

27 February 2019

The Honourable Robert S French AC
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By email: suicjs@bigpond.com

Dear Mr French

Draft Model Code

Thank you for your letter of 8 February and the opportunity to comment on the draft model code attached to it.

On behalf of Griffith University, I wish to thank you for the work that you have undertaken on this complex subject matter in a relatively short period of time. We appreciate your recognition also that there is not a crisis in free speech in Australian universities, which is an important contribution to the public debate on this issue.

Griffith has a strong commitment to freedom of speech and academic freedom. We welcome a consideration of ways in which these might be better protected in the university context. The proposal that you put forward of a detailed code is one approach to this issue. Other approaches include a more general statement of principle (such as the Chicago Declaration) or a higher level policy that focuses on principal rather than detail (for example, the current policy on academic freedom at the University of Melbourne or ANU). Whatever mode is ultimately considered best, we welcome your proposal to bring greater clarity to the term 'free intellectual inquiry' by distinguishing between free speech and academic freedom. These are both important values and, while they are certainly overlapping, also have distinct purposes and scopes.

Even if a detailed model code is considered the best way forward, there are some matters in the current draft that are of concern to us and we would appreciate an opportunity to engage with you with respect to them.

The first concern is the proposal that this particular policy be given a superior role to other university policies. We presume that the rationales for this are both symbolic (to underline the importance of the subject matter) and practical (to ensure that it is clear that this policy prevails over others where there is conflict). Yet other university policies also deal with matters of significance and import, including those around health and safety of staff and students. The creation of a new class of superior policy would unnecessarily complicate an already complicated legal and policy landscape within universities.

The second concern is to ensure that there has been a proper examination of what is proposed and the existing legal requirements on universities. Academic freedom, for example, is defined and protected in the EBAs of many universities. Before a different definition of academic freedom is adopted in policy, it would be important to consider the implications of doing so when there is a potential for conflict. The proposed Code also has the potential to come into conflict with other laws, such as s18C of the Race Discrimination Act. While these laws have been controversial, they are still binding on universities.

The third set of concerns are around ensuring that the importance of teaching as an important element of university life is reflected and protected in any Code. The classroom creates different challenges for free speech than some other aspects of campus speech. For example, neither teachers nor students have the option of not attending classes or of leaving if the speech in the classroom is harmful to them, by contrast with a public lecture or someone making political arguments in the university grounds. Creating a high-quality learning experience might also require a degree of control of free speech by a teacher, for example in requiring participation by all students (notwithstanding that free speech usually includes the right to refuse to speak) or in limiting the speech of a particularly voluble student to allow for greater participation by others. Teachers may legitimately require contributions to be relevant to the materials being covered and not to be *ad hominem* or insulting. Conversely, it is also important for university authorities to keep some control over what content is covered in classrooms as this may be necessary for professional accreditation or to ensure that students are given a complete overview of an area in foundational courses in a discipline. With the currently broad definition of academic freedom, it may appear that such directions to academics about teaching would be a breach of academic freedom.

It is also important to recognise that an academic may voluntarily limit their own right to speech freely about their research or may have restrictions placed on them by law (eg in the context of national security) or ethics (eg a promise to research subjects to protect them from identification). Universities are increasingly entering into contracts with third parties which provide valuable opportunities for faculty to work with industry, government and others but which may require limits on speech to protect intellectual property or for other reasonable purposes. We note that this is dealt with implicitly in the principles in the discussion around contracts and philanthropy but may benefit from more specific protection.

Finally, it would be helpful if greater consideration is given to the cyber context in which many of the most complex issues arise. For example, staff members may consider themselves to be expressing a private opinion through social media but may still be identifiable through that medium as a staff member and their views may be more visible to a wider audience (including students) than they may be aware. Students commonly engage with one another (and sometimes staff) outside the physical university and such engagements can give rise to claims of harassment and bullying. At present, the Code focuses very much on the physical university but that no longer captures the full range of university activities.

We also have a range of more detailed recommendations if the decision is made that a detailed code is the best way forward. The complexity of trying to capture all of the situations in which issues of academic freedom and freedom of speech is in issue is reflected by the variety of comments and may lead to the conclusion that a broader statement of principles is a better way forward than the more legislative approach currently set out in the model Code.

Our specific comments are as follows:

1. The objects of the Code refer twice to lawful freedom of speech as 'a paramount value.' We recommend that the word 'paramount' is replaced by a term such as 'significant' or 'important'. A value that is paramount is, by definition, more important than other values when universities have

other values that are at least equally important. The various limitations already built into the objects clauses play the role of recognising this to some extent (including using 'a' rather than 'the' paramount value) but also demonstrate that freedom of speech is not paramount, as it may need to give way to other important institutional needs such as the regulation of access to land or protection of physical safety.

2. We suggest that two additional reasons for limiting freedom of lawful speech should be included in either objects clause 1 or principles clause 1:
 - a. 'to allow for the enforcement of appropriate conduct in environments such as the classroom, laboratory or examinations;
 - b. To comply with the requirements of third-party agreements, legal or ethical requirements that impose a duty of confidentiality on researchers or restrict their freedom of speech for the purposes of the research'.
3. The objects clause sub-paragraph 2 refers to 'intellectual inquiry.' Consistently with later parts of the Code, we suggest that this clause could read 'To ensure that freedom of speech and academic freedom are treated as significant values by the university.'
4. The definition of academic freedom is useful, but it includes the right of academic staff and students to make public comment on any issue not speaking on behalf of the university (bullet point 4). This might be better included under the definition of a more general freedom of speech, and in that context could include the rights of all staff members and not simply academics to exercise their freedom of speech in this way. If this is done, we recommend that an additional sentence is added to the freedom of speech provisions: 'Nothing in this Code prevents a university from taking management or legal action to protect the reputation of the university or its staff against defamatory or untrue statements.'
5. Within the definition of academic freedom it may be helpful to include a note that such freedom does not include unlawful speech or speech which is inconsistent with reasonable university regulation aimed at protecting student or staff wellbeing. One issue that is raised by a number of the more contentious cases around academic freedom is the extent to which a university can impose on staff and students reasonable boundaries around the manner in which they exercise their academic freedom. It is clear that scholars must be free to criticize the opinions, methodology and arguments of others in their field. When such attacks become *ad hominin* or abusive, however, they can veer into bullying behaviour which we consider should not be covered by the definition of academic freedom. Given that the Principles create an absolute right around academic freedom (as compared to the more limited rights of free speech, and in some tension with Object 1) it is important that the scope of term is defined appropriately or such limitations are built into the Principles.

In addition, we recommend that the following be added to the definition of academic freedom: 'It is consistent with academic freedom for an academic to be required to teach a particular subject or subjects and to cover the required course material in that subject.'

6. The reasons that are given for restricting freedom of speech in Object 1 and those given in Principle 1 are different in scope. It might be helpful to take the grounds for restriction out of Object 1 (perhaps replacing them with 'other than those imposed by law or as outlined in the principles below'). Principle 1 could then include a compilation of both the sets of permissible

restrictions from Object and Principle 1. In addition, it could be made clear in considering the limits that might be made reasonable through the operation of law, that these include the avoidance of civil liability, including the duty of care a university owes to its students and staff (restricting this to those who come onto its lands runs the risk of excluding the cyber realm where many problematic aspects of speech occur).

7. The division between external and invited visiting speakers is used primarily in the Code to provide some useful guidance with respect to when a university might have heightened obligations to cover the costs of speakers who may be in need of additional security and other conditions of use. The inclusion within the definition of an 'invited person' of any person invited by any academic, however, means that a single member of the university community can trigger what may be a substantial financial obligation on behalf of the entire university. The same is true of the inclusion in the same definition of 'group of students', which may in practice collapse the distinction between the two categories of visiting speaker. We agree that the distinction between the two types of speakers should be maintained to make clear that a university may decide to refuse to provide space to, or place additional obligations on, speakers who are not invited by the university to speak. However, we suggest that Principle 5(d) should be amended to say that the university may seek costs towards security for any speaker. Many universities will choose not to pass on these costs, but others which are struggling financially or which are the intended venue for numerous controversial speakers which impose a substantial burden over time should not be required to distort their finances in this manner. A provision could be included to say that universities that choose in some circumstances to charge for the provision of security must develop guidelines for ensuring that these charges are imposed in a manner that does not discriminate against certain types of speech on the basis of its content.
8. Under the definition of 'the duty to foster the wellbeing of staff and students', the final bullet point notes that there is no duty to protect a person from feeling offended, shocked or insulted by 'the lawful speech of another'. There is some contradiction with third bullet point, which does allow the university to regulate some types of insulting speech.

The reference to lawful speech here is, presumably, intended to highlight that at present the university may have a duty in some circumstances to protect students or staff against some types of offence (for example under s.18C of the Racial Discrimination Act). However, particularly given how controversial the application of this law can be, it may be better to highlight the existing responsibility by amending the definition to state that the obligation around wellbeing 'does not extend to a duty to protect any person from feeling offended, shocked or insulted by speech unless such speech is in contravention of other laws.'

Bullet point 3 in the same definition might be usefully reformulated to focus on the way in which the speech in question causes harm relevant to university life. A formulation along the following lines might be appropriate: 'supports reasonable and proportionate measures to prevent any person from using lawful speech which is intended to humiliate or degrade a person or groups of persons and which a reasonable person would regard in the circumstances as likely to affect (1) the standing of a person or group of persons as equal members of the University community or (2) their capacity to participate fully in University life.'

9. Under clause 2 of the Principles, adverse action is prohibited by reference both to the content of the speech (which is appropriate) and its 'manner of delivery', subject only to the limitations set out in clause 1. It is generally recognised that some limitations on manner of delivery are more

easily justified than content restrictions. Universities may, for example, wish to restrict the use of microphones in restricted spaces or near to workplaces. We suggest that it would be better for 'or manner of delivery' to be deleted. The issue of whether protestors in exercising their freedom of expression can prevent another person from speaking is also at issue here. A university might restrict the place in which a protest can take place in order to allow those who wish to hear a speaker to do so, and those who wish to protest to do so also.

10. Clause 5.c of the Principles should include 'where the content of the speech *or the manner in which the event is conducted* is or is likely to be...'. We suggest this change because some of the controversies around public lectures have included groups which have required sex segregated seating, which universities would be within their rights to refuse. This change could also be made in Principles clause 6.

Once again, our thanks for the approach that you have brought to this complex task. Freedom of speech and academic freedom are important values within the Griffith community and we would welcome an opportunity to be involved in the next stage of discussions around finalising the best recommendation to the Minister.

We are happy to have this response made public in due course. If we can be of any further assistance, please do not hesitate to contact us through my office.

Yours sincerely

A handwritten signature in black ink that reads "Carolyn Evans". The signature is written in a cursive, flowing style.

Professor Carolyn Evans
Vice Chancellor and President