

28 February, 2019

**The Hon Justice Robert S French AC**

Sent by email: [sulcsj@bigpond.com](mailto:sulcsj@bigpond.com)

Dear Justice French,

**NTEU Response to Draft Model Code for Freedom of Speech / Academic Freedom**

Thank you for providing the NTEU with an opportunity to respond to your Draft Model Code for Academic Freedom/Free Speech.

The NTEU shares your views that there is no evidence of a crisis of free speech at Australian universities and that the institutional autonomy of our universities must be at the centre of any discussion around academic freedom or free speech.

To the extent that some universities' current policies are so broadly framed as to be a burden on academic freedom or free speech, we agree that this may in part be due to the wording of Section 19-115 of the Higher Education Support Act (2003) (HESA 2003), which requires them to *"have a policy that upholds free intellectual inquiry in relation to learning, teaching and research."*

We emphasise the importance of Section 19-115 because it was the NTEU that was primarily responsible for its inclusion into HESA 2003 in 2011. The motivation for the NTEU lobbying for the inclusion of such a clause was that prior to 2011, neither the objects of the Act nor its provisions made any reference to the concept of academic freedom. The use of the term free intellectual inquiry, as opposed to academic freedom (NTEU's preference at the time) was, as we understand it, a compromise to satisfy the concern of others in the sector.

There is no doubt that the term free intellectual inquiry unnecessarily conflates the concept of academic freedom and free speech which is unhelpful in the current debates. We also accept your observation that the effect of the use of such broad terminology has led to a diverse range of rules, principles and codes, which in some cases have been used to suggest that free speech is under threat at certain institutions.

***Free speech***

Taking into account the need to clarify the terminology, the NTEU does not support the suggestion that university policies or indeed HESA 2003 should address the issue of free speech. As you highlight in your draft code, university students and staff are entitled to enjoy the same free speech rights as other Australians. Therefore, we believe that any attempts to

codify free speech in university policy is not only unnecessary, but will in all likelihood only act to further constrain such rights on university campuses. The issue of free speech should remain within the realm of civic society.

### **Academic freedom**

The NTEU's Policy, adopted by National Council in 2008, states that:

*National Council reaffirms Academic Freedom as an essential and defining characteristic of a university education which is critical to the creation and dissemination of new knowledge.*

It is worth pointing out that the Union's policy does not frame the issue of academic freedom explicitly or primarily in terms of the rights of university staff, but rather in terms of the creation and dissemination of knowledge which is for the public good. While the advancement of knowledge might be considered to be "good in itself", the NTEU believes it critical for broader social, economic, cultural, environmental and scientific progress. This requires development of new knowledge and the testing of received wisdom, and can involve the expression of what may be unpopular, controversial or even outrageous views or findings.

Therefore, the NTEU would contend that academic freedom should not be defined as attaching only to academic staff but to all staff and students engaged in teaching, research and scholarship.

### **NTEU Recommendation 1**

**The NTEU does not support any attempt to legislate or to codify or regulate free speech in Australian universities.**

### **Academic freedom and university staff**

As noted above, the NTEU was the driving force behind the inclusion of Section 19-115 into HESA2003. In addition to your legitimate concern about the use of an imprecise term such as freedom of intellectual inquiry, we would also point out that following its inclusion, universities acted quickly to ensure that this legislative provision could confer no actual rights on employees, by use of the contract of employment.

Since the Federal Court's 2009 Judgment in [\*Yousif v Commonwealth Bank of Australia \(No 2\)\*](#) [2009] FCA 656; 185 IR 414, it seems clear that if an employer explicitly states in the Letter of Appointment that a particular Policy, or Code of Conduct does *not* form part of the contract of employment, then the policy will usually not confer legal rights on the employee. By way of example, the standard Letter of Appointment at the University of Technology, Sydney (UTS) is typical of how most, if not all, universities now deal with this issue.

*The Appointee will comply at all times with the UTS Code of Conduct and other policies and instruments which UTS may adopt, from time to time, in relation to its operation and governance. Access to the present policies and other instruments is available through the UTS website ([www.gsu.uts.edu.au/policies/index.html](http://www.gsu.uts.edu.au/policies/index.html)). **UTS policies, procedures or other such instruments do not form part of this Contract of Employment and are not intended to be contractual in nature unless expressly provided within this Contract of Employment. The Appointee acknowledges that UTS may adopt, vary or rescind any policies or procedures from time to time, in its absolute discretion and without any limitation on its capacity to do so.***

What this means is that the University's policies including a policy on freedom of intellectual freedom as required by Section 19-115 of HESA 2003 confers no enforceable rights on any employee who is appointed in the terms expressed in such a letter. As this is now the standard form of employment contract at all universities, we would argue that this directly undermines the intent and spirit of HESA 2003.

### ***Academic freedom and enterprise agreements***

A number of academic experts including Professor Jim Jackson from Southern Cross University have pointed out, the only enforceable protections for freedom of expression and academic freedom are to be found in the enterprise agreements which the NTEU has negotiated with universities. It is an issue of great concern (and we would hope also to the broader community) that in the most recent round of enterprise agreement negotiations, a number of universities have strenuously resisted the attempts by the Union to create enforceable rights in relation to academic freedom through its inclusion in enterprise agreements. The University of Melbourne wanted clauses relating to academic freedom removed from their enterprise agreement and to be covered by university policy (which would be unenforceable).

## **NTEU Recommendation 2**

**NTEU recommends that HESA 2003, be amended in the following ways:**

### **2-1 Objects of this Act**

The objects of this Act are:

- (a) to support a higher education system that:
  - (iv) promotes and protects ~~free intellectual inquiry in learning, teaching and research~~ **academic freedom**;

### **19-115 Provider to have policy upholding free intellectual inquiry policies upholding academic freedom and free speech**

A higher education provider that is a \*Table A provider or a \*Table B provider must ~~have policy that upholds free intellectual inquiry in relation to learning, teaching and research~~ **have policies or other arrangements which provide enforceable rights to academic freedom.**

We would also suggest including an amended version (see below) of your definition of academic freedom to be included in Schedule 1 of HESA 2003.

### ***The need for a code?***

As will be evident from the discussion above, while we accept that it is not your intention to create a statutory foundation for a more intrusive regulatory environment in higher education, we are concerned that others may not share your view. If and when such a code is published, the temptation will be to mandate it either in legislation or in TEQSA standards.

We fear that any attempts to codify principles of academic freedom will result in a similar level of confusion and misinterpretation as currently exists within university policies. By way of example, we would highlight paragraph (5) (c) (iii) under Principles of the Code, which reads:

- (5) *The university has the right and responsibility to determine the terms and conditions upon which it shall permit external visitors and invited visitors to speak on university land and use university facilities and in so doing may:*
- (c) *refuse permission to any invited visitor or external visitor to speak on university land or at university facilities where the content of the speech is or is likely to:*
    - (iii) *involve 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.*

The inclusion of such a principle immediately presents difficult questions of interpretation and implementation for university administrators, but more importantly it will no doubt be used by critics to suggest that any decision to prevent someone from speaking at a university on the grounds that it does not '*meet academic standards*' or is something which is '*detrimental to the university's character*' is based on nothing more than a particular ideological bias. As suggested in our views on free speech above, any attempt to codify a set of principles, while not intended to do so, we fear will soon be used and interpreted as rules and no doubt will soon be challenged either administratively or legally.

Given that we do not accept that there is a crisis of academic freedom or free speech at our universities, our preferred approach is to respect institutional autonomy and use a minimalist approach. This would essentially involve making minor amendments to the Higher Education Support Act (HESA) 2003 to clarify what is meant by section 19-115 (see below), and undertaking a comprehensive audit of university policies, procedures, contracts and agreements to determine whether they are compliant with these provisions.

We caution against publishing a Model Code, even if only intended to be used as a resource. Codifying, even by way of principle, an enigmatic concept like academic freedom by definition constrains its application. The unintended consequence of any such codification, especially in its current form, we fear will be to limit rather than liberate academic freedom and free speech.

Our concerns with the specific aspects of the Draft Code are outlined below.

Yours sincerely,



**Dr Alison Barnes**  
**NTEU National President**

## Specific Issues with Draft Code

### Objects

No comments.

### Application

NTEU is curious as to why “the student representative body” as opposed to students more generally are explicitly identified. While we acknowledge that the reference is in response to recent student representative protests, we feel singling out such organisations is unnecessary or useful. Would the definition apply to a students appointed to a student organisation by the university? Who/what are these students representing? Surely the Code should apply to all students.

NTEU would suggest amending the existing sentence as follows:

The Code applies to the governing body of the university, its officers, employees **and students**, its decision-making organs, including those exercising academic governance **and** responsibilities. ~~and the student representative body.~~

All references to the ‘student representative body’ be replaced by reference to ‘students’.

### Definitions

#### **‘academic freedom’**

The NTEU believes that academic freedom should apply to the task or activity being undertaken by a staff member and not the classification of staff.

At some universities professional, technical, teaching and research staff are not classified or covered by the academic classification but within the higher education worker (HEW) or a separate teaching classification. Many of these staff will be involved in academic activities including teaching and research but given the way the definitions are currently written would not be covered by academic freedom.

Therefore, we recommend replacing the term “academic staff” with “staff” trough out the code and would amend existing wording/definitions as follows:

**‘academic freedom’** for the purposes of this Code comprises the following elements:

- the freedom of **academic** staff to teach, discuss, and research and to disseminate and publish the results of their research without restriction by established scholarly consensus or institutional policy, but subject to scholarly standards;
- the freedom of **academic** staff and students to engage in intellectual inquiry, to express their opinions and beliefs, and to contribute to public debate, in relation to their subjects of study and research;
- the freedom of **academic** staff and students to express their opinions in relation to the university in which they work or are enrolled free from institutional censorship or sanction;
- the freedom of **academic staff** and students to make public comment on any issue in their personal capacities, not speaking either on behalf of the university or as an officer of the university;

- the freedom of **academic** staff to participate in professional or representative academic bodies;
- the freedom of students to participate in student societies and associations;
- the autonomy of the university which resides in its governors, executive and **academic** staff in relation to the choice of academic courses and offerings, the ways in which they are taught and the choices of research activities and the ways in which they are conducted.

**'invited visiting speaker'** any person who has been invited by the university or by a student society or association or group of students or representative body or by a member or members of the **academic** staff of the university to speak on the university's land or facilities.

**All other references to 'academic staff' should be replaced with 'staff' throughout the Code.**

### **'the duty to foster the wellbeing of staff and students'**

The NTEU feels that the definition needs greater clarification especially as at it relates to the difference between:

- a university being able to prevent someone from using lawful speech which is intended to **insult**, humiliate or intimidate (third dot point)
- but
- not being able to protect anyone from being offended, shocked or **insulted** (fourth dot point)

The distinction clearly relates to the motivation of the speaker, a very complex legal question, which we believe, in its current form, would create difficulties for university administrations to interpret or implement.

### **'the university'**

In a similar vein to the observation above relating to singling out the student representative body in Application, we would suggest re-writing this definition as follows:

**'the university'** means the university as an entity and includes its decision-making organs and officers, **its staff, students** ~~representative body~~ and entities controlled by the university.

### **Operation**

No comment.

### **Principles of the Code**

In order to eliminate or minimise unintended consequences, as outlined above in relation to Principle (5) (c) (iii) for example, the NTEU believes any principles in the code should be expressed in the most general of terms. By way of further example, we are concerned that the inclusion of principle like (5) (a) opens universities up to accusations that it would shut down free speech through the imposition of unnecessary, complicated, or time-consuming red tape or bureaucratic interference.

Therefore, we would suggest a significantly reduced set of principles which might be amended to.

### Principles

- 1) Every member of the staff and every student at the university has the same freedom of speech in connection with activities conducted on university land or otherwise in connection with the university, as any other person in Australia subject only to reasonable and proportionate regulations to protect the safety and wellbeing of staff, students and visitors.
- 2) The exercise by a member of staff or student of academic freedom shall not constitute misconduct nor attract any penalty or other adverse action.
- 3) The cost, in whole or in part, of providing security and other measures in the interests of public safety in relation to an event or activity involving an external visitor(s), be met by those visitors or the persons organising the event or activity.
- 4) All prospective students are entitled to be fully informed and be able to seek advice about the content of courses, provided that staff are not precluded from including content on the grounds that it may offend or shock any student(s).

Other aspects of the principles, such as the fact that they should apply, all other things being equal, to all university, policies, procedures, collaborative arrangements, contracts or agreement, are fundamental and should be included in amendments to HESA 2003 as outlined above.