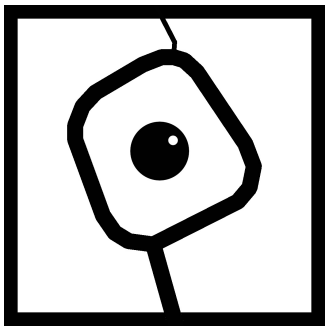

Wellington Square Watch

holding Oxford's bureaucracy to account:
„für gemäßigten Fortschritt in den Schranken der Gesetze und Universitätsatzungen bzw. -ordnungen."

email and website: [secretary@]
wellingtonsquarewatch.org

25/01/2025, 03:57.

Draft evidence to the Statute XI Working Group.

J.P. Loo, Somerville College.

For a summary of our findings, click [here].

The present draft is not yet final. Please contact the author before citing it. The latest version is available at this [link].

Contents

1 Preliminaries.

Note: 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.

1 Background.

- *23 May 2024*: University Council published proposals to amend the university's Statute XI: University Discipline, and consequential amendments.[1]
- *June 2024*: a number of groups and members of the university opposed the amendments. Our report [link] suggested that the statutes were poorly drafted.

  > Proposed amendments to university statutes, if strictly enforced, could force gay Oxonians to out themselves, effectively expel financially disadvantaged students awaiting disciplinary hearings, and allow arbitrary withdrawals of access to IT facilities.
  >
  > Singing hymns in Corpus Christi processions, publishing research that would make drugs cheaper, and affixing posters to railings outside the Radcliffe Camera at a vigil—these all could be banned under the proposals.

- *11 June 2024*: Council withdraws the proposals.[2]
- *15 October 2024*: Congregation agreed to form a working group to redraft the proposals.[3]
- *January 2025*: the working group [link; responses by 31 January 2025] and university student union [link; responses by 28 January 2025] announced consultations on the proposals.

2 In brief.

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 the amendments made so far.

The text proposed by the working group nevertheless remains significantly flawed. By way of illustration, it could still

> § 5.3 prohibit singing in a college-organised concert if it would disrupt a nearby tutorial;

1. *Oxford University Gazette*, 5422, 23 May 2024, p 465 [link].
2. *Gazette*, 5254, 13 June 2024, p 528 [link].
3. *Gazette*, 5433, 17 October 2024, p 66 [link].

> § 6.3 prohibit a gay student from claiming to be straight to avoid outing themselves in a college bar;
>
> § 7.2 allow Council to improperly interfere in disciplinary bodies' proceedings in individual cases or to improperly seek to procure a certain outcome by the inducing of their members by changing the rules of procedure;
>
> § 8.2 allow seemingly arbitrary withdrawals of access to IT facilities even before disciplinary cases are properly heard;
>
> § 7.4 lead to confusion as to which bodies of the university have the authority to enact a policy on harassment, and what its scope should be; and
>
> § 9.3 prohibit otherwise permissible assistance to students facing disciplinary procedures, and prohibit otherwise lawful, orderly, and permitted protests demanding changes to university statutes to permit an activity endorsed by the protesters and previously prohibited.

In light of these concerns, we make a number of recommendations to improve the text, including

> § 5.6 the reinsertion of a proviso that some conduct should be reckless or intentional to be prohibited;
>
> § 6.5 the removal of a general prohibition on dishonesty and its replacement by more specific prohibitions on individual forms thereof;
>
> § 7.6 steps to ensure that important rules to be made by Council separately from the statute do not lead to unfairness, including the clear specification of the scope of the policy on harassment and the bodies responsible for drafting it;
>
> § 8.4 steps to ensure that the circumstances in which access to IT facilities may be withdrawn are restricted, and that these withdrawals should clearly be subject to appeal); and
>
> § 9.4 substitution of reference to encouragement with reference to incitement or conspiracy.

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.

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.[4]

1 *Clause 3(1).*

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

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

We do not consider the working group's proposals adequate. See § 5.

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

We do not consider the working group's proposals adequate. See § 5.

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 § 6.

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 § 7.

4. *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.

11 Our comments.

4 General comments.

4.1 *The purposes of the amendments.*

4.1.1 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—[1]

4.1.1.1 to substantively improve the process by which cases of sexual harassment are handled;

4.1.1.2 to clarify and consolidate the text, and make it more accessible;

4.1.1.3 *not* to 'affect free speech or the right to protest in any way'; and

4.1.1.4 *not* to 'create any new powers relating to lawful protest'.

4.1.2 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—

4.1.2.1 substantive improvements to disciplinary provisions and proceedings *generally*; and

4.1.2.2 in particular, the prohibition of as yet unknown forms of misconduct (e.g. forms of 'dishonest behaviour').

4.1.3 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.

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.

1. *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.

4.2 *Discretion and drafting.*

4.2.1 Our evidence generally stresses the importance of tight drafting. We understand that this point may be taken too far, and we wish to anticipate possible responses in that connexion.

4.2.2 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.

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

4.2.2.2 Any inadvertent changes introduced through insufficiently tight 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.

4.2.2.3 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. Consider

dishonesty. 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 there is reasonable disagreement over this question. 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.

The third reason is therefore that imprecision in supposedly non-substantive redrafting could therefore inadvertently introduce genuinely substantive changes. For numerous reasons above, that would be unwise: it vitiates trust to claim that substantive changes in fact are simply questions of redrafting; substantive changes should be properly scrutinised and motivated; and the working group may not even be the correct forum to propose them.

4.2.3 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.

4.2.4 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. We take it that it would be unwise to prohibit all of these on the basis that there may emerge in future forms of selfishness 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 wrongdoing is necessary.

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. The determination of the balance 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—and determine—

- 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', we are not aware that there has yet been a single case of dishonest behaviour 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.

4.3 *Comments on the functioning of the working group.*

4.3.1 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.[2]

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

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.

4.3.3 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.[3]

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 appreciate that the working group has a difficult schedule, and that its members are busy. We therefore have difficulty in understanding why, in view of those difficulties, the task of the working group has been made more difficult by the shortening of the consultation period. And we have further difficulty in understanding why the *end* of the consultation period should have been moved forward; presumably the date announced was, when formulated, compatible with the schedule of the working group.

Given that the period from seventh week of Michaelmas to third week of Hilary presumably was not considered excessively long when it was first suggested, and the fairly compressed timeline that

2. *Ibid.*

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

has actually been offered, it would be reasonable to extend the consultation.

4.3.4 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. 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, and should *state them carefully*.

4.3.5 We were concerned to hear in the public forum the suggestion that the working group's consultation paper duplicated or closely copied text issued by Professor Williams, the Pro-Vice-Chancellor (Education), especially that he appears not to be a member of the working group.[4] In that connexion, and with a view to engendering (deserved) trust in the independence of the working group, 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. 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. 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.

5 Intention or recklessness.

5.1 *In summary.*

The proposed text would prohibit accidental and minor disruptions of university activities, e.g. by chanting at a lawful and orderly protest, or singing at a college concert.

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

5.2 Relevant proposals.

5.2.1 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)…

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

5.2.3 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.'

5.3 Conduct prohibited.

5.3.1 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!

5.3.2 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.

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 § 7.) 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.

5.3.3 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.[5]

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.[6] 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

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

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.

We mention this case because we think it its analysis admits a perspicuous presentation and is fairly common, but we consider that there are similar cases we have omitted.

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.

5.3.4 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.

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

5.4.1 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.

5.4.2 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 ¶¶ 7.6.2 and 7.6.6).

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.

5.5 *Questions for Council and the working group.*

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

5.5.2 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?

5.6 *Recommendation.*

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.

6 Dishonesty.

6.1 *In 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).

6.2 *Relevant proposals.*

Section 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).

6.3 *Conduct prohibited*

6.3.1 We have no objection to the text after 'including'.

6.3.2 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.

6.3.3 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).

6.3.4 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 ¶ 4.2.

6.4 Questions for Council and the working group.

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

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

6.5 *Recommendation.*

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.

7 Procedural fairness and Council-drafted policies.

7.1 *In summary.*

Amendments to Statute XI must be considered in light of proposed amendments to other Regulations, and the provisions of other policies to be drafted by Council, including the Student Disciplinary Procedures and a policy on harassment. The consultation paper has not commented on these issues.

7.2 *Relevant proposals (Student Disciplinary Procedures).*

7.2.1 The working group's proposed text retains clause 8, which provides that Council shall elaborate 'Student Disciplinary Procedures' that

> (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.

7.2.2 Under the working group's proposed texts, the procedures provide for, in practice, 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'.

The working group has not issued a proposed text of the Student Disciplinary Procedures. It is therefore impossible to anticipate how any of the matters enumerated will be provided for.

7.2.3 The proposed text therefore removes a number of safeguards in the present text of Statute XI.

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.

7.2.4 We are concerned that the removal of these safeguards could lead to unfairness or the perception of unfairness in the handling of disciplinary cases.

- 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.

7.2.5 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).

7.2.6 The working group may be operating on the basis of proposed Student Disciplinary Procedures. If that is so, they should be published, so that the combined effect of the procedures and the redrafting of the statute may be known.

That alone would not suffice. Clauses 8(1) and (2) provide for 'document[s]' published by Council. It is unclear whether these 'documents' are subject to any scrutiny by Congregation or notice period before enactment. Regulations, by contrast, must be published fifteen

days before their entry into force in the *Gazette*, and Congregation may annul or amend them.[7]

7.3 *Relevant proposals (ancillary regulatory changes).*

Council announced certain amendments to the Regulations ancillary to its proposed changes to Statute XI.[8] 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.

7.4 *Relevant proposals (harassment policy).*

Clause 3(3) of the working group's proposed text provides that the

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

It is not specified clearly who should draft the policy, whether it must undergo legislative scrutiny, what its scope is, and whether it is binding. These matters should all be specified.

7.5 *Questions for Council and the working group.*

7.5.1 Is Council or the working group proceeding on the basis of any particular proposed text of the procedures?

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

7.5.3 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?

7. Statute VI, s 19(1).

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

7.6 Recommendations.

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

7.6.2 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.

7.6.3 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 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.

7.6.4 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.

7.6.5 Before the passage of Statute XI, Council or the working group should either an assurance that the safeguards noted in 7.2 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.

7.6.6 Some restriction more effective than the adverb 'exceptionally'[9] 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.

9. S 2.

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

- Council may elaborate a policy on harassment by regulation;[10] 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.

8 Arbitrary withdrawal of access to IT systems.

8.1 *In 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 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.[11]

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 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.[12]

10. We consider that the legislative scrutiny provided for by section 19, Statute VI is sufficient.
11. s 15(2), IT Regulations 1 of 2002 unamended [link].
12. *Ibid*.

Even more confusingly, the working group's draft of Statute XI appears to include a similar power:[13]

> 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 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 subject 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.

13. cl 23(1), Annex B; this is retained from Council's proposals.

22 *Our comments.*

9 Encouragement.

9.1 In 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.

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.

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.

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.

III Recapitulation.

Note: section and paragraph numbers (after § and ¶) are clickable and link to the relevant location.

10 Recapitulation of questions for Council and the working group.

§ 5.5 *Omission of the proviso 'intentionally or recklessly'.*

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

§ 6.4 *Prohibition of dishonesty.*

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

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

§ 7.5 *Procedural fairness and the Student Disciplinary Procedures.*

- Is Council or the working group proceeding on the basis of any particular proposed text of the procedures?
- If not, is there at least some understanding in the working group of its likely content?
- *Policy on harassment.* In the working group's view, on the present proposals—
  - 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?

§ 8.3 *Withdrawal of access to IT facilities.*

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

11 Recapitulation of procedural recommendations.

¶ 4.1.3 The working group should clearly clarify the aim or aims of each proposed provision of the amendments (e.g. to improve drafting,

to substantively improve the handling of sexual assault and harassment complaints, or to substantively make general improvements to disciplinary procedures), in order to avoid confusion.

¶ 4.2.2 Amendments *solely* intended to improve drafting should very precisely follow the provisions of the existing text.

¶ 4.2.4 Where amendments make substantive changes beyond improvements to the handling of sexual assault and harassment complaints, the sorts of case motivating the amendments and evidence that we should expect such cases (e.g. statistics about past cases) should be supplied. Only if these cases are impossible to cover is there any reason to cover them through broad terms that also cover unobjectionable behaviour, such as 'dishonesty' or 'selfishness'.

¶ 4.3.2 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.

¶ 4.3.3 Given the delay in the consultation period from seventh week of Michaelmas (30 November) to 16 January, and the bringing forward of its end from third week to Friday of second week, it would greatly facilitate those submitting evidence, and be in the interests of trust, to extend the consultation period.

¶ 4.3.5 The working group should consider making more of its proceedings public, including minutes, minority views (if any), and even their meetings themselves.

12 Recapitulation of substantive recommendations.

§ 5.6 The working group should include the proviso 'intentionally or recklessly' in clause 3(2), or, at the very least, clause 3(2)(a), (b), and (c).

§ 6.5 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.

§ 5.6 The working group should amend clause 3(2) of the proposed text of statute XI to read

> No member of the University or student member shall (or shall attempt to) *intentionally or recklessly*…

§ 7.6 *Procedural fairness and the student disciplinary procedures*

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

¶ 7.6.2 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.

¶ 7.6.3 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 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.

¶ 7.6 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.

¶ 7.6.2 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.

¶ 7.6.3 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 (in the Patten era, before its amendment by the Standing Committee of the National People's 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 con-

sistent with the principles of natural justice shall, to the extent of the inconsistency, be disregarded.

¶ 7.6.4 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.

¶ 7.6.5 Before the passage of Statute XI, Council or the working group should either an assurance that the safeguards noted in 7.2 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.

¶ 7.6.6 Some restriction more effective than the adverb 'exceptionally'[1] 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.

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

- Council may elaborate a policy on harassment by regulation;[2] 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.

§ 8.4 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.

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

1. s 2.

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

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.