementation plan. Is this intended to be the same climate change response implementation plan provided for in s9(1)(b) of the Bill? If so, this must be clarified in s12 to avoid uncertainty and ambiguity.

84. Some of our proposed changes, in line with the above comments, as well as some non-substantive proposed amendments are reflected on the wording of this section as follows:

> "*12.(1) The Minister must, in consultation with the Ministerial Committee on Climate Change, by notice in the Gazette, every five years, determine SETs for greenhouse gas emitting sectors and sub-sectors, which must- (a) address, as a minimum, the following considerations- (i) the cost and benefits**, including externalities and co-benefits, as well as the social, and environmental implications**; (ii) be based on the best available science**[;]** and **[(iii)]** the best available mitigation options; and (b) be consistent with the national greenhouse gas emissions **reduction** trajectory **and the Paris Agreement commitment to limit global temperature increase to well below 2 degrees Celsius above pre-industrial levels, while pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels**.*
>
> *(2) The Minister must review the SETs every five years from the date of initial publication, and when necessary, may amend the SETs. **Any amendment to the SETs must be a progression beyond the current SET and must reflect the sector's highest possible ambition**.*
>
> *…*
>
> *(4) The Minister responsible for each sector and sub-sector for which SETs have been determined in accordance with subsection (1) must prepare**, and publish in the Gazette,** **following a consultation process in terms of sections 16 and 17,** a SERP which provides how the relevant sector and sub-sector will meet the SETs within five years of the publication of the SETs.*
>
> *(5) A SERP, contemplated in subsection (4), must be published in the Gazette by the Minister responsible for each sector and sub-sector for implementation, and after the publication must be submitted to the Minister within six months of the publication of the SETs in the Gazette, and must be reviewed **by the Minister responsible for each sector** and**, following a consultation process in accordance with sections 16 and 17, be** updated upon every subsequent revision of the SETs as contemplated in subsection (2).*
>
> *(6) SETs must be included in the government planning cycles and their implementation must be monitored and reported on by the Presidency, **which reports must be publicly available**, to ensure that the national climate change response is properly and coherently implemented across government.*
>
> *(7) The Minister responsible for each sector and sub-sector must annually report to the Presidency on progress on the implementation of the relevant SERP and the achievement of the relevant SETs. **These reports must be publicly available.***
>
> *(8) The Minister must collate, compile and synthesise SERPs and, thereafter, submit progress reports on the implementation of the SERPs to Cabinet, on an annual basis, **which progress reports must be publicly available**..."*

Carbon budgets (section 13)

85. Our primary concerns with this provision are the following:

85.1. The implementation of the carbon budgets is dependent on numerous steps that will still need to be taken by the Minister following the promulgation of this legislation. This makes the carbon budgeting system vulnerable to delays and abuse, which is highly problematic, given the need for urgent climate action.

85.1.1. The threshold should be stated in the Bill – this also provides the legal certainty needed for emitters to plan and start putting the necessary measures in place as soon as possible to ensure that they comply with the Act.

85.1.2. There are numerous uncertainties around, for example: to whom the budgets will apply and how they will apply; and whether budgets can be transferred (the Bill should expressly state that they cannot be transferred).

85.1.3. The Bill must ensure that a person cannot simply avoid exceeding the threshold by creating a new corporation and selling some of its emitting facilities to the new corporation.[90]

85.1.4. The requirements, process and procedures for GHG mitigation plans under s13(8) should be set out in the Bill.

85.2. The Bill should provide a legally-binding decision-making framework, including: a list of mandatory considerations to be taken into account by the Minister (for example as with licensing in terms of legislation such as the NWA and AQA);[91] and acceptable methodologies and approaches, to guide the setting of carbon budgets, and the approval of mitigation plans by the Minister. These considerations should explicitly prohibit "grandfathering" (allowing established GHG emitters to carry on with business-as-usual) as a method for carbon budget allocations.[92]

85.3. The Bill should expressly state that the Minister must ensure that the sum of all allocated carbon budgets shall be lower than the national GHG emissions reduction trajectory, and that the sum of carbon budgets allocated in a sector shall be lower than the SET for that sector and period. Consideration must also be given by the Minister, when allocating carbon budgets, to emissions from emitting entities that fall **below** the threshold.

85.4. It is arbitrary that the Minister must, in terms of s13(7), require a person to submit and implement a GHG mitigation plan by notice in the Gazette. The obligation to submit and implement a mitigation plan should **apply automatically** to all persons once a carbon budget has been allocated, and should not be dependent on the publication of a notice.

85.5. S13(9)(c)(ii), requires annual reporting on carbon budgets, but it does not say to whom the reporting must be done and by when – would this annual deadline be the anniversary of the carbon budget allocation date? This should be clarified. Provision should also be made for the annual reports to be independently verified.

85.6. There is no express provision for carbon budgets, mitigation plans, and annual reports on carbon budget compliance to be publicly available. This must be remedied, as these records are crucial for ascertaining progress on GHG emission mitigation and for holding emitters accountable.

85.7. S13(10) would allow someone who has failed, is failing, or will fail to comply with their carbon budget to apply, in "extreme circumstances" (although "extreme circumstances" are not defined), for more time to comply. This would open the entire carbon budget system up for abuse, as mentioned above at paragraph 15.5. Unless companies are strictly held to their carbon budgets, there is little hope that these will bring about meaningful emission reductions. **S13(10), (11) and (12) must be deleted**. If they are not deleted, we recommend (while fully reserving our clients' rights to challenge such a provision) that, at the very least, "extreme circumstances" must be defined, that public participation in terms of s16 and s17 must be conducted for an application under s13(10), and that any additional time provided for compliance is minimal.

[90] Amendments to the Companies Act, 2008 should be considered to address this.

[91] See s27 of the NWA; and s39 of AQA.

[92] The DEA's proposed design to 'operationalise the post-2020 mitigation system', currently under-development, outlines detailed methodologies and approaches to determine thresholds and carbon budget allocations of emitting entities.

86. The SEIA states that the Bill will benefit business and industry by providing "*certainty to business on South Africa's commitment and means of transitioning to a lower carbon and climate resilient economy and society*" and "*[c]ertainty around the extent to which emitters will be required to contribute to the national effort to reduce GHGs. This enables business to plan and budget their investments in lower carbon and resource efficient technologies, well in advance, with an opportunity for the creation of new lower carbon industries and related employment opportunities*."[93] A failure to set the trajectory and the threshold in the Act, will have quite the opposite effect and simply give rise to uncertainty.

87. We confirm that a non-compliance and an explanation for the non-compliance in terms of s13(9)(iv) would not remove or absolve the criminal liability for an offence under s19(1)(b).

88. Some of our proposed changes, in line with the above comments, as well as some grammatical/non-substantive proposed amendments are reflected on the wording of this section as follows:

> "*13. (1) The **[Minister must, by notice in the Gazette, determine a]** greenhouse gas emissions threshold**,** for the purpose of determining persons that will be allocated a carbon budget, **is (EMISSION THRESHOLD TO BE INSERTED).***
>
> *(2) The greenhouse gas emissions threshold, contemplated in subsection (1), **[may] must** be reviewed**, and, if amended, it must always be ratcheted downwards.***
>
> *(3) Before publishing **[the greenhouse gas emissions threshold, or]** any amendment **[there]**to **the greenhouse gas emissions threshold**, the Minister must follow a consultative process in accordance with sections 16 and 17.*
>
> *(4) In accordance with the greenhouse gas emissions threshold contemplated in subsection (1), the Minister must allocate a carbon budget that is applicable to a specified person for not less than three successive five year periods.**The Minister must ensure that the sum of all allocated carbon budgets shall be lower than the national greenhouse gas emissions reduction trajectory, also taking into account emissions from emitters that fall below the threshold, and that the sum of carbon budgets allocated in a sector shall be lower than the sectoral emission target for that sector and period.***
>
> *(5) The Minister must review a carbon budget allocated to a person every five years**, which review must follow a consultative process in accordance with sections 16 and 17**.*
>
> *(6) The Minister must review and revise a carbon budget allocated to a person within **[a reasonable time] six months,** if the national greenhouse gas inventory demonstrates an increase in national greenhouse gas emissions above the national greenhouse gas emissions trajectory.*
>
> *(7) **[The Minister must, by notice in the Gazette, require]** a person to whom a carbon budget has been allocated **[to] must** prepare, submit to the Minister for approval and implement a greenhouse gas mitigation plan which describes the mitigation actions that such a person will implement to comply with the allocated carbon budget.*
>
> *(8) A greenhouse gas mitigation plan must **be publicly available and must** comply with the requirements, process and procedures as may be prescribed by the Minister.*
>
> *(9) A person to whom a carbon budget has been allocated is obliged: (a) [**T**]**t**o comply with the carbon budget; (b) to implement the approved greenhouse gas mitigation plan properly; and (c) in accordance with the methodology contained in the approved greenhouse gas mitigation plan- (i) **to** monitor its annual greenhouse gas emissions; (ii) **to** evaluate its progress towards compliance with the carbon budget; (iii)*

[93] P6, SEIA for the Climate Change Bill.

to *annually report* ***to the Minister by (INSERT DATE)*** *on the progress towards compliance with the carbon budget; and (iv) in the event that such reporting indicates that the person has failed, is failing or will fail to comply with the carbon budget, to* ***immediately*** *provide an explanation of measures the person will implement in order to achieve compliance****, which explanation must be publicly available****.*

[(10) A person contemplated in subsection (4), may, under extreme circumstances, make an application to the Minister for an extension of the compliance timeframes with a carbon budget allocated that person.

(11) An application contemplated in subsection (10) must be accompanied by the following documents: (a) a detailed explanation of the reasons for the extension being applied for, including but not limited to technological, environmental, economic, financial, social and employment reasons; and (b) any supporting documents.

(12) The Minister may, by notice in the Gazette, grant an extension subject to such conditions as the Minister may determine, or refuse to grant the extension with written reasons.]*"*

Phase down and phase out of synthetic GHG emissions and declaration (section 14)

89. While we certainly support the phasing down and out of synthetic GHGs, it is not clear how this provision is intended to align with the Regulations Regarding the Phasing Out and Management of Ozone Depleting Substances, 2014.[94] No mention is made of these regulations in the transitional provisions in the Bill (s21).

90. South Africa is also party to the Montreal Protocol on Substances that Deplete the Ozone Layer ("Montreal Protocol") and more importantly, the Kigali Amendment to the Montreal Protocol.[95] The plan to phase down/phase out the use of synthetic GHGs envisioned by section 14(1)(a) should not be inconsistent with, or less stringent than South Africa's existing national and international commitments, which must be a minimum consideration for the development of the s14(1) plan.

91. We make the following comments and recommendations on the content of s14:

    91.1. A timeframe must be stipulated within which the plan to phase down or phase out the use of synthetic GHGs must be developed. We recommend 1 year from the promulgation of this Act.

    91.2. The plan to phase down or phase out the use of synthetic GHGs, and any updates thereto, must be made publicly available and published in the Gazette.

    91.3. S14 must expressly require the proper disposal of synthetic GHGs that are "banked" (stored) in existing and aging refrigerators, air conditioners, and other equipment.

        91.3.1. In South Africa as in elsewhere in the world, substantial quantities of synthetic GHGs with significant potential to adversely impact the environment are banked in refrigerators, air conditioners, and other equipment nearing end-of-life (EoL) and that can be released to the atmosphere upon improper disposal.

        91.3.2. Researchers in China, the USA, and Australia published a study about synthetic GHGs banked in refrigerators, air conditioners, and other equipment nearing EoL stating the following: *"[t]he global community has responded to the dual threats of ozone depletion and climate change from refrigerant emissions (e.g., chlorofluorocarbons, CFCs, and hydrofluorocarbons, HFCs) in*

[94] Available here https://cer.org.za/wp-content/uploads/2010/03/Ozone-depleting-substances.pdf.
[95] https://www.unenvironment.org/news-and-stories/news/kigali-amendment-montreal-protocol-another-global-commitment-stop-climate.

refrigerators and air conditioners (RACs) by agreeing to phase out the production of the most damaging chemicals and replacing them with substitutes. Since these refrigerants are "banked" in products during their service life, they will continue to impact our environment for decades to come if they are released due to mismanagement at the end of life. Addressing such long-term impacts of refrigerants requires a dynamic understanding of the RACs' life cycle, which was largely overlooked in previous studies…".[96] The study makes numerous policy recommendations[97] to address the challenges of obsolete RACs management and associated impacts.[98]

91.3.3. The regulatory scheme in place in the USA[99] could be evaluated as a possible model for regulating the proper disposal of synthetic GHGs that are banked in existing and aging refrigerators, air conditioners, and other equipment that should be included as a central component of s14 of the Bill. The US Environmental Protection Agency (EPA) regulations specify, *inter alia*: a prohibition on intentionally venting ozone depleting substances (ODS) refrigerants and ODS substitutes into the atmosphere while disposing of refrigeration/AC equipment; certification requirements for refrigerant recovery equipment, as well as refrigerant evacuation requirements, to maximise recovery of ODS during the disposal of refrigeration/AC equipment; certification requirements for technicians disposing of refrigeration/AC equipment, excluding small appliances;[100] safe disposal requirements for small appliances to ensure removal of refrigerants from goods that enter the waste stream with the refrigerant charge intact; and record-keeping requirements for persons disposing of refrigeration/AC equipment to certify to EPA that they have acquired refrigerant recovery equipment and are complying with the rules.[101]

91.4. The s14(1) plan must provide for the consideration of the combined direct and indirect climate impacts of synthetic GHGs used as refrigerants. According to the United Nations Industrial Development Organisation: "*In Africa and beyond, the successful implementation of the Kigali Amendment (KA) requires addressing two types of emissions that result from refrigeration and air conditioning (RAC) equipment: Direct emissions, from refrigerant gases, foams or solvents, contribute to climate change when fluids with Global Warming Potential (GWP) are released into the atmosphere. The higher the GWP (reference value is CO_2 = 1), the stronger the negative climate impact. Indirect emissions are produced when RAC equipment consumes energy, resulting in the emission of GHGs from power plants. As energy production is the primary factor in the emission of GHG in the atmosphere, energy use is a key consideration. In fact, direct emissions only make up 10 to 40 per cent of total climate impact, while the remaining 60 to 90 per cent are indirect emissions related to electricity consumption. Over the lifetime of RAC equipment, both direct and indirect emissions occur during stages of production, operation, maintenance and end-of-life treatment. Therefore, the effectiveness of the KA in driving down GHG emissions hinges on a nation's ability to effectively address both direct and indirect emissions in national strategies*."[102] The combined direct and indirect emissions

[96] Duan, H., Miller, T. R., Liu, G., Zeng, X., Yu, K., Huang, Q., ... & Li, J. (2018). "A Chilling Prospect: Climate change effects of mismanaged refrigerants in China. Environmental science & technology".

[97] Some of the policy recommendations include: prioritising air conditioners (ACs) over refrigerators (as results show that the GWP impacts are almost entirely derived from scrap ACs; promoting sound formal recycling of EoL RACs in collaboration with the informal sector; classifying refrigerants as hazardous waste; and enhancing the destruction rate of refrigerants.

[98] Duan, H., Miller, T. R., Liu, G., Zeng, X., Yu, K., Huang, Q., ... & Li, J. (2018). "A Chilling Prospect: Climate change effects of mismanaged refrigerants in China. Environmental science & technology".

[99] Under Section 608 of the Clean Air Act (CAA), the US EPA has established regulations (40 CFR Part 82, Subparts A and F) that are relevant to the disposal of refrigeration/AC equipment.

[100] see Box 4 on page 3.

[101] Unites States Environmental Protection Agency (February 2011) "How to Properly Dispose of Refrigeration and Air-Conditioning Equipment" https://www.epa.gov/sites/production/files/documents/ConstrAndDemo_EquipDisposal.pdf See also: Environmental Investigation Agency (2009) "Recovery and Destruction of ODS Banks to Protect Greenhouse Gas Reductions under the Kyoto Protocol." https://content.eia-global.org/posts/documents/000/000/432/original/Recovery_and_Destruction_of_ODS_Banks_V2.pdf

[102] UNIDO (2017) "Africa and the Kigali Amendment" http://ccacoalition.org/en/resources/africa-and-kigali-amendment at page 8.

associated with synthetic GHGs must be a minimum consideration for the plan to phase down/phase out the use of synthetic GHGs.

91.5. A plan to phase down/phase out the use of synthetic GHGs cannot be a one-size fits-all approach because there are distinct classes of synthetic GHG uses in South Africa and different solutions to minimising the climate impacts of synthetic GHG uses for these different classes. These classes would be the use of synthetic GHGs in, for example: domestic refrigeration; commercial refrigeration; transport refrigeration; industrial refrigeration; room air conditioning; and heat pumps. The best solutions to minimise the climate impacts of synthetic GHG uses will depend on factors such as: public safety, technological complexity, and economies of scale that are unique to each class of use. Therefore, identification of the predominant classes of synthetic GHG uses in South Africa, and separate inventories for each class of synthetic GHGs, must be a minimum consideration for the plan to phase down/phase out the use of synthetic GHGs.

91.6. Consideration must also be given to the role of minimum energy performance standards. Synthetic GHGs are used in a variety of appliances of varying energy efficiencies. Since *indirect* GHG emissions depend on the energy efficiency of appliances, the climate impact of synthetic GHG uses will depend substantially on energy efficiency performance standards that South Africa enacts for such appliances. Energy efficiency is a key component of the Kigali Amendment. [103] South Africa has adopted some minimum energy performance standards that can be the basis for advances in minimising the climate impacts of the use of synthetic GHGs.[104] Improving minimum energy performance standards must be a minimum consideration for the plan to phase down/phase out the use of synthetic GHGs.

92. Some of our proposed changes, are reflected on the wording of section 14 as follows, and must be read with the proposed amendments listed above:

> "*(1) The Minister, in consultation with the Minister responsible for energy, the Minister responsible for trade and industry and any affected party, must - (a)* ***within one year of the coming into effect of this Act*** *develop* ***and publish in the Gazette,*** *a plan to phase down or phase out the use of synthetic greenhouse gases; and (b) review [**and**], update* ***and publish*** *the plan contemplated in paragraph (a) every five years.*
>
> *(2) A plan developed in accordance with subsection (1)(a), must address the following minimum considerations- (a) how importers and exporters of synthetic greenhouse gases must account for their emissions of synthetic greenhouse gases; (b) measures that facilitate the phase out of synthetic greenhouse gases; (c) setting and prescribing thresholds for the use of synthetic greenhouse gases;* ***[and]*** *(d) timeframes for phasing out synthetic greenhouse gases* ***(e) the combined direct and indirect emissions associated with synthetic GHGs; (f) identification of the predominant classes of synthetic GHG uses and separate inventories for each; and (h) improving minimum energy performance standards*** *…"*

Chapter 6: General Matters and Transitional Arrangements

Regulations (section 15)

93. While we, in principle, have no objection to the Minister's powers to make regulations under the Act, we are concerned with the extent of issues and level of detail that has been left for regulation under s15. This is highly problematic as it is likely to result in, *inter alia*: delays in the implementation of the Bill; legislative uncertainty; and inadequate commitment to applying and implementing the legislation, owing to the delayed and missing detail and the fact that regulations can be subject to more frequent change.

[103] *Ibid*.

[104] For example, "Compulsory Specification for Energy Efficiency and Labelling of Electrical and Electronic Apparatus" GN 944 in Government Gazette 38232 (28 November 2014).

94. Furthermore, it is not clear whether the Minister is limited to **only** making regulations on issues determined by the Ministerial Committee, given that s8(6)(b) states that the Ministerial Committee "*must determine areas requiring regulations in terms of this Act*" and s15 states that the Minister "*may make regulations*" in relation to the issues listed in s15. This must be clarified.

95. We recommend that express provision be made for regulations dealing with, **but not limited to**:

    95.1. energy efficiency, including provision for regulations to set mandatory energy efficiency standards for appliances, buildings and vehicle fuel efficiency;[105]

    95.2. renewable energy;

    95.3. small-scale embedded generation;

    95.4. the GHG emissions inventory, emissions and climate data, and GHG emissions reporting;

    95.5. the phase out of subsidies (direct and indirect) to the fossil fuel sector;

    95.6. sustainable transport, including provision for regulations to facilitate, *inter alia*, public transport, integrated rapid transit (IRT), non-motorised transport, modal shifts from road to rail freight, and transit oriented development; and

    95.7. sustainable agriculture, including provision for regulations to facilitate climate-smart or climate- resilient agriculture, conservation agriculture or agro-ecology.

96. We submit that, in relation to the provision for regulations on information relating to "*direct and indirect [GHG] … emissions, including for the purposes of planning, analysis and monitoring; and to inform how the Republic may comply with any international obligations*", express provision must be made for regulations on GHG emissions reporting to be done, and information to be provided, at **facility-level** as opposed to aggregated GHG emission data being provided. At present, the GHG Reporting Regulations are being interpreted and implemented in a way that allows for aggregated GHG emissions reporting at company (as opposed to facility) level. We have – on numerous occasions[106] - expressed our serious concerns with this, and the implications that it will have for the integrity and effectiveness of South Africa's GHG emission reporting measures, to the DEA. We remain available to discuss this issue with the DEA.

97. The penalties provided for in s15(2) should, in accordance with our recommendations in paragraph 108.3 below, be strengthened and amended.

98. Some of our proposed changes, in line with the above comments, as well as some non-substantive proposed amendments are reflected on the wording of this section as follows:

> *"15. (1) The Minister may make regulations- (a) that will promote the effective implementation of* ***this Act [the national framework]****, including- (i) in relation to any matter necessary to give effect to the Republic's obligations in terms of an international agreement relating to climate change; and (ii) in relation to the management of emissions of greenhouse gases including- (aa) the determination, review, amendment and cancellation of a carbon budget allocation and all matters related thereto; (bb) the phasing down or phasing out of synthetic greenhouse gases, including the development of timeframes, inventories and*

[105] To facilitate alignment and implementation of, *inter alia*, National Energy Efficiency Strategy; and SANS 204 - Energy Efficiency in Buildings.

[106] See our letter of 19 January 2018 https://cer.org.za/wp-content/uploads/2018/01/CER-letter-re-GHG-Regulations_19-January-2018.pdf and our 7 July 2016 comments on the draft GHG Reporting Regulations https://cer.org.za/wp-content/uploads/2016/08/CER-Submissions-Draft-GHG-Reporting-Regs-7-7-16.pdf.

mechanisms for reporting; ***[and]*** *(cc) incentives and disincentives to encourage a change in behavior towards the* ***[generation]*** ***reduction*** *of emissions of greenhouse gases amongst all sectors of society …"*

Consultation (section 16)

99. We support the provision for consultation to be conducted by the Minister or MEC before exercising any power under this Act, and for public participation in s16(2)(c). However it is not clear:

    99.1. whether the public participation procedure in s17 is the process that must be followed for public participation in terms of s16(1)(c), and if it is not the s17 process, then what process is to be followed in terms of s16(1)(c);

    99.2. what process should be followed when powers such as undertaking a climate change needs and response assessment and developing a climate change response implementation plan are exercised by mayors (municipalities) – we submit that express provision should be made for consultation in these circumstances too; and

    99.3. whether this obligation also applies to powers exercised by other Ministers under the Bill, in relation to the publication and reviewing of SERPs, for example. As s16(1) only refers to "the Minister", the presumption is that s16 does not apply to other Ministers, which is problematic.

100. These issues must be clarified and rectified. Provision must be made in the section for consultation with or by municipalities and other Ministers.

101. Some of our proposed changes, in line with the above comments, are reflected on the wording of this section as follows:

> "*16(1) Before exercising a power in terms this Act, the Minister,* ***Ministers of sector departments, [or]*** *MEC* ***or mayor*** *must follow such consultative processes as may be appropriate in the circumstances.*
>
> *(2) When conducting the consultations contemplated in subsection (1), the Minister****, or Ministers, as the case may be,*** *must - (a) consult all Cabinet members whose areas of responsibility will be affected by the exercise of the power; (b) in accordance with the principles of cooperative governance as set out in Chapter 3 of the Constitution, consult the MEC responsible for the environment in each province that will be affected by the exercise of the power; and (c) allow public participation in the process* ***in accordance with section 17 of this Act****.*
>
> *(3) When conducting the consultations contemplated in subsection (1), the MEC* ***or Mayor*** *must - (a) consult all members of the Executive Council whose areas of responsibility will be affected by the exercise of the power; (b) in accordance with the principles of cooperative governance as set out in Chapter 3 of the Constitution, consult the Minister and all other national organs of state that will be affected by the exercise of the power; and (c) allow public participation In the process*."

Public participation (section 17)

102. We recommend that, in addition to what is proposed by s17, the Bill also require consideration of gender and cultural diversity in its public participation processes, and that the Bill put in place mechanisms to create public awareness about climate change. We provide the following examples:

    102.1. Peru's Framework Act on Climate Change, for example, provides for the following "principle of participation": "*Every person has the right and duty to participate responsibly in the processes of decision making in the integrated management of climate change that each level of government adopts. For this*

purpose, the State guarantees timely and effective participation, considering intercultural and gender-based approaches." [107] Peru's Act also requires that competent authorities that administer financial resources for the mitigation and adaptation of climate change "*establish mechanisms for the exchange of information, consultation and dialogue, in order to ensure effective participation of stakeholders at all stages of public policy and investment projects associated with climate change*."[108]

102.2. Article 23 of Guatemala's Climate Change Act also deals with education, dissemination, and public awareness related to climate change. It states: "*All public institutions will promote and facilitate, at the national, regional and local levels, strategic dissemination actions, public awareness, sensitization, and education regarding the impacts of climate change, which will lead to the conscious and proactive participation of the population in their different roles, before the imminent danger of their physical integrity, production capacity, health, heritage and development.*"

103. We recommend that similar provisions to these of Peru and Guatemala, be incorporated into s17.

104. Our further, and more specific, concerns with the content and wording of s17 are the following:

104.1. The application of s17(1) appears to be limited to the exercising of powers, which, in terms of the Act, must be exercised in accordance with s17. For this reason, it is vital that s16 consultation make express reference to public participation in terms of s17, as recommended above. Alternatively, we recommend that the provision for s17 only to apply where this is expressly required in terms of the Act, be removed, or for s17 public participation to expressly be required in the following sections: 6; 8(7) and 8(13); 9(1); 10(1); (10(3); 10(6); 10(9); 10(11); 11; 12; 13; 14; and 15. The fact that public participation is currently **not** expressly required for steps to be taken under sections 8, 9, 10, 12(4), 12(10), 13(4) or 14, for example, is highly problematic and must be addressed and expressly provided for in the Act.

104.2. S17 only requires the giving of notice of a power to be exercised. The section must expressly require that the **actual document of the power to be exercised be made available** for consideration, so that stakeholders can consider the detail and terms of the power to be exercised. This would be in accordance with the legal requirements for a fair process in terms of the Constitution and the Promotion of Administrative Justice Act, 2000 ("PAJA").[109]

104.3. A 30 day comment period may, in some circumstances, be an insufficient time period to consider and comment on technical, lengthy, or complex matters. We recommend that this provision be amended to allow for some discretion in respect of the timeframe by stating that at least 45 days should be provided.

104.4. Provision must be made for public participation in respect of the exercise of powers by municipalities (mayors), in terms of s9 of the Bill.

105. Some of our proposed changes, in line with the above comments are reflected on the wording of this section as follows:

"*(1) Before exercising a power **[which,]** in terms of this Act, **[must be exercised in accordance with this section,]** the Minister or MEC must give notice of the proposed exercise of the relevant power- (a) in the Gazette; and (b) in at least one newspaper distributed nationally or, if the exercise of the power will affect only a specific area, in at least one newspaper distributed in that area.*

[107] Peru, Framework Act on Climate Change, section 2.6, http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2018/04/1638161-1.pdf.
[108] *Ibid*, section 21.
[109] S3(a); 3(c); and 4, PAJA.

(2) The notice must - (a) invite members of the public to submit to the Minister or MEC, within ***at least 45 [30]*** *days of publication of the notice in the Gazette, written representations on or objections to the proposed exercise of the power; and (b) contain* ***copies of the records or document reflecting the power to be exercised and*** *sufficient information to enable members of the public to submit meaningful representations or objections.*

(3) The Minister or MEC ***or Mayor in respect of powers exercised in terms of section 9 of this Act,*** *may in appropriate circumstances allow any interested person or community to present oral representations or objections to the Minister or MEC, or a person designated by the Minister or MEC.*

(4) The Minister or MEC ***or Mayor in respect of powers exercised in terms of section 9 of this Act,*** *must give due consideration to all representations or objections received or presented before exercising the power concerned*."

Delegation (section 18)

106. We have no objection to provision being made for delegation of powers under the Bill. We do recommend, however, that:

    106.1. provision be made for all delegations to be published and easily publicly accessible, for purposes of certainty, and to relieve the administrative burden of having to provide proof of delegation through formal information requests; and

    106.2. the powers of setting the emissions trajectory (s11), of determining the SETs (s12) and of determining the GHG emission threshold (s13) (in the event that our recommendations that these be set in the Act itself, are not followed), cannot be delegated.

107. Some of our proposed changes, in line with the above comments, are reflected in the wording of section 18 as follows:

    "*18. (1) The Minister may delegate to an official in the Department any power or duty conferred on the Minister, by or under this Act except - (a) the power to publish or amend a notice in terms of section 15 or publish or amend a regulation in terms of section 15;* ***[or]*** *(b) the duty imposed on the Minister by section 8;* ***(c) the duty imposed on the Minister to set the greenhouse gas emissions reduction trajectory in terms of section 11; (d) the Minister's obligation to determine sectoral emission targets in terms of section 12(1) of this Act; or (e) the Minister's obligation to determine the greenhouse gas emissions threshold in terms of section 13(1) of this Act.***

    (2) A delegation referred to in subsection (1) - (a) must be in writing ***and publicly available****; (b) may be made subject to conditions; (c) does not prevent the exercise of the power or the performance of the duty by the Minister himself or herself; (d) may include the power to sub-delegate; and (e) may be withdrawn by the Minister…"*

Offences and penalties (section 19)

108. This provision is woefully inadequate and requires substantial reworking in that:

    108.1. the offences are too narrow and only relate to non-compliances with carbon budgets. The Act should clearly state that it is a criminal offence to emit GHGs if a facility exceeds the GHG emissions threshold, even if the operator has not been allocated a carbon budget. The submission of false or misleading information under the Act; or failing to comply with a SET (s12) or the trajectory (s11), for example, should also be listed as offences;

108.2. the current wording of s19(1)(a) and (b) would imply that **both** (a) – a failure to prepare or submit a mitigation plan - and (b) – exceedance of a carbon budget – would need to occur in order for an offence to be committed, under s19. This cannot be what was intended by the drafters of the Bill. The "and" should be replaced with "or"; and

108.3. the penalty (fine) amounts are too low to serve as a sufficient deterrent. Provision should be made for higher penalties linked to turnover for example, in the event of excess emissions.

109. We also strongly recommend that provision be made for administrative penalties to be imposed in the event of non-compliances with the Act, given the difficulties in securing criminal convictions.[110]

110. Some examples of potentially more effective and appropriate offence and penalty provisions, can be found in Mexico's climate law and Nigeria's Climate Bill:

110.1. Mexico's General Law on Climate Change[111] allows any interested party to challenge *any* government official's non-compliance with the Law to the judiciary. Article 116 states: "*The public servants charged with applying and enforcing compliance with this Law will be charged with applicable administrative sanctions in cases of non-compliance with their responsibilities in accordance with the Federal Law of Administrative Responsibilities of Public Servants, and other legislation that is applicable, whether it be civil or criminal liability to the fullest extent of the law*."[112] Mexico's Federal Law of Administrative Responsibilities of Public Servants states that "*any interested party may present a complaint or suit for failure to comply with a public servant's obligations*."[113] Mexico gives concurrent power to both provincial and national governments to sanction non-compliance with the law.[114] Additionally, the Federal Prosecutor for Environmental Protection has the power to conduct inspections regarding emission reporting to verify information that emitters have provided to the government.[115]

110.2. Nigeria's Climate Change Bill, 2018[116] provides for a private right of action against willful acts that adversely affect mitigation and adaptation efforts to Nigeria's National High Court.[117] The Bill allows the Court to "*compel a public officer to take measures to prevent or discontinue an act or omission that is harmful to the environment*."[118] In terms of penalties, Nigeria's Bill allows for compensation to victims of a violation relating to climate change duties. It provides: *"(23)(1) A person or private organization is guilty of an offence, where such person or organization has willfully acted in a manner that has or is likely to adversely affect efforts towards the mitigation and adaptation measures to the effects of climate change under this Bill. (2) A person may, pursuant to any provision of this Bill, apply to the Federal High Court alleging that a person has committed an offence under subsection (1) of this section. (3) Where an*

[110] See, for example: https://cer.org.za/wp-content/uploads/2011/11/Fourie-M-SAJELP-Paper-June-2009-Final.pdf; and https://open.uct.ac.za/bitstream/handle/11427/12859/thesis_law_2014_hugo_re.pdf?sequence=1.

[111] Ley General de Cambio Climatico. Available at: http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2018/03/leyclimatico.pdf.

[112] Article 116. "Los servidores públicos encargados de la aplicación y vigilancia del cumplimiento de esta Ley, serán acreedores a las sanciones administrativas aplicables en caso de incumplimiento de sus disposiciones de acuerdo con lo dispuesto en la Ley Federal de Responsabilidades Administrativas de los Servidores Públicos y demás legislación que resulte aplicable, sin perjuicio de la responsabilidad civil y penal a que haya lugar".

[113] Chapter II, Article 10, *Ley Federal de Responsabilidades Administrativas de los Servidores Publicos*.

[114] General Law on Climate Change ("GLCC") Article 7 Section 26, Article 8, Section 18.

[115] GLCC Article 111.

[116] The full title for this bill is the "Bill for an Act to Provide a Legal Framework for the Mainstreaming of Climate Change Responses and Actions into Government Policy Formulation, Implementation and the Establishment of the National Council on Climate Change; and for Related Matters." Nigeria's House of Representatives introduced the bill first and passed it on 11 August, 2017. Available at: http://placbillstrack.org/view.php?getid=2704.

[117] Nigeria Climate Change Bill, section 23.

[118] *Ibid*.

application is made under sub-section (2) of this section, the Court may make an order or give directions that it considers appropriate to- (a) prevent, stop or discontinue an act or omission that is harmful to the environment; (b) compel a public officer to take measures to prevent or discontinue an act or omission that is harmful to the environment; or (c) provide compensation to a victim of a violation relating to climate change duties."

111. We strongly recommend that similar provisions to those implemented in Mexico and proposed in Nigeria's Bill be incorporated into this Bill.

112. Some of our proposed changes, in line with the above comments (noting that these amendments alone would not address the broader concerns listed above), are reflected on the wording of this section as follows:

> *"19. (1) A person commits an offence if - (a) that person fails to* ***timeously*** *prepare, submit and implement an approved greenhouse gas mitigation plan;* ***[and]*** ***or*** *(b) that person's greenhouse gas emissions exceed the greenhouse gas emissions allowance prescribed by that person's carbon budget, during the applicable period…"*

Appeals (section 20)

113. While we certainly have no objection to an appeal process being provided for in the Bill, we are concerned about some of the following practical issues:

    113.1. As any delegated decision under the Act can be taken on appeal, this could potentially result in decisions on, for example, the GHG emission threshold and the emissions trajectory (if the power to determine these has been delegated) being challenged on appeal. In our experience, appeals in terms of s43 of NEMA are lengthy, and, in many instances, appeal decisions have been delayed for more than a year. This provision could therefore bring about considerable delays in the implementation of crucial aspects of the Act, such as carbon budgets and the GHG emissions trajectory. This cannot be permitted. This is another reason why it is crucial that more detail be included in the Bill itself. The carbon budget threshold and GHG emissions trajectory, at the very least, must be stipulated in the Act, and not left for determination at a later stage.

    113.2. We are concerned that the s43 NEMA process is not applicable to the provisions of Bill (notwithstanding our concerns with, *inter alia*, the short timeframes under the NEMA appeal process) as it (s43 NEMA) specifically refers and applies to a decision taken under NEMA or a specific environmental management act (SEMA), as well as to directives issued in terms of s28(4). As far as we are aware, the Bill is not intended to be a SEMA.

    113.3. Furthermore s20 and NEMA's s43 would not address decisions taken under the Act by other ministers or their delegated authorities, or decisions taken by the Ministerial Committee. S43(1A) NEMA only applies to decisions taken by persons acting under powers delegated by the Minister and/or the Minister of Mineral Resources, but not other ministers. Would there be an appeal to the Minister where another minister or the Ministerial Committee has made a decision under the Act, for example in relation to the review and/or implementation of SERPs and/or developing and implementing a climate implementation plan?

114. We refer to our recommendations at paragraph 48.4 above for a separate and independent appeals authority to consider and determine appeals of decisions taken under this Act, in terms of an appropriate and separate internal appeals process.

Savings and transitional provisions (section 21)

115. We have no objections to this provision.

116. Insofar as the GHG Reporting Regulations, 2017, and the Pollution Prevention Plan Regulations, 2017 are concerned, our concerns with the regulations and their current implementation are set out in our comments of 8 February 2016 (comments on the Draft Declaration of GHGs as Priority Pollutants and Pollution Prevention Plan Regulations)[119] and 7 July 2016 (comments on the Draft GHG Reporting Regulations)[120] and in our subsequent correspondence with DEA of 19 January 2018[121] and June 2018.[122] As explained in paragraph 15.8, we submit that any replacement regulations must, **at the very least**, provide for detailed facility-level reporting by persons required to report GHG data and submit pollution prevention plans, and for all plans and reports to be publicly available. The DEA's current stance, that these records are commercially sensitive and that only aggregated, company-level reporting is required, is highly concerning, and – we submit – not in line with the Constitution.

117. As set out above, at paragraph 89, it should be clarified whether the Regulations Regarding the Phasing Out and Management of Ozone Depleting Substances, 2014,[123] were also intended to be included here or whether they are to remain in place, even with the provisions of s14 of the Bill.

Schedule

118. We recommend that – in line with our recommendation at paragraph 82 - SETs should be broadened, so as not only to set an emissions reduction target, but also to set broader objectives for the sectors listed in this schedule. In line with this recommendation, the list of functional areas in the schedule to the Bill should be expanded to include, *inter alia*:

    118.1. Basic Education;

    118.2. Higher Education; and

    118.3. International Relations and Cooperation.

Conclusion

119. We request and strongly recommend that the Bill be amended in line with the above comments and suggested changes.

120. The Bill must address the concerns listed in paragraph 15 above, in order to be effective and meaningful climate change legislation, which gives effect to the Bill of Rights in the Constitution.

121. We trust that the DEA will give due consideration to our comments and take the necessary steps to ensure that an appropriately-amended Bill (in line with the above comments) is finalised and promulgated as soon as possible, given the urgency of the matter.

[119] Available at https://cer.org.za/wp-content/uploads/2016/08/CER-comments-on-the-Declaration-of-GHGs-as-priority-pollutants-the-NPPP-Regulations-_-8-Feb-2016.pdf.
[120] Available at https://cer.org.za/wp-content/uploads/2016/08/CER-Submissions-Draft-GHG-Reporting-Regs-7-7-16.pdf.
[121] Available at https://cer.org.za/wp-content/uploads/2018/01/CER-letter-re-GHG-Regulations_19-January-2018.pdf.
[122] Available at https://cer.org.za/wp-content/uploads/2018/07/CER-SUBMISSIONS-DEA-OPERATIONALISATION-OF-POST-2020-MITIGATION-SYSTEM_15-June-2018.pdf.
[123] Available here https://cer.org.za/wp-content/uploads/2010/03/Ozone-depleting-substances.pdf.

Yours faithfully
CENTRE FOR ENVIRONMENTAL RIGHTS

per: 

Nicole Loser
Attorney
Direct email: nloser@cer.org.za