



UNIVERSITY
OF WOLLONGONG
AUSTRALIA

22 February 2019

The Hon Robert French AC
freedomofspeechreview@education.gov.au

Dear Sir

Thank you for your correspondence of 8 February 2019 regarding the independent review you are conducting into freedom of speech in Australian higher education.

I agree with your assessment that there is no freedom of speech crisis in the sector and am of the view that sufficient policies and procedures are in place within Australian universities in relation to this issue.

While I appreciate your efforts in producing a Draft Model Code, I and my colleagues have some reservations about the potential reach of the Code and about the interaction of some of the definitions and provisions therein. In order to allow time to adequately address these issues and to provide you with a fulsome response to issues raised, I respectfully request an extension to the deadline set in your correspondence.

I understand that Universities Australia intends to provide a response on behalf of the sector following its plenary meeting next week. I am hoping that your deadline can be extended so that the University can take the UA response into account in preparing our individual response to you.

In relation to your request to publish the University of Wollongong's correspondence with you on this matter, I consent to the publication of this correspondence on the departmental website after the conclusion of the review.

If you have any questions or clarifications concerning this letter, please do not hesitate to contact Dr Nancy Huggett, Director of the Governance and Legal Division on nhuggett@uow.edu.au / (02 4221 5684).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Paul Wellings'.

Professor Paul Wellings CBE
Vice-Chancellor

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Vice-Chancellor



UNIVERSITY
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1 March 2019

The Hon Robert French AC
freedomofspeechreview@education.gov.au

Dear Sir

Thank you for your response on 27 February 2019 providing the University of Wollongong (UOW) with an extension until 1 March 2019 for the submission of feedback on the draft model code (the Code) regarding freedom of speech in Australian universities.

As noted in my previous correspondence of 22 February 2019 and echoed in the correspondence submitted to you by Universities Australia (UA) on 26 February 2019, I endorse your assessment that there is no freedom of speech crisis in the sector and am of the view that sufficient policies and procedures are in place within Australian universities regarding this issue. I believe UOW encourages an environment where students and staff can participate in debates and express their views. We uphold the principles of free speech on campus, subject to our duties and obligations at law, and we have operational procedures in place to assess requests for visiting speakers so as to encourage debate while maintaining a safe and respectful university environment. I am of the view that, if any additional measures are required, they should be in the form of high level principles which universities could draw upon and integrate into their policies and procedures as desired.

In your correspondence of 8 February 2019, you asked for specific feedback on the Code. My comments and concerns are set out below for your consideration:

1. The intended reach of the Code is unclear.

While your correspondence of 8 February suggests that universities *may* wish to adopt the Code, 'with or without modification,' later in your letter you discuss potential amendments to the *Higher Education Support Act 2003* (Cth) and the TEQSA Standards which suggests the Code may not be optional.

Further, the 'Operation' section of the Code states that the University shall have regard to the principles of the Code when drafting delegated legislation; that powers or discretions conferred on the University, or persons or bodies, by a law made by the University under its delegated law-making powers shall be exercised in accordance with this Code; and that the Code shall prevail, to the extent of any inconsistency, over any non-legislative rule, code, guidelines, principles or policies of the university and of any of its organs and of the student representative body.

As UA has noted, if the Code is given legislative force and operates as per the operational provisions of the draft Code then a number of policies and procedures that have been carefully constructed in consultation with the wider university community would be overridden which would undermine institutional autonomy and community expectations (for example, in relation to the proper management of University land, resources and facilities and the proper handling of staff and student misconduct).

Professor Paul Wellings CBE
Vice-Chancellor

2. The definitions of Freedom of Speech, Academic Freedom and Institutional Autonomy have been conflated in a way that is potentially unhelpful to universities.

All Australian institutions share a commitment to Academic Freedom in the sense of acknowledging the rights of academic staff to speak on issues of concern in their area of expertise and to respond to social issues. While there may be merit in a single definition of Academic Freedom, defining it in its broadest sense and without qualification, may cause inconsistencies with institutional definitions within policy and enterprise agreements and will create uncertainty as to the position of the University regarding the exercise of Academic Freedom in particular incidents.

The Code also appears to situate Freedom of Speech *within* Academic Freedom whereas the former is usually seen as having the wider context. The conflation of definitions, while intended to assist the sector, may create unintended consequences in relation to issues such as misconduct, confidentiality, the protection of intellectual property, the protection of personal information, and the use of the university name.

3. Definition of ‘the duty to foster the wellbeing of staff and students’.

This definition is used in the Code as grounds for the University to regulate the exercise of freedom of speech by persons on University land and by all staff members and students. While the definition seeks to ensure that no staff member or student suffers unfair disadvantage or discrimination by reason of their ‘inherent attributes’, that no staff member or student is subject to intimidation or threatening behaviour and that reasonable and proportionate measures to prevent lawful speech that is ‘intended to insult, humiliate or intimidate’ are supported, it does not take into account other issues that the University must consider. These additional issues relating to the general welfare of staff, students and the community include: the physical safety of staff, students, and property; the University’s obligations to visitors; any Work Health and Safety requirements or restrictions in relation to the use of buildings or certain parts of the land (i.e. building capacities); and any other express or implied obligations at law that the University holds as a landholder of a quasi-public space. Currently UOW Protocol Procedures allow for a WHS-informed risk assessment process in relation to speakers on campus, which is unlikely to be in compliance with the above definition.

The definition also appears inconsistent with the duty of the University to prevent unfair disadvantage or discrimination under the *Anti-Discrimination Act 1977 (NSW)*, which not only deals with protection from discrimination on the basis of a person’s ‘inherent attributes’ but also extends to a person’s marital or domestic status; a person’s responsibility as a carer; and/or HIV/AIDS vilification. I am concerned that the University may incur vicarious liability in relation to these additional heads of discrimination if, for example, the discrimination is undertaken by an academic staff member exercising their Freedom of Speech, as situated in the expanded definition of Academic Freedom in the Code, in the course of their employment. I am also concerned that this definition places a burden on the University to prove the ‘intent’ of a person exercising their freedom of speech before being able to regulate that expression.

4. Inadequate Restraints on Academic Freedom and Free Speech regarding statements by staff.

Principle 1 of the Code grants all University staff members and students the same freedom of speech in connection with activities conducted on University land or in connection with the University as any other person in Australia. The University may only limit that right via reasonable and proportionate regulation of the expression of free speech as necessary for the discharge of teaching and research and/or to enable the university to fulfil its ‘duty to foster wellbeing of students and staff.’ Principles 1 and 2, if read strictly, do not appear to provide the University with the ability to regulate freedom of expression for other reasons such as to prevent staff members from revealing confidential information relating to sensitive and strategic business decisions, such as intellectual property or information relating to confidential internal staffing matters.

Principle 3 of the Code appears to provide an absolute defence for academic staff and students in that the exercise of Academic Freedom “shall not constitute misconduct nor attract any penalty or other adverse action.” This defence is not qualified with respect to the lawfulness, professionalism or malicious intent of said exercise of Academic Freedom by that particular academic staff member. This appears to be in direct contradiction of the University’s rights under the *University of Wollongong (Academic Staff) Enterprise Agreement 2015*, the *Fair Work Act 2009 (Cth)* (see s123(1)(b)) and the *Fair Work Regulation 2009 (Cth)* (see r1.07(2)(ii)), which allow the University to dismiss an employee for wilful conduct that is inconsistent with the contract of employment or that causes serious and imminent risk to the reputation of the University. Under Principle 3, for example, a Professor making derogatory and offensive remarks about his or her colleagues on social media may not be actionable by the University because the Professor made those comments under the guise of Academic Freedom as defined in the Code (see points 3 and 4 of the definition of Academic Freedom in the Code).

5. Restraint on University’s ability to manage its land and facilities - External Speakers.

Principles 5 and 6, read together, restrain the University’s right to autonomously manage its land and facilities, including the rights afforded under the *Inclosed Lands Protection Act 1901* and at common law to prevent entry or exclude individuals from University land. While it is acknowledged in the Code that the University has the right to manage how an external speaker may be booked, the Code provides that the University is only able to refuse permission for a speaker to attend the University under Principle 5(c) where the content of the speech:

- a) is or is likely to be unlawful;
- b) prevents the University from fulfilling its duty to foster the wellbeing of staff and students; or,
- c) involves the advancement of theories or propositions which do not meet scholarly standards to such an extent as to be detrimental to the University’s character as an institution of higher learning.

While these grounds are sufficient on the basis of the content of the speech, and may provide the University with an element of reputational protection, they do not provide the University with the ability or discretion to refuse permission, or cancel, on the basis of other concerns such as:

- a) the University not having the capacity or the facilities to safely handle expected numbers;
- b) real and legitimate concerns for the physical safety of persons and property at the event; or
- c) the University needing the facilities for an event more closely aligned to its core objects at late notice.

6. Student speakers are seen as University speakers.

The Code assumes greater knowledge and control of the activities of student associations, student clubs and groups than is currently the case. The definition of ‘Invited Speakers’ in the Code includes speakers invited by student groups, clubs and associations. While student associations undergo an induction and are asked to notify the University in accordance with its procedures when they invite speakers onto campus, University management would not be aware of or have control over speakers invited by clubs or student groups (which are not defined and could be simply a collection of students with no formal association).

7. Social Media and Freedom of Speech.

I note the response from UA pointed out that many of the issues we face are complicated by the increasing use of social media platforms by academic staff and students, the use of which is not currently dealt with or anticipated in the Code.

I would prefer (and UOW currently maintains) a risk-based approach to notifications of visiting speakers and to uphold the principles of freedom of speech consistent and compliant with our legal obligations (e.g. anti-discrimination and confidentiality requirements as well as our obligations to provide a safe work and study environment).

I hope the above feedback is helpful and I wish you luck with the review, if you have any questions or clarifications concerning this letter, please do not hesitate to contact Dr Nancy Huggett, Director of the Governance and Legal Division on nhuggett@uow.edu.au / (02 4221 5684).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Paul Wellings', with a long horizontal line extending from the end of the signature.

Professor Paul Wellings CBE
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