



Law Council
OF AUSTRALIA

Office of the President

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Committee Secretary
Standing Committee on Environment & Energy
House of Representatives
PO Box 6021
Parliament House
CANBERRA ACT 2600

By email: Environment.Reps@aph.gov.au

Dear Committee Secretary

Supplementary submission: Climate Change (National Framework for Adaptation and Mitigation) Bill 2020 and Climate Change (National Framework for Adaptation and Mitigation) (Consequential and Transitional Provisions) Bill 2020

On 1 February 2021, the Law Council appeared before the House of Representatives Standing Committee on the Environment and Energy (**the Committee**) for its inquiry into the Climate Change (National Framework for Adaptation and Mitigation) Bill 2020 (**the Substantive Bill**) and the Climate Change (National Framework for Adaptation and Mitigation) (Consequential and Transitional Provisions) Bill 2020 (**the Consequential Bill**).

This supplementary submission addresses two issues that were raised by Committee members during the Law Council's appearance at the public hearing. The Committee requested the Law Council's further views on:

- 'why it is important to legislate a target, to lock it in beyond a political cycle of political parties at election time, and have a long-term legislated target so that it remains regardless of what's happening in the political space? Obviously acts can be repealed but, on the whole, by having continuity beyond an election cycle, what does that do for a legal framework?'; and
- whether the Law Council has a view on 'one criticism of the bills...that has come, that it's adding a layer of an administrative burden or a layer of administration to our current scheme'.

These matters are addressed separately below.

Importance of legislation

As previously flagged, the Law Council is currently considering its policy on climate change. It provides the following preliminary comments in that context based on the views of its Climate Change Working Group.

As outlined by its representative Ms Robyn Glindemann in her evidence at the public hearing to the inquiry, the Law Council considers that the Bills have the potential to drive government and business behaviour to reduce greenhouse gas emissions and provide the overarching framework for government, business and, by extension, the Australian community to adapt to the impacts of a changing climate.

In that context, a legislated target would provide certainty to policy makers about the guiding policy goal and timing. This will be essential when developing emissions reduction and adaptation plans and assessing the relative merits of different policy options. This assessment is an essential part of the law-making process. For the business and community sectors, a legislated target would provide certainty about the long-term policy framework and reduce legal and regulatory risks.¹

A legislated target can establish the necessary architecture to achieve common solutions. While the Law Council considers that laws should not always be the first, or only, mechanism to address complex social and economic issues, they can provide clarity, certainty and clear performance measures regarding objectives, roles and responsibilities. They can also establish long-term consensus across the community regarding important norms and objectives – for example, the *Racial Discrimination Act 1975* (Cth) would have had less traction and reach across successive generations as a federal Racial Discrimination Policy.

For all stakeholders, a legislated target will enhance transparency about current policies and the possibility of change. Where policies remain in place only as long as the prevailing government, and have less public visibility, there is ongoing uncertainty amongst the business and community sectors. Legislation which has a unifying objective, and is backed by strong support across multiple sectors, may help to overcome such uncertainty.

One issue recently raised with the Law Council by its membership is that the Bill allows the target day (as defined in clause 22(2)) to be changed by the Minister after advice is given. This may have the potential to undermine the value of setting a target day in the first place, resulting in substantial ongoing lobbying to bring it forward. As such, it may reduce certainty and transparency about how when or how this will occur, with business and policymakers being required to factor in the consequential risks into their decision-making. One option may be to amend the Bill to only enable the target day to only be amended by legislation, rather than by legislative instrument.

On the other hand, the Law Council has also previously recognised that a key intention of the Bill is to enable the Executive, in response to the advice given by the Climate Change Commission, to retain some level of control over whether the Target of net zero emissions (set out in clause 22(1)) will be met earlier and how, meaning that flexibility is retained in addressing any resulting social, economic and environmental issues and concerns. Parliament may wish to decide how best to strike the balance between achieving sufficient certainty and affording some flexibility, and the kind of legislation which is most appropriate in this regard.

As noted by Ms Glindemann in her evidence, the Law Council considers that if the Australian Government does move to enshrining an emissions target in legislation, as other governments have done, then it is also critically important to enshrine in legislation the mechanism to achieve that target, as the Bill does. The national adaptation plans and emissions reduction plans which the Minister is required to periodically prepare and/or set under Parts 3 and 5 of the Bill would set out the pathway to achieving emissions reduction, as well as providing a comprehensive structure for adaptation to those climate changes which are already 'locked in.' They also provide the framework for the development of

¹ In this regard, the Law Council notes the Business Council of Australia supports a national goal of net-zero emissions by 2050 “to provide direction and drive investment in new technologies that will be critical to achieving this goal”: Business Council of Australia, ‘2021 policy platform’ <<https://www.bca.com.au/>>.

cohesive Australian, State and Territory Government policy across different areas and improve certainty for all sectors of the community and the economy.

Concerns about administrative burden

The Law Council understands the Committee's question about whether the Bills add a 'layer of an administrative burden' to refer to Part 3 of the Consequential Bill, which proposes a substantive amendment to the *Public Governance Performance and Accountability Act 2013* (Cth) (**Accountability Act**).²

Namely, the Consequential Bill inserts a new section 19A into the Accountability Act to require the accountable authority of a Commonwealth entity to consider the following when performing functions or duties or exercising powers:

(a) the potential risks from, and impacts of, climate change relevant to the performance of the function or duty, or exercise of the power (which are further explained in subsection 19A(2)); and

(b) the potential contribution to Australia's emissions of greenhouse gases or the potential contribution to the broader impacts associated with climate change from the performance of the function or duty or exercise of power.

The Law Council recognises that the need to consider these factors and to address the legal risks associated with failing to do so (including the risk of judicial review) may add to the administrative burden of those Commonwealth entities where such consideration does not already take place, perhaps less formally, as a matter of course.

The imposition of an additional administrative burden does not by itself render the proposed section unwarranted. However, the Law Council acknowledges that a broad range of people and entities is captured by the definitions for 'accountable authority'³ and 'Commonwealth entity'⁴ under the Accountability Act. This means that the obligation proposed by the new section 19A will be expansive in application. For example, it will extend to the Director of the Australian Institute of Criminology when performing his or her functions relating to the conduct and publication of criminological research in Australia,⁵ and to the Clerk of the Senate when performing his or her administrative functions for the Department of the Senate.⁶

In such cases, where the performance and/or exercise of any of the potential functions, duties and powers of an accountable authority for a Commonwealth entity bears no reasonably identifiable relation to actual or potential climate change risks or impacts, the

² Note, as the Law Council stated in its submission of 3 December 2020, the objects of the Accountability Act include to require the Commonwealth and Commonwealth entities 'to meet high standards of governance, performance and accountability' and "to provide meaningful information to the Parliament and the public": s 5.

³ An accountable authority is defined under s 12 of the Accountability Act by reference to the relevant Commonwealth entity, as follows: for a Department of State or Parliamentary Department, the Secretary of the relevant Department; for a listed entity, the person or group of persons prescribed by an Act or the rules to be the accountable authority of the entity; and for a body corporate, the governing body of the entity, unless otherwise prescribed by an Act or the rules.

⁴ A Commonwealth entity is defined under s 10 of the Accountability Act as: (a) a Department of State; or (b) a Parliamentary Department; or (c) a listed entity; or (d) a body corporate that is established by a law of the Commonwealth; or (e) a body corporate that: (i) is established under a law of the Commonwealth (other than a Commonwealth company); and (ii) is prescribed by an Act or the rules to be a Commonwealth entity...

⁵ See, *Criminology Research Act 1971* (Cth) ss 16, 35.

⁶ See, *Parliamentary Service Act 1999* (Cth) s 54(1)(a); Parliament of Australia, 'Senate Brief No. 15 – The Clerk of the Senate and Other Senate Officers'

<https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Senate_Briefs/Brief15>.

Committee may consider that requiring consideration of the factors listed at section 19A may result in an unwarranted administrative burden.

As such, the Committee may wish to consider narrowing the categories of people and entities to whom the new section 19A applies. Reference may be had to the *Climate Change Act 2017* (Vic) (**Victorian Act**), in which the equivalent obligation to the obligation proposed by section 22 of the Consequential Bill is limited, and applies only to specific decisions or actions made under a list of six Acts.⁷ These Acts all provide for functions which have clear relevance to the objects of environmental or land management and/or protection and, by extension, climate change-related risk or impacts.⁸

Examples of ‘decision[s] or action[s]’ which are explicitly subject to the relevant obligation under the Victorian Act include ‘a decision by the Environment Protection Authority relating to the licensing of scheduled premises under section 20’ of the *Environment Protection Act 1970* (Vic) and the preparation of a Biodiversity Strategy by the relevant Secretary under the *Flora and Fauna Guarantee Act 1988* (Vic), for example.⁹

Alternatively or in addition to narrowing the categories of Commonwealth entities to which the proposed section 19A applies, the Law Council reiterates the suggestion made in its 3 December 2020 submission that the proposed Climate Change Commission could provide education and training to applicable Commonwealth entities and their accountable authorities. This would promote proper understanding and meaningful application of the duty, noting that it will, however, come with its own administrative burden and cost.

Considering potential administrative burdens imposed by the Bills in a more general sense, the Law Council observes that administrative burdens can be caused by uncertainty, poorly drafted legislation or poorly administered legislation. For example, industries and business must continually review their future strategies and resourcing allocations where policy and legislative change occurs constantly at the federal, state and territory level, or where different jurisdictions or regulatory bodies impose new, sometimes conflicting requirements. Overarching federal legislative frameworks which set clear, unified objectives, mechanisms and responsibilities invariably serve to resolve these tensions in the longer-term.

We thank you once again for the opportunity to provide this supplementary submission to the Committee. If you have any further inquiries, please contact Ms Leonie Campbell, Deputy Director of Policy, at leonie.campbell@lawcouncil.asn.au or on (02) 6246 3733 or Ms Alexandra Wormald, Policy Lawyer, at Alexandra.wormald@lawcouncil.asn.au or on (02) 6246 3724.

Yours sincerely



Dr Jacoba Brasch QC
President

⁷ See, s 17, Schedule 1.

⁸ They are, namely, the: *Catchment and Land Protection Act 1994* (Vic); *Marine and Coastal Act 2018* (Vic); *Environment Protection Act 1970* (Vic); *Flora and Fauna Guarantee Act 1988* (Vic); *Public Health and Wellbeing Act 2008* (Vic) and *Water Act 1989* (Vic): Schedule 1.

⁹ See, Schedule 1.

