

EXPLANATORY NOTE

MODEL CODE FOR PROTECTION OF FREEDOM OF SPEECH AND ACADEMIC FREEDOM IN AUSTRALIAN HIGHER EDUCATION PROVIDERS

1 Introduction

- 1.1 The *Model Code for Protection of Freedom of Speech and Academic Freedom in Australian Higher Education Providers, March 2019 (Model Code)* is the result of a review undertaken by the Hon. Robert French, AC, former Chief Justice of the High Court of Australia, and current Chancellor of the University of Western Australia to assess how the Higher Education Standards Framework and university policies and practices promote and protected academic freedom and freedom of speech in an Australian context (**French Review**). The purpose of the French Review was to suggest options considered to better promote these concepts. It was carried out in two stages and provided universities with the opportunity to respond to a first draft of the Model Code.
- 1.2 A revised draft of the Model Code was circulated to the Australian University Chancellors' Council in June 2019 by a working group consisting of Mr French (in his capacity as Chancellor of the University of Western Australia), the Hon. Gareth Evans AC (Chancellor, Australian National University) and Mr Peter Varghese AO (Chancellor, University of Queensland).
- 1.3 In a media release of 9 April 2019, the Minister for Education, the Hon. Dan Tehan MP asked universities to consider adopting the Model Code on a voluntary basis, noting that the French Review had made it very clear that it can be adopted without the need to amend the *Higher Education Support Act 2003* or the *Higher Education Standards*.

2 Purpose of this Explanatory Note

- 2.1 The purpose of this Explanatory Note is to provide context around the adoption of the principles of academic freedom and freedom of speech enunciated in the Model Code.
- 2.2 A copy of the Model Code (as revised by the Australian University Chancellors' Council) is attached as Annexure "A" to this Explanatory Note. All references to the Model Code in this Explanatory Note refer to that revised version.

3 The principle of academic freedom

- 3.1 The UNESCO *Recommendation concerning the Status of Higher-Education Teaching Personnel* states:

"Autonomy is the institutional form of academic freedom and a necessary precondition to guarantee the proper fulfilment of the functions entrusted to higher-education teaching personnel and institutions"¹

and

"Higher-education teaching personnel are entitled to the maintaining of academic freedom, that is to say, the right, without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative academic bodies)."²

- 3.2 The *Western Sydney University Act* prescribes as the University's object:

"... the promotion, within the limits of the University's resources, of scholarship, research, free inquiry, the interaction of research and teaching, and academic excellence".³

¹ UNESCO *Recommendation concerning the Status of Higher-Education Teaching Personnel* (11 November 1997), VA 18.

² UNESCO *Recommendation concerning the Status of Higher-Education Teaching Personnel* (11 November 1997), VI A 27.

³ *Western Sydney University Act 1997* (NSW), s.8(1)

- 3.3 In addition, the *Higher Education Support Act* prescribes that higher education providers, “... must have a policy that upholds free intellectual inquiry in relation to learning, teaching and research.”⁴
- 3.4 The French Review noted that there is no settled definition of academic freedom, but that the concept is recognised as synonymous with universities and academics in liberal democratic societies and “reflects the distinctive relationship of academic staff and universities.”⁵
- “It is a freedom which ... reflects the distinctive relationship of academic staff and universities.”⁶
- 3.5 This concept is explicitly recognised in the University’s Academic and Professional Staff Agreements⁷:
- The University recognises that intellectual freedom is an essential part of University employment and is therefore committed to act in a manner consistent with the protection and promotion of intellectual freedom within the University, including the right of an Employee:
- (a) to pursue critical and open inquiry and to freely discuss, teach, assess, develop curricula, publish, and research;
 - (b) to participate in public debates and to express opinions about issues and ideas related to their discipline area and professional expertise, or higher education issues generally;
 - (c) to participate in professional and representative bodies, including unions, and decision making processes and governance roles within the University, and to engage in community service without fear of harassment, intimidation, or unfair treatment; and
 - (d) to express unpopular or controversial views, but this does not mean the right to harass, vilify, denigrate, or intimidate.
- An Employee will not represent their individual opinions as being those of the University.
- 3.6 The University’s revised strategic plan, *Securing Success 2018-2020*, emphasises academic freedom as one of the University’s core values coupled with a commitment to:
- “...foster a culture of inclusive decision-making and robust intellectual inquiry, within a framework of ethical behaviour .”⁸ (2018:4,11).
- 3.7 The Board of Trustees *Framework for Ethical Decision Making* (Board of Trustees, April 2019) was framed by the *Western Sydney University Act 1997* (NSW) which states that the object and functions of the University are, in broad terms, to promote:
- “...scholarship, research, free inquiry, the interaction of research and teaching, and academic excellence”.

The Model Code⁹ defines “**academic freedom**” in the following terms:

- (a) the freedom of academic staff to teach, discuss and research and to disseminate and publish the results of their research;
- (b) 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;
- (c) 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;
- (d) the freedom of academic staff to participate in professional or representative academic bodies;
- (e) the freedom of students to participate in student societies and associations;

⁴ *Higher Education Support Act 2003* (Cth), s.19.115.

⁵ French Review, p.18.

⁶ French Review, p.18.

⁷ *Western Sydney University Academic Staff Agreement 2017-2021*, cl. 56, *Western Sydney University Professional Staff Agreement 2017-2021*, cl. 65

⁸ *Western Sydney University Securing Success 2018-2020 Strategic Plan*, Strategic Objective 6, p.11

⁹ As revised by the Chancellors’ Council Working Group, refer para.1.2.

- (f) the autonomy of the higher education provider in relation to the choice of academic courses and offerings, the ways in which these are taught and the choices of research activities and the ways in which they are conducted.

3.8 The Model Code also proposes five limitations on academic freedom in the following terms:

“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.”¹⁰

3.9 The Code also incorporates the additional principles that:

“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.”¹¹

And

“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.”¹²

4 The principle of freedom of speech

4.1 Freedom of speech (as defined by Article 19 of the *Universal Declaration of Human Rights*) means that everyone has the right to freedom of opinion and expression, including the freedom to hold opinions without interference and to seek, receive and impart information and ideas through media and regardless of frontiers.

4.2 In Australia, freedom of speech is also a common law right that may only be abrogated or limited by laws made by Parliament or through other common law principles as interpreted by Australian courts. These include, for instance, legal rights and responsibilities prescribed in defamation, anti-discrimination and anti-vilification laws.

4.3 The Model Code does not define “freedom of speech” but, importantly, does define “speech” as extending 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.”

4.4 As with academic freedom, the general principle enunciated in the Model Code, as it relates to the meaning of freedom of speech in the context of a university. is that:

“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:

¹⁰ Model Code, Principle (3).

¹¹ Model Code, Principle (4)

¹² Model Code, Principle (5)

- 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 of the university."¹³

4.5 In addition, the Model Code incorporates the principle that academic staff are not necessarily precluded from including course content solely on the ground that it may offend or shock a student or class of students, provided they comply with the University's policies and rules with respect to wellbeing of staff and students¹⁴.

4.6 The promotion of an inclusive and respectful intellectual climate has particular relevance to Western Sydney University as a multicultural community where our students bring a wide range of life-experiences, beliefs and values and affiliation with a diversity of local and international communities.

4.7 In the context of external visiting speakers and invited visiting speakers, the Model Code acknowledges that the University has the right and responsibility to determine the terms and conditions on which those persons can speak on university land and use university facilities (which would include social media and other platforms made available by the University) and to refuse permission in certain circumstances¹⁵.

5 Adoption of Model Code Principles

5.1 Western Sydney University, mindful of its mission to promote positive social change, intellectual innovation and economic development to its community¹⁶, encourages the exchange and testing of ideas through robust, principled and informed debate among its staff and students that takes into account the following values, as expressed in the University's *Code of Conduct*:

- a commitment to excellence and quality;
- integrity;
- equity and inclusiveness;
- collegiality and participation.¹⁷

5.2 The University already has in place a number of instruments and processes that describe and apply the principles of academic freedom and freedom of speech. These instruments are, in turn designed to align with each other, to comply with legislative imperatives and to reflect the University's values and beliefs as articulated in *Securing Success 2018-2020*¹⁸. In this context, these instruments include:

- Academic and Professional Staff Enterprise Agreements¹⁹;
- the Board of Trustees Ethical Framework²⁰;
- Charter of Academic Freedom;

¹³ Model Code, Principle (1).

¹⁴ Model Code, Principle (8)

¹⁵ Model Code, Principles (6), (7) and (8)

¹⁶ *Western Sydney University Act 1997* (NSW), s.8(3)(a).

¹⁷ Western Sydney University, *Code of Conduct Policy*, paras. (14) to (7).

¹⁸ Western Sydney University, *Securing Success 2018-2020 Strategic Plan*

¹⁹ which have primacy as instruments approved and registered under the *Fair Work Act 2009* (Cth) and by virtue of s.109 of the Australian Constitution.

²⁰ approved by the Board of Trustees of Western Sydney University on 10 April 2019

- (d) Code of Conduct;
- (e) University rules, policies and processes related to behaviour, such as bullying, harassment, unlawful discrimination, conflicts of interest, student misconduct and so on;
- (f) policies and processes related to appropriate access to and use of property, facilities and services owned, controlled or provided by the University and made available to staff, students and visitors, such as hire and use of venues, email, internet usage, social media and other platforms.

5.3 It is that context, the University considers that the Model Code should not be interpreted as an “umbrella” instrument that undermines the University’s institutional autonomy and operates to override any of the University’s bylaws, rules, codes of conduct, policies or industrial agreements. Such an approach has the potential to create uncertainty and confusion. Rather, the Principles under the Model Code will inform the review of the University’s non-statutory policies and procedures to ensure alignment with the Principles in the Model Code in their interpretation and application. Any departure from those Principles should be for valid, clearly articulated reasons.

ANNEXURE “A”

A Model Code for the Protection of Freedom of Speech and Academic Freedom in Australian Higher Education Providers **(as revised by Chancellors’ Council Working Group, June 2019)**

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