LA TROBE UNIVERSITY

La Trobe University's response to the Senate Foreign Affairs, Defence and Trade Legislation Committee

September 2020

Inquiry into Australia's Foreign Relations (State and Territory Arrangements) Bill 2020 and Australia's Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020

ENQUIRIES
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INTRODUCTION AND EXECUTIVE SUMMARY

La Trobe University welcomes the opportunity to respond to this Senate Inquiry into Australia's Foreign Relations (State and Territory Arrangements) Bill 2020 [the Bill] and Australia's Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020 [the consequential Bill].

La Trobe notes the intent of this legislation to ensure consistency in Australia's foreign policy, a cornerstone of every sovereign nation. We note the serious threat that foreign interference poses to Australia and this is why the sector has worked in lockstep with the Government in putting in place the necessary protocols to safeguard Australia's interests. Universities participate as equal partners with Government agencies in the Universities Foreign Interference Taskforce (UFIT), which has established guidelines that help keep Australia's institutions and intellectual property secure. The draft Bills, while including public universities in their scope, regrettably foresee no role for the UFIT and appear disjointed from the existing foreign interference and national security-related requirements that universities are already adhering to.

Our chief concern is that the legislation, as currently drafted, is so wide in scope that it could pose a serious threat to the free exchange of ideas and Australia's contribution to open science, which are central features of universities' raison d'être. The risk that existing agreements could be voided or that prospective agreements could be vetoed and/or delayed could cause hundreds of thousands of dollars to be lost, opportunities to lapse and cause immeasurable harm to Australia's world-renowned universities and global research reputation. This would have ripple effects on the attraction of the country to international students, researchers, industry and foreign investment.

From an implementation perspective, the draft legislation fails to provide clarity on a number of fundamental issues such as the definition of foreign policy, the criteria that will be used to define the institutional autonomy of foreign universities, timeframes for vetting agreements and details around which type of agreements would be exempt from the legislation. In addition, the draft legislation does not provide for any recourse of appeals to the Foreign Minister's decisions on any agreement with the Consequential Bill seeking to remove the possibility of judicial review. This raises another critical issue, namely whether the Commonwealth Government would bear the cost of any fees associated with the early termination of existing contracts.

Finally, the legislation appears to discount the significant regulatory burden and compliance costs that it would impose on public universities as well as on the Department of Foreign Affairs and Trade (DFAT).

We strongly believe that there are more efficient, sensible ways of achieving the Government's intent without the risk of compromising universities' and Australia's future international co-operation.

Key Recommendation:

- **La Trobe recommends that the Government work with the higher education sector through the University Foreign Interference Taskforce (UFIT) to establish a more efficient way of achieving the intent of the legislation.**

DETAILED CONSIDERATION

A. Foreign Interference Risk Management Approach for the Higher Education sector

The Higher Education sector has received numerous requests to comply with Foreign Interference guidelines and legislation over the past two years. These requirements are becoming increasingly disjointed and repetitive and a result there is a risk of confusion on an issue of national importance.

Universities currently comply with the following foreign interference and national security related requirements:

- University Foreign Interference Taskforce (UFIT) Guidelines
- Foreign Influence Transparency Scheme (FITS) Act
- Autonomous Sanctions Act
- Defence Trades Control Act
- Membership of Defence Industry Security Program (DISP) in order to be eligible for Defence-related research funding. Membership requires security clearances and intensive internal security and risk procedures to be adhered to.
- Inclusion of questions relating to Foreign Interference and a requirement to state how the proposed research (including international collaborations) meets the National Interest Test in all Australian Research Council (ARC) grant applications
- Establishment of an Integrity Unit within TEQSA to manage UFIT recommendations and their implementation

In addition, the Minister for Home Affairs has requested the Parliamentary Joint Committee on Intelligence and Security (PJCIS) undertake an inquiry into foreign interference in Australian Universities, which is due to report in July 2021. Any recommendations stemming from this inquiry will likely require further input and resourcing from universities.

The requirements that would emanate from the proposed Foreign Relations Bills are in addition to the comprehensive list of existing requirements outlined above and appear to be completely separate from the existing processes. In particular, the current draft legislation sidelines the University Foreign Interference Taskforce (UFIT) and the UFIT Guidelines.

It is recommended that a more streamlined and coherent approach to the management of foreign interference risk is adopted for Australian Universities. It is also recommended that the PJCIS inquiry take into account the numerous obligations Universities are required to undertake and ensures any recommendations and timing aligns with the Foreign Relations Bill and other UFIT requirements to avoid unnecessary work, duplication and confusion.

B. The loose definition of 'Foreign Policy'

One key area of concern in the draft legislation is the lack of clarity over what constitutes 'foreign policy'. This is not surprising given the fluidity of foreign policy positions depending on elected Governments' policy platforms and the changing nature of global relations. At Section 5 (2), the Bill defines foreign policy as follows:

> *(2) Australia's foreign policy includes policy that the Minister is satisfied is the Commonwealth's policy on matters that relate to:*
>
> *(a) Australia's foreign relations; or*
>
> *(b) things outside Australia;*
>
> *whether or not the policy:*
>
> *(c) is written or publicly available; or*

(d) has been formulated, decided upon, or approved by any particular member or body of the Commonwealth.

This legislation would therefore give the Government the ability to cancel agreements if they do not adhere to Australia's foreign relations (which are not defined) and if they are inconsistent with Australia's foreign policy (which is loosely defined as what the Foreign Minister may say it is, irrespective of whether it is written or publicly available). Needless to say, this is an extremely fluid and moving target, which makes it very hard, nigh impossible for universities to manage and mitigate potential risks through the normal due diligence processes. It is basically impossible to predict what Australia's foreign policy towards any nation will be in the future. This puts universities (and any other entity captured by the legislation) in a very difficult position when negotiating any sort of international agreement. It is worth recalling that these agreements are usually very complex, involving multiple actors and often involving millions of dollars. Moreover, the knowledge that any agreement (past, existing or future) can at any moment be vetoed by the Australian Government is unlikely to instil any confidence in any of our prospective partners who may well decide to take their business elsewhere.

Further to the concerns above, as argued by Ms Conley Tyler in ***The Conversation***, the idea that Australia would consistently speak with 'one voice' runs counter to the practice of modern diplomacy which is rather characterised by multiple voices including the very distinct voice of research and education co-operation.

In summary, in imposing such a strict scrutiny on all sorts of foreign arrangements that public universities may enter into, this legislation may cause irreparable harm to the capacity of Australian public universities, academics and students to engage with other institutions and academics.

C. Lack of clarity about the definition of 'institutional autonomy' for a foreign university

Another area of significant concern is the lack of clarity in the legislation on what criteria will be used to define 'institutional autonomy' for a foreign university.

Section 12 (p.3) of the Bill's Explanatory Memorandum (EM) specifies that the Bill would cover all sorts of arrangements with foreign entities including "foreign universities that do not have institutional autonomy, as distinct from the levels of institutional autonomy enjoyed by Australian public universities" and mentions instances where "a government or a political party exerting control or influence over the university management, curriculum and/or research activities" as examples of the criteria that may be used to determine what constitutes a lack of institutional autonomy.

Section 8(i) of the Bill outlines that a foreign university which has 'institutional autonomy' may be exempt from requiring Ministerial approval while Section 8(2) then attempts to provide additional information on the concept of institutional autonomy. However, as the Bills read, no clear definition or criteria are provided to assist in determining what would be considered in this definition.

Our understanding is that these rules will be set by the Foreign Affairs Minister in a legislative instrument, which can be unilaterally changed by the Minister at any point. It is our recommendation that the criteria or test of what the Minister may take into consideration for determining whether or not a foreign university has institutional autonomy are included in the Bill. These criteria could include:

- the management/governance of the foreign university and its leadership
- consideration of whether the foreign university is independent of its government or whether its government has strong influence on the management of the university
- how/who funds the university, who contributes to the university's revenue and the reasons for the financial contribution
- government involvement/influence on the activities the university engages in, especially regarding research
- reputation and history of the university

- government involvement/ management/ influence of the curriculum/ student related matters

Arguably it is difficult to determine a test for institutional autonomy, as perhaps even some Australian public universities may have difficulty determining complete institutional autonomy. Such a test would therefore need to be determined on a case-by-case basis, likely taking into consideration the country and government of the foreign university, similar to the process outlined in the Foreign Influence Transparency Scheme (FITS) legislation.

Finally, it is hard to miss the anomaly of putting the spotlight on overseas universities which do not have 'institutional autonomy' as a proxy high risk indicator, while simultaneously reducing the level of autonomy held by Australian public universities. It is fair to say that if this legislation were to be enacted, the Australian government, which would have the ability to veto a public university's existing or future research agreements with another foreign university, could also be described as 'exerting control or influence over the university's…research activities', the example cited in the EM. Hence, an Australian public university would arguably risk failing the same test that will be enacted for a foreign university.

D. Ambiguity regarding types of agreements, exemptions and timeframes; the majority of universities' arrangements should be 'exempt arrangements'

One of the major issues with the legislation is the fact that it fails to distinguish between different types of agreements and puts all arrangements in the same 'risk' basket. It stands to reason that from a foreign interference perspective, an MOU for a study exchange program for arts students or a research agreement providing for the exchange of rural health data are likely to pose less risk than a research co-operation agreement on facial recognition with a military university. It is recommended that, if the legislation were to be enacted, the MFA adopt a risk-based approach to determine the applicability of notifiable agreements. A risk-based model would increase operational efficiency by allowing routine low risk agreements (such as routine research co-operation, student exchanges, fieldwork and academic collaboration) to continue without the need for Ministerial review. High-risk agreements could be identified by triggering predetermined thresholds. This could be implemented via a risk tool questionnaire to be managed by universities as part of an established process within the UFIT framework and export controls which flags high-risk agreements to be submitted.

Similarly, the legislation provides no information about the timeframes for approval for an agreement in an environment where most agreements are time-sensitive. Should the legislation be enacted, there should be a possibility to fast-track priority agreements such as agreements with a high potential revenue for Australia and/or linked to major scientific breakthroughs. These agreements cannot afford to wait their turn in a haystack of agreements.

Further, the Bills provide no information on which arrangements will be considered as "exempt arrangements". The EM highlights the possibility of the Minister exempting: thematic types of arrangements (e.g. research arrangements), arrangements during particular time periods and arrangements regarding emergencies (e.g. urgent health related matters). However, as the Bills reads, it is difficult to determine what category of arrangements (e.g. binding or non-binding) and/or what subject matter of arrangements (e.g. research, student exchange, procurement) would be exempt. This is a crucial piece of information for universities.

Finally, given the confidential nature of many arrangements, we recommend the envisaged public register should only publicise agreements approved by the MFA, which are not confidential in nature.

E. Inconsistency in the application of non-core and core agreements

Section 14 of the EM specifies that the Act creates a 'two-tier system' and distinguishes between 'core foreign agreements' and 'non-core foreign agreements'. The main difference is that for 'core' foreign arrangements, the Minister's approval is required before the commencement of negotiations. For 'non-core foreign arrangements', which is the one capturing public universities, the requirement is only to notify the Minister before entering the agreement, implying that negotiations are allowed to proceed without the need to inform the Minister in advance. Similarly, when introducing the Bill in Parliament, the Attorney General said that the Bill is intended to distinguish between non-core and core arrangements with state and territory entities only needing to notify to MFA if they propose to enter a non-core agreement rather than prior to commencing negotiations.

However, in our view this distinction is not adequately reflected in the way the Bills are drafted. According to Section 34 [the Bill], even for non-core foreign arrangements (i.e. the one including public universities), there is a requirement for universities to inform the Minister prior to entering negotiations/proposals with foreign entities. This requirement would make it particularly difficult and cumbersome for any sort of co-operation with international partners to occur. **We strongly recommend that the two-tier system between core and non-core foreign agreements be made clearer in the legislation.**

F. Lack of recourse for appeals

Further information is required regarding the operational implementation of the legislation including the type of information required and timeframes for submission of existing arrangements to the MFA for review. In addition, the legislation provides no information on any potential penalties making the potential impact on universities harder to assess.

As currently drafted, neither of the two Bills provide for an appeals process to the Foreign Minister's decision in the event that an agreement is vetoed or not allowed to proceed. In fact, the Consequential Bill provides that decisions under the foreign relations bill will be assessed on the basis of Australia's foreign relations and foreign policy and that the "opportunity for such decisions to be subject to judicial review should be reduced to preserve the Commonwealth government's prerogative- exercised through the Minister for Foreign Affairs- to determine Australia's foreign relations posture and foreign policy". This in effect means that a decision by the MFA is final and unlikely to be reviewed or appealed by virtue of the Administrative Decisions (Judicial Review) Act 1977. This raises another critical issue. Should the MFA decide to terminate an existing contract signed by the University, the University could be liable to pay significant amounts of money for breach of or early termination of the contract. Given that the contract would be terminated for circumstances beyond the University's control, will the Commonwealth Government bear the cost of any breach of contract and/or any associated legal fees?

IMPACT ON LA TROBE

A. Scope of notifiable agreements

In response to the proposed legislation, La Trobe has carried out an initial scan of the number of existing and potential agreements that would be captured. We estimate that more than 600 agreements would be in scope including research co-operation agreements, international course articulation agreements, academic exchanges, international PhD and Work-Integrated-Learning agreements amounting to millions of dollars of revenue. In addition to the actual monetary value, some of these arrangements are priceless in terms of knowledge generation, opportunities and Australia's reputation as a leading global research nation. If one were to multiply that loss or opportunity cost across the sector, the consequences will be significant.

From a practical perspective, if one were to consider all arrangements across all Australian universities, the amount of agreements that would need to be scrutinised by DFAT would run in the thousands. The question rises whether the significant regulatory burden that this proposed scheme would entail on DFAT has been taken into account. Spreading DFAT resources so thinly over thousands of agreements the majority of which would be completely routine and low risk, does not seem to be the most efficient use of resources. More importantly, it risks diverting attention from those agreements that may require further scrutiny. It is worth recalling that universities already evaluate whether an agreement poses a risk to national security and foreign policy as part of existing due diligence processes.

Even if the majority of the agreements, as expected, would pass the DFAT test, it will take time for the new DFAT unit to process a multitude of existing and prospective agreements. It is important to keep in mind that many of these agreements are time sensitive. Any delay in the conclusion of these agreements would significantly reduce Australia's competitiveness in international markets particularly against more commercially minded countries such as Germany, the UK and the US. This becomes even more problematic if public universities need to provide notification even before commencing negotiations, as outlined in Section E above.

In summary, the passage of this legislation would have a widespread impact on the University through:

- Loss of research cooperation opportunities including with industry partners
- Loss of research funding opportunities affecting PhD students
- Impact on global rankings due to restricted research opportunities
- Decreased innovation
- Loss of income resulting from a reduction in international student numbers due to breakdown of international relationships
- Loss of income resulting from a reduction in domestic student numbers due to reduced research or student exchange opportunities
- Decreased operational efficiency due to increased regulatory burden of submitting all (applicable) arrangements to the Minister of Foreign Affairs (MFA)
- Potential penalties imposed on the University for cancellation of existing arrangements
- Potential reputational damage resulting from listed arrangements on the public register, including cancelled and not approved

Research

- We have identified more than 200 current or pending agreements that are either definitely in scope of this draft legislation and/or very likely to be within scope. Our initial scanning has already unearthed the lack of clarity in the legislation such as whether agreements within international organisations e.g. World Health Organisation (WHO) would be in scope.
- If all of these agreements were deemed to be in scope, their total monetary value amounts to around $20 million. This is however a conservative estimate. One clear issue we have identified is that there are a number of enabler agreements which have negligible monetary value in themselves but without which the performance in other research grants would be severely hampered. To name one example, La Trobe has in place a material transfers agreements to move biological samples, which underpins a grant worth $3.2million. Again, we anticipate that there will be multiple instances of this across the sector.
- The research co-operation agreements that we have in place are often complex agreements with multiple parties that are challenging to negotiate. If lengthy administrative and approval processes had to be added to these already complex processes, there is a high risk that many of these agreements will fall through or go to competing universities in other countries.
- The fact that any agreement that we are close to signing or have signed in the past can be vetoed by the Foreign Minister, means that will be impossible for universities to negotiate in good faith and

nullifies any notion of 'commercial in confidence' when dealing with an Australian public university. This would render it extremely hard to enter into large international research collaborations. If Australia is not party to large international research collaborations, we will lose national capacity in areas such as health and medical research. The importance of this active presence on the international research stage could not be more evident while the world is experiencing a global pandemic.

- To cite another example of perhaps the unintended consequences of this legislation, La Trobe has a number of existing or expected to be completed PhD agreements with international partners including China and India. If students enrolled in these programs by 2021 did not complete their degrees (as a result of this legislation), the potential loss of income in the form of loss of Research Training Program revenue would be more than $5million. If some of our agreements were cancelled, we may have an obligation to permit some students to come on-shore to undertake the degree they are enrolled in at further cost to the university. To give an example, for a subgroup of about 15 students enrolled only at La Trobe (not joint enrolment) for whom there is no other route of continuity, the university would bear the cost of at least $1million.

International

- La Trobe has in place around 450 agreements with overseas entities including MOUs, student mobility and exchange abroad agreements, articulation agreements, courseware licensing agreements and study tours agreements to mention but a few.
- Our international partnerships, some of which have been in place for over 30 years, are crucial from an international education perspective. The Chinese government has imposed internationalisation KPIs on local universities which means all Chinese universities are looking for foreign university partnerships similar to the ones which La Trobe and other Australian universities have in place. This has led to a number of business development opportunities which are we are currently pursuing. Should this legislation come into play, and given the ambiguity within it, we could not be confident we could pursue such business development opportunities in the future – potentially resulting in millions of dollars in lost revenue.
- Finally, we submit that the introduction of such restrictive practices could have several unintended consequences such as an increase in the number of agreements between universities and private sector entities/organisations to develop business opportunities, that may still pose a risk to Australia's national security but which are not captured by the legislation. In addition, these restrictions may lead to an increase in the number of informal arrangements between individual academics, particularly in research. This was quite commonplace in Australian universities and led to many universities formalising international partnerships. An increase in informal arrangements will limit Australian universities' ability to be strategic in building international partnerships, which may have a significant impact on important external indicators of excellence, such as rankings and accreditations.

Compliance costs and Operational Resourcing

- Introduction of this legislation will have a significant operational and financial impact on the University, both initial and ongoing. To achieve compliance, the University will be required to undertake a stocktake of all existing arrangements including contracts, MOUs, partnerships and any other arrangements that represent a commitment between the two parties. A central depository will need to be maintained and all new proposals to enter into an arrangement and actual arrangements will need to be submitted to the MFA. This will require additional staffing resources as will ongoing management and monitoring.