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Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers

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**COMMERCIAL EDUCATION SOCIETY OF
AUSTRALIA
PERIODIC DISCUSSION PAPER No.7***

**July
2019**

**REPORT OF THE INDEPENDENT REVIEW OF FREEDOM OF SPEECH IN
AUSTRALIAN HIGHER EDUCATION PROVIDERS¹**

SUMMARY BY

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Introduction

This summary does not claim to be preferred in any way to a reading of the complete report with its succinct and simple recommendations, including “A Model Code for the Protection of Freedom of Speech and Academic Freedom in Australian Higher Education Providers”. The review is an important document for all institutions dedicated to teaching, particularly at the tertiary level, in having a shared understanding of freedom of speech within an institution.

The Review involved a two-stage consultation process with universities and other stakeholders between November 2018 and March 2019, and it also considered recent pertinent debates in Canada, New Zealand, the UK and USA. The latter included consideration of six major universities there.

The Terms of Reference of the Review required it to:

- 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.
- Outline realistic and practical options that could be considered to better promote and protect freedom of expression and freedom of intellectual inquiry, including:
 - revision/clarification of the Standards
 - development of a sector-led code of conduct.

‘Academic freedom’ does not appear in the Terms of Reference which mention ‘free intellectual inquiry’ because that term appears in the HE Standards. It is a term of uncertain meaning but seems to cover some elements of academic freedom. Academic freedom has a complex history and apparently no settled definition. It is nevertheless seen as a defining characteristic of universities and similar institutions. Any principle or code relating to academic freedom should incorporate a definition which

* **These papers are for internal discussion within CESA: on topics related to CESA’s Mission and Vision.**

¹ Robert S French AC. 2019. *Report of The Independent Review of Freedom of Speech in Australian Higher Education Providers*. Canberra, ACT: Commonwealth of Australia, 300pp.

embodies its essential elements for Australian purposes, including relevant aspects of freedom of speech, freedom of intellectual inquiry and institutional autonomy. **All Australian Higher Education Providers (HEPs) are expected to establish Codes based on the main French recommendation.**

Scope

The Review is an example of a meticulous approach to a vexed issue. The extent and limits of freedom of speech under statute law and the common law and the implied constitutional freedom of political communication form part of the general law background to this Review.

It begins with “Universities have recently been described as a contemporary battleground over the boundaries of the debates, discussions and collaboration that are essential to the idea of a university.² Contention about freedom of speech and academic freedom — what they mean and what are their limits — has varied in content and intensity from time to time depending upon political and social issues of the day. The protagonists are often motivated by differing ideological or political world views. Recent events in the United States involving protests against and cancellation of visits by speakers to campus were described by one writer as ‘part of the latest front in the culture wars’.³

From the available evidence however, claims of a freedom of speech crisis on Australian campuses are not substantiated. That said, there is a range of diverse and broadly framed institutional rules, codes and policies covering a variety of topics which leave room for the variable exercise of administrative discretions and evaluative judgments. These are capable of eroding the fundamental freedom of speech and that freedom of speech which is an essential element of academic freedom. That fact constitutes a risk to those freedoms and makes the sector an easy target for criticism.

The principal recommendation emerging from this Report is that protection for the freedoms be strengthened, within the sector, on a voluntary basis by the adoption of umbrella principles embedded in a Code of practice for each institution. Such a Code could be adopted across the sector collectively or by individual institutions with or without modification. It is not proposed that it be imposed by statute on universities or higher education providers generally. The Model Code has been drafted so that its adoption by any higher education provider should comply with the relevant statutory standards, as presently existing, or if amended as proposed.

The Review process involved the gathering of information relevant to the Terms of Reference, including:

- Commonwealth statutory standards and criteria applicable to higher education providers in the context of Commonwealth funding-related regulation of the higher education sector.
- State and Territory statutes and standards applicable to the sector, and to freedom of expression more broadly.
- International statutory standards applicable to the higher education sector.
- Rules, codes, principles, policies and practices of higher education providers in Australia relevant to the regulation of speech and expressive conduct on higher education premises by staff, students, invited visitors, and visitors seeking to use institutional facilities.
- Comparative international examples of the above.
- Observations of key stakeholders.

There is also a perceived tension between freedom of speech and the diversity and inclusion policies adopted by many universities. Such policies can be linked to the duties under the Higher Education Standards, including the duties to treat students and staff equitably and to foster their wellbeing.

The Review also consider ‘Institutional autonomy’ as a further dimension of academic freedom. It is

² Peter MacKinnon. 2018., *University Commons Divided: Exploring Debate & Dissent on Campus* (University of Toronto Press) ix.

³ Sigal R Ben-Porath. 2017. *Free Speech on Campus* (University of Pennsylvania Press) 14.

the capacity of the institution to discharge, in the way it thinks fit, its mission of transmitting and generating human knowledge and conferring on students the skills and abilities which the community is entitled to expect. It covers autonomy in the formulation and application of domestic rules and policies relating to the conduct of students and staff and visitors to the institutions. The extent and limits of such autonomy is ultimately a matter of public policy informed by the history, tradition and purposes of higher education as well as by contemporary needs

The Australian Debate

Debate about alleged restrictions on freedom of speech in Australian universities are partly informed by differing perspectives on appropriate institutional responses to speech, which impacts on social, cultural, ethnic and religious sensitivities and on vulnerable members of the staff and student communities.

- Sometimes it reflects conflicting views about the place of scholarly standards in determining who should or should not be heard on campus.
- Sometimes it reflects a difference of view between the managers of an institution on the one hand and academic staff or students on the other in relation to speech which is seen to affect the 'reputation' of the institution or its relationship with important third parties.

In the 1960s there was a strong governmental philosophy in favour of institutional autonomy as an aspect of academic freedom. It was expressed in a speech given by Prime Minister Robert Menzies at the University of New South Wales (UNSW) in 1964 in which he said: "The integrity of the scholar would be under attack if he were told what he was to think about and how he was to think about it. It is of the most vital importance for human progress in all fields of knowledge that the highest encouragement should be given to untrammelled research, to the vigorous pursuit of truth, however unorthodox it may seem. It is for this reason that in Australia we have established the autonomy of universities, and have, so far as I know, and I hope I am right, consistently refrained from interfering in their work with what I call political executive directions."⁴

In 2001, a report entitled 'Universities in Crisis' was published by the Employment, Workplace Relations, Small Business and Education References Committee of the Australian Parliament and led to the enactment of the HES Act. The Report was focused largely on the adequacy of university funding arrangements at that time. It pointed to a link between academic freedom and funding: "The overwhelming commercial imperative for universities to protect their reputation and capacity to earn income was said to have led to a deterioration in the intellectual climate, academic freedom and morale and the increased victimisation of dissenters."⁵

There has been, since 2001, a good deal of writing and discussion about the rise of managerialism in universities in Australia and consequential effects upon collegiality, freedom of expression and academic freedom. One aspect of those effects might be seen in policies and practices referring to the consequences of expressive conduct for the 'reputation' of the institution.

There have from time to time been controversies concerning ministerial refusals to approve publicly funded research grants to university researchers on the basis of the topics of the proposed research. The ministerial power to refuse approval to particular grants was exercised by the Federal Minister for Education, Brendan Nelson, in the early 2000s and more recently in 2018 by the Federal Minister for Education and Training, Simon Birmingham. Those exercises of ministerial power were met with the criticism that they impinged on academic freedom. Presumably the link to academic freedom in that argument rests on the basis that the recommending body for the grants enjoys an extension of the

⁴ Robert Menzies. 1964. 'The Universities — Some Queries' (Inaugural Wallace Wurth Memorial Lecture, University of New South Wales, 28 August) 13.

⁵ Employment, Workplace Relations, Small Business and Education References Committee, Parliament of Australia, *Universities in Crisis* (2001) 6–7 [1.22].

institutional autonomy associated with the academic governance of institutions in relation to academically-determined processes of application, review and recommendation

The emphasis of recent commentary critical of universities, and leading to the Review, seems to have shifted to internal constraints on freedom of speech for staff, students and visitors to the university. That extends to freedom of speech as an aspect of academic freedom. Commentary on that topic has come from the Institute of Public Affairs (IPA)⁶ and the Centre for Independent Studies (CIS)⁷. The published works of those bodies are referred to in order to indicate the nature of the criticisms advanced by leading protagonists in Australia.

In the same vein, the New South Wales Treasurer, Dominic Perrottet, speaking to the Sydney Institute, referred to

- the barring of controversial speakers from university campuses,
- the burdening of event organisers with the cost of security where controversial speakers were involved and
- letting protests against speakers escalate to the point where riot police had to be called in.

Treasurer Perrottet accused universities of failing to act as they are meant to ‘as facilitators of debate’.⁸

In testimony given to the Education and Employment Legislation Committee of the Senate in October 2018, Professor Saunders, the Chief Commissioner of TEQSA, indicated that TEQSA took a broad approach to the standard relating to free intellectual inquiry. He said: “We interpret free intellectual inquiry broadly, so we’re thinking about freedom of expression, freedom of speech as well as freedom to actually investigate and teach and those sorts of things.”⁹ He added: “whilst issues of equity and diversity are really important in terms of both staff and students and the community of the university or higher education provider, those considerations really should not override considerations to do with free intellectual inquiry.”¹⁰

That view is reflected in part by the designation of ‘freedom of expression’ and ‘academic freedom’ in the Code recommended by this Review as ‘paramount’ and ‘defining’ values respectively.

Questions of academic freedom can arise from conditions attached to philanthropic gifts. There is a risk that requirements imposed by the donor of a large or ongoing gift may compromise institutional autonomy. Universities generally appear to be aware of the risk. Controversy surrounded the recent rejection of a philanthropic gift offered to the ANU on the basis that its conditions might have involved an impermissible interference with the ANU’s autonomy in relation to course control and presentation. Critics of the ANU’s decision appear to have regarded it as giving effect to an academic prejudice against a particular perspective on the teaching of history and thus reflecting a restrictive approach to freedom of intellectual inquiry. It is not necessary to offer any view about the merits of the controversy beyond observing that it has underpinned an aspect of the debate which has led to this Review.

Freedom of Speech under International Law

Freedom of expression as a fundamental human right is reflected in the Universal Declaration of Human Rights and many international conventions. A leading example is the *International Covenant on*

⁶ Matthew Lesh. 2018. *Free Speech on Campus Audit 2018* (Institute of Public Affairs, December 2018).

⁷ Jeremy Sammut. 2018., ‘University Freedom Charters: How to best protect free speech on Australian campuses’, *Centre for Independent Studies* (Policy Paper No 10, October 2018).

⁸ Dominic Perrottet MP 2018. ‘Fighting Back to Preserve our Freedom: How politically correct bullies are using the power of the State to shut down debate’ (Speech, The Sydney Institute, 16 October).

⁹ Tertiary Education Quality and Standards Agency, Submission to *Independent Review on Freedom of Speech in Australian Higher Education Providers* (19 December 2018).

¹⁰ Commonwealth, *Education, Employment and Legislation Committee Estimates*, Senate, 25 October 2018, 174–75 (Professor Nicholas Saunders).

Civil and Political Rights to which Australia is a party.

Article 19 guarantees freedom of speech subject to limitations and restrictions. Limitations and restrictions are inevitable features of such guarantees. There is no such thing as an unqualified freedom of expression. Article 19 provides

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order, or of public health or morals.

Article 19 should be read in conjunction with arts 17, 18 and 20. Article 17 provides, inter alia, that no one shall be subjected to unlawful attacks on his honour and reputation and that everyone has the right to the protection of the law against such interference or attacks. Article 18, which guarantees the right to freedom of thought, conscience and religion, states that the right shall include freedom, either individually or in community with others and in public or private, to manifest religion or belief in worship, observance, practice and teaching. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights or freedoms of others. Also relevant is art 20(2) which provides that:

Recommendation:

A Model Code for the Protection of Freedom of Speech and Academic Freedom in Australian HEPs

A Model Code is proposed as a non- statutory instrument, in such a way as to avoid conflict with statutory obligations, whether or not derived from existing delegated legislation or other legal duties imposed on the university by law. The draft below uses the term 'university' but is capable of application to other HEPs, albeit there may be differences requiring adjustments.

Objects

The objects of the Code are:

- (1) To ensure that the freedom of lawful speech of staff and students of the university and visitors to the university is treated as a paramount value and therefore is not restricted nor its exercise unnecessarily burdened by restrictions or burdens other than those imposed by law and set out in the Principles of the Code.
- (2) To ensure that academic freedom is treated as a defining value by the university and therefore not restricted nor its exercise unnecessarily burdened by restrictions or burdens other than those imposed by law and set out in the Principles of the Code.
- (3) To affirm the importance of the university's institutional autonomy under law in the regulation of its affairs, including in the protection of freedom of speech and academic freedom.

Application

- (1) The Code applies to the governing body of the university, its officers and employees and its decision-making organs, including those involved in academic governance.
- (2) The Code also applies to student representative bodies to the extent that they have policies and rules which are capable of being applied to restrict or burden the freedom of speech of anyone, or academic freedom.

Definitions

'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;
- 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 higher education provider in which they work or are enrolled;
- the freedom of academic staff, without constraint imposed by reason of their employment by the university, to make lawful public comment on any issue in their personal capacities;
- 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 higher education provider 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.

'academic staff' all those who are employed by the university to teach and/or carry out research and extends to those who provide, whether on an honorary basis or otherwise, teaching services and/or conduct research at the university.

'external visiting speaker' any person who is not an invited visiting speaker and for whom permission is sought to speak on the university's land or facilities.

'imposed by law' in relation to restrictions or burdens or conditions on a freedom include restrictions or burdens or conditions imposed by statute law, the common law (including the law of defamation), duties of confidentiality, restrictions deriving from intellectual property law and restrictions imposed by contract.

'invited visiting speaker' any person who has been invited by the university to speak on the university's land or facilities. Note: The definition of 'university' which limits this class of visitor.

'non-statutory policies and rules' means any non-statutory policies, rules, guidelines, principles, codes or charters or similar instruments.

'speech' extends to all forms of expressive conduct including oral speech and written, artistic, musical and performing works and activity and communication using social media; the word 'speak' has a corresponding meaning.

'staff' for the purposes of this Code 'staff' includes all employees of the university whether fulltime or part-time and whether or not academic staff.

'the duty to foster the wellbeing of staff and students';

- includes the duty to ensure that no member of staff and no student suffers unfair disadvantage or unfair adverse discrimination on any basis recognised at law including race, gender, sexuality, religion and political belief;
- includes the duty to ensure that no member of staff and no student is subject to threatening or intimidating behaviour by another person or persons on account of anything they have said or proposed to say in exercising their freedom of speech;
- supports reasonable and proportionate measures to prevent any person from using lawful speech which a reasonable person would regard, in the circumstances, as likely to humiliate or intimidate other persons and which is intended to have either or both of those effects;
- does not extend to a duty to protect any person from feeling offended or shocked or insulted by the lawful speech of another.

'the university' means the university as an entity and includes its decision-making organs and officers, its student representative bodies, undergraduate and post-graduate, and any entities controlled by the university.

'unlawful' means in contravention of a prohibition or restriction or condition imposed by law.

Operation

(1) The university shall have regard to the Principles of this Code in the drafting, review or amendment of any non-statutory policies or rules and in the drafting, review or amendment of delegated legislation pursuant to any delegated law-making powers.

- (2) Non-statutory policies and rules of the university shall be interpreted and applied, so far as is reasonably practicable, in accordance with the Principles of this Code.
- (3) Any power or discretion under a non-statutory policy or rule of the university shall be exercised in accordance with the Principles in this Code.
- (4) This Code prevails, to the extent of any inconsistency, over any non-statutory policy or rules of the university.
- (5) Any power or discretion conferred on the university by a law made by the university in the exercise of its delegated law-making powers shall be exercised, so far as that law allows, in accordance with the Principles of this Code.
- (6) Any power or discretion conferred on the university under any contract or workplace agreement shall be exercised, so far as it is consistent with the terms of that contract or workplace agreement, in accordance with the Principles of this Code.

Principles of the Code

- (1) Every member of the staff and every student at the university enjoys freedom of speech exercised on university land or in connection with the university subject only to restraints or burdens imposed by:
 - law;
 - the reasonable and proportionate regulation of conduct necessary to the discharge of the university's teaching and research activities;
 - the right and freedom of others to express themselves and to hear and receive information and opinions;
 - the reasonable and proportionate regulation of conduct to enable the university to fulfil its duty to foster the wellbeing of students and staff;
 - the reasonable and proportionate regulation of conduct necessary to enable the university to give effect to its legal duties including its duties to visitors to the university.
- (2) Subject to reasonable and proportionate regulation of the kind referred to in the previous Principle, a person's lawful speech on the university's land or in or in connection with a university activity shall not constitute misconduct nor attract any penalty or other adverse action by reference only to its content.
- (3) Every member of the academic staff and every student enjoys academic freedom subject only to prohibitions, restrictions or conditions:
 - imposed by law;
 - imposed by the reasonable and proportionate regulation necessary to the discharge of the university's teaching and research activities;
 - imposed by the reasonable and proportionate regulation necessary to discharge the university's duty to foster the wellbeing of students and staff;
 - imposed by the reasonable and proportionate regulation to enable the university to give effect to its legal duties;
 - imposed by the university by way of its reasonable requirements as to the courses to be delivered and the content and means of their delivery.
- (4) The exercise by a member of the academic staff or of a student of academic freedom, subject to the above limitations, shall not constitute misconduct nor attract any penalty or other adverse action.
- (5) In entering into affiliation, collaborative or contractual arrangements with third parties and in accepting donations from third parties subject to conditions, the university shall take all reasonable steps to minimise the restrictions or burdens imposed by such arrangements or conditions on the freedom of speech or academic freedom of any member of the academic staff or students carrying on research or study under such arrangements or subject to such conditions.
- (6) 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:
 - (a) require the person or persons organising the event to comply with the university's booking procedures and to provide information relevant to the conduct of any event, and any public safety and security issues;
 - (b) distinguish between invited visitors and external visitors in framing any such requirements and conditions;

- (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:
 - (i) be unlawful;
 - (ii) prejudice the fulfilment by the university of its duty to foster the wellbeing of staff and students;
 - (iii) involve the advancement of theories or propositions which purport to be based on scholarship or research but which fall below scholarly standards to such an extent as to be detrimental to the university's character as an institution of higher learning;
- (d) require a person or persons seeking permission for the use of university land or facilities for any visiting speaker to contribute in whole or in part to the cost of providing security and other measures in the interests of public safety and order in connection with the event at which the visitor is to speak.

(7) Subject to the preceding Principles the university shall not refuse permission for the use of its land or facilities by an external visitor or invited visitor nor attach conditions to its permission, solely on the basis of the content of the proposed speech by the visitor.

(8) Consistently with this Code the university may take reasonable and proportionate steps to ensure that all prospective students in any of its courses have an opportunity to be fully informed of the content of those courses. Academic staff must comply with any policies and rules supportive of the university's duty to foster the wellbeing of staff and students. They are not precluded from including content solely on the ground that it may offend or shock any student or class of students.