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Environmental Defence Society submission on the Climate Change Response (Zero Carbon) Bill

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1. Introduction

The Environmental Defence Society (EDS) thanks the Environment Select Committee for the opportunity to make a submission on the Climate Change Response (Zero Carbon) Amendment Bill (the Bill).

EDS is a not-for-profit organisation dedicated to achieving good environmental outcomes for all New Zealanders. It is active in capacities as a litigator, a policy think tank, and a conference organiser. EDS organises the annual Climate Change and Business Conference.

EDS is supportive of the Bill. In particular, the setting of a long-term 2050 target, structured stepping stones (budgets) for getting there, and the creation of mandatory plans for achieving them are crucial framework features for addressing New Zealand's greenhouse gas emissions and mitigating global climate change. EDS is also strongly supportive of creating an independent Climate Change Commission with a structured role in the decision-making process, including its role in providing robust advice and an accountability mechanism for government. Providing for a Commission alongside government decision-making strikes an appropriate balance between independence and accountability.

We support the inclusion of both mitigation and adaptation measures in the Bill, and roles for the Commission for both.

We encourage members of Parliament to adopt a cross-party consensus on the Bill. Climate change is an existential issue that transcends party politics and demands long-term policy stability.

The focus of this submission is the legal framework and institutional and process machinery of the Bill, rather than the science of climate change or the adequacy of specific targets. While it is extremely important to get the framework right first, we also note that the adequacy of measures and how we achieve a just transition to a climate neutral society will depend on the detail contained in subordinate instruments like emissions reduction plans and adaptation plans.

2. Targets: Approach to biogenic methane and carbon dioxide

The Bill provides legally binding targets for greenhouse gas emissions, and takes a "two baskets" approach (essentially, different targets for longer-lived carbon dioxide and shorter-lived biogenic methane). There is a net zero target (by 2050) provided for all greenhouse gases other than biogenic methane. For biogenic methane, the target is a gross one, and in two stages: 10 percent less by 2030 (than a 2017 benchmark) and a range of 24 to 47 percent less by 2050 (again, from a 2017 benchmark). The Bill does not single out particular sectors for special treatment in terms of targets – instead, it recognises the differences in scientific properties of different greenhouse gases. We are supportive of that distinction, for reasons outlined in the Parliamentary Commissioner for the Environment's report and the scientific work cited in it.[1]

EDS supports the "two baskets" distinction between methane and other, longer-lived, greenhouse gases.

In practice, the distinction means that particular sectors (particularly agriculture) are treated differently from other sectors, since the relative proportion of biogenic methane that makes up emissions from the agricultural sector is significant. But treating methane differently is not necessarily a "free pass" for the agricultural sector. It depends on how the difference is expressed, and value judgements about what is fair.

We will not dwell upon the adequacy of the specific targets in numerical terms, other than to note that we support the unequivocal need to achieve a climate neutral society and economy, that it makes sense to provide separate a separate target for methane and that embedding ultimate emissions reduction targets in primary legislation is a desirable thing. Legislative targets help to outline clear end points - to achieve a stable, predictable policy and therefore investment landscape for climate change, for business, government, and the public.

A net zero target

We support the inclusion of a net zero target for carbon dioxide emissions. A net target recognises the need for flexibility as to how carbon neutrality is achieved (for example, it may prove more efficient to plant trees or facilitate land use change than to require absolute reductions in emissions). We cannot change our carbon-intensive methods of production immediately, even though climate action is urgent. Offsets therefore play an important role in the short term. We also recognise that offsets will continue to play a role in the longer term, as some important human activities may struggle to transition to alternatives.

EDS supports the inclusion of a net-zero target for greenhouse gases other than biogenic methane.

A purpose/principle of climate neutrality

However, to accompany a specific net zero target for gases other than biogenic methane, the legislation still requires an overarching statement of its goal. While this could be expressed as an overall net zero target for all gases (ie including methane), it may make more sense to express it in a statutory purpose statement or set of decision-making

[1] See www.pce.parliament.nz/publications/farms-forests-and-fossil-fuels-the-next-great-landscape-transformation

principles as something like “climate neutrality”. That makes the goalpost very clear for what society is aiming for, while allowing flexibility as to exactly what it means in numerical terms as the science develops.

Among other things, this measure would make it clear that additional measures to address methane would need to be part of a climate neutral equation when we consider what 2050 should look like, even if this is not set in stone in terms of specific targets. Methane emissions within even the most ambitious gross 2050 target in the bill (47 percent less) could still cause climate damage, and it would be inconsistent with climate neutrality and the idea of zero carbon to allow that to happen. We understand that there are currently significant issues with offsetting for methane (removals of equivalent carbon dioxide through planting) as floated in the Parliamentary Commissioner for the Environment’s report. But the idea of climate neutrality should still be embedded within the Bill to drive this kind of measure as the science develops. Methane is shorter lived in the atmosphere, and its warming potential can therefore be offset by removals of carbon dioxide equivalent over roughly the same time period as the life of a tree. It also means that the risk of a forest sink disappearing once planted (eg burning down) would be less than where a sink is planted to offset longer-lived carbon dioxide emissions.

A carbon neutral future is also not just about reducing gross methane emissions and achieving net zero carbon dioxide emissions. For example, a general purpose of climate neutrality may also be vital in supporting decisions to invest in negative emissions technology.

A broad purpose of climate neutrality may also highlight the need to consider not just net zero targets, but also the value of reducing *gross* carbon dioxide emissions. Carbon sinks are not a permanent solution, especially given other pressures on land use that may be required (such as for food production, landscape protection, urban development). Even if we become a nation full of pine trees (a highly questionable proposition), what then? Even “permanent” forest sinks can disappear – they can burn down, or (especially if they are monoculture) may be susceptible to disease. The Bill requires some mechanism to drive society to low or zero-carbon alternatives, not just a net zero carbon economy. It requires not just accounting, but wisdom.

Including a general purpose statement or decision-making principles around climate neutrality would then allow the Climate Change Commission to report on the government’s broader progress towards achieving a truly low-carbon (or even regenerative) society, not just one that relies on achieving numerical targets and (potentially) increasing amounts of offsetting.

EDS recommends including an overriding target/purpose/principle based on climate neutrality, alongside a specific net zero target for gases other than biogenic methane. This would encourage, as the science evolved, measures to address methane beyond just gross reductions. It could also recognise the value of negative emissions technology, and the importance of reducing gross carbon dioxide emissions (not just using offsets). The Climate Change Commission would be required to report not just on government progress in relation to targets and budgets, but also provide a scorecard on how the Act’s purpose and principles are being met.

Legislative targets for methane

Aside from an overall goal of climate neutrality, the key question in our view is whether we embed methane targets in primary legislation, or instead provide a process for interim methane targets to be determined over time as the science develops. We recognise that there are risks and opportunities with both. The different properties of methane and features of the agricultural sector means it is not just the science of climate change that is important when thinking about this question – it is the question of what is fair and ethical between sectors and people.[2]

The attraction of putting specific targets for methane in the legislation itself is that it makes it certain for everyone what "fair" means from the point of royal assent, and that it is most appropriate for Parliament to determine that question. It allows us to get on with achieving a target with a degree of policy certainty (for sectoral interests as well as the public and government), rather than allowing value-based debate to continue as the process for setting targets rolls out over time. A carefully legislated gross target could drive greater efficiency and innovation in the sector (although we do not comment on the adequacy of a 10 percent interim target or the range of longer term targets specifically). There are genuine arguments on both sides, and neither should be dismissed. We do, however, support the need for a degree of flexibility in longer-term targets to allow the law to respond to the evolving science, as long as a clear climate neutral goal is embedded in decisions.

Furthermore, allowing the independent Climate Change Commission to make decisions about targets as the science evolves, rather than setting targets in legislation, would arguably be inappropriate, given that targets are a statement about fairness between methane and carbon dioxide emitters as much as they are a statement about the science of keeping warming to within 1.5C. And yet it would not be ideal for successive governments to have sole responsibility for setting interim targets either, as this is a continued recipe for policy uncertainty across parliamentary terms (even if advised by an independent Commission).

On the other hand, it is hard (although by no means impossible) to change a legislative target once legislated for. This allows less room for interim targets to be revisited as the science develops (which it undoubtedly will), and as the Commission's advice evolves. There are valid arguments that specific methane targets be referred to the Commission for further consideration, based on an overall goal of climate neutrality.

The current drafting in the Bill reflects something of a compromise, in that there is a firm short term gross reduction target for methane, coupled with a range of longer-term gross targets within which a specific target can be established later. We generally support this approach, as it provides a reasonably clear policy signal while allowing a degree of flexibility as the science evolves and as debates about fairness continue. However, again, we do not comment specifically on the adequacy of the numbers themselves.

EDS supports the general approach of the Bill to gross targets for methane (including a range within which a longer-term target can be established), but does not comment on the adequacy of the specific numbers.

[2] See www.newsroom.co.nz/2019/07/05/667804/lighter-methane-target-for-farmers-a-question-of-equity-not-science-report

We also note that comparable (although potentially less controversial) issues over sectoral fairness may eventuate when sector-specific emissions reduction plans are created. This could equally arise as between different emitters of carbon dioxide, not just between methane emitters and carbon dioxide emitters; just because carbon dioxide is treated the same across all sectors, does not mean that emissions reduction plans will necessarily treat all sectors the same. Again, including decision-making principles in the Bill could assist when it comes time to make later choices about fairness.

EDS recommends that decision-making principles be included in the Bill, to provide guidance to decision-makers when considering the policy implications (including fairness) of emissions reduction plans.

3. Climate Change Commission

We strongly support the creation of a Climate Change Commission and, generally speaking, its roles proposed in the Bill. A similar model has had positive results in the United Kingdom. There are significant benefits in having a robustly independent, science-focused institution to provide advice to and act as a watchdog and accountability mechanism alongside an elected government making policy decisions. The model encourages transparency, is likely to provide greater stability in climate policy across governments, and helps to depoliticise the climate change issue.

EDS supports the creation of an independent Climate Change Commission.

Mitigation and the Commission

EDS supports the idea that the Commission itself does not make substantive decisions about budgets and emissions reduction plans. If we have targets embedded in legislation, then the mix of responses to meet that target is the proper role of an elected government, given the implications of the mix of policies for many other interrelated things (for example, the consequences of the billion trees programme for rural communities). In other words, even with a legislative target, there are many value-based judgments to be made about how we reach that target. That is what an elected government (and responsible Minister) is for.

A robust advisory role and a watchdog role is appropriate for the Commission. To perform that role, it needs to be firmly independent of government. That independence is of constitutional significance given the importance of climate change to every aspect of our society. We understand that there are advantages and disadvantages of maximising independence (eg the Commission as a parliamentary office) and keeping reasonably close connections with government (eg the Commission as a Crown entity).

On balance, we support the creation of the Commission as an independent Crown entity through its inclusion in Schedule 1, Part 3 of the Crown Entities Act 2004. This means the Commission is, under s 105 of the Crown Entities Act, generally not obliged to have regard to or give effect to government policy. However, this independent status could be made more obvious in cl 8 of the Bill (proposed s 5C), by describing it there as an "independent Crown entity" rather than just a "Crown entity". Furthermore, we consider it inappropriate that, as an independent advisory agency and watchdog, there is a power for the Minister to direct the Commission to have regard to government policy on various more specific matters (relating to the Paris Agreement and unit supply settings). Removing this power would not *prevent* the Commission from having regard to these matters, nor would it prevent judicial

review action against the Commission if it failed to take into account a relevant matter. There also need to be safeguards to ensure that the Commission is properly funded and resourced to perform its roles.

EDS supports a recommendatory rather than binding role for the Commission in making budgets and plans. It needs a firmly independent role as an advisory body and watchdog. We support the Commission being established as an independent Crown entity (and recommend that this status be clarified further in cl 8 of the Bill), but also emphasise the need for further safeguards around its independence.

Other roles and the Commission

We support the Commission having a structured role reviewing and monitoring climate adaptation plans, and producing risk assessments. The latter is an appropriate role for an independent, science-oriented institution. The former, having implications for a wide range of other issues, is an appropriate role for an elected government. We do, however, question whether it is appropriate for the Minister to produce the first risk assessment. Even if it takes time, this could also be done by the Commission, as its independence is as important for the first assessment as subsequent ones.

We also suggest that the Commission could usefully have a wider role than just an independent advisor and watchdog. It could be tasked with advocacy on climate related matters, as an institutional repository and public-facing source of climate-related information, and a source of assistance and advice for other groups engaged in climate change mitigation and adaptation (eg community groups, or local government). Its statutory mandate in proposed s 5B could usefully be expanded in this way, and its resourcing should reflect any such role.

EDS supports the Commission having a structured role reviewing and monitoring adaptation plans, as well as producing risk assessments. It should also produce the first risk assessment. Furthermore, EDS recommends that the Commission should have a wider role, including advocacy and other functions.

4. Targets and Budgets: Enforceability

We have, above, expressed our support for a Climate Change Commission with recommendatory powers only. However, we consider that the adequacy of the Commission as currently designed is heavily dependent on the ability to enforce legislative targets and budgets.

The Bill currently provides for transparency and accountability by having an independent Commission produce recommendations and reports on progress. That is desirable, as it makes New Zealanders aware about what the government is doing and how it is tracking, so that they can consider that when they go to the polls. But elections are not an effective means of enforcing a failure to meet environmental obligations of constitutional significance, as many different issues and concerns need to be weighed. Again - climate change needs to transcend politics.

Currently, targets and budgets, and related duties (eg the duty of the Minister to ensure net budget emissions do not exceed the emissions budget) lack legal enforceability. There is no

mechanism to enforce failures in court, only a proposed declaratory jurisdiction (incidentally, it would be desirable to clarify which court has such jurisdiction).

We have stated above that it is the proper role of an elected government to make decisions on budgets and emissions reduction plans if there is a firm target in legislation and a budget that has been set in line with it, because *how* we get there involves many value judgments. But those institutional settings are conditional on those targets actually being upheld in practice, rather than being aspirational. There is a specific process provided for in the Bill for targets to be amended and budgets to be borrowed and banked, and that provides a comprehensive list of reasons, and institutional safeguards, around when flexibility is acceptable.

The Bill therefore needs to provide tangible consequences for a failure to meet a target/budgets, and a pathway for enforcement. Such failures are amenable to objective judicial enforcement rather than subjective judgement (much more so than under the sustainable management purpose of the Resource Management Act, for example), given that they are based on specific numerical figures.

At present, the only financial consequence provided in the Bill is the award of costs. One option could be an appeal pathway whereby the courts cannot direct the government to act in a specific way, but be empowered to direct the government to put in place measures that would achieve the target or meet a budget. To require the government to comply with the law – a binding target/budget – is not a radical constitutional proposition.

EDS recommends that the Bill include an enforcement mechanism to ensure that targets and budgets are actually met.

5. Purpose and principles of legislation

We support the integration of zero carbon legislation within (as an amending act to) the existing Climate Change Response Act. However, the current proposal in the Bill for changing the purpose of the Climate Change Response Act lacks aspiration, and does not reflect the ambition inherent in the net zero target and the title of the amendment bill itself. We recommend that it be strengthened (eg that the purpose is to achieve a climate neutral society and economy by 2050, not just to implement New Zealand's international obligations), and broadened to include the very significant climate change adaptation content that is being inserted into the primary legislation. Currently, amendments proposed to the Act's purpose are limited to mitigation.

As foreshadowed earlier, we also recommend inserting a set of general decision-making principles within the Bill. These would have to be taken into account in all public decision-making. This reflects that climate change is an important consideration in a wide range of other more specific statutory frameworks (eg transport, resource management, local government) and government decision-making more generally (eg investment choices, internal policies and procedures) even if there are no accompanying regulations to bind people directly. Principles could include the desirability of near zero gross carbon dioxide emissions, net zero biogenic methane emissions, the importance of maintaining and enhancing other aspects of the natural environment at the same time as mitigating and adapting to climate change, environmental, economic and social resilience, and precaution. If the Climate Change Response Act is to become a policy-heavy statute significantly wider

than a vehicle for a technocratic emissions trading scheme, it requires a robust set of decision-making principles to guide the content of policies and plans made under it.

Of course, the Bill would need to be cautious about how such general principles related in a legal sense to other frameworks. “Have regard to” or “take into account” would seem most appropriate. It would be desirable more generally to consider other key legislation to determine its consistency with the goals and principles reflected in the Bill, and amend in a way that both reflects the scheme of the specific legislation as well as climate change concerns.

One significant example would be an exploration of how climate change mitigation, and targets/budgets, could be better embedded in the Resource Management Act (RMA). This would involve considering the insertion of climate change mitigation into Part 2 of the Act, clarifying the ability to create national policy statements on the climate, and the creation of national environmental standards. In particular, the Bill could remove the decision-making restrictions on local government in ss 70A and 104E of the RMA. At present, the Bill provides generally that targets and budgets are able to be (but do not *have* to be) considered under other frameworks, but under ss 70A and 104E of the RMA (for local government, at least) they explicitly *cannot* be considered. This will create an anomalous situation that requires reconsideration and amendment. One of the key rationales for the RMA restrictions on local government jurisdiction was that there was no national level plan/policy in place to create local consistency. With targets, budgets, and emissions reduction plans, that will no longer be the case. A meaningful response to climate change is urgent, and legislative impediments to councils addressing mitigation need to be removed.

More broadly, the Climate Change Commission in its watchdog role could usefully be required to comment not just on progress against percentage targets and integrity of budgets, but also on the extent to which government policies (across many different portfolios) are reflecting broader decision-making principles under the Act.

EDS recommends including a more robust purpose statement into the Climate Change Response Act focusing on climate neutrality, and including reference to adaptation. A set of decision-making principles would also be desirable, and progress against these could be usefully reported on by the Climate Change Commission. The Resource Management Act needs to be amended to remove the prohibition on local government considering the impacts of activities on climate change.

6. Emissions reductions plans

EDS supports the production of emissions reductions plans, including sector-specific plans. These plans must outline policies and strategies for meeting an emissions budget. In line with the suggestions above, they could also usefully be required to outline how the government plans to reflect the broader decision-making principles and purpose of the legislation (as suggested earlier). Those principles could usefully ensure that decision-makers take into account the risks and co-benefits of different approaches to climate change mitigation (eg the biosecurity risks of monoculture plantation forestry, the synergies of indigenous forest for other aspects of the environment, or the need to consider the economic impacts of different land uses on rural communities).

EDS supports the production of emissions reduction plans. We recommend that greater guidance be contained in decision-making principles concerning matters to which regard must be had when making decisions on those plans.

We generally support the proposal in terms of how emissions reduction plans are produced and who makes decisions. Presently, the Bill clarifies the relationship between emissions targets/budgets with other decision-making frameworks (they are permissive considerations only). However, it does not clarify the relationship between emissions reduction plans and other legal frameworks. We recommend that the Bill clarify the legal effect that emissions reductions plans have. This is extremely important, as it will drive how a whole variety of agencies (eg the Electricity Authority, the Energy Efficiency and Conservation Authority, the New Zealand Transport Agency etc) need to think about climate change.

As with general decision-making principles recommended earlier, it would be appropriate for such plans to be "taken into account" or "had regard to" in decision-making under other frameworks. If the direction were firmer than that, it runs the risk of upsetting other carefully designed statutory schemes (such as the RMA, which provides safeguards to protect local environments). However, it would be important for other key statutes to be reviewed. Under some acts, it may be extremely important for decision-makers to have to (for example) "have particular regard to" or even "give effect to" an emissions reduction plan. Such directions could, for transparency and user-friendliness, be located in those other statutes themselves following careful consideration, but at a minimum the bill should require that decision-makers under other legal frameworks take into account the plan. If there is no legal requirement to do so, it could be ignored by agencies having a crucial practical role in addressing climate change. There would also be limited potential for people to take judicial review action for a failure to consider such an important document.

As mentioned earlier, local government has an important role in climate change mitigation. It is anomalous that the RMA prevents councils taking into account effects on climate change. The Act would provide a barrier for councils to take into account emissions reduction plans, despite significant potential and will for local government to play a part in achieving them. That should be removed, alongside a direction for emissions reduction plans to be a mandatory consideration in decision making on plans and consents under the RMA.

Although it is not clear on the face of the Bill, it may be the intention for emissions reduction plans to be more of an action plan outlining what the government then intends to do (including, potentially, a programme of legislative amendment) rather than instruments having legal effect or influence in their own right. If that is the case, we suggest that a non-exhaustive list of other relevant statutory frameworks (eg the RMA) is included, alongside a direction that emissions reduction plans need to specifically outline how or whether they are to be used to meet budgets and targets, and why/why not. Otherwise, the risk may be an undue focus in plans on non-regulatory or "soft" approaches to reducing emissions. This does not remove the need for the point in the previous paragraph – that emissions reduction plans themselves need at least to be taken into account in decisions made under other frameworks.

EDS recommends that a firmer legal link be established between emissions reduction plans and the key statutory frameworks under which they would be implemented. This could be a mandatory direction for decision-makers to "have regard to" or "take into account" an emissions reduction plan. There should also be an obligation to outline in the plan whether or how other key frameworks are to be used in implementing the plan. Local government should not be prevented from having regard to an emissions reduction plan in their roles under the Resource Management Act.

7. Adaptation plans

Under the Bill, the Minister is to prepare an initial national risk assessment, with subsequent assessments to be made by the Climate Change Commission. Here, we reiterate our previous question as to whether it is appropriate for the Minister to produce the first risk assessment. Even if it takes time, this could also usefully be done by the Commission, as its independence is as important for the first assessment as subsequent ones.

National adaptation plans, in response to risk assessments, are to be prepared by the Minister, but with the government's performance assessed by the Commission through regular progress reports. This is appropriate. Tough adaptation decisions will need to be taken by politicians (how to respond), but there will be independent risk assessments (what the risk is) and a framework of accountability and transparency behind adaptation plans (whether they are being achieved).

As with emissions reduction plans, the Bill does not currently clarify the relationship between adaptation plans and other legal frameworks under which significant elements would likely be implemented. It is very important for this relationship to be clarified, especially in the context of regional policy statements and district plans under the RMA (which address land use planning) and infrastructure planning and funding under the Local Government Act. At the very least, adaptation plans should be specifically highlighted in those statutes as matters to which regard (or particular regard) must be had when making decisions on national direction, regional policy statements and plans. If such plans had no legal influence in tangible decision making elsewhere, it becomes simply a "plan to make other plans" that will eventually result in some action. That is not good enough given the urgency of the climate adaptation challenge.

One solution would be for an adaptation plan to be a deemed national policy statement under the RMA. Another would be to create an obligation on central government to give effect to an adaptation plan via a separate and mandatory national policy statement (within reasonably urgent timeframes). The relationship with other national direction (especially the New Zealand Coastal Policy Statement) would need to be clearly described. Associated funding implications of the national policy statement would also need to be addressed in an adaptation plan – especially to the extent it is to be implemented by local government.

Finally, we suggest that an adaptation plan is something that could usefully be co-developed with relevant councils and iwi, rather than just consulted on, particularly where there is a need for targeted adaptation measures in specific locations (eg those at high risk of sea level rise).

EDS supports the production of risk assessments and adaptation plans. However, a clearer legal link needs to be established between adaptation plans and the statutory frameworks under which they would be implemented, especially the Resource Management Act (for, among other things, land use decisions) and Local Government Act (for, among other things, infrastructure planning and funding decisions). A legal direction could be to have regard to adaptation plans, or for adaptation plans to be deemed to be, or directly inform the creation of, a national policy statement on climate change adaptation under the Resource Management Act.

8. Concluding statements

We again thank the Environment Select Committee for the opportunity to submit on this extremely significant Bill. We are pleased to see the urgency of the climate change challenge being recognised in far reaching and novel reforms, and welcome the chance to contribute to a constructive debate about potential improvements. We wish to be heard in relation to our submission.