Disclosure provision of the adaptation reporting power

16 October 2019

This purpose of this note is to provide advice to the Environment Committee (the Committee) relating to proposed section 5ZV(3B) of the Climate Change Response (Zero Carbon) Amendment Bill 2019 (the Bill).

Context

The Committee is concerned about the degree of confidentiality provided to the Climate Change Commission (Commission) and the Minister under subsection (3B), and would prefer the provision to reflect a higher level of transparency. The Committee expressed discomfort with the use of the double-negative in (3B), and current drafting which may appear to a layperson to require the approval of the person to whom the information relates before it can be released.

The Committee also questioned why the duty went beyond the requirements of the Official Information Act 1982 (OIA).

Response to Committee’s request for advice on 5ZV(3B)

Purpose of Amendment

New section 5ZV(3B) relates to the power in subsection (1), which allows the Minister and the Commission to request information on climate change adaptation from reporting organisations to support their functions under Part 1C of the Bill. This includes sensitive information. The purpose of (3B) is to ensure the Commission and Minister’s use of information gathered under subsection (1) is managed with care, and is expressly for the purposes outlined in Part 1C of the Bill. It is important that the power to request information is balanced with an appropriate assurance that sensitive information will be protected by the Commission and the Minister.

The types of information that would be gathered through the adaptation reporting power may be highly sensitive in nature (e.g. trade secrets, privileged legal advice, financial information, etc.). Therefore, a mechanism to prevent public disclosure of this information is necessary. However, it is not proposed to be a blanket protection as the Minister and the Commission must be able to disclose information where it is required to discharge their adaptation functions under Part 1C of the Bill.

Limitations of the Official Information Act 1982 to protect sensitive information

Subsection (3B) is intended to apply in addition to the requirements of the Official Information Act 1982 and the Privacy Act 1993.

Where information has been gathered through the adaptation reporting power, the OIA will only apply when official information is requested by a member of the public. The OIA does not apply to the use of information by the Minister, Commission, or by the government in general. For example, information on lifeline utility providers (e.g. airports, energy providers, etc.) collected through the adaptation reporting power could be released by the Commission as part of a national climate change risk assessment without any statutory obligation to withhold commercially sensitive information (such as, intellectual property, trade secrets, financial information etc.).

The Privacy Act (1993) applies only to natural persons. This means that it would not apply to commercially sensitive information from non-natural persons (e.g. companies), which many reporting organisations will be.
However, these Acts do not limit what the Commission or Minister may make public in the performance of their adaptation functions under Part 1C of the Bill (e.g. in preparing a National Climate Change Risk Assessment, National Adaptation Plan, etc.).

*Proposed amendment in the revision-tracked version of the Bill*

The Departmental Report outlined the recommendation to amend the Bill by inserting a new provision that protects sensitive information from public disclosure, subject to an exception if it would limit the Minister or Commission’s ability to perform their adaptation duties under Part 1C of the Bill. The Departmental Report advised that the Minister or Commission would need to consult with the person to whom the information is confidential before making a decision to publicly disclose the sensitive information. This is reflected in new s 5ZV(3B).

The obligation to consult the person to whom the information relates in s 5ZV(3A)(a) is intended to better inform the Commission or Minister about the nature of the sensitive information that may be released, and ensure that a reporting organisation is informed of an upcoming release. Section 5ZV(3A)(b) makes it clear that (despite consultation with reporting organisations) information must be publicly disclosed by the Commission and the Minister if the disclosure of that information is necessary to properly carry out their adaptation functions in Part 1C of the Bill.

*Next Steps*

Ministry for the Environment officials are working with the Parliamentary Counsel Office (PCO) to identify drafting options to better reflect the need for transparency of information and address any concerns the Committee may have in relation to s 5ZV(3A). PCO will provide a proposed drafting change to the Committee.