

# SUBMISSION TO THE FOREIGN AFFAIRS, DEFENCE AND TRADE LEGISLATION COMMITTEE: AUSTRALIA'S FOREIGN RELATIONS (STATE AND TERRITORY ARRANGEMENTS) BILL 2020

25 SEPTEMBER 2020

Universities Australia would like the Committee to consider the following issues.

- Serious concerns regarding workability of the Bill for universities, but also for the Department of Foreign Affairs and Trade, given that more than 10,000 agreements and arrangements will be in scope and require review.
- The potential the Bill has to act as a disincentive to international partners and funders planning to engage with Australian researchers and/or universities.
- There are already a range of laws that apply to universities in relation to national security and foreign investment, as well as the guidelines developed in partnership with government via the University Foreign Interference Taskforce (UFIT). It is unclear why further legislation is required.
- The additional transparency required by government could be resolved using existing data collection processes.
- The Bill lacks clarity on a number of significant issues with several important operational aspects to be defined in the rules, which are yet to be drafted.

#### **Recommendations:**

- The Australian Government should reconsider the inclusion of universities in the Bill.
- If the Bill includes universities the Australian Government should include in it a list of exclusions to narrow the scope of arrangements to focus only on agreements of interest.
- The Australian Government should consider existing processes for collecting information on international partnerships that are already in place, and, with some adjustment, could supply the transparency that seems to be the policy intent of the Bill.

# 1 INTRODUCTION

Universities Australia welcomes the opportunity to make a submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee's inquiry into the Australia's Foreign (State and Territory Arrangements) Bill 2020, which was introduced into Parliament on 3 September 2020.

Universities Australia is the peak body for the university sector, representing Australia's 39 comprehensive universities. Universities Australia's members educate more than 1.4 million students and conduct research and development on behalf of the nation.

Universities Australia strongly advocates that the Australian Government consider a coordinated approach to identifying and managing the risk of foreign interference in Australian universities. We are concerned the Bill is not proportionate to risk and would impose an onerous administrative impost on universities and on the Department of Foreign Affairs and Trade. Universities Australia is not aware of similar legislation in other nations.

## 2 IMPACT OF THE BILL ON AUSTRALIA'S UNIVERSITIES

Identified impacts of the Bill are as follows.

1. The Bill has the potential to significantly reduce Australia's capacity for global engagement.
2. As drafted, the Bill will create a significant regulatory burden for both universities and government.
3. The Bill provides a disproportionate response to a problem. The policy intent of increased transparency could be served through other, much simpler means.
4. There is a lack of coordinated response across government, with the Bill appearing to duplicate existing government processes.
5. There is an urgent need for further consultation, particularly in relation to the development of the rules.

### 2.1 DISPROPORTIONATE RESPONSE

Section 9(1) of the Bill defines an arrangement as 'any written arrangement, agreement, contract, understanding or undertaking...' As written, this will potentially capture more than ten thousand agreements of various types that universities have established through concerted efforts to build and strengthen global engagement. Seeking to have universities notify government of all such arrangements, regardless of their nature, fails to acknowledge the highly globalised nature of research and the wide range of university activities and collaborations. The Bill represents significant overreach, imposing an onerous solution to an issue which could be dealt with more simply.

Any information the government may require to achieve greater oversight of partnerships between Australian universities and foreign entities is routinely collected by universities, and could be collated without the need for legislation.

The government has not demonstrated why the existing laws in relation to national security, foreign investment or the work being carried out by the University Foreign Interference Taskforce (UFIT) are not adequately protecting Australia's national interests.

The Bill will require universities to notify the Foreign Affairs Minister of more than ten thousand existing arrangements. These include agreements with international funding agencies such as the European Research Council, the National Institutes of Health and the US Defence Advanced Research Projects Agency.

The fact that the Minister has the ability to make a declaration prohibiting or amending an arrangement at any point after the arrangement has finalised creates significant uncertainty. Combined with the lack of clarity regarding what constitutes a change in Australia’s foreign policy posture, this creates an environment which may deter international partners from making collaborative arrangements or funding commitments. There is also no protection to ensure the ongoing viability of agreements or collaborations should there be future changes or shifts in foreign policy.

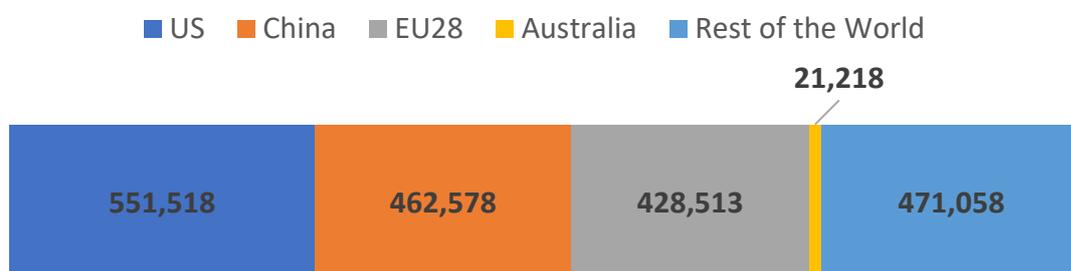
Universities are also concerned that the Bill provides no recourse to appeal decisions or obtain further information if the Minister makes a declaration that amends or prohibits an arrangement. Section 58 of the Bill provides that the Minister is not required to observe procedural fairness in exercising a power or performing a function under this Act. This gives the Minister powers to make decisions in a manner which are not subject to merit reviews including review by the Administrative Appeals Tribunal.

## 2.2 CAPACITY FOR GLOBAL ENGAGEMENT

The Bill will impose constraints on the sector’s ability to engage with international partners. There are many ways universities, academics and students interact with overseas institutions and colleagues. If every interaction is subject to disallowance or amendment, this is highly likely to limit the ability of Australia’s researchers and students to engage effectively in the ways that are essential for both researchers’ and students’ development.

The importance of international partners in supporting Australia’s research endeavour cannot be understated. Research is a global enterprise underpinned by extensive overseas collaboration. As outlined in Figure 1, Australia is a minor player in terms of R&D funding, accounting for 1.1 per cent of the world’s R&D expenditure of \$US1.934 trillion. Given this, Australian researchers need to collaborate as extensively and strategically as they can to maximise the returns on Australia’s investments in R&D.

**Figure 1: Global Gross Expenditure on R&D in 2018 (\$US million).<sup>1</sup>**



The Bill does not extend to private corporations and entities. This may lead to a shying away from collaboration with public universities and research institutions. This has obvious implications for

<sup>1</sup> Main Science and Technology Indicators database. Accessed 2 September 2020. Prices are in constant 2015 prices and PPP. The EU28 is the 28 countries that belong to the European Union.

the accessibility and availability of research outputs and outcomes—a ‘privatisation’ of research is not an optimal outcome for the public good, either in Australia or globally.

If it is not possible to have universities excluded from the Bill, a list of specific exclusions should be drawn up to ensure Australia’s global research and engagement capacity is not compromised.

## 2.3 LACK OF COORDINATED APPROACH ACROSS GOVERNMENT

This Bill will provide the Australian Government with broad powers that will allow the Foreign Affairs Minister to veto or amend international arrangements with international partners. The Department of Foreign Affairs and Trade (DFAT) has described the Bill as having no intent to drill down to what it describes as ‘business as usual activities’, but analysis of the legislation suggests that universities will need to inform the Minister of any arrangement with any foreign government research funders regardless of the country of origin, nature of the project and track record of collaborative relationship.

As responsible, autonomous institutions, universities are working in partnership with the National Counter Foreign Interference Coordinator (Department of Home Affairs) and a range of government agencies, as part of the University Foreign Interference Taskforce (UFIT). UFIT was formed in August 2019 by universities and government expressly to tackle growing issues facing government and universities in foreign interference, collaboration and cyber intrusions.

Universities Australia has consistently advocated for maintaining an appropriate balance between national security and research outcomes. Principles addressing this balance are contained in UFIT’s *Guidelines to Counter Foreign Interference in the Australian University Sector*. These guidelines were developed and agreed between a range of government agencies and the university sector. The draft legislation provides no role for the University Foreign Interference Taskforce (UFIT) and appears divorced from the UFIT guidelines and the work the sector is already undertaking with government to counter foreign interference. Universities are also already working with government in compliance with the *Defence Trade Controls Act 2012* (Department of Defence), and Australia’s Sanctions regimes (Department of Foreign Affairs and Trade) neither of which appears to be taken into consideration in the Bill.

As a consequence of their involvement in UFIT, Australia’s universities have been working carefully to develop their own internal mechanisms to underpin their approaches to countering foreign interference and to strengthen due diligence and review of international partnerships. This includes:

- changes to oversight and decision-making structures and responsibilities;
- reviewing and updating of a broad range of policies, procedures and mechanisms to identify and strengthen safeguards and update reporting practices;
- increasing capacity and expertise in relevant areas;
- strengthening due diligence mechanisms; and
- development of disclosure registers to include sensitive research.

Universities have been working in partnership with government to strengthen their capabilities to face challenges across a range of fronts, including foreign interference. Duplication of regimes and increased regulatory burden does not contribute to enhancing capabilities.

## 2.4 REGULATORY BURDEN

As currently drafted, the Bill will compel universities to provide details on their entire cohort of international arrangements. Potentially, thousands of university agreements may fall within the legislation's scope, including:

- collaborative research projects;
- research funding agreements from large international funding bodies (e.g. European Research Council, the US National Institutes of Health and the US Defence Advanced Research Projects Agency);
- research collaborations;
- consortia and joint venture arrangements (e.g. EMBL Australia, International Ocean Discovery Program, space and Antarctic research programs, and many others);
- qualifications recognition;
- student and staff exchanges;
- cultural activities;
- transnational education;
- scholarship programs; and
- student mobility programs.

The figures in the shaded box provide an illustration of the extent of Australian universities' global engagement across the sector and is most likely a conservative estimate. Universities and other sector sub-group submissions will provide specific examples of the extent and nature of universities' international arrangements.

Implementation of the Bill will require all universities to inform the Foreign Affairs Minister of their existing arrangements with foreign entities that meet the criteria outlined in the Bill within six months of the legislation being brought into effect. Furthermore, as stated in Section 34(1) if an entity proposes to enter an arrangement with a foreign entity, they must notify the Minister about the *proposal* and again when actually entering the agreement – a two-step process that will essentially double the regulatory burden.

This means that the Foreign Affairs Minister will need to be notified about every funding application for a research project that involves an international partner, regardless of whether the application is successful or proceeds. By way of example, in 2019, 81 per cent of successful Australian Research Council (ARC) funding applications included an international collaboration component. This amounted to 945 projects, all of which would come with the requirement to notify the Minister not only of the agreement when it commences, but the intent to even submit a project application. Given that the success rate for ARC funding applications is between 15 and 25 per cent for the various schemes, this number represents just a small fraction of the number of proposals that would be required to be notified to the Minister. This number will be amplified significantly when including the number of applications to all other Australian and international funding agencies, including the National Health and Medical Research Council, European Research Council, the US National Institutes of Health etc.

There are numerous other academic activities that also involve international partners and agreements that are much more informal in nature – student visits to overseas laboratories, attendance at conferences or workshops, field work, among many others. As written, the Bill will require universities to notify the Minister of all such arrangements and agreements.

The cumulative administrative and regulatory burden this will impose upon universities, as well as the Department of Foreign Affairs and Trade, will be very significant. It is difficult to see how this is proportionate to any risk.

### **The scale of Australian universities' global engagement**

Universities Australia's Global Links data collection is a biennial survey documenting the range and extent of universities' global connections. The collection provides an illustration of the extent of Australia's global connections and the vast number of international agreements across the sector.

The data is largely restricted to institution-to-institution links, so the number will only increase when taking into account agreements with foreign funding bodies and other organisations.

In 2018, Australian universities had approximately **10,392 links** with foreign institutions.

There were approximately **17,595 different arrangements** – including research collaborations, student exchange, staff exchange, short-term mobility programs and study abroad programs.

## **2.5 NEED FOR FURTHER CONSULTATION**

Apart from the inherent issues with the Bill, its workability and the potential to deter the collaboration that is the lifeblood of Australian research, there is a range of outstanding questions. These apply to the Bill, but also to the rules that will accompany it. They include:

- What criteria will be used to define 'institutional autonomy' for a foreign university?
- What is the process by which an application for consideration by the Foreign Affairs Minister is made?
- What information will the Minister require to assist the decision-making process?
- What constitutes an arrangement, given they are described as written, and could this include emails, text messages or other forms of written communication?
- What constitutes a subsidiary arrangement?
- What information will be made available in the public register?
- What classifies as an exempt arrangement and how will exemptions be managed?

Further detailed consultation is required with the sector on the core issues with the Bill, as well as the many questions inherent in it.

## **3 CONCLUSION**

The primary reason given for the inclusion of universities in the Bill is that there is currently no government visibility of the range of agreements with foreign entities that are in place across the sector. This could be addressed in a number of ways without the need for new laws. We would be happy to work with the Australian Government to find a workable solution.