

Code for the Protection of Freedom of Speech and Academic Freedom Discussion Paper

In November 2018, the Minister for Education, the Hon Dan Tehan MP commissioned the Hon Robert French AC, former Chief Justice of the High Court and Chancellor of the University of Western Australia, to undertake a review of freedom of speech and academic freedom in higher education in Australia.

In April 2019, Mr French released his review which recommended that higher education institutions implement a code for the Protection of Freedom of Speech and Academic Freedom. That review included a model code for institutions to consider using.

More details on the French review can be viewed at the Department of education website:
<https://www.education.gov.au/independent-review-freedom-speech-australian-higher-education-providers>

The University of Newcastle established a working group to consider the French review and to make recommendations to University Council. In December 2019, University Council approved a draft *Code for the Protection of Freedom of Speech and Academic Freedom* (see attached) for consultation with University staff and students.

The following timetable for consultation and ultimate approval of the code is as follows:

8 April – 8 June:	Consultation with staff and students
8 July:	Academic Senate – review feedback from consultation and make recommendation
13 July:	Executive Committee – review feedback from consultation and Senate recommendation
30 July:	Nominations and Governance Committee – review recommendations and propose final form of code to University Council
14 August:	University Council to approve final code

Key issues for Consultation:

Staff and students are invited to comment on any aspect of the draft code. Through the working group process and engagement with colleague in other universities, the following issues have been identified as areas of particular interest that may warrant deeper consideration. These issues are provided as a guide and are not intended to limit the issues which people may wish to raise in their response to the draft code.

1. How should the code apply at University of Newcastle?

French's review anticipated that the code would be pre-eminent among University policies. We determined that whilst these principles are very important, it is important that they work with the Universities existing policy framework. This is addressed in the introduction to the code, where it specifically identifies that in the event of any inconsistency with policy documents then the existing policy documents will prevail.

In making this distinction it is intended that the code would inform subsequent review and consideration of relevant University policies. It is intended that any identified inconsistencies between the code and other policy documents will be considered as they are identified and addressed appropriately.

2. Differentiating Freedom of Speech and Academic Freedom

We considered that the French model code unnecessarily conflated the principles of Freedom of Speech into a definition of Academic Freedom. Our view is that Freedom of Speech and Academic Freedom are distinct principles which warrant separate treatment.

3. Defining freedom of speech and any limits

The French review did not propose a definition of freedom of speech for the model code. We support that approach as freedom of speech is a common law right that can only be constrained by statute or by contract. In this context it is important that the code reflects that freedom of speech is not an absolute right but rather can be subject to appropriate limits. The draft code in clause 11 identifies those limits as “restraints or burdens”:

- a) imposed by law;
- b) imposed by the right and freedom of others to express themselves and to hear and receive information and opinions; and
- c) imposed by the reasonable and proportionate regulation of conduct to:
 - i) discharge the University’s teaching and research activities;
 - ii) enable the University to fulfil its duty to foster the wellbeing of staff and students; and
 - iii) enable the University to give effect to its legal duties including its duties to visitors to the University.

Further in relation to subclause 11(c)(ii) the duty to foster the wellbeing of staff and students is further defined in clause 8(h) as:

- i) includes the duty to ensure that no staff or students suffer unfair disadvantage or unfair adverse discrimination on any basis recognised at law;
- ii) includes the duty to ensure that no staff or students are 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;
- iii) 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, intimidate, harass, or bully other persons; and
 - being intended to have any one or more of those effects;
 - does not extend to a duty to protect any person from feeling offended, shocked or insulted by the lawful speech of another;

We consider that these limits on freedom of speech seek to strike a balance between free speech and other important considerations including ensuring the wellbeing of staff and students and the Universities capacity to undertake its teaching and learning activities.

4. Academic Freedom

Clause 14 grants to every member of staff and every student a positive right of academic freedom subject only to prohibitions, restrictions or conditions imposed by:

- a. law;
- b. the reasonable and proportionate regulation necessary to the discharge of the University’s:
 - i. teaching and research activities; and
 - ii. duty to foster the wellbeing of staff and students;
- c. the reasonable and proportionate regulation to enable the University to give effect to its legal duties; and
- d. the University by way of its reasonable requirements

Academic Freedom is defined in clause 8(a) as:

- i. the freedom of staff in the course of their academic activities to teach, discuss and research, and to disseminate and publish the results of those activities;
- ii. the freedom of staff and students in the course of their academic activities to engage in intellectual inquiry, to express their opinions and beliefs, and to contribute to public debate in relation to those activities;
- iii. the freedom of staff and students to express their opinions in relation to the University in which they work or are enrolled;
- iv. the freedom of staff to participate in professional or representative bodies and associations;
- v. the freedom of students to participate in student societies and associations;
- vi. the autonomy of the University 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;

The definition of Academic Freedom was taken from the French model code, and adapted to fit the particular circumstances of the University. The French definition sought to grant Academic Freedom to Academic Staff engaged in certain activities. We consider that Academic Freedom is best defined by reference to the activity, and needed to be directly connected to the conduct of academic activities rather than defining a class of staff.

5. Course content

The French review identified a need to expressly address a number of considerations relating to the content of courses taught at the University. The University has included the proposal from the French draft code in clauses 18, 19 and 20 of the draft code.

6. The right of staff and students to express opinions about the University

The French code sought to ensure that members of the University community were free to express opinions in relation to the University. It did this in its definition of Academic Freedom. The University has adopted the French approach to this issue in Clause (8)(a) of the draft code with a significant adaptation. The French code by including this in its definition of Academic Freedom sought to only grant this right to academic staff and students. We felt there was no justification for excluding other staff from this grant of rights.

It is worth considering whether this principle is properly an academic freedom principle or a freedom of speech principle. Should we accept the French drafting to include this in Academic Freedom definition or should it sit more naturally under Freedom of Speech?

Having said this it is important to acknowledge that this right sits alongside certain other obligations. For example, members of academic or professional staff who occupy executive positions in the University or who, as officers of the University, have access to privileged or confidential information may be bound by the terms of their contract of employment not to express opinions about the University and in particular not to use confidential information in a way that may give rise to a breach of their contractual obligations. Such a limit on the right is not contained in the draft code but is an example of how the document has to be read in context with other University documents.

7. Public comment by members of staff

The French code proposed as part of the Freedom of Speech that “The freedom of staff to make lawful public comment on any issue in their personal capacity will not be subject to constraint imposed by reason of their employment with the University.”

We supported this principle and it is included as clause 13 of the draft code. Consideration may need to be given to how a person identifies that their comments are being made in their personal capacity. This may

have regard not only to, how the comments are conveyed but also how those comments might be received by an audience and thus the steps taken to ensure it is understood that comments were being made in a personal capacity.

8. Relationship between the Code and University instruments

French recommended that the code should have supremacy over other University instruments. The University has a policy regime which we consider is designed to balance the interest of all stakeholders at the University. We see the code and its principles as playing an important role in informing the drafting, review or amendment of any non-statutory rule, code or policy of the University and in interpreting those documents. This does not override the application of those policies. In this regard clause 4 of the draft code expressly states that in the event of any inconsistency with higher University documents then the provision of these other documents will prevail. In the process of implementation we will be looking for inconsistencies and seeking to resolve them wherever possible and desirable.

9. Visitors to the University

The French review identified the regulation of visiting speakers on University land or using University facilities as a significant issue for consideration. These provisions sought to balance the University's autonomy to determine how its facilities are used against the broader protection of freedom of speech. In the French code this balance was achieved by, in addition to the right to exclude speakers who are likely to breach the law, giving the University the right to exclude a speaker who is likely to involve advancing theories that purport to be based on academic theory that in the view of the University falls below scholarly standards and could be detrimental to the University's reputation.

The University in clause 17 of the draft code was largely adopted the French code approach to visitors to the University.