THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: PuLC/RHvk:1972162

17 September 2020

Mr Michael Tidball
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: myles.gillard@lawcouncil.asn.au

Dear Mr Tidball,

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

Thank you for your memorandum dated 8 September 2020 seeking input in respect of the inquiry into the Australia's Foreign Relations (State and Territory Arrangements) Bill 2020 ("Foreign Relations Bill") and Australia's Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020 ("Consequential Amendments Bill").

The Law Society's Public Law Committee has contributed to this submission. For the reasons set out below, on balance the Law Society does not support the passage of the Bills as currently drafted.

Necessity

The Bills are likely to be constitutionally valid as falling within the external affairs power, as it involves relations with other countries.[1] However, the Law Society queries whether the scheme proposed by the Bills is necessary given the operation of the Foreign Influence Transparency Scheme. If an arrangement does not involve foreign interference under the existing relevant scheme, we query the rationale and utility for requiring that such an arrangement be declared under the proposed scheme.

In our view, the same policy issue appears again in relation to the scope of the obligation to report and obtain approval or a declaration under the scheme proposed by the Bills.

Uncertainty

In our view, there is significant uncertainty about the scope of the Bills as a result of legislative drafting choices.

[1] See Stephen J in the *Seas and Submerged Lands Case* (1975) 135 CLR 337 in respect of "international intercourse between states… or of its nationals"). If the Commonwealth relied on geographical externality that would seem more problematic given statements by various justices in *Pape v FCT* (2009) 238 CLR 1. However, as the arrangements targeted involved other countries or their nationals this would appear likely to be a sufficient nexus.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney
ACN 000 000 699 ABN 98 696 304 966
lawsociety.com.au
T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au
Law Council OF AUSTRALIA
CONSTITUENT BODY

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." 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. Given the critical nature of this definition, the Law Society'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 legislative instruments, and any subsequent amendments, are not subject to the same level of parliamentary or public scrutiny.

Such uncertainty is problematic from a compliance perspective. For example, the objective of the Foreign Relations Bill is to protect Australia's foreign relations by ensuring that any arrangement between a State/Territory entity and a foreign entity is, among other things, not inconsistent with Australia's foreign policy (clause 5(1)). "Foreign policy" is defined in clause 5(2) as follows:

> (2) ***Australia's foreign policy*** includes 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.

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.

Procedural fairness and judicial review

Lastly, it is unclear why the Minister should not be required to observe any requirements of procedural fairness in exercising a power or performing a function under the scheme, particularly when the Consequential Amendments Bill also amends the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) to list the Foreign Relations Bill as a law to which the ADJR Act does not apply. In our view, the lack of procedural safeguards, given the proposed scope of the Bills, weakens the case for passing these Bills.

Thank you for the opportunity to provide comments. Any questions may be directed to Vicky Kuek, Principal Policy Lawyer on victoria.kuek@lawsociety.com.au or (02) 9926 0354.

Yours sincerely,

Richard Harvey
President