

Review of the Adoption of the Model Code on Freedom of Speech and Academic Freedom

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Executive Summary

In March, 2019 the *Review of Freedom of Speech in Australian Higher Education Providers* (the French Review) recommended a Model Code for the Protection of Freedom of Speech and Academic Freedom in Australian Higher Education Providers (the Model Code; see Appendix A). On behalf of its members, Universities Australia advised that universities would adopt the Model Code, adapt it or ensure that the principles of the Model Code were reflected in their policies.

This Review of the Adoption of the Model Code was established in August, 2020. The issues involved are complex and span advice and recommendations to the Minister and suggestions to universities.

The focus of the task was on validating the alignment of universities' policies with the Model Code. Because universities said that they would adopt the Model Code, adapt it or ensure that the principles of the Model Code were reflected in their policies, the analysis did not require duplication of the Model Code. Instead, it centred on whether each university's policy, or policies, align with four 'central concepts' of the Model Code. For a university's policies to be 'fully aligned' with the Model Code they would have to be consistent with each of the four 'central concepts'.

This Review has considered the alignment of universities' policies with the Model Code at a particular point in time. The challenge is to ensure that:

- there is an ongoing commitment to the principles of the Model Code in a way that addresses the areas of non-alignment of current policies that are identified in this Report;
- the principles of the Model Code are embedded in the culture of each university; and
- the public are given confidence that there is no free speech crisis on Australian campuses.

The key findings, recommendations and suggestions are set out below against each of the Terms of Reference; the recommendations and suggestions are also set out in Appendix C.

Term of Reference 1. Validate the alignment of universities' suite of relevant policies with the principles of the Model Code on freedom of speech and academic freedom in higher education providers.

- Thirty-three universities advised that they have completed their implementation of the Model Code; eight advised that they have not completed this work; one university did not respond (paragraph 1.4).
- Of the thirty-three universities that have completed their work to implement the Model Code:
 - nine have policies that are fully aligned with the Model Code (five of these have one or two minor matters in need of attention);
 - fourteen have policies that are mostly aligned, with a small number of areas of non-alignment;
 - four have policies that are partly aligned, with significant areas that are not aligned;
 - six have policies that are not aligned (paragraph 3.7).
- Of the eight universities that have not yet completed their work to implement the Model Code:

- two provided draft policies that, if implemented, would be fully aligned with the Model Code;
- six do not yet have policies or draft policies that are fully aligned (paragraph 3.7).

Even the adoption of the Model Code without modification does not guarantee that it will be understood by everyone; universities are large organisations with many employees engaged in a range of activities that can affect the freedom of speech and academic freedom of other members of staff or students.

It is **suggested** (in paragraph 4) that universities should consider ways of continuously reinforcing the university's commitment to freedom of speech and academic freedom. This could take the form of a briefing as part of the university's induction programs for new staff, new members of the academic board and for new members of the governing body; time could be scheduled for periodic discussion at faculty, academic board and governing body meetings. Induction programs for students could also incorporate a session aimed at educating them about their rights to academic freedom and freedom of speech.

Ways of creating and strengthening a culture committed to freedom of speech and academic freedom are discussed in paragraph 4.2.

Term of Reference 2. Consider whether there are areas of particular strength or weakness in institutional responses and offer any suggestions to institutions where alignment with the Model Code could be improved.

The twenty-one universities that have adopted an overarching policy or code dealing with academic freedom and freedom of speech have addressed academic freedom and freedom of speech in a clearer, more authoritative manner than those that have numerous instruments dealing with aspects of academic freedom and freedom of speech.

It is **suggested** (in paragraph 3.1) that universities should adopt a single, overarching code or policy dealing with freedom of speech and academic freedom.

All universities that have completed the implementation of the Model Code were able to point to a statement that showed that they value academic freedom and freedom of speech. Alignment with the Model Code was strongest where the statement also committed the university to ensuring that academic freedom and freedom of speech are not restricted or burdened except as set out in the university's code or policy dealing with academic freedom and freedom of speech.

It is **suggested** (in paragraph 3.2) that those universities whose policies do not already do so, should strengthen alignment with the Model Code by making it clear that academic freedom and freedom of speech are of such value that they will not be restricted or burdened except by restrictions or burdens permitted by their freedom of speech and academic freedom policy or code.

Thirteen of the thirty-three universities that have completed their implementation work defined academic freedom in a way that limited it to activity "within the staff member's area of expertise" or activity that is consistent with "standards of scholarship" or "professional standards". These terms were not defined; they are open to interpretation in a manner that could limit academic freedom and they are more restrictive of academic freedom than the definition in the Model Code.

It is **suggested** (in paragraph 3.3) that universities should remove from their definition of “academic freedom” limitations that are not included in the Model Code definition.

With the exception of paragraph (7), which deals with visiting speakers, most universities have adopted, or adapted, the *Principles of the Code* section of the Model Code. In the absence of any evidence that paragraph (6) of the *Principles of the Code* is too narrow, no change is recommended to paragraph (7); this means that, to be consistent with the Model Code, universities should adopt or adapt paragraph (7) (paragraph 3.4).

Paragraph (4) of the *Operation* section of the Model Code provides that the Code prevails, to the extent of any inconsistency, over any non-statutory policy or rules of the university. Even where a university has adopted Paragraph (4), having inconsistent rules and policies in operation can be a source of confusion for staff, students and visitors.

It is **suggested** (in paragraph 3.5.1) that every university, even those that have adopted paragraph (4) of the *Operation* section of the Model Code, should undertake a project, within a defined period of time, to review all its policies, rules and codes to ensure that they are not inconsistent with the university’s freedom of speech and academic freedom code or policy.

The French Review expressed concern regarding policies that leave room for the variable exercise of administrative discretions and evaluative judgments; particular kinds of policies, such as staff codes of conduct, were identified (these are listed in paragraph 2.5.4). Paragraphs (3) and (5) of the *Operation* section of the Model Code operate to ensure that powers or discretions of this kind are exercised in accordance with the *Principles of the Code*. It would help decision-makers if the policy that is the source of such a power or discretion were, itself, to provide that the power or discretion must be exercised in accordance with the university’s code or policy dealing with freedom of speech and academic freedom.

It is **suggested** (in paragraph 3.5.2) that all universities, even those that have adopted paragraphs (3) and (5) of the *Operation* section of the Model Code, should review at least their rules, codes and policies dealing with the matters identified in paragraph 2.5.4, that is:

- Student Misconduct Policies
- Codes of Conduct applying to Staff
- Codes of Conduct applying to Students
- Bullying, Discrimination and Harassment Policies or Procedures
- Policies regarding the Hire or Use of University Facilities.

If these include provisions that leave room for the exercise of administrative discretions or evaluative judgments that could limit freedom of speech or academic freedom, they should be amended so as to make it clear that the power or discretion must be exercised in accordance with the university’s freedom of speech and academic freedom code or policy.

[Note: more is required than simply providing that these policies are to be ‘read with’ or ‘subject to’ the university’s code or policy dealing with freedom of speech and academic freedom.]

Some universities have included additional provisos or requirements that must be satisfied to support the *exercise* of freedom of speech or academic freedom. For example, a requirement that freedom of speech and academic freedom must be “conducted reasonably, professionally and in good faith”. Eight of the thirty-three universities that have completed their implementation work require freedom of speech and academic freedom to be exercised in accordance with the

university's code of conduct. These codes of conduct often include requirements of a similar kind. In many cases these provisos and requirements are imprecise and not of a kind authorised by paragraphs (1) or (3) of the *Principles of the Code*. In the case of provisos or requirements that are not of a kind authorised by the *Principles of the Code* section of the Model Code, a solution may be to include these as 'expectations', making it clear that failure to meet the expectation is not sanctionable.

It is **suggested** (in paragraph 3.6.2) that, if a university wishes to include in its policy or code dealing with freedom of speech and academic freedom provisos or requirements of a kind not authorised by the *Principles of the Code* section of the Model Code, it should designate these as "expectations" with which students and staff should comply, but that the policy or code must make it clear that failure to meet these expectations is not sanctionable, that is, it will not constitute misconduct or attract any penalty or adverse action.

Term of Reference 3. Identify exemplars of particularly good practice that could be shared or promoted within the higher education sector.

The approaches of three universities in particular are noted in the Report:

- La Trobe University's *Protection of Freedom of Speech and Academic Freedom Policy* adopts the Model Code. A Working Group oversaw a detailed process that involved assessing all current policies for compliance with the Model Code. This is an exemplar in terms of alignment with the Model Code, its operationalisation and the processes followed.
- The University of Sydney's *Charter of Freedom of Speech and Academic Freedom* is based on a methodical and disciplined consideration of every provision in the Model Code. This is an exemplar in terms of the development of a policy based on a detailed analysis and deep understanding of the Model Code.
- RMIT University's *Intellectual Freedom Policy* includes innovations that are carefully crafted to ensure that they are consistent with the Model Code. This is an exemplar of how, with a deep understanding of the French Review and the Model Code, it is possible to adapt the Model Code to a university's requirements.

Term of Reference 4. Provide advice to the Minister for Education on the overall alignment of universities policies with the principles of the Model Code and, if warranted, any suggestions on how the alignment could be further improved.

It is apparent from the statistics set out above regarding Term of Reference 1, that:

- some universities have not completed the process of adopting the Model Code, adapting it or ensuring that the principles of the Model Code are reflected in their policies
- in the case of universities that consider that they have completed the process, the majority have policies that are fully aligned or mostly aligned with the Model Code, but, in the case of some universities' policies, there are areas of non-alignment – in some policies, such significant areas of non-alignment that they have been assessed as 'not aligned'.

There is a role for university governing bodies in ensuring the alignment of university policies with the principles of the Model Code and in the fostering of a culture committed to freedom of speech and academic freedom. This could take the form of an annual freedom of speech and academic freedom attestation statement made by the governing body and published in the university's annual report. The attestation statement would need to be based on the governing body's active engagement both in satisfying itself of the alignment of the university's freedom of speech and academic freedom policy or code with the principles of the Model Code and in the governance oversight of the implementation of that policy or code. The attestation statement would provide a focal point for governance and management; it should drive ongoing engagement and consideration of freedom of speech and academic freedom.

It is suggested that a small group of Chancellors, chaired by the Chair of the University Chancellors Council (UCC), should be asked to develop a template setting out mandatory and optional reporting matters (some suggestions are listed in paragraph 5.1). The only non-negotiable should be that every attestation statement must identify the university's main policy or policies regarding freedom of speech and academic freedom and state whether, in the opinion of the governing body, they are consistent with the Model Code.

It is **recommended** (in paragraph 5.1) that

- (i) the Model Code be amended to include a requirement that the university's governing body prepares an annual attestation statement regarding freedom of speech and academic freedom and that this is published in the university's annual report; at a minimum, this must identify the university's main policy or policies regarding freedom of speech and academic freedom and state whether, in the opinion of the governing body, they are consistent with the Model Code;
- (ii) the first attestation statement to be published should explain what has been done to respond to the information provided by the Department regarding the assessment of the alignment of the university's policy or policies with the Model Code;
- (iii) a small group of Chancellors, chaired by the Chair of the UCC, should be asked to develop a template identifying other mandatory and optional matters to be included in the annual freedom of speech and academic freedom attestation statement made by the governing body and published in the annual report.

Term of Reference 5. Provide advice to the Minister for Education on whether the Code needs further refinement or change.

If the *Higher Education Support Amendment (Freedom of Speech) Bill 2020* is enacted, the *Higher Education Support Act 2003* (Cth) will define "academic freedom" in accordance with the definition in the UCC version of the Model Code. To ensure consistency, both the definition of "academic freedom" and paragraph (2) of the *Principles of the Code* section of the Model Code should be amended so they are consistent with the UCC version of the Model Code (see paragraphs 2.3 and 2.4).

If the *Higher Education Support Act 2003* (Cth) is amended to include the definition of "academic freedom" in the UCC version of the Model Code, it is **recommended** (in paragraph 2.4) that the Model Code be amended by

- (i) replacing the definition of “academic freedom” in the Model Code with the definition of “academic freedom” in the UCC version of the Model Code; and
- (ii) replacing paragraph (2) of the *Principles of the Code* section in the Model Code with paragraph (2) of the *Principles of the Code* section in the UCC version of the Model Code.

The policies of a number of universities do not align with the *Operation* section of the Model Code which aims to address the problems arising from diverse and broadly framed rules, codes and policies affecting, or capable of affecting, freedom of speech and academic freedom (see paragraphs 2.5.4 and 3.5.3). Some universities argued that giving the *Principles of the Code* overriding effect could create uncertainty regarding the operation of their other policies. There is substance to this argument, particularly so far as paragraph (4) of the *Operation* section of the Model Code is concerned, and, to a lesser extent, also regarding paragraphs (2), (3) and (5) of the *Operation* section of the Model Code. The objectives of paragraphs (2), (3), (4) and (5) of the *Operation* section of the Model Code could be achieved by a university undertaking the considerable task of bringing all its existing policies and rules into alignment with the *Principles of the Code*.

It is **recommended** (in paragraph 3.5.3) that the Model Code be amended by inserting a note to the *Operation* section that provides:

“As an alternative to adopting some or all of paragraphs (2), (3), (4) and (5) of the *Operation* section of the Model Code, a university may confirm that it has brought all its existing policies and rules into alignment with the *Principles of the Code*.”

Several universities asserted that their policies were consistent with paragraph (2) of the *Application* section of the Model Code as they apply to students, but paragraph (2) of the *Application* section is directed at the application of the Model Code **by** student representative bodies. Where a student representative body is a separate legal entity, a university should use its best endeavours to encourage that entity to adopt the university’s policy on freedom of speech and academic freedom.

It is **recommended** (in paragraph 3.6.1) that the Model Code be amended by inserting a note to paragraph (2) of the *Application* section that provides:

“Where a student representative body is a separate legal entity, the university will use its best endeavours to encourage it to adopt the university’s policy on freedom of speech and academic freedom.”

The Terms of Reference for this Review are focused on the alignment of universities’ policies with the Model Code. The Terms of Reference do not contemplate the type of investigation that would need to be undertaken to determine whether there is a need for each university to establish a formal complaints procedure.

It is **recommended** (in paragraph 5.2) that the need for a complaints process to be included in the Model Code could be the subject of future consideration.

Review of the Adoption of the Model Code on Freedom of Speech and Academic Freedom

1. Introduction

1.1 Background and Terms of Reference

In March, 2019 the Hon Robert French AC completed a *Review of Freedom of Speech in Australian Higher Education Providers* (the French Review).¹ The French Review recommended:

- a Model Code for the Protection of Freedom of Speech and Academic Freedom in Australian Higher Education Providers (the Model Code) (see paragraph 2 below); and
- amendments to the *Higher Education Support Act 2003* (Cth) and the *Higher Education Standards Framework* to align them with the terminology in the Model Code (see paragraph 2.4 below).

In his address to the Universities Australia Conference in February, 2020, the Hon Dan Tehan MP, Minister for Education, made it clear that the Government expected universities to implement the Model Code by the end of 2020.² On behalf of its members, Universities Australia (UA)³ advised that universities would adopt the Model Code, adapt it or ensure that the principles of the Model Code were reflected in their policies.⁴

This Review of the Adoption of the Model Code was established in August, 2020. The Terms of Reference are to:

1. Validate the alignment of universities' suite of relevant policies with the principles of the Model Code on freedom of speech and academic freedom in higher education providers;

¹ <https://docs.education.gov.au/node/52661> (accessed 1 November, 2020). The Terms of Reference for the French Review are set out at <https://ministers.dese.gov.au/tehan/review-university-freedom-speech> (accessed 1 November, 2020).

² <https://ministers.dese.gov.au/tehan/universities-australia-conference> (accessed 23 November, 2020).

³ <https://www.universitiesaustralia.edu.au/>; <https://www.universitiesaustralia.edu.au/our-universities/university-profiles/> lists the thirty-nine members of Universities Australia (accessed 1 November, 2020).

⁴ Letter of 3 September, 2019 from Professor Deborah Terry, Chair, Universities Australia to the Minister for Education which refers to how universities intend to “adopt, adapt, or ensure the principles of the code are reflected” in their policies. See also <https://www.universitiesaustralia.edu.au/media-item/government-backs-importance-of-freedom-of-expression/> (accessed 1 November, 2020);

2. Consider whether there are areas of particular strength or weakness in institutional responses and offer any suggestions to institutions where alignment with the Model Code could be improved;
3. Identify exemplars of particularly good practice that could be shared or promoted within the higher education sector;
4. Provide advice to the Minister for Education on the overall alignment of universities policies with the principles of the Model Code and, if warranted, any suggestions on how the alignment could be further improved;
5. Provide advice to the Minister for Education on whether the Code needs further refinement or change.⁵

1.2 Approach taken

The aim of this Review is to:

- offer advice and suggestions to universities to assist sector-wide adoption of, and consistency with, the principles of the Model Code, while acknowledging the autonomy of universities to adapt the Model Code to each university's particular context and circumstances;
- provide the Minister with advice on the overall alignment of policies across the university sector with the principles of the Model Code and on whether the Model Code needs any amendment.

The Terms of Reference require what might be described as a *technical* validation of the alignment of each university's policies with the principles of the Model Code so that, based on this, an assessment can be made of the overall alignment of universities' policies with the principles of the Model Code (see paragraph 3 below).

The Terms of Reference also seek advice to the Minister on whether the Code needs refinement or change. A recommendation for amending the Code might be based on a need to rectify problems universities have had either:

- in adopting or adapting the Model Code or ensuring that the principles of the Model Code are reflected in their policies; or
- in applying the principles of the Model Code.

Providing advice to the Minister on whether the Code needs refinement or change also requires a *qualitative* assessment of whether the universities' policies are effective to achieve the objectives of the French Review and the Model Code (see paragraphs 2.1 and

⁵ <https://ministers.dese.gov.au/tehan/evaluating-progress-free-speech> (accessed 1 November, 2020).

2.2 below). This assessment draws on an understanding of how universities, and their management and governance, operate (see paragraph 4.2 below).

Advice is given and some suggestions are made to universities regarding how they might achieve consistency with the principles of the Model Code. Recommendations are made to the Minister for amendments to the Model Code. The suggestions and recommendations are made in the body of this Report, but they are also set out in Appendix C.

1.2.1 A note on scope and terminology

Although the headings to both the French Review and the Model Code refer to “higher education providers”, the Model Code is expressed to apply to universities. The Terms of Reference for this Review make it clear that it is about universities’ responses to the Model Code.

Some of the Terms of Reference refer to “the principles of the Model Code”. This Review has not taken this to be limited, narrowly, to the section of the Model Code headed *Principles of the Code*. The *Principles of the Code* section of the Model Code cannot be properly understood without having regard to other parts of the Model Code. This is obvious in the case of the *Definitions*, but the sections headed *Application* and *Operation* are also essential to the role of the *Principles of the Code*. The approach taken is consistent with other Terms of Reference that refer to “the Model Code” and “the Code”.

1.3 Consultation

On 31 August, 2020 letters were sent to the Vice-Chancellors of Australia’s forty-two universities seeking their submissions regarding any aspect of the Terms of Reference. Vice-Chancellors were asked not to be limited by the following matters in making their submissions, but they were asked to identify:

- any problems the university has had in aligning its policies with the principles of the Model Code;
- if relevant, the reasons why the university’s policies diverge in some substantial way from the principles of the Model Code or do not address some substantive aspect of the Model Code;
- what steps the university has taken to ensure that its policies regarding freedom of speech and academic freedom are known and understood throughout the university; and
- who is responsible for ensuring compliance with the policies.

Thirty-four universities made a submission.

Student associations and groups were also invited to make a submission as were State and Territory Education Ministers, university groups, the National Tertiary Education Union (NTEU) and others who had made a submission to the French Review.

To discuss matters arising from the Terms of Reference:

- a teleconference was held with Mr Stephen Gerlach AM, Chancellor of Flinders University, in his role as the current Convenor of the University Chancellors Council (UCC);⁶
- a videoconference was held with Professor Nick Saunders AO, Chief Commissioner, Mr Alistair Maclean, Chief Executive Officer, Mr Greg Simmons, Director, Policy and Analysis, and Ms Rosemary Marcon, Manager, Executive Office, Tertiary Education Quality and Standards Agency (TEQSA);⁷ and
- a meeting was held with Ms Catriona Jackson, Chief Executive and Director, and Dr Krisztian Baranyai, Policy Analyst, Universities Australia (UA).⁸

At their request, a video conference was held with Ms Elaine Pearson, Australia Director, and Dr Sophie Richardson, China Director, Human Rights Watch.⁹ Following this, a video conference was held with Professor Ian Jacobs, Vice-Chancellor, and Professor George Williams, Deputy Vice-Chancellor, Planning and Assurance, University of New South Wales.¹⁰

A submission was made by Ms Pnina Levine, a Lecturer from the Curtin University School of Law, who researches in the areas of academic discipline and academic freedom.¹¹

1.4 Assistance from the Department of Education, Skills and Employment

In preparation for the Review, the Department of Education, Skills and Employment (the Department) had ascertained that, at 19 August, 2020, twenty-two universities considered that they had completed their work in implementing the Model Code. The Department had undertaken a preliminary comparison of these universities' policies with the Model Code. The Department wrote to the Vice-Chancellors of each of these twenty-two universities asking them to validate the Department's assessment of the university's policies and to explain why any aspect of the Model Code had been modified, or remained unaddressed, in the university's policy framework. This work has contributed to the analysis in this Review.

The Department wrote to the Vice-Chancellors of the remaining twenty universities seeking information on progress in addressing the Model Code. This information has also contributed to this Review.

Since these letters were written, some more universities have advised that they have completed their work.

⁶ [https://ucc.edu.au/home-ucc#:~:text=The%20University%20Chancellors%20Council%20\(UCC,tertiary%20education%20sector%20in%20Australia](https://ucc.edu.au/home-ucc#:~:text=The%20University%20Chancellors%20Council%20(UCC,tertiary%20education%20sector%20in%20Australia) (accessed 1 November, 2020).

⁷ <https://www.teqsa.gov.au/> (accessed 1 November, 2020).

⁸ <https://www.universitiesaustralia.edu.au/> (accessed 1 November, 2020).

⁹ Video conference, 14 October, 2020 followed by an email submission dated 21 October, 2020 from Ms Pearson.

¹⁰ Video conference, 4 November, 2020 followed by a letter from the Vice-Chancellor dated 5 November, 2020.

¹¹ Email from Ms Levine dated 13 November, 2020 which was by a conference call on 18 November, 2020.

Thirty-three universities advised that they have completed their work: Australian Catholic University; Bond University; Central Queensland University; Charles Darwin University; Curtin University; Deakin University; Edith Cowan University; Federation University Australia; Flinders University; Griffith University; James Cook University; La Trobe University; Macquarie University; Monash University; Queensland University of Technology; RMIT University; Southern Cross University; Torrens University; University of Adelaide; University of Melbourne; University of Newcastle; University of New South Wales; University of Notre Dame; University of Queensland; University of South Australia; University of the Sunshine Coast; University of Sydney; University of Tasmania; University of Technology Sydney; University of Western Australia; University of Wollongong; Victoria University; Western Sydney University.

Eight universities advised that they have not completed their work: the Australian National University; Charles Sturt University; Murdoch University; Swinburne University of Technology; University of Canberra; University of Divinity; University of New England; University of Southern Queensland.

Carnegie Mellon University Australia did not provide information regarding its progress in implementing the Model Code.

2. The Model Code

The Model Code as recommended by the French Review is set out in Appendix A.

2.1 Objectives of the recommendations made by the French Review

The French Review was prompted by the public airing of concerns about freedom of speech and academic freedom in Australian universities.¹² It recommended that *protection for freedom of speech and academic freedom be strengthened* within the sector by the adoption of umbrella principles embedded in a code of practice for each institution.¹³

Given debate about the boundaries of freedom of speech and academic freedom, another objective of the French Review was to *clarify the meaning and limits of freedom of speech and academic freedom*.¹⁴

A third, key objective was to *support a culture disposed to freedom of speech and academic freedom*. It was suggested that a code of practice, which is owned by the sector, offers more promise in supporting a culture disposed to these freedoms than rules imposed by prescription.¹⁵

The French Review did not recommend increased government regulation;¹⁶ one reason for this was to *ensure institutional autonomy*.¹⁷

2.2 The Model Code as a sector-wide resource

The French Review hoped that the Model Code would encourage universities to share experiences and thereby promote the consistent application of the principles of the Code or their variation by the sector.¹⁸

Ms Catriona Jackson, Chief Executive and Director of UA, advised that UA has discussed academic freedom, freedom of speech and the Model Code in plenary sessions as and when issues have arisen.¹⁹

TEQSA's Corporate Plan 2019-2023 provides that TEQSA will "work with the sector on the [French] review's implications for an understanding of responsibilities under the Higher

¹² *Review of Freedom of Speech in Australian Higher Education Providers* page 13.

¹³ *Ibid* page 14.

¹⁴ *Ibid* page 13; see also pages 34, 49 and 114.

¹⁵ *Ibid* page 225.

¹⁶ *Ibid* page 14; see also pages 39 and 212.

¹⁷ *Ibid* pages 14, 18, 211, 220 and 222.

¹⁸ *Ibid* pages 211, 216, 220 and 294.

¹⁹ Meeting with Ms Catriona Jackson, Chief Executive and Director, and Dr Krisztian Baranyai, Policy Analyst - Research and Innovation, UA, 23 September, 2020.

Education Standards Framework.”²⁰ TEQSA has not taken any formal position on matters such as the UCC’s revisions to the Model Code.²¹

The UCC is the body that seems to have taken the lead role in discussing the Model Code and developing a shared understanding of it; see paragraph 2.3 below. It is appropriate that the UCC should have taken this leadership position, particularly given that freedom of speech and academic freedom have been the subject of some public concern (see paragraphs 2.1 and 2.5.2). One of the roles of the UCC is to provide a forum for communication and discussion²² and Chancellors would be aware of the role of the governing body in relation to upholding and protecting freedom of speech and academic freedom (see paragraph 5.1 below).

2.3 The UCC version of the Model Code

The French Review was discussed at the UCC’s meeting held in May 2019. In June, 2019, a Working Group, whose members were Mr French, in his role as Chancellor of the University of Western Australia, together with the Hon Gareth Evans AC, then Chancellor of the Australian National University, and Mr Peter Varghese AO, Chancellor of the University of Queensland, circulated a revised version of the Model Code for consideration by the UCC. The UCC Convenor advised that the revisions were endorsed by the UCC and that the updated version was formally adopted by the UCC.²³ This “UCC version of the Model Code” is set out in Appendix B, with the revisions to the Model Code highlighted.

One difference between the Model Code and the UCC version of the Model Code relates to the way that they deal with the freedom of academic staff to comment on issues in their personal capacities. The Model Code defines “academic freedom” to include:

“the freedom of academic staff, without constraint imposed by reason of their employment by the university, to make lawful public comment on any issue in their personal capacities”.

It seems that the UCC considered that including, in the definition of “academic freedom”, comments made in a personal capacity, confused freedom of speech and academic freedom.²⁴ Accordingly, the UCC version removes the personal capacity aspect of the definition of “academic freedom” from the definition section and inserts it, instead, in a not materially different form in that part of the Code that deals with freedom of speech. It provides that:

²⁰ <https://www.teqsa.gov.au/sites/default/files/corporate-plan-2019-23-web.pdf?v=1571613989> page 13 (accessed 1 November, 2020).

²¹ Videoconference with Professor Nick Saunders AO, Chief Commissioner, Mr Alistair Maclean, Chief Executive Officer, Mr Greg Simmons, Director, Policy and Analysis, and Ms Rosemary Marcon, Manager, Executive Office, TEQSA, 22 September, 2020.

²² <https://ucc.edu.au/home-ucc> (accessed 1 November, 2020).

²³ Teleconference with Mr Stephen Gerlach AM, Chancellor of Flinders University, in his role as Convenor of the UCC, 22 September, 2020.

²⁴ Letter from Mr Stephen Gerlach AM, Chancellor of Flinders University, in his role as Convenor of the UCC, 24 September, 2020 page 1.

“... the freedom of academic staff to make lawful public comment on any issue in their personal capacities [shall not] be subject to constraint imposed by reason of their employment by the university.”

(see paragraph (2) of the *Principles of the Code* section of the UCC version of the Model Code in Appendix B).

Accordingly, for the purpose of this Review, which is based on the documents read as a whole, there is no substantive difference between the Model Code and the UCC version of the Model Code (see paragraph 3.3 below).

2.4 Making the terminology in the *Higher Education Support Act*, the *Higher Education Standards Framework* and the Model Code consistent

The French Review recommended amendments to the *Higher Education Support Act 2003 (Cth) (HESA)*²⁵ and the *Higher Education Standards Framework (Standards Framework)*.²⁶ The amendments would make the terminology in those documents consistent with that in the Model Code. It was made clear that this was not essential to support the Model Code or to render it compliant with the Act or the Standards.²⁷

In October, 2020 the Australian Government introduced the *Higher Education Support Amendment (Freedom of Speech) Bill 2020* into the Commonwealth Parliament. If enacted, this will amend the *HESA* to insert a new definition of “academic freedom” and replace the current term - “free intellectual inquiry” - with “freedom of speech and academic freedom”. Section 19-115 of the *HESA* will require universities to

“have a policy that upholds freedom of speech and academic freedom”.

“Academic freedom” will be defined in the legislation in accordance with the definition in the UCC version of the Model Code (see paragraph 2.3 above).

The following recommendation is made to ensure consistency.

If the *Higher Education Support Act 2003 (Cth)* is amended to include the definition of “academic freedom” in the UCC version of the Model Code, it is **recommended** that the Model Code be amended by

- (i) replacing the definition of “academic freedom” in the Model Code with the definition of “academic freedom” in the UCC version of the Model Code; and
- (ii) replacing paragraph (2) of the *Principles of the Code* section in the Model Code with paragraph (2) of the *Principles of the Code* section in the UCC version of the Model Code.

²⁵ Paragraph 2-1(iv) and Section 19-115; see *Review of Freedom of Speech in Australian Higher Education Providers* pages 226-7.

²⁶ *Higher Education Standards Framework (Threshold Standards) 2015* paragraphs 6.1 4 and B1.1; see *Review of Freedom of Speech in Australian Higher Education Providers* page 228.

²⁷ *Review of Freedom of Speech in Australian Higher Education Providers* pages 226 and 228.

2.5 The ‘central concepts’ on which the Model Code is based: a framework for validating the alignment of universities’ policies with the Model Code

Identifying what can be described as the ‘central concepts’ on which the Model Code is based, provides not only for greater understanding of the Model Code, but also a structure for addressing the Terms of Reference. The four central concepts, which overlap, are discussed in paragraphs 2.5.1- 2.5.4. They provide a framework against which the alignment of universities’ policies with the Model Code is assessed in paragraph 3 below. The four central concepts are:

- (1) Academic freedom is a defining value and characteristic of universities and freedom of speech of staff, students and visitors is a paramount value (see paragraph 2.5.1 below)
- (2) Academic freedom and freedom of speech are matters of public concern that should be addressed in a clear, comprehensive and authoritative way (see paragraph 2.5.2 below)
- (3) “Umbrella principles”, dealing with freedom of speech and academic freedom, should inform all other rules and policies (see paragraph 2.5.3 below)
- (4) Broadly framed rules, codes and policies that involve the exercise of administrative discretions and evaluative judgments should not be allowed to erode freedom of speech and academic freedom (see paragraph 2.5.4 below).

2.5.1 Academic freedom is a defining value and characteristic of universities and freedom of speech of staff, students and visitors is a paramount value

The French Review concluded that the “essential elements and history [of academic freedom] ... mark it as a defining characteristic of universities”.²⁸

The second of the *Objects* of the Model Code, read together with the *Principles of the Code*, reflects this characterisation of the value to be accorded to academic freedom:

To ensure that academic freedom is treated as a defining value by the university and therefore not restricted nor its exercise unnecessarily burdened by restrictions or burdens other than those imposed by law and set out in the Principles of the Code.

It should be noted that there are two aspects to this formulation; academic freedom is not only a defining value, but, also, because of this, it is not to be restricted or burdened except in the ways specified.

“Freedom of expression” was categorised by the French Review as a free-standing value to be applied by higher education providers and as an aspect of academic freedom.²⁹

²⁸ Ibid page 114; see also pages 18 and 35 and Chapter 11.

²⁹ Ibid pages 18, 192, 214-5, 222 and 224.

The designation of the freedom of lawful speech of staff, students and visitors to universities as a “paramount value” created some concern when comments were received regarding a first draft of the Model Code.³⁰ The French Review clarified the position by explaining that the use of the term “paramount” accords the freedom a priority, which is not absolute, over other values and interests; accordingly:

“[f]reedom of speech can be described as paramount yet subject to limitations imposed by law and reasonable and proportionate limitations imposed by an institution to enable it to discharge its functions.”³¹

The first of the *Objects* of the Model Code, read together with the *Principles of the Code*, reflects this characterisation of the value to be accorded to the freedom of lawful speech of every member of staff, students and visiting speakers:

To ensure that the freedom of lawful speech of staff and students of the university and visitors to the university is treated as a paramount value and therefore is not restricted nor its exercise unnecessarily burdened by restrictions or burdens other than those imposed by law and set out in the Principles of the Code.

Again, there are two aspects to this formulation; freedom of lawful speech is not only a paramount value, but, also, because of this, it is not to be restricted or burdened except in the ways specified.

2.5.2 Academic freedom and freedom of speech are matters of public concern that should be addressed in a clear, comprehensive and authoritative way

The French Review concluded that, from the available evidence, “claims of a freedom of speech crisis on Australian campuses are not substantiated”;³² there was no “systemic pattern” of action adverse to freedom of speech.³³ Nonetheless, it was noted that there is an issue of principle and policy that is a matter of public concern; this should properly be addressed by the sector in as “clear and comprehensive and authoritative way as it can.”³⁴

2.5.3 “Umbrella principles”, dealing with freedom of speech and academic freedom, should inform all other rules and policies

The French Review emphasised the benefits of adopting a set of umbrella principles on freedom of speech and academic freedom, informing all other rules and policies. Umbrella principles would improve “the accessibility of ... important information to university decision-makers, other staff, students and the wider community”.³⁵ These umbrella principles are set out in the section of the Model Code headed *Principles of the Code*.

³⁰ Ibid page 213.

³¹ Ibid page 213.

³² Ibid page 13.

³³ Ibid page 217.

³⁴ Ibid page 89.

³⁵ Ibid page 157; see also page 175 dealing with the value of overarching statements in relation to administrative judgments regarding the use of university land or facilities.

2.5.4 Broadly framed rules, codes and policies that involve the exercise of administrative discretions and evaluative judgments should not be allowed to erode freedom of speech and academic freedom

The French Review noted that universities had a range of diverse and broadly framed rules, codes and policies relating to, affecting, or capable of affecting freedom of speech and academic freedom; these:

“leave room for the variable exercise of administrative discretions and evaluative judgments. ... [They] are capable of eroding the fundamental freedom of speech and that freedom of speech which is an essential element of academic freedom. That fact constitutes a risk to those freedoms and makes the sector an easy target for criticism.”³⁶

The breadth of university rules, codes and policies was the basis for a critique regarding:

- **Student Misconduct Policies** that define misconduct as behaving in a manner detrimental to the ‘good repute’ of the university or ‘causing another person to fear for their wellbeing’;³⁷
- **Codes of Conduct applying to Staff** that refer to the risk of harm to the ‘reputation’ or ‘prestige’ of the university’;³⁸
- **Codes of Conduct applying to Students** that characterise some conduct by how it ‘may reasonably be perceived’³⁹ or that provide that reputational damage to the university is a qualifier on student freedom of expression;⁴⁰
- **Bullying, Discrimination and Harassment Policies or Procedures** that are expressed so broadly that it may be difficult for those who are bound by them to determine their limits;⁴¹
- **Policies regarding the Hire or Use of University Facilities** that deny access based on judgments about activities being ‘inappropriate’ or ‘conflicting with the university’s mission, goals or values’.⁴²

The French Review envisaged that the Model Code could be applied to guide the exercise of powers and discretions, effectively restraining “the exercise of overbroad powers to the extent that they would otherwise be applied adversely to freedom of speech and academic freedom without proper justification.”⁴³ Accordingly, the *Operation* section of the Model Code provides that:

- (1) The university shall have regard to the Principles of this Code in the drafting, review or amendment of any non-statutory policies or rules and in the

³⁶ Ibid page 14; see also pages 217-218.

³⁷ Ibid page 153; see also pages 139-140 regarding the rules of some universities relating to student misconduct, procedures for investigating alleged misconduct and the imposition of penalties relating to student misconduct.

³⁸ Ibid pages 214-215.

³⁹ Ibid page 150.

⁴⁰ Ibid page 151.

⁴¹ Ibid page 163; see also page 164 regarding ‘unintentional discrimination or harassment’.

⁴² Ibid page 172.

⁴³ Ibid page 219.

drafting, review or amendment of delegated legislation pursuant to any delegated law-making powers.

- (2) Non-statutory policies and rules of the university shall be interpreted and applied, so far as is reasonably practicable, in accordance with the Principles of this Code.
- (3) Any power or discretion under a non-statutory policy or rule of the university shall be exercised in accordance with the Principles in this Code.
- (4) This Code prevails, to the extent of any inconsistency, over any non-statutory policy or rules of the university.
- (5) Any power or discretion conferred on the university by a law made by the university in the exercise of its delegated law-making powers shall be exercised, so far as that law allows, in accordance with the Principles of this Code.
- (6) Any power or discretion conferred on the university under any contract or workplace agreement shall be exercised, so far as it is consistent with the terms of that contract or workplace agreement, in accordance with the Principles of this Code.

3. Alignment of universities' policies with the principles of the Model Code

The following framework, which is based on the four 'central concepts' of the Model Code identified in paragraph 2.5 above, was used to validate the alignment of universities' policies with the Model Code. Rather than looking for duplication of the Model Code, the analysis centred on whether each university's policy, or policies, align with the four 'central concepts' of the Model Code explained in paragraphs 2.5.1-2.5.4 above:

- (1) Is academic freedom treated as a defining value and characteristic and is freedom of speech of staff, students and visitors treated as a paramount value in a manner consistent with the Model Code? (see paragraph 2.5.1 above and paragraph 3.2 below)
- (2) Have academic freedom and freedom of speech been addressed in a clear, comprehensive and authoritative way consistently with the Model Code? (see paragraph 2.5.2 above and paragraph 3.3 below)
- (3) Have "umbrella principles", dealing with freedom of speech and academic freedom, been identified to inform all other rules and policies in the manner envisaged by the Model Code? (see paragraph 2.5.3 above and paragraph 3.4 below)
- (4) Has the university ensured that broadly framed rules, codes and policies that involve the exercise of administrative discretions and evaluative judgments will not erode freedom of speech and academic freedom? (see paragraph 2.5.4 above and paragraph 3.5 below).

For a university's policies to be described as "fully aligned" they would have to be consistent with each of these four 'central concepts' of the Model Code. As previously noted, universities agreed that they would adopt the Model Code, adapt it or ensure that the principles of the Model Code were reflected in their policies. It follows that a university's policy, or policies, could be said to be aligned with the Model Code without being an exact replica of it.

Paragraphs 3.2-3.5 identify areas of strength or weakness in universities' responses and offer suggestions regarding how alignment with the Model Code could be improved. The observations in these paragraphs are written with a view to assisting each university to bring its policies into alignment with the Model Code.

Some specific areas of non-alignment are also identified and explained in paragraph 3.6.

Recommendations are made to the Minister regarding refinements to the Model Code based on the experience of universities to date in working with the Model Code.

Before turning to these matters, there is one issue that proved to be perhaps the most significant in terms of ensuring alignment with the Model Code; this was whether an overarching code or policy was adopted or, instead, the university relied on several policies or other instruments to set out its position regarding freedom of speech and academic freedom.

3.1 An overarching code or policy or several sources

Twenty-one of the thirty-three universities that have completed their implementation of the Model Code have adopted an overarching policy or code dealing with academic freedom and freedom of speech.

In the case of seven universities, to determine what is the university's approach to academic freedom and freedom of speech, it was necessary to have regard to a number of instruments including some or all of: the legislation establishing the university, the university's strategic plan, its vision or mission statement, its enterprise agreement and a number of codes and policies dealing with staff conduct, research conduct, student conduct, media commentary and hire of facilities. Taken together, a suite of instruments could align with the principles of the Model Code, but, almost without exception, single, overarching codes or policies were found to be more strongly aligned with the principles of the Model Code.

The universities that have adopted a single, overarching code or policy were found to have addressed academic freedom and freedom of speech in a clearer, more authoritative manner than those that have numerous instruments dealing with aspects of academic freedom and freedom of speech (see the discussion in paragraph 2.5.2 above and paragraph 3.3 below).

This Review had the advantage of having input from each university regarding their policies (see paragraph 1.4 above). In the case of some universities, without this it would have been extremely difficult to identify how the university's policy suite aligned with the principles of the Model Code or, frankly, even which of the university's policies were relevant. This was because these universities referred to provisions in a variety of instruments that were directed at wider issues, but which included some provision that touched on some aspect of academic freedom or freedom of speech; sometimes the various provisions were inconsistent.

Overarching codes or policies are better able to provide members of staff, students and the public with clarity and confidence regarding the university's approach. This is of value not only to those who benefit from the provisions regarding freedom of speech and academic freedom, but also to those who have to interpret and apply them and those who have to interpret and apply other rules and policies that might affect freedom of speech and academic freedom (see paragraph 2.5.4 above). Being able to point to a single code or policy is also conducive to giving the public confidence that freedom of speech and academic freedom is a core focus of the university (see the discussion in paragraph 2.5.2 above and paragraph 3.3 below).

Overarching codes or policies are also more likely to create a culture in which freedom of speech and academic freedom are valued than a policy framework requiring people to locate aspects of the university's approach addressed in a piecemeal manner in numerous documents (see paragraph 4.2 below).

Where it is necessary to have regard to statements in a diverse range of instruments to gain an understanding of a university's approach, the authority of each instrument is diminished and clarity can be lost.

Overarching codes or policies dealing with academic freedom and freedom of speech also better facilitate the sharing by universities of their experiences and the promotion of a consistent application of the principles of the Model Code by the sector (see paragraph 2.2 above).

Five of the thirty-three universities that have completed their implementation of the Model Code have adopted two statements, policies or codes: one dealing with academic freedom and another dealing with freedom of speech. While this is preferable to numerous instruments, the analysis showed that it is not without problems. The reason usually given for adopting two instruments was to keep academic freedom and freedom of speech separate. Freedom of speech was, however, categorised by the French Review, not only as a free-standing value, but also as an aspect of academic freedom.⁴⁴ This is reflected in the definition of "academic freedom" in the Model Code that includes references to the freedom of academic staff and students to express opinions, and contribute to public debate, in relation to their subjects of study and research and to express their opinions in relation to their university. Because freedom of speech is an aspect of academic freedom, universities that have one policy or code dealing with academic freedom and another dealing with freedom of speech were generally found to have interlocking and sometimes overlapping instruments; this is not conducive to clarity. It was also observed that, in some cases, the two instruments were inconsistent in relation to key matters such as the definition of academic freedom. One university's policy regarding academic freedom did not apply to students.

Some universities delegated to their academic board the task of preparing a statement on academic freedom. Academic boards are collegial bodies and, perhaps as a result of this, some of these statements had the appearance of being drafted in committee. In some cases, it was apparent that the academic board did not have a full understanding of how the objectives and findings of the French Review influenced the development of the Model Code. For example, these statements often limited academic freedom in a manner not contemplated by the definition of academic freedom in the Model Code (paragraph 3.3 below identifies some examples). This is not meant as a criticism of academic boards. If a university's academic board is asked to prepare a statement on academic freedom, it would, however, be beneficial if someone who is familiar with the details of the French Review were to assist with the drafting process to ensure that the statement is consistent with the

⁴⁴ Ibid page 18 "[f]reedom of speech is an aspect of academic freedom although used in a sense which is not congruent with the general freedom of expression applicable on and off campus. It is a freedom which, in this context, reflects the distinctive relationship of academic staff and universities"; see also pages 192, 214 and 222.

principles of the Model Code and not inconsistent with the university's statement or policy on freedom of speech.

It is **suggested** that universities should adopt a single, overarching code or policy dealing with freedom of speech and academic freedom.

3.2 Is academic freedom treated as a defining value and characteristic and is freedom of speech of staff, students and visitors treated as a paramount value in a manner consistent with the Model Code?

In assessing the alignment of each university's policies with this 'central concept' of the Model Code, it was not seen as essential that the policy uses the term "defining" to describe the value accorded to academic freedom or "paramount" to describe the value accorded to freedom of speech. Instead, it was asked whether the policies treat academic freedom and freedom of speech in a manner that is consistent with these characterisations.

The first and second *Objects* of the Model Code refer to freedom of lawful speech and academic freedom not being "restricted" or their exercise "unnecessarily burdened". Particular concern was expressed in the French Review regarding restrictions:

"imposed by reason of managerial concerns about 'reputation' and 'prestige' or the effect of ... [the conduct of academic staff] on government and private sector funding or on particular philanthropic donors."⁴⁵

Accordingly, an important aspect of assessing the alignment of each university's policies with the principles of the Model Code was to determine whether they are consistent with the value accorded to academic freedom and freedom of lawful speech as being of such significance that they are not restricted or their exercise burdened by restrictions or burdens other than those imposed by law and set out in the *Principles of the Code* section of the Model Code.

All universities that have completed the implementation of the Model Code were able to point to a statement that showed that they value academic freedom and freedom of speech, but the *Objects* section of the Model Code also commits the university to ensuring that academic freedom and freedom of speech are not restricted or burdened except as set out. Alignment with the Model Code was, therefore, strongest where the statement also committed the university to ensuring that academic freedom and freedom of speech are not restricted or burdened except as set out in its code or policy dealing with academic freedom and freedom of speech.

The Federal, State or Territory legislation that establishes most Australian universities, generally includes, in the objects or functions of the university, provisions that relate to freedom of inquiry or academic freedom. Several universities referred to this legislation, and one university referred to this legislation alone, as evidence of alignment with the *Objects* section of the Model Code. Nonetheless, as the French Review explained, while these Acts *acknowledge* freedom of inquiry and academic freedom, they do not *restrain*

⁴⁵ Ibid page 216.

rule-making powers by reference to those considerations.⁴⁶ Accordingly, the legislation establishing a university was not considered enough on its own to align a university's policy suite with this central concept of the Model Code.

One university expressed the view that freedom of speech and academic freedom are fundamental values that are applied "alongside" other fundamental values of the university. The French Review was critical of the approach exemplified by this university:

"Some respondents seem to favour treating freedom of speech as just one value to be considered among a number of competing values. If that view is reflected in existing administrative approaches anywhere in the sector, then its combination with broadly worded policies and rules affecting expressive conduct, presents a risk of erosion of the freedom in the face of administrative and managerial imperatives and/or the restrictive demands of particular groups asserting that their interests underpin values which should be given priority over freedom of speech."⁴⁷

It is **suggested** that those universities whose policies do not already do so, should strengthen alignment with the Model Code by making it clear that academic freedom and freedom of speech are of such value that they will not be restricted or burdened except by restrictions or burdens permitted by their freedom of speech and academic freedom policy or code.

3.3 Have academic freedom and freedom of speech been addressed in a clear, comprehensive and authoritative way consistently with the Model Code?

Eleven of the thirty-three universities that have completed their implementation work have based their policies on the UCC version of the Model Code. As explained in paragraph 2.3 above, read as a whole, there is no substantive difference between the Model Code and the UCC version of the Model Code. Provided a university's policy protected the freedom of academic staff to make comment in their personal capacity in the manner contemplated by the UCC version of the Model Code, it was considered to be consistent with the Model Code despite not including this personal capacity aspect of the definition in the university's definition of "academic freedom".

One of the eleven universities that adopted the UCC definition of academic freedom failed to protect the freedom of academic staff to make comment in their personal capacity in the manner contemplated by the UCC version of the Model Code. This means that its policy is not consistent with the Model Code or with the UCC version of the Model Code.

Four of the thirty-three universities that have completed their implementation work did not adopt the definition of "academic freedom" in the Model Code or the UCC version, but, instead, referred to the relevant provision in their enterprise bargaining agreement. One obvious problem with this is that, unlike the Model Code, the definition of "academic freedom" in enterprise bargaining agreements does not extend to the academic freedom of students.

⁴⁶ Ibid page 137.

⁴⁷ Ibid page 213.

The universities that adopted the definition of academic freedom in their enterprise bargaining agreement argued that this was necessary in the case of academic staff to avoid arguments about which definition applies in the event of inconsistency. These universities did not suggest that the definition of academic freedom in their current enterprise agreement is wider in scope than the definition in the Model Code. It would be an odd enterprise agreement that precluded a university from granting freedoms to staff that are greater than those provided in the enterprise agreement.

Thirteen of the thirty-three universities that have completed their implementation work defined academic freedom in a way that limited it to activity that is “within the staff member’s area of expertise” or is consistent with “standards of scholarship” or “professional standards”. These terms were not defined. They are not only open to interpretation in a manner that could limit academic freedom, but also more restrictive than the definition of academic freedom in the Model Code; the Model Code requires, at most, only that the activity is in relation to the “subjects of study and research” of the member of academic staff or the student.

Defining academic freedom subject to limitations that are not consistent with the definition in the Model Code was a feature of some statements regarding academic freedom prepared by academic boards.

It is **suggested** that universities should remove from their definition of “academic freedom” limitations that are not included in the Model Code definition.

3.4 Have “umbrella principles”, dealing with freedom of speech and academic freedom, been identified to inform all other rules and policies in the manner envisaged by the Model Code?

The purpose of the *Principles of the Code* section of the Model Code is to identify, and narrow, the types of restrictions that can be imposed by a university to limit freedom of speech or academic freedom and the circumstances in which a university can refuse permission to a visiting speaker on the basis of the content of the speech. It should be noted that:

- the permissible restrictions are those listed in the Model Code; they are *not* expressed as ‘including’ those listed. This is reinforced by paragraphs (2), (4) and (7) of the *Principles of the Code*. Three of the thirty-three universities that have completed their implementation of the Model Code have expressed the permitted restrictions as ‘including’ those they listed; this is not consistent with the purpose of the *Principles of the Code* and it has the potential to undermine the effectiveness of the Model Code.
- some of the permissible restrictions identified in the *Principles of the Code* are expressed to be those “necessary” to achieve a purpose such as “necessary to the discharge of the university’s teaching and research activities”. The same three universities as those referred to in the previous point have expressed these restrictions as “necessary or desirable” which is more permissive than the Model Code.

A small number of universities drew attention to policies in their policy suite that are of a kind permitted by paragraph (1), (3) or (6) of the *Principles of the Code* section of the Model Code, but they did not identify any statement of principles of a kind contemplated by the Model Code to limit to defined categories the kinds of restrictions they can impose on freedom of speech, academic freedom and visiting speakers. It appeared that some of these universities had not fully understood the purpose of the *Principles of the Code* section of the Model Code.

Subject to the points noted above, with the exception of paragraph (7), most universities have adopted, or adapted, the *Principles of the Code* section of the Model Code in a manner consistent with it.

The starting point for understanding paragraph (7) is to consider paragraph (6) of the *Principles of the Code* section of the Model Code. Paragraph (6) deals with the terms and conditions on which a university permits external and invited visitors to speak on university land. It provides that:

- (6) The university has the right and responsibility to determine the terms and conditions upon which it shall permit external visitors and invited visitors to speak on university land and use university facilities and in so doing may:

...

- (c) refuse permission to any invited visitor or external visitor to speak on university land or at university facilities where the content of the speech is or is likely to:
 - (i) be unlawful;
 - (ii) prejudice the fulfilment by the university of its duty to foster the wellbeing of staff and students;
 - (iii) involve the advancement of theories or propositions which purport to be based on scholarship or research but which fall below scholarly standards to such an extent as to be detrimental to the university's character as an institution of higher learning;
- (d) require a person or persons seeking permission for the use of university land or facilities for any visiting speaker to contribute in whole or in part to the cost of providing security and other measures in the interests of public safety and order in connection with the event at which the visitor is to speak.

Most universities have policies that are consistent with the various grounds for refusal contemplated by paragraph (6). Fewer have, however, included a provision consistent with paragraph (7) which provides that, subject to this,

“the university shall not refuse permission for the use of its land or facilities by an external visitor or invited visitor nor attach conditions to its permission, solely on the basis of the content of the proposed speech by the visitor”.

One university said that it had not adopted paragraph (7) because it was concerned that there might be unintended consequences. No university gave an example of a ground on which it might wish to refuse permission that would not be allowed under paragraph (6)(c) of the *Principles of the Code*. It seems that universities are wary of depriving themselves of

discretion to refuse permission to visiting speakers ‘just in case’ there is some reason not otherwise provided for under its policies.

In the absence of any evidence that paragraph (6) of the *Principles of the Code* is too narrow, no change is recommended to paragraph (7); this means that, to be consistent with the Model Code, universities should adopt or adapt paragraph (7).

3.5 Have universities ensured that broadly framed rules, codes and policies that involve the exercise of administrative discretions and evaluative judgments will not erode freedom of speech and academic freedom?

3.5.1 Treatment of other policies that may be inconsistent

Paragraph (4) of the *Operation* section of the Model Code provides that the Model Code prevails, to the extent of any inconsistency, over any non-statutory policy or rules of the university. Even where a university has adopted Paragraph (4), having inconsistent rules and policies in operation can be a source of confusion for staff, students and visitors.

It is **suggested** that every university, even those that have adopted paragraph (4) of the *Operation* section of the Model Code, should undertake a project, within a defined period of time, to review all its policies, rules and codes to ensure that they are not inconsistent with the university’s freedom of speech and academic freedom code or policy.

This suggestion is connected with, but different from, the suggestion made in paragraph 3.5.2.

3.5.2 Treatment of broadly drafted rules, codes and policies that leave room for the exercise of administrative discretion and evaluative judgment

A consistent theme of the French Review was that of concern regarding policies that leave room for “the variable exercise of administrative discretions and evaluative judgments”. These are not policies that are, on their face, inconsistent with the principles of the Model Code (inconsistent policies are discussed in paragraph 3.5.1), but, rather, policies that confer powers or discretions that are capable of being exercised in a manner that is inconsistent with the *Principles of the Code* (see paragraph 2.5.4 above). Paragraphs (3) and (5) of the *Operation* section of the Model Code aim to ensure that powers and discretions in policies of this kind are exercised in accordance with the *Principles of the Code* section of the Model Code.

Provisions of the kind set out in paragraphs (3) and (5) of the *Operation* section of the Model Code are, however, effective only if decision-makers are aware of them and understand them. It would help decision-makers if the rule, code or policy that is the source of the power or discretion were, itself, to provide that the power or discretion must be exercised in accordance with the university’s code or policy dealing with freedom of speech and academic freedom. This would aid decision-makers’ awareness of the requirement.

The French Review described reviewing all policies and rules of a university to narrow their application to freedom of speech and academic freedom as “like cleaning the Augean Stables.”⁴⁸ Nonetheless, it is desirable that this significant task is undertaken.

It is **suggested** that all universities, even those that have adopted paragraphs (3) and (5) of the *Operation* section of the Model Code, should review at least their rules, codes and policies dealing with the matters identified in paragraph 2.5.4, that is:

- Student Misconduct Policies
- Codes of Conduct applying to Staff
- Codes of Conduct applying to Students
- Bullying, Discrimination and Harassment Policies or Procedures
- Policies regarding the Hire or Use of University Facilities.

If these include provisions that leave room for the exercise of administrative discretions or evaluative judgments that could limit freedom of speech or academic freedom, they should be amended so as to make it clear that the power or discretion must be exercised in accordance with the university’s freedom of speech and academic freedom code or policy; more is required than simply providing that these policies are to be ‘read with’ or ‘subject to’ the university’s code or policy dealing with freedom of speech and academic freedom.

3.5.3 The Operation section of the Model Code

The *Operation* section addresses the problems arising from what the French Review described as diverse and broadly framed rules, codes and policies affecting, or capable of affecting freedom of speech and academic freedom; it also deals with powers or discretions of this kind in contracts and workplace agreements. By way of summary, the six paragraphs provide that:

- the university will have regard to the *Principles of the Code* in drafting, reviewing or amending policies and delegated legislation (paragraph (1));
- policies and rules will be interpreted and applied, so far as is reasonably practicable, in accordance with the *Principles of the Code* (paragraph (2));
- powers and discretions exercisable under non-statutory policies or rules will be exercised in accordance with the *Principles of the Code* (paragraph (3));
- the Code prevails, to the extent of any inconsistency, over other policies or rules (paragraph (4));
- powers and discretions conferred on the university by a law made by the university in the exercise of its delegated law-making powers shall be exercised, so far as that law allows, in accordance with the *Principles of the Code* (paragraph (5));
- powers and discretions conferred on the university under a contract or workplace agreement shall be exercised, so far as it is consistent with the terms of that contract or workplace agreement, in accordance with the *Principles of the Code* (paragraph (6)).

The policies of a number of universities do not align with this aspect of the Model Code.

⁴⁸ Ibid page 219.

Queensland universities pointed out that they are unable to make delegated legislation.⁴⁹ This makes the second part of paragraph (1) and all of paragraph (5) of the *Operation* section redundant, but it would seem to have no effect on the capacity of Queensland universities to align their policies with the other aspects of the *Operation* section. The French Review did not propose that the Model Code be enacted as delegated legislation; it recognised that not all institutions have the power to make delegated legislation.⁵⁰

Some universities argued that giving the *Principles of the Code* “overriding effect” created uncertainty regarding the operation of their other policies. There is some validity to this argument, particularly so far as paragraph (4) is concerned and, to a lesser extent, also regarding paragraphs (2), (3) and (5), but it seems to overstate the impact of paragraphs (1) and (6). The effect of these paragraphs is limited by the requirements only to “have regard to” and, in the case of contracts or workplace agreements, “so far as it is consistent with the terms of that contract or workplace agreement”.

The University of Sydney’s *Charter of Freedom of Speech and Academic Freedom* provides that the University will have regard to its principles for the protection of freedom of speech and academic freedom in drafting, reviewing or amending policies and other instruments (thereby aligning with paragraph (1) of the *Operation* section of the Model Code), but that the principles do not have overriding legal effect.⁵¹ The view was taken that the preferable approach was to remove inconsistencies in the University’s codes and policies to ensure that they conform with the principles in the University’s *Charter*.⁵² This is consistent with a view expressed by several universities that they preferred to undertake a separate process over time to identify, review and align their policies with the *Principles of the Code* and, presumably, undertake a similar process as they enter into contracts and workplace agreements.

Fourteen universities indicated that they have completed, or are currently undertaking, a special process to review all their policies to make them consistent with the section of their freedom of speech and academic freedom code or policy that equates to the *Principles of the Code* section of the Model Code. Three other universities said they will do this as policies come up for cyclical review.

In paragraphs 3.5.1 and 3.5.2 above it was suggested that there are good reasons why all universities, even those that have adopted paragraphs (3), (4) and (5) of the *Operation* section of the Model Code, should review their policies, rules and codes. The objectives of paragraphs (2), (3), (4) and (5) of the *Operation* section of the Model Code could be achieved by a university undertaking the considerable task of bringing all its existing policies and rules into alignment with the *Principles of the Code*. This would include ensuring that:

⁴⁹ Letter dated 19 August, 2020 from Professor Sandra Harding, Vice-Chancellor of James Cook University, in her role as Chair of the Queensland Vice-Chancellors’ Committee.

⁵⁰ *Review of Freedom of Speech in Australian Higher Education Providers* page 219; see also page 229.

⁵¹ University of Sydney, *Charter of Freedom of Speech and Academic Freedom* section 3.

⁵² University of Sydney, Report of the *French Review Model Code Implementation Group* (30 September 2019) page 6.

- provisions that leave room for the exercise of administrative discretion or evaluative judgment make it clear that the power or discretion must be exercised in accordance with the university's code or policy regarding freedom of speech and academic freedom; and
- if there is any inconsistency between the policies or rules and the university's code or policy concerning freedom of speech and academic freedom, the policies or rules are amended so as to ensure that the university's code or policy regarding freedom of speech and academic freedom prevails.

It is important to emphasise that simply inserting into an existing policy or rule a general statement referring to the university's code or policy on freedom of speech and academic freedom would not be enough.

No change is recommended regarding paragraphs (1) and (6) of the *Operation* section, noting that paragraph (6) applies only so far as the exercise of the power or discretion is consistent with the terms of the contract or workplace agreement.

So far as contracts are concerned, Federation University Australia reported that it had incorporated wording in the recitals in its agreement and memorandum of understanding template document acknowledging the importance to the University of protecting freedom of speech and academic freedom. This is an exemplar of how a university can focus attention on freedom of speech and academic freedom when negotiating contracts.

It is **recommended** that the Model Code be amended by inserting a note to the *Operation* section that provides:

“As an alternative to adopting some or all of paragraphs (2), (3), (4) and (5) of the *Operation* section of the Model Code, a university may confirm that it has brought all its existing policies and rules into alignment with the *Principles of the Code*.”

As no change is recommended regarding paragraphs (1) and (6) of the *Operation* section, to be consistent with the Model Code, a university's freedom of speech and academic freedom code or policy would have to include provisions adopting or adapting paragraphs (1) and (6) of the *Operation* section of the Model Code.

3.6 Specific areas of non-alignment

There are two areas in respect of which some or many of the universities' policies are not consistent with the Model Code:

- paragraph (2) of the *Application* section of the Model Code regarding student representative bodies; and
- the inclusion in policies of restrictions on the exercise of academic freedom and freedom of speech that are broader than those contemplated by the Model Code.

These are examined in paragraphs 3.6.1 – 3.6.2 below.

3.6.1 Application to student representative bodies

Paragraph (2) of the *Application* section of the Model Code provides that it

“applies to student representative bodies to the extent that they have policies and rules which are capable of being applied to restrict or burden the freedom of speech of anyone, or academic freedom.”

Several universities asserted that their policies were consistent with this as they apply to students. Other universities recognised that the application of the Model Code **to** students is not the same as the Model Code being applied **by** student representative bodies.

The fact that a policy applies to students to ensure that their freedom of speech and academic freedom are not unnecessarily burdened or restricted by the university is not the same as applying the Model Code to limit the extent to which a student representative body can restrict or burden freedom of speech and academic freedom.

Student representative bodies are generally separate legal entities, often with their own employees; even a statement in a university’s policy declaring that it applies to such an entity cannot make it do so. As Universities Australia said in its submission:

“Universities can create policies that they expect a student body to adopt as well, although that may require the student body to enact its own policies to do so.”⁵³

Where a student representative body is a separate legal entity, a university should use its best endeavours to encourage that entity to adopt the university’s policy on freedom of speech and academic freedom. This is the approach that Curtin University, Murdoch University, the University of Queensland and the University of Sydney reported that they are taking; the University of Sydney is also encouraging its independent residential colleges to adopt its *Charter of Freedom of Speech and Academic Freedom*. This will, of course, be easier and more effective for universities that have a single, overarching code or policy rather than a number of codes, policies and other instruments dealing with aspects of freedom of speech and academic freedom.

Universities sometimes allow their student representative bodies to manage, or take part in, an event that is held on campus. Consistent with using its best endeavours to encourage that entity to adopt the university’s code or policy on freedom of speech and academic freedom, the university could require that, as a condition of allowing this, in managing or taking part in the event, the student representative body, its officers and employees, must apply the university’s policies on freedom of speech and academic freedom. Again, this will be easier and more effective for universities that have a single, overarching code or policy rather than numerous codes, policies and other instruments dealing with aspects of freedom of speech and academic freedom.

It is **recommended** that the Model Code be amended by inserting a note to paragraph (2) of the *Application* section that provides:

⁵³ UA, Submission dated 14 October, 2020, page 2.

“Where a student representative body is a separate legal entity, the university will use its best endeavours to encourage it to adopt the university’s policy on freedom of speech and academic freedom.”

3.6.2 Additional provisos or requirements limiting the exercise of freedom of speech and academic freedom

In paragraph 3.3 above reference was made to policies that *define* academic freedom in a more limited manner than the definition in the Model Code. This paragraph turns to restrictions on the *exercise* of academic freedom or freedom of speech.

Some universities have included additional provisos or requirements that must be satisfied for them to support the exercise of freedom of speech or academic freedom. The proviso or requirement is ‘additional’ in the sense that it is not a requirement contemplated, or allowed for, by the *Principles of the Code* section of the Model Code. For example:

- a requirement that freedom of speech and academic freedom must be “conducted reasonably, professionally and in good faith”
- a statement that the Academic Board does not support any pursuit of academic freedom that results in “actions that bring the university into disrepute”
- a requirement to act “in a manner consistent with the University’s values of integrity, respect, rational enquiry and personal excellence”.

Eight of the thirty-three universities that have completed their implementation work require freedom of speech and academic freedom to be exercised in accordance with the university’s code of conduct. These codes of conduct often include ‘additional’ requirements of a similar kind. For example, staff must:

- discharge their duties “for proper purpose”
- engage in “constructive” criticism
- “behave in a way that upholds the integrity and good reputation of the University”.

Provisos and requirements of this kind are imprecise; they could be interpreted so as to restrict the exercise of freedom of speech and academic freedom in a manner greater than that permitted by the Model Code. They leave room for evaluative judgments that are, as the French Review said, capable of eroding freedom of speech and academic freedom.⁵⁴ This contrasts with the commendable decision taken by Western Sydney University “not to impose restrictions based on vague notions of damage to reputation or brand.”⁵⁵

⁵⁴ See paragraph 2.5.4 above.

⁵⁵ Western Sydney University’s *Response to the Independent Review of the Adoption of the Model Code on Freedom of Speech and Academic Freedom*, 18 September 2020, page 2.

These comments should not be taken to imply that the exercise of freedom of speech or academic freedom cannot be regulated by a staff or student code of conduct. Paragraphs (1) and (3) of the *Principles of the Code* section of the Model Code allow for some limitations to be imposed on freedom of speech and academic freedom of a kind found in codes of conduct, particularly provisions necessary for:

- the discharge of the university’s teaching and research activities;
- others to express themselves and to hear and receive information and opinions;
- the discharge of the university’s duty to foster the wellbeing of students and staff (note that this “supports reasonable and proportionate measures to prevent any person from using lawful speech which a reasonable person would regard, in the circumstances, as likely to humiliate or intimidate other persons and which is intended to have either or both of those effects”, but it “does not extend to a duty to protect any person from feeling offended or shocked or insulted by the lawful speech of another”⁵⁶);
- courses to be delivered.

In view of their lack of precision, provisos and requirements of the kind referred to above would be most unlikely to meet the description of the permissible limitations set out in paragraphs (1) and (3) of the *Principles of the Code*.

One of the most common additional requirements is that academic freedom must be exercised in accordance with “scholarly standards”. Expressing a view regarding this requirement is more challenging; no-one would feel comfortable criticising a university for encouraging adherence to scholarly standards. Nonetheless, there is no single, accepted standard for scholarship and no university policy that added this requirement defined what it means, how it is to be assessed or by whom. Again, it is important to emphasise that these comments should not be taken to imply that standards cannot be set; paragraph (3) of the *Principles of the Code* section of the Model Code allows for reasonable and proportionate regulation necessary to discharge teaching and research or by way of reasonable requirements as to the content of courses. It would, however, seem likely that more would be needed to satisfy paragraph (3) of the *Principles of the Code* than a requirement to adhere to undefined “scholarly standards”.

In the case of provisos or requirements regarding the exercise of academic freedom or freedom of speech that are not of a kind authorised by the *Principles of the Code* section of the Model Code, a solution may be to include these as ‘expectations’, making it clear that failure to meet the expectation is not sanctionable. This suggestion is drawn from RMIT University’s policy.⁵⁷

⁵⁶ See the definition of ‘the duty to foster the wellbeing of staff and students’ in the Model Code.

⁵⁷ RMIT University’s *Intellectual Freedom Policy* uses the term ‘must’ rather than ‘should’ in relation to compliance with the University’s expectations; the reviewer prefers ‘should’.

It is **suggested** that, if a university wishes to include in its policy or code dealing with freedom of speech and academic freedom provisos or requirements of a kind not authorised by the *Principles of the Code* section of the Model Code, it should designate these as “expectations” with which students and staff should comply, but that the policy or code must make it clear that failure to meet these expectations is not sanctionable, that is, it will not constitute misconduct or attract any penalty or adverse action.

3.7 Outcomes regarding alignment

As explained in paragraph 3 above, for a university’s policies to be described as “fully aligned” with the Model Code, they would have to be consistent with each of the four ‘central concepts’ of the Model Code. Paragraphs 3.2-3.6 have been written in a way that aims to provide advice to universities to assist them to bring their policies into alignment with the Model Code.

On the basis of the analysis referred to in paragraphs 3.2-3.6 above, of the thirty-three universities that have completed their work to implement the Model Code:

- nine have policies that are fully aligned with the Model Code (five of these have one or two minor matters in need of attention);
- fourteen have policies that are mostly aligned, with a small number of areas of non-alignment;
- four have policies that are partly aligned, with significant areas that are not aligned;
- six have policies that are not aligned.

Of the eight universities that have not yet completed their work to implement the Model Code:

- two provided draft policies that, if implemented, would be fully aligned;
- six do not yet have policies or draft policies that are fully aligned.

The Terms of Reference do not ask the Review to identify particular universities, but it is expected that the Department will provide information to each university regarding the assessment of the alignment of the university’s policy or policies with the Model Code.

The Terms of Reference do ask for exemplars of particularly good practice that could be shared or promoted in the sector. Two universities that have adopted very different approaches, but achieved consistency with the Model Code are:

- La Trobe University: the University’s *Protection of Freedom of Speech and Academic Freedom Policy* adopts the Model Code. At the same time, a Working Group oversaw a detailed process which involved Planning and Governance staff assessing all current policies (310 policies) for compliance with the Model Code; a number of policies were revised and three policies or procedures were rescinded. This is an exemplar in terms of alignment with the Model Code, its operationalisation and the processes followed.
- The University of Sydney: the University’s *Charter of Freedom of Speech and Academic Freedom* is based on a methodical and disciplined consideration of every provision in the Model Code. The *Report of the French Review Model Code*

Implementation Group is publicly available;⁵⁸ one annexure includes a marked-up version of the Model Code.⁵⁹ This is an exemplar in terms of the development of a policy based on a detailed analysis and deep understanding of the Model Code. The annexure must have assisted the understanding of the University's governing body regarding how it was proposed that the University should adapt the Model Code.

RMIT University's *Intellectual Freedom Policy* includes innovations that are carefully crafted to ensure that they are consistent with the Model Code (see, in particular, paragraph 3.6.2 above). This is an exemplar of how, with a deep understanding of the French Review and the Model Code, it is possible to adapt the Model Code to a university's requirements, but still maintain consistency with the Model Code.

Particular aspects of the approaches of these and other universities are referred to in the analysis above.

⁵⁸ <https://apo.org.au/sites/default/files/resource-files/2019-10/apo-nid264771.pdf> (accessed 1 November, 2020).

⁵⁹ Ibid. Annexure E.

4. The effectiveness of policies

Even the adoption of the Model Code without modification does not guarantee that it will be understood and applied by every staff member. Universities are loosely coupled organisations with employees engaged in a range of activities that can affect the freedom of speech and academic freedom of other members of staff or students. It is important that universities promote greater understanding of their codes or policies regarding freedom of speech and academic freedom and how they are to be applied. As a submission from the President of a student association said:

“I doubt that the vast majority of ... [this University’s] staff and students are aware that we even have such a code, so how then could they be expected to abide by its principles in their business at the university? ... there is a plethora of school and faculty level policies, both official and unofficial, which affect the freedom of students and academics”.

Most universities advised that they had engaged in a lengthy consultative process to develop their response to the French Review. This is good practice as it assists in the development within the university community of an understanding of freedom of speech and academic freedom. It is, however, *suggested* that universities should consider ways of continuously reinforcing the university’s commitment to freedom of speech and academic freedom. This could take the form of a briefing as part of the university’s induction programs for new staff, new members of the academic board and for new members of the governing body; time could be scheduled for periodic discussion at faculty, academic board and governing body meetings. Induction programs for students could also incorporate a session aimed at educating them about their rights to academic freedom and freedom of speech. The University of Melbourne advised that, from 2021, all commencing students will be required to complete a curriculum module on freedom of speech. All this would assist in supporting a culture disposed to freedom of speech and academic freedom.

Of course, the best way that a university can demonstrate the effectiveness of its policies regarding freedom of speech and academic freedom is by applying them. Sometimes this may happen in the full glare of publicity by refusing to accede to public calls to censure a member of academic staff for expressing controversial views. On other occasions it may happen privately when, for example, academic freedom and its importance to universities is explained to a politician or donor who has asked that a staff member who is expressing views critical of government policy or the donor’s actions be silenced.

4.1 Recent examples

TEQSA representatives advised that, of approximately 500 concerns raised with TEQSA in 2019-2020,⁶⁰ only one percent related to freedom of intellectual inquiry and that its Student

⁶⁰ It is understood that a ‘concern’ can be raised by: someone contacting TEQSA; TEQSA identifying a matter because of media coverage; or referral of an issue to TEQSA.

Expert Advisory Group⁶¹ had not identified any problems regarding freedom of speech or academic freedom. Nonetheless, as the French Review noted:

“even a limited number of incidents seen as affecting freedom of speech may have an adverse impact on public perception ... they may have a ‘chilling effect’ on the exercise of freedom of speech”;⁶² and

“even a small number of high profile incidents can have adverse reputational effects on the sector as a whole.”⁶³

Matters that have attracted media attention since the publication of the French Review include reports regarding:

- allegations that the University of Sydney cancelled a lecture by human rights activist Tecber Ahmed Saleh after the embassy of Morocco made representations to the University raising concerns about her being hosted (the article refers to the University’s response)⁶⁴
- the rejection by student associations at Queensland University of Technology and Monash University of applications from Generation Liberty to participate in events (one article refers to the response of the Vice-Chancellor of QUT)⁶⁵
- the University of Queensland’s suspension of student Drew Pavlou for misconduct⁶⁶ (the University has published responses⁶⁷)

⁶¹ https://www.teqsa.gov.au/sites/default/files/student_expert_advisory_group_-_terms_of_reference.pdf?v=1531971492 (accessed 1 November, 2020).

⁶² *Review of Freedom of Speech in Australian Higher Education Providers* page 217.

⁶³ *Ibid* page 224.

⁶⁴ <https://www.theguardian.com/world/2019/sep/22/foreign-interference-fears-after-sydney-university-cancels-western-sahara-speaker> (accessed 13 November, 2020).

⁶⁵ <https://www.theaustralian.com.au/nation/students-reasons-for-rightwing-ban-wrong/news-story/2b6dfd4b7de6195c0dc6bda2e085742f> (this includes the response of the Vice-Chancellor of QUT); <https://www.theaustralian.com.au/inquirer/intellectual-freedom-only-if-your-values-are-aligned/news-story/6665eedc434bc01622e80b2b8859ef9a> ; <https://www.theaustralian.com.au/inquirer/university-owweek-censors-excel-themselves/news-story/189f25197779d2bab740edddad41f8a0> (accessed 13 November, 2020).

⁶⁶ <https://www.abc.net.au/news/2020-04-23/drew-pavlou-facing-expulsion-from-uq-over-china-activism/12168678>; https://www.washingtonpost.com/world/asia_pacific/student-known-as-vocal-critic-of-china-faces-expulsion-from-australian-university/2020/04/16/1a1e0a9a-7ee0-11ea-84c2-0792d8591911_story.html; <https://www.abc.net.au/news/2020-05-29/drew-pavlou-suspended-university-queensland/12302350>; <https://www.nytimes.com/2020/05/29/world/australia/drew-pavlou-china-university-queensland.html>; <https://www.afr.com/work-and-careers/education/the-war-against-drew-pavlou-uq-s-rebel-senator-20200531-p54y1j>; <https://www.news.com.au/lifestyle/real-life/news-life/the-australian-university-student-china-wanted-to-silence-whose-simple-protest-sparked-a-living-hell/news-story/4fcea3b66535bed6d6e08a320cd246ae> (accessed 13 November, 2020).

⁶⁷ The University’s responses are to be found at <https://www.uq.edu.au/news/uq-responds/student-disciplinary-matters> (accessed 13 November, 2020).

- Victoria University's removal of material about the Bosnian War from a course on human rights (the articles refer to the University's response)⁶⁸
- allegations that Charles Darwin University apologised and revised material following complaints from Chinese students regarding an introduction to an assignment that stated that coronavirus originated in China⁶⁹
- the University of New South Wales' removal of a social media post that linked to an article, posted in the University's Newsroom, about the human rights implications of Hong Kong's new national security law. The article was also apparently removed from the Newsroom, but remained available on the UNSW Law website.⁷⁰ The University's actions were said to have followed an online campaign from Chinese students and media.⁷¹ The Vice-Chancellor published an apology for the removal of the tweet saying that it was removed because it appeared to represent a UNSW view⁷²
- allegations that the ANU removed an academic, Dr Priya Dev, as a moderator of a panel on the COVIDSafe app because of concerns, expressed by someone involved in the development of the app, that Dr Dev was critical of the app (one article quotes an ANU spokesperson's response).⁷³

The Ridd case, which was mentioned in the French Review,⁷⁴ continued to attract publicity.⁷⁵

⁶⁸ <https://www.sarajevotimes.com/victoria-university-in-austalia-apologises-for-any-hurt-caused-for-removal-of-genocide-content-in-human-rights-lecture/>; <https://www.sbs.com.au/news/victoria-university-accused-of-censorship-after-removing-serbian-war-crimes-material> (accessed 13 November, 2020).

⁶⁹ <https://www.smh.com.au/world/asia/china-exporting-ccp-speech-controls-to-australia-as-second-university-caught-in-row-20200805-p55jrf.html>; <https://www.smh.com.au/politics/federal/human-rights-commission-urges-rigorous-defence-of-free-speech-at-unis-20200806-p55j6a.html> (accessed 13 November, 2020).

⁷⁰ Letter dated 5 November, 2020 from the Vice-Chancellor, Professor Ian Jacobs, page 2.

⁷¹ <https://www.smh.com.au/national/critical-test-of-academic-freedom-for-australian-universities-20200804-p55iec.html>; <https://thenewdaily.com.au/news/2020/08/05/unsu-apologises-after-act-of-cowardice-accusation-in-deleting-hong-kong-posts/>; <https://www.smh.com.au/politics/federal/human-rights-commission-urges-rigorous-defence-of-free-speech-at-unis-20200806-p55j6a.html> (accessed 13 November, 2020).

⁷² <http://www.president.unsw.edu.au/news/statement-freedom-speech> (accessed 13 November, 2020).

⁷³ <https://www.afr.com/rear-window/how-anu-buckled-on-covidsafe-panel-20201026-p5680a>; <https://www.innovationaus.com/anu-shoddy-treatment-of-academic-freedom/>; <https://www.innovationaus.com/strange-times-at-anu-and-a-covidsafe-gag/> (accessed 13 November, 2020).

⁷⁴ *Review of Freedom of Speech in Australian Higher Education Providers* pages 202 and 289.

⁷⁵ <https://www.theguardian.com/australia-news/2020/jul/22/james-cook-university-wins-appeal-in-peter-ridd-unfair-dismissal-case>; <https://www.theage.com.au/national/academic-freedom-on-trial-as-sacked-professor-asks-high-court-to-decide-20200729-p55gph.html>; <https://www.theaustralian.com.au/higher-education/sacked-icu-scientist-peter-ridd-seeks-high-court-appeal/news-story/b25447d961b0f1f2ec86a39fbd593abf> (accessed 13 November, 2020).

4.2 The importance of culture; the role of the vice-chancellor and the academic board; distancing the university from controversial views

As the French Review said:

“A culture powerfully predisposed to the exercise of freedom of speech and academic freedom is ultimately a more effective protection than the most tightly drawn rule.”⁷⁶

Submissions from the Australia Director of Human Rights Watch,⁷⁷ Ms Elaine Pearson, and Dr Sophie Richardson, China Director, emphasised the importance of creating an environment in which students and staff have both an understanding of academic freedom and confidence that their university will respond to allegations of threats to academic freedom. They drew attention to measures Oxford and some Ivy League universities are implementing.⁷⁸ They also referred to the need to protect the freedom of speech of foreign students and to ensure that academic staff “feel bold enough to discuss controversial topics and know that universities have their back.”⁷⁹

How is a culture “powerfully predisposed to the exercise of freedom of speech and academic freedom” to be created and strengthened?

4.2.1 The role of the vice-chancellor

As the chief executive officers of universities, vice-chancellors have a key role in creating a culture committed to freedom of speech and academic freedom.

Most of the universities that made submissions advised that the vice-chancellor is formally responsible for ensuring compliance with their policies regarding freedom of speech and academic freedom. While this, and statements made by vice-chancellors championing freedom of speech and academic freedom, are important signals, they are insignificant compared with the vice-chancellor’s response when freedom of speech or academic freedom are challenged.

A vice-chancellor who refuses to yield to public calls to act in a manner contrary to the principles of the Model Code, and explains why that is the case, sends a strong message to staff, students and the public.

Universities are large organisations with many employees engaged in a range of activities that can affect freedom of speech and academic freedom; sometimes even a quite junior staff member may take action that is, unwittingly, contrary to the principles of the Model Code. Mistakes are sometimes made. A vice-chancellor who acts decisively to remedy the

⁷⁶ *Review of Freedom of Speech in Australian Higher Education Providers* page 219; see also pages 116, 118 and 225.

⁷⁷ <https://www.hrw.org/> (accessed 13 November, 2020).

⁷⁸ See <https://www.theguardian.com/education/2020/sep/28/oxford-moves-to-protect-students-from-chinas-hong-kong-security-law> and <https://www.wsj.com/articles/chinas-national-security-law-reaches-into-harvard-princeton-classrooms-11597829402> (accessed 13 November, 2020).

⁷⁹ Email submission dated 21 October, 2020 from Ms Elaine Pearson.

breach of the principles of the Model Code makes a significant contribution to the creation of a culture predisposed to the exercise of freedom of speech and academic freedom.

In short, a vice-chancellor's actions 'in the eye of a storm' can have a powerful impact on the culture of the university. An issue of this kind would be likely to be reported by the vice-chancellor to the university's governing body for discussion at its next meeting or, if not reported, raised by a member of the governing body.

4.2.2 The role of the academic board

Academic boards (sometimes known as senate, academic senate or academic council) can support a culture that defends freedom of speech and academic freedom. In some universities, the academic board and its officers are a powerful, effective part of the governance structure. In these universities the chair of the academic board is considered to be 'in', but not part 'of' the senior management structure.

A common formulation of the role of the academic board is that, among other things, it is to

- encourage the maintenance and development of high standards of teaching and research; and to
- maintain effective oversight and monitoring of the academic activities of the University.⁸⁰

Academic boards typically function as the principal advisory body on all academic matters. On this basis it has been said that they ensure academic freedom.⁸¹ In some universities, this is made explicit. For example, the Academic Board at the University of Western Australia University is responsible to the University's Senate for "safeguarding the academic freedom of the University".⁸² Provisions of this kind are an *indirect* form of support for freedom of speech and academic freedom.

Some universities have formalised a more *direct* role for the Academic Board in relation to academic freedom. This usually takes one of two forms. First, a role in developing rules regarding freedom of speech and academic freedom. For example, paragraph 14(g) of the ANU's Academic Board Charter provides that the Board's responsibilities include:

⁸⁰ University of Queensland Academic Board Policy, paragraph 2.1 c i and ii.

<https://ppl.app.uq.edu.au/content/1.30.03-academic-board> (accessed 13 November, 2020).

⁸¹ National Chairs of Academic Boards/Senates Conference (November 2013) "The Purpose and Function of Academic Boards and Senates in Australian Universities" page 1, "Mission of the Board".

https://www.uws.edu.au/_data/assets/pdf_file/0006/710475/Purpose_and_Function_of_Academic_Boards_-_Final_-_March_2014.pdf (accessed 13 November, 2020).

⁸² University of Western Australia Statute, Chapter 6, section 62(3)

https://www.governance.uwa.edu.au/_data/assets/pdf_file/0012/3449568/UWA-Statute-Final--Academic-Board-Chapter.pdf (accessed 13 November, 2020).

“developing and promoting principles pertaining to academic freedom within the ANU and of its staff, students and official visitors.”⁸³ (emphasis added)

The second, direct role for the Academic Board relates to monitoring compliance. At Deakin University, the Chair of the Academic Board reports regularly to Council regarding freedom of speech and academic freedom, including an annual review of actions by the Academic Board to uphold academic freedom.⁸⁴

RMIT University’s *Intellectual Freedom Policy*, which deals with freedom of speech and academic freedom, goes further. It provides for a request to be made to the Chair of the Academic Board for “review or assessment” regarding a potential failure to uphold the rights provided for in the policy. The Chair of the Academic Board is to undertake an assessment and may resolve the matter, with or without corrective actions, seek advice from an advisory panel or refer it to other institutional processes. The outcome is reported to the Academic Board.

4.2.3 Distancing the university from controversial views

Two universities’ academic freedom policies include a statement that, by supporting academic freedom, the university does not imply that it endorses particular views expressed by academic staff. While this is undoubtedly correct, it is important to consider the circumstances in which reference might be made to a statement of this kind.

Universities sometimes face criticism arising from a member of their academic staff expressing a controversial view regarding some topic within their field of research; there may be calls, even from within the university, for the university to distance itself from the staff member’s views. The advent of social media has made this kind of criticism a more common occurrence and, no doubt, sometimes, a nuisance. There may be a temptation to bring an end to the criticism by publishing a statement that the views of the academic are not endorsed by the university or do not express the university’s views. Publishing a statement of this kind, especially where it is linked to a particular controversy, may have a chilling effect on the exercise of academic freedom.

Even a general statement, not associated with a particular controversy, that the views of academic staff are not endorsed by the university, or do not represent the views of the university, is problematic. Those who hold senior leadership positions in universities and the governing body may express the views of ‘the university’ on matters such as government policies affecting higher education, but the notion that ‘the university’ could hold a view on every topic researched by every member of academic staff in the university is absurd; unless carefully drafted, a general statement of the kind referred to could perpetuate this misunderstanding.

⁸³ <https://www.anu.edu.au/files/committee/Academic%20Board%20Charter%202020.pdf> (accessed 13 November, 2020).

⁸⁴ Deakin University, Submission, 30 September, 2020. This report is included in the Council’s business schedule.

The views expressed by a member of academic staff within their field of research may, of course, be contested by other researchers from the same university, or from a different university, who express a different view. This is quite different from the senior management of a university seeking to distance the university from controversial views expressed by a member of academic staff. The former is an aspect of academic freedom, the latter is antithetical to the creation of a culture predisposed to the exercise of freedom of speech and academic freedom.

A better response to criticism of a university based on the views expressed by a member of academic staff is to explain the nature of academic freedom and the university's commitment to it. Being able to point to a code or policy dealing with freedom of speech and academic freedom facilitates this.

5. Future steps to ensure ongoing alignment with the Model Code; the role of university governing bodies; a complaints process?

This Review has considered the alignment of universities' policies with the Model Code at a particular point in time. The challenge is to ensure that:

- there is an ongoing commitment to the principles of the Model Code in a way that addresses the areas of non-alignment of current policies that are identified in paragraphs 3.2-3.6 above;
- the principles of the Model Code are embedded in the culture of each university in the manner envisaged by the French Review (some suggestions are made in paragraph 4 above); and
- the public are given confidence that there is no free speech crisis on Australian campuses (see paragraph 2.5.2 above).

Australia is not alone in grappling with issues of this kind. The French Review analysed responses in a number of jurisdictions, including Ontario.

In Ontario a policy was announced on 30 August, 2018 that required universities to develop free speech policies by January 2019 meeting a minimum standard prescribed by the Government. Those that did not comply with the free speech requirements could be subject to a reduction in operational grant funding.⁸⁵ The French Review considered the Ontario approach to be “rather abrupt and heavy-handed”.⁸⁶ All universities did, however, develop policies by January 2019 and they were assessed as reflecting the principles articulated by the government.⁸⁷ There is one aspect of the Ontario approach that could be adapted in Australia and another that could be considered in the future.

5.1 Annual Report

The aspect of the Ontario approach that could be adapted in Australia to meet the challenges identified in paragraph 5 relates to the publication of an annual report. In Ontario, each university is required to prepare an annual report on the implementation of its free speech policies and a summary of compliance. This report is published online and submitted to the Higher Education Quality Council of Ontario (HEQCO). The first of these

⁸⁵ *Review of Freedom of Speech in Australian Higher Education Providers* page 77-78.

⁸⁶ *Ibid* page 79.

⁸⁷ “Freedom of Speech on Campus” 2019 Annual Report to the Ontario Government by the Higher Education Quality Council of Ontario, page 2.

“Annual Implementation Reports” were submitted and posted on institutional websites in September 2019.⁸⁸

It is suggested that this could be adapted in Australia, not as a requirement to submit a report to any external body, but as a requirement to publish information about freedom of speech and academic freedom in each university’s annual report. This could take the form of an annual attestation made by the university’s governing body.

Two reasons in particular support a heightened role for university governing bodies in relation to freedom of speech and academic freedom:

- first, the *Higher Education Standards Framework* requires that *the governing body* takes steps to develop and maintain an institutional environment in which freedom of intellectual inquiry is upheld and protected (or, if the *Standards Framework* is amended, to develop and maintain an institutional environment in which freedom of speech and academic freedom is upheld and protected⁸⁹);
- secondly, it is the UCC that has given the Model Code close attention; to the extent that the French Review might have hoped that the Model Code would encourage universities to share experiences and thereby promote the consistent application of the principles of the Code or their variation by the sector, it seems that it is the UCC that has undertaken that role.⁹⁰

These factors, but particularly the first, suggest a role for university governing bodies in ensuring the alignment of university policies with the principles of the Model Code and in the fostering of a culture committed to freedom of speech and academic freedom. Such an attestation by the governing body may go some way to address matters of public concern (see paragraph 2.5.2 above).

The attestation statement would need to be based on the governing body’s active engagement in satisfying itself that the university’s freedom of speech and academic freedom policy has been brought into alignment with the Model Code. Similarly, there would need to be active governance oversight both of the implementation of the policy and of the steps taken to foster a culture committed to freedom of speech and academic freedom. The annual freedom of speech and academic freedom attestation statement would provide a focal point for governance and management; it should drive ongoing engagement and consideration of freedom of speech and academic freedom.

The annual freedom of speech and academic freedom attestation statement made by the governing body and published in the university’s annual report could:

⁸⁸ “Freedom of Speech on Campus” 2019 Annual Report to the Ontario Government by the Higher Education Quality Council of Ontario, page 3.

⁸⁹ *Higher Education Standards Framework (Threshold Standards) 2015* paragraph 6.1 4; see paragraph 2.4 above.

⁹⁰ See paragraph 2.3 above.

- identify the university’s main policy or policies regarding freedom of speech and academic freedom and state whether, in the opinion of the governing body, they are consistent with the Model Code (the first attestation statement to be published should explain what has been done to respond to the information provided by the Department regarding the assessment of the alignment of the university’s policy or policies with the Model Code; see paragraph 3.7 above)
- outline what action has been taken to ensure that other policies have been brought into alignment with the university’s policy or policies on freedom of speech and academic freedom (see paragraph 3.5 above); in some years this could be based on an internal audit report
- where the university’s student representative body is a separate legal entity, explain what action has been taken to encourage it to adopt the university’s policy or policies on freedom of speech and academic freedom (see paragraph 3.6.1 above)
- describe how, in the relevant year, the university has supported a culture committed to freedom of speech and academic freedom (see paragraph 4.2 above)
- describe any issues of concern that have come to the attention of the governing body regarding freedom of speech and academic freedom in the relevant year and whether they have been addressed by the university in a manner that upholds and protects freedom of speech and academic freedom.

It will be important to allow universities to adapt their report to their circumstances, but, at the same time, to ensure that a minimum amount of information is available. The HEQCO reported that one of the lessons learned from its first annual report cycle was that:

“many institutions pine for a template. We discovered that absent a template, some institutions did not touch on all the reporting elements”.⁹¹

Accordingly, it is suggested that a small group of Chancellors, chaired by the Chair of the UCC, should be asked to develop a template setting out mandatory and optional reporting matters. The list set out above might be a starting point for their consideration. The only non-negotiable should be the first requirement mentioned above, that is, every attestation statement must identify the university’s main policy or policies regarding freedom of speech and academic freedom and state whether, in the opinion of the governing body, they are consistent with the Model Code.

It is ***recommended*** that

- (i) the Model Code be amended to include a requirement that the university’s governing body prepares an annual attestation statement regarding freedom of speech and academic freedom and that this is published in the university’s annual report; at a minimum, this must identify the university’s main policy or

⁹¹ “Freedom of Speech on Campus” 2019 Annual Report to the Ontario Government by the Higher Education Quality Council of Ontario, pages 4-5.

- policies regarding freedom of speech and academic freedom and state whether, in the opinion of the governing body, they are consistent with the Model Code;
- (ii) the first attestation statement to be published should explain what has been done to respond to the information provided by the Department regarding the assessment of the alignment of the university's policy or policies with the Model Code;
 - (iii) a small group of Chancellors, chaired by the Chair of the UCC, should be asked to develop a template identifying other mandatory and optional matters to be included in the annual freedom of speech and academic freedom attestation statement made by the governing body and published in the annual report.

5.2 A complaints process?

The Ontario approach requires each university's free speech policy to have associated procedures for the lodging of free speech related complaints. The Model Code does not currently include a complaints process.

The Terms of Reference for this Review are focused on the alignment of universities' policies with the principles of the Model Code. The Terms of Reference do not contemplate the type of investigation that would need to be undertaken to determine whether there is a need for each university to establish a formal complaints process. Of course, a university could provide for such a process as RMIT University has (see paragraph 4.2.2 above) or it could establish such a process to respond to a particular matter that raised issues regarding freedom of speech or academic freedom.

It is **recommended** that the need for a complaints process to be included in the Model Code could be the subject of future consideration.

5.3 Conclusion

This has been an interesting project dealing with matters that are of fundamental importance to the way universities operate and to their public credibility. The reviewer's admiration for the Model Code, its clarity and balance, has grown immeasurably. It is truly surprising that more universities have not started with the Model Code as a template, adapting it (if necessary) to their particular (properly identified) circumstances.

Most of the time, most students and most members of staff probably don't think much about freedom of speech or academic freedom, but, when an issue arises, being able to identify a policy that sets out the university's position benefits everyone; it can also give the public confidence in the university's commitment to freedom of speech and academic freedom. Most universities said that they had consulted widely with staff and, in some cases, student representatives, in developing their policies, but in most cases they did not say how they would make new staff members aware of their policies or educate students about freedom of speech and academic freedom.

While paragraph 5.1 recommends a heightened role for university governing bodies in relation to freedom of speech and academic freedom, it is the senior managers of the

university who provide the day to day leadership necessary both to adopt a policy and to continually reinforce it so as to create an environment in which freedom of speech and academic freedom are understood and supported.

**A Model Code for the Protection of Freedom of Speech and Academic Freedom in
Australian Higher Education Providers**

Objects

The objects of the Code are:

- (1) To ensure that the freedom of lawful speech of staff and students of the university and visitors to the university is treated as a paramount value and therefore is not restricted nor its exercise unnecessarily burdened by restrictions or burdens other than those imposed by law and set out in the Principles of the Code.
- (2) To ensure that academic freedom is treated as a defining value by the university and therefore not restricted nor its exercise unnecessarily burdened by restrictions or burdens other than those imposed by law and set out in the Principles of the Code.
- (3) To affirm the importance of the university's institutional autonomy under law in the regulation of its affairs, including in the protection of freedom of speech and academic freedom.

Application

- (1) The Code applies to the governing body of the university, its officers and employees and its decision-making organs, including those involved in academic governance.
- (2) The Code also applies to student representative bodies to the extent that they have policies and rules which are capable of being applied to restrict or burden the freedom of speech of anyone, or academic freedom.

Definitions

'academic freedom' for the purposes of this Code comprises the following elements:

- the freedom of academic staff to teach, discuss, and research and to disseminate and publish the results of their research;

- the freedom of academic staff and students to engage in intellectual inquiry, to express their opinions and beliefs, and to contribute to public debate, in relation to their subjects of study and research;
- the freedom of academic staff and students to express their opinions in relation to the higher education provider in which they work or are enrolled;
- the freedom of academic staff, without constraint imposed by reason of their employment by the university, to make lawful public comment on any issue in their personal capacities;
- the freedom of academic staff to participate in professional or representative academic bodies;
- the freedom of students to participate in student societies and associations.
- the autonomy of the higher education provider in relation to the choice of academic courses and offerings, the ways in which they are taught and the choices of research activities and the ways in which they are conducted.

‘academic staff’ all those who are employed by the university to teach and/or carry out research and extends to those who provide, whether on an honorary basis or otherwise, teaching services and/or conduct research at the university.

‘external visiting speaker’ any person who is not an invited visiting speaker and for whom permission is sought to speak on the university’s land or facilities.

‘imposed by law’ in relation to restrictions or burdens or conditions on a freedom include restrictions or burdens or conditions imposed by statute law, the common law (including the law of defamation), duties of confidentiality, restrictions deriving from intellectual property law and restrictions imposed by contract.

‘invited visiting speaker’ any person who has been invited by the university to speak on the university’s land or facilities.

Note: The definition of ‘university’ which limits this class of visitor.

‘non-statutory policies and rules’ means any non-statutory policies, rules, guidelines, principles, codes or charters or similar instruments.

‘speech’ extends to all forms of expressive conduct including oral speech and written, artistic, musical and performing works and activity and communication using social media; the word ‘speak’ has a corresponding meaning.

‘staff’ for the purposes of this Code ‘staff’ includes all employees of the university whether fulltime or part-time and whether or not academic staff.

‘the duty to foster the wellbeing of staff and students’;

- includes the duty to ensure that no member of staff and no student suffers unfair disadvantage or unfair adverse discrimination on any basis recognised at law including race, gender, sexuality, religion and political belief;
- includes the duty to ensure that no member of staff and no student is subject to threatening or intimidating behaviour by another person or persons on account of anything they have said or proposed to say in exercising their freedom of speech;
- supports reasonable and proportionate measures to prevent any person from using lawful speech which a reasonable person would regard, in the circumstances, as likely to humiliate or intimidate other persons and which is intended to have either or both of those effects;
- does not extend to a duty to protect any person from feeling offended or shocked or insulted by the lawful speech of another.

‘the university’ means the university as an entity and includes its decision-making organs and officers, its student representative bodies, undergraduate and post-graduate, and any entities controlled by the university.

‘unlawful’ means in contravention of a prohibition or restriction or condition imposed by law.

Operation

- (1) The university shall have regard to the Principles of this Code in the drafting, review or amendment of any non-statutory policies or rules and in the drafting, review or amendment of delegated legislation pursuant to any delegated law-making powers.
- (2) Non-statutory policies and rules of the university shall be interpreted and applied, so far as is reasonably practicable, in accordance with the Principles of this Code.
- (3) Any power or discretion under a non-statutory policy or rule of the university shall be exercised in accordance with the Principles in this Code.
- (4) This Code prevails, to the extent of any inconsistency, over any non-statutory policy or rules of the university.
- (5) Any power or discretion conferred on the university by a law made by the university in the exercise of its delegated law-making powers shall be exercised, so far as that law allows, in accordance with the Principles of this Code.
- (6) Any power or discretion conferred on the university under any contract or workplace agreement shall be exercised, so far as it is consistent with the terms of that contract or workplace agreement, in accordance with the Principles of this Code.

Principles of the Code

- (1) Every member of the staff and every student at the university enjoys freedom of speech exercised on university land or in connection with the university subject only to restraints or burdens imposed by:
 - law;
 - the reasonable and proportionate regulation of conduct necessary to the discharge of the university's teaching and research activities;

- the right and freedom of others to express themselves and to hear and receive information and opinions;
 - the reasonable and proportionate regulation of conduct to enable the university to fulfil its duty to foster the wellbeing of students and staff;
 - the reasonable and proportionate regulation of conduct necessary to enable the university to give effect to its legal duties including its duties to visitors to the university.
- (2) Subject to reasonable and proportionate regulation of the kind referred to in the previous Principle, a person's lawful speech on the university's land or in or in connection with a university activity shall not constitute misconduct nor attract any penalty or other adverse action by reference only to its content.
- (3) Every member of the academic staff and every student enjoys academic freedom subject only to prohibitions, restrictions or conditions:
- imposed by law;
 - imposed by the reasonable and proportionate regulation necessary to the discharge of the university's teaching and research activities;
 - imposed by the reasonable and proportionate regulation necessary to discharge the university's duty to foster the wellbeing of students and staff;
 - imposed by the reasonable and proportionate regulation to enable the university to give effect to its legal duties;
 - imposed by the university by way of its reasonable requirements as to the courses to be delivered and the content and means of their delivery.
- (4) The exercise by a member of the academic staff or of a student of academic freedom, subject to the above limitations, shall not constitute misconduct nor attract any penalty or other adverse action.
- (5) In entering into affiliation, collaborative or contractual arrangements with third parties and in accepting donations from third parties subject to

conditions, the university shall take all reasonable steps to minimise the restrictions or burdens imposed by such arrangements or conditions on the freedom of speech or academic freedom of any member of the academic staff or students carrying on research or study under such arrangements or subject to such conditions.

- (6) The university has the right and responsibility to determine the terms and conditions upon which it shall permit external visitors and invited visitors to speak on university land and use university facilities and in so doing may:
- (a) require the person or persons organising the event to comply with the university's booking procedures and to provide information relevant to the conduct of any event, and any public safety and security issues;
 - (b) distinguish between invited visitors and external visitors in framing any such requirements and conditions;
 - (c) refuse permission to any invited visitor or external visitor to speak on university land or at university facilities where the content of the speech is or is likely to:
 - (i) be unlawful;
 - (ii) prejudice the fulfilment by the university of its duty to foster the wellbeing of staff and students;
 - (iii) involve the advancement of theories or propositions which purport to be based on scholarship or research but which fall below scholarly standards to such an extent as to be detrimental to the university's character as an institution of higher learning;
 - (d) require a person or persons seeking permission for the use of university land or facilities for any visiting speaker to contribute in whole or in part to the cost of providing security and other measures in the interests of public safety and order in connection with the event at which the visitor is to speak.

- (7) Subject to the preceding Principles the university shall not refuse permission for the use of its land or facilities by an external visitor or invited visitor nor attach conditions to its permission, solely on the basis of the content of the proposed speech by the visitor.
- (8) Consistently with this Code the university may take reasonable and proportionate steps to ensure that all prospective students in any of its courses have an opportunity to be fully informed of the content of those courses. Academic staff must comply with any policies and rules supportive of the university's duty to foster the wellbeing of staff and students. They are not precluded from including content solely on the ground that it may offend or shock any student or class of students.

UCC version of the Model Code (marked up to show how it varies from the Model Code)

A Model Code for the Protection of Freedom of Speech and Academic Freedom in Australian Higher Education Providers

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- (3) To affirm the importance of the university's institutional autonomy under law in the regulation of its affairs, including in the protection of freedom of speech and academic freedom.

Application

- (1) The Code applies to the governing body of the university, its officers and employees and its decision-making organs, including those involved in academic governance.
- (2) The Code also applies to student representative bodies to the extent that they have policies and rules which are capable of being applied to restrict or burden the freedom of speech of anyone, or academic freedom.

Definitions

'academic freedom' for the purposes of this Code comprises the following elements:

- the freedom of academic staff to teach, discuss, and research and to disseminate and publish the results of their research;

- the freedom of academic staff and students to engage in intellectual inquiry, to express their opinions and beliefs, and to contribute to public debate, in relation to their subjects of study and research;
- the freedom of academic staff and students to express their opinions in relation to the higher education provider in which they work or are enrolled;
- ~~the freedom of academic staff, without constraint imposed by reason of their employment by the university, to make lawful public comment on any issue in their personal capacities;~~
- the freedom of academic staff to participate in professional or representative academic bodies;
- the freedom of students to participate in student societies and associations.
- the autonomy of the higher education provider in relation to the choice of academic courses and offerings, the ways in which they are taught and the choices of research activities and the ways in which they are conducted.

‘academic staff’ all those who are employed by the university to teach and/or carry out research and extends to those who provide, whether on an honorary basis or otherwise, teaching services and/or conduct research at the university.

‘external visiting speaker’ any person who is not an invited visiting speaker and for whom permission is sought to speak on the university’s land or facilities.

‘imposed by law’ in relation to restrictions or burdens or conditions on a freedom include restrictions or burdens or conditions imposed by statute law, the common law (including the law of defamation), duties of confidentiality, restrictions deriving from intellectual property law and restrictions imposed by contract.

‘invited visiting speaker’ any person who has been invited by the university to speak on the university’s land or facilities. For the purposes of this definition, ‘the university’ includes its decision-making organs and officers; its student representative bodies, undergraduate and post-graduate; any clubs, societies and associations recognized by its decision-making organs or student representative bodies; and any entities controlled by the university.

~~Note: The definition of ‘university’ which limits this class of visitor.~~

‘non-statutory policies and rules’ means any non-statutory policies, rules, guidelines, principles, codes or charters or similar instruments.

‘speech’ extends to all forms of expressive conduct including oral speech and written, artistic, musical and performing works and activity and communication using social media; the word ‘speak’ has a corresponding meaning.

‘staff’ for the purposes of this Code ‘staff’ includes all employees of the university whether fulltime or part-time and whether or not academic staff.

‘the duty to foster the wellbeing of staff and students’;

- includes the duty to ensure that no member of staff and no student suffers unfair disadvantage or unfair adverse discrimination on any basis recognised at law including race, gender, sexuality, religion and political belief;
- includes the duty to ensure that no member of staff and no student is subject to threatening or intimidating behaviour by another person or persons on account of anything they have said or proposed to say in exercising their freedom of speech;
- supports reasonable and proportionate measures to prevent any person from using lawful speech which a reasonable person would regard, in the circumstances, as likely to humiliate or intimidate other persons and which is intended to have either or both of those effects;
- does not extend to a duty to protect any person from feeling offended or shocked or insulted by the lawful speech of another.

~~‘the university’ means the university as an entity and includes its decision making organs and officers, its student representative bodies, undergraduate and post-graduate, and any entities controlled by the university.~~

‘unlawful’ means in contravention of a prohibition or restriction or condition imposed by law.

Operation

- (1) The university shall have regard to the Principles of this Code in the drafting, review or amendment of any non-statutory policies or rules and in the drafting, review or amendment of delegated legislation pursuant to any delegated law-making powers.
- (2) Non-statutory policies and rules of the university shall be interpreted and applied, so far as is reasonably practicable, in accordance with the Principles of this Code.
- (3) Any power or discretion under a non-statutory policy or rule of the university shall be exercised in accordance with the Principles in this Code.
- (4) This Code prevails, to the extent of any inconsistency, over any non-statutory policy or rules of the university.
- (5) Any power or discretion conferred on the university by a law made by the university in the exercise of its delegated law-making powers shall be exercised, so far as that law allows, in accordance with the Principles of this Code.
- (6) Any power or discretion conferred on the university under any contract or workplace agreement shall be exercised, so far as it is consistent with the terms of that contact or workplace agreement, in accordance with the Principles of this Code.

Principles of the Code

- (1) Every member of the staff and every student at the university enjoys freedom of speech exercised on university land or in connection with the university subject only to restraints or burdens imposed by:
 - law;
 - the reasonable and proportionate regulation of conduct necessary to the discharge of the university's teaching and research activities;

- the right and freedom of others to express themselves and to hear and receive information and opinions;
 - the reasonable and proportionate regulation of conduct to enable the university to fulfil its duty to foster the wellbeing of students and staff;
 - the reasonable and proportionate regulation of conduct necessary to enable the university to give effect to its legal duties including its duties to visitors to the university.
- (2) Subject to reasonable and proportionate regulation of the kind referred to in the previous Principle, a person's lawful speech on the university's land or in or in connection with a university activity shall not constitute misconduct nor attract any penalty or other adverse action by reference only to its content; nor shall the freedom of academic staff to make lawful public comment on any issue in their personal capacities be subject to constraint imposed by reason of their employment by the university. -
- (3) Every member of the academic staff and every student enjoys academic freedom subject only to prohibitions, restrictions or conditions:
- imposed by law;
 - imposed by the reasonable and proportionate regulation necessary to the discharge of the university's teaching and research activities;
 - imposed by the reasonable and proportionate regulation necessary to discharge the university's duty to foster the wellbeing of students and staff;
 - imposed by the reasonable and proportionate regulation to enable the university to give effect to its legal duties;
 - imposed by the university by way of its reasonable requirements as to the courses to be delivered and the content and means of their delivery.
- (4) The exercise by a member of the academic staff or of a student of academic freedom, subject to the above limitations, shall not constitute misconduct nor attract any penalty or other adverse action.
- (5) In entering into affiliation, collaborative or contractual arrangements with third parties and in accepting donations from third parties subject to

conditions, the university shall take all reasonable steps to minimise the restrictions or burdens imposed by such arrangements or conditions on the freedom of speech or academic freedom of any member of the academic staff or students carrying on research or study under such arrangements or subject to such conditions.

(6) The university has the right and responsibility to determine the terms and conditions upon which it shall permit external visiting speakers ~~visitors~~ and invited visiting speakers~~visitors~~ to speak on university land and use university facilities and in so doing may:

(a) require the person or persons organising the event to comply with the university's booking procedures and to provide information relevant to the conduct of any event, and any public safety and security issues;

(b) distinguish between invited visiting speakers ~~visitors~~ and external visiting speakers ~~visitors~~ in framing any such requirements and conditions;

(c) refuse permission to any invited visiting speaker ~~visitor~~ or external visiting speaker ~~visitor~~ to speak on university land or at university facilities where the content of the speech is or is likely to:

(i) be unlawful; or

(ii) prejudice the fulfilment by the university of its duty to foster the wellbeing of staff and students;;

(iii) ~~involve the advancement of theories or propositions which purport to be based on scholarship or research but which fall below scholarly standards to such an extent as to be detrimental to the university's character as an institution of higher learning;~~

(d) refuse permission to any external visiting speaker to speak on university land or at university facilities where the content of the speech is or is likely to involve the advancement of theories or propositions which purport to be based on scholarship or research but which fall below scholarly standards to such an extent as to be detrimental to the university's character as an institution of higher learning.

(e) require a person or persons seeking permission for the use of university land or facilities for any external visiting speaker to contribute in whole or in part to the cost of providing security and other measures in the interests of public safety and order in connection with the event at which the external visiting speaker ~~visitor~~ is to speak.

- (7) Subject to the preceding Principles the university shall not refuse permission for the use of its land or facilities by an external visiting speaker ~~visitor~~ or invited visiting speaker ~~visitor~~ nor attach conditions to its permission, solely on the basis of the content of the proposed speech by the visitor.
- (8) Consistently with this Code the university may take reasonable and proportionate steps to ensure that all prospective students in any of its courses have an opportunity to be fully informed of the content of those courses. Academic staff must comply with any policies and rules supportive of the university's duty to foster the wellbeing of staff and students. They are not precluded from including content solely on the ground that it may offend or shock any student or class of students.

SUGGESTIONS:

Paragraph 3.1

It is **suggested** that universities should adopt a single, overarching code or policy dealing with freedom of speech and academic freedom.

Paragraph 3.2

It is **suggested** that those universities whose policies do not already do so, should strengthen alignment with the Model Code by making it clear that academic freedom and freedom of speech are of such value that they will not be restricted or burdened except by restrictions or burdens permitted by their freedom of speech and academic freedom policy or code.

Paragraph 3.3

It is **suggested** that universities should remove from their definition of “academic freedom” limitations that are not included in the Model Code definition.

Paragraph 3.5.1

It is **suggested** that every university, even those that have adopted paragraph (4) of the *Operation* section of the Model Code, should undertake a project, within a defined period of time, to review all its policies, rules and codes to ensure that they are not inconsistent with the university’s freedom of speech and academic freedom code or policy.

Paragraph 3.5.2

It is **suggested** that all universities, even those that have adopted paragraphs (3) and (5) of the *Operation* section of the Model Code, should review at least their rules, codes and policies dealing with the matters identified in paragraph 2.5.4, that is:

- Student Misconduct Policies
- Codes of Conduct applying to Staff
- Codes of Conduct applying to Students
- Bullying, Discrimination and Harassment Policies or Procedures
- Policies regarding the Hire or Use of University Facilities.

If these include provisions that leave room for the exercise of administrative discretions or evaluative judgments that could limit freedom of speech or academic freedom, they should be amended so as to make it clear that the power or discretion must be exercised in accordance with the university’s freedom of speech and academic freedom code or policy.

[Note: more is required than simply providing that these policies are to be ‘read with’ or ‘subject to’ the university’s code or policy dealing with freedom of speech and academic freedom.]

Paragraph 3.6.2

It is **suggested** that, if a university wishes to include in its policy or code dealing with freedom of speech and academic freedom provisos or requirements of a kind not authorised by the *Principles of the Code* section of the Model Code, it should designate these as “expectations” with which students and staff should comply, but that the policy or code must make it clear that failure to meet these expectations is not sanctionable, that is, it will not constitute misconduct or attract any penalty or adverse action.

Paragraph 4

It is **suggested** that universities should consider ways of continuously reinforcing the university’s commitment to freedom of speech and academic freedom. This could take the form of a briefing as part of the university’s induction programs for new staff, new members of the academic board and for new members of the governing body; time could be scheduled for periodic discussion at faculty, academic board and governing body meetings. Induction programs for students could also incorporate a session aimed at educating them about their rights to academic freedom and freedom of speech.

RECOMMENDATIONS:

Paragraph 2.4

If the *Higher Education Support Act 2003* (Cth) is amended to include the definition of “academic freedom” in the UCC version of the Model Code, it is **recommended** that the Model Code be amended by

- (i) replacing the definition of “academic freedom” in the Model Code with the definition of “academic freedom” in the UCC version of the Model Code; and
- (ii) replacing paragraph (2) of the *Principles of the Code* section in the Model Code with paragraph (2) of the *Principles of the Code* section in the UCC version of the Model Code.

Paragraph 3.5.3

It is **recommended** that the Model Code be amended by inserting a note to the *Operation* section that provides:

“As an alternative to adopting some or all of paragraphs (2), (3), (4) and (5) of the *Operation* section of the Model Code, a university may confirm that it has brought all its existing policies and rules into alignment with the *Principles of the Code*.”

Paragraph 3.6.1

It is **recommended** that the Model Code be amended by inserting a note to paragraph (2) of the *Application* section that provides:

“Where a student representative body is a separate legal entity, the university will use its best endeavours to encourage it to adopt the university’s policy on freedom of speech and academic freedom.”

Paragraph 5.1

It is **recommended** that

- (i) the Model Code be amended to include a requirement that the university’s governing body prepares an annual attestation statement regarding freedom of speech and academic freedom and that this is published in the university’s annual report; at a minimum, this must identify the university’s main policy or policies regarding freedom of speech and academic freedom and state whether, in the opinion of the governing body, they are consistent with the Model Code;
- (ii) the first attestation statement to be published should explain what has been done to respond to the information provided by the Department regarding the assessment of the alignment of the university’s policy or policies with the Model Code;
- (iii) a small group of Chancellors, chaired by the Chair of the UCC, should be asked to develop a template identifying other mandatory and optional matters to be included in the annual freedom of speech and academic freedom attestation statement made by the governing body and published in the annual report.

Paragraph 5.2

It is **recommended** that the need for a complaints process to be included in the Model Code could be the subject of future consideration.
