



**Western Cape
Government**

Environmental Affairs &
Development Planning

**STANDING COMMITTEE ON PREMIER AND CONSTITUTIONAL
MATTERS:**

**Constitution of the Western Cape First Amendment Bill:
Repeal the provisions regarding the Commissioner for the
Environment**

Public hearings in May 2021

Overview of the Presentation

1. Background & Status

- This section provides a summary of the status of the Commissioner for the Environment

3. Commissioner for Environment – Functions & Duties

- The section deals with establishment, functions and duties imposed by the Constitution of the Western Cape

5. Costing

- This section provides a projected costing for the establishment of the Commissioner for the Environment over the MTEF

2. History

- The section provides an overview of the history of the processes conducted to date:
 - Amendment proposals

4. Response to Functions & Duties

- This section provides a response to the duties and functions of the Commissioner for the Environment in relation to the prevailing legislative and policy regime

6. Conclusion

Overview of the Presentation

1. Background & Status

BACKGROUND

- **Section 71** of Chapter 9 of the Provincial Constitution establishes the **Commissioner for the Environment**
 - Chapter 9 “Other Constitutional entities”
Cultural Council and Commissioner for Children
- Sections 72 – 77 deals with the Powers and Functions; Obligations of provincial organs of state, Reports, Appointment, Tenure, Removal and suspension.
- It is **binding on the Provincial Legislature and Executive** in terms of sections 104(3), 125(6)(b) of the National Constitution and sections 9(2) and 35(3) of the Provincial Constitution...
...unless and until the relevant sections of Chapter 9 of the Provincial Constitution are repealed, or rendered inoperative or inconsistent by national legislation

BACKGROUND

- **The Provincial Parliament may amend** the Provincial Constitution, if the Provincial Parliament concludes, that:
 - Commissioner is **no longer desirable** – such decision is dependent on political and policy considerations.

- **DEA&DP position – undesirable for the following reasons:**
 - Duplication of roles and responsibilities;
 - Consume scarce state resources;
 - Will not address Governance gaps.

STATUS

- Constitution of the Western Cape assented to on 15 January 1998 by the Premier of the Western Cape
- The Commissioner for the Environment has **never been appointed** since then.
- The Commissioner **is listed** as a Schedule 3C Provincial Public Entity in terms of Section 47(1)(b1) of the PFMA -
 - Listed with the Department of Environmental Affairs and Development Planning.

Overview of the Presentation

2. History

HISTORY (1): 2001 – 2002

- Cabinet granted in-principle approval for the draft Bill on the Commissioner for the Environment –
 - A Commissioner for the Environment Bill was produced by Department of Environmental and Cultural Affairs and Sport;
 - Published for comment.
- An Organisational Design was developed comprising of:
 - 1 x Deputy Director-General; 2 x Assistant Director; 1 x Administration Clerk; 1 x Administration Clerk.

HISTORY (2): 2001 – 2002

Contents of the Bill:

- Definitions
- Establishment and appointment
- Powers, functions and duties
- Relations (with other organs of state)
- Delegations
- Financial Provisions (Provincial Parliament must appropriate funds/resources) & Remuneration
- Vacancies

HISTORY (3): 2001 – 2002

- Definitions –
 - **“environment”** means the surroundings in the Province within which humans exist and which are made up of –
 - (a) the land, water and atmosphere of the earth;
 - (b) the micro-organisms and plant and animal life;
 - (c) any part or combination of (a) and (b) and the interrelationship between them, and
 - (d) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing which influence human health and well-being;

Compare: National Environmental Management Act, 1998 (Act. No. 107 of 1998):

“environment” means the surroundings within which humans exist and that are made up of-

- (i) the land, water and atmosphere of the earth;
- (ii) micro-organisms, plant and animal life;
- (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and
- (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being

Exactly the same

HISTORY (3): 2001 – 2002

- Definitions –
 - “**environmental administration**” means any action, omission or decision by an organ of state which significantly affects the environment in an adverse manner

HISTORY (4): 2005 – 2007

- In 2005, the Standing Committee on Community Development was briefed on the status of the Commissioner
- In 2005, the then Minister of Environmental Affairs and Development Planning prepared a Cabinet Memorandum to request the suspension of the establishment of the Commissioner.
- In 2007, the DEA&DP requested the de-listing of the Commissioner for the Environment as a Schedule 3C Public Entity
 - Based on the promulgation of national legislation

HISTORY (5): 2009

- In 2009, against the legislative reforms that occurred, the DEA&DP requested a Legal Opinion on the desirability of appointing the Commissioner:
 - Legal Opinion was obtained from Adv Farlam in 2009 - Conducted analysis confirmed the legislative reforms that had occurred; Amendment to the Constitution should not be taken lightly
- Opinion indicated that it would be **preferable to amend** the Constitution to permit the appointment of the Commissioner **when it is appropriate or desirable to do so.**

On this basis, the Amendment of the Western Cape Constitution proceeded

HISTORY (6): 2010 – 2014

September 2010, the Constitution of the Western Cape Draft First Amendment Bill (2010) was published for comment:

- Bring about certain technical amendments (Part 1);
- Amend the provisions relating to -
 - the Commissioner of the Environment; (and
 - the Children's Commissioner)

making their appointment by the Premier **discretionary** (i.e. when it is desirable to do so).

- 2010-2013: Consideration of comments received;
- In this period, establishment of the Special Cabinet Constitutional Review Committee;
- October 2014: Bill was introduced to Provincial Parliament.

HISTORY (7): 2015

February 2015:

Provincial Parliament published the Bill and conducted public hearings

Legal opinion was provided by the **Parliamentary Legal Advisor**, who indicated that the discretionary approach should not be supported and the provisions dealing with the Commissioner **should rather be repealed**, if the Constitution was to be amended.

HISTORY (8): 2015

July 2015:

- The Bill was withdrawn into Rule 160
- Further analyses will be conducted to determine:
 - Tasks that the Commissioners will carry out;
 - Analysis of legislation and practice to identify gaps which a Commissioner can fill
 - Develop appropriate policy based on the above.

Department conducted further analysis to determine the status of legislation since the 2009 Farlam Opinion and, confirmed that duplication exists.

HISTORY (9): 2016 – 2018

2016:

Decision to rather separate the processes related to the Children's Commissioner and the Commissioner for the Environment.

2017:

- Cabinet **approved the drafting of a new Bill**, to:
 - Bring about certain technical amendments;
 - **Repeal the provisions relating to the Commissioner for the Environment.**

2018:

January - Draft Bill **published for public comment.**

September - Provincial Parliament published the Bill for public comment and referred the Bill to the Standing Committee on the Premier and Constitutional Matters in accordance with Standing Rule 171.

HISTORY (10): 2019

2019:

- The Standing Committee resolved to not proceed with the process (27/02/2019)
- WCPP dissolved on 04/05/2019 and thus the Bill lapsed.

HISTORY (11): 2018/2019 – WCHC Case no.: 4159/18

In the matter between:

WINSTON ERASMUS

Applicant

and

THE PREMIER, WESTERN CAPE PROVINCE

First Respondent

THE SPEAKER, WESTERN CAPE LEGISLATURE

Second Respondent

**MEMBER OF THE EXECUTIVE COUNCIL,
ENVIRONMENTAL AFFAIRS, WESTERN CAPE**

Third Respondent

HISTORY (12): 2018/2019 – WCHC Case no.: 4159/18

Applicant launched proceedings on 09 March 2018 **seeking declaratory orders** against the respondents as follows:

- Premier, Speaker & MEC/Provincial Minister (Respondents) failed to implement Provincial Legislation into s71 of the Constitution of the Western Cape (Provincial Constitution);
- Premier failed to prepare and initiate provincial legislation into s35(2)(f) of the Provincial Constitution to provide for matters incidental to the Office of the Commissioner for the Environment;
- Premier & MEC failed to act in accordance with the National Constitution and Provincial Constitution;
- Premier's conduct amounts to violation of the National Constitution and Provincial Constitution;
- Premier & Speaker have broken their oath of office/affirmations

Requested that the Premier/MEC:

- be directed to provide the establishment principles governing the Commissioner for the Environment;
- postpone the Vote 9 of WC Appropriation Bill, 2019 until the DEA&DP APP until such time that is in conformity with s71 of the Provincial Constitution (i.e. postpone adopting the APP)

HISTORY (13): 2018/2019 – WCHC Case no.: 4159/18

Applicants application to be heard on the urgent roll was dismissed – placed on semi-urgent roll and heard on 07 February 2019;

Judgement delivered on 14 March 2019, **dismissing the application**, that:

- Applicant had no *locus standi*;
- Noted the decision of the Western Government not to proceed with the appointment of the Commissioner for the Environment on the basis of duplication of functions due to promulgation of legislation at National & Provincial spheres and the constrained fiscal environment.

Applicant gave Notice of Application for Leave to Appeal – dismissed by Justice Boqwana on 30 April 2019

Still no approach to the SCA (yet)

Overview of the Presentation

3. Commissioner for the Environment – Functions & Duties

Commissioner for the Environment – Functions & Duties (1)

Sections 71 to 77 of the Constitution of the Western Cape

- **s 71(1)** There is a provincial Commissioner for the Environment.
The provincial Commissioner for the Environment is established.
- **s 71(2)** “In the exercise of his or her powers and functions the Commissioner must ensure the conservation of the environment in the Western Cape, and must give attention to the need to balance the goals of environmental conservation and sustainable development.”

Firstly, the reason for the establishment is explained, namely to ensure the conservation of the environment within the Western Cape specifically (geographical jurisdiction);

Secondly, to give attention to the balancing of environmental conservation versus sustainable development.

Commissioner for the Environment – Functions & Duties (2)

- **s 71(3)**

“The Commissioner is independent and subject only to the national Constitution, this Constitution and the law, and must be impartial and must exercise the powers and perform the functions of the office of Commissioner without fear, favour or prejudice.”

The independence and impartiality of the Commissioner is confirmed;

- **s 71(4)**

“Other provincial organs of state must assist and protect the Commissioner to ensure the independence, impartiality, dignity and effectiveness of the office of Commissioner”

The Commissioner must be assisted and protected by other provincial organs of state (all provincial departments and provincial public entities);

Commissioner for the Environment – Functions & Duties (3)

- **s 71(5)**

“No person or provincial organ of state may interfere with the functioning of the Commissioner.”

To prevent hindrance in performing its functions.

- **s 72(1)(a)**

“The Commissioner must —

(a) monitor urban and rural development which may impact on the environment;”

The first responsibility of the Commissioner -

Rural development is the process of improving the quality of life and economic well-being of people living in rural areas, often relatively isolated and sparsely populated areas.

Urban development is a system of residential expansion that creates cities. Residential areas are the primary focus of urban development.

Commissioner for the Environment – Functions & Duties (4)

- **s 72(1)(b)**

“(b) investigate complaints in respect of environmental administration;”

Simply put, **environmental administration** is helping to run an environmental organisation.

In the current NEMA context (One Environment) it refers to **Environmental Governance** that comprises the rules, practices, policies and institutions that shape how humans interact with the environment.

- **s 72(1)(c)**

“(c) recommend a course of conduct to any provincial organ of state or municipality whose activities have been investigated; and;”

Recommends to two spheres of government only and it follows that neither the activities of the national sphere of government within the Western Cape Province nor that of private national or juristic persons can be investigated.

Course of conduct, means a pattern of conduct composed of 2 or more acts, evidencing a continuity of purpose and process.

Commissioner for the Environment – Functions & Duties (5)

- **s 72(1)(d)**

“(d) act in accordance with the principles of co-operative government and intergovernmental relations referred to in Chapter 2.”

The Commissioner is bound to carry out its functions within the ambit of Chapter 2 of the Constitution, 1996, as given effect to in *the Intergovernmental Regulations Framework Act (No. 13 of 2005)*, and relevant published regulations.

- **s 72(2)**

“The Commissioner has the additional powers and functions as may be provided for in provincial legislation.”

Self explanatory – yet it cannot be in conflict with the constitutional foundation set in sections 71-77 of the CWC.

Commissioner for the Environment – Functions & Duties (6)

- **s 73(1)**

“(1) Where the Commissioner has made recommendations to a provincial organ of state, that organ must report to the Commissioner on its actions in response to those recommendations within a reasonable time.”

Such time period would be determined by the Commissioner in the recommendations (course of conduct) made to the provincial organ of state (which includes provincial public entities).

It means that the Commissioner is obligated to monitor adherence to its recommendations (Note: provincial organ of state)

- **s 73(2)**

“(2) Any provincial organ of state which refuses or fails to implement the Commissioner’s recommendations must upon request furnish the Commissioner with written reasons for that refusal or failure.”

It means that the Commissioner is obligated to monitor adherence to its recommendations.

Please note that there is no similar constitutional obligation placed on municipalities, even though it follows from s 72(1)(c) that the Commissioner can also investigate activities of a municipality within the Western Cape Province and recommend a course of conduct accordingly.

Commissioner for the Environment – Functions & Duties (7)

- **s 74**

“The Commissioner —

- (a) must report to the Provincial Parliament annually on his or her activities and on environmental matters in the Western Cape;
- (b) must submit any recommendations made by him or her to the Provincial Parliament; and
- (c) may report to the Provincial Parliament at any other time.”

This section deals with the reporting by the Commissioner to the Provincial Parliament -

- needs to submit an annual report to the Provincial Parliament, e.g. its activities, environmental matters within the Western Cape Province.
- needs to submit all recommendations made regarding activities of provincial and local sphere of government investigated.

Provincial Parliament may call upon the Commissioner to report at any other time as well, e.g. commenting on a draft Bill that might have implications for the environment of the Western Cape.



The Commissioner is accountable to the Provincial Parliament, who is therefore obligated to monitor (and evaluate) the performance of the Commissioner.

Commissioner for the Environment – Functions & Duties (8)

- **s 75(1)**

“(1) The Commissioner must be a South African citizen who —
(a) is ordinarily resident in the Western Cape;
(b) is a fit and proper person with specialised knowledge of, or experience in, environmental matters; and
(c) complies with the requirements imposed by provincial legislation”

This section deals with the minimum qualifications and requirements of the individual to hold office as the Commissioner for the Environment.

Note: Subsection (c), can only apply if the specific provincial legislation mentioned in s 72(2) is enacted.

Commissioner for the Environment – Functions & Duties (9)

- **s 75(2) and (3)**

“(2) The Premier must appoint as the Commissioner a person —

- (a) nominated by a committee composed of all parties represented in the Provincial Parliament and which decide to participate; and
- (b) approved by the Provincial Parliament by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Provincial Parliament.

(3) The rules and orders of the Provincial Parliament must provide for the involvement of civil society in the nomination process.”

- The Provincial Parliament will need to plan and implement a process by which to invite nominations for the Commissioner and conduct an interview process accordingly, before making a recommendation to the Premier.
- The Provincial Parliament recommendation to the Premier should be done in accordance with the formula set out in subsection (2)(b) and civil society must be involved in the nomination process.
- The Premier appoints the Commissioner.

Note: Section 80 of the CWC does not prescribe the same detailed process for the appointment of the Commissioner for Children.

Commissioner for the Environment – Functions & Duties (10)

- **s 76**

“The Commissioner is appointed for a term of three years, renewable once.”

This provision states that the tenure of the same incumbent in office is no less than three years and no longer than six (6) years.

- **s 77(1)**

“(1) The Commissioner may be removed from office only on —

- (a) the ground of misconduct, incapacity or incompetence;
- (b) a finding to that effect by a committee composed of all parties represented in the Provincial Parliament and which decide to participate; and
- (c) the adoption by the Provincial Parliament of a resolution calling for that person’s removal from office with a supporting vote of at least two thirds of the members of the Provincial Parliament.”

Although the Premier appoints the Commissioner, based on the recommendation of the Provincial Parliament, the latter has to determine whether the incumbent is fit to hold office and prescribes formula for such removal.

Commissioner for the Environment – Functions & Duties (11)

- **s 77(2)**

“The Premier —

- (a) may suspend the Commissioner from office at any time after the start of the proceedings of a committee of the Provincial Parliament for the removal of that person; and
- (b) must remove a person from office upon adoption by the Provincial Parliament of the resolution calling for that person’s removal.”

This section sets out the obligations of the Premier regarding the removal and suspension of the Commissioner.

4. Response to Functions & Duties

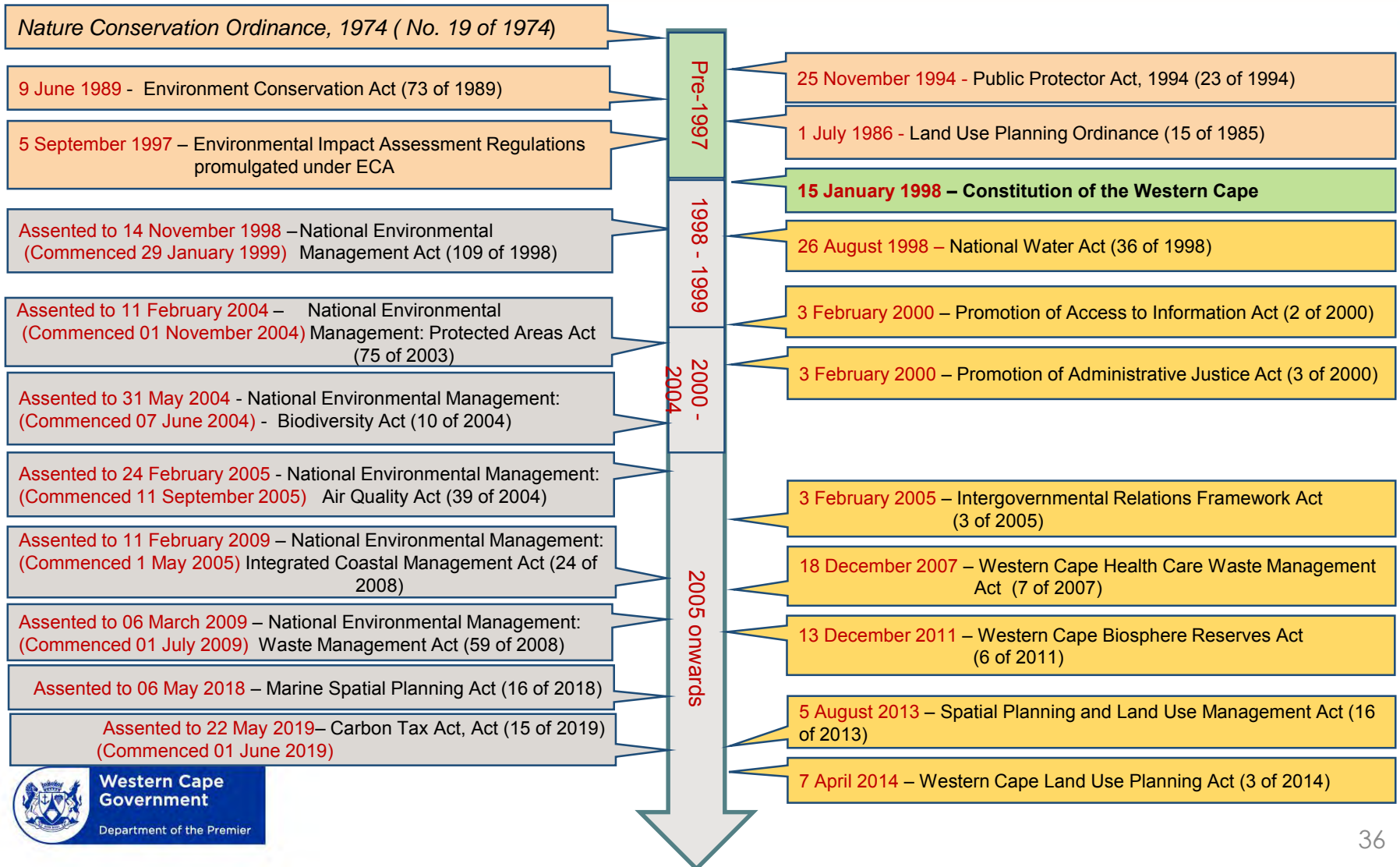
Response to Functions & Duties (1)

Policy and law reform since the Constitution of the Western Cape was enacted:

- Since the commencement of the Provincial Constitution, numerous laws (along with extensive subordinate legislation) aimed at integrated environmental management and governance, including coordination, administrative oversight, was enacted.
- **National and provincial legislation provide adequately for the protection of the environment -**
 - There is an overlap and duplication of roles and functions provided for in national and provincial legislation

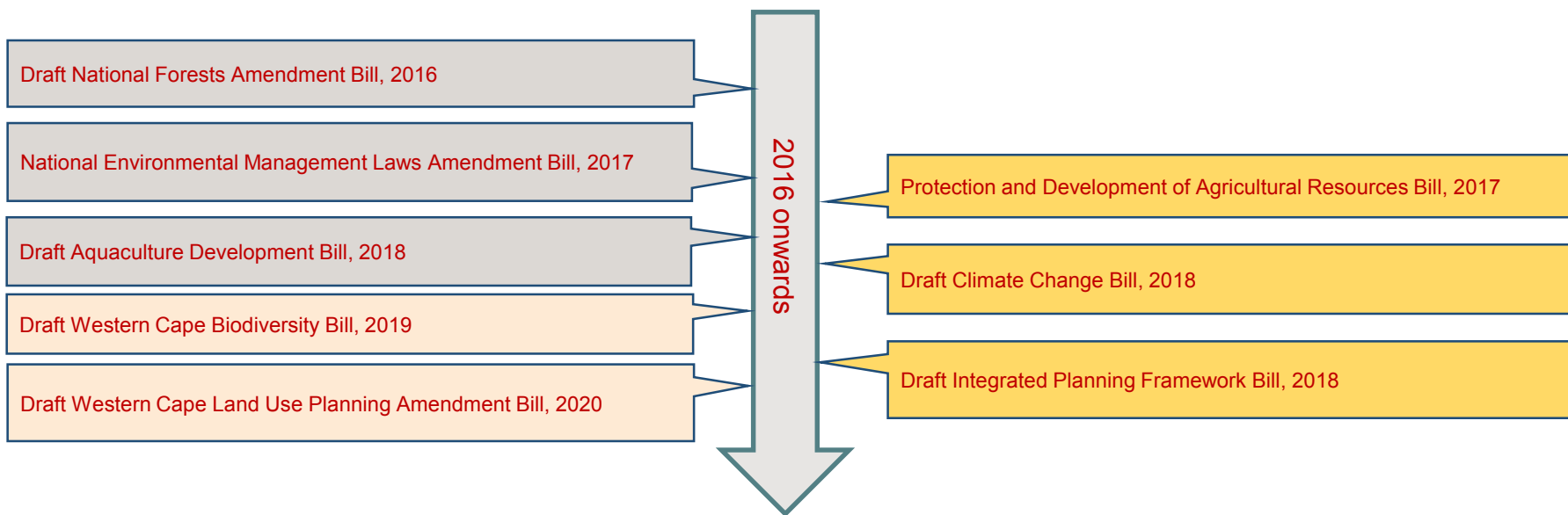
Response to Functions & Duties (2)

Legislative Enactments since 1989



Response to Functions & Duties (3)

Relevant draft legislation, including...



Response to Functions & Duties (4)

Strategic policies governing the environment management, including:

- White Paper on Environmental Management (1997)
 - White Paper on Conservation and Sustainable Use of Biodiversity (1997)
 - White Paper for Sustainable Coastal Development in South Africa (2000)
 - White Paper on Integrated Pollution and Waste Management (2000)
 - White Paper on Spatial Planning and Land Use Management (2001)
 - National Framework Strategy for Sustainable Development (2009)
 - National Strategy for Sustainable Development (2011)
 - National Waste Management Strategy (2011)
 - National Climate Change Response White Paper (2011)
 - National Development Plan 2030 (2012)
 - White Paper on the National Environmental Management of the Ocean Policy (2013)
 - Environmental Impact Assessment Management Strategy for South Africa (2014)
 - Provincial Spatial Development Framework (PSDF) (2014)
 - Integrated Urban Development Framework (2016)
 - National Biodiversity Strategy and Action Plan 2015 – 2025 (2016)
 - National Protected Area Expansion Strategy for South Africa (2016)
 - The 2017 National Framework for Air Quality Management in the Republic of South Africa (2017)
 - Strategy to Address Air Pollution in Dense Low- Income Settlements (2018)
 - South African Strategy for the Biosphere Reserve Programme (2016 – 2020)
-
- United Nations: Sustainable Development Goals 2015

Since 2000

Response to Functions & Duties (5)

There is a Provincial Commissioner for the Environment...This function is currently catered for in:

- **National Environmental Management Act, 1998 –**
 - Provides for the establishment of fora or advisory committees
- **National Environmental Management: Waste Act, 2008 –**
 - Provides for the appointment of a Provincial/National Waste Management Officer to coordinate waste management matters. The Act requires the development of Provincial Norms and Standards. The Act also provides for the establishment of a Waste Management Bureau.
- **National Environmental Management: Air Quality, 2004 –**
 - Provides for the appointment of Provincial/National Air Quality Officer to coordinate air quality management matters. The Act also makes provision for the establishment of a National Air Quality Advisory Committee to advise the Minister on any air quality related matters.
- **National Environmental Management: Integrated Coastal Management Act, 2008 –**
 - Provides for the appointment of national and provincial Coastal Management Committees to promote integrated coastal management and effective co-operative governance.

Response to Functions & Duties (6)

There is a Provincial Commissioner for the Environment...This function is currently catered for in:

- **National Environmental Management: Biodiversity Act, 2004 –**
 - Provides for the appointment of the South African Biodiversity Institute (SANBI) to
 - monitor and report on biodiversity matters, the conservation status of all listed threatened or protected species and listed ecosystems and the status of all listed invasive species, the impacts of all categories of genetically modified organisms;
 - act as an advisory and consultative body on matters relating to biodiversity and national botanical gardens
- **National Environmental Management: Protected Areas Act, 2003 –**
 - Provides for the assignment of the management of a national park/provincial nature reserves to management authorities (e.g. SANParks and CapeNature) and assigning the management of a marine protected area to a national organ of state.
- **National Water Act, 1998 –**
 - Provides for the establishment of Water Catchment Management Agencies, Water User Associations and a Water Tribunal
- **Spatial Planning and Land Use Management Act, 2013 –**
 - Provides for the establishment of Municipal Tribunals

Response to Functions & Duties (7)

There is a Provincial Commissioner for the Environment...This function is currently catered for in:

- **Western Cape Land Use Planning Act, 2014 –**

The Provincial Minister must monitor provincial land use planning and the impact of one or more of the following matters on provincial land use planning:

- (a) disaster management;
- (b) housing;
- (c) regional planning and development;
- (d) urban and rural development;
- (e) provincial tourism;
- (f) protection of biodiversity, heritage and agricultural resources;
- (g) main public infrastructure facilities and services;
- (h) water and energy resources;
- (i) adaptation to climate change and the mitigation of the impact of climate change;
- (j) renewable energy production and energy conservation; or
- (k) economic development.

Response to Functions & Duties (8)

The Commissioner ... **must ensure the conservation of the environment in the Western Cape, and give attention to the need to balance the goals of environmental conservation and sustainable development...**:

This function is currently catered for:

- National Environmental Management Act, 1998 provides **sustainable development principles** that apply throughout the Republic to the actions of all organs of state that may significantly affect the environment.
- Sustainable development is defined in the National Environmental Management Act, 1998 and is aligned to all statutes governing the environment and development.
- Spatial Planning and Land Use Management Act, 2013 provides **principles** which apply to spatial planning, land development and land use management,
- The National Environmental Management Act, 1998, the various Specific Environmental Management Acts, Spatial Planning and Land Use Management Act, 2013 provide for **regulatory application procedures for listed and specified activities which may impact negatively on the environment**
- The Spatial Planning and Land Use Management Act, 2013 and Western Cape Land Use Planning Act, 2014, provide for the compilation of **Spatial Development Frameworks** at various geographical scales/spheres of government

Response to Functions & Duties (9)

The Commissioner **is independent and impartial...**

This function is currently catered for in:

- The requirement of independence and impartiality of decision-makers is provided for in the **Promotion of Administrative Justice Act, 2000** – administrative actions are reviewable if it is taken *inter alia* because of the unauthorised or unwarranted dictates of another person or body, or if the administrator who took it was biased or reasonably suspected of bias.
- In terms of the **Public Protector Act, 1994**
- the office of the Public Protector must serve impartially and independently and perform his or her functions in good faith and without fear, favour, bias or prejudice.
- ...to investigate any conduct in state affairs, or in public administration in any sphere of government, that is alleged or suspected to be improper or to have resulted in any impropriety or prejudice, to report on that conduct and to take appropriate remedial action...

Response to Functions & Duties (10)

The Commissioner **must monitor urban and rural development which may impact on the environment...**

This function is currently catered for in:

- The **National Environmental Management Act, 1998** provides that:
 - Each provincial government must ensure that municipalities adhere to the relevant environmental implementation and management plans, and the principles contained in section 2 in the preparation of any policy, programme or plan, including the establishment of integrated development plans and land development objectives
 - State of Environment Reports must be compiled by national and provincial spheres of government
 - Environmental Implementation Plans are compiled and annually reported by national and provincial spheres of government
 - The Medium Term Strategic Framework for the environmental sector contains objectives and targets associated with urban and rural development
- In terms of the **Western Cape Biosphere Reserves Act**, all land uses and land use plans within a biosphere reserve must comply or be consistent with the framework plan concerned

LUPA - Provincial Minister must monitor:

Regional planning and development;
Urban and rural development.

Response to Functions & Duties (11)

The Commissioner **must investigate complaints in respect of environmental administration...**

This function is currently catered for in:

- The **National Environmental Management Act, 1998** provides for:
 - Any Minister, MEC or Municipal Council may refer for **conciliation** under NEMA a difference or disagreement concerning the exercise of any of its functions which may significantly affect the environment, or any appeal brought in relation to a difference or disagreement regarding the protection of the environment; and the (national) Director-General may appoint a conciliator if requested to do so
 - A difference or disagreement regarding the protection of the environment may be referred to **arbitration**
 - The Minister and certain other ministers and MECs may designate persons in organs of state as **environmental management inspectors** or environmental mineral resource inspectors. Such inspectors **must monitor and enforce** compliance with the laws for which they have been designated, and may investigate any act or omission which is reasonably suspected to constitute a breach of the law. They may also issue compliance notices, etc.

Response to Functions & Duties (12)

The Commissioner **must investigate complaints in respect of environmental administration...**

This function is currently catered for in:

- The **National Environmental Management Act, 1998** provides for:
 - A duty of care (s28)

The Director-General, the Director-General of the department responsible for mineral resources or a provincial head of department may direct any person who is causing, has caused or may cause significant pollution or degradation to the environment to –

- a) cease any activity, operation or undertaking;
 - b) investigate, evaluate and assess the impact of specific activities and report thereon;
 - c) commence taking specific measures before a given date;
 - d) diligently continue with those measures; and
 - e) complete those measures before a specified reasonable date
- Interested parties, or groups of persons, may apply to court in respect of an environmental breach, or institute private prosecutions etc.

Response to Functions & Duties (13)

The Commissioner must investigate complaints in respect of environmental administration...

This function is currently catered for in:

- In terms of the **Western Cape Monitoring and Support of Municipalities Act**:
 - If the Provincial Minister has reason to believe, based on an assessment, that a municipality cannot or does not fulfil a statutory obligation or that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in the municipality, the Provincial Minister must in writing inform the municipality of his or her view and the reasons for that view and –
 - (a) by written notice to the municipality, request the municipal council or municipal manager concerned to provide the Provincial Minister with the information required in the notice; or
 - (b) if the Provincial Minister considers it necessary, cause the matter to be investigated.

Response to Functions & Duties (14)

The Commissioner must investigate complaints in respect of environmental administration...

This function is currently catered for in:

- In terms of the **Public Protector Act, 1994**, the Public Protector may -
 - investigate, on his or her own initiative or on receipt of a complaint, any alleged-
 - maladministration in connection with the affairs of government at any level;
 - abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;
 - improper or dishonest act, or omission or offences referred to in certain sections of the Prevention and Combating of Corrupt Activities Act 12 of 2004, with respect to public money;
 - improper or unlawful enrichment, or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function; or
 - act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person;

Response to Functions & Duties (15)

The Commissioner **must investigate complaints in respect of environmental administration...**

This function is currently catered for in:

- In terms of the **Public Protector Act, 1994** the Public Protector may -
 - endeavour to resolve any dispute or rectify any act or omission by mediation, conciliation or negotiation; advising any complainant regarding appropriate remedies; or any other means that may be expedient in the circumstances;
 - at a time prior to, during or after an investigation:
 - if he or she is of the opinion that the facts disclose the commission of an offence by any person, to bring the matter to the notice of the relevant authority charged with prosecutions; or
 - if he or she deems it advisable, to refer any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting therefrom or make any other appropriate recommendation he or she deems expedient to the affected public body or authority; and
 - on his or her own initiative, on receipt of a complaint or on request relating to the operation or administration of the Promotion of Access to Information Act, 2000, endeavour, in his or her sole discretion, to resolve any dispute by mediation, conciliation or negotiation; advising, where necessary, any complainant regarding appropriate remedies; or any other means that may be expedient.

Response to Functions & Duties (17)

The Commissioner **must recommend a course of conduct to any provincial organ of state or municipality whose activities have been investigated...:**

This function is currently catered for in:

- In terms of the **National Environmental Management Act, 1998, which**, provides for:
 - The Director-General, the Director-General of the department responsible for mineral resources or a provincial head of department may direct any person who is causing, has caused or may cause significant pollution or degradation to the environment to –
 - a) cease any activity, operation or undertaking;
 - b) investigate, evaluate and assess the impact of specific activities and report thereon;
 - c) commence taking specific measures before a given date;
 - d) diligently continue with those measures; and
 - e) complete those measures before a specified reasonable date.
 - **The Environmental Management Inspectorate** are empowered to investigate contraventions of the NEMA and the SEMAs
 - NEMA provides for offences and penalties for non-compliance.

Response to Functions & Duties (18)

The Commissioner **must act in accordance with the principles of co-operative government and intergovernmental relations....:**

This function is currently catered for in:

- In terms of the **National Environmental Management Act, 1998, which**, provides for:
 - **Environmental Implementation Plans and Environmental Management Plans** to coordinate and harmonise the environmental policies, plans, programmes and decisions of the various national and provincial departments that exercise functions that may affect the environment or are entrusted with powers and duties aimed at the achievement, promotion, and protection of a sustainable environment, and of provincial and local spheres of government.
 - **Environmental management co-operation agreements**, where the Minister and every MEC and municipality, may enter into environmental management co-operation agreements with any person or community for the purpose of promoting compliance with the principles laid down in this Act, including -
 - standards for the protection of the environment;
 - set of measurable targets and
 - monitoring and reporting requirements

Response to Functions & Duties (19)

The Commissioner **must act in accordance with the principles of co-operative government and intergovernmental relations...**:

This function is currently catered for in:

- The **Intergovernmental Relations Framework Act, 2005** , provides for the establishment of intergovernmental coordination structures across all spheres of government. The environmental sector has established such coordination structures that meet quarterly:
 - MinMec – Minister, MECs and SOEs
 - MinTech – DG of Environmental Affairs and provincial HODs and SOEs
 - MinTech Working Groups – 11 Working groups consisting of technical experts across the various functional fields (e.g. climate change, air quality, waste management, biodiversity, coastal management, etc.)
- The various Specific Environmental Management Acts also make provision for various governance structures across all spheres of government and with non-governmental stakeholders.

Response to Functions & Duties (20)

The Commissioner **must report annually to the Provincial Parliament on his / her activities**

This function is currently catered for in:

- The **Public Finance Management Act, 1999** includes specific reporting requirements
- All organs of state report (quarterly) on their performance in terms of the objectives and targets set in their Medium Term Strategic Framework (5 year cycle).
- The **National Environmental Management Act, 1998** provides for annual reporting on the implementation of Environmental Implementation Plans
- National and Provincial Environmental Implementation Plans (3 year cycles), including annual performance reporting, and
- National and Provincial State of Environmental Reporting (5 year cycles)

Additional matters of concern: Erasmus Litigation (WCHC Case no.: 4159/18)

Recalling the Erasmus matter, three additional supplementary points were raised:

“19. ...the water crisis the public is experiencing due to the mismanagement of water resources... ;

20. At the time the application was launched Day Zero was predicted to occur [sic] 12 April 2018. **The Province water resources should have been and could have been better monitored and managed had an independent Ombudsman for the Environment been appointed.**

22. The first water desalination plants were a month away from becoming operational at the time of launching this application, **to date the water desalination plants do not test for pollutant** substances like E. coli and Staphylococcus aureus...

23. The Commissioner for the Environment **is urgently needed to regarding the disposal of the conduct a study and report to the Provincial Parliament** the effects of the major environmental challenge of desalination highly concentrated salt brine that contains other chemicals used throughout the process.”

Response (1)

In reply, on water governance:

- Matters of water are governed by National Legislation* *“which created national norms and standards and provided for their own investigation and enforcement mechanisms, not only would an Environmental Commissioner have no jurisdiction to investigate any matters which do not constitute a provincial competence but that he or she would in fact be duplicating the tasks being done by other government departments both nationally and provincially.”*

*the preamble to the National Water Act, 1998 (Act 36 of 1998) acknowledges that it is the National Government which has the *“overall responsibility for and authority over the nation’s water resources and their use, including the equitable allocation of water for beneficial use, the redistribution of water, and international water matters.”*

Chapter 14 of the National Water Act accordingly provides for a national enforcement and monitoring function pertaining to water. In this regard

the Environmental Commissioner would have very little impact on the crisis.

Response (2)

In reply, whether desalination plants pose a health or environmental risk:

- The national Department of Environmental Affairs (DEFF) issued the City of Cape Town with coastal water discharge permits (“CWDP”) for the Strandfontein, Monwabisi and V&A Waterfront desalination operations for the discharge of desalination.
- Given that this is a national function, the existence of an Environmental Commissioner in the provincial sphere would not have had an effect on the granting of the requisite permit.
- In terms of the National Environmental Management: Integrated Coastal Management Act, 2008 (Act 24 of 2008) (NEM:ICMA) marine sewage discharge is a regulated activity and the responsibility for regulating land-derived effluent discharges into coastal waters rests with the DEFF.
 - The EMI members have the power to investigate matters in respect thereof.

NEM:ICMA also establishes a national system of integrated coastal and estuarine management in the Republic, including norms, standards and policies, in order to promote the conservation of the coastal environment.

NEM:ICMA also defines the rights and duties in relation to coastal areas and determines the responsibilities of organs of state in relation to coastal areas.

Overview of the Presentation

5. Costing

COSTING (1)

- 2001: Organisational Design proposed:

1 x Deputy Director-General;

2 x Assistant Director;

1 x Administration Clerk.

DO NOT AGREE
THAT THIS IS
SUFFICIENT

-
- Comparison with other structures based on Constitution of the Western Cape:

- WC Police Ombudsman

- Children's Commissioner

- Both at DDG levels;

- Have a staff complement of ± 12

COSTING (2)

Children's Commissioner

(DDG x 1) @ SL15

+

Director	x 1	@ SL13
Deputy Director	x 2	@ SL11
Assistant Director	x 3	@ SL9
Children's Commissioner Officer	x 2	@ SL8
Administrative Officer	x 1	@ SL7
Administrative Clerk	x 1	@ SL5
Personal Assistant	<u>x 2</u>	@ SL7
Total (incl DDG)	13	

Only DDG & 1 other post filled

Police Ombudsman

(DDG x 1) @ SL15

+

Deputy Director	x 2	@ SL11
Assistant Director	x 2	@ SL9
Investigating Officer	x 4	@ SL8
Administrative Officer	x 1	@ SL7
Case Flow Officer	x 1	@ SL5
Personal Assistant	<u>x 1</u>	@ SL7
Total (incl DDG)	12	

All posts filled

COSTING (3): Proposal

Subject to an Organisational Design exercise and approval

Financial implications Based on 2020/21 COE estimates	YEAR 1	YEAR 2	YEAR 3
	R	R	R
DDG X 1 (SL15)	1 594 627	1 669 574	1 748 044
DIRECTOR X 1 (SL13)	1 108 077	1 160 157	1 214 684
DEPUTY DIRECTOR (INCLUDING COMMUNICATION MANAGER & OPERATIONS) X 2 (SL11)	1 536 906	1 609 141	1 684 770
ASSISTANT DIRECTOR – INVESTIGATIONS X 4 (SL9)	1 586 222	1 660 774	1 738 831
ADMINISTRATION OFFICER X 1 (SL8)	333 580	349 259	365 674
ADMINISTRATION CLERK X 1 (SL5)	183 777	192 415	201 458
PERSONAL ASSISTANT X 2 (SL7)	544 886	570 496	597 309
Other(in lieu of 37% benefits)	979 933	1 025 990	1 074 211
Total COE x 12 posts	7 868 008	8 237 806	8 624 981
Start up costs	3 000 000	-	-
Operational Cost 20%	1 573 602	1 647 561	1 724 996
Estimated Total Cost	12 441 610	9 885 367	10 349 977

COSTING (4)

- The financial funding required for the effective functioning of the office of the Commissioner for the Environment amounts to:
 - R12,44 mil for Year 1,
 - R9,88 mil for Year 2,
 - R10,35 mil for Year 3...
- Start up costs of R3 mil is included in first year of establishment.

Overview of the Presentation

6. Conclusion

Conclusion (1)

- National legislation and provincial legislation provide adequately for the protection of the environment (i.e. enabling provisions)
- The filling of the vacancy is not desirable, because it would:
 - involve an overlap and duplication of roles and functions provided for in national legislation;
 - not address governance gaps; and
 - consume scarce state resources.

Conclusion (2)

- Ombud-like functions:
 - Issues raised during consultations are not issues the Commissioner for the Environment would have the power to deal with.
 - Potential public recourse options for the Commissioner for the Environment would be limited as there is no remedial provision other than to investigate complaints in respect of environmental administration.
 - The Commissioner for the Environment would not have any power to investigate any complaints against national government and private entities.
 - The Commissioner for the Environment would not be a decision-making body regarding environmental authorisations, nor would it be an appeal body.



Thank you