

EXPLANATORY STATEMENT

Issued by the authority of Minister for Education and Youth

Tertiary Education Quality and Standards Agency Act 2011

Tertiary Education Quality and Standards Agency Higher Education Standards Framework Amendment (Threshold Standards—Freedom of Speech and Academic Freedom) 2021

AUTHORITY

The *Tertiary Education Quality and Standards Agency Higher Education Standards Framework Amendment (Threshold Standards—Freedom of Speech and Academic Freedom) 2021* (the Amending Instrument) is made by the Minister for Education and Youth under subsection 58(1) of the *Tertiary Education Quality and Standards Agency Act 2011* (TEQSA Act). The Amending Instrument amends the *Higher Education Standards Framework (Threshold Standards) 2021* (the Principal Instrument).

As an amendment, the Minister also relies on subsection 33(3) of the *Acts Interpretation Act 1901*, which clarifies that the power to make the Principal Instrument includes the power to amend it.

PURPOSE AND OPERATION

The Principal Instrument was made on 24 April 2021 to set out new “Threshold Standards” under the TEQSA Act and to set the requirements that a higher education provider must meet, and continue to meet, in order to be registered by the Tertiary Education Quality and Standards Agency (TEQSA) to operate in Australia. The Threshold Standards provide the basis for the regulation of Australian higher education providers by TEQSA. The Threshold Standards are intended to ensure that the barrier to entry into the higher education sector is set sufficiently high to underpin and protect the quality and reputation of the sector as a whole. They also establish a basis of operational quality and integrity from which all providers can continue to build excellence and diversity.

The purpose of this Amending Instrument is to make some minor amendments to the Principal Instrument to reflect recent amendments to the *Higher Education Support Act 2003* made by the *Higher Education Support Amendment (Freedom of Speech) Act 2021*, which amended section 19-115 of that Act to require Table A and Table B providers to have a policy that upholds “freedom of speech and academic freedom”, as opposed to the previous requirement for a policy that upholds “free intellectual inquiry”. Those amendments also inserted a definition of “academic freedom” to mean:

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

- (b) 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;
- (c) 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;
- (d) the freedom of academic staff to participate in professional or representative academic bodies;
- (e) the freedom of students to participate in student societies and associations;
- (f) 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.

The Honourable Robert French AC, former Chief Justice of the High Court of Australia, recommended this change in his 2019 Independent Review of Freedom of Speech in Australian Higher Education Providers (French Review) to ensure consistency of language between HESA and the Model Code for the Protection of Freedom of Speech and Academic Freedom proposed in the review report.

These new amendments will further support higher education providers by ensuring consistency of language between all three of the Principal Instrument, HESA and the Model Code, which all Table A and Table B universities have now adopted.

This instrument will also make a minor amendment to correct the unintended omission of a requirement that, to become registered, universities must self-accredit and deliver both undergraduate and postgraduate courses of study, as was the case in the preceding 2015 and 2011 Threshold Standards and recommended by the Review of the Higher Education Provider Category Standards.

Schedule 2 of the instrument repeals the entirety of the *Higher Education Standards Framework (Threshold Standards) 2015*, as that instrument has been superseded by the 2021 version.

REGULATORY IMPACT

The Office of Best Practice Regulation advises that a Regulation Impact Statement is not required, as the OBPR considers that the proposal is unlikely to have a more than minor regulatory impact (OBPR reference number ID 43142).

COMMENCEMENT

The Instrument commences on the day after it is registered on the Federal Register of Legislation.

CONSULTATION

These amendments have been the subject of significant stakeholder consultation between 2018 and 2021, variously by the Honourable Robert French AC, the Higher Education Standards Panel (the Panel) and Ministers.

The Honourable Robert French AC provided the final report of the French Review to the Government in March 2019. He recommended amending Standards A.6.1.4 and B.1.1 to change ‘free intellectual inquiry’ to ‘freedom of speech and academic freedom’, reflecting the language in his proposed Model Code, and his recommended amendments to HESA. In developing his report and recommendations, The Honourable Robert French AC undertook two rounds of stakeholder consultation with higher education providers, including seeking comment on a draft of the Model Code.

Section 58 of the TEQSA Act establishes specific requirements before the Minister responsible for higher education can make new standards for higher education. The Minister may only make and vary the standards for higher education if a draft has been developed by the Higher Education Standards Panel and the Minister has sought and considered comments on the draft from both TEQSA and the Council of Commonwealth, state and territory ministers responsible for higher education.

The Government accepted the French Review’s recommendations. The then responsible Minister asked the Panel to provide him with advice on amending the Standards, and wrote to state and territory ministers advising them of his intentions. In October 2019, the Panel provided the former Minister with draft amendments consistent with the recommendation.

Under Section 168 of the TEQSA Act, the Panel must consult interested parties in the performance of its functions. In developing its advice to the Minister in 2019, the Panel undertook consultation with the higher education sector, seeking submissions on a draft of the amendments. Twelve submissions were received. The Panel recommended a minor grammatical change to the Honourable Robert French AC’s proposed text, based on that input.

The Panel recommended delaying any changes to the Threshold Standards until Parliament passed the French Review’s recommended amendments to HESA, to ensure consistency between the statutes. Following receipt of the Panel’s advice, the Minister sought comment from both TEQSA and state and territory education ministers as required by the TEQSA Act, and has taken account of their views in drafting the Amending Instrument.

The 2019 Review of the Higher Education Provider Category Standards undertook extensive consultation with the higher education sector and was overseen by the Panel. The review canvassed the longstanding requirement that university category providers deliver both undergraduate and postgraduate courses in a discussion paper and assessed the idea in the final report. The review concluded that the requirement remained warranted. Words to this effect were inadvertently omitted from the relevant clause in the Threshold Standards during drafting of the Principal Instrument.

As an unintentional omission, this was not highlighted during stakeholder consultation on the draft instrument and consequently was not identified through that process. Given the issue was considered and addressed by the PCS Review itself, the matter has been

adequately addressed. It is not considered that further consideration is needed before correcting the text error.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Tertiary Education Quality and Standards Agency Higher Education Standards Framework Amendment (Threshold Standards—Freedom of Speech and Academic Freedom) 2021

The *Tertiary Education Quality and Standards Agency Higher Education Standards Framework Amendment (Threshold Standards—Freedom of Speech and Academic Freedom) 2021* (the Amending Instrument) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The purpose of this Amending Instrument is to make some minor amendments to the Principal Instrument to reflect recent amendments to the *Higher Education Support Act 2003* made by the *Higher Education Support Amendment (Freedom of Speech) Act 2021*, which inserted new section 19-115 into that Act to require Table A and Table B providers to “have a policy that upholds freedom of speech and academic freedom”.

Human rights implications

The Instrument engages the following rights:

- the right to education – Article 13 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), and Article 28 of the *Convention on the Rights of the Child* (UNCRC); and
- the right to freedom of expression – Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR).

Right to education

The principle of academic freedom derives in part from the right to education enshrined in Article 13 of the ICESCR. The UN Committee on Economic, Social, and Cultural Rights (UN CESCR) has emphasised that the “right to education can only be enjoyed if accompanied by the academic freedom of staff and students”. It has also indicated that “staff and students in higher education are especially vulnerable to political and other pressures which undermine academic freedom” (UN CESCR, General Comment 13 at paragraph 38). Academic freedom supports the right to education as it facilitates the ability of students, academics and researchers to proffer views freely, inquire critically and examine issues, challenge orthodoxies, contribute to the body of knowledge across disciplines and exchange ideas without reproach.

Article 13(1) of the ICESCR recognises each person’s right to education, and that education is important to “*the full development of the human personality*”, and enables “*all persons to*

participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups”.

Similarly, Article 28(1) of the UNCRC recognises the *“right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity”.*

The Amending Instrument makes minor changes to the Threshold Standards already in place under the TEQSA Act, which operate to continue to ensure that higher education providers provide quality education to students, consistent with the principles of freedom of speech and academic freedom.

Right to freedom of expression

Article 19 of the ICCPR states that everyone shall have the right to hold opinions without interference and have the right to freedom of expression, which includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in form of art, or through any other media of their choice. Article 19 can be read in conjunction with Article 15(3) of the ICESCR which also obliges states parties to respect the freedom “indispensable for scientific research and creative activity”. At the core of the right to academic freedom is the right of the individual to conduct research, to publish and to disseminate learning through teaching and inquiry, without unreasonable interference.

In its General Comment on Article 13 of ICESCR (which relates to the right to education), the UN CESCR observed:

“Academic freedom includes the liberty of individuals to express freely opinions about the institution or system in which they work, to fulfil their functions without discrimination or fear of repression by the State or any other actor, to participate in professional or representative academic bodies, and to enjoy all the internationally recognized human rights applicable to other individuals and ‘[t]he enjoyment of academic freedom requires the autonomy of institutions of higher education” (UN CESCR, General Comment 13, paras. 38 and 40).

The new definition of “academic freedom” inserted into the *Higher Education Support Act 2003*, and reflected by the amendments made by this Amending Instrument to the Threshold Standards under the TEQSA Act, is intended to ensure that providers develop and maintain an institutional environment in which freedom of speech and academic freedom are freedom of intellectual inquiry is upheld and protected. The amendments are intended to implement recommendations arising from the *2019 Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers*, undertaken by the Honourable Robert French AC, former Chief Justice of the High Court of Australia. The amendments are intended to be compatible with, and further, the right to freedom of expression.

Conclusion

The Instrument is compatible with human rights because it promotes the protection of the human rights engaged.

Minister for Education and Youth

EXPLANATION OF PROVISIONS

Section 1: Name

This section states the name of the Amending Instrument, which is how it is to be cited.

Section 2: Commencement

This section states that the Amending Instrument commences on the day after it is registered on the Federal Register of Legislation.

Section 3: Authority

This section refers to the power to make the instrument, which is subsection 58(1) of the *Tertiary Education Quality and Standards Agency Act 2011*. The amendment is also authorised by subsection 33(3) of the *Acts Interpretation Act 1901*, which clarifies that the power to make a legislative instrument includes the power to amend it.

Section 4: Definition

This section clarifies that the “Principal Instrument” referred to in the Schedule is the *Higher Education Standards Framework (Threshold Standards) 2021*, which was made on 24 April 2021 under the *Tertiary Education Quality and Standards Agency Act 2011*.

Section 5: Schedules

This section clarifies that the amendments in the Schedules are effective to amend the Principal Instrument, and to repeal the *Higher Education Standards Framework (Threshold Standards) 2015*.

Amendments made by the Schedules

The amendments made by **items 1 to 3** in Schedule 1 are minor amendments to the Principal Instrument to reflect recent amendments to the *Higher Education Support Act 2003* made by the *Higher Education Support Amendment (Freedom of Speech) Act 2021*, which amended section 19-115 of that Act to require Table A and Table B providers to have a policy that upholds “freedom of speech and academic freedom” instead of a policy that upholds free intellectual inquiry, as it previously read,

The amendments will ensure that existing references to “freedom of intellectual enquiry” in the Principal Instrument will be replaced with references to “freedom of

speech and academic freedom”, in line with terminology used in the *Higher Education Support Act 2003*.

The amendments will mean that the Threshold Standards will contain standards requiring the governing body of a registered higher education provider to take steps to develop and maintain an institutional environment in which freedom of speech and academic freedom are 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 (this is the amendment to paragraph 4 in the provision numbered “6.1” under the “Governance and Accountability” heading).

Providers will also be required to have a clearly articulated higher education purpose that includes a commitment to freedom of speech and academic freedom (through the amendment to paragraph 1 in the provision numbered “B1.1” in Part B of the Principal Instrument).

The amendment made by **item 4** corrects an inadvertent omission in the Principal Instrument, to specify that providers in the Australian University category must self-accredit and deliver courses of study at both undergraduate and postgraduate level.

Item 1 in Schedule 2 repeals the *Higher Education Standards Framework (Threshold Standards) 2015*, as that instrument has been superseded by the 2021 version.