



Proposed free speech amendments to the Higher Education Support Act

University of Melbourne response

February 2020

Executive Summary

The University of Melbourne is pleased to respond to the proposed amendments to *Higher Education Support Act* (HESA) following the recommendations made in the Independent Review of Freedom of Speech in Australian Higher Education Providers (the French Review). We acknowledge the Australian Government's interest in safeguarding academic freedom and freedom of speech in our higher education sector, and the consultative approach it has taken to addressing this issue.

While the final report of the French Review found that "claims of a freedom of speech crisis on Australian campuses were not substantiated", it also found that safeguards for academic freedom and free speech could be strengthened, and recommended that universities should voluntarily adopt a Model Code for free speech, as well as amendments to the *Higher Education Support Act* and the *Higher Education Standards Framework* that would enshrine academic freedom and freedom of speech.

The University of Melbourne supports the broad intent of the proposed HESA amendments. However, we are concerned that one these amendments – the inclusion of a definition of academic freedom – has the potential for unintended consequences. There is a danger that introducing a single, detailed definition of academic freedom generates problems in the context of TEQSA's work in assessing institutional policies and practices against that definition across a diverse higher education sector. Given these problems, we suggest that the Government proceed with the other two amendments to HESA, but that it not introduce the definition of academic freedom as proposed. This approach respects the intent of the proposed amendments - to provide support for institutions in building and maintaining robust frameworks for protecting academic freedom.

For further information or to discuss this submission Professor Richard James, Deputy Vice-Chancellor (Academic) can be contacted on (03) 9035 4800 or r.james@unimelb.edu.au.

Comment on proposed changes

University of Melbourne free speech framework

A commitment to academic freedom is embedded in all of the University of Melbourne's teaching and research activities. The objects of our enabling legislation, the *University of Melbourne Act 2009*, include the "promotion of critical and free inquiry, informed intellectual discourse and public debate within the University and in wider society." The University's suite of policies provide protection and support for academic freedom and freedom of speech more generally:

- The *Academic Freedom of Expression Policy* came into effect in 2012; this policy has been singled out by other universities and public commentators for its robust protection of academic freedom.
- The University's *Freedom of Speech Policy* came into effect in June 2019. While this policy was developed well before the release of the final report of the French Review, it is aligned with the Model Code published in the report.
- In addition to policies that explicitly act in support academic freedom and freedom of speech, the University has conducted a comprehensive review of its policies in response to the French Review, to ensure that these are aligned with the Model Code.

While we are confident that these policies provide strong support for academic freedom and freedom of speech for staff, students and the broader university community, we are committed to continuous improvement in this area. The task of achieving an optimal policy framework is ongoing, as it should be.

We note that other universities have responded positively to the French Review's findings, reviewing and in many cases updating their policies in light of the Model Code. In broad terms, the Review's recommendations have already had the intended effect of prompting institutions to assess the adequacy of the current academic freedom protections, ensuring freedom of speech is also sufficiently identified and protected, and of providing guidance on policy development.

Proposed amendments to HESA

The Government is proposing the following three amendments to HESA:

1. Amending section 2-1 (Objects of Act) to replace "free intellectual inquiry in learning, teaching and research" with "freedom of speech and academic freedom".
2. The introduction of a detailed definition of academic freedom for the purposes of HESA and the *Tertiary Standards Agency Act 2011*.
3. Amending section 19-115 to require providers to have a policy upholding "freedom of speech and academic freedom" (rather than a policy upholding "free intellectual inquiry").

The University of Melbourne supports the first and third of these proposed amendments but opposes the second. The French Review's final report recommended the re-wording of sections 2-1 and 19-115 to bring the Act into line with the Model Code published in the report. We agree that it is appropriate that there be common terminology between the legislation and the exemplar policies provided to the sector. The University therefore supports those changes.

However, the introduction of the proposed definition of "academic freedom" into the legislative and regulatory framework has the potential to be unworkable. Our concerns relate not to the

appropriateness of the definition itself but to the practical problems that are likely to come with the use of any specific definition with legislative force.

There is considerable diversity across the sector in the specific ways in which academic freedom is defined. This is to be expected given the relevant policies have evolved independently over a number of years and are embedded in broader policy frameworks that are unique to particular institutions. For some universities, a definition of academic freedom is included in enterprise agreements which cannot be amended within their current term, and even then, future amendment may not be possible through negotiation within an industrial context.

The diversity of policy frameworks will inevitably cause challenges for TEQSA when tasked with assessing whether an institution's policies correspond to a specific definition proposed for inclusion in HESA and the HE Standards. This would require TEQSA to carry out a sort of conceptual enquiry for which it is not designed and which could generate a level of uncertainty regarding the outcomes of its compliance and quality assessments. In addition, the outcomes of these assessments can be open to challenge.

Consequently, the University suggests that the best practical approach to achieving the stated policy objectives is to proceed with the proposed re-wording of the sections 2-1 and 19-115 of HESA but not to legislate the proposed definition of academic freedom. Instead, TEQSA could produce a *Guidance Note* that sets out the broad principles of good academic freedom and freedom of speech policies, which will partly inform its regulatory activities and which can be refined and updated as required.

Finally, adherence to academic freedom is already a condition of funding under the Act. Under s19:

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

It would be open to the Minister to amend this section of the Act, as recommended by the French Review, to:

A higher education provider that is a Table A provider or a Table B provider must have a policy(ies) that upholds freedom of speech and academic freedom.

This approach would advance the key aim of encouraging ongoing review and strengthening of academic freedom and free speech protections without generating unintended consequences.