



***Submission to the Environment Select Committee on the Climate Change Response
(Zero Carbon) Amendment Bill***

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Foreword

This legislation is a milestone moment for New Zealand. It is also an encouraging step forward for the many communities around the Pacific who for too long have been looking down the barrel of inaction on climate change. We know the hard work that has gone into drafting this Bill, with collaboration from across the political spectrum, and it is truly encouraging to see the general direction it is taking.

However, the Bill needs significant strengthening and improvements to enable New Zealand to move towards becoming a global leader in the fight against climate destruction. To do this we need to include strong targets for net zero greenhouse gases and a robust framework for decision-making in the Bill to ensure we get there.

The IPCC report published last year has shown us exactly the dystopic future that we face if the global community does not get to net zero emissions and limit warming to 1.5 degrees Celsius. Through our work in the Pacific, Oxfam has seen the consequences first-hand as people are already experiencing the impacts of climate change. Sea-level rise, ocean acidification, prolonged droughts and super-charged cyclones are all now affecting their ability to make a living and feed their families.

Tinaai Teaua, a member of Kiribati Climate Action Network, told Oxfam: *“Land is very important. We can’t leave. We don’t want to leave. This is our home and this is our land. We should stay here. But the problem is getting closer and closer. My message to the world [is] to look at us. What our culture is like. How we are so proud of being I-Kiribati. The main message is to limit warming to 1.5°C. That was already agreed, but **now they have to live up to their words.**”*

New Zealand has a powerful history of being the world’s first; we were the first country to give women the vote and become nuclear-free. Now it is time to do that once again. New Zealand can lead the world in playing our part in tackling climate destruction head-on. Oxfam’s values are to choose courage over comfort, recognise our connectedness across the world, and to seek justice. We ask that the Environment Select Committee take these values to heart when making amendments to this Bill.

Oxfam New Zealand and the Zero Carbon Act

This submission is made by Oxfam New Zealand (Oxfam). Oxfam welcomes the submission process, which provides New Zealanders the opportunity to have their say on how we make the shift to a zero-carbon future. Our submission outlines new and additional legislative components that must be added to the Zero Carbon Bill. These will ensure that there is a fair and just transition not just for people in New Zealand, but for our Pacific neighbours and globally.

Oxfam New Zealand is a registered Charitable Trust that is a legally autonomous member of the global Oxfam confederation of 19 affiliates in 86 countries. Oxfam New Zealand works in partnership with Oxfam in the Pacific (a registered Trust in Fiji), to deliver international development programmes in the Pacific region, conduct advocacy and campaigns that amplify the voices of marginalised people, and respond to humanitarian crises. Oxfam has a wealth of experience working with communities, and with women in particular, to adapt to and mitigate climate change based on a human-rights approach.

Executive Summary

Oxfam wants a Zero Carbon Act passed into law that:

- Enshrines in law the aim to keep global heating below 1.5 degrees Celsius.
- Has an overall 2040 target of net zero emissions, for all gases.
- Includes a legally binding mechanism to enforce targets.
- States that all government departments must take the Zero Carbon Act into account in their work.
- Restricts the extent to which forestry offsets and international carbon markets meet our emissions budgets, and where they are used, prioritises the role of indigenous flora and fauna.
- Ensures clear consideration, at all stages of the impacts of climate destruction and the government's responses to it, on people in New Zealand and overseas who experience poverty and inequality.
- Ensures Climate Change Commission members are knowledgeable about the global climate justice aspects of climate destruction.

Purpose of the Zero Carbon Act

Reference to the Paris Agreement

The amended purpose of the Climate Change Response Act, section 3(1)(aa), is admirable by seeking to provide a mechanism for the government to act consistently with the Paris Agreement temperature goal of 1.5 degrees. However, there is still ambiguity as to whether the Act's purpose is to enable the government to act consistently with the international law obligations under the Paris Agreement, in the same way that the current section 3(1)(a) refers to obligations under the Framework Convention on Climate Change and Kyoto Protocol.

Although this would be implicit, since the Paris Agreement is a related legal instrument made with the aim of “enhancing the implementation of the Convention including its objectives”¹, it is worth expressing this clearly, as well as attaching the Paris Agreement text as a Schedule to the Act for consistency of approach.

Recommendation

Oxfam therefore submits that the Paris Agreement text be added as a Schedule to the Climate Change Response Act and that section 3(1)(aa) be amended as follows:

(aa) provide a framework by which New Zealand can develop and implement clear and stable climate change policies that contribute to **New Zealand meeting its international commitments towards** the global effort under the Paris Agreement to limit the global average temperature increase to 1.5° Celsius above pre-industrial levels; and

Global justice

Any domestic climate change response should have at its core considerations of the global justice aspects of climate destruction and climate change policy-making. Less developed countries, and small-island developing states with which New Zealand has a strong connection in the Pacific have done the least to cause climate change, yet are suffering the worst effects. Those who have contributed least are typically the most vulnerable to its impacts and have the least resources to respond, with a particularly disproportionate impact on women. Oxfam therefore believes that climate action is a matter of global justice: any action that we take domestically must consider the global impacts of our response.

This can be included in the Zero Carbon Act by the matters the Minister must have regard to before recommending appointment of members of the Commission.

Recommendations

Oxfam requests that section 5H(1) be amended to read:

(d) technical and professional skills, experience, and expertise in, and an understanding of innovative approaches relevant to,—
(i) the environmental, ecological, social, economic, and distributional effects of climate change and climate change policy interventions **both domestically and globally**; and

¹ Adoption of the Paris Agreement under the United Nations Framework Convention on Climate Change (signed 22 April 2016, entered into force 4 November 2016) [Paris Agreement], art 2.

Equally, in the matters the Commission must consider when exercising its powers under the Act, bringing the global consideration of equity between countries should be at the forefront, and not just left to the arena of political negotiation at the global climate change talks.

Oxfam therefore requests that the following subsection be added to section 5L:

(e) the distribution of benefits, costs, and risks **associated with New Zealand's domestic response between countries and** between generations; and

Te Tiriti o Waitangi

The Act must honour Te Tiriti o Waitangi by giving effect to meaningful partnership between iwi and the Crown; actively recognising the tino rangatiratanga of iwi and hapū; and acknowledging the centrality of tikanga Māori, mātauranga Māori, and Māori worldviews to Aotearoa New Zealand's climate change response.

In order to uphold the Crown's obligations under Te Tiriti, the Act must ensure that the tino rangatiratanga of Māori is upheld when decisions are made under it. In order to do this, Oxfam believes that there needs to be greater decision-making autonomy afforded to iwi and hapū in the determination of climate policy that affects Māori and not just the requirement for the Crown to 'consult' them.

The Climate Change Commission will have significant impact on the shape and scale of action that affects all New Zealanders, but particularly Māori, and so the decisions for how members of the Commission are appointed, as well as the decisions that the Commission itself makes should be made in partnership with Māori.

Recommendations

Oxfam therefore submits that section 5F be amended to read as follows:

- (2) The nominating committee must comprise—
- (a) the Chairperson of the Commission; and
 - (b) 4 or more other people who, in the opinion of the Minister, have the relevant skills or experience to identify suitably qualified candidates.
 - (c) at least two of the above shall be suitably qualified representatives of iwi and Māori representative organisations**

We further submit that Te Tiriti o Waitangi and te ao Māori should be mandatory considerations when setting emission budgets (cl 5Z), mitigation policy plans (cl 5ZD), and national adaptation policy plans (cl 5ZQ).

Human Rights

According to the Report of the UN Special Rapporteur on extreme poverty and human rights, climate change “threatens the future of human rights and risks undoing the last fifty years of progress in development, global health, and poverty reduction.”² It is crucial that climate

² *Climate change and poverty: Report of the Special Rapporteur on extreme poverty and human rights* UN Doc A/HRC/41/39 (25 June 2019).

change decision-making takes human rights and gender implications into account, both in the global sense, with regards to the rights of communities disproportionately affected by climate destruction, and domestically in the way that decisions are made.

Because reaching net zero emissions will require a transformation of the economy not seen since the industrial revolution, rights will necessarily be affected. There is currently no reference to human rights in the Climate Change Response Act. Although there is a presumption by the courts that Parliament intends to legislate consistently with human rights obligations, it is important that the Act clearly references the Bill of Rights Act and Human Rights Act to put this at the front of decision-makers' minds.

Recommendation

Oxfam therefore requests that express reference to these pieces of legislation be included within the Act, and that the following subsection be added to **section 5L**:

- (i) **The likely human rights implications of its decisions**

Targets and accounting in the Act

New Zealand's 2050 target ambition and the importance of 1.5 degrees Celsius.

It is crucial that New Zealand does its fair share to keep warming under 1.5°C. As a highly developed country, and due to our relative wealth and historic emissions, we are in a position of responsibility to minimise our contribution to this issue that disproportionately impacts people living in poverty. This is recognised in the Paris Agreement's principle of differentiation, where countries are to take action based on their common but differentiated responsibilities and respective capabilities.³ Developed countries are to continue taking the lead by setting absolute, economy-wide emissions reduction targets.⁴

Pacific Island countries are on the frontline of the global climate crisis and experience more damage to their livelihoods, dignity, wellbeing, economic prosperity and security than other regions. In the low-lying atoll nations of Kiribati, Tuvalu, Tokelau and the Marshall Islands, communities already face severe challenges as rising seas contaminate fresh-water supplies, destroy food crops and erode land. Large numbers of people face displacement over the coming decades, and many Pacific Island countries, including the Solomon Islands, Vanuatu, Fiji, Tonga and the Federated States of Micronesia, lie in the path of climate breakdown enhanced tropical cyclones. Climate change and disasters also have a disproportionate impact on the poorest members of the community, and on women, children, and older persons.

The Climate Action Tracker currently rates New Zealand's climate change targets as 'insufficient' in representing a fair share of the global effort for keeping warming within 2 degrees let alone 1.5.⁵

The Intergovernmental Panel on Climate Change's 1.5 C report recommended that to have a good chance of keeping warming within 1.5 degrees, global net CO₂ emissions need to decline by about 45% from 2010 levels by 2030, reaching net zero around 2050.⁶ For highly developed countries, this therefore requires net CO₂ emissions to reach zero *earlier* than 2050, to allow more scope for developing countries to transition in an equitable way.

An all gases or 'two-basket' approach

The targets within the Act currently distinguish between methane and other greenhouse gases. Oxfam believes that an all gases target is the simplest way to enable an equitable share of the burden of reducing emissions across the economy, and to enable consistency with absolute economy wide targets set under the Paris Agreement.

Although methane is a short-lived gas, there are strong reasons for integrating it in a net zero target. Firstly, the IPCC has found it is 28-32 times more potent in its potential warming

³ Paris Agreement, s 4(3).

⁴ S 4(4).

⁵ Climate Action Tracker "New Zealand – fair share" <https://climateactiontracker.org/countries/new-zealand/fair-share/>

⁶ Intergovernmental Panel on Climate Change "Summary for Policy Makers" in V Masson-Delmotte and others (eds) *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (2018) at C.1.

effect.⁷ Second, methane emissions have been rising far faster than predicted, threatening to negate or reverse efforts to reduce carbon dioxide emissions.⁸ Thirdly, 91 percent of long public submissions on the proposed Zero Carbon Bill favoured getting all gases, including methane, to net zero.⁹

Recommendations

Oxfam therefore recommends a long term target under the Zero Carbon Act of net zero emissions by 2040 for all gases.

If the Committee resolves to move forward with a ‘two baskets’ approach, **Oxfam requests** that a higher methane target is set. A 10% reduction by 2030 is achievable with no new policies if farmers adopted current best practice, showing that a higher abatement is possible if there is coordinated effort from government and the appropriate support for farmers to transition.¹⁰

The IPCC deduced that methane reductions of at least 35% would be needed by 2050 to limit global warming to 1.5°C with no or limited overshoot.¹¹ An ambitious target of 47% reflects New Zealand’s ability and responsibility both as a rich developed nation, and with some of the highest per-capita methane emissions to do more than the bare minimum global average.

International aviation and shipping emissions

International aviation and shipping emissions remain the largest source of global emissions not currently regulated by governments. Emissions of carbon dioxide from shipping are projected to increase by 50 to 250 percent in the period to 2050.¹² In the absence of momentum towards including these emissions within the Paris Agreement and weak industry commitments under the IMO and ICAO, countries must start to regulate these emissions within their own emissions budgets.

The United Kingdom Climate Change Commission has been taking these emissions into account in its carbon budgets through an informal means, and has continued to recommend that the government include these in emissions budgets.¹³

The behavioural decisions of New Zealanders, and the policy decisions made by government have an impact in these areas, and we already see this in the way that import duties and immigration requirements regulate these spaces. Including New Zealand’s share of these emissions in how we transform the economy to a low-carbon future within the Zero Carbon Act makes sense.

⁷ Myhre, G., D. Shindell and others, “Anthropogenic and Natural Radiative Forcing” in *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2013) at 714.

⁸ E. Nisbet and others “Very Strong Atmospheric Methane Growth in the 4 Years 2014–2017: Implications for the Paris Agreement” (2019) 33(3) *Global Biogeochemical Cycles* 318 <https://doi.org/10.1029/2018GB006009>

⁹ Ministry for the Environment *Zero Carbon Bill Consultation – Summary of Submissions* (October 2018), p. 6.

¹⁰ Report of the Biological Emissions Reference Group (December 2018), p. 5.

¹¹ IPCC 1.5 Report as above no 6 at C.1.2.

¹² UNFCCC “Shipping aviation and Paris” <https://unfccc.int/news/shipping-aviation-and-paris>

¹³ UK Climate Change Committee *2018 Progress Report to Parliament*, p. 172.

Forestry offsets

Oxfam is worried that the Bill does not restrict forestry offsets. Overly relying on trees to offset our ongoing emissions is risky and inappropriate because trees are not permanent - they can be harvested, lost to fire, pests, and climate impacts. We support tree planting, especially native trees. But they are a poor substitute for actually stopping carbon emissions at their source.

Prohibiting international credits

Oxfam believes that section 5W(1) Bill saying emissions budgets must be met “as far as possible” by domestic reductions and removals is vague and unhelpful. It is crucial that the Act drives policies that reduce domestic emissions and does not simply export our responsibilities overseas. In the past, New Zealand companies were also party to the exploitative use of fraudulent Emissions Reduction Units under the Kyoto Protocol, amply portraying the risks inherent in trading away the responsibility for domestically produced carbon emissions.¹⁴ Domestic reductions are needed to drive action and innovation from local communities and businesses, rather than allowing us to pay other countries to do our work for us.

Recommendations

Oxfam therefore requests that section 5S be amended to read:

net budget emissions means gross emissions, including aviation and shipping emissions offset by removals ~~and offshore mitigation~~

Oxfam further requests that the Bill be revised to include a gross emissions target, or a forestry offset cap, to limit the risk of over-reliance on trees.

Further, section 5W(1) should be revised to include the prohibition of the use of international credits to promote long-term certainty and accountability.

¹⁴ Geoff Simons and Paul Young “Climate Cheats” *The Morgan Foundation* (April 2016).

Legal accountability and the framework for decision-making

New Zealand's current trajectory and the decision-making dilemma

According to the Ministry of the Environment, under current policies New Zealand is only projected to reduce its emissions by 6.4 percent from 2005 levels by 2030.¹⁵ The conclusion was that “projections show we need to do more to meet our targets.”¹⁶

The decisions that will need to be made if New Zealand is to play its part in tackling climate destruction will only get harder. It is therefore important the Zero Carbon Act sets clear terms for decision-making discretion to ensure that sufficient action is taken across government and that targets set do not become merely signals of political intent in the short term.

The Zero Carbon Bill in its current form seeks to provide a role for legal accountability for policy-making through the creation of a duty on the Minister to meet emissions budgets and the 2050 target. But on current drafting, this provides a weakened form of legal accountability, and is largely retrospective. Oxfam believes the Bill should have strong mechanisms to enforce targets, and so the courts should have the flexibility of tools available under the common law to provide legal accountability for decision-making, both retrospectively and prospectively.

Backward-looking accountability

Section 5ZJ appears to be included to limit the options for judicial review of a failure to achieve an emissions budget, and prevent the situation where a Minister is held to account for decisions of a previous administrations.

Limiting the legal enforceability for meeting an emissions budget waters down the plain meaning of section 5U from being a duty to “ensure” a certain outcome, to merely being an aspiration worked towards. This could “devalue the notion of a duty and permit Parliament to reassure the public with empty gestures and the executive to sit back and take no further notice.”¹⁷ The rationale for creating a legal duty without a legal remedy to enforce it is debatable law-making, by creating the “theoretically paradoxical position that the duty-bearer is allowed to decide what the duty requires it to do.”¹⁸

The United Kingdom's Climate Change Act has no corresponding section that limits legal remedies. While expressly including the option of a declaration of non-compliance is a positive inclusion, overly restricting remedies is unadvisable, and acts as an ouster clause disproportionate to the risk of frivolous litigation.¹⁹

Recommendation

Oxfam therefore submits that Section 5ZJ be removed entirely, or if not possible, that s 5ZJ(1) be deleted.

¹⁵ Ministry for the Environment “National Communication and Biennial Report 2017 Snapshot” (December 2017) at 3.

¹⁶ At 3.

¹⁷ Harry Woolf and others (eds) *de Smith's Judicial Review* (8th ed, Sweet & Maxwell, London, 2018) at p. 282.

¹⁸ Paul Craig *Administrative Law* (8th ed, Thomson Reuters, London, 2016) at p. 57.

¹⁹ Legislation design and Advisory Committee “Excluding or limiting the right to judicial review” <<http://ldac.org.nz/guidelines/supplementary-materials/excluding-or-limiting-the-right-to-judicial-review/>>.

Other government departments

In a similar way, limiting legal accountability for a failure to consider targets and emissions budgets in other areas of government decision-making is not an advisable approach. If the Zero Carbon Act is to have the function of providing a framework for climate change decision-making across government and society, then it is crucial that the targets and emissions budgets are taken into account in the exercise of public functions across the public sector. This would enable the Act to influence decision-making in a similar way to how the Bill of Rights Act, the principles of the Treaty of Waitangi, and international law norms do currently.

Recommendation

Oxfam therefore requests that section 5ZK(2) be deleted and that section 5ZK(1) read as follows

- (1) A person or body **must** ~~may, if they think fit,~~ take the 2050 target or an emissions budget into account in the exercise or performance of a **relevant** public function, power, or duty conferred on that person or body by or under law (subject to other requirements that apply by or under law).

Forward-looking accountability

Emissions budgets and accompanying plans are the key way that the legislation aims to create “clear and stable climate change policies that contribute to the global effort under the Paris Agreement”.²⁰ An inadequate mitigation strategy could frustrate the legislative purpose of enabling New Zealand to meet its international commitments, including the Paris Agreement.²¹ It is therefore imperative that the Bill clearly mandates the formulation of plans adequate for meeting emissions budgets.

While a level of political scrutiny of emissions reduction plans will always exist, there is an important role for the courts in making sure accountability does not “slip through the net”.²² A judgment as to adequacy and progress in implementation would not bind the government to a policy outcome, but would frame the decision-making within a margin of discretion consistent with the statutory intent.

Recommendation

Oxfam therefore requests section 5ZD be amended to read as follows:

5ZD Requirement for emissions reduction plan

- (1) The Minister must prepare and publish a plan setting out the policies and strategies ~~for~~ **capable of** meeting an emissions budget.

Making emissions budgets legislative instruments

Section 5ZA, which outlines the requirement for the publication of emissions budgets as it currently stands does not give emission budgets any legislative standing. This contrasts with

²⁰ Zero Carbon Bill, s 3(1)(aa).

²¹ CCRA, s 3(1).

²² Annabel Lee and Justin Leslie “Judicial Review of Target-Setting Legislation” (2010) 15 Jud. Rev. 236 at [31].

the UK Climate Change Act where budgets are statutory instruments made by the relevant minister.²³

One implication of 5ZA not taking this approach is that budgets cannot be disallowed by Parliament after being presented to it – as is the case with legislative or disallowable instruments (Legislation Act 2012 ss4, 41 and 42). Oxfam supports the UK approach as this provides an additional parliamentary oversight over the setting of emission budgets. At the moment the Minister/Government alone has the power to set budgets.

Another implication of not giving budgets the status of legislative instruments is that there will be less scope for the Courts to judicially review government bodies for failing to give sufficient regard to budgets. By contrast, if the budgets had the status of legislative instruments, the Courts would be required to take judicial notice of them.²⁴

Recommendation

Oxfam therefore requests that section 5ZA be amended to give budgets the status of legislative instruments in line with the submission of the Climate Change Litigation Network.

Climate Commission's functions

Oxfam requests that the Climate Commission's functions include the ability to assist local government in decision-making where appropriate.

Provisions along these lines were suggested by Taylor and Scanlan in their recent article to allow the commission to act in a role similar to Environment Commissioners.²⁵ This would allow local authorities where appropriate to appoint the commission members to make decisions on matters such as resource consents involving climate change issues.

Recommendation

The following subsection should therefore be added to section 5J:

(j) to act as a public authority appointed by a local authority under s 33 of the Resource Management Act 1993 to carry out functions utilising the commission's specialist expertise in matters relating to climate change.

²³ Climate Change Act 2008 (UK), ss 80 & 90.

²⁴ Legislation Act 2012, s 16.

²⁵ *The UK Climate Change Act – An Act to Follow?* (2017) Policy Quarterly, Vol 14, Issue 3 p 66 at 72.

Adaptation

National risk assessment, adaptation plan and regional climate-induced displacement

The national climate change risk assessment and national adaptation plan should also include the development of a long-term climate migration strategy that encompasses the many paths climate migrants will take in the Pacific – coast to highland; rural to urban; island to island; country to country – and the unique risks each path poses for human rights – loss of citizenship, trafficking, forced displacement, loss of culture, lands, livelihoods, and language.

Recommendation

Oxfam therefore requests the following change be made to section 5ZN(2)(b) and section 5ZQ(4)(b):

the distribution of the effects of climate change across society **and in the Pacific region**, taking particular account of vulnerable groups or sectors:

Oxfam supports the requirement for national adaptation planning, but suggests that central government and local government should take a partnership approach in terms of both funding and knowledge to best inform these plans.

/ENDS/