

UA response to the consultation on the National Higher Education Code to prevent and respond to gender-based violence

July 2024



Australian universities are committed to actively addressing gender-based violence on campus.

We will continue to work in collaboration with students, practitioners, and subject matter experts to combat this issue. All Universities Australia (UA) members are signatories to the **Charter on Sexual Harm**, which was publicly released on 17 November 2023. The Charter contains nine action items which align with the seven Potential Standards under the National Code. Some of these areas of alignment include:

- Providing support to all people who report sexual harm, which includes providing access to trauma-informed and culturally appropriate support services.
- Providing clear and accessible processes for anyone who chooses to make a report.
- Publicly reporting annually on the number of reported instances of sexual harm in our organisations.
- Working effectively in a research-informed manner to better understand and assist in addressing the prevalence of sexual harm in our wider society.

Many of the principles in the National Code are also aligned with UA's **Primary Prevention of Sexual Harm in the University Sector – Good Practice Guide**. The Good Practice Guide promotes building individual and organisational capability to prevent gender-based violence and foster a positive university culture and a whole-of-organisation approach. We recommend this is referenced in the Code as a template for guidance.

UA welcomes evidence-based solutions to addressing gender-based violence. We agree that education and training should be designed in consultation with – and reflect the needs and experiences of – specific cohorts of students and staff. The university sector has a repository of academic experts and specialist staff working in the gender-based violence and sexual harm areas. These staff are familiar with their local communities and the nuances of local issues relevant to individual institutions. Given sectoral expertise, we welcome the opportunity to work closely with the Department on:

- potential partnership opportunities;
- involvement in working groups; and
- collaboration on best practice and evidence-based research.

In supporting the outcomes outlined in the Action Plan Addressing Gender-based Violence in Higher Education, we have some recommendations to ensure that the Code works as well as possible in the existing legal/regulatory regime and can be implemented by all universities and providers. We have made eight recommendations below we believe will deliver the strongest chance of success to support a whole of organisation approach to prevent and respond to gender-based violence and we look forward to working constructively with government and other stakeholders to drive institutional and societal change.

Key Recommendations

- 1 Issues of regulatory overlap and confusion** are addressed immediately to reduce the potential for dysfunction.
- 2** In addition to drawing on the significant expertise of members of the Expert Working Group, the government consults experts in university governance, legal and integrity matters specifically within the education sector **to ensure universities can report effectively against the Code.**
- 3 To ensure timely resolution of complaints** while adhering to a trauma-informed approach, consideration should be given to the feasibility of the one-month resolution period. This timeframe should be extended, with the provision that the university maintains consistent and appropriate communication with all involved parties throughout the investigation, to ensure an appropriate resolution is achieved.
- 4 There is a phased approach to Code implementation.** This will allow all universities time to build the necessary capacity, relationships and trust necessary for the Code to be effective.
- 5 Frameworks and guidance are made available** to support providers to meet the standards in a way that accounts for local and institutional diversity and responsiveness. Flexibility in the Code will also be needed for providers' international campuses to ensure compliance with relevant national laws.
- 6 There is regular review and update of the Code** to ensure processes and best practice evolve to meet changing student and social needs; and that natural evolution of definitions are captured.
- 7** That where institutional capacity and/or local service resources are limited **universities can apply for support to assist capacity building** to implement the Code.
- 8** There is **provision in the Code for providers to establish contractual arrangements** with third-party accommodation providers.



Recommendation 1

Issues of regulatory overlap and confusion are addressed immediately to reduce confusion and the potential for dysfunction.

The implementation of the National Code is likely to result in regulatory fragmentation for higher education. There is significant overlap between the **Higher Education Standards Framework (Threshold Standards) 2021** and the proposed Code. Specifically, the Threshold Standards provide clear standards on governance and self-assurance and cover well-being and safety, and student grievances and complaints.

Furthermore, the Higher Education Standards Panel will have no line of sight for the National Code as a new set of Standards, given its role is linked in legislation to the TEQSA Act. The new Student Ombudsman will also have a role in working with individuals and will likely also have to apply the Code in circumstances that will help to flesh out its implications in specific cases.

In UA's view, the most coherent approach would be to have the Unit within the Department responsible for best practice and working with providers to improve standards, for the Ombudsman to have the authority to deal with individual complaints, and for TEQSA to have regulatory authority in areas where systemic problems emerge (on reference from either the Department or the Ombudsman, among other avenues).

However, recognising the government is making a conscious decision that responsibility for the Code sits within the Department rather than in TEQSA, it is critical that should this continue there is an understanding within the Department (and TEQSA) on the overlap between these two sets of standards. Similarly, we note that the Support for Students policy adds yet another level of fragmentation to the regulatory environment. Similarly, there is the potential for the Ombudsman to take a different approach to the Department and/or TEQSA. Unless this is addressed in design and implementation there is also a risk that government attention and oversight will be diffused due to parallel processes. Departmental siloes must be avoided to reduce the risk of dilution of good practice already in place. Appropriately trained staff to deliver these additional functions well will also be required.

All UA member universities want to be compliant and do the right thing. Students and their wellbeing are at the centre of this. However, UA is concerned that there is no mechanism for drawing together these standards and this may lead to unintended consequences or provider confusion. The regulatory requirements must be cohesive so that universities can focus their attention on delivering outcomes for students rather than directing resources to meeting overlapping and unclear compliance.

It would be helpful if, as initial first steps, the Department could define/distinguish the responsibilities, limits and procedural classifications between its role and TEQSA's in establishing the Code and addressing gender-based violence. Such clarity will assist providers and students.

A recommended distinction between the two agencies would be:

- the provision of good practice guidance from the Unit; and
- responsibility for a provider's adherence to the Code through TEQSA.

It is imperative that there is an educative process as part of the implementation of the Code. This must include how institutions should connect these overlapping standards and regulations should the government proceed with compliance sitting within the Department rather than TEQSA.

UA also requests that clarity is provided on the data set providers must report on under the Code. This includes:

- confirmation of the data type, storage and reporting; and,
- whether it aligns with the Workplace Gender Equality Agency (WGEA) or with another agency reporting to the Unit.

This clarity is essential to ensure that providers do not duplicate work and can focus resources on addressing the Standards under the National Code.

Recommendation 2

In addition to drawing on the significant expertise of members of the Expert Working Group, the government consults experts in university governance, legal and integrity matters specifically within the education sector to ensure universities can report effectively against the Code.

UA acknowledges the extraordinary contribution made by members of the Expert Working Group. However, despite their individual and collective expertise there is limited expertise for the Department to draw on from the membership of this group in terms of how standards are both developed, implemented and reported on.

UA is also concerned about some of the language in the Code. For example, under the Standard on procedures, the Code recommends "avoiding or limiting cross-examination of victim-survivors wherever possible." Use of "cross examination" in this context is inappropriate, as there are fundamental differences between a university misconduct investigation and a criminal process where a person can be cross-examined by lawyers during a trial. UA discusses these differences in the **2023 Sexual Harm Response Guidelines**.



Language and processes around "investigation" also need to be clarified. University misconduct investigations must determine whether misconduct has occurred *on the balance of probabilities*. Such investigations mandate that all parties be interviewed. Any discrepancies in accounts must be checked, which in turn may require the reporting student to be re-interviewed. Where the person about whom the report is made is also a person to whom the university has formal obligations, the university must also apply critical elements of procedural fairness. This includes:

- providing a person with appropriate details of the allegation against them;
- providing an opportunity to respond; and
- providing the right to be treated without bias in any investigation or decision concerning the allegation¹.

UA supports the wellbeing of students who make a disclosure or report of gender-based violence being prioritised. This should include, wherever possible, avoiding the student being re-interviewed. However, this needs to be balanced with the alleged perpetrator's rights and universities' requirements to observe the principles of natural justice and procedural fairness. These principles, to which universities must by law adhere, dictate that any assessment or investigation will be undertaken in an impartial way. Alternative terms and procedural fairness approaches are also provided in the **2023 Sexual Harm Response Guidelines**. We refer the Department to the Guidelines.

UA recommends that:

- the Department seek input from additional experts in university governance, legal and integrity measures within the HE context to reinforce the expertise available through the Expert Working Group
- alternatives to and/or clarification of the above terms are used in the Code; and
- the Code recognises the need for procedural fairness while considering how this might be best achieved while protecting those who have reported (e.g. by only re-interviewing where necessary).

Recommendation 3

To ensure timely resolution of complaints while adhering to a trauma-informed approach, consideration should be given to the feasibility of the one-month resolution period. This timeframe should be extended, with the provision that the university maintains consistent and appropriate communication with all involved parties throughout the investigation, to ensure an appropriate resolution is achieved.

UA supports realistic timeframes for the resolution of reported instances of sexual harm². However, imposing a one-month time limit for resolution contradicts a trauma-informed approach and poses risks to due process. There are many aspects of these processes over which universities do not have direct control³. In addition, the complexity of such issues complicates strict adherence to specific resolution timeframes. (Further detail is provided in Box 1 below.)

The Code's proposed "Standard on procedures" timeline risks exacerbating these complexities. It also jeopardises implementing a trauma-informed approach, as this approach requires proceeding at a pace directed by the complainant, thereby providing them with agency.

Universities must balance the need for timely resolutions with providing appropriate support and ensuring fairness for all parties involved.

The need for reasonable timeframes for resolution

When a report of sexual harm, gender-based violence, or other problematic behaviour is received, the university contacts the alleged perpetrator, usually via email to ensure a formal record of correspondence and request a meeting.

If the alleged perpetrator is a student, they are also given the opportunity to consult an internal student advocate who may accompany them to the meeting. However, the alleged perpetrator may not respond promptly. The university makes some allowance for this by offering two to three additional meeting opportunities. In some cases, the student may request time to arrange legal representation before attending any formal meetings with the university, may be suffering from ill health, or may be out of the country at the time.

If the allegation is against a staff member, enterprise bargaining agreements and unfair dismissal laws can clash with the requirement to resolve the matter within one month under the National Code. Although this can be time-consuming, it is crucial for universities to follow due process and demonstrate that the alleged perpetrator has had the opportunity to prepare and access support before the formal meeting.

¹ 2023 Sexual Harm Response Guidelines

² See UA's revised 2023 Sexual Harm Response Guidelines

³ UA's 2023 Sexual Harm Response Guidelines also outlines the conditions in this process over which universities have control — and those over which they do not. Many of the latter make it challenging for universities to comply with the specific resolution timeframe proposed in the Code.



Recommendation 4

There is a phased approach to Code implementation. This will allow all universities time to build the necessary capacity, relationships and trust necessary for the Code to be effective.

Addressing gender-based violence is complex. Effective responses are based on strong partnerships and trust between all parties involved. These take time to build. Not all universities are starting from the same baseline with established structures, teams and processes in place. Effective responses also take into account local contexts, including baseline institutional capacity and level of services available in a given area. UA supports the aims and underlying principles of the Code at a national level. However, for effective implementation, universities must be allowed:

- time to build capacity (services, partnerships and reporting) and familiarity with the Code requirements; and
- to customise responses to their local context.

Recommendation 5

Frameworks and guidance are made available to support providers meet the standards in a way that accounts for local and institutional diversity and responsiveness. Flexibility in the Code will also be needed for providers' international campuses to ensure compliance with relevant national laws.

It is critical the Code supports responsiveness to local context. UA supports the Code's national principles and/or standards. However, universities must be allowed — and enabled — to apply these principles locally. This includes adapting examples of good practice to their own unique culture, size, capacity, structure, models of practice and community needs. The importance of understanding the context in which interventions take place is paramount for universities to effectively address these matters. Differences in law enforcement jurisdictions across states and territories should also be considered in the application of the National Code.

Standards of service or policies that apply to domestic campuses do not always translate to the international context where nuances and local laws apply. Universities must comply with these laws and customs. Accordingly, there will be times when applying the National Code will be beyond the providers' authority; thus, compliance must be negotiated by the Minister with their counterpart in the foreign country.

Similarly, the differing level of services and capacity across the sector and society also need to be taken into account. As currently written, the National Code states that: *"all victim/survivors and perpetrators should receive or have access to the same level of expert support when they need it, regardless of the institution at which they study or work."* While such uniformity is commendable, it does not reflect the variable access to social and community services across Australia.⁴ In a Code setting out national standards, it is more appropriate to outline a reasonable minimum provision that is required and that all students and staff should be able to expect. This should be done while understanding that, particularly in regional and remote Australia, access to expert services and professionals is hard in every area and that universities need to balance risks in situations where limited resources may be stretched.

Recommendation 6

There is regular review and update of the Code to ensure processes and best practice evolve to meet changing student and social needs

The Code will need regular review and updating where necessary, as societal norms and legal standards evolve. This includes review to capture new approaches and research as well as updates to terminology to reflect these changes.⁵ UA recommends that: the Standards are written in a way that allows for such changes to occur; and there is regular review of the National Code to capture the natural evolution of approaches and definitions.

Recommendation 7

That where institutional capacity and/or local service resources are limited universities can apply for support to assist capacity building to implement the Code.

The Code presents an opportunity to uplift all Australian universities when tackling gender-based violence. Many of the requirements in the Code are already being delivered but as we have highlighted above institutional differences (size, geography etc.) mean that not all universities are resourced in the same way. UA also notes that the Accord had a strong focus on rigorous governance. UA has previously indicated our support for these recommendations. The Accord also recognised that the sector is facing ongoing funding concerns. We are fully supportive of the intent of the National Code. However, this is a further unfunded requirement being placed on universities that is compounded by increased administration rather than service delivery which will benefit students.

We recommend that where appropriate criteria are met, universities can apply for support to assist in capacity building to implement the Code.

⁴ For instance, smaller/regional towns are generally under-serviced. They do not have the same level of specialist referral services and specialised sexual assault units within police or other community services. This typically reflects the contextual resourcing of certain areas in which providers are embedded (i.e., areas where providers have long service waiting lists usually have similar issues).

⁵ Terminology is important. It can support or inhibit awareness and reporting. For example, the 2023 Sexual Response Guidelines use the term "sexual harm" as it increases awareness of the issue and builds confidence in reporting behaviours which previously may have gone unreported.



Recommendation 8

There is provision in the Code for providers to establish contractual arrangements with third-party accommodation providers.

These arrangements should outline the avenues available for students to raise concerns and detail how reports of sexual harm, gender-based violence, and other problematic behaviours will be managed by these third-party providers. This recommendation aligns with the advice UA provided to members in the **2023 Sexual Harm Response Guidelines**. Standalone accommodation providers should be required to collaborate and share information with universities, while ensuring as much as possible, that a single set of processes will be enacted to manage disciplinary matters.



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