March 7, 2016

Leo Estrada
Chair, UCLA Academic Senate

Re: Report of the Joint Committee of the Administration and Academic Senate dated February 17, 2016 (“Report”)

Dear Chair Estrada,

You have requested that the Charges Committee review and comment on the Report given its role in resolving disciplinary cases arising out of charges of violations of the Faculty Code of Conduct (“FCC”).

The Charges Committee is very supportive of most of the Report’s administrative, training and data collection recommendations, and the basic thrust of much of the Report, which is to emphasize that Academic Senate involvement, peer review, and due process protections for respondents remain the hallmark of the disciplinary processes for Senate members.

We do have four sets of concerns with the Report’s recommendations:

1. Recommendation I.A.1 (amending the FCC to expressly prohibit “sexual violence and sexual harassment, as defined by University policy”): Sexual violence and sexual harassment, of course, are already violations of the FCC. Charges based on allegations of this kind of misconduct involving students, colleagues and University staff, have come before the Charges Committee regularly for many years. The introduction of the seemingly innocuous clause “as defined by University policy,” however, is new. Members of the Charges Committee, like many members of the UCLA community and the larger society, share the concern that the breadth of the language in the University’s new sexual violence and sexual harassment policy (“SVSH policy”) could potentially threaten longstanding and fundamental values of free expression and academic freedom. The SVSH policy now addresses these concerns by expressly making itself, including its expansive definition of sexual violence and sexual harassment, subject to existing policies protecting free expression and academic freedom. In our view, the FCC need not be amended to expressly reference the definitions in the SVSH policy as proposed, but if it is, that amendment should also contain an express savings clause making the definition of sexual violence and sexual harassment subject to existing free expression and academic freedom protections. The FCC, which remains under the control of the Academic Senate, should not blindly defer to other (changeable) University policies under the control of the Administration for the protection of these central values.

2. Recommendation I.D.1 (disclosure of confidential settlement outcomes to title IX complainants). As the Report recognizes, the great majority of sexual violence and sexual
harassment complaints against Senate faculty have historically proven to be unsubstantiated. Report at 27 (noting 141 sexual misconduct charges systemwide in 2012-15 against Senate members, but only 11 of which were eventually substantiated). Public dissemination of the settlement terms of unsubstantiated allegations of sexual misconduct could have devastating consequences to an individual faculty member’s reputation both professionally and personally. Moreover, the system properly relies heavily on settlement in the disposition of these charges. Ibid. (noting that only one of the 141 systemwide sexual misconduct cases in 2012-15 against Senate members went to hearing and resulted in a finding that discipline was warranted). Releasing the terms of settlement of these cases may make it substantially more difficult to efficiently resolve both substantiated and unsubstantiated claims, and, particularly in the case of the large number of unsubstantiated claims, may be grossly unfair to the respondent Senate member. The Charges Committee believes this recommendation should be rejected outright, or if not rejected outright, then subject to enforceable strict contractual confidentiality limitations that preclude any further dissemination by the complainant.

3. Recommendation I.D.2 (three-year rule). The Charges Committee disagrees with the Report’s characterization of the scope and purposes of the three-year rule. The legislative history of the three-year rule and its amendments makes clear that the rule was intended to be, and should operate as, a kind of statute of limitations, albeit a “soft” one subject to equitable exceptions and tolling in appropriate circumstances. See Ltr. Dtd Mar. 15, 2005 from George Blumenthal to UC President Robert C. Dynes (“The intent of the statute of limitations in SBL 336.B.4 is to protect faculty from having to defend themselves against charges for events taking place in the distant past. Modeled on statutes of limitations in criminal and civil law, the provision avoids a situation where a faculty member is precluded from an adequate defense against charges because evidence has been lost, memories have faded, or key witnesses are no longer available. The full justification of the amendment can be found on pages 28-30 of the March 9, 2005 Assembly Agenda.”); see also Ltr dtd Aug. 6, 2004 from Carolyn Martin Shaw, Chair Committee on Privilege & Tenure, to Lawrence Pitts (“Senate Bylaw 336 governs the standards and procedures employed by divisional Privilege and Tenure committees for disciplinary cases. One important aspect of these standards and procedures is the statute of limitations for disciplinary cases, which protects faculty from having to defend themselves against charges for events taking place in the distant past when evidence, memories and witnesses may have long disappeared.”). The three-year rule has been properly applied in the past to require putative complainants (including the Administration) to bring their complaints to the attention of the Senate within three years of discovery of the factual basis of a claim absent some equitable basis for delay. It should continue to serve this salutary role in avoiding litigation over stale claims and the resulting unfairness to the respondent. Given the context of the Report (especially a relatively recent controversy resulting in the public dismissal of a UC Berkeley faculty member following allegations of a pattern of sexual misconduct), the Charges Committee suspects that the
Report’s proposed recharacterization of the three-year rule is driven by concerns that a three year limitations period may not be appropriate in cases of sexual misconduct. Although we recognize that in the larger society there has been debate and concern over time-barred sexual misconduct claims, we do not believe that the existing “soft” three-year rule has operated unfairly even in the context of sexual misconduct claims. Nevertheless, if there is a consensus that the special exigencies of sexual misconduct claims require a different balance than the three-year rule, a special limitations rule for sexual misconduct claims should be fashioned (a four-year or five-year rule perhaps, or express equitable exceptions for delays tailored to these particular kinds of claims). It would be wrong to effectively gut all limitations periods for all claims because of special concerns about time-barring sexual misconduct claims. Only a small (albeit very important) share of the charges brought to our attention allege sexual misconduct, and in the great run of cases some limitations period is clearly necessary. The “soft” three-year rule has proved a workable balance providing fair access to the charges process for complainants while protecting both the system and respondents against stale claims for the wide range of matters that may result in charges.

4. The Charges Committee noted that the Report failed to address consequences for filing malicious, frivolous or bad faith charges in the disciplinary process. The enhanced systemwide training recommended by the Report should be expanded to include an appropriate module on the consequences of such misconduct, as well as training modules addressing the problems identified by the Report with respect to confusion over the time frames and processes for the disciplinary process and reporting procedures. This could be readily incorporated into the sexual harassment training already required of all faculty and staff.

Very truly yours,

Daniel J. Bussel, Chair, Charges Committee

On behalf of the members of the Charges Committee:
Roshan Bastani
Cameron Gundersen
Helen Lavretsky
Diana Messadi
Clyde Spillenger
Christopher Anderson
David Blank

cc: Academic Senate Executive Board
Linda Mohr, Academic Senate CAO
Chris Jados, Executive Assistant