

A brief history of Academic Freedom and the Union

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The forthcoming conference on academic freedom follows a proud tradition of tertiary education unions leading the debate on academic freedom in Aotearoa New Zealand. That includes securing the statutory protections we now enjoy. When examining the threats to academic freedom today it is helpful to reflect on that recent history.

The embedding of academic freedom, and the critic and conscience responsibility of tertiary institutions, in the Education Act 1989 is a unique achievement. The catalyst was the move by Labour's Education Minister Phil Goff to impose market mechanisms, including national fees, on universities. At that time tertiary staff were represented by four separate unions, with the Association of University Staff of New Zealand (AUS) covering academic and general staff at universities.

A number of prominent members of the AUS coordinated strategic interventions across politics, media, staff and student unions, campuses, and alumni, which forced the Minister to backtrack and secured the inclusion of explicit protections in the new Education Act. That campaign was eloquently chronicled by Auckland University's associate professor of politics Ruth Butterworth and history professor Nick Tarling in *A Shakeup Anyway*¹ - a must-read when considering how to confront today's challenges.

The resulting provisions (Sections 161 and 162) have several elements:

- The explicit intention of the statute is that academic freedom will be preserved and *enhanced*. Ministers, and authorities and agencies of the Crown (eg TEC) *must act in all respects* so as to give effect to that intention.
- Protection of academic freedom is a requirement to be a university, and a potential characteristic of other higher education institutions.
- Universities must also “accept a role as critic and conscience of society”.
- Academic freedom is broadly defined, spanning the right of academics and students to state controversial or unpopular opinions (within the law) and to engage in research, and for the institution and its staff to decide what is taught and how.
- At the same time, academic freedom is not a libertarian free for all. It is to be exercised within the law, with highest ethical standards, be open to public scrutiny, and institutions must be accountable and use their resources “properly”.

¹ Ruth Butterworth and Nicholas Tarling, *A Shake-up Anyway. Government and the Universities in New Zealand in a Decade of Reform*, Auckland University Press, 1994

A downside of the Act is that academic freedom relies heavily on the institution in which it is exercised. Both academic freedom and institutional autonomy are to be preserved and enhanced. That implicit assumes the institutions will indeed promote and enhance academic freedom.

A particular problem arose from the inclusion in Section 161 of the freedom of the institution to appoint its own staff. The State Sector Act 1988 shifted employment responsibilities in universities from the nation-wide State Services Commission to Vice-Chancellors of individual institutions. This conferred a new degree of power and leverage over staff who exercised academic freedom in ways the institution did not like, as well as undermining collective bargaining by unions.

The framing of academic freedom within this institutional context has increasingly been used to circumscribe how it is defined and how it can be exercised - including attempts by employers to circumscribe academic freedom in employment contracts and institutional policies. The union was very aware of these risks and fought hard but unsuccessfully against the State Sector Act and the consequential erosion of collective bargaining once the Employment Contracts Act was passed in 1991.

By the late 1990s there was growing concern over the erosion of academic freedom. At the time, I was national president and Rob Crozier was Executive Director. AUSNZ commissioned an independent report on academic freedom from Canadian academic expert Don Savage. In addition to analysing historical and international developments, and the New Zealand legislation, Don's lengthy report made particular use of the 1997 UNESCO *Recommendation Concerning the Status of Higher Education Teaching Personnel* (see below), which talks specifically to academics' rights in critiquing developments within their institutions. The report was published in a book along with articles by Sir Ken Keith (a former law professor and adviser on the Education Act), Kathy Irwin on Māori academic freedom and myself.²

The establishment of an Academic Freedom Award was another strategy to profile academic freedom and help protect those who exercised it. The inaugural award went to three whistleblower academics from Canterbury University, who as medical specialists employed by the neoliberalised public hospitals had been gagged from speaking about threats to patient safety. The award was presented at an Academic Freedom conference in 2000, where the book was also launched, by none other than Noam Chomsky. Those doctors - Philip Bagshaw, Stuart Garland and Gary Nicholls - remain stalwarts of public health activism in Canterbury today. Several years later Tertiary Education Minister Steve Maharey presented the same award to me at the AUS annual conference for my academic and union contributions to academic freedom.

A further important opportunity created by the statutory protections for academic freedom was the potential for judicial review. In 1999 AUS successfully challenged the University of Waikato, then led by Professor Bryan Gould, to stop the merger of the Law Faculty with Management and Māori and Pacific Studies with Education. Professor Margaret Wilson and Professor Wharehuia Milroy were co-applicants.³ The judgement of Hammond J., previously Dean of Law at Auckland University, is worth a read. While it temporarily drew a line in the

² Rob Crozier, *Troubled Times. Academic Freedom in New Zealand*, Dunmore Press, 2000

³ Association of University Staff of New Zealand Inc v University of Waikato [2002] NZAR 817

sand, the concerted power of Vice-Chancellors, Government and Councils eroded its impact over time.

What lessons might we draw today from these previous battles?

A concerted medium-term multi-level strategy at political, media, institutional, alumni and communities is vitally important. That requires an energetic, focused and well-connected team to develop and execute such a strategy.

Publicity and profile are really important, demonstrating the public value of academic freedom so it is not just a privilege claimed by academics. There are plenty of examples of the exercise of academic freedom to public benefit involving Covid-19, Te Tiriti, journalism, trade training, climate change, etc. Academics who do this work will be very supportive, but busy, so need to be used most effectively (eg media, meetings with ministers).

Bringing Ministers and potentially sympathetic VCs into the conversation helps to cut through the adversarialism that dominates our relationships in tertiary institutions.

Litigation is high stakes and high cost, but remains is a potent possibility. Either we acquiesce in the legislation being ignored or we make it have a meaning. Cases need to be selected carefully, with a view not just to immediate interests, but also to the longer-term strategic risks and gains in the tertiary sector.

Note:

Education Act (1989)

161 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) 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.

Section 162: Establishment of Institutions

...

In recommending to the Governor-General under subsection (2) that a body should be established as a university the Minister shall take into account—

(a) that universities

(i) they are primarily concerned with more advanced learning, the principal aim being to develop intellectual independence:

(ii) their research and teaching are closely interdependent and most of their teaching is done by people who are active in advancing knowledge:

(iii) they meet international standards of research and teaching:

(iv) they are a repository of knowledge and expertise:

(v) they accept a role as critic and conscience of society;

The 1997 UNESCO Recommendation Concerning the Status of Higher Education Teaching Personnel

A31. Higher-education teaching personnel should have the right and opportunity, without discrimination of any kind, according to their abilities, to take part in the governing bodies and to criticize the functioning of higher education institutions, including their own, while respecting the right of other sections of the academic community to participate, and they should also have the right to elect a majority of representatives to academic bodies within the higher education institution.

32. The principles of collegiality include academic freedom, shared responsibility, the policy of participation of all concerned in internal decision-making structures and practices, and the development of consultative mechanisms. Collegial decision-making should encompass decisions regarding administration and determination of policies of higher education, curricula, research, extension work, the allocation of resources and other related activities, in order to improve academic excellence and quality for the benefit of society at large.

While the UNESCO *Recommendation* recognises the variety of higher education institutions and consequently that the structures involved may differ according to the type of establishment involved, it goes on to say:

18. Autonomy is the institutional form of academic freedom...

20. Autonomy should not be used by higher education institutions as a pretext to limit the rights of higher-education teaching personnel provided for in this Recommendation or in other international standards set out in the appendix (i.e. United Nations statements on human rights and ILO policies on labour questions).