Evidence to the Statute XI Working Group.
27 January 2025.

This evidence was prepared by J.P. Loo (Somerville College and Faculty of Philosophy) for Wellington Square Watch. A copy of it as submitted is available at the following [link]. The latest copy is available at [link]

[secretary@]wellingtonsquarewatch.org

Contents

1 Preliminaries.

1.1 Navigation.

Section and paragraph numbers (after § and ¶) are clickable and link to the relevant location. References to sections are to the existing text of the statute, and to clauses to the proposed text. We have marked recommendations in italics.

1.2 Summary.

1.2.1 *Our position.* We welcome the consultative approach of the working group, and its willingness to openly discuss the central issue: the proper interpretation of the proposed amendments, and whether changes are therefore necessary. We also welcome some of the amendments made so far.

Nevertheless, we consider that the text remains significantly flawed, as elaborated in the following sections. One difficulty should be stressed, which is that the intentions of the working group and/or Council in proposing individual provisions are not always clear. Where they are not clear, we have sought to anticipate what they might be, in order to address them properly.

For that reason, our evidence is longer than it would otherwise have been; but those parts concerning intentions that the working group does not have in proposing particular provisions may safely be disregarded, and we have sought to organise our evidence to make that straightforward.

1.2.2 *Further correspondence.* We are concerned that the working group's and university student union's consultation papers do not properly address these concerns or the underlying difficulties with the text. We therefore recommend that the working group should extend its consultations and take oral evidence if necessary.

We shall be happy to correspond further with the working group in order to facilitate its work.

1.3 Response to Annex A.

Our response to each row of the table in Annex A of the working group's consultation paper is as below.[1]

1 *Clause 3(1).*

We have no comment at present on the working group's revisions to clause 3(1).

1. *Statute XI (Student Discipline) Working Group: Consultation*, 28th Nov. 2024, URL: HTTPS://ACADEMIC.ADMIN.OX.AC.UK/SITEFILES/STATUTE-XI-CONSULTATION-PAPER-FINAL-WITH-ANNEX.PDF.

2 *Clause 3(2)(a).*

We do not consider the working group's proposals adequate. See § 3.

3 *Clause 3(2)(b).*

We do not consider the working group's proposals adequate. See § 3.

4 *Clause 3(2)(c).*

We are wholly satisfied by and commend the working group's revisions to clause 3(2)(c).

5 *Clause 3(2)(e).*

We do not consider the working group's proposals adequate. See § 4.

6 *Clause 4.*

We do not consider the working group's proposals adequate. See § 9.

7 *Clause 23(3).*

We do not consider the working group's proposals adequate. See § 6.

2 General comments.

2.1 The purposes of the amendments.

2.1.1 *Possible purposes.* Council and the working group have proposed amendments with a number of different intended purposes (all of which we think *per se* reasonable). We understand Council and the working group to intend—[2]

- to substantively improve the process by which cases of sexual harassment are handled;
- to clarify and consolidate the text, and make it more accessible;
- *not* to 'affect free speech or the right to protest in any way'; and
- *not* to 'create any new powers relating to lawful protest'.

2. *Response to 'Public Statement on Proposed Amendments to University Statutes'*, University of Oxford, 6th June 2024, URL: HTTPS://WWW.OX.AC.UK/NEWS/2024-06-06-RESPONSE-PUBLIC-STATEMENT-PROPOSED-AMENDMENTS-UNIVERSITY-STATUTES.

In the course of the discussion in a public forum, at various points we understood the working group or members thereof to have had in mind additional aims, including—

- substantive improvements to disciplinary provisions and proceedings *generally*; and
- in particular, the prohibition of as yet unknown forms of misconduct (e.g. forms of 'dishonest behaviour').

It is rather difficult to assess some of the proposed changes where we have no knowledge of the working group's intentions, its evidential basis, or its reasoning. (In some cases, either the consultation paper or the public forum made matters clearer.) We regret that our evidence is far longer than it would have been had those intentions been clear. With a view to aiding the working group, we have sought to anticipate those intentions in order to make more substantive comments than the mere expression of confusion in the absence of any obvious argument for particular changes.

2.1.2 *Recommendation.* We consider that the working group and Council should make very clear which of the purposes above (and any others) are served by each amendment.

2.1.3 This would serve to allay misunderstandings and create trust between concerned members of the university, the working group, and Council. If on some topic the working group seeks to make substantive changes, but its other statements suggest that it only intends to redraft and clarify the relevant provisions, it is natural to infer that there is the possibility of deception, especially in the present charged environment. It is in the interests of all parties to avoid any inadvertent miscommunications through the clear expression of the views of, *inter alia*, the working group.

2.2 Discretion and drafting.

2.2.1 We attach great importance to the exact meaning of the proposed amendments, and to precise drafting. We understand that the pursuit of these desiderata could be taken too far, and that drafting is subject to other demands, such as clarity, concision, and the legitimate needs of decision-makers for a certain flexibility in their application. We now explain our view of the right balance.

Members of the working group who already attach great importance to precision of drafting may not need to read this subsection.

2.2.2 *Amendments to consolidate the text.* Members of the working group in the public forum and Council have suggested that some amendments were proposed with a view to the consolidation of the text in clearer and shorter form. We are of the view that such amendments must

ensure that the new text precisely matches the old text where any controversy may arise.

2.2.2.1 First, if there is no substantive reason for a change, arguments about the anticipation of possibly unknown problems do not arise.

2.2.2.2 Second, inadvertent changes introduced through insufficiently precise drafting could inadvertently introduce substantive changes without any argument in their favour or proper scrutiny.

Some members of the working group and panel appeared to make a similar point in response to suggestions that the existing statute should be improved in other respects: fresh changes, if proposed, should be subject to a higher level of scrutiny, and should be proposed in another forum. We have no firm position on this view, but we suggest that if that is the view of the working group, it would be incoherent to introduce other substantive changes simply to improve clarity or accessibility.

2.2.2.3 In particular, imprecise drafting may lead to the inadvertent prohibition of wide swathes of conduct that is unobjectionable or otherwise should not be a matter of university discipline.

We think that to do so is inherently objectionable.

The working group may disagree. But there are two further effects that should be remarked upon. The first is that absurd prohibitions diminish trust—in Council, the working group, Congregation, the disciplinary process as a whole, and the processes of governance. We should like the proctors to be able to discharge their responsibilities fairly and effectively; the less students trust them and the overall system, the harder their jobs are.

The second is that between very clear instances of conduct in response to which it is implausible disciplinary conduct should be initiated and very clear instances of objectionable behaviour that should be punished lies a vast grey area. We accept that to perfectly divide the grey area is impossible. But we think that it behoves the working group to try. If the whole grey area is prohibited, all discretion would devolve to the proctors and disciplinary bodies charged with the enforcement of the statutes. That would leave many important substantive questions of legislative policy to the proctors.

2.2.2.4 The case of dishonesty is illustrative. Below, we suggest that the policy would prohibit cheating at cards—even when not for money. That's obviously not something in which the university should be involved. But it is conceivable that the proctors might think that cheating at cards for a large sum of money *should* be prohibited. We think that there is reasonable disagreement as to whether the ideal statute would prohibit such conduct, and whether it would in that case be the subject of proceedings. Even if it should be, at what value should the

proctors involve themselves? Surely over a few pennies they should not; yet over thousands of pounds, the case is much stronger. We think would be unfair to the proctors to force additional decisions of this kind on them; it is Congregation's duty, and the working group should assist Congregation in discharging that duty responsibly.

2.2.2.5 Recommendation. Proposals intended *only* to clarify and consolidate the text or to make it more accessible should, we think, be held to a very high standard of interpretative scrutiny. The consolidated text should simply mirror, in rearranged and clearer form, the original text.

2.2.3 Substantive changes. Some proposals appear to be motivated by the desire to substantively change disciplinary provisions and proceedings generally. Some members of the panel in the public forum suggested that changes intended to alleviate existing problems in the statute are not matters for the working group. If the working group does intend to introduce general substantive changes, we should like to know for what reason it does not wish to consider general substantive changes proposed by members of the university.

By way of example, one question from the audience concerned the seeming lack of topical restriction to cases of sexual assault and harassment in overall changes to the proposals. The response was that they were in fact *intended* to be general. There is nothing *a priori* wrong with, and, indeed, much *prima facie* reasonable in attempts to improve the statute generally. In respect of the same provisions, however, it seemed that other members of the panel were of the view that no substantive change was intended, and therefore that there was no cause for concern. They cannot both be right.

2.2.4 Flexibility for the future. If the working group does intend to propose general substantive disciplinary amendments, a final comment is necessary on the tension between precision of drafting and the exigencies of the unknown future.

In discussing section 3(2)(e), we asked why it was not possible to prohibit specific forms of 'dishonest behaviour' rather than dishonest behaviour in general. In response to this, it was, perfectly cogently, pointed out that it is rather difficult to anticipate all possible forms of dishonesty to which a disciplinary response would be necessary. This is, of course, true. But the same is true of other categories of wrongdoing, such as the use of unpleasant language, rude behaviour, or selfishness.[3] We take it that it would be unwise to prohibit all of these on the basis that there may emerge in future forms of selfish-

3. It has, not entirely unseriously, been suggested to us that the same could even be said of, for example, 'usury' or 'sorcery'; and as much as the comparison sounds ludicrous, it is on closer examination not a wholly unreasonable parallel.

ness that would merit a university response but also defy any attempt to anticipate or describe them more precisely. Some criterion more specific than the mere *possibility* of description-defying patterns of wrongdoing is necessary. For it is surely possible that the university will soon face a vast number of cases of selfishness that would legitimately be matters of university discipline and yet cannot conveniently be described otherwise; yet it would be absurd to include in this clause 'selfish conduct'.

We hope that the working group will agree that, in isolation, both precise drafting and room for manœuvre are desirable; the real question is how they should be balanced when they are in tension. In finding the right balance, it should consider—

- the extent of the imprecision (e.g., are there clear examples of unobjectionable conduct that would inadvertently be prohibited? is there a large grey area that is inadvertently painted entirely black?); and
- the extent to which we have any reason to believe that matters will change unpredictably in such a way as to require discretion and room for manœuvre.

We think that the very natural criterion to apply is obvious. In proposing to ban a certain class of behaviour, the working group should assess current cases of wrongdoing—whether they result in punishment under the existing statute or not. It should then determine in respect of the current patterns of cases, or plausible projections of future patterns—

- whether they can properly be dealt with under the existing statutes; and
- whether they could properly be dealt with by *precisely drafted amendments*.

Only if the answer to both questions is 'no' is there even a *prima facie* case, we submit, for more sweeping amendments. And, in that case, the evidence, or at least the nature of the evidence, justifying that view should be made clear. To return to the example of 'dishonest behaviour', neither Council nor the working group has detailed even a single case in which the proctors found the existing statute to be insufficient; and only a large class of highly heterogeneous cases of dishonesty that—

- defy any preciser concise description; and
- should be matters of university discipline

could justify the present rather imprecise text. If we were made aware of such a body of evidence, we should of course have to revise the view stated below.

2.2.5 *Lawfulness.* Finally, in some cases, the broadness of the amendments raises questions as to whether they would be lawful, given the university's obligations under the European Convention on Human Rights. This is elaborated in § 10.

2.2.6 *Recommendation.* If the working group wishes to propose imprecisely drafted amendments that would prohibit much ordinary or unobjectionable behaviour—

- it should not do so solely on the basis of some hypothetical risk of which there is no other evidence;
- it should base such amendments on patterns in existing conduct and disciplinary cases;
- it should explain why the conduct concerned should be a matter of university discipline;
- it should show clearly that there is good reason to think that future conduct would be so heterogeneous that it cannot satisfactorily be described more precisely and with less sweeping language; and
- it should determine whether the benefits of the prohibition are proportionate to the scope of the inadvertent prohibitions.

2.3 The functioning of the working group.

2.3.1 *Explicit discussion of the text of the amendments.* We are pleased that the working group

- is deliberately consulting members of the university;
- has shown willingness to amend some of Council's proposals;
- appears to be willing to make further amendments if necessary; and
- most importantly, is willing to openly discuss the proper construction of the text of the amendments.

This is a welcome contrast to Council's earlier approach. In its earlier statement in defence of its original proposals, Council failed to explicitly discuss the text of its proposals, and, therefore, elided the central questions that must be addressed in assessing the amendments.[4]

2.3.2 Nevertheless, we regret that the text the working group has circulated for discussion remains significantly flawed, and that the consultation paper does not address or fully address many remaining difficulties.

4. *Response to 'Public Statement on Proposed Amendments to University Statutes'.*

We also think that discussions in the public forum elucidated several issues in dispute.

2.3.3 *Recommendation.* The working group should therefore consult authors of submissions to clarify any questions it has, and consider hearing oral evidence, to which members of the panel seemed open.

2.3.4 *The consultation period.* In this connexion, we are also concerned that the period of consultation has been curtailed. According to the university website, the consultation was to

> run from Week 7 in Michaelmas Term 2024 to Week 3 in Hilary Term 2025.[5]

The consultation was announced in the *Gazette* of 16 January 2025; week 7 of Michaelmas Term ended on 30 November. The consultation is scheduled to end on 31 January, i.e. Friday of week 2. This is an effective curtailment of seven weeks.

We understand that the working group consulted some members of the university before 16 January. Nevertheless, the *Gazette* is the proper organ through which announcements should be made.

2.3.5 *Recommendation.* In view of the late announcement of the consultation, we consider that the working group should accept evidence submitted after 31 January to the extent that it is practicable.

2.3.6 *Supporting the credibility of the working group.* We should very much like the working group to succeed. To us, it will succeed if it assesses the proposals cogently, and with appropriate independence from Council and bodies responsible for their earlier evolution, *and is seen to do so*. That is not to say that the working group should disregard all that has come before it. Rather, it is to say that it should properly address arguments and evidence before it that have previously responded to, in particular, the positions of Council and those of its members who supported the initial proposals of June.

2.3.7 *Recommendation.* The working group is of course perfectly entitled to make up its own mind, and under no obligation to accept only the evidence submitted to it that is not in agreement with the views of Council or its relevant members. But if it does so, it is essential that it should *have reasons* for its agreement with Council's initial views, should *state them clearly*, and should make them public. It should also publish responses to the evidence provided to it.

2.3.8 *Transparency and credibility.* We were concerned to hear in the public forum the suggestion that the working group's consultation paper

5. *Proposed Changes to Statute XI*, URL: HTTPS://ACADEMIC.ADMIN.OX.AC.UK/UNIVERSITY-STATUTES.

duplicated or closely copied text issued by Professor Williams, the Pro-Vice-Chancellor (Education), especially since he appears not to be a member of the working group.[6]

2.3.8.1 Recommendation. In that connexion, and with a view to engendering trust in the independence of the working group, and independence itself, we suggest that the working group should publish its minutes. If a significant minority view emerges, it should also publish any statement drafted thereof. The working group could even consider making its hearings public.

2.3.8.2 We understand that the working group *may* need to consider evidence that cannot be published—e.g. details of individual cases heard by the proctors—and of course are not of the view that that details of those should be published or the relevant portions of hearings made public.

2.3.8.3 Recommendation. But we are of the view that discussions of the sort that were held in the public forum of 23 January are best held in public.

2.3.9 The remit of the working group. The consultation paper states that the consultation is

> restricted to the revisions to Statute XI only—the Non-Academic Disciplinary Procedure and Harassment Policy/Procedure are not in scope.

2.3.9.1 The impossibility of assessing Statute XI in isolation. We do not think that it would be prudent to ignore questions that *arise in considering the statute* simply because they happen to also require consideration of the procedures or policy. Given the extensive areas the statute formerly covered that are now to be covered by the procedures and policy, the working group's recommendations would be at best incomplete on the basis of such a restriction.

It is for example impossible to assess Statute XI without consideration of whether the secondary enactments under it should be made by regulation or simply by publication in some opaque and unspecified manner.

This point was urged by several members of the panel in the public forum; attendees were reminded that provisions should be assessed in the context of the Statutes and Regulations in general.

2.3.9.2 If the procedures and policies remain a black box. If the contents of the procedure and policy are simply unknown, it would be irresponsible to recommend a statute deferring so extensively to them. The only responsible course of action would be to retain safeguards provided for by the existing text of the statute in the proposed text of

6. The same speaker said that and Professor Williams did not correct him.

the statute. These provisions could then subsequently be enacted by regulation rather than by statute.

2.3.9.3 Compatibility with resolutions of Congregation. We further are unable to regard this restriction as compatible with the resolution of Congregation under which the working group was formed.[7]

> The remit of the working group shall include… the protections and rights that this university has extended to its faculty, staff and/or students in previous resolutions of Congregation.

Such protections include those elaborated in § 5.2.1. It would seem impossible to properly include those protections in that remit if the working group is to insist upon excluding any discussion of the proposed enactments to which those protections appear to be moved. Such insistence would appear to amount to a misunderstanding by the working group of its remit and could discredit any recommendations that would follow. It is in the interests of the timely conclusion of the process that the working group should more clearly state that questions arising in consideration of the amendments to Statute XI will be properly considered whether or not they also require discussion of other enactments or proposed enactments. That is perfectly compatible with a restriction of its remit such that questions solely arising in connexion with other instruments that do not involve Statute XI should be excluded. It is also compatible with an approach under which the working group would consider Statute XI given a fixed text or set of governing principles vis à vis the procedures and policy.

2.3.9.4 The introduction of the policy on harassment in the statute. Finally, we note that the policy on harassment was proposed by the working group itself at clause 3(a).[8] We find no equivalent provision in the text proposed by Council. It would be particularly illogical for the working group to introduce a proposed enactment and then to fail to discuss its contents.

2.3.9.5 Recommendation. The working group should consider within its remit all questions that arise in considering the proposed amendments to Statute XI, even if they must also involve discussion of other enactments. It is of course entitled to exclude matters wholly unrelated to Statute XI.

7. *Gazette*, 5431, 3 October 2024 [link], p 16.

8. See Annex B.

3 Intention or recklessness.

3.1 Summary.

The proposed text would likely prohibit unobjectionable conduct, including—

- accidental and minor disruptions of university activities, e.g. by chanting at a lawful and orderly protest, or singing at a college concert;
- proper participation in dangerous activities (e.g. dangerous sports); and
- reasonable forms of display or attachment of writing upon university or college property that *at present would be permitted*, or, on an alternative construction, destruction, damage or defacement of others property *with lawful authority*.

3.2 Relevant proposals.

3.2.1 *'Intentionally or recklessly' removed.* The prohibitions included in statute XI are listed under the following provision.

> 2. (1) No member of the university shall in a university context *intentionally or recklessly*…
>
> The equivalent provision under the amendments is
>
> 3. (2) No member of the University or student member shall (or shall attempt to)…

The removal of the qualification that prohibited behaviour must be intentional or reckless dramatically changes the scope of the prohibition.

3.2.2 *Conduct to which the proviso formerly applied.* The proposed text includes under clause 3(2)

> (a) disrupt[ion] or obstruct[ion of] any of the teaching or study or research or the administrative, sporting, social, cultural, or other activities of the University[;]
>
> (b) deface[ment], damage, or destr[uction of] any property of the University or any college or any other person (including without lawful authority by displaying or attaching any writing or advertising material upon it), or knowingly misappropriate such property, including by its unauthorised occupation [; and]
>
> (c) action which is likely to cause injury or to impair safety[.]

These are subject to university discipline either when in a 'university context', which is to say 'on university or college premises; [or] in the course of university activity within or or outside Oxford whether academic, sporting, social, cultural, or other.'

3.3 What the proposals would prohibit.

3.3.1 *Unobjectionable disruptions or obstructions prohibited.* We agree that some disruption or obstruction should be a matter of university discipline, but not all. As we pointed out in our previous analysis, all sorts of seemingly legitimate activity could disrupt or obstruct university activities, e.g. through noise or the impediment of pedestrian and vehicular traffic:

- eucharistic processions marking the Feast of Corpus Christi involve the singing of hymns;
- lawful and orderly political processions often involve chanting; and
- when Oxford United was promoted to the premiership, a victory procession was organised.

Indeed, some activities organised by the university or colleges could also disrupt other university activities: college concerts could lead to noise pollution. Sometimes, simply walking about can inadvertently cause disruption!

We think it is very obvious that participation in these sorts of activity should not be prohibited. We hope that the working group does not intend to prohibit them, and that the proctors would not be so obtuse as to pursue disciplinary proceedings in such cases. But the plain meaning of the text imposes such a prohibition, even after the working group's amendments. The central reason is that the catch-all clause omits the proviso that conduct should be intentional or reckless.

3.3.2 *'University context' does not exclude the relevant examples.* Clause 2 does restrict these prohibitions, except in exceptional cases provided for by the Student Disciplinary Procedures, to university contexts. (The latter proviso, we think, makes all the more pressing the difficulties we point out in § 5.) But much of the unobjectionable activity mentioned above could happen on college or university land, given the scope of university and college holdings in Oxford. Consider e.g. the plaza outside the Weston Library.

Moreover, many of the following examples may amount to 'university activities' in that they may be organised by societies or other bodies of the university.

3.3.3 *Display or attachment of writing.* We also consider that the 'display or attach[ment of]…writing' upon university or college property is in some cases perfectly reasonable. Graffiti is, we suppose, prohibited; and, in any case, it is unlawful. But even the temporary affixing of a poster with twine would amount to the display or attachment of writing. This is a perfectly common practice at the Radcliffe Camera;

it has happened on the anniversary of the 4 June massacre, and the death of A.A. Navalny.[9]

Members of the panel in the public forum suggested that conduct of this kind would already be prohibited under the present statute. We do not think that this specific example would be prohibited. The present statute reads

> 2. (1) No member of the university shall in a university context *intentionally or recklessly*…(d) deface, damage or destroy or attempt to deface, damage or destroy any property of the University or college or any other individual or knowingly misappropriate such property.

The affixing of a poster with twine to the railings of the Radcliffe Camera would not *intentionally* damage or destroy any property. The question is whether it would amount to intentional or reckless defacement.[10] It is surely not reckless conduct on any ordinary reading of the word. Is it therefore intentional defacement? In the heraldic sense we suppose it might be, but that is surely not intended in the context: railings are not flags. Unless the mere *obscuring* of some part of the railings would amount to defacement—which we do not accept—we do not think that in the ordinary sense of the word the affixing of a poster with twine to the railings would amount to defacement. For it would surely no more deface the railings to hold a poster in precisely the same place it would be were it affixed with twine by hand than to affix it with that twine; and yet it would not deface the railings to simply hold a poster close to them.

The working group's proposed text, however, appears to risk explicitly including such displays and attachments of writing.

> No member of the University or student member shall (or shall attempt to)…deface, damage or destroy any property of the University or any college or any other person (including without lawful authority by displaying or attaching any writing or advertising material upon it)…

Admittedly, the point is not quite clear, because it is not obvious what the inclusion asserted here is meant to mean.

- Does 'without lawful authority' modify 'displaying or attaching…'? If so, presumably the clause should be read to include 'displaying or attaching any writing or advertising material upon it without lawful authority' under defacement, damage, or destruction. On the other hand, this would appear to prohibit defacement, damage, and destruction *with* lawful authority. Presumably that is not the proper construction. On

9. We pointed this out in our report of 11 June 2024.
10. We are not convinced that 'deface' is a suitable word; we are not aware of any case other than one from Australia defining it.

the other hand, it would comport with the prior absence of 'without lawful authority' in the text.

- Alternatively, does it modify 'deface, damage, or destroy'? If so, it is not clear how the appending of 'by displaying or attaching any writing or advertising material upon it' is grammatical, but presumably the intention is to include 'displaying or attaching any writing or advertising material upon it' in defacement, damage, or destruction without lawful authority. In that case, display and attachment are not qualified in any way, in which case even the attachment of a poster to the railings of the Radcliffe Camera with twine would be prohibited.

3.3.4 *Lawful excuse and lawful authority.* We are further concerned that the standard is lawful *authority* rather than lawful *excuse*. Above, we suggested that the clause, on its natural construction, would permit damage, defacement, and destruction with lawful authority—for example, at the request of the owner. The question of whether the phrase 'lawful authority' or 'lawful excuse' should be used is therefore of more general importance. (We suggest below that 'lawful excuse' should come at the start of the clause, i.e. qualify 'deface, damage or destroy', and 'knowingly misappropriate'.) The difference, commonsensically, is that *authority* connotes some explicit and positive permission, whereas *excuses* may be had by those who have not explicitly been granted permission. We think it is fairly obvious that the statute should not prohibit conduct with lawful excuse. It is therefore in the interests at least of clarity that 'lawful excuse' should be used rather than 'lawful authority' if the latter is intended, since, commonsensically, they may be distinguished.

It may be objected in this connexion that 'lawful authority' and 'lawful excuse' have the same meaning. In that case, it would be preferable to use the word 'excuse' for the reason above. But we also submit that the point is wrong in law.[11]

> Their Lordships doubt if it is possible to define the expresion 'lawful excuse' in a comprehensive and satisfactory manner and they do not propose to make the attempt. …There are, however, two general conclusions on the construction and effect of the regulation which are relevant.… [T]the defence of 'lawful excuse' may be sufficiently proved although no 'lawful authority' exists for doing what is charged against the accused. …[I]n proving a 'lawful excuse', which falls short of 'lawful authority,' it is the excuse or exculpatory reason put forward by the accused, rather than the [otherwise unlawful conduct] that must be shown to be lawful.

11. *Wong Pooh Yin v Public Prosecutor* [1955] AC 93, pp 100–1.

Here then is an explicit analysis of the common-sensical distinction. Defacement, damage, or destruction of property—

- may be permitted by reason of lawful excuse if the *excuse* itself is lawful; but
- would not be permitted by reason of lawful authority unless the defacement, damage, or destruction itself were lawful.

It is perhaps for this reason that the Criminal Damage Act 1971 prohibits destruction or damage without lawful excuse rather than without lawful authority.

3.3.5 *Misappropriation, intention, and recklessness.* A similar difficulty arises at the end of clause 3(2)(b):

> No member of the University or student member shall (or shall attempt to)…knowingly misappropriate such property, including by its unauthorised occupation.

The text after 'including' is inserted. We think that it is possible that the omission of the requirement that there should be intention or recklessness could, in certain circumstances, materially affect the construction of the clause. Suppose, for example, that a student is ordered to leave a room in an unreasonably short period of time (an hour, let us say). For various reasons (e.g. a broken limb) this cannot be effected. This clearly amounts to unauthorised occupation, and therefore is classified as misappropriation. It may also be entirely knowing—the student may know perfectly well that they have been ordered to leave. It would not, however, be intentional or reckless.

As we stated above (¶ 2.2), this is a clear case in which, one would hope, no body of the university would seek to institute disciplinary proceedings; but it still paints a large grey area between it and conduct that clearly is legitimately a matter of university discipline entirely black.

3.3.6 *Authorisation, lawful authority, and lawful excuse.* A further difficulty with this passage arises in the use of the word 'unauthorised'. For the reasons above, we think that 'without lawful authority or excuse' is a preferable formulation.

3.3.7 *'Misappropriation' as superior to the previous formulation vis à vis university property.* A final point concerns the statute's former distinction between university and college property, and property generally; for the following has been removed:

> (e) occupy or use or attempt to occupy or use any property or facilities of the University or of any college except as may be expressly or impliedly authorised by the university or college authorities concerns.

We think that the proposed collapsing of this provision into misappropriation generally is satisfactory and assists in the consolidation of the statute.

3.3.8 *The scope of 'knowingly'.* There is also a scope ambiguity in this case: does 'knowingly' apply to unauthorised occupation too? That is not clear.

3.3.9 *Inadvertent application of chalk to university or college property.* One example raised in the working group was that of the application of chalk to university premisses. We suppose that it is more natural to view the application of chalk, for example, to the *wall* of a college as defacement. (In this connexion we note that chalk is presumably sufficiently easy to rub off that colleges are quite happy to see information about rowing recorded in it.) On that, we are inclined to agree with the suggestions of members of the panel in the public forum. But the qualification *intentional* would omit, for example, the application of chalk to what seems to be a pavement that is not university or college property but turns out to be.

3.3.10 *Legitimate forms of dangerous activity.* A similar problem applies to clause 3(2)(c). Not all action likely to cause injury is wrong, let alone legitimately a matter of university discipline. Many sports are 'likely to cause injury' or 'impair safety'. Some first aid is too. The difference is that proper participation in them is not *intentionally or recklessly* action likely to cause injury, if the proper precautions are observed and so on.

3.4 The working group's comments on section 3(2)(a).

3.4.1 *'Related activities'.* The working group addresses the concern that 'related activities' is

> too broad and gives the University scope to impose discipline over an unknowable range of activities.

This is a separate concern from ours, which is that the proviso 'intentionally or recklessly' is removed. Unsurprisingly, the response of the working group therefore does not properly address our concern.

3.4.2 *'University context'.* The working group further observes that

> disciplinary action can only be instigated in relation to conduct occurring in a University context (see section 2 of the Statute).

We first observe that it may also be taken otherwise, 'exceptionally, as otherwise indicated in the Student Disciplinary Procedures'. Given that the working group appears to view the restriction to a university context as an essential reason to retain clause 3(2)(a) in similar form, our recommendations in respect of the Student Discip-

linary Procedures are all the more important (in particular ¶¶ 5.4.2 and 5.4.6).

Second, as we observed above, we do not think that the restriction to a university context is sufficient; much conduct that should not be prohibited and is perfectly reasonable indeed happens on university or college premisses, or in the course of university activities.

3.5 Questions for Council and the working group.

3.5.1 Is the omission of 'intentionally or recklessly' intentional?

3.5.2 Is Council or the working group of the view that its omission would have significant interpretative effects? If so, why has neither remarked on it?

3.6 Recommendations.

3.6.1 The working group should include the proviso 'intentionally or recklessly' in clause 3(2), or, at the very least, clauses 3(2)(a), (b), and (c), in order to more closely follow the existing provisions.

3.6.2 Clause 3(2)(b) should read

> [No member of the University or student member shall (or shall attempt to) intentionally or recklessly]…without lawful authority or excuse—
>
> (i) deface, damage or destroy any property of the University or any college or any other person; or
>
> (ii) knowingly misappropriate [or occupy] such property.

We have no firm opinion as to whether 'or occupy' should be included, but we consider that it would include occupation without lawful authority or excuse, as intended.

4 Dishonesty.

4.1 Summary.

The proposed text would prohibit all dishonesty on college and university premisses, which would prohibit some perfectly reasonable conduct (e.g. not outing oneself as gay) and some conduct that, although unreasonable, should not be a matter of university discipline (e.g. cheating at cards in a college bar).

4.2 Relevant proposals.

Clause 3(2)(e), as proposed, prohibits

> engage[ment] in any dishonest behaviour, including by forging or falsifying any document (a) which causes any person loss or harm or (b), in relation to the University, the holding of any university office, or any application for any university membership, office or position or any student place at the university (in which case such dishonesty shall be understood to be continuing throughout the period in which he or she holds that membership, office, position or student place).

4.3 What the proposals would prohibit.

4.3.1 *Specific forms of dishonest behaviour.* We have no objection to the text after 'including'.

4.3.2 *Dishonesty generally considered.* However, we consider that 'dishonest behaviour' is far too wide.

Prima facie, dishonest behaviour includes—

- cheating at cards, or on one's partner; and
- lying of any kind, including about one's sexuality when not out, and white lies.

Suppose, for example, that a gay student is worried (whether rightly or wrongly) that a certain social group is homophobic; one of their number asks whether they are gay, in response to which they issue a denial. This is clearly dishonest; but it is also clearly reasonable. There is no good argument that this should be a matter of university discipline.

We do not wish to take any particularly adventurous view on sexual morality, but it is also hard to see why infidelity should be a matter of university discipline. And cheating at cards, especially if it is not for money, is surely wrong—but hardly something with which to trouble the proctors.

The difficulty is that the plain meaning of clause 3(2)(e) prohibits all of these.

4.3.3 *Dishonesty in a university context.* It is true that clause 2 provides that, except in exceptional circumstances, the relevant conduct must occur in a 'university context'. But, as drafted, that would include conduct—

- on a social trip organised by a university society;
- in a college bar or room; and
- in a common room in university departments.

We do not think that cheating at cards should be a matter of university discipline simply because it happens in a university department, or that cheating should become a matter of university discipline simply because it happens in a college rather than privately rented room. But it is difficult to see any other construction of clause 3(2)(e).

In connexion with freedom of expression, we also observe that much political speech happens in the course of activities of registered university societies, which may fall under the ambit of 'university activity within or outside Oxford whether academic, social, sporting, social, cultural, or other' (clause 1(g)(i)) and is not therefore excluded by clause 2.

4.3.4 *Anticipation of unknown forms of misconduct.* As we understand the view propounded (if not held) by some members of the panel in the public forum, it is necessary to prohibit all this in order to anticipate forms of dishonesty whose nature is as yet unknown but that may require a response as a matter of university discipline. We respond to such an argument in ¶ 2.2.

4.4 Article 10 of the European Convention on Human Rights.

4.4.1 *Compliance with the European Convention on Human Rights.* There is some reason to think that a generalised prohibition of dishonesty would violate Article 10 of the European Convention. In *Salov v Ukraine*, Strasbourg held that a 'false statement of fact' 'the veracity of which' was doubted by the applicant was nevertheless protected.[12] In *Brzeziński v Poland*, the court held certain exaggerations or provocations were protected in the context of the local standards of debate.[13]

> Bien que le ton sur lequel le requérant s'était exprimé était incisif, voire parfois ironique, le langage employé n'était ni vulgaire ni injurieux. La Cour estime que les termes utilisés restent dans les *limites de l'exagération ou de la provocation admissible*, au regard du ton et du registre ordinaires du débat politique au niveau local (*Jean-Jacques Morel*, précité, § 42).

This restates nearly *verbatim* its view in *Jean-Jacques Morel v France*.[14]

> De plus, elle ne partage pas l'avis du Gouvernement quant à l'absence de prudence et à la virulence dont aurait fait preuve le requérant, les propos litigieux ne contenant ni allégation explicite de commission d'une infraction ni mise en cause du titulaire de l'emploi contesté. Elle observe en outre que les termes utilisés, bien que polémiques, restent néanmoins dans *les limites de l'exagération ou de la provocation admissibles*, au regard du ton et du registre ordinaires du débat politique.

4.4.2 *The scope of permissible restrictions on dishonest statements.* We do not submit that there is any generalised *protection* of dishonest speech; for there is no generalised protection of arbitrary speech under the convention in the first place. But we do submit that an analogous analysis must be applied to that in the case of *factually false* statements; although states and public authorities are clearly entitled to prohibit

12. ¶¶ 111–117.
13. ¶ 54, emphasis ours.
14. ¶ 42, emphasis ours.

some forms factually false statements, it does not follow that their general prohibition conforms to the provisions of the Convention. In that connexion, we submit that Strasbourg has anticipated and implicitly protected certain forms of borderline dishonesty by way of protection of speech within the *limites de l'éxagération ou de la provocation*. Accordingly, we are of the view that clause 3(2)(e)'s conformity with the Convention is at the very least suspect.

4.4.3 *Article 10 and the university.* We shall not elongate this submission by making the fairly anodyne and obvious point that the university is bound to observe Article 10, although we should be happy to elaborate in a further submission if the working group so desires.

4.4.4 *The response of the working group in the public forum in this connexion.* We are concerned that the working group has not properly addressed this issue. In particular, we consider that the only justification offered in the public forum in this connexion would be unlikely to satisfy the courts of the proportionality of clause 3(2)(e). The justification suggested (whether for the purpose of debate or as a statement of the view of the relevant member we do not know) was, as we understand it, that future forms of dishonesty could require a response, but their nature remains unknown, and it is not therefore possible to draft any prohibition more precise than one on 'dishonesty'. That, we submit, is not a wholly plausible analysis of the proportionality of the restriction.

> To put the matter explicitly,[15] it hardly shows that
>
> > the objective of the measure is sufficient important to justify the limitation of a protected right

because the precise nature of the objective is wholly unelucidated. It remains unclear whether the prohibition on dishonesty is

> rationally connected to the objective

because the objective remains unclear. The argument purports to show that no

> less intrusive measure could have been used without unacceptably compromising the achievement of the objective

only by means of stating the objective so nebulously that that conclusion is foregone. And in failing to state exactly what it is that would need to be prohibited, it is impossible to determine

> whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

15. *Bank Mellat v Her Majesty's Treasury*, [2013] UKSC 38.

4.5 Questions for Council and the working group.

4.5.1 What specific forms of dishonesty, if any, did Council have in mind in drafting clause 3(2)(e)?

4.5.2 What evidence is there that these forms of dishonesty are or could become sufficiently prevalent to merit explicit mention in the code of discipline?

4.5.3 Has the working group considered clause 3(2)(e) in the context of Article 10 of the European Convention on Human Rights?

4.6 Recommendation.

4.6.1 Clause 3(2)(e) before 'including' should be struck, to instead prohibit only the forgery and falsification of documents, rather than dishonesty generally. If Council or the working group consider that other forms of dishonesty should be matters of university discipline, they should more explicitly be listed.

4.6.2 If the clause is retained, it should be assessed in light of Article 10 of the European Convention on Human Rights, and, in particular, *Jean-Jacques Morel v France*, *Salov v Ukraine*, and *Brzeziński v Poland*.

5 Procedural fairness and delegated powers.

5.1 Summary.

5.1.1 The working group's proposed text delegates numerous powers to Council at clause 8 in granting it authority to specify the Student Disciplinary Procedures.

5.1.2 It is simply not tenable to discuss the amendments to Statute XI in isolation. The working group may wish to minimise the extent to which it discusses the Student Disciplinary Procedures. But the effect of the 'revisions to Statute XI' cannot sensibly be discussed in isolation, because the elaboration of the procedures could radically alter the overall effect. Some discussion is inevitable (¶ 2.3.9).

5.1.3 The scope of the procedures is wide (¶ 5.2.3), and the way in which it is amended remains unclear (¶ 5.2.5). The proposed amendments to Statute XI therefore cannot be assessed in isolation; the overall effect will depend very much on the procedures.

5.1.4 Concerns as to the conditions under which these enactments may be amended would be resolved by amending the word 'document' to 'regulation'; the provisions of Statute VI, including concerning legislative scrutiny by Congregation, would then apply (¶ 5.2.5).

5.1.5 That would not, however, suffice; the working group should still make recommendations as to Council's earlier proposed amendments to the Regulations, one of which is cause for concern in our view (¶ 5.2.6; § 8).

5.1.6 We are concerned that the working group has not yet commented on these questions.

5.2 Safeguards to be moved and currently at risk.

5.2.1 *Existing safeguards in Statute XI to be removed.* The proposed text of Statute XI omits the following safeguards in the present text.

> s 8(1) Members of the Student Disciplinary Panel serve for at least three years. This prevents their arbitrary removal during that period.
>
> s 8(2) The chair and vice chairs of the Student Disciplinary Panel must be 'barristers or solicitors of at least five years' or 'have experience which makes them suitable for appointment'.
>
> s 9(2) Delays in the Student Disciplinary Panel's proceedings are somewhat restricted: no complaint may be heard 'more than six months after the date of the first interview' except in the discretion of the Chair or Vice-Chair.
>
> s 13 If the Student Disciplinary Panel hears a case in the first instance, a student has the right of appeal (to the Student Appeal Panel).
>
> s 14(1) The High Steward appoints the Student Appeal Panel from 'individuals who hold a legal qualification *and* have experience which makes them suitable for appointment *and* shall not be members of Congregation'.
>
> s 14(2) The Student Appeal Panel may appoint assessors 'in the interest of justice and fairness'.
>
> s 33 Any 'student member who is the subject of the disciplinary action' may appeal a decision of the Proctors to the Student Disciplinary Panel.

5.2.2 *Risks to procedural fairness.* The importance of the provisions of the replacement Student Disciplinary Procedures is therefore clear. If they are not properly elaborated, the procedures will unfairly limit the rights of the accused.

- The value of appeals, prompt hearings, and qualified members of disciplinary bodies is obvious.
- Appointment for three years avoids improperly motivated removal by Council. Across the Atlantic, there is at least a widespread perception that university discipline has

been moulded to serve political ends in view of protests for or against Israel, Palestine, or groups identified with either. It is surely unwise to allow e.g. the perception that Council, influenced by donors, could seek to influence individual cases through appointments that would be irregular on the present scheme. Not only must justice be seen to be done, but those charged with upholding it will work more effectively when it is.

- The High Steward is a figure independent of Council; their authority to appoint the Student Appeal Panel is an important sign of independence.

5.2.3 *The extent of powers delegated to Council in drafting the Student Disciplinary Procedures.* The proposed text of Statute XI, at clause 8, provides that Council, by the procedures, may—

> (1)…specify the procedure under which a Proctor, the Student Disciplinary Panel and/or the Student Appeal Panel shall hear and determine referrals of student members who are alleged to have breached section 3 or 4 of this statute…[or] (2)…committed Academic Misconduct.

The scope of the Student Disciplinary Procedures extends, in practice, to nearly the entirety of the disciplinary process, including—

> cl 2 disciplinary action in respect of conduct not in a university context, 'exceptionally';
>
> cl 10 powers and penalties following breaches of the Code of Discipline;
>
> cl 11 the procedures and appointment and removal of members of the Student Disciplinary and Appeal Panels;
>
> cl 12 the hearing of evidence;
>
> cl 17 '[f]urther rules relating to the constitution, powers, duties, and procedures relating to the Proctors (including at a Proctor's Disciplinary Hearing), the Student Disciplinary Panel, the Student Appeal Panel, and the Appeal Court, and the powers, duties, and procedures of the Proctors in relation to matters covered by [Statute XI.]';
>
> cl 19 'the procedure to be followed in the imposition of immediate fines, the amount of the fine, and a student member's right of appeal'; and
>
> cl 23(1)'precautionary measures…where there are reasonable grounds for the[ir] imposition'.

There are some provisions that partially provide similar reassurances, but we do not think them adequate.

> cl 14 Provisions for the Appeal Court are maintained.

But this is not satisfactory in respect of the Student Disciplinary and Appeal Panels.

cl 17 'Further rules' elaborated in the procedures under this section must 'comply with the principles of natural justice'.

But there is no requirement that the procedures *as a whole* should comply with the principles of natural justice. This includes all the other matters provided for by other sections, including appointment and removal of members, the hearing of evidence, powers and punishments, and so on.

cl 24 Precautionary measures imposed by the Proctors are subject to appeal.

But there is no general provision for the appeal of other proctorial decisions. And even where there is a right of appeal, there is no time limit, which could lead to unfair outcomes (e.g. in cases where funding is time-limited).

5.2.4 *The problem is not necessarily their content but that we have no knowledge of it.* The working group may already have worked on the basis of perfectly satisfactory proposed Student Disciplinary Procedures. Or the procedures may make substantive changes on which comment is required and to which members of the university may wish to object. The problem is not necessarily the text of the procedures themselves; it is, rather, that we simply don't know what they do or will provide for.

5.2.5 *Documents and regulations.* We noted above that we have no knowledge of the likely text of the procedures. That is not the only problem; one would remain even if draft texts were published. Clauses 3(3), 8(1) and 8(2) refer to 'document[s]' published by Council or 'the University'. It remains unclear whether Council (or the body or bodies designated by 'the University) may amend those documents—

- without the consent of Congregation; and
- without their publication in the *Gazette* and a suitable notice period.

We submit that both requirements are important. It would be odd, in our view, to permit Council to unilaterally amend the disciplinary procedures without Congregation's involvement. And it would be especially odd to do so if the requirement to draw Congregation's attention to those amendments by notice in the *Gazette* were omitted. By contrast,

- Regulations must be published fifteen days before their entry into force in the *Gazette*,
- and Congregation may annul or amend them.[16]

16. Statute VI, s 19(1).

5.2.6 *Council's previous proposed amendments to the Regulations.* We should stress that it would also not be enough to simply amend 'document' to 'regulation'. The working group should also consider Council's intention to make certain amendments to the Regulations ancillary to its proposed changes to Statute XI.[17] These are not mentioned in the consultation paper.

Most of the changes are mechanical, and do not in our view require separate comment. However, one does; we are concerned it may allow arbitrary withdrawal of access from IT systems. This is explained in § 8.

5.3 Questions for Council and the working group.

5.3.1 Is Council or the working group proceeding on the basis of any particular proposed text of the Student Disciplinary Procedure?

5.3.2 If not, is there at least some understanding in the working group of their likely content?

5.3.3 In the working group's view, on the present proposals in connexion with the policy on harassment—

- which body or bodies of the university are responsible for the drafting this policy?
- what form of legislative scrutiny, if any, must the policy undergo before enactment?
- is the policy binding; and
- what is the scope of the policy? does it cover e.g. procedures for hearing relevant disciplinary cases, or support for survivors and complainants?

5.4 Recommendations.

5.4.1 In clauses 8(1) and 8(2), replace 'document' with 'regulation'.

5.4.2 Clause 8 should mirror clause 17(2) in respect of the procedures as a whole; it could, for example, include a new subsection.

> (5) The Student Disciplinary Procedures shall comply with the principles of natural justice.

5.4.3 Decision-makers should expressly be required to construe the procedures in conformity with the principles of natural justice and to disapply provisions that do not. The Hong Kong Bill of Rights (before its amendment by the Standing Committee of the National People's

17. *Gazette*, 24 May 2024, p 460 [link], s 15(2).

Congress) provides a useful template, from which we may derive the following:

> Any provision of the Student Disciplinary Procedures that admits of a construction consistent with the principles of natural justice shall be given such a construction. Any provision of the Student Disciplinary Procedures that does not admit of a construction consistent with the principles of natural justice shall, to the extent of the inconsistency, be disregarded.

5.4.4 In order to maintain or improve provisions for procedural fairness in the existing Statutes and Regulations, the working group should draft amendments to Statute XI in light of—

- Council's proposals for the Student Disciplinary Procedures if available; or principles it proposes binding the eventual text of the procedures, if no draft text is suitable; and
- any consequential amendments Council intends to make to the Regulations.

If provision for a policy on harassment is maintained, clause 3(3) should provide that

- Council may elaborate a policy on harassment by regulation;[18] and
- the scope of the regulation should be limited to the further elucidation of the definition of harassment within the meaning of Statute XI, and other more clearly specified matters in the university's approach to it.

5.4.5 Before the passage of Statute XI, Council or the working group should issue an assurance or recommendation that the safeguards noted in ¶ 5.2.1 in Statute XI shall be maintained until and unless Congregation and student members are consulted on their modification, whether by means of further elaboration of the statute or the procedures.

5.4.6 Some restriction more effective than the adverb 'exceptionally' (clause 2) should be applied to disciplinary action concerning conduct outside a university context. This should, first, concern the circumstances in which it is begun: it could, for example, require the approval of a specially constituted independent panel. It should, second, provide for additional procedural safeguards in the event that such disciplinary proceedings are undertaken, so that they are not unfairly or unnecessarily prejudicial to the accused.

18. We consider that the legislative scrutiny provided for by section 19, Statute VI is sufficient.

6 Withdrawal of access to facilities.

6.1 In brief.

We agree with others' concerns that clause 23(3), which is a substitution for the provisions of section 50(2) in respect of student members, lowers the threshold for withdrawal of access significantly, and suggest the restoration of the proviso 'where the conduct of the individual concerned gives rise to a need for immediate action'.

6.2 Relevant proposals.

6.2.1 Section 50(2) applies to students.

> Where the conduct of the individual concerned gives rise to a need for immediate action, the person or body referred to in sub-section (1) above may ban the member of University staff, member of Congregation or student member concerned from the use of or access to the land, building, facilities or services in question forthwith pending further proceedings under this section, such a ban not to exceed twenty-one days.

Under clause 23(3), the initial proviso is missing.

> Any person having charge of any land or building of the University, or of any facilities or services provided by or on behalf of the University, if they have reasonable grounds to believe that the student member who has the use of or access to the land, building, facilities, or services in question has caused or is likely or threatens to cause damage to property, or inconvenience or harm to other users, may as a precautionary measure ban a student member from the land, building, facilities, or services in question for up to twenty-one days.

6.2.2 We did not understand from the working group's remarks whether the omission of the proviso is deliberate.

6.2.3 If it is not deliberate, it should be reinstated.

6.2.4 If it is deliberate, we should like evidence that immediate action is needed in the additional circumstances contemplated by clause 23(3).

We are slightly sceptical that there could be such cases, because those would have to be cases where immediate action is necessary but there is no need for immediate action.

6.3 Recommendations.

6.3.1 If these provisions in respect of students are to be removed from clause 26(1), they should be removed from clause 26(2), which currently has the same text as section 50(2): it refers to a 'student member concerned', but under clause 26(1) the person concerned cannot be a 'person who is only a student member'.

6.3.2 The proviso '[w]here the conduct of the individual concerned gives rise to a need for immediate action' should be inserted at the beginning of clause 23(3).

7 Reference to the policy on harassment.

7.1 Summary.

7.1.1 The working group proposes to include a reference to an existing policy on harassment. Its purpose in so doing is unclear. We consider that whatever that purpose was, the proposal is unhelpfully ambiguous. We attempt to anticipate what that purpose might be, and suggest that in each case the proposed clause is inadequate. In the absence of any further detail from the working group, we cannot definitively ascertain whether the intended purpose is fulfilled. We consider the possibility that the clause was introduced with a view to—

- aiding navigation;
- clarifying the extent to which the policy is binding; and
- requiring existing powers to be used more clearly (through a single policy).

7.1.2 We further note that the clause is unhelpfully ambiguous whatever its purpose.

7.2 Relevant proposals, and our recommendations.

7.2.1 *The position of the working group.* The consultation paper states that

> [i]t is proposed to retain the current University definition of harassment for students and staff (as set out in the current Statute XI) but also to include in the Statute (section 3.(3)(a)) a reference to the University's Harassment Policy.

The consultation paper also states that

> this consultation is restricted to the revisions to Statute XI only—the Non-Academic Disciplinary Procedure and Harassment Policy/Procedure are not in scope.

Analogously to our comments above on the Student Disciplinary Procedure, we think that a strict reading of this topical restriction would be illogical, inconsistent with the resolution of Congregation constituting the working group, and incompatible with a proper assessment of the proposals. It would be particularly illogical for the working group to declare the revision by which the reference is to be inserted beyond its remit when the working group itself proposes that reference.

Clause 3(3)(a) reads

> The University shall publish a policy on harassment which shall specify further detail about the University's approach to and definition of harassment.

7.2.2 *The purpose of clause 3(3)(a).* The working group has not stated why this reference is needed. We anticipate a few possible purposes below, and explain why in each case there is a better solution or the proposal is inadequate.

7.2.3 *Navigation.* There is no need for the reference to aid navigation, because reference could be included outside the statute wherever it is published. (For example, the webpage at which Statute XI is published contains lists of '[o]ther useful links' and '[r]elated regulations'.)

7.2.4 *Delegating further power to set policy on harassment.* Whatever its other purposes, clause 3(3)(a) is unhelpfully ambiguous: it omits to state which body or bodies of the university shall have authority to specify the content of the policy, and which body or bodies shall publish it.

The Equality and Diversity Unit publishes the policy on its webpage.[19] It appears that Council and some of its committees 'approved' it. We surmise that the policy is therefore enacted under Council's general powers under Statute VI, section 1. This suggests that the authority to specify the content of the policy is different from the authority to publish it. We do not think that it would be right to permit any arbitrary body of the university from specifying the content of the policy, and we think that the body responsible for specifying it should more naturally be responsible for publishing it.

7.2.5 *Recommendation.* If the reference is retained, '[t]he University' should be amended to read 'Council' or the bodies intended.

7.2.6 *Substantively changing the extent to which the policy is binding.* It is also possible that the intention is to clarify the extent to which the policy is binding. If so, we think that clause 3(3)(a) simply introduces more confusion, and could be read such as to have objectionable effects. In this case, the intention would be to grant Council (or some any other body) powers *in addition to those under section 1 of Statute VI* in connexion with harassment. If that is the intention—

- the present clause is grossly inadequate, because it does not make clear in the slightest what additional powers are sought;
- we cannot anticipate for the working group which additional powers are sought in the absence of any indication of

19. *Harassment Policy*, Equality and Diversity Unit, University of Oxford, URL: HTTPS://EDU.ADMIN.OX.AC.UK/UNIVERSITY-POLICY-ON-HARASSMENT.

> what they are, and therefore cannot propose any clear formulation, but consider that a matter for the working group itself; and
>
> • given that these powers are delegated under the statutes, they should be treated analogously to the Student Disciplinary Procedures: the same arguments apply *mutatis mutandis*, and so too the same recommendation—that the policy should be elaborated *by regulation* and subject therefore to the scrutiny of Congregation.

7.2.7 *Recommendation.* If the intention is to substantively change the extent to which the policy is binding, far more detail must be provided.

7.2.8 *Delegation of statutory power.* Even if there is no intention to delegate any further powers, the inclusion of the reference could be read as a further delegation of power beyond that contained in Statute VI. If there is no such intention, and the reference must be retained, we suggest the formulation containing 'restate' below.

7.2.9 *Requiring Council to state explicitly how it uses its explicit powers.* If that is not the intention, we struggle to see the purpose of the reference. Perhaps the only remaining benefit is that it requires the university to elaborate a single document explaining the use of the very same powers, or to make clear that Congregation, in enacting the statute, has anticipated the need for a policy on harassment, but that it considers that some other provision already has attended to it.

7.2.10 *Recommendation.* In that case, it would be clearer to state

> Council shall publish document which shall specify the policies made in exercise of its powers and delegated powers under section 1 of Statute VI concerning the University's approach to and definition of harassment and restate the contents of any other enactments concerning harassment.

This is subject to our further recommendation on the publishing of amendments below.

7.2.11 *Single source of information.* It is possible that this reference is intended to assist in the implementation of Condition E6.2.[20]

> The provider must maintain a single comprehensive source of information which sets out policies and procedures on subject matter relating to incidents of harassment and sexual misconduct, including

20. *Condition E6: Harassment and Sexual Misconduct*, Office for Students, 17th May 2024, URL: HTTPS://WWW.OFFICEFORSTUDENTS.ORG.UK/FOR-PROVIDERS/STUDENT-PROTECTION-AND-SUPPORT/HARASSMENT-AND-SEXUAL-MISCONDUCT/CONDITION-E6-HARASSMENT-AND-SEXUAL-MISCONDUCT/.

> intimate personal relationships between relevant staff members and students.

But we fail to see how the policy does so. Either it already amounts to a 'single comprehensive source of information' or it does not; mere reference to it hardly changes how comprehensive it is.

7.2.12 *Clarity as to textual changes.* The Office for Students has published the following guidance.[21]

> A provider must be transparent about changes it has made to the content of its comprehensive source of information and ensure that historical versions are easily accessible in line with the prominence principles. Information must be accessible for as long as it is relevant to a student in order to protect their interests. For example, this would include the need for individuals involved in an investigatory process to access and store the information for the duration of that process. A provider should consider the need for historical versions of some policies to be available to students to access after they leave their course, because, for example, they may be relevant to a complaint. It may also be helpful to students for a provider to make the information in the single comprehensive source of information downloadable. Transparency about changes to policies allows students to understand what they can expect from their provider and the expectations placed on them. For example, students should be clear how a complaint will be handled if a provider's policies have changed between an incident and the complaint being raised.

The Statute, on the other hand, simply requires that the 'University shall publish a policy on harassment'. We suggest this requirement would most naturally be met by requiring that the policy should be a regulation, as we have suggested above in connexion with the Student Disciplinary Procedures; in that case, the relevant provisions would be published in the *Gazette* and a record, therefore, kept. A further possibility would be to use the same system by which the Examination Regulations' version history is made available to ensure that the version history of the policy is easily accessible. (Indeed, that would be a good idea so far as any enactment vis à vis harassment, or, indeed, any university enactment whatseover is concerned; but the working group may consider the latter to be beyond its remit.)

7.2.13 *Recommendations.*

- In clause 3(3)(a), replace 'policy' with 'regulation'.
- The version history of the policy or regulation should be made available in the same way as that of the Examination Regulations.

21. *Ibid.*, Guidance, ¶ 18.

8 Arbitrary withdrawal of access to IT systems.

8.1 Summary.

Council proposed certain regulatory changes tied to the changes to statute XI. One of them appears to allow arbitrary withdrawals of access to IT systems by any 'decision-maker'. The working group does not appear to be aware of this concern or to have addressed it.

8.2 Relevant proposals.

8.2.1 *Present restrictions on withdrawal of access.* University regulations at present provide that access to IT facilities

> may be withdrawn *under section 48 or 49 of Statute XI* pending a determination, or may be made subject to such conditions as the Proctors or the Registrar or other decision-maker (as the case may be) shall think proper in the circumstances.[22]

Sections 48 and 49 provide for punishment of disorderly behaviour during hearings before disciplinary panels, orders suspending or postponing penalties, and suspensions of students who do not comply with disciplinary orders. It is only pending *these specific decisions* that the relevant decision-makers that access to IT systems may be withdrawn; at present, withdrawals are not permitted in other disciplinary proceedings.

8.2.2 *The confused position under the proposals.* But item (b) proposes to strike 'under section 48 and 49 of Statute XI', so that the section simply reads that access

> may be withdrawn pending a determination, or may be made subject to such conditions as the Proctors or the Registrar or other decision-maker (as the case may be) shall think proper in the circumstances.[23]

Even more confusingly, the working group's draft of Statute XI appears to include a similar power:[24]

> 23. (1) The Proctors shall have power to impose 'precautionary measures' on any student member or members where there are reasonable grounds for the imposition of such measures, in accordance with the Student Disciplinary Procedures.

8.2.3 *Appeals.* But there is a crucial difference; clause 24 of the proposed text of Statute XI at least provides for appeals following precautionary measures. Section 15(2) of the IT Regulations does not *per se*. Under the current text of Statute XI, decisions under section 15(2) are partially sub-

22. s 15(2), IT Regulations 1 of 2002 unamended [link].
23. *Ibid.*
24. cl 23(1), Annex B; this is retained from Council's proposals.

ject to appeal—if made by the proctors; but as amended, there is no explicit provision that orders under section 15(2) are to be regarded as precautionary measures for the purposes of appeals.

8.3 Questions for Council and the working group.

8.3.1 What purpose does the proposed text of section 15(2) of the IT Regulations serve that is not provided for by clause 23(1) of the proposed text of Statute XI?

8.3.2 Under the proposed amendments, what does 'determination' mean? Does it include any determination by any decision-maker in the university whatsoever? If not, why don't the proposals specify *which* determinations?

8.3.3 Is it the intention of Council to amend the Regulations as proposed? The Regulations must be amended simply because sections 48 and 49 are no longer included in the proposed text of Statute XI; presumably Council must propose some amendment to them. If Council intends to amend them differently, how?

8.3.4 Does the working group intend to comment on Council's proposed amendment to the IT Regulations? Has it any preliminary view, and, if so, what is it?

8.3.5 On the current proposals, are withdrawals under section 15(2) subject to appeal? Is it intended that they should be?

8.4 Recommendations.

The text of section 15(2) should be amended to refer to the precise analogues of determinations under sections 48 and 49 of the present text of Statute XI, and, if necessary, relocated. Withdrawals of access should clearly be subject to a right of appeal.

9 Encouragement.

9.1 Summary.

'Encourage' includes more conduct than 'incite or conspire'; if there is no intention to make any substantive change here, the latter language should be retained.

9.2 Relevant proposals.

Section 3 of the present statute provides that

> No member of the University shall incite or conspire with any other individual to engage in any of the conduct prohibited under this Part.

The working group proposes, in clause 4, that instead

> No member of the University or student member shall encourage another individual to engage in any of the conduct prohibited under this Part, or to agree with another to do the same.

9.3 Conduct prohibited.

9.3.1 *Encouragement through orderly and otherwise permitted behaviour.* Following the discussion in the public forum, we agree that encouragement includes far more conduct than incitement or conspiracy. In particular, encouragement could be entirely unintentional and incidental. For example, to volunteer to provide assistance in drafting an appeal to the Student Disciplinary Panel might encourage student members to vandalise property, on the basis that they might receive wholly permissible assistance in drafting an appeal. Similarly, to participate in a lawful and orderly protest in compliance with the statutes could encourage others to participate in unlawful or disorderly actions in the same cause, or to violate university statutes in the process.

9.3.2 *Accessibility and clarity.* The working group repeatedly said that the sole intention in this case was to make the statute clearer. Whilst this is a commendable aim, we agree with various speakers in the public forum that the mere use of the words 'conspire' and 'incite' is unlikely to make the statute unreasonably impenetrable, and that the limited intimidatory effects of such language are preferable to the decrease in precision in the substitution of 'encourage'. Some members of the panel suggested that a fresh formulation could be found. We think that it would be preferable simply to revert to the original formulation; there is no guarantee of success in qualifying 'encouragement'.

For example, it might seem that the inclusion of the qualification 'intentionally' would suffice. But that would prohibit the provision of otherwise entirely lawful and permissible assistance to *other people* who violate university statutes with the stated aim of ensuring that those who violate university statutes could at least be assured that others would help them to insist on their procedural rights with the explicit aim of reducing the perceived burden so incurred. That would appear to be a perfectly reasonable attitude to civil disobedience. Indeed, we ourselves in some cases would be minded to take such an approach. Similarly, an entirely lawful and orderly protest could be held to endorse certain conduct and to demand that the university should repeal any enactment prohibiting it. That would surely encourage the prohibited conduct (in endorsing it), but it would be quite draconian to prohibit such a protest.

9.3.3 *Redundancy.* We further submit that 'agree with another to do the same' is also redundant and unnecessary if 'incite or conspire' is retained.

9.4 Recommendation.

Reference to encouragement should be replaced by the original reference to incitement or conspiracy. Clause 4 should read

> No member of the University or student member shall incite or conspire with any other individual to engage in any of the conduct prohibited under this Part.

10 Chilling effects; the European Convention on Human Rights.

10.1 Summary.

10.1.1 Strasbourg has held that, in certain circumstances, broadly drafted legislation may give rise to violations of the Convention not by reason of its clearly resulting in their application with the effect of punishing protected conduct, but by reason of its chilling effect.

10.1.2 We are of the view that some proposed clauses risk a similar difficulty.

10.2 The chilling effect of broad prohibitions.

10.2.1 *The application of the Convention* to the university is trite law, and we shall not elongate our submission by stating its basis (as above).

10.2.2 *Chilling effects.* In *Altuğ Taner Akçam v Turkey*, Strasbourg held that an investigation *alone* could amount to an interference in the right of freedom of expression (¶ 75), which could engage Article 10 (¶ 82), and, if in pursuance of insufficiently clear legislation, fail to satisfy Article 10 (¶¶ 84, 93). And indeed in those circumstances they did.

10.2.3 *The case of the university.* In the same connexion, we submit that if the statute employs overly broad language, the proctors (or other bodies of the university), acting purely in good faith, could find themselves obliged to investigate all sorts of cases of ostensible dishonesty. For example, in political disputes, it is very common for opponents to consider, in good faith, that the other side has somehow broken the law, or university statutes. It is not enough that the proctors might eventually decide either that the relevant conduct is not prohibited or that it is nevertheless protected in view of the university's overarching commitments to the law, freedom of speech, and so on. For sustained complaints could themselves give rise to interference (¶ 75).

> [W]hile the applicant was not prosecuted and convicted of the offence under Article 301, the criminal complaints filed against by

> extremists for his views on the Armenian issue had turned into a harassment campaign and obliged him to answer charges under that provision. It can therefore be accepted that, even though the impugned provision has not yet been applied to the applicant's detriment, there mere fact that in the future an investigation could potentially be brought against him has caused him stress, apprehension and fear of prosecution.

A mere sustained campaign of complaints alone would not be a problem. The difficulty turned, in *Altuğ Taner Akçam*, on the clarity of Article 301: it was too broad, and therefore it was not possible for the applicant to simply ignore the complaints, because it gave rise to a genuine and reasonable fear. In that case (¶ 93),

> any opinion or idea that is regarded as offensive, shocking or disturbing can easily be the subject of a criminal investigation by public prosecutors.

10.2.4 *'Quality of law'.* Below, we shall submit that some of the clauses of the proposed statute are just as 'unacceptably broad' (¶ 95) as 'offensive'. They therefore also (*ibid.*)

> [do] not meet the "quality of law" required by the Court's settled case-law

and so, in our view, are not 'prescribed by law'. In the cases of Articles 10 and 11, they would therefore amount to violations of the Convention.

10.2.5 *Our gloss.* We venture to gloss Strasbourg's view thus. An enactment may not, on its proper construction, clearly and impermissibly prohibit a certain course of conduct. But it may be so poorly drafted that it may reasonably appear to do so; and in that case, the threat of proceedings, if sufficiently credible, itself has an impermissible chilling effect.

10.3 Application to individual clauses.

10.3.1 In each case, we shall seek to establish that there is some class of behaviour

- that appears to fall within the plain meaning of the scope of the prohibition imposed by the clause,
- and therefore plausibly could be subject to a chilling effect,
- but nevertheless engages a Convention right, rendering the chilling effect interference,
- for which there is no good argument under the Convention.

10.3.2 *Clause 3(2)(b)*: disruption or obstruction of any kind of university activity of any kind.

- The class of conduct concerned is lawful and orderly participation in noisy protests.
- We have explained how this falls under the plain meaning of the statute in 3.2. It is quite reasonable to imagine that potential protesters might fear e.g. pressure on the proctors to investigate noisy protests near important university offices or outside events hosted by important donors. It is also quite reasonable to imagine that they might fear repeated complaints by their political opponents.
- It is surely trite to establish that some protests protected by the Convention may turn out to be noisy.

10.3.3 *Clause 3(2)(e)*: dishonest behaviour of any kind.

- The class of conduct concerned is the making of statements that might reasonably be feared to be deemed dishonest in e.g. public debate.
- It is quite foreseeable that political opponents would seek to use the clause—possibly in good faith—to pursue their opponents through disciplinary procedures, and to think that the subjects of those complaints reasonably may be left unable to reassure themselves that the complaints are no cause to worry.
- We have already established that some such statements—and perhaps even some dishonest statements—are protected under Article 10 (4.4).

10.3.4 *Clause 4.*

- Consider cases where a cause is widely supported by different groups; some deliberately use unlawful or prohibited means, and others exclusively lawful means. We are concerned here with the latter lawful means—indeed, means protected under the Convention.
- That cause, however, has a large number of opponents. Those opponents could charge that the lawful supporters of the cause in various ways 'encourage' the latter in their pursuance of unlawful or prohibited means to the same end (see 9.3). On the proposed formulation of clause 4, these complaints would at least appear to be credible, and therefore amount to interference with rights under (*inter alia*) Articles 10 and 11.

10.4 Overarching legal protections don't suffice.

10.4.1 In a previous statement, 'the University' (Council, we surmise) observed that it was, whatever the contents of the statutes, 'subject to, and complaint with, UK law'.[25]

10.4.2 It was of course the case that in *Altuğ Taner Akçam*, the impugned domestic law was subject to the overall provisions of the Convention. That did not mean that the impugned provisions were somehow permissible.

10.4.3 It must further be observed that it would not suffice even to insert within the statute a direct reference to the legal obligations of the university, *inter alia* under the Convention. First, only members of the university with a good understanding of the Convention would meaningfully benefit from these provisions. And, second, in the absence of any guarantee that e.g. the proctors would correctly apply the Convention and therefore disapply any impugned provisions of the statute, the risk of a chilling effect would still arise.

10.5 Recommendations.

10.5.1 We consider that all our proposed formulations would avoid these difficulties, and therefore reiterate our proposals above.

10.5.2 We further are of the view that the working group should publish an opinion by a King's Counsel assessing the compatibility of the proposals with the Convention, and, in particular, Articles 10 and 11.

11 Conclusion.

- The text proposed by the working group, in our view, remains deeply flawed. A substantive and satisfactory response to all the evidence before the working group—whether in accordance with our recommendations or otherwise—is in the interests of the timely completion of the process of amending Statute XI. It is therefore *inter alia* in the interests of those in whose name the amendments were in large part proposed, i.e. victims of harassment and assault.
- If the working group is unable to complete its work in the time intended, it would be preferable to delay its work and to obtain consensus this year; to press ahead when so many flaws remain would lead to the possibility of a reversal in Congregation and further controversy.
- We remain at the disposition of the working group.

25. *Response to 'Public Statement on Proposed Amendments to University Statutes'*.