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24 September 2020

Committee Secretary,
Foreign Affairs, Defence and Trade Committee,
Department of the Senate,
PO Box 6100,
Parliament House.

Dear Committee Secretary,

UWA Submission – Australia's Foreign Relations (State and Territory Arrangements) Bill 2020

The University of Western Australia is grateful for the opportunity to comment to the Senate Foreign Affairs, Defence and Trade Legislation Committee on the provisions of the Australia's Foreign Relations (State and Territory Arrangements) Bill 2020.

UWA has grave concerns about the Bill, particularly in relation to its application to Australian public universities, and submits that it should not be passed in its current form. It confers wide executive powers on the Minister and departmental delegates enlivened by a criterion of inconsistency of a foreign arrangement with 'Australia's foreign policy'. That term is defined to include policy that is in the Minister's mind, whether or not it is written or publicly available and whether or not it has been formulated decided upon or approved by any particular member or body of the Commonwealth.

Australian universities each have hundreds or thousands of agreements with foreign institutions, which cover matters like student exchange, articulation and research collaboration. Higher Education providers have developed extensive global networks over recent decades, and our systems of teaching and research rely heavily on international collaboration.

At times, governments have assisted universities in building these networks through Austrade, ministerial trade delegations and other avenues.

UWA's academic and executive leadership is well aware of geopolitical change, which requires us to continually assess how we can ensure that our people and interests remain secure, and that the national interest is served. UWA has been a full participant in the University Foreign Interference Taskforce process, and is implementing the recommendations in the UFIT guidelines. We remain committed to working with Government agencies to ensure that we continue to do so even as the outlook evolves over time.

At the same time institutional autonomy is a central element of the free and vigorous higher education system which is essential to our economic and scientific progress and cultural enrichment. It requires us to push back vigorously and without apology against proposals for the extension of executive power which may affect that autonomy without well-defined boundaries or limitations.

I commend this submission to the committee.

Yours sincerely,

Professor Amit Chakma, Vice-Chancellor
The University of Western Australia

Recommendations

1. The definition of 'Australian foreign policy' which appears in s 5(2) should be narrowed so as not to include 'policy' which has not been formulated, decided upon or approved by any particular member or body of the Commonwealth. At the very least the Minister or decision-maker acting on a view of 'Australian foreign policy' should be required to state the relevant policy and the basis of his or her satisfaction that it is Australia's foreign policy within the meaning of the definition.
2. Change the requirement for all non-core 'arrangements' to be reviewed by DFAT so that only legally-binding written agreements are covered.
3. Recognising that the UFIT Guidelines and other Government-led initiatives are strengthening universities' management of foreign interference risks, either
    a. limit the coverage of non-core arrangements to
        i. Australian campuses overseas and
        ii. foreign government related research or education offices on Australian campuses, or
    b. include in the Bill exemptions for administrative correspondence, teaching agreements and research agreements.
4. Provide additional financial resources for universities to meet the compliance requirements of the commencement of the legislation.
5. Require decision makers to provide reasons for a decision that relate to an instrument or articulation of Australia's foreign policy.
6. Provide a means of review or appeal to decisions made by the Minister's delegate, such as through established AAT or ADJR processes.
7. Remove provisions that exempt decisions made under the Bill from the need to provide procedural fairness.
8. Provide that declarations made under the Bill are disallowable instruments.
9. Include provisions enabling State/Territory entities to seek compensation on just terms in cases where the Minister's declaration has a financial impact.
10. Allow the continuation of non-core arrangements which the Minister has decided to terminate, until any appeal is complete.
11. Align the Minister's powers in relation to non-core arrangements that are legally binding under Australian law with those that apply to arrangements that are legally binding under foreign law.
12. Include a definition of 'institutional autonomy' in the Bill.
13. Provide that only information about arrangements subject to a declaration are required to be on the Public Register.
14. Add a provision to the effect that nothing in the Bill will diminish academic freedom or freedom of speech of Australian academics.

Support for the objective

UWA assumes that the purpose of this legislation, when applied to universities, is to ensure that risks to Australia's foreign relations and foreign policy are managed around high-level collaborations such as overseas campuses of Australian universities, foreign government-associated research and/or education offices on Australian campuses, and sensitive research. If that is the intention then we support it.

The concept of foreign policy in the legislation

The definition of 'Australian foreign policy' which appears in cl 5(2) is extraordinarily wide. The Minister's satisfaction that something is Commonwealth policy whether or not written or publicly available or formulated decided upon or approved by anybody, means that a crucial determinant of his or her power resides in a decisional black box devoid of transparency and accountability. It allows for the possibility that the Minister or an official delegate can determine the existence of a policy, for the first time, in the context of approval or disapproval of a particular arrangement. The definition should be narrowed so as to exclude that possibility. The Minister or decision-maker, acting on a view of Australian foreign policy should be required to state the relevant policy and the basis of his or her satisfaction that it is Australia's foreign policy within the meaning of the definition. Absent any such disclosure the decision-making process is opaque.

Recommendation 1: The definition of 'Australian foreign policy' which appears in s 5(2) should be narrowed to as not to include 'policy' which has not been formulated, decided upon or approved by any particular member or body of the Commonwealth. At the very least the Minister or decision-maker acting on a view of 'Australian foreign policy' should be required to state the relevant policy and the basis of his or her satisfaction that it is Australia's foreign policy within the meaning of the definition.

Administrative burden and purpose of the legislation

The Bill, however, would sweep up an enormous range of activities, and would create unmanageable administrative burden for universities and for the Department of Foreign Affairs and Trade. We question whether this is the best way to manage these national risks, in particular as universities are already implementing parallel measures, including strengthened due diligence checks and record keeping, in response to the University Foreign Interference Taskforce Guidelines, new ARC conflict of interest policy, and other Government-led processes which we again support and engage with fully.

UWA holds several hundred research and teaching agreements with universities in countries which might be considered to give limited institutional autonomy to universities. The review of these agreements represents a significant administrative burden to the Department of Foreign Affairs and Trade. Providing a copy of these agreements in a form required under the legislation also represents an unreasonable cost of compliance to universities. This is particularly problematic given the huge impact to university finances caused by the COVID-19 global pandemic and proposed changes to university funding.

The Bill's definition of 'arrangements' is broad enough to capture things as mundane or anodyne as emails between executive assistants arranging a meeting between an Australian university officer

and one overseas. In such situations, the Bill would require universities to provide a copy of each email to DFAT before sending it.

Our estimation is that, if administrative correspondence in which 'arrangements' are made is required to be provided to the Department, in any given year UWA alone would need to provide six to seven thousand documents, each of which DFAT would need list on the Public Register.

Further, many arrangements between Australian university researchers and their counterparts abroad might not even be captured by the Bill, as the agreements are not made by the universities themselves. Bilateral and informal agreements between researchers are common, and are fundamental to the ability of Australian researchers to collaborate with the world's best scientists and scholars. These agreements, along with participation in foreign government talent programs and similar, will anyway be picked up by universities' strengthened registers of external engagement and adjunct appointments.

Recommendation 2: change the requirement for all non-core 'arrangements' to be reviewed by DFAT so that only legally-binding written agreements are covered.

Recommendation 3: recognising that the UFIT Guidelines and other Government-led initiatives are strengthening universities' management of foreign interference risks, either (a) limit the coverage of non-core arrangements to (i) Australian campuses overseas and (ii) foreign government related research or education offices on Australian campuses, or b) include in the bill exemptions for administrative correspondence, teaching agreements and research agreements.

Recommendation 4: provide additional financial resources for universities to meet the compliance requirements of the commencement of the legislation.

Governance, procedural fairness, transparency and the rule of law

In effect, the Bill provides that the Foreign Minister's delegate may expunge or alter legally binding agreements – new or historic – at the stroke of a pen with no procedural fairness. The decision maker does not need to provide reasons, nor nominate a stated instrument or articulation of Commonwealth policy upon which their decision is based. The expungement may occur at any point in the life of the agreement.

UWA considers that the opacity with which legally binding contracts can be expunged or altered unilaterally by a Commonwealth public servant, combined with the excision of the bill from Administrative Appeals Tribunal appeals and the *Administrative Decisions (Judicial Review) Act 1977*, is contrary to the rule of law. It expands the sovereign risk of doing business with Australia and the stated objectives of the legislation do not justify these extreme contraventions of the rights of Australian entities.

Recommendation 5: require decision makers to provide reasons for a decision that relate to an instrument or articulation of Australia's foreign policy.

Recommendation 6: provide a means of review or appeal to decisions made by the Minister's delegate, such as through established AAT or ADJR processes.

Recommendation 7: remove provisions that exempt decisions made under the Bill from the need to provide procedural fairness.

Recommendation 8: provide that declarations made under the Bill are disallowable instruments.

Termination of arrangements legally binding under foreign law

The Bill provides the Minister with the power to require a university to terminate or vary a contract that is legally binding under foreign law, in alignment with the relevant foreign law and/or the termination or variation provisions within the agreement. It is conceivable that such an act would have a financial cost on a university. For example, where an Australian university operating an overseas campus under an agreement with a national government had this arrangement terminated by the Minister, this would have severe impacts on the enrolled students, and severe financial impact on the Australian university, including the potential for legal claims to be made against it. No provision is made in the Bill for a university to seek compensation on just terms from the Minister in such circumstances where a property right has been extinguished but not acquired by the Commonwealth, or for the arrangement to continue while any appeal is considered.

Moreover, there are key differences in the Minister's powers between non-core arrangements that are legally binding under Australian law, and non-core arrangements that are legally binding under foreign law. There is a risk that foreign contracting parties will therefore insist that future agreements be conducted under foreign law. Given that the Bill creates additional sovereign risk around contracting with State-Territory entities, there is also an incentive for foreign contracting parties to add financial penalties to variations or terminations of such contracts under foreign law. The effect of this is to significantly increase the financial risk to Australian parties of contracting with foreign counterparts, which will have a chilling effect on such agreements.

Recommendation 9: include provisions enabling State/Territory entities to seek compensation on just terms in cases where the Minister's declaration has a financial impact.

Recommendation 10: allow the continuation of non-core arrangements which the Minister has decided to terminate, until any appeal is complete.

Recommendation 11: align the Minister's powers in relation to non-core arrangements that are legally binding under Australian law with those that apply to arrangements that are legally binding under foreign law.

Definition of institutional autonomy

There is no definition of 'institutional autonomy' in relation to foreign universities in the Bill. Rather, this has been pushed to the Rules. The definition of 'institutional autonomy' has a huge impact on the application of the Bill to Australian universities, and a faulty definition in the rules would completely transform the meaning of the Bill. This makes it impossible for Australian universities to make a meaningful assessment on what would be within scope until the Rules are promulgated.

The Bill's application to foreign universities that do not have institutional autonomy is ironic, given that its provisions diminish the autonomy of Australian universities.

Recommendation 12: include a definition of 'institutional autonomy' in the Bill.

Information on Public Register

The Bill provides for a Public Register of arrangements to be kept by the Minister, but gives broad power for the Minister to set the information on the Register in the Rules. Universities have no comfort that the information required to be included on the Public Register will not impede their ability to maintain confidentiality of uncommercial intellectual property related to yet to be published research findings. As well, personal information may be included on the register without sufficient context. Further, if too much information about university agreements is included on the Register, it may prejudice future negotiations with other entities.

To maintain transparency, the Register should include only information on arrangements for which a declaration has been made by the Minister, rather than information about every arrangement about which the Minister has been notified.

Recommendation 13: provide that only information about arrangements subject to a declaration are required to be on the Public Register.

Impact on second track diplomacy

By regulating universities' arrangements with foreign principals, the Commonwealth will harm the ability of academics to engage in second-track dialogues with individuals or groups connected with foreign governments, as these dialogues will in effect be 'DFAT sanctioned' as a result of their not being rejected by the Minister. This will harm Australia's broader diplomatic effectiveness in the world, and stifle open debate, academic freedom and freedom of expression amongst Australian academics and between Australian academics and their foreign counterparts. Moreover, it turns Australian foreign relations academics into de facto agents of the Commonwealth government, restricting their freedom to engage in legitimate academic research and debate on matters anathema to government of the day.

Recommendation 14: add a provision to the effect that nothing in the Bill will diminish academic freedom or freedom of speech of Australian academics.