New Zealand Productivity Commission inquiry on transitioning to a low-emissions economy

Comments of ClientEarth on Draft Report

ClientEarth is an environmental law organisation with offices in London, Brussels, Warsaw and New York.[1]

As part of our Climate Change work programme, we seek to support the development of law aimed at driving the transition to a low-carbon economy. We very much welcome the focus being given by the New Zealand Productivity Commission to the achievement of a low-emissions economy, particularly in the context of the New Zealand government's commitment to legislate for achieving net zero emissions by 2050.

We support the draft report's recommendation that "The broad principles and framework of the United Kingdom's Climate Change Act should be used as a basis for designing a new architecture for New Zealand's climate change legislation" (R7.2, p.170). Notwithstanding that such legislation should, of course, "be carefully tailored to fit the New Zealand context", we take this opportunity to offer some words on certain elements that, through our extensive work on the UK Climate Change Act, we have come to view as important.

Strategies – Flexibility within constraints

The Productivity Commission's draft report finds that, when formulating a requirement in law to prepare a low-emissions strategy, there should be "recognition that strategies for the long term will inevitably be less certain and well-defined than those for the short term" (F7.8, p.179).

This should not be a reason, however, for allowing government unconstrained freedom to decide by what point its strategies should be fully formed. On the contrary, it is important that a new law attends carefully to the question of the point(s) in time by which strategies must meet clear standards of preparedness. There comes a point at which strategies must in fact be certain (though still, of course, open to revision), well-defined, and capable of the most searching scrutiny.

In his March 2018 report, "A Zero Carbon Act for New Zealand", the NZ Parliamentary Commissioner for the Environment alluded to the dangers of leaving open this question in law:

"It may be perfectly reasonable to leave options open ten or more years in advance of a budget period, but as that budget period draws nearer, the inadequacy of policies will progressively suggest that it is implausible that the budget will be met. At a certain point, the ongoing generation of emissions budgets that stand less and less chance of being met would, if allowed to continue, undermine the credibility of the entire system." (p.31).

Experience in the UK context is at risk of bearing out this concern. Following the setting of the fourth carbon budget (2023-2027) in 2011, the UK government's failure to set out adequate detailed policies for meeting the budget (ie. to "close the policy gap") was, to some degree, tolerated at first.

[1] https://www.clientearth.org/

In the years since, the Committee on Climate Change ("CCC") has repeatedly called on the government to close the policy gap, but to little effect.[2]

Following the publication of the Clean Growth Strategy in October 2017, which again failed to close the policy gap, the situation has now become very serious. The CCC has been compelled to seek to impose its own timescales for the full development of the government's policy plans. In its January 2018 report, the CCC said:

"There is a particular risk around meeting the fourth carbon budget, given that it begins in only five years' time and that plans set out so far are insufficient. The Government should set out in 2018 the additional policies that will close the remaining gap to meeting the budget." // "It is over six years since the fourth carbon budget was set. Given these delays, it is even more important that policy development now proceeds with the greatest urgency." (p.9, p.28)

It can be seen how, if government action is not motivated towards ensuring plans or strategies meet certain standards by clear points in time, the 'credibility of the entire system' risks being undermined.

We wholeheartedly agree with the draft report's recommendation that an independent Climate Commission should be instituted. Likewise, the responsibilities recommended for the Commission (R7.9) seem to us wholly appropriate. However, in order for the Commission to be able to focus on and discharge these responsibilities effectively, it should not be put in the position of also having to play the role of rule-maker (as, arguably, the CCC has found itself compelled to do). This means that a new law should clearly define the requisite standards of climate plans at certain points in time, leaving the government with the freedom to draw up the shape of those plans, and the Commission the capacity to advise on their content (cost-effectiveness, deliverability, coherence etc.), delivery and refinement over time.

There are also important practical reasons to define in law a clear timetable for the detail and preparedness of plans: challenges are identified early and at a time when remedial action can be more easily taken.

In *Enforcing the Climate Change Act* (2015, quoted at p.181 of the draft report), Jonathan Church argued that – in English law, at least – the polycentricity and complexity of decisions taken to meet (or not) emissions targets do not render legal duties to meet such targets non-justiciable. However it is true, as the draft report suggests, that questions remain as to how such duties might best be enforced. The more that the law ensures plans and strategies – however formulated – remain on track to meeting targets as they approach, the more such questions over legal enforcement are avoided.

<u>Flexibility of reporting obligations</u>

We make one additional point here, also related to the idea that climate law must provide for "flexibility within constraints".

[2] This history is explored in detail in the ClientEarth report: "Mind the Gap: Reviving the Climate Change Act".

We agree that “Legislation should set a specific timeframe for publication of the Government’s strategy” including “an element of flexibility to allow for exceptional situations where publication of the updated low-emissions strategy may need to be delayed” (p.181).

That said, the UK experience – in which the publication of the Clean Growth Strategy was repeatedly delayed from December 2016 to October 2017 for no clear reason – has shown that any element of flexibility should be delimited as clearly as possible. Defining the kinds of situations likely to be considered exceptional would be valuable in this regard, and/or a requirement that reasons for any delay be given publicly and at certain intervals to ensure a high degree of political accountability. We would also recommend, in any event, the incorporation of a ‘long-stop’ deadline to limit any (justified) delay in publication.

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