

Dr Michael Spence AC
Vice-Chancellor and Principal

3 September 2020

Professor (Emeritus) Sally Walker
c/- Higher Education Division
Commonwealth Department of Education,
Skills and Employment

By email: HigherEd@dese.gov.au

Dear Professor Walker,

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

Thank you for your letter of 31 August 2020 inviting the University of Sydney to make a submission to the review of Australian universities' implementation of the *Model Code for the Protection of Freedom of Speech and Academic Freedom*, developed thoughtfully by former High Court Chief Justice, Robert French AC, as part of his landmark review of 2018-19.

The University welcomes the opportunity to share information with you about how we are responding to Mr French's review and his recommended model code. In December 2019, our Senate adopted the University's *Charter of Freedom of Speech and Academic Freedom*. This document replaced the University's *Charter of Academic Freedom*, which was originally adopted in 2008. The revised Charter incorporated the *Principles* of Mr French's *Model Code*.

We have no feedback to provide on the review's terms of reference but provide the following responses to your four specific questions.

1. Any problems the University has had in aligning your policies with the principles of the Model Code

The process of alignment is ongoing with no major problems arising to date. Please see the attached final report of the *University of Sydney French Review Model Code Implementation Group I* established in 2019 to advise the University about how it should respond to Mr French's recommendations, including the principles of his model code.

2. If relevant, the reasons why your policies diverge in some substantial way from the principles of the Model Code or do not address some substantive aspect of the Model Code

Not relevant. Please refer to the terms of the University's [Charter of Freedom of Speech and Academic Freedom](#), which took effect on 1 January 2020, following the policy review and development processes detailed in the attached report of the University's French Review Model Code Implementation Group. We have encouraged the independent residential colleges and student representative bodies affiliated with the University to respond to the model code and the University's newly adopted Charter.

3. What steps you have taken to ensure that your policies regarding freedom of speech and academic freedom are known and understood throughout the University

We completed extensive internal and external communication about the new Charter with staff and students immediately after its adoption by our Senate in December 2019. For example, see the [news item we ran on 10 December 2019](#). Since the Charter took effect on 1 January 2020, we have periodically drawn our community's attention to it and its principles. For example, shortly after the announcement of your review we ran the attached story in our staff news. We have also started the process of ensuring our relevant policy instruments align with the terms of the new Charter, beginning with our *Code of Conduct* for staff and affiliates, a review of which has almost concluded. Further, the [NSW Parliament](#) was informed earlier this year of the University's adoption of the *Charter of Freedom of Speech and Academic Freedom* in our 2019 Annual Report.

4. Who is responsible for ensuring compliance with the policies

The Vice-Chancellor is the institutional 'owner' of the new Charter and the responsible University officer for ensuring compliance. However, practical responsibility for ensuring the University upholds and protects freedom of speech and academic freedom rests with the University Senate, its Academic Board, the Vice-Chancellor, the other members of the University's Executive and the Deans and Heads of the University's Faculties, University Schools, Centres and Institutes.

I trust this information is helpful and would be happy to discuss any aspect of our approach with you further if that would be of assistance.

Yours sincerely,

(signature removed)

Michael Spence

Attachments

- A** The University of Sydney Staff News (11 August 2020) *Reminder: University's updated Charter of Freedom of Speech and Academic Freedom*
- B** The University of Sydney (1 January 2020) *Charter of Freedom of Speech and Academic Freedom*
- C** The University of Sydney (30 September 2019) *A Model Code for the Protection of Freedom of Speech and Academic Freedom in Australian Higher Education Providers, Report of the French Review Model Code Implementation Group*

The University of Sydney, Staff News (11 August 2020) *Reminder: University's updated Charter of Freedom of Speech and Academic Freedom*

<https://intranet.sydney.edu.au/news/all/2020/08/11/reminder-on-freedom-of-speech-charter.html> (requires access to University staff intranet)

Reminder: University's updated Charter of Freedom of Speech and Academic Freedom

11 August 2020

The Federal Minister for Education, the Hon Dan Tehan has recently announced a review into the progress universities have made implementing the French Model Code on free speech. Following is a reminder of the University's updated freedom of speech Charter and Principles that have been adopted based on the French Model code.

In December last year, the University Senate [endorsed the recommendations of the French Review Model Code Implementation Group](#) by amending and renaming the University's Charter of Academic Freedom to the [Charter of Freedom of Speech and Academic Freedom \(pdf, 203 KB\)](#), with a set of principles for the protection of freedom of speech and academic freedom attached to the revised Charter. The amended Charter came into effect on 1 January this year.

The recommendations and revised Charter were developed in response to an independent review of freedom of speech in Australian higher education providers, commissioned by the federal government and conducted by former High Court Chief Justice the Hon Robert French AC.

Vice-Chancellor and Principal, Dr Michael Spence AC reaffirmed the University's critical role as a place of free inquiry, rigorous debate and discussion.

"Protecting and respecting freedom of speech and academic freedom have been fundamental to the University since its establishment 170 years ago. Our updated Charter provides clear guidance for the University community and I encourage all staff and students to familiarise themselves with the principles it upholds," Dr Spence said.

"The University must always be a place where ideas can be freely discussed, including those views that are controversial or unpopular. It is a place where people are free to express themselves and are also free to protest or disagree, so long as they do so respectfully and in accordance with the law."



CHARTER OF FREEDOM OF SPEECH AND ACADEMIC FREEDOM

The Senate of the University of Sydney, as the governing authority of the University of Sydney and with the endorsement of the Academic Board, by resolution adopts this Charter.

Dated: 9 December 2019

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PART 1 – CHARTER OF FREEDOM OF SPEECH AND ACADEMIC FREEDOM

1 Commencement

This Charter commences on 1 January 2020.

2 Charter

- (1) The University of Sydney's campuses and facilities sit on the ancestral lands of many of Australia's First Peoples, who have for thousands of generations exchanged knowledge for the benefit of all.
- (2) Respectfully acknowledging the ancient learning cultures and traditions of Aboriginal and Torres Strait Islander peoples, The University of Sydney declares its commitment to freedom of speech and academic freedom as fundamental to the conduct of a democratic society and to the quest for intellectual, moral and material advance in the human condition.
- (3) The University of Sydney affirms its institutional right and responsibility, and the rights and responsibilities of each of its scholars and students, to pursue knowledge for its own sake, wherever the pursuit might lead. The University further supports the responsible transmission of that knowledge so gained, openly within

the academy and into the community at large, in conformity with the law and the policies and obligations of the University.

- (4) The University of Sydney, consistently with the principles enunciated in its mission and policies, undertakes to promote and support:
- (a) the free, and responsible pursuit of knowledge through research in accordance with the highest ethical, professional and legal standards;
 - (b) the dissemination of the outcomes of research, in education, as publications and creative works, and in public discourse; and
 - (c) the principled and informed discussion and debate of all aspects of knowledge and culture.
- (5) The University of Sydney greatly values courage, civility and respect and promotes a climate where people disagree well.
- (6) In support of this Charter, The University of Sydney adopts the Principles in Part 2 for the protection of freedom of speech and academic freedom and declares its commitment to upholding these Principles.

Note: The University's Principles for the Protection of Freedom of Speech and Academic Freedom are based on a model code for the protection of these freedoms developed by former High Court Chief Justice, the Hon Robert S. French AC, following an independent review of policies supporting freedom of speech and intellectual inquiry in Australian higher education completed in March 2019: <https://www.education.gov.au/review-university-freedom-speech>

PART 2 – PRINCIPLES FOR THE PROTECTION OF FREEDOM OF SPEECH AND ACADEMIC FREEDOM AT THE UNIVERSITY OF SYDNEY

3 Operation

The University shall have regard to these Principles in drafting, reviewing or amending any non-statutory policies, rules or industrial agreements and in the drafting, reviewing or amending of delegated legislation pursuant to any delegated law-making powers, but the Principles do not have overriding legal effect.

4 Definitions

**academic
freedom**

for the purposes of these Principles, comprises the following elements:

- the freedom of staff, in the course of their academic activities, to educate, discuss, or research and to disseminate and publish the results of those activities;
- the freedom of staff and students, in the course of their academic activities, to engage in intellectual inquiry, to express their opinions and beliefs, and to contribute to public debate, in relation to those activities;
- the freedom of staff and students to express their opinions in relation to the University in which they work or are enrolled;

- the freedom of staff to participate in professional or representative bodies and associations;
- the freedom of students to participate in student societies and associations; and
- the autonomy of the University 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	means any person who is not an invited visiting speaker and for whom permission is sought to speak on University land or through the use of University facilities.
imposed by law	in relation to restrictions or burdens or conditions on a freedom, includes 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	means any person who has been invited by the University or a member of the University community, whether in that or some other capacity, to speak on University land or through the use of University facilities.
non-statutory policies and rules	means any non-statutory policies, rules, guidelines, principles, codes, 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 these Principles, includes all employees and affiliates of the University.
student	for the purposes of these Principles, is a person who is defined as a student by the University of Sydney Student Charter 2020, which presently provides that a student is a person who is: <ul style="list-style-type: none"> • currently admitted to candidature in an award course at the University; or • a non-award student, exchange student or study abroad student.
the duty to foster the wellbeing of staff and students	<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 including race, sex, 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 or proscribe any person from using lawful speech which a reasonable person would regard, in the circumstances, both:
 - as likely to humiliate, intimidate, harass or bully other persons; and
 - as being intended to have any 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.

University	means the body corporate incorporated under Section 5 of the University of Sydney Act 1989.
University community	means staff and students of the University.
unlawful	means in contravention of a prohibition or restriction or condition imposed by law.

5 Principles

- (1) Every member of 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:
 - (a) law;
 - (b) the reasonable and proportionate regulation of conduct necessary to the discharge of the University's education and research activities and, to the extent that those activities are informed and advanced by argument and disagreement, by setting scholarly standards for those arguments and disagreements that are conducive to the University's core mission of the advancement of knowledge;
 - (c) the right and freedom of others to express themselves and to hear and receive information and opinions;
 - (d) the reasonable and proportionate regulation of conduct to enable the University to fulfil its duty to foster the wellbeing of students and staff; and
 - (e) 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) Nothing in any non-statutory policy or rule of the University shall restrict or inhibit the freedom of staff to make public comment on any issue in their personal capacities.
- (3) As a corollary to Principle 1 and recognising that the University is a place where people are free to express themselves as well as a place where people are free to protest and disagree, all staff and students enjoy the freedom to protest subject only to restraints and burdens imposed by:
 - (a) law, including those laws which protect persons from being humiliated or intimidated;
 - (b) the reasonable and proportionate regulation of conduct necessary to the discharge of the University's education and research activities, including by

- making arrangements to ensure that those activities are not disrupted by any protests;
- (c) the right and freedom of others to express themselves and receive information and opinions, recognising the freedom of all members of the University community to express their respective views;
 - (d) the reasonable and proportionate regulation of conduct to enable the University to fulfil its duty to foster the wellbeing of its students and staff, including by way of mitigating the risk that protests become violent and ensuring the safety of staff and students; and
 - (e) the reasonable and proportionate regulation of conduct necessary to enable the University to give effect to its legal duties to visitors to the University.
- (4) Subject to reasonable and proportionate regulation of the kind referred to above, a person's lawful speech on the University's land 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.
- (5) Every member of staff and every student enjoys academic freedom subject only to prohibitions, restrictions or conditions:
- (a) imposed by law;
 - (b) imposed by the reasonable and proportionate regulation necessary to the discharge of the University's education and research activities, and, to the extent that those activities are informed and advanced by argument and disagreement, by setting scholarly standards for those arguments and disagreements that are conducive to the University's core mission of the advancement of knowledge;
 - (c) imposed by the reasonable and proportionate regulation necessary to discharge the University's duty to foster the wellbeing of students and staff;
 - (d) imposed by the reasonable and proportionate regulation necessary to enable the University to give effect to its legal duties; and
 - (e) 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.
- (6) The exercise by a staff member or student of academic freedom, subject to the above limitations, shall not constitute misconduct nor attract any penalty or other adverse action.
- (7) 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 staff or students carrying out research or study under such arrangements or subject to such conditions.
- (8) The University has the right and responsibility to determine the terms and conditions upon which it shall permit external visiting speakers and invited visiting speakers 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 and external visiting speakers in framing any such requirements and conditions;

- (c) refuse permission to any invited visiting speaker or external visiting speaker to speak on University land or through the use of 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;
 - (d) refuse permission to any external visiting speaker to speak on University land or through the use of 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; and
 - (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 is to speak.
- (9) Subject to the preceding Principles the University shall not refuse permission for the use of its land or facilities by an external visiting speaker or invited visiting speaker nor attach conditions to its permission, solely on the basis of the content of the proposed speech by the visitor.
- (10) 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. 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.

6 Rescissions and replacements

This document replaces the *Charter of Academic Freedom* which is rescinded as from the date of commencement of this document.

NOTES

Charter of Freedom of Speech and Academic Freedom

Date adopted: 9 December 2019

Date commenced: 1 January 2020

Administrator: Vice-Chancellor

Review date: 31 December 2025

Rescinded documents: Charter of Academic Freedom

AMENDMENT HISTORY

Provision	Amendment
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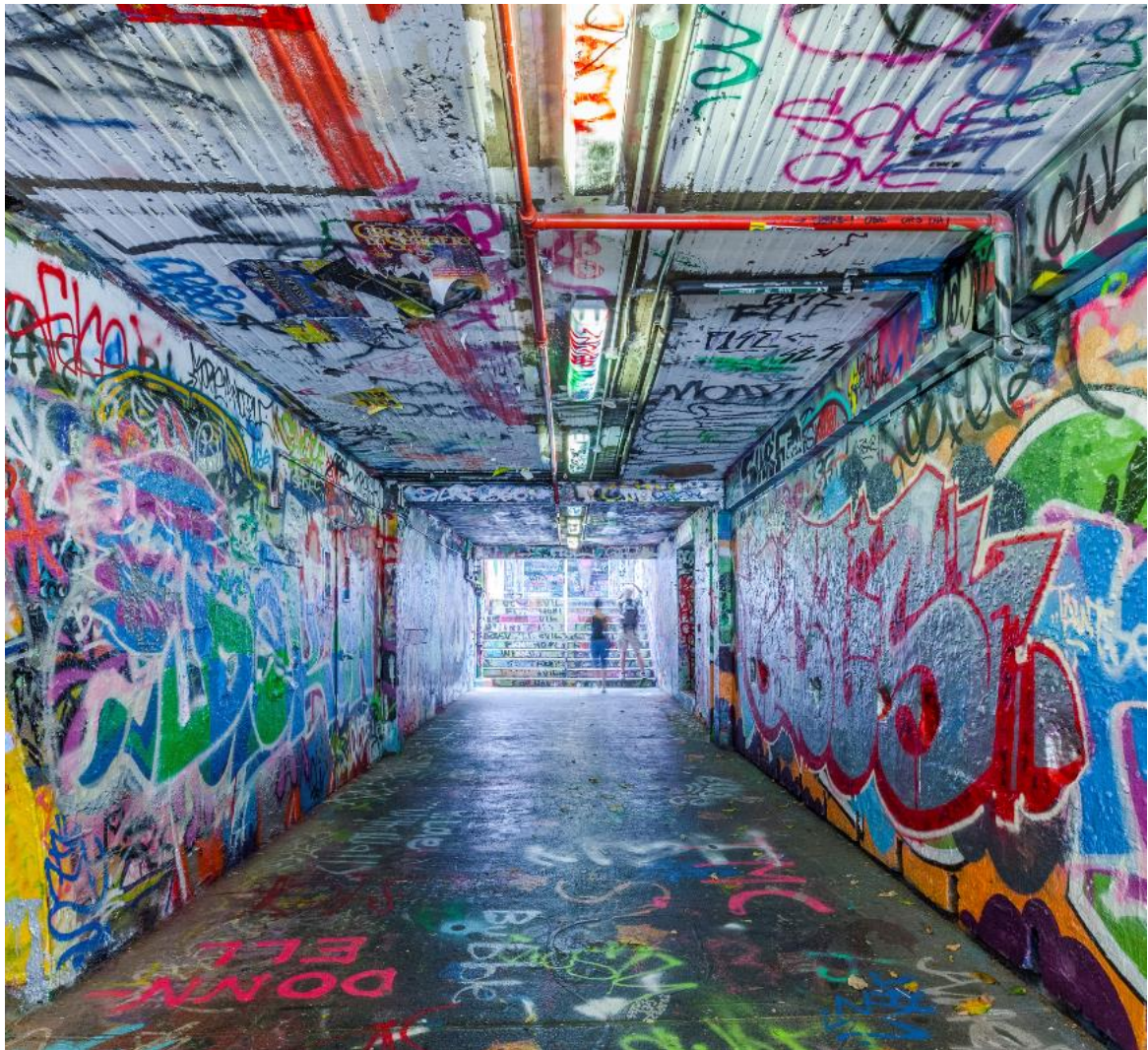
Commencing



THE UNIVERSITY OF
SYDNEY

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

Report of the French Review Model Code Implementation Group



30 September 2019

Richard Fisher AM
General Counsel
Adjunct Professor, Faculty of Law

26 September 2019

Dr. Michael Spence AC
Vice-Chancellor and Principal
Level 5, F23 Administration Building
UNIVERSITY OF SYDNEY NSW 2006

Dear Vice-Chancellor

REPORT OF THE FRENCH REVIEW MODEL CODE IMPLEMENTATION GROUP

It is my pleasure to present for your consideration the Report of the French Review Model Code Implementation Group ("**Group**").

The Group was established on 29 July 2019 to advise you by 30 September on the steps the University should take to implement the principles of the Model Code recommended in the *Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers* ("**The French Review**"), released by the Federal Government on 6 April 2019.

Having considered the implementation issues and options, and having consulted with staff, students and other members of the University community, the Group recommends that the University should implement the Model Code by appending an amended version of the Code's principles to the University's Charter of Academic Freedom, which should be renamed the "*Charter of Freedom of Speech and Academic Freedom*".

The Group's reasons for recommending this approach to implementing the Model Code are explained in the Report, while its **Annexure E** sets out the amendments the Group proposes should be made to both the Charter of Academic Freedom and the Model Code as amended by a Working Group of the Chancellors' Council in June 2019.

I would like to thank all members of the Group for their extremely thoughtful and constructive contributions to this important project over the last two months. It has been a pleasure working on this task with senior members of the University community as well as representatives of the Academic Board, NTEU, SRC, SUPRA, the principals of the residential affiliated colleges and the University's Human Resources Office.

I am especially grateful for the time and expertise which Professor Anne Twomey from the Sydney Law School contributed to the Group's discussions during what has been an extremely busy time for her. Anne's legal insights and drafting suggestions were most helpful as was the direct feedback she was able to gain from Mr. French about his thinking concerning the operation of some aspects of the Code. Those additional insights were invaluable to the course of our deliberations.

On behalf of all members of the Group I also wish to thank Tim Payne and Denise Wee from your Office for the excellent support they have provided the Group and me over the last two months.

Finally, thank you for the opportunity to lead what has been a very collegial, intellectually challenging and rewarding project. I have enjoyed it greatly.

I trust the Group's advice will assist you, the Academic Board and, ultimately, the Senate, to determine the best way for the University to implement the Model Code.

Yours sincerely

(SIGNATURE REMOVED)

R H Fisher
Chair, French Review Model Code Implementation Group

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Annexures

- A. The French Model Code as modified by a Chancellors’ Council Working Group, June 2019
- B. The Implementation Group’s Membership and Terms of Reference
- C. French Model Code Issues Paper, July 2019
- D. Summary of written feedback received through the Implementation Group’s consultations
- E. Proposed amendments to the University’s Charter of Academic Freedom and the French Model Code

Executive summary

“Universities have a special role as institutions dedicated to free open and critical expression across the full scope of human knowledge and endeavour. Central to this role is the freedom of staff and students to teach, research, debate and learn independent of external political circumstance and pressure.”¹

Freedom of speech and academic freedom are inextricably linked with the capacity of universities to perform this special role.

The publication in April 2019 of the Hon Robert French AC’s *Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers* provided the University of Sydney with an opportunity to assess the effectiveness of its own arrangements for promoting and protecting those freedoms.²

A key recommendation of Mr French’s report was that all Australian higher education providers should adopt voluntarily the *Model Code for the Protection of Freedom of Speech and Academic Freedom in Australian Higher Education Providers* (“Code”) he developed as part of his review.

In June 2019, Mr French, as Chancellor of the University of Western Australia and as a member of the Australian University Chancellors’ Council, together with the Hon Gareth Evans AC and Mr Peter Varghese AO as the Chancellors of the Australian National University and the University of Queensland respectively, circulated a revised version of the Code for consideration by the Chancellors’ Council.

With a view to the University adopting the Principles in the Code as amended by the Chancellors’ Council Working Group, the Vice-Chancellor appointed an Implementation Group (“Group”) to review the Code and make recommendations about the basis for its adoption.

The Group approached its work mindful both of the basis of its appointment and that the University of Sydney was created to expand knowledge through the “...promotion, within the limits of its resources, of scholarship, research, free enquiry, the interaction of research and teaching, and academic excellence” and is deeply committed to promoting “...free enquiry as necessary to the conduct of a democratic society and to the quest for intellectual, moral and material advice in the human condition.”³

The Group included representatives of the University’s Senior Executive, the Academic Board, the Sydney University branch of the National Tertiary Education Union (NTEU), the Students’ Representatives Council (SRC), the Sydney University Postgraduate Representative Association (SUPRA) and the principals of the independent residential colleges affiliated with the University.

¹ Universities Australia, Submission No 15 to the Senate Standing Committee on Education, Employment and Workplace Relations, Parliament of Australia, *Inquiry into Allegations of Academic Bias in Universities and Schools* (7 August 2008)

² <https://www.education.gov.au/review-university-freedom-speech>

³ The [University of Sydney Act 1989 \(NSW\)](#), section 6(1) and [Charter of Academic Freedom 2008](#).

The Group consulted with members of the University community about the Code through these representatives and via a call for written feedback from staff and students issued on 12 August 2019. The Group held five meetings between its establishment on 29 July 2019 and 18 September 2019, with its deliberations guided by the Issues Paper included at **Annexure “C”**.

This Report follows a similar structure to that of the Issues Paper and summarises the Group’s conclusions concerning the questions raised in the Issues Paper. The resulting ‘Resolution of Issues’ set out from page seven of this Report informed the Group’s proposed amendments to the Code and its recommendations concerning its operation at the University of Sydney. In these regards, the Group **resolved to recommend** that:

- (a) The University should adopt the Code as amended by Chancellors’ Council Working Group and with the further amendments recommended by the Group in **Annexure “E”**, by incorporating the Code’s Principles as an attachment to the University’s Charter of Academic Freedom; and
- (b) the Code as amended should be applied as a Statement of Principles, which informs the review and revision of the University’s non-statutory rules, codes of conduct, policies and industrial instruments, but should not be given overriding legal status.

The Group’s view that the Code should not override the University’s rules, codes of conduct, policies or industrial instruments reflected a concern it could result in uncertainty about the operation of those documents with the possible escalation rather than resolution of disputes. The Group acknowledged, however, that it would be appropriate and desirable for decision-makers in the University to have regard to the Code’s Principles when applying or interpreting any of the codes or policies of the University, or when exercising a discretion under such a code or policy.

The Group made various recommendations arising from its proposed approach to implementing the Code. For example, it recommended that priority be given to reviewing the *Code of Conduct*, *Code of Conduct of Students*, *Public Comment Policy* and the *Acceptable Use of ICT Resources Policy* for consistency with the Principles in the Code (if adopted as recommended by the Group). In this context, the Group noted that both the *Code of Conduct* and the *Code of Conduct for Students* are currently undergoing review.

The Group also recommended that the University, if amending the *Charter of Academic Freedom*, should take the opportunity to include appropriate recognition of the Indigenous knowledge, culture and traditions that have been occurring on the lands on which the University sits for more than 60,000 years.

Background

On 14 November 2018, the Federal Minister for Education, the Hon Dan Tehan MP, announced the appointment of the Hon Robert French AC, former Chief Justice of the High Court, to conduct an independent review of policies supporting freedom of expression and intellectual inquiry in Australian higher education.⁴

Mr French's report on that inquiry was submitted to the Government in March 2019.⁵ It reflects both a broad-ranging review of the protections afforded to both freedom of speech and academic freedom in other jurisdictions as well as extensive consultations within and beyond the higher education sector in this country. The result is a report which, with respect to Mr French, makes a valuable contribution to the debate in Australia about the protection of freedom of speech and academic freedom across our higher education sector.

Mr French drew the results of those various engagements together in a recommended *Model Code for the Protection of Freedom of Speech and Academic Freedom in Australian Higher Education Providers* ("Code").

On 8 April 2019 Minister Tehan wrote to the Vice-Chancellor advising that the Government had accepted Mr French's recommendations and asking that the University's Senate give full and careful consideration to adopting the Code as an institutional regulation, or where this is not possible, as an overarching institutional policy. In doing so, Minister Tehan acknowledged the University's autonomy, stating *"that the making of regulations and policies by a university or higher education provider is a matter for your institution."*

It is to be noted also that, in his report, Mr French, when recommending a Code for adoption by higher education providers, said:

"Such principles and a code of practice, which is owned by the sector, offer more promise in supporting a culture disposed to the freedoms than imposed prescription."

He also observed that: *"a Model Code embodying a set of umbrella principles could be adopted with or without modification, by individual institutions."* Indeed, Mr French, as Chancellor of the University of Western Australia and as a member of the Australian University Chancellors' Council, together with the Hon Gareth Evans AC and Mr Peter Varghese AO as the Chancellors of the Australian National University and the University of Queensland respectively, proposed in June 2019 amendments to the Code for consideration by the Chancellors' Council. It is that version of the Code, **attached as Annexure "A"**, which is the focus of this Report.

On 29 July 2019, the Vice-Chancellor announced the appointment of an Implementation Group (the membership of which is listed in the Group's terms of reference included as **Annexure "B"**) with the task of advising him and, through him, the University Executive and the Senate, as to:

- (a) the terms upon which the Code should be adopted by the University; and
- (b) the means by which it should be adopted.

⁴ <https://ministers.education.gov.au/tehan/review-university-freedom-speech>

⁵ <https://docs.education.gov.au/node/52661>

It is important to note that the premise of the Group's remit is that the University should adopt the Code or its Principles, a premise which is reinforced by the Group being established as an implementation group.

In that context, the Group proceeded upon the basis that the focus of its deliberations should be on determining the means and extent to which the terms of the Code should be adopted by the University.

As a first step in that process, the Group resolved to focus its review on the Code as modified by the Chancellors' Council working group. That review was informed by an Issues Paper prepared by the Chair (**Annexure "C"**).

On 12 August 2019 the Group issued a two-week call for feedback on the Code through staff and student news emails and postings on the University's news websites. A summary of the feedback received from staff and students is **attached** as **Annexure "D"**.

Implementation of the Code

As noted, one of the issues which the Group was requested to consider was the means by which the Code should be adopted by the University.

So as to give context to the Group's recommendations with respect to the various issues it considered, it would be useful to address the Group's recommendation as to the means by which the Code should be adopted in advance of reporting on the outcome of its consideration of the detailed provisions of the Code.

The Group **resolved to recommend** that:

- (a) The University should adopt the Code as amended by Chancellors' Council Working Group and with the further amendments recommended by the Group in **Annexure "E"**, by incorporating the Code's Principles as an attachment to the University's Charter of Academic Freedom; and
- (b) the Code as amended should be applied as a Statement of Principles, which informs the review and revision of the University's non-statutory rules, codes of conduct, policies and industrial instruments, but should not be given overriding legal status.

The Group's view that the Code should not have an overriding application so far as concerns the operation of any of the University's rules, codes of conduct, policies or industrial instruments, was informed by the concern that otherwise there would be considerable uncertainty as to whether a University code or policy was inconsistent with the Code, the extent of that inconsistency and the resulting applicable rule. This lack of certainty would be likely to exacerbate and prolong disputes, potentially leading to costly litigation to resolve them. This is particularly the case because the Code permits exceptions to the Principles where they are "proportionate", "reasonable" and "necessary". These are terms which may be subject to

differing interpretations. The Group took the view that the preferable approach would be to remove inconsistencies by reviewing University codes and policies to ensure they conform with the Principles in the Code. Such a proactive approach would be a more effective means of eliminating inconsistency, while avoiding the problem of uncertainty.

However, the Group acknowledged that it would be appropriate and desirable for decision-makers in the University to have regard to the Code's Principles when applying or interpreting any of the codes or policies of the University or exercising a discretion under such a code or policy.

The Group **further resolved to recommend** that the University should, when amending the *Charter of Academic Freedom*, take the opportunity to include appropriate recognition of the Indigenous knowledge, culture and traditions that have been occurring on the lands on which the University sits for more than 60,000 years.

The Group **further resolved to recommend** that whenever the Code refers to "teaching activities", that reference should be amended to "education activities" to reflect the broader nature of the University's educational mission and approach, and that wherever the Code refers to "university" or "higher education provider" that reference should be amended to "University".

The Group **further resolved to recommend** that the University undertake a review of its non-statutory rules, codes of conduct and policies with a view to ensuring that they are consistent with the provisions of the Code as adopted by the University through incorporation in its Charter of Academic Freedom.

The Group **further resolved to recommend** that priority be given to reviewing the following:

- *Code of Conduct*
- *Code of Conduct for Students*
- *Public Comment Policy*
- *Acceptable Use of ICT Resources Policy 2019*.

The Group **noted** that both the *Code of Conduct* and the *Code of Conduct for Students* are presently the subject of reviews.

Resolution of issues

The Issues Paper (**Annexure C**) prepared to inform the Group's deliberations asked it to address 14 threshold questions arising from issues relevant to the University's consideration of how best to implement the Code or its Principles. The Group's recommended responses to each question are summarised below with rationales provided where necessary.

Issue 1 Application of the Code at the University of Sydney

Question 1: Should the Code or its Principles apply to student representative bodies and residential colleges formally affiliated with the University but not regulated by it? If so, how should this occur?

The Group accepted that the University could not require either the independent affiliated residential colleges or its student representative bodies to adopt the Code. However, the Group, acknowledging that the circumstances of the University's colleges, as residential communities, raise particular issues, **resolved to recommend** that the University should encourage them to adopt the Principles in the Code to the extent that they could do so consistently with their own rules, codes, policies or activities.

The Group **further resolved to recommend** that to the extent that the terms of the Code either expressly or by implication, bind the student representative bodies and independent affiliated residential colleges, the relevant provisions of the Code should be amended accordingly by the University.

As to the application of the Code, the Group **further resolved to recommend** that, to the extent relevant, it should apply to all staff and affiliates, not just academic staff, as well as to students of the University. In making this recommendation the Group **noted** that the *University of Sydney Act*, by s.4, defined the University as follows:

"A University, consisting of:

- (a) a Senate,*
 - (b) Convocation,*
 - (c) The professors and full-time members of the academic staff of the University and such other members or classes of members of the staff of the University as the by-laws may prescribe, and*
 - (d) The graduates and students of the University,*
- Is established by this Act as a continuation of the University of Sydney established by Act 14 Vic No 31."*

However, the Group, as appears below in some of its recommendations, considers that provisions of the Code should be of more general application and, in particular, should apply to professional staff and affiliates of the University as well as its employed academic staff. In this regard it was recognised that many staff of the University who are categorised as professional staff undertake academic activities.

Equally, the Group accepted that the assumption implicit in the drafting of the Code; namely, that it should only apply to those working or studying at the University as well as visitors to the University's campuses, was appropriate.

Issue 2 Defining freedom of speech

Question 2: Is it appropriate and sufficient for the purposes of implementing the Code to leave the general character of the freedom of speech undefined and subject to only express limitation?

The Group **resolved to recommend** that the term “freedom of speech” does not require definition for the purposes of the Code or the incorporation of the protections of that freedom into the University's codes of conduct, rules and policies.

In this context, freedom of speech is a common law right, which may only be constrained by statute law (e.g. defamation or sedition), or contract. Accordingly, save to the extent that it is a right which is circumscribed in accordance with the Code (as amended), the common law right should be exercisable in the environment of the University.

Issue 3 Limitations on freedom of speech

Question 3: Should any of the limitations on freedom of speech proposed in Principle 1 of the Code be excluded or modified if the University adopts that Code or its Principles?

Principle 1 reads:

- “(1) *Every member of 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.”*

The duty to foster the wellbeing of students and staff is defined as follows:

- “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 Group **resolved to recommend** that the third dot point in the definition should be amended to read:

"supports reasonable and proportionate measures to prevent or proscribe any person from using lawful speech which a reasonable person would regard, in the circumstances, both:

- (a) as likely to humiliate, intimidate, harass or bully other persons; and*
- (b) as being intended to have any one or more of those effects".*

The Group **further resolved to recommend** that Principle 2 be added, which draws on wording from elsewhere in the Code, as follows:

"...Nothing in any non-statutory policy or rule, of the University shall restrict or inhibit the freedom of all staff to make public comment on any issue in their personal capacity."

The Group **further resolved to recommend** that there be an additional principle to the following effect:

As a corollary to Principle 1 and recognising that universities are a place where people are free to express themselves as well as a place where people are free to protest and disagree, every member of the staff and every student at the University, enjoys the freedom to protest subject only to restraints or burdens imposed by:

- *law, including those laws which protect persons from being humiliated or intimidated;*
- *the reasonable and proportionate regulation of conduct necessary to the discharge of the University's education and research activities, including by making arrangements to ensure that those activities are not disrupted by any protest;*
- *the right and freedom of others to express themselves and receive information and opinions, recognising the freedom of all members of the University community to express their respective views;*
- *the reasonable and proportionate regulation of conduct to enable the University to fulfil its duty to foster the wellbeing of its students and staff, including by way of mitigating the risk that protests become violent and ensuring the safety of staff and students;*

- *the reasonable and proportionate regulation of conduct necessary to enable the University to give effect to its legal duties to visitors to the University."*

In providing that freedom of speech may be constrained by 'the right and freedom of others to express themselves and to hear and receive information and opinions', the Code recognises both the freedom to express a view and the freedom to protest against that view. Free protest should be permitted on University land or in connection with University activities, but it should not be exercised in a way that prevents the free speech of others (including by blocking access to buildings, preventing people from attending events or preventing speakers from being heard) or which causes property damage or physical risk or danger to others.

Issue 4 Academic freedom

Question 4: Should there be a grant of a positive right of academic freedom or should effect be given to the principle in the Code in a negative way by simply not breaching it?

The Group **resolved to recommend** that the right of academic freedom was most appropriately protected by the Charter of Academic Freedom (as it is proposed to be amended) and as it is reflected in the University's codes of conduct, rules, policies and industrial instruments.

It was the view of the Group that the University's existing Charter of Academic Freedom (as proposed to be amended by the Group), together with the University's codes of conduct, rules, policies and industrial instruments, provided stronger and more complete protection than the Code.

Issue 5 The right of staff and students to express opinions about the University

Question 5: Should members of the University community be free to express opinions in relation to it, and, if so, should that freedom be subject to some limitation, such as being required to be exercised through the established governance arrangements?

The Group **resolved to recommend** that there be no limitation on the freedom of members of staff or students to express opinions in relation to the University.

Whilst the Group recognised that, by reason of the definition of the University in its Act, the academic staff and students are members of the University, it saw no reason to distinguish between academic staff and professional staff.

By way of contrast, the Group accepted that those members of the professional staff who occupy executive positions in the University or who, as officers of the University, have access to privileged or confidential information may be bound by the terms of their contract of employment not to express opinions about the University.

Issue 6 Public comment by members of staff

Question 6: Should the limitations on the making of public comment by members of staff in their personal capacities and, in particular, the requirement that their comments be respectful of the opinions of others which are imposed by the University's Public Comment Policy, be incorporated into the Code or its Principles?

The Group dealt with this issue by way of its recommendations in respect of Issue 3.

Issue 7 Restrictions on the exercise of academic freedom by members of staff

Question 7: Are the restrictions proposed by the Code on the exercise of academic freedom appropriate for adoption by the University? Should any of the proposed restrictions be excluded or modified by the University when implementing the Code or its Principles?

In this regard, Principle 3 of the French Model Code reads:

“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.”*

The Group **resolved to recommend** that Principle 3 of the Code and its proposed definition of academic freedom be adopted by the University with the amendments marked in **Annexure “E”** to extend the Principle to professional staff engaged in academic activities and, to the extent that those activities are informed and advanced by argument and disagreement, to make it clear that it is reasonable for the University to set the scholarly standards it believes are conducive to delivering its core mission of the advancement of knowledge.

The Group, however, **noted** that if there is to be a definition of academic freedom included in the *Higher Education Support Act 2003*, the final dot point which reads:

“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”

would be more appropriately incorporated in that Act as a separate provision, which operated as a legislative confirmation of that autonomy.

Issue 8 The requirement of ‘civility’

Question 8: If the University adopts the Code or its Principles, should the exercise of academic freedom or the freedom of speech be further constrained by a requirement of tolerance, honesty, respect and ethical behaviour?

The Group’s consideration of this issue was further assisted by a report from Professor Twomey of discussions she had had with Mr French. He expressed the view that, to the extent that a code of conduct or policy which imposed such an obligation in circumstances where a breach of that obligation would have disciplinary consequences, it would be unreasonable and disproportionate.

Consistently with its consideration of that view, the Group **resolved to recommend** an amendment to the definition of the duty to foster the wellbeing of staff and students as recorded in the discussion above concerning Issue 3.

In addition to this consideration, the Group recognised that argument and disagreement are essential elements of the core mission of a university to advance knowledge. Accordingly, the Group **resolved to recommend** that the second dot point of Principles 1 and 3 of the Code be amended to read respectively:

“the reasonable and proportionate regulation of conduct necessary to the discharge of the University’s education and research activities and, to the extent that those activities are informed and advanced by argument and disagreement, by setting scholarly standards which are conducive to the University’s core mission of the advancement of knowledge”; and

“imposed by the reasonable and proportionate regulation necessary to the discharge of the University’s education and research activities and, to the extent that those activities are informed and advanced by argument and disagreement, by setting scholarly standards which are conducive to the University’s core mission of the advancement of knowledge”.

The Group accepted that, absent some constraints which impose scholarly standards on the means by which arguments or disagreements might be undertaken in the environment of a university (beyond those constraints which might be appropriate in the community at large), the pursuit of its core mission could be frustrated.

Issue 9 Misconduct for breach of the Code

Question 9: Should the Code or its Principles, if adopted, make it plain that the corollary; namely a breach of the Code or its Principles constitute misconduct?

The Group **resolved to recommend** that disciplinary matters should be addressed by the codes of conduct, University policies and industrial instruments. This reflected the view of the Group that it would create uncertainty and confusion if the operation of the University’s codes of conduct, policies and its industrial instruments were subject to the overarching operation of the Code.

Issue 10 Relationship between the Code and University instruments

Question 10: Should the Code or its Principles have any application beyond the drafting, review or amendment of any non-statutory rule, code or policy of the University?

The Group **resolved to recommend** that the Code should not have operation beyond those circumstances. This recommendation reflects the reasoning of the Group in relation to Issues 3 and 9.

Issue 11 Visitors to the University

The Issues Paper's questions 11, 12 and 13 address collectively Principles 6 and 7 in the Code, which are concerned with the regulation of visiting speakers on University land or using University facilities. Those Principles read:

“(6) The university has the right and responsibility to determine the terms and conditions upon which it shall permit external visiting speakers and invited visiting speakers 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 and external visiting speakers in framing any such requirements and conditions;*
- (c) refuse permission to any invited visiting speaker visitor or external visiting speaker to speak on ~~the~~University land or ~~at~~ through the use of ~~the~~University facilities where the content of the speech is or is likely to:
 - (i) be unlawful; or*
 - (ii) prejudice the fulfilment by the ~~the~~University of its duty to foster the wellbeing of staff and students.**
- (d) refuse permission to any external visiting speaker to speak on ~~the~~University land or ~~at~~ through the use of ~~the~~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 ~~the~~University's character as an institution of higher learning.*
- (e) require a person or persons seeking permission for the use of ~~the~~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 is to speak.*

(7) Subject to the preceding Principles the ~~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.”

The Group **resolved to recommend** that these Principles be adopted by the University with the amendments indicated above to make it clear that the same Principles apply if the speech is to occur on University land or through the use of University facilities, whether physical or virtual.

Issue 12 Course content

Question 14: Should the University adopt the wording of the Code's Principle 8, which is concerned with the publication of course content, as drafted, or are amendments required?

The wording of Principle 8 is:

“(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 s~~Staff must comply with any policies and rules supportive of the ~~u~~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.”

The Group **resolved to recommend** that the University adopt Principle 8 of the Code, subject to the edits indicated above, which are required to ensure consistency with the drafting of other Principles, as recommended for amendment by the Group.

Ends/

Annexure A
French Model Code with Chancellors' Council Working Group Amendments,
June 2019

**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. 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 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; 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 visitng 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.

July 2019

University of Sydney French Model Code Implementation Group**Purpose**

The Vice-Chancellor has established the *French Review Model Code Implementation Group* to advise him – and, through him, the University Executive and its Senate – about how the University should respond to the recommendations of the *Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers* (“the French Review”), released 6 April 2019.

Membership & meetings

Chair, Mr Richard Fisher AM, General Counsel

Professor Lisa Jackson Pulver AM, Deputy Vice-Chancellor, Indigenous Strategy and Services

Associate Professor Tony Masters, Chair of the Academic Board

Professor Anne Twomey, The University of Sydney Law School

Ms Jodi Dickson, Director, Workplace Relations Director, Human Resources

Dr Gareth Bryant, Sydney University Branch of the National Tertiary Education Union (NTEU)

Mr Jacky He, President, the Sydney University Student Representative Council (SRC)

Ms Xiner Yuan, Sydney University Postgraduate Representative Association (SUPRA)

Professor Don Markwell, Warden, St Paul’s College (first meeting)/Mr Adrian Diethelm, Rector, St John’s College (subsequent meetings) (Residential colleges)

Members may send delegates to meetings if they are unable to attend and the NTEU, SRC and SUPRA representatives may bring one staff member each to observe.

Terms of reference

The Implementation Group will provide the Vice-Chancellor with an initial report and recommendations on the steps the University should take to implement the principles of the Model Code recommended by the French Review, or as modified by a Working Group of the Australian University Chancellors’ Council, or as further modified by the Implementation Group.¹ In preparing its initial report, the Implementation Group may address issues including, but not limited to, the following:

1. Whether the Model Code’s principles should be given expression in the form recommended by the French Review or be reflected in amendments to the University’s existing by-laws, agreements, rules, policies and procedures; including those listed in the attachment to these terms of reference.
2. The extent and type of changes that would need to be made to the University’s existing instruments for upholding freedom of speech and academic freedom.

¹ The French Review Model Code as modified by the Chancellors’ Council Working Group is attached to these Terms of Reference.

Following receipt of the Implementation Group's initial report the Vice-Chancellor may request the Group's advice on additional matters.

Consultation

The Implementation Group will consult widely with staff, students, affiliates, alumni and other members of the University community including, if feasible, by releasing a draft of its report for written feedback from members of the University community.

Deliverables and timeframes

The Implementation Group will apply its best endeavours to submit an initial report to the Vice-Chancellor by 30 September 2019, with a view to the Academic Board and Senate considering advice from the Vice-Chancellor about the University's response to the French Review at their meetings on 5 and 6 November 2019 respectively.

Secretariat and resourcing

Secretariat support for the Implementation Group will be provided by Higher Education Policy and Projects in the Office of the Vice-Chancellor and Principal.

Higher Education Policy and Projects will work closely with the University Policy Manager, University Quality Manager and other specialist staff from the Office of General Counsel, Human Resources, other central portfolios, faculties and schools as required.

The Vice-Chancellor will consider requests from the Implementation Group for dedicated funding to cover the cost of specialist advice considered essential for the Implementation Group to complete its work.

Further information

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Denise Wee, Executive Officer, Higher Education Policy, Office of the Vice-Chancellor
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Attachments

- A. Initial list of laws and University instruments potentially affected by the French Review's Model Code and principles (excluding local provisions and guidelines)**
- B. French Review Model Code as modified by the Chancellors' Council Working Group**
(Refer to Annexure A)

Attachment A

Initial list of laws and University instruments potentially affected by the French Review's Model Code and principles (excluding local provisions and guidelines)

Instrument	Determining authority
LEGISLATION	
University of Sydney Act 1989	NSW Parliament
INDUSTRIAL INSTRUMENTS	
University of Sydney Enterprise Agreement 2018 - 2021	University, NTEU, CPSU
UNIVERSITY RULES	
University of Sydney (Academic Board) Rule 2017	Senate
University of Sydney (Campus Access) Rule 2009	Senate
University of Sydney (Coursework) Rule 2014	Senate
University of Sydney (Higher Degree by Research) Rule 2011	Senate
University of Sydney (Policies Development and Review) Rule 2011	Senate
University of Sydney (Student Appeals against Academic Decisions) Rule 2006	Senate
University of Sydney (Student Discipline Rule) 2016	Senate
POLICIES	
Academic Honesty in Coursework Policy	Vice-Chancellor
Affiliates Policy	Vice-Principal (Operations)
Bullying, Harassment and Discrimination Prevention Policy	Vice-Principal (Operations)
Charter of Academic Freedom	Senate
Code of Conduct – Staff and Affiliates	Vice-Chancellor
Code of Conduct for Students	Academic Board
Cotutelle Scheme Policy	Academic Board
Coursework Policy	Academic Board
External Interests Policy	Vice-Chancellor
Gift Acceptance Policy	Vice-Chancellor
Learning and Teaching Policy	Academic Board
Open Access to University Research Policy	Vice-Chancellor

Outside Earnings of Academic Staff Policy	Vice-Chancellor
Policy on the Use of University ICT Resources	Vice-Principal (Operations)
Public Comment Policy	Vice-Chancellor
Research Agreements Policy	DVC (Research)
Research Code of Conduct	DVC (Research)
Research Data Management Policy	DVC (Research)
Research Fellows: Conditions Policy	Academic Board
Research Principles	Academic Board
Resolution of Complaints Policy	Vice-Principal (Operations)
Scholarships and Student Recognition Awards Policy	Academic Board
Sponsorship Policy	Vice-Chancellor
Supervision of Higher Degree by Research Students Policy	Academic Board
Thesis and Examination of Higher Degrees by Research Policy	Academic Board
Work Health and Safety Policy 2016	Senate
PROCEDURES	
Academic Honesty Procedures	Academic Board
Gift Acceptance Procedures	Vice-Principal (Advancement)
Learning and Teaching Procedures	DVC (Education)
Outside Earnings of Academic Staff Procedures	Chief HR Officer
Student Complaints Procedures	DVC (Education)
Thesis and Examination of Higher Degrees by Research Procedures	Academic Board
Work Health and Safety Procedures	Vice-Chancellor

Annexure C



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

(“French Model Code”)

University of Sydney Implementation Group

The terms of the French Model Code

Issues Paper

July 2019

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Attachment

French Model Code with amendments as recommended by the Chancellors' Council Working Group,
21 June 2019

1. Introduction

- 1.1** The Vice-Chancellor has established an Implementation Group to advise him – and, through him, the University, its Academic Board and Senate – on how the University can best approach implementation of the principles of the Model Code recommended by the French Review, or as modified by a Working Group of the Australian University Chancellors' Council (see attached), or as further modified by the Implementation Group.¹
- 1.2** This issues paper has been prepared to help focus and facilitate the Implementation Group's deliberations. The paper does not purport to be a complete articulation of the relevant issues. It is also accepted that members of the Implementation Group may have divergent views in relation to each of the issues. So, whilst the Implementation Group will proceed on the basis that, desirably, it adopts a unanimous view in relation to each of the relevant issues, it is accepted that there may be minority views, which will need to be recorded for the purpose of ensuring that the Group's report reflects the views of all of its members.

2. Application of the French Model Code at the University of Sydney

The University

- 2.1** Adoption of the Model Code would impose obligations on the University to:
- have regard to the Code's principles in drafting, reviewing and amending its non-statutory policies, rules or delegated legislation;
 - interpret and apply policies and rules consistently with the Code's principles; and
 - exercise its powers or discretions (whether under non-statutory policies or rules, delegated law-making powers, contract or workplace agreements) in accordance with the Code's principles (where it is lawful to do so).
- 2.2** The Model Code imposes no obligations on individuals, except to the extent that they are individuals exercising the powers or discretions of the University (e.g. in relation to disciplinary matters) or otherwise interpreting, applying, reviewing or amending policies, rules or delegated legislation. Nor are any rights conferred upon them. The Code is therefore applied to those involved in exercising the internal governance powers of the University.

Student representative bodies

- 2.3** The Model Code is expressed to apply to student representative bodies, but only to the extent that they have policies or rules that are capable of restricting or burdening freedom of speech or academic freedom.

¹ References to the French Model Code in this paper are references to that Code as it is suggested to be amended by a Working Group of the Australian University Chancellors' Council (see attached).

Residential colleges

- 2.4 The Model Code does not mention residential colleges. As drafted, the Model Code would apply to activities that occur in places of accommodation operated by universities. However, many residential colleges in Australia are independent entities. At the University of Sydney for example, Sancta Sophia College, St Andrew's College, St John's College, St Paul's College, Wesley College and the Women's College all manage their lands and affairs independently in accordance with their own Acts of the NSW Parliament.
- 2.5 To the extent that the Model Code is expressed to apply to entities that are not under the University's control its application to them will be a matter for discussion between the University and each entity.

Q.1 Should the Model Code or its principles apply to student representative bodies and residential colleges formally affiliated with the University but not regulated by it? If so, how should this occur?

3. Freedom of speech

- 3.1 The French Model Code does not offer a definition of either freedom of speech or freedom of expression. However, the nature and scope of freedom of speech may be understood through reference to Chapter 9 of the French Report and, in particular, the passages from two judgments to which Mr French refers.
- 3.2 The first passage is taken from the judgment in *R v Somerset County Council; ex parte Fewings* [1995] 1 All ER 513, 524 which reads:
- "For private persons, the rule is [that] you may do anything you choose which the law does not prohibit. It means that the freedoms of the private citizen are not conditional upon some distinct and affirmative justification for which he must burrow in the law books. Such a notion would be anathema to our English legal traditions."*
- 3.3 The second passage is taken from the judgment of the High Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564, where the Court said:
- "Under the legal system based on the common law, 'everybody is free to do anything subject only to the provisions of the law', so that one proceeds 'upon an assumption of freedom of speech' and turns to the law 'to discover the established exceptions to it'."*

Q.2 In the context of these judgments and the analysis of Mr French in Chapter 9 of the French Report, is it appropriate and sufficient for the purposes of the policies of the University to leave the general character of the freedom of speech or freedom of expression undefined and subject only to express limitations?

4. Limitations on freedom of speech proposed by the French Model Code

4.1 The French Model Code proposes at Principle 1 that every member of staff and every student at the University should enjoy 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.”*

Q.3 Should any of the limitations proposed in Principle 1 of the Model Code be excluded or modified if the University adopts the Code or its principles?

5. Academic freedom

5.1 The French Model Code proposes a definition of academic freedom with 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;*²~~
- *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.”*

² A Working Group of the Australian University Chancellors’ Council, which included Mr French, has recommended that this clause be deleted, with the issue addressed in Principle 2 (see attached).

- 5.2 The Australian Government has accepted the French Review's recommendation that this definition of academic freedom is included in the *Higher Education Support Act*, with relevant sections of the Higher Education Standards Framework also amended to include references to freedom of speech and academic freedom.

Q.4 Should there be a grant of a positive right of academic freedom or should effect be given to the principle in the Model Code in a negative way by simply not breaching it?

- 5.3 At least three elements of the definition raise issues for consideration by the Implementation Group.

- 5.4 First, there is the proposed freedom to express opinions in relation to the University.

Q.5 Should that freedom be available and, if so, should it be subject to some limitation, such as being required to be exercised through the established governance arrangements of the University?

- 5.5 Second, there is the proposed freedom on the part of academic staff to express their private opinions in their personal capacities without constraint being imposed by reason of their employment.

- 5.6 A Working Group established by the University Chancellors' Council concluded that this element of the definition of academic freedom was more about free speech than academic freedom and, as such, should not be included in the definition. Accordingly, it recommended an amendment to clause (2) of the section of the French Model Code concerned with the Principles of the Code which, if adopted, would stipulate that the making of public comment on any issue by academics in their personal capacities should not be subject to any constraint by reason of their employment by a university.

- 5.7 As to the position of the University, inferentially at least, paragraph (g) of the Guidelines in its Public Comment Policy, supports the right of the staff to make public comment on matters in their private capacity, subject to satisfaction of specific conditions. That paragraph reads:

"Staff commenting publicly on an issue not in their field of expertise should:

- *do so from a private address (whether postal or email)*
- *not use University letterhead*
- *if they wish [to] identify themselves as a university staff member they must also indicate unambiguously that they are expressing their personal opinion and not presenting the opinion or position of the University*
- *follow the University's policy on use of its Information and Communication Technology resources*
- *be mindful that they show respect for the options [sic] of others, do not injure a person's reputation or create a basis for defamation action."*

Q.6 Should the limitations on the making of public comment by members of staff in their personal capacities and, in particular, the requirement that their comments be respectful of the opinions of others, which are imposed by the University's Public Comment Policy, be incorporated into the French Model Code or its principles, whether as a Code or by way of amendments to the University's existing rules and policies?

5.8 Third, the French Model Code's proposed definition of academic freedom does not define any responsibilities or limitations that apply to individuals when exercising academic freedom. The Model Code deals with the issue of limitations under 'Principles of the Code' as discussed below.

6. Limitations on academic freedom proposed by the French Model Code

6.1 The French Model Code also proposes five limitations on academic freedom under Principle 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."*

6.2 The French Report notes the following regarding academic freedom and its history:

"It is a freedom which... reflects the distinctive relationship of academic staff and universities, a relationship not able to be defined by reference to the ordinary law of employer and employee relationships. Academic freedom has a complex history and apparently no settled definition. It is nevertheless seen as a defining characteristic of universities and similar institutions. Any principle or code relating to academic freedom should incorporate a definition which embodies its essential elements for Australian purposes, including relevant aspects of freedom of speech, freedom of intellectual inquiry and institutional autonomy." (French Report, p.18)

6.3 As the French Report notes, while academic freedom is a term used frequently, there is no settled definition internationally – even though the concept is recognised as synonymous with universities and academics in democratically liberal societies.

- 6.4** The American Association of University Professors (AAUP) has led efforts to define the concept of academic freedom in American colleges and universities. In 1940, the AAUP, in conjunction with the Association of American Colleges (now the Association of American Colleges and Universities), drafted and approved the *Statement of Principles on Academic Freedom and Tenure*.³ The statement's purpose was and remains to "promote public understanding and support of academic freedom and tenure and agreement upon procedures to ensure them in colleges and universities."
- 6.5** The AAUP and AACU have long recognised that membership of the academic profession carries with it special responsibilities. Both associations either separately or jointly have consistently affirmed these responsibilities in major policy statements, providing guidance to professors in their utterances as citizens, in the exercise of their responsibilities to the institution and to students, and in their conduct when resigning from their institution or when undertaking government-sponsored research. Of particular relevance is the "Statement on Professional Ethics" adopted in 1966 as Association policy (AAUP, *Policy Documents and Reports*, 11th ed. [Baltimore: Johns Hopkins University Press, 2015], 145–46).⁴

Q.7 Are the French Model Code's proposed restrictions on the exercise of academic freedom appropriate for adoption by the University? Should any of the proposed restrictions be excluded or modified by the University when implementing the French Model Code or its principles?

7. Further limitations on freedom of speech or academic freedom

- 7.1** In each of the Code of Conduct for Staff & Affiliates, and the Code of Conduct for Students, it is provided that amongst the values which should inform their conduct, there should be tolerance, honesty, respect, and ethical behaviour. Moreover, the Charter of Academic Freedom of the University provides that the exercise of the rights and responsibilities recognised by that Charter should be exercised in "*conformity with the law and the policies and the obligations of the University*". Those policies include the Codes of Conduct.

Q.8 If the University adopts the French Model Code or its principles should the exercise of academic freedom or the freedom of speech be further constrained by a requirement of tolerance, honesty, respect and ethical behaviour?

³ <https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>

⁴ <https://www.aaup.org/report/statement-professional-ethics>

8. Misconduct for breach of the French Model Code

- 8.1 The terms of the French Model Code expressly stipulate that the exercise by a member of staff or a student of their freedom of speech or their academic freedom consistently with the provisions of the Code shall not constitute misconduct.

Q.9 Should the Model Code or its principles, if adopted, make it plain that the corollary; namely a breach of the Model Code or its principles will constitute misconduct?

9. Operation of the French Model Code

- 9.1 The French Model Code provides that regard shall be had to the Principles of the Code when drafting, reviewing or amending policies, rules or delegated legislation.

- 9.2 The Code also provides that:

- “(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.”*

Q.10 If the University adopts the principle referred to in paragraph 9.1 and both conducts a review of existing Rules, Codes, Policies, Procedures and Agreements to satisfy itself that they comply with that Principle and applies that Principle in the future, should its Rules, Codes, Policies, Procedures and Agreements speak for themselves rather than being construed as having regard to some other Code?

10. Visitors to the University

- 10.1 The French Model Code as amended by the Chancellors' Council Working Group makes provision for the regulation of visitors to the University and for the University to determine the terms and conditions upon which it shall permit speakers to speak on University land.
- 10.2 The Model Code as amended draws a distinction between external visiting speakers and invited visiting speakers, with the following explanation provided:

"[The issues of] concern related to the vexed question of the conditions appropriate to apply to visiting speakers espousing positions seen as obnoxious, unscholarly or even (for example, in the case of 'anti-vaxxers') dangerous. There was a felt need to differentiate more clearly between the conditions appropriate to apply to the two distinct categories of speakers already defined in the Code, viz 'invited visiting speakers' on the one hand and 'external visiting speakers' on the other.

We addressed this concern with a number of amendments to Principles (6) and (7), together with a clarification of the expression 'invited by the university' in the Definitions section. The basic principle applied was that in the case of speakers invited by the university, or any group of its members, an absolute minimum of constraint should apply – recognizing the centrality of free intellectual inquiry to the whole idea of a university and the force, in this context, of the argument that unfettered debate is the best poison antidote. The same considerations do not necessarily apply in the case of external speakers simply wanting the university as a venue."
(Gareth Evans, Robert French and Peter Varghese, email to Chancellors, 21 June 2019)

10.3 Invited visiting speakers are defined as follows:

"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."

10.4 External visiting speakers are defined as:

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

10.5 In relation to both invited visiting speakers and external visiting speakers, the French Model Code provides that the University may refuse permission for them to speak on University land if 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."

Q.11 Are they proper bases upon which to preclude a speaker from speaking on University land?

10.6 In the case of external visiting speakers, the Code further provides that the University may:

“... 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.”

Q.12 Is that a proper basis upon which to preclude a speaker from speaking on University land?

10.7 Further in the case of an external visiting speaker it is proposed that the University may:

“... 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 is to speak.”

Q.13 Is that a reasonable impost? Would it be a reasonable impost if the same requirement could be applied in the case of an invited visiting speaker?

11. Course content

11.1 Principle 8 of the Model Code would apply to communication with students by the University or its academic staff about the content of courses that may cause distress or offence. As drafted this principle would allow the University to take reasonable and proportionate steps to advise prospective students about the content of courses but would not impose an obligation for them to do so. It would impose an obligation on academic staff to comply with the University’s rules and policies to foster wellbeing of staff and students, but not preclude them from including course content solely on the ground that it may offend or shock any student or class of student. The obligation falls on academic staff members responsible for course delivery, but in practice the principle would require the University to not include in its rules or policies any obligation on academic staff to exclude material from courses that might offend or shock students.

Q.14 Should the University adopt the wording of the Model Code’s Principle 8 as drafted, or are amendments required? If so, what amendments and why?

Attachment

French Model Code with amendments marked up as recommended by the Chancellors’ Council Working Group, 21 June 2019 (Refer to Annexure A)

Annexure D

SUMMARY OF WRITTEN FEEDBACK RECEIVED THROUGH THE IMPLEMENTATION GROUP'S CONSULTATIONS

No.	Date received	Writer	Issues raised
1	14/08/2019	Student	<ol style="list-style-type: none"> 1. All student organisations and their guests should be treated equally (without hindrance or chastisement). 2. Members of the international academic community should be allowed to speak on campus. 3. University of Sydney academic staff should be allowed to express their personal opinions on any topic so long as they ensure that they are not seen to be representing the 'character, opinion or view' of the University. 4. Also asked the question: Why was this stricken from the code? <i>'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.</i>
2	19/08/2019	Student staff member	<ol style="list-style-type: none"> 1. Supports the proposed strengthening of the campus free speech code. 2. Free speech is the bedrock upon which academic freedom and intellectual discourse rests. 3. Prefers to study and work at a university that has a wide free speech policy. 4. Hopes that the University commits to creating a more pro-free speech climate on campus.
3	20/08/2019	Australasian Union of Jewish Students at the University of Sydney	<ol style="list-style-type: none"> 1. Supports rigorous academic debate and scholarship. 2. Seeks assurances that implementation of the Code will not lower the standard of debate and will not have adverse effects contrary to the goals of the Vice-Chancellor and the Implementation Group. 3. Hopes that any claim of 'political censorship' while defending behaviour which meets the definition of discrimination on the basis of religion and involving the deliberate intention to humiliate and intimidate, would not hold any more weight after implementation of the Code. 4. Hopes that protections under section 6(d) of the French Code against material that would 'fall below scholarly standards to such an extent as to be detrimental to the university's character as an institution of higher learning' would keep publication of certain material off campus with no exceptions. 5. Seeks clarification from the Implementation Group whether the University will leave staff or student groups who host speakers to foot the bill for protestors over whose behaviour they have no control. 6. Hopes that student welfare and wellbeing remain a priority, and that more information about steps that the University intends to take to ameliorate the risk of harm to students would be welcome.

No.	Date received	Writer	Issues raised
4	26/08/2019	National Centre for Cultural Competence	<p>1. NCCC welcomes the University's support for academic freedom and freedom of speech, and notes that the free speech of researchers and advocates has challenged prevailing and often discriminatory attitudes and added powerfully to debates and led social change.</p> <p>2. Notes that speech may be harmful and have disproportionate and unreasonable negative effects on members of the University and compromise the University's stated values and aspirations of equity, inclusion and wellbeing.</p> <p>3. Requests that careful consideration be given to how the University would consider speech related to topics of academic discussion that do not involve direct threats, humiliation or harassment, but do involve discussion of topics that may involve histories of trauma, cultural loss or racial harm.</p> <p>4. Asks the IG to consider that:</p> <ul style="list-style-type: none"> • the viewpoints, knowledges and histories of marginalised groups most impacted by harmful speech are not always considered in debates about what speech may be injurious. There is a need to consult with these groups on the potential impacts of harmful speech on their communities. In a diverse University, the institution cannot assume it knows what these groups will know or believe until it listens to their perspectives. • there are well-documented physical and mental health effects of exposure to harmful speech, including racism and ethnic and religious intolerance. • the current cultural and political context in Australia is one characterised in part by a resurgent wave of extremism and intolerance, in which hate speech and racist groups are gaining currency and traction. In this context, students and staff look to the University as a place where they are going to feel safe.

Annexure E

Proposed amendments to the University's Charter of Academic Freedom and the French Model Code

Charter of Freedom of Speech and Academic Freedom

Approved by: []

Date of Effect: []

The University of Sydney's campuses and facilities sit on the ancestral lands of many of Australia's First Peoples, who have for thousands of generations exchanged knowledge for the benefit of all.

Respectfully acknowledging the ancient learning cultures and traditions of Aboriginal and Torres Strait Islander peoples, The University of Sydney declares its commitment to freedom of speech and academic freedom ~~enquiry~~ as ~~necessary~~ fundamental to the conduct of a democratic society and to the quest for intellectual, moral and material advance in the human condition.

The University of Sydney affirms its institutional right and responsibility, and the rights and responsibilities of each of its individual scholars and students, to pursue knowledge for its own sake, wherever the pursuit might lead. The University further supports the responsible transmission of that knowledge so gained, openly within the academy and into the community at large, in conformity with the law and the policies and obligations of the University.

The University of Sydney, consistent with the principles enunciated in its mission and policies, undertakes to promote and support:

- the free, and responsible pursuit of knowledge through research in accordance with the highest ethical, professional and legal standards;
- the dissemination of the outcomes of research, in ~~education~~ teaching, as publications and creative works, and in ~~public media~~ discourse;
- the principled and informed discussion and debate of all aspects of knowledge and culture;

The University of Sydney greatly values civility and respect and promotes a climate where people disagree well.

In support of this Charter, The University of Sydney adopts the attached Principles for the protection of freedom of speech and academic freedom and declares its commitment to upholding these Principles.

This Charter of Freedom of Speech and Academic Freedom is endorsed by the Senate and Academic Board of The University of Sydney.

Principles for the Protection of Freedom of Speech and Academic Freedom at The University of Sydney¹

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

University of Sydney: Text below is the French Model Code with amendments as recommended in June 2019 by the Chancellors' Council Working Group comprising Mr French, Gareth Evans, Peter Varghese, and with the University Implementation Group's recommended amendments marked.

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

These Principles Code applies to the governing body of the university University's Senate, its officers and employees of the University and its decision-making organs, including those involved in academic governance.

- (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 these Principles Code comprises the following elements:

- the freedom of academic staff, in the course of their academic activities,

¹ The University's Principles for the Protection of Freedom of Speech and Academic Freedom are based on a model code for the protection of these freedoms developed by former High Court Chief Justice, the Hon Robert S. French AC, following an independent review of policies supporting freedom of speech and intellectual inquiry in Australian higher education completed in March 2019: <https://www.education.gov.au/review-university-freedom-speech>

to ~~teach~~educate, discuss, ~~or~~and research and to disseminate and publish the results of ~~their research~~those activities;

- the freedom of ~~academic~~staff and students, in the course of their academic activities, 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~~those activities;
- the freedom of ~~academic~~staff and students to express their opinions in relation to the ~~higher education provider~~University in which they work or are enrolled;
- the freedom of ~~academic~~staff to participate in professional or representative ~~academic~~bodies and associations;
- the freedom of students to participate in student societies and associations.
- the autonomy of the ~~higher education provider~~University 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.~~

'affiliate' means a clinical title holder or an adjunct, conjoint or honorary appointee.

'external visiting speaker' means any person who is not an invited visiting speaker and for whom permission is sought to speak on ~~the university's~~University land or through the use of University 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' means any person who has been invited by the ~~university~~University to speak on ~~the university~~University land or through the use of University 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.~~

‘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~~ these Principles, ‘staff’ includes all employees and affiliates of the university ~~University whether fulltime or part-time and whether or not academic staff.~~

‘student’, for the purposes of these Principles, is a person who is currently admitted to candidature in an award course of the University.

‘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 or proscribe any person from using lawful speech which a reasonable person would regard, in the circumstances, both:
 - (a) as likely to humiliate, or intimidate, harass or bully other persons; and
 - (b) as being intended to have any one or more of those effects 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.

‘University’ means the Senate, staff as defined above and students.

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

Operation

The ~~university~~ University shall have regard to ~~these~~ Principles of this Code in the drafting, review or amendment of any non-statutory policies ~~or rules~~ or industrial agreements and in the drafting, review or amendment of delegated legislation pursuant to any delegated law-making powers, but the Principles do not have overriding legal status.

- ~~(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 [universityUniversity](#) enjoys freedom of speech exercised on [universityUniversity](#) land or in connection with the [universityUniversity](#) subject only to restraints or burdens imposed by:
 - law;
 - the reasonable and proportionate regulation of conduct necessary to the discharge of the [universityUniversity](#)'s [teachingeducation](#) and research activities and, to the extent that those activities are informed and advanced by argument and disagreement, by setting scholarly standards for those arguments and disagreements that are conducive to the University's core mission of the advancement of knowledge;
 - 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 [universityUniversity](#) to fulfil its duty to foster the wellbeing of students and staff;
 - the reasonable and proportionate regulation of conduct necessary to enable the [universityUniversity](#) to give effect to its legal duties including its duties to visitors to the [universityUniversity](#).

(2) Nothing in any non-statutory policy or rule of the University shall restrict or inhibit the freedom of staff to make public comment on any issue in their personal capacities.

(3) As a corollary to Principle 1 and recognising that the University is a place where people are free to express themselves as well as a place where people are free to protest and disagree, all staff and students enjoy the freedom to protest subject only to restraints and burdens imposed by:

- law, including those laws which protect persons from being humiliated or intimidated;
- the reasonable and proportionate regulation of conduct necessary to the discharge of the University's education and research activities, including by making arrangements to ensure that those activities are not disrupted by any protests;
- the right and freedom of others to express themselves and receive information and opinions, recognising the freedom of all members of the University community to express their respective views;
- the reasonable and proportionate regulation of conduct to enable the University to fulfil its duty to foster the wellbeing of its students and staff, including by way of mitigating the risk that protests become violent and ensuring the safety of staff and students;
- the reasonable and proportionate regulation of conduct necessary to enable the University to give effect to its legal duties to visitors to the University.

~~(2)~~(4) Subject to reasonable and proportionate regulation of the kind referred to ~~above~~in the previous Principle, a person's lawful speech on the ~~university~~University's land or in ~~of in~~ connection with a ~~university~~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)~~(5) 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~~University's ~~teaching education~~ and research

activities, and, to the extent that those activities are informed and advanced by argument and disagreement, by setting scholarly standards for those arguments and disagreements that are conducive to the University's core mission of the advancement of knowledge;

- imposed by the reasonable and proportionate regulation necessary to discharge the universityUniversity's duty to foster the wellbeing of students and staff;
- imposed by the reasonable and proportionate regulation necessary to enable the universityUniversity to give effect to its legal duties;
- imposed by the universityUniversity by way of its reasonable requirements as to the courses to be delivered and the content and means of their delivery.

(4)(6) The exercise by a staff 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)(7) In entering into affiliation, collaborative or contractual arrangements with third parties and in accepting donations from third parties subject to conditions, the universityUniversity 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~~out research or study under such arrangements or subject to such conditions.

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

- (a) require the person or persons organising the event to comply with the university's–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 and external visiting speakers in framing any such requirements and conditions;
- (c) refuse permission to any invited visiting speaker or external visiting speaker to speak on university–University land or at universitythrough the use of University facilities where the content of the speech is or is likely to:

- (i) be unlawful; or
 - (ii) prejudice the fulfilment by the ~~university~~ University of its duty to foster the wellbeing of staff and students.
- (d) refuse permission to any external visiting speaker to speak on ~~university~~ University land or ~~at university through the use of 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~~ University's character as an institution of higher learning.:-
- (e) require a person or persons seeking permission for the use of ~~university~~ 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 is to speak.

~~(7)~~(9) Subject to the preceding Principles the ~~university~~ University shall not refuse permission for the use of its land or facilities by an external visiting speaker or invited visiting speaker nor attach conditions to its permission, solely on the basis of the content of the proposed speech by the visitor.

~~(8)~~(10) ~~Consistently with this Code the university~~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 s~~Staff must comply with any policies and rules supportive of the ~~university's~~ 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.