

Regulatory Impact Statement: Strengthening Freedom of Speech in New Zealand's Universities

Coversheet

Purpose of Document	
Decision sought:	This report seeks approval to final policy decisions for legislative amendments to strengthen freedom of speech within New Zealand's universities.
Advising agencies:	Ministry of Education
Proposing Ministers:	Hon Penny Simmonds, Minister for Tertiary Education and Skills
Date finalised:	2 December 2024
Problem Definition	
<p>New Zealand's universities accept a role as critic and conscience of society and have specific rights and responsibilities relating to academic freedom. Freedom of speech within universities is critical to fulfilling these responsibilities, ensuring that academics and students can explore and challenge different ideas and are exposed to a diversity of views.</p> <p>We are aware that some stakeholders are concerned that universities are failing to uphold freedom of speech, eroding their position as critic and conscience and undermining academic freedom. These perceived failures relate to:</p> <ul style="list-style-type: none">a) Concerns that the range of acceptable views within universities on contentious issues has narrowed, leading to academics and students self-censoring out of fear of backlash or professional consequences.b) Concerns that universities are actively seeking to protect students and staff from encountering views that they might find disagreeable or upsetting, and that this is influencing the curriculum and limiting scope for intellectual challenge.c) Concerns that invited speakers are being disinvited or events are being cancelled as a result of protests or objections from students or other groups, restricting which speakers are given a platform and the diversity of viewpoints that students are exposed to.d) Concerns that universities are not taking a sufficiently proactive approach in protecting academics from harassment and abuse (including on social media), which limits their ability to fulfil universities' statutory role as critic and conscience of society.e) Concerns that foreign actors are pressuring universities to constrain academic freedom and freedom of speech, taking advantage of universities' dependence on international student revenue and other foreign income sources.f) Concerns that universities as institutions are facing pressure to take positions on matters that are not to do with their role or functions. <p>While there has been significant public debate about these issues, both in New Zealand and internationally, we lack clear evidence of the accuracy of these concerns and the scale and impact of any problems.</p>	
Executive Summary	

The National Party and ACT Party coalition agreement commits the Government to amending the Education and Training Act 2020 to require tertiary education providers receiving taxpayer funding to commit to a freedom of speech policy. The Minister for Tertiary Education and Skills (the Minister) has subsequently agreed to only progress this change in relation to universities, rather than all publicly funded tertiary providers.

The Minister's objectives for these changes are to:

- a) promote diversity of opinion and protect academic freedom within educational institutions, where learners are encouraged to explore new ideas and perspectives;
- b) reinforce existing university obligations in relation to academic freedom;
- c) further protect people's right to freedom of speech, particularly for speakers who are invited to speak on tertiary campuses and who may be considered controversial; and
- d) minimise additional cost, trade-offs or unintended consequences associated with the policy.

We have considered the following options for the protection of freedom of speech that aim to achieve these objectives:

- Requiring universities to issue a freedom of speech statement.
- Requiring universities to issue a freedom of speech statement and placing a duty on university councils to actively protect freedom of speech and academic freedom.
- Requiring universities to issue a freedom of speech statement that meets specified requirements and placing a duty on university councils to actively protect freedom of speech and academic freedom.

We have considered three options for the oversight and monitoring of policy changes, in addition to the status quo of universities' regular accountability arrangements:

- Requiring universities to publicly report on freedom of speech and academic freedom and maintain complaints procedures.
- Oversight of the policy via Universities New Zealand.
- Oversight of the policy by a new statutory officer and a new disputes resolution body to address staff and student freedom of speech complaints.

Given that we have not consulted on the problem or potential options, we would favour maintaining the status quo. We note that New Zealand's universities are already considering their relationship to freedom of speech, with some independently taking steps to clarify their obligations to protect freedom of speech. If legislative change is to be progressed, on balance we would favour requiring universities to issue a freedom of speech statement and placing a duty on university councils to ensure the university actively protects freedom of speech, as these changes best meet the Minister's objectives. We recommend that additional oversight should occur through requiring universities to publicly report on freedom of speech and academic freedom and maintain complaints procedures.

The Minister's preferred policy option is to require universities to issue a freedom of speech statement that includes specified requirements and place a duty on university councils to ensure the university actively protects free speech, with the same oversight and monitoring settings we recommend above. Our key concerns with this approach are the potential for unintended consequences, including negative impacts on disadvantaged groups within the university community, and the risk that prescriptive requirements are deemed inconsistent

with the New Zealand Bill of Rights Act 1990 (BORA). The lack of broader consultation or engagement on these proposals increases these risks.

Limitations and Constraints on Analysis

This analysis was developed under very constrained timeframes given the decision to progress legislative amendments within the Education and Training Amendment Bill No. 2 (ETAB 2). As such, we have not been able to publicly consult on this issue. We have not consulted with wider university leadership, staff, students or the wider community, nor have we consulted with Māori or other population groups that may be disproportionately impacted by these changes.

There is limited direct evidence on the extent and impact of the issue of freedom of speech in New Zealand's universities to support the problem definition and impact analysis for this proposal. There is no consistent data collection of staff or student views on these issues, and individual controversies tend to be highly contested and politicised. Recent surveys of staff and students on concerns regarding freedom of speech in New Zealand's universities capture a small pool of self-selecting responders. We have access to one internal survey of academic staff of a university that captures some staff views on academic freedom.

We have taken two key steps to mitigate the constraints on our analysis:

- a) We undertook a period of targeted engagement with university leadership and the Free Speech Union.¹
- b) We sought out evidence and public perspectives on this issue where possible, noting methodological issues with data collection and wider contexts to public commentary.

Responsible Manager

*Katrina Sutich, General Manager, Tertiary Education & Evidence
Te Pou Kaupapahere, Ministry of Education*



2 December 2024

Quality Assurance (completed by QA panel)

Reviewing Agency:	Ministry of Education Ministry of Justice
Panel Assessment & Comment:	The Ministry of Education's Quality Assurance Panel, with representation from the Ministry of Justice, has reviewed the Regulatory Impact Statement produced by the Ministry of Education (dated 2 December 2024). The panel considers that, because of the impact of the time constraints imposed on consultation and analysis, it partially meets the Quality Assurance criteria. The analysis has sought to mitigate these constraints with targeted consultation and reference to pre-existing evidence. It provides useful and clear analysis of the options for strengthening free speech and the potential impacts, risks, and limitations of the proposed approach.

¹ The Free Speech Union is a registered trade union that advocates for New Zealanders' rights to freedom of speech and intellectual inquiry.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

1. The National Party and ACT Party coalition agreement commits the Government to amending the Education and Training Act 2020 (the Act) to require tertiary education providers receiving taxpayer funding to commit to a free speech policy.
2. The Minister has subsequently agreed that this amendment only apply to universities, rather than all publicly funded tertiary providers. This is because:
 - a) the benefit of applying this policy to Institutes of Technology and Polytechnics (currently part of Te Pūkenga) and Private Training Establishments would be considerably lower relative to compliance costs on the sector, given that these organisations do not have the same critic and conscience role as universities.
 - b) imposing these obligations on Wānanga would be particularly problematic from a Te Tiriti perspective, constraining their rangatiratanga and ability to approach speech issues in a way that it is consistent with their own tikanga. While Wānanga do have a legislative critic and conscience role, they are explicitly required to approach this from a mātauranga Māori, te reo Māori, and tikanga Māori perspective. We are not aware of any concerns about how Wānanga fulfil this role.

We have therefore focused our analysis on freedom of speech within universities rather than all tertiary education providers.

3. There are eight universities in New Zealand, employing approximately 22,500 staff and providing education to approximately 177,000 students at degree-level study and above (including postgraduate study). In 2023, universities received approximately \$1.445 billion in public funding for tuition subsidies. While universities offer higher education to the largest pool of students, Wānanga, private training establishments and some polytechnics also offer tertiary education at degree level and above.

The legislative framework and policy settings

The role of New Zealand's universities

4. Under the Act, it is a characteristic of universities that they accept a role as critic and conscience of society. This role may be interpreted as requiring that universities provide an environment within which academic staff can state and publish ideas and conclusions without fear of retribution or persecution, either within or beyond the walls of the universities.² In short, this requires a university environment that is conducive to open debate and free speech.
5. The Act also provides that universities have academic freedom and institutional autonomy. It requires that institutions must exercise academic freedom and autonomy in a manner that is consistent with institutions maintaining the highest ethical standards and accountability for public resources. Academic freedom is defined as:
 - a) the freedom of academic staff and students, within the law, to question and test received wisdom, to put forward new ideas, and to state controversial or unpopular opinions;
 - b) the freedom of academic staff and students to engage in research;

² David. Gareth Jones, Kerry Galvin and David Woodhouse, *Universities as Critic and Conscience of Society: The Role of Academic Freedom*, New Zealand Universities Academic Audit Uni, March 2000. [ASQ6 Critic and Conscience.pdf](#)

- c) the freedom of the institution and its staff to regulate the subject matter of courses taught at the institution;
 - d) the freedom of the institution and its staff to teach and assess students in the manner that they consider best promotes learning; and
 - e) the freedom of the institution through its chief executive to appoint its own staff.
6. Commentary about freedom of speech in tertiary education often discusses the concept interchangeably with academic freedom. The two concepts overlap but serve different purposes. While freedom of speech protects general expression from censorship, academic freedom specifically safeguards scholarly inquiry and teaching within educational contexts. Academic freedom therefore provides a different set of rights and obligations, with debate around the extent to which academic freedom is limited to discourse that meets scholarly standards and whether academics only have academic freedom in relation to their areas of expertise.
 7. There can also be tensions between the academic freedom of individual academics and students, and the academic freedom and autonomy of an institution. These tensions can play out in issues such as the ability of the leadership of an institution to determine the content of academic programmes. The need to balance these tensions is part of the rationale for strong expectations of academic governance within institutions.
 8. It is generally accepted that academic freedom is a flow-on from the set right to freedom of expression under New Zealand legislation, i.e. freedom of speech/freedom of expression is essential to exercise academic freedom.

Rights and limitations to freedom of speech

9. Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind, under section 14 of the New Zealand Bill of Rights Act 1990 (BORA). In our analysis, freedom of expression and freedom of speech are discussed as interchangeable concepts. Universities and other public tertiary institutions have a statutory obligation to uphold the BORA in their operations and treatment of staff and students.
10. Under section 5 of the BORA, the right to freedom of expression is subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Justified limitations upon freedom of expression include circumstances where speech is illegal under the Human Rights Act 1993 (HRA), such as public speech that incites racial hostility.³
11. New Zealand also has responsibilities under the International Covenant on Civil and Political Rights 1966, which protects freedom of expression under Article 19 and outlines permissible restrictions on freedom of expression under Article 19(3). Here, restrictions may be for the rights and reputations of others, and for the protection of national security or of public order, or of public health or morals.
12. The right to freedom of expression must be carefully considered and balanced alongside other human rights obligations which all have equal weighting, including the right to education, the right to be free from discrimination, and rights to religion, belief and political opinion. There are other legal restrictions on freedom of speech that universities and other public institutions must consider, including: where material is distributed in a manner deemed illegal harassment; where communications are considered harmful under the Harmful Digital Communications Act 2015; and cases of defamation.

³ Section 61 of the HRA states it is unlawful to use words in any public place that are likely to excite hostility against or bring into contempt any group of persons in or who may be coming to New Zealand on the ground of the colour, race, or ethnic origins of that group of persons.

13. The HRA also prohibits discrimination based on political opinion in employment and provision of services, including venue hire. However, there has been limited jurisprudence on the definition of political opinion – the Human Rights Commission have advised that this definition tends to be relatively narrow (e.g., political opinion as alignment with a political party).
14. Universities' statutory obligations to uphold freedom of speech and academic freedom need to be considered alongside other legislative obligations, beyond obligations to uphold other human rights under the BORA. Most notably, universities have responsibilities in relation to student wellbeing under the Education (Pastoral Care of Tertiary and International Learners) Code of Practice 2021 (Code of Pastoral Care). Universities must also consider their obligations to staff and students under the Health and Safety at Work Act 2015.
15. If the right to freedom of expression is breached unjustifiably, individuals have several remedies available: judicial review in the High Court (expensive and time-consuming); complaints to the Ombudsman (free but recommendations are not binding); or internal provider grievance procedures.

University approaches to freedom of speech

16. Most of New Zealand's universities have taken steps to develop freedom of speech and/or academic freedom policies. We have identified the following statements and policies across universities:

Institution	Current policy	Comment
University of Auckland	Draft policy – not ratified	Not published but has reportedly been rejected by the University's academic senate.
Auckland University of Technology	Charter of Academic Freedom	Confirms academic freedom and freedom of expression for the university community, subject to some limitations. May refuse permission to visitors where the content of speech falls below academic standards or may negatively impact the wellbeing of staff or students.
Waikato University	Staff code of conduct	Academic freedom briefly discussed in broader code of conduct.
Massey University	Academic Freedom Policy	Confirms centrality of academic freedom and freedom of expression within the law, constrained by the universities' health and safety obligations.
	External speaker guidelines	Requires a risk assessment for external speakers.
Victoria University of Wellington	Draft guiding principles under development	
University of Canterbury	Critic & Conscience of Society and Academic	Affirms the right of university staff and students to express views on all topics, subject to the obligation to respect the

	Freedom Principles and Policy	academic freedom of others and ensure a fair discussion of contrary views.
Lincoln University	We have not been able to identify a specific policy	
University of Otago	University of Otago Statement on Free Speech	Described by the Free Speech Union as the “gold standard” policy. Does not oblige the University to provide visitors with a platform “to advance their ideas or theories in ways which fundamentally undermine the University’s character as an institute of higher learning.”

17. We have heard from university leadership that they have had to consider their obligations to staff and students as part of developing their responses to freedom of speech concerns. The necessity of free speech within universities is generally taken as given, but university leadership must consider how an environment of free speech might be effectively facilitated while maintaining strong standards for teaching, learning, research, and the health and safety of staff and students. University leadership must also consider how any freedom of speech statement might interact with and change their internal policies.
18. Public commentators have afforded particular praise to the University of Otago’s Statement on Free Speech. This statement was developed by a panel representing academic staff and students across the university, who conducted targeted consultation with the wider university community to inform the statement’s wording.
19. Under the status quo, it is likely that universities will continue of their own volition to manage concerns regarding freedom of speech, with some continuing their work to adopt some kind of freedom of speech statement or policy. In addition, universities will continue to adhere to their legislative obligations under the Act and the BORA.
20. The adequacy of any freedom of speech policy will depend on the approach of university leadership and the strength of university governance, including academic governance. It is likely that there would continue to be a range of different approaches, with ongoing concerns from stakeholders about the adequacy of some universities’ approaches and implications for academic freedom.

What is the policy problem or opportunity?

21. Freedom of speech within universities has been the subject of considerable public debate, both in New Zealand and internationally. Stakeholders within and outside of the university system have been critical of universities’ approaches to freedom of speech, arguing that the approaches undermine universities’ legislative role and do not give effect to their responsibilities in relation to academic freedom.
22. Many of these concerns are anecdotal and we do not have good information about how accurate or widespread these issues might be. Broadly, stakeholder concerns relate to one or more of the following categories:
 - a) Concerns that the range of acceptable views within universities on contentious issues has narrowed, leading to academics and students self-censoring out of fear of backlash or professional consequences.
 - b) Concerns that universities are actively seeking to protect students and staff from encountering views that they might find disagreeable or upsetting, and that this is influencing the curriculum and limiting the scope for intellectual challenge. In part, this perception has likely been prompted by a broader cultural shift toward upholding social spaces that are conducive to the wellbeing and understanding of

groups who experience systemic discrimination, as well as heightened legislative responsibilities on universities for student safety and wellbeing.

- c) Concerns that invited speakers are being disinvited or events are being cancelled as a result of protests or objections from students or other groups, restricting which speakers are given a platform and the diversity of viewpoints students are exposed to. These concerns have centred around a number of controversial events, with some stakeholders arguing that universities have taken inconsistent approaches toward facilitating or preventing speech by external speakers that is controversial or offensive – but not illegal. High profile incidents include the cancellation of an event to be held at Massey University featuring political speaker Don Brash in 2018.
- d) Concerns that universities are not taking a sufficiently proactive approach in protecting academics from harassment and abuse (including on social media), which limits their ability to fulfil universities' role as critic and conscience of society. This concern was recently highlighted in Dr Siouxsie Wiles' Employment Court case against the University of Auckland.
- e) Concerns that universities' dependence on international student revenue and other foreign income sources could make them vulnerable to pressure from foreign actors to constrain academic freedom and freedom of speech. Discussions with central agencies suggest that this is a real concern and that agencies are proactively working with universities to identify and mitigate these risks where they arise.
- f) Concerns about the prospect of universities taking institutional positions on issues that do not relate to the actual operations of the university. Those advocating for institutional neutrality argue that this is critical to the protection of freedom of speech and academic freedom in universities and that when institutions take official stances on contentious geopolitical issues, it can create an atmosphere where academics and students who hold contrary views feel unable to express them freely. They contend that institutional positions, even when well-intentioned, can effectively signal which views are acceptable within the academic community and which may face scrutiny or disapproval. This concern has been amplified amidst the Israel-Gaza conflict, with universities facing protest and pressure from some members of the university community to take an institutional position on the conflict.

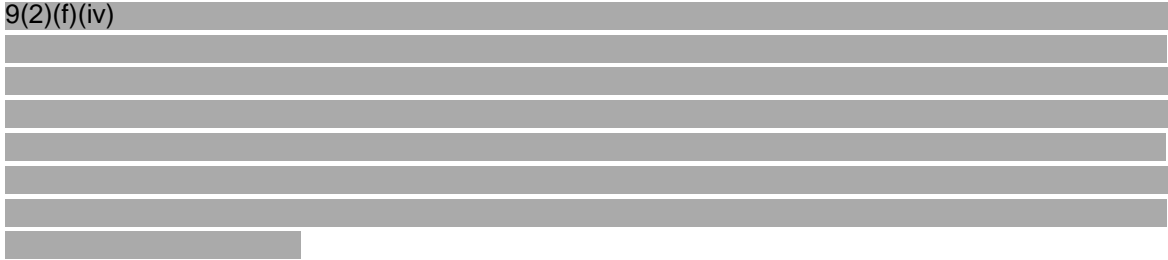
23. The significance of freedom of speech issues within universities is highly contested. Some stakeholders within the academic community argue that concerns are overblown and emphasised in order to build a case for prioritising freedom of speech over other rights, particularly freedom from discrimination. Here, concerns have been raised regarding the impact of unbridled free speech upon communities who experience systemic marginalisation. Platforms to speak and the personal impacts of speech can vary, based upon a person's social circumstances.

24. We understand that during consultation on the University of Otago's freedom of speech statement, the development panel received significant engagement from groups who perceive themselves as being disproportionately impacted by speech that is deemed offensive or immoral, namely population groups who experience systemic discrimination. We have not had time to seek out the perspectives of these groups within university communities to engage further on this issue.

25. It is also important to note that examples of restrictions upon external speakers have become highly politicised, highlighting fringe cases that may or may not be consistent with universities' regular approaches toward issues of freedom of speech.

26. Similarly, some academic and public commentators have questioned complete allegiance to institutional neutrality, arguing that universities often take positions on issues that are inherently political (e.g. reducing carbon use) and that universities can have ethical obligations to take a stance on issues of significant moral concern. It is also challenging to determine what a 'neutral' position is on many issues, and even if universities do not take a 'position', one could be inferred from their actions (or lack thereof).

27. 9(2)(f)(iv)



28. 9(2)(f)(iv)



New Zealand evidence

29. We have limited evidence on the actual extent and impact of freedom of speech concerns in New Zealand. This is partly because there is no consistent data collection of staff or student views on these issues, and partly because individual controversies tend to be highly contested and politicised.
30. We undertook a two-week period of targeted engagement to inform our understanding of the policy problem. This involved in-person meetings with leadership representatives from two universities and with the Free Speech Union. We also received written feedback from leadership within three other universities.
31. A recent report from the New Zealand Initiative makes a case for there being significant threats to academic freedom in New Zealand.⁴ The report tends to use the concepts of academic freedom and freedom of speech/free speech interchangeably. In addition to a number of testimonials highlighting concerns about freedom of speech at New Zealand universities, the report draws on three main evidence sources:
- a) A Heterodox New Zealand survey of undergraduates, which highlighted that New Zealand students have a similar level of reluctance to students in the United States to discuss their views on gender, politics, religion and sexual orientation. The survey does not reveal the source of this reluctance, although the authors speculate that it suggests a climate on campus that is not conducive to freedom of speech.
 - b) A 2022 Free Speech Union academic freedom survey, in which about half of respondents reported that they were not free to state controversial or unpopular opinions, with similar proportions suggesting they do not feel comfortable discussing the Treaty of Waitangi and colonialism, race, and sex and gender. The validity of this survey has been criticised due to its self-selection bias and very small response rate (3.1% of those surveyed).
 - c) A review of 'academic freedom incidents' since 2013, including deplatformings, event cancellations, disciplining and requested disciplining of academics, and harassment. High profile incidents include Massey University's decision to decline to host Don Brash, the letter sent to the Listener by University of Auckland professors raising concerns relating to mātauranga Māori, and Dr Siouxsie Wiles' Employment Court case against the University of Auckland.
32. Discussions with university leaders suggest that they do not consider the above information to be representative of the issues and perspectives within their institutions. While they do

⁴ James Kierstead, *Unpopular Opinions: Academic Freedom in New Zealand*, The New Zealand Initiative: <https://www.nzinitiative.org.nz/reports-and-media/reports/unpopular-opinions-academic-freedom-in-new-zealand/document/854>

not necessarily have comprehensive information, their engagement on these issues suggests a greater breadth of perspectives within universities and a lower level of overall concern that freedom of speech is being constrained.

33. For example, an internal survey of academic staff at one institution highlights that the majority of staff felt generally positive about their ability to test, question or defend perceived wisdom; their freedom to put forward or question new ideas; and their freedom to engage in research of their choice (noting that there were still a minority of academics who did not agree with this view). Respondents were slightly less positive about their ability to choose the subject matter on courses they teach, and their freedom to state controversial or unpopular opinions with colleagues, students and the general public.
34. The above surveys and the academic freedom review do, to some extent, support the concerns listed above. However, they each have methodological problems and as such do not give us a good picture of whether they are representative of broader issues at universities. Ideally we would want to do broader consultation with universities, academics and students to better understand the scale and scope of these issues before attempting to address them via legislation.

International context

35. Debates around freedom of speech within universities are not unique to New Zealand. Universities across comparator jurisdictions have been critiqued for their approach to freedom of speech issues:
 - a) In the United States, which has strong constitutional freedom of speech protections, the “Chicago Principles” on freedom of expression developed by an academic committee at the University of Chicago have provided an influential pro-free speech standard adopted by some other universities.
 - b) In the United Kingdom (UK), a 2018 Parliamentary enquiry recommended greater focus on freedom of speech by the Office for Students (the university regulator in England), including monitoring and reporting, and the issuing of clear guidance on the importance of freedom of speech and the legal restrictions on speech. Legislative amendments, which passed in 2023 but have not come into force, would have significantly strengthened UK universities’ obligations to take reasonably practicable steps to ensure freedom of speech. This would have occurred through creating a positive duty on universities to promote the importance of freedom of speech, supported by a new statutory tort for damages relating to breaches of academic freedom and dedicated enforcement by the regulator. The current UK Labour Government has stopped the commencement of the 2023 amendments citing concerns about the potential impact on vulnerable groups and costs on universities.
 - c) In Australia, the former chief justice of the Australian High Court, Hon Robert French, undertook a comprehensive independent review of freedom of speech in Australian higher education providers in 2019. French concluded that there was no evidence to establish a systemic pattern of freedom of speech being undermined in Australian higher education, but found sufficient reason to be concerned about adverse impact on public perception and the risk of a chilling effect on the exercise of freedom of speech. The review recommended legislative amendments to require governing bodies of higher education institutions to develop and maintain an institutional environment in which freedom of speech and academic freedom are upheld and protected. It also included a ‘Model Code’, which universities would be encouraged to adopt.

What objectives are sought in relation to the policy problem?

36. The Minister has agreed to four objectives to seek in relation to strengthening freedom of speech within New Zealand's universities:

- a) to promote diversity of opinion and protect academic freedom within educational institutions, where learners are encouraged to explore new ideas and perspectives;
- b) to reinforce existing university obligations in relation to academic freedom;
- c) to further protect people's right to freedom of expression, particularly for speakers who are invited to speak on tertiary campuses and may be considered controversial; and
- d) to minimise additional cost, trade-offs or unintended consequences associated with the policy.

Section 2: Deciding upon an option to address the policy problem

37. There are two main design decisions to consider when deciding upon a policy option to best strengthen freedom of speech within New Zealand's universities:
- Decision One: Expectations for protections upon freedom of speech, and
 - Decision Two: Oversight and monitoring of expectations upon universities.
38. Our analysis of Decision Two considers oversight and monitoring arrangements to support the Minister's preferred option for Decision One.

Decision One – Protections upon freedom of speech

What criteria will be used to compare options to the status quo?

39. The below criteria were selected to ensure maximum efficacy of the policy proposal and to meet the outlined objectives with regard to freedom of speech expectations within legislation:
- Reinforces freedom of speech – the extent to which the option offers stronger freedom of speech protections than the status quo (as mentioned above, the reinforcement of academic freedom is seen to flow-on from freedom of speech protections).
 - Clarity and consistency - the clarity of legislative requirements and ability to promote consistency across the sector.
 - Sector buy-in – the extent to which the option allows the sector to take ownership of their approach to this issue and promotes buy-in from university leadership, academic staff, students and the university community.
 - Costs – the expected costs to the sector of implementing the option.
 - Unintended consequences – the risk that the policy option may result in adverse impacts upon the university community.
40. There is a trade-off between the strength and clarity of freedom of speech expectations (i.e., how prescriptive they are) and sector buy-in, cost and unintended consequences for said expectations. Scaling up prescriptiveness increases the burden upon universities to be compliant with legislation across their operations and internal policies, and reduces the ability for universities to tailor their freedom of speech statements in line with the views of their community (and thus reduces the likelihood of buy-in).
41. Where options better meet the criteria of reinforcing freedom of speech, they may involve trade-offs against universities' other obligations, including where they have a role to protect the health and wellbeing of staff and students.
42. Given the Minister's decision that the proposal should only apply to universities, we have not considered options for setting freedom of speech requirements for other types of tertiary providers.
43. The options outlined below have been selected as broadly representative of the different approaches to addressing the identified problem. A range of variations to these options could also be progressed. Our analysis of the options is limited by time constraints and the lack of consultation with key stakeholders. We have not had time to fully consider a substantive range of options, nor do we have a clear view of potential options that would

be supported by key stakeholders (analysis of buy-in from the sector is based on what we have heard through targeted engagement and our general estimation).

What options are being considered?

Expectations upon universities:

Option One – Status quo

44. Place no further legislative requirements on universities to set a freedom of speech statement or policy. It is expected that universities will continue to consider issues of freedom of speech of their own volition and uphold their statutory responsibilities to protect academic freedom, and most universities will produce some kind of variation on a freedom of speech statement or policy. The right to freedom of expression is robustly protected in New Zealand under the BORA and the HRA.

Option Two – Free speech statement

45. Amend the Act so that universities are required to set a statement on the protection of freedom of speech (similar to the statement of the University of Otago). It is expected that universities will determine key principles regarding the protection of freedom of speech based on consultation with staff, students and the wider community.

Option Three – Free speech statement and duty on Councils

46. Amend the Act so that universities are required to set a statement on the protection of freedom of speech (consistent with Option Two), and
47. Place a duty on university councils to protect and promote freedom of speech and academic freedom within the activities of the university and for its members, consistent with their free speech statement and existing academic freedom obligations.

Option Four – Free speech statement meeting specified requirements and a duty on Councils

48. Amend the Act (consistent with Option Three), with universities required to set a statement on the protection of freedom of speech that meets specified expectations.
49. The Minister has indicated that legislation should require that the following expectations be incorporated into universities' freedom of speech policies (subject to further refinement):
- a) Universities should recognise that freedom of speech is critical to maintaining academic freedom;
 - b) Universities should actively foster an environment where ideas can be challenged, controversial issues discussed, and diverse opinions expressed (including by invited speakers), in a respectful manner consistent with any university codes of conduct;
 - c) Universities' policies and procedures around freedom of speech should be clear, consistently applied, and focused on fostering genuine debate rather than restricting it;
 - d) Universities should not as institutions take positions on matters that do not directly concern the role or functions of the university;
 - e) Universities may not limit freedom of speech of staff or students, except where it violates the law or as required to avoid disrupting the ordinary activities of the university;
 - f) Universities should seek to uphold their role as critic and conscience of society by maintaining an open platform for invited speakers of diverse viewpoints; and
 - g) Universities must not deny the use of university premises by an invited speaker on the basis of their ideas or opinions.

How do the options compare to the status quo/counterfactual?

Key for judgements:

- ++** much better than doing nothing/the status quo/counterfactual
- +** better than doing nothing/the status quo/counterfactual
- 0** about the same as doing nothing/the status quo/counterfactual
- worse than doing nothing/the status quo/counterfactual
- much worse than doing nothing/the status quo/counterfactual

	Option One – Status quo	Option Two – Freedom of speech statement	Option Three – Freedom of speech statement and duty on Councils	Option Four – Freedom of speech statement meeting specified requirements and a duty on Councils
Reinforces freedom of speech	0	0 Negligible difference from the status quo.	+ Setting a duty on Councils to protect freedom of speech provides additional assurance of implementation.	++ Setting a duty on Councils to protect freedom of speech provides additional reinforcement.
Clarity and consistency	0	+ Consistency across universities with setting a statement.	+ Consistency across universities with setting a statement.	++ Outlining specific freedom of speech objectives ensures greater clarity and consistency.
Sector buy-in	0	- Places an additional administrative requirement on universities with limited consultation.	- Placing an additional duty on councils without due consultation will result in limited sector buy-in.	-- Requiring universities to meet specified objectives and placing an additional duty on Councils without due consultation will result in very limited buy-in.
Cost	0	-	-	-

		Minor costs associated with the development of a policy and ongoing compliance.	Minor costs associated with the development of a policy and ongoing compliance.	Similar costs to the other options.
Unintended consequences	0	0 Limited scope for unintended consequences.	0 Limited scope for unintended consequences.	-- Stronger and more prescriptive requirements create a more significant risk of unintended consequences. Some risk that the legislation is considered inconsistent with BORA and other human rights obligations.
Overall assessment	0	- Limited benefits compared to the status quo. Universities that do not already have a policy are likely to object to costs and to infringement on institutional autonomy.	0 Strengthens protections on freedom of speech, with some costs and limited likelihood of sector buy-in.	- Significantly strengthens freedom of speech protections through specific requirements on universities, but is accompanied by significant cost, a likely negative response from the sector and increased risk of unintended consequences.

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

50. Ultimately, we do not see a clear case for legislative change to strengthen protections upon freedom of speech, given the limited availability of robust evidence on this issue and our uncertainty regarding risks and unintended consequences in this space.
51. If progressing with a legislative option, on balance, we recommend Option 3 to strengthen freedom of speech expectations in universities. Our preliminary view is that this approach strengthens protections upon freedom of speech in a consistent manner across universities, with assurance of implementation through a duty on councils, while minimising the risk of unintended consequences and leaving scope for universities to engage with their communities on a freedom of speech statement (aiming for some level of sector buy-in). We acknowledge that this recommendation has been formed with a basic problem definition and limited understanding of perspectives within the university sector.
52. The success of a more flexible freedom of speech statement in changing behaviours would depend on the response of university governance bodies, including both university councils and academic boards. This is in part why we suggest that Options Three should be supplemented by a duty on university councils.
53. The Minister has indicated that she intends to progress with Option Four to strengthen freedom of speech expectations in universities. We note the benefits to this approach in setting strong and consistent expectations across universities for their policies on freedom of speech, ensuring the prioritisation of freedom of speech above other considerations within a university environment (except where speech is illegal). However, we have some concerns about this approach:
 - a) The Ministry of Justice have highlighted concerns that a prescriptive approach to legislative amendments could undermine other rights affirmed in BORA, as well as rights in other legislation and international law. For example, where one member of the university communities' freedom of speech rises to the level of harassment that breaches another member's right to freedom from discrimination. A prescriptive requirement that does not allowing freedom of speech rights to be balanced against any competing rights may be assessed as inconsistent with BORA for this reason.
 - b) In addition, more prescriptive options could see universities be made to mediate cases where the speech of academics or students is in violation of internal Codes of Conduct, of where the permission of speech may be in tension with universities' obligations under the Code of Pastoral Care.
 - c) There is a trade-off with the prescriptiveness of the policy option and sector buy-in, with universities likely to feel that having specified requirements imposed upon them undermines their institutional autonomy. The likelihood of limited sector buy-in increases with the lack of consultation with key sector stakeholders on this policy proposal. A lack of consultation on this option may be perceived by some stakeholders as directly at odds with the policy objective to protect freedom of expression and promote diversity of opinion (albeit within an academic context). Universities are generally concerned that these policy changes are being progressed in an expedited way without appropriate consultation, especially given that the proposed changes (in their view) undermine legislative expectations of institutional autonomy.
 - d) A lack of consultation raises substantial risk around the emergence of unintended consequences from the implementation of this policy. In general, a more prescriptive approach to is likely to create higher risks, particularly given the time available to develop these proposals and the lack of consultation. Creating more rules-based requirements do not tend to be effective in complex areas of regulation, where there are risks of both unintended consequences and can create incentives

to find technical workarounds (e.g. a focus on the letter rather than the spirit of the law). Scaling up prescriptiveness also increases administrative burden and monetary cost to universities.

54. As part of targeted engagement, a university advised us that a new legislative obligation seems duplicative and unnecessary, given that New Zealand's existing legal framework includes provisions and protections for freedom of expression. This perspective was generally shared by the other universities we discussed this issue with, and similar concerns were raised by the Human Rights Commission. This university expressed their preference that universities be encouraged to adopt voluntary freedom of expression statements. Their preferred approach if any legislative requirement is introduced is for it to be modelled on the Australian Model Code on Freedom of Speech and Academic Freedom.
55. Our discussions with universities and agencies have also highlighted concerns about the implications of freedom of speech being perceived as having primacy over other human rights. Creating a hierarchy of rights in this way is not in line with human rights law and practice. For example, we have heard concerns that an environment that prioritises unrestricted speech may have practical implications for student participation and wellbeing, creating de facto barriers to education for some groups that are inconsistent with the right of equal access to education. Speech that is inciteful or harmful may also damage social cohesion within universities and lead to safety concerns whereby others may be empowered to commit violence.
56. We have also heard that requiring universities to prioritise freedom of speech above other rights in the BORA may make legislation inconsistent with the BORA.
57. Overall, within the potential implementation process for Options 4, legislative descriptions for the objectives of a speech statement, or the prescriptive requirements that must inform a freedom of speech statement, would need to be developed with consideration of universities' obligations to uphold other human rights, including those under the BORA, and universities' obligations under the Code of Pastoral Care.

Decision Two – Oversight and Monitoring

58. If Ministers agree to progress regulatory changes to require universities to develop a freedom of speech policy, a decision on how this policy will be overseen and monitored is required. The analysis below provides advice on the options for oversight and monitoring arrangements to support the Minister's preferred option for such a policy (i.e. Option 4 above).

What criteria will be used to compare options to the status quo?

59. The below criteria were selected with regard to the oversight and monitoring of universities' freedom of speech obligations under legislation:
 - a) Assurance and redress – assesses the reliability and strength of oversight arrangements and the extent to which the option provides suitable redress arrangements for individual complainants.
 - b) Institutional autonomy – assesses the extent to which the option is consistent with current relationships between government and universities, with universities maintaining institutional autonomy.
 - c) Cost and risk – considers expected costs, the risk level and estimations of unintended consequences.

What options are being considered?

Option One – Status quo

60. Assign universities responsibility for overseeing their own compliance, subject to existing external scrutiny and complaints channels.
61. Scrutiny mechanisms such as the Office of the Auditor General and select committee oversight would apply, and universities could be challenged on the compliance of their statements via judicial review.
62. Complaints about individual instances where it is alleged that universities have not complied with their obligations would be considered via internal university complaint processes and would be within the jurisdiction of the Ombudsman's Office and subject to judicial review if an individual wanted to challenge the outcome. The Human Rights Commission also provides dispute resolution services in relation to discrimination complaints, with the Human Rights Tribunal an option if these are unsuccessful. Unions such as the Tertiary Education Union and the Free Speech Union would also have a role in advocating for their members.

Option Two – Strengthen oversight via annual reporting and complaints procedure requirements

63. In addition to existing accountability arrangements, universities would be required to publicly report on student and staff views on academic freedom and freedom of speech in their annual reports, as well as on the number and nature of any complaints, and to establish complaints procedures (similar to existing requirements in the Pastoral Care Code of Practice). Reporting would need to be informed by surveying of staff and students and would need to be sufficiently consistent so that it can be compared or 'benchmarked' across universities.

Option Three – Oversight by Universities New Zealand

64. In addition to the requirements in Option Two, Universities New Zealand would be required to monitor and oversee universities' compliance with the legislative requirements and overall approach to freedom of speech and academic freedom issues. This function could be performed by the successor to the Academic Quality Agency, an independent function of Universities New Zealand responsible for academic audits which is currently being redesigned.

Option Four – Oversight by a statutory officer with annual reporting requirements in legislation, and a new disputes resolution body

65. In addition to the requirements in Option Two, a statutory officer would be established within the Tertiary Education Commission or another entity that has regulatory responsibilities for the higher education sector, with responsibility for oversight of universities' fulfilment of their freedom of speech statement obligations. An independent disputes resolution body for individual freedom of speech and academic freedom complaints would also be established, similar to the body established in relation to the Pastoral Care Code.

How do the options compare to the status quo/counterfactual?

Key for judgements:

- ++** much better than doing nothing/the status quo/counterfactual
- +** better than doing nothing/the status quo/counterfactual
- 0** about the same as doing nothing/the status quo/counterfactual
- worse than doing nothing/the status quo/counterfactual
- much worse than doing nothing/the status quo/counterfactual

	Option One – Status quo (regular accountability arrangements)	Option Two – Oversight through regular accountability arrangements with annual reporting and complaints procedure requirements in legislation	Option Three – Oversight by Universities New Zealand with annual reporting and complaints procedure requirements in legislation	Option Four – Oversight by a statutory officer with annual reporting requirements, and a new disputes resolution body
Assurance and Redress	0	<p style="text-align: center;">+</p> <p>Ensures a level of accountability with additional monitoring requirements and a tailored approach to dispute resolution.</p>	<p style="text-align: center;">+</p> <p>Ensures a level of accountability with additional monitoring requirements and a tailored approach to dispute resolution.</p>	<p style="text-align: center;">++</p> <p>Ensures strong accountability with external monitoring and unique and robust approach to dispute resolution.</p>
Institutional autonomy	0	<p style="text-align: center;">0</p> <p>Consistent with current accountability functions.</p>	<p style="text-align: center;">-</p> <p>Likely to be perceived as undermining the autonomy of individual institutions.</p>	<p style="text-align: center;">--</p> <p>Likely to be perceived as violating institutional autonomy without due consultation.</p>
Cost and risk	0	-	-	--

		Reporting and surveying will incur cost and additional labour for universities.	Reporting will incur cost and additional labour for universities and the Ministry. UNZ would need to stand up an additional function to audit.	Risks very unclear and likely to eventuate with limited consultation on establishment of a statutory officer. An oversight officer and new disputes resolution body will also incur comparatively substantial costs.
Overall assessment	0	0 Provides additional accountability arrangements, with uncertain additional reporting costs.	- Provides additional accountability with costs incurred, and risks undermining institutional autonomy.	-- A significant and costly structural shift that might risk undermining institutional autonomy.

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

66. On balance, we consider that Option Two would best provide assurance that universities are shifting their policies and practices in response to legislation, while maintaining a level of institutional autonomy. The Minister has indicated that she wishes to progress with Option Two to support the oversight and monitoring of universities' freedom of speech statements.
67. Requiring universities to publicly report on student and staff views on academic freedom and freedom of speech in their annual reports, as well as on the number and nature of any complaints, presents a middle-ground in strengthening compliance monitoring while not enforcing structural changes. Nevertheless, this option would come with costs that we have not been able to estimate in the time available and would depend significantly on how universities would be required to assess student and staff views (e.g. internal vs independent surveys). Universities are likely to object to further reporting requirements on cost grounds, given the significant concerns that they have raised around existing regulatory reporting requirements.
68. We note that the Cabinet paper does not specify the details of these reporting requirements, other than signalling that they should allow for university performance on freedom of speech issues to be benchmarked. Final decisions on the detail of reporting arrangements are proposed to be delegated to the Minister for Tertiary Education and Skills. Whether the accountability benefits of reporting will outweigh the costs will depend significantly on the decisions made using this delegation (e.g. the approach to surveying staff and students may significantly impact the ongoing cost to universities).
69. In the above multi-criteria analysis, options for oversight and monitoring scale upwards in terms of assuring universities implement their freedom of speech policies and suitability of redress for complainants, but in turn present increasingly significant costs, risks and sector resistance. In particular, Option Four presents clear costs in undermining institutional autonomy and in requiring significant structural change.
70. On the other hand, ensuring compliance through relying on universities' broader accountability arrangements, including institutional and academic governance requirements, is consistent with current understandings of universities' institutional autonomy. We generally rely on universities to self-regulate their affairs, particularly in relation to academic matters -- this is seen as critical to ensuring sufficient independence from the government-of-the-day to fulfil their critic and conscience role.

What are the marginal costs and benefits of the decisions?

The following assessment considers the combined marginal costs and benefits of both decisions 1 and 2.

Affected groups	Comment	Impact.	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Universities	<ul style="list-style-type: none"> • Limitations upon institutional autonomy • Increased administrative burden in setting a policy and adhering to additional reporting requirements • Ongoing costs in responding to freedom of speech concerns from university community members • Potential ongoing costs with providing space for controversial external speakers (including security costs). • Ongoing costs of surveying, reporting and complaints management. 	Medium	Low
University Staff and Students	<ul style="list-style-type: none"> • Prioritisation of freedom of speech over other rights under the BORA, leading to potential adverse impacts on rights such as freedom from discrimination 	Medium	Low
Non-monetised costs		Medium	Low
Additional benefits of the preferred option compared to taking no action			
University Councils	<ul style="list-style-type: none"> • Clarity and consistency regarding universities' freedom of speech obligations 	Low	Low
University Staff and Students	<ul style="list-style-type: none"> • Strengthened protections upon freedom of speech and academic freedom • Clarity and consistency regarding universities' freedom of speech obligations 	Medium	Low
External speakers	<ul style="list-style-type: none"> • Strengthened protections upon free speech for those invited to speak at a university. • Clarity and consistency regarding universities' freedom of speech obligations. 	Medium	Low
Non-monetised benefits		Medium	Low

71. Due to time, scope and consultation limits, we have low evidence certainty across all impact assessments. We do not know how key stakeholders anticipate this policy will play out, nor do we have a clear view of the ultimate costs or benefits to this policy.
72. The status quo has fewer marginal costs relative to the proposed option, allowing universities to clarify their obligations to protect freedom of speech while avoiding increased administrative burden due to reporting requirements and perceived infringements upon institutional autonomy.

How do the decisions align with Te Tiriti?

73. As a partner to Te Tiriti, the Crown has a duty to actively promote and protect Tiriti rights and interests and to develop education settings in a way that supports Māori-Crown relationships. This duty is recognised in section 4(d) of the Act which records one of the education system’s purposes as being ‘to establish and regulate an education system that honours Te Tiriti o Waitangi and supports Māori-Crown relationships’. Te Tiriti analysis supports the Crown to uphold our obligations to Māori by actively considering how the proposed reforms might impact Māori and engage with Treaty obligations.
74. While the analysis in the below table presents a mixed image on the Te Tiriti implications of this policy, our primary concern is that we have no clear view on the perspectives of Māori with regard to freedom of speech in universities, which significantly inhibits the completeness of this analysis. In addition, the lack of engagement with Māori in the development of this policy in of itself raises kāwanatanga and rangatiratanga risks. In the absence of consultation, we will not be able to meet Cabinet’s expectations for consideration of Te Tiriti o Waitangi in policy making as set out in CO(19)5.

A high-level Te Tiriti o Waitangi analysis of the proposed policy to strengthen freedom of speech in New Zealand’s universities:

Key: We have assessed each option based on the following criteria.	Poor	Limited	Fair	Excellent
	Little or no alignment with considerations relevant to the article.	Limited (or mixed) alignment with considerations relevant to the article.	A fair amount of alignment with considerations relevant to the article.	In depth alignment with considerations relevant to the article.

Note: As outlined above, the below analysis is speculative, and limited by a lack of formal engagement or consultation on these proposals with Māori.

<p>Article 1: Kāwanatanga The Crown has the right to govern (kāwanatanga).</p> <p>With regard to the Treaty partner and Māori interests, the Crown should act in good faith and reasonably</p>	<p>Limited</p> <p>The Government has the right to govern through legislation, and there is strong consideration for this in the case of core democratic freedoms such as the freedom of speech. Nonetheless, the Courts and Waitangi Tribunal have found that the Crown has a Treaty obligation to govern honourably, in good faith, and in full sight of Māori interests.</p> <p>The Crown has not engaged with Māori on the proposals in this policy, despite the possible differential impacts on Māori faculty and students. There is a significant risk that the lack of engagement impedes the Crown’s ability to take decisions on this policy while operating in good faith with respect to Māori interests.</p> <p>This policy strengthens the protection of freedom of speech for Māori who are members of the university community. However, it is conceivable that Māori members of the academy and tertiary students may on the whole prefer that free speech protections are balanced alongside their right to freedom of discrimination and universities’ obligations to protect the</p>
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	<p>wellbeing of staff and students, particularly as Māori are likely to be disproportionately affected by speech that is controversial or offensive due to patterns of systemic discrimination in New Zealand.</p>
<p>Article 2: Rangatiratanga Provides Māori with rangatiratanga over resources and taonga which they wish to retain.</p>	<p>Limited</p> <p>We have not engaged with Māori on the proposed policy to strengthen free speech in New Zealand’s universities, meaning that responding to and providing for the specific interests of Māori, including providing for the exercise of rangatiratanga, has been limited.</p> <p>The proposed option is to set the expectation that universities may not limit freedom of speech of staff or students, except where it violates the law or as required to avoid disrupting the ordinary activities of the university.</p> <p>There are spaces on university campuses that are governed in part by tikanga Māori (e.g., spaces for students’ associations or student support centres). These are manifestations of rangatiratanga within the university context. It is possible that the expectations around freedom of speech could disrupt tikanga practices or the cultural and emotional safety of faculty and students in these spaces.</p> <p>In this way, if expectations around and implementations of freedom of speech practices are not designed in consultation with appropriate Māori individuals and groups, there is a risk that rangatiratanga is undermined.</p> <p>On the other hand, strengthening protections on freedom of speech may better support Māori to express and exert rangatiratanga within university spaces.</p>
<p>Article 3: Ōritetanga Promises to Māori equal benefit from citizenship.</p>	<p>Limited</p> <p>As mentioned, this policy strengthens the protection of freedom of speech for Māori who are members of the university community. However, Māori members of the academy and tertiary students may prefer that free speech protections are balanced alongside their right to freedom of discrimination and universities’ obligations to protect the wellbeing of staff and students, particularly as Māori are likely to be disproportionately affected by speech that is controversial or offensive due to patterns of systemic discrimination in New Zealand.</p> <p>As we have also mentioned above, we have heard concerns from agencies that an environment that prioritises unrestricted speech may have practical implications for student participation and wellbeing, creating de facto barriers to education for some groups (including Māori students and academic staff) that are inconsistent with the right of equal access to education. From an Article 3 perspective, there is some risk that this policy may disturb the ability of Māori to retain equal access to education alongside others.</p>

Section 3: Delivering an option

How will the new arrangements be implemented?

75. We understand that the Minister wishes to have legislation in place to enact the freedom of speech coalition agreement by 2026. Legislative amendments to the Education and Training Act 2020 to implement this policy will be progressed through ETAB 2. 9(2)(f)(iv)
76. Oversight of the implementation of universities' freedom of speech policies will occur through universities' regular accountability arrangements, subject to existing external scrutiny and complaints channels.
77. Universities will meet specified legislative requirements in relation to staff and student freedom of speech complaints (similar to existing requirements in the Pastoral Care Code of Practice). Requirements will ensure that staff and students have a suitable, safe, and efficient avenue through which to direct freedom of speech complaints, guaranteeing appropriate redress where possible.
78. We do not have a strong awareness of implementation risks for this proposal, given a lack of consultation with key stakeholders on the consequences of any proposal with university settings. As such, we have limited capacity to plan for risk mitigation.
79. The Ministry of Education will work to clearly notify universities of their new obligations, set clear expectations on what changes are required and provide support where possible. Legislative amendments will allow for a six-month transition period to give universities time to develop their freedom of speech statement in consultation with their communities and ensure they are compliant with final provisions in legislation.

How will the new arrangements be monitored, evaluated, and reviewed?

80. As mentioned, will universities themselves will maintain accountability for the day-to-day monitoring and enforcement of this policy.
81. Universities will be required to publicly report on student and staff views on academic freedom and freedom of speech in their annual reports, as well as on the number and nature of any complaints. This requirement provides opportunity for the evaluation of the efficacy of this policy. The Minister has indicated that she will consider options to ensure that this reporting is sufficiently standardised so that it can be effectively monitored and compared. Final decisions on the approach to standardised reporting are proposed to be delegated to the Minister.
82. The Ministry will look to evaluate the efficacy of policy changes drawing on universities' reporting on student and staff views on academic freedom and freedom of speech, as outlined in universities' annual reports.