



THE UNIVERSITY OF
SYDNEY

Dr Michael Spence AC

Vice-Chancellor and Principal

1 March 2019

The Hon Robert S French AC

By email: sulcsj@bigpond.com

Dear Mr French,

Thank you for the opportunity to comment on the draft Model Code. The University of Sydney considers the draft an excellent addition to the suite of legal instruments and policies that protect freedom of speech and academic freedom across Australia's higher education sector.

In preparing our attached feedback we have consulted with the Chancellor, Belinda Hutchinson AM, the Chair of our Academic Board, Associate Professor Anthony Masters, our General Counsel, Richard Fisher AM and Professor Anne Twomey, Director of the Constitutional Reform Unit in our Law School. We have also conferred with members of the University's leadership group and look forward to discussing the draft (or the next iteration) with our Academic Board, Senate and representatives of our staff, affiliates and students.

In our detailed attached comments we suggest that the Model Code's definition of academic freedom needs to define the limits of the freedom more clearly. It is critical to ensure the scope of this definition is appropriate if the exercise of academic freedom within the bounds of the definition is to be used as a defence against allegations of misconduct. This would ensure any rights under the Code are understood alongside other reasonable and lawful obligations. There has also been some concern expressed that the Code be consistent with the Fair Work Act and existing enterprise agreements. Comments attached deal with these issues at specific points.

Additionally, your covering letter was particularly helpful in clearly parsing the two frequently conflated notions of *freedom of speech* and *academic freedom*. We think it would be useful if the Model Code also included a definition of *freedom of speech*.

A Model Code such as the one you propose will help the University of Sydney fine-tune its relevant rules and policies. While recognising the importance of institutional autonomy, it helps address public concerns about freedom of speech and academic freedom in Australian universities. It could also benefit governments and higher education providers in other countries considering issues around the protection of freedom of speech and academic freedom. We thank you for this valuable contribution to the sector and for the open and consultative way you have engaged with providers.

We look forward to reviewing the next draft of the Model Code and have no objection to our responses to your letters being published on the department's website.

Yours sincerely,

Michael Spence

Comments on the Draft Model Code

Original Text	Proposed Amended Text	Comments
<p>[Page 1 - 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, which they share with all people, is treated as paramount value and is not restricted nor its exercise burdened by limits or conditions other than those imposed by law or by reasonable regulation to of access to and use of the University's land and facilities and the discharge of its legal duties of care to those who come on to its land whether as staff, students or visitors and its duty to foster the wellbeing of students and staff.</p>	<p>[Page 1 - 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, which they share with all people, is treated as paramount value and is not restricted nor its exercise unnecessarily burdened by limits or conditions other than those imposed by law or by reasonable regulation to of access to and use of the University's land and facilities and the discharge of its legal duties of care to those who come on to its land whether as staff, students or visitors and its duty to foster the wellbeing of students and staff.</p>	<p>The phrase "which they share with all people" appears intended to import existing constraints on freedom of speech. This could be clearer.</p> <p>We have proposed a minor amendment for greater consistency with the existing tests around the implied freedom of political communication.</p>
<p>[Page 1 - The Objects of the Code are:] (1) To ensure that the freedom of lawful speech of staff</p>	N/A	<p>There are many people who teach and/or conduct and publish university research but who are not 'staff' because they are not employed by the University (e.g., the University has thousands of clinical, legal and other professional title holders who are not employees.). Consideration might be given to providing a definition of staff that extends to include adjuncts, holders of honorary offices, those with clinical titles, contractors, members of University boards, etc. The University of Sydney defines these as 'affiliates' in its code of conduct, and they are bound by all relevant University rules and policies.</p>
<p>[Page 2 - Application] The Code applies to the governing body of the university, its officers and employees and its decision-making organs, including those</p>	N/A	<p>See above re: 'staff'</p>

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exercising academic governance responsibilities and the student representative body.	[Page 2 - Application] The Code applies to the governing body of the university, its officers and employees and its decision-making organs, including those exercising academic governance responsibilities and to students and the student representative body.	While some obligations only apply to the University, the Code should apply to students as well.
[Page 2 - Application] The Code applies to the governing body of the university, its officers and employees and its decision-making organs, including those exercising academic governance responsibilities and the student representative body.	[Page 2 - Application] The Code applies to the governing body of the university, its officers and employees and its decision-making organs, including those exercising academic governance responsibilities and the student representative bodies.	Most universities would have more than one student representative body – such as one for undergraduates and one for postgraduates. There are also student bodies/societies for different faculties or schools (e.g., Sydney University Law Society). It would therefore be preferable to refer generally to them in the plural so as to ensure they are all captured.
[Page 2 - Application] The Code applies to the governing body of the university, its officers and employees and its decision-making organs, including those exercising academic governance responsibilities and the student representative body.	N/A	Is there a word missing before ‘responsibilities’ or is it intended to mean ‘academic responsibilities’? It is not clear.
[Page 2 – ‘academic freedom’ for the purposes of this Code comprises the following elements:] <ul style="list-style-type: none"> The freedom of academic staff to teach, discuss, and research and to disseminate and publish the results of their research without restriction by established scholarly consensus or institutional policy, but subject to scholarly standards. 	N/A	We recommend discussing and agreeing definitions for ‘scholarly consensus’ and ‘scholarly standards’. At present, these are very nebulous terms. If the exercise of academic freedom within the scope of this definition is to be a defence to allegations of misconduct (Principles of Codes (3), p.4) it is critical that the definition accurately defines the limits of academic freedom, including the obligations and responsibilities of those entitled to the freedom.

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<p>[Page 2 – ‘academic freedom’ for the purposes of this Code comprises the following elements:]</p> <ul style="list-style-type: none"> The freedom of academic staff to teach, discuss, and research and to disseminate and publish the results of their research without restriction by established scholarly consensus or institutional policy, but subject to scholarly standards. 	N/A	<p>There are institutional policies that affect freedom to research and disseminate work but which are not for the purpose of restricting freedom of speech. For example, the University of Sydney Research Code of Conduct deals with culturally sensitive data, ethics, respect for the environment, special responsibilities with respect to the treatment of Aboriginal and Torres Strait Islander peoples or special groups, such as children or those with mental illness or dependency. It might be possible to group these matters within ‘scholarly standards’, but it might be better to say ‘scholarly and ethical standards’.</p>
<p>[Page 2 – ‘academic freedom’ for the purposes of this Code comprises the following elements:]</p> <ul style="list-style-type: none"> The freedom of academic staff and students to make public comment on any issue in their personal capacities, not speaking either on behalf of the University or as an officer of the university. 	<p>[Page 2 – ‘academic freedom’ for the purposes of this Code comprises the following elements:]</p> <ul style="list-style-type: none"> The freedom of academic staff and students to make public comment on any issue in their personal capacities, not speaking either on behalf of the University or as an officer of the university. 	<p>We query whether there should there be some kind of ‘out’ in the model code for circumstances where the restriction is not for the purpose of affecting freedom of speech, but has an incidental effect of doing so and is proportionate. For example, constraints may be imposed for financial reasons, ethical reasons, conflict of interest reasons or practical or logistical reasons (e.g., not having the appropriate equipment to undertake certain research, or having to prioritise its use).</p> <p>Technically, this is not a matter of ‘academic freedom’ – it is about personal freedom, with which the University should not interfere as long as the person does not associate himself or herself with the University in making the statement or cause reputational harm to the University.</p> <p>The University’s position is that the existing policy strikes the right balance. That is to say, rather than “authorising” members of the University community to</p>

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<p>[Page 2 – ‘academic freedom’ for the purposes of this Code comprises the following elements:]</p> <ul style="list-style-type: none"> The autonomy of the university which resides in its governors, executive and academic staff 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. 	N/A	<p>exercise their rights as citizens, they should be precluded from identifying themselves with the University when commenting on some matter not within their field of academic competence.</p> <p>There are competing considerations present in this provision. For example, the University ought to be entitled to consider whether it is commercially viable to offer a course, and to consider whether certain uses of resources are the best allocation of resources as between competing priorities. One potential approach to addressing this is a clear statement which clarifies that the Code does not operate to require a university to provide resources or material support to any particular event, program etc.</p>
<p>[Page 2 – definitions]</p> <p>‘external visiting speaker’ any person who is not an invited visiting speaker and for whom permission is sought to speak on the university’s lands or facilities.</p> <p>‘invited visiting speaker’ any person who has been invited by the university or by a student society or association or group of students or representative body or by a member or members of the academic staff to the university to speak on the university’s lands or facilities’</p>	N/A	<p>It’s not clear why a distinction is being drawn between these categories of speaker, particularly given the breadth of the University membership that can confer status as an ‘invited visiting speaker’.</p>
<p>[Page 3 – ‘the duty to foster the wellbeing of staff and students’:]</p> <ul style="list-style-type: none"> Includes the duty to ensure that no member of staff and no student suffers unfair disadvantage or unfair adverse discrimination by reason of their inherent attributes; 	<p>[Page 3 – ‘the duty to foster the wellbeing of staff and students’:]</p> <ul style="list-style-type: none"> 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; 	<p>There are a number of other categories of discrimination which the law recognises that are not ‘inherent attributes’ (e.g., religious or political affiliation). It’s appropriate that this provision references other existing kinds of discrimination established at law. If the existing wording is unclear, it could include a non-exhaustive list of factors (e.g., race, gender, sexuality, religion, political beliefs).</p>

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<p>[Page 3 – ‘the duty to foster the wellbeing of staff and students’:]</p> <ul style="list-style-type: none"> 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 in exercising their freedom of speech; 	N/A	<p>Alternative wording for this provision could also be ‘includes the duty to act in accordance with anti-discrimination law’.</p> <p>Query whether this should be extended to the protection of invited visitors who have, in the past, been subject to threatening or intimidating behaviour by students seeking to prevent them from exercising their freedom of speech?</p>
<p>[Page 3 – ‘the duty to foster the wellbeing of staff and students’:]</p> <ul style="list-style-type: none"> 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 in exercising their freedom of speech; 	<p>[Page 3 – ‘the duty to foster the wellbeing of staff and students’:]</p> <ul style="list-style-type: none"> 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 propose to say in exercising their freedom of speech; 	<p>Threats and intimidation often occur in the context of what people think a speaker is going to say, without ever letting the speaker actually say anything.</p>
<p>[Page 3 – ‘the duty to foster the wellbeing of staff and students’:]</p> <ul style="list-style-type: none"> Supports reasonable and proportionate measures to prevent any person from using lawful speech which is intended to insult, humiliate or intimidate and which a reasonable person would regard, in the circumstances, as likely to have one or more of those effects; 	<p>[Page 3 – ‘the duty to foster the wellbeing of staff and students’:]</p> <ul style="list-style-type: none"> Supports reasonable and proportionate measures to prevent any person from using lawful speech which is intended to insult, humiliate or intimidate and which a reasonable person would regard, in the circumstances, as likely to have one or more of those effects; 	<p>Conduct which has the effect of humiliating or intimidating someone may already be regulated (or even criminalised) at law. Mere insult is a different category of conduct and is of significantly less severity. It should not be included here.</p> <p>In addition, we query whether framing this around ‘intention’ is the right approach. An objective threshold around harm may be an alternative option.</p>
<p>[Page 3 – ‘the duty to foster the wellbeing of staff and students’:]</p>	N/A	<p>This deals with the subjective/objective/intent issues that arose in the public debate in relation to s 18C.</p>

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<ul style="list-style-type: none"> • Supports reasonable and proportionate measures to prevent any person from using lawful speech which is intended to insult, humiliate or intimidate and which a reasonable person would regard, in the circumstances, as likely to have one or more 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 		<p>The concern is that the matter should not be determined by the subjective feelings of the recipient of the communication, as this is too indeterminate. What one person regards as insulting, offensive or shocking may be perfectly acceptable to others. Hence the duty does not extend to protecting the subjective feelings of the recipients. But it does extend to circumstances where there is both intent on the part of the communicator of the speech to insult, humiliate or intimidate and there is an objective assessment that a reasonable person would regard it as having such an effect. (Compare the University of Sydney bullying policy which includes an objective assessment of whether a reasonable person would see behaviour as ‘humiliating, intimidating or threatening’, but does not address whether this is the intention of the person engaged in the conduct.)</p> <p>This seems to be a reasonable balance. It is hard to see any circumstances in which it is appropriate, as part of academic freedom, for a person to intend to humiliate, intimidate or threaten.</p>
<p>[Page 3 – definitions] ‘the university’ means the university as an entity and includes its decision-making organs and officers, its student representative body and entities controlled by the university.</p>	N/A	See above re definitional issues.
<p>[Page 4] (3) This Code prevails to the extent of any inconsistency, over any non-legislative rule, code, guidelines, principles or policies of the university and of any of its organs and of the student representative body.</p>	N/A	Query whether the last paragraph of the Draft Code should be included with this provision.

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<p>[Page 4 – Principles of the Code] (1) Every member of the staff and every student at the university has the same freedom of speech in connection with activities conducted on university land or otherwise in connection with the university, as any other person in Australia subject only to the constraints imposed by:</p>		<p>This presumably incorporates a common law right of freedom of speech (subject to any limitation by statute) and the implied freedom of political communication which is not a personal right, but which acts as a limitation on legislative power at both the Commonwealth and State levels and would therefore operate as a limitation on the statutes that establish universities and confer delegated law-making powers upon them.</p>
<p>[Page 4 – Principles of the Code] (1) Every member of the staff and every student at the university has the same freedom of speech in connection with activities conducted on university land or otherwise in connection with the university, as any other person in Australia subject only to the constraints imposed by:</p> <ul style="list-style-type: none"> • the right and freedom of all to express themselves and to hear and receive information and opinions; 		<p>We assume that this is getting at the problem of some voices drowning out others, literally or metaphorically, and the need on some occasions to limit the speech of some in order to support a broader range of voices being able to communicate freely and be heard. On rare occasions in a class, it might be necessary to limit the interventions by one dominant student in order to be able to hear from other students, for example. It might also justify moving student protestors who are opposed to a particular invited speaker to a space some distance from the relevant venue, so the speaker is able to be heard.</p> <p>An example was the protest by male students in 1914 against a speech by the suffragist Adela Pankhurst in 1914 when they threw firecrackers in the windows and rocks on the roof to prevent her from being heard. Presumably this exception would have allowed the University to require them to move away from the venue (while still expressing their protest).</p> <p>If this is not what it means, however, further clarification would be helpful.</p>

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<p>[Page 4 – Principles of the Code] (2) Subject to reasonable and proportionate regulation of the kind referred to in the previous principle, a person's lawful expressive conduct 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 or manner of delivery.</p>	<p>N/A</p>	<p>This is an important qualification. It would exclude obscenity, criminal forms of offensive or obstructive behaviour, breaches of discrimination laws, etc. It would also presumably exclude speech that is intended or likely to incite violence, unlawful discrimination, etc.</p>
<p>[Page 4 – Principles of the Code, a list of constraints from other sources / areas of law]</p> <ul style="list-style-type: none"> The reasonable and proportionate regulation of conduct to enable the university to fulfil its duty to foster the wellbeing of students and staff. 	<p>[Page 4 – Principles of the Code, a list of constraints from other sources / areas of law]</p> <ul style="list-style-type: none"> 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 to enable the university to fulfil its duties to visitors. 	<p>The existing text does not adequately recognise the University's WH&S obligations, in particular to visitors.</p>
<p>[Page 6] (5)(d) in the case of an external visitor, require the person or persons seeking permission for the use of university land or facilities 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 visitor is speaking</p>	<p>N/A</p>	<p>Is this intended to imply that the University should not impose a charge on student societies for security if they invite controversial speakers to attend the campus, or is the distinction instead that while the 'external visitor' may be charged, the invited visitor is not charged, but the University booking procedure can still impose a charge on the body that invited the visitor? Some clarity would be helpful.</p>
<p>[Page 6] (7) 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</p>	<p>N/A</p>	<p>The use of 'may' is important, as this leaves it up to the University to decide. It is still, however, subject to the caveat that academic staff cannot be required to exclude content on the grounds that it might offend or shock. If, however, there is an intention to 'insult,</p>

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<p>informed of the content of those courses, and to seek advice about their content, provided that academic staff are not precluded from including content on the grounds that it may offend or shock any student or class of students</p>		<p>humiliate or intimidate', then this could be made subject to reasonable and proportionate means to prevent it, as part of the duty to foster the wellbeing of staff and students.</p>
<p>[Page 6] (8) Consistently with the principles in this Code, the university, in its discharge of its duty to foster the wellbeing of students, may provide special support including dedicated rooms or places for any particular group of students which is likely to benefit from such support.</p>	<p>[Page 6] (8) Consistently with the principles in this Code, the university, in its discharge of its duty to foster the wellbeing of students, may provide special support including dedicated rooms or places for any particular group of students which is likely to benefit from such support.</p>	<p>While this is a laudable goal, it is outside the scope of the Code. It has to do entirely with resourcing and not with speech. It is appropriate that this be removed, noting the earlier comments in which we have sought a caveat that this Code is not about resources, availability of or access to programs made available to minority groups etc.</p>

