

Date: 6 June 2022

To: Portfolio Committee on Environment, Forestry and Fisheries

Attention: Ms Tyhileka Madubela

Email: climatechangebill2022@parliament.gov.za

Dear Sirs/Madams

SUBMISSIONS TO THE DRAFT CLIMATE CHANGE BILL 2022

INTRODUCTION

1. The Legal Resources Centre ("**the LRC**") is one of South Africa's oldest public interest law firms founded in 1979, focusing on human rights and constitutional law. The goals of the LRC are to promote justice, build respect for the rule of law, and contribute to the socio-economic transformation in South Africa and beyond. In this regard, the LRC's clients are predominantly vulnerable and marginalised, including people who are poor, homeless and landless. The LRC has and is still committed to assisting communities through strengthening knowledge, skills and experience, in order to assist communities to claim their fundamental constitutional rights. The LRC's main focus areas are rights to education and land.
2. The LRC has offices situated in various cities in South Africa namely Johannesburg, Cape Town, Durban and Makhanda.
3. The LRC welcomes the Climate Change Bill 2022 ("**the Bill**"). The Bill is a welcome measure to address climate change, particularly as the most serious

consequences of climate change are that it will impact upon vulnerable and marginalised communities.

4. The Bill in aspects does not address important issues which are commented on below.

STRUCTURE OF THE SUBMISSION

5. The structure of the submission is as follows:;

- 5.1. An introduction;

- 5.2. South Africa's international obligations

- 5.2.1. the United Nations Framework Convention on Climate Change;

- 5.2.2. the Paris Agreement;

- 5.2.3. Convention on Biological Diversity;

- 5.3. Just transition;

- 5.3.1. Sustainable Development;

- 5.3.2. The rush for oil and gas on South Africa's coastline;

- 5.4. Climate change funding;

- 5.4.1. Climate financing mechanisms;

- 5.4.2. Climate change finance and corruption in South Africa;

- 5.5. The polluter pays principle;

- 5.6. Principles that must be included in Clause 3:

- 5.6.1. Women's Rights;

- 5.6.2. Ecosystem approach;

- 5.6.3. Cumulative impact;

- 5.7. The coordination of state – policy alignment and institutional arrangements;
- 5.8. The role of local government;
- 5.9. The lack of provisions relating to disaster response and risk reduction;
- 5.10. Public participation;
- 5.11. Impact on communities;
- 5.12. Referral of the Bill to the National House of Traditional and Khoi San leaders;
- 5.13. Conclusion.

COMMENTS TO THE BILL

6. Introduction

- 6.1. The effects of climate change are recognised by the state in that South Africa “is especially vulnerable to the impacts of climate change”.¹ As stated by the Department of Forestry, Fisheries and the Environment.
- 6.2. Climate Change is a worldwide crisis and as such in terms of s2(e) of the Bill, the objects of the Act are to give effect to South Africa’s international commitments and obligations in relation to climate change.

7. International Obligations

8. South Africa is a signatory and has ratified many international conventions and agreements. The main international obligations that relate to the Bill and comments on their incorporation into the Bill are discussed below.:-

- 8.1. United Nations Framework Convention on Climate Change and the Paris Agreement (Comment to the Bill generally)

¹ Department of Forestry, Fisheries and the Environment “South Africa’s Second national Climate Change Report” available at https://www.dffe.gov.za/otherdocuments/reports/southafricas_secondnational_climatechange (Accessed on 1 June 2022).

- 8.1.1. According to the United Nations, climate change is the single biggest threat to development, and its widespread, unprecedented impacts disproportionately burden the poorest and most vulnerable.
- 8.1.2. South Africa is a party to the United Nations Framework Convention on Climate Change (“**UNFCCC**”) and the Paris Agreement and understands the harmful impact that climate change will have on South Africa and recognizes the need for mitigation and adaptation measures. “The average temperatures within South Africa have been rising in almost all seasons and regions, changes in rainfall show weaker trends, but there is a tendency towards a decline in the number of rain days in almost all regions, however in contrast, extreme rainfall events have increased in frequency.”²
- 8.1.3. The South African Constitution in Section 24 provides us with a right to have our “*environment protected, for the benefit of the present and future generations...*”³ Section 24 further places an obligation on the State to uphold our environment right, this is done through both legislative means and the ratifying of international treaties that seek to address protection of the earth. The UNFCCC and the Paris Agreement address the dangerous GHG concentrations in the atmosphere and seek to put measures in place that will mitigate further harm caused to the earth.
- 8.1.4. The United Nations Framework Convention on Climate Change (UNFCCC)**
- 8.1.4.1. In 1992 South Africa signed the UNFCCC, the objective of the UNFCCC is “to achieve the stabilization of GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”⁴ The UNFCCC calls on countries to promote education, training and public awareness related to climate change and to encourage public participation by making

² McSweeney R and Timperley T “The Carbon Brief Profile: South Africa” (2018) available at <https://www.carbonbrief.org/the-carbon-brief-profile-south-africa#:~:text=South%20Africa%20is%20the%20world's,fuel%2C%20towards%20gas%20and%20renewables> (Accessed on 3 June 2022).

³ Section 24, the Constitution of South Africa.

⁴ 1994 United Nations Framework Convention on Climate Change.

information accessible.⁵ South Africa is under an obligation to communicate its implementation of this convention by submitting information related to its emissions and the sources thereof and to provide a general description of the steps taken or envisioned in implementing the UNFCCC.⁶

8.1.5. The Paris Agreement

8.1.5.1. South Africa is a signatory to the Paris Agreement, which “aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty.”⁷ The Paris agreement seeks to achieve its objectives by “holding the increase in the global average temperature to below 2 degrees Celsius (°C) above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels.”⁸ Signatories to the Paris Agreement are required “to prepare, communicate and maintain successive nationally determined contributions (“**NDCs**”) that it intends to achieve.”⁹ The subsequent NDCs must represent progression beyond the current NDCs. The NDCs shall be communicated to the United Nations every five years, this ensures that there is accountability and continued commitment to strengthening the response to climate change. The Paris Agreement obliges its signatories to strengthen its institutions, to ensure that relevant scientific information, research and knowledge is produced, so that decision making on climate change is supported and informed.¹⁰ In terms of the Paris Agreement, South Africa is required to implement a legislative framework, that will promote implementation and transparency for the country’s climate change response measures.¹¹

⁵ 1994 United Nations Framework Convention on Climate Change ,Article 4 (h)(i).

⁶ 1994 United Nations Framework Convention on Climate Change, Article 12(1)

⁷ 2015 Paris Agreement, Article 2 (1).

⁸ 2015 Paris Agreement, Article 2 (1)(a).

⁹ 2015 Paris Agreement, Article 4(2).

¹⁰ 2015 Paris Agreement, Article 7(7).

¹¹ 2015 Paris Agreement, Article 13.

8.1.6. Recommendations

- 8.1.6.1. The Bill fails to expressly set out South Africa's obligation to prepare and submit NDC's and that subsequent NDC need to show progression. It is therefore submitted that a provision be included specifically setting out South Africa's commitments in terms of its NDC and that reference not only be made to it in the preamble of the Bill. There is a need for urgent climate action however given the delay in implementation of the Bill, coupled with the time frames allocated to the Minister and various departments with taking adaptive and mitigation measures, it is highly likely that South Africa will not achieve its NDCs adaptation and mitigation goals for the period 2020-2030.
- 8.1.6.2. The mitigation measures in place include determining the GHG emissions trajectory and setting sectoral emissions targets for GHG emitting sectors and sub-sectors that needs to be consistent with the GHG emissions trajectory. The Bill in Clause 22(3) further compels; *"The Minister must, in consultation with the Ministers responsible for each sector and sub-sector listed in terms of subsections (1) and (2), determine by notice in the Gazette the prescribed framework and the sectoral emissions targets for sectors and sub-sectors."* The Bill in Clause 22(6) states that *"The Minister responsible for each sector or sub-sector for which sectoral emissions targets have been determined, in accordance with subsection (3), must adopt policies and measures towards the achievement of the sectoral emissions targets"*. The budget allocation around climate change adaptation and mitigation must be addressed to ensure that there is adequate funding allocated to meet the onerous capacity requirements.
- 8.1.6.3. The Bill fails to adequately address training and education as required by the Paris Agreement, on the impacts of climate change. The Bill needs to be amended to include this aspect and address the way it seeks to empower communities to actively participate in public participation processes, where they are interested and affected by climate change.

8.2. Convention on Biodiversity (Comments to Preamble and Clause 2 of the Bill)

8.2.1. The Bill provides, in its Preamble, that “*the Republic [...] has made international commitments and obligations, including to communicate and implement an effective national determined climate change response, encompassing mitigation and adaption actions, that represents the Republic’s fair contribution to the global climate change response*”.

8.2.2. Its stated Objectives, in Clause 2, include to “*give effect to the Republic’s international commitments and obligations in relation to climate change*”.

8.2.3. It is submitted that the Bill should make explicit reference to the commitments of the Republic in terms of:

8.2.3.1. The Convention on Biodiversity (“**CBD**”) to which South Africa is a member state. The CBD urges member states to be subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices (CBD:1992:Article B(j)); and

8.2.3.2. Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements (CBD, 1992: Article 10 c).

8.2.3.3. The CBD Tkarihwaí:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities Relevant to the Conservation and Sustainable Use of Biological Diversity highlights the importance of indigenous and local custodianship, and recognizes the holistic interconnectedness of humanity with ecosystems that is embedded in their customary rules

as well as cultures, spiritual beliefs and customary practices (including linguistic diversity), and recognises these as key to the conservation and sustainable use of biodiversity.

- 8.2.3.4. The Bill, in its current form specify that decisions be based on “the best available science, evidence and information” (Clause 3(h)). The importance of indigenous and local knowledge and experience is omitted. Given South Africa’s international obligations and the growing international recognition of the importance of taking local knowledge into account when assessing climate change impacts, it is submitted that the clause should be amended to read: “the best available science, evidence and information, including local and indigenous knowledge”.

9. Just Transition (Comments to the Bill generally, the Preamble, Clause 1 and Clause 2(d), Clause 3(d))

- 9.1. President Ramaphosa has previously said: “*Climate change is an existential challenge that confronts us all, and South Africa is committed to playing its part in reducing global emissions.*”¹² While the public commitment is welcome, the Bill in its current form does not possess the necessary urgency needed to address climate change in South Africa. Decisions taken by the government must support its public commitments to move towards its net-zero targets and a just transition.
- 9.2. There is an urgency needed to address climate change in South Africa, the rush for oil and gas exploration along the coastline of South Africa as well as our commitments under the Paris climate agreements.
- 9.3. The purpose of the Bill is as follows: “*To enable the development of an effective climate change response and a long-term, just transition to a low-carbon and*

¹² South African Government “South Africa establishes a historic international partnership to support a just transition” (2 November 2021) available at <https://www.gov.za/speeches/presidency-international-partnership-support-just-transition-2-nov-2021-0000> (Accessed on 3 June 2022).

climate-resilient economy and society for South Africa in the context of sustainable development; and to provide for matters connected therewith.”

- 9.4. The definition of a “just transition” in section 1 of the Bill is inadequate. The effects of climate change will be devastating on developing countries like South Africa who do not have the necessary money to adapt its infrastructure and resettle populations.¹³ And while globally, South Africa is not in the top 10 emitters in the world, it is however the largest emitter on the African continent accounting for almost half of the continent’s emissions.¹⁴
- 9.5. The International Labour Organization describes a just transition as greening the economy in a way that is as fair and inclusive as possible to everyone concerned, creating decent work opportunities and leaving no one behind. This includes through effective social dialogue among all groups impacted, and respect for fundamental labour principles and rights.
- 9.6. There is a dominant narrative that says that developing countries must not take a proactive role in decarbonising, due to historical and present power imbalances and be allowed space to use fossil fuels in aid of development. This position, however, is short-sighted.¹⁵ As recently illustrated by the KwaZulu-Natal’s heavy rains and the previous drought in Cape Town in 2017, South Africa is being hit by climate change and we will need to put in frameworks to adequately address this.
- 9.7. What is required is a “just transition” to ensure there is climate justice. These two concepts are interrelated. A “just transition” requires us to re-envision our economy and society by building a more equal and ecologically sustainable economy, based on peoples need and not short-term profits. Generally, this will require our energy systems to be based on renewables such as wind and solar. This will in turn open South Africa to a new job market in renewables

¹³ International Monetary Fund “Poor and Vulnerable Countries Need Support to Adapt to Climate Change) available at <https://blogs.imf.org/2022/03/23/poor-and-vulnerable-countries-need-support-to-adapt-to-climate-change/> (Accessed on 3 June 2022).

¹⁴ CDC Climat, EDF, IETA “South Africa: An emissions trading case study” available at <https://www.edf.org/sites/default/files/south-africa-case-study-may2015.pdf> (Accessed on 3 June 2022).

¹⁵ The Africa Report “African countries are joining the world in decarbonising, but is this fair?” available at <https://www.theafricareport.com/131724/african-countries-are-joining-the-world-in-decarbonising-but-is-this-fair/> (Accessed on 3 June 2022).

which will also require investment in the training and upskilling of workers for the “green economy”. The Bill needs to ensure that this is possible and in its current form, fails to do so.

9.8. Importantly, sustainable development is at the heart of the “just transition” and sustainable development is not the enemy of economic development. Instead, there is increasing evidence that climate action does not threaten economic growth, this is largely due to the fact that renewable technology is more accessible and cheaper now than it was a decade ago. The costs of renewables will only decrease going forward.¹⁶

9.9. Sustainable development is needed for the “just transition”:

9.9.1. Environmental protection is not the enemy of development and they should not be pitted against each other. Any attempts to do so would misunderstand what South African law requires in terms of striking a balance between the protection of the environment and the need for social and economic development.

9.9.2. The Constitution says in Section 24 that everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development (section 24(b)(iii)).

9.9.3. The Constitution requires a consideration of present and future generations, and a balance between ecologically sustainable development and justifiable economic and social development.

9.9.4. This balancing requirement is also found in the section 2(3) of the National Environmental Management Act 107 of 1998 (“**NEMA**”) principle that development must be socially, environmentally and economically

¹⁶ Dincer, I “ Renewable energy and sustainable development: a crucial review” Renewable and Sustainable Energy Reviews (June 2000) 157 – 175 available at https://www.sciencedirect.com/science/article/pii/S1364032199000118?casa_token=GmbwhOju3uwAAAAA:1HoYC-LfkHeetknG7zyEErf-JV0LmJ8SzoS0o26a06HrjnHIL0ZOPaKIRDkLaPnlq2H0l2eiQg (Accessed on 3 June 2022)

sustainable, and in respect of mineral and petroleum resources, section 3(3) of the Mineral and Petroleum Resources Development Act 28 of 2002 (“*MPRDA*”), which compels the Minister of Mineral Resources and Energy to ensure the sustainable development of South Africa's mineral and petroleum resources within a framework of national environmental policy, norms and standards while promoting economic and social development.

9.9.5. While the Constitution does not define sustainable development, NEMA says it is the integration of social, economic and environmental factors into planning, implementation and decision making so as to ensure that development serves present and future generations.

9.9.6. Any entities, that want to develop, including mining companies cannot subordinate the environment to development without following the laws designed to assess where that balance lies. That flies in the face of the constitutional reality that the “*need for development must now be determined by its impact on the environment, sustainable development and social and economic interests.*”

9.10. The rush for oil and gas on SA's coast

9.10.1. In December 2021, Wild Coast communities in the Eastern Cape, represented by the LRC, approached the Makhanda High Court and were successfully granted an interdict to temporarily stop Shell and Impact Africa from carrying out a seismic survey along the wild coast.¹⁷

9.10.2. This case is based on the failure of Shell and Impact Africa to meaningfully consult the affected communities as well as the Department of Mineral Resources and Energy failure to take into account a number of critical considerations - including the impact that the seismic blasting would have on the livelihoods of affected communities, on the spiritual and cultural

¹⁷ Legal Resources Centre “28 December 2021 – Major victory for Wild Coast communities: Shell interdicted from conducting seismic operations with immediate effect” available at <https://lrc.org.za/28-december-2021-major-victory-for-wild-coast-communities-shell-interdicted-from-conducting-seismic-operations-with-immediate-effect/> (Accessed on 3 June 2022).

practices of such communities, and the cumulative impact of all seismic blasting along the Wild Coast.

- 9.10.3. The Department of Mineral Resources and Energy (“**DMRE**”) also failed to take into account South Africa’s legal obligations under international law. This includes obligations to protect the right to take part in cultural life, to protect marine and coastal environments, to respect and protect the rights of Indigenous peoples (including their right to practice their culture and to participate in decision-making in matters that would affect their rights).
- 9.10.4. The DMRE also further failed to take into account the South African Constitution, which speaks to the right to participate in the cultural life of one’s choice, as established in section 30. Therefore, determining whether social and cultural rights are implicated by oil & gas projects involves an analysis of the importance of the beliefs or practices to the applicants’ cultural identities.
- 9.10.5. The International Energy Agency (“**IEA**”) has stated that we are no longer able to explore the possibility of new oil and gas fields if we wish to limit global warming to 1.5 degrees Celsius.¹⁸ The Intergovernmental Panel on Climate change (“**IPCC**”) latest report confirms that new exploration and extraction of fossil fuels will lead to the inability of a country to meet their commitments under the Paris Agreement.
- 9.10.6. Notably, while natural gas is cleaner than coal and has been touted as a ‘transition fuel’ it is still a potent greenhouse gas. If countries utilise gas as a ‘transition fuel’ it will exceed the allocated carbon budgets associated within the 1.5 degree Celsius trajectory. Furthermore, it is notable that South Africa does not have any existing infrastructure for the use of natural gas and the time required to implement this will not be cost competitive as it is likely to be after 2030 and in a period when the world is transitioning to renewables.

¹⁸ <https://www.theguardian.com/environment/2021/may/18/no-new-investment-in-fossil-fuels-demands-top-energy-economist>

9.10.7. In addition to the multi-decade infrastructure needed to use natural gas, its exploration, extraction and processing poses other environmental risks and specifically marine conservation risks. It is therefore recommended that countries should move from coal to renewable energy without shifting to gas as a transition fuel as this will not save money. Notably, market volatility (as highlighted by the Russian invasion in Ukraine) have now made it clear that gas will not give South Africa the energy security it desperately requires. Conclusively, the high prices for gas and the decreasing costs of renewables such as wind and solar have indicated that natural gas is no longer a bridge to the transition to renewables.

9.10.8. Beyond this, it has been made clear that oil and gas plays a de-stabilising role in international politics for which consumers pay the price. Energy security is what South Africa needs in order to develop and for this to happen we need to accelerate the transition to renewable energy.

9.10.9. Recommendations

9.10.9.1. There should be no exploration for new oil and gas resources.

9.10.9.2. There should be no new investment in the development of oil and gas reserves beyond that which had already been sanctioned by January of 2020.

9.10.9.3. There should be no new infrastructure for production, refining and transport and use of oil and gas (including power plants) that produce emissions exceeding the carbon budget aligned with the 1.5°C threshold.

9.10.9.4. Equity and justice must be at the heart of all efforts to fight climate change.

9.10.9.5. Governments, decision-makers, community, and private landowners must avoid the development and operation of oil and gas activities that might have negative impacts on sacred sites or territories, or Indigenous and Community Conserved Areas.

9.10.9.6. The rules for, and rights of, Indigenous Peoples, should be respected in planning the transition away from oil and gas.

10. Climate Change Financing (Comments to the Bill generally, section 5 of the Memorandum on the objects of the Climate Change Bill, 2022, Clause 2(b) and Clause 3(c))

10.1. Climate financing mechanism

10.1.1. The Climate Policy Initiative has estimated that the South African economic transition will cost an aggregated R2 trillion (of which 60% has already been incurred). National Treasury has acknowledged that there is urgency to increase local financial sector capability to respond to the prevailing social and environmental challenges which will have a major impact on the economy.¹⁹ In the 2022 Budget Review, Treasury indicated plans to pilot a climate budget tagging methodology to inform future spending priorities and budget reforms. The Bill provides an opportune moment to define and promote climate financing.

10.1.2. According to the National Climate Change Response White Paper, improved finance policy coordination is critical to creating a sustainable climate finance architecture. New market-based instruments and environment-related financial reforms in the private and public sectors are needed to create a climate resilient economy and society. Public finance can further support climate change through the procurement of sustainable technologies by Government.

10.1.3. There is currently no climate financing framework in the Bill, despite the White Paper referring to an interim climate finance coordination mechanism to secure the necessary resources for mitigation and adaptation programmes. The White Paper states that the mechanism will match resources to priority programmes and contain a climate finance tracking facility to track the use and impact of funds. The terms of reference of the mechanism would be determined in 'consultation with the private

¹⁹ The National Treasury Draft Paper of 2020 Financing a Sustainable Economy.

sector and civil society'. To the LRC's knowledge, no such consultation has taken place.

10.1.4. Recommendations:

10.1.4.1. The LRC recommends that the Bill include the following:

10.1.4.1.1. Clear definitions of climate finance, with guidelines on tagging and reporting;²⁰

10.1.4.1.2. A finance coordination mechanism with appropriate accountability mechanisms such as public reporting and oversight;

10.1.4.1.3. A finance strategy which provides for a range of measures which include long-term funding framework for mitigation and adaption actions; funding for urgent action toward climate-related disasters, and long-term funding toward climate-resilient development;

10.1.4.1.4. Mainstreaming of climate change response into the fiscal and budgetary process and so integrate the climate change response programmes at national, provincial and local government level and at development finance institutions and state-owned entities;

10.1.4.1.5. Improve public-private coordination for climate finance. The Climate Finance Landscape found that climate spending and investment remains siloed between the public and private sector;

10.1.4.1.6. Increase support for blended finance vehicles and develop innovative financial tools; and

10.1.4.1.7. More incentives should be created for climate finance spending, both by the private sector and households.

10.2. Climate Change Finance and Corruption

²⁰ South African Climate Finance Landscape 2020 (Climate Policy Initiative, Bertha Centre, Greencape).

- 10.2.1. In light of the funding required for transition and to address the impacts of climate change a new era in international financing has been ushered in. The capacity of state institutions to manage and spend multilateral climate finance faces a poor level of trust due to corruption and a poor implementation evidence base. Whilst we have laws criminalising many forms of corrupt conduct, kleptocrats who control the administration of state funds are assisted by a complex transnational network of professional enablers who successfully support the concealment of corrupt wealth of public figures in our country as evidenced in the Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State. The LRC supports economic modelling and climate classification tagging in the budget for tracking climate-related expenditure for transparency and restoring trust and aligns with the call that clear fiduciary standards be met before the approved funds may be accessed for transparent management of the revenues received by the government.
- 10.2.2. In terms of any mention of international financing, the Bill does provide in its objectives in Clause 2(b) that there must be effective management of inevitable climate change impacts and further recognises in Clause 3(c) the acknowledgement of international equity and each country's common but differentiated responsibilities and capabilities. The Bill further states in the Memorandum Section 5 that there will be financial implications for state.
- 10.2.3. However, the Bill does not provide for a designated coordination mechanism on finance to enable transparency. It is not clear what anti-corruption controls on climate finance may be established, coordinated, and evaluated for South Africa to optimise climate finance for effectiveness and not stolen, wasted, or directed to suboptimal activities. Whilst the effectiveness of anti-corruption tools in the climate sector may be untested and unknown, past, and present cases of corruption have lessons for protection against future corruption. Large amounts of money will flow in to support climate change interventions, including via untested

disbursement mechanisms of foreign nations with the risk that inadequate mechanisms may advance corruption due to spending imperatives from the urgency of the climate crisis.

10.2.4. Transparency International²¹ highlights that substantive provisions to regulate governance issues and protect against corruption must be mapped and anti-corruption tools developed for implementation. Corruption may weaken the quality of environmental laws and regulations and enable the capturing of individual politicians or the state generally thereby shaping government policy away from effective climate action. Optimising climate finance is not just a question of good technical design to reduce emissions or narrowly monitoring carbon accounting but to ensure transparency in policymaking; accountability in decision-making; 'bottom up' engagement with climate-affected communities and civil society; controls around fraud, bribery, and procurement; regulation of lobbying and financial monitoring is required in legislating a comprehensive climate change framework to guard against corruption at all levels.

10.2.5. According to Transparency International - corruption inhibits climate change preparedness, by undermining the capital flows necessary for critical infrastructures. In addition, corruption takes money away from essential services such as health systems, clean water delivery, sanitation, and flood defences, which are all essential to deal with the fallout from climate change. Transparency International records that the main factors driving corruption are low transparency, a lack of community engagement, and limited accountability, despite formal mechanisms for addressing these and further that conventional anti-corruption approaches that focus on formal mechanisms of transparency and accountability have limited effects. According to Transparency International, corruption can manifest in the form of political interference from vested interests, such as industries with oil and gas companies whose profits depend on activities that harm

²¹ Transparency International "Global Corruption Report: Climate Change, 2011" available at https://images.transparencycdn.org/images/2011_GCRclimatechange_EN.pdf (Accessed on 3 June 2022).

the climate. Ultimately, this results in politicians shaping government policy away from climate action and undermining measures to solve the climate crisis. A recognition of the challenge of state capture should be used not as an opportunity to expand the reform agenda beyond what is feasible for even the most committed reform-minded governments, but rather to prioritize that agenda more effectively by developing a clearer sense of the mechanisms to protect against corruption.

10.2.6. According to Transparency International much of the climate funding will flow through untested channels and needs to be disbursed quickly increasing the need for good management. Because climate financing will come from several different sources, a lack of common reporting and accounting criteria will make it hard to track it and compare results of what was funded, and with what impact on the environment. In countries where governance is poor, the response to climate change will be particularly weakened, putting lives and livelihoods at risk. Many of those countries judged most vulnerable to the most visible effects of climate change by the World Bank – drought, flooding, storms, or rising sea levels – are also countries where experts perceive high levels of corruption in public services, according to TI’s Corruption Perceptions Index (“**CPI**”).

10.2.7. Public access to information and participation in climate change policy arenas will ensure that decisions are not influenced only by special interests. If civil society groups have access to information about adaptation and mitigation projects, they can monitor, provide oversight and verify that projects achieve the emissions-reductions or climate-proofing benefits that they claim.

10.2.8. Recommendations

10.2.8.1. The LRC submits the messaging of the United Nations Sustainable Development Goals (“**SDGs**”), particularly SDGs 16 and 17 that emphasise inclusive societies, justice for all and strong partnerships, should be leveraged when engaging different actors and stakeholders in the climate space. SDG 16 is to ‘Promote peaceful and inclusive

societies for sustainable development, provide access to justice for all and build effective, accountable, and inclusive institutions at all levels. SDG 17 is to ‘Strengthen the means of implementation and revitalise the global partnership for sustainable development’. SDGs 16 and 17 clarify processes and promote shared platforms for input that give equal access to different stakeholders. Furthermore, aligning with mechanisms that apply the transparency and objective criteria principles like Article 9 of United Nations Convention Against Corruption (“**UNCAC**”) in managing corruption risks will support transparency.

10.2.8.2. Transparency International records specific measures around procurement transparency that may be directly adapted to preventing exclusion around climate action including registering communications and engagements and banning secret meetings between policymakers and other stakeholders with equal communication with all stakeholders – for example, all parties receive all communications about an issue, and all parties’ policy positions are available to all lobbying parties. Actively providing for the principles intended to drive the engagement process with stakeholders may emphasise that exclusionary practices will not be tolerated.

10.2.8.3. Providing for finance governance in the Bill will ensure that corruption does not reduce the level of public investment and maintain the good quality of services procured. South Africa is keenly aware of the costs of corruption that is particularly acute in infrastructure and service delivery projects, where lower-quality inputs or technical expertise are substituted. The silence of the Bill for managing climate finance in the face of a strong evidence base of corruption is a gap that must be addressed.

11. Polluter pays principle (Comments to Clause 3(j))

11.1. The LRC welcomes that the Constitutional right to a healthy environment recognised in the Preamble and the polluter pays principle in Clause 3(j) of the

Bill. However, recognition of this right is not enough without implementation and protection of these rights.

- 11.2. The polluter pays principle is also recognised in the NEMA in Section 2(p).
- 11.3. However, this principle in terms of abandoned mines has not been forthcoming. The principles set out in NEMA equally apply to the MPRDA in terms of Section 37 which advises that NEMA will serve as a guideline for the interpretation, administration, and implementation of the environmental requirements of the MPRDA.
- 11.4. In terms of a right to a healthy environment and implementation of the polluter pays principle, as recently as 31 March 2022, it was recognised by the auditor general in a media release²² that the DMRE needs to increase its rehabilitation of abandoned mines due to the risk they cause to health, safety and the environment of communities. It further stated that the government needs to improve its rehabilitation as it negatively affected local communities and the environment²³. It must be highlighted that an audit was conducted in 2009 which stated the same issues. The DMRE at present is managing 6100 mines with the auditor general advising that the “department’s management was ineffective and did not address the environmental, social and health impact of unrehabilitated mine within a set time frame”²⁴.
- 11.5. The LRC has had first-hand experience of this through its litigation regarding an abandoned mine. On 31 May 2019, the LRC issued an application which

²² Auditor – General South Africa “Auditor-General calls for stricter management in rehabilitating abandoned mines and mine openings” available at [https://www.agsa.co.za/Portals/0/Reports/Special%20Reports/2021/2022%20%20MEDIA%20STATEMENT%20\(Derelict%20and%20Ownerless%20Mines%20Performance%20Report\)%20FINAL%20\(002\).pdf?ver=2022-03-31-102059-447×tamp=1648714873244](https://www.agsa.co.za/Portals/0/Reports/Special%20Reports/2021/2022%20%20MEDIA%20STATEMENT%20(Derelict%20and%20Ownerless%20Mines%20Performance%20Report)%20FINAL%20(002).pdf?ver=2022-03-31-102059-447×tamp=1648714873244) (Accessed on 1 June 2022).

²³ Auditor – General South Africa “Auditor-General calls for stricter management in rehabilitating abandoned mines and mine openings” available at [https://www.agsa.co.za/Portals/0/Reports/Special%20Reports/2021/2022%20%20MEDIA%20STATEMENT%20\(Derelict%20and%20Ownerless%20Mines%20Performance%20Report\)%20FINAL%20\(002\).pdf?ver=2022-03-31-102059-447×tamp=1648714873244](https://www.agsa.co.za/Portals/0/Reports/Special%20Reports/2021/2022%20%20MEDIA%20STATEMENT%20(Derelict%20and%20Ownerless%20Mines%20Performance%20Report)%20FINAL%20(002).pdf?ver=2022-03-31-102059-447×tamp=1648714873244) (Accessed on 1 June 2022) Page 1.

²⁴ Auditor – General South Africa “Auditor-General calls for stricter management in rehabilitating abandoned mines and mine openings” available at [https://www.agsa.co.za/Portals/0/Reports/Special%20Reports/2021/2022%20%20MEDIA%20STATEMENT%20\(Derelict%20and%20Ownerless%20Mines%20Performance%20Report\)%20FINAL%20\(002\).pdf?ver=2022-03-31-102059-447×tamp=1648714873244](https://www.agsa.co.za/Portals/0/Reports/Special%20Reports/2021/2022%20%20MEDIA%20STATEMENT%20(Derelict%20and%20Ownerless%20Mines%20Performance%20Report)%20FINAL%20(002).pdf?ver=2022-03-31-102059-447×tamp=1648714873244) (Accessed on 1 June 2022) Page 3.

sought relief against the DMRE, the Department of Human Settlement; Water and Sanitation, the Mogale City Local Municipality and the Department of Trade and Industry.

- 11.6. The application is primarily to compel the relevant government departments to hold the Mintails group of companies liable for rehabilitation costs which are estimated to be approximately R460 000 000.00. As the companies within the Mintails group have commenced with liquidation applications, the result is that the Mintails Group escapes liability for the rehabilitation costs. In terms of the MPRDA, should a company who owes rehabilitation costs liquidate then the liability will fall to the state and more specifically burden the taxpayers with further debts.
- 11.7. This matter is currently still in litigation. However, what can be highlighted in this case is that the polluter did not pay, and the departments required to implement compliance, have failed. Further the price of this pollution has been carried by local communities and the environment.
- 11.8. This case is not unique with over 6100 abandoned mines being prevalent in South Africa.
- 11.9. Whilst poor management and lack of political will have contributed to South Africa's legacy of greenhouse gas emitting abandoned mines, a lack of finances is a contributing factor. Although R49bn is required to rehabilitate South Africa's abandoned mines, the DMRE has only been allocating R120m annually for this purpose.²⁵
- 11.10. Abandoned mines are not only an issue regarding lack of rehabilitation but also in terms of causing emissions which will add to the climate change issue.
- 11.11. A 19-month data investigation of mine closures indicated that between at least 2011 and 2017, no large coal mines operating in South Africa were granted

²⁵ Mail and Guardian 'R49bn to rehabilitate 6 000 mines' available at: <https://mg.co.za/article/2019-12-06-00-r49bn-to-rehabilitate-6000-mines/#:~:text=An%20average%20of%20about%20R120,and%20energy%20on%20November%202020>, (Accessed on 27 May 2022).

closure. This means the mines have not been rehabilitated and are simply abandoned, leaving a legacy of local and global pollution.²⁶

11.12. The country's operating and abandoned coal mines release greenhouse gases with a global warming effect equivalent to up to 4.3-million tonnes of carbon dioxide a year. That roughly equates to consuming 10-million barrels of oil.²⁷

11.13. In addition to carbon dioxide, abandoned coal mines can emit methane for decades.²⁸ Methane has 25 times the global warming potency of carbon dioxide.²⁹

11.14. The Auditor-General has found that the DMRE has been mismanaging its responsibilities for the rehabilitation of the derelict and ownerless mines.³⁰

11.15. Recommendations

11.15.1. Due to the DMRE being a contributor to climate change through mismanagement of abandoned mines and granting of mining rights for fossil fuels, this should be mentioned in the Bill. The issues of abandoned mines are one that should be specifically mentioned due to its potential contribution to climate change. The impact of mining and exploration in South Africa should also be mentioned as a climate change factor.

11.15.2. To alleviate the South African taxpayer from being held responsible to pay for the rehabilitation of greenhouse emitting abandoned mines, a mechanism needs to be put in place so that those who operated mines which are now abandoned are held responsible for the contribution those

²⁶ Mark Oldalde 'Coal Mines Leave a Legacy of Ruin in South Africa' available at <https://pulitzercenter.org/stories/coal-mines-leave-legacy-ruin-south-africa#:~:text=More%20than%206%2C000%20abandoned%20mines,left%20to%20deal%20with...>, (Accessed on 27 May 2022).

²⁷ Ibid.

²⁸ Paul Tullis 'The Long, Long Road to Cleaning Up Coal's Carbon Footprint' available at <https://www.bloomberg.com/news/articles/2022-04-26/methane-gas-business-hopes-to-make-abandoned-mines-greener>, (Accessed on 27 May 2022).

²⁹ Ibid.

³⁰ Ed Stoddard 'DMRE's failure to rehabilitate abandoned mines poses health risks to communities' available at: <https://www.dailymaverick.co.za/article/2022-03-30-dmres-failure-to-rehabilitate-abandoned-mines-poses-health-risks-to-communities/>, (Accessed on 27 May 2022).

mines are now making to climate change or that the DMRE is compelled to rectify the situation.

- 11.15.3. The polluter pays principle should be reinforced with mechanisms to allow for a party to be held liable should they not comply with their greenhouse gas mitigation plan. Further *locus standi* should be provided for considering the Constitution to any party in terms of Section 38 which reads that “*anyone listed in this section has the right to approach a competent court, alleging that a right in the bill of rights has been infringed or threatened, and the court may grant appropriate relief*”. The enforcement of this Bill should allow for state as well as private persons to be held liable by any person as everyone has a right to a healthy environment.

12. Principles that must be included in Clause 3

12.1. Women’s Rights (Comments on Clause 3 of the Bill)

- 12.1.1. Climate change is a global challenge that burdens all of humanity, but not equally. Clause 3(f) of the Bill recognises the vulnerable groups in our country but is not clear how the majority of whom are women and encumbered disproportionately will be firmly on the agenda of climate change law, or how women – from different backgrounds – may participate in negotiations and the design and implementation of programmes. The Bill does not recognise that women are strained differentially by the effects of climate change or that women have and continue to serve as agents of mitigation and adaptation. For example, water scarcity, droughts, and soil erosion, not only disenfranchises farmers and landowners, but also undermines hygiene and sanitation, affecting maternal health, women’s economic productivity, and girls’ education.
- 12.1.2. The LRC submits that it is important to recognize that the mere reference to women does not guarantee that women’s experiences and leadership will be integrated into climate change policies and protocols. Women must also be able to lead and be heard at the national and municipal levels and be brought into the fore. Climate change is not only an environmental

phenomenon but also a security, economic development, health and human rights imperative. In all three of these areas, women who according to the 2021, Statistics South Africa number approximately 51,1% (about 30,75 million) of the population – will bear severe gendered impacts of climate change without equal representation in decision-making or recognition in policy design.

- 12.1.3. The LRC submits that despite women facing unique and sometimes disproportionate burdens of climate change,³¹ women also represent a wealth of indigenous knowledge, which can inform and influence solutions to address climate change to adapt their lives to survive and care for their dependents.
- 12.1.4. The Bill must recognise the different, and similar, ways in which men and women experience the effects of climate change, and ensure that women’s voices are represented at national, provincial, and municipal negotiations to realise the transformative potential – whether in humanitarian, environmental, political, or socioeconomic spheres – of climate change law and programmes.

12.2. Ecosystems Approach (Comments on Clause 3)

- 12.2.1. While the Bill refers to the importance of ecosystems, it does not explicitly call for an ecosystems approach. An ecosystem approach is a “*strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way*”³². This, the LRC submits, is a serious omission.
- 12.2.2. The Marine Spatial Planning Act 16 of 2018 (“**Marine Spatial Planning Act**”) includes specific reference to an ecosystems approach in its listed

³¹ M. Alam, R. Bhatia and B. Mawby, Women and Climate Change: Impact and Agency in Human

Rights, Security, and Economic Development, Published by the Georgetown Institute for Women, Peace and Security, 2015, https://www.climateinvestmentfunds.org/sites/cif_enc/files/knowledge-documents/georgetown_women_and_climate_change_2015.pdf

³² Convention on Biological Diversity “Ecosystem Approach” available at <https://www.cbd.int/ecosystem/#:~:text=The%20ecosystem%20approach%20is%20a,three%20objectives%20of%20the%20Convention>. (Accessed on 3 June 2022)

principles. However, as has been noted from researchers involved in marine spatial planning in South Africa, the promotion of this approach has been seriously hampered by development decisions made under Operation Phakisa, as “South Africa’s national interest in growing its oceans economy is outpacing the development and application of robust tools to measure marine ecosystem condition”³³.

12.2.3. The problem is that, despite the good intentions of the Marine Spatial Planning Act, these objectives are scuppered because parallel processes are proceeding that do not require an ecosystems approach. It is thus imperative that framework legislation that will cut across as many sectors as the Bill, must include explicit reference to these basic principles. If not, it is inevitable that these principles will be applied inconsistently across sectors. An ecosystems approach, for it to be successful, requires by its very nature that it must be applied consistently.

12.2.4. The LRC thus submits that the Principles in Clause 3 should include the text: “the advancement of an ecosystems approach”.

12.3. Cumulative impact

12.3.1. The Principles should further include specific reference to cumulative impacts and require decision-makers to take these into account. Regulations to the National Environmental Management Act (GNR 982 - 985 in GG 38282) define these as “. . . *the past, current and reasonably foreseeable future impact of an activity, considered together with the impact of activities associated with that activity, that in itself may not be significant, but may become significant when added to the existing and reasonably foreseeable impacts eventuating from similar or diverse activities*”.

³³ Lombard A, Dorrington R, Reed J, Ortega-Cisneros K, Penry G, Pichegru L, Smit K, Vermeulen E, Witteveen M, Sink K, McInnes A and Ginsburg T “Key Challenges in Advancing an Ecosystem-Based Approach to Marine Spatial Planning Under Economic Growth Imperatives” available at <https://www.frontiersin.org/articles/10.3389/fmars.2019.00146/full> (Accessed on 3 June 2022).

12.3.2. In as early as 2004, the Department then known as Department of Environmental Affairs and Tourism, published a document entitled Integrated Environmental Management Information Series: Cumulative Effects Assessment, in which it identifies such assessments as “the tool to provide direction in understanding impacts on future generations”. The document continues:

Each individual development, when assessed on its own, may produce impacts that are socially acceptable. However, when the effects of the numerous single developments are combined, these impacts may become cumulatively significant. [...] The aim of Cumulative Effects Assessment is to avoid what has been described by Odum as the ‘tyranny of small decisions’.

12.3.3. It is submitted that the Principles of the Bill should include the wording “the need for decision-makers to take cumulative impacts into account”.

13. Coordination of State – policy alignment and institutional arrangements (Comments on Chapter 2, 3 and 4)

13.1. Chapters 2, 3 and 4 of the Bill, appear to provide for a coordinated and integrated response by the state to climate change impacts and for the effective management of inevitable climate change impacts in that the Bill addresses institutional and coordination arrangements across the three spheres of government namely national, provincial, and local; highlights the need for the spheres of government and entities, sectors as well business to respond to challenges of climate change and policy alignment and institutional arrangements. The Bill places great responsibility on municipalities and provincial government to assess climate change needs and create climate response implementation plans to cover both adaptation and mitigation measures.

13.2. Alignment of policies

13.2.1. Whilst the Bill’s horizontal and vertical mechanisms for climate change governance appear comprehensive, Clause 7(1) is not clear how the

policies will be aligned both vertically (from national to local levels) and horizontally (between national departments). The Bill does not set out the key mechanisms for alignment or coordination to be clearly identifiable for transparency and accountability in implementation. The challenge to implementation due to the fragmented nature of responsibility without clear mechanisms between different governance elements may create uncertainty on how policies may be jointly implemented and aligned. The LRC submits that regulatory and economic instruments to operationalise climate policy across different government departments must be included in the Bill to establish a clear relationship between different elements within the Bill for joint implementation and aligned across sectors.

- 13.2.2. Clause 7(1) must extend to and apply to every department and organ of state as there is no single department or organ of state that is not or that will not be affected by climate change. The LRC submits that obligations ought not to be subject to one's working relations and persuasion, in terms of asking sectors to consider climate change but rather on the law that compels each sector and level of government to respond effectively.
- 13.2.3. Clause 7(2) provides for organised labour, civil society, and business to advise on the climate change response and mitigation and adaptation. The LRC submits that transparency supports equitable access to information – accordingly independent scientific bodies, technical practitioners and researchers that will provide the state with the best available and recent science on climate change responses required to address it must include mechanisms that enable all stakeholder to easily see key data that inform decisions affecting South Africa.

13.3. Institutional arrangements

- 13.3.1. The Bill does not require functionaries with climate change specific knowledge or capability. Rather, those that already serve will now also assume climate portfolios as Clause 8(1) provides that Section 16 of the Intergovernmental Relations Framework Act No. 27898 of 2005, that provides for intergovernmental forums that promote and facilitate

intergovernmental relations between the province and local governments in the province will also serve as forums on climate change.

- 13.3.2. The evidence is that this elaborate system for vertical and horizontal coordination has not augmented the effectiveness of coordination and the level of integration for service delivery to date. Whilst most provinces may have developed climate change strategies and plans, only a few have mainstreamed climate change into inter-sectoral plans and strategies – and this to no visible degree of success. Progress towards developing strategies and implementing policies within smaller cities and local governments is less advanced and faces challenges due to limited technical capacity. South Africa says all the right things but the political will for alignment into that space – is absent from the Bill. This translates into a lack of policy direction for the state on what is required in terms of mainstreaming climate change.
- 13.3.3. A lack of clarity on mechanisms for coordination, policy alignment and accountability for implementation horizontally among national government departments and vertically between national, provincial, and municipal governments, as well as with non-state actors, risks a silo-based culture of how the departments may work on climate change and coordinate with the Department of Forestry, Fisheries and the Environment (“*DFFE*”). Some key pieces of legislation, such as the Disaster Management Act 57 of 2002 (“*DMA*”) and National Water Act 36 of 1998, have already been amended to include climate change clauses in them, and may assist policy coordination and implementation in these sectors but the lack of clarity on the roles and responsibilities of individual sectoral agencies is not clarified sufficiently.
- 13.3.4. The LRC submits that the communication gaps of who to speak to, what role they are playing and whose interests they are representing must be clarified for continuity between sectors and levels of government. Setting up the structure is easy but advancing implementation rests on capacity, political influence and leverage and must be unambiguous. Accordingly greater clarity and transparency about the identity of the responsible

individuals and focal points on climate change issues in each agency is required. In practice even when the right departments are around the table, the level of representation is not senior enough. Stakeholders believe they are dealing with one government, so the Bill must clarify the state's internal structure positions for example from trade and industry, transport, human settlements, mineral resources and energy, water, agriculture, education to discuss and agree on one government's view and not just the DFFE's view.

- 13.3.5. The LRC aligns with the view that linking climate policy to poverty reduction objectives is key to leveraging buy-in and effective engagement across levels of governance - horizontally and vertically. One to two-thirds of the population lives in informal settlements demonstrating lack of capacity of city governments and accountability to citizens. The recent KwaZulu-Natal floods demonstrated this. Such devastating disasters are increasing in frequency. Thus national, provincial, and local government's responsibilities are important for reducing risks and responding effectively when a disaster occurs. The quality of governance, including the control of corruption, corresponds with the quality of infrastructure services. At present, the state demonstrates little or no accountability to citizens and shows little interest in reducing climate change risks.
- 13.3.6. The LRC submits it is necessary to embed just transition in every aspect of legislation, regulation and planning for all departments and all levels of government whilst recognising that whilst centralised strategic planning, regulation and legislation is necessary, transitions remain context-specific with communities, and regions being consulted in developing transition responses. Whilst democratically elected leaders control the direction of government, public servants notionally play a strong technical role supported by thousands of policy workers in multiple levels of government. The evidence however is that essential functions for delivering a just transition, such as the ability to conduct any rigorous social equity analysis, remains beyond the capacity of the public service at present. Thus, execution may not correspond with the urgency of the climate crisis.

Recognising that reforms to the public service are beyond the scope of the Bill but it is essential that the public service have the capacity to deliver via the administrative bodies provided by the Bill.

- 13.3.7. The LRC submits significant gaps present challenges that the Bill must address including the reality that dialogue exclusive to the national level creates downstream challenges because concerns at the national level will differ from those at the local level. Most local governments are insufficiently aware of the challenges associated with climate change or have the knowledge or skill to address those challenges. The Bill is silent on the significant change required in the energy sector or mechanisms to connect community and expert knowledge across relevant fields – such as urban design, environmental health, wetland and mine rehabilitation to enable community action in living and working environments. The Bill does not clarify the role of data or mechanisms to monitor and document the impact of climate change on people and any transition projects implemented.

14. The Role of Local Government (Comments of Clause 9 and 15)

- 14.1. The Bill envisions an extended role for municipalities in the combatting of climate change in South Africa. In particular, Clause 9 of the Bill makes provision for the district intergovernmental forum, established in terms of Section 24 of the Intergovernmental Relations Framework Act, to act as the Municipal Forum on Climate Change. The Municipal Forum on Climate Change has the responsibility of coordinating climate change response actions for those activities within its operational control, as well as provide a report on these action to the relevant Provincial Forum on Climate Change.
- 14.2. In terms of the Intergovernmental Relations Framework Act, the district intergovernmental forum serves as a consultative forum for the district municipality and the local municipalities to discuss and consult each other on

various matters in the district.³⁴ The forum consists of the district and local municipality mayors or councillors.

- 14.3. Clause 15 of the Bill foresees the mayor of a metropolitan or district municipality undertaking a climate change needs and response assessment for the municipality. The mayor must also assess the extent to which its constitutionally mandated functions are affected by climate change and formulate steps to address these effects in the performance of the municipality's functions. The assessment must amongst other things, be based on the best available science, evidence, and information, and must analyse the nature and characteristics of the municipality and its unique climate change needs and risks.
- 14.4. Clause 15 also requires the development and implementation of a climate change response implementation plan. The plan must be informed by the climate change needs identified in the assessment and include measures or programmes relating to both adaptation and mitigation in line with the constitutional mandate of the municipality.
- 14.5. While the LRC supports the notion that local government is an essential partner in the climate change response, we foresee multiple difficulties with this approach and the role that has been envisioned for municipalities. The concern is based on two considerations. Firstly, local government structures in South Africa lack the capacity to comply with its role in terms of the Bill, and secondly, local government is a contributor to the climate change crisis.
- 14.6. The Constitution envisions a central role for local government. This includes the delivery of basic services to all South Africans to contribute to meaningful and sustainable improvements in the living standards of communities. The constitutional vision is that municipalities should act as sites of sustainable and

³⁴ Section 26(1) of the Intergovernmental Relations Framework Act 13 of 2005. These matters include the making and implementation of national and provincial policy relating to matters affecting local government interests in the district, implementation of legislation relating to matters affecting local government interests in the district, the provision of services in the district, coherent planning and development in the district and the co-ordination and alignment of the strategic and performance plans and priorities, objectives and strategies of the municipalities in the district.

meaningful improvement, and as the first link between the state and its citizenry. This is however not the reality for many municipalities in the country.

- 14.7. Only 27 of the 257 municipalities in South Africa received a clean audit in 2019/2020, and the Auditor-General of South Africa found that in 2018/2019, 79% of municipalities had a financial health status that was either concerning or requiring urgent intervention. The financial distress that municipalities experience is in part driven by an unsustainable funding model for local government. The 1998 White Paper on Local Government envisioned that 73% of municipal finances will be derived from revenue collection – placing the burden on citizens. In reality, municipalities are collecting revenue far below this target, and research by the Public Affairs Research Institute suggests that local government is able to fund less than 50% of its operating expenditure from revenue collection, which results in a chronic budgetary shortfall.³⁵ The budgetary shortfalls, coupled with pervasive corruption, a lack of skills, and poor management at local government level, has created a melting pot for incompetence to thrive.
- 14.8. This is particularly worrying, given the fact that the effects of climate change will be felt most accurately at local level. In particular, South Africa's scarce water resources will be affected by the climate change crisis – exasperating existing water shortages. Water availability is adversely affected by environmental degradation and resource pollution, inefficient use of water, inappropriate allocation of water in ways that does not serve the public interest, and the attempted implementation of overly complex mechanisms for water resource governance.³⁶ Many municipalities are becoming increasingly poor at managing consumption, at metering, billing and collecting, and enforcing compliance with water restrictions.³⁷ They are also ineffective in managing the water supply process, often contributing to the pollution of scarce water resources.

³⁵ Ledger T & Rampedi M “The end of the road: A critical review of the local government fiscal framework” (2021) Public Affairs Research Institute 1.

³⁶ Ledger T & Tissington K “Strengthening municipal systems for inclusive water and sanitation in South Africa” (2021) Public Affairs Research Institute 12.

³⁷ *Ibid.*

- 14.9. The LRC and its clients have experienced the failures of local government first hand and have been involved in litigation that was aimed at compelling municipalities to comply with their constitutional and legislative obligations, particularly in relation to the environment. This litigation has been aimed at the failures of municipalities to properly manage the provision of basic services, such as sanitation and refuse collection. While the litigation revealed the institutional decay and incompetency at local government level, it also illustrated the extent to which municipalities themselves contribute to the pollution of the environment and water resources, which contributes to the climate change crisis.
- 14.10. In 2018, the LRC, on behalf of ten individual residents of Makhanda in the Eastern Cape, approached the high court to compel the local Makana Municipality to take steps to address the failing sanitation system. The town is plagued by persistent sewerage spills that pollute the natural environment and make the lives of residents unbearable. The existing wastewater treatment works functions at 78% over its capacity. The town's sewerage is all carried to the Belmont Valley and Mayfield Waste Water Treatment Works on the outskirts of town where it must be treated before being released into the surrounding rivers. The Belmont Valley Waste Treatment Works had been functioning over capacity for years and raw sewerage from the treatment works was being released into the natural waterways and rivers around the town. This caused large scale environmental pollution that killed plant and animal life and polluted water sources that are used for drinking and agricultural purposes.
- 14.11. In June 2020, the municipality and the applicants agreed on a two-part order that was made an order of court. This included weekly visits by the municipality to unblock the drains near the homes of the residents, regular threading of the sewerage pipes, and lime treatments³⁸ for the areas affected by the spills. Our clients also sought an order that the municipality identify all the sewerage spills

³⁸ Lime is a calcium-containing mineral that is commonly used to treat sewerage spills. It neutralises the smell of the sewerage and sanitises the affected areas.

in town and produce a plan on how the spills will be managed until a more sustainable solution can be found.

- 14.12. The municipality was also directed to appoint a qualified person to assess the sanitation needs in Makhanda, draft a report on the budgetary requirements to meet those needs, and implement the recommendations. This includes the upgrading of the sewerage treatment works and the replacement of broken pipes. Nearly two years after the orders were granted, the municipality's compliance with these orders has been haphazard. Sewerage spills continue to plague the Makhanda community, and the raw sewerage is still being released into rivers and waterways, continuing to pollute the natural environment. They have also not produced the required plan.
- 14.13. In September 2021, Makana Municipality was also ordered by the high court to address its pervasive refuse problem, which contributes to pollution and the deterioration of the natural environment. The LRC acted on behalf of the Ezihagwini Street Committee in Makhanda, who obtained an order finding the municipality's Bylaws and Waste Management system unconstitutional for its failure to protect and fulfil the residents' right to an environment that is not harmful to their health. The municipality was also compelled to produce a long-term solution for the problem of waste management in town.
- 14.14. The court also directed compliance with the National Environmental Management (Waste) Act 59 of 2008 ("**NEMWA**") and placed an obligation on the municipality to review its bylaws to make it compliant with the NEMWA. The municipality was also directed to clean all the unofficial dump sites and provide residents with three black bags a week, that are collected on a weekly basis. Again, the implementation of this order by the municipality has been problematic, with only limited compliance and numerous excuses from municipal officials as to why the order is not being adhered to.
- 14.15. On 29 July 2019, the high court in Pietermaritzburg declared the uMsunduzi Municipality, uMshwathi Municipality and uMgungundlovu Municipality's ("the municipalities") "*ongoing and persistent failure to provide the farm occupiers and labour tenants who are residing within areas of their jurisdiction with*

access to basic sanitation, sufficient water and collection of refuse is inconsistent with the Constitution of the Republic of South Africa, 1996, particularly Sections 9, 10, 24, 27(1)(b), 33, 152, 153, 195 and 237.³⁹ This order was granted after persistent efforts by farm dwellers within the municipal areas to gain access to basic services were ignored. Compliance with this order has also been problematic and the municipalities have to a large degree failed to comply with its terms, rather opting to appeal the order and judgment.

- 14.16. The examples above illustrate some of the challenges at local government level, as well as how these challenges are playing into the climate change crisis in South Africa. Municipalities are not adequately funded or capacitated to perform its existing functions, and it is unlikely that they will have the financial and institutional capacity to play the role that the Bill foresees. The assessment that is envisioned by municipalities, requires a reliance on the best available science, evidence, and information to produce an analysis of the nature and characteristics of the municipality and its unique climate change needs and risks.
- 14.17. Experience has shown that where municipalities were ordered to produce assessments and plans in respect of basic services such as sanitation or refuse, they were either unable to comply with the order, or produced plans that were so inadequate that it did not address the needs of the communities. The reality is that climate change responses are complex and require skills, resources, and capacity. Most municipalities in South Africa do not at present have the ability to meet its existing constitutional and legislative obligations. The fear is that the institutional and financial challenges at local government level, will hamstring the climate change response as envisioned in the Bill.
- 14.18. There is also a need for municipalities to acknowledge and address the role that it plays in contributing to the climate change crisis. The failure to provide safe and healthy basic municipal services do not only impact people, but, as the LRC's litigation has shown, can be devastating for the natural environment. While it is important that municipalities play an important role in combating

³⁹ *Mshengu & Others v Msunduzi Local Municipality & Others* [2019] 4 All SA 469 (KZP).

climate change, there is a clear need for them to comply with existing obligations in respect of service delivery as part of this response.

14.19. Recommendations

- 14.19.1. The LRC recommends the reform of the municipal fiscal framework to place less reliance on revenue collection as a source of income to fund local government operations. The current funding model is unsustainable and contributes to the lack of financial and institutional capacity at local level.
- 14.19.2. The climate change response at local level must also be combined with a concerted effort to ensure compliance with local government's constitutional and legislative obligations in relation to the delivery of basic services.
- 14.19.3. The LRC also recommends that designated funding be allocated to local government to support its role as envisioned in the Bill. This funding must be separate from existing revenue sources to ensure that the work of the district intergovernmental forum is effective.

15. Lack of provisions relating to disaster response and risk reduction (Comments to Clause 18(5)(c))

- 15.1. The IPCC shows that human activity contributes to global warming and climate change, climate change drives the increase in weather extremes in climate-related disasters; and human induced processes such as unplanned urbanisation further magnify disaster risk. Whilst the Bill focuses on climate change adaptation, there is little to no focus on disaster risk reduction, which is the actions and plans targeting the prevention of new, and the reduction of existing, disaster risk.⁴⁰
- 15.2. Clause 18(5)(c) of the Bill states that

⁴⁰ M Valente and others "Aligning disaster risk reduction and climate change adaptation in the post-COP26 era" available at <https://www.preventionweb.net/publication/aligning-disaster-risk-reduction-and-climate-change-adaptation-post-cop26-era> (Accessed on 4 June 2022)

The National Adaptation and Strategy Plan must include an assessment of the Republic's vulnerability to climate change and related risks at sectoral, cross-sectoral and geographic levels, including a consideration of relevant disaster risk assessments in terms of the Disaster Management Act.

- 15.3. There are multiple problems with the climate change disaster response being regulated in terms of the DMA. The Covid-19 pandemic has brought the limitations of the DMA to light. Decision-making under the DMA is concentrated to executive officials with poor accountability mechanisms or opportunities for public consultation. The Intergovernmental Committee on Disaster Management in terms of section 4 of the DMA only allows for members of the executive to participate in disaster management decisions, to the exclusion of non-state or expert representatives.
- 15.4. Further, the DMA framework allowed for wide discretionary powers to be allocated to the Minister of Cooperative Governance and Traditional Affairs. For example, the Covid-19 Regulations issued under the DMA allowed for emergency procurement procedures to be followed. This led to widespread manipulation of state contracts allowing for the looting of state resources by private individuals.⁴¹
- 15.5. The recent floods in KwaZulu-Natal were declared a disaster in terms of the DMA. Despite this, there were poor co-ordinating mechanisms to respond to the disaster, with government indicating that an independent agency would be appointed to manage the disaster relief funds in an effort to avoid corruption.⁴² Despite the relief funding, the provincial government would need to reprioritise funding from other areas in order to respond to the infrastructure damage

⁴¹ EWN "NPA Believes accused in Police PPE Fraud Case used as a Front for Contracts" available at <https://ewn.co.za/2022/02/09/npa-believes-accused-in-police-ppe-fraud-case-used-as-a-front-for-contracts> (Accessed on 4 June 2022).

⁴² BusinessTech "Worries that KZN disaster relief funds will be looted: report" available at <https://businesstech.co.za/news/government/578044/worries-that-kzn-disaster-relief-funds-will-be-looted-report/> (Accessed on 4 June 2022).

caused by the flooding, potentially compromising other areas of service delivery.⁴³

15.6. There is no further mention in the Bill of disaster risk reduction and management as described in the National Climate Change Response White Paper. The White Paper notes that more effective disaster management is required to deal with the increased number of extreme weather events. There will be a need to declare and support disaster areas in an immediate crisis as well as during long term recovery. The DMA only deals with short term crises (the declared state of disaster lapses after three months unless extended by the Minister of Cooperative Governance and Traditional Affairs) and will not be sufficient to deal with the long-term impacts of Climate Change.

15.7. Recommendations

15.7.1. The Bill should incorporate principles of the United Nations Sendai Framework for Disaster Risk Reduction 2015-2030. The Sendai Framework states that:

15.7.1.1. While the enabling coordinating role of governments remain essential, it is necessary to empower local authorities and local communities to reduce disaster risk, including through resources, incentives and decision-making responsibilities;⁴⁴

15.7.1.2. Underlying disaster risk factors through disaster risk-informed public and private investments is more cost-effective than primary reliance on post-disaster response and recovery;⁴⁵

15.7.1.3. Strengthening of disaster risk governance is required. Disaster risk assessments should be mainstreamed into all sectors including urban planning, land degradation and informal housing. There should also

⁴³ IOL “Disaster funds have not yet arrived in KZN’ a month after the floods” available at <https://www.iol.co.za/mercury/news/disaster-funds-have-not-yet-arrived-in-kzn-a-month-after-the-floods-1b844b94-32d8-43ef-965a-ef9b34ebc47a> (Accessed on 4 June 2022).

⁴⁴ United Nations Sendai Framework for Disaster Risk Reduction 2015-2030, s19(f).

⁴⁵ Sendai Framework for Disaster Risk Reduction 2015-2030, s19(j).

be provisions relating to disaster preparedness and contingency policies, plans and programmes;⁴⁶

- 15.7.1.4. Disaster risk management should be incorporated into post-disaster recovery and rehabilitation processes, facilitate the link between relief, rehabilitation and development and develop capacities that reduce disaster risk in the short, medium and long-term including through the development of land-use planning and structural standards improvement;⁴⁷
- 15.7.1.5. Recovery schemes should be provided, including psychosocial support and mental health services.⁴⁸
- 15.7.1.6. The LRC further recommends that risk is quantified and factored into national budgetary processes and that insurance-related instruments be strengthened to assist households, business, and government absorb the losses from disasters. Innovative public-private partnerships will be required to develop applicable insurance-related products. Pooling of risk by and between national governments contributes to reducing the fiscal and socio-economic consequences of disasters.⁴⁹ The WHO Health Emergency and Disaster Risk Management framework should also be taken into account for intersectoral health operations during disasters.

16. Public Participation (Comments to Clause 29)

16.1. Development decisions

- 16.1.1. The Principles to the Bill include “the need for decision-making to consider the special needs and circumstance of localities and people that are

⁴⁶ Sendai Framework for Disaster Risk Reduction 2015-2030, s33(a).

⁴⁷ Sendai Framework for Disaster Risk Reduction 2015-2030, s33(j)).

⁴⁸ Sendai Framework for Disaster Risk Reduction 2015-2030, s33(o).

⁴⁹ Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation – Special Report of the Intergovernmental Panel on Climate Change.

particularly vulnerable to the adverse effects of climate change”. This is welcomed.

16.1.2. It is submitted, however, that Clause 29 entitled ‘public participation’, does not go nearly far enough to give effect to this principle. The mechanisms proposed, namely publication in a gazette and in a newspaper, echo largely those contained in Regulations to the Mineral and Petroleum Resources Development Act. The latter have been the subject of much litigation in particular because these proposed mechanisms are wholly inefficient in ensuring meaningful consultation. They simply do not reach many localities in South Africa and ‘particularly vulnerable’ persons.

16.1.3. It is submitted that the principles to be included in the Bill pertaining to decision making should focus on outcomes and principles rather than tick the box mechanisms that have proven so ineffective. For guidance on such principles, we refer the legislature to the African Charter on Human and Peoples’ Rights (“**African Charter**”).

16.1.4. The African Charter and its entrenchment of the right to development provides the appropriate principles relating to development decisions. South Africa is a party to that treaty and is thereby enjoined, in terms of Article 1, to “*recognise the rights, duties and freedoms enshrined in [the] Charter and shall undertake to adopt legislative or other measures to give effect to them*”.

16.1.5. The African Charter, in Articles 20 and 22, provides:

“[all peoples] shall [...] pursue their economic and social development according to the policy they have freely chosen”;

and

All peoples shall have the right to their economic, social and and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. States shall have the duty,

individually or collectively, to ensure the exercise of the right to development.

- 16.1.6. The African Commission on Human and Peoples' Rights ("***the African Commission***"), the authoritative interpreter of the African Charter, has found that this requires

fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development. [...] Freedom of choice must be present as a part of the right to development.

- 16.1.7. In a resolution adopted by the African Commission in 2012, it held that:

Mindful of the disproportionate impact of human rights abuses upon the rural communities in Africa that continue to struggle to assert their customary rights to access and control of various resources, including land, minerals, forestry and fishing...calls upon State Parties to [...] confirm that all necessary measures must be taken by the State to ensure participation, including the free, prior and informed consent of communities, in decision-making related to natural resource governance; [...and] to promote natural resources legislation that respect human rights of all and require transparent, maximum and effective community participation in a) decision-making about, b) prioritisation and scale of, and c) benefits from any development on their land or other resources, or that affects them in any substantial way.

- 16.1.8. It is submitted that the Bill should entrench the important principles of transparent, timely and effective community participation where they are effected and, where relevant, their consent.

- 16.1.9. Further that the Minister, MEC or mayor must give due consideration to all representations and objections received or presented before exercising the power concerned as cited in Clause 29(4) is not sufficient to encompass free, prior and informed consent as in the resolution adopted by the African Commission.

16.2. Representation of communities and the public

- 16.2.1. Public participation is not clearly stated or mentioned in terms of the provincial forums or municipal forums. Public participation is only limited to exercising of certain powers. Public participation should be incorporated in every aspect of the Bill due to it having an effect on every person.
- 16.2.2. Therefore, local communities, grassroots organisations and the public should be included in the forums at provincial and municipal levels for there to be effective, transparent, accountable and coherent government as in Section 41 of the Constitution.
- 16.2.3. In terms of Clause 10(1) a Presidential Climate Commission will be appointed by the President and include 30 members. Once again, no mention is made of grassroots organisations and communities who will face the harshest consequences of climate change. The number of seats in this Commission is also not advised on. This could lead to one civil society representation with business having the greatest number of seats. This needs to be corrected so there is equal representation. It is also advised that the President be referred candidates and not just able to elect members, which may be biased.

17. The impact on communities (Comments to Clause 23 and 24)

- 17.1. The Bill defines the Carbon Tax Act 15 of 2019 with no further mention. The Carbon Tax Act is tax that will follow carbon omissions passed a certain point. The Bill does mention in Clause 23 Listed greenhouse gases and activities and in Clause 24 carbon budgets. However, neither section mentions the Carbon Tax Act

17.2. Recommendations

- 17.2.1. The Carbon Tax Act should be cited in carbon budgets. It should further state that the persons who pay Carbon Tax are not entitled to increase its prices of goods and services that are supplied. The Tax and budgets should be paid from the entities profits and not indirectly paid by the

consumer, who can be the poorest of the poor. In example, should a producer of bread need to pay carbon tax, this should not trickle down to the communities who purchase this bread. This will only result in the poorer become poorer and the polluters of omissions not paying for the carbon omissions.

- 17.2.2. This would also impact on communities right to food as in the Constitution as it would be inaccessible due to not being affordable.
- 17.2.3. Further it should be stated that should a person, due to carbon budgets, need to use alternative methods to continue activities, that this costs should not be felt by the consumers of these goods and services.
- 17.2.4. The taxing of the poor for the carbon tax and budgets of a person, would be in conflict with the idea and definition of just transition (as discussed above) which states that it is a “shift towards a low-carbon, climate-resilient economy and society and ecologically sustainable economies and societies which contribute toward the creation of decent work for all, social inclusion and the eradication of poverty”. By taxing the poor indirectly, the eradication of poverty will not be possible.

18. Referral of the Bill to the National House of Traditional and Khoi-san Leaders (Comments to section 6.7 of the Memorandum on the objects of the Climate Change Bill, 2022)

- 18.1. The Memorandum on the Objects of the Bill states that ‘the State Law Advisers are of the opinion that it is not necessary to refer the Bill to the National House of Traditional and Khoi-San Leaders in terms of section 39(1)(a)(i) of the Traditional and Khoi-San Leadership Act 2019 as it does not contain any provisions which directly affect traditional or Khoi-San communities or provisions which pertain to customary law or customs of traditional or Khoi-San communities.
- 18.2. The LRC submits that the Bill directly impacts on customary law and customs of traditional or Khoi-San communities as these communities are the most likely to be impacted by catastrophic impacts of climate change. According to

the United Nations Permanent Forum on Indigenous Issues, indigenous people are among the first to face the direct consequences of climate change, owing to their dependence upon and close relationship with the environment and its resources. Climate change-induced disasters, such as floods and droughts, contribute to degradation of ecosystems and affect agricultural, pastoral, and fishery activities, which undermines food security. Effective participation of indigenous communities is crucial to the development of mitigation measures to ensure that such measures do not negatively affect vulnerable communities.⁵⁰

18.3. Recommendations

18.3.1. Communities subscribing to customary law must be given an opportunity to make representations on the Bill as their rights will be directly impacted by the actions envisaged in the Bill. For example, the rights of many fisherfolk to ocean resources in terms of customary law will be impacted. In certain instances, the National House of Traditional and Khoi-San Leaders will be well-placed to provide the views of traditional communities on the Bill and therefore should be consulted. However, we stress that traditional leaders do not always represent the views of traditional communities.⁵¹ We therefore propose that special consultative efforts be undertaken with traditional communities directly, and not only through the National House of Traditional and Khoi-San Leaders.

CONCLUSION

18.4. As the LRC, this submission to the Bill is for the benefit of the communities and clients that we work with.

⁵⁰ Indigenous Peoples Indigenous Voices “ Climate Change and indigenous peoples” available at https://www.un.org/esa/socdev/unpfii/documents/backgroundunder%20climate%20change_FINAL.pdf (Accessed on 4 June 2022)

⁵¹ Bafokeng Land Buyers Association and Others v Royal Bafokeng Nation and Others 2018 (5) SA 566 (NWM).

- 18.5. We hope this submission is considered and the necessary amendments are made to ensure the Act is in line with the international law, the Constitution and the human rights of all.
- 18.6. The LRC would be interested in making verbal presentations.