

# Strengthening legal protections of academic freedom and campus freedom of speech

*Submission to the Stakeholder consultation on the  
proposed free speech amendments to the Higher  
Education Support Act 2003 (HESA)*

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## 1. Overview

As recommended by the French review of freedom of speech in Australian higher education providers, the government plans to amend the *Higher Education Support Act 2003 (HESA)* and the *Tertiary Education Quality and Standards Agency Act 2011 (TEQSA Act)* to define academic freedom and freedom of speech. There would be consequential amendments to the *Higher Education Standards Framework (Threshold Standards) 2015* (the draft amendments are at Appendix A).

Existing related rules are based on the idea of 'free intellectual inquiry'. This does not necessarily protect freedom of speech outside intellectual discussion and misses some implications of the idea of academic freedom.

The new definition would clarify what is required for higher education provider registration by TEQSA and to satisfy section 19-115 of *HESA*, which currently requires institutions receiving public research funding to have a policy on free intellectual inquiry.

The broad intent of the amendments is sound. It is prudent to provide a stronger legal basis for academic freedom, as other countries already do. Freedom of speech is also a desirable value. However, the proposed definition has the following difficulties:

- The definition mixes academic freedom and freedom of speech provisions, making it difficult to use in contexts where only one of these is relevant;
- Academic freedom is embedded in the norms and practices of academic research and scholarship, which legitimately limit what academics can say in their professional capacity, and this should not be inadvertently undermined;
- Except in relation to comment by academics on non-academic matters the policy applies to all types of higher education provider, when a wider range of distinctions between providers should be considered;
- The definition provides no general freedom of speech protection for students – only in criticising their higher education provider and in relation to their subjects of study and research.

Some proposed amendments to remedy these problems are outlined in section 4.

Aside from definitional concerns, broader policy on academic freedom and freedom of speech could be improved:

- Table A and B providers, which are eligible for public research funding, are regulated twice in essentially the same way, through a TEQSA registration requirement and a *HESA* requirement to have a policy on academic freedom. Possibly publicly-funded institutions could or should have additional requirements. Section 19-115 should be restricted to these additional requirements;
- Non-academic staff are not covered, but could have a general freedom of speech protection added through a section 19-115 policy;

- Except in amending the objects of *HESA*, which can affect the way a court would interpret other *HESA* provisions, the new definition provides no protection against government decisions that would affect academic freedom or freedom of speech;
- *HESA* should be amended to constrain government discretion in line with the academic freedom and freedom of speech definitions, while still allowing the government to set priorities for the funding of teaching and research.
- The *TEQSA Act* should be amended so that academic freedom is not just defined. There should be a requirement that academic freedom is a condition of higher education provider registration.

## 2. Legal implications of the definitions

The proposed amendments to *HESA* and the *TEQSA Act* are intended to support the Model Code for the Protection of Freedom of Speech and Academic Freedom in Australian Higher Education Providers, which was recommended by the French review of freedom of speech in Australian higher education providers. The French Model Code is at Appendix B.

As pointed out in the French review, legislative amendments are not essential to support the Model Code. For higher education providers that adopt the code its legal authority comes from their internal decision-making processes. They can make any policy that is not legally prohibited. Within the constraints of other speech-related law, such as defamation and vilification, higher education providers can have broad-ranging academic freedom and freedom of speech policies.

The most important way in which the proposed changes would support the intent of the Model Code is to amend the *Higher Education Standards Framework (Threshold Standards) 2015*. This is a change to delegated legislation rather than the *TEQSA Act* itself. The Threshold Standards, as they are commonly called, are made by the minister on advice from the Higher Education Standards Panel, which has already indicated that it supports the change. Either house of parliament can disallow changes to the Threshold Standards.

To be registered as a higher education provider under the *TEQSA Act*, the Threshold Standards currently require an organisation with or seeking registration to have a higher education purpose that 'includes a commitment to and support for free intellectual inquiry in its academic endeavours.' With the proposed definition, that purpose would expand beyond academic endeavours to include freedom of speech.

Neither the *TEQSA Act* nor the Threshold Standards define 'free intellectual inquiry'. TEQSA has significant discretion to decide what it means. Under the proposed changes, there would be a legislated definition of academic freedom (which includes freedom of speech – see Appendix A and section 3.1 below), and so TEQSA would have less discretion as to what the term means.

TEQSA would not, as the amendment currently stands, need to take the Model Code as a guide to what the statutory definitions mean in practice. The code as drafted in the French report has no legal authority outside the institutions that adopt it. It is possible, however, that the minister may direct TEQSA to use something like the code in interpreting the statutory definitions. Under section 136 of the *TEQSA Act* the minister may give TEQSA general directions in the performance of its functions. These directions could also be disallowed by either house of parliament.

Under the Threshold Standards, if the amendment is passed TEQSA must ensure that the 'governing body takes steps to develop and maintain an institutional environment in which freedom of speech and academic freedom is upheld and protected'. Currently, the governing body has to 'take steps to develop and

maintain an institutional environment in which freedom of intellectual inquiry is upheld and protected.’

This widened obligation on the governing body has greater legal implications than a pro forma academic freedom and freedom of speech purpose. It would require TEQSA to check that such an environment exists. The government proposes adding freedom of expression questions to the Student Experience Survey, which is an annual survey of higher education students that investigates their satisfaction with teaching and other aspects of university life. Results from the freedom of expression question could be one way in which TEQSA assesses whether universities are compliant with the Threshold Standards. The results could be added to the Risk Assessment Framework, which is a range of indicators used by TEQSA for the routine monitoring of all higher education providers. However, for reasons discussed in section 3.3 below it may be difficult to judge whether student views as expressed in the Student Experience Survey are reasonable.

Under TEQSA’s regulatory model it would not act as a formal arbiter on the various academic freedom and freedom of speech disputes that arise from time-to-time. It is not a complaints body. But where TEQSA sees problems of a more persistent or systemic nature it could attach conditions to registration. Breaching a condition could lead to a fine or in a worst-case scenario deregistration as a higher education provider. The maximum fine of about \$25,000 means that for a large institution such a penalty is more an embarrassment than a financial influence on behaviour (section 113 of the *TEQSA Act*). TEQSA’s general legal requirement that it act proportionately means that deregistration is unlikely for a provider that it is otherwise performing well.

For the section 19-115 of *HESA* requirement to have a policy on academic freedom and freedom of speech the amendments would clarify what the policy would need to contain to be compliant. The requirement to have a policy does not give the minister power to intervene in particular cases. Rather, the policy would give affected parties grounds for complaints to the relevant university authorities. Section 19-115 would not give the minister power to penalise the university for unsatisfactory decisions based on the policy.

If a university did not have an academic freedom and freedom of speech policy, it could be penalised by a reduction of its grant(s) under Division 54 of *HESA*. The legislation does not specify a maximum penalty, although it does describe various considerations that the minister can take into account and the processes involved, including giving the university an opportunity to respond to any decision.

## 3. Commentary on issues

### 3.1 Differences between academic freedom and freedom of speech

The amendments look at academic freedom through the prism of freedom of speech. There are practical similarities between them, as part of academic freedom is the right of academics to make public statements. However, academic freedom is not a general right of free expression. Rather, it is part of an inter-related set of ideas about the role of universities in preserving, improving and increasing knowledge.

Universities perform this role more effectively if they can get some distance from current orthodoxy and shorter-term economic and other practical needs. This has become harder to do as 40 per cent of young people go to university, as scientific and other innovations drawing on academic research have become more important to the economy, and as universities seek large amounts of public money. But it helps that universities have substantial operational autonomy. Academic freedom takes that autonomy down to the individual academic staff member, who can criticise current knowledge and develop new knowledge.

However, academic freedom works within the knowledge purposes of universities. To perform their knowledge function academics have rules about what counts as evidence and a valid argument. These rules differ by discipline and are contested within academia, but the idea that there should be rules is not controversial. These rules help determine what information, ideas and analysis are worth preserving, and what new information, ideas and analysis might be an advance on the status quo.

Academics in their academic role therefore do not have a general expressive right to say whatever they want, as they would if academic freedom was just an aspect of freedom of speech. The rules of academia are enforced through the processes of academic appointments and promotions, peer review of research proposals and work for publication, and the indicators of academic esteem, such as publications in prestigious journals, citations, and awards. Academics who consistently fall short of their discipline's standards can justifiably be dismissed.

Academic freedom is therefore narrower than freedom of speech, since it works within the constraints of the academic profession and its rules about what counts as evidence and a valid argument. But provided they follow those rules, academics as academics have stronger speech support and safeguards than they do as general citizens. Academics are paid and protected by their employer to conduct and disseminate research and scholarship. In their field, academics have intellectual authority they do not as general citizens. A general right of freedom of speech allows people to express their views, regardless of whether those views are supported by evidence or argument, but does not confer any employer support, credibility or protection.

While the draft amendment separately mentions the activities of academics as academics, academics as employees and academics as citizens, it should clarify that academic activity has legitimate constraints – academia is a profession, and

as with any profession its members must follow rules. The Model Code alludes to this by referring to the 'reasonable and proportionate regulation necessary to the discharge of the university's teaching and research activities'. However, as noted in section 2 the Model Code does not itself have any legal authority outside the institutions that adopt it. While TEQSA would interpret 'academic freedom' in the context of other requirements in the Threshold Standards, as they apply to teaching and research, it would be better to avoid ambiguity and clarify that academic freedom involves duties as well as rights.

Some clarifying legislative words on the academic nature of academic freedom are suggested below in section 4.1. As academics still have a general freedom of speech right under the current and proposed amendments, clearer rules on academic freedom won't affect what academics can say in public, but it will avoid tension with other regulations and practices concerning teaching, scholarship and research.

The wording should also avoid the implication that students have any general freedom of speech in their academic activities. The mutual task of students and academics in a subject is for the students to acquire an understanding of relevant facts and methodologies. That imposes constraints on them to stay on topic and work within the discipline's accepted standards. As with academic freedom, the Model Code's 'reasonable and proportionate regulation necessary to the discharge of the university's teaching and research activities' provision takes account of this issue. But there remains the issue of the Model Code not, on current announced policy, having any legal authority over TEQSA's actions. It would be better to clarify the issue in the legal definitions.

### 3.2 Should different types of higher education provider be regulated the same way?

The draft academic freedom definition implies that universities and other higher education providers can sometimes be treated differently. Universities are explicitly mentioned once, so that universities would need a policy allowing academics to criticise their own institution, but not other higher education providers (although they would be free to have such a policy).

One reason for this distinction is that it draws on the idea that academics are part of the university community, and not just employees, and so should freely participate in debates about the university's direction. Many non-university higher education providers have conventional corporate structures, in which shareholders and their representatives are the only controlling members. The small size of most non-university providers may also be relevant, as staff often work at close quarters with the people they criticise. When university academics denounce their institution's leaders they are usually talking about people they rarely meet face-to-face.

Other distinctions are worth considering. An academic freedom relating to research is not obviously essential to the non-university providers that are not legally required to conduct research and often have little or no research output. Should non-university providers be required by TEQSA rules to have policies on activities they do not undertake? But as members of the academic profession,

academics at non-university providers would expect some discretion over how they teach their courses and to be able to use their scholarship in debates inside and outside their institutions. More limited academic freedom policies would be relevant in these cases.

Another potential distinction is between specialised/niche providers, especially those that are faith-based, and more comprehensive higher education providers. In specialised and faith-based providers, students and academics come together because they share goals that go beyond the pursuit of knowledge. It would seem odd to require these providers to continue employing academics who come to oppose a central rationale for the higher education provider existing in the first place.

If higher education providers are further distinguished, an issue to consider as the Provider Category Standards (the provisions of the Threshold Standards that determine how higher education providers are classified) are reformed is how university colleges are classified – in their activities they are starting to look like universities, but the existing university college and some potential future university colleges have religious affiliations.

Section 4.2 below has a proposed amendment to the *TEQSA Act* that would allow TEQSA to distinguish between types of higher education provider in deciding how to apply academic freedom and freedom of speech rules.

A distinction envisaged in the Government's legal framework on academic freedom and freedom of speech (although not the proposed definition itself) is between those providers that are publicly funded for research and those that are not. Section 19-115 of *HESA*, which applies to Table A and Table B providers, would require a policy on academic freedom and freedom of speech. This distinction could be linked to a view that publicly-funded research should be communicated beyond the academy. Protecting the freedom of academics to disseminate their knowledge is part of ensuring that the public gets value for their money.

If section 19-115 policy just mirrors rules that all HEPs must comply with anyway as a condition of TEQSA registration it is unnecessary bureaucracy and exposes Table A and B institutions to being punished twice for essentially the same fault. Section 19-115 should be re-drafted to only cover additional requirements. Suggested new words are in section 4.2 below.

### 3.3 Student freedom of speech

As a prompt for the French review was concern about student freedom of speech, it is surprising that the amendment does not prevent universities from imposing general constraints on freedom of speech. The protections are limited to criticising their higher education provider and expressing views in relation to their subjects of study and research.

In theory, a university could restrict the right of students to express their views on other topics without breaching any legal requirements. Universities are unlikely to want to do this in any systematic way, but the French review noted that the broad language of various codes of conduct and other university rules



could limit freedom of expression. The revised definition in section 4.1 below is designed to rectify this omission.

The current provision referring to student intellectual inquiry sounds like it is alluding to cases where students might feel unduly constrained in expressing their views within their 'subjects of study and research'. There is some local and international survey evidence that these constraints are felt, although concern about the reactions of fellow students seem more common than concerns about academic staff.

A difficulty in these cases is that, as noted in section 3.1, students have no general freedom of speech in the classroom. Without detailed evidence on specific cases, it is hard to distinguish between justified student constraint on expressing their views (because those views are irrelevant to the subject or because they cannot support them with evidence or argument) and problematic constraint where they feel unable to challenge, with appropriate evidence and argument, the views of an academic or other students. The two cases could get the same response in a Student Experience Survey question, the likely main source of information for TEQSA.

Student organisations can also have policies or sponsor activities inconsistent with freedom of speech, as has been recently alleged by the Institute of Public Affairs in relation to the QUT student guild's market day. Section 3.3 below has an amendment which would allow the government to rectify this if it turned out to be a significant problem.

### 3.4 Non-academic staff

The academic freedom and freedom of speech definitions provide no direct protection for non-academic staff. I understand that some institutions view this as an omission. The Model Code itself specifies freedom of speech for all staff, although not academic freedom for those who are not in academic jobs. There is no current obstacle to any higher education provider creating such protections, and the proposed amendments would not change that. The question is whether non-academic staff are so different from academics and students that they should be excluded from the proposed legal protections.

The situation in which non-academic staff can be most obviously distinguished is in relation to expressing their opinions on the higher education provider. If they are tasked with carrying out higher education provider policies or representing the provider it is a reasonable requirement that they not publicly attack or undermine their employer. Their grievances can be expressed privately or through their union. The right of non-academic (as well as academic) staff to union representation to advocate for their interests is legally protected under the *Fair Work (Registered Organisations) Act 2009*.

However, non-academic staff at publicly-funded universities could be given a general protection of freedom of speech on matters unrelated to their employment. This could be an aspect of a policy under section 19-115 of *HESA* that went beyond what was required for registration under TEQSA. The affected universities are typically large, multi-faceted organisations whose purposes are

not likely to be undermined, and may be enhanced, by their staff being able to express a variety of views. In a smaller institution with narrower purposes difficult or embarrassing staff could make it more difficult for everyone else to achieve their goals.

### 3.5 Government decisions and academic freedom and freedom of speech

Academic freedom and freedom of speech are important principles generally, regardless of the source of challenges to them. The proposed amendments to *HESA* and the *TEQSA Act* are mainly directed at universities and have only limited impact on government. The exception is an amendment to *HESA*'s objects to mention academic freedom and freedom of speech (Appendix A). The courts interpret legislation in ways that would best achieve its purposes (section 15AA of the *Acts Interpretation Act 1901*). This would mean that in a contested case, which was based on an ambiguous provision of *HESA*, a court would interpret it as not justifying limiting academic freedom and freedom of speech.

Apart from a mention of autonomous institutions in *HESA*'s current objects, only broad inference from the overall structure of the Act supports academic freedom. The Act is not very well-designed to support a government that wanted to control what universities do in detail. But it contains no direct protection of academic freedom or freedom of speech from government decisions.

The major academic freedom vulnerability in *HESA* is that the minister has discretion to attach conditions to grants, and in the case of non-university higher education providers, student loans. A long-standing flaw of *HESA* is that there are few constraints on what conditions can be attached to grants.

One curious aspect of the current legislative strategy is that although the *TEQSA Act* would acquire a definition of academic freedom it would still not contain a requirement that the Threshold Standards include anything about academic freedom. This is an omission. In theory, a minister could appoint a compliant Higher Education Standards Panel and rewrite the Threshold Standards in ways that reduced rather than increased academic freedom (although the Senate may disallow the change).

It is clearly the current minister's intent to make academic freedom more rather than less secure. But, to rephrase a famous quotation, if all ministers were angels we would not need legislation. The legislation should be made more robust to the actions of future education ministers.

Other countries have academic freedom provisions applying to government as well as to universities. For example, the New Zealand *Education Act 1989*, after offering a balanced rights and responsibilities definition of academic freedom, states that 'in the performance of their functions the Councils and chief executives of institutions, *Ministers, and authorities and agencies of the Crown* shall act in all respects so as to give effect to the intention of Parliament as expressed in this section' (emphasis added). The full New Zealand definition is at Appendix C.

In England, the *Higher Education and Research Act 2017* approaches the issue

from the perspective of 'institutional autonomy', the definition of which includes academic appointments, course content, and the freedom of academics to question received wisdom and advance new ideas. The Office for Students is the main higher education regulator, and the first item in its list of duties is the 'need to protect the institutional autonomy of English higher education providers'. In giving guidance to the Office for Students, the Secretary of State (minister) responsible for higher education must have the regard to the need to protection institutional autonomy. The relevant sections are at Appendix D.

Some additional changes that restrain the actions of government, as well as universities, are desirable. These changes require the Threshold Standards to include academic freedom and freedom of speech and limit ministerial discretion. Some draft words are in section 4.4.

## 4. Proposed statutory amendments and additions

### 4.1 Definitional amendment

#### **Amendment to Schedule 1, Definitions of the *Higher Education Support Act 2003* and Division 3, Definitions of the *Tertiary Education Quality and Standards Agency Act 2011***

“Academic freedom”, for the purposes of the *Higher Education Support Act 2003* and the *Tertiary Education Quality and Standards Agency Act 2011* (TEQSA Act) and any Standards made under that Act, comprises the following elements:

- The freedom of academics to pursue knowledge in accordance with ethical, professional and legal standards;
- The freedom of academics to disseminate knowledge in teaching and through publication in accordance with ethical, professional and legal standards;
- Supported by the freedom of academic staff to participate in professional or representative academic bodies;
- Supported by the freedom of academic staff to express their opinions in relation to the university in which they work;
- But limited by higher education provider autonomy in relation to the choice of academic courses and offerings, the ways in which these are taught, and the choice of funded research activities.

“Freedom of speech”, for the purposes of the *Higher Education Support Act 2003* and the *Tertiary Education Quality and Standards Agency Act 2011* and any standards made under that Act, comprises the following elements:

- The freedom of academic staff, without constraint imposed by reason of their employment by the higher education provider, to make lawful public comment on any issue in their personal capacities;
- The freedom of students, without constraint imposed by reason of their enrolment in a higher education provider, to make lawful public comment on any issue, including on the conduct or performance of their higher education provider;
- The freedom of students to express their views within their academic studies, subject only to reasonable regulation to require adherence to scholarly standards and to protect the well-being of students and staff;
- Supported by the freedom of students to participate in student societies and associations.

“Higher education provider autonomy”, for the purposes of the *Higher Education Support Act 2003*, means:

- The power of the higher education provider to decide which academic courses to offer, the ways in which those courses are taught, and which research activities it supports.

#### 4.2 Amendment to clarify the application of academic freedom and freedom of speech rules to different types of higher education provider

##### **Addition to section 58 of the *Tertiary Education Quality and Standards Agency Act 2011***

This addition would ensure that TEQSA's enforcement of academic freedom and freedom of speech requirement was sensitive to the activities of the provider and did not unnecessarily limit providers established for specific purposes.

Section 58(6): The Standards shall uphold academic freedom in a way that is appropriate to the provider's purposes and academic activities.

Section 58(7): The Standards shall require an higher education provider to promote freedom of speech for academic staff and students in ways appropriate to the provider's purposes.

##### **Amendment to section 19-115 of the *Higher Education Support Act 2003***

Repeal the existing provision, which creates duplicate regulation with TEQSA, and replace it with:

Section 19-115: A higher education provider that is a Table A provider or a Table B provider may be required to have policies on academic freedom and freedom of speech that go beyond requirements under the *Tertiary Education Quality and Standards Act 2011*.

#### 4.3 Amendment to protect freedom of speech of students affected by student organisations

##### **Addition to section 19-67(2) of the *Higher Education Support Act 2003***

Add to existing section 19-67 which covers the Student Services, Amenities, Representation and Advocacy Guidelines:

Section 19-67(2)(d): requirements relating to the freedom of speech of students.

#### 4.4 Amendments to protect academic freedom and freedom of speech from government

##### **Addition to section 58 of the *Tertiary Education Quality and Standards Agency Act 2011***

Add to existing Section 58 on the making of the Threshold Standards:

Section 58(4A): The Provider Registration Standards shall include protections of freedom of speech and academic freedom.

##### **Addition to section 16-60 of the *Higher Education Support Act 2003*:**

Replace existing 16-60(4), which deals with the conditions the minister can impose on higher education providers seeking approval under HESA. All of those specifically mentioned in section 16-60(3) relate to FEE-HELP.

Section 16-60(4): The minister must not impose any condition that infringes on higher education provider autonomy or academic freedom other than those permitted by subsection (3).

Insert new 16-60(5):

Section 16-60(5): Other than as limited by sub-section (4) the minister may impose other conditions on the higher education provider to protect students, staff and creditors and to enhance compliance with the *Higher Education Support Act 2003*.

**Addition to section 30-25 of the *Higher Education Support Act 2003***

Section 30-25 covers the funding agreements that universities must sign to receive funding for Commonwealth supported places.

This addition would create additional constraints on the content of funding agreements.

Section 30-25(2C): The agreement must not specify a condition that would limit academic freedom or freedom of speech.

**Addition to section 41-25 of the *Higher Education Support Act 2003***

Section 41-25 covers the conditions that can be attached to 'other grants', which includes the Research Support Scheme, the Research Training Program, national institutes and equity research, among other things.

This addition would create a limit on what conditions can be attached to other grants.

Section 41-25: Make the existing text sub-section (1), and add:

Section 45-25(2): The conditions must not specify a condition that would limit academic freedom or freedom of speech.

# Appendix A: Proposed government amendments to the *Higher Education Support Act 2003*, the Tertiary Education Quality and Standards Agency Act 2011, and the *Higher Education Standards Framework (Threshold Standards) 2015*

## *Higher Education Support Act 2003*

### Section 2-1 Objects of this Act

The objects of this Act are:

- (a) to support a higher education system that:
- (iv) promotes and protects **freedom of speech and academic freedom** free intellectual inquiry in learning, ~~teaching and research.~~

1. Introduction of a definition of 'academic freedom' as follows:

"Academic freedom", for the purposes of this Act and the *Tertiary Education Quality and Standards Agency Act 2011* (TEQSA Act) and any standards made under that Act, comprises the following elements:

- The freedom of academic staff to teach, discuss, and research and to disseminate and publish the results of their research;
- The freedom of academic staff and students to engage in intellectual inquiry, to express their opinions and beliefs, and to contribute to public debate, in relation to their subjects of study and research;
- The freedom of academic staff and students to express their opinions in relation to the higher education provider in which they work or are enrolled;
- The freedom of academic staff, without constraint imposed by reason of their employment by the university, to make lawful public comment on any issue in their personal capacities;
- The freedom of academic staff to participate in professional or representative academic bodies;
- The freedom of students to participate in student societies and associations; and

- The autonomy of the higher education provider in relation to the choice of academic courses and offerings, the ways in which they are taught and the choices of research activities and the ways in which they are conducted.

Section 19-115 of the *HESA* be amended to read:

A higher education provider that is a Table A provider or a Table B provider must have a policy that upholds **freedom of speech and academic freedom** ~~free intellectual inquiry in relation to learning, teaching and research.~~

### Amendment of the *Higher Education Standards Framework (Threshold Standards) 2015*

The relevant HE Standard, 6.1 at par 4, be amended consequentially to read:

The governing body takes steps to develop and maintain an institutional environment in which ~~freedom of intellectual inquiry~~ freedom of speech and academic freedom is upheld and protected, students and staff are treated equitably, the wellbeing of students and staff is fostered, informed decision-making by students is supported and students have opportunities to participate in the deliberative and decision-making processes of the higher education provider.

1. A consequential amendment to the criteria for higher education providers set out in Part B of the Standards would have B1.1 reading:
  1. The higher education provider has a clearly articulated higher education purpose that includes a commitment to and support for ~~free intellectual inquiry in its academic endeavours~~ freedom of speech and academic freedom.



# Appendix B: A Model Code for the Protection of Freedom of Speech and Academic Freedom in Australian Higher Education Providers

## Objects

The objects of the Code are:

- (1) To ensure that the freedom of lawful speech of staff and students of the university and visitors to the university is treated as a paramount value and therefore is not restricted nor its exercise unnecessarily burdened by restrictions or burdens other than those imposed by law and set out in the Principles of the Code.
- (2) To ensure that academic freedom is treated as a defining value by the university and therefore not restricted nor its exercise unnecessarily burdened by restrictions or burdens other than those imposed by law and set out in the Principles of the Code.
- (3) To affirm the importance of the university's institutional autonomy under law in the regulation of its affairs, including in the protection of freedom of speech and academic freedom.

## Application

- (1) The Code applies to the governing body of the university, its officers and employees and its decision-making organs, including those involved in academic governance.
- (2) The Code also applies to student representative bodies to the extent that they have policies and rules which are capable of being applied to restrict or burden the freedom of speech of anyone, or academic freedom.

## Definitions

'**academic freedom**' for the purposes of this Code comprises the following elements:

- the freedom of academic staff to teach, discuss, and research and to disseminate and publish the results of their research;

- the freedom of academic staff and students to engage in intellectual inquiry, to express their opinions and beliefs, and to contribute to public debate, in relation to their subjects of study and research;
- the freedom of academic staff and students to express their opinions in relation to the higher education provider in which they work or are enrolled;
- the freedom of academic staff, without constraint imposed by reason of their employment by the university, to make lawful public comment on any issue in their personal capacities;
- the freedom of academic staff to participate in professional or representative academic bodies;
- the freedom of students to participate in student societies and associations.
- the autonomy of the higher education provider in relation to the choice of academic courses and offerings, the ways in which they are taught and the choices of research activities and the ways in which they are conducted.

**'academic staff'** all those who are employed by the university to teach and/or carry out research and extends to those who provide, whether on an honorary basis or otherwise, teaching services and/or conduct research at the university.

**'external visiting speaker'** any person who is not an invited visiting speaker and for whom permission is sought to speak on the university's land or facilities.

**'imposed by law'** in relation to restrictions or burdens or conditions on a freedom include restrictions or burdens or conditions imposed by statute law, the common law (including the law of defamation), duties of confidentiality, restrictions deriving from intellectual property law and restrictions imposed by contract.

**'invited visiting speaker'** any person who has been invited by the university to speak on the university's land or facilities.

Note: The definition of 'university' which limits this class of visitor.

**'non-statutory policies and rules'** means any non-statutory policies, rules, guidelines, principles, codes or charters or similar instruments.

**'speech'** extends to all forms of expressive conduct including oral speech and written, artistic, musical and performing works and activity and communication using social media; the word 'speak' has a corresponding meaning.

**'staff'** for the purposes of this Code 'staff' includes all employees of the university whether fulltime or part-time and whether or not academic staff.

**'the duty to foster the wellbeing of staff and students';**

- includes the duty to ensure that no member of staff and no student suffers unfair disadvantage or unfair adverse discrimination on any basis recognised at law including race, gender, sexuality, religion and political belief;
- includes the duty to ensure that no member of staff and no student is subject to threatening or intimidating behaviour by another person or persons on account of anything they have said or proposed to say in exercising their freedom of speech;
- supports reasonable and proportionate measures to prevent any person from using lawful speech which a reasonable person would regard, in the circumstances, as likely to humiliate or intimidate other persons and which is intended to have either or both of those effects;
- does not extend to a duty to protect any person from feeling offended or shocked or insulted by the lawful speech of another.

**'the university'** means the university as an entity and includes its decision-making organs and officers, its student representative bodies, undergraduate and post-graduate, and any entities controlled by the university.

**'unlawful'** means in contravention of a prohibition or restriction or condition imposed by law.

## Operation

- (1) The university shall have regard to the Principles of this Code in the drafting, review or amendment of any non-statutory policies or rules and in the drafting, review or amendment of delegated legislation pursuant to any delegated law-making powers.
- (2) Non-statutory policies and rules of the university shall be interpreted and applied, so far as is reasonably practicable, in accordance with the Principles of this Code.
- (3) Any power or discretion under a non-statutory policy or rule of the university shall be exercised in accordance with the Principles in this Code.
- (4) This Code prevails, to the extent of any inconsistency, over any non-statutory policy or rules of the university.
- (5) Any power or discretion conferred on the university by a law made by the university in the exercise of its delegated law-making powers shall be exercised, so far as that law allows, in accordance with the Principles of this Code.
- (6) Any power or discretion conferred on the university under any contract or workplace agreement shall be exercised, so far as it is consistent with the terms of that contract or workplace agreement, in accordance with the Principles of this Code.

## Principles of the Code

- (1) Every member of the staff and every student at the university enjoys freedom of speech exercised on university land or in connection with the university subject only to restraints or burdens imposed by:
  - law;
  - the reasonable and proportionate regulation of conduct necessary to the discharge of the university's teaching and research activities;

- the right and freedom of others to express themselves and to hear and receive information and opinions;
  - the reasonable and proportionate regulation of conduct to enable the university to fulfil its duty to foster the wellbeing of students and staff;
  - the reasonable and proportionate regulation of conduct necessary to enable the university to give effect to its legal duties including its duties to visitors to the university.
- (2) Subject to reasonable and proportionate regulation of the kind referred to in the previous Principle, a person's lawful speech on the university's land or in or in connection with a university activity shall not constitute misconduct nor attract any penalty or other adverse action by reference only to its content.
- (3) Every member of the academic staff and every student enjoys academic freedom subject only to prohibitions, restrictions or conditions:
- imposed by law;
  - imposed by the reasonable and proportionate regulation necessary to the discharge of the university's teaching and research activities;
  - imposed by the reasonable and proportionate regulation necessary to discharge the university's duty to foster the wellbeing of students and staff;
  - imposed by the reasonable and proportionate regulation to enable the university to give effect to its legal duties;
  - imposed by the university by way of its reasonable requirements as to the courses to be delivered and the content and means of their delivery.
- (4) The exercise by a member of the academic staff or of a student of academic freedom, subject to the above limitations, shall not constitute misconduct nor attract any penalty or other adverse action.
- (5) In entering into affiliation, collaborative or contractual arrangements with third parties and in accepting donations from third parties subject to

conditions, the university shall take all reasonable steps to minimise the restrictions or burdens imposed by such arrangements or conditions on the freedom of speech or academic freedom of any member of the academic staff or students carrying on research or study under such arrangements or subject to such conditions.

- (6) The university has the right and responsibility to determine the terms and conditions upon which it shall permit external visitors and invited visitors to speak on university land and use university facilities and in so doing may:
- (a) require the person or persons organising the event to comply with the university's booking procedures and to provide information relevant to the conduct of any event, and any public safety and security issues;
  - (b) distinguish between invited visitors and external visitors in framing any such requirements and conditions;
  - (c) refuse permission to any invited visitor or external visitor to speak on university land or at university facilities where the content of the speech is or is likely to:
    - (i) be unlawful;
    - (ii) prejudice the fulfilment by the university of its duty to foster the wellbeing of staff and students;
    - (iii) involve the advancement of theories or propositions which purport to be based on scholarship or research but which fall below scholarly standards to such an extent as to be detrimental to the university's character as an institution of higher learning;
  - (d) require a person or persons seeking permission for the use of university land or facilities for any visiting speaker to contribute in whole or in part to the cost of providing security and other measures in the interests of public safety and order in connection with the event at which the visitor is to speak.

- (7) Subject to the preceding Principles the university shall not refuse permission for the use of its land or facilities by an external visitor or invited visitor nor attach conditions to its permission, solely on the basis of the content of the proposed speech by the visitor.

Consistently with this Code the university may take reasonable and proportionate steps to ensure that all prospective students in any of its courses have an opportunity to be fully informed of the content of those courses. Academic staff must comply with any policies and rules supportive of the university's duty to foster the wellbeing of staff and students. They are not precluded from including content solely on the ground that it may offend or shock any

## Appendix C: Academic freedom definition in the New Zealand *Education Act 1989*

### Section 161 Academic freedom

- (1) It is declared to be the intention of Parliament in enacting the provisions of this Act relating to institutions that academic freedom and the autonomy of institutions are to be preserved and enhanced.
- (2) For the purposes of this section, **academic freedom**, in relation to an institution, means—
  - (a) the freedom of academic staff and students, within the law, to question and test received wisdom, to put forward new ideas and to state controversial or unpopular opinions:
  - (b) the freedom of academic staff and students to engage in research:
  - (c) the freedom of the institution and its staff to regulate the subject matter of courses taught at the institution:
  - (d) the freedom of the institution and its staff to teach and assess students in the manner they consider best promotes learning:
  - (e) the freedom of the institution through its chief executive to appoint its own staff.
- (3) In exercising their academic freedom and autonomy, institutions shall act in a manner that is consistent with—
  - (a) the need for the maintenance by institutions of the highest ethical standards and the need to permit public scrutiny to ensure the maintenance of those standards; and
  - (b) the need for accountability by institutions and the proper use by institutions of resources allocated to them.
- (4) In the performance of their functions the Councils and chief executives of institutions, Ministers, and authorities and agencies of the Crown shall act in all respects so as to give effect to the intention of Parliament as expressed in this section.



## Appendix D: Institutional autonomy and academic freedom in the English *Higher Education and Research Act 2017*

Section 8: In this Part, “the institutional autonomy of English higher education providers” means—

- (a) the freedom of English higher education providers within the law to conduct their day to day management in an effective and competent way,
- (b) the freedom of English higher education providers—
  - (i) to determine the content of particular courses and the manner in which they are taught, supervised and assessed,
  - (ii) to determine the criteria for the selection, appointment and dismissal of academic staff and apply those criteria in particular cases, and
  - (iii) to determine the criteria for the admission of students and apply those criteria in particular cases, and
- (c) the freedom within the law of academic staff at English higher education providers—
  - (i) to question and test received wisdom, and
  - (ii) to put forward new ideas and controversial or unpopular opinions,without placing themselves in jeopardy of losing their jobs or privileges they may have at the providers.

### Section 2: General duties

- (2) In performing its functions, the OfS must have regard to—
  - (a) the need to protect the institutional autonomy of English higher education providers, ...
- (3) In performing its functions, including its duties under subsection (1), the OfS must have regard to guidance given to it by the Secretary of State.
- (4) In giving such guidance, the Secretary of State must have regard to the need to protect the institutional autonomy of English higher education providers.