

21 February 2019

The Hon Robert S French AC
Review into University Freedom of Speech
Suite 2, Level 13
Allendale Square
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Perth WA 6000

By email: sulcsj@bigpond.com

Dear Mr French,

Thank you for your letter dated 8 February 2019 providing an update on the Independent Review of Freedom of Speech in Higher Education and providing a Draft Model Code for comment.

As noted below, we are surprised and concerned that a draft code has been issued without the relevant Terms of Reference of the Independent Review first being addressed. In particular, we believe the case needs to be made as to why a code framed in this prescriptive, legalistic way is needed given legislative provisions for academic freedom and freedom of intellectual inquiry exist and why such a voluntary code would override any conflicting statutes or rules.

Response to Draft Model Code

Western Sydney University has reviewed the Draft Model Code and, as invited, provides its response as follows.

Framing of the Draft Model Code

- The Draft Model Code covers the expected considerations of, amongst other things, clear commitment expressed as 'paramount value', reasonable regulation of access, and duties of care as foreshadowed by the Terms of Reference of the Independent Review.
- The assumption that freedom of speech and intellectual inquiry are aspects of academic freedom (Object (2) of the Draft Model Code) leads to conflation of freedom of expression on the one hand, and freedom of intellectual inquiry and academic freedom on the other. The lack of clarity around these terms has been characteristic of the recent public debate and assertion of a 'crisis' which draws strongly, and following Professor Glyn Davis, inappropriately on the US free speech debate (Davis, ANU, December 2018).

Stone and Roberts (2018) argue that:

[T]his debate would benefit from a clearer distinction between the concepts of academic freedom and freedom of speech.

... As a corollary of their role in advancing and disseminating knowledge, academics are said to have “academic freedom” – the freedom of academics to conduct their teaching, research and publishing activities without fear of intrusion or retribution by powers such as university governance, the state, or powerful private actors. Academic freedom entails responsibilities. In carrying out their work academics must comply with discipline-specific methods and meet scholarly standards related to accuracy, completeness and relevance.

... Existing alongside these questions of academic freedom and institutional autonomy is the question of freedom of speech in the university, extending well beyond teaching and research to the university’s ‘town square’.

- The dissemination of a Draft Model Code pre-empts findings related to the first three Terms of Reference, as noted below. This is critical to providing the rationale for a code, appropriate context, and potentially inflames the fabricated ‘crisis’ of free speech on campus.

Terms of Reference

The review will:

- *Assess the effectiveness of the Higher Education Standards Framework (the Standards) to promote and protect freedom of expression and freedom of intellectual inquiry in higher education.*
- *Assess the effectiveness of the policies and practices to address the requirements of the Standards, to promote and protect freedom of expression and intellectual inquiry.*
- *Assess international approaches to the promotion and protection of free expression and free intellectual inquiry in higher education settings, and consider whether any of these approaches would add to protections already in place in the Australian context...*

...

- Further, context is critical for the purposes of a voluntary Draft Model Code. It is respectfully suggested that a plain English preamble should be included, having regard to the following.

(a) *Higher Education Support Act 2003 (Cth) s. 19.115* – which provides:

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

The Draft Model Code makes no reference to this important provision and its coverage of Table A and Table B providers is not accurately reflected in the proposed wording of the Code, which ‘refers to universities but is capable of application to other higher education providers.’

(b) Academic freedom and freedom of intellectual inquiry are already routinely recognised important principles in a range of governance policies, including the foundation Acts of universities. At Western Sydney University, this includes the following, as outlined in our initial submission: *Western Sydney University Act 1997 (NSW)*; Academic and Professional Staff Enterprise Agreements; the University's Strategic Plan, *Securing Success 2018-2020*; the draft Ethical Framework for University Governance; Code of Conduct; Respect and Inclusion in Learning and Working Policy; Media, Social Media and Public Commentary Policy; Research Code of Practice; Asset Management Policy; Space Hiring Policy; and Conference Policy.

(c) UNESCO *Recommendation Concerning the Status of Higher-Education Teaching Personnel* (Nov 1997), which provides:

At paragraph 18: '*Autonomy is the institutional form of academic freedom and a necessary precondition to guarantee the proper fulfilment of the functions entrusted to higher-education teaching personnel and institutions*'

At paragraph 27: '*...Higher-education teaching personnel are entitled to the maintaining of academic freedom, that is to say, the right, without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative academic bodies...*'

(d) The American Association of University Professors, since its famous *Statement of Principles on Academic Freedom and Tenure* in 1940.

(e) The *Report of the Committee on Freedom of Expression* ('*The Chicago Statement*', 2014) – is more recent and more widely cited. The Chicago Statement is a concise (two and a half page), plain English document that provides a clear historical and contextual statement, a commitment, and appropriate legal and institutional caveats.

According to Professor Katharine Gebler as of February 2018, the Chicago Statement had been adopted by 34 other universities in the US. This leaves around 1,600 universities that have not adopted it, possibly because their existing policies already support the same views (Gelber, *The Conversation*, Nov 2018).

This demonstrates that, internationally, academic freedom and concomitant institutional autonomy have been established and long recognised as abiding principles, essential to the mission of universities as institutions of higher learning.

- The current Draft Model Code may foster unintended consequences. Conservative US activist group Foundation for Individual Rights in Education (FIRE) is one of the most prominent advocates of adoption of the Chicago Statement and has produced a student activist toolkit: <https://www.thefire.org/students-5-reasons-you-should-advocate-for-the-chicago-statement-on-your-campus/>.

FIRE appears to promote the principles of the Statement – for example, a recent article published on their website provides:

‘One way to get the conversation started about improving the campus climate for free expression is by discussing the adoption of a free speech statement. Once you engage faculty members, fellow students, and administrators to consider the innate value of free expression, the logical next step is to work to ensure the university’s speech codes align with those values’.

‘Students: 5 reasons you should advocate for the ‘Chicago Statement’ on your campus’ by Mary Zoeller, 19 Sept 2018

However, FIRE’s underlying premise is that:

‘The university setting is where students are most subject to the assignment of group identity, to indoctrination of radical political orthodoxies, to legal inequality, to intrusion into private conscience, and to assaults upon the moral reality of individual rights and responsibilities. Illiberal university policies and practices must be exposed to public criticism and scrutiny so that the public is made aware of the violations of basic rights that occur every day on college campuses’

<https://www.thefire.org/about-us/history/>

This raises the question of whether the prescriptive and legalistic framing of the Draft Model Code will incite FIRE-like activism or discourage it through detailed explication.

Specific Matters within the Draft Model Code

Operation

(a) We raise concerns with the wording of clause 1, which provides:

‘The university shall have regard to the principles of this Code in the drafting of delegated legislation pursuant to its delegated law-making powers’

(b) We also question the appropriateness of clause 3, given it is a voluntary code, which provides:

‘This Code prevails, 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’

Principles

(c) The focus in clause 5 on visitors speaking rather than the myriad forms of expressive conduct on campus, and the concomitant responsibilities regarding duty of care dependent on context, is an unfortunate narrowing of the principles. Following Stone and Roberts (2018), the difference between the ‘public’ arena or the confines of the University college:

‘A residential college that serves as a student’s home on campus is quite different from a classroom, which is in turn different from a public space – like a lecture theatre, lawn or courtyard. The protection for freedom of expression should be correspondingly greater the more public the forum.’

(d) In clause 7, it is unclear what the intended meaning of 'fully informed' is, in the context of course information. A student commencing a course is unlikely to be 'fully informed' regardless of the information provided.

(e) Similarly, in clause 8 it is unclear what the meaning of 'special support' is and whether it refers to support beyond 'dedicated rooms or places' what that support would be and what would be reasonable 'special support' in the circumstances.

Funding

As a final comment, we note that Liberal Senator James Paterson argues that government funding for universities should be tied directly to compliance with upholding free speech and academic freedom (Gelber, *The Conversation*, June 2018).

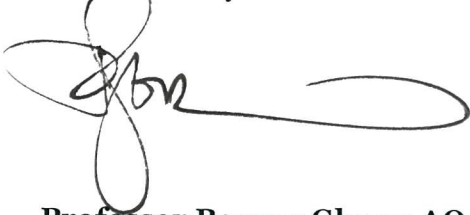
This raises concern about what safeguards are in place, if any, that mean compliance with a voluntary code as presented, would not impact on university funding.

Request to publish our responses

Western Sydney University consents to this response, and our letter to The Secretariat of the Review into University Freedom of Speech (to which you were cc'ed) dated 18 December 2018, being published on the Department of Education and Training website after the publication of the final Report.

Should you require further information, please contact my office on (02) 9683 8122.

Yours sincerely



Professor Barney Glover AO
Vice-Chancellor and President