

4 March 2019

The Hon Robert S French AC  
Suite 2, Level 13  
Allendale Square  
77 St George's Terrace  
Perth WA 6000

Dear Mr French

On behalf of Charles Sturt University, I am pleased to respond to the draft Model Code you have prepared and emailed to me on 8 February 2019.

### General Position

Thank you for your letter of 8 February regarding a Draft Model Code in relation to freedom of speech in Universities. We appreciate your work on this important issue, although as you note you have not been persuaded that there actually is a "free speech crisis." Implementing new policy or regulation is always a complex matter and we are concerned to ensure that if any changes are made, they have overall positive effects. In our view, much of the criticism of university policy in this space has been based on specious, or deliberately partial, reading of policy.

We see some potential benefits in the concept of a high-level Model Code which universities can voluntarily adopt, with or without modification, within their existing policies, subject to their governing laws or rules. However, we have concerns about the recommendations for the draft Model Code, in its current form.

Such a high-level code would be supported so as to (using your words) "*create a framework for the sharing of experiences and for consistent application in practice*" and "*as an optional resource available to the sector to adopt either on an institutional or collective basis and able to be varied or qualified by institutions or collectively.*"

Whilst we are supportive in principle of the development of a Model Code which seeks to provide guidance on how to apply the principles of freedom of (lawful) speech and intellectual enquiry, we are especially concerned that the draft Model Code, in its current form, particularly with its emphasis on language and principles expressed in many places in absolute terms, purports to confer extensive rights relating to freedom of speech on academic staff and students that exceed those that arise under common law (despite the intent of Principle (1)). By way of example, we take issue with a Model Code that purports to describe freedom of speech as "paramount", when the common law meaning of that term means supreme or more important than anything else.

Likewise, depending on how the draft Model Code is interpreted and applied, it might significantly and inappropriately limit the rights and powers of a university with regards to several key areas of its operations (including how it handles and protects confidential information and intellectual property, how it may take action in relation to staff misconduct and how it may control and manage the use of its facilities and land).

Finally, in terms of high level issues, we do not support the proposal that the Code “preferably” be incorporated in an institutional statute or regulation in such a form that it is “*superior to administrative policies and codes.*”

Charles Sturt University, as we would anticipate would be the case for most Australian universities established by Statute or under a Constitution, has an object enshrined by legislation (in section 7(1) of the [Charles Sturt University Act 1989](#)) that references “free inquiry” **amongst a number of other objects**, namely:

*“... the promotion, within the limits of the University’s resources, of scholarship, research, **free inquiry**, the interaction of research and teaching, and academic excellence.”*

All functions of the University, including the principal functions listed in section 7(2) of our Act, must be subservient to that object (and subject always, of course, to our obligation to comply with the law). Our object is also expressly stated to be the promotion of the object “**within the limits of the University’s resources.**” A number of “principal functions” are also set out in the Act for the promotion of that object, one of which (in section 7(2) of our Act) is:

*“... the encouragement of the dissemination, advancement, development and application of knowledge informed by free inquiry.”*

However, those rights, as expressed in our policies and procedures, are **not** (correctly in our view) expressed in absolute or paramount terms. For example:

- in our [University Governance Charter](#) our institutional commitment to promoting and supporting free intellectual enquiry and expression is expressed to be subject to our “... **obligations under law and within the limits of its resources**” and to be undertaken “*in accordance with the highest scholarly, ethical, professional and legal standards.*”
- in our Code of Conduct the “right of intellectual freedom” is expressed to be accompanied by responsibilities to:
  - a) *support the role of the University as a place for independent thought and learning, constructive criticism and rational debate;*
  - b) *search for and disseminate knowledge and truth responsibly and honestly; and*
  - c) *respect the intellectual freedom and intellectual property rights of others.*

More broadly those principles also remain subject to other policies and procedures, such as those dealing with confidentiality, intellectual property and work health and safety (the latter of which includes policies that require staff and students to behave in a manner that contributes to a work and study environment that is free from bullying, discrimination and harassment). Those policies and procedures reflect the many laws, codes, and contractual arrangements under which the University operates and which impose limits on what our staff and students can freely say (including criminal laws, anti-discrimination laws, contempt laws, broadcasting laws and codes of conduct, intellectual property laws, secrecy laws, privacy laws and related codes of practice, various research codes and many commercial agreements and policies which impose obligations of confidentiality and non-disclosure on certain types of information and intellectual property).

In the above context, whilst our University Council, as the governing authority of the University, is empowered to make By-Laws that are not inconsistent with the [Charles Sturt University Act 1989](#), a By-Law which purported to implement the draft Model Code in its current form, with Principles expressed in absolute terms, would appear to not only be in conflict with the University’s object, but would fail to allow for a nuanced approach to the multiplicity of duties and obligations that the University must manage in any given situation.

## Some key drafting issues from our Submission

In summary of some of our key submissions, we note that:

- As currently drafted we are not persuaded that the Model Code will provide clarity as it uses a variety of terminology without adequately separating and clarifying them (e.g. the phrases freedom of lawful speech; freedom of speech and intellectual enquiry; and academic speech seem to be used somewhat inconsistently).
- The draft Model Code confers extensive rights relating to freedom of speech on academic staff and students of a university that the average Australian citizen generally does not enjoy (notwithstanding the intent of Principle (1)).
- The draft Model Code in several respects is expressed in absolute terms and does not properly allow for a nuanced approach which is required where there are competing duties and obligations in any set of circumstances.
- Notwithstanding your cover letter which suggests that the draft Model Code contains a “level of umbrella principles”, the draft Code is quite specific and reads like legislation.
- The draft Model Code focusses heavily on the terms and conditions upon which universities should allow visitors to *speak on University land and use University facilities* (see Principles (2) and (5) in particular). No consideration at all is given to whether and how this principle should operate or be applied by an institution such as Charles Sturt University where two thirds of our students are enrolled online. Our online facilities are generally closed to students and staff for teaching, education, research and administrative purposes. We typically have limited numbers of user licences for the multitude of software applications that support our online facilities. Closing those facilities to students and staff is not only permitted by our object (which refers to the promotion of our object “*within the limits of the University’s resources*”), but also does not prejudice the freedom of speech of others, given that the broader public has access to extensive free online forums in which to see, receive and impart information (e.g. via social media).

Our submission below provides a range of recommendations relating to the draft Model Code.

I would be delighted to provide any further information to you in considering the merits of the draft Model Code.

Yours sincerely

**Professor Andrew Vann**  
Vice-Chancellor

## 1. Introduction

1.1 The purpose of the draft Model Code is outlined in the Honourable Robert S French AC's cover letter dated 8 February 2019 which accompanied the draft Model Code.

Specifically, Mr French states in his letter that:

- *“The Code is capable of application as a standalone set of principles for any higher education provider which may wish to adopt it with or without modification. It is also designed to provide the basis for a common set of principles which higher education providers might consider as capable of application across the sector.”*
- *“The proposed Code uses the terms ‘freedom of speech’ and ‘academic freedom’ instead of ‘freedom of intellectual inquiry’. They are intended to distinguish between freedom of speech as a common societal freedom and freedom of speech and intellectual inquiry as aspects of academic freedom.”*
- *“The Code is expressed in terms of principles which are capable of application to diverse institutional rules and policies and contractual and workplace agreements with staff.”*
- *“These proposals do not involve the creation of a statutory foundation for a more intrusive regulation of the sector... Importantly, the Code is not drafted on the premise that it can only operate as a common code. However, the adoption of a common code, drafted at the level of umbrella principles, would lend it greater authority and create a framework for the sharing of experiences and for consistent application in practice.”*
- *“I emphasise the support for a Model Code along the lines proposed, or some variant of it, does not involve a commitment to it. A Model Code will be recommended in my Report as an optional resource available to the sector to adopt either on an institutional or collective basis and able to be varied or qualified by institutions or collectively.”*

## 2. Request for response

On 8 February 2019, Mr French requested a response to the draft Model Code by 22 February. We understand that this was subsequently extended.

## 3. Draft – A Model Code

The draft Model Code is attached at Annexure A.

## 4. Submission

Charles Sturt University is pleased to provide a submission in regard to the draft Model Code. We have prepared a comprehensive and detailed submission containing commentary of our view and position.

Building on our commentary, view and position, Charles Sturt University also proposes a range of recommendations, that we believe would strengthen the draft Model Code.

## 5. Recommendations

Charles Sturt University recommends the following to be taken into consideration in the next iteration of the draft Model Code. Please note that not all sections of the draft Code are commented upon in this submission.

### 5.1 Opening Preamble

- (1) The opening preamble to the draft Code proposes that the draft Code is *“preferably to be incorporated in an institutional statute or regulation and thus superior to administrative policies and codes.”*
- (2) **Position of Charles Sturt University**
  - (a) The wording of the preamble appears to be inconsistent with the intent of the draft Code as outlined by Mr French, in particular his comment that *“[t]hese proposals do not involve the creation of a statutory foundation for a more intrusive regulation of the sector.”*
  - (b) As currently drafted, section 7(1) of the [Charles Sturt University Act 1989](#) (NSW) (**University Act**) sets out the University’s object as follows: *“the promotion, within the limits of the University’s resources, of scholarship, research, **free inquiry**, the interaction of research and teaching, and academic excellence.”*
  - (c) To suggest that freedom of speech, intellectual enquiry and academic freedom trump the University’s obligations to promote other limbs of the University’s object or to pursue the many principal functions (as further described in section 7(2) of the University Act) is in potential conflict with the University’s object as identified in section 7(1) of the University Act.
  - (d) From a governance perspective, given the University Act is a NSW Act of Parliament, the requirement in the draft Code would then require the University’s Council to make or amend the current By-Law (which it is permitted to do under section 31 of the University Act provided such By-Laws are not inconsistent with the University Act).
  - (e) We have doubts as to whether our University Council can make a By-Law which alters the priority of one particular aspect of the University’s object or principal functions, that is, in our opinion such a By-Law would be inconsistent with the University Act and therefore beyond the Council’s powers pursuant to section 31 of the University Act.

### (3) Charles Sturt University’s Recommendations

The preamble should be amended to reflect the position taken in Mr French’s cover letter, that is, *“the Code is capable of application as a standalone set of [high level] principles for any higher education provider*

*which **may wish to adopt it with or without modification**. It is also designed to provide the basis for a common set of principles which higher education providers might consider as capable of application across the sector.”*

## 5.2 Object (1)

- (1) The first object of the draft Code is drafted as follows:

*“To ensure that the freedom of lawful speech of staff and students ...and visitors to the university, which they share with all people, is treated as a paramount value and is not restricted nor its exercise burdened by limits or conditions other than those imposed by law or by reasonable regulation 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... and its duty to foster the wellbeing of students and staff.”*

### (2) Position of Charles Sturt University

- (a) The University’s object is subject to the qualifier that the University’s promotional activities are to be “**within the limits of the University’s resources**.” This concept of doing what is reasonably practicable having regard to an organisation’s resources is common to many laws, including workplace safety laws and laws requiring reasonable accommodation for those with disabilities. There is no acknowledgement of the limits of an organisation’s resources in the way this Object (1) is drafted or how it must be applied by universities.
- (b) The reference to “paramount value” in this Object (and in Object (2) and elsewhere in the draft Model Code) is not appropriate, given that the common law meaning of that term means ‘supreme’ or ‘more important than anything else’. Something is either paramount or not, it cannot be one of a number of “paramount” values. How does one interpret and balance a number of (allegedly) paramount values if they come into conflict? We suggest it could, however, be one of a number of principal (i.e. ‘main’) values.

### (3) Charles Sturt University’s Recommendations

- (a) Object (1) be amended to acknowledge the limits of an organisation’s resources in the way this Object (1) is drafted or how it must be applied.
- (b) Object (1) be amended to reflect that “*freedom of lawful speech*” is one of a number of principal functions or values of a university. The use of the term “paramount” in this Object (and in Object (2) and anywhere else it appears in the draft Model Code) is inappropriate.

## 5.3 Object (2)

- (1) The second object of the draft Code is drafted as follows:

*“To ensure that freedom of speech and intellectual inquiry as aspects of academic freedom are treated as paramount values by the university.”*



(2) **Position of Charles Sturt University**

- (a) Again, the reference to “paramount value” is not appropriate. We suggest it could, however, be one of a number of principal (i.e. ‘main’) values.

(3) **Charles Sturt University’s Recommendations**

- (a) Object (2) be amended to reflect that “*freedom of speech and intellectual enquiry as aspects of academic freedom*” is one of a number of principal values of a university. As stated above, the use of the term “*paramount*” in this Object is inappropriate.

5.4 **Object (3) of the Draft Model Code**

- (1) The third Object of the draft Code is drafted as follows:

*“To affirm the importance which the university accords to its institutional autonomy under law in the regulation of its affairs, including in the protection of freedom of speech and academic freedom.”*

(2) **Position of Charles Sturt University**

- (a) Notwithstanding this Object (3), the draft Code, in its current form, does not appear to affirm the importance which a university accords to its institutional autonomy. Rather, the Object may be read in absolute terms without limitation or conditions other than those imposed by law.
- (b) Furthermore, the only other reference to “autonomy” in the draft Code is in the definition of “academic freedom” (the last bullet point) which is in the context of offering academic courses and offerings.
- (c) Following on from our recommendations with respect to Objects (1) and (2), the protection of freedom of (lawful) speech and academic freedom is one of a number of principal values of a university. A university should also have autonomy to make its own policies for good governance and so forth. The “protection of freedom of speech and academic freedom” need not and should not be separately referenced in this affirmation of institutional autonomy (unless this Object is amended to also list examples of the many **other** principal values that universities may have regard to, to remove any suggestion of absolute paramountcy of that one identified principle).

(3) **Charles Sturt University’s Recommendations**

- (a) This Object in the draft Code be amended to a simple affirmation of the importance which a university accords to its institutional autonomy, deleting the phrase “*including in the protection of freedom of speech and academic freedom.*”

## 5.5 Application

- (1) The application of the draft Code is “*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.*”
- (2) **Position of Charles Sturt University**
  - (a) The university does not have day to day control over student representative bodies.
  - (b) Furthermore, the student representative bodies should not be treated as if they are decision-making organs for a university. Many decisions of student representative bodies are merely recommendations which are subject to the approval of the university.
- (3) **Charles Sturt University’s Recommendation**
  - (a) The Application be amended to delete reference to ‘student representative bodies’.

## 5.6 Definitions – “Academic Freedom”

- (1) The definition of “academic freedom” is contained in 7 bullet points which we have not replicated here for brevity.
- (2) **Position of Charles Sturt University**
  - (a) Generally, the definition is conflated and does not make a distinction between the concepts of freedom of speech, freedom of association, institutional autonomy and academic freedom (notwithstanding that the distinctions were addressed to some extent in Mr French’s covering letter).
  - (b) The definition of “academic freedom” appears to cover off just about any form of public comment made by an academic staff member or student regardless of content, scholarly intent or context, or regardless of the manner of delivery. Not all speech by academic staff should be characterised as academic speech or in the pursuit of academic freedom and subject to a Model Code of this nature. Conversely, why is the definition limited to academic staff and students to the exclusion of professional/general staff?

For example, why should a personal but public comment expressed by a mathematician about a matter not in their field of expertise but not speaking on behalf of the university (e.g. a statement about refugees) be caught by the definition of “academic freedom” under the fourth bullet point (which describes the freedom of academic staff to make public comment on any issue), but not a similar statement made by a professional staff member? We submit that the extension of the definition to refer to rights of academic staff to make public comment on matters not on behalf of the university or as officers of the university and not within their recognised field of academic expertise actually have nothing to do with “academic freedom.”



- (c) There is no limitation on “academic freedom” in regard to lawfulness or a university’s code of conduct (notwithstanding that Object (3) refers to institutional autonomy), or enterprise agreements, particularly in regard to the ability to criticise an employer.
- (d) Specifically, there is no context to the inclusion in the definition of “academic freedom” of the element that refers to “*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.*” A statement of that nature is fraught with the potential for misunderstanding (again, in light of university codes of conduct and applicable enterprise agreements).
- (e) Furthermore, the definition of “academic freedom” in this context appears to propose that academic staff be given almost unfettered rights of free speech in almost any context (including, for example, expressing public opinions in relation to the university). As drafted, the mere act of identifying oneself as an employee or academic at a university could be a defence against any action against that individual for public remarks that bring the university into disrepute, provided they can assert they are doing so in their “*personal capacity.*” It is unclear why the draft Code proposes that academic staff should be treated differently than general staff when it comes to expressing their opinions about the university, nor is there any clear statement noting that such opinions must be subject to the types of limitations on free speech outlined above (including lawfulness and a university’s own code of conduct and enterprise agreements).

### (3) **Charles Sturt University’s Recommendations**

- (a) The definition of “academic freedom” requires re-drafting to reflect the different concepts of freedom of speech, freedom of association, institutional autonomy and academic freedom. Whilst this is addressed somewhat in Mr French’s letter of 8 February, the draft Model Code seems to conflate these concepts. Among other things, the phrases “freedom of speech” and “lawful speech” are used in the Code, but no definitions are given. Does ‘lawful’ mean compliant with the law (which in our view does not go far enough), or does it mean compliant with the law and applicable contracts and codes that apply to the university’s operations (and should we distinguish between mandatory and voluntary codes)?
- (b) Consideration should be given as to why there is a distinction between academic staff and general staff, and that distinction (if appropriate) should be more clearly explained in the Model Code.
- (c) There should be a clear statement to the effect that no persons, including staff and students of universities, should have an expectation of unfettered rights of free speech. Freedom of speech is never an unfettered right, regardless of who we are talking about, even in the context of “academic freedom”.
- (d) Following on from the preceding point, limitations on the scope of “academic freedom” for any staff or students should be clearly stated, and should include limitations with respect to:

- lawfulness (including, for example, compliance with criminal laws, anti-discrimination laws, defamation laws, contempt laws, broadcasting laws, intellectual property laws, secrecy laws and privacy laws, and common law obligations such as the common law and equitable duties of confidentiality);
  - overriding contractual obligations (e.g. non-disclosure agreements and agreements which impose limitations on the use and disclosure of confidential information, commercial-in-confidence information and intellectual property);
  - other applicable codes under which the university operates and which impose limits on what our staff and students can freely say (e.g. privacy codes and research codes which limit the use and disclosure of certain types of information and intellectual property);
  - a university's own code of conduct and related policies, particularly those which have, as their principal concern, the workplace health and safety of staff, students and visitors (including, for example, bullying and harassment prevention policies); and
  - enterprise agreements.
- (e) There should be more detail about the distinction between public comment made in one's personal capacity and comments made on behalf of the university or as an officer of the university. Why is the freedom to express personal opinions about the university, the freedom to make public comment on any issue in one's personal capacity, the freedom to participate in professional or representative academic bodies and the freedom of students to participate in student societies and associations all listed under the definition of "academic freedom", given that these sorts of activities are not traditionally viewed as part of an individual's "academic freedom" but are more simply part of one's broader rights of free speech and association.

#### 5.7 Definitions – "invited visiting speaker"

- (1) The definition of "invited visiting speaker" extends to any person invited by a "representative body" (of the university) or "academic staff of the university."
- (2) **Charles Sturt University's Recommendations**
- (a) As the definition of "university" includes its officers and entities controlled by the university, the references to any person invited by a "representative body" (of the university) or "academic staff of the university" may be deleted.

#### 5.8 Definitions – "the duty to foster the wellbeing of staff and students"

- (1) The definition of "*the duty to foster the wellbeing of staff and students*" is contained in 4 bullet points which we have not replicated here for brevity.

## (2) Position of Charles Sturt University

- (a) This definition purports to relate to the duty to foster the wellbeing of staff and students, yet makes no mention at all of the legal obligations of a university (and the rights and responsibilities of workers) regarding workplace health and safety, or the obligations of a university as an owner or occupier of land to take reasonable measures to ensure premises are safe. These lawful rights and obligations must be factored in to any purported definition related to the duty to foster the wellbeing of staff and students. This is particularly important given that Principle (1) of the Code suggests that a university's ability to regulate with respect to freedom of speech should be subject **only** to the three constraints limited in that Principle (one of which concerns the duty to foster the wellbeing of students and staff). In short, we do not think the definition takes into account physical safety of the community and property, or WHS requirements, or other implied and express obligations a university may have as an employer and an owner or occupier of land.
- (b) We query whether the definition goes far enough in relation to anti-discrimination responsibilities in every jurisdiction. Specifically, the definition and the references in the final two dot points to lawful speech should be reconsidered to ensure these references take into account the differences in anti-discrimination laws and obligations in various jurisdictions.
- (c) There are conflicting concepts in regard to "insults" (at one point the definition states that the duty to foster the wellbeing of staff and students "*supports reasonable and proportionate measures to prevent any person from using lawful speech which is intended to insult, humiliate or intimidate other persons and which a reasonable person would regard, in the circumstances, as likely to have one or more of those effects*" yet in the very next bullet point it says it "*does not extend to a duty to protect any person from feeling offended or shocked or insulted by the lawful speech of another*"). Is it only "*unlawful insulting remarks*" that are not supported (in which case they would be prohibited anyway by the mere fact of being unlawful)?
- (d) Generally, we do not think the definition takes into account physical safety of the community and property, or WHS requirements, or other implied and express obligations a university may have as a land holder.

## (3) Charles Sturt University's Recommendations

- (a) The definition should be reconsidered to ensure it acknowledges and accounts for the differences in anti-discrimination responsibilities in various jurisdictions.
- (b) Bullet points 3 and 4 should be redrafted for clarity given the inconsistency between these two points. Bullet point 3 supports reasonable and proportionate measures to prevent persons from using lawful speech which is intended to insult, humiliate or intimate others (introducing a difficult burden of proof to show that someone "intended" to insult or humiliate someone else), yet bullet point 4 says

the duty does not extend to a duty to protect any person from feeling insulted by the lawful speech of another.

#### 5.9 Definitions – “the university”

- (1) The definition of “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.*”
- (2) **Position of Charles Sturt University**
  - (a) The university does not have day to day control over student representative bodies.
  - (b) Furthermore, student representative bodies should not be treated as if they are a decision-making organ of the university.
- (3) **Charles Sturt University’s Recommendations**
  - (a) We suggest deleting the reference to “student representative bodies” from the definition.

#### 5.10 Operation

- (1) Paragraphs (1) and (2) under the heading “Operation” refer to a university having regard to the principles of the Code in drafting delegated legislation, and that “*[a]ny power or discretion conferred on the university or on any person or body by a law made by the university in the exercise of its delegated law-making powers shall be exercised so far as the text and purpose of the law allows, in accordance with this Code.*”
- (2) Paragraph (3) refers to the Code prevailing, to the extent of inconsistency, over internal university policy.
- (3) Paragraph (4) provides that “*[a]ny power or discretion conferred on the university or the student representative body including powers or discretions conferred under contract or workplace agreements or deriving from property rights, whether as to real or other property, shall be exercised, so far as is reasonably practicable, in accordance with this Code.*”
- (4) **Position of Charles Sturt University**
  - (a) We refer back to comments made with respect to the Opening Preamble to the Code which are also applicable to these paragraphs.
  - (b) With regards to paragraph (3) we refer again to our comments with respect to the draft Objects which require paramountcy to be given to “*freedom of lawful speech*” and “*freedom of speech and intellectual enquiry as aspects of academic freedom*” – this would be inconsistent with our University’s object and principal functions as set out in the University Act.
  - (c) To give superiority to this Code over a university’s own rules, policies and decision-making powers is untenable.

(5) **Charles Sturt University's Recommendations**

- (a) The Operation should be revised to reflect that the draft Code is intended to contain high level principles which may be adopted by universities, with or without modification, within their own set of policies.

That is consistent with Mr French's own remarks in his letter dated 8 February 2019 to the effect that the Code is intended to be an *"optional resource available to the sector to adopt either on an institutional or collective basis and able to be varied or qualified by institutions or collectively"* and further that it is not drafted on the premise that it can only operate as a *"common code"* but rather it is *"drafted at the level of umbrella principles (which) .. create a framework for the sharing of experiences and for consistent application in practice."* We support the intention expressed in Mr French's letter and would like to see this more clearly reflected in the draft Model Code.

- (b) The Operation should remove references to the Code prevailing over a university's own policies and rules (see in particular Principle (3)). We can support statements of intent that endeavour to ensure universities use reasonable measures to act consistently with the Code, but take issue with a Code that appears to express the concept of "academic freedom" and the principles contained therein as paramount considerations that prevail over a university's statutory (or constitutional) object and principal functions or any policies and rules designed to further that object and principal functions.

5.11 **Principles of the Code – Principle (1)**

- (1) This Principle (1) grants every member of staff and student the 'same' freedom of speech (in connection with activities conducted on university land or otherwise in connection with a university) as any other person in Australia subject to certain constraints as listed in 3 bullet points.

(2) **Position of Charles Sturt University**

- (a) It is unclear whether this Principle actually grants further rights than any other person in Australia would enjoy.
- (b) The Code states that the responsibilities with regard to "*freedom of speech*" are "*subject only to the constraints*" listed in Principle (1), which include:
- (i) the reasonable and proportionate regulation of conduct necessary to the discharge of the university's teaching and research activities;
  - (ii) the right and freedom of all to express themselves and to hear and receive information and opinions; and
  - (iii) the reasonable and proportionate regulation of conduct to enable the university to fulfil its duty to foster the wellbeing of students and staff.

- (c) The potential consequence here is that if the principles of due process and natural justice are applied to a decision by a university to apply an over-riding ‘constraint’, any person whose activity is refused will be entitled to appeal or seek review of that decision.
- (d) There is the potential for universities being tied up in disproportionately expensive and onerous processes defending their decisions to restrict certain activities on university land or connected with the university based on one or more of those reasons, against individuals who assert that their activities are in the pursuit of “*freedom of speech.*”
- (e) There is no explicit constraint to the effect that universities should be able to impose reasonable and proportionate regulation of conduct and statements necessary for the furtherance or protection of business concerns, confidential or commercial-in-confidence information, commercial research or intellectual property, or which acknowledges that universities should be able to develop reasonable and proportionate policies and codes of conduct in relation to the making of public comment which may impact the integrity or reputation of the university and its staff or students.

(3) **Charles Sturt University’s Recommendations**

- (a) Consideration should be given as to whether this Principle actually grants further rights than any other person in Australia would enjoy.
- (b) The Principle should be clarified to allow a university to regulate statements regarding confidential information with respect to its business and operations, including reasonable constraints that regulate conduct with respect to commercial research confidential or commercial-in-confidence information, and intellectual property.
- (c) The Principle should be clarified to acknowledge that universities should be entitled to implement reasonable and proportionate standards and codes of conduct in relation to the making of public comment which may unduly damage the integrity and reputation of the university, its staff and students or other individuals. As a general principle, we submit that academic freedom does not include an unfettered and protected privilege to deride or defame individuals, groups or the university or to ignore the policies or decisions that have been formally made within the university, or which the university is required to observe at law

5.12 **Principles of the Code – Principles (2) and (3)**

- (1) Principle (2) provides that “*[s]ubject 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.*”
- (2) Principle (3) provides that the “*exercise by a member of the academic staff or of a student of academic freedom shall not constitute misconduct nor attract any penalty or other adverse action.*”



(3) **Position of Charles Sturt University**

- (a) With respect to Principle (2), the “*reasonable and proportionate regulation*” which a university is permitted to make which can regulate a person’s “lawful expressive conduct” in university land or facilities is limited to the kind referred to in Principle (1) (which refers to regulation of teaching and research activities and regulation to enable a university to fulfil its duty to foster the wellbeing of students and staff).
- (b) Both Principles (2) and (3) appear to be expressed in terms of an absolute barrier to misconduct proceedings or other adverse action (Principle (3) is particularly broad, given that it is not subject to Principle (1)). At face value, they could be read as an institutional endorsement for staff and students to breach confidentiality, ignore contractual or common law obligations with regards to confidential information and intellectual property and ignore duties with respect to the use and disclosure of intellectual property. It should be made clear that universities are entitled to:
- regulate public statements regarding confidential information and intellectual property with respect to its business concerns (including commercial in confidence information and trade secrets), contractual rights and obligations, commercial research and the handling of confidential information and intellectual property, and with respect to the workplace generally; and
  - set codes of conduct and impose employment obligations in relation to the making of public comment having regard to those lawfully imposed rights and obligations.
- (c) Principle (3) is not made subject to Principle (1) (unlike Principle (2)) and this appears to provide an “absolute defence” in relation to staff misconduct and gives preferential treatment to academics over professional staff. To suggest the exercise of “academic freedom” is an absolute right which cannot constitute misconduct or give rise to other adverse action is not manageable nor acceptable within a university context.
- (d) Also, why does Principle (3) only relate to academic staff (noting that universities have highly skilled professional staff who may have extensive academic interests/qualifications).

(4) **Charles Sturt University’s Recommendations**

- (a) Principles (2) and (3) should be amended to make it clear that a university should be able to regulate conduct and public statements impacting upon a university’s business concerns, confidential or commercial-in-confidence information, commercial research or intellectual property, and should be entitled to set codes of conduct in relation to the making of public comment to the extent they may adversely impact on the integrity or reputation of the university.
- (b) Principle (3) should be made subject to Principle (1) (similar to Principle (2)) and, as discussed above, that Principle (1) be expanded.

- (c) Principle (3) should extend to both academic and professional staff.

#### 5.13 Principles of the Code – Principle (4)

(1) Principle (4) provides that “[i]n 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 constraints 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.”

#### (2) Position of Charles Sturt University

(a) The inclusion of a best endeavours obligation to take “all reasonable steps” to minimise constraints imposed by third party agreements is not unreasonable. However, if this Principle is taken to the extreme and, for example, an academic staff member breaches confidentiality obligations or IP rights that arise under a third party agreement, the outcome might be that even though such conduct would place the university in breach of the agreement, no action could be taken against the academic staff member if they are able to rely on the defence of “academic freedom” against any misconduct proceedings (e.g. on the basis that under Principle (3) the university could not characterise their behaviour as misconduct).

#### (3) Charles Sturt University’s Recommendations

(a) Due consideration needs to be given as to how this Principle (4) interacts with with Principles (1), (2) and (3), and the principle of “academic freedom” should not be a defence against misconduct proceedings in circumstances where a staff member breaches confidentiality obligations or IP rights that arise under a third party agreement.

#### 5.14 Principles of the Code – Principle (5) and Principle (6)

(1) Principle (5) outlines the basis on which universities may determine the terms and conditions to permit external visitors and invited visitors to speak on university land and use university facilities.

(2) Principle (6) provides that universities are not able to refuse permission “solely on the basis of the likely content of the proposed speech by the visitor.”

#### (3) Position of Charles Sturt University

(a) Whilst these principles provide the ability for a university to refuse external speakers, we consider the grounds for refusal to be inadequate and do not take into account other competing obligations and responsibilities a university might have in relation to the particular activity (for example, the duty of care to the public). Furthermore, the grounds do not permit universities to consider their own values when deciding whether or not to permit external speakers on university grounds.

- (b) The application of these principles creates a presumption that all external visitors may speak on university land and may force universities to be on the back foot trying to justify their position if they intend to refuse permission.
- (c) There is no clear reference to an ability to consider “freedom of speech” in the context of potential reputational impacts on universities (which do not fall within the specific grounds on which a university can rely to refuse an external visitor).
- (d) The reference in Principle (5)(c)(iii) which has some regard to a “university’s character” is only in the context of scholarly standards, and is not a clear reference to reputation or integrity generally, either of the university or its staff and students. The apparent inability of a university to take its own reputation and values into consideration at all could have significant potential adverse flow-on impacts (including potential financial impacts, destruction of stakeholder confidence, disruption to student intakes and so on).
- (e) We would be concerned that the current drafting might permit certain groups to see this Code as an opportunity to test their “right” under to speak on university land and use university facilities to promote views that are objectionable to a particular community, but which do not necessarily meet the (undefined) standard of being “*insulting, humiliating or intimidating*”, which in turn might have adverse impacts on that university’s reputation within that particular community.
- (f) These Principles also focus on the terms and conditions upon which universities should allow visitors to *speak on University land and use University facilities* (see Principles (2) and (5) in particular), but no consideration is given to how these Principles should operate or be applied by an institution such as Charles Sturt University where two thirds of our students are enrolled **online**. Does the Code envisage that the University should make all University facilities (including its online facilities) “*open to external visitors and invited visitors*” to speak to the broader University community?

If so, why? Our online facilities are generally closed to students and staff for teaching, education, research and administrative purposes. We typically have limited numbers of user licences for the multitude of software applications that support our online facilities. We are also potentially subject to adverse action in respect of any information that we allow to be published on our online facilities (e.g. under defamation and vilification laws, for breach of intellectual property rights and so on) and have limited resources to vet and correct unlawful statements that may be published online. In this context, closing those facilities to students and staff is not only permitted by our object (which refers to the promotion of our object “*within the limits of the University’s resources*”), but it also does not infringe in any practical way upon the freedom of speech of others, given that the broader public has access to extensive online forums in which to see, receive and impart information (e.g. via a multitude of social media platforms and the broader media). We submit that these Principles should be amended to make it clear that universities retain broad rights to control access to and use of their online facilities.

(4) **Charles Sturt University's Recommendations**

- (a) These Principles (5) and (6) should be redrafted so as to ensure universities retain sufficient control over its ability to permit or refuse external visitors to speak on university land and use university facilities and do not fetter the right of universities to control their online facilities having regards to its business needs, legal obligations, resources and other policies and procedures.

## **Annexure A**

Draft Model Code

## **Draft Recommendation – A Model Code**

A Model Code is proposed in the following terms, preferably to be incorporated in an institutional statute or regulation and thus superior to administrative policies and codes. The draft below refers to universities but is capable of application to other 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, which they share with all people, is treated as a paramount value and is not restricted nor its exercise burdened by limits or conditions other than those imposed by law or by reasonable regulation 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, student or visitors and its duty to foster the wellbeing of students and staff.
- (2) To ensure that freedom of speech and intellectual inquiry as aspects of academic freedom are treated as paramount values by the university.
- (3) To affirm the importance which the university accords to its institutional autonomy under law in the regulation of its affairs, including in the protection of freedom of speech and academic freedom.



## 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.

## 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 without restriction by established scholarly consensus or institutional policy, but subject to scholarly standards;
- 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 university in which they work or are enrolled free from institutional censorship or sanction;
- 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;
- 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 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.

**‘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.

**‘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 of the university to speak on the university's land or facilities.

**'speech'** extends to all forms of expressive conduct including oral speech and written, artistic, musical and performing works and activity; the word 'speak' has a corresponding meaning.

**'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 by reason of their inherent attributes;
- 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;
- supports reasonable and proportionate measures to prevent any person from using lawful speech which is intended to insult, humiliate or intimidate other persons 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.

**'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.

## **Operation**

- (1) The university shall have regard to the principles of this Code in the drafting of delegated legislation pursuant to its delegated law-making powers.
- (2) Any power or discretion conferred on the university or on any person or body by a law made by the university in the exercise of its delegated law-making powers shall be exercised so far as the text and purpose of the law allows, in accordance with this Code.

- (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.
- (4) Any power or discretion conferred on the university or the student representative body including powers or discretions conferred under contract or workplace agreements or deriving from property rights, whether as to real or other property, shall be exercised, so far as is reasonably practicable, in accordance with this Code.

### **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:
  - the reasonable and proportionate regulation of conduct necessary to the discharge of the university's teaching and research activities;
  - the right and freedom of all 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.
- (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.
- (3) The exercise by a member of the academic staff or of a student of academic freedom shall not constitute misconduct nor attract any penalty or other adverse action.
- (4) 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 constraints 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.

- (5) 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 do not meet scholarly standards to such an extent as to be detrimental to the university's character as an institution of higher learning.
  - (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.

- (6) 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 solely on the basis of the likely content of the proposed speech by the visitor.
- (7) Consistently with this Code the university may take reasonable and proportionate steps to ensure that all prospective students in any of its courses has an opportunity to be fully 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.
- (8) Consistently with the principles set out in this Code, the university, in the 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.