MELBOURNE LEGISLATIVE FRAMEWORK

This legislative framework outlines a basis for deciding when decisions of the University should be reflected in legislation i.e. a University statute or regulation, and when it is more appropriate for those decisions to be expressed as simple resolutions, standing resolutions of Council or Academic Board, or as University rules or policies. It also outlines criteria to enable judgements as to whether a matter to be reflected in legislation should be expressed as a statute or as a regulation, and what form of record is appropriate for decisions not recorded as legislation.

The *University of Melbourne Act 2009* (the Act) establishes the University as “a body politic and corporate”. When the University acts by way of a resolution of its governing body, or by the decision of one of its authorised officers, it acts in a manner typical of a body corporate. However, it also has been empowered to act as a body politic in making legislation, a power not normally possessed by corporations.

Council has recently reduced the number, and simplified the complexity, of University statutes and regulations. Accordingly, this framework is based on the assumption that legislative forms should not routinely be used to express University decisions, rules and policies, but should only be resorted to when non-legislative forms are for some reason inadequate.

1. **When is legislation necessary?**

   (a) **When the Act expressly requires it.** There are some cases where the University only has power to act if it does so by legislation. Council may only revoke a degree, for example, “If the statutes so provide …” (section 10[3]) and must do so “… in the circumstances and manner prescribed in the university statutes” (section 10[4]). And while Council is given power unequivocally to grant degrees or other awards, it appears from section 10 [2] that persons may only be admitted to degrees *honoris causa* or without examination if a statute or regulation has so provided. A majority of members present is sufficient to decide any question before Council, unless Council has provided otherwise by statute (Schedule 1, clause 12): it is thus not possible for Council to impose a higher requirement than the vote of a majority of its members present, unless it does so by a statute.

   (b) **When the University seeks to regulate conduct other than the conduct of an employee, client or other person who has contracted with it.** Legislation is necessary to enable the University to regulate the conduct of members of the public. The Act provides in section 28 that the University may make “… any university statutes and university regulations with respect to … any person entering or on land or other property of the University or using University facilities.” Traffic is the prime example here. Another is use of the University’s library facilities or recreation reserves.

   (c) **When the Act has given a power to act by legislation, and the power is not one generally available to a body corporate.** Most bodies corporate may determine their own internal structures and rules, establish subsidiaries, buy, sell, enter into joint ventures and other commercial contracts, conduct research, and establish policies to guide their dealings with their employees and clients. Companies also have all the capacity and powers of an individual, whereas the powers of the University depend on the terms of the Act. Companies cannot normally grant academic awards or honorary titles, or ‘affiliate’ or ‘recognise’ other entities. They can discipline their employees, but not their clients, yet the University is empowered to discipline its students. In each of these cases, the University has
been granted a power to act as a body politic in areas not necessarily available to it as a body corporate, and so its activities in these areas should be governed by University legislation.

2. **When else might a simple decision or policy be inadequate?**

(a) When balancing the rights of different classes of members of the University. Intellectual property policy is an obvious example. Determining the constituencies for the elected members of Council is a less obvious one.

(b) When preserving a right of University employees or students not normally available to employees and clients of other corporations. Students and staff would feel more secure if the principles of academic freedom traditional to universities were referred to in University legislation, not merely expressed as a policy.

3. **When making internal legislation, how should the University determine what to put into a statute as opposed to a regulation?**

(a) When the Act requires it. Some examples are given in paragraph 1(a) above. In addition, if Council wishes to legislate to affiliate a college or other body, it needs an enabling statute (section 29 [3]). Enabling the Vice-Chancellor or the Academic Board to make university regulations is another example of an action by Council which requires an enabling statute (section 30[1]).

(b) **Utilising the Victorian “Premier’s Guidelines”**. While the Guidelines are intended for public servants seeking to determine when to include material in a draft Act of Parliament as opposed to subordinate legislation, they can provide a useful guide to the University in deciding between different levels of its internal legislation. (All University legislation, whether in the form of statutes or regulations, is ‘subordinate’ in the context of parliamentary legislation.) According to the Guidelines, significant policies setting out new purposes or ideas, and matters with a significant impact on an individual’s rights and freedoms or imposing significant penalties, should be dealt with by primary legislation. Matters of detail subject to frequent change, and matters related to the detailed implementation of policy or its enforcement, or prescribing fees, forms or time limits, should be dealt with at a lower level of legislation.

In particularly sensitive areas, it may be desirable to retain all details within the statute, so that third parties have the security of knowing that the University cannot unilaterally change their rights and obligations, but must obtain Ministerial approval.

(c) **Statutes generic, regulations particular**. Provisions which apply to all affiliates, semi-autonomous bodies or student organizations are set out in the relevant statute. Provisions which apply to an individual affiliate, semi-autonomous body or student organization are set out in its particular regulation.

All legislation, whether in the form of a statute or a regulation, should be accessible to the general public through the University websites.
4. **What are the distinctions between a simple resolution, a standing resolution, and a policy?**

**Background Information**

Any decision of Council in accordance with clauses 12, 13 or 14 of Schedule 1 to the Act is a resolution of Council. Resolutions of the University (or any of its organs) not reflected in legislative form may be enforceable by a person dealing with the University, if those decisions are otherwise part of some recognized framework of legal rights and obligations e.g. under the law of contract. To change such a resolution, the relevant body must make a new decision following its procedural rules.

For at least 70 years, possibly longer, Council has sought to distinguish between its ‘one-off’ decisions and those intended to have continuing force for the long term, referring to the latter group as Standing Resolutions. Standing Orders for Council’s meetings and terms of reference for Council’s committees are ‘long-standing’ Standing Resolutions of Council. For a period in the late 1980’s and early 1990’s, the University dispensed with internal regulations, converting them all into Council standing resolutions (and thus by-passing the need to obtain Governor-in-Council approval of changes). The Victorian Government brought that period to an end with the University Acts (Amendment) Act 1994, which in effect restored the Standing Resolutions of Council as regulations, while removing the requirement for any outside approval of University legislation in that form.

Subsequently, Standing Resolutions have been used to record decisions with on-going application concerning the operations of Council and its committees. Until early 2009, they were also used to record Council approved policies and guidelines which did not take the form of prescriptive directions, and hence did not appear to be suitable to be recorded as regulations. The precise legal status of these Standing Resolutions, and whether they are still legislative instruments, was unclear in the absence of any terms dealing with that matter in the Act or in University legislation.

Most corporations have prescriptive directions or rules governing aspects of their operations, and the University quite properly has many rules besides those it has expressed as statutes, regulations or standing resolutions– the Academic Board’s Principles of Selection for the various courses are one such large body of rules.

University policy instruments will only bind insofar as their observance is required by contract, eg with an enrolling student or a University facility user. However, certain policies, such as the Principles of Selection, could be made binding on the University and its members in the sense of having the force of law if, having been made, they are identified and expressed to be so binding by University statute or regulation. This option can be pursued in specific cases if needed.

**Proposed Distinction**

Council has recently determined that its Standing Resolutions are limited to defining the manner in which Council and its committees conduct business. The only other formal instruments outside legislation will be the University trust instruments, created under the Trust Governance Statute 10.3.

All Standing Resolutions of Council and Trust Instruments are accessible to the general public through University websites.
All other University decisions with ongoing application, whether emanating from Council, Academic Board, or senior management, and whether in the form of prescriptive directions or of guidelines, are being gathered into an on-line policy library. The eventual boundaries between regulations and policies are influenced by any Council decision as to the extent to which the Academic Board should be empowered to make University regulations. The requirements for degrees and diplomas previously grouped as R3 regulations for example, have been transferred to become regulations of the Board (Regulation 11.1.A1), thus remaining as part of University legislation. Other Board decisions or resolutions may more appropriately be reflected in the policy library, rather than in a legislative format.

Parts of the policy library may also be restricted for internal University access only, at the discretion of the policy maker.

5. Some draft definitions of University of Melbourne instruments

**Statute**

A University of Melbourne Statute is typically of a permanent or long lasting nature, and governs the internal affairs of the University at the highest level, consistent with the University of Melbourne Act 2009. It may prescribe or enshrine certain powers, responsibilities and actions that are expressly required under that Act, and which may require enforcement, or a Statute may describe organisational values that are considered to be of central importance. Statutes typically only contain overarching policies concerning matters which have significant impact on University-wide operations, or on an individual's rights and freedoms or impose significant penalties for non-conformance. They do not contain procedural guidelines or detailed statements of policy. They can only be amended with the approval of the relevant Minister in the Government of Victoria. If regulation making power under a particular statute is to be extended beyond Council, e.g. to the Vice-Chancellor or Academic Board, the relevant parent statute will so provide.

**Regulation**

A University of Melbourne Regulation is a subordinate instrument usually made pursuant to a parent Statute, to which it can give effect by containing a policy framework and, if at a high level of importance, limited procedural guidelines that enable the intent of the Statute to be carried out. Regulations may be amended more frequently than a Statute in order to reflect organisational change and can only be made, amended or rescinded by Council (or other body or person authorised by the Act). Regulations may be generic and provide parameters within which policy is developed or may enable non-legislative rules to be made by an authorised body, such as the Academic Board, or a senior officer.

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