Queensland University of Technology

Submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee

regarding

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

25 September 2020

Dear Senators,

The Queensland University of Technology (QUT) is grateful for the opportunity to comment on these two Bills, the first chance that universities have been afforded to address the mooted provisions and their likely effects. In light of the potential for significant negative impact upon universities, and therefore Australia's research effort more generally, it is imperative that the Senate is apprised of the concerns of the university sector. While we understand the Department of Education, Skills and Employment was consulted prior to the introduction of the legislation, it is important to note that universities themselves were not consulted, and have until now had no input into its provisions.

Top line

QUT strongly supports Universities Australia's position on these Bills. Furthermore, and for the reasons set out below, QUT holds that the inclusion of public universities in this legislation is unnecessary, onerous, counter-productive, damaging, redundant and disproportionate. The application of the Bills' measures to universities will inflict real and immediate harm to the national interest for no perceived benefit. QUT recommends that **the legislation be amended to remove universities from its application**.

Unnecessary

It is not clear what problem the Government is trying to solve by including university international agreements in a Commonwealth oversight function relating to foreign policy. University agreements are not geopolitical in nature, but go to collaborative arrangements around specific activities within teaching and rese5arch. They much more closely resemble business agreements, which the Government has excluded from the remit of the proposed regime.

Onerous

It is not clear that the Government is aware of the scale of the bureaucratic task it has set for itself and for universities. University international arrangements that may be captured by this legislation include research agreements, student exchange agreements (required for QUT students to study in another university), international cooperation agreements, memoranda of understanding (MoUs), joint PhD 'cotutelle' agreements, articulation agreements (allowing for mutual recognition of QUT curriculum and the partner university curriculum), joint agreement for coursework double degrees, subsidiary agreements (such as non-disclosure agreements), academic exchange and visiting scholar agreements, and other sundry arrangements with international partners.

These arrangements are absolutely essential to QUT's core business, as they provide the appropriate legal and commercial protection for our Australian students, researchers and other staff who are active internationally. They support the legal and normal business of institutions, and indeed allow them to act internationally. For example, the large number of study abroad agreements are required for travel documents, visas and the orderly movement of individuals internationally. Joint PhD agreements similarly are necessary for the university partners to recognise the award being offered by both sides and to allow for the students advanced studies to be recognised. Research MoUs exist to provide legal grounds for exchange, protection of intellectual property and the legal rights of our researchers. Research arrangements with foreign research institutes and universities are core support documents that support the advancement of global science – and Australia's access to its benefits.

Extrapolating from our own register, it is plausible that this legislation will compel the assessment of something in the order of 100,000 separate university international agreements nationally. At QUT alone we have an estimated 1,100 extant agreements (i.e. in force or in train), and we are by no means the most globally connected institution in the country. These international agreements are open and transparent, produced through a formal approval process and are recorded on accessible data bases held centrally. While not all these agreements will have to be notified, under the terms of the legislation, they will all have to be assessed. Each university must first assess its own raft of hundreds, if not thousands, of international agreements, determine those that are notifiable under the legislation, and carefully record their justification for each decision.

The Department of Foreign Affairs and Trade will then have to make its own assessment of the many tens of thousands of notified agreements, and presumably conduct audits of the remainder, to assure the accuracy of universities' notification assessments and capture any non-notified agreements that the Department determines should have been included. The quantum of work involved in processing the current extant agreements nationally is daunting: it is plausible the system will never clear the backlog and achieve equilibrium, to enable timely review of the future steady flow of emerging international agreements.

The fact that universities are classified as 'non-core' entities – therefore requiring only notification of international agreements rather than authorisation – is of course preferable to being classified as 'core' entities, but that distinction has no bearing on the work required

to identify, assess and register the agreements. Nor does it remove the uncertainty associated with the provision. Particularly absent an obvious beneficial purpose, the imposition of this significant body of work upon both universities and Government is not only wasteful, but will divert university energies at a moment of significant stress upon the sector, with simultaneous increases in workload and decreases in resourcing.

Counter-productive

Collectively, the circa hundred thousand university international agreements already in place are an outstanding soft diplomacy resource built up over decades with astonishing goodwill, trust and confidence between Australia's higher education and research sector with overseas institutions, funding agencies, research agencies and functional agencies; such as space and astronomy agencies, centres for public health and energy departments, to name a few. If the Parliament legislates that the agreements that enable this beneficial collaboration can be cancelled or amended – unilaterally, by fiat and retrospectively – the immediate effect will be to diminish Australia's standing in the eyes of the global higher education and research community, at an unquantifiable but definite cost to Australia's reputation as an open society that values educational opportunity, scientific engagement and academic freedom.

As these Bills manifest the Government's insistence that it has no particular foreign country in mind (or even any particular risk profile), the effect of this legislation will be to compromise Australia's science, research and educational relations with the entire world. It will at a stroke undermine an incredibly successful element of Australian soft diplomacy that has been carefully nurtured over decades by successive governments in partnership with universities and the wider research sector.

Damaging

The legislation provides that a foreign university that does not enjoy institutional autonomy is a foreign entity for these purposes, and that Australian universities must notify the Government of any international agreement they hold with such a university. The inference is that the condition of institutional autonomy is a form of innocence not requiring monitoring by the Commonwealth, while compromised institutional autonomy constitutes grounds for concern, sufficient to signify elevated risk.

The criteria for establishing whether or not a foreign university lacks institutional autonomy are not included in the legislation, as they are to be determined by the Minister. However, any reasonable definition of institutional autonomy would have to include being free from arbitrary political interference by the national government through the forced cancellation or amendment of a university's agreements with foreign counterparts. This kind of denial of institutional autonomy is precisely the effect of the Bills under consideration. It is difficult to understand why the Government is intent on placing all Australian public universities into a state of compromised institutional autonomy that by its own reasoning constituted a risk factor for engagement. Yet that is the effect of the Bills.

This is a matter of grave concern to the sector, as it will immediately elevate the risks of conducting partnerships of whatever form with Australian universities. We cannot expect our global research partners to be sanguine about the prospect of previously solid agreements suddenly becoming subject to political interference, liable to be cancelled for reason outside the scope of the agreements themselves.

The notion that our national government is reaching into the very fabric of what collaboration is between places of higher learning is anathema to the very principles of academic freedom. Indeed, these freedoms are enshrined in the German constitution, and the notion that a partner has to seek governmental approval and is subject to political interference may preclude arrangements being established with that country alone.

Should the Parliament pass these Bills in this form, immediately upon royal assent universities will on good faith be obliged to notify all relevant international partners of this new material aspect of business risk. Some partners may wish to retreat from arrangements, or wind them down; some may even be obliged by their own anti-foreign interference obligations to cancel agreements with us. We simply do not know. The imposition of a new business risk *in medias res* may expose Australian universities to legal liability. The legislation holds that universities that are adversely affected in material terms will need to seek recourse in the courts, suing the Commonwealth for compensation.

Rendering Australian universities liable to political interference will hamper all of our international relationships, not only those with foreign universities that are deemed by the Minister to be lacking in institutional autonomy. The new regime of political interference will render Australian universities less attractive targets for international engagement across all activities and among all kinds of partners. Global science and research is an intensely competitive enterprise, and although the best in the world are happy to work with us they have plenty of alternatives. This risk is as just as real in other arenas, such as student agreements and academic exchanges.

This new risk of arbitrary political interference – which can be wielded at any point in the future, for any reason – cannot fail to weigh heavily against Australian universities when international counterparts are considering who best to partner with. Compensation for diminished prosects will be difficult to obtain, with the material effect of a loss of partnering attractiveness much harder to quantify than the loss of an existing arrangement, leaving universities to bear the burden of a diminished appetite across global higher education and research for working with Australia.

Redundant

It is important to note that all university international agreements are already subject to our obligations under the *Defence Trade Controls Act 2012*, the *Foreign Influence Transparency Scheme Act 2018* and the *Guidelines to counter foreign interference in the Australian university sector* developed by the Government's University Foreign Interference Taskforce (UFIT).

The recently established UFIT is working effectively, with a marked degree of openness and cooperation between all principals. Between them, UFIT and the instruments named above regulate universities' actual activities, focusing where functional vulnerabilities could arise, and they include comprehensive disclosure and transparency obligations. What we actually do in collaboration with our international partners is what matters in terms of foreign engagement, influence and – the parchment is not where the risk lies. Additional federal government oversight (with veto and amendment rights) over black letter agreements does nothing to mitigate real risk, since the actual activities conducted within those agreement are well regulated already.

In fact, there is a genuine prospect that the effect of imposing multiple sets of compliance obligations from different parts of Government will elevate underlying risk rather than alleviate it, by increasing complexity and imposing upon responsible officers a duplication of effort that will hamper their ability to deal with substance of the matter – that is, the activities we actually undertake – rather than the poorly harmonised regulatory frameworks of two siloed arms of the same Government. This outcome would be counterproductive to the agreed shared policy objective of minimising and mitigating actual underlying risk.

Disproportionate

The provisions of the *Australia's Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020*, placing every aspect of the operation of the *Australia's Foreign Relations (State and Territory Arrangements) Bill 2020* beyond the remit of the *Administrative Decisions (Judicial Review) Act 1977*, are unreasonable and excessive. The exclusion of strictly political decisions from judicial review is the stated rationale for this approach, but it is plain that much of the operation of the regime will be administrative in nature, like all government processes. For example, the determination of a Departmental officer that a university international agreement is either notifiable or not under the regime is obviously not a political decision – indeed, if it were, it would be most inappropriate for a member of the Australian Public Service to be making it. Contrary to the assertions of the explanatory memorandum, it is not remotely "appropriate to *fully* exclude procedural fairness" (EM §1177, emphasis added), since most actions undertaken in the operation of the regime fall outside the realm of political decision-making. All elements of the implementation of this regime other than the political decision-making stage are clearly of a perfectly routine administrative nature, and must be subject to the same judicial review as other usual functions of government.

The Department's advice to universities that recourse will be available through the Federal Court and the High Court is unconvincing. The legislation specifies this recourse only regarding matters of compensation. Contrary to the encouragement of officials, we doubt the Government would welcome a challenge on whether the Commonwealth's foreign relations power in the Constitution extends to the normal conduct of university business. For more mundane purposes this assurance of judicial oversight is quite possibly incorrect – it is an open question whether the Federal Court would even hear a complaint regarding a clerical or administrative matter.

Recommendations

1. For the foregoing reasons, **QUT recommends that the legislation be amended to remove universities from its application**.

Failing that,

2. In the event the Parliament elects not to remove universities from the scope of the legislation, **QUT recommends that the Bills be amended to restrict their coverage of universities to a notification regime,** mitigating the significant risk to Australian research by removing the Minister's powers to cancel and amend university agreements by fiat.

Additionally,

3. Regardless of the above, **QUT recommends that the Consequential Amendments Bill be amended so that only political decisions are exempted** from oversight under the *Administrative Decisions (Judicial Review) Act 1977.*