17 September, 2008

Professor Jim Jackson

Mr John Carter, Committee Secretary
Senate Standing Committee on Education, Employment and Workplace Relations
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear John,

Thank you for the opportunity to make a submission to the *Academic Freedom Enquiry* being conducted by the Senate Standing Committee on Education, Employment and Workplace Relations.

As previously advised I am Professor of Law and Chair of the Academic Board at Southern Cross University. The views contained within are my personal opinion however and do not represent the view of SCU or its Academic Board.

I completed my doctorate on *Legal Rights to Academic freedom in Australian Universities* in 2002 through the University of Sydney. I have attached that thesis to this submission.

I will forward to you my other writings in the area of Academic Freedom by mail and invite the Committee to consider these. I do this because writings on academic freedom in Australia, especially the legal aspects, are not very common.

These publications are:

- *Express and Implied Contractual Rights to Academic Freedom in the United States* (1999) 22 Hamline Law Review 467 – 499

- *Blinking Dons or Donning Blinkers: Fiduciary and Common Law Obligations of Members of Governing Boards of Australian Universities* (2002) 6 Southern Cross University Law Review 1 – 76 (co-authored with J Cowley)

- *Orr to Steele: Crafting Dismissal Processes in Australian Universities* (2003) 7 Southern Cross University Law Review 220

- *Express Rights To Academic Freedom In Australian Public University Employment* (2005) 9 Southern Cross University Law Review 107

- *When can Speech Lead to Dismissal in a University?* (2005) 10 No 1 *Australia and New Zealand Journal of Law and Education* 23

- *Implied Contractual Rights to Academic Freedom* (2006) 10 *Southern Cross University Law Review* 139

Please note that these publications concern universities and are not about schools though the paper *When can Speech Lead to Dismissal in a University* does examine an important case that came out of a school context.

There are some particular matters in my work that I would like to draw your attention to:

- In Chapters 2, 3 and 4 of the thesis I consider the history of academic freedom in Australia in some detail. Senators may be interested to hear the views of Sir Robert Menzies on the topic in a speech he gave at UNSW in 1964:

  > 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.[1]

- Table 1 in Chapter 2 describes those countries that have legislated for academic freedom, these include South Africa, Ireland, United Kingdom, New Zealand. In my opinion the New Zealand approach in the *Education Act 1989* (New Zealand), s 161 is the most thorough because it purports to ensure that Councils and chief executives of institutions, Ministers, and authorities and agencies of the Crown give effect to the intention of Parliament that academic freedom and the autonomy of institutions are to be preserved and enhanced.

- Chapter 3 describes many academic freedom disputes that occurred in the first 100 years of Australian universities. I would draw the Committee's particular attention to the respective stories of Professors Wood, Irvine and Anderson at the University of Sydney, all three cause one to reflect on the particular role of

[1] Menzies, Sir Robert *The Universities – Some Queries* The Inaugural Wallace Wurth Memorial Lecture 28 August, 1964, UNSW, at p 13

parliament in academic freedom disputes and the dangers of outside intervention in matters that are best left to universities to resolve. A good example of this is how the Sydney University Senate dealt with the second Anderson matter in May 1943, after the University was pressured by the NSW Parliament to impose limits that should be observed by the teaching staff of the University on religious or other controversial matters. Senate resolved:

> *The Senate assumes that the resolution was forwarded to it, not simply for information but with a view to some action being taken, and would, to be effective, require the imposition of some test, or some limitation on Professor Anderson's utterances.*
>
> *As regards the first, it is laid down in the University and University Colleges Act that no religious test shall be applied to the teachers or the students of the University and yet, without it, it is manifestly impossible to ensure that the views put forward by teachers and students will always be generally acceptable. The Senate desires to affirm its conviction that no such test should be imposed. And remembering as it does, the results which have followed the regimentation of universities in other parts of the world, it is also strongly of the opinion that nothing but harm would follow the stifling in a university of the spirit of free inquiry. As regards the imposing of limitations, the Senate has in the past relied, and must continue to rely, on the intellectual integrity, and the good taste and the good sense of its staff to approach all problems in an objective, disinterested, and scientific a spirit as possible, and so to state and argue them so as not to inflame people's minds to no good purpose.*
>
> *The Senate desires also to inform the Legislative Assembly that every facility and encouragement is given to societies and groups within the university, whose object it is to foster the Christian religion and to promote the knowledge and observance of Christian principles.*[2]

- Chapter 4 covers more recent academic freedom disputes. Of particular value in relation to attempts to control the content of classroom teaching is the enormous pressure placed on Harry (Ross) Anderson at the University of Queensland by the Attorney General of Queensland in the 1950s. The O'Neill matter at that same university in the 1970s is also of interest, especially the way it was dealt with by Sir Zelman Cowan as Vice Chancellor. These may be older matters but I believe they are very much on point, and relevant to your Enquiry.

- Chapters 5 and 6 discuss various legal matters associated with academic freedom, including the development of dismissal processes in Australian universities which are very much designed to protect the concept.

- In Chapter 7 I developed a definition of academic freedom linked to notions of professionalism. In a paper derived from this Chapter, *When can Speech Lead to Dismissal in a University* I reached the following conclusions which I believe are of some relevance to your Enquiry:

[2] University of Sydney Archives, Senate Minutes 3 May 1943 pp 372 - 374

This article did not examine the increased casualisation[3] of the academic workforce in Australia or its effects on academic freedom, though it is readily acknowledged that these non tenured academics are particularly vulnerable if they speak out against their employer. Such academics may find that their short term or sessional appointments are simply not renewed. Casual academics are often quite junior in the academy with little economic or industrial power. There is also anecdotal evidence that many of these casual staff are being offered Australian Workplace Agreements which are unlikely to contain any express academic freedom clauses.

An academic's speech can bring about that academic's dismissal, there being no absolute right of academic freedom in Australian Universities. There is a requirement of professional responsibility in the intra and extra mural speech of academics. In speech, as in all other forms of academic behaviour, academics are subject to the prevailing misconduct rules at that institution.

There is no absolute or unqualified legal right of academic freedom in Australian universities. On the contrary, academic freedom carries with it attendant obligations. For example an indignant cry of academic freedom could never justify the dissemination of that which is knowingly false, poorly researched, or the product of negligently prepared or falsified data. These matters are as much the 'enemy' of academic freedom as the university, church, corporation or state which seeks to censor or control the utterances of its academics.

Academics as scholars devoted to the discovery and dissemination of knowledge must act professionally in all aspects of their duties. Furthermore their universities must afford them the opportunity to do that. An examination of professional conduct looks to both what is done and the manner in which it is done:

• An academic whose work is poorly researched cannot claim academic freedom protection as an excuse.

• Acting professionally cannot mean that the work is performed in a manner that intimidates or bullies students or other academics.

• Academic freedom operates within the law, so professional conduct requires cognisance of laws operating both within and outside the university.

• Prima facie professional conduct requires the academic to operate within the rules and ethics of his/her profession as an academic, and within his/her professional discipline if there is one. However, if the academic in his/her teaching and research is actually questioning or rejecting the methods, practices or ethics of the discipline or the academy itself, the academic needs to indicate that his/her work is not done according to traditional or standard methods which he/she rejects.

• A professional exercise of academic freedom carries with it an obligation to disclose any limitations or qualifications on the speech or writing of the academic.

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[3] The recent Senate inquiry *Universities in Crisis* devotes a significant amount of detail to casualisation and its effects citing the Chair of the Australian Vice Chancellor's Committee (the AVCC), Professor Chubb, as indicating that increased casualisation had "profound implications for the quality of the educational environment; and a worsening position in terms of international comparators." AVCC figures also showed "the proportion of university staff employed as casuals had more than doubled in the past decade, from 9 per cent in 1990 to 18 per cent in 2000. The increase had been most dramatic for teaching-only staff – 90 per cent of whom were casuals compared with 30 per cent ten years ago." Australian Senate, Senate Employment, Workplace Relations, Small Business and Education References Committee *Universities in Crisis*, Canberra, 27 September 2001 at para 3.90. Casualisation is addressed in the Report at 9.52 – 9.62.

• Acting professionally also requires an academic to disclose when the academic is simply voicing an opinion as opposed to a fully researched position, and the fact that the academic does not speak for the university, unless these matters are abundantly obvious.

An academic has the right to criticise the university provided there is no express contractual provision or binding policy to the contrary, and all representations are made honestly and professionally. Much has been said about the professional pursuit of knowledge, suggesting that an academic who is honestly and truthfully on that path has little to fear from his/her speech. An academic who makes an assertion about his employer university could well be placed in a situation where to claim the academic freedom privilege in his/her defence he/she will have to prove the truth of what was said or at least that the claim was made in circumstances where an academic acting honestly and professionally would be justified in making the public assertion about their university. An academic asked to withdraw a remark criticising the university would need to do so promptly or be very confident that it does meet the canons of responsible scholarship, and does not contravene an express contractual provision or a rule contained in binding policy, or a provision of an enterprise bargaining agreement.

An academic must exercise particular care when criticising the university, including its management practices or executive. The Steele case[4] *and Rigg v University of Waikato*[5] *powerfully illustrate the dangers academics face when they choose to criticise publicly their employers. Modern universities spend many thousands of dollars marketing and promoting image, and will defend this investment against comments from their staff that go to matters such as standards (Steele) or safety (Rigg). Sadly this, and the heavy evidentiary onus that will be placed on academics to prove their assertions, will have a chilling effect on the likelihood of individual academics voicing opinions on intra mural matters.*

Rigg did not discharge the onus and Steele may have been in some difficulty gaining sufficient evidence to prove his claims if the university had conducted a misconduct investigation.

The university also faces duties in relation to academic freedom flowing from the university's contractual obligations to its employees and its obligations to carry out its statutory functions. The institutional search for knowledge often dictated in the university statute requires a level of tolerance of heterodox thought within the academy lest today's heterodoxy be tomorrow's orthodoxy. The university has an obligation to provide the conditions for the pursuit of knowledge by its academics, and also to ensure that such pursuit is not done at the expense of the academic freedom rights of others in the academy. Academic freedom imposes duties and obligations on the academic and the university.

The university has a right to expect that its academics will assist and not act against its obligations under its statute. Accordingly universities should not fail to act in circumstances (perhaps ironically because they might be concerned not to trample on academic freedom) where an academic in purported exercise of his/her academic freedom has spoken unprofessionally in ways which could do serious damage to the university. The best example of this is Rigg v University of Waikato where the University did act.

There have been some significant developments relating to academic freedom since my thesis was written. In particular, there are now a number of instances where academic freedom or free inquiry is described in state legislation with varying levels of purpose. I now summarise these for the benefit of the Committee:

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[4] *NTEIU v University of Wollongong* [2001] FCA 1069 (8 August, 2001). The unsuccessful appeal is *University of Wollongong v NTEIU* [2002] FCAFC 85 (28 March, 2002)

[5] *Rigg v University of Waikato* [1984] 1 NZLR 149

Free inquiry is described in all NSW university statutes as an object of universities, see, for example, s 6 (1) of the *University of Sydney Act* 1989 (NSW):

> *The object of the University is the promotion, within the limits of the University's resources, of scholarship, research, free inquiry, the interaction of research and teaching, and academic excellence*

Victorian university statutes describe *academic freedom* in the context of the characteristics of members of Council. *Melbourne University Act 1958* (VIC) s 5:

> *The Governor in Council, the Minister and the Council must have regard to appointing members to the Council who have- (a) the knowledge, skills and experience required for the effective working of the Council; (b) an appreciation of the values of a University relating to teaching, research, independence and academic freedom.*

This same approach is adopted in s 11A of the *University of Canberra Act* 1989 (ACT). The source for this approach in Victoria and the ACT appears to be the *National Governance Protocols* especially Protocol 7.5.45.

Free inquiry is also specifically mentioned in s 10 of *the Higher Education Act* in Western Australia as a defining feature of a university, but this follows from the MCEETYA protocols now described. MCEETYA released the National Protocols for Higher Education Approval Processes in 2000. These were revised in 2006. Protocol A lists nationally agreed criteria for all higher education institutions. This Protocol includes these statements:

> *3. An institution involved in Australian higher education delivery must meet the following criteria:*
> *A3. has a clearly articulated higher education purpose that includes a commitment to and support for free intellectual inquiry in the institution's academic endeavours*
> *A4. delivers teaching and learning that engage with advanced knowledge and inquiry*

Protocol D describes additional criteria for all Australian universities:

> *4. In addition to meeting the nationally agreed general criteria for higher education delivery in Protocol A, an Australian university will meet the following criteria:*
> *D1. demonstrates a culture of sustained scholarship which informs teaching and learning in all fields in which courses are offered*
> *D2. undertakes research that leads to the creation of new knowledge and original creative endeavour at least in those fields in which Research Masters and PhDs or equivalent Research Doctorates are offered*
> *D3. demonstrates commitment of teachers, researchers, course designers and assessors to free inquiry and the systematic advancement of knowledge*
> *D4. demonstrates governance, procedural rules, organisational structure, admission policies, financial arrangements and quality assurance processes which are underpinned by the values and goals of universities and which ensure the integrity of the institution's academic programs.*

These protocols are recognised and given effect to in Commonwealth and State legislation as follows:

> *Higher Education Support Act* 2003 (Cth) s 16.25
> *Training and Tertiary Education Act* 2003 (ACT) s 89.
> *Higher Education Act* 2004(NT) s 14
> *Higher Education Act* 2001 (NSW) s 5

Higher Education (General Provisions) Act 2003 (Qld) s 5
Training and Skills Development Act 2008 (SA) s 5
Tasmanian Qualifications Authority Act 2003 (Tas) s 55O
Education and Training Reform Act 2006 (Vic) s 4.3.40
Higher Education Act 2004 (WA) s 10

It is quite apparent that academic freedom is dealt with in some detail in Australian statutes. Rarely is it defined, but it clearly sits as a critical part of the MCEETYA definition of a university through the Protocols as implemented at state and territory level. Accordingly any attempt to regulate it, by further legislation or some form of code of conduct, must recognise that the concept is already imbedded in Australian university law, and that any code may well require the amendment of state and territory statutes and constitutional support of state governments.

I wish the Committee all the best in its deliberations.

Yours sincerely

Jim Jackson