

27 November 2020

Critical Infrastructure Security Division  
National Resilience and Security Group  
Department of Home Affairs

### **Group of Eight (Go8) Response: Exposure Draft Security Legislation Amendment (Critical Infrastructure) Bill 2020**

The Go8 is pleased to respond to the Exposure Draft consultation on the Security Legislation Amendment (Critical Infrastructure) Bill 2020.

In September, the Go8 made a number of recommendations in its submission to the Consultation on Protecting Critical Infrastructure and Systems of National Significance. The Go8 stated then that the proposed reforms, as suggested for the higher education and research sector, were too broad for useful application.

The Go8 continues to maintain all nine recommendations from the September submission<sup>1</sup>. This is based on the fact that the draft Exposure Bill has still not fundamentally advanced consideration, or discussion on ramifications and sector impact. Nor has it dealt with an essential definition of actually what critical education assets may specifically be?

The Go8 reiterates its firm commitment to ensuring that our most important infrastructure assets are sufficiently and appropriately safeguarded, with regulation being commensurate to the threat and the need to maintain the sector's productivity.

The Go8 recognises, that Australia having sound security, where risks are proactively and responsibly managed, is most necessary to ensuring we can maintain a robust economic and societal future for the benefit of every Australian

The pandemic has demonstrated that Australia will lean heavily for economic and social recovery on those sectors adaptable and agile in COVID-19 response; be it in directly combating the disease, buffering the shocks of its impact, or transforming industries so Australia can be a more sovereign nation.

The Go8 supports that more sovereign approach. But, unwieldy and overly burdensome regulation, applied with a broad brush and having no regard for the specific needs of different sectors, has the potential to greatly compromise such agility and our very prosperity – let alone the effective implementation of the legislation. We all want a secure nation but security must surely be a beneficial tool not a word that is an end in itself.

This Bill as it relates to the university sector cannot deliver positive outcomes from a deficient baseline.

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<sup>1</sup> A copy of the Go8's September 2020 submission to the Consultation on Protecting Critical Infrastructure and Systems of National Significance (including earlier discussion of definition and threshold) is at **Attachment A**.

The Go8 is concerned that if sector-specific rules cannot be developed or finalised until after the Bill is introduced and passed, the momentum and effort to produce fit for purpose regulation will be further compromised.

The Department of Home Affairs has indicated to the Go8 that the legislation will not be activated for the higher education and research sector until there is agreement regarding what parts of the sector the legislation will apply to, or need to be 'turned on' for.

**The Go8 seeks assurance that this is indeed the case.** As you would be aware the Go8 has had a most productive relationship with the Department of Home Affairs and the nation's Security Services regarding all aspects of security as it pertains to Go8 universities.

Additional parameters and guidance are also essential as it relates to the Minister's rule-making power.

In summary, the Go8's assessment of the Bill is that:

- The proposed definition of a *critical education asset* is an extensive over-reach of the intent and purview of the proposed reforms and is required to be tighter and clearer if it is to be consistent with assurances made to the Go8 by the Department of Home Affairs. The regulatory impost as the Bill stands would be significant, if, as read, universities must consider each and every part of their institution and capability – be it, to give just a few examples, a sports oval, parking lot, theatre, library, shop or dedicated research lab – as part of a critical asset. Should this assumption be correct, the Go8 proposes an alternative more tailored definition, one that differentiates between asset categories or infrastructure, and their degree of importance to the sector's functioning.
  - A critical education asset is a *physical* asset limited to specific sub-categories of assets [*to be inserted*] or named assets agreed with the higher education and research sector, that have been assessed as critical to the social or economic wellbeing of the nation or Australia's ability to conduct national defence and ensure national security. The definition would constrain the asset to one *owned and operated by the university*; ignoring assets owned by others.

If this assumption is incorrect, the greater emphasis in the legislation should be on the areas of a university that are to be *directly impacted by the legislation rather than a vague and ill-defined critical education asset*.

- There is almost no appreciation in the Bill of the complexity and intricate links of the higher education and research sector, and that any sector impact would flow-on to Government and other sectors. This must be remedied, including through reconsideration of the definition of a *critical education asset*.
- There is a significant risk of duplication in regulatory oversight and implementation across sectors. This would occur because of the intricate links between higher education and research, and other sectors. Notwithstanding the Bill's rather more specific definition of critical assets for other sectors, the respective obligations of the water and sewerage, transport and energy sectors which clearly have infrastructure on university campuses must be properly defined to work (with regards to this Bill) with those of the higher education and research sector.
- The proposal that the Department of Home Affairs will regulate the higher education and research sector creates, at minimum, yet another regulatory master for universities. The Go8 is currently subject to

regulation by at least four major Government portfolios<sup>2</sup>. The Go8 proposes far more alignment in regulatory requirements.

- The Government's intention to render assistance to protect assets during a cyber-attack must be proportionate to the higher education and research sector level of internal expertise, and recognise the sector's joint activity to address cyber security concerns.
- Further clarity is needed on systems of national importance, and their possible relevance to the higher education and research sector, given the heightened regulatory implications of these systems.
- Some exceptions to how, when and in what circumstances the Positive Security Obligation may apply to the higher education and research sector must be incorporated in advance of the Bill becoming law.

The Go8's previous recommendations from our September submission are included below, with additions in bold:

### Recommendations

1. That the extension of the Security of Critical Infrastructure Act 2018 to the higher education sector be nuanced and targeted, informed by a comprehensive understanding of university operations and relationships, and the potential ramifications of regulatory approaches.
  - a. **In order to achieve this, far more time is needed than the 14 days' timeframe for consultation on draft rules proposed in the Bill (30AL). The Go8 proposes a minimum of 60 days consultation for new rules and 30 days for amended rules.**
2. That the parameters be more tightly defined - after the Department of Home Affairs reaches an understanding of universities - rather than as currently suggested by the Department, as for utilities such as gas, water, and electricity, and our ports, all of which are quite different in structure.
  - a. **As a principle, the definition – or at minimum, the interpretation – of critical education asset should be framed by exclusion rather than inclusion of assets. That is, the definition should specifically name assets or groups of assets to be included rather than assigning the label to the entire university. Distinction should be possible for instance between buildings and open spaces, research laboratories and university pubs, and indeed it should be possible to assign levels of criticality to critical assets on the basis of immediate versus longer term impact<sup>3</sup>.**
  - b. **That systems of national importance are more tightly defined in the Bill, with examples provided to stakeholders of what such systems can be – if and where already identified and agreed with sectors.**
3. That a pilot focusing on specific purposes or infrastructure to begin, such as cyber, may assist to better establish the parameters, ramifications and approach to be extended more broadly across other purposes or infrastructure.
  - a. **Such a pilot should focus on specific assets or groups of assets that may be considered for inclusion in the definition as per Go8's Recommendation 2a.**

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<sup>2</sup> These are the Department of Education, Skills and Employment, Department of Foreign Affairs, Attorney-General's Department, and the Department of Defence.

<sup>3</sup> For example one could consider degrees of criticality in regards to the facilities on which the development of a vital vaccine candidate relied (with shorter term immediate impacts) versus the computational modelling equipment supporting long term Bureau of Meteorology forecasts (and response to future weather events).

4. That all efforts be taken to minimise overlap and duplication with other regulatory measures currently in place to secure university operations.
5. That a concerted effort be taken by Government to avoid over-reach and the distinct potential for unintended consequences in developing its approach.
  - a. **There must be stronger parameters around the Ministerial discretion to declare ‘systems of national importance’ and to prescribe or declare additional assets for sectors – to avoid the possibility of misapplication of the legislation.**
  - b. **The relevance of the Positive Security Obligation and each of its three aspects to areas of the higher and research sector needs to be more specifically defined; and the Positive Security Obligation required only for those specific assets or groups of assets under a revised definition of critical education asset**
6. That there be an emphasis on minimising the regulatory burden on universities (already extensive) and that the methodology and results of the Government’s own inquiries into the regulatory cost be made available to the sector as soon as possible.
7. That Government be open and transparent regarding the potential consequences for the sector, including the extent and nature of its ‘assistance’ in situations of cyber-attack.
  - a. **There should be an independent review of the legislation’s operation to ensure it is fit-for-purpose, effective, and has no unintended negative consequences; in addition to the proposed processes to review the operation, effectiveness and implications of sector-specific rules.**
8. That Government seriously consider that a positive way to align with existing regulatory requirements as well as ensuring limited cost and impost would be to use an existing mechanism to oversee the implementation of future agreed measures. Further discussion is needed to determine which existing body or mechanism may be best suited.
9. For reforms under the Security of Critical Infrastructure Act 2018 to be effective, they must be both consistent in intent across sectors, and tailored to each sector’s operational and risk profile; while also making provisions for the interconnectedness of sectors.

### **Additional discussion**

#### *Wider ramifications from the treatment of higher education and research*

The Go8 emphasises that the notion of a university simply focused on teaching, learning and producing graduates is long out-dated, with the higher education sector engaging extensively, and in complex long-term and embedded partnerships beyond the campus to local, State, Territory, Federal, and International Governments, industry, academia, and community.

This means that the inclusion of the entire university as a critical education asset subjects this vast ecosystem of activity – without differentiation between its parts – to regulation under this Bill. If the Positive Security Obligation were to apply to an entire university as proposed, and across all universities in the sector, **the regulatory impost would be enormous if universities are required to consider each and every area of their institution and capability as part of a critical asset. The Go8 alone has assets of \$40.4 billion in worth in 2019<sup>4</sup>. Further clarification is required.**

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<sup>4</sup> Department of Education, Skills and Employment 2020, 2019 Financial Report for Higher Education Providers

Go8 assets range from the Peter Doherty Institute for Infection and Immunology, recognised most recently for its work on COVID-19 – a joint venture between University of Melbourne and the Royal Melbourne Hospital – to the National Computational Infrastructure (NCI) at the Australian National University which partners with Bureau of Meteorology, Geoscience Australia, CSIRO among others, the University of Western Australia Octagon Theatre which hosts live performances, and the largest farm campus (Dookie at University of Melbourne) in the southern hemisphere.

Assets include equipment and infrastructure as varied as commercial polymer fibre draw towers, a Schmidt Cassegrain Telescope, heavy ion accelerators, immersive visualisation facilities, plant glasshouses, animal houses, magnets, groundwater bores, flux towers, and modified mouse strains – to give a minuscule idea of such assets.

Also, where the university interacts with other sectors included under the Bill, and indeed hosts or houses – on its campuses – assets owned or operated by other sectors (such as by the financial services and markets sector, the telecommunications sector, or the health care and medical sector), the entire university being subject to the Bill and the Positive Security Obligation has the potential to duplicate obligations on those sectors.

- A rudimentary view of a ‘critical banking asset’, one that is ‘critical to the carrying on of banking business by an authorised deposit-taking institution’, is that it would seem for instance to apply to the Australian National University’s Commonwealth Bank ANU.
- Such duplication and overlap may well compromise the implementation of the legislation’s intent; for example, if each party assumed that the other party was responsible for a particular part of the university under the Positive Security Obligation and neither addressed it.

Equally, the university’s obligations under the Bill and the ensuing need to scrutinise such assets and activities for hazards entailing material risk, runs the risk of delaying or compromising the smooth establishment and function of vital partnerships, which in turn would adversely affect the university’s productivity and ability to contribute to the nation’s prosperity. For example, if a university is required to implement the Positive Security Obligation on an Australian Government entity being established on its campus, this may delay or complicate the establishment of such an entity.

#### *Complexity of reforms and commensurate effort*

The extent of the reforms across 11 different sectors warrants far more deliberation and effort to ensure the reforms match the risks presented across sectors, and that the resulting legislation appropriately reflects the concerns faced by each. Much more time is needed to achieve a credible and useable definition of a critical education asset.

The Go8 advocates that consultation regarding the rules be extended beyond that proposed in the draft legislation:

- This needs to extend well beyond the 14 days’ timeframe for consultation proposed in the Bill (30AL).
- For the initial set of draft rules published by the Minister, a minimum of 60 days should be allowed.
- For amendments to existing rules, a minimum of 30 days consultation should occur.

The Go8 also advocates that the extent or breadth of a hazard, and its material risk to assets, cannot be disregarded when developing a tailored and commensurate set of reforms. It is clear from the draft Bill, the Positive Security Obligation, and discussion surrounding national security threats, that cyber incidents are of

specific concern. Yet, the identification of critical education assets does not provide for distinction between assets which could be cyber-compromised, and those which cannot or are less likely to be.

#### *Intention for Government to render assistance*

The Government's intention to render assistance to protect assets during a cyber attack must only be applied in a fine-tuned and proportionate way that has regard to: the need to maintain university autonomy - especially as Australian universities are rightly being asked to increasingly value this in their counterparts; the degree of expertise that already resides in the sector and could be internally applied and disseminated<sup>5</sup>; and the gains made from assistance already being provided by Government to bolster the strategic and operational cyber-readiness of the sector<sup>6</sup>.

#### *Refining the definition of critical education asset*

The definition of the critical education asset as 'a university that is owned or operated by an entity that is registered in the Australian university category of the National Register of Higher Education Providers'<sup>7</sup> is patently excessive.

By the Department's own description in the explanatory document, this would subject the entire university to the Positive Security Obligation, with the only avenue for exclusion to be by individual sieving out of university areas to which the Positive Security Obligation need or need not apply. **The Go8 appreciates the Government's stated intention to work with it to consider how, if necessary, the Positive Security Obligation would apply to various parts of a university.**

- Clearer assurance is needed within the legislation that there will be no obligation on the sector under this legislation until those parts have been defined and agreed. Section 30AB of the exposure draft should be tightened to make this intention more obvious, if in fact that section is intended to provide that reassurance.

Indeed, an entire university arguably cannot be subject to the Positive Security Obligation given the definition of critical infrastructure in the Australian Government's Critical Infrastructure Resilience Strategy which refers to '*physical facilities, supply chains, information technologies, and communication networks*'.

The Go8 contends that only a small subset of a university need be captured under the definition of critical education asset. Such components should be carefully identified by their direct relevance under the Bill – including their likelihood of being subject to expected hazards and attracting specific material risks from those hazards.

The Go8 understands from the Department of Home Affairs that the legislation will not 'be turned on' for the sector until such time as parts of the university – or specific assets have been identified for coverage under the

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<sup>5</sup> The Australian National University's identification of a highly sophisticated data breach and its response to and learnings from that incident provides an example of the level of preparedness within the sector.

<sup>6</sup> <https://ministers.dese.gov.au/tehan/enhancing-cyber-security-australias-universities>

<sup>7</sup> Section 5, p.12 of the Exposure Draft; Paragraph 151 of the Explanatory Document to the Exposure Draft.

Positive Security Obligation. Until sufficient legislative assurance and clarity is provided to reassure the sector on this point, the Go8 proposes that the approach to refining the definition could be as follows:

- The definition of a critical education asset could draw on some of the more refined definitions applied to other sectors by the Bill, for example, for Defence, which specifically discusses platforms, material, technology, network, and a service – all of which may also be relevant to the higher education and research sector. Critical education assets could also potentially be a subset of higher education infrastructure and research infrastructure discussed in previous reviews for Government<sup>8</sup>. Potential considerations are further discussed at *Appendix 1*. A basis for a refined definition is suggested below:
  - A critical education asset is a physical asset limited to specific sub-categories of assets [to be inserted] or named assets agreed with the higher education and research sector, that have been assessed as critical to the social or economic wellbeing of the nation or Australia’s ability to conduct national defence and ensure national security. The definition would constrain the asset to one owned and operated by the university<sup>9</sup>, placing those assets owned by others out of range.

Clarity should also be provided as to what the obligation is for a university, or entity, registered in the Australian university category of the National Register of Higher Education Providers as it relates to assets on the university that are owned and operated by other sectors covered by the Bill.

#### *Strengthened decision-making framework in avoidance of over-reach and unintended consequences*

Greater detail is needed in the decision-making framework used to implement the legislation. Currently there are several gaps or elements that need to be tightened if there is to be confidence in implementation outcomes. These include but are not limited to:

- **Detail regarding the basis on which the Minister may declare ‘systems of national importance’ and prescribe or declare additional assets for sectors, as well as the right of review and level of transparency around such decisions.**
  - It is insufficient that a system of national significance which attracts further requirements under the legislation is simply declared by the Minister ‘with regard to the nature and extent of interdependencies with other critical infrastructure assets’.
  - It would be helpful to have examples of such systems already declared by the Minister for already regulated sectors, if these exist.
  - Such systems may exist in the higher education and research sector, including those national systems owned and operated with Government and the private sector across the higher education and research sector. These serve other industries or sectors such as the resources or health sectors.
- **Far greater guidance and detail in the framework regarding the basis for the Minister’s rule- making power.** For example:

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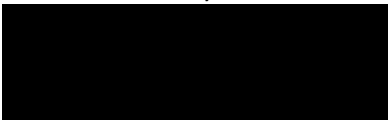
<sup>8</sup> Notable reviews include the Higher Education Infrastructure Working Group Final Report 2015; the Review of Research Infrastructure 2016; and numerous Research Infrastructure Roadmaps (2004, 2006, 2008, 2011, 2016).

<sup>9</sup> University or ‘an entity that is registered in the Australian university category of the National Register of Higher Education Providers’

- Greater clarity regarding the conditions that need to be met for an asset to be deemed a system of national significance.
- What factors will be taken into consideration as the basis to rules prescribing that a specified critical education asset is not a critical infrastructure asset.
- **The relevance of the Positive Security Obligation and each of its three aspects to areas of the higher education and research sector needs to be more specifically set out; in addition to the Positive Security Obligation being required only for those specific assets or groups of assets under a revised definition of critical education asset.**
  - Tighter discussion of elements of the Positive Security Obligation is required. For example, it would seem inappropriate to simply suggest that review and updating of risk management programs required under the Positive Security Obligation occur on ‘a regular basis’ without qualifying this.
- **How the obligations under this Bill complement, or have the potential to overlap or duplicate, other university requirements should be clearly described for the sector.**

This includes whether the Department of Home Affairs is as proposed the most appropriate regulator of this legislation for the higher education and research sector, versus other regulators such as the Department of Education, Skills and Employment. The basis for the Department of Home Affairs being nominated as the regulator for the higher education and research sector should be clearly explained.

Yours sincerely



**VICKI THOMSON**  
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## Appendix 1

### Refining the Definition of critical education asset

Currently the definition of critical education asset under the Security Legislation Amendment (Critical Infrastructure) Bill 2020 is as follows

- critical education asset means a university that is owned or operated by an entity that is registered in the Australian university category of the National Register of Higher Education Providers.

This definition should be refined, including by drawing on existing expertise and discussion of higher education and research infrastructure in a range of reviews<sup>10</sup> for the Australian Government over the last two decades.

For example, consideration could be given to which infrastructure components of the following<sup>11</sup> are within scope of the bill, and which precise elements of these components:

- Land
- Buildings, including non-residential and residential
- Fixed infrastructure (e.g. university physical assets providing electricity, water, gas, as well as facilities such as roads and footpaths)
- IT equipment and services
- Scientific equipment
- Physical assets associated with Technical and administrative human capital supporting research
- Research support facilities in their entirety
- Other physical assets, such as library holdings, motor vehicles, non-physical operational assets e.g. artworks

Further consideration could be given, consistent to the categorisation in the Higher Education Infrastructure Review Working Group's Final Report 2015, to whether or not the infrastructure serves 'core university functions' – which may be more applicable under the legislation – or 'commercial and trading functions' covering dedicated buildings or spaces housing operations run on a commercial basis.

- Core university functions—buildings and space for core university teaching and learning, research, administrative and support activities
- Commercial/trading operations—dedicated buildings and spaces housing operations that can be run on a commercial basis, including:
  - student (and possibly staff) residential accommodation
  - food, beverage and hospitality operations
  - venues for professional and other short course training
  - leased retail and other services space
  - parking structures
  - space leased to external research organisations and other academic-related entities.

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<sup>10</sup> Notable reviews include the Higher Education Infrastructure Working Group Final Report 2015; the Review of Research Infrastructure 2016; and numerous Research Infrastructure Roadmaps (2004, 2006, 2008, 2011, 2016).

<sup>11</sup> List taken from the Higher Education Infrastructure Working Group Final Report 2015



As a first step, the Department of Home Affairs may wish to consider working with the Go8 and other universities to gain a further appreciation of categories of assets or infrastructure, and to consider ruling categories in or out of scope, as a preamble to reaching a clearer more restrained definition of critical education asset.