25 September 2020

Committee Secretariat
Foreign Affairs, Defence and Trade Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Chair

Re: **Australia's Foreign Relations (State and Territory Arrangements) Bill 2020**

UNSW welcomes the opportunity to make a submission on *Australia's Foreign Relations (State and Territory Arrangements) Bill 2020* (the **Bill**). We are committed to ensuring that our interactions with overseas partners are in the national interest and recognise the pre-eminence of the Commonwealth in directing Australia's foreign affairs.

Key points:

- UNSW already works with many government agencies and within a regulatory framework to protect Australia's national interests from foreign interference.
- This legislation is retrospective in effect, which is inherently objectionable, given the potentially far-reaching impacts of the legislation on existing arrangements
- The Bill contains serious flaws in its application to universities, including that the legislation extends to every conceivable form of collaboration (whether legally binding or not and regardless of subject-matter) with a relevant foreign party
- The administrative burden of compliance on the sector and on Government will be unmanageable, with thousands of agreements to review emanating from UNSW alone.
- There is a lack of clarity around what constitutes 'foreign policy' or 'foreign relations', leaving universities with the impossible task of anticipating which agreements may or may not be overturned now and into the future.
- The Bill will expose Australian universities to high levels of legal risk, and the possibility of being forced to compensate foreign entities. Mandatory termination of existing agreements exposes universities to the prospect of huge financial and reputational harm. The uncertainty with respect to future agreements will at best create delay and at worst lead to the loss of valuable research and educational opportunities which are in the national interest.
- Despite the potential to result in significant financial and reputational harm for universities, this Bill lacks the basic requirements of procedural fairness.
- The Bill will undermine the negotiating position and international competitiveness of Australian universities to the national detriment.

Partnerships and the development of international agreements which advance the national interest through thought leadership, strong relationships and economic benefit are a key aspect of UNSW's strategy. During the last five years we have built up a wide range of partnerships with industry and academia across the world.

In doing so UNSW has gone to great lengths to comply with legislation and regulatory requirements. In addition, UNSW has taken extensive advice about specific agreements before entering into them where there are any doubts about national interest, government policy or foreign interference. This has included a regular dialogue with senior staff in the security agencies – and indeed no specific issue of concern about UNSW activities or individual staff members has been raised during the last five years.

UNSW remains committed to this agenda and to evolving to reflect changing geopolitical circumstances and government policy. We are not suggesting that our procedures are foolproof but to date they have served UNSW and the nation well. In raising concerns about the Bill we are seeking to ensure that the government establishes a workable and clear framework which is in the overall national interest.

The objectives of the Government have been well served in recent times through the Universities Foreign Interference Taskforce. It has seen highly collaborative engagement by the higher education sector with Government in the form of the Guidelines to Counter Foreign Interference in the Australian University Sector (**UFIT Guidelines**). The Guidelines address foreign interference risks within a self-regulatory framework and are the product of considerable time, care and thought by universities and security agencies.

Unfortunately, unlike the Guidelines, the Bill is poorly directed to achieving its goal, and is flawed in a number of respects. It will have the unintended effect of undermining the international competitiveness of Australia's universities and the partnerships which are so important to Australia's influence and economic wellbeing. It will also require resources to be diverted from teaching Australian students and preparing them for the workforce. These are especially problematic consequences at the present time given the impact of the pandemic on our nation and the need to give Australian students the best opportunities of securing employment.

The Bill will generate considerable commercial uncertainty and risk for universities and their overseas partners, including by calling into question existing arrangements implemented with a substantial investment of Australian resources. Given the Minister's proposed powers with regard to these existing arrangements, there is also the potential for universities to be exposed to substantial unplanned and unfunded liabilities, and for collateral damage to impacted third parties including Australian students and businesses.

Regarding future arrangements, the commercial uncertainty created by the Bill will act as a disincentive for foreign partners to collaborate with Australian universities in securing commercial opportunities with industry, in accessing international research funds and in the intensely competitive global higher education marketplace. Universities will be obliged to structure commercial negotiations and transactions around the possibility of a declaration prohibiting the (proposed) arrangement. The practical impact of this commercial risk cannot be overstated and will expose universities to an incomparable competitive disadvantage.

It is important to stress that the loss of opportunity to which universities are exposed will have direct impacts on Australian commercial partners, and on Australian consumers who would otherwise benefit from research outcomes and educational opportunities offered by the arrangement. At a minimum, the Minister should be bound to make a decision on a notified proposed arrangement within a specified minimum number of days after notification, and absence of declaration prohibiting the transaction within the required period should result in an (irreversible) right to proceed. This is a commonplace statutory arrangement.

All of these effects will exacerbate the acute difficulties faced by the higher education sector as a consequence of the COVID 19 pandemic.

The Bill requires significant amendment to address these problems. In particular, it is critical to narrow the scope of the legislation to maintain a stable environment for higher education providers engaging in international collaborative activity in the fields of research, teaching and ordinary commercial activities permitted under university enabling legislation. These collaborations and the global relationships which they foster deliver significant benefits to the Australian economy and community and are critical to the continued existence of a globally competitive higher education system in Australia.

We summarise our specific recommendations here, and provide further detail below:

Specific Recommendations:

i) Universities should not be subject to the legislation.

If universities are not exempted from the legislation:

ii) Universities should be subject to a disclosure regime only, akin to that existing under the Foreign Influence Transparency Scheme Act. This would ensure that the Government has sufficient visibility over transactions which are relevant to the national interest, and Universities can continue to engage in ordinary and beneficial activities which assist them to fund and carry out vital research and teaching

If the current proposed regime of both disclosure and exposure to declarations affecting existing and proposed arrangements is to prevail:

iii) the Minister should significantly narrow the definition of 'arrangements' falling within this framework, including through the use of financial thresholds.

iv) the legislation should not operate retrospectively; arrangements existing as at the commencement date should not be affected.

v) the criteria for Ministerial decision-making under the Act should be clarified, particularly in circumstances where there is no right of review in respect of decisions. The Bill enables the Minister to make decisions by reference to foreign policy that is yet to be made public, and indeed that is yet to be formed and approved by the Commonwealth.

vi) the legislation should include defined time frames, and finality, for ministerial decisions relating to universities' proposed arrangements. This is critical to provide the certainty and stability required for commercial transactions, and to avoid the loss of valuable opportunities for the benefit of the Australian economy.

vii) the legislation should not exclude the application of the principles of procedural fairness and should allow administrative review. Reasons should also be provided where an arrangement is invalidated. The objectives of the legislation can be achieved without excluding the rules of procedural fairness and there are no urgency or other grounds which justify the exclusion of those rules.

Existing legislation and practices can manage foreign engagement risk

UNSW recognises the dynamic and complex international context in which universities operate and the need to work closely with the Australian Government to ensure that we act in the national interest.

In 2019 UNSW demonstrated its commitment to active engagement with Government in relation to significant overseas collaborations, when it consulted widely with Government and Government agencies before concluding a major research joint venture in China. UNSW consulted with the Department of Foreign Affairs and Trade, the Department of Home Affairs, the Department of Education and ASIO. UNSW welcomed the opportunity to seek advice from the Commonwealth in a thoroughly transparent manner to ensure that the research benefits of this significant joint venture will be delivered securely, consistently with the protection of people, intellectual property and other assets, data and other key interests.

UNSW also conducts rigorous assessments as required by the Australian Government's Defence Export Controls framework.

Last year, UNSW was pleased to be able to participate in the development of the UFIT Guidelines, with representatives on three of the four working groups. We are working actively to ensure that the Guidelines are reflected in our processes and policies, and in our approach to engagement with overseas partners.

Existing regimes such as the *Defence Trade Controls Act 2012*, Australia's autonomous sanctions regime and the UFIT Guidelines were developed by the Commonwealth in consultation with universities. Universities are also subject to the Foreign Influence Transparency Scheme Act and the amendments to the Criminal Code and other legislation effected by the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018*.

With a comprehensive regulatory framework to address foreign engagement risks already in place, the imposition of additional and far-reaching legislative controls on the sector is disproportionate and unnecessary. The inclusion of universities as State/Territory entities is anomalous, with no other comparable organisations, such as state-owned corporations, singled out for inclusion in section 7 of the legislation. The lack of critical detail as to the criteria for institutional autonomy (in relation to foreign universities) strongly suggests that the decision to include universities within the scope of the Bill requires further careful consideration informed by consultation with the sector.

Unmanageable practical impacts

There has been no opportunity for consultation with the university sector. The legislation is drafted in the broadest possible terms, such that the practical impact on universities will be enormous and disproportionate to the objects of the legislation.

In its current form, the Bill applies to any 'written arrangement, agreement, contract, understanding or undertaking' (irrespective of value, nature or purpose) between an Australian public university and a foreign government or a foreign entity associated with a foreign government, and, most significantly, between an Australian public university and a foreign university that does not satisfy the (as yet undeclared) criteria for institutional autonomy.

The reach of the legislation extends to every conceivable form of agreement, (including even minor variations of agreements) and seemingly also to unilateral undertakings. In failing to set monetary thresholds or other specific attributes for reportable arrangements, the Bill may be contrasted with other regulatory regimes such as that created by the *Foreign Acquisitions and Takeovers Act*. As a result, the Bill will apply to vast numbers of inconsequential arrangements which do not engage with any of the Commonwealth's relevant policy concerns.

The Bill applies to arrangements irrespective of whether these arrangements are legally binding. This means for example that the legislation will apply to all of the non-binding and high-level MOUs, which are widely used within the global higher education sector to build trust and goodwill, and express broad and aspirational intentions to collaborate. These instruments typically have no legal force.

The broad definitions of both 'arrangement' and 'foreign entities' mean that arrangements which are part of the everyday operations of Australian universities such as Study Abroad agreements, articulation agreements and collaborative research agreements will require disclosure, and will be subject to the uncertainties created by the Bill. The legislation may also extend to commonplace, low risk and highly desirable activities, such as arrangements associated with organising academic conferences, and arrangements between discipline colleagues to co-author material for publication in peer-reviewed journals, or to co-supervise a higher degree research candidate. Communications evidencing the forming of arrangements in regard to such matters will need to be identified and declared, including in regard to matters that do not engage any of the policy concerns underlying the Bill.

Administrative burden

As a result of the breadth of the proposed legislation, both universities and the Government will be subject to expensive and time-consuming administrative burdens.

The Bill currently states that within six months universities are required to inform the Minister of existing arrangements that fall within its scope. As indicated above, the Bill should not be given retrospective effect, by applying it to existing arrangements.

By way of example, on a conservative basis UNSW estimates that it currently has more than 4000 MOUs and agreements (such as articulation agreements and international research agreements) in force with overseas partners. Allowing for the breadth of 'arrangements' as defined in the Bill, we estimate that this figure could go well beyond 10,000.

Universities will be obliged to commit significant resources to identifying and notifying all relevant arrangements and developing systems to ensure that any variations to these arrangements are also captured and notified. Universities will also need to ensure internal systems enable future arrangements to be captured and notified to government within 14 days of the arrangement being made. A less burdensome arrangement, in the absence of a ministerial override, would be for universities to provide an annual report to the Minister of international agreements entered into.

These processes will require the development of new systems and tools to ensure compliance, requiring dedicated resources at a time when universities are already dealing with the financial and operating implications of COVID-19. The result will be more money having to be spent on compliance with fewer resources available for classroom teaching and vital research, including the research that is driving public health responses to COVID 19.

It will also be a massive undertaking for DFAT to assess the arrangements reported by all of Australia's public universities. Given the broad drafting of the legislation, there will be hundreds of thousands of documents submitted to DFAT for review. Establishing and maintaining the Public Register will also be a significant administrative and logistical undertaking for the Department.

Lack of clarity around what constitutes 'Foreign Policy'

The Minister will assess arrangements by reference to Australia's 'Foreign Policy'. However, the concept in the Act is extremely broad and nebulous. It includes policy which is not written or publicly available as well as policy that has not yet been formed, decided or approved by any particular Commonwealth body.

The Explanatory Memorandum (para 188) notes that the Minister's discretion (to make declarations) should operate broadly and flexibly, recognising that foreign policy is dynamic. It states: "The Minister

is not required to identify a particular written policy, such as the Foreign Policy White Paper, prior ministerial or departmental statements, or other formal documents, in assessing whether or not an arrangement is consistent with or is inconsistent with Australia's foreign policy".

It will be very difficult to determine whether an arrangement is consistent with Australia's Foreign Policy given such a fluid definition. The legislation effectively asks universities to comply with policy positions that may not be known or knowable. UNSW would like to conduct its affairs in ways that are consistent with 'foreign policy' but will be unable to do so with any certainty given the lack of clarity about the term. This is a poor outcome because it undermines the ability of universities to take preventative action and to ensure upfront compliance.

Ministerial powers are unacceptably broad and will create uncertainty, disruption, and competitive disadvantage

The Minister's powers include the ability to require that arrangements be varied. This is conceptually flawed in that one party to an arrangement will not have the power unilaterally to vary it. Forcing a variation on the foreign counterparty will effectively mean a repudiation of the arrangement, exposing the Australian party to the risk of legal claims and liabilities and to the risk of downstream arrangements being disrupted. In addition to financial exposure for universities, depending on the nature of the affected arrangement, the interests of students and of Australian industry partners will also be put at risk.

Compounding the uncertainty of the legislative scheme, the Minister has the power to change their mind about an existing arrangement. They may declare an arrangement to be invalid even where they have previously decided not to make a declaration in respect of the same arrangement, that is, irrespective of whether the Minister was aware of the arrangement prior to its execution, and did not prohibit entry into the arrangement.

Under the proposed legislation, there is a 30-day time limit for decisions relating to core foreign arrangements, but this time limit does not apply to notifications made by universities. The current Bill does not outline the process for Ministerial consideration of arrangements, or the timeframe around Ministerial decisions, which will add further uncertainty to existing and potential arrangements.

This regulatory uncertainty will make negotiation and engagement with foreign counterparts singularly complex. In a highly competitive marketplace, Australian universities will be placed at a significant competitive disadvantage in that they will be obliged to disclose the impacts of the legislation, and, where possible, to negotiate agreements which reflect the possibility of Ministerial decisions under the legislation. There is good reason to fear that the legislation will have a chilling effect on Australian universities' engagement with global partners whether governmental, industry or academic.

The contracting flexibility required as a result of the legislation will come at a price, and Australian universities can expect to be significantly disadvantaged in negotiating arrangements. Risk management associated with offshore arrangements will also be correspondingly more complex. Opportunities to respond to international tenders and similar processes are likely to diminish given the necessity to negotiate contractual mechanisms reflecting the potential impact of the legislation.

The fact that there are no rights of appeal or review, and that the legislation specifically excludes any right to procedural fairness, is also problematic, as universities will have no recourse or remedies in respect of Ministerial decisions, despite their exposure to very substantial damages. The potential availability of compensation for acquisition of property otherwise than on just terms offers little, if any, comfort, as it is unclear how this will be relevant in the ordinary course of events.

The risks involved will act as a major disincentive to academics, other staff and universities as a whole from engaging in overseas activities at a time when the benefits economically and in other ways are badly needed.

UNSW looks forward to working with the Commonwealth to improve this legislation and achieve our shared goals of supporting the national interest.

Yours sincerely

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