

22 September 2020

Senator the Honourable James McGrath
Chair
Senate Standing Committees on Education and Employment

Dear Senator McGrath

Responses to Questions on Notice

I write to respond to the questions I took on notice during my evidence to the Committee. These responses have been developed consistent with the approach taken in the Submission that was lodged in the name of the Melbourne Centre for the Study of Higher Education. I have drawn on the expertise of colleagues at the Centre to ensure the responses are as complete as possible. I have consulted Professor William Locke, Mr Ian Marshman, Professor Vin Massaro and Mr Mark Warburton.

Question: Senator KIM CARR: It brings back the question about whether or not any commitments in this environment—where you don't know who the minister will be post December, let alone future elections—will have an impact on the measures contained in this bill. In fact, would it be the case that this bill probably involves the highest level of Commonwealth interventions into the affairs of university in the history of the Commonwealth?

Response: Legislation has often provided for Ministerial discretion, but it has tended to be accompanied by the conditions in which it would be exercised, and it has been limited. In the case of the Bill currently being considered by the Parliament, Ministerial discretion will be applied to significant funding allocations as well as introducing an unprecedented involvement by the Minister and the Department in the academic judgements of universities, including serious consequences financially and reputationally if they are found to have erred.

The Education Legislation Amendment (Provider Integrity and Other Measures) Bill 2017 amended the Higher Education Support Act 2003 (HESA) to include Section 16-60, giving the Minister the power to impose conditions on higher education providers for a variety of matters, and subsection (4) of the section states that there are no limits on the conditions the Minister may impose on the approval of a higher education provider.

The Bill currently being considered by the Parliament suggests that the inclusion of universities in the 2017 legislation was deliberate and continues the trend of increasing Federal Government power (exercised either by the Minister or the Secretary of the Education Department) to regulate the affairs of universities, including new provisions that would allow government to intervene in their academic domain.

Question: Senator KIM CARR: In fact, could it not be the case that under these provisions ministers, in the future, will be able to determine the salaries of vice-chancellors?

Response: The appointment conditions of Vice-Chancellors are matters for Councils and they are established under Acts of Parliament, so other than the Minister tying funding, especially discretionary funding, to the size of the salary of the VC and senior staff it would be difficult.

Nevertheless, Section 16-60 could be used to apply a condition dealing with a Vice-Chancellor's remuneration or other expenditure of a university. Subclause (1) provides that:

The Minister may impose conditions on a body corporate's approval as a higher education provider. Such conditions need not be imposed at the time notice of approval is given to the provider.

While the legislation states that specific matters may be included in such conditions, subclause (4) makes it clear that the power is not limited to those conditions. It therefore appears that it could be used to deal with a broad range of matters.

In addition, Section 36-70 would appear to enable the Minister to intervene in such matters. This form of intervention would tend to be used by a minister who wished to impose conditions on all higher education providers or a class of higher education provider. The clause reads as follows.

36-70 Providers to comply with the Commonwealth Grant Scheme Guidelines

- (1) The Commonwealth Grant Scheme Guidelines may specify conditions that higher education providers must comply with for the purposes of this Division.
- (2) A higher education provider must comply with all such conditions in respect of any year for which the provider receives a grant under this Part.
- (3) However, the provider need not comply with such a condition during a particular year if the condition comes into force on or after the day on which the provider entered into a funding agreement under section 30-25 in respect of a period that includes that year.

Importantly the Commonwealth Grant Scheme (CGS) Guidelines are subject to disallowance by the Parliament. Nonetheless, the provision gives very broad scope for the Minister to specify conditions with which universities and other higher education providers must comply. Based on my understanding, it does not appear there is anything that would prevent the CGS Guidelines from dealing with Vice-Chancellor remuneration or university expenditure.

The CGS Guideline provisions contrast with the Minister's power to enter into a CGS funding agreement with a university. While the Minister has a broad power to impose conditions in CGS funding agreements, Section 30-25(2B) precludes the Minister including conditions relating to industrial relations matters. Depending on the interpretation of 'industrial relations matters', this would appear to prevent a funding agreement dealing with the Vice-Chancellor's remuneration, but not with university expenditure. A CGS funding agreement could be used to apply a condition relating to a university's expenditure on a particular university.

Gwilym Croucher
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