New South Wales
Council for Civil Liberties

NSWCCL SUBMISSION

NSW DEPARTMENT OF EDUCATION

2020 CODE OF CONDUCT REVIEW

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About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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NSW Department of Education 2020 Code of Conduct Review

The NSW Council for Civil Liberties (NSWCCL) thanks the Department of Education for the opportunity to make a submission in regard to the discussion paper for the 2020 Code of Conduct Review.

The right to free speech and the right to openly participate in political debate are rights which must be available to all residents of NSW whether or not they are employed by the Department of Education. NSWCCL is concerned that the proposed changes to the Code of Conduct by the NSW Department of Education (the Department) has the potential to reduce the civil liberties of Departmental Employees through a restriction on their rights to communicate through personal social media channels.

In this submission the NSWCCL has chosen to concentrate on question 2 in the discussion paper:

2. Where should the department set standards in respect to recognising an employee's choice to engage with social media but ensuring the reputation of the department and public sector?

Social Media

Social media policies or guidelines that restrict the rights of employees to engage in free speech and other political activities, public commentaries or debate are a direct infringement on that employee's civil and political rights. As a matter of general principle, such restrictions can only be justified if they are rationally connected to a legitimate aim, necessary for the pursuit of that aim and adequate in their balance. It is entirely unacceptable to create restrictions on free speech without a clear public benefit, which has not been provided in this social media policy.

Public servants, like all citizens, deserve the right to engage in public commentary on their field, on politics, and on matters relating to national, state and local elections. Without the ability to provide such commentary, our democracy itself is weakened. It is the right of all citizens to express their views, for without the views of citizens, the government cannot serve their interests.

In 1997, the High Court clarified that the Australia's constitutionally mandated system of representative and responsible government guaranteed a minimum freedom of political communication.[1] Some degree of free expression is required for electors to make free and informed choices at elections and to participate in representative democracy. As the court said in *Australian Capital Television v The Commonwealth*:

> Only by exercising that freedom can the citizen criticize government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives.[2]

The High Court has made it abundantly clear that when undue restrictions are placed on free speech, it is democracy and democratic governance itself that suffers. This is all to underscore the value that the

[1] Lange v Australian Broadcasting Corporation [1997] HCA 25; 189 CLR 520

[2] (1992) 177 CLR 106 [38].

Australian system of government places on freedom of speech. It is unnecessary to fully traverse the familiar justifications for protecting this freedom; it is a value espoused universally by Australians.

At the international level, the UN International Covenant on Civil and Political Rights, Article 19[3] states:

> Everyone shall have the right to hold opinions without interference.
>
> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> For respect of the rights or reputations of others;
>
> For the protection of national security or of public order (ordre public), or of public health or morals.

The NSW Department of Education overseas teachers at over 2,240 schools. As a result, tens of thousands of teachers and staff would be affected by the policy guidelines. Such a weighty burden on freedom of expression must be adequately and strictly justified.

2. No clear justification

It is unclear what public benefit is served by limiting the right of teachers to talk about matters such as (1) what is in the curriculum, (2) laws around education, (3) the actions of the government that directly impact their work, (4) what make a good or bad teacher, (5) what make a good or bad student.

Such discussions would directly be impacted by the proposed change to the Code of Conduct.

In effect, the proposed revisions to the Code of Conduct seek to end public commentary by teachers about their profession. The effect will be chilling both on public education itself (as an institution that is meant to serve, and therefore talk to, the public), on teachers (who are meant to learn from each other), and on our democratic institutions, which are meant to learn from those exposed to the brunt of the policies and initiatives of the government. To ban teachers from talking about teaching policy, is to ensure that the government ignores their voices when passing policy reform initiatives.

Furthermore, the restrictions on social media use are not necessary for teachers to fulfil their role. A teacher critiquing teaching policy or education laws would not in any way be undermining the effectiveness of their work, their teaching or their role in the classroom. By contrast, teachers should act as role models for students by demonstrating public engagement and inquisitiveness about their own profession. To do so does not limit their impartiality in teaching, their job performance or the reasonable expectations placed upon them by both students and parents.

[33] https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

3. Misrepresentation of Law

The discussion paper includes the following assertion:

> The High Court of Australia matter of Comcare v. Banerji (2019) in broad terms found that an employer could take action against an employee using an anonymous twitter handle to criticise the government of the day's policies and the department they worked for.

Insofar as it intends to state a principle of general application (as opposed to merely the outcome of the case), it is incorrect. It does not take into account that an employer's actions may be legal or illegal depending on the particular provisions in question, whether they catch the appropriate conduct as a matter of statutory construction, and whether the provisions are, properly construed, inadequate in their balance in pursuit of the legitimate aim of a professional, impartial public service. Banerji's case serves only as authority for the principle that the APS Code of Conduct impugned in that case did not infringe upon the implied freedom of political communication. The case cannot determine what the Department can do in relation to particular incidents which may arise.

Moreover, the limits of the public service's ability to restrict the speech of its employees has not been fully tested yet, despite Banerji. Given the extremity of the conduct in that case, it is still an open question how the court would treat less vituperative criticism of the government on topics less central to the work of the particular department, for example.

4. Proportionality between breach and punishment as a requirement of the Code

The High Court in Comcare v. Banerji (2019) made it clear that:

> Breach of the impugned provisions renders an employee of the APS liable to no greater penalty than is proportionate to the nature and gravity of the employee's misconduct.

It is imperative that, in the Department's revised code, the punishment should be proportional to the breach. And the lower end of this proportionately must be clearly defined. If posting 9000 tweets criticizing your employer results in termination, then any single tweet should be regarded as having no need for disciplinary action whatsoever.

The principle of proportionality demands that the lower end of any scale of severity express or implied in the code need not produce any outcome or infringement whatsoever on the public servant involved.

5. The issue of anonymity

A final consideration is the issue of anonymity. The High Court in Comcare v. Banerji (2019) suggested that anonymity is not a defence for public commentary impugned by social media guidelines of this nature.

As a result, the suggested code would have the impact of affecting the free speech rights of teachers and other Education Department employees, regardless of how they communicate that speech. The inability to engage in private, anonymous online forums or discussions for example, would mean that teachers would have no recourse to public online discussion whatsoever.

The mere fact that anonymity might not always hide someone's identity is not a sufficient explanation for abolishing their free speech rights altogether. In fact, it is part of the history of democracies that

commentary about injustice, illegal behaviour and moral wrongdoing are often, by necessity, made by anonymous voices. To pass this code would impose an unjustified restriction on this commentary.

Conclusion

To return to the question posed by the discussion paper: Where should the department set standards in respect to recognising an employee's choice to engage with social media but ensuring the reputation of the department and public sector?

In the opinion of the NSWCCL any standards regarding the use of social media by Departmental employees should ensure their right to free speech including the right to participate in political discourse, by not going further than absolutely necessary in limiting such rights.

The proposed social media guidelines should be restricted to matters where an employee is conducting illegal behaviour, such as committing criminal offences, through their speech. No further burden on free speech is necessary for the public interest, nor justified in this context.

This submission was prepared by Josh Krook on behalf of the New South Wales Council for Civil Liberties. We hope it is of assistance to the NSW Department of Education.

Yours sincerely,

Secretary
NSW Council for Civil Liberties