



Professor Joanne Scott
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27 February 2019

The Honourable Robert S French AC
Secretariat for Review of Freedom of Speech
Quality and Access Branch
Higher Education Group
Australian Department of Education and Training
Email: freedomofspeechreview@education.gov.au

Dear Hon Robert S French AC,

Review of freedom of speech in higher education – Draft Model Code

Thank you for your letter of 8 February 2019 and the opportunity to provide comment on the draft Model Code.

It was pleasing to note the acknowledgement of the challenges of developing a national code, that respects the legitimate institutional autonomy of Australian universities, and the intention to express the draft Model Code in terms of principles which are capable of application to diverse institutional rules and policies and contractual and workplace agreements with staff.

Overall, we believe the draft Model Code requires further work to address the lack of consistency and the overly prescriptive nature that ultimately fails to consider the complexities of individual universities. A better outcome for the sector might be to agree on a set of high-level core principles that can be adopted and embedded into each institution's own policies and procedures.

While USC understands the spirit underpinning the draft Model Code we hold fundamental concerns regarding: terminology; restraints on, and exceptions to, the general principle of freedom of speech; and operation and scope.

Terminology

- We are concerned that the terminology used in the draft Model Code has not been adopted consistently which may create uncertainty in terms of how the Model Code would apply. For example, the terms 'academic freedom', 'freedom of speech' and 'lawful expressive conduct' appear to be used somewhat interchangeably.

- In your letter dated 8 February 2019, you provided some clarification for how these terms might be used, but it did not appear that this underlying philosophy was fully reflected in the draft Model Code.
- The definition of ‘academic freedom’ is lengthy and arguably includes elements which we believe go beyond what might be considered academic freedom (e.g. see dot points 3, 4 and 5 in the definition).
- Similarly, the definition of ‘the duty to foster the wellbeing of staff and students’ appears to lack a full consideration of all relevant issues (e.g. in our view it doesn’t appear to consider work, health and safety or risk assessment requirements).

Restraints on, and exceptions to, the general principle of freedom of speech

- We believe the restraints and exceptions to the general principle of freedom of speech require additional thought. Partly this is due to the confusion of interpretation arising from the inconsistency of terminology noted above.
- We are also concerned that the draft Model Code in its current form may create a potential basis for endorsing a breach of confidentiality, intellectual property and other contractual arrangements, given the emphasis placed on compliance with the principles of free speech. Whilst this is almost certainly an inadvertent consequence, it raises concerns around the ‘unintended consequences’ arising from the draft Model Code.
- We feel there are also examples of overreach within the draft Model Code:
 - Principle 3 provides academic staff or students with an exception to a university’s misconduct policies and procedures where that misconduct arises from the exercise of ‘academic freedom’ (again, note the very wide definition of academic freedom).
 - Principle 5 seeks to prescribe the circumstances when a university may determine the terms and conditions for permitting ‘external visitors’ and ‘invited visitors’ (both defined terms) to speak on university land and use university facilities. The obvious concern with the use of such a prescriptive mechanism is that it may be too narrow and is unlikely to capture all relevant circumstances. Given that Principle 6 essentially states that in all other circumstances the university shall not refuse permission for the use of its land or facilities, the effect is to limit a university’s ability to take other relevant factors into account when managing who comes onto its land and uses its facilities.

Operation and scope

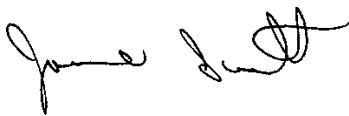
- The draft Model Code also appears to intentionally set down a very broad scope for its operation. There are various references (e.g. to student bodies, delegated law-making powers and paramount values) which, depending on how these undefined terms are interpreted, could significantly increase the impact of the draft Model Code on the university.
- In that regard, it appears problematic for the draft Model Code to assert that it should be ‘superior’ to other policies and procedures. It is not clear how this could be implemented, particularly for universities established by statute, such as USC. Additionally, this could

potentially require a university to review every policy and procedure to bring these into line with the draft Model Code (see comment below).

- Whilst the draft Model Code seeks to provide protection for academic freedom and freedom of speech, it does not include any acknowledgement that users of these freedoms have some degree of responsibility in the exercise of such freedoms (e.g. to exercise in a reasonable and proportionate manner).
- It is likely that inconsistencies both within the draft Model Code and between the draft Model Code and the policies and procedures of the university could expose a university to complaints and provide the basis for appeals by academic staff or students.
- The draft Model Code also creates a dichotomy between a university's academic staff and its other staff (e.g. professional staff). It is by no means clear that this separation works appropriately in the various circumstances where the draft Model Code applies. We are concerned that it fails to address circumstances affecting non-academic members of staff which would be covered if the staff member was an academic member of staff.

Like you, USC is not persuaded of the existence of a 'free speech crisis' and considers that more time could safely be given to refine the draft Model Code or develop an alternative.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Joanne Scott', with a stylized flourish at the end.

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