

CENTRE FOR CHILD LAW SUBMISSIONS

ON

THE CLIMATE CHANGE BILL

[B9 - 2022]

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CENTRE FOR
CHILD LAW

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ABOUT THE CENTRE FOR CHILD LAW

The Centre for Child Law (“CCL”) is a children’s rights organisation registered as a Law Clinic with the Legal Practice Council. CCL contributes to the establishment and protection of children’s rights through litigation, legislative and policy advocacy, research, as well as education. CCL’s mission is to set legal precedent to improve and strengthen laws pertaining to children and ensure that constitutional rights are realised.

THE CENTRE’S POSITION ON THE CLIMATE CHANGE BILL

This submission is prepared by CCL and is endorsed by the following organisations:

1. **Section 27** and
2. **Centre for Environmental Rights.**

CCL welcomes and supports the measures put in place by the Department of Forestry, Fisheries and the Environment (“the Department”) to enable the development of an effective climate change response and a long-term just transition by the introduction of the Climate Change Bill (“the Bill”).

Indeed, this Bill is important to children, not only in their right to a healthy environment, but also insofar as it affects each of the fundamental rights they are entitled to under the Constitution.¹ Environmental rights and the successful mitigation of and adaption to climate change have a very direct effect on children’s rights, such as the right to development (where air pollution is a major health risk), as well as their right to food (where droughts and floods have threatened food security). Section 28 of the Constitution places a duty on the Department to consider the best interests of children as paramount in every matter which concerns them. Climate change undoubtedly concerns South Africa’s children.² Not only has climate change already caused catastrophic harm to the rights of the current generation, it will continue to do so and its effects

¹ The Constitution of the Republic of South Africa of 1996 secs: Sections 9 (equality clause); 10 (inherent human dignity); 11 (right to life); section 12 (right not to be subjected to cruel, inhuman or degrading treatment); (right to have the environment protected, for the benefit of present and future generations); 27(1) (a),(b) and (2) (right to healthcare, food and water) and 28 (2) (child’s best interests clause).

² Constitution sec 28(2).

will carry over into future generations.³ Unlike any other right in the Bill of Rights, section 24 places a duty on the Department to protect the rights of future generations. As a result, the best interests of the children of future generations are also paramount and actionable in the climate change strategy adopted by the Department. Consequently, CCL holds that children's rights should be mainstreamed in all fields of national environmental policy, energy law policy and national measures for climate change adaptation.⁴

While CCL supports the Bill, we are concerned that in its current form, the Bill falls short insofar as its provisions do not adequately include meaningful participation of groups who are vulnerable to the negative and devastating effects of climate change, including poor and/or rural women and children, including infants, child-headed households, the sick and the aged, and physically challenged persons as informed by the National Climate Change Response White Paper ("the White Paper").⁵ Our submissions relate to the environmental rights of children and future generations as primary considerations in the interpretation and assessment of the provisions of the Bill.⁶

We hope that our submissions will assist the advancement of a holistic approach to children's rights and the way in which the environmental rights of this group of vulnerable stakeholders should be given special attention in this process.

THE CENTRE FOR CHILD LAW'S SUBMISSIONS

CCL's submissions are as follows:

1) Clarity on children's rights in the Bill:

³ Colombian Supreme Court Judgement: '*Future Generations v Ministry of the Environment and Sustainable Development and Others*'. <http://climatecasechart.com/non-us-case/future-generation-v-ministry-environment-others/#:~:text=On%20April%205%2C%202018%2C%20the,Amazon%20as%20a%20%E2%80%9Csubject%20of> Accessed on 26 May 2022.

⁴ UNICEF East Asia & Pacific (2020) '*Background Paper on: Environmental and Children's Rights in International Law and national Jurisprudence*' at para 64. <https://www.unicef.org/eap/reports/childrens-environmental-rights-national-and-international-law>. Accessed on 18 May 2022.

⁵ Government Gazette Notice 757 of 2011, 'White Paper of The National Climate Change Response White Paper' sec 3.

⁶ Climate Change Bill [B9 – 2022].

Section 3(f) in the Bill reads as follows:

“The interpretation and application of this Act must be guided by... the need for decision-making to consider the special needs and circumstance of localities and people that are particularly vulnerable to the adverse effects of climate change, including vulnerable workers and groups such as women, especially poor and rural women, children, especially infants and child-headed families, the aged, the poor, the sick and the physically challenged.”⁷

CCL notes with appreciation the proposal to consider the special needs of vulnerable groups as indicated in section 3(f). However, we would like to draw the Portfolio Committee of the Environment, Forestry and Fisheries’ (“Portfolio Committee”) attention to the fact that this proposed principle is not adequately reflected in subsequent provisions in the Bill.

Unlike other vulnerable groups, children have a limited voice and participation in decision-making processes. This limitation therefore underscores the need for the Portfolio Committee and the Department to not only consider children’s unique realities, rights and needs in decisions but to also involve children in decisions that will define their future. This should be done in line with section 28(2) of the Constitution which protects children’s best interests. Section 28(2) reads:

“A child’s best interests are of paramount importance in every matter concerning the child”⁸

The ‘best interests’ principle plays a significant role in protecting and advancing children’s rights. Firstly, section 28(2) is not only a substantive right, but it is also a fundamental interpretative legal principle and a rule of procedure.⁹ Therefore, section 28(2) not only helps or guides the interpretation of other rights but it is also a self-standing right,¹⁰ which can be very useful in climate change decision-making processes in terms of the Bill. The State through this Bill, should fulfil its responsibilities towards children in terms of section 28 (2).

⁷ Ibid sec 3(f).

⁸ Constitution sec 28(2).

⁹ United Nations (2013) ‘General Comment on The Right of The Child to Have His or Her Best Interests Taken as A Primary Consideration No. 14/2013’ CRC /C/GC/14 at para 1.

https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf. Accessed on 26 May 2022.

¹⁰ R Fambasayi ‘Leveraging City-level Climate Change Law and Policy for the Protection of Children’ (2021) 29 The International Journal of Children’s Rights 872-896.

Due to children’s developmental needs, their vulnerability to climate change and their exposure to high health and safety risks associated with climate change, the CCL recommends that the consideration of children’s special needs and circumstances in terms of this Bill must be anchored on and guided by section 28(2) of the Constitution and this should be clear in the Bill.

We further remind the Portfolio Committee of the Constitutional Court’s decision in *S v M*¹¹:

S v M (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) (26 September 2007) para 18 – 20.

“[18] Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children.

[19] Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood. And foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from avoidable trauma.

[20] Thus, even if the State cannot itself repair disrupted family life, it can create positive conditions for repair to take place, and diligently seek wherever possible to avoid conduct of its agencies which may have the effect of placing children in peril. It follows that section 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk. Similarly, in situations where rupture of the family becomes inevitable, the State is obliged to minimise the consequent negative effect on children as far as it can.”

CCL therefore, **proposes** the following:

- i. **New insertion:** The insertion of ‘**Vulnerable Groups**’ in section 1 of the Bill and the Portfolio Committee can draw from the definition which is provided in the *National Climate Change Response White Paper*¹² this definition is also reflected in terms of section 3 ‘Principles’ of the Bill.

¹¹ *S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) (26 September 2007) paras 18 – 20.

¹² Government Gazette Notice 757 of 2011 at 3.

CCL suggests as follows:

“Vulnerable groups means vulnerable workers and groups such as women, especially poor and rural women, children, especially infants and child-headed families, the aged, the poor, the sick and the physically challenged.”

- ii. **Clarity on children’s best interests:** While we welcome the Bill, it is important to point out that it is not the only relevant consideration in relation to children and climate change, neither does it override duties created by other legislation such as the Children’s Act. The best interest principle as enshrined in the Bill of Rights and repeated in the Children’s Act remains the paramount consideration in all matters concerning children, including climate change legislation. The Department therefore, bears a constitutional duty to consider children’s interests from both a substantive and procedural approach. CCL proposes that an express requirement for adequate and specific consideration of children’s interests in line with section 28(2) of the Constitution be included in the Bill. Particular attention should be afforded to the paramountcy of the best interests of children in, for example, the development of the *National Adaptation Strategy* contemplated in section 18 of the Bill; and the execution of climate change needs assessments as contemplated in proposed section 15. Specific reference should be made to this principle within the Bill in order to ensure its core relevance in climate change strategies.

2) Paris Agreement commitments should be expressly set out as legally binding in the Bill.

South Africa, along with 169 other countries signed the landmark Paris Agreement in 2015. As a signatory, South Africa bound itself in terms of section 231 of the Constitution,¹³ which states that an international agreement binds the State upon ratification.

¹³ Constitution sec 231.

Section 2 of the Bill does not explicitly commit to article 2 (a) of the Paris Agreement,¹⁴ in terms of which the aim is to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by “holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels”.¹⁵ This provision is further tied to the constitutional right to have the environment protected for current and future generations,¹⁶ who should inherit an environment with liveable average temperatures.

As a signatory to the Paris Agreement, in fulfilling its international commitments towards a global response to climate change, and in ratifying the international instruments aimed at curbing the increase of global average temperature, South Africa has a responsibility to explicitly include the said targets in the Bill.

CCL therefore, **proposes:**

- i. The **insertion** of targets in section 2 (e) of the Bill as follows:

(e) give effect to the Republic’s international commitments and obligations in relation to climate change, **including to 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 of climate change.**¹⁷

- 3) **The Bill should be clear on how children can participate in decision-making processes and how they can hold duty bearers accountable.**

¹⁴ Paris Agreement/ 2015.

¹⁵ Ibid art 2 (a).

¹⁷ Centre for Environmental Rights (2022). ‘Life After Coal Campaign Comments on the Climate Change Bill, 2022’ at 32. https://cer.org.za/wp-content/uploads/2022/05/Life-After-Coal-comments-Climate-Change-Bill-2022_27_May_2022.pdf. Accessed on 27 May 2022.

Despite the existing, and still developing, comprehensive environmental and children's rights protections expressed in domestic, regional and international instruments, environmental harm as a consequence of climate change still threatens the rights of children.¹⁸ Therefore, it is important for children to participate in decisions related to their well-being.

The CCL acknowledges that participatory democracy requires regular engagement between the State and its people and further requires consideration of and consultation with vulnerable groups, minority communities and other non-state actors in policy-making processes. However, the CCL notes that children do not always have a voice in the polity. Nevertheless, children have in terms of section 10 of the Children's Act, a right to participate in any matter concerning them as well as to have their views given due consideration.

The CCL therefore draws the attention of the Portfolio Committee to a 2021 decision by the UN Portfolio Committee on the Rights of the Child, where a group of children lodged a complaint with the United Nations against their governments and successfully established that they personally experienced real and significant harm as a result of the impact of climate change.¹⁹

Decision adopted by the UN Portfolio Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 104/2019.²⁰

The Portfolio Committee considers that, as children...are particularly impacted by the effects of climate change, both in terms of how they experience such effects as well as the potential of climate change to affect them throughout their lifetime, in particular, if immediate action is not taken. Due to the particular impact on children, and the recognition by States parties to the Convention that children are entitled to special safeguards, including appropriate legal protection states have heightened obligations to protect children from foreseeable harm.

¹⁸ R Fambasayi (2021). 'The Protection of Environmental Rights and Interests of Children: A South Africa Perspective' 32 Stellenbosch Law Review 386-409: at 387.

¹⁹ Ibid para 10.

²⁰ United Nations (2019) 'Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 104/2019' CRC/C/88/D/104/2019 para 10.13. <https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-child-communications>. Accessed on 26 May 2022.



CCL therefore submits, that children’s participation is pivotal as a particularly affected demographic, and their views regarding all matters concerning them, such as climate change legislation and policy, should be given due consideration.²¹ This is further supported by the Special Rapporteur’s report²² which recommends that States should facilitate the participation of children in environmental decision-making processes.²³

CCL acknowledges and appreciates the provisions set out in the public participation clause in section 29 of the Bill. However, as we have demonstrated that children have limited opportunities to participate and share their views on local government, we would like the section to be revised so that it explicitly makes provision for child participation. Municipal forums established in terms of section 9 of the Bill are an ideal platform to foster inclusive child-responsive climate action and enhance meaningful child participation.

CCL therefore, **proposes** the following:

- i. That processes for meaningful child participation be explored in the Bill including setting out measures to ensure transparency and feedback to children.
- ii. Children’s participation in terms of section 29 of the Bill should not be inferred, and CCL recommends the insertion of and specific mention of children in the clause as follows:

29 (2) The notice must –

- (a) invite members of the public, **including children and vulnerable groups**, to submit to the Minister, MEC or mayor, as the case may be, within 30 days of publication of the notice in the Gazette, written representations on or objections to the proposed exercise of the power.

- iii. CCL also proposes the establishment of a consultative child-inclusive structure under the Municipal Forum of Climate Change established in terms of section 9 of the Bill.

²¹ Children’s Act 38 of 2008 sec 10.

²² United Nations (2018) ‘*Report of the Special Rapporteur on the issue of human rights obligations to the enjoyment of a safe clean healthy and sustainable environment*’ A/HRC/37/58 para 71.
file:///D:/Climate%20Change%20Bill/Report%20of%20the%20Special%20Rapporteur%20on%20HR%20to%20enjoy%20safe_clean_helathy_and%20sustainable%20environment.pdf. Accessed on 18 May 2022.

²³ Ibid at para 71 (d).

4) Giving effect to the principle of intergenerational equity in the Bill.

The environmental clause of the Constitution²⁴ grants everyone the right to have the environment protected, for the benefit of present and future generations and section 24 (b) reads:

“Everyone has the right to – (a) an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that -prevent pollution and ecological degradation promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”²⁵

The right of future generations to inherit a healthy environment is a constitutionally protected right. This means that the government, in exercising its duties to mitigate climate change, should take sustainable development into account. Sustainable development “meets the needs of the present without compromising the ability of future generations to meet their own needs”.²⁶ The Special Rapporteur²⁷ further highlights this important consideration, that discussions about future generations should consider the rights of children who are already living and who will experience the environment in the future. Therefore, the yardstick between future generations and children living today shifts every time a child is born.²⁸

Defending the environment for present and future generations has become an imperative goal for governments.²⁹ We therefore, remind the Portfolio Committee of the emerging international jurisprudence on climate change, where children are litigating against their States on the basis of the right to be protected against current and future environmental harm in terms of domestic law and in international instruments.

In Australia, for example, where children petitioned the Federal Court to block the expansion of a coal mine on the basis that the State had a duty of care to avoid causing harm to children, due to

²⁴ Constitution sec 24.

²⁵ Constitution of the Republic of South Africa sec 24 (b).

²⁶ United Nations (2018) ‘Report of the Special Rapporteur on The Issue of Human Rights Obligations to The Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’ A/HRC/37/58 para 67. <https://www.ohchr.org/en/hr-bodies/hrc/regular-sessions/session37/list-reports>. Accessed on 26 May 2022.

²⁷ Ibid.

²⁸ Ibid at para 68.

²⁹ Declaration of the United Nations Conference on the Human Environment para 6, <https://legal.un.org/avl/ha/dunche/dunche.html> Accessed on 24 May 2022.

the air pollution that would be caused by the expansion.³⁰ And in Pakistan, where a child challenged the use of fossil fuels, and asserted that continued use of coal by the Pakistan government violated the public trust doctrine³¹ and other interconnected rights. Along with several other emerging jurisprudence, it is clear that the obligation on States to protect current and future generations against the impacts of climate change is urgent.

CCL therefore **recommends**:

- i. That the effects of the proposed measures are assessed according to the extent to which they will affect children's rights, including the rights of future generations before they are taken.³² This assessment should be incorporated into the provisions of the Bill.

5) The Bill must allow access to information for children.

In terms of section 16(1)(b), the Constitution provides as follows: “Everyone has a right to freedom of expression, which includes freedom to receive or impart information or ideas.”³³

The constitutional provision above could be interpreted to mean that it requires access to information for all children on environmental matters and the development of child-responsive measures for accessing environmental resources and services.³⁴ In line with the World Conservation Congress (IUCN) resolution which endorsed the child’s inherent right “to be equipped for the responsibility to help address the environmental challenges they will be confronted with.”³⁵ We therefore, propose that platforms by which the Minister should give notice

³⁰ *Sharma and others v Minister for the Environment* http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210527_VID3892021_judgment.pdf. Accessed on 25 may 2022.

³¹ *Rabab Ali v Federation of Pakistan & Another* <http://climatecasechart.com/non-us-case/ali-v-federation-of-pakistan-2/>. Accessed on 25 may 2022.

³² This recommendation is based on recommendations by the Special Rapporteur concerning children's educational and procedural rights: A/HRC/37/58 para 71 (b).

³³ Constitution sec 16(1)(b).

³⁴ Kids Rights Foundation (2016) ‘*Kids Rights Report 2016. Cleaning up the Mess – Children’s Rights and Environmental Protection*’. Amsterdam, The Netherlands at 17. <https://www.kidsrights.org/research/kidsrights-reports/environment-cleaning-up-the-mess/> Accessed on 18 May 2022.

³⁵ IUCN International Union for Conservation of Nature (2012) ‘*Resolutions and Recommendations. World Conservation Congress: Child’s right to connect with nature and to a healthy environment*’. Jeju, Republic of Korea. WCC-2012-Res-101-EN at 148-150. <https://portals.iucn.org/library/node/10358>. Accessed 25 May 2022.



in terms of section 29 in the Bill should be expanded so that they also cater to children and promote adequate access to information.

CCL therefore, **recommends** the insertion of electronic communications platforms to give notice regarding public participation in a format that is accessible to children (such as websites, social media platforms et cetera³⁶) as follows:

29(1) Before exercising power in terms of sections 15(1), 16(1), 16(2), 17(1), 17(2), 18(2), (19)(1)(b), 19(1)(c), 20(1), 20(3), 21(1), 21(4), 22(1), 22(2), 22(3), 22(7), 22(9), 22(10), 23(1), 23(1), 23(2), 23(5), 23(6), 25 or 27 the Minister, MEC or mayor must give notice of the proposed exercise of the relevant power—

(c) any electronic communications platforms in terms of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002).³⁷

6) Application of the Bill and the inclusion of strong penalties, compliance and enforcement mechanisms as an effective deterrence against the contravention of provisions in the Bill.

Section 4(2) of the Bill reads “The Bill binds all organs of State”. The CCL recommends that the Portfolio Committee considers expanding this provision given that the Bill also places obligations on non-state actors.

We further submit that ‘persons’ as contemplated in terms of section 24 of the Bill should also be mandated to protect children’s rights from environmental harm due to their activities.³⁸ In line with the “polluter pays principle” outlined in section 3 of the Bill, effective penalties should be imposed on those persons who contravene section 24.

³⁶ This may include relevant social media platforms, which may be more ideal to reach and appeal to children. This may also require the deliverance of the notice to be child-friendly, to promote accessibility.

³⁷ Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002).

³⁸ United Nations (2018) ‘*Report of the Special Rapporteur on The Issue of Human Rights Obligations to The Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*’ A/HRC/37/58 para 79.

<https://www.ohchr.org/en/hr-bodies/hrc/regular-sessions/hrc/session37/list-reports>. Accessed on 26 May 2022.

CCL therefore, **recommends** that:

1. Section 4(2) of the Bill should be amended so that it is clear that the Bill binds more than just organs of State.
2. We recommend the following changes to the 'offences and penalties' clause in terms of section 32:³⁹
 - 2.1 In addition to the requirements for preparing a greenhouse gas mitigation plan in terms of chapter 4 on the Bill, persons should carry out environmental and human rights impact assessments that examine the effects of their activities on children.
 - 2.2 Persons who exceed their carbon budgets should be subjected to a higher carbon tax for the excessive emissions and are guilty of an offence in terms of section 32
 - 2.3 The Portfolio Committee consider creating criminal offences for failure to comply with provisions of the Act by non-state actors.

CONCLUSION

CCL notes with appreciation the measures to enable the development of an effective climate change response and a long-term just transition and encourages further development of this Bill based on the recommendations proposed. Although there exist several gaps in the Bill as far as children's right to environmental justice and participation is concerned as identified in our submissions above. We further note that the Bill is heavily administrative but still recommend the inclusion of mechanisms to allow children to play their part, however small that part maybe.

We urge the Portfolio Committee to ensure that measures are put in place to allow for meaningful child participation during public hearings to allow children to share their concerns and questions about the Bill. To do this, we call for the Portfolio Committee to invest in reaching out to children and representative public interest and information regarding all aspects of this process should be made available in a format that is accessible to children.

Hearings must be conducted in the spirit of participatory democracy and to ensure that the views and voices of all participants are heard and a child-friendly approach should be followed in conducting the hearings. Information, including timelines regarding public hearings, must be

³⁹ Offences and penalties clause.

made available to give participants adequate time to prepare presentations and mobilise their constituencies.

CCL further **endorses** submissions by the following organisations:

1. **Section27** and
2. **Centre for Environmental Rights**, commenting on the Bill on behalf of the **Life After Coal Campaign**.

CCL will welcome an invitation to make oral submissions before the Portfolio Committee if necessary and is open to producing further written submissions.

-End

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