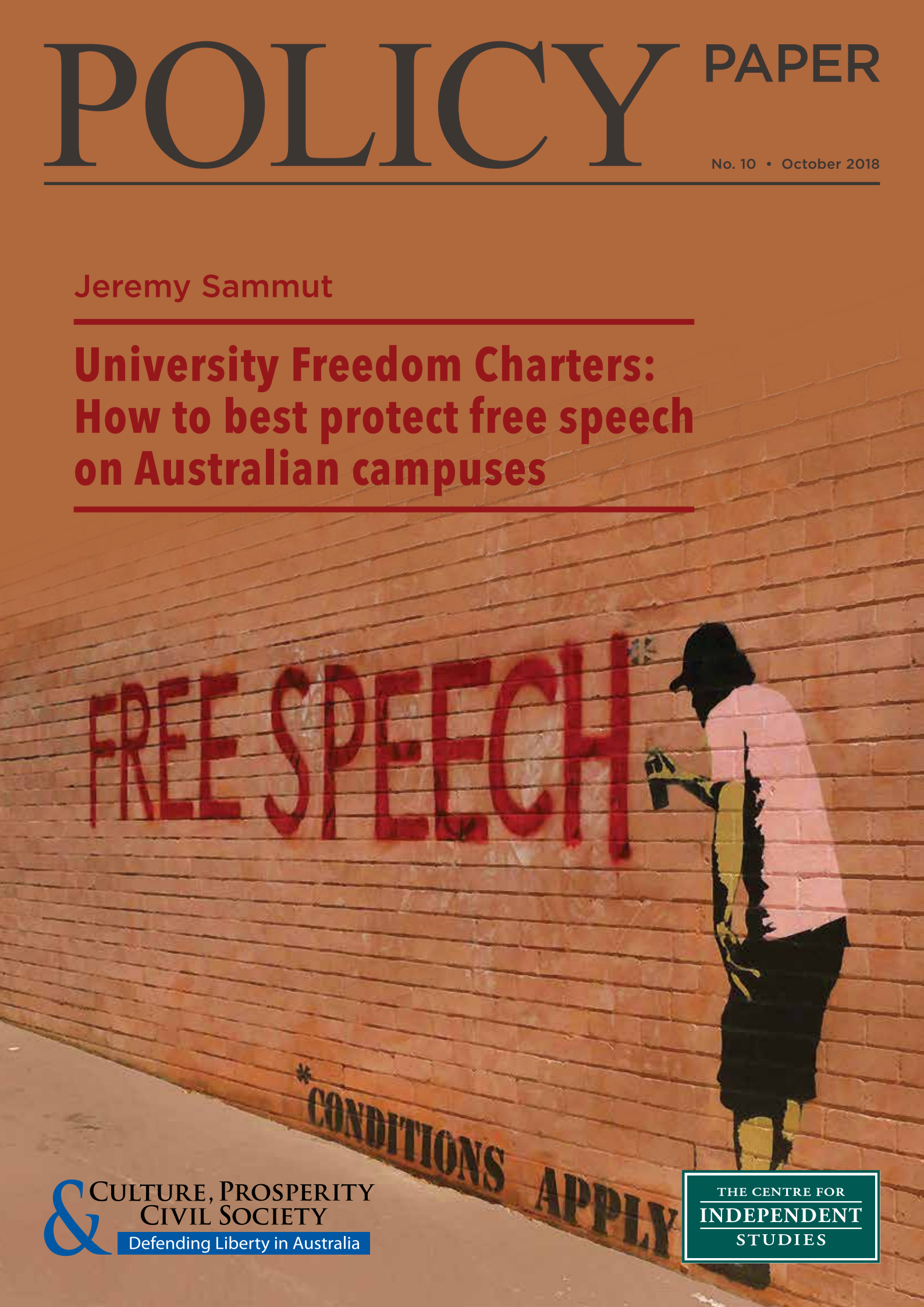


Jeremy Sammut

## University Freedom Charters: How to best protect free speech on Australian campuses





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Jeremy Sammut



POLICY Paper 10

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## Introduction

This Policy Paper adds to the debate about threats to free speech in Australian universities by suggesting how and why a 'university freedom charters' policy might be implemented by the federal government to promote intellectual tolerance and diversity of ideas, opinions, and debate on campus. It indicates what kind of statement of international 'best practice' on freedom of thought and expression might be included in charters that universities would be required to adopt; with the aim of effectively shaping the culture, expectations, and behaviour of students and staff with respect to defending free speech in these institutions.

The recommended content of the freedom charters proposed here is mainly drawn from the 'Chicago Principles' – the Statement on Principles of Free Expression – formulated by the University of Chicago in 2012, and also on the 2014 report compiled by the university's Stone Committee on Freedom of Expression. Both the Chicago Principles and the Stone Report are explored at length to indicate the kind of language that could be incorporated into similar freedom charters in Australia.

This paper also recommends how and why a freedom charters policy that is backed with financial penalties for non-compliance with free speech 'best practice' might operate to actively spur Australian universities to implement appropriate measures to address anti-free speech disruptive behaviour and properly protect

freedom of thought and expression. This proposal for a new regulatory and compliance framework featuring greater external accountability for universities as the best way to promote free speech, is heavily drawn from the similar policy announced in 2018 in the Canadian province of Ontario.

The reasons an 'Ontario-style' policy is needed in Australia are explained in terms of overcoming an evident and interrelated lack of institutional will within universities, and lack of political will within governments, to take appropriate action regarding protections for free speech on campus. This paper also explains why the recommended policy is superior to recent proposals for Australian universities to voluntarily adopt 'Chicago-style' charters, and to recent calls for the federal parliament to legislate 'US-style' campus free speech laws: these options would respectively leave universities to either self-regulate free speech, or be subject to only weak free speech accountabilities.

Hence the robust regulatory and compliance approach announced by the Ontario Government is explored at length as a potential model for Australia. Outlined is how and why our federal government could emulate that approach and implement compulsory freedom charters to ensure Australian universities are more transparently accountable for encouraging and maintaining free speech on campus.



# The Free Speech Crisis on Campus

In September 2018, riot police were called to Sydney University to break up a violent protest by 40 students who were attempting to stop social commentator Bettina Arndt from making a speech questioning claims by feminist activists about a 'rape culture' at universities. The speech had gone ahead after university authorities delayed approving the application for a venue by the organisers (the Liberal Club), and then refused to waive the fee charged to student groups whose events require a security presence to keep the peace and protect attendees from demonstrators. By seeking to forcefully block entry to the venue, the student protesters (led by the university Women's Collective) sought to enforce their previously issued demand the university deny Arndt a "platform" on campus due to her allegedly unacceptable views on sexual violence.<sup>1</sup>

The violent scenes of verbal and physical abuse seen at Sydney University are an example of the 'no platforming' phenomena that lies at the heart of what has been dubbed the 'Campus Free Speech Crisis' on universities and colleges campuses in North America.<sup>2</sup>

The term, 'no platforming', refers to the practice of denying the right to speak ('disinviting') or be heard ('shouting down') to so-called controversial speakers, who are accused of allegedly promoting ideas claimed to be 'offensive' or 'hurtful' to some students, and/or claimed to not align with values such as racial, gender, and sexual 'inclusion' and 'diversity'.<sup>3</sup> Consistent with the contours of contemporary identity politics, the views of speakers denied a platform are routinely labelled and condemned as racist, patriarchal or homo- or trans-phobic; hence the restrictions on freedom of thought and expression on campus amounts in practice to a form of political censorship and policing of the ideological boundaries of so-called acceptable speech.<sup>3</sup> The denial of freedom of speech on campus has led to significant public ridicule of 'politically correct' universities that are accused of coddling the 'snowflake generation' of students who require 'safe spaces' where certain forms of speech are proscribed, and who are 'triggered' — allegedly suffer psychological and emotional harm — by the expression of views that challenge their own.<sup>4</sup>

The free speech problems in Australian universities do not appear to be on the same scale as they are

in North American universities and colleges (see Box). The vast majority of those who work and study at Australian universities simply go peacefully about their core business of teaching and learning in a professional and respectful manner. However, when we are discussing protecting a fundamental freedom such as the right to free expression, as well as upholding the higher purpose of universities to promote free and open inquiry in the pursuit of truth, what matters in a truly democratic society is the incidence — rather than the prevalence — of anti-free speech attitudes and behaviours that affect the rights and freedoms of others.

As the treatment of Arndt shows the Australian higher education sector is not immune to free speech problems. Nor are the cultures in both the administrative wings and academic faculties of Australian universities immune from identity politics and hostility to free speech.<sup>5</sup> As the Institute for Public Affairs' *Free Speech on Campus 2017 Audit* found:

There have been a growing number of censorious actions at Australian universities, including violent protests against the presence of speakers, venue cancellations for controversial speakers, students required to pay selective security fees, activist students demanding censorship of course content, universities censoring academics for their speech, students instructed to not express their viewpoint, and the growing use of trigger warnings.<sup>5</sup>

This finding is supported by other recent incidents that have highlighted concerns about freedom of thought and expression in Australian universities. Such incidents in 2018 include the University of Western Australia's decision to cancel a speech by a visiting American paediatrician and academic (who questions the science around transgenderism) citing 'risk management' issues, and following protests by students citing student safety and welfare concerns;<sup>6</sup> and the sacking by James Cook University of geophysicist Professor Peter Ridd for his views about the impact of climate change on the Great Barrier Reef.<sup>7</sup>

\* La Trobe University, for example, banned — subsequently overturned — Arndt from speaking on campus because her views on 'rape culture' allegedly did not align with the university's campaign against sexual violence. <https://www.theaustralian.com.au/news/nation/la-trobe-university-lifts-ban-on-bettina-arndt-talk-at-student-liberal-club-event/news-story/15e4a639120c837ef3b0da18149f0897>

\*\* A telling illustration of the confluence of these cultures may be the rejection by more than 100 academics of Sydney University's plans to partner with the Ramsay Centre for Western Civilisation to provide scholarships for students to study a degree in the history of Western civilisation. The academics argue that this plan to teach students about the cultural origins of their own society should be 'no platformed' not only because students would allegedly be taught about the "superiority" of Western civilisation compared to other civilisations, but also because promoting this form of 'racism' would violate the university's policies on promoting "diversity and inclusion" - i.e. be offensive, hurtful, and harmful to some members of the university's staff and students. <https://www.smh.com.au/politics/federal/ramsay-course-offers-stark-choice-to-australian-universities-20180905-p501yt.html> ; [https://docs.google.com/forms/d/e/1FAIpQLScz2bd3bi2u2kQdfQnO6n4IKizekt188nGztQOu53\\_XPU9Mhg/viewform](https://docs.google.com/forms/d/e/1FAIpQLScz2bd3bi2u2kQdfQnO6n4IKizekt188nGztQOu53_XPU9Mhg/viewform); <https://www.google.com.au/amp/s/amp.theaustralian.com.au/higher-education/sydney-university-staff-criticise-regressive-ramsay-agenda/news-story/fccf62a02b7fd59fad55d312a7b8051c>

## **The Campus Free Speech Crisis in North America**

Compiled by Monica Wilkie, Policy Analyst in the Culture, Prosperity and Civil Society Program at The Centre for Independent Studies.

The incidents discussed below represent a number of alarming international examples of people who have been 'no-platformed' or otherwise punished for holding opinions or expressing — or even entertaining — views that do not conform to the progressive orthodoxies that exist on university campuses. These examples are an insight into how universities have lost their way with regards to standing up for intellectual freedom, curiosity and diversity.

### **CANADA**

#### **Jordan Peterson**

In March 2018, Canadian psychologist Dr Jordan Peterson, was due to give a speech at Queen's University in Kingston Canada. A group of around 200 protestors demonstrated outside the great hall, constantly shouting and banging on the windows as the talk progressed; a stained glass window was smashed in the fracas. Some protestors breached security and ran inside while the speech was taking place. A female protester carrying a garrotte was subsequently arrested.<sup>8</sup>

#### **Ryerson University**

In August 2017, the panel discussion "The Stifling of Free Speech on University Campuses" was cancelled after activists claimed it would give a platform to fascists. Speakers were to include psychologist Dr Jordan Peterson, political commentator Faith Goldy, behavioural scientist Gad Saad and psychologist Oren Amitay. Ryerson Communication Director Michael Forbes concluded that the university was unable to provide the necessary security required for the event to safely continue.<sup>9</sup>

#### **Lindsay Shepherd**

On November 8, 2017, Lindsay Shepherd, a 23-year-old graduate student at Canada's Wilfrid Laurier University, was called into a meeting with the heads of her department and a 'diversity and inclusion officer.' Earlier in the week Shepherd had shown her first-year students a five-minute clip from a debate that appeared on the Canadian public television show *The Agenda*. The clip featured Jordan Peterson and two other academics discussing the use of gender-neutral pronouns. Shepherd was accused of "causing harm to trans students" and "creating a toxic climate" in her classroom. The administrators told Shepherd that she may even be in violation of Canadian human rights law and that she should not have presented the ideas neutrally. Shepherd subsequently released the audio of the recording to the media. Several protests erupted on campuses — and continue to this day when Shepherd attempts to hold an event — and there was a concerted effort by trans-activists to have Shepherd removed from the campus.<sup>10</sup>

### **UNITED STATES**

#### **Charles Murray**

In March 2017, political scientist and author Charles Murray (a former guest of the CIS), was due to give a speech at Middlebury College. As Murray began his address, a number of students stood up and turned their backs on him, while many others screamed. The chanting and shouting continued for 20 minutes until it was announced that Murray and his interviewer would enter another room and their discussion would be live-streamed. However, the protestors continued to disrupt with noise and setting off fire alarms. After the discussion, Murray was escorted to his car and his group was assaulted by students. Faculty member Allison Stanger sustained neck injuries in the fracas and had to be taken to the emergency room.<sup>11</sup>

#### **Heather MacDonald**

In April 2017, Manhattan Institute fellow and best-selling author, Heather MacDonald, was invited to give a speech at Claremont McKenna College about her latest book, *The War on Cops: How the New Attack on Law and Order Makes Everyone Less Safe*. In the weeks leading up to the event, a number of Facebook posts highlighted the intentions of protestors to show up with many calling MacDonald a "fascist" and a "white supremacist." On the night of the event, about 250 protestors chanted various slogans and blocked the entrance to the building where MacDonald was due to speak. Before the speech began, MacDonald was kept in a safe room with the blinds drawn as protestors gathered outside, and a police escort was required to move her to the auditorium where the talk was due to take place. MacDonald's talk concluded after taking only two questions — the police decided the situation had become too dangerous — and MacDonald was secreted away in an unmarked police van.<sup>12</sup>

### Professor Amy Wax

On August 9, 2017 University of Pennsylvania's Professor Amy Wax and University of San Diego's Professor Larry Alexander penned an op-ed for Philly.com, in which they argued that a decline in "bourgeois values" since the 1950s had contributed to a variety of social ills. Wax and Alexander also questioned multiculturalism and the rise of the single-parent family. Wax was condemned as a racist, sexist, homophobe, and it was suggested that her comments vilified and harmed minority students on campus. Student groups called for a formal policy censuring hate speech; one group IDEAL even claimed that rational argumentation was equivalent to hate speech and discriminatory acts. Five of Wax's fellow Penn Law professors responded with an op-ed in *The Daily Pennsylvania* entitled, "Notions of 'Bourgeois' Cultural Superiority Are Based on Bad History." The op-ed linked Wax to white supremacists and focused on the racial and sex discrimination that took place in the 1950s, at the exclusion of all else. After increasing pressure on March 13, 2018, University of Pennsylvania Law Dean Ted Ruger announced that Wax would no longer be allowed to teach a mandatory first-year course.<sup>13</sup>

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## Tehan: Voluntary 'Chicago-Style' Charters

The apparent rise of an anti-free speech culture in universities was felt significant enough to form the subject of recent remarks in a speech by Robert French, former Chief Justice of the High Court of Australia. French criticised what he described as "a worrying intolerance for the expression at universities of views which some consider harmful," while also warning that attempts by administrators, academics and student groups to prevent the discussion of contentious subjects on Australian campuses may violate the implied constitutional right to freedom of political communication. Singling out what he called the "extended concept of safety" employed to justify restricting so-called harmful speech to protect the feelings and well-being of members of the university community, French argued that the public standing and reputation of universities in a liberal democratic society would be eroded — and would potentially invite legislative intervention to protect free speech — if action was not taken to "encourage and maintain a robust culture of open speech and discussion even though it may involve people hearing views they find offensive or hurtful."<sup>14</sup>

The attention focused on free speech in universities has led Federal Education Minister, Dan Tehan, to suggest a potential solution. As well as urging university administrators to send the security bill to troublemaking protestors rather than charge those who organise peaceful events, Tehan has flagged possible changes to university codes of conduct. He has raised the possibility of Australian universities adopting the charter introduced by the University of Chicago (and adopted by 45 other American universities) — *the Statement on Principles of Free Expression* — to defend campus freedom of speech and address "disruptive conduct" (as opposed to legitimate and peaceful protest and contesting of ideas).<sup>15</sup> Tehan said he would support any university administrators who adopted a charter based on the Chicago Principles, which stipulate that while members of the University are permitted to protest and criticise views expressed on campus they consider offensive or worse, "they may not obstruct, disrupt, or otherwise interfere with the freedom of others to express views they reject or even loathe."<sup>16</sup>



# Maintaining Free and Open Inquiry at the University of Chicago

The approach to defending free speech on campus pioneered at the University of Chicago has essentially amounted to a formal restatement of the university's commitment — as an institution — to upholding the values and principles of freedom of thought and expression that once were taken for granted and believed to be ingrained within the life and culture of universities.

The *Statement on Principles of Free Expression*<sup>17</sup> was promulgated by the University of Chicago in 2012 in response to, and recognition of, the major threat the campus free speech crisis posed to the ethos, mission and purpose of the university as an institution. The level and nature of the threat is reflected in the text of the *Statement*. To underscore what was at stake — “a vibrant commitment to free and open inquiry, [without which] a university ceases to be a university” — this “statement of the aspirations” of the University, which was written by Geoffrey R. Stone, Edward H. Levi Distinguished Service Professor of Law and former Provost of the University, begins with a telling illustration.

The *Statement* begins by Stone recounting the events of 80 years prior. In 1932, a student group at the University of Chicago invited the US Communist Party presidential candidate [William Foster] to lecture on campus, an event that, predictably, “triggered a storm of protest from critics both on and off campus.” But rather than give in to the critics who condemned the University for giving Foster a platform, the then University President Robert M. Hutchins defended the freedom of students to “discuss any problem that presents itself” while insisting that the “cure” for objectionable ideas “lies through open discussion rather than through inhibition.” Hutchins would later insist that “free inquiry is indispensable to the good life, that universities exist for the sake of such inquiry, and [that] without it they cease to be universities.”<sup>18</sup>

According to the *Statement*, this incident — or rather Hutchins' response and sentiments — captured “the spirit and promise” of the University. Hence, Hutchins' words formed the foundation of the section of the *Statement* setting out the University's fundamental commitment to the principle of free speech:

Because the University is committed to free and open inquiry in all matters, it guarantees all members of the University community the broadest possible latitude to speak, write, listen, challenge, and learn. Except insofar as limitations on that freedom are necessary to the functioning of the University, the University of Chicago fully respects and supports the freedom of all students, faculty and staff “to

discuss any problem that presents itself,” free of interference.<sup>19</sup>

With respect to the “functioning of the University”, the *Statement* goes on to say that the freedom of expression is not “absolute” with respect to “narrowly-defined circumstances” where restrictions might be properly imposed on illegal, threatening, harassing, defamatory or other forms of speech that might invade privacy, confidentiality or otherwise disrupt the ordinary activities of the university. The purpose of clarifying legitimate restrictions on speech was, however, to identify what was really being targeted in terms of unacceptable restrictions on speech: intolerance towards of diversity of speech and different views and opinions. Hence, the *Statement* proceeds by affirming that the university is fundamentally “committed to the principle that it may not restrict debate or deliberation because the ideas put forth are thought to be offensive, unwise, immoral, or wrongheaded.” It follows therefore that “members of the University community must also act in conformity with this principle” because judgements about merit of ideas were for individuals to make in a university committed to free and open inquiry. Setting its sights squarely on the ‘no platforming’ phenomena, and drawing the distinction between the right to protest as opposed to the anti-free speech behaviour the university has labelled “disruptive conduct”, the *Statement* details what “conformity with this principle” means in practice:

Although faculty, students and staff are the views expressed on campus, they may not obstruct, disrupt, or otherwise interfere with the freedom of others to express views they reject or even loathe.<sup>20</sup>

The *Statement* then insists that the antidote to both anti-free speech disruptive conduct, and to what some may consider bad or unacceptable speech, is for the university to defend and uphold the free speech of all — lest it ceases to be a university:

For members of the University community, as for the University itself, the proper response to ideas they find offensive, unwarranted and dangerous is not interference, obstruction, or suppression. It is, instead, to engage in robust counter-speech that challenges the merits of those ideas and exposes them for what they are. To this end, the University has a solemn responsibility not only to promote a lively and fearless freedom of debate and deliberation, but also to protect that freedom when others attempt to restrict it.<sup>21</sup>

# Disruptive Conduct Restricting Speech of Others

The Chicago Principles were formerly adopted by the University of Chicago following the 2014 Report of the Committee on Freedom of Expression (the Stone Report). The Committee, chaired by Professor Stone, was appointed by the University President and Provost “in light of recent events nationwide that have tested institutional commitments to free and open discourse.”<sup>22</sup> The Stone Report fulfilled the committee’s purpose of “articulating the University’s overarching commitment to free, robust, and uninhibited debate and deliberation”<sup>23</sup> by restating much of the language of the *Statement on Principles of Free Expression*. However, in some ways the Stone Report was more powerful. Its formulation of the problem and solution was less abstract, and more pointed and targeted at the anti-free attitudes and behaviours that needed eradicating in practice to protect free speech on campus.

Hence, in articulating the University’s institutional obligation to defend free and open inquiry and discussion of ideas, the Stone Report took implicit aim at the concepts of safety, diversity and inclusion behind the ‘snowflakes’ and ‘no-platforming’ phenomena in setting out the values and behaviours that were required in practice to uphold and protect free speech on campus:

It is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. Although the University greatly values civility, and although all members of the University community share in the responsibility for maintaining a climate of mutual respect, concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community ... It is for the individual members of the University community, not for the University as an institution, to make those judgments for themselves, and to act on those judgments not by seeking to suppress speech, but by openly and vigorously contesting the ideas that they oppose ... Although members of the

University community are free to criticize and contest the views expressed on campus, and to criticize and contest speakers who are invited to express their views on campus, they may not obstruct or otherwise interfere with the freedom of others to express views they reject or even loathe.<sup>24</sup>

Beyond such formal statements lies the real significance of the subsequent actions taken by the University of Chicago to put its commitment to the principle of freedom of thought and expression into practice. In June 2016, the Committee on University Discipline for Disruptive Conduct was appointed to “review and make recommendations about procedures for student disciplinary matters involving disruptive conduct including interference with freedom of inquiry or debate.” In response to the increase in disruptive behaviour at the university — “where audience members foreclosed discourse by shouting down speakers and otherwise interfered with the opportunity of attendees hear those speakers and appropriately contest their ideas if they so desired” — the committee’s recommendations strove to balance the legitimate right of dissent and protest as part of the life of university, with the official commitment to ensuring the university’s free speech principles were upheld.<sup>25</sup>

The approach recommended by the committee, and subsequently endorsed by the University Senate, had three main elements. The first element signalled how seriously the university took the commitment to protecting the free speech of all by centralising within the All-University Disciplinary System the disciplinary process for disruptive conduct “with the hope that doing so will provide greater consistency across cases.” The second element moved to empower the university officials to decisively respond to disruptive conduct and ensure others can speak and be heard by granting advance authority to remove disruptive individuals from events. The third element was targeted education for students and student groups to foster better understanding of the rights and responsibilities of all members of the university in relation to free speech and disruptive conduct.<sup>26</sup>

## Spence: Solution Looking for a Problem?

The adoption of 'freedom charters' in American colleges illustrates the evident need to counteract anti-free speech behaviour by recommitting — as institutions — to upholding the principles of freedom of thought and expression. Both the *Statement* and the Stone Report contain the kind of language that would rightly belong in university freedom charters in Australia: when Purdue University adopted the former in its entirety, its President noted that "we didn't see how we could improve the language."<sup>27</sup> But worthy statements of principle count for little unless there is a real institutional commitment to ensuring those principles are practiced as part of life of the university. This ultimately depends on what action an institution is has the will to take action to protect freedom of speech when others attempt to restrict it.

Hence it may be naïve of Minister Tehan to implore Australian universities to "show leadership" and voluntarily adopt charters to protect free speech on campus, "even where those ideas may be confronting to some people." It may underestimate the 'institutional' obstacles within contemporary universities, and hence underestimate how reluctant universities may be to embrace the principles of freedom of thought and expression, let alone promote and enforce such principles in practice.

Concerns about relying on universities to take voluntary 'Chicago-style' action are highlighted by the confused and insouciant attitude displayed by higher education leaders to free speech issues.

In a recent article in *The Australian* commenting on the events that took place at the Bettina Ardent speech, the Vice-Chancellor of the University of Sydney, Michael Spence, wrote that all university staff and students were required to "observe codes of conduct in the conduct of debate." However, with respect to enforcing such codes:

We are often presented with the need to balance the right to protest with the right to ensure that protest is not conducted in a way that silences others. But we also expect that difficult ideas may create protest that is passionate and loud. As the opposition assistant spokeswoman for universities observed last week, the recent media examples of debate on campuses show free speech is alive and well.<sup>28</sup>

Spence supported his assertion there was no free speech problem on campus by referring to the statements made by the federal Labor Party's shadow

assistant minister for universities, Senator Louise Pratt:

I don't think there's a problem on campuses in relation to free speech ... I think the examples in the media show, frankly, that there is contested debate on campuses and that they go to very meaningful issues that are of interest to the community and students. There is, in some cases, a level of conflict about them — which goes to show that free speech is alive and well.<sup>29</sup>

Pratt and Spence both characterised the scenes at Sydney University as an example of legitimate right to protest and exercise of counter free speech, even though the police had to be called onto campus to allow the Arndt event to proceed. According to the account by Bettina Arndt:

Sydney University demonstrators took things to a different level. The security guards were overwhelmed by the unruly protesters who blocked the corridor leading to the venue preventing most of the audience from attending the event. Our students were threatened, physically jostled, some even flung against walls by the aggressive crowd prior to the riot squad being called in by security to control the protesters before my talk could go ahead.<sup>30</sup>

Both Vice-Chancellor Spence and Senator Pratt downplayed and mischaracterised what actually took place at the Arndt event and — more importantly — confused the issues by mistaking the right to protest with the real issue of (violent and abusive) disruptive conduct that restricts the right to free speech of others. The logical interpretation of Spence's and Pratt's stance is that they believe 'Chicago-style' charters are an unnecessary solution to a free speech problem on campus that (in their view) does not exist.

The same confusion — mistaking protest and disruption — was evident in the claims made in response to Dan Tehan's remarks about free speech in universities by Vicki Thomson, the chief executive of the Group of Eight peak lobby group representing Australia's leading universities (including the University of Sydney). Thomson questioned the existence of "the problem that the minister is trying to solve here" and said "she couldn't remember a particularly violent protest [on university campuses] in the past 10 years."<sup>31</sup>

In reality, the violent scenes at the Arndt event are precisely the kind of anti-free speech behaviours that “interfere with the freedom of others to express views” that are specifically targeted by the Chicago Principles, and by the revised codes of conduct the University of Chicago has put in place “to protect that freedom when others attempt to restrict it.”

If university administrators can’t identify the ‘Chicago-style’ free speech problems, it’s difficult to see how they can be trusted to implement ‘Chicago-style’ free speech solutions. The apparent lack of institutional will within the university sector to take appropriate action to address free speech issues suggests that imploring universities to voluntarily self-regulate freedom of thought and expression is insufficient.<sup>†</sup>

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## ‘US-Style’ Campus Free Speech Laws

The former Vice-Chancellor of Macquarie University, Steven Schwartz, has also strongly urged Australian universities to voluntarily address free speech issues by adopting appropriate ‘Chicago-style’ rules, procedures and policies that affirm their commitment to free speech principles and practices on campus. Besides the intrinsic importance of the issues at stake, he has also suggested there are good strategic reasons why Australian universities might do so. Schwartz has noted that Robert French’s warning of legislative intervention if universities fail to defend free speech is far from hypothetical, based on experience in the US — where a number of states have legislated to protect free speech in their universities.<sup>32</sup>

It might therefore be wise for Australian universities to follow the University of Chicago’s example by adopting a charter expressing their commitment to encouraging and maintaining a robust culture of free and open inquiry, and back this with a disciplinary and other processes designed to address disruptive conduct that restrict the freedom of thought and expression of others on campus. This is because lack of action on protecting free speech may invite government action to ensure universities fulfil their obligations to the community in a liberal democratic society.

However, the reality may be that rather than rely on universities to self-regulate, we have already reached the point — as is evident in the US — of requiring greater government intervention to require universities to comply with freedom of thought and expression obligations. In a telling illustration of universities lack of institutional will around these issues, research released by the Institute of Public Affairs (IPA) last year showed that just eight of Australia’s 42 universities have an explicit policy

protecting ‘free intellectual inquiry’, despite this being a mandatory requirement and condition of federal funding under the *Higher Education Support Act (2003)*.<sup>33</sup>

As the IPA’s Matthew Lesh has observed, a dozen US states have passed some form of campus free speech legislation, and another dozen have introduced, but not passed, similar legislation. As Lesh argues, US-style campus free speech laws<sup>††</sup> could be drawn upon to provide a model for similar and stronger laws in Australia.<sup>34</sup> The most comprehensive legislation that has been passed (in North Carolina, Arizona, Illinois, and Virginia, and Georgia ) contains many features that could indeed be incorporated into university freedom charters in Australia. Such features include requiring universities to:

- Formulate an official university policy that strongly affirms the importance of free expression along Chicago Principle lines.
- Prevent administrators from disinviting ‘controversial’ speakers whom members of the campus community wish to hear.
- Establish a system of disciplinary sanctions for students and anyone else who interferes with the free speech rights of others.
- Reaffirm the principle of institutional neutrality on issues of public controversy to encourage robust freedom of thought and expression on campus.
- Submit a yearly public report to the public, the governor, and legislature detailing how the administration has handled free speech issues.<sup>35</sup>

Commendable though these various elements are, what is striking is how weak are the external accountability mechanisms included in even the strongest campus free speech legislation passed so

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<sup>†</sup> Indicative of such lack of institutional will is that when G8 universities were asked to echo the letter sent by the University of Chicago Dean of Students to incoming first year students affirming the institution’s free speech principles and lack of support for trigger warnings and safe spaces, all eight universities declined to support such a letter. Janet Albrechtsen, “No-offence culture of American campuses hurts Australia too,” *The Australian*, November 2, 2016.

<sup>††</sup> The campus free speech laws that have been passed or proposed in some states have been based on or inspired by the “Model Legislation” drafted by the libertarian think tank the Goldwater Institute. <https://goldwaterinstitute.org/campus-free-speech/>

far in the United States. Much of the US legislation, “either have no oversight system at all or depend on administrators to report on themselves.”<sup>36</sup> But even in the states with the strongest legislation (such as North Carolina, for example), the chief oversight measure — the annual report to the public, the governor and the legislature — “has only the power of sunlight and persuasion.”<sup>37</sup> Advocates of this approach hope the annual reporting requirements will encourage university governors to force administrators to take free speech on campus seriously, lest the mishandling of free speech issues leads to public criticism and attracts the negative attention of legislators who might find “reason to reconsider the level of their appropriations for the university.”<sup>38</sup>

At best, then, even the strongest US campus free speech legislation contain only weak external accountability mechanisms. It essentially relies

on self-regulation of free speech compliance by universities in a regulatory and compliance environment lacking direct sanctions; in the hope that the foreshadowed — but highly indirect — political and funding consequences that the ‘sunshine’ of public criticism might lead to, may instil the institutional will inside universities to do the right things on free speech.

Using the US-style campus free speech as the model for Australia therefore risks replicating the demonstrable failure of similar policies. In the vast majority of Australian universities — 34 out of 42 — existing legislative requirements to develop intellectual freedom policies have been met with largely pointless platitudes, with little apparent effort made by the federal government and higher education regulators to ensure compliance.

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## The Case for Compulsory Freedom Charters

The implications of the mass non-compliance by Australian universities with the current soft regulatory framework are important with respect to how best to proceed to protect freedom of thought and expression on Australian campuses.

- The first implication is that this is an alarming measure of the apparent lack of interest in documenting the commitment to intellectual freedom among the vast majority of university administrators.
- The second is that governments have been negligent in ensuring universities fulfil the legislative obligations mandated by parliament; and the failure of the existing regulatory and compliance regime — and the lack of political will to enforce it — is obvious.
- The third is that given the lack of institutional will displayed by universities, we cannot simply rely on universities to finally do the right thing and voluntarily implement and comply with a Chicago-style charter.
- The fourth is that if they are to prove an effective means of remedying the free speech crisis, Chicago-style university freedom charters
  - a) cannot be voluntary; and;
  - b) cannot be toothless tigers — simply platitudes to which lip-service might be paid, but with no action to actually encourage and maintain a robust culture of free speech for all on campus.
- The fifth is that if this kind of ‘US-style’ campus free speech legislation is necessary, it should include an

element of compulsion in the form of a robust and transparent regulatory and compliance framework (including potential financial sanctions) in order to:

- c) overcome the respective and interrelated lack of political and institutional will and evident inertia of governments and universities, and;
- d) enforce genuine external accountability for what universities do, and do not do, to promote and protect free speech.

If universities are to fulfil their traditional mission in a liberal democratic society, of promoting free inquiry and reasoned debate of competing ideas, there is a strong case for appropriate political intervention and direction. Greater external accountability should be imposed on universities and their administrators, to ensure these institutions fulfil the role the community expects — and funds — them to play. This could be achieved by requiring universities to comply with the Chicago-style free speech obligations that a university freedom charter would entail, which would become a condition of receipt of taxpayer funding.

To ensure such charters have ‘teeth’ and prove effective, it would also be appropriate for non-compliance with free speech policies and requirements to attract financial sanctions. Under an ‘Ontario-style’ freedom charters policy, non-compliant universities would have some of their \$17 billion in taxpayer-funding withheld by the federal government, if they fail to implement ‘best practice’ free speech policies to address disruptive conduct that restricts the right to freedom of thought and expression of others on campus.



## ‘Ontario-Style’ Free Speech Policies

A potential new regulatory and compliance model and more robust and transparent approach to actively defending free speech on campus — which could be emulated in Australia — has been announced in the Canadian province of Ontario. In response to high-profile incidents spotlighting concerns about curbs on free speech in Ontario’s publicly-funded universities,<sup>5</sup> the leader of the Progressive Conservative Party, Doug Ford, made a campaign promise during the June 2018 provincial general election to protect free speech on campus by tying higher-education funding to new free speech requirements. After winning a majority of the seats in the legislature, the Progressive Conservative Government led by Premier Ford announced in August that universities would be required by January 1 2019 to develop, implement and comply with free speech policies that meet a minimum standard — or risk facing government funding cuts for failing to comply with ‘best practice’.<sup>39</sup>

Under the new policy approach as detailed by the Ford Government and announced at the end of August 2018,<sup>38</sup> the Ontario Ministry of Training, Colleges and Universities intends to require all universities and colleges to develop — and publicly post by the New Year deadline — free speech policies that must apply to faculty, students, staff, management and guests. These policies will not only have to include a definition of freedom of speech, but also meet additional minimum standards by including “Principles based on the University of Chicago Statement on Principles of Free Expression.” The mandated principles included in the policy announcement are:

- Universities and colleges should be places for open discussion and free inquiry.
- The university/college should not attempt to shield students from ideas or opinions that they disagree with or find offensive.
- While members of the university/college are free to criticize and contest views expressed on campus, they may not obstruct or interfere with the freedom of others to express their views.
- Speech that violates the law is not allowed.<sup>40</sup>

Clearly, the intent of the Ontario government is to require universities to commit to the Chicago Principles. But the real key to the new policy as announced is the intention to guide and encourage universities to practice these principles and adopt a

more active approach to encouraging and maintaining a free speech culture with respect to targeting and addressing what the new policy describes as “ongoing disruptive protesting that significantly interferes with the ability of an event to proceed.”<sup>41</sup> While it is foreshadowed that universities will be required to deal with disruptive conduct contrary to its free speech policies only under existing student discipline measures, the new policy also suggests that “institutions consider official students groups compliance with the policy as condition for ongoing financial support or recognition, and encourage student unions to adopt policies that align with the free speech policy.”<sup>42</sup> The new policy also states that the intention is for complaints regarding free speech to in the first instance be dealt with under existing complaints and compliance mechanisms. However, the further intention is to supplement this with a new external process that may see “unresolved complaints against publicly-assisted universities and colleges about free speech ... referred to the Ontario Ombudsman, which has the power to investigate complaints about colleges and universities.”<sup>43</sup>

This is consistent with the other major thrust and innovation of the new policy: greater external accountability for what universities do, and do not do, to protect free speech. In the same way that an external complaints process is intended to encourage universities to take a more active approach to protecting free speech, the same intention — encouraging universities to adopt ‘best practice’ free speech policies — is behind the proposed new mandated reporting requirements. From September 2019, according to the policy announcement, all universities and colleges will be required to submit and publish “an annual report on implementation progress and a summary of its compliance”, and submit the report to the Higher Education Quality Council of Ontario (HEQCO).<sup>44</sup>

Under the new policy, it is envisaged that HEQCO — the statutory body charged with conducting evidence-based research to improve the quality of Ontario’s higher education — will also be directed to research free speech on campus and “monitor and evaluate system-level progress on the free speech policy.” The new arms-length regulatory role HEQCO is slated to play regarding free speech, will also potentially lead to financial sanctions as a last, but powerful, additional layer of accountability. After reviewing the annual

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<sup>5</sup> The most notable of which was the Lindsay Shepherd affair: the disciplinary proceedings launched by Wilfred Laurier University against a teaching assistant for showing students a video of psychologist Jordan Peterson discussing gender-neutral pronouns on a public broadcaster current affairs show. <https://www.cbc.ca/news/canada/kitchener-waterloo/laurier-lindsay-shepherd-apology-video-petersen-1.4424590>

<sup>38</sup> Note that the legislation required to put the new policy into effect has yet to be presented to parliament.

reports of each university, HEQCO's role will then be to provide advice to the government; and if that advice suggests that an institution has failed to introduce, report on, or follow a free speech policy as required, the government "may respond with reductions to their operating grant funding, proportional to the severity of non-compliance."<sup>45</sup>

If the federal government implemented a freedom charters policy that contained similar new and meaningful Ontario-style external accountability mechanisms — including the ultimate risk of incurring financial penalties for non-compliance — this would establish a powerful new method of creating the required institutional will to take action on free speech. Tying funding to actively protecting and promoting free speech on campus would focus the

mind of university administrators on free speech problems — especially the minds of administrators who claim there is no problem and mistake legitimate protest with disruptive conduct silencing free speech on campus. Compulsory university freedom charters backed with the possibility of financial sanctions would send a clear signal about the political will of the federal government regarding defending free speech on campus. This demonstration of political will, in turn, allied to a more transparent accountability process would spur university administrators — create the requisite institutional will — to ensure compliance with free speech obligations, once funding was directly at stake.

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## No Government Censorship; No Hate Speech

The threshold question that arises in relation to the proposed university freedom charters is whether the federal government should have any involvement in regulating speech in universities — even through the arms-length administrative structure that is envisaged?

For some, the idea of university freedom charters may raise the spectre of political interference and censorship by government. But this misunderstands the nature of the problem and the solution. The intention isn't to clamp down on dissenting speech; it is to facilitate the maxim of free speech that is currently under threat by the rise of an anti-free speech culture in universities. Rather than dictating or censoring speech, freedom charters would in practice prevent political bias on campus by ensuring those with different political perspectives and values are free to express their views. As Professor Stone has noted, rather than imposing political censorship, requiring universities to abide by free speech obligations amounts to requiring these institutions to "handcuff itself in order to make sure that people feel free to contest ideas that they or the leaders of the university or the trustees of the universities might disagree with."<sup>46</sup>

At a fundamental level, implementing university freedom charters would help ensure universities fulfil their traditional role and mission in a liberal democratic society. In liberal democracies, it is eminently appropriate for governments (and the politicians elected by the people to serve in those governments) to ensure that institutions funded by

taxpayers fulfil their intended purposes. Fulfilling these democratic obligations requires governments to establish the necessary administrative arrangements that ensure taxpayer-funded institutions do not deviate from those purposes. It is therefore eminently appropriate for the federal government to exert its overall administrative responsibility for higher education, and use its leverage over funding, to ensure that taxpayer-funded universities fulfil their obligations to taxpayers. This is what freedom charters will do; by supplementing the governance, oversight, and accountability of universities in order to create the political and institutional will and commitment required to encourage and maintain a robust culture of free speech.

Hence rather than an unwarranted and heavy-handed (let alone radical) government intervention, university freedom charters that emulated the approach employed in Ontario would simply apply the golden rule of bureaucratic systems with regards to compliance with the free speech policies: what gets measured, reported, and rewarded — and potentially financially penalised — is what gets done. University freedom charters would apply the standard prosaic formulas of bureaucratic governance to effectively promote the highest purposes and aspirations of universities: free and open inquiry in the pursuit of truth.

Nevertheless, university freedom charters are still likely to be mischaracterised as a draconian threat to institutional independence, particularly because of the financial 'teeth' they would include.<sup>47</sup> Critics

in Ontario were quick to characterise the threat to pull funding as an unprecedented and inappropriate overreach by the government into the internal affairs of self-governing universities. However, these claims mischaracterised the nature and details of new regulatory and compliance framework.<sup>48</sup>

Critics are wrong to claim that under an Ontario-style approach, universities would stand to lose funding when disruptive conduct occurs on campus. This is not correct, and the intention of the Ontario model as announced allays such concerns. What would be required of Australian universities under the kind of freedom charters policy recommended here is that they create and enforce clear policies that distinguish between legitimate protest and anti-free speech disruptive conduct. Ideally, therefore, freedom charters legislation should not dictate mandatory disciplinary procedures and punishments (such as withdrawing funding from student groups involved in disruptive conduct), and should instead rightly leave matters of codes of conduct and enforcement of free speech policies to the discretion of individual universities.

It is also preferable for financial penalties — based on severity and persistence of non-compliance — to be specified in legislation. The determination of such penalties should not be left to the discretion of the government of the day as exercise of such discretion would in practice invite perception and reality of politically-motivated interference in making decisions to impose or not impose financial sanctions. Specified penalties — that would make it clear what

universities are risking by being non-compliant — are also preferable to achieve what is the real and major objective: *not* to punish universities for disruptive conduct, but to make them more transparently accountable for creating and enforcing policies that effectively protect and promote free speech.

This is to say — and make clear — that financial penalties under the freedom charters policy should only apply if universities are non-compliant with the mandated requirements to implement 'best practice' free speech policies to discourage disruptive conduct that restricts the right to freedom of thought and expression on campus. No thought or action should be given to forcing universities to lose funding simply because disruptive conduct occurs; such penalties, moreover, would be counter-productive, as they would in practice be liable to encourage risk-averse attitudes to 'controversial' speech and speakers on campus.<sup>‡</sup>

University freedom charters are also likely to be mischaracterised as a policy that would license 'hate speech' on campus against some individuals and groups.<sup>49</sup> This is another red herring. As is explicit under the Ontario model, and as per the Chicago Principles, speech that violates the law is not permitted on campus.<sup>50</sup> The same would apply under university freedom charters. This is to say that illegal forms of speech would not be allowed on Australian campuses and would be subject to the existing federal and state incitement, anti-discrimination and vilification laws that proscribe 'hate speech'.

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<sup>‡</sup> I am indebted to Professor Steven Schwartz for his feedback on the points in this and the proceeding two paragraphs.

## Conclusion: Charters to Promote Liberal Democracy

The best way for the federal government to encourage and maintain free speech on campus in Australia would be to implement a compulsory university freedom charter policy based on the key elements of the free speech policies announced by the Ontario Government — but adjusted to local circumstances — to ensure universities are more transparently accountable for properly protecting and promoting freedom of thought and expression on campus.

Under this 'Ontario-style' freedom charters policy, Australian universities would be required to develop free speech policies consistent with the Chicago Principles, and be required to comply with that policy and take steps (both disciplinary and educational) to ensure all members of the university — especially student groups — comply with the policy in order to address disruptive conduct that interferes with free speech on campus. Compliance with freedom charter requirements should also be monitored via greater external accountability, as well as be backed by the potential threat of discretionary financial sanctions for proven non-compliance. HEQCO in Ontario is more or less the equivalent of the Australia's national higher education quality and regulatory agency, the Tertiary Education Quality and Standards Agency (TEQSA). It is conceivable that TEQSA could fulfil the role that HEQCO is envisaged playing in Ontario, should the federal government seek to implement a similar freedom charter policy approach here in Australia.

We might lament that universities, of all places, need to be held to greater external account and be required to comply with a freedom charter — let alone be threatened with financial penalties — to fulfil their core responsibility to defend freedom of thought and expression. We might also lament that contemporary university students may expect not to be exposed to ideas they disagree with at institutions of higher learning. But rather than simply wishing it was otherwise, there is a need to weigh the importance of the fundamental principles at stake with the corresponding need to implement appropriate

measures to protect and promote those fundamental principles. Implementing university freedom charters would take meaningful action — demonstrating the political will necessary to generate the essential institutional will — to stem the growth of an intolerant anti-free speech culture on campus and ensure universities remain true universities: bastions of civil debate, rational discussion, and intellectual freedom.

The recommended approach to actively promoting free speech on campus is also justified by the increasingly important need for universities to fulfil their traditional role and mission of promoting free and open inquiry at a time of growing toxic social and political polarisation in Western nations including Australia. The most concerning aspect of such polarisation is the manifest intolerance of diversity of views and opinions: which is to say: the failure to respect the right to freedom of speech for all citizens. If they abrogate their responsibility to defend freedom of thought and expression, the universities will help to legitimise the anti-democratic belief that robust free speech and debate of competing ideas should be restricted.

This underscores the need for freedom charters to ensure universities fulfil their — never more important — purpose of modelling the kind of civic values and behaviour crucial to the health and proper functioning of liberal democracy. In the words of the Stone Report, "fostering the ability of members of the University to engage in such debate and deliberation in an effective and responsible manner is an essential part of the University's educational mission."<sup>51</sup> If universities don't provide an education in democratic values in the broadest sense, where are Australians going to learn and see practiced the principles of tolerance and respect for the rights and freedoms of all citizens — which the maintenance of a democratic society depends on? Freedom charters that hold universities to account for protecting free speech on campus would ensure our institutions of higher learning play their vital role in promoting the principles of liberal democracy in Australia.

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