Law Council
OF AUSTRALIA

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

Senate Standing Committee on Foreign Affairs, Defence and Trade

24 September 2020

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the input of the Law Society of New South Wales to this submission.

Executive Summary

1. The Law Council of Australia (**Law Council**) is grateful for the opportunity to provide a submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade (**Committee**) in relation to the Australia's Foreign Relations (State and Territory Arrangements) Bill 2020 and the Australia's Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020 (**the Bills**).

2. The Bills seek to create a legislative scheme that would enable the Minister for Foreign Affairs (**Minister**) to assess whether arrangements between state and territory governments and foreign governments, and entities related to them, would adversely affect Australia's foreign relations or would be inconsistent with Australia's foreign policy.

3. The Law Council appreciates that there are increasing complexities in Australia's relationship with a number of international partners and recognises the desire for the Australian Government to maintain consistency in its foreign relations and increase oversight of key arrangements.

4. Noting this context, the Law Council raises a number of aspects of the proposed scheme for the Committee's consideration, including:

   - any additional regulatory burden imposed under the reforms, particularly for Australian public universities;
   - the need to promote certainty in how the proposed measures are applied; and
   - the appropriateness of excluding procedural fairness requirements, merits review and the application of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**).

5. Should to the proposed scheme proceed, the Law Council makes the following recommendations:

   - key terms in the operation of the proposed scheme, including the definition of 'institutional autonomy', should be set out in the primary legislation;
   - guidance should be published to assist in determining how the Minister will consider the range of matters relating to Australia's foreign policy when assessing a proposed negotiation or arrangement;
   - consideration should be given to the appropriateness of excluding procedural fairness, merits review and the ADJR Act in the context of the stated aims of the proposed measures; and
   - consideration should be given to the need for further justification for the proposed scheme, with specific reference to existing legislative controls already in place regarding foreign engagement by entities subject to the Bills.

Introduction

6. The Bills seek to create a legislative scheme that would enable the Minister to assess whether arrangements between state and territory governments and foreign governments, and entities related to them, would adversely affect Australia's foreign relations or would be inconsistent with Australia's foreign policy.

7. The proposed scheme is intended to foster a systematic and consistent approach to foreign engagement across all levels of governments and ensure a consistent approach to managing Australia's foreign relations.

8. A key aspect of the proposed scheme is the ability for the Australian Government to assess arrangements between state, territory or local governments or Australian public universities, and a foreign government or related entities, and determine whether they adversely affect Australia's foreign relations, or are inconsistent with Australia's foreign policy.

9. The Law Council notes that the proposed scheme has been developed in a geopolitical climate where there are clear tensions regarding foreign influence. The views expressed by the Law Council are therefore concerned with ensuring that any policy response to such tension is proportionate and effective, noting the additional regulatory burden that may apply should the reforms proceed.

10. The Committee may wish to inquire as to the potential impact of this burden on those defined as non-core entities under the Bills, most notably Australian public universities which benefit greatly from international collaboration, and as discussed below, are already subject to a range of legislative controls focussed on foreign relations.

Scope of the proposed measures

11. The Law Council suggests that the Committee should consider the potential for uncertainty in the proposed scheme as a result of legislative drafting choices. This poses particular challenges for those subject to the proposed measures, and those tasked with providing advice as to compliance, including legal practitioners.

12. For example, whether or not a 'university agreement' falls within the purview of the proposed scheme turns on whether the foreign university has 'institutional autonomy'.[1] However, the Bills do not define this term. Rather, forthcoming subordinate legislation will determine the criteria for assessing whether a foreign university has institutional autonomy. The Explanatory Memorandum does little to clarify why this decision was made, only noting that:

> *The rules will prescribe the circumstances in which a foreign university does not have institutional autonomy. Those circumstances must exist in relation to the foreign university, for the foreign university to be considered a foreign entity for the purposes of the Act. By way of example only, a lack of institutional autonomy may include a government or a political party exerting control or influence over the university management, leadership, curriculum, and/or research activities.*

13. Given the critical nature of this definition, the Law Council's position is that the primary legislation should clearly provide such criteria. From a rule of law perspective, leaving substantive matters to subordinate legislation is unsatisfactory, given that such

[1] Australia's Foreign Relations (State and Territory Arrangements) Bill 2020, 8(1)(i)(ii).

legislative instruments, and any subsequent amendments, are not subject to the same level of parliamentary or public scrutiny.

14. Such uncertainty is also problematic from a compliance perspective. For example, the objective of the proposed scheme is to protect Australia's foreign relations by ensuring that any arrangement between a state or territory entity and a foreign entity is, among other things, not inconsistent with Australia's foreign policy.[2] 'Foreign policy' is defined in proposed subclause 5(2) as including a:

> *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.*

15. Noting the need for flexibility and discretion when assessing whether or not an arrangement is consistent with Australia's foreign policy, the Explanatory Memorandum states in relation to the definition at proposed subclause 5(2):

> *The breadth and inclusivity of this definition reflects that, under this Act, the Minister may take into account a range of matters relating to Australia's foreign policy when assessing a particular proposed negotiation or arrangement, some of which may not be written or formalised.*[3]

16. However, this broad approach creates challenges for those tasked with applying the proposed measures. This will present particular difficulties for the legal profession. It is difficult to envisage how a legal practitioner might advise their client in respect of policies that are not publicly available, or which may not yet have been formulated. While proposed subclause 51(2) includes matters that the Minister must make into account, this is an inexhaustive list, and could benefit from additional guidance to assist in interpretation.

17. The same is true for the thresholds in the proposed scheme for the requirement that the Minister must be satisfied that an arrangement would not adversely affect, or would be unlikely to adversely affect, Australia's foreign relations. The term 'foreign relations' is not defined in the Bills, making it difficult for entities to assess whether an arrangement is likely to adversely affect such relations.

Recommendations

- **Key terms in the operation of the proposed scheme, including the definition of 'institutional autonomy' should be set out in the primary legislation.**

[2] Ibid, 5(1).
[3] Explanatory Memorandum, Australia's Foreign Relations (State and Territory Arrangements) Bill 2020, 32.

- **Guidance should be published to assist in determining how the Minister will consider the range of matters relating to Australia's foreign policy when assessing a proposed negotiation or arrangement.**

Procedural fairness and judicial review

18. Proposed clause 58 states that the Minister is not required to observe requirements of procedural fairness in exercising a power or performing a function under the scheme. In justifying this exclusion, the Explanatory Memorandum suggests that the provision of reasons relating to a decision could adversely affect Australia's foreign relations, especially to the extent that the decision may disclose Australia's foreign policy or position in relation to particular issues, which may disadvantage Australia's position in international forums or negotiations.[4]

19. The Law Council suggests that the Committee should have regard to the appropriateness of removing procedural fairness under the proposed scheme, particularly when the measures also purport to exclude the operation of the ADJR Act.

20. While there may be sensitivities that preclude the provision of reasons relating to a decision under the propose scheme, the absence of procedural fairness removes the right for an entity to access to reasons for a decision and the ability to respond to those reasons.

21. The Committee should also consider the effect that an exclusion of procedural fairness may have on public confidence in the proposed scheme through a lack of transparency. In relation to the importance of procedural fairness on positive decision-making, the Honourable Robert French AC states:

> *A failure to give a person affected by a decision the right to be heard and to comment on adverse material creates a risk that not all relevant evidence will be before the decision-maker, who may thereby be led into factual or other error. Apparent or apprehended bias is likely to detract from the legitimacy of a decision and so undermine confidence in the administration of the relevant power*.[5]

22. In providing justification for the exclusion of merits review of a decision made under the proposed measures, the Explanatory Memorandum notes that policy decisions of a high political content have been identified by the Administrative Review Council (**ARC**) as being generally unsuitable for merits review.[6] It is noted, however, that the same report by the ARC continues by stating that this exception:

> *… relates to decisions that involve the consideration of issues of the highest consequence to the Government. Only rarely will decision-making powers fall within this exception, and it is unlikely that a decision-making power not personally vested in a Minister would suffice.*[7]

23. The removal of procedural fairness and merits review become more significant given the potentially broad scope of the proposed scheme, as commented on above. The combination of a scheme that relies on broad concepts such as inconsistency with

[4] Ibid, 11.
[5] The Honourable Robert French AC, 'Administrative Law in Australia: Themes and Values Revisited' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 25, 47.
[6] Explanatory Memorandum, Australia's Foreign Relations (State and Territory Arrangements) Bill 2020, 12.
[7] Administrative Review Council, 'What Decisions Should be Subject to Merits Review?' (1999), 4.22.

foreign policy and adverse effects on foreign relations, together with a lack of transparency may raise concerns as to the potential for inconsistency and arbitrariness in the decision-making process. Such an approach may be seen to be in contrast to the stated aim of the measures to promote systematic and consistent approaches to foreign engagement.

24. In justifying the exclusion of the ADJR Act, the Attorney-General states in his Second Reading speech that:

> *Decisions made under the foreign relations bill will be assessed on the basis of Australia's foreign relations and foreign policy, and as such, 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.*[8]

25. It is submitted that the Committee should consider whether the removal of procedural safeguards in the proposed measures, in combination with the potentially wide scope of the Bills, weakens the case for passing these Bills.

Recommendation

- **Consideration should be given to the appropriateness of excluding procedural fairness, merits review and the ADJR Act in the context of the stated aims of the proposed measures.**

Necessity of the proposed measures

26. In commenting on the necessity of the measures contained in the Bills, the Attorney-General has noted in his Second Reading Speech that the proposal is necessary:

> *… because it ensures that the Commonwealth government will have full visibility of all arrangements with foreign countries, and can support the states, territories and local government and Australian public universities in undertaking effective, appropriate and informed international engagement overseas.*[9]

27. Despite the above justification, the Law Society of New South Wales (**Law Society**) has raised a question as to the necessity of the scheme as proposed by the Bills given the existing operation of the *Foreign Influence Transparency Scheme Act 2018* (Cth) (**FITS Act**). Specifically, where an arrangement does not trigger obligations under the FITS Act, the Law Society has queried whether declaring an arrangement under the proposed scheme is a necessary step to achieving the objects of the measures.

28. This concern may be particularly relevant for those bodies defined as 'non-core' state and territory entities under the proposed measures, including Australian public universities, which are already be subject to a range of legislative controls, including the FITS Act, the *Defence Trade Controls Act 2012* (Cth), and the *Autonomous Sanctions Act 2011* (Cth).[10]

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[8] Hon Christian Porter MP, *House of Representatives Hansard* (3 September 2020), 15.
[9] Ibid, 10.
[10] See, Group of Eight Australia '*Go8 Statement on Australian Foreign Relations Bill*' (August 27, 2020) <https://go8.edu.au/go8-statement-on-australian-foreign-relations-bill>.

29. Neither of the Explanatory Memorandums for the Bills, nor the Minister's Second Reading Speeches make reference to these existing regimes, and there is an absence of explanation as to how the proposed scheme will complement these ongoing obligations. It may be appropriate for the Committee to inquire as to whether further justification for the proposed scheme is required noting existing frameworks already in place.

Recommendation

- **Consideration should be given to the need for further justification for the proposed scheme, with specific reference to existing legislative controls already in place regarding foreign engagement by entities subject to the Bills.**