



Centre for Environmental Rights

Advancing Environmental Rights in South Africa



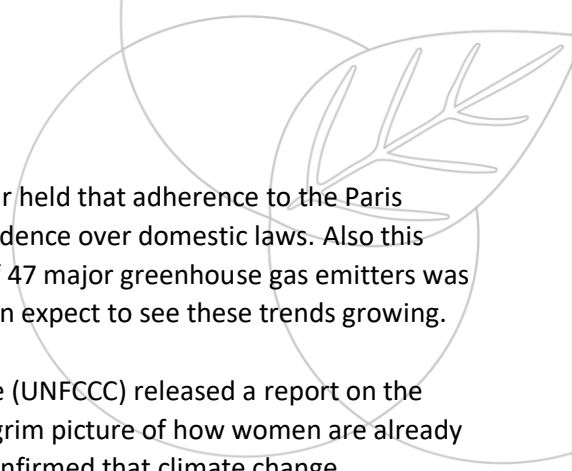
PRESENTATION NOTES: PARLIAMENTARY PORTFOLIO COMMITTEE ON ENVIRONMENT, FORESTRY AND FISHERIES 7 SEPTEMBER 2022

Introduction

1. Honourable members, we thank you for the opportunity to address you on the Climate Change Bill. My name is Wandisa Phama, and I'm the Deputy Director at the Centre for Environmental Rights.
2. We are grateful and relieved to see the Bill progressing towards being our all-important Climate Change Act, and trust that this process will continue in a constructive and prompt manner. We have no time to waste in addressing the climate crisis that is already impacting us, and this piece of legislation will empower us all to mount the effective climate change response required to literally save lives, infrastructure and the economy.
3. The risks and impacts of climate change are by now hopefully well known. Far from being an abstract issue of climate alone, climate change for us in South Africa will mean tangible disruptions such as rising food prices, restricted access to water, rising unemployment as businesses can no longer function, climate migration, social instability and the potential for internal conflict and violence. In short, it's first and foremost a human rights issue.
4. Conversely, a well-managed climate change response can lead to widespread socio economic wellbeing as we embrace a low carbon, green economy and upgrade and improve living conditions for millions
5. To achieve this, we need an effective Climate Change Act. As much as we need to see this Act come into being as soon as possible, we also need to see certain of the limitations and deficiencies in the current Bill before you being addressed.
6. As you are aware, we submitted comprehensive comments on the Bill in May of this year. These comments arise out of extensive research and consultation, and have been endorsed by bodies such as the SAHRC, Section 27, the Centre of Child Law, the City of Cape Town and others. We urge you to take the full range of our comments into account, but will use this opportunity today to highlight the key concerns and recommendations that we have in respect of the Bill.

Climate Change as a human rights and gender justice issue

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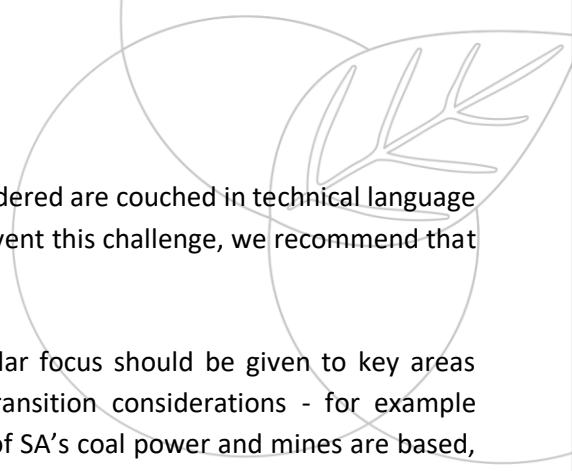
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7. Expanding a little on the Human Rights aspect, a court in Brazil¹ this year held that adherence to the Paris agreement is a human rights issue, and that the Agreement takes precedence over domestic laws. Also this year, the Phillipines Human Rights Commission held that the conduct of 47 major greenhouse gas emitters was immoral and may lay a basis for liability for human rights abuse.² We can expect to see these trends growing.
 8. This year the United Nations Framework Convention on Climate Change (UNFCCC) released a report on the gender-differentiated impacts of climate change. The report painted a grim picture of how women are already facing significantly elevated risks of climate harms. The research also confirmed that climate change exacerbates many patriarchal dynamics in society, including systemic gender discrimination.
 9. There are many documented cases of gender-based violence being exacerbated in the wake of climate-induced disasters such as cyclones and floods.
 10. Around the world, and here in South Africa, women and girls are the household members most often expected to perform chores such as fetching water and firewood. As climate impacts steadily increase so too do the distances that girls need to travel to find these resources. This also increases their vulnerability to experiencing GBV.
 11. Women in rural parts of South Africa are also most likely to be responsible for maintaining food gardens as a means to provide food for their families. Climate change impacts such as floods and droughts also negatively affect this essential form of subsistence farming.
 12. Climate impacts also increase forced migration, with men travelling to urban centres to look for work, leaving women behind to defend their rights and property, often without the education to do so effectively. Women also have fewer land rights, with women accounting for less than 20 per cent of landowners worldwide but for more than 40 per cent of the individuals working the land.
 13. We highlight these issues, honourable members, to show that, when you balance the comments from the various sectors, including high emissions sectors who may resist strong climate action, that we are not balancing against some nebulous and far-off seeming environmental needs. We are talking about the survival needs of people.

Public Participation

14. Given the extent and nature of the climate crisis, and the far-reaching impact on all levels of society and regions in South Africa, we strongly encourage a highly comprehensive programme of meaningful public participation.
15. Our experience has shown that geographically remote and economically challenged communities and individuals are often effectively excluded from meaningful public participation, both online and in person, in processes of this nature. This is often due to prohibitive data and transport costs.

¹ <https://legal.earthrefuge.org/psb-et-al-v-brazil-on-climate-fund/>

² <https://chr.gov.ph/nicc-2/>



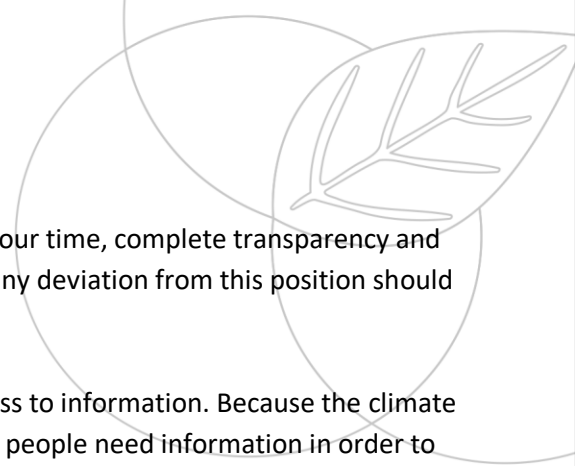
16. Additionally, much of the information presented and issues to be considered are couched in technical language which effectively excludes full and meaningful participation. To circumvent this challenge, we recommend that the following be considered:

- a. In-person hearings in all regions and large metros. Particular focus should be given to key areas strongly affected by climate change response and just transition considerations - for example Emalahleni, Lephalale, Newcastle – areas where a majority of SA’s coal power and mines are based, and (in Lephalale’s case) are also water scarce and highly vulnerable to climate impacts.
- b. Knowledgeable translation / interpreting services should be provided.
- c. Adequate and effective notice of hearings, information relevant for meaningful participation in hearings, invitations to comment and other participation processes should be provided.
- d. Given that certain sectors of society – particularly women and youth – are shown to have to carry a disproportionate burden of the climate crisis impacts, we recommend that additional measures be taken to ensure adequate consultation with, and adequate proportionate representation of youth and women throughout this process.

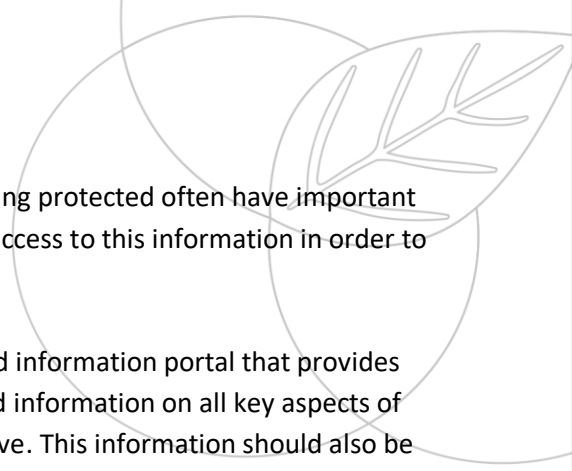
Urgency and timeframes

17. Honourable members – the KZN floods in April this year, the Day Zero drought in Cape Town have been scientifically linked to climate change. It is here now. And the urgency to respond is high. As are the costs.
18. We are advised that the Ministry and Department of Forestry, Fisheries and the Environment are undertaking many of the activities envisaged by the Bill, but this is being done on a voluntary basis and dependent on the voluntary good faith of other ministries and private sector roleplayers. We cannot rely on this goodwill, and need long-term legal certainty and clear statutory backing for a number of key mechanisms that currently have no deadlines or timeframes in the Bill.
19. In terms of mitigation - The Bill necessarily relies heavily on certain mechanisms to provide certainty and enforceability for key mitigation action, most notably the allocation of carbon budgets - these are an assigned amount of greenhouse gas emissions allocated to a person - by the Minister, as well as the determination of sectoral emissions targets – greenhouse gas emission limits to be allocated per sector. Neither of these key mechanisms have any timeframes or deadlines attached to them, creating the real and perceived risk that the Climate Change Act may be toothless and ineffective.
20. In terms of adaptation - the Bill prescribes various steps to be taken by national, provincial and local government to assess climate change needs and then produce response plans. In the case of provincial and local government, the obligation to produce a climate change response implementation plan only becomes mandatory a full five years after the Climate Change Act comes into operation. When we consider the nature of potential near-term climate impacts for South Africa, we can see that the need to mainstream climate change adaptation in the relevant organs of state is critically urgent.

Transparency, access to information and proactive disclosure



21. When it comes to climate change, the most serious global challenge of our time, complete transparency and automatic disclosure of information must be the default position, and any deviation from this position should be justified publicly by those wishing to do so.
22. In its current iteration, the Bill provides for inappropriately limited access to information. Because the climate crisis impacts on every person, community, business and social activity, people need information in order to understand how the country's climate response is progressing, what their risks of exposure might be, and how the different role-players are responding in terms of exercising their mandates and responsibilities.
23. Transparency is also a critical measure for holding GHG emitters accountable, particularly given our limited compliance monitoring capabilities, and enables action by civil society to call for the enforcement of environmental laws, as envisaged by the preamble to NEMA.
24. The Bill provides that any information that is provided to the Minister or the Department must be made available to the public subject to the Promotion of Access to Information Act (PAIA) and the Protection of Personal Information Act (POPIA).
25. This provision in the Bill is weak and unacceptable, in that both PAIA and POPIA provide grounds on which the providing of information can be refused, for example on commercial grounds. We don't mind personal details like names, phone numbers and addresses being withheld, but POPIA can't be used as an excuse to withhold GHG emission data for instance. It is imperative that the Bill provide for automatic disclosure of information that is critical to climate mitigation, and to enable people to prepare for, and adapt to, climate impacts.
26. The wording of the applicable clause in the Bill, also suggests that information generated by the Minister or Department, which could include important information relating to response plans and activities, including monitoring and evaluation, does not need to be made publicly available. The Bill should make express provision for data and reports generated under provisions of the Bill to be gazetted, and also made available online and automatically on request. The Minister herself has acknowledged, in a PAIA appeal decision on the disclosure of GHG emission data that *"the overall purpose of the administration of justice, requires the disclosure of the anticipated projected emissions and the data relating to anticipated and actual emission reduction."* There is therefore no reason why data on GHG emissions, anticipated emissions and emission reports by emitting facilities should not be made automatically available as a default position.
27. Our experience has shown that, given limited compliance monitoring capacity within government, civil society and non-governmental stakeholders are often compelled to monitor, and raise awareness of social and environmental harms such as pollution.
28. Climate risk assessments and adaptation plans and strategies can profoundly affect the people, communities and businesses that they are intended to protect. Sound adaptation will in cases mean changes to infrastructure, human settlements, provision of essential services, spatial development, transport and the commercial and social landscape. It is therefore essential that the latest and evolving assessments and plans are easily publicly available so that people, communities and businesses can make appropriate choices and plans in response to intended and actual adaptation actions taken by state actors.

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29. Additionally, the very individuals and groupings who are supposedly being protected often have important experience and knowledge about adaptation needs, and need to have access to this information in order to meaningfully contribute to assessment and risk management activities.
30. We recommend that the Bill provide for a publicly accessible web-based information portal that provides regularly updated and well-structured, and easy to understand data and information on all key aspects of climate response, including but not limited to the items referred to above. This information should also be translated into relevant official languages.

Ambitious, clear and effective emissions reduction targets

31. The urgent need to curb emissions, along with a clear target and strict emissions trajectory, are not adequately set out in the Bill. The new legislation cannot be effective unless there is absolute certainty on what the goal is. The Bill **must make explicit reference to the Paris Agreement goal of holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels.**³
32. The Bill should explicitly and immediately set out a strict trajectory that reflects, **at minimum** (meaning in the worst case), the lowest range of the 2021 NDC update (although we dispute that even the low end of the range is consistent with the 1.5°C Paris Agreement target), with an **express and urgent requirement for further downward ratcheting of the trajectory** ambition.⁴
33. The Bill must stipulate long term, and interim, targets for emissions reduction. Based on the IPCC SR1.5 report referenced in paragraph 19 above, we know that we, along with most other nations, need to reduce GHG emissions to “net zero by 2050”, and by 45% (over 1990 levels) by 2030 to avoid runaway global warming.
34. The concern that we have with using net zero as a target is that it relies on future uncertain technology⁵ or inappropriate or inadequate nature-based solutions⁶ to remove as much CO₂ as is being emitted, and thereby granting emitters and regulators a false licence to delay real and meaningful emissions. This is particularly concerning for sectors (such as the electricity sector) where low-emission alternatives, which are cleaner and cheaper are readily available. Neither technology nor nature-based solutions are even remotely likely to come anywhere near being able to counter GHG emissions if left unabated, or at least not substantially reduced. On this basis we contend that the Bill must contain a long-term target of “actual zero,” or at a minimum “near zero” (allowing for a small amount of hard-to-abate emissions that may be able to be removed by technology in future) in terms of total emissions, and zero emissions from fossil fuel combustion by 2040.
35. Given that we need to see urgent emission reduction in the near-to mid-term (45% reduction by 2030 – according to the IPCC), it is submitted that the Bill should contain, or at least cater for, interim emissions reduction targets. This will assist in ensuring immediate action and not dangerously deferring mitigation action

³ Article 2(1)(a), Paris Agreement.

⁴ Ratcheting is a mechanism that ensures that successive targets are stricter (lower) than the targets currently in force, reflecting the principle in the Paris Agreement (Art 4(3)) that “*each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition...*”

⁵ <https://mahb.stanford.edu/blog/climate-scientists-concept-of-net-zero-is-a-dangerous-trap/>

⁶ The carbon cycle has two parts: one fast cycle whereby carbon circulates between the atmosphere, land and seas, and one slow cycle whereby carbon circulates between the atmosphere and the rocks which make up Earth's interior. Fossil fuels (coal, oil and gas) come from rocks (part of the slow cycle). Carbon emissions from fossil fuel burning are today 80 times larger than the natural flow of carbon from Earth's interior (via volcanoes). Since the return of carbon to Earth's interior takes millions of years, about half of the emitted carbon remains in the atmosphere for a long time and contributes to global warming. Using the fast carbon cycle to remove slow carbon cycle emissions is misleading and not practicable.

to some distant point in the future. It is acknowledged that this is a complex task and relates to issues like integrated energy planning and more.

36. At the very least, we submit that the Bill should prescribe that the Minister establishes, within six months, or at most a year, adequate interim targets – at the least for 2030 and 2035 - towards the goal of near zero by 2050 for all emissions, and a zero emissions target for emissions from fossil fuel combustion by 2040. These targets would need revising with every revision of the NDC.

Penalties for non-compliance

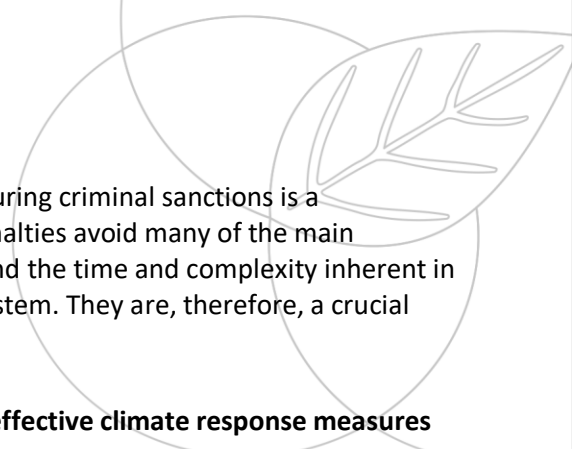
37. One of the most urgent and fundamental imperatives of the Bill is to ensure adequate GHG emission reductions. If there are inadequate consequences for failing to do so, in other words, if the Bill does not provide for the withdrawal of license to operate,⁷ or the making of criminal offences and levying of administrative penalties, we are not going to see the necessary change happening quickly enough.
38. The only criminal offence in the current Bill is the failure to prepare and submit a GHG mitigation plan to the Minister⁸ subject to penalties imposed in terms of s49B(2) of the National Environmental Management Act, 1998 (NEMA). The Bill does not contain any penalties for failing to implement such plan, nor for failing to report, monitor or effect remedial action if the plan is not being adhered to, or for exceeding a carbon budget. The lack of consequence for these failures effectively renders the Bill toothless to ensure compliance with mitigation plans and carbon budgets. These failures need to, at least, be criminal offences and must be made subject to administrative penalties.
39. Of utmost concern to us is that there is no penalty (criminal or administrative) for exceeding a carbon budget.⁹ The carbon budget is possibly the clearest and strongest mechanism in the Bill for ensuring emission reductions by individual emitters.
40. We know from statements made by the Ministers of Finance and Forestry, Fisheries and the Environment, that a higher carbon tax rate is intended to be levied on emissions exceeding the carbon budget, but this measure is highly inadequate as the sole compliance mechanism, particularly where the carbon tax is not high enough to disincentivise violations and/or compensate for the harm caused (in other words, where it is cheaper for companies to pay the higher tax than it is to reduce its GHG emissions
41. Provision also needs to be made for a broader range of penalties including revoking of the licence to operate – where emitters exceed carbon budgets and or fail to adhere to mitigation plans – and personal liability for directors of emitting companies.¹⁰
42. Given the serious and fundamentally harmful nature of exceeding an allocated carbon budget, such exceedance must be made an offence and/or subject to administrative penalties. A meaningful carbon tax (and, it seems, mandatory carbon budgets) have been deferred until 2026, making it even more important that such violations be severely penalised to ensure prompt emissions reduction action. Without these offences and penalties, the Bill will enable a situation where emitters may choose to exceed their carbon budget, accept the higher carbon tax rate, and be subject to no further action which prohibits the harmful activity.

⁷ S24(7) of the Bill.

⁸ S32 of the Bill.

⁹ S24 of the Bill.

¹⁰ Note that personal liability for directors under NEMA's section 34(7) is only triggered by criminal offences under this act – without a criminal offence, the provisions under this section – are not applicable.)

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43. The need for administrative penalties is predicated on the fact that securing criminal sanctions is a complicated, time and resource-consuming process. Administrative penalties avoid many of the main constraints of criminal enforcement – including: the burden of proof, and the time and complexity inherent in securing a criminal conviction and an over-burdened criminal justice system. They are, therefore, a crucial deterrent mechanism.

Capacitating and empowering organs of state to implement adequate and effective climate response measures

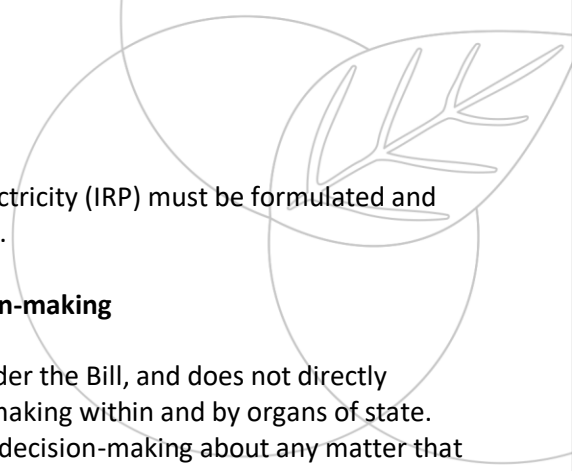
44. The Bill places a large burden on municipalities, provinces, sector departments, and the Minister, without making adequate provision for capacity-building and funding. Financial support, technology development, skills transfer, and capacity-building are key aspects of the Paris Agreement, yet these issues – which are crucial for the effective functioning of climate change mitigation and adaptation measures - are entirely absent from the Bill.
45. It is unclear how many municipalities, provinces, and sector departments, which are already struggling to fulfil obligations in relation to air quality, water, and waste management - for example - will have the necessary capacity and resources to carry out the obligations that will be imposed by the Act.

Mainstreaming and prioritising climate response and sound climate governance across government

46. The Bill does not adequately provide for a strong, suitably prioritised and well-coordinated climate response across government as a whole. Climate change response cannot be relegated to being an issue that needs to compete with all others, leaving the Minister and the Department to struggle for co-operation and compliance with the provisions of the Bill.
47. We recommend that the Bill include the following prescriptions in order to facilitate the necessary mainstreaming and prioritisation of climate response across government:
- a. Establishing an executive, non-political, inter-departmental body to oversee cross-sectoral implementation;
 - b. Compelling the Minister to report to parliament bi-annually on progress made with implementing all key provisions in the Bill;
 - c. Directing the Finance Minister and National Treasury to create a dedicated climate change component in, or supplement to, the national budget for climate change response;
 - d. Stipulating and strengthening the powers of the Minister to issue guidelines, receive reports and review and evaluate measures established in terms of the Bill;
 - e. Creating focal points within the Schedule 1¹¹ and Schedule 2¹² ministries, departments and state owned entities, for example the appointment of a person within such entities responsible for implementing, reporting on and liaising about responsibilities created by the Bill;
 - f. Mainstreaming climate change considerations in state procurement policies; and

¹¹ Ministries who have functions relevant to Sectoral emissions Targets in the Bill.

¹² National Departments and SOEs with sector adaptation responsibilities.

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- g. Key instruments such as the Integrated Resource Plan for electricity (IRP) must be formulated and used to support the necessary emissions reduction pathways.

Responsibility of organs of state to consider climate response in decision-making

- 48. The Bill fails to stipulate clear guiding principles for decision-making under the Bill, and does not directly provide for assessments of climate change impacts across **all** decision-making within and by organs of state. The consideration of climate impacts needs to be applicable in all state decision-making about any matter that is impacted by climate change or potentially contributes to climate change.

Empowering communities and individuals to respond to the impacts of climate change and to hold those responsible (government and emission-intensive industry) accountable.

- 49. The public participation process in the Bill only applies in a range of instances, but not in certain key instances such as the making of peremptory regulations¹³ or any of the provisions relating to carbon budgets.¹⁴ The public participation process also needs to make more provision for education, awareness-raising, and empowerment of communities.
- 50. We recommend that, in addition to what is proposed by s29, the Bill also require consideration of gender and cultural diversity in its public participation processes, and that the Bill put in place mechanisms to create public awareness about climate change.

Conclusion

- 51. Honourable members, we urge that these considerations be taken into account. In our written submission, we have proposed wording changes to the Bill to assist in ensuring that the principles and concerns that we have tabled are effectively addressed.
- 52. We wish to direct you in particular to the wording that we have suggested adding in the principles section. These additions have been extensively researched to ensure that they meet the overarching objectives of the Bill, as well as those of NEMA and the Constitution.
- 53. We thank you, and extend an invitation to you to engage with us at any time regarding any of these matters. Additionally, we would be happy to put you in contact with any of a range of scientists, economists and other experts that can speak to these matters more deeply.

Presented by:

Wandisa Phama – Deputy Director, CER

Brandon Abdinor – Climate Advocacy Lawyer, CER

¹³ S27(2) of the Bill.

¹⁴ S24 of the Bill.