

BANNED BOOKS AND SEDITIOUS SPEECH: ANTI-TERRORISM LAWS AND OTHER THREATS TO ACADEMIC FREEDOM

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This article examines contemporary challenges to academic freedom in Australia. It explores what is meant by academic freedom and the extent to which it is protected in Australia. It then examines three current threats: the commercialisation of universities, changes to the Australian Research Council, and new anti-terrorism laws and policies. The article concludes by proposing strategies for responding to these threats, including establishing a common understanding of the rights and responsibilities attached to academic freedom, engaging in broader public debate about academic freedom and its value to the national interest, and advocating for broader rights protections through mechanisms like a national charter of human rights.

I INTRODUCTION

Academic freedom is essential to the work of Australian universities. Their role in educating students and advancing human knowledge depends upon academics and students working and learning in an environment in which they can freely exchange ideas, challenge conventional wisdom and debate controversial issues. Indeed, it is hard to see how universities can achieve excellence in research and the development and transfer of knowledge without a significant degree of academic freedom.

Academic freedom is hard to define and can be taken for granted. It also receives little real protection in Australia, something that is more apparent now that the freedom is under threat. This threat includes changes made to the allocation of research funding and the pressure on universities to become more like commercial enterprises to generate income to support their core activities, including activities that are no longer funded by compulsory student union fees.

The threat is also a product of other debates, like how best to protect the community from terrorism. The so-called 'war on terror' has led to the erosion of many democratic freedoms, ranging from freedom of association to the right to a fair trial.¹ Academic freedom has also been affected, often incidentally. After all, it is meaningless unless it can be exercised in a society that fosters and protects other important values like freedom of speech.

After exploring what is meant by academic freedom and how it is protected, we examine three current threats to academic freedom: the commercialisation of universities, changes to the Australian Research Council (ARC) and new anti-terrorism laws and policies. We conclude by proposing strategies for how to respond.

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II WHAT IS ACADEMIC FREEDOM?

Although the term ‘academic freedom’ is often used, its meaning is rarely agreed upon and the concept can be difficult to define. It is sometimes portrayed as a negative right of non-interference with, for example, teaching, researching and publishing, while at other times as a positive freedom to engage in the same activities.² In either form, the freedom is not absolute but something that operates within reasonable limits.

As Dr William G Tierney argues, academic freedom is an evolving concept. For example, junior academics have been known to shift their research to areas more likely to result in promotion or tenure and certain research subjects have not also been considered acceptable: in the mid 20th century academics were not always free to conduct work on gay and lesbian studies.³ Tierney considers that while there should be broad agreement about the meaning of academic freedom, more concrete definitions ought to be worked out by individual universities after debate amongst academic staff.⁴

A 2001 study sponsored by the Australia Institute found that academic freedom was understood by the social science academic respondents as ‘an individual right to: teach, research and publish on contentious issues; choose their own research colleagues; and speak on social issues without fear or favour in areas of their expertise ... balanced by the responsible and disciplined exercise of scholarly expertise’.⁵ A later study by Gerlese Åkerlind and Carole Karyooz analysed the same data. They found that the academics’ understanding of the freedom varies greatly. They broke the responses down into five different ways of understanding the freedom:

- (1) an absence of constraints on academics’ activities;
- (2) an absence of constraints, within certain self-regulated limits [such as limiting research to areas considered by the researcher to be important to society or the development of the field];
- (3) an absence of constraints, within certain externally-regulated limits [such as public ethical constraints or accepted standards of scholarly enquiry];
- (4) an absence of constraints, combined with active institutional support [such as funding, resources and infrastructure]; and
- (5) an absence of constraints, combined with responsibilities on the part of academics [such as a responsibility to exercise the freedom by participating in social debates and research].⁶

Universities sometimes define academic freedom in their collective agreements or codes of conduct. For example, the University of New South Wales (UNSW) collective agreement signed in 2006 defines the freedom as the right of an academic to:

- (i) contribute to the decision-making processes and structures of the University; including the right to express opinions about the operations of the University and higher education policy more generally;
- (ii) pursue critical and open inquiry, publish, research and, consistent with the University’s academic processes, freely discuss, teach, assess and develop curricula;
- (iii) participate in public debates and express opinions about issues and ideas and about the University or higher education issues more generally;
- (iv) participate in professional and representative bodies, including unions, and engage in community service;

- (v) express their personal views, consistent with the University's Code of Conduct, without fear of harassment, intimidation or unfair treatment.

The UNSW Code of Conduct provides for duties that correspond with this right:

The University recognises and protects the concept and practice of academic freedom as essential to the proper conduct of teaching, research and scholarship within the University. While academic freedom is a right, it carries with it the duty of academics to use the freedom in a manner consistent with a responsible and honest search for and dissemination of knowledge and truth. Within the ambit of academic freedom lies the traditional role of academics in making informed comment on societal mores and practice and in challenging held beliefs, policies and structures. Where such comments are offered by academics as members of the University it is expected that those commentaries will lie within their expertise. That expectation is not intended to restrict the right of any academic to freely express their opinions in their private capacity as an individual member of society.

While academic freedom is often stated in documents like this, it has no generally accepted definition in Australia. At its minimum core, the freedom refers to a level of non-interference with an academic's teaching, researching and publishing activities. Beyond this, the freedom cannot be readily defined from existing practice, nor can the responsibilities and limitations that attach to it.

III THE PROTECTION OF ACADEMIC FREEDOM

In some countries academic freedom is protected by legislation or even in a national constitution. For example, s 161 of the New Zealand *Education Act 1989* provides the following protection for academic freedom:

- (1) It is declared to be the intention of Parliament in enacting the provisions of this Act relating to institutions that academic freedom and the autonomy of institutions are to be preserved and enhanced.
- (2) For the purposes of this section, 'academic freedom', in relation to an institution, means—
 - (a) The freedom of academic staff and students, within the law, to question and test received wisdom, to put forward new ideas and to state controversial or unpopular opinions:
 - (b) The freedom of academic staff and students to engage in research:
 - (c) The freedom of the institution and its staff to regulate the subject-matter of courses taught at the institution:
 - (d) The freedom of the institution and its staff to teach and assess students in the manner they consider best promotes learning:
 - (e) The freedom of the institution through its chief executive to appoint its own staff.
- (3) In exercising their academic freedom and autonomy, institutions shall act in a manner that is consistent with—
 - (a) The need for the maintenance by institutions of the highest ethical standards and the need to permit public scrutiny to ensure the maintenance of those standards; and
 - (b) The need for accountability by institutions and the proper use by institutions of resources allocated to them.

- (4) In the performance of their functions the Councils and chief executives of institutions, Ministers, and authorities and agencies of the Crown shall act in all respects so as to give effect to the intention of Parliament as expressed in this section.

The *Constitution of the Republic of South Africa 1996* provides protection for academic freedom in s 16 of its *Bill of Rights*:

- (1) Everyone has the right to freedom of expression, which includes
 - a. freedom of the press and other media;
 - b. freedom to receive or impart information or ideas;
 - c. freedom of artistic creativity; and
 - d. academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to
 - a. propaganda for war;
 - b. incitement of imminent violence; or
 - c. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

By contrast, Australia does not protect academic freedom in its Constitution or by statute, nor does it have a national bill of rights from which it might be implied. However, as Jim Jackson finds in his extensive research on the protection of academic freedom in Australia,⁷ express and implied rights to academic freedom can be found elsewhere, especially in the industrial agreements made by universities with their staff.

Collective agreements, formerly called enterprise agreements, often protect academic freedom.⁸ A collective agreement is an agreement negotiated between an employer and its employees (or their union) that sets out the rights and obligations of both parties. It applies for a fixed term after which it must be renegotiated.⁹ A collective agreement is enforceable under the *Workplace Relations Act 1996* (Cth) against both employers and employees.¹⁰

Of the collective agreements entered into by Australian public universities in 2001, Jackson found that around half make some reference to academic freedom (like the UNSW agreement above), with around one third containing detailed clauses.¹¹ However, not all academics are subject to collective agreements. In order to receive certain funding, universities must now offer employees the opportunity to instead enter into an Australian Workplace Agreement (AWA), an individual agreement between employee and employer.¹²

Many universities, such as UNSW as set out above, also include references to academic freedom in a code of conduct. However, a code of conduct is not enforceable by itself. This depends on whether the code is referred to in an academic's contract of employment or the collective agreement governing their employment.

When an academic commences employment at a university he or she signs a contract of employment. While this could provide expressly for a right to academic freedom, such a clause is rare. Universities generally use a standard form contract that does not set out the rights and obligations of the employee and employer, but instead refers to the collective agreement and code of conduct.¹³

It is possible that academic freedom could be implied into employment contracts using a 'business efficacy test' or a 'customs and usage test', or to all contracts of a particular class by implying a term from the law that creates the relevant university.¹⁴ A business efficacy term of academic freedom could be implied where academic freedom is 'necessary for the reasonable

or effective operation of the contract'.¹⁵ Jackson argues that in cases where there is no code of conduct or collective agreement that limits academic freedom it is probable that academic freedom would be implied. This would be on the basis that academic freedom is necessary for the advancement of knowledge and to meet the teaching and research duties of an academic.¹⁶

Jackson finds that it is possible, but less likely, that academic freedom would be implied into a contract using the custom and usage test.¹⁷ A term of academic freedom would be implied under this test where it is 'so well known and acquiesced in that persons making a contract in that situation reasonably can be presumed to have imported it into their contract'.¹⁸ While it has been difficult to prove a custom and usage term in other fields, the strong tradition of employee speech rights in Australian universities gives some support to implying such a term in academia.¹⁹

Academic freedom might also be implied by law into a class of contracts, such as all academic contracts at one university. The legislation that incorporates a university usually refers to the universities' teaching and research functions. For example, s 6 of the *University of Sydney Act 1989* (NSW) states:

- (1) 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.
- (2) The University has the following principal functions for the promotion of its object:
 - ...
 - (b) the encouragement of the dissemination, advancement, development and application of knowledge informed by free inquiry.²⁰

In order for the university to discharge these statutory obligations, it is arguably necessary that it provide its academics, as part of their employment contracts, with the academic freedom necessary to conduct their research.²¹

There are, however, limitations to proving an implied term using any of these methods. The term must be capable of clear definition and actually necessary, rather than merely reasonable. In addition, the employment contract must not expressly contradict the implied term and, if giving effect to words in an award or collective agreement, the terms of the contract must expressly incorporate that award or collective agreement.²² This issue has not come before a court, so it is not possible to say with any certainty whether academic freedom might be protected in this way.

Overall, the protection of academic freedom in Australia is limited. Collective agreements provide the main protection, but this is vulnerable. Such agreements are subject to change in federal industrial law, are renegotiated every few years, vary from university to university (with many not referring to the freedom at all) and not all academics are subject to them. While there is the possibility of implying protection for academic freedom into employment contracts, this has yet to be tested and even if it did occur the level of academic freedom so implied may be minimal. Furthermore, any of these possibilities can be overridden by federal law. Such a law could displace the employment arrangements of a university or even any future recognition of academic freedom under State law.²³

Even though it has limited legal protection, academic freedom is still recognised in other ways. The current state of the law means that the freedom is mostly a set of conventions or assumptions for those who work in the university sector. As a result, academic freedom can be

fragile and easy to breach. Its maintenance will often depend on the vigilance of those who work in universities and on the goodwill of those who have the power to undermine it.

In the following sections, we focus on three areas that are posing threats to academic freedom in Australia. Australia is not alone in facing these challenges. The increasing commercialisation of research, difficulties faced in obtaining research funding and the impact of counter-terrorism laws are having similar effect on universities in other western countries like the United Kingdom and the United States of America.

IV COMMERCIALISATION

The commercialisation of universities is a long standing trend that continues to pose challenges for academic freedom in Australia. Labor and Liberal governments over the past three decades have brought about enormous changes in the funding and structure of universities. In 1974 the Whitlam government removed university education fees and took full responsibility for university funding, but by 2000 Commonwealth government operation grants accounted for less than half of university income.²⁴ Universities have increasingly had to look to non-government sources of funding. This now comes in large part from international and domestic students in both government-subsidised Higher Education Contribution Scheme (HECS) and full-fee paying places. Under recent reforms universities have the discretion to set tuition levels for up to 35 per cent of places in a course and vary HECS fees within a certain range.²⁵ Universities have also turned to industry and the private sector to establish research partnerships and obtain further funding.

The change in funding sources has been accompanied by a change in management and structure. Universities have moved to a more corporate style organisation where students are increasingly treated as customers and greater power is held by senior managers. Pressure can be placed on academics to help meet the marketing goals of the university by engaging in teaching and research in line with the university's corporate plan.²⁶

Commercialisation has brought important benefits to universities (and to the public at large through a lower tax burden than would otherwise be needed to support the university sector). Commercial partnerships can provide universities with, for example, the funding to engage in expensive technology development.²⁷ Such partnerships can also lead to the cross-fertilisation of ideas, greater industry relevance and improved research quality.²⁸

Commercialisation also poses challenges for academic freedom. The pressure on academics to generate funding can encourage them to channel their research into well-defined, safe areas that are likely to be funded.²⁹ Consequently, academics may be deterred from more controversial areas of research that are unlikely to obtain funding or else have their promotion opportunities stunted. The amount of time taken in writing grant applications and tenders, as well as developing and marketing commercial courses, can also result in reduced time to research, think and debate ideas.³⁰

Where external funding for research is obtained, the publication of research may be affected. The free expression of ideas and the commercial need to protect profits do not always sit well together. For example, in a 1997 survey 20 per cent of American medical scientists surveyed said that they had held back publication of research results to safeguard their own, and their commercial sponsors', property rights.³¹ Academics may also face difficulties in publishing controversial work that may place universities or funding sources in a bad light. In a 2001 survey

of social science academics, 17 per cent indicated that they had been prevented from publishing contentious results as a result of commercialisation.³²

There may also be restrictions on sharing ideas with colleagues due to commercial-in-confidence arrangements with industry.³³ An academic's contract with industry may even restrict their colleagues from carrying out competing research. Dr Gideon Polya, for example, was prevented from even seeing a colleague's contract with a major agricultural college that contained a no-competition clause that may have restricted his research.³⁴

Teaching has also been affected with academics reporting that courses that bring in income, such as those with high student enrolments and fee-paying courses, are valued over others.³⁵ Academics have expressed concern that fee-based courses can result in lower student standards due to full-fee paying students being marked more leniently to avoid disapproval from both students and university management.³⁶ For example, a full-fee paying Curtin University student received her degree after she had supposedly been caught three times for plagiarism.³⁷ Although there may not be express directions about marks, factors that may affect marking include that students are seen as 'customers', universities are marketed to international students as being flexible, the need for high course enrolments and recognition that international students bring in funding.³⁸

V CHANGES TO THE AUSTRALIAN RESEARCH COUNCIL

The ARC was established as an independent body under the *Australian Research Council Act 2001* reporting to the Minister for Education, Science and Training. It administers funding programs for approved research projects worth an estimated \$572 million in the 2006-2007 financial year³⁹ and provides advice to the Minister on which proposals should receive financial assistance. On 1 July 2006, a new law came into effect that changed the structure and operation of the ARC.

Prior to the changes, the transparency and independence of the ARC funding process was brought into question by the then Minister for Education, Science and Training Brendan Nelson vetoing recommendations for funding made by the ARC Board. Nelson vetoed several ARC grants in 2004 and seven in 2005. He did not disclose what projects were vetoed, or his reasons for the veto, but it is generally understood that they were in the humanities area.⁴⁰ At the time, former ARC chief executive Vicki Sara warned that political interference with research grants would damage Australia's international reputation for world class research. The Australian Vice-Chancellors Committee (AVCC) chief executive John Mullarvey called for more transparency in the process, including the publication of the details of the minister's decision.⁴¹

Instead of providing for a more independent and transparent process, the *Australian Research Council Amendment Act 2006* (Cth) has cast more doubt on the transparency and objectivity of the ARC and its allocation of research grant funding. The new structure of the ARC increases ministerial control, which has the potential to result in a more politicised process that will place even more pressure on academics to tailor their research projects to meet the political objectives of the government.

The ARC is now run by a chief executive officer (CEO) who is appointed by the Minister. This is in contrast to its previous structure, under which the ARC was managed by a Board and a CEO. The Minister appointed members to the Board for specified periods of up to three years and was obliged to try to ensure that the composition of the Board reflected the breadth of academic, industry and community interests in the outcomes of research. The Minister could only terminate

a member's appointment for reasons including misbehaviour, or physical or mental incapacity. The Minister also appointed the CEO for a specified period of up to five years, something that is retained in the new structure.

The removal of the Board means that the Minister plays a greater role in the operation of the ARC. The Minister is in a position to ensure the CEO role is carried out by someone who will deliver outcomes in line with government policies. A CEO may come under great political pressure to please the Minister because, unlike the Board members, the CEO's appointment can be terminated at the whim of the Minister.

The new structure threatens the internationally accepted peer review process for approving funding grants. The Minister is responsible for approving financial assistance for research proposals on the basis of recommendations made to him or her by the ARC.⁴² Previously, the Board approved all recommendations that were submitted to the Minister, but under the new scheme the recommendations are made solely by the CEO.⁴³ The Board also wrote, subject to the Minister's approval, the funding rules that dealt with matters such as eligibility criteria, and the application and assessment process. These rules are now prepared by the CEO.⁴⁴

To assist the Board in its consideration of research proposals, it established a peer review committee called the College of Experts. The committee has been retained by the Minister to assess funding applications, make funding recommendations to the ARC and advise the ARC on academic developments.⁴⁵ The Board provided a buffer between the committee and the Minister. The Minister can now choose to disband the committee or to change its functions or membership without consulting anyone else.⁴⁶ The current Minister for Education, Science and Training, Julie Bishop, has said that she will not veto the committee's recommendations or interfere with it.⁴⁷ However, the potential for interference by her or a future minister remains.

Even in the absence of external pressure, the possibility of political interference can be internalised by an organisation. In early 2006, ABC's Four Corners program aired allegations that the CSIRO prevented its scientific staff from engaging in public debate relevant to their research when it reflected badly on government policy. Dr Graeme Pearman, former CSIRO climate director, claimed to have been gagged at least six times over a year from talking about the need to have targets to drastically cut greenhouse gas emissions to slow down global warming. He claimed that the CSIRO was 'very afraid that there may be consequences to their bottom line if they, in fact, are seen to be interfering with government policy'.⁴⁸ As a result of the story, the CSIRO reviewed its guidelines on public commentary and now encourages staff to speak out on contentious issues so long as they are not advocating a particular policy position.⁴⁹

The motivation for the changes to the ARC are questionable. The government claimed that they implemented the Uhrig Report, which recommended statutory authorities should be managed by either a CEO or a board depending on the characteristics of the particular authority.⁵⁰ Opponents to the Bill claimed that the government was using the Uhrig Report inappropriately to gain greater control over funding for research and pointed to the alternative approach being pursued in the restructure of the National Health and Medical Research Council (NHMRC). This approach, also implemented in line with the Uhrig Report, gave greater independence to the advisory council of the NHMRC.⁵¹

Criticisms of the new structure were raised when the Bill passed through Parliament. It was referred to the Senate Employment, Workplace Relations and Education Legislative Committee and, while the government members supported the Bill, the opposition and Democrat members were critical. The opposition members were particularly negative about the government's failure

to properly consult with the academic and research community, and only supported the Bill because the government attached the ARC's appropriations for 2008-2009 to it.⁵²

These changes will result in research funding proposals being influenced to a greater degree by the policies of the current government. It means that academics are less free to choose their research without political interference. The internal pressure placed on academics to obtain ARC grants combined with the need to develop a research proposal that will be acceptable to the CEO and the Minister may have long term impact on the diversity and quality of research in Australia.

VI TERROR LAWS

Prior to September 11 Australia had little history of enacting laws aimed at terrorism, with only the Northern Territory having such a law.⁵³ In the five years since the Commonwealth has made 37 new laws that directly deal with terrorism (an average of one new law every seven weeks).

These laws have had a profound effect on a range of human rights. They demonstrate how even the most basic freedoms of Australians are vulnerable. They also show that when something as fundamental as freedom of speech is breached, such as through laws on sedition, the chances of protecting what are seen as lesser or incidental freedoms like academic freedom can be low.

The threat to academic freedom posed by the new terror laws is twofold. First, as a matter of law academics could during their research or teaching commit an offence and be jailed, or brought in for questioning by ASIO. Secondly, while the legal risk of jail is low, the lack of clarity in the scope of the law combined with its potentially severe impact can lead to self-censorship.

A The Legal Risk

1 Sedition

In the wake of the 7 July 2005 London bombings, the Federal Parliament enacted new sedition laws. The offence of sedition is an archaic law that emerged as a distinct offence in the United Kingdom in the early seventeenth century. Australia inherited the British common law of sedition, which was codified in a 1920 amendment to the federal *Crimes Act 1914* (Cth).⁵⁴ Since then, the law of sedition has been discredited, mainly because of the use to which the laws were put. Sedition laws have been used against dissident figures like Mahatma Gandhi and Nelson Mandela and, in Australia, against Peter Lalor after the Eureka Stockade and members of the Australian Communist Party.

Nonetheless, Parliament acted with haste after the London bombings and passed the new sedition law so that it would be operating, as the government desired, by Christmas 2005. The law removed the existing sedition offences from the *Crimes Act* and created new offences in s 80.2 of the *Criminal Code* (Cth) punishable by up to seven years in jail. They apply to anyone, Australian or not, anywhere in the world, but the Attorney-General must consent to the prosecution of an offence.

The offences include where a person urges:

- 'another person to overthrow by force or violence' the Constitution, a state, territory or Commonwealth government, or the authority of the Commonwealth government;
- 'another person to interfere by force or violence with lawful processes for an election of a

- member or members of a House of Parliament’;
- ‘a group or groups (whether distinguished by race, religion, nationality or political opinion) to use force or violence against another group or other groups (as so distinguished); and the use of the force or violence would threaten the peace, order and good government of the Commonwealth’;
- ‘another person to engage in conduct’ with the intention that the conduct ‘assist an organisation or country’ that is ‘at war with the Commonwealth, whether or not the existence of a state of war has been declared’ and is specified by proclamation to be ‘an enemy at war with the Commonwealth’; or
- ‘another person to engage in conduct’ with the intention that the conduct ‘assist an organisation or country’ that ‘is engaged in armed hostilities against the Australian Defence Force’.

Section 80.3 provides a defence for a person who acts in ‘good faith’ in a set of specified circumstances—pointing out errors in legislation, for example, or urging someone to attempt lawfully to bring about a change to a law, or publishing a report or commentary on a matter of public interest. However, this defence is limited and does not expressly include many legitimate forms of communication, such as artistic speech or academic or scientific discussion. This differs from anti-vilification legislation, which expressly excludes communications made for academic purposes.⁵⁵

When the sedition law was enacted, it was widely believed to be flawed.⁵⁶ As a compromise, it was agreed that the new sedition law would be passed but referred to the Australian Law Reform Commission. Amongst other things, the Commission recommended a redraft of the offences to ensure that forms of communication—including artistic speech and academic scholarship—were protected. Instead of offering ‘in good faith’ defences the legislation would require the court to consider such factors in establishing an intention for force or violence to occur as an element of the offence itself.⁵⁷ Attorney-General Philip Ruddock has said that he does not agree such an intention should be included in the offences. The government is still considering the Commission’s other recommendations.⁵⁸

Academics are routinely involved in scrutinising and criticising government action and policies. Without an express exception for academic debate, it is uncertain whether academics will contravene the sedition laws. For example, would an academic commit an offence if he or she included in an exam question someone else’s words urging another person to overthrow a government by force? It would be unlikely that the academic would be found to have intentionally urged another person to carry out such actions merely by publishing them in this way. However, the breadth of the offence leaves some room for doubt. The offence does not require that the academic actually intend that the violence occur, and such an example would not fall within the good faith exception (an exam paper is not intended to bring about a change to the law and is not a report or commentary).

2 *Censorship*

Where sedition laws do not apply, the government has still been able to ban books on security grounds. In July 2006, the Classification Review Board banned, or ‘refused classification’, for two Islamic books, *Defence of the Muslim Lands* and *Join the Caravan*, that encourage suicide bombing and call for Muslims to engage in acts of violence in Bosnia, Afghanistan and elsewhere.⁵⁹ The Attorney-General referred these books, along with six others and one film, to the Board after the Classification Board gave them an unrestricted classification and both the Australian Federal

Police and the Commonwealth Director of Public Prosecutions ruled that they did not constitute sedition.⁶⁰ The Board did not place any restrictions on the other books and classified the film as PG (parental guidance recommended) with consumer advice of ‘mild themes’.⁶¹

The Classification Review Board can ban books where they ‘promote, incite or instruct in matters of crime or violence’.⁶² The enforcement of classified materials is carried out at a state and territory level. In New South Wales and Victoria, for example, a person who sells a book that has been refused classification or who leaves such a book in a public place can be punished by up to two years in jail.⁶³ Banned publications are also prohibited from being imported into Australia without the Attorney-General’s (or his or her delegate’s) permission.⁶⁴

The banning of the two Islamic books has already impacted on academic research. In late September 2006, the University of Melbourne library withdrew access to these books, which were bought in 2005 for a university course on jihad, so as not to fall foul of the censorship laws. The University has written to federal Attorney-General Philip Ruddock seeking assurance that limited access to the books for research and educational purposes is acceptable.⁶⁵

Attorney-General Philip Ruddock has indicated that he will consider whether academics may access banned material for research on a ‘limited’ and ‘structured’ basis.⁶⁶ However, such a proposal misunderstands how good research takes place. If researchers are required to jump through hoops to obtain an array of permissions, they will be deterred from undertaking research into the controversial area at all.

By limiting academics’ access to books on terrorism, the government is also limiting their ability to understand and criticise the ideas expressed in them. It is likely that we will see an extension of these laws. The Attorney-General has announced that the censorship laws are being reviewed by the State, Territory and Commonwealth censorship ministers to determine whether they deal adequately with the threat of terrorism.⁶⁷

3 *Possessing a Thing or Collecting or Making a Document*

Sections 101.4 and 101.5 of the *Criminal Code* make it an offence to possess a thing, or collect or make a document that is ‘connected with preparation for, the engagement of a person in, or assistance in a terrorist act’. The defendant must have known or been reckless as to the connection, but the offence is committed even if the document is not connected to a specific terrorist act.

The effect of such open-ended drafting is to expose to liability an academic who, for example, downloads from the internet a document providing instructions on bomb construction. Because there is a substantial risk that others may be using that information to plan some sort of terrorist activity, the person may be liable even though his or her reason for obtaining the document is entirely innocent (such as academic research). The requirement that the academic collects the document with the intention of using it to assist in preparation of a terrorist act is a defence only if the academic can raise a reasonable possibility that, in collecting the document, he or she did not intend to facilitate or assist in the doing of a terrorist act. The prosecution must refute this beyond a reasonable doubt, but the academic must argue his or her innocence first.

4 *Praising Terrorism*

Academics may again run into trouble if they praise someone else’s terrorist act. Under the *Criminal Code* the Attorney-General can ban an organisation not only because it engages in

terrorism but because it advocates the doing of a terrorist act.⁶⁸ Advocacy extends to where an organisation ‘praises’ someone else’s terrorist act and there is a mere ‘risk’ that this might lead another person again to commit such an act.⁶⁹

An example could be where an organisation praises (perhaps in conferring an honorary degree) Nelson Mandela’s resistance against apartheid in South Africa (something that amounts to terrorism under Australian law). There is a risk that this could encourage someone else in Australia or elsewhere in the world to take up arms against a similarly abhorrent regime. It is also unclear when an organisation can be said to be ‘praising’ terrorism, including whether the praise must take place publicly or whether the words of a single member are sufficient. It is possible that public or private comments by an academic praising Mandela’s action could lead to the academic’s university being prescribed as a terrorist organisation (with its staff jailed for being members of that organisation!).⁷⁰

5 ASIO Questioning and Seizure Powers

Even if academics do not commit an offence in carrying out their research or teaching, they may still be taken into custody by the police and questioned by the Australian Security Intelligence Organisation (ASIO). It is not necessary that the academic is suspected of any wrongdoing, only that there are reasonable grounds for believing the warrant will ‘substantially assist the collection of intelligence that is important in relation to a terrorism offence’ and that ‘relying on other methods of collecting that intelligence would be ineffective’.⁷¹ An academic can also be detained if the Attorney-General is satisfied that if they are ‘not immediately taken into custody and detained’, then they ‘may alert a person involved in a terrorism offence that the offence is being investigated; or may not appear before the prescribed authority; or may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce’.⁷² If an academic is to be questioned about their research, detention could occur where it is thought the academic might destroy their notes to protect an interviewee to whom the academic had promised anonymity.

Under a questioning warrant, ASIO can ask a person questions for up to 24 hours in eight hour blocks and require him or her to provide records or things that are relevant to intelligence in relation to a terrorism offence. A person must not refuse to answer the questions put to him or her, or give answers that are ‘false or misleading’. In either case, the penalty is imprisonment for up to five years.⁷³

Academics researching terrorism may come into contact with information that is of interest to intelligence agencies in relation to a terrorism offence. For example, an academic who is researching terrorist organisations or even just alienation in parts of the Australian community may interview people associated with such organisations. ASIO may be interested in such interviews but unable to obtain such a candid interview themselves. It is possible that they would use a questioning warrant to bring an academic in for questioning and obtain copies of their research and interviews.

The possibility that ASIO would use such powers to interview academics is not remote. The Australian Federal Police has already used its separate powers to interview a terrorism studies student. In 2005, a Monash University student was questioned by the police after purchasing and borrowing books on Palestinian suicide bombings, a subject he was researching for his course on terrorism. Following this, the academic teaching the course, Dr David Wright-Neville, said he would warn his students that they were probably being monitored.⁷⁴

The Australian National University (ANU) is developing protocols on how to deal with security agencies' interest in academic research. It has warned its PhD students to inform interviewees, where relevant, that any information they provide might be passed on to security agencies.⁷⁵ Dr Greg Fealy is an ANU academic who researches Islamic fundamentalism in Indonesia. He argues that field interviews with people involved in suicide bombing is vital to understanding terrorism: 'Sometimes, you get insights from meeting people, from being able to discuss with them, at length, their motivations and their rationale for carrying out suicide terrorism. You can only get that from first-hand access to those people, rather than second-hand accounts'.⁷⁶ Informing such interviewees that their anonymity cannot be guaranteed will surely put an end to such interviews, which in turn will seriously limit our ability to understand terrorism.

B *Self-Censorship and the 'Chilling Effect'*

It would be surprising to see academics charged with terrorism offences or universities proscribed as terrorist organisations. Attorney-General Philip Ruddock has said he does not expect that 'genuine' academics would break the law.⁷⁷ However, this is not clear on the face of the legislation and there is no way of knowing how this or future governments will apply the law. Regardless of whether academics actually commit terrorism offences in carrying out their research, the mere risk that offences might apply can lead to self-censorship. Sedition and other laws constraining speech and research inevitably have a 'chilling' effect on what academics say and the research they undertake. Academics are less likely to use robust critical speech about the 'war on terror' or may even shy away from undertaking terrorism research in the first place. When people do not have free on-the-spot legal advice, they may not act for fear of the consequences.

There is likely to be a further chilling of academic research if the government enlists the help of universities in policing terrorism, and places further limits on the exchange of knowledge. In the United Kingdom, the government has issued practical guidelines about tackling 'violent extremism in the name of Islam' in universities.⁷⁸ The final product, which has been criticised for eroding fundamental principles of civil liberty and its discriminatory targeting of Muslims,⁷⁹ is an improvement on the draft copy that was obtained in October by the *Guardian* newspaper. The *Guardian* reported that the draft guidelines asked university staff to spy on 'Asian-looking' and Muslim students whom they suspect are involved in Islamic extremism and support terrorist violence. John Mullarvey, the chief executive of the AVCC, confirmed that no similar directive has been given in Australia but that the AVCC is working with the government on export control and national security. To require university staff to spy on students would undermine education. The concept of extremism is vague, and a policy such as that originally proposed would result in a level of distrust and fear amongst students and staff. This could result in people turning away from courses they need to broaden their perspective and break down their extreme views.

The AVCC is meeting with the government to discuss the implications for universities of the government's export control review. The export of certain materials that could be used for developing weapons of mass destruction (WMDs) or terrorist activity, such as chemicals, toxins, nuclear materials, electronics, lasers and other goods, is already controlled under export laws. The government is now looking to extending these laws to a broader range of 'intangible technology transfer', which includes tuition, publishing papers on the internet or presenting material at conferences. Activities that could contribute to a weapons program are subject to export controls and monitored but the government may expand its focus to activities that contribute to a wider range of prohibited exports.⁸⁰ Universities may also be asked to report on enrolment inquiries and requests to attend conferences and seminars from citizens of countries suspected of having

WMDs.⁸¹ While universities have a responsibility to ensure that technology directly related to the creation of weapons of mass destruction do not fall into the wrong hands, placing controls on intangible items, such as the exchange of ideas, may limit academic's ability to engage in debate and their willingness to do so.

Academics play an important role in ensuring that Australia is protected from terrorism and that we have effective anti-terrorism laws and policies. Indeed, 'Safeguarding Australia', including 'Protecting Australia from terrorism and crime', is a National Research Priority for ARC funding.⁸² However, if academics do not have access to relevant books, cannot conduct interviews and fear that they may have to hand over their research to intelligence agencies, they may become reluctant or even unable to undertake research in the field.

Surveillance, policing and controlling finances alone will not beat terrorism. If we are to win the 'war on terror', it is essential that we understand the motivations and rationales behind it. In order to understand the mindset of a suicide bomber or a home grown terrorist, it is vital that academics are able to interview potential terrorists and have access to the books they read.

We are starting to see in concrete ways how anti-terror laws are limiting academic research. Flinders University Professor Riaz Hassan, the recipient of an \$829,000 ARC grant to study suicide terrorism, has abandoned his plans to interview the leadership of terrorist organisations such as Hezbollah and Hamas because of his concerns about anti-terrorism laws, specifically offences that target associating with members of terrorist organisations. The Attorney-General warned that '[t]here should be some caution in associating, for instance, with the external security arm of Hezbollah'.⁸³ The Attorney-General's comments highlight the lack of clarity in the law. The offence of associating with a member of terrorist organisation requires that the association provide support to the terrorist organisation.⁸⁴ However, this is not clear from the Attorney-General's comments, which could confuse academics and lead to more self-censorship than is necessary to comply with the law.

The Attorney-General has indicated he is happy to meet with academics and talk to them about their projects and the anti-terrorism powers and offences.⁸⁵ However, the role and obligations of academics should be clear on the face of the legislation and, where relevant, there should be an express exemption for their work. Even this is not sufficient. There needs to be education about how the law applies to academics. It is difficult enough for legal academics to understand the hundreds of pages of terrorism laws, let alone academics in other disciplines. While it is reasonable that academics should be required to report information and answer questions that may prevent a terrorist attack, they should be able to pursue research into the ideology and causes of terrorism, and the motivation and psychology of terrorists without the threat of interference from the government or fear of committing a terrorist offence.

VII CONCLUSION

Academic freedom is under threat from the commercialisation of the universities, reform of the ARC and new anti-terrorism laws passed after September 11. Together, they are having a major impact upon the ability of Australian academics to research and teach with the same freedom that they have had in the past. This is a problem not only for the academics themselves, but also for society at large which depends upon the quality of academic work to better understand the problems facing the nation and to promote our future prosperity. More government interference with the work of academics, combined with ever greater pressures to research and teach in particular areas, will over time frustrate economic development and social progress.

Before we can adequately respond to these threats, we must agree upon what we are trying to protect. We need a clearer sense of both the rights and the responsibilities that attach to academic freedom. Until we resolve this debate, it will be difficult to agree on what needs to be safeguarded, and to what extent. It is also hard to protect something that remains vague and ill-defined. Until the scope of the freedom is more apparent, it will continue to exist as something that is honoured more often due to convention and practice than to any firm legal obligation.

The threat to academic freedom should be met in public debate by explaining the importance of the freedom and its value to the national interest. This ought to make it more difficult for these or future threats to academic freedom to be realised. However, we must be realistic about how effective this strategy will be. Even where there is rigorous public debate the tide of public opinion may support measures such as tough anti-terror laws at the expense of academic freedom. In addition, other measures like the reform of the ARC may never achieve the prominence in public debate that might prevent the change. In both instances, the most that can sometimes be hoped for is victory at the margins that blunts some of the worst problems, rather than a wholesale rejection of the change itself.

Australian academics face the likelihood that academic freedom will continue to be whittled away over time as the existing threats continue and new threats emerge. Advocacy will have some success in minimising the loss of the freedom, but over time the freedom will be lessened. This highlights the need for a broader strategy.

To protect academic freedom over the longer term we must realise it is part of larger debates about other important values in Australian public life. These include the independence of the public service and its capacity to provide government with fearless and frank advice and the ability of non government organisations (and even charities) to engage in public advocacy and not lose their funding as a result. Attacks on these values are possible in part because Australia does not take seriously enough the need to protect some of our most important democratic rights. Even freedom of speech has no secure protection in Australian law and instead depends upon the goodwill and good sense of the government of the day. When such goodwill is in short supply, or during a climate of popular fear, freedom of speech can be curtailed and with it a number of other important principles like academic freedom. If we do not take freedom of speech seriously, it is hard to argue for the maintenance of something like academic freedom.

The best way forward is not only to oppose specific threats to academic freedom but to support with a coalition of like interests broader reform to our system of government and to the legal rules. That reform should include the better protection of democratic freedoms through a national charter of human rights. Although such a law has been enacted in the ACT (*Human Rights Act 2004*) and Victoria (*Charter of Human Rights and Responsibilities Act 2006*), Australia remains the only democratic nation without a national law of this kind.⁸⁶

Experience elsewhere shows that a Charter could give real protection to human rights like freedom of speech and could have a powerful impact in shaping public debate. While no such law provides the whole answer, and is not a substitute for ongoing political or industrial action, it would be a valuable tool in preventing the further erosion of academic freedom in Australia.

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 21. *Ibid* 161-2.
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