

Submission to the Department of Education
Interim Report on the Universities Accord

Outline and Summary

Thank you for the opportunity to make a submission to the Department regarding the Interim Report on the Universities Accord.

This submission has been prepared in my capacity as a Senior Research Fellow of the T.C. Beirne School of Law at the University of Queensland. However, the views expressed below are entirely my own and are not necessarily representative of the School, The University of Queensland or any other government, organisation or agency.

I am willing and able to provide additional information on our views on other questions in the submission or my response if necessary.

Executive Summary

The Interim Report¹ makes clear that in its opening piece that Australia’s university, TAFE and tertiary education sector operates in ‘an era of profound intellectual, technological, economic and cultural change, in which complacency is dangerous and our egalitarian values need to be defended and renewed’.² The goals for these Higher Education Institutions (HEIs)³, as set by the Interim Report, are set out in five “Priority Actions”. The Interim Report then goes to list ten ‘system shifts’⁴ which are said to be needed to empower and shape the university system by 2035.

The Interim Report was also at pains to point out the key role HEIs play in the national security ecosystem of Australia. It makes that position clear in the “*The Review story at a glance...*” section, linking the need to ‘meet the defence and security challenges to our region, and strengthening our democratic culture’ to the strength of our individual HEIs.⁵ Further, the Interim Report links HEIs as a ‘best asset’ to underpinning national security and industrial capability,⁶ which in turn requires our HEIs to overcome the significant shortfalls of lacking ‘institutional resilience and “metabolic rate” needed to prepare our nation for the future’.⁷

¹ Department of Education, *Australian Universities Accord: Interim Report* (Canberra, July 2023) (“the Interim Report”) 1.

² *Ibid*, 9.

³ For the purposes of scope, this definition is inclusive. It recognizes that universities are not the sole location where sensitive national security, military- and intelligence-focused research might take place, and there are other classes of institution (however defined) at which both teaching and research into these subjects is undertaken. Therefore, the more inclusive term – “higher education institution”, abbreviated to HEI – will be used throughout this submission to include universities, trade colleges, specialist research and teaching campuses, and other entities to whom the described forms of national security risks will apply.

⁴ Interim Report (n 1) 20.

⁵ *Ibid*, 1.

⁶ *Ibid*, 4.

⁷ *Ibid*, 5.

Areas like military and defence research,⁸ cybersecurity,⁹ and artificial intelligence¹⁰ are considered critically important not only for Australian universities from the perspective of teaching, learning and research, but also as part of ongoing contributions to the stability of the Indo-Pacific region.

The above observations are important because our HEIs are ‘both a monument to, and a crucible of, rational inquiry’, where knowledge is the most valuable product.¹¹ Despite that sentiment, the Interim Report makes no mention of how Australian government, non-government, academia, and civil society will collaborate to protect that product – that is, the knowledge HEIs produce in research and impart through teaching and learning.

Unfortunately, nowhere does the Interim Report recognise or discuss the significance of “knowledge security” or “research security”.

Knowledge security, a term pioneered by the Netherlands government, is described as:

Knowledge security is first and foremost about preventing the undesirable transfer of sensitive knowledge and technology. Transfer is undesirable if it compromises our country’s national security. Knowledge security also entails the covert influencing of education and research by other states. Such interference places academic freedom and social safety in jeopardy. Finally, knowledge security involves ethical issues that can be at play in collaboration with countries that do not respect fundamental rights.¹²

On the other hand, “research security” is a term predominantly in use in the American and Canadian research ecosystems, both of which are more matured than Australia:

Research Security refers to the ability to identify possible risks to your work through unwanted access, interference, or theft and the measures that minimize these risks and protect the inputs, processes, and products that are part of scientific research and discovery.¹³

Both terms speak to a similar concept – the idea of ensuring that the open and transparent research, collaboration and methodologies in use at HEIs are not abused or misused by foreign agents, opportunistic thieves, or serious or organised criminal actors in order to obtain

⁸ Ibid, 46.

⁹ Ibid, 46.

¹⁰ Ibid, 54.

¹¹ Nigel Stobbs, ‘Academic Freedom and University Autonomy’, in Sally Varnham, Patty Kamvounias, Joan Squelch (Eds.), *Higher Education and the Law* (The Federation Press, Canberra, 2015) 203-214, 203.

¹² Government of the Netherlands, *What is knowledge security?* (website, 7 April 2022)

<<https://english.loketkennisveiligheid.nl/knowledge-security>>.

¹³ Government of Canada, *Why Safeguard your Research?* (website, 31 March 2023)

<<https://science.gc.ca/site/science/en/safeguarding-your-research/general-information-research-security/why-safeguard-your-research>>.

financial, military, intelligence, or security advantages, in ways that may compromise the national security interests of the host country.

This submission places these ideas of knowledge security and research security at the centre of a call to refocus some elements of the University Accord on securing Australia's higher education sector. It is without question an incredibly important industry to Australia, not only economically, socially and culturally, but also for the future of our diplomacy, security and defence strategies in both regional and global contexts. The alternative – a university sector which ignores or minimises the threat posed – has the potential to threaten our international diplomatic and defence ties, our regional standing, and the achievement of Australia's medium- and long-term strategic objectives. That situation cannot be allowed to prevail.

The threats to our HEIs are not academic: they are happening now. Universities have been told to “harden” their posture against foreign interference and espionage,¹⁴ but have been given limited information on how best to do so.¹⁵ Our students and academics are being threatened in Australia and abroad, by agents posing as debt collectors¹⁶ and anti-corruption officers.¹⁷ Our allies are also experiencing these same threats on their campuses and in their classrooms.¹⁸ Yet, just two years after the Parliamentary Joint Committee on Intelligence and Security (PJCIS) handed down its report on national security risks in HEIs,¹⁹ less than half of the recommendations of the PJCIS were supported, and almost none have been fully implemented.²⁰

The University Accord represents a one-in-a-generation occasion to ensure the legislative and policy settings of Australian HEIs are correct. At least some of that effort should be focused on ensuring the security and integrity of Australia's world-leading research, knowledge generation and teaching.

¹⁴ Joseph Brookes, 'Universities told to “harden” against foreign interference threat', *Innovation Australia* (website, 28 March 2022) <<https://www.innovationaus.com/universities-told-to-harden-against-foreign-interference-threat/>>.

¹⁵ Tom Ravlic, 'ASIO opposes publication of its university monitoring activities', *The Mandarin* (online, 17 February 2023) <<https://www.themandarin.com.au/212476-asio-opposes-publication-of-its-university-monitoring-activities/>>.

¹⁶ Stella Yifan Xie, 'When China's Aggressive Debt Collectors Come Knocking: “You Committed a Sin”', *The Wall Street Journal* (online, 15 June 2020) <<https://www.wsj.com/articles/when-chinas-aggressive-debt-collectors-come-knocking-you-committed-a-sin-11592227095>>.

¹⁷ Mark Walden, 'Operation Fox Hunt and China's international efforts to force “fugitives” back', *ABC News* (online, 19 January 2022) <<https://www.abc.net.au/news/2022-01-19/china-operations-to-force-fugitives-back/100747234>>.

¹⁸ Nidhi Subbaraman, 'Universities Forge Ties with FBI Amid Foreign Influence Crackdown' (2020) 579 *Nature* 331; Charlie Parker, 'Iranian regime exploits deals with UK unis to help develop weapons', *The Australian* (online, 31 July 2023) <<https://www.theaustralian.com.au/world/the-times/iranian-regime-exploits-deals-with-uk-unis-to-help-develop-weapons/news-story/10e0c681ae93959fe409c54577a201e3>>.

¹⁹ Commonwealth Parliament, *Inquiry into national security risks affecting the Australian higher education and research sector* (Final Report, March 2022) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/NationalSecurityRisks/Report> (“the PJCIS Report”).

²⁰ Australian Government, *Australian Government response to the Parliamentary Joint Committee on Intelligence and Security report: National security risks affecting the Australian higher education and research sector* (Report, 14 February 2023) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/NationalSecurityRisks/Government_Response>.

Knowledge and research security in more detail

One significant domain of the Interim Report which does not appear to have been addressed at all is the need for knowledge security or research security in Australian HEIs. Comparatively, this places Australia well behind other developed economies:

- In the United States, research security is a fundamental part of the US research enterprise, and which embeds counter-foreign interference and counter-espionage systems in all national funding applications.²¹ Further, a vast supply of resources is available for researchers from the National Counterintelligence and Security Center, itself an organ of the Office of the Director of National Intelligence²² (equivalent to Australia’s Office of National Intelligence).
- The Netherlands Government has established the *National Contact Point for Knowledge Security*, an online clearing house for collaboration across ministries and the university sector ‘with questions about opportunities, risks and practical matters concerning international cooperation’.²³ The Contact Point provides deidentified case studies of espionage and intellectual property theft, legal frameworks for export control and foreign interference, and a direct helpline into Government for researchers.
- In Canada, the Canadian Security Intelligence Service (CSIS) plays a key role in mitigating national security threats to HEIs. In particular, the CSIS provides a “Safeguarding your Research” checklist, as well as links to a centralised repository of tools to assist HEIs in managing their national security risk.²⁴ Key amongst these are the *National Security Guidelines for Research Partnerships* (with associated risk assessment), which are mandatory for all Federally funded research grants and considered “strongly recommended” for all other forms of funding.²⁵
- Across the broader EU, the European Commission has formulated guidelines for HEIs to enhance their ‘values, governance, partnerships and cybersecurity’ in the face of foreign interference in research and innovation, with specific focus on HEIs.²⁶ Though each partner State of the Union will take their own domestic approaches to the interpretation of these guidelines, they represent a “whole-of-EU” approach to tackling knowledge and research security.

²¹ National Science Foundation, *Research Security at the National Science Foundation* (website, 2022) <<https://new.nsf.gov/research-security>>.

²² Office of the Director of National Intelligence, *Research Security* (website, 2023) <<https://www.dni.gov/index.php/safeguarding-science/research-security>>.

²³ Government of the Netherlands, *Contact Point for Knowledge Security* (website, 2022) <<https://english.loketkennisveiligheid.nl/>>.

²⁴ Government of Canada, *Safeguarding Your Research* (website, 2022) <<https://science.gc.ca/site/science/en/safeguarding-your-research>>.

²⁵ Innovation, Science and Economic Development Canada, *National Security Guidelines for Research Partnerships* (ISED, 2019) <https://science.gc.ca/site/science/sites/default/files/attachments/2023/national_security_guidelines_for_research_partnerships.pdf>.

²⁶ European Commission, *Tackling R&I foreign interference* (Working document, Publications Office of the European Union, 2022) <<https://data.europa.eu/doi/10.2777/513746>>.

Australia's own approach to research or knowledge security is somewhat lamentable. The University Foreign Interference Taskforce (UFIT) Guidelines,²⁷ originally produced in 2019 and refreshed in 2021, do not adequately address a number of areas of risk, such as targeted acts of espionage against employees, risks posed by higher-degree research students (i.e., Masters and Doctoral programs) and institutional arrangements with foreign entities. Further, as the PJCIS observed in 2021, the UFIT Guidelines do not address all national security risks to HEIs and are not benchmarked across the sector, meaning responses are fragmented and incomplete across numerous institutions.²⁸

The UFIT Guidelines are also largely devoid of specific content, being more "aspirational" in nature, leaving individual HEIs in Australia to implement their own versions of compliance with it. These Guidelines vaguely recommends that universities and higher education institutions conduct due diligence and risk assessments 'on partners and personnel' as well as 'the potential of technology and/or research'. Unfortunately, neither universities nor individual researchers have the resources or expertise to properly vet those partners or personnel for risks to national security.

Governmental organisations fare no differently. The Australian Research Council (ARC) – the statutory body of the Commonwealth which administers the \$800 million a year in funding under the National Competitive Grants Program (NCGP) – has almost no resources on dealing with research or knowledge security. Instead, it provides a copy of the UFIT Guidelines on its website and indicates, somewhat obliquely, how national security risks are managed in the NCGP.²⁹ The ARC does not publish information about grants or projects (even on a deidentified basis) which are refused for national security reasons, or which may attract particular risks. Nor does the ARC provide any guidance on how national security risk in sensitive or high-risk technologies can be mitigated.

There is further – unlike the US, Canadian and Netherlands governments – no centralised point of contact for HEIs into government for information or resources on best practice for controlling or eliminating national security risk.

The Netherlands National Contact point for example coordinates across the numerous Ministries with interests in the security and integrity of research endeavours: the Ministry of Agriculture, Nature and Food Quality, Ministry of Defence, Ministry of Economic Affairs and Climate Policy, the Ministry of Education, Culture and Science, the Ministry of Foreign Affairs, the Ministry of Justice and Security and the Ministry of the Interior and Kingdom Relations.

Australia has no such centralised coordination point into governmental support, resources, or assistance. Indeed, the existing Counter Foreign Interference Coordinator, the office charged with 'coordinating Australia's whole-of-government efforts to respond to acts of

²⁷ Department of Education, *Guidelines to Counter Foreign Interference in the Australian University Sector* (17 November 2021) <<https://www.education.gov.au/guidelines-counter-foreign-interference-australian-university-sector/resources/guidelines-counter-foreign-interference-australian-university-sector>>.

²⁸ The PJCIS Report, n 19, 136-137.

²⁹ Australian Research Council, *Research Security* (website, 2022) <<https://www.arc.gov.au/funding-research/research-security>>.

foreign interference',³⁰ has existed since 2018 but has not published a single useful resource, either for HEIs or otherwise.

Most recently, the Australian Security Intelligence Organisation produced a resource entitled *Collaborate with Care*,³¹ a guidance document intended to operate alongside and complement the University Foreign Interference Taskforce (UFIT) Guidelines.³² This document represents the first truly useful resource for HEIs in Australia looking to tackle national security risks both on- and off-campus. However, neither the *Collaborate with Care* document nor the UFIT Guidelines have any legally coercive effect on HEIs, their policies or practices.

The scope and content of academic freedom

Knowledge security and research security are loaded terms in academic contexts because of the collision between the restrictions required by those concepts and the right to academic freedom. Australia has recently experienced a strong focus on the protection of academic freedom (including the freedom of academics to speak on, discuss or publish unpopular or controversial topics).

As a matter of international law, academic freedom has long been recognised as a human right under Article 15(1)(b) of the *International Covenant on Economic, Social and Cultural Rights 1966* (ICESCR)³³ – which recognises the right of everyone ‘to enjoy the benefits of scientific progress and its applications’ – and also as a derivative right of the right to free participation in culture under Article 27(1) of the *Universal Declaration of Human Rights* (UDHR).³⁴ Australia is a signatory to both ICESCR and the UDHR, and carries international obligations under both treaties.

In 2009 UNESCO released the Vienna Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications. The Vienna Statement recognised an individual right to enjoy the benefits of scientific progress and its applications, and that States held a duty to respect that right. In doing so, the Vienna Statement provided for a balance between:³⁵

- *To respect the freedoms indispensable for scientific research and creative activity, such as freedom of thought, to hold opinions without interference, and to seek, receive, and impart information and ideas of all kinds;*

...

³⁰ Department of Home Affairs, *National Counter Foreign Interference Coordinator* (website, 11 July 2023) <<https://www.homeaffairs.gov.au/about-us/our-portfolios/national-security/countering-foreign-interference/cfi-coordinator>>.

³¹ ASIO, *Protect Your Research, Collaborate with Care* (website, 2023) <<https://www.asio.gov.au/protect-your-research>>.

³² UFIT Guidelines, n 27.

³³ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, entered into force 16 December 1966, 993 UNTS 3. Australia is a signatory to the ICESCR.

³⁴ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

³⁵ UNESCO, *Experts' Meeting on the Right to Enjoy the Benefits of Scientific Progress and its Applications* (Venice, Italy, 2009) <<https://unesdoc.unesco.org/ark:/48223/pf0000185558>>; reflected in the *Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications* (UNESCO, July 2009) <https://www.aaas.org/sites/default/files/VeniceStatement_July2009.pdf>.

- *To take appropriate measures to prevent the use of science and technology in a manner that could limit or interfere with the enjoyment of the human rights and fundamental freedoms.*

Yet that Statement was supported by the Special Rapporteur's report in 2012 on the scope of the right which involved a call to States to 'protect all strata of the population both socially and materially, from possible harmful effects of the misuse of scientific and technological developments'³⁶ (emphasis added). The Special Rapporteur considered that States should adopt the precautionary principle to exercise 'caution and the avoidance of steps are required in case an action or policy might cause severe or irreversible harm to the public or the environment' as well as to 'monitor the potential harmful effects of science and technology, to effectively react to the findings and inform the public in a transparent way'.³⁷

Both the Vienna Statement and the Special Rapporteur's report find favour in the *Recommendation on Science and Scientific Researchers* in 2017³⁸ and the *General Comment of the Committee on Economic, Social and Cultural Rights* in 2020.³⁹ Both statements recognise the importance of the freedom of inquiry coupled with the freedom of communication of results, but recognise the growing importance that restrictions on communication may be justified if accompanied by appropriate safeguards subject to 'strict justification'.⁴⁰

Many European countries like France, Germany, Spain and the Netherlands adopt academic freedom as a Constitutional protection.⁴¹ Academic freedom in the US is equally protected as a derivative freedom of the First Amendment to the *US Constitution*. The US Supreme Court has said that such freedoms were 'of transcendent value to all of us, and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom'.⁴²

Australian academic freedom is not protected by our *Constitution*, either as a species of freedom of speech or otherwise.⁴³ Instead, academic freedom has a statutory footing provided by the *Higher Education Support Act 2003* (Cth), which imposes obligations on Australian HEIs to 'have a policy that upholds freedom of speech and academic freedom'.⁴⁴ Such policies must, as a minimum, protect 'the freedom of academic staff to teach, discuss,

³⁶ Farida Shaheed, *Report of the Special Rapporteur in the field of cultural rights: The right to enjoy the benefits of scientific progress and its applications* (UNGA Human Rights Council, A/HRC/20/26) at 14, [50].

³⁷ Ibid.

³⁸ UNESCO, *Recommendation on Science and Scientific Researchers* (Records of the General Conference, 39th session, Paris, 30 October-14 November 2017), Annex II.

³⁹ Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 25 (2020) on Science and Economic, Social and Cultural Rights (Article 15 (1) (B), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights* (United Nations, E/C.12/GC/25, 2020).

⁴⁰ UNESCO, [38]; CESCR, [35]-[36].

⁴¹ Terence Karran, Lucy Mallinson, *Academic Freedom in the U.K.: Legal and Normative Protection in a Comparative Context* (Final report, University and College Union, May 2017).

⁴² *Keyishian v Board of Regents* 385 US 589 (1967), 603.

⁴³ Unlike the protections of academics in the United States, South Africa, Spain, Germany or Japan in their *Constitutions*.

⁴⁴ *Higher Education Support Act 2003* (Cth), s 19.115.

and research and to disseminate and publish the results of their research’ and ‘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’.⁴⁵ Similar statutory obligations are imposed on HEIs in Aotearoa New Zealand,⁴⁶ Canada⁴⁷ and the United Kingdom.⁴⁸

Academic freedom in Australia is highly fragmentary because the obligations imposed by law results in separate HEIs developing their own policies, such that the content and character of academic freedom is recognised in different ways across the country. For public universities, such policies are largely enacted by reference to their enabling statute,⁴⁹ whereas private universities enact policies that reflect the nature of the company which operates them.⁵⁰ Although the *Higher Education Standards Framework (Threshold Standards) 2011* (Cth) provides some guidance, these standards do not articulate how academic freedom should be protected, merely that it must be.⁵¹

It has largely been left to the courts in Australia to identify the content of academic freedom. In the case of *Gray*,⁵² an academic employee of the University of Western Australia sought – after completing research at the university relating to liver cancer – to commercialise and patent certain inventions which had arisen during his time at the University. The court found that he was able, in protection of his right to freedom of speech and academic freedom, to pursue such patents as he saw fit. Appeals to both the Full Court⁵³ and the High Court⁵⁴ were dismissed.

Although this case did not relate specifically to the concept of knowledge or research security, it carries several lessons of relevance.

Firstly, the nature of academic employment in research (which for present purposes includes the appointment of Masters’ students and PhD candidates) involves unique characteristics of freedom to choose where, when and how publication of their research occurs. As Griggs and Price said, the ‘distinctiveness of academic employment and the freedom an academic has in choosing the line of research and publishing as they see fit — this [sits] uneasily with the requirement to maintain secrecy surrounding any confidential information obtained through the position’.⁵⁵

⁴⁵ Ibid, Schedule 1, definition of ‘academic freedom’.

⁴⁶ *Education and Training Act 2020* (NZ), ss 267(1) and (4).

⁴⁷ *C-32, An Act respecting academic freedom in the university sector*.

⁴⁸ *Higher Education (Freedom of Speech) Act 2023* (UK), Pt A1.

⁴⁹ See for example *Australian National University Act 1991* (Cth), s 5(1); *University of Melbourne Act 2009* (Vic), s 5(1).

⁵⁰ See for example *Bond University Act 1987* (Qld), s 3(1); *Torrens University Australia Act 2013* (SA), s 5.

⁵¹ Relevantly, cls 6.1.4 and B1.1.

⁵² (2008) 246 ALR 603.

⁵³ *University of Western Australia v Gray* (2009) 179 FCR 346.

⁵⁴ *University of Western Australia v Gray* [2010] HCATrans 11 (12 February 2010).

⁵⁵ Lynden Griggs, Rohan Price, ‘The University Academic as a Fiduciary - Where to Following University of *Western Australia v Gray*?’ (2008) 19(3) *Journal of Law, Information and Science* 22; citing *Gray* (2009) 179 FCR 346, [198].

Secondly, HEIs cannot “read down” academic freedom. Any variation to the content of the freedom must involve ‘express arrangements’⁵⁶ between the institution and the researcher.

Writing outside of his role with the court, Justice French developed a *Model Code for the Protection of Freedom of Speech and Academic Freedom in Australian Higher Education Providers* (“Model Code”). Eighteen months after the publication of Justice French’s report, the Department of Education engaged Professor Sally Walker to conduct a review of university adoption of the Model Code.⁵⁷ Her report showed that although most universities had taken steps to align their policies with the Model Code, several had not. Further, Professor Walker’s findings were that even amongst Australian universities who had undertaken work to align their policies with the Model Code had not all completely aligned their policies on academic freedom (in fact, only nine had done so⁵⁸).

Both the Model Code (as developed by Justice French⁵⁹) and the amended Model Code (as developed by the University Chancellors Council⁶⁰ [“amended Model Code”]) enshrine the freedom of speech and academic freedom subject to limitations and restrictions imposed only by:

- the 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.

The scope of both the Model Code and the amended Model Code permit restrictions on both freedom of speech and academic freedom as permitted by law, and where reasonable and proportionate either to discharge the university’s teaching and research activities or to give effect to its legal duties.

Under all three limbs as outlined in the Model Code and the amended Model Code, universities should be enabled and permitted to limit academic freedom – albeit only to the barest extent as considered reasonable, necessary and proportionate to the risk sought to be mitigated. The University Accord should consider the appropriate recognition of knowledge and research security in line with the nature of academic freedoms in its Final Report.

⁵⁶ Ibid.

⁵⁷ Sally Walker, *Review of the Adoption of the Model Code on Freedom of Speech and Academic Freedom* (Final Report, December 2020) <<https://www.education.gov.au/higher-education-reviews-and-consultations/independent-review-adoption-model-code-freedom-speech-and-academic-freedom>>.

⁵⁸ Ibid, 27.

⁵⁹ Ibid, Appendix A.

⁶⁰ Ibid, Appendix B.

The Proper Balance of National Security and Academic Freedom

Thus, academic freedom is not an unlimited freedom without certainty or boundary.⁶¹ The recent High Court of Australia decision in *Ridd* reiterated that academic freedom – whilst a vitally important right in a democratic and egalitarian society like Australia – is nevertheless qualified.⁶² Academic freedom may be subject to the above limits, which practically will include matters invoking interference with the legal rights of others,⁶³ where the expression involves ‘harassment, vilification, bullying, or intimidation’,⁶⁴ and in order to respect confidentiality where it serves the public interest.⁶⁵

It is on this basis – the overwhelming public interest – which requires steps for the securing of knowledge and research must be taken. This is not to say that it subordinates the entirety of academic freedom; merely that there may be circumstances which demand that, in the interests of Australia, certain research or knowledge is subject to certain safeguards, limitations or restrictions.⁶⁶

For example, it is difficult to square the contention that an individual exercising their academic freedom would be acting contrary to the public interest in most cases. In a liberal democracy such as Australia, the nature of academic freedom is almost indistinguishable from the public interest, particularly the public interest in intellectual inquiry and the robust engagement in debate and public discourse. If a matter falls within an individual’s area of expertise and does not affect the legal rights of others, the notion of academic freedom allows an individual to share their ideas, irrespective of whether those views are controversial or otherwise lack civility or courtesy. As the Full Court of the High Court said in *Ridd*:⁶⁷

Whilst different views might reasonably be taken about some additional restrictions upon intellectual freedom, the instrumental and ethical foundations for the developed concept of intellectual freedom are powerful reasons why it has rarely been restricted by any asserted “right” of others to respect or courtesy. It is not necessary to go as far as Said’s assertion that “the whole point [of an intellectual] is to be embarrassing, contrary, even unpleasant” to conclude that, however desirable courtesy and respect might be, the purpose of intellectual freedom must permit of expression that departs from those civil norms. (footnotes omitted)

But if the researcher is involved in sensitive, protected, or classified research, it should be necessary and appropriate in the context of the public interest that academic freedom be limited. It may be that ‘[a]cademic staff, who have the credentials and professional obligation to engage in scholarly debates including on matters of public interest, are afforded broader

⁶¹ Robert French, *Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers* (Report, March 2019) 18.

⁶² *Ridd v James Cook University* (2021) 95 ALJR 878, 886 at [25].

⁶³ *Ibid*, 886 at [24].

⁶⁴ *Ibid*, 886 at [32].

⁶⁵ *Ibid*, 888-889 at [38]-[40].

⁶⁶ Carolyn Evans, Adrienne Stone, *Open Minds: Academic Freedom and Freedom of Speech in Australia* (La Trobe University Press, 2021) 54-55.

⁶⁷ *Ridd*, [33].

latitude to associate themselves with their institution...'.⁶⁸ But those same academic staff may also be subject to the limitations of law,⁶⁹ or the rule-making powers invested in HEIs by virtue of their enabling legislation.⁷⁰ Those same restrictions are also, if enacted in a manner that is reasonable, necessary and proportionate to the risk, compliant with Australia's international obligations.⁷¹

The necessary balance should respect the following principle:

Open by default, protected where necessary

Those necessary values for innovation and creativity in academia – openness, transparency, intellectual exchange and robustness in inquiry – should be retained and appropriately protected in legislation; however, those same values should submit to the needs of national security, where the imposition of controls or limitations are **reasonable, necessary, and proportionate**, and where imposition is only to the barest degree needed to achieve its aims. Such is not just necessary for the protection of our research and teaching bodies of knowledge, but also to ensure the integrity of Australia's geopolitical, economic and diplomatic objectives.

As a first principle, the Australian government should focus on hardening Australian HEIs by developing their institutional resilience and awareness of the security risks in the broader national and international context. They should look to create and maintain a strong research environment that respects each institution's autonomy, whilst simultaneously ensuring each institution has the tools and resources needed to protect itself from those risks.

Equally, the government must also recognise that in some instances, self-regulation and individual compliance will not be enough. The government should be willing and able to assess the standards by which each institution address its mitigation of national security risk (i.e., initially by comparison to the UFIT Guidelines, and later to an agreed upon binding standard). As a last resort, the government should be prepared to take actions which call out or even sanction high-risk behaviour by Australian HEIs.

The government should also consider the development of an inventory of technologies and research domains which it considers "sensitive" or otherwise essential to the national security of Australia. The criteria for identifying those domains should be publicly available, flexible and responsive to the emergence of new threats and novel technologies.

⁶⁸ Robert French, *Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers* (Final report, March 2019) 166.

⁶⁹ Such as disclosures of classified information: *Criminal Code* (Cth), ss 913.3 and 122.1-122.4A.

⁷⁰ *Ibid*, 133-137.

⁷¹ See for example the ICCPR, art 19(3)(b), which permits limitation of the freedom of speech and freedom of expression if reasonable, necessary and proportionate '[f]or the protection of national security or of public order'.

Visa security and integrity for students and academics

The Interim Report indicates a significant overhaul in Australia's migration and post-study work rights is needed in ensuring both enough students as well as job-ready graduates are available for a wide range of key industries. Unsurprisingly, the Interim Report also reflects positively on the Australia's track record as an attractive location for international study, placing third in the world behind Canada and the United Kingdom.⁷² The Interim Report also stipulates that HEIs play a vital role in, and spend significant resources on, supporting international students to both enrol in and complete their chosen course of study, as well as connect through to industry to put those skills into use. However, the Interim Report does not raise the issue of national security risks attendant in making Australia so attractive to foreign talent.

Also in 2023, a review was completed on Australia's migration system, which included a focus on international student visas ("the Migration Review").⁷³ In addition to the direct and indirect economic benefits of international students, the Migration Review also found significant that such students generate 'cultural capital and [diplomatic] "soft-power" for Australia', an improvement in international trade relations, and the contribution of labour to particular economic areas.⁷⁴ Whilst confronting the nature of potential abuse of the system by 'non-genuine students and unscrupulous profit-seeking education providers',⁷⁵ the Migration Review focused solely on contributions of international students post-qualification.⁷⁶

Yet nowhere in either the Interim Report nor the Migration Review is any mention of the important role, either now or in the future, played by security assessments undertaken by the Australian Security Intelligence Organisation (ASIO).

Under the *Migration Act 1958* (Cth), the Department of Home Affairs may refer any application for a visa to ASIO for a security assessment. A person who is 'directly or indirectly a risk to security'⁷⁷ is also considered to have a 'character concern',⁷⁸ which may result in any visa application being refused and/or any visas already issued being cancelled.⁷⁹ This includes student visas which may have been subject to an adverse security assessment.

Security assessments for visa purposes are estimated to contribute between 20% and 40% of ASIO's annual security assessment caseload,⁸⁰ though this has no doubt increased given ASIO's most recent threat assessment which stated, 'Australia is facing an unprecedented

⁷² Interim Report (n 1), 93.

⁷³ Martin Parkinson, Joanna Howe, John Azarias, *Review of the Migration System* (Final Report, Department of Home Affairs, 2023) <<https://www.homeaffairs.gov.au/reports-and-pubs/files/review-migration-system-final-report.pdf>>.

⁷⁴ *Ibid*, 105.

⁷⁵ *Ibid*, 106.

⁷⁶ *Ibid*, 109-116.

⁷⁷ "Security" is defined in the *Australian Security Intelligence Organisation Act 1979* (Cth), s 4.

⁷⁸ *Migration Act 1953* (Cth), s 5C(1)(g).

⁷⁹ *Ibid*, s 134B, 501(1) and (6)(g).

⁸⁰ Australian National Audit Office, *Security Assessments of Individuals* (Report, 25 June 2012) <<https://www.anao.gov.au/work/performance-audit/security-assessments-individuals>>.

challenge from espionage and foreign interference'.⁸¹ In 2021-22, ASIO completed 6,474 visa assessments, up on 5,971 from 2020-21.⁸² Based (at least in part) on those assessments, in 2021-22, the Department cancelled 148 visas onshore and 8,270 visas offshore – down from 368 onshore and 13,071 offshore in 2020-21 – but did not provide specific breakdowns for reasons that such visas were cancelled (as it does generically for other visa types).⁸³

Collectively these statistics demonstrate two things: firstly, that ASIO will – certainly in the future contemplated by the University Accord – be required to conduct more security assessments, to more depth, and more quickly; and secondly, they do not currently have the necessary resourcing to achieve those outcomes.

Further, the issue is also raised in the Interim Report of precisely where on the spectrum of ameliorating national security risks most Australian HEIs will sit in the context of international students. Consider the following:

- Does an Australian HEI carry any obligation to conduct due diligence on the students and/or academics it seeks to appoint?
- Does the Australian government's decision to grant an international student visa vouchsafe that student is not a risk to Australian security?
- If so, what responsibilities does an Australian HEI have in relation to monitoring international students, as well as its employees, for threats to national security?
- If not, to what extent should an Australian HEI do so that does not replicate assessments performed by the Government?

Case study 1: At Duke University in 2010,⁸⁴ graduate student Ruopeng Liu was granted permission to study in a university laboratory perfecting a meta-material capable of rendering objects invisible to millimetre-wave radar. Liu is alleged to have not only supported the visa applications of two other researchers (who may have held links to Chinese military intelligence) but also subsequently took several copies, measurements and sensitive research data from the laboratory back to China. This act allowed the establishment of a “shadow laboratory” to enable use of the meta-material by the Chinese military.

In those circumstances, what responsibilities would the university have had in relation to “screening” Liu and his fellow researchers?

And what monitoring actions should the university have done to prevent the alleged theft?

⁸¹ Michael Burgess, *Director-General's Annual Threat Assessment* (website, 21 February 2023)

<<https://www.asio.gov.au/director-generals-annual-threat-assessment-2023>>.

⁸² Australian Security Intelligence Organisation, *Annual Report 2021-22* (Report, Canberra, 2022)

<<https://www.transparency.gov.au/annual-reports/australian-security-intelligence-organisation/reporting-year/2021-22-46>>.

⁸³ Department of Home Affairs, *Visa statistics* (website 18 December 2022)

<<https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation>>.

⁸⁴ Cynthia McFadden, Aliza Nadi, Courtney McGee, 'Education or espionage? A Chinese student takes his homework home to China', *NBC News* (online, 24 July 2018) <<https://www.nbcnews.com/news/china/education-or-espionage-chinese-student-takes-his-homework-home-china-n893881>>. See also ASIO (n 31), 18.

Indo-Pacific engagement by universities

The Interim Report notes that only 3.5% of research income for Australian HEIs comes from international sources, as well as noting that Australia is a key partner in the Indo-Pacific, where our expertise and research capabilities can leverage and be leveraged by our regional neighbours.⁸⁵ In particular the Interim Report notes that ‘Australia’s geographical location and research strengths position the nation well to drive innovation in areas that strengthen our work with our Indo-Pacific neighbours without compromising Australia’s technological advantages in critical defence technologies’.⁸⁶

However, present practice by universities has not borne this out. Consider for example, the Public Register of Foreign Arrangements maintained by the Department of Foreign Affairs and Trade.⁸⁷ It is a legal requirement for entities to publicly record arrangements with any “foreign principal”, such as a foreign government, an agency or organ of a foreign government, or a foreign HEI.⁸⁸

Of the 7,901 results on the public register at the time of writing this submission, very few appear to be between Australian universities and our Indo-Pacific neighbours and allies. Australian universities have self-disclosed the existence of only 46 agreements with India, 98 with New Zealand and 119 with all of the island nations located in the Indo-Pacific region (Cook Islands, Fiji, French Polynesia, Kiribati, Nauru, New Caledonia, New Zealand, Papua New Guinea, Republic of Palau, Republic of the Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu). Compared with 3,363 agreements with universities in China, there exists a massive discrepancy between both funding availability and research being conducted with our nearest regional neighbours. This massive discrepancy in research collaboration and cooperation needs to be addressed by incentivising HEI involvement in our immediate geopolitical region.

In the Interim Report, this possibility is presented as ‘expanding to new international student markets’. Yet the benefits in doing so are far greater than just providing economic stability for Australian HEIs. Australian HEIs have the capacity to contribute – both in terms of funding but also capacity-building – to both the research and teaching environments of our Pacific neighbours in a manner that contributes to peace and security in the region.

Some have referred to the draw of international students to Australia as “soft diplomacy”⁸⁹ – that would be an accurate assessment, and is needed to counter China’s increasing influence.⁹⁰ Australia has played a role in the counter to those efforts, lobbying the island

⁸⁵ Interim Report (n 1), 82.

⁸⁶ Ibid.

⁸⁷ Department of Foreign Affairs and Trade, *Foreign Arrangements Scheme* (website, 2023) <<https://www.foreignarrangements.gov.au/public-register>>.

⁸⁸ *Foreign Interference Transparency Scheme Act 2018* (Cth).

⁸⁹ Gregory Michael McCarthy, ‘The Universities Accord draft contains “spiky” ideas, but puts a question mark over the spikiest one of all’, *The Conversation* (online, 28 July 2023) <<https://theconversation.com/the-universities-accord-draft-contains-spiky-ideas-but-puts-a-question-mark-over-the-spikiest-one-of-all-210383>>.

⁹⁰ Patricia O’Brien, ‘China in the Pacific: The Fiji Case’, *The Diplomat* (online, 1 May 2023) <<https://thediplomat.com/2023/05/china-in-the-pacific-the-fiji-case/>>.

nations directly as well as supporting the establishment of a NATO satellite office in Japan.⁹¹ However, Australia also needs to consider the national security and geopolitical advantages of improving its international student offerings to countries in geopolitical area, such as Fiji, Tonga, the Solomon Islands, and Papua New Guinea, as well as regional allies such as Japan and India (who, with the US, form part of the “Quad”, the Quadrilateral Security Dialogue).

This was also recognised in the Migration Review, where migration was needed to ‘support the role we want to play in the world’.⁹² Despite that ambition, the Migration Review found ‘forgoing opportunities to deepen people-to-people links with our neighbours’.⁹³ These findings should be somewhat surprising given the \$1.62 billion in development assistance aid supplied by Australia to the Indo-Pacific.⁹⁴

The University Accord should therefore look to recognise the increasing importance of HEI education in Indo-Pacific nations, not just to challenging the largely Euro-centric dynamic of academic discourse, but also for the achievement of diplomatic and national security objectives. Closer and more substantial educational agreements with our regional neighbours will not only strengthen our own research endeavours but make those partners less attractive and at lower risk for approaches by our potential geopolitical adversaries.

The University Accord must also emphasis a greater level of HEI investment in programs in the Indo-Pacific. Doing so will not only increase the attractiveness of Australia as a destination for international students and contribute to Australia’s economy more broadly but will also achieve the objectives of Australia’s migration system and signalling a more unified approach to the Indo-Pacific region to democracy and liberal values.

International student experience

Immediately following from this observation, it is pointless providing opportunities for international students to engage in research and learning activities at Australia HEIs if they cannot meaningfully take up or engage in those opportunities. Relevantly, the Interim Report focused attention on the hardships suffered by international students as a function of their vulnerability in a foreign country, surrounded by difficult-to-navigate legal systems and a lack of support mechanisms.⁹⁵

Another issue, related to the implications of knowledge and research security, is also relevant to the attendance of international students at campuses of Australian HEIs. Evidence provided to the Parliamentary Joint Committee of Intelligence and Security’s *Inquiry into national security risks affecting the Australian higher education and research sector* described incidents where expatriate students and researchers had been threatened, coerced or

⁹¹ Tory Shepherd, ““Much more ambitious”: Australia to deepen partnership with NATO as it opens Japan office”, *The Guardian* (online, 14 June 2023) <<https://www.theguardian.com/world/2023/jun/14/much-more-ambitious-australia-to-deepen-partnership-with-nato-as-it-opens-office-japan>>.

⁹² Migration Review (n 73), 162.

⁹³ Ibid.

⁹⁴ Department of Foreign Affairs and Trade, *Annual Report 2021-22* (Canberra, 26 September 2022) <<https://www.transparency.gov.au/annual-reports/department-foreign-affairs-and-trade/reporting-year/2021-22-7>>.

⁹⁵ Interim Report (n 1), 119-120.

intimidated by the agents of foreign powers whilst at Australian campuses.⁹⁶ Several recommendations made by the Inquiry were targeted at dealing with this issue, but the Government's response only 'Supported' or 'Noted' those recommendations.⁹⁷

These risks have not vanished since the PJCIS Report was handed down. University of Technology Sydney advised its students they were free to dispute or disagree with opinions or beliefs after some students alleged they were the subject of "doxing" attack.⁹⁸ International students studying in Australia have complained that of numerous approaches by foreign agents from their home countries, posing as debt collectors or corruption investigators.⁹⁹ Some Chinese students have even been approached by actual officers of their police force, after a "contact point" was established in Sydney by Wenzhou's Department of Public Security.¹⁰⁰

The Senate Select Committee on Foreign Interference Through Social Media heard similar evidence. Numerous witnesses provided first-hand accounts of death threats, stalking, doxing and other forms of online abuse by accounts that were either operated by foreign intelligence services, or proxies acting on their behalf.¹⁰¹ Warnings have also been made about the actions of foreign intelligence recruiters on professional social media such as LinkedIn.¹⁰²

Not only does the University Accord need to – quite properly – deal with the threats of physical and sexual violence on the campuses of Australian HEIs for all students, they need to also be aware of and resourced to appropriately recognise, report and mitigate acts of physical and emotional threats, violence or coercion, all of which may be in support of a broader infiltration or subversion of the academic environment.

⁹⁶ Parliamentary Joint Committee of Intelligence and Security's *Inquiry into national security risks affecting the Australian higher education and research sector* (Final report, Parliament of Australia, March 2022) 20-23.

⁹⁷ Australian Government, *Response to the Parliamentary Joint Committee on Intelligence and Security report: National security risks affecting the Australian higher education and research sector* (Report, February 2023) 4.

⁹⁸ Where the personal contact details – such as phone numbers, emails or addresses – of a person are maliciously made public, often to discourage or threaten such a person indirectly: Sophie McNeill, 'How Australian universities are working to counter China's global attacks on academic freedom', *ABC News* (online, 1 April 2022) <<https://www.abc.net.au/news/2022-04-01/australian-universities-countering-chinas-attacks-on-freedom/100951816>>.

⁹⁹ Brendan Walker-Munro, 'Why universities are still at risk for foreign interference', *The Interpreter* (online, 7 August 2023) <<https://www.lowyinstitute.org/the-interpreter/why-universities-are-still-risk-foreign-interference>>.

¹⁰⁰ Bang Xiao, 'China establishing overseas police presence in Australia and around the world', *ABC News* (online, 13 October 2022) <<https://www.abc.net.au/news/2022-10-13/beijing-sets-up-overseas-police-presence-including-in-australia/101512216>>.

¹⁰¹ Brendan Walker-Munro, Sarah Kendall, 'Foreign interference through social media is an active threat. Here's what Australia can do', *The Conversation* (online, 7 August 2023) <<https://theconversation.com/foreign-interference-through-social-media-is-an-active-threat-heres-what-australia-can-do-211036>>.

¹⁰² Andrew Greene, 'ASIO launches first public awareness campaign to warn Australians of foreign spies on social media', *ABC News* (17 November 2020) <<https://www.abc.net.au/news/2020-11-17/asio-warns-foreign-spies-grooming-australians-on-social-media/12889228>>; Fiona Hamilton, 'Exposed: the Chinese spy using LinkedIn to hunt UK secrets', *The Times* (online, 23 August 2023) <<https://www.thetimes.co.uk/article/1ba8f1bc-4102-11ee-8b31-3c9c533abb75?shareToken=051a3a880f6742f3854e4fbaa36cef8a>>.

Collaboration in the face of national security threat

Collaboration is another key focus of the Universities Accord and appears as a significant policy focus in areas of teaching, learning, research and commercialisation.¹⁰³ However, the Report addresses international collaboration for HEI's teaching and research mission in the following way:

It explores options to balance an expansion of our international student market with the upkeep of world-leading student experience and the importance of staying on the forefront of innovation while helping our neighbours through research partnerships and offshore teaching models, especially contributing to our neighbours' efforts to grow their own education offerings.¹⁰⁴

The Interim Report calls for Australia-based HEIs to 'promote global connectivity' to 'deepen Australia's engagement and influence on the global stage, helping us work with partners overseas to meet common goals, it also means Australia has access to cutting-edge global research and discoveries'.¹⁰⁵

There are two aspects to this statement in the Interim Report which should be of concern when viewed through a national security context.

Firstly, whilst the Interim Report makes some mention of Australia's educational partnerships with our strategic partners, these are essentially fleeting or passing references. The Interim Report barely mentions India,¹⁰⁶ and makes only passing reference to Japan.¹⁰⁷ Such a restricted view fails to consider the incredible contribution those countries make to Australia's security through the Quad Security Dialogue. New Zealand – one of our closest regional allies – is largely ignored save for discussion of their educational Code of Practice.¹⁰⁸ Singapore is discussed only regarding their MySkillsFuture program,¹⁰⁹ and Indonesia is not mentioned at all. Our collaborations with these countries should be placed first and foremost in the University Accord, with appropriate strategies and policies in place to deepen our collaborations with these strategic partners.

Secondly, the Interim Report approaches all forms of collaboration as positive, without appropriately recognising that particular kinds of collaboration can be higher risk than others, and where 'even legitimate academic engagement with partners can cause damage to the national interest and present a national security threat'.¹¹⁰ Collaboration in HEIs is especially vulnerable to interference, infiltration and manipulation,¹¹¹ precisely because of the high

¹⁰³ Interim Report (n 1), 10, 11, 13-15.

¹⁰⁴ Ibid, 79.

¹⁰⁵ Ibid, 80.

¹⁰⁶ Ibid, 83 and 95.

¹⁰⁷ Ibid, 43 and 105.

¹⁰⁸ Ibid, 137.

¹⁰⁹ Ibid, 65.

¹¹⁰ ASIO (n 31), 1.

¹¹¹ AFP, 'Britain investigating reports of UK universities working with Iran on drones (website, 21 June 2023) <<https://english.alarabiya.net/News/world/2023/06/21/Britain-investigating-reports-of-UK-universities-working-with-Iran-on-drones>>; Arthur Parashar, 'MI5 boss Ken McCallum warns British students they are "magnetic targets for espionage and manipulation" by hostile foreign states', *The Daily Mail* (online, 22 July

premium that Western democratic states (such as Australia) place on freedom of expression and academic freedom.

In the case of universities in the European Union, it has long been recognised that openness and transparency can go hand-in-hand with risk:

Inherently, [university] is where some of the brightest minds gather to conduct research. Moreover, many academics tend towards collaboration and... [the] unguarded transfer of knowledge. The cooperative culture of many educational institutions in open societies, can regrettably, lead to...security risks.¹¹²

It was for precisely this reason that ASIO published *Collaborate With Care*, to recognise that the academic environment 'is the target of sophisticated and persistent espionage and foreign interference activities from a range of nations'.¹¹³ Collaboration without due diligence may result in foreign governments and intelligence services 'attempt[ing] to exploit this collaborative environment to acquire information and technology to their benefit, and to your—and Australia's—detriment'.¹¹⁴

Consistent with the position taken throughout this submission, the University Accord offers a platform for ensuring that HEIs are appropriately and properly resourced and prepared to manage national security risk both on- and off-campus. To do so, the Accord should be reflecting that not all collaboration is without risk, and that individual researchers, institutions, the government and even civil society should be live to the risks posed by adversarial nations willing to compromise Australia's knowledge base and technological developments. This is not to say that collaboration is unwelcome – far from it. Rather that HEIs will need to be prepared for the important role they will play in Australia's national security ecosystem.

This needs to be supported by a robust legislative framework in which HEIs are given the resources and tools to tackle collaborations which pose national security risk. Using the power in the *Australian Constitution*,¹¹⁵ government should consider enacting legislation to permit the listing of organisations or entities which pose national security threats to Australian HEIs from either research or teaching perspectives. Such listing should include (as a minimum):

- “Black-listing” – describing entities whose behaviours, public statements or connections pose unacceptable levels of risk to Australia's security, defence, international relations or foreign policy objectives. Collaborations with “black-listed” entities, irrespective of country of origin, should be banned.

2023) <<https://www.dailymail.co.uk/news/article-12325801/MI5-boss-Ken-McCallum-warns-British-students-magnetic-targets-espionage-manipulation-hostile-foreign-states.html>>; Sam Cooper, 'Chinese Consulates task Chinese students in aggressive intelligence ops: Canadian intelligence', *The Bureau* (website, 17 August 2023) <<https://www.thebureau.news/p/chinese-consulates-task-chinese-students>>.

¹¹² David Toman, Jan Famfollet, *Protecting Universities and Research from Foreign Interference and Illicit Technology Transfer* (Report, 2022) <https://europeanvalues.cz/wp-content/uploads/2022/11/REPORT_en_-_Protecting_Universities_-from_Foreign_Interference-2022.pdf> 4.

¹¹³ ASIO (n 31), i.

¹¹⁴ *Ibid.*

¹¹⁵ *Constitution*, s 51(vi); see *Thomas v Mowbray* (2007) 233 CLR 307 and Anthony Gray, 'The Australian Government's Use of the Military in an Emergency and the Constitution' (2021) 44(1) *UNSW Law Journal* 357.

- “Grey-listing” – describing entities whose academic or other credentials cannot be suitably verified to the satisfaction of the Australian government. Collaborations with “grey-listed” entities may be permissible if a HEI has undertaken sufficient due diligence and enacted robust risk control measures in relation to that collaboration;
- “Red listing” – describing entities whose connections with military personnel, organisations or facilities pose an unacceptable risk that information, knowledge or technology shared with such entities may be diverted to military “end-use”.¹¹⁶

Case study 2: Under US export control laws, the President (or his or her delegate) may impose licensing requirements (either a need for an export licence or a ban) on certain organisations and entities where they ‘act or at significant risk of acting contrary to the national security or foreign policy interests of the United States’.¹¹⁷ Exports to these entities include collaboration and sharing of information, knowledge or technology in both military and “dual-use” (i.e., both civilian and military uses) categories.

Most recently, the US has banned numerous Chinese, Russian and Iranian universities because of their ‘problematic behaviours’, which have included attempts to infiltrate American research institutions and universities. Others have provided students and academics to American universities subsequently involved in, accused of, or convicted of engaging in espionage, intellectual property theft or foreign interference.¹¹⁸

Australian export control laws do not allow for this level of listing or entity control,¹¹⁹ and therefore cannot proscribe certain entities to prohibit or control research activity. Although Australia does have a foreign interference registration scheme¹²⁰ (under which such research collaborations would need to be reported), this is largely self-regulatory. Further, the Commonwealth’s “veto” powers¹²¹ – where the Minister may terminate any arrangement or agreement contrary to Australia’s interests – is not proactiv, and may only be used on arrangements or agreements already executed. This power has also only been exercised once before in relation to infrastructure contracts between the Chinese and Victorian governments.¹²²

¹¹⁶ *Customs Act 1901* (Cth), s 112BA.

¹¹⁷ 15 CFR §744.11.

¹¹⁸ Jonathan Lehrfeld, ‘DoD looks to block Chinese and Russian influence on US academia’, *Military Times* (online, 6 July 2023) <<https://www.militarytimes.com/news/your-military/2023/07/05/dod-looks-to-block-chinese-and-russian-influence-on-us-academia/>>.

¹¹⁹ *Defence Trade Controls Act 2012* (Cth); except as imposed under the *Autonomous Sanctions Act 2011* (Cth).

¹²⁰ *Foreign Interference Transparency Scheme Act 2018* (Cth).

¹²¹ *Australia’s Foreign Relations (State and Territory Arrangements) Act 2020* (Cth).

¹²² Daniel Hurst, ‘Federal government tears up Victoria’s Belt and Road agreements with China’, *The Guardian* (online, 22 April 2021) <<https://www.theguardian.com/australia-news/2021/apr/21/federal-government-tears-up-victorias-belt-and-road-agreements-with-china>>.

This submission should not be viewed as endorsement for any form of “ban” on international students, doctoral candidates, or academics from one country or another. Such a ban would be a highly radical, controversial and potentially unlawful approach to the treatment of national security risk on the following grounds:

1. Such “bans” may result in reciprocal limitations or sanctions being imposed by the offended country, and which may go beyond the academic and potentially result in economic, diplomatic, or political costs which outweigh the possible benefit;¹²³
2. It would be extremely difficult to identify what areas of research, or what sub-specialities within a field, would be captured as “high risk”. The difficulty is analogous to “dual use” technologies, which are civilian technologies which may also be misused for military, security, or intelligence purposes;¹²⁴ and
3. A ban on students from a particular country, even on grounds of national security, might be considered a form of unlawful racial discrimination¹²⁵ (as well as violating Australia’s various international human rights obligations¹²⁶).

Instead, prohibitions or limitations on collaborations should be entity-specific, with stated reasons for the imposition of such restrictions, and avenues for aggrieved entities to seek judicial or administrative review. Government agencies given the responsibility of administering such entity lists should be aware that their actions will be subject to open and transparent scrutiny by a Judge, and should ensure their decisions are rational, reasonable, and referenced to appropriate evidence of wrongdoing or risk.

Research funding

The Interim Report also addresses the fact that ‘University research activity is currently underwritten by international student revenue and other cross-subsidies, and this creates unacceptable risk to the future’, especially where ‘funding security from year to year is unpredictable or at best subject to cyclic volatility’.¹²⁷

In line with those observations around research funding, the Interim Report makes mention of the need to ensure sustainable ongoing funding of the National Collaborative Research Infrastructure Strategy (NCRIS). The NCRIS was established with the intention to provide funding for ‘national research infrastructure’, which in turn involves funding not just the

¹²³ For an example, see reports of the directive in 2021 banning Chinese education agents from sending students to Australian universities: Julie Hare, ‘Chinese students told not to study in Australia’, *Australian Financial Review* (online, 25 February 2021) < <https://www.afr.com/policy/health-and-education/chinese-students-told-not-to-study-in-australia-20210225-p575t1>>.

¹²⁴ Jan Famfollet, *Protection of Strategic and Dual-Use Technologies* (Report, 2022) <<https://europeanvalues.cz/en/protection-of-strategic-and-dual-use-technologies/>>.

¹²⁵ *Racial Discrimination Act 1975* (Cth), s 9(1): It is unlawful for a person to do any act involving a distinction, **exclusion**, restriction or preference based on race, colour, descent or **national or ethnic origin** which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life (emphasis added).

¹²⁶ See for example the issues in banning the hijab in Ibrahim Abraham, ‘Hijab in an age of fear: Security, secularism, and human rights’ (2006) 19(2) *Australian Religion Studies Review* 169.

¹²⁷ Interim Report (n 1), 34.

facilities, equipment and resources for research but ‘experts needed to operate it’.¹²⁸ Whilst that approach is laudable, the NCRIS is due to expire in 2028-29, and has been criticised as failing to ‘provide a holistic or guaranteed sustainable source of research funding’.¹²⁹ The Interim Report thus recommends the government consider moving the NCRIS to sustainable, ongoing funding.¹³⁰

Both observations are strongly supported, as providing stability to research funding would also deal with the national security risks which are inherent in seeking funding sources from foreign entities.

Academics and researchers at Australian HEIs compete for funding from a variety of sources, both government and non-government, domestic and international. Whilst this competition ensures that only the most worthwhile projects are funded and ensures Australian researchers can compete internationally, it opens researchers up to the risk of seeking funding from less-secure or higher-risk funding partners. This in turn permits those funding partners access to, and influence over, the products of such research (whether in the form of knowledge or tangible inventions).

The risks of arrangements with foreign funding partners can be manifested in a variety of ways. Students on exchange from international institutions can complain or protest where Australian HEIs teach or research on issues that are taboo or controversial in their home countries.¹³¹ Universities may moderate or even delete social media posts or articles in response to foreign pressure, such as experienced by UNSW in 2020.¹³² Internationally, HEIs have received demands to alter controversial publications with threats that research funding will be restricted or withdrawn completely.¹³³

Case study 3:¹³⁴ In 2021, representatives of an Australia-based foundation—backed by a wealthy foreign-based business figure—approached an Australian university and offered to pay all expenses for a dinner to commemorate the diplomatic relationship between the Australian Government and the business figure’s home country.

¹²⁸ Department of Education, *National Collaborative Research Infrastructure Strategy (NCRIS)* (website, 2022) <<https://www.education.gov.au/ncris>>.

¹²⁹ Interim Report (n 1), 109.

¹³⁰ Ibid.

¹³¹ Jonathan Benney, ‘How should Australia respond to China’s influence in our universities?’, *The Conversation* (online, 30 October 2017) <<https://theconversation.com/how-should-australia-respond-to-chinas-influence-in-our-universities-86064>>.

¹³² Daniella White, ‘Freedom of Speech: Uni warns of foreign harassment’, *Sydney Morning Herald* (online, 15 August 2023) <<https://www.smh.com.au/politics/nsw/chilling-effect-top-uni-warns-students-about-foreign-harassment-20230801-p5dsxq.html>>.

¹³³ Jon Henley, ‘Dutch university gives up Chinese funding due to impartiality concerns’, *The Guardian* (online, 25 January 2022) <<https://www.theguardian.com/world/2022/jan/25/dutch-university-gives-up-chinese-funding-due-to-impartiality-concerns>>; Andreas Fulda, David Missal, ‘Mitigating threats to academic freedom in Germany: the role of the state, universities, learned societies and China’ (2022) 26(10) *The International Journal of Human Rights* 1803, DOI: 10.1080/13642987.2021.1989412.

¹³⁴ This case study is replicated in its entirety from ASIO (n 31), 21.

When staff conducted basic due diligence on the foundation by searching online, they discovered the business figure had been linked to multiple accusations of bribery and corruption internationally.

When staff discovered these accusations, they recommended the university not proceed with the collaboration, as it could potentially be an avenue for foreign interference, and cause reputational damage to the university.

Donations can be a vector for foreign inference: foreign-linked entities can use donations to gain access to senior staff and key decision-makers, and influence the institution's business decisions and the direction of research in a way that benefits a foreign country.

Universities are not especially trained or resourced to conduct the necessary and appropriate levels of due diligence on their proposed funding partners or institutions, either at the negotiation stage or during the life of such funding agreements. In many cases, those best placed to undertake such assessments – the Department of Home Affairs or ASIO – cannot share intelligence information with HEIs due to the onerous secrecy provisions in those agencies' enabling legislation.

Close relationships between government and HEIs will remain vitally important to disrupting the types of approaches mentioned above; however, another means of removing the threat is to ensure that Australian researchers are appropriately funded from domestic sources free of foreign interference or influence. This in turn requires that the Australian Government, whether directly (such as through increased funding to the ARC and similar funding bodies) or indirectly (by establishing strong funding guidelines for Australian HEIs), promotes an awareness and uptick in the necessary and appropriate due diligence when HEIs and individual researchers consider their funding partners.

Security Risks of Doctoral Candidates

Doctoral candidates – those enrolled in Doctor of Philosophy, Cotutelle, or similar higher degree by research (HDR) programs – occupy a fundamentally important role in the research ecosystem of Australian HEIs. The Interim Report recognises this fundamental role in fuelling Australia's 'transition to a more knowledge intense economy, especially in critical fields...'¹³⁵ The need for doctoral candidates under the AUKUS Agreement has also been called out,¹³⁶ something that has recognised since the announcement of both the acquisition of nuclear submarines as well as the increased knowledge sharing arrangements.¹³⁷

¹³⁵ Interim Report (n 1), 57.

¹³⁶ Ibid.

¹³⁷ Ben Packham, 'Subs need 108 PhD-level nuke scientists a year', *The Australian* (online, 6 March 2023) <<https://www.theaustralian.com.au/nation/defence/submarines-need-108-phdlevel-nuclear-scientists-a-year/news-story/dd90b2754969d5170f18017386b05686>>; Neil Martin, 'Three tiers and more than 8000 new engineers: what it will take to deliver AUKUS nuclear submarine program', *UNSW Newsroom* (online, 31 March 2023) <<https://www.unsw.edu.au/news/2023/03/three-tiers-and-more-than-8000-new-engineers--what-it-will-take->>; Brendan Walker-Munro, Lauren Sanders, Rain Liivoja, 'Preparing Australian universities for AUKUS',

Doctoral study is the most senior level of study available in Australia, corresponding to Level 10 of the Australian Qualifications Framework.¹³⁸ According with that level of seniority, numerous Australian HEIs have been treating doctoral candidates as *ad hoc* members of staff, including by providing of office space and computing resources in exchange for casual teaching and assessment duties.¹³⁹

Under current arrangements, the Interim Report recognises that both government and Australian HEIs will need to build the research workforce through appropriate and targeted development of PhD students in various pipelines in critical industries.¹⁴⁰ One such pipeline that has been proposed builds on the “industry PhD”, where candidates work on problems of relevant industries, supported by (and often placed within) those same industries.¹⁴¹ Another involves the amendment of doctoral course rules to permit portfolio or project-based formats to meet the requisite degree requirements.¹⁴²

Those measures should be strongly supported; however, an increase in doctoral candidate admissions in Australia come with attendant risks that are not mentioned in the Interim Report.

The majority of these doctoral candidates are likely to be sought from Australia’s international student pool, given enrolments for research have increased by more than 100% between 2008 and 2020.¹⁴³ The UFIT guidelines do not specifically address the mitigation measures necessary for countering the risks of espionage, foreign interference, or intellectual property theft posed by some doctoral candidates. HEIs are advised to conduct due diligence examinations ‘on research activities, partners, and university staff and research students who are at risk of foreign interference’. However, HEIs lack the institutional capacity to conduct these kinds of assessments, and it would be inappropriate to force supervisors of potential candidates to undertake those assessments on the HEIs behalf. As mentioned above, those best-placed in government – such as ASIO and the Department of Home Affairs – are bound by strict secrecy laws. They are usually unable to provide specific intelligence on known risks, especially if it could compromise ongoing security or intelligence investigations.

The Strategist (online, 7 August 2023) <<https://www.aspistrategist.org.au/preparing-australian-universities-for-aucus/>>.

¹³⁸ Australian Qualifications Framework, *Qualification levels* (website, 2022) <<https://www.aqf.edu.au/framework/aqf-qualifications>>.

¹³⁹ Margot Pearson, Terry Evans, Peter Macauley, ‘Editorial’ (2004) 26(3) *Studies in Continuing Education* 347, DOI: 10.1080/0158037042000265917.

¹⁴⁰ Interim Report (n 1), 108.

¹⁴¹ *Ibid*, 113.

¹⁴² *Ibid*, 115.

¹⁴³ Caitlin Cassidy, ‘Instant noodles and extra jobs: PhD candidates “barely scraping by” on stipends below minimum wage’, *The Guardian* (online, 29 January 2023) <<https://www.theguardian.com/australia-news/2023/jan/29/instant-noodles-and-extra-jobs-phd-candidates-barely-scraping-by-on-stipends-below-minimum-wage>>.

Case study 4: In 2020, doctoral student Li Jianjun came to the attention of the Counter Foreign Interference Taskforce for alleged involvement in a plot to infiltrate NSW Parliament using MP Shaoquett Moselmane. Both Li and Chen were forced to leave Australia after their visas were cancelled, allegedly following adverse security advice from ASIO.¹⁴⁴

However, that security advice does not appear to have been provided to the supporter and host of both Li and Chen in Australia, Western Sydney University, who were subsequently criticised for offering both a letter of recommendation and a video message in support of the review of Li and Chen’s visa cancellation.

Australia does have a security clearance system – administered jointly between the Department of Defence (the Australian Government Security Vetting Agency or AGSVA) and ASIO.¹⁴⁵ Universities could act as the sponsor of such clearances, and be generally responsible for certain responsibilities in relation to those individuals, i.e., conducting annual training, ensuring appropriate disclosures are made, etc.

Security clearances may be sought where an individual has access to “security classified” information, i.e., carrying dissemination limiting markers such as AUSTEO or AGAO, or classifications such as SECRET and TOP SECRET. Clearances may also be required because a candidate ‘occup[ies] a position of trust requiring additional assurance about the integrity of the position’s occupant’.¹⁴⁶ The Department of Defence provides the following guidance about the purpose for security clearances:

The purpose of the security vetting process is to determine whether an individual is suitable to hold a security clearance—that is, whether they possess and demonstrate an appropriate level of integrity. In the security context, integrity is defined as a range of character traits that indicate the individual is able to protect Australian Government resources. These character traits are: honesty, trustworthiness, maturity, tolerance, resilience and loyalty.

The assessment of a clearance subject needs to establish confidence that they possess a sound and stable character, and that they are not unduly vulnerable to influence or coercion. The PSPF requires that any doubt regarding an individual’s suitability to hold a security clearance be resolved in the national interest.¹⁴⁷

However, Australia’s current security vetting function residing with AGSVA is considered not fit for purpose to deal with the future of the higher education sector. Firstly, security clearances are only available for Australian citizens or permanent residents, meaning the vast majority of doctoral candidates will be unable to obtain one. Secondly, the vast backlog of

¹⁴⁴ Sean Rubinsztein-Dunlop, Echo Hui, ‘Australia revokes Chinese scholar visas and targets media officials, prompting furious China response’, *ABC News* (online, 9 September 2020) <<https://www.abc.net.au/news/2020-09-09/chinese-scholars-have-visas-revoked-as-diplomatic-crisis-grows/12644022>>.

¹⁴⁵ Part of the Department of Defence: *Applicants & Holders – Getting a security clearance* (website, 2022)<<https://www.defence.gov.au/security/clearances/applicants-holders/getting-a-security-clearance>>.

¹⁴⁶ Department of Defence, *Security clearances – overview* (website, 2022) <<https://www.defence.gov.au/security/clearances/about/overview>>.

¹⁴⁷ Ibid.

open security clearance cases was cited as one reason for transferring the most sensitive of clearances – “positive vetting” – to ASIO earlier this year.¹⁴⁸ Thirdly, , security clearances are also not a panacea for abuse, misuse or illegal conduct.¹⁴⁹ Whilst establishing a “university-specific” security clearance system has been suggested by some,¹⁵⁰ such a system would be a massive undertaking that will require significant governmental investment.

Together with other researchers, I have written of the other risks which may manifest in relation to doctoral candidates:

There are other risks that arise from the need to rapidly develop skills in complex technologies. Masters and doctoral students are routinely provided access to the IT infrastructure of universities in the course of their studies, which may enable maliciously motivated actors to take advantage of our lax cybersecurity. James Paterson, the Shadow Home Affairs Minister, has also alleged that the teaching of cybersecurity secrets to foreign nationals is contrary to Australia’s national security interests. Graduate students may also have certain resource dependencies for their research – such as the critical minerals or semiconductors needed in bleeding-edge technologies – which are not currently a significant part of Australia’s sovereign supply chains.

Existing mitigation measures are complex, unwieldy and limited by a lack of resources, expertise and time. For instance, universities must comply with Australian export rules when dealing with items with a potential military use. While there’s strong coordination between those issuing licences and universities in applying these controls, the list of controlled items and associated rules are complex and the system isn’t fit for purpose in dealing with novel technologies, such as those listed in the AUKUS agreement.

The publication of information and research about certain dual-use and military technologies requires government licensing under the Defence Trade Controls Act, but the scheme usually relies on self-reporting and self-assessment of projects. If a research project contains US military technology—which is one focus of AUKUS—the additional US control requirements are particularly onerous and come with the possibility of US criminal sanction if breached. As it stands, these rules significantly burden those researching this type of technology.

...

Restricting this type of research may do more harm than good.¹⁵¹

¹⁴⁸ Andrew Greene, ‘Defence struggling to process staff security clearances needed ahead of AUKUS rush’, *ABC News* (online, 31 March 2023) <<https://www.abc.net.au/news/2023-03-31/defence-struggle-security-clearances-aukus-staff-rush/102167842>>; see also Daniel Hurst, ‘ASIO to take over issuing high-level security clearances due to “unprecedented” espionage threat’, *The Guardian* (online, 29 March 2023) <<https://www.theguardian.com/australia-news/2023/mar/29/asio-to-take-over-issuing-high-level-security-clearances-due-to-unprecedented-espionage-threat>>.

¹⁴⁹ Phil McCausland, Ken Dilanian, Courtney Kube, ‘Does the Teixeira case mean the national security clearance system is broken?’, *NBC News* (online, 19 April 2023) <<https://www.nbcnews.com/politics/national-security/teixeira-case-mean-national-security-clearance-system-broken-rcna80170>>.

¹⁵⁰ William A. Stoltz, ‘Security clearance overhaul needed to build Australia’s high-tech workforce’, *The Strategist* (online, 2 December 2021) <<https://www.aspistrategist.org.au/security-clearance-overhaul-needed-to-build-australias-high-tech-workforce/>>.

¹⁵¹ Walker-Munro, Sanders and Liivoja (n 137).

Security measures in relation to doctoral candidates are not without their risks. International students in Masters' and PhD programs have been frustrated by the government's delays in completing 'legislated national security checks' as part of their visas.¹⁵² Four years later, reports emerged that delays for visas for international students remained or had gotten worse.¹⁵³ Not only do visa processing delays harm Australia's international image as an attractive location for doctoral study, but also present opportunities for our potential geopolitical adversaries to capitalise on our failures to promptly offer enrolment.¹⁵⁴

Risks to our national security in HEIs also need to be balanced against encouraging an environment of innovation and novelty. According to a 2020 report by Universities Australia, our HEIs contribute up to 87% of the country's 'discovery' or basic research and 45% of applied research.¹⁵⁵ Another report demonstrated that this discovery research is 'an essential and complementary element and force multiplier to our sovereign defence industry and capability edge'.¹⁵⁶

Finally, we need to be decreasing discrimination in Australian society, not increasing it. If our institutions are unable to properly perform entity-based assessments, 'nationality can easily become an unfair proxy for risk'.¹⁵⁷ True, Australia needs to ignore "country agnosticism" and acknowledge that certain countries engage in these types of illegal and unwanted behaviours towards our HEIs, and call out those actions which can be attributed to those countries to discourage them from interfering in the future.¹⁵⁸ But that same acknowledgment should not result in Australian society tilting towards discrimination against *all* persons of a particular racial or national origin, especially given the incredible benefits economically, culturally and socially which international students bring to this country.

Conclusion

The Interim Report of the Universities Accord sets out an appropriate policy and guidance framework for the delivery of education to 2035 and beyond. However, the lack of consideration of research security or knowledge security in the context of teaching, learning

¹⁵² Kirsty Needham, 'Claims Chinese researchers blocked from Australian universities', *Sydney Morning Herald* (online, 14 March 2018) <<https://www.smh.com.au/world/asia/claims-chinese-researchers-blocked-from-australian-universities-20180313-p4z482.html>>.

¹⁵³ Julie Hare, 'PhD students stuck overseas as visa delays take up to 3 years', *Australian Financial Review* (online, 29 November 2022) <<https://www.afr.com/politics/federal/phd-students-stuck-overseas-as-visa-delays-take-up-to-3-years-20221129-p5c24i>>.

¹⁵⁴ Wing Kuang, 'Australia and the US are cracking down on "Chinese spies" in STEM, and Beijing is taking advantage', *ABC News* (online, 10 February 2023) <<https://www.abc.net.au/news/2023-02-10/australia-loses-young-scientists-as-china-recruit-stem-talents/101926524>>.

¹⁵⁵ Universities Australia, *Research & Innovation* (website, 2023) <<https://www.universitiesaustralia.edu.au/policy-submissions/research-innovations/>>.

¹⁵⁶ Peter Jennings, Robert Clark, *University funding can be boosted through defence research* (blog, Australian Strategic Policy Institute, 11 August 2020) <<https://www.aspi.org.au/opinion/university-funding-can-be-boosted-through-defence-research>>.

¹⁵⁷ Walker-Munro, Sanders & Liivoja (n 137).

¹⁵⁸ Daniel Ward, *Losing our agnosticism: How to make Australia's foreign influence laws work* (Report, Australian Strategic Policy Institute, July 2021) <https://ad-aspi.s3.ap-southeast-2.amazonaws.com/2021-07/Losing%20our%20agnosticism.pdf?VersionId=ja5ANdwWpE6IRlgR_So2jrar_a6SFW22>.

and research is likely to continue to present risks to Australia's national security unless this area is comprehensively addressed in the Final Report.

This submission has made only brief proposals in relation to specific areas of interest. Therefore, we would be happy to provide further details, or attend further consultation, as determined by the Department on any other issues that may arise during this process.

Thank you for the opportunity to make this submission.

Dr Brendan Walker-Munro, Senior Research Fellow, The University of Queensland

