

Report of the Independent Review of
**Freedom of Speech in Australian
Higher Education Providers**

March 2019



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The Hon Robert S French AC

19 March 2019

The Hon. Dan Tehan, MP
Minister for Education
House of Representatives
Parliament House
Canberra ACT 2600

Dear Minister

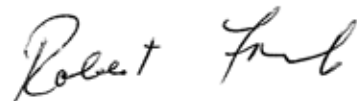
Please find enclosed for your consideration the Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers. Thank you for inviting me to conduct the Review.

The Review involved a two-stage consultation process with universities and other stakeholders between November 2018 and March 2019. I have appreciated their cooperation in that process.

I would also like to express my appreciation for the support provided by the secretariat team in your department.

It is my hope that the Report will be of assistance to higher education providers in dealing with the important issues of freedom of speech and academic freedom.

Yours sincerely

A handwritten signature in black ink that reads "Robert French". The signature is written in a cursive, flowing style.

Robert S French AC

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INDEPENDENT REVIEW

OF

FREEDOM OF SPEECH IN AUSTRALIAN HIGHER EDUCATION PROVIDERS

1 Introduction

Universities have recently been described as a contemporary battleground over the boundaries of the debates, discussions and collaboration that are essential to the idea of a university.¹ The description has been true for a long time in a number of places. There was no golden age when the scope of freedom of speech and academic freedom in the higher education sector was settled under a common consensus. However, public airing of concerns about both in Australian universities has led to this Review. The Review covers higher education providers generally, but the focus is on universities where the debate seems to have been most acute.

Contention about freedom of speech and academic freedom — what they mean and what are their limits — has varied in content and intensity from time to time depending upon political and social issues of the day. The protagonists are often motivated by differing ideological or political world views.

Recent events in the United States involving protests against and cancellation of visits by speakers to campus were described by one writer as ‘part of the latest front in the culture wars’.² An administrator at the University of California at Berkeley, speaking after the cancellation on safety grounds of a visit by Milo Yiannopoulos, associated with the right-wing ‘Breitbart News’, said ‘[i]t feels like we’ve become the O K Corral for the Hatfields and McCoys of the right and left.’³ So called ‘right’ and ‘left’ perspectives have informed debate in Australia. From the available evidence however, claims of a freedom of speech crisis on Australian campuses are not substantiated.

¹ Peter MacKinnon, *University Commons Divided: Exploring Debate & Dissent on Campus* (University of Toronto Press, 2018) ix.

² Sigal R Ben-Porath, *Free Speech on Campus* (University of Pennsylvania Press, 2017) 14.

³ Ibid 15.

That said, there is a range of diverse and broadly framed institutional rules, codes and policies covering a variety of topics which leave room for the variable exercise of administrative discretions and evaluative judgments. These are capable of eroding the fundamental freedom of speech and that freedom of speech which is an essential element of academic freedom. That fact constitutes a risk to those freedoms and makes the sector an easy target for criticism.

The answer to those concerns is not increased government regulation. Existing legislative and statutory standards are pitched at a level of generality which allows for choice in how their requirements are met. They respect institutional autonomy which is a dimension of academic freedom. However, the relevant Higher Education Framework (Threshold Standards) 2015 (HE Standards) could be clarified by changing their subject matter from ‘free intellectual inquiry’ to ‘freedom of speech’ and ‘academic freedom’ and inserting a workable definition of the essential elements of academic freedom.

The principal recommendation emerging from this Report is that protection for the freedoms be strengthened, within the sector, on a voluntary basis by the adoption of umbrella principles embedded in a Code of practice for each institution. Such a Code could be adopted across the sector collectively or by individual institutions with or without modification. It is not proposed that it be imposed by statute on universities or higher education providers generally. The Model Code has been drafted so that its adoption by any higher education provider should comply with the relevant statutory standards, as presently existing, or if amended as proposed.

It is important that the institutional autonomy of universities in particular and higher education providers generally be retained. They should, so far as possible, keep control of their own affairs. Their controllers include the governing bodies, executive managers, academic boards and student representative bodies, along with the body of staff and students as participatory members. The Model Code proposal, together with cognate amendments to the *Higher Education Support Act 2003* (Cth) (HES Act) and the HE Standards are offered as a means of protecting and enhancing participatory institutional autonomy and the freedoms it should serve.

2 Terms of Reference

The Terms of Reference of the Review required it to:

- Assess the effectiveness of the Higher Education Standards Framework (the Standards) to promote and protect freedom of expression and freedom of intellectual inquiry in higher education.
- Assess the effectiveness of the policies and practices to address the requirements of the Standards, to promote and protect freedom of expression and intellectual inquiry.
- Assess international approaches to the promotion and protection of free expression and free intellectual inquiry in higher education settings and consider whether any of these approaches would add to protections already in place in the Australian context.
- Outline realistic and practical options that could be considered to better promote and protect freedom of expression and freedom of intellectual inquiry, including:
 - revision/clarification of the Standards
 - development of a sector-led code of conduct.⁴

⁴ The responses to the Terms of Reference are set out in s 28 of this Report.

3 The Conduct of the Review

The Review process involved the gathering of information relevant to the Terms of Reference, including:

- Commonwealth statutory standards and criteria applicable to higher education providers in the context of Commonwealth funding-related regulation of the higher education sector.
- State and Territory statutes and standards applicable to the sector, and to freedom of expression more broadly.
- International statutory standards applicable to the higher education sector.
- Rules, codes, principles, policies and practices of higher education providers in Australia relevant to the regulation of speech and expressive conduct on higher education premises by staff, students, invited visitors, and visitors seeking to use institutional facilities.
- Comparative international examples of the above.
- Observations of key stakeholders.

At the commencement of the Review, letters were sent to individual universities and their representative organisations including the Chancellors and Vice-Chancellors of all Australian universities, the Chairpersons of Universities Australia and the Group of Eight (Go8), the Chairman of the Universities Chancellors' Council and the Tertiary Education Quality and Standards Agency (TEQSA). Letters were also written to the National Tertiary Education Union (NTEU), to student associations and the National Union of Students (NUS). Non-university higher education providers which are far more numerous were consulted directly on the draft Model Code. All 42 universities and other relevant stakeholders were invited to provide information not on the public record or easily accessible on the university website which might be of assistance in the Review. The Review received 59 responses to the initial request for comment and 39 responses to a subsequent specific request for comment on the Draft Model Code.

Departmental officers undertook qualitative desk-top analysis of publicly accessible University Acts, statutes, regulations, rules, policies, guidelines and procedures primarily through a search of provider websites. Where possible the policy sections of the websites were used to identify relevant documents with the main search functions of the website acting as a supporting search tool. A check-list covering the main areas of concern to the Review was used to facilitate the research process, including but not limited to: freedom of speech, freedom of expression, intellectual inquiry, academic and intellectual freedom, student misconduct, codes of conduct, university land use, access to facilities and inclusiveness.

It is possible that some additional relevant policies or clauses within policies exist that were overlooked during the data collection process. The searches and material supplied by a number of universities provided a substantial indication of the breadth and diversity of policies and procedures which may have effects upon freedom of speech and academic freedom. The Review did not undertake an audit of each policy and statement of practice.

The extent and limits of freedom of speech under statute law and the common law and the implied constitutional freedom of political communication form part of the general law background to this Review. The Review also takes place against a history of Commonwealth regulation of the higher education sector leading up to the enactment of the HES Act and the HE Standards with their references to freedom of intellectual inquiry in teaching and learning. There is an array of State and Territory regulatory statutes which are part of the general regulatory framework. The powers of higher education providers to restrict expressive conduct by regulating access to and use of their lands and buildings form part of the context. So too do contracts of employment of academic staff, statutorily supported enterprise bargaining agreements, and the associated managerial powers of university executives. In addition, collaborative arrangements between institutions and third parties may lead to the imposition on, or voluntary assumption by, academic staff and post-graduate or post-doctoral researchers, of confidentiality constraints designed to protect commercial interests and intellectual property rights generated by the collaboration.⁵ There is also a perceived tension between freedom of speech and the diversity and inclusion policies adopted

⁵ The caution required in this respect in entering into arrangements with institutions subject to authoritarian national governments is discussed in John Fitzgerald, 'Academic freedom and the contemporary university – lessons from China' (Annual Academy of Humanities Lecture, 47th Annual Symposium of the Australian Academy of the Humanities, 'Asia, Australia: Transnational Connections', Melbourne, 15 November 2016).

by many universities. Such policies can be linked to the duties under the HE Standards, including the duties to treat students and staff equitably and to foster their wellbeing.⁶

‘Academic freedom’ does not appear in the Terms of Reference. They mention ‘free intellectual inquiry’ because that term appears in the HE Standards. It is a term of uncertain meaning but seems to cover some elements of academic freedom. Freedom of speech is an aspect of academic freedom although used in a sense which is not congruent with the general freedom of expression applicable on and off campus. It is a freedom which, in this context, reflects the distinctive relationship of academic staff and universities, a relationship not able to be defined by reference to the ordinary law of employer and employee relationships. Academic freedom has a complex history and apparently no settled definition. It is nevertheless seen as a defining characteristic of universities and similar institutions. Any principle or code relating to academic freedom should incorporate a definition which embodies its essential elements for Australian purposes, including relevant aspects of freedom of speech, freedom of intellectual inquiry and institutional autonomy.

Institutional autonomy is a further dimension of academic freedom. It is the capacity of the institution to discharge, in the way it thinks fit, its mission of transmitting and generating human knowledge and conferring on students the skills and abilities which the community is entitled to expect. It covers autonomy in the formulation and application of domestic rules and policies relating to the conduct of students and staff and visitors to the institutions. The extent and limits of such autonomy is ultimately a matter of public policy informed by the history, tradition and purposes of higher education as well as by contemporary needs. It is a value which is given weight in this Review. It must necessarily be consistent with accountability for the discharge of higher education providers’ statutory functions and their efficient use of public resources. It includes accountability through regulatory and audit review and parliamentary scrutiny. There is nothing incongruous about that.

This Review has been instigated in part because of a perception by some in government, and by elements of the community, of a restrictive approach to freedom of speech at Australian universities in its free-standing sense and as an aspect of academic freedom. That perception has developed as a response to a relatively small number of high profile cases which have attracted publicity. They have included protests against invitations

⁶ HE Standards [6.1.4].

to visiting speakers and attempts to disrupt their presentations. Discussion within Australia has also been influenced by concerns about trends in other countries and by governmental and institutional responses to them particularly in the United States. It is appropriate to begin by referring to the Australian debate.

4 The Australian debate

Debate about alleged restrictions on freedom of speech in Australian universities are partly informed by differing perspectives on appropriate institutional responses to speech, which impacts on social, cultural, ethnic and religious sensitivities and on vulnerable members of the staff and student communities. Sometimes it reflects conflicting views about the place of scholarly standards in determining who should or should not be heard on campus. Sometimes it reflects a difference of view between the managers of an institution on the one hand and academic staff or students on the other in relation to speech which is seen to affect the ‘reputation’ of the institution or its relationship with important third parties.

4.1 *The old is new again*

Academic freedom and freedom of speech issues have arisen from time to time in the long history of higher education in Australia. In the 1960s there was a strong governmental philosophy in favour of institutional autonomy as an aspect of academic freedom. It was expressed in a speech given by Prime Minister Robert Menzies at the University of New South Wales (UNSW) in 1964 in which he said:

The integrity of the scholar would be under attack if he were told what he was to think about and how he was to think about it. It is of the most vital importance for human progress in all fields of knowledge that the highest encouragement should be given to untrammelled research, to the vigorous pursuit of truth, however unorthodox it may seem. It is for this reason that in Australia we have established the autonomy of universities, and have, so far as I know, and I hope I am right, consistently refrained from interfering in their work with what I call political executive directions.⁷

At a less lofty level, freedom of expression debates on Australian campuses in the early 1960s and 1970s tended to focus on censorship and obscenity laws. Challenges to censorship practices were made through student newspapers of the time. One high profile example occurred in 1969 when the editor of *Pelican*, the student newspaper at the University of Western Australia (UWA), published an issue on the theme of censorship and particularly film censorship. The editor was convicted by the Court of Petty Sessions of the offence of

⁷ Robert Menzies, ‘The Universities — Some Queries’ (Inaugural Wallace Wurth Memorial Lecture, University of New South Wales, 28 August 1964) 13.

having published an obscene paper contrary to s 2(1) of the *Indecent Publications Amendment Act 1967* (WA). The publication included quotations from a number of passages in Philip Roth's novel *Portnoy's Complaint*. It also contained reproductions of a Beardsley print of *Lysistrata and the Three Ladies* and the reproduction of a banned poster for the Patch Theatre's production of *Othello*. The Full Court of the Supreme Court of Western Australia dismissed the appeal against conviction by a majority.⁸

A recent history of the student press of the period makes the point that censorship debates were not confined to questions of pornography or obscenity, '[i]t was also about freedom of speech in the context of political and religious ideas.'⁹ In 1964, foreshadowing current debate, the University of Sydney Student Representative Council suspended the editor of the student newspaper *Honi Soit* for articles bearing allegedly anti-Semitic headlines. The Student Representative Council agreed that:

The use of issues concerning race, colour or creed in the student newspaper that threatened to incite hatred, ridicule or contempt is inconsistent with the principles of *Honi Soit*.¹⁰

The President of the Student Representative Council at the time was Michael Kirby, who was later to become a leading Australian jurist and law reformer.

In the second half of the 1960s and early 1970s student political action on campus was enlivened by Australia's involvement in the Vietnam War and the introduction of military conscription which had a direct impact on the lives of students who were, for the most part, in the age range subject to the call-up. That activism had a global dimension. The Free Speech Movement in Berkeley in the 1960s found its reflection in student activism on Australian campuses and particularly in the context of protests against Australia's involvement in the Vietnam War and conscription. Freedom of speech, however, was not central to that aspect of political activism by students. They had a lot to say on a variety of

⁸ *MacKinlay v Wiley* [1971] WAR 3 and see A Dickey, 'The Legal Concept of Obscenity in Western Australia' (1972) 10 *University of Western Australia Law Review* 223. See also *Brown v Members of the Classification Board of Review* (1998) 154 ALR 67.

⁹ Sally Percival Wood, *Dissent: The Student Press in 1960s Australia* (Scribe, 2017).

¹⁰ *Ibid.*

topics and for the most part were not prevented from doing so by university administrations or student organisations.

Moving forward to the beginning of this century, a parliamentary inquiry explored the relationship between the commercial imperatives now facing universities and associated managerialism, on freedom of expression and academic freedom.

4.2 2001 — *Parliamentary Inquiry — Universities in Crisis*

In 2001, a report entitled ‘Universities in Crisis’ was published by the Employment, Workplace Relations, Small Business and Education References Committee of the Australian Parliament and led to the enactment of the HES Act. The Report was focussed largely on the adequacy of university funding arrangements at that time. It pointed to a link between academic freedom and funding:

The overwhelming commercial imperative for universities to protect their reputation and capacity to earn income was said to have led to a deterioration in the intellectual climate, academic freedom and morale and the increased victimisation of dissenters.¹¹

The Committee concluded that academic freedom was under threat from within and that an independent ombudsman position should be created. It said in its Report:

The Committee takes the view that universities cannot be relied on to maintain their own internal inquiries when serious issues arise which go to the core of academic freedom. As the Committee has noted elsewhere, the new managerial culture is now so entrenched that universities have an instinct to stifle uncomfortable opinions of a kind usually associated with academic institutions. They have an understandable tendency to place the value of the university’s reputation before their obligation to protect the rights of its faculty members to free expression. This tendency arises from a disregard for what universities should stand for. Some university administrators may have never understood this. Others may have forgotten. Recent cases have shown that there are bound to be challenges to the integrity of any inquiry process. It is for this reason that the Committee has

¹¹ Employment, Workplace Relations, Small Business and Education References Committee, Parliament of Australia, *Universities in Crisis* (2001) 6–7 [1.22].

recommended in Chapter 4 the establishment of an office for a universities ombudsman.¹²

State, Territory and Commonwealth Ombudsman offices now deal with complaints by students at universities or other higher education providers where the complainant has had both an internal and an external review.¹³ The Commonwealth Ombudsman, in 2016, published Australasian Best Practice Guidelines for complaint handling at universities. The Guidelines were developed as a joint project of Australasian Ombudsmen. They are described as tailored specifically for universities and are intended to assist them to make their complaint-handling systems more robust and effective.

There has been, since 2001, a good deal of writing and discussion about the rise of managerialism in universities in Australia and consequential effects upon collegiality, freedom of expression and academic freedom. One aspect of those effects might be seen in policies and practices referring to the consequences of expressive conduct for the ‘reputation’ of the institution.

4.3 *Ministerial refusal to approve research grants*

There have from time to time been controversies concerning ministerial refusals to approve publicly funded research grants to university researchers on the basis of the topics of the proposed research. The ministerial power to refuse approval to particular grants was exercised by the Federal Minister for Education, Brendan Nelson, in the early 2000s¹⁴ and more recently in 2018 by the Federal Minister for Education and Training, Simon Birmingham.¹⁵ Those exercises of ministerial power were met with the criticism that they impinged on academic freedom. Presumably the link to academic freedom in that argument rests on the basis that the recommending body for the grants enjoys an extension of the institutional autonomy associated with the academic governance of institutions in relation to

¹² Ibid 305 [9.40]. For an extended discussion of this topic in the context of public university employment see James G Jackson, ‘Express Rights to Academic Freedom in Australian Public University Employment’ (2005) 9 *Southern Cross University Law Review* 107.

¹³ Australian Government Study Assist, Information for Students About Government Assistance for Financing Tertiary Study, (online) <<https://www.studyassist.gov.au/>>.

¹⁴ Gideon Haigh, ‘Research Funding: The New Censorship’, *The Monthly* (May 2006) 20–29.

¹⁵ Jon Piccini and Dirk Moses, Simon Birmingham’s intervention in research funding is not unprecedented, but dangerous’, *The Conversation* (Web Article, 26 October 2018) <<http://theconversation.com/simon-birminghams-intervention-in-research-funding-is-not-precedented-but-dangerous-105737>>.

academically-determined processes of application, review and recommendation.¹⁶ That aspect of recent debate about academic freedom does not fall within the terms of reference of this Review.

4.4 *2008 Senate Inquiry and Report*

There was a limited public airing of the issue of academic freedom in Australian universities in 2008. The Senate Education, Employment and Workplace Relations Committee (SEEWRC Committee) reported in December of that year on academic freedom in schools and in higher education. The thrust of the report concerned allegations of academic bias made by certain student groups. One of the terms of reference concerned:

ways in which intellectual diversity and contestability of ideas may be promoted and protected, including the concept of a charter of academic freedoms.¹⁷

The SEEWRC Committee ultimately declined to make any recommendation with regard to any of its terms of reference.¹⁸ It was not satisfied that the complaints before it about academic bias were particularly significant. They appeared to concern ‘only a very small proportion of the student population’.¹⁹ Many of the submissions it received reflected individual discomfort at specific occurrences that had occurred on university campuses which was the very discomfort that students and academics should, in the SEEWRC Committee’s view, become comfortable tolerating. The SEEWRC Committee also observed that universities as ‘autonomous institutions’ have ‘soundly working grievance mechanisms established to deal with complaints from students’, which students are not reluctant to use.²⁰ Further, nothing emerged from the inquiry which warranted the reconsideration of current policy, apart from issues to do with effective monitoring of teaching quality.²¹

¹⁶ On that question see Edwina McDonald and George Williams, ‘Banned Books and Seditious Speech: Anti-Terrorism Laws and Other Threats to Academic Freedom’ (2007) 12 *Australian and New Zealand Journal of Law and Education* 29, 35–37.

¹⁷ Senate Standing Committee on Education, Employment and Workplace Relations, Parliament of Australia, *Allegations of Academic Bias in Universities and Schools*, December 2018, vii.

¹⁸ Ibid [1.32].

¹⁹ Ibid [1.33].

²⁰ Ibid [1.35].

²¹ Ibid [1.36].

The SEEWR Committee essayed a brief discussion of academic freedom. It quoted from a report of a survey of social scientists conducted by the Australia Institute in 2001. Academic freedom was described as the rights of academics to:

- teach, research and publish contentious issues;
 - choose their own research colleagues; and
 - speak on social issues without fear or favour in areas of their expertise.
- ... balanced by the responsible and disciplined exercise of scholarly expertise.²²

As appears, that definition incorporated an aspect of freedom of expression and intellectual inquiry as elements.

The SEEWR Committee was asked to report on the idea of a legislated charter of academic freedom, an idea which had originated in the United States.²³ The Committee referred to a paper by Professor George Williams and Edwina MacDonald which had been provided to it by way of submission.²⁴ They contended that academic freedom was under threat from the commercialisation of universities, from changes which diminished the transparency of the Australian Research Council (ARC) process and from anti-terrorism laws. Those factors were said to be having a major impact on the ability of Australian academics to research and teach with the same freedom that they had had in the past. The paper linked those concerns to a wider proposal for the better protection of democratic freedoms through a national Charter of Human Rights, along the lines of laws enacted in the Australian Capital Territory (ACT), Queensland and Victoria. A Charter, it was said, could give real protection in relation to freedom of speech and could have a powerful impact in shaping public debate. That of course was part of a larger debate about the absence of comprehensive justiciable protection for human rights and freedoms generally in Australia.

²² Ibid [1.17] citing Carol Kayrooz, Pamela Kinnear and Paul Preston, *Academic Freedom and Commercialisation of Australian Universities: Perceptions and experiences of social scientists*, Australia Institute Discussion Paper No 37 (March 2001) 44.

²³ Emanating from an academic David Horowitz who founded Students for Academic Freedom and proposed an Academic Bill of Rights in 2001.

²⁴ Edwina MacDonald and George Williams, 'Banned Books and Seditious Speech: Anti-Terrorism Laws and Other Threats to Academic Freedom' (2007) 12 *Australia and New Zealand Journal of Law and Education* 29, attachment 2 to letter of 21 July 2008 submitted to Senate Committee.

The NTEU argued before the SEEWR Committee in favour of statutory protection referring to threats to academic freedom arising from new anti-terrorism and sedition laws which might restrict the rights of researchers and lay them open to criminal charges. The focus of this part of the debate before the SEEWR Committee in relation to the protection of academic freedom was a concern about commercialisation and external and governmental threats to the freedom.

In another submission Dr Ben Saul, now Challis Professor of International Law at Sydney University, then Director of the Sydney Centre for International Law, proposed:

1. Parliament should legislatively protect academic freedom in universities, for example based on the protection in s 161 of the *Education Act 1989* (NZ).²⁵
2. Workplace agreements in all Australian universities should include a minimum standard clause on the protection of academic freedom.
3. Individual academic employment contracts should expressly provide for the protection of academic freedom in employment.²⁶

In the course of his submission he also contended that students cannot expect not to be confronted or challenged by views put to them by their lecturers, including by political, ideological or cultural viewpoints with which students disagree. He quoted an observation of Edward Said ‘[l]east of all should an intellectual be there to make his/her audiences feel good: the whole point is to be embarrassing, contrary, even unpleasant.’²⁷

Universities Australia, the national body of the Australian Universities Vice-Chancellors, in its submission to the Senate Committee in 2008 said:

Universities have a special role as institutions dedicated to free open and critical expression across the full scope of human knowledge and endeavour. Central to this

²⁵ Referred to later in this Report.

²⁶ Dr Ben Saul, Submission No 1 to Senate Standing Committee on Education, Employment and Workplace Relations Committee, Parliament of Australia, *Allegations of Academic Bias in Universities and Schools* (15 July 2008).

²⁷ E Said, *Representations of the Intellectual: 1993 Reith Lecture* (Vintage Books, 1996) 12 quoted in Dr Ben Saul, Submission No 1 to Senate Standing Committee on Education, Employment and Workplace Relations Committee, Parliament of Australia, *Allegations of Academic Bias in Universities and Schools* (15 July 2008) 3.

role is the freedom of staff and students to teach, research, debate and learn independent of external political circumstance and pressure.²⁸

The context of the 2008 Senate Committee reference differed from that of this Review. The Senate Committee was concerned with academic bias and, in relation to academic freedom, attracted submissions concerned with external constraints, particularly derived from government and the pressure of commercialisation. It reached no considered view on whether statutory protection of academic freedom was necessary. That question, it concluded, would have ‘to be looked at as part of the governance framework for universities and would require the full attention of university councils and vice-chancellors, as well as academic specialists.’²⁹

4.5 *Australian Law Reform Commission Report 2015*

Reference should also be made to the Report of the Australian Law Reform Commission (ALRC) entitled ‘Traditional Rights and Freedoms—Encroachments by Commonwealth Laws’ which was delivered in 2015.³⁰ The Report reviewed laws that prohibit, or render unlawful, speech or expression in different contexts. They include the criminal law and laws dealing with unlawful discrimination, imposing secrecy obligations, laws relating to privilege and contempt, media broadcasting and telecommunication laws, information laws and intellectual property laws.³¹

The ALRC undertook a comprehensive examination of the provenance, history and basis for freedom of expression. It acknowledged the widespread recognition of its fundamental importance in common law jurisdictions. It declined to make any specific findings in relation to the encroachment of particular laws on its exercise. It did recommend however, that some laws should be the subject of further review ‘to determine whether they unjustifiably limit freedom of speech’.³² Those included certain anti-discrimination and criminal laws. The ALRC Report relates to freedom of expression in connection with the

²⁸ Universities Australia, Submission No 15 to Senate Standing Committee on Education, Employment and Workplace Relations Committee, Parliament of Australia, *Allegations of Academic Bias in Universities and Schools* (7 August 2008).

²⁹ Senate Standing Committee on Education, Employment and Workplace Relations Committee, Parliament of Australia, *Allegations of Academic Bias in Universities and Schools* (December 2008) 41.

³⁰ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Final Report No 129, 2015).

³¹ Ibid 90–91 [4.67].

³² Ibid 126 [4.251].

impact of laws of general application and not specifically in relation to its exercise in the higher education sector.

4.6 *Institute of Public Affairs and Centre for Independent Studies papers*

The emphasis of recent commentary critical of universities, and leading to the Review, seems to have shifted to internal constraints on freedom of speech for staff, students and visitors to the university. That extends to freedom of speech as an aspect of academic freedom. Commentary on that topic has come from the Institute of Public Affairs (IPA) and the Centre for Independent Studies (CIS). The published works of those bodies are referred to to indicate the nature of the criticisms advanced by leading protagonists in Australia.

The IPA is described on its website as ‘an independent, non-profit public policy think tank, dedicated to preserving and strengthening the foundations of economic and political freedom’.³³ It published, in December 2018, a document entitled ‘Free Speech on Campus Audit 2018’ (2018 IPA Audit).³⁴ It was the third of such ‘audits’, the first having been published early in 2016 and the second in December 2017 (2017 IPA Audit). The 2018 IPA Audit included an appendix setting out a list of relevant ‘university policies and actions’.

The claim was advanced in the 2018 IPA Audit that the majority of Australian universities limit the diversity of ideas on campus. Only nine were said to have a ‘stand-alone policy’ that protects intellectual freedom as required by the HES Act.³⁵ There was said to be evidence of increasing censorship at Australian universities reflected in the growing number and scope of speech codes. They were said to prohibit a wide variety of speech including ‘insulting’ and ‘unwelcome’ comments, ‘offensive language’ and, in some cases, ‘sarcasm’.³⁶ It was also claimed in the 2018 IPA Audit that there has been a growing number of censorious actions at Australian universities, including violent protests against the presence of speakers, venue cancellations for controversial speakers, students required to pay security fees to cover speaker events, activist students demanding course content censorship, universities censoring academics for their speech, and students instructed to not express their viewpoints.³⁷ The 2018 IPA Audit rated universities according to a colour-coded ‘hostility

³³ ‘About’, *Institute of Public Affairs* (Web Page) <<https://ipa.org.au/about-us>>.

³⁴ Matthew Lesh, *Free Speech on Campus Audit 2018* (Institute of Public Affairs, December 2018).

³⁵ HES Act s 19-115.

³⁶ Lesh (n 34) 2.

³⁷ Lesh (n34) 2. A list of university actions adverse to freedom of speech, set out in the 2018 IPA Audit is summarised in Appendix 14.

score'.³⁸ This polemical device, as appears later in this Report, has been used in the United States, Canada and the United Kingdom.

Mr Matthew Lesh, the author of the 2018 IPA Audit, made a submission to this Review by letter attaching a number of documents including the 2018 IPA Audit. He drew attention to a recommendation in the Audit that:

universities abolish problematic policies, introduce policies that safeguard free intellectual inquiry and sign on to the University of Chicago's sector-leading statement on free expression.³⁹

This was a reference to a Statement of Principles of Free Expression adopted by the University of Chicago (the Chicago Principles), which is discussed later in this Report. Mr Lesh argued that if universities were unwilling to take steps to safeguard free expression the Australian Government should introduce United States-style free speech on campus legislation.⁴⁰ One of the attachments to his submission was an opinion piece in *The Australian* newspaper critical of TEQSA which he claimed had failed to protect free speech on campus and should develop an explicit guidance note on free intellectual inquiry. He evidently treated the requirement for 'free intellectual inquiry', in the relevant statutory standard prescribed under the *Tertiary Education Quality and Standards Agency Act 2011* (Cth) (TEQSA Act), as embodying a general requirement to protect freedom of speech. The submission also made reference to over-protective approaches to contentious speech on campus, generically designated as 'safetyism', associated with 'demands for safe spaces, trigger warnings and censorship'.⁴¹

Another protagonist with a similar perspective to that of the IPA is the CIS which, in October 2018, published a policy paper entitled 'University Freedom Charters: How to best

³⁸ A mechanism which has been used elsewhere for example The Spotlight Database of the Foundation for Individual Rights and Education (FIRE) in the United States and the Free Speech University Ratings, published by online journal 'spiked' in the United Kingdom. A Campus Free Index is published by the Justice Centre for Constitutional Freedom in Canada.

³⁹ Matthew Lesh, Submission to the *Independent Review of Freedom of Speech in Australian Higher Education Providers* (submission undated) 2.

⁴⁰ Ibid. Some State statutes in the United States are referred to later in this Report.

⁴¹ Ibid 4.

protect free speech on Australian campuses’. The author was Dr Jeremy Sammut.⁴² The CIS, according to its mission statement ‘promotes free choice, individual liberty, defends cultural freedom, and the open exchange of ideas.’⁴³

Doctor Sammut referred, in his paper, to an incident at Sydney University in September 2018 when police were called to the University to ‘break up a violent protest by 40 students who were attempting to stop social commentator Bettina Arndt from making a speech questioning claims by feminist activists about a “rape culture” at universities.’⁴⁴ The incident was said to exemplify the ‘no platforming’ phenomenon at the heart of ‘what has been dubbed the “Campus Free Speech Crisis” on universities and college campuses in North America.’⁴⁵

The CIS paper advocated the introduction of ‘compulsory freedom charters [based on the Chicago Principles] to ensure Australian universities are more transparently accountable for encouraging and maintaining free speech on campus.’⁴⁶ A compliance mechanism by way of financial penalties was suggested along the lines of a policy put in place by the Government of the Province of Ontario in Canada in August 2018. Under the Ontario policy, discussed later in this Report, colleges and universities were given until 1 January 2019 to develop, implement and comply with a free speech policy that met a minimum standard prescribed by the government and was based on best practices from around the world. The stated object of the policy was to protect free speech, but also to ensure that hate speech, discrimination and other illegal forms of speech are not allowed on campus. Colleges and universities were required to report annually on their progress to the Higher Education Quality Council of Ontario, commencing September 2019. Those that did not comply with the free speech requirements could be subject to a reduction in operational grant funding.⁴⁷

⁴² Jeremy Sammut, ‘University Freedom Charters: How to best protect free speech on Australian campuses’, *Centre for Independent Studies* (Policy Paper No 10, October 2018) <<https://www.cis.org.au/app/uploads/2018/10/pp10.pdf>>.

⁴³ ‘Misson & History’, *Centre for Independent Studies* (Web Page) <<https://www.cis.org.au/about/mission/>>.

⁴⁴ Sammut (n 42) 2.

⁴⁵ Ibid quoting Stanley Kurtz, *National Review* (Web Article, 27 September 2017) <<https://www.nationalreview.com/corner/campus-free-speech-crisis-deepens/>>.

⁴⁶ Sammut (n 42) 1.

⁴⁷ Office of the Premier, ‘Ontario Protects Free Speech on Campuses’ *Government of Ontario* (News Release, 30 August 2018) <<https://news.ontario.ca/opo/en/2018/08/ontario-protects-free-speech-on-campuses.html>>.

The IPA and CIS documents referred to relatively few actual incidents in Australia.⁴⁸ They directed attention to the contents of university codes, policies and practices. They also drew upon the more intense debate in the United States which has been productive of a large number of books, journal articles, speeches, public commentaries, reports and proposed institutional responses to the asserted need to protect freedom of speech at universities.

4.7 *Some political perspectives*

Public expressions of concern by political figures in Australia about freedom of speech at universities, which have been part of the debate leading to this Review, are relatively recent. Proposals for enhanced statutory or funding controls may be contrasted with the content of an address to the Universities Australia Conference on 26 February 2014 by the then Federal Minister for Education, Christopher Pyne. The address was entitled ‘Embracing the new freedom: Classical values and new frontiers for Australia’s universities’.⁴⁹ The freedom of which the Minister spoke was that promised by Prime Minister Abbott in the previous year in a speech to the Universities Australia Conference, when he said, ‘[i]n line with the commitment to freedom and autonomy, we will reduce universities’ regulatory and compliance burden.’⁵⁰ There was no reference to freedom of speech in either address. The notion of institutional autonomy as an aspect of academic freedom was aligned with values held by former Prime Minister Robert Menzies and which were enunciated in a speech to the UNSW quoted earlier in this Report.⁵¹

In June 2018, Senator James Paterson, a Liberal Senator from Victoria, wrote a piece for *The Australian* newspaper concerning the decision of the Australian National University (ANU) not to proceed with a course on Western Civilisation to be funded by the Paul Ramsay Foundation. He described it as evidence of a ‘rampant anti-western bias’ at many Australian universities which he generalised to a concern about ‘free speech, intellectual freedom and viewpoint diversity’.⁵² He proposed that ‘the government should tie funding to compliance

⁴⁸ The list of incidents as set out in the 2018 IPA Audit is summarised in Appendix 14.

⁴⁹ Christopher Pyne, ‘Embracing the new freedom: Classical values and new frontiers for Australia’s universities’ (Speech, Universities Australia Conference, 26 February 2014) 3.

⁵⁰ Tony Abbott, (Address, Universities Australia Higher Education Conference, February 2013).

⁵¹ Menzies, (n 7).

⁵² James Paterson, ‘ANU and Western Civilisation course: Time to punish unis that limit freedom of thought’, *The Australian* (online), 18 June 2018.

with the requirement to uphold the fundamental values of free speech, academic freedom and viewpoint diversity'.⁵³

In a response, published in the online journal *The Conversation* in the same month, Professor Katharine Gelber a Professor of Politics and Public Law at the University of Queensland, who has written extensively on freedom of speech and academic freedom, rejected the contention in Senator Paterson's article that universities do not have governance policies that support academic freedom. She cited among other things Codes of Conduct and Enterprise Bargaining Agreements listed in the 2017 IPA Audit.⁵⁴

In an interview reported on 22 October 2018, the New South Wales Education Minister, Rob Stokes, was said to have accused universities of encouraging a 'far-left group think mentality'. He reportedly alleged that robust debate had become almost non-existent in universities because of the rise of 'identity politics'.⁵⁵ Earlier in the same month the New South Wales Treasurer, Dominic Perrottet, speaking to the Sydney Institute, referred to the barring of controversial speakers from university campuses, the burdening of event organisers with the cost of security where controversial speakers were involved and letting protests against speakers escalate to the point where riot police had to be called in. Treasurer Perrottet accused universities of failing to act as they are meant to 'as facilitators of debate'.⁵⁶

4.8 *Sectoral and regulatory perspectives*

The suggestion that there may be a 'free speech crisis' in Australian universities has been strongly contested by university representatives and representative bodies. Professor Glyn Davis was Vice-Chancellor of Melbourne University from January 2005 until September 2018. He commented critically on both the 2017 IPA Audit and the CIS policy paper. In a speech delivered at a summit held at the ANU in December 2018 he described the claim of a crisis as 'special pleading', observing '[w]e hear ministers, senators and think

⁵³ Ibid.

⁵⁴ Katharine Gelber, 'The great irony in punishing universities for 'failing' to uphold freedom of speech', *The Conversation* (Web Article, 21 June 2018) <<https://theconversation.com/the-great-irony-in-punishing-universities-for-failing-to-uphold-freedom-of-speech-98548>>.

⁵⁵ Report of the interview quoted by Richard Fisher AM, 'What are universities' obligations and restrictions for free speech' (Speech, Campus Review Seminar, 21 November 2018) <<http://sydney.edu.au/usap/docs/FISHER%20-%20Free%20Speech%20and%20Discrimination.pdf>>.

⁵⁶ Dominic Perrottet MP, 'Fighting Back to Preserve our Freedom: How politically correct bullies are using the power of the State to shut down debate' (Speech, The Sydney Institute, 16 October 2018).

tanks speak about an imminent danger to free speech.’⁵⁷ The evidence, he said, ‘turns out to be a small number of anecdotes repeatedly retold, warnings about trends in the US, implausible readings of university policies, and unsourced claims that staff and student feel oppressed.’⁵⁸ He noted a substantial reliance, in the 2017 IPA Audit, on United States cases and the implication that Australia is on, or will, travel down the same path.⁵⁹

Concerns about freedom of speech and academic freedom on campus have not been dismissed by university leaders. In an address delivered at a National Conference on University Governance in October 2018⁶⁰ the Chancellor of the ANU, the Hon Gareth Evans AC QC emphasised not only the central importance of university autonomy but what universities do with that autonomy. He suggested that:

an absolute priority in this respect is maintaining totally intact, with no qualifications whatever, the traditional idea of the university as the home of free speech, of the clash of ideas, of unconstrained argument and debate.⁶¹

Mr Evans spoke of the ‘disconcerting development’ in the United States, on traditionally very liberal campuses, of ‘attempt[s] by some students and staff to shut down argument and debate, on the basis that people should not be exposed to ideas which with they strongly disagree’.⁶² There were early signs of the same phenomenon in Australia. He cited the incident involving Bettina Arndt at the University of Sydney and the cancellation at UWA of an address by an American speaker organised by the Australian Family Association. He referred to the practice of ‘no-platforming’ which he described as ‘disinviting or shouting down visiting speakers espousing various heresies’.⁶³ He mentioned ‘trigger warnings’ which he defined as warnings to students about potentially upsetting themes they may encounter in class discussion or assigned texts. He referred to the establishment of ‘safe spaces’, or ‘safe learning environments’, in which students ‘can be completely insulated from

⁵⁷ Professor Glyn Davis, ‘Special pleading: free speech and Australian universities’ (Speech, Summit to explore issues of academic freedom and autonomy, Australian National University, 4 December 2018).

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ The Hon Gareth Evans AC QC, ‘Maintaining University’s Raison d’etre: Meeting the Challenge’ (Inaugural Chancellor’s Oration, National Conference on University Governance: The Challenge of Change for Australian Universities, University Chancellor’s Council, 4 October 2018).

⁶¹ Ibid 8.

⁶² Ibid.

⁶³ Ibid.

anything that may assault their sense of what is moral and appropriate'.⁶⁴ The Chancellor concluded with the observation that:

Learning to live with uncomfortable ideas, and responding to them appropriately, is part of the business of growing up. How can anyone cope with the world if sheltered from awareness of any views he or she does not already hold? Lines have to be drawn, and administrators' spines stiffened, against manifestly unconscionable demands for protection against ideas and arguments claimed to be offensive.⁶⁵

The Chancellor returned to his theme in the Summit on Academic Freedom and Autonomy held at the ANU, at which Professor Davis also spoke. The Chancellor agreed with Professor Glyn Davis 'that we do not presently have anything remotely resembling a free speech crisis in the Australian system'.⁶⁶ Nevertheless he accepted that there had been enough things happening recently within Australia and elsewhere to raise issues of free speech, academic freedom and academic autonomy — and the need for clarity about the meaning of each of those terms and how they relate to each other. That view is reflected in the Conclusion and Recommendations from this Review.

Professor Nicholas Saunders, the Chief Commissioner of TEQSA, wrote to the Review on 19 December 2018 in answer to a request for information regarding the practical operation of the requirement in the HE Standards that the governing body of each higher education provider develop and maintain an institutional environment in which freedom of intellectual inquiry is upheld and protected.⁶⁷ Professor Saunders indicated that TEQSA is aware of very few cases in which issues of free intellectual inquiry have been raised as complaints or concerns. The only relevant regulatory decision involved the imposition of a condition in June 2014 on the initial registration of a provider of theological studies. That condition was revoked in November 2014. TEQSA had also sought information from the University of Sydney about the incident involving Bettina Arndt, which was mentioned in the CIS policy paper. The University advised that the outcome of an external investigation would be reported to TEQSA in 2019.

⁶⁴ Ibid.

⁶⁵ Ibid 9.

⁶⁶ The Hon Gareth Evans AC QC, 'Academic Autonomy, Freedom and Free Speech' (Welcome Address, Summit on Academic Freedom and Autonomy, Australian National University, 5 December 2018).

⁶⁷ HE Standards [6.1.4].

The issue of freedom of expression has been raised with TEQSA's Student Expert Advisory Group whose members comprise student leaders of national bodies at undergraduate and postgraduate levels from public and private higher education providers in the sector. TEQSA was advised by members of the group that in their experience freedom of expression did not seem to be under threat and was not a major issue for them.⁶⁸

In testimony given to the Education and Employment Legislation Committee of the Senate in October 2018, Professor Saunders indicated that TEQSA took a broad approach to the standard relating to free intellectual inquiry. He said:

We interpret free intellectual inquiry broadly, so we're thinking about freedom of expression, freedom of speech as well as freedom to actually investigate and teach and those sorts of things.⁶⁹

He added:

whilst issues of equity and diversity are really important in terms of both staff and students and the community of the university or higher education provider, those considerations really should not override considerations to do with free intellectual inquiry.⁷⁰

That view is reflected in part by the designation of 'freedom of expression' and 'academic freedom' in the Code recommended by this Review as 'paramount' and 'defining' values respectively.

Professor Saunders went on to express concern about the language of some policies put to him by Senator Stoker and taken from the 2017 IPA Audit. Examples included policies characterising the use of 'sarcasm' as 'unacceptable behaviour' and prohibiting behaviour that 'offends or could offend'. Professor Saunders said he could not speak for his fellow Commissioners, but the examples quoted did not sit comfortably with him. He said:

⁶⁸ Tertiary Education Quality and Standards Agency, Submission to *Independent Review on Freedom of Speech in Australian Higher Education Providers* (19 December 2018).

⁶⁹ Commonwealth, *Education, Employment and Legislation Committee Estimates*, Senate, 25 October 2018, 174–75 (Professor Nicholas Saunders).

⁷⁰ *Ibid* 175.

They certainly do not fit with the concept of a university being a place where ideas are contested and debated ... and where people are coming to learn how to think, without real concern about whether or not they're likely to be offended and the like. So, yes, we certainly will look at that.⁷¹

And further:

Many of these policies, I think, emerge from well-meaning action in terms of trying to right perceived wrongs or avoid unnecessary conflict, but certainly it would not be appropriate for Australia's higher education sector to be a place where people were so careful that one should never offend anybody else.⁷²

The Chief Executive of the Go8 wrote to the Review on 19 December 2018 setting out five propositions:

1. There is no substantive evidence of the alleged 'crisis' of free speech on Australian university campuses.
2. The concepts of academic freedom and freedom of speech are distinct and the two must not be conflated.
3. The HE Standard is robust and serves a critical purpose; but that does not include a role in regulating speech on campus.
4. Go8 universities already have comprehensive policy frameworks in place.
5. Australia does not have a constitutional protection of freedom of expression. Should there ever be a need to further guarantee freedom of speech, this may be best achieved through constitutional reform rather than university regulation.

There may be a tension between the third proposition and the view expressed by Professor Saunders to the Senate Committee about the scope of the term 'free intellectual

⁷¹ Ibid 177.

⁷² Ibid 177.

inquiry’ and TEQSA’s readiness to look into the allegedly restrictive policies cited to him from the 2017 IPA Audit.

If applied to the sector generally, the fourth proposition would have to be viewed with reservation having regard to the number and diversity of rules and policies relating to or affecting or capable of affecting freedom of speech and academic freedom. That diversity between and within institutions and the various topics covered by the rules and policies which it encompasses, do not support a comfortable inference of comprehensiveness of protection so much as potential for overreach adverse to the freedoms. A similar reservation applies to the Universities Australia reference, in its second round response to the Review, when it observed that a proposed Model Code ‘could override a broad range of university policies and procedures that have been carefully constructed — balancing rights and responsibilities — over many decades by university governing councils...’.⁷³ A plausible characterisation would be of a rather untidy organic process. A survey of policies and practices in existence today does not support the view that they are the product of some smooth policy trajectory across the sector.

The relevance of the fifth proposition in the Go8 response to a university’s stance with respect to protection of freedom of expression is not apparent. The response is presumably directed to the absence of a free-standing guarantee of freedom of expression in the *Australian Constitution*. There is, as discussed later, an implied constitutional freedom of political communication which limits Commonwealth, State and Territory legislative power and affects the common law. It also affects the extent to which universities, in the exercise of powers conferred upon them by law, can burden freedom of expression. There is also a restrictive common law approach to the interpretation of statutes which, if they are interpreted expansively, may impinge upon freedom of expression. In Victoria, Queensland and the ACT there are statutory protections for freedom of expression and other rights and freedoms which impose duties upon public authorities and require the interpretation of State and Territory laws in a way that is compatible with that freedom.⁷⁴

The Go8 said that upholding freedom of expression is essential to the core mission of universities. Universities exist for the pursuit of truth, the advancement of learning and the acquisition, dissemination and preservation of knowledge for the common good. The Go8

⁷³ Universities Australia, Response to Draft Model Code (26 February 2019) 1.

⁷⁴ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32; *Human Rights Act 2004* (ACT) s 30; *Human Rights Act 2018* (Qld) enacted 27 February 2019.

reaffirmed its members' commitment to freedom of expression for all who engage in the discussion of ideas on campuses and digital platforms. It argued that apparent overseas trends in this area do not necessarily indicate that the same is occurring on Australian university campuses. Suggestions of a 'free speech crisis' most often draw upon events and trends in the United States to argue that the same trends are occurring in Australia. In 2017 Australia's thirty-eight public universities were home to more than 1.37 million students and 50,000 academics. The evidence of a 'free speech crisis', it was said, comprised some half a dozen incidents over four years which have been given a profile disproportionate to their impact. That does not amount to a systemic problem. The Go8 acknowledged, however, that for some in the Australian community there has developed a concern about freedom of speech on campus and it respects those perceptions.

Universities Australia released a statement on 7 November 2018 of 'their commitment to the enduring principles of academic freedom and freedom of expression on campuses and amongst their students and staff.'⁷⁵ The statement was described as a 'reaffirmation' building upon the 2008 statement referred to earlier. Universities Australia added that 'both invited speakers and those who wish to protest the views of those speakers exercise their freedom of expression at such events'.

A few observations offered by individual universities were dismissive of any need for the Review. One Vice-Chancellor said simply 'I note that the principles of academic freedom and freedom of expression have been enshrined in university legislation and policy for hundreds of years and that the sector's management of such issues is robust and appropriate.'⁷⁶ The historical assertion is questionable. The statement that the sector's management is 'robust and appropriate' is, with respect, an argumentative observation of little empirical value. Another university responding to the Review referred to the HE Standards requiring higher education providers to 'uphold free intellectual inquiry in relation to teaching and research' and to the application of existing 'federal laws covering vilification or defamation'.⁷⁷ That university's establishment Act sets out as one of its

⁷⁵ 'University leaders reaffirm long standing commitment to founding ideals', *Universities Australia* (Media Release, 7 November 2018) <https://www.universitiesaustralia.edu.au/Media-and-Events/media-releases/University-leaders-reaffirm-longstanding-commitment-to-founding-ideals#.XG-AMKizaUK>>.

⁷⁶ University of Wollongong Australia, Submission to *Independent Review of Freedom of Speech in Australian Higher Education Providers* (21 December 2018) 5.

⁷⁷ There is a uniform defamation law which has been enacted by States and Territories since 2006. This, however, is not a federal law.

objects that the university will promote ‘critical and free inquiry ... intellectual discourse and public debate within the University and wider society’. Given that legal framework it was argued that ‘there would seem to be no need for further government regulation in this space, especially as the university has not been legally challenged at federal or state level under either Act.’⁷⁸ However, the absence of any legal challenge to a university’s policies or decisions in this area is not evidence of an absence of risk to important societal and institutional values which deserves attention. And as appears from the Terms of Reference of this Review, further regulation is not a necessary outcome. Indeed, as the Recommendations will show, it is not the outcome.

By way of contrast, the University of South Australia in its submission to the Review said that:

in response to a range of issues in the sector and the community that have brought a focus on freedom of expression and freedom of intellectual inquiry UniSA’s Academic Board at its October 2018 meeting resolved to establish a working group to review and make recommendations regarding the University’s current position and policy environment on academic freedom and freedom of expression.⁷⁹

On the whole the universities who responded to the Review indicated their support for it.

The Innovative Research Universities Group (IRU) is a network of seven comprehensive universities which describes itself as ‘committed to inclusive excellence in teaching, learning and research in Australia.’⁸⁰ In its response to the Review, the IRU said the Vice-Chancellors of its member universities had discussed the issue several times in 2018 and had given thought to a common statement using the Chicago Principles as an exemplar. It observed that debate on questions of freedom of expression and intellectual inquiry ‘generates a lot of noise, such that an independent, evidence-based assessment of exactly what the problem is, and ways to address it, should be helpful.’⁸¹ It noted that the ideas of

⁷⁸ Monash University, Submission to *Independent Review of Freedom of Speech in Australian Higher Education Providers* (28 January 2019).

⁷⁹ University of South Australia, Submission to *Independent Review of Freedom of Speech in Australian Higher Education Providers* (20 December 2018) 2.

⁸⁰ ‘Purpose’, *Innovative Research Universities*, (Web Page) <<https://www.iru.edu.au/about/purpose/>>; Member universities are Charles Darwin University, Flinders University, Griffiths University, James Cook University, La Trobe University, Murdoch University and Western Sydney University.

⁸¹ Innovative Research Universities, Submission to *Independent Review of Freedom of Speech in Australian Higher Education Providers* (18 December 2018) 1.

freedom of speech and academic freedom are often conflated rather than treated as two related issues.⁸² That observation has been made in a number of responses from higher education providers to this Review.

The NUS also provided a submission to the Review which said that its member organisations across Australia had not experienced a free speech crisis. The NUS acknowledged that individual incidents had occurred on certain campuses, but said that their frequency was ‘rather more moderate than media coverage might suggest’.⁸³ NUS asserted its belief that ‘student campus culture supports and protects free speech and open discourse’.⁸⁴ It stated:

NUS continues to affirm Universities Australia’s statement that Australian campuses ‘foster vigorous debate and encourage the contest of ideas’ and believes Australian students are educated in an environment that broadly maintains freedom of intellectual inquiry.⁸⁵

The National Association of Australian Universities Colleges (NAAUC) also made a submission. It is the peak body for students living on university campuses. Its membership base comprises more than 100,000 students. The NAAUC submission said that currently no team members, guest speakers or delegates had raised issues of free speech. As an organisation it aims to facilitate free discussion about difficult topics throughout all of its events and programs. It added that, while acknowledging the importance of freedom of speech to students and residents, it also recognised that the freedom could be used to defend discriminatory beliefs and practices or result in policies which may harm students’ welfare. It said ‘unfortunately, this is an issue our organisation does not yet have the answer to.’ It supported the right of anyone to express their views in a respectful manner, but also supported students living in residences free from discrimination and harm. The NAAUC

⁸² Ibid.

⁸³ National Union of Students, Submission to *Independent Review of Freedom of Speech in Australian Higher Education Providers*, (January 2019).

⁸⁴ Ibid.

⁸⁵ Ibid 4.

added ‘we will endeavour to continue this debate with our members, as we acknowledge that this is becoming a contentious political issue.’⁸⁶

4.9 *Freedom of expression and academic freedom in academic employment contracts*

Issues of freedom of expression, as an aspect of academic freedom, and academic freedom can arise in the context of academic employment terms and conditions including the terms and conditions of enterprise bargaining agreements. There is express reference to academic freedom in many of them. Given the lack of consensus on a precise definition, it is unlikely to be implied.⁸⁷ Demands by academic staff at the University of Melbourne that academic freedom should be specifically referred to in employment contracts and enterprise bargaining agreements were reported in *The Age* newspaper in August 2017. Staff reportedly expressed concerns about a proposed new workplace agreement which members of the University’s Law, Health Sciences, Business and Science Faculties had characterised as restricting their right to speak out ‘without fear or favour’. The proposed agreement was said no longer to include a definition of academic freedom but to refer to a separate policy, dealing with the principle, to which the University said it would have ‘regard’. The pre-existing agreement provided that staff could ‘engage in critical inquiry, intellectual discourse and public controversy without fear or favour’, albeit that did not include ‘the right to harass, intimidate or vilify’.⁸⁸

In May 2018, University of Melbourne staff reportedly voted to go on strike as a protest against the proposed new workplace agreement. The NTEU argued that the change in the agreement, removing definitions of academic and intellectual freedom, would limit legal protections for staff who ‘make controversial or unwelcome public comments’, presumably because of uncertainty about the precise latitude of the academic and intellectual freedom that

⁸⁶ National Association of Australian Universities Colleges, Submission to *Independent Review of Freedom of Speech in Australian Higher Education Providers*.

⁸⁷ Jackson, (n 12); Jim Jackson, ‘Implied Contractual Rights to Academic Freedom in Australian Universities’ (2006) 10 *Southern Cross University Law Review* 139.

⁸⁸ Henrietta Cook, ‘A Chilling Effect: academics accuse University of Melbourne of shutting down speech’, *The Age* (Web Article, 24 August 2017) <<https://www.theage.com.au/national/victoria/a-chilling-effect-academics-accuse-university-of-melbourne-of-shutting-down-speech-20170824-gy3c2m.html>>.

employees of the University would be afforded by their employer if the new agreement were accepted.⁸⁹

The general issue in this area is the extent to which contractual powers conferred on university administrations in relation to academic staff may be deployed to constrain intra-mural criticism and extra-mural speech.

4.10 *Academic freedom and philanthropic gifts*

Questions of academic freedom can arise from conditions attached to philanthropic gifts. There is a risk that requirements imposed by the donor of a large or ongoing gift may compromise institutional autonomy. Universities generally appear to be aware of the risk. Melbourne University, for example, has an Advancement Policy, which provides for the acceptance of gifts on the basis that:

The University accepts only gifts that are consistent with the University's established priorities and does not accept gifts when a condition of such acceptance may compromise its integrity, autonomy and commitment to academic freedom.⁹⁰

Controversy surrounded the recent rejection of a philanthropic gift offered to the ANU on the basis that its conditions might have involved an impermissible interference with the ANU's autonomy in relation to course control and presentation. Critics of the ANU's decision appear to have regarded it as giving effect to an academic prejudice against a particular perspective on the teaching of history and thus reflecting a restrictive approach to freedom of intellectual inquiry. The case involved a proposal by the Ramsay Centre for Western Civilisation to fund a bachelors degree course in 'western civilisation'. The ANU rejected the offer to provide funding of \$50 million to establish the course 'owing to concerns about academic freedom'⁹¹ — ie, controls over course content and delivery. The Ramsay Centre has since reached agreement with the University of Wollongong to fund the degree at that institution, although this has been the subject of a protest petition signed by 800 staff and

⁸⁹ Ibid.

⁹⁰ Melbourne University, Melbourne Policy Library, Advancement Policy, MPF1133, [4.1].

⁹¹ Michael McGowan, 'Ramsay Centre finds home for western civilisation degree in Wollongong', *The Guardian* (Web Article, 17 December 2018) <<https://www.theguardian.com/australia-news/2018/dec/17/ramsay-centre-finds-home-for-western-civilisation-degree-in-wollongong>>.

students.⁹² It is not necessary to offer any view about the merits of the controversy beyond observing that it has underpinned an aspect of the debate which has led to this Review.

4.11 *The Australian debate – not unique*

The Australian debate, outlined in the previous section, has been conducted in other comparable countries and it is helpful to point to the similarity of the issues which have been raised elsewhere and responses to them. Consideration of those responses is useful even though they have been formulated in constitutional and legislative contexts that differ from those in Australia.

⁹² Robert Bolton, ‘Wollongong Uni staff want Ramsay Centre Western civilisation course axed’, *The Australian Financial Review* (Web Article, 18 December 2018) <<https://www.afr.com/news/policy/education/wollongong-uni-staff-want-ramsay-centre-western-civilisation-course-axed-20181218-h1995m>>.

5 The United Kingdom

5.1 *Statutory regulation affecting freedom of expression and academic freedom*

The United Kingdom provides perhaps the most useful resource on the topics of freedom of speech and academic freedom in report of reviews and guidelines which can be drawn upon to inform Australian sectoral responses. That is so even though these issues have been considered in the United Kingdom in a particular legislative and regulatory context.

The most significant statute law applying to higher education providers in that country is the *Education (No 2) Act 1986* (UK) (Education (No 2) Act). Section 43 of that Act entitled ‘Freedom of speech in universities, polytechnics and colleges’ provides that:

- (1) Every individual and body of persons concerned in the government of any establishment to which this section applies shall take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers.
- (2) The duty imposed by subsection (1) above includes (in particular) the duty to ensure, so far as is reasonably practicable, that the use of any premises of the establishment is not denied to any individual or body of persons on any ground connected with—
 - (a) the beliefs or views of that individual or of any member of that body; or
 - (b) the policy or objectives of that body.

The section also requires the governing body of each establishment to which it applies to issue and keep up to date a code of practice setting out the various matters prescribed in the section. Section 43(4) requires that every individual and body of persons concerned in the government of any such establishment is to take such steps as are reasonably practicable, including where appropriate the initiation of disciplinary measures, to secure that the requirements of the code of practice for that establishment are complied with.

Section 6 of the *Human Rights Act 1998* (UK) makes it unlawful for a public authority to ‘act in a way which is incompatible with a Convention Right’ under the

European Convention on Human Rights.⁹³ The word ‘act’ is defined to include ‘a failure to act’. One of the Convention rights is freedom of expression. It appears that the concept of a public authority in the United Kingdom is capable of application to universities created by Acts of Parliament which are exercising public functions.⁹⁴ Whether it applies to other higher education providers has not been judicially determined.

A general provision, s 202(2)(a) of the *Education Reform Act 1988* (UK) (Education Reform Act) required University Commissioners to:

have regard to the need—

- (a) to ensure that academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions ...

The Commissioners’ powers and duties were renewed annually by statutory instrument. The last statutory instrument was signed in 1995 and expired in April 1996.⁹⁵ The Commissioners have not operated since then.⁹⁶

The *Equality Act 2008* (UK) specifies a ‘Public sector equality duty’ which includes the duty to ‘foster good relations between persons who share a relevant protected characteristic and persons who do not share it’.⁹⁷ The relevant protected characteristics are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

Universities in England, Wales and Scotland are also subject to s 26(1) of the *Counter-Terrorism and Security Act 2015* (UK). That section imposes a duty on higher education bodies, when exercising their functions to ‘have due regard to the need to prevent people from being drawn into terrorism’. It is known as the ‘Prevent Duty’. It requires those

⁹³ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by Protocols Nos 11 and 14, 4 November 1950, ETS 5.

⁹⁴ *R (Ben-Dor) v University of South Hampton* [2016] EWHC 953.

⁹⁵ It also appears that the provision is applicable only to universities established before 1992.

⁹⁶ ‘Free Rein? The question of academic freedom’, *Wonkhe* (Web Article, 9 January 2017) <<https://wonkhe.com/blogs/free-rein-the-question-of-academic-freedom/>>.

⁹⁷ *Equality Act 2010* (UK) s 149(1)(c).

bodies when doing this to have ‘particular regard’ to the duty to ensure free speech⁹⁸ and to have particular regard to the importance of ‘academic freedom’.⁹⁹ ‘Academic freedom’ is defined as in s 202(2)(a) of the Education Reform Act.

5.2 1997 – *The Dearing Committee*

There have been a number of reviews of higher education in the United Kingdom which have considered academic freedom and freedom of expression. A major inquiry was conducted in 1996 and 1997 by the National Committee of Inquiry into Higher Education, under the chairmanship of Sir Ronald Dearing.¹⁰⁰ In a chapter of the Report dealing with management and governance of higher education institutions, the Committee referred to three essential principles relating to institutional autonomy, academic freedom and institutional governance:

- institutional autonomy should be respected. Whilst we take it as axiomatic that government will set the policy framework for higher education nationally, we equally take it as axiomatic that the strategic direction and management of individual institutions should be vested wholly in the governance and management structure of autonomous universities and colleges;
- academic freedom within the law should be respected. By this we mean the respect for the disinterested pursuit of knowledge wherever it leads. This too is axiomatic, but needs to be managed responsibly by individual academics and institutions;
- institutional governance should be conducted openly and should be responsive to constituencies internal and external to the institution.¹⁰¹

5.3 2011 — *The Grant Report*

In 2011, Universities UK published a report of a Working Group chaired by Professor Malcolm Grant of University College, London, on the topic of ‘Freedom of speech on campus: rights and responsibilities in UK universities’.¹⁰² The Working Group was set up

⁹⁸ *Counter-Terrorism and Security Act 2015* (UK) s 31(2)(a).

⁹⁹ *Ibid* s 31(2)(b).

¹⁰⁰ The National Committee of Inquiry into Higher Education, United Kingdom, *The Dearing Report (1997) Higher Education in the Learning Society* (London, 1997).

¹⁰¹ *Ibid* 228 [15.4].

¹⁰² Universities UK, ‘Freedom of speech on campus: rights and responsibilities in UK universities’ (Universities UK, London, February 2011).

against the background of a perception that a number of persons involved in violent terrorism in the United Kingdom in recent years had been university graduates and some of them former student leaders of Islamic student societies.

In his Foreword to the report of the Working Group, Professor Grant reaffirmed the character of universities as:

open institutions where academic freedom and freedom of speech are fundamental to their functioning; where debate, challenge and dissent are not only permitted but expected, and where controversial and offensive ideas are likely to be advanced.¹⁰³

He described intellectual freedom as fundamental to the mission, teaching and research of universities. At the same time the freedoms were subject to limits imposed by law in order to protect the rights and freedoms of others. As he observed, those limits are neither simple nor always easy to apply. He referred in particular to the Public Sector Equality Duty and a new regulatory structure separating student unions constitutionally from their host universities in England and Wales and placing them under the control of the Charity Commission.¹⁰⁴

Summing up the tensions between the different policy imperatives applicable to universities in the United Kingdom he said:

Universities need to go beyond the minimum prescribed by law to ensure openness and transparency in their internal relations, that meetings of student societies are open to all and that views expressed at them are open to challenge. This is to engage, and not to marginalise, different cultures. Universities need also to ensure that potentially aberrant behaviour is challenged and communicated to the police where appropriate. *But it is emphatically not their function to impede the exercise of fundamental freedoms, in particular freedom of speech, through additional censorship, surveillance or invasion of privacy.*¹⁰⁵

In its recommendations the Working Group observed that free speech, campus security, equality rights, charity law and the rights of students and staff raised issues to which there were rarely simply answers and which were situation specific. A survey conducted by

¹⁰³ Ibid 2.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid 3 (emphasis added).

the Working Group revealed that different universities had addressed those issues in different ways. As the Working Group observed:

[i]n these matters different people may reach different but equally legitimate conclusions about the same matters. These are contested issues.¹⁰⁶

The recommendations of the Working Group were to form the basis of further work by Universities UK, which describes itself as the collective voice of 136 universities in England, Scotland, Wales and Northern Ireland. Relevant recommendations were to:

- Ensure that all involved in making decisions in relation to campus security, academic freedom, free speech and equality rights are familiar with the legal requirements operating in this area ...
- Review current protocols/policies on speaker meetings to ensure they are up to date and relevant, and are aligned with the students' union's protocols and policies.
- ...
- Work with the students' union to provide clear information to students and student societies about the rights and responsibilities of the institution, the students' union, student societies and students in relation to academic freedom, free speech and equality rights.
- Develop, if not already in existence, and maintain a mechanism for regular dialogue with relevant external organisations such as the police, local authorities and community groups.
- Take an appropriate role in relevant national, regional and local strategies, to include regular links with local colleges and other relevant local institutions to share practice and information. This might include the identification of regional contacts to facilitate local and regional networks.¹⁰⁷

Among the recommendations to government were that it should acknowledge and reflect the legal requirements imposed on universities in relation to academic freedom and free speech when engaging with them. The Report annexed examples of a University Code of Practice and a Due Diligence Process for accepting event bookings.

¹⁰⁶ Ibid 32.

¹⁰⁷ Ibid.

5.3(i) *Academic freedom*

An ongoing definitional challenge was illustrated by the Working Group's observation that academic freedom is a concept, frequently invoked, whose meaning remains elusive even though in many ways it is intrinsic to the nature of universities and the role of academics.¹⁰⁸ The Working Group noted that the concept of academic freedom has evolved in different contexts. Its characterisation in the United States and the United Kingdom is linked to the premise of university autonomy and the position of academics within autonomous institutions. German approaches tend to focus on unity between teaching and research with both staff and students able to enjoy academic freedom.

The Working Group suggested that in the United Kingdom the concept of academic freedom is associated with a number of values including:

- freedom from state and political interference
- institutional self-governance and autonomy
- individual freedom to undertake teaching and research
- institutional excellence
- security of academic tenure
- peer review and open and rigorous criticism of ideas¹⁰⁹

Those values were said to be reflected in the provisions of the Education Reform Act and particularly s 202(2)(a). They applied to academic staff but not to staff who were not academics nor to students or visitors to an institution, nor to the institution itself.

The principle of academic freedom, as explained by the Working Group, operated as a constraint on action taken by universities in relation to academic staff. It prevented them from being disciplined, dismissed or suffering other detriment on the grounds that they had exercised their academic freedom. Academic freedom was qualified by the expression 'within the law'.¹¹⁰ The boundaries were set by the criminal law and civil law but it was the law that would constrain the requirement to protect academic freedom, not a university's

¹⁰⁸ Ibid 9.

¹⁰⁹ Ibid.

¹¹⁰ Ibid 10.

choices. The Working Group drew a distinction between academic freedom and freedom of speech. It described the latter as ‘a wider concept that goes beyond the rights of academics and applies to everyone.’¹¹¹

5.3(ii) *The Public Sector Equality Duty*

The Public Sector Equality Duty extends beyond the prohibition of unlawful discrimination to ‘a generic duty which will require universities to have regard to the need to eliminate unlawful discrimination and harassment, advance equality of opportunity and foster good relations between different groups.’¹¹² The Working Group acknowledged the difficulties that can arise in defining the boundary between free speech and unlawful harassment. Harassment was defined by reference to conduct or speech, relating to one of the protected equality characteristics, which has the purpose or effect of violating another’s dignity or creating a hostile, intimidating, offensive or humiliating environment. The Working Group made the important point that in the context of academic freedom and free speech in universities the legal definition of ‘harassment’ was not satisfied simply by the complainant stating that the speech or conduct in question had the relevant effect on them. The complainant’s perception was one factor in an analysis which required consideration of all the circumstances and crucially, whether it was reasonable to conclude that the speech or conduct had the prohibited effect. The ultimate test appears to be objective rather than subjective.¹¹³

Relevantly to the issue of diversity and inclusion policies in Australia, the duty to promote good relations and the protection of freedom of speech were seen by the Working Group as not necessarily in conflict, although their relationship was described as complex. Where competing ‘protected characteristics’ are involved — for example between religious faith and sexual orientation — the duty to promote good relations should not be seen as automatically requiring persons to refrain from expressing their opinions.¹¹⁴ The Working Group said:

¹¹¹ Ibid.

¹¹² Ibid 14.

¹¹³ Ibid.

¹¹⁴ Ibid.

Tolerance and respect for opposing viewpoints, and the right to hold and express those opinions, are central to the preservation of the right to freedom of speech and entirely compatible with the fostering of good relations.¹¹⁵

The relationship between the free speech principle and the obligation to foster good relations between different groups, arising under statute in the United Kingdom, is broadly analogous to the relationship between the free speech principle in Australia and the duty to foster the wellbeing of staff and students prescribed in the HE Standards.

In the United Kingdom the *Public Order Act 1986* (UK) complements equality legislation and makes it a criminal offence to stir up racial and religious hatred, including the use of threatening, abusive or insulting words or behaviour. The Working Group observed that this may often be a factor in determining whether or not to allow a visiting speaker to attend a speaker meeting. An exemption in the Act in relation to religious hatred provides that the law shall not be read or given effect to:

in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.¹¹⁶

5.3(iii) *A useful resource*

The Report of the Working Group is a useful resource for those seeking to understand the ramifications and complexities of freedom of speech and academic freedom questions. Despite the particular legislative context which it addressed, its reasoning has application to discussion of those issues in Australia. The Report however was by no means the end of discussion of academic freedom and freedom of expression in the United Kingdom.

5.4 2016 — *The College of St George Report*

In 2016, the College of St George, partnered with the Centre of Islamic Studies at the School of Oriental and African Studies at the University of London, conducted a private

¹¹⁵ Ibid.

¹¹⁶ *Public Order Act 1986* (UK) s 29J enacted in 2007.

consultation over two days with 33 experts from the higher education sector. In November 2016, the College published a report of the consultation which referred to a growing sense that freedom of speech and academic freedom in universities is under threat. The report referred to ‘a growing sense that freedom of speech and academic freedom in universities is under threat’.¹¹⁷ There was also said to be a sense ‘that the rules of engagement regarding freedom of speech are becoming increasingly uncertain, and that clarity of definitions and protocols is much needed’.¹¹⁸ The Report identified internal student-driven activity including no platforming and safe space policies as one factor imposing constraints on freedom of speech.

5.5 2018 — *The Joint Committee on Human Rights Report*

In March 2018, the Joint Committee on Human Rights of the House of Commons and the House of Lords (the Committee) reported on freedom of speech in universities.¹¹⁹ The Committee reasserted the basic principle that:

Everyone has the right to free speech within the law. Unless it is unlawful, speech should usually be allowed. Free speech within the law should mean just that. This can include the right to say things which, though lawful, others may find disturbing or upsetting.¹²⁰

The Committee made the point that the right to free speech extends beyond the right to make speeches and covers all forms of expression. Freedom of expression and freedom of association together cover the right to form societies with lawful aims even where those aims are not shared with the majority, and the right to peaceful protest.

Factors limiting free speech in universities were listed:

- intolerant attitudes, often incorrectly using the banner of ‘no platforming’ and ‘safe-space’ policies;

¹¹⁷ College of St George, *Freedom of Speech in Universities* (Report, 31 October–1 November 2016) 3.

¹¹⁸ Ibid.

¹¹⁹ Joint Committee on Human Rights, *Freedom of Speech in Universities* (House of Lords Paper No 111, House of Commons Paper No 589, Session 2017–19).

¹²⁰ Ibid 3.

- incidents of unacceptable intimidatory behaviour by protestors intent on preventing free speech and debate;
- unnecessary bureaucracy imposed on those organising events;
- fear and confusion over what the Prevent duty entails;
- regulatory complexity;
- unduly complicated and cautious guidance from the Charity Commission;
- concern by student unions not to infringe what they perceive to be restrictions.¹²¹

In its summary the Committee commented that the extent to which students restrict free speech at universities should not be exaggerated. In a comment, applicable to the Australian situation, the Committee observed ‘[w]here it happens, it is a serious problem and it is wrong. But it is not a pervasive problem.’¹²²

Evidence before the Committee showed that overall there was support for freedom of speech among the student population. However even though much of the concern had been generated by a small number of incidents, which had been widely reported and often repeated, any interference with free speech rights in universities was unacceptable. The Committee was concerned that such interference as had been reported could be having ‘a chilling effect’ on the exercise of freedom of speech more widely.¹²³

The Committee referred to the Public Sector Equality Duty imposed on universities and said:

Equality law can operate as a limiting factor on freedom of speech by making certain speech and conduct unlawful, and so universities have to balance their obligation to secure free speech with the duty to promote good relations between different groups with protected characteristics.¹²⁴

It does not appear that discrimination law in Australia imposes as broad an obligation on universities as that imposed under the Public Sector Equality Duty in England.

¹²¹ Ibid.

¹²² Ibid 4. See also Rachel Schraer and Ben Butcher, ‘Universities: Is free speech under threat?’ *BBC News* (Web News Article, 23 October 2018) <<https://www.bbc.com/news/education-45447938>>.

¹²³ Joint Committee on Human Rights (n 119) 4.

¹²⁴ Ibid 14 [19].

The Committee referred to free speech university rankings issued by an online journal ‘Spiked’, analogous to the IPA Audits. The rankings project was launched in 2015 and is well reported in media in England. In 2018, the journal asserted that ‘55% of universities actively censor speech, 39% stifle speech through excessive regulation, and just 6% are truly free, open places’.¹²⁵ It claimed that censorship in universities is a ‘chronic problem’ and that restrictions on free speech are increasing each year. In language rather similar to that used by Professor Davis in his address at the ANU Summit in 2018, the Committee observed that press accounts of widespread suppression of free speech are ‘clearly out of kilter with reality.’¹²⁶ In the course of its inquiry it heard first-hand from key players in the university setting, including students, student societies and student union representatives, vice-chancellors and university administration staff. It concluded:

A large amount of evidence suggests that the narrative that ‘censorious students’ have created a ‘free speech crisis’ in universities has been exaggerated.¹²⁷

5.5(i) *No platforming*

The Committee addressed a definitional problem in relation to so-called ‘no platforming’. According to the National Union of Students in the United Kingdom a ‘no platform policy’ was intended to prevent individuals or groups known to hold racist or fascist views from speaking at student union events and to ensure that student union officers do not share a public platform with such individuals or groups.¹²⁸ The Committee reported, however, that the term ‘no platforming’ is applied to a wider range of student actions including:

- Internal decisions within student bodies to ban external speakers/groups from speaking at universities;
- Internal decisions to withdraw invitations from speakers due to views which the organisers did not share;

¹²⁵ ‘Spiked’, Free Speech University Rankings 2018.

¹²⁶ Joint Committee on Human Rights (n 119) 19 [35].

¹²⁷ Ibid.

¹²⁸ Ibid 21, see ‘Box 5: No platforming policies’.

- When the invited speaker withdraws as a result of refusal to adhere to conditions that the student union body or university imposes on the event;
- Individuals, students or student officers refusing to share a platform with external speakers; and
- Disinviting speakers due to pressure from other students who oppose the speaker's presence in the university.¹²⁹

The Committee argued that not all the scenarios listed under the heading of 'no platforming' unduly interfere with freedom of expression. Student groups cannot be obliged to invite a particular speaker just because that person wants to speak at the university. Nor do they have to continue with an invitation if they decide they no longer wish to hear from a particular person. Speakers can decline to share a platform with those whom they oppose. They can also decline to attend an event if they do not want to comply with the conditions imposed in relation to it. None of those things constitutes an interference with free speech rights. That conclusion is logically correct. However, such responses may, as a practical matter, affect the diversity of views heard on campus. If freedom of speech extends to the freedom to hear a range of views then it might be said that banning speakers because of their views indirectly burdens that freedom.

The Committee thought that the imposition of unreasonable conditions in relation to visiting speakers would constitute an interference with free speech. It would not be a reasonable condition to require a speaker to submit a copy or outline of their speech in advance. As a general proposition this seems correct and applicable in Australia. That said, invited speakers are often reasonably asked to provide an abstract or outline of their talk for advertising and public information purposes.

5.5(ii) *Safe spaces*

The Committee discussed 'safe space' policies, which it described as 'guidelines produced by student unions that aim to encourage an environment on campus free from harassment and fear.'¹³⁰ Under those policies, as defined by the Committee, student unions seek to restrict the expression of certain views or words that make some groups feel unsafe. Written evidence from the University of Cambridge indicated that its safe space policies extended to women, LGBT and black and minority ethnic groups, and disabled student

¹²⁹ Ibid 22 [41] (footnotes omitted).

¹³⁰ Ibid 27, see 'Box 8: Safe space policies'.

networks. While understanding the intention behind ‘safe spaces’, the Committee heard evidence to suggest that such policies, when extended too far, can restrict lawful expression by groups with unpopular views, or can restrict their related rights to freedom of association.¹³¹ Some student societies have found themselves subject to greater scrutiny than others from student unions during the ‘freshers’ week’ and experienced difficulty in getting representation at first year events. Some have been banned entirely by the student union.

The Committee concluded that the concept of ‘safe spaces’ had proved problematic, often marginalising the views of minority groups. They need to co-exist with and respect free speech. They could not cover the whole of the university or university life without impinging on rights to free speech under art 10 of the *European Convention on Human Rights*. When that happens, the Committee argued, people are moving from the need to have a ‘safe space’ to seeking to prevent the free speech of those whose views they disagree with.¹³² This again is a proposition that should not be controversial in Australia. ‘Safe spaces’ in the limited sense of providing meeting areas and support measures for particular groups is one thing. Even then the terminology is questionable suggesting that the campus world beyond the ‘safe space’ is fraught with risk from which particular groups need protection. Making the whole campus a ‘safe space’ with restrictive rules burdening freedom of speech in the interests of particular groups is another thing entirely. It seems to seek to insulate students from the off-campus world with which they have to engage day-to-day when they are not at the university. It is a world with which, as graduates of the university, they will have to engage fully.

5.5(iii) *Invited speakers*

The Committee accepted that there has to be a process to govern speakers coming from off campus. Universities and student unions would have to consider whether an event involving a speaker might give rise to protests and so require additional security.¹³³ The Committee said:

It is reasonable for there to be some basic processes in place so that student unions and universities know about external speakers. Codes of practice on freedom of

¹³¹ Ibid 27 [56].

¹³² Ibid 28–29 [60].

¹³³ Ibid 39 [92].

speech should facilitate freedom of speech, as was their original purpose, and not unduly restrict it. Universities should not surround requests for external speaker meetings with undue bureaucracy. Nor should unreasonable conditions be imposed by universities or student unions on external speakers, such as a requirement to submit their speeches in advance, if they give an assurance these will be lawful.¹³⁴

The Committee welcomed the practice of many universities of funding the security necessary to ensure controversial speakers could be heard in safety. If security were needed to ensure that a lawful event could proceed safely it should be provided so the event could go ahead. It should be adequate to the risks envisaged. Effective action should be taken against protestors who break the law.¹³⁵

As a general comment, the Committee's observations on this topic are applicable to the Australian situation. However, it should be a matter for each institution to determine the extent to which it can and should meet the costs of ensuring security and public safety at an on-campus event, particularly where this may involve a significant outlay. A distinction can also legitimately be drawn between the approach to be taken to events involving speakers invited by students or academic groups and events organised by non-university bodies seeking to use university facilities.

5.5(iv) *The Office for Students*

Like the work of the Universities UK Working Group, the Report of the Committee must be seen in the context of circumstances applicable in the United Kingdom not least the application to universities of art 10 of the *European Convention on Human Rights* through the provisions of the *Human Rights Act 1998* (UK), the application of s 43 of the Education (No 2) Act and regulatory arrangements involving the Charities Commission and the Office for Students. That Office came into existence on 1 January 2018 and became operational on 1 April 2018. It will take over regulatory responsibility for the sector in 2019. Analogously to TEQSA, it will oversee a Register of Higher Education Providers and will set conditions for registration, including a public interest governance condition. The Office proposes:

To include freedom of speech in a standard list of 'public interest principles' which would form part of the 'public interest governance condition' applying to the

¹³⁴ Ibid 39 [93].

¹³⁵ Ibid 40 [95].

‘Approved categories.’ Compliance with the public interest principle of securing freedom of speech would be monitored and non-compliance could result in ‘formal sanctions against the provider including monetary penalties, suspension from the register or deregistration’.¹³⁶

The regulatory framework within which the Office is now working has been described as giving it ‘the power to evaluate the efficacy of institutional codes of practice and processes to secure freedom of speech in a way never seen in English higher education before’.¹³⁷ Allowing for its particular context, the Report of the Committee again provides a useful point of reference for the purposes of this Review. However, the level of regulatory complexity and the prescriptive statutory framework in the United Kingdom is neither appropriate nor necessary in Australia.

A very recent and helpful development, since this Review was established, has been the publication of common guidelines by the Equality and Human Rights Commission (EHRC), established under the *Equality Act 2006* (UK) and the regulatory body responsible for enforcing the *Equality Act 2010* (UK) (Equality Act 2010).

5.6 *The Equality and Human Rights Commission Guide*

Following the Committee Report the Universities Ministry in the United Kingdom convened a summit of leaders from the higher education sector in May 2018. The participants agreed that the EHRC should develop new guidance for use in the sector.

A guide was published by the EHRC in February 2019 (the Guide). David Isaac, Chair of the EHRC, said of it:

The free expression and exchange of different views without persecution or interference goes straight to the heart of our democracy and is a vital part of higher education. Holding open, challenging debates rather than silencing the views of those we don’t agree with helps to build tolerance and address prejudice and discrimination. Our guidance makes clear that freedom of speech in higher

¹³⁶ Ibid [27] citing Department for Education, *Securing student success: risk based regulation for teaching excellence, social mobility and informed choice in higher education* (Government consultation on behalf of the Office for Students, 19 October 2017) 33.

¹³⁷ Diana Beech, *Cracking the Code: A practical guide for university free speech policies* (Higher Education Policy Institute Report No 109, July 2018) 17.

education should be upheld at every opportunity and should only be limited where there are genuine safety concerns or it constitutes unlawful behaviour.¹³⁸

The guidance it offered was tied to the statutory framework applicable in the United Kingdom. Allowing for that context, the Guide is still a useful point of reference for Australian higher education providers in relation to principles applicable to the protection of freedom of speech generally. The Guide offered five core principles as follows:

1. Everyone has the right to free speech within the law.
2. Higher education providers should always work to widen debate and challenge, never to narrow it.
3. Any decision about speakers and events should seek to promote and protect the right to freedom of expression.
4. Peaceful protest is a protected form of expression; however, protest should not be allowed to shut down debate or infringe the rights of others.
5. Freedom of expression should not be abused for the purpose of unchallenged hatred or bigotry.

Providers of higher education should always aim to encourage balanced and respectful debate ...¹³⁹

The EHRC made the frequently repeated point that freedom of speech is relevant to, but should not be confused with, the important principle of academic freedom. That said ‘academic freedom’ as the EHRC explained it, embraced freedom of expression as a special aspect of the relationship between academic staff and the university employer:

Academic freedom relates to the intellectual independence of academics in respect of their work, including the freedom to undertake research activities, *express their views*, organise conferences and determine course content without interference.¹⁴⁰

¹³⁸ UK Government, ‘Free Speech to be protected at university’ (Web News Article, 2 February 2019) <<https://www.gov.uk/government/news/free-speech-to-be-protected-at-university>>.

¹³⁹ Equality and Human Rights Commission, *Freedom of Expression: A Guide for Higher Education Providers and Students Unions in England and Wales* (Guide, February 2019) 6.

¹⁴⁰ Ibid 15 (emphasis added).

It elaborated on that definition by reference to the duties of higher education providers (HEPs) to act in accordance with art 10 of the *European Convention on Human Rights* and the duty imposed by s 43 of the Education (No 2) Act. The EHRC said:

HEPs must protect the freedom of expression of academics and staff. Student complaints and protests should not result in HEPs imposing limits on course content or speaker events organised by lecturers. HEPs should also take steps, such as providing support to their staff, where necessary to make sure that the pressure of student complaints does not lead to self-censorship of academic work. They must also ensure that internal policies ... do not unduly inhibit academic freedom.¹⁴¹

In relation to the Public Equality Duty, the EHRC discussed the concept of harassment under the Equality Act 2010, mentioned earlier in this section. It observed:

Whether or not behaviour is harassment is not just based on the view of the person making the complaint. The courts consider whether it is reasonable for the behaviour to have that effect, as well as the circumstances. They have to balance competing rights, including the right to freedom of expression of the person responsible.

The harassment provisions cannot be used to undermine academic freedom. Students' learning experience may include exposure to course material, discussions or speaker's views that they find offensive or unacceptable, and this is unlikely to be considered harassment under the Equality Act 2010.¹⁴²

Again, freedom of expression can be seen as an important element of academic freedom. The EHRC added that if the subject matter of the talk is clear from material promoting an event then people who attend would be unlikely to succeed in a claim for harassment arising from the views expressed by the speaker.¹⁴³

The discussion of harassment relates to the interpretation and application of provisions of the Equality Act 2010. Nevertheless, it is also applicable to a normative framework which is relevant, independently of the statutory framework, to the development of common principles in Australia.

¹⁴¹ Ibid.

¹⁴² Ibid 18.

¹⁴³ Ibid.

The EHRC referred to the term ‘hate speech’ which, as it observed, does not have any legal meaning. Generally, it said, hate speech is taken to describe forms of expression that incite violence, hatred or discrimination against other people and groups.¹⁴⁴ The Oxford English Dictionary defines ‘hate speech’ as ‘abusive or threatening speech or writing that expresses prejudice against a particular group especially on the basis of race, religion or sexual orientation.’ That definition, covering as it does expressions of ‘prejudice’, seems to expand the relevant meaning of ‘hate’ which is ‘dislike intensely; feel hatred towards’.¹⁴⁵ The *New Oxford Companion to the Law* goes further and includes ‘expression which is likely to cause offence or distress to other individuals on the basis of their association with a particular group ...’.¹⁴⁶ That class of speech could encompass statements that the beliefs of a particular religion are wrong, delusional and harmful because of the negative attitudes they bear to particular social groups on the basis of gender or sexual orientation. Over-broadening the definition can amount to misappropriation of the negative moral connotation associated with the word ‘hate’ in common usage and loss of moral clarity and moral force in rules proscribing such speech. Rules against ‘hate speech’ broadly defined have a correspondingly broad impact on freedom of speech.

The broadening of the usage of ‘hate speech’ can be illustrated by reference to the Committee of Ministers of the Council of Europe which, in 1997, adopted for the first time, at an international level, a definition of ‘hate speech’ as covering ‘all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance’.¹⁴⁷ In 2016, the European Commission against Racism and Intolerance defined ‘hate speech’, more extensively, as:

the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of ‘race’, colour, descent, national or ethnic origin, age, disability, language,

¹⁴⁴ Ibid 19.

¹⁴⁵ Oxford English Dictionary (2nd ed, 2004).

¹⁴⁶ Peter Cane and Joanne Conaghan, *New Oxford Companion to Law* (Oxford University Press, 2008) 520.

¹⁴⁷ Council of Europe Committee of Ministers, Recommendation No R(97)20 of the Committee of Ministers to Member States on ‘Hate Speech’, adopted 30 October 1997, 107.

religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status ...¹⁴⁸

The point to be made, relevantly for present purposes, is that it is desirable that if the term ‘hate speech’ is used in university rules or policies it should be defined at a level that is relatable to ordinary usage, rather than at a level which widens the range of constraints which may be imposed on expressive conduct well beyond that which ordinary people would understand as involving ‘hate’ or incitement to ‘hate’.

A consideration relevant in the Australian scene and dealt with in the Guide, is the duty of care of higher education providers and student unions. The EHRC observed that both higher education providers and student unions have to take steps to ensure the safety of students, members, employees and visiting speakers under their common law duty of care. The statutory duty under the Education (No 2) Act ‘does not require HEPs to protect free speech at the expense of the safety of staff, students or speakers’.¹⁴⁹ The EHRC added:

For example, it would be reasonable to cancel an event if the participants would not be safe from physical harm, for instance, if there was a threat of violent protests. However, the provider would need to show that no ‘reasonably practicable’ steps, such as increased security (within reasonable cost) could have been taken.¹⁵⁰

The Guide also dealt at a fairly high level of generality with the tension between the duty imposed on universities by s 43 of the Education (No 2) Act and the Public Sector Equality Duty. The tension is analogous to that which exists in Australia between the principle that freedom of speech should be protected generally and the university’s duty of care to students and staff and the duty imposed by the HE Standards to treat them equitably and foster their wellbeing.¹⁵¹ The Guide stated that higher education providers must comply with the Public Sector Equality Duty. Thus, higher education providers have a legal responsibility to think about how they can promote equality and minimise tension and

¹⁴⁸ European Commission Against Racism and Intolerance, ECRI General Policy Recommendation No 15 on Combating Hate Speech, adopted 8 December 2015, 3 (footnote omitted).

¹⁴⁹ Equality and Human Rights Commission, *Freedom of Expression: A Guide for Higher Education Providers and Student Unions in England and Wales* (Guide, February 2019) 22.

¹⁵⁰ Ibid.

¹⁵¹ HE Standards cl 6.1.4.

prejudice between different groups on campus and is something to be considered when they are promoting freedom of expression. The EHRC stated:

For example, when a HEP takes steps to ensure a debate on a divisive topic can go ahead – to protect free speech – it must consider the potential impact on students who may feel vilified or marginalised by the views expressed. They should think about how to ensure those students feel included and welcome within the HEP environment. HEPs who are subject to the s 43 duty should therefore use the PSED to encourage good relations, but without restricting lawful free speech.¹⁵²

That is perhaps easier said than done and is part of the challenge facing Australian universities and other higher education providers, albeit outside the specific legislative context applicable in the United Kingdom.

In a box entitled ‘Freedom from harm’ the Guide referred to a National Union of Students Guidance Statement about the need to balance freedom of speech with freedom from harm. In this context, a distinction might be drawn between deciding whether to invite a speaker on to campus on the one hand, and whether to cancel an invitation on the other:

SUs [Student Unions] are entitled – and required, to the extent that the speech may break the law – to consider ‘harm’ that someone’s views may cause to some of their members, when deciding whether to invite a speaker to an event they are organising.

However, if a speaker has already been invited by an SU society or group and the speech will be lawful, the SU will need to consider their obligations under their HEP’s s 43 code of practice. If an SU cancels a speaker in these circumstances, their HEP has a duty to take reasonably practicable steps to ensure the speaker event can proceed.¹⁵³

The decision whether or not to invite a speaker does not of itself involve an issue of freedom of speech – nobody has a right to be invited. But cancellation of an invited speaker may raise a legal question in the United Kingdom and arguably, as previously observed, a freedom of speech issue where cancellation deprives persons of the opportunity to hear that speaker’s views.

¹⁵² Equality and Human Rights Commission (n 149) 26.
¹⁵³ Ibid 27.

The Guide went on to deal with the ways in which higher education providers and student unions can work together on freedom of speech issues. It noted that the Committee of University Chairs and the National Union of Students had published guidelines on relationships between higher education provides and student unions.¹⁵⁴

The EHRC then referred to the requirement imposed on higher education providers by s 43 to develop a code of practice and observed:

The starting point to approach any event should be that it is able to go ahead. However, there will be some situations where HEPs need to use their judgement to balance their other legal duties.

They should only consider cancelling an event if there are no reasonable options for running it.¹⁵⁵

A flowchart was provided setting out a series of questions to be addressed in relation to invited speakers. The chart responded to the statutory duty imposed by s 43 but is plainly capable of adaptation to an events policy giving effect to freedom of expression and academic freedom as paramount values subject to qualifications by law, including duties of care and the duties imposed by the Higher Education Standards.

The Guide also set out practical steps to ensure that lawful speech is protected as required by s 43. The promotion of balanced debate and challenge at events was suggested as a way of reducing legal risk. Those steps included:

- challenging high risk-speakers with opposing views
- having an independent chairperson to facilitate an event and make sure a range of viewpoints can be heard
- filming an event to deter the use of unlawful speech
- putting additional security in place
- ticketing an event to avoid non-student violent protest
- requesting to see any promotional materials before the event

¹⁵⁴ Ibid 29.

¹⁵⁵ Ibid 31.

- having a policy setting out principles of respectful discourse that speakers have to follow
- supporting and encouraging the [student union] and student body to host debates
- training staff on how to facilitate well-balanced debate, and
- postponing the event if necessary to enable one or more of the steps above to be taken.¹⁵⁶

The term ‘no platforming’ was discussed in the Guide in the context of s 43. As noted above, the National Union of Students in the UK has a formal ‘no platform’ policy. While the term ‘no platforming’ is sometimes used to describe individual decisions not to invite a certain speaker, the EHRC argued that those are not ‘no platform’ policies.¹⁵⁷

The Guide also dealt with the term ‘trigger warnings’. Those are warnings which, according to the EHRC, are used to let people know that subjects are due to come up with content that some may find distressing or difficult. By way of example, some higher education providers in the United Kingdom use trigger warnings to signal that material may include scenes or references to sexual violence. The EHRC argued that trigger warnings can help to facilitate free speech by enabling balanced debate to take place without causing harassment. Those who find the views offensive or distressing can make an informed decision to stay or leave. The EHRC observed:

Although trigger warnings may lead certain students to choose to opt-out of debate or discussions, the action is not stopping anything being discussed by those who want to attend. Event organisers should, however, think about how trigger warnings may be provided in a way that does not risk unnecessarily putting people off participation.¹⁵⁸

As a general proposition, the Guide provides a useful resource as an indicator of an approach to legal risk management, in relation to freedom of speech, that may inform analogous approaches to the protection of freedom of speech on Australian campuses and the

¹⁵⁶ Ibid 33.

¹⁵⁷ Ibid 35.

¹⁵⁸ Ibid 43.

tension between that freedom, the legal duties of Australian higher education providers and the integrity of their missions and values.

The EHRC made reference in its Guide to a proposed model code of practice for visiting speakers, which was developed by the Higher Education Policy Institute in 2018. An outline of that code of practice follows.

5.6(i) *A proposed model code of practice for visiting speakers*

In 2018, the Higher Education Policy Institute, which had produced a Report for the Committee, published a further work which its author, Dr Diana Beech, the Institute's Director of Policy and Advocacy, focussed upon the policies and practices relevant to invited speakers on university campuses.¹⁵⁹ The recommendations contained in her Report were based on findings from a sample of 20 different Codes of Practice on freedom of speech. The selected policies came from a wide range of universities to reflect the diversity of the United Kingdom higher education sector. Questions relevant to the policies included:

- How easy are the policies to follow?
- How much detail do they offer?
- Do they include clear processes and procedures?
- Are there any unreasonable requests for information?
- Is it evident who is responsible for the final decision?
- Are the timescales involved clear and realistic?¹⁶⁰

Those questions provided the basis for her 'practical guide for universities seeking to secure free speech on campus'.¹⁶¹ The recommendations included the following elements:

1. Accessibility — users of the code should have all documentation needed to seek permission to host an external speaker or event through the use of hyper-links and full

¹⁵⁹ Beech (n 137).

¹⁶⁰ Ibid 21.

¹⁶¹ Ibid.

web addresses in an appendix to the code so that those using printed versions could still access all the required information.¹⁶²

2. Dissemination — higher education institutions ought to consider preparation of materials in a range of formats, including braille or audio format and keep a record of where the code of practice has been posted.¹⁶³
3. Definitions — the code should define the size and nature of events which it covers. Higher education providers should be mindful of opportunities for meetings and events enabled by digital technologies to ensure they do not become a loophole to circumvent the code.¹⁶⁴
4. Clarity — higher education providers should visualise their codes of practice in a simple, supplementary process flowchart.¹⁶⁵
5. Length — higher education providers should find ways to put all the necessary information and supporting documents together in one document by using appendices or annexes to the main policies.¹⁶⁶
6. Proportionality — policies should be kept to an average length of four to five pages. Additional information should be hosted in appendices or annexes to the codes, clearly marked using separate headings.¹⁶⁷
7. Format — higher education institutions should produce additional governance documents, such as statements recognising the importance of free speech and its fundamental role in a higher education setting. They should also be clearly linked to the main code of practice on freedom of speech.¹⁶⁸
8. Administration — detail of the ‘policy owner and contact information’ should be provided in a cover page to the codes for ease of reference.¹⁶⁹
9. Timeliness — codes should be regularly updated in line with any new developments in the law and include up-to-date information about the last time they were reviewed

¹⁶² Ibid 24–25.

¹⁶³ Ibid 25.

¹⁶⁴ Ibid 27.

¹⁶⁵ Ibid 28.

¹⁶⁶ Ibid 30.

¹⁶⁷ Ibid 30–31.

¹⁶⁸ Ibid 31.

¹⁶⁹ Ibid 33.

and any forthcoming review or approval processes. They should not be housed on ‘Members only’ areas of institutional websites.¹⁷⁰

10. Remit — this relates to the application of codes to offshore campuses which must be subject to any applicable foreign law.¹⁷¹
11. Schedules — higher education providers ought to highlight required and realistic timescales clearly throughout their policies.¹⁷²
12. Mitigation — higher education providers should consider removing from their codes of practice any request considered to be ‘unreasonable’ such as asking for transcripts of speeches before they are made.¹⁷³
13. Assistance — to ensure codes of practice are not used to restrict controversial speakers and events unnecessarily, higher education institutions ought to include reasonable options that can be provided to organisers to enable an event to go ahead, including added security provisions or room facilities (such as microphones, PA systems and projector screens).¹⁷⁴
14. Accountability — higher education providers should include in their codes of practice on freedom of speech information about their chosen accountable officer which could be included in process flowcharts.¹⁷⁵
15. Appeals — higher education providers should endeavour to write into their codes clear and practicable timescales to assess an appeal, including a rough estimate as to when the result of an appeal will be received.¹⁷⁶

The Guide offers a practical approach to the management of that aspect of freedom of speech on university campuses which has perhaps been most visible to the public eye in Australia, namely dealing with visiting speakers. The code which it embodies does not contain the criteria for determining whether an event involving a visiting speaker can be held on campus or the conditions to be imposed upon such events. They should be found in a set of principles of general application.

¹⁷⁰ Ibid 34–35.

¹⁷¹ Ibid 37.

¹⁷² Ibid 38.

¹⁷³ Ibid 38–39.

¹⁷⁴ Ibid 39.

¹⁷⁵ Ibid 40–41.

¹⁷⁶ Ibid 42.

Finally in this section concerned with the United Kingdom, reference can be made to examples of existing university rules at the Universities of Oxford, Cambridge and Edinburgh.

5.7 *Selected UK university rules*

5.7(i) *University of Oxford*

The University of Oxford has two relevant statutes, Statute XI on University Discipline and Statute XII on Academic Staff and the Visitation Board. Statute XI sets out a code of discipline which makes express reference to freedom of speech. It prohibits the disruption by any member of the University in a university context of the lawful exercise of freedom of speech by members, students and employees of the University or by visiting speakers.¹⁷⁷ Disruption of teaching, study, research or administrative, sporting, social, cultural or other activities of the University is also prohibited.¹⁷⁸ There is a rule against violence, indecent, disorderly, threatening or offensive behaviour or language¹⁷⁹ and against harassment of any member, visitor, employee or agent of the University.¹⁸⁰ Harassment is defined very broadly as:

unwanted and unwarranted conduct towards another person which has the purpose or effect of:

- (i) violating that other's dignity; or
- (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for that other;¹⁸¹

The concept of an 'offensive environment' is not easy to grasp.

Statute XII relating to academic staff provides that it and any regulation made under it shall be construed to give effect to certain guiding principles including:

to ensure that members of the academic staff have freedom within the law to question and test received wisdom and to put forward new ideas and

¹⁷⁷ University of Oxford, *Statute XI: University Discipline* (at 1 October 2009) s 2(1)(b).

¹⁷⁸ *Ibid* s 2(1)(a).

¹⁷⁹ *Ibid* s 2(1)(h).

¹⁸⁰ *Ibid* s 2(1)(m).

¹⁸¹ *Ibid* s 1(1)(e).

controversial or unpopular opinions, including their opinions about the University, without institutional censorship and without placing themselves in jeopardy of losing their jobs or privileges, and as further provided for in section 4 below ...¹⁸²

This principle is applicable to Australian higher education providers, particularly in relation to intra-mural criticism as an aspect of academic freedom.

Section 4 of the Statute contains a statement of freedoms beginning with the freedom of expression set out in the guiding principles regardless of whether they are exercised within or outside the context of University employment.¹⁸³ Staff are free within the framework of their contractual duties and applicable agreements with research funding bodies to carry out research on subjects of their choosing and to publish and disseminate the results of that research as they wish and in whatever form they wish without any interference or any suppression.¹⁸⁴ They are also free to conduct teaching in a manner that they consider appropriate according to the standards and norms of the relevant department or faculty.¹⁸⁵

In addition to its statutes on discipline and academic staff, the University of Oxford has issued a statement on the importance of freedom of speech declaring that free speech is the life blood of a university. It states that a university may make rules concerning the conduct of debate but should never prevent speech that is lawful. It continues:

Inevitably, this will mean that members of the University are confronted with views that some find unsettling, extreme or offensive. The University must therefore foster freedom of expression within a framework of robust civility. Not all theories deserve equal respect. A university values expertise and intellectual achievement as well as openness. But, within the bounds set by law, all voices or views which any member of our community considers relevant should be given the chance of a hearing. Wherever possible, they should also be exposed to evidence, questioning and argument. As an integral part of this commitment to freedom of expression, we will take steps to ensure that all such exchanges happen peacefully. With appropriate regulation of the time, place and manner of events, neither

¹⁸² University of Oxford, *Statute XII: Academic Staff and the Visitation Board* (at 15 February 2017) s 1(1).

¹⁸³ *Ibid* s 4(1)(a).

¹⁸⁴ *Ibid* s 4(1)(c)(i).

¹⁸⁵ *Ibid* s 4(1)(c)(ii).

speakers nor listeners should have any reasonable grounds to feel intimidated or censored.¹⁸⁶

The statement is said to underlie the detailed procedures of the University of Oxford.

5.7(ii) *University of Cambridge*

The University of Cambridge has published a statement on freedom of speech.¹⁸⁷ It asserts that the University fosters an environment in which staff and students can participate fully in university life and feel able to question and test received wisdom and to express new ideas and controversial or unpopular opinions without fear of disrespect or discrimination. Staff can exercise that freedom within the law without placing themselves at risk of losing their job or any University privileges. Staff and students are expected to receive and respond to intellectual and ideological challenges in a constructive and peaceable way. The university experience instills the capacity for critical engagement in its students, allowing them to engage with a wide range of viewpoints and to listen, dissect, analyse, reason, adjudicate, and respond to those viewpoints. The Cambridge Statement expressly refers to art 10 of the *European Convention on Human Rights*.

The University has, as required by s 43 of the Education (No 2) Act, adopted a code of practice for the organisation of meetings and other events on its premises.¹⁸⁸ The statement and the code provide the only mechanism by which the University can cancel or impose conditions on meetings or events where such action is deemed necessary because of the events subject matter and/or speakers. The purpose is to ensure that the use of University premises is not inappropriately denied to any individual or body of persons on any ground connected with their beliefs or views or the policy or objectives of a body of which they are a member. The University will not unreasonably refuse to allow events to be held on its premises. The lawful expression of controversial or unpopular views will not itself constitute reasonable grounds for withholding permission for an event. Reasonable grounds for refusal include, but are not limited to, the fact that the event is likely to:

¹⁸⁶ University of Oxford, 'Statement on the importance of freedom of speech' (Statement) <https://www.ox.ac.uk/sites/files/oxford/field/field_document/Statement%20on%20the%20importance%20of%20freedom%20of%20speech.pdf>.

¹⁸⁷ University of Cambridge, 'University Statement on Freedom of Speech' (Statement) <https://www.cam.ac.uk/system/files/university_statement_on_freedom_of_speech.pdf>.

¹⁸⁸ University of Cambridge, 'Code of Practice on Meetings and Public Gatherings on University Premises'.

- Include the expression of views that risk drawing people into terrorism or are the views of proscribed groups;
- Incite others to commit a violent or illegal act;
- Pose a genuine risk to the welfare, health or safety of members of the University or the general public, or give rise to a breach of the peace.¹⁸⁹

5.7(iii) *The University of Edinburgh*

The University of Edinburgh has promulgated a Code of Student Conduct and a policy on speakers and events. The Code sets out examples of student misconduct in s 12 but states that the list is not exhaustive. It includes:

Conduct which unjustifiably infringes freedom of thought or expression whilst on University premises or engaged in University work, study or activity ...¹⁹⁰

It also includes offensive behaviour or language¹⁹¹ and harassing, victimising or discriminating against any person on grounds of age, disability, race, ethnic or national origin, religion or beliefs, sex, sexual orientation, gender reassignment, pregnancy, maternity, marriage or civil partnership, colour or socio-economic background.¹⁹²

The Edinburgh Policy on Speakers and Events is a response to the ‘Prevent Duty’ imposed by the *Counter-Terrorism and Security Act 2015* (UK).¹⁹³ It is expressed to set out how the University will meet its obligations under that Act as well as other relevant Acts while ensuring freedom of speech on campus. Clause 1.1 of the Policy states:

Freedom of expression within the law is central to the concept of a university. To this end, the University seeks to foster a culture which permits freedom of thought and expression within a framework of mutual respect. As part of this, the

¹⁸⁹ Ibid.

¹⁹⁰ The University of Edinburgh, ‘Code of Student Conduct’, 24 September 2018, 4 [12.4].

¹⁹¹ Ibid [12.3].

¹⁹² Ibid [12.7].

¹⁹³ The University of Edinburgh, ‘Policy on Speakers and Events’, 10 November 2015.

University has a long and proud tradition of hosting speakers from around the world who come to the University to share their thoughts and insights, and help the University fulfil its mission of advancing and disseminating knowledge.

The Policy sets out principles including the recognition and upholding of the fundamental importance of freedom of thought and expression.¹⁹⁴ If the University believes that there is a demonstrable and serious risk that a speaker and/or those at an event may break the law, breach the University's statutory duties and/or pose a demonstrable and significant risk to the wellbeing of students, staff or visitors, it may require that certain conditions are met or, in exceptional circumstances, may refuse to allow the event to go ahead.¹⁹⁵

The policy identifies three different classes of events:

- those organised by students or staff at the University;
- those held under the auspices of the University regardless of location; and
- those not directly related to the University's normal academic or administrative business.¹⁹⁶

There is a 'University Compliance Group', chaired by the University Secretary comprising a number of key senior staff with specific knowledge/expertise in relevant legal and philosophical issues. The Group may assess information contained in a detailed event form against a range of established criteria including the University's commitment to freedom of thought and expression, its statutory obligations under provisions of the policy. The Group will recommend to the Secretary either approving the event unconditionally or with conditions or refusing approval. The recommendations will be recorded with a summary of the reasons given. There is provision for the event organiser to make an appeal against the University Secretary's decision to the University Principal.¹⁹⁷

¹⁹⁴ Ibid cl 3.1

¹⁹⁵ Ibid cl 3.2.

¹⁹⁶ Ibid cl 4.2.

¹⁹⁷ Ibid cl 8.

6 Canada

Debate on free speech in universities is alive and well in Canada. A Campus Free Speech Index, a publication of the Justice Centre for Constitutional Freedoms, claims to measure the state of free speech in 60 Canadian public universities and student unions. The format of the publication is not unlike that followed in *'Spiked'* in the United Kingdom and the IPA Audits in Australia. It grades universities according to an alphabetical scale from 'A' to 'F'. Current debate has been characterised in a book, published in 2018, as taking place in the 'university commons' which the author, Peter MacKinnon, President Emeritus of the University of Saskatchewan, defined as 'space for the debate, discussion and collaboration that are both inherent in and essential to the idea of the university.'¹⁹⁸ In a passage referred to in the Introduction to this Report, he described the commons, as 'a contemporary battle ground over its boundaries'.¹⁹⁹ History and recent events lend support to that characterisation.

6.1 *The University of Toronto Statement 1992*

An early example of an individual institutional free speech policy was the statement published by the University of Toronto in May 1992.²⁰⁰ It asserted the right of all members of the University to examine, question, investigate, speculate and comment on any issue referenced to prescribed doctrine as well as the right to criticise the University and society at large. It went on to say however that the purpose of the University depended upon an environment of tolerance and mutual respect and that every member should be able to work, live, teach and learn in a university free from discrimination and harassment. Limits to the right of free speech were acknowledged. While no member of the University should use language or indulge in behaviour intended to demean others on the basis of various attributes, the values of mutual respect and civility may, on occasion, be superseded by the need to protect lawful freedom of speech. However, members of the University should not weigh lightly the shock, hurt, anger or even the silencing effect that may be caused by the use of such speech. It is the 'silencing effect' of some speech which informs some approaches to

¹⁹⁸ Mackinnon (n 1) ix.

¹⁹⁹ Ibid 37.

²⁰⁰ University of Toronto Governing Council, 'Statement on Free Speech', *University of Toronto* (Statement, 28 May 1992) <<http://www.governingcouncil.utoronto.ca/Assets/Governing+Council+Digital+Assets/Policies/PDF/pmay281992.pdf>>.

the protection of particular groups of students under diversity and inclusion policies. This is a theme of discussion generally of the interaction between freedom of speech and diversion and inclusion policies.

In the Toronto Statement, the right to free speech was said to be complemented by the right to freedom of association. It extended to individuals cooperating in groups. All members have the freedom to communicate in any reasonable way and to make reasonable use of university facilities in accordance with its policies and subject to the University's rights and responsibilities.

6.2 *The Universities Canada Statement 2011*

In 2011, the organisation of Canadian Universities, Universities Canada, issued a statement on academic freedom. That statement defined academic freedom as 'the freedom to teach and conduct research in an academic environment'.²⁰¹ It included the right to freely communicate knowledge and the results of research and scholarship. Unlike the broader concept of freedom of speech, it was said to be based on institutional integrity, rigorous standards for inquiry and institutional autonomy which allows universities to set their research and educational priorities.

The Statement described academic freedom as constrained by the professional standards of the relevant discipline and the responsibility of the institution to organise its academic mission. The insistence on professional standards was said to speak to the rigour of the inquiry and not to its outcome. University leadership was said to have a responsibility for ensuring that funding and other partnerships did not interfere with autonomy in deciding what was studied and how. University Presidents had to play a leadership role when communicating the values around academic freedom to internal and external stakeholders. Universities were also to ensure that the rights and freedoms of others were respected and that academic freedom would be exercised in a reasonable and responsible manner.²⁰² That statement was evidently criticised by the Canadian Association of University Teachers (CAUT) for its silence on extra-mural expression and the freedom to criticise a university.²⁰³

²⁰¹ Universities Canada, 'Statement on Academic Freedom', (Media News, 25 October 2011) <<https://www.univcan.ca/media-room/media-releases/statement-on-academic-freedom/>>.

²⁰² Ibid.

²⁰³ Shannon Dea, 'A Brief History of Academic Freedom', *University Affairs* (Online News Article, 9 October 2018).

6.3 *Academic freedom of intra-mural criticism — Saskatchewan*

One aspect of academic freedom which has not received great prominence in the Australian debate, is the freedom of academic staff to publicly criticise the policies or performance of the institution's administration and governors. The extent of that aspect of academic freedom can engender dispute when the internal critic holds an academic appointment and also has senior administrative responsibilities. Examples abound.

The University of Saskatchewan was the centre of such a controversy in May 2014. The University dismissed a professor who was the Executive Director of the School of Public Health after he complained publicly about resourcing cuts connected to an overhaul of the university entitled 'Transform US'. In his letter of termination, signed by the Provost of the University he was told:

In publicly challenging the direction given to you by both the president of the university and the provost, you have demonstrated egregious conduct and insubordination and have destroyed your relationship with the senior leadership team of the university.²⁰⁴

Following public criticism of the decision, the professor was reinstated to his academic position the day after his dismissal, but not to his administrative office. The University Board then decided to terminate without cause the appointment of the University President, who subsequently instituted wrongful dismissal proceedings against the University and its governors.²⁰⁵

A division of opinion between administrators and academics over the extent of freedom of expression as an aspect of academic freedom, when it comes to intra-mural criticism by academics holding administrative roles, was on display in an opinion piece, written after the Saskatchewan incident, by the President and the Vice-chancellor of the

<<https://www.universityaffairs.ca/opinion/dispatches-academic-freedom/a-brief-history-of-academic-freedom/>>.

²⁰⁴ 'It's an Embarrassment: University of Saskatchewan Slammed for "Outrageous" firing of professor who spoke against cuts', *National Post* (Online News Article, 15 May 2014) <<https://nationalpost.com/news/canada/its-an-embarrassment-university-of-saskatchewan-slammed-for-outrageous-firing-of-professor-who-spoke-out-against-cuts>>.

²⁰⁵ 'Buckingham, Busch-Vishniac say goodbye to University of Saskatchewan', *CBC* (Online News Article, 4 July 2015) <<https://www.cbc.ca/news/canada/saskatoon/buckingham-busch-vishniac-say-goodbye-to-university-of-saskatchewan-1.3138660>>.

University of Alberta.²⁰⁶ The President distinguished freedom of speech and academic freedom, and said of the latter ‘[a]cademic freedom must be based on rigorous enquiry and reasoned discourse. And it comes with responsibilities.’²⁰⁷ In the context of administrative decisions, faculty and those in leadership positions should debate issues and question directions — up to a point. She added:

But to suggest that deans be permitted to publicly condemn the decisions of the senior leadership or board at all times after a decision has been arrived at is folly. This is no different to decision making principles in a cabinet. No organization can advance without these principles.²⁰⁸

The Saskatchewan case is not unique.

6.3 *Ontario Policy 2018–2019*

A conservative government intervention recently occurred in Ontario when the government of the Province announced a policy on 30 August 2018 requiring colleges and universities in the Province, by 1 January 2019, to develop free speech policies meeting ‘a minimum standard prescribed by the Government’ and to implement and comply with those policies.²⁰⁹

The Provincial Government’s announcement stated that each institutional policy must apply to faculty, students, staff, management and guests and must include the following elements:

- A definition of freedom of speech[.]
- Principles based on the University of Chicago Statement on Principles of Free Expression ...

²⁰⁶ Indira Samarsekera, ‘When universities make choices, deans must fall in line’, *The Globe and Mail* (Online News Article, first published 28 May 2014, updated 12 May 2018) <<https://univcan.ca/media-room/medi-release/when-universities-make-choices-deans-must-fall-in-line/article18880531>>.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ Office of the Premier, ‘Upholding Free Speech on Ontario’s University and College Campuses’, News, 30 April 2018.

- That existing student discipline measures apply to students whose actions are contrary to the policy (eg, ongoing disruptive protesting that significantly interferes with the ability of an event to proceed).
- That institutions consider official student groups' compliance with the policy as a condition for ongoing financial support or recognition, and encourage student unions to adopt policies that align with the free speech policy.
- That the college/university uses the existing mechanisms to handle complaints and ensure compliance. Complaints against an institution that remain unresolved may be referred to the Ontario Ombudsman.²¹⁰

Each institution was required by the policy, from September 2019, to prepare an annual report on the 'implementation progress and a summary of its compliance'.²¹¹ The report is to be published online and submitted to the Higher Education Quality Council of Ontario (HEQCO). The relevant government ministry will direct HEQCO to undertake research on campus free speech and to monitor and evaluate system-level progress on the policy. It will receive, review and assess each institution's annual report and will provide advice to the Minister. Institutions which fail to comply with the government requirement to introduce and report on free speech policies or to follow their own policies once implemented, may be faced with ministerial reductions to their operating grant funding proportional to the severity of non-compliance.

The CAUT condemned what it called 'unprecedented interference with institutional autonomy' and 'a solution in search of a problem'.

In response to the government policy, the 24 colleges of the Province adopted a single free-speech policy to apply at each of their campuses. The joint policy was written by a committee of a dozen college administrators and a student representative. Complaints were made that there was no input from academic staff.²¹²

The Policy Statement adopted by the Canadian colleges was based on the Chicago Principles. It defines freedom of expression as the right to speak, listen, challenge and learn and asserts that it must be protected as essential to discovery, critical assessment and the

²¹⁰ Ibid.

²¹¹ Ibid.

²¹² Joe Friesen, 'Ontario Colleges Adopt Single Free-speech Policy as Universities Rush to Meet Deadline', *The Globe and Mail* (Online News Article, 16 December 2018) <<http://www.theglobeandmail.com/canada/article-ontario-universities-scramble-to-release-common-free-speech-policy/>>.

effective dissemination of knowledge and ideas because it leads to social and economic advancement. It states that colleges must allow for open discussion and free inquiry where diverse voices can be heard and ideas and viewpoints explored and discussed freely and debated openly without fear of reprisal even if considered to be controversial or to conflict with views of some members of the college community. Civility is greatly valued and all members share responsibility for maintaining a climate of mutual respect. Nevertheless, according to the policy, it is not the role of colleges to shield members of their communities from ideas and opinions that they may find disagreeable or offensive. It is for individuals and not colleges to make such judgments for themselves and to debate and challenge ideas that they find unacceptable. The rights of people to express or hear ideas must be respected. Colleges may reasonably regulate the time, place and manner of freedom of expression to ensure that it does not disrupt normal college operations and ordinary college activities or endanger the safety of others. The Policy Statement is said to be ‘aligned with other college policies, all of which shall be read in harmony’. The universities have also now adopted free speech policies within the deadline.²¹³

While the Ontario approach left the content of the relevant policies to the institutions to determine, acting individually or collectively, it was a rather abrupt and heavy-handed approach. That kind of approach is not necessary or appropriate in Australia. It sets an undesirable precedent for executive intrusion into the governance of the sector generally.

²¹³ Kristin Rushowy, ‘Free speech policies now in effect at Ontario’s colleges and universities’, *Hamilton Spectator* (Online News Article, 7 January 2019) <<http://www.thespec.com/news-story/9111276-free-speech-policies-now-in-effect-at-ontario-s-colleges-and-universities/>>.

7 New Zealand

7.1 *Legislative provisions*

Part 14 of the *Education Act 1989* (NZ) is entitled ‘Establishment and disestablishment of tertiary institutions’. Section 160 of the Act appearing in that Part sets out its object:

The object of the provisions of this Act relating to institutions is to give them as much independence and freedom to make academic, operational, and management decisions as is consistent with the nature of the services they provide, the efficient use of national resources, the national interest, and the demands of accountability.

Section 161 declares it to be the intention of Parliament, in enacting the provisions of the Act relating to institutions, ‘that academic freedom and the autonomy of institutions are to be preserved and enhanced’. The term ‘academic freedom’ is defined in s 161(2) as:

For the purposes of this section, **academic freedom**, in relation to an institution, means—

- (a) the freedom of academic staff and students, within the law, to question and test received wisdom, to put forward new ideas and to state controversial or unpopular opinions:
- (b) the freedom of academic staff and students to engage in research:
- (c) the freedom of the institution and its staff to regulate the subject matter of courses taught at the institution:
- (d) the freedom of the institution and its staff to teach and assess students in the manner they consider best promotes learning:
- (e) the freedom of the institution through its chief executive to appoint its own staff.

Institutions are required by s 161(3) to act in a manner consistent with:

- (a) the need for the maintenance by institutions of the highest ethical standards and the need to permit public scrutiny to ensure the maintenance of those standards; and
- (b) the need for accountability by institutions and the proper use by institutions of resources allocated to them.

Sections 160 and 161 are, on the face of it, strong statements of academic freedom in New Zealand, including recognition of institutional autonomy as an element of that freedom. There has been some litigation in New Zealand which has touched on the concept of academic freedom in the statute but not so as to have direct application to this Review.²¹⁴

7.2 *Concerns about freedom of speech*

There has been recent debate about freedom of speech in New Zealand universities, which would be familiar to Australian ears. In 2017, 27 prominent New Zealanders signed an open letter expressing concern about freedom of speech in New Zealand universities. In that letter they said:

Governments and particular groups will from time to time seek to restrict freedom of speech in the name of safety or special interest. However, debate or deliberation must not be suppressed because the ideas put forth are thought by some or even by most people to be offensive, unwise, immoral or wrongheaded.

Universities play a fundamental role in the thought leadership of a society. They, of all places, should be institutions where robust debate and the free exchange of ideas take place, not the forceful silencing of dissenting or unpopular views.

Focus was given to the debate following the cancellation by Massey University of a booking made by a student politics club for a speech to be delivered by a former politician and National Party leader, Don Brash. According to a statement issued by the University on 7 August 2018, the event was cancelled for security reasons after members of the student club had approached the University administration because of social media posts suggesting that the event could lead to violence. There was considerable public criticism of the decision.

²¹⁴ For a review of the interaction between academic freedom and the law in New Zealand see Jeremy Upton, 'Academic Freedom and the Law' (2008) 16 *Waikato Law Review* 324.

In a press release the University said that it had considered providing additional security for the event but decided the risk of harm to students, staff and members of the public was far greater. The controversy about the event appears to have centred around views that Mr Brash and supporters had expressed in relation to Maori wards on councils.²¹⁵ In the event, Mr Brash delivered his address to the student club on 17 October 2018 at the University's Manawatū campus.²¹⁶ Subsequently the University instigated an internal review of the event by a former Deputy State Services Commissioner.

7.3 *University charters*

By way of example of institutional policy in New Zealand, the University of Auckland has a student charter said to outline the roles and responsibilities of staff and students. It has little to say about freedom of expression except to identify as responsibilities of students:

- 4.1 Act at all times in a way that demonstrates respect for the rights of other students and staff so that the learning environment is both safe and productive.
- ...
- 4.6 Show commitment to the ideals of a university with special reference to achieving personal excellence in performance and allowing freedom of expression.²¹⁷

The University of Otago also has a student charter, the purpose of which is 'to affirm and restate in accessible form the principles behind the existing policies of the University'.²¹⁸ It sets out a list of 'student rights', none of which refers to freedom of expression. There is

²¹⁵ 'Brash talk to student club cancelled due to security concerns', *Massey University* (Online News Article, 7 August 2018)

<http://www.massey.ac.nz/massey/about-massey/news/article.cfm?mnarticle_uuid=B3E11F9F-2C2C-4E9B-A0AD-352E72A76BB6>.

²¹⁶ New Zealand Herald, 'Brash to speak at Massey Uni following free speech saga', *NewstalkZB* (Online News Article, 17 October 2018)

<<https://www.newstalkzb.co.nz/news/national/don-brash-to-speak-at-massey-university-months-after-he-was-banned-from-delivering-it/>>.

²¹⁷ 'Student Charter', *The University of Auckland* (Charter)

<<https://www.auckland.ac.nz/en/students/forms-policies-and-guidelines/student-policies-and-guidelines/student-charter.html>>.

²¹⁸ 'Student Charter', *University of Otago* (Charter) <<https://www.otago.ac.nz/about/otago005275.html>>.

also a list of responsibilities, including to ‘promote an environment which is safe and free from harassment and discrimination.’²¹⁹

The University of Canterbury has a policy on academic freedom which ‘sets out the University position on the academic freedom of academic staff and students when expressing their opinions’.²²⁰ The policy defines academic freedom in the same terms as s 161(2) of the *Education Act 1989* (NZ). The policy relevantly provides:

The purpose of this policy is to recognise the centrality of individual and institutional academic freedom to the betterment of society through the advancement of knowledge; to ensure that the exercise of academic freedom is a routine experience of scholarship and communication, so that it is exercised without fear of discrimination or disadvantage of any kind, and it is preserved and enhanced.

The University values its obligation and role as a critic and conscience of society and supports and encourages academic staff and students to responsibly practise the tenets of academic freedom of expression as central to the proper conduct of teaching, administration, research and scholarship. Implicit within this role is the freedom of academic staff and students to critique ideas both within and beyond the University itself.

The University values its autonomy, ‘the institutional form of academic freedom’ through which it guarantees fulfilment of the functions of academic staff and students. Academic freedom of expression is core to the University’s obligation to be the critic and conscience of society because academic freedom can only exist within an environment that encourages creativity, radical ideas and criticism of the status quo, and freedom is needed to express criticism.²²¹

The policy requires that expression must be ‘undertaken reasonably’ and ‘in good faith’.²²² It provides that staff and students may hold views and express them freely on all topics, ‘even outside their expertise whilst identifying themselves as members of the University’ so long as they consider whether it is reasonable, in the circumstances, to link their comments to their association with the University.²²³ The policy also expressly provides that ‘[a]cademic staff

²¹⁹ Ibid.

²²⁰ ‘Critic and Conscience of Society and Academic Freedom Principles and Policy’, *University of Canterbury* (University Policy, September 2018) 1
<<https://www.canterbury.ac.nz/media/uc-policy-library/general/Critic-&-Conscience-of-Society-and-Academic-Freedom-Principles-and-Policy.pdf>>.

²²¹ Ibid 2(footnotes omitted).

²²² Ibid.

²²³ Ibid 3.

and students have the liberty to speak freely, including on policies affecting higher education, and to criticise the University and its actions.’²²⁴

8 The United States

8.1 *Academic freedom and freedom of speech*

Debate about freedom of speech in universities and academic freedom has a long history in the United States. Professors at United States universities in the 19th century had no real protection against summary dismissal by the President of the university who might be influenced by the governing body or trustees. Gradually, however, as explained by Eric Barendt in his book *Academic Freedom and the Law*²²⁵ the professors asserted greater freedom from university trustees. Academic appointments and promotions had to be the province of scientifically competent academics. A general concept of academic freedom informed this development. Perhaps also informed by the First Amendment, it extended to ‘a qualified freedom of extra-mural speech ...’.

The American Association of University Professors (AAUP) was established in 1915. It published a Declaration on Principles of Academic Freedom and Tenure (Declaration) in that year. In that Declaration it defined academic freedom as having three elements:

- freedom of inquiry and research;
- freedom of teaching within the university or college; and
- freedom of extra-mural utterance and action.²²⁶

The third element was said to have more frequently been the occasion of controversy than the freedom of teaching. Committees of the AAUP had investigated five cases which involved the right of university teachers to express their opinions freely outside the university or to engage in political activities in their capacity as citizens. The AAUP took the view that general principles to do with freedom of teaching within the university were also applicable to freedom of extra-mural speech subject to certain qualifications and supplementary considerations.

The importance of academic freedom was to be seen in the light of the purposes for which universities exist, which were defined as:

²²⁵ Eric Barendt, *Academic Freedom and the Law* (Hart Publishing, 2010) 165.

²²⁶ The American Association of University Professors, ‘AAUP’s 1915 Declaration of Principles’ (Declaration, 31 December 1915)
<http://www.aaup-ui.org/Documents?Principles/Gen_Dec_Princ.pdf>.

- A. To promote inquiry and advance the sum of human knowledge.
- B. To provide general instruction to the students.
- C. To develop experts for various branches of the public service.²²⁷

The Declaration asserted, in relation to the second proposition, that freedom of utterance was as important to the teacher as to the investigator. Nobody could be a successful teacher unless respected by the students and attracting their confidence in the teacher's intellectual integrity.

The Declaration stated that, in the early period of university development in America, the threat to academic freedom was ecclesiastical and the disciplines mainly affected were philosophy and the natural sciences. The danger zone had moved to the political and social sciences. It was there that academic freedom was most likely to be threatened and the need for it most evident. The AAUP identified as a serious difficulty the existence in a democracy of an overwhelming and concentrated public opinion — a tyranny of public opinion.

Academic freedom, it was acknowledged, attracted corresponding duties. Freedom of teaching could only justly be asserted by those who carried on their work in the temper of the scientific inquirer. The liberty of scholars to set forth their conclusions was conditioned by them being conclusions gained by scholarly method and held in a scholar's spirit — the fruits of competent and patient and sincere inquiry. They were to be set forth with dignity, courtesy and temperance of language. The teacher was not to provide students with ready-made conclusions but to train them to think for themselves and to provide them access to those materials which they needed if they were to think intelligently. The point was made that the classroom utterances of university and college teachers ought to be considered privileged communications and not for the public at large. They were often designed to provoke opposition or arouse debate. Sometimes sensational newspapers had quoted and garbled such remarks. It is not suggested here that any such privilege should apply or could be applied in the contemporary world of online lectures and digital lecture capture.

²²⁷

Ibid.

Academic teachers were said to be under a peculiar obligation, in their extra-mural utterances, to avoid hasty or unverified or exaggerated statements and to refrain from intemperate or sensational modes of expression. However, their freedom of speech outside the university was not to be limited to questions falling within their own specialties. A college professor could not be deprived of the political rights given to every citizen.

A key criticism of the Declaration was that it failed to confront the question of what constituted extra-mural utterances. It neglected a key threat to academic freedom. In the event, it has been said that the Declaration has become an extraordinary object of affection for conservatives.²²⁸ Barendt contends that the 1915 Declaration reflected the views of an elite group of professors and was not supported by the universities themselves.

In 1940, following an agreement reached with the Association of American Colleges, a new Statement of Principles on Academic Freedom and Tenure was published by the AAUP and, according to Barendt, set the standard for professional freedom in the 70 years to follow.²²⁹ The relevant principles set out in the 1940 Statement were as follows:

- (a) Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties ...
- (b) Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject ...
- (c) College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations ... Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.²³⁰

²²⁸ See John K Wilson, 'AAUP's 1915 Declaration of Principles: Conservative and Radical, Visionary and Myopic' (2016) 7 *AAUP Journal of Academic Freedom* 1–12.

²²⁹ Barendt (n 225) 168 referring also to W P Metzger, 'The 1940 Statement of Principles on Academic Freedom and Tenure' (1990) 53 *Law and Contemporary Problems* 3.

²³⁰ The Principles are set out in M Finkin and R Post, *For the Common Good: Principles of American Academic Freedom* (New Haven, Yale University Press, 2009) Appendix 1.

An interpretive Comment issued in 1970 stated that a faculty member's expression of opinion as a citizen should not amount to a ground for dismissal unless it clearly showed unfitness for his or her position.²³¹

The Declaration has been endorsed by many educational associations and incorporated into faculty handbooks. Its principles in relation to academic freedom and tenure frequently appear in faculty members' contracts.²³² Barendt says that it created a culture of respect for academic freedom within universities although in recent years some State legislatures have introduced Bills to require that teaching be 'balanced' and student beliefs respected. As he argues:

If implemented, these proposals would clearly infringe the freedom of professors to teach their subjects according to the appropriate professional standards and to challenge their students with new and controversial ideas.²³³

The Declaration evidences the potential benefit of a common set of principles — deriving both authority and durability from the agreement which underpins it.

8.2 *Academic freedom and scholarly standards*

It is a truism that university staff and students should not be less free than anyone else in exercising their freedom of speech. Nor should they be more free. There is however a distinction between the general freedom and the academic freedom constrained by scholarly standards. Barendt makes an important point in that respect:

professors, like other citizens, have free speech rights to say what they like, subject only to the limits imposed by the general laws of incitement, libel and so on. But academic freedom confers a right to teach and publish on the basis of the standards that have been accepted by the profession and are applied through the processes of peer review and quality assessment m... extra-mural expression were regarded as an aspect of academic freedom, its dissemination might be held to the same standards.²³⁴

²³¹ Barendt (n 225) 168.

²³² Ibid 172.

²³³ Ibid 173.

²³⁴ Ibid 275–6.

That is to say the two freedoms should not be conflated for the standards attached to the exercise of academic freedom might constrain the exercise of the general freedom

8.3 *A debate with ideological dimensions*

There is an immense literature on these topics in the United States involving debate about university rules and principles, speech codes, discipline statutes, safe spaces, no platforming, trigger warnings and the like. Some of that debate is characterised as an aspect of ongoing conflict between ‘conservative’ and ‘liberal’ world views. Some academic writers see the concern about freedom of speech as part of a strategic push by the ‘conservative right’ to undermine diversity initiatives on college and university campuses.²³⁵ One writer in the most recent Part of the *AAUP Journal of Academic Freedom*, contends that there is a war on free speech in the United States within and without the university and that the seeming promotion of free speech is a way to silence it and the discourses of marginalised groups. The writer asserts that by designating classrooms as ‘safe spaces’, especially in diverse urban university settings, academics are actually preserving their students’ free speech as well as their own academic freedom.²³⁶ That is a rather elusive proposition which would seem to meet broadly based constraints on both freedoms.

There is no doubt that there is a ‘left/right’ strand in the debate in the United States and, to a lesser extent, in Australia. It would be simplistic, however, in analysing the arguments, to consign them to ideological siloes. That would ignore the fact that although there is no ‘crisis of free speech’ there is an issue of principle and policy which is a matter of public concern and should properly be addressed by the sector in as clear and comprehensive and authoritative way as it can.

8.4 *Legislative measures*

In some States of the United States controversy about free speech at universities has led to legislative controls. Utah has enacted a *Campus Individual Rights Act*.²³⁷ That Act relevantly provides:

²³⁵ Reshmi Dutt-Ballerstadt, ‘When Free Speech Disrupts Diversity Initiatives: What We Value and What We do Not’ (2018) 9 *AAUP Journal of Academic Freedom* 1–19, 1.

²³⁶ Jamie Weida, ‘Free Speech, Safe Spaces, and Teaching in the Current US Political Climate’ (2018) 9 *AAUP Journal of Academic Freedom* 1–13.

²³⁷ House Bill 54, 2017 General Session (Utah 2017).

53B-27-203 Expressive activities at an institution.

- (1) An outdoor area of an institution's campus is a traditional public forum.
- (2) An institution may maintain and enforce reasonable time, place, or manner restrictions on an expressive activity in an outdoor area of the institution's campus, if the restrictions:
 - (a) are narrowly tailored to serve a significant institutional interest;
 - (b) are based on published, content-neutral, and viewpoint-neutral criteria; and
 - (c) leave open ample alternative channels for communication.
- (3) Subject to Subsection (2), an institution may not prohibit:
 - (a) a member of the institution's community or the public from spontaneously and contemporaneously assembling in an outdoor area of the institution's campus; or
 - (b) a person from freely engaging in noncommercial expressive activity in an outdoor area of the institution's campus if the person's conduct is lawful.
- (4) This part does not apply to expressive activity in an area on an institution's campus other than an outdoor area.

There is a *Campus Free Expression Act* in Missouri, framed in similar terms to the Utah legislation. It also creates a cause of action for violation for freedom of expression at the university.

In Tennessee, s 6 of the *Campus Free Speech Protection Act*²³⁸ requires the governing body of each university to adopt a policy that affirms 17 principles of free speech that are set out in the section. The text of the provision is very detailed. It includes an affirmation of students' fundamental constitutional right to free speech. It would preclude the suppression of free exchange of ideas because ideas put forth are thought by some or even most members of the institution's community to be 'offensive, unwise, immoral, indecent, disagreeable, liberal, traditional, radical, or wrong-headed'. It states that it is not the proper role of an institution to attempt to shield individuals from free speech, including ideas and opinions of that character. Civility and mutual respect should never be used as a justification for closing off discussion of ideas. The principles also include a requirement that the institution not charge students security fees based on the content of their speech or that of guest speakers invited by them or the anticipated reaction or opposition of listeners to speech. Students and all faculty members are to be allowed to invite guest speakers to campus to engage in free

²³⁸ Senate Bill 723 (Tennessee, 2017).

speech regardless of the views of the guest speakers. Finally, an institution shall not disinvite a speaker invited by a student, student organisation or faculty member because the speaker's anticipated speech may fall into any of the objectionable categories referred to earlier. On the other hand, the Act does not require an institution to fund costs associated with student speech or expression.

Legislation similar to that in Utah, Missouri and Tennessee has been enacted in Arizona, California, Colorado, North Carolina, Virginia and Wisconsin. The legislation has been promoted by a body called 'The Goldwater Institute'. The AAUP issued a report in April 2018 by way of response to the Goldwater Institute's campaign. It identified States in which such legislation had been introduced or enacted and discussed the legislation in each State. The AAUP concluded that campus free speech laws and academic freedom are 'false friends' and that a political agenda is masquerading behind the 'free speech' campaign. Model Bills were said to exhibit a preference for punishment. It called on faculty members to dispel myths and challenge facile solutions.

Many American universities have adopted statements of principle and policies in relation to academic freedom and freedom of expression and have done so without legislative prodding. It is appropriate to mention some of those statements.

8.5(i) *Harvard University*

Harvard University has a University-wide Statement of Rights and Responsibilities describing itself as a community ideally characterised by free expression, free inquiry, intellectual honesty, respect for the dignity of others and openness to constructive change. Harvard first adopted the Statement on an interim basis on 20 September 1970, before it was finally adopted in May 1977. It was revised in February 2002.

The Statement refers to values essential to the University's nature as an academic community including freedom of speech and academic freedom. Interference with any of the freedoms must be regarded as a serious violation of the personal rights upon which the community is based. The Statement provides that it is the responsibility of all members of

the academic community to maintain ‘an atmosphere in which violations of rights are unlikely to occur and to develop processes by which these rights are fully assured’.²³⁹

The Statement notes that failure to meet the values and responsibilities it prescribes ‘may be profoundly damaging to the life of the University’.²⁴⁰

It is said to be implicit in the language of the Statement that intense personal harassment of such a character as to amount to grave disrespect for the dignity of others should be regarded as an unacceptable violation of the personal rights on which the University is based.

Preservation of the values and responsibilities identified in Harvard’s Statement is said to be the objective of the University’s specific policies and procedures.

8.5(ii) *Stanford University*

Stanford University has a policy relating to events requiring security or extraordinary resources.²⁴¹ The University welcomes events that provide for the free exchange of ideas and knowledge in support of its mission. It also has an institutional interest in ensuring that such events are able to be held successfully while not affecting the daily business functions of the University overall, compromising the safety of its community, resulting in burdensome financial obligations or having other impacts that may interfere with the ability of the University to accomplish its research and teaching mission.

All events on Stanford property must have an on-campus Stanford affiliated event sponsor actively involved in the planning, management and content of the event. Events that may require security or otherwise involve extraordinary use of campus resources include visits by recognisable or well-known celebrity speakers, events attended by large crowds or that may draw significant attention from the news media. Events with a potential for disruption or with a demonstrated history of harm to persons or property also fall within the policy.

²³⁹ ‘University-Wide Statement on Rights and Responsibilities’, *Harvard University* (Statement, January–February 2002) <<https://parovost.harvard.edu/university-wide-statement-rights-and-responsibilities>>.

²⁴⁰ Ibid.

²⁴¹ Office of Special Events and Protocol, ‘Events Requiring Security or Extraordinary Resources’, *Stanford University* (Policy, 2017) <<https://osep.stanford.edu/sites/g/files/sbiybj1691/f/events-requiring-security-extra-resouces.pdf>>.

The policy states that an event request may be denied if the Stanford event sponsor cannot confirm all the funds required to meet estimated security costs. These may of course come from within the University. Thus sponsoring academic departments, schools and units are responsible for underwriting all costs associated with events including the costs of security. Recognised student organisations are responsible for the full cost of their events. All sponsors of events requiring security must confirm the ability to fund the events and to provide 50% of costs in advance before extending or accepting an invitation publicising or confirming an event.

The distinction between external speakers sponsored by elements of the University and external speakers sponsored by non-University bodies seeking the use of University facilities is appropriate and capable of application by Australian higher education providers.

8.5(iii) *New York University*

New York University (NYU) has published a set of guidelines regarding protests and dissent which have been in place since 1991.²⁴² The University says that is committed to maintaining an environment where open vigorous debate and speech can occur. That commitment entails encouraging and assisting university organisations that want to sponsor speakers as well as informing members of the university community who seek guidance concerning forms of protest against speakers. It may involve the University paying for extraordinary security measures in connection with a controversial speaker.

Under the heading ‘Dissent/Protest’ the NYU guidelines acknowledge the right to dissent as the complement of the right to speak. It does not mean they must be exercised concurrently and in the same forum. A speaker is entitled to communicate her or his message to the audience during the allotted time and the audience is entitled to hear the message and see the speaker during that time. Acceptable dissent includes picketing, silent or symbolic protest and responding vocally to a speaker spontaneously and temporarily. However, chanting or making sustained or repeated noise in a manner which substantially interferes with a speaker’s communication is not permitted. Neither is the use or threat of force or violence such as defacing a sign or assaulting a speaker or a member of the audience. The University strongly encourages sponsoring organisations to arrange with their speakers a reasonable opportunity for a question and answer period.

²⁴² ‘Guidelines Regarding Protest and Dissent’, *New York University* (Guidelines, 2 May 1991) <https://www.nyu.edu/content/dam/nyu/compliance/documents/protest_dissent.pdf>.

The policy provides that where security measures are required the University will fund those measures which may include bag searches, checking of coats and video-taping, audio-taping and/or photographing the event with prior notice to the audience. Where a meeting is closed the sponsoring organisation is ordinarily to be responsible for planning, obtaining and funding its own security. Any provision for the use of force as a security measure must be planned with the participation of the University Department of Public Safety.

8.5(iv) *Yale University*

Yale University has formally endorsed as an official policy a statement from a report of the Committee on Freedom of Expression at Yale originally published in January 1975.²⁴³ It begins with the observation that the primary function of the University is to discover and disseminate knowledge by means of research and teaching. To fulfil that function a free interchange of ideas is necessary not only within the walls of the University but with the world beyond as well. The statement says:

It follows that the university must do everything possible to ensure within it the fullest degree of intellectual freedom. The history of intellectual growth and discovery clearly demonstrates the need for unfettered freedom, the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable. To curtail free expression strikes twice at intellectual freedom, for whoever deprives another of the right to state unpopular views necessarily also deprives others of the right to listen to those views.²⁴⁴

Those who voluntarily take up membership in a university and thereby assert a claim to its rights and privileges also acknowledge the existence of obligations upon themselves and their fellows. The University states:

Above all, every member of the university has an obligation to permit free expression in the university. No member has a right to prevent such expression.

²⁴³ Committee on Freedom of Expression at Yale, 'Report of the Committee on Freedom of Expression at Yale', *Yale College* (Report, 23 December 1974)
<<https://yalecollege.yale.edu/deans-office/reports/report-committee-freedom-expression-yale#Report%20of%20the%20Committee>>

²⁴⁴ Ibid.

Every official of the university, moreover, has a special obligation to foster free expression and to ensure that it is not obstructed.²⁴⁵

The statement refers to ethical responsibilities in the exercise of freedom of expression. If the exercise of the freedom is to serve its purpose and thus the purpose of the University it should seek to enhance understanding:

Shock, hurt, anger are not consequences to be weighed lightly. No member of the community with a decent respect for others should use, or encourage others to use, slurs and epithets intended to discredit another's race, ethnic group, religion, or sex. It may sometimes be necessary in a university for civility and mutual respect to be superseded by the need to guarantee free expression. The values superseded are nevertheless important, and every member of the university community should consider them in exercising the fundamental right to free expression.²⁴⁶

The statement nevertheless treats the right to free expression as paramount:

even when some members of the university community fail to meet their social and ethical responsibilities, the paramount obligation of the university is to protect their right to free expression. This obligation can and should be enforced by appropriate formal sanctions. If the university's overriding commitment to free expression is to be sustained, secondary social and ethical responsibilities must be left to the informal processes of suasion, example, and argument.²⁴⁷

The Yale statement concludes by observing that the campus is open to any speaker whom students or members of the faculty have invited and for whom official arrangements to speak have been made with the university. However the right to free expression also includes the right to peaceful dissent, protests in peaceable assembly and orderly demonstrations which may include picketing and the distribution of leaflets. Such protests are permitted on the Yale campus, subject to approval as to schedule and location by the appropriate university official until or unless they disrupt regular or essential operations of the University or

²⁴⁵ Ibid.

²⁴⁶ Ibid.

²⁴⁷ Ibid.

significantly infringe upon the rights of others, particularly the right to listen to a speech or lecture.

8.5(v) *Chicago and Princeton*

Reference has been made in discussion in Australia to the desirability of Australian universities adopting policies based upon the University of Chicago's Statement of Principles of Free Expression. The background and content of the Statement are set out below.

In 2012, Professor Geoffrey Stone, a First Amendment scholar and Edward H Levi Distinguished Service Professor of Law at the University of Chicago, drafted a statement of its aspirations. The statement referred to an event 80 years earlier in which a student organisation at the University had invited to the campus William Foster, the Communist Party candidate for President of the United States. The invitation elicited much protest from critics on and off the campus. The President of the University at the time, Robert Hutchins, said in answer to the critics that the students should have freedom to discuss any problem that presented itself. He said that the 'cure' for ideas we oppose 'lies through open discussion'. He later stated that 'free inquiry is indispensable to the good life, that universities exist for the sake of such inquiry, [and] that without it they cease to be universities'.²⁴⁸

Professor Stone described Hutchins' response to the Foster incident as capturing the spirit and promise of the University of Chicago. The University guarantees to all the members of its community the broadest possible latitude to speak, write, listen, challenge and learn. Stone acknowledged that the freedom is not absolute. He said:

In narrowly-defined circumstances, the university may properly restrict expression, for example it violates the law, is threatening, harassing or defamatory, or invades substantial privacy or confidentiality interests. Moreover, the university may reasonably regulate the time, place and manner of expression to ensure that it does not disrupt the ordinary activities of the university.²⁴⁹

Central to his statement was the following proposition:

²⁴⁸ Stone et al, Report of the Committee on Freedom of Expression (2014) *University of Chicago* <<https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf>>.

²⁴⁹ Geoffrey Stone, Statement on Principles of Free Inquiry (July 2012) *University of Chicago* <<https://cpb-us-w2.wpmuchdn.com/voices.uchicago.edu/dist/3/337/files/2019/01/Statement-on-principles-of-free-inquiry-by-Prof.-Geoffrey-Stone-University-of-Chicago-News-1fljp61.pdf>>.

Fundamentally, however, the university is committed to the principle that it may not restrict debate or deliberation because the ideas put forth are thought to be offensive, unwise, immoral or wrong-headed. It is for the members of the university community to make those judgments for itself.²⁵⁰

The proper response for members of the University community as for the University itself, to ideas they found offensive, unwarranted and dangerous was not interference, obstruction or suppression. It was instead robust counter-speech challenging the merits of those ideas and exposing them for what they are. The University had a solemn response not only to promote lively and fearless freedom of debate and deliberation, but to protect it when others attempted to restrict it.

In July 2014, a Committee on Freedom of Expression at the University of Chicago was appointed by the University President in response to what were described on the University's website as 'nationwide events' 'that have tested institutional commitments to free and open discourse'. That committee was chaired by Professor Stone and included members from a number of academic disciplines within the University. The Committee reviewed the University's history, examined events at other institutions and consulted individuals 'both inside and outside the University'. The report which it produced, by way of a statement, was admirably brief and was said to reflect the longstanding and distinctive values of the University and to affirm the importance of maintaining and celebrating those values for the future.

The University was able to look back on a long institutional history of commitment to freedom of expression quoting an address by the University President of 1902 declaring that 'the principle of complete freedom of speech on all subjects has from the beginning been regarded as fundamental in the University of Chicago' and that 'this principle can neither now nor at any future time be called in question'. The statement referred to the Foster incident and a later statement by University President Hanna Gray who observed that:

Education should not be intended to make people comfortable, it is meant to make them think. Universities should be expected to provide the conditions within which hard thought, and therefore strong disagreement, independent judgment, and the

²⁵⁰

Ibid.

questioning of stubborn assumptions can flourish in an environment of the greatest freedom.

The 2014 Stone Report essentially took the form of an elaboration of what had appeared in the 2012 statement. It made the point that it is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable or even deeply offensive. While the University valued civility and all members of the University community share responsibility for maintaining a climate of mutual respect, concerns about civility and mutual respect could never be used as a justification for closing off discussion of ideas however offensive or disagreeable they might be to some members of the University community.

The Report made reference, as Professor Stone had in his 2012 statement, to the limitations on freedom of speech, observing that:

The University may restrict expression that violates the law, that falsely defames a specific individual, that constitutes a genuine threat or harassment, that unjustifiably invades substantial privacy or confidentiality interests, or that is otherwise directly incompatible with the functioning of the University. In addition the University may reasonably regulate the time, place and manner of expression to ensure that it does not disrupt the ordinary activities of the University.

These were described as ‘narrow exceptions to the general principle of freedom of expression’. It was said to be vitally important that those exceptions never be used in a manner that is inconsistent with the University’s commitment to a completely free and open discussion of ideas. The statement also made the important point that although members of the University community are free to criticise and contest the views expressed on campus and speakers invited to express their views ‘they may not obstruct or otherwise interfere with the freedom of others to express views they reject or even loathe’.

Consistent with their free speech principles, Chicago University’s Office of LGBTQ Students Life has a ‘Safe Space Program’. It provides space for LGBTQ students in which

they can discuss issues of sexual identity or gender without being made to feel marginalised.²⁵¹

Princeton University has a published statement on freedom of expression, which follows the University of Chicago Principles. It was adopted by faculty at Princeton University at a meeting on 6 April 2015.

For present purposes the Chicago Principles is a useful guide to the form of a model code setting out umbrella principles applicable to individual institutions and potentially across the sector — they assert the paramountcy of freedom of expression and the importance of academic freedom but they also recognises reasonable qualifications.

²⁵¹ University of Chicago Office of LGBTQ Student Life Safe Space (website) cited in John Palfrey *Safe Spaces Brave Spaces: Diversity and Free Expression in Education* (MIT Press, 2017) 374 fn 6.

9 Freedom of Speech — A Paramount Value

Australia has no equivalent to the First Amendment guarantee of freedom of speech under the Constitution of the United States. Its people enjoy common law freedoms. A list of those freedoms was set out in the Report published by the ALRC in 2015 in connection with its Inquiry into Encroachments by Commonwealth Laws on Traditional Rights and Freedoms. They include freedom of speech, religion, association and movement.²⁵² They can be defined tritely by the absence of legal constraints. A distinguished English Judge put it well:

For private persons, the rule is [that] you may do anything you choose which the law does not prohibit. It means that the freedoms of the private citizen are not conditional upon some distinct and affirmative justification for which he must burrow in the law books. Such a notion would be anathema to our English legal traditions.²⁵³

In similar vein, in relation to freedom of speech, the High Court said in *Lange v Australian Broadcasting Corporation*:

Under a legal system based on the common law, ‘everybody is free to do anything subject only to the provisions of the law’, so that one proceeds ‘upon an assumption of freedom of speech’ and turns to the law ‘to discover the established exceptions to it’.²⁵⁴

Freedom of speech has been described, however, as more than a mere freedom, being characterised, even in the common law courts, as a ‘right’. Lord Coleridge spoke in 1891 of the ‘right of free speech’ as ‘one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment so long as no wrongful

²⁵² Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Report 129, December 2015).

²⁵³ *R v Somerset County Council; Ex parte Fewings* [1995] 1 All ER 513, 524 (Sir John Laws).

²⁵⁴ (1997) 189 CLR 520, 564.

act is done'.²⁵⁵ That nomenclature has found its way into international law. Article 19 of the *International Covenant on Civil and Political Rights* provides that 'everyone shall have the right to freedom of expression'.²⁵⁶

Two leading Australian legal academics, Professors Enid Campbell and Harry Whitmore, once described freedom of speech as 'the freedom par excellence; for without it, no other freedom could survive'.²⁵⁷ In the words of Eric Barendt it is 'closely linked to other fundamental freedoms which reflect ... what it is to be human; freedoms of religion, thought and conscience'.²⁵⁸ The ALRC in the Report it published in 2015 accepted that freedom of speech and freedom of expression are integral aspects of a person's right of self-development and fulfilment.

Consistently with that usage, the common law concept of free speech is not to be equated simply with an area of expressive action left open by the law. As Professor T R S Allan put it, in relation to civil and political liberties generally:

The traditional civil and political liberties, like liberty of the person and freedom of speech, have independent and intrinsic weight: their importance justifies an interpretation of both common law and statute which serves to protect them from unwise and ill-considered interference or restriction.²⁵⁹

The weighty value accorded to freedom of speech at common law has been reflected in observations from the High Court over the years, including reference to 'the paramount importance of encouraging and protecting freedom of expression and discussion, especially in relation to matters of public interest'²⁶⁰ and the statement that '[f]reedom of communication,

²⁵⁵ *Bonnard v Perryman* [1891] 2 Ch 269, 284. See also *R v Commissioner of Police of the Metropolis; Ex parte Blackburn (No 2)* [1968] 2 QB 150, 155; *Wheeler v Lester City Council* [1985] AC 1054; *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 220.

²⁵⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(2).

²⁵⁷ E Campbell and H Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 113 quoted in Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Report No 129, December 2015) [4.1].

²⁵⁸ Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2013) quoted in Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Report No 129, December 2015) [4.1].

²⁵⁹ T R S Allan, 'The Common Law as Constitution: Fundamental Rights and First Principles' in C Saunders (ed) *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) 148.

²⁶⁰ *Pervan v North Queensland Newspaper Co Ltd* (1993) 178 CLR 309, 328.

which of course includes freedom of speech, is properly regarded in our society as a fundamental right.’²⁶¹

A similar approach is taken in international human rights law. In 1946 at the first meeting of the General Assembly of the United Nations it was called ‘the touchstone of all human rights’. That approach was reflected in the courts of the United Kingdom. Lord Steyn, in 2000, wrote:

Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stewart Mill), ‘the best test of truth is the power of thought to get itself accepted in the competition of the market ...’ Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country ...²⁶²

The importance attached at common law and international law to freedom of speech does not convert it into a right which can be exercised inconsistently with the rights and freedoms of others. It does not carry with it a right to go on to private land in order to express a particular view. It does not carry with it a right to go on to land when access requires permission, for example by a public authority controlling the land for particular purposes. It does not carry a right to protest against the speech of others by shouting them down or otherwise acting to prevent them from speaking. There are, and always have been, limits.

As appears from the preceding references, freedom of speech at common law and international law serves two important purposes — respect for the dignity and autonomy of individuals and facilitating the flow of information and ideas essential to the functioning of democratic societies. A caution that may be attached to emphasis on those underlying purposes was expressed in relation to human rights generally by Professor Peter Bailey at the

²⁶¹ *Cunliffe v Commonwealth* (1994) 182 CLR 272, 363.

²⁶² *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 126 (citations omitted).

ANU. He pointed out that the basis for the existing lexicon of human rights is essentially derived from western liberal thinking. He observed:

The thinking contains heavy overtones relating to the importance of the individual and the individual's freedom. It does not provide for group rights and it gives little priority to the interests of the community, except as made up of individuals.²⁶³

He pointed to potential tensions with the religious and cultural views of peoples in Asia, Africa and South America.

In a higher education sector significantly dependent upon the enrolment of international students there may be a need, without compromising the paramount importance of freedom of speech, to cultivate an awareness of the existence of different perspectives from within different national cultures, on the hierarchy and importance of individual rights and freedoms.

9.1 *A bounded concept*

Freedom of speech is not and never has been absolute. Historically, its legal limits were found in common law offences such as sedition, blasphemy and scandalising the courts. The common law torts of defamation, passing off and deceit are other long-standing examples. The protection of confidential information is another.

Statutes in common law jurisdictions prohibit various forms of expressive conduct including that which is offensive, insulting or obscene, harassing or intimidating. Generally the law has set a high bar before those characterisations are reached. Negative speech directed to particular classes of persons defined by their attributes, ancestry, or religious beliefs can contravene laws giving effect to human rights norms. This is sometimes referred to generally but inaccurately as 'hate speech' or 'vilification' — inaccurately because, as discussed earlier, the range of speech actually covered is wider than that which is commonly understood as reflecting or inducing hatred or vilification. For that reason its application to the lower range of offensive or insulting speech can lack moral clarity and therefore moral force.

²⁶³ Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis Butterworths, 2009) [1.4.3].

Australian courts tend to interpret statutes which limit common law freedoms restrictively. As long ago as 1922, the High Court, in a case involving the power of the Melbourne Corporation to regulate processions, held that the power did not authorise the corporation to ban processions. Justice Higgins said:

It must be borne in mind that there is this common law right [to take part in processions] ... and that any interference with a common law right cannot be justified except by statute – by express words or necessary implication. If a statute is capable of being interpreted without supposing that it interferes with the common law right, it should be so interpreted.²⁶⁴

The restrictive approach is noticeable in relation to statutes affecting freedom of speech. In *Ball v McIntyre*,²⁶⁵ decided in 1966, Justice Kerr held that the statutory offence of ‘offensive’ behaviour required behaviour which was ‘calculated to wound the feelings, arouse anger, resentment, disgust or outrage in the mind of a reasonable man’.²⁶⁶ The reasonable man was one ‘reasonably tolerant and understanding and reasonably contemporary in his [or her] reactions’.²⁶⁷ The legal standard was, in effect, a warning to judges to proceed with caution before making a finding of offensive behaviour. Restrictive interpretations have been reflected in many later decisions, a number of which have cited that judgment. In *Coleman v Power*, decided in 2004, Justices Gummow and Hayne discussed the approach to the interpretation of a criminal statute affecting freedom of speech and observed that:

In confining the limits of the freedom, a legislature must mark the boundary it sets with clarity. Fundamental common law rights are not to be eroded or curtailed save by clear words.²⁶⁸

And in *Evans v State of New South Wales* the Full Court of the Federal Court said:

²⁶⁴ *Melbourne Corporation v Barry* (1922) 31 CLR 174, 206 and see generally D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis, 8th ed, 2014) 5.35.

²⁶⁵ (1966) 9 FLR 237.

²⁶⁶ Ibid 243 applying a formulation by O’Brien J in *Worcester v Smith* (1951) VLR 316, 318.

²⁶⁷ Ibid 245.

²⁶⁸ (2004) 220 CLR 1, 75.

freedom of expression in Australia is a powerful consideration favouring restraint in the construction of broad statutory power when the terms in which that power is conferred so allow.²⁶⁹

The general approach of Australian courts to the interpretation of statutes affecting common law rights and freedoms was described in the ALRC Report, on Traditional Rights and Freedoms:

Some common law rights and freedoms are considered to be so important that they have constitutional status, including in countries without a bill of rights. While in Australia ‘common law constitutionalism’ has not been applied by courts to invalidate statutes, the special status of some rights is reflected in how courts interpret legislation. Applying the ‘principle of legality’, courts will not interpret a statute so that it encroaches on, or limits, a fundamental right or common law principle unless Parliament has made it unmistakably clear that it intended the statute to do so. This is similar to interpretation provisions in some human rights statutes.²⁷⁰

A restrictive approach to limits on freedom of speech in the context of an international convention was reflected in the leading judgment of the European Court of Human Rights in 1976 in *Handyside v United Kingdom*.²⁷¹ The case concerned the freedom of expression guaranteed by art 10 of the *European Convention on Human Rights*. The Court held that protection of freedom of expression applies not only to information or ideas that are favourably received or regarded as inoffensive but also ‘those that offend, shock or disturb the State or any sector of the population’.²⁷² Such it said are the demands of ‘that pluralism, tolerance and broadmindedness without which there is no “democratic society”’.²⁷³ That broad statement was of course subject to the provisions of art 10(2) allowing for restrictions to be imposed on the freedom for various societal purposes including the protection of the reputation or rights of others.²⁷⁴ The Court also said in a later case:

²⁶⁹ (2008) 168 FCR 576, 596 [78].

²⁷⁰ Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Report No 129, December 2015) [1.7].

²⁷¹ (1976) 1 EHRR 737.

²⁷² Ibid [49].

²⁷³ Ibid.

²⁷⁴ See generally Luzius Wildhaber, ‘The Right to Offend Shock or Disturb? – Aspects of Freedom of Expressions under the European Convention on Human Rights’ (2001) 36 *Irish Jurist* 17–31.

The court is faced not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.²⁷⁵

The proper limits that the law may impose on freedom of expression have been the subject of much philosophical debate. John Stuart Mill said that ‘the only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others.’²⁷⁶ That begs the large question mentioned earlier — what is harm? It is a question which lies at the heart of some controversies about freedom of speech on university campuses. Plainly enough, physical injury or death inflicted on another person is a harm. Incitement to violence therefore involves the risk of such harm. Incitement to adverse discrimination based upon hatred or contempt or ridicule directed against a person or group of persons involves a risk of inflicting harm. Economic loss is a harm. Personal reputational damage is a harm. Beyond those core examples there is room for debate. Reputational damage to an institution may depend upon the definition of the constituency whose good opinion is said to define reputation. There may be another constituency with a very different view of the relevant facts and circumstances. It is in such cases that contestable value judgments may come into play. There is real difficulty where harm is defined by reference to the subjective reactions or feelings of members of a class of persons said to be affected by some expressive conduct.

An example of a ‘harm’ which should not be subjectively defined arises in relation to offensive speech, a class of speech which sometimes appears in university codes. It is useful to recall the words of Justice Hayne in his judgment in *Monis v The Queen*:

The common law has never recognised any general right or interest not to be offended. The common law developed a much more refined web of doctrines and remedies to control the interactions between members of society than one based on any general proposition that one member of society should not give offence to another. ... The common law did not provide a cause of action for the person who was offended by the words or conduct of another that did not cause injury to person, property or reputation.²⁷⁷

²⁷⁵ *Sunday Times v United Kingdom* (1979) 2 EHRR 245; Ect HR [65].

²⁷⁶ John Stuart Mill, *On Liberty* (John W Parker, 1859) 14–15.

²⁷⁷ [2013] 249 CLR 92, 175 [223].

As his Honour went on to observe, however, legislatures in common law jurisdictions including Australia have created offences which hinge on words or conduct being ‘offensive’.²⁷⁸

Some kinds of expressive conduct are prohibited by law because of their harmful impact, objectively defined, on particular classes of person. What is generically referred to as ‘racial vilification’ is made unlawful by s 18C of the *Racial Discrimination Act 1975* (Cth). The section renders unlawful acts done otherwise than in private, which are reasonably likely ‘in all the circumstances to offend, insult, humiliate or intimidate another person or a group of people’ where the acts are done because of the race, colour, national or ethnic origin of the other person or persons. Each of the States and the ACT have vilification provisions in their racial discrimination legislation. The New South Wales legislation makes it unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or persons on the ground of race.²⁷⁹ The South Australian and ACT laws are similar to the New South Wales statute. The relevant laws of Queensland, Victoria and Tasmania cover both racial and religious vilification. Western Australia imposes criminal penalties for racial vilification but not civil sanctions.²⁸⁰

Speech or other expressive conduct can constitute sexual harassment for the purposes of Australian law but it is more likely to be conduct done otherwise than in a public setting. That is not to preclude the possibility of public conduct constituting sexual harassment in particular circumstances. In the United States gender-based speech or conduct that creates an intimidating, hostile or offensive work environment may amount to sexual harassment.²⁸¹

As reported by the ALRC in 2015, there are numerous Commonwealth laws which interfere with freedom of speech and expression. Intellectual property, media, broadcasting and telecommunication laws limit the content of publications, broadcasts, advertising and other media products. Anti-discrimination laws apply in workplace relations to prohibit

²⁷⁸ Ibid [224].

²⁷⁹ *Anti-Discrimination Act 1977* (NSW) s 20C(1).

²⁸⁰ *Racial Vilification Act 1996* (SA), *Discrimination Act 1991* (ACT), *Anti-Discrimination Act 1991* (Qld), *Racial and Religious Tolerance Act 2001* (Vic), *Anti-Discrimination Act 1998* (Tas), *Criminal Code 1913* (WA) ss 76–80.

²⁸¹ See J M Karner, ‘Political Speech, Sexual Harassment and a Captive Workforce’ (1995) 83 *California Law Review* 637.

certain forms of speech and expression.²⁸² There are also a number of provisions of counter-terrorism laws and secrecy offences which impact on the freedom.²⁸³

There is in place a range of restrictions on expressive conduct created, for a variety of purposes, not only by the statute law of the Commonwealth, but also by the laws of the States and the Territories of Australia and by the common law. Much existing legislation, especially in the area of racial or religious vilification, would cover the kind of speech which higher education providers would legitimately want to prevent being heard on their campuses. Generally speaking, as earlier noted, courts have adopted an approach to the interpretation of legislation affecting expressive conduct which gives effect to a presumption in favour of freedom of speech.

Freedom of speech is bounded by law but the law is generally interpreted in favour of the freedom to the extent that its words allow. The imposition of tighter limits on the freedom by higher education providers, than the limits imposed by the general law, requires powerful justification having regard to the societal value attached to the freedom. As a general proposition, no higher education rule or policy should make it more difficult to exercise the freedom on campus than off it. To the extent that higher education rules seek to deal with offensive or insulting or humiliating or intimidating speech, the question whether speech answers those categories in any case should be defined objectively rather than by reference to the subjective reactions of individuals which may be highly variable. Formulae such as ‘speech which a reasonable person in the circumstances would regard as insulting or humiliating or intimidating’ are to be preferred as limiting the scope of any restrictions. A further safeguard would require that the speaker intend the speech to have one or other of those effects. The word ‘offensive’ may be too broad to be used even when subject to an objective test.

As noted earlier, freedom of speech is limited in the sense that it cannot be exercised in a way that is inconsistent with the rights and freedoms of others. An extension of that concept, which is an area of current debate, would treat the freedom as qualified by diversity and inclusion policies. The qualification would allow for the protection of the sensitivities or vulnerabilities of particular groups of students whom it is thought may be unfairly disadvantaged by exposure to certain kinds of lawful speech.

²⁸² *Fair Work Act 2009* (Cth) s 676.

²⁸³ Australian Law Reform Commission Report No 129 (n270) [4.5]–[4.6].

Sigal Ben-Porath in her book *Free Speech on Campus* observed in this connection:

The focus should not be on civility as a main norm but rather on the conditions for dignitary safety, whose absence limits the substantive access of some members of the community. Even within a civil classroom, without dignitary safety, students fear humiliation, ridicule, and rejection and are therefore partially or wholly barred from taking full advantage of their learning opportunities.²⁸⁴

As she points out, deciding if harm or risk of harm is significant enough to justify putting a limitation on the free exchange of ideas, can be difficult. This is especially so when the harmed party is a person whose identity and skills are evolving and whose wellbeing is entrusted to the university along with the role of intellectual growth. She writes:

Protecting a student's intellectual comfort by avoiding serious challenge to her views may create a sense of well-being and safety, but the price paid in development and in the opportunity to participate in the university's mission would be too high to pay. On the other hand, when the challenges presented to a student are based not on shaking her beliefs or views but rather on undermining her dignity and questioning whether she belongs in the institution altogether — especially as a member of an identity group — this can damage not only her sense of well-being but also the ability of others to hear her and evaluate her views. The guiding principles for drawing this line should be based on a democratic commitment to inclusive freedom rather than on principles of civility.²⁸⁵

That kind of consideration may be relevant to the implementation, in speech codes, of a higher education provider's duty, under the HE Standards, to foster the wellbeing of students.

The common law freedom of speech, discussed generally in this section, is supported, in Australia, by a considerably narrower implied constitutional freedom of political communication to which it is necessary to turn now. The implied freedom operates as a limit on law-making power and lies within boundaries allowing for reasonably appropriate restrictions for a legitimate purpose consistent with the constitutional scheme for a representative and responsible government.

²⁸⁴ Sigal Ben-Porath, *Free Speech on Campus* (University of Pennsylvania Press, 2017) 42.
²⁸⁵ Ibid.

9.2 *The implied freedom of political communication*

There is no comprehensive guarantee under the *Australian Constitution* for individual rights and freedoms. In his judgment in *Australian Capital Television Pty Ltd v Commonwealth*²⁸⁶ Sir Anthony Mason said:

The framers of the Constitution accepted, in accordance with prevailing English thinking, that the citizen's rights were best left to the protection of the common law in association with the doctrine of parliamentary supremacy.²⁸⁷

Nevertheless in that case the High Court implied a freedom of political communication under the Constitution which operates as a limit on the legislative power of the Commonwealth and also of the States and Territories of Australia. It also limits the application of the common law particularly in relation to defamation concerning public figures. The Court held invalid a new Pt IIID of the *Broadcasting Act 1942* (Cth) which sought to prohibit political advertising by means of radio and prohibition during an election period in relation to a federal election or referendum, a Territory election or a State or local government election.

The implied freedom was first argued in a companion case to the *ACTV Case* namely *Nationwide News Pty Ltd v Willis*.²⁸⁸ *The Australian* newspaper was prosecuted on account of an article critical of the Industrial Relations Commission of Australia. It was prosecuted under a section of the *Industrial Relations Act 1988* (Cth) which provided that a person shall not by writing or speech use words calculated to bring a member of the Industrial Relations Commission or the Commission into 'disrepute'. The High Court held the section invalid. Three of the members of the Court held that it infringed an implied freedom of political communication. The implication was derived from the text and structure of the *Constitution* relating to representative democracy and the election of parliamentary representatives by the people.

The implied freedom imposes limits on legislative power and on the common law. It was elaborated in its application to the common law in a number of defamation cases involving politicians. The leading decision in that line was *Lange v Australian Broadcasting*

²⁸⁶ (1992) 177 CLR 106.

²⁸⁷ Ibid 136.

²⁸⁸ (1992) 177 CLR 1.

Corporation.²⁸⁹ The test for validity in *Lange*, as modified in a later case, *Coleman v Power*,²⁹⁰ involved two questions:

1. Does the challenged law in its terms, operation or effect, effectively burden freedom of communication about government or political matters?
2. If the law effectively burdens that freedom, is the law nevertheless reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

That formulation was further elaborated in *McCloy v New South Wales*²⁹¹ in which the Court rejected a challenge to the validity of a New South Wales law prohibiting political donations from property developers. As appears from the wording of the test, questions of reasonableness and proportionality fall to be considered in determining the validity of legislative burdens on the freedom. Indeed, reasonableness and proportionality can and should be viewed as relevant, well beyond the prescriptions of constitutional law, when any burden on any freedom is considered.

Justice Brennan said in *Cunliffe v Commonwealth*²⁹² ‘the implication is negative: it invalidates laws and consequently creates an area of immunity from legal control, particularly from legislative control.’ That is to say it creates an area of freedom of action which cannot be unreasonably encroached upon by statute. There is a question whether it is applicable to the common law more widely than in the area of defamation.

The implied freedom also applies indirectly to delegated legislation. A statute, validly enacted, will not authorise the making of delegated legislation or indeed the creation of administrative powers or discretions which could be exercised in such a way as to impermissibly burden the freedom.²⁹³ It affects the scope of the powers which can be conferred on public authorities, including higher education authorities in relation to the making of delegated legislation, including by-laws, rules and regulations.

²⁸⁹ (1997) 189 CLR 520.

²⁹⁰ (2004) 220 CLR 1.

²⁹¹ (2015) 257 CLR 178.

²⁹² (1994) 182 CLR 272.

²⁹³ *Wotton v State of Queensland* (2012) 246 CLR 1.

10 Freedom of Speech under International Law

Freedom of expression as a fundamental human right is reflected in the Universal Declaration of Human Rights²⁹⁴ and many international conventions.²⁹⁵ A leading example is the *International Covenant on Civil and Political Rights* to which Australia is a party. Article 19 guarantees freedom of speech subject to limitations and restrictions. Limitations and restrictions are inevitable features of such guarantees. There is no such thing as an unqualified freedom of expression. Article 19 provides:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 19 should be read in conjunction with arts 17, 18 and 20. Article 17 provides, inter alia, that no one shall be subjected to unlawful attacks on his honour and reputation and that everyone has the right to the protection of the law against such interference or attacks. Article 18, which guarantees the right to freedom of thought, conscience and religion, states that the right shall include freedom, either individually or in community with others and in public or private, to manifest religion or belief in worship, observance, practice and

²⁹⁴ *Universal Declaration of Human Rights*, GA Res 271A (III), UN GAOR, UN Doc A/810 (10 December 1948).

²⁹⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, UNTS 999 (entered into force 23 March 1976, art 19; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 10; *Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa*, The African Commission on Human and Peoples' Rights (Resolution adopted at its 32nd Ordinary Session in Banjul, The Gambia, 17 to 23 October 2002) art 1.

teaching.²⁹⁶ Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights or freedoms of others. Also relevant is art 20(2) which provides that:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

The expressive conduct protected by arts 18 and 19 with their internal limitations and those imposed by arts 17 and 20 should also be read with the rights of peaceful assembly and freedom of association guaranteed in arts 21 and 22.

An extended discussion of the scope of freedom of expression under international legal conventions and any associated rule of customary international law, is beyond the scope of this Review. The provisions referred to, however, demonstrate the existence of limits which are not susceptible of precise definition but which do involve the application of proportionality principles.

²⁹⁶ *International Covenant on Civil and Political Rights* (n 256) art 18(1).

11 Academic Freedom — A Defining Value

There is a considerable history of academic freedom and a very large literature concerning its meaning and application. It is not possible nor is it necessary in the context of this Review to embark upon an extended analysis of it. Its essential elements and history nevertheless mark it as a defining characteristic of universities and like institutions.

The ideal of academic freedom can be traced back to Socrates' defence in Plato's *Apology*, before the Athenian people, of his right to discuss controversial topics with others, that those in power found unacceptable. And yet, as has been pointed out by Irwin Polishook, a leading American history educator, his teaching was self-constrained by, and served, his belief in God.²⁹⁷

The church was the custodian of medieval schooling and scholarship in the middle ages. It did not make any claim to offer intellectual freedom within or beyond the territory of theology. Any dissent from the 39 Articles of the Church of England was prohibited as late as 1628 at Oxford and Cambridge, thereby limiting controversy over much that mattered at both universities.²⁹⁸ In the event, in different ways, higher education became for the most part a secular pursuit.

The evolution, in medieval Europe, of university education into a secular activity supported by the State was complex. It followed different paths in different countries, and later around the world.²⁹⁹ An influential system which grew up under Lutheran domination was that of Prussia.³⁰⁰ In 1794, the Legal Code of Prussia contained a declaration that:

All public schools and universities are establishments of the State, having in view the instruction of the youth in useful knowledge and sciences.³⁰¹

The 18th century saw the increase of a demand that instructors should be free to teach what they conceived to be the truth without interference from public authorities. The extent

²⁹⁷ Irwin Polishook, 'Academic Freedom and Academic Contexts' (1994) 15 *Pace Law Review* 141.

²⁹⁸ *Ibid* 142.

²⁹⁹ See generally E E Brown, *Academic Freedom* (1900) Educational Review New York 209–31 reproduced in the Series, *Scholar Select*.

³⁰⁰ *Ibid* 215.

³⁰¹ *The General Law Code for Prussian States*, proclaimed 5 February 1794, effective 1 June 1794.

to which that demand was respected depended upon the monarch in power. In 1819, apprehensive of revolutionary tendencies among the young, the German Diet issued a decree binding on Prussia designating a special official for each university who was ‘carefully to observe the spirit in which the university professors lectured’ and ‘to exercise a salutary influence upon instruction, with a view to determining the future attitude of the youthful student’.³⁰² In 1850, Prussia adopted a written constitution, art 20 of which provided that ‘[s]cience and its teachings shall be free.’ Its successor in modern Germany is art 5(3) of the Basic Law which provides that arts and science, research and teaching, shall be free.³⁰³

A highly regarded American scholar, E E Brown, writing at the end of the 19th century about the history of academic freedom, asked the fundamental question — what [do] we really mean by academic freedom? He rejected the proposition that it stood for ‘mere independence of all constraint’.³⁰⁴ Isolation from other public interests was no true freedom, but a bare abstraction. The freedom of institutions, like that of individuals, was a moral conception — a mode of existence rich in vital relationships. It was not to be realised in the mere absence of responsibility.³⁰⁵ Freedom of instruction implied instruction which put the student in possession of universal standards of excellence. It would also put the student in the way of employing those standards in the discharge of the duties of real life. Brown wrote:

Something like this seems to be implied in the demand that educational questions shall be determined solely on educational grounds; and in that demand is briefly summed up the whole question of academic freedom.³⁰⁶

In a comment which some would see as having contemporary relevance, Brown said that the danger most to be feared in both public and other institutions was internal — an inordinate desire for material prosperity:

³⁰² ‘Supplement: Constitution of the Kingdom of Prussia’ (1894) 5 *The Annals of the American Academy of Political and Social Science* 1.

³⁰³ *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany] art 5(3).

³⁰⁴ Brown (n 299) 224.

³⁰⁵ Ibid.

³⁰⁶ Ibid 225.

Nothing will more effectually stop the mouths of teachers whose utterances may be expected to check the inflow of funds for buildings and endowment.³⁰⁷

He concluded by observing that academic freedom cannot be expressed in formulae nor secured by mere systems of administration:

It belongs to men who deserve it for pre-eminent worth and command it by the courage of well-reasoned conviction. No sort of freedom is worth having which can be marked out by fixed lines or maintained by inferior men without a struggle.³⁰⁸

An extension of that proposition in contemporary language would emphasise the importance of an organisational culture which, more powerfully than rules, embraces the freedom as an instrument of institutional and individual excellence.

The movement towards public control of universities in the United States, as in other countries, was a step in the direction of academic freedom which was one with academic responsibility. Nevertheless, it was not without vicissitudes for those of independent mind. Irwin Polishook wrote that at the end of the 1890s professors and presidents of American colleges were being dismissed ‘for advocating free trade and greenbacks, participating in a Populist Convention, speaking against organised monopolies, favouring free silver, opposing imperialism and delivering a pro-labour speech’.³⁰⁹

In Western universities today, academic freedom is reflected not only in a legal recognition of qualified freedom of speech as one of its elements, but also in institutional arrangements such as the traditional system of tenure and the participation by faculty members in academic government.³¹⁰ These arrangements stand in contrast to those in primary and secondary institutions, whose focus is on the transmission rather than the discovery of knowledge.³¹¹ The literature on the topic, despite reflecting certain common elements, demonstrates a degree of definitional diversity.

³⁰⁷ Ibid 230.

³⁰⁸ Ibid 231.

³⁰⁹ Polishook (n 297) 146.

³¹⁰ ‘Developments in the Law: Academic Freedom’ (1968) 81 *Harvard Law Review* 1045, 1049.

³¹¹ Ibid 1050.

There are concerns that the operating environment of universities in Australia today presents some threats to academic freedom. With universities being seen more as businesses providing services to clients and run by executives rather than academics, it has been suggested that ‘the division between those executives ... and academics ... has never been greater.’³¹² Professor Katharine Gelber argues that research has shown that in the context of increased commercialisation some academic staff in the social sciences are concerned about the implications for academic freedom of speech, of increased workloads, pressure to attract research funding and an emphasis on fee-based and vocationally oriented courses.³¹³ Intra-mural criticism of universities is not always supported as an aspect of academic freedom.³¹⁴ In some cases it may lead to adverse consequences for the academic.

An article concerning contested dismissals from universities in Australia was published in 2002 by Emeritus Professor Brian Martin.³¹⁵ The article focussed on the case of the dismissal of Associate Professor Ted Steele from the University of Wollongong in 2001, but ranged more broadly. Professor Martin referred to a study in the United States, reported in *The Bulletin* of the AAUP, which concerned contested dismissals between 1916 and 1970. There was no equivalent study in Australia. The United States’ figures indicated a trend, in the latter part of the period studied, from dismissals based on external coercion to dismissals resulting from ‘administrative pressure to get rid of ideological embarrassments’. Martin characterised the trend as a reduction in external threats to academic freedom and an increase in threats from university administrations.

Professor Martin offered a useful observation about academic freedom in this context:

Whatever the status of academic freedom ‘in reality’, belief in its importance can be a powerful force. The opportunity for astute managers is to portray a university as a defender of free speech. This is easiest when attacks come from the outside. But inside criticism can also be made into a source of strength. By both tolerating or even fostering dissent, and publicising its toleration, university managers can portray themselves as enlightened and open. But despite the opportunity here, no Australian university stands out as a haven for dissent, perhaps in part because the

³¹² Jackson (n 12).

³¹³ Katharine Gelber, ‘Academic Freedom and the ‘Intellectual Diversity’ Movement in Australia’ (2009) 14(2) *Australian Journal of Human Rights* 95.

³¹⁴ Jackson (n 12); See also Jim Jackson ‘When Can Speech Lead to Dismissal in a University’ (2005) 10 *Australian and New Zealand Journal of Law and Education* 23.

³¹⁵ Brian Martin, ‘Dilemmas of defending dissent: the dismissal of Ted Steele from the University of Wollongong’ (2002) 45 *Australian Universities Review* 7.

government's higher education policies foster conformity among institutions in pursuit of funds rather than intellectual debate.³¹⁶

Academic freedom, for Australian purposes, embraces the freedom of intra-mural criticism of the university and its policies and administration. The merits of cases involving disciplinary measures against academic staff who have engaged in intra-mural criticism are not always straightforward as there may be a number of behavioural issues in play. Academics who hold senior administrative roles, including faculty heads, arguably have a duty, once a decision has been made by a leadership group of which they are a part, to commit to its implementation, or if they cannot, then to resign from the administrative role.

In the end there are probably no hard and fast rules which can be devised to cover that aspect of academic freedom. Far more important than rules will be a culture which embraces the inevitability of dissent on the one hand and the importance of compromise to the effective functioning of the institution.

11.1 *Academic freedom in the international sphere — the UNESCO Recommendation*

Turning again to the sphere of international law, there is no express reference in the *International Covenant on Civil and Political Rights* to the concept of academic freedom. However, relevant provisions are to be found in the *International Covenant on Economic, Social and Cultural Rights* to which Australia is also a party.³¹⁷ It provides in art 15:

1. The States Parties to the present Covenant recognize the right of everyone:
 - (a) To take part in cultural life;
 - (b) To enjoy the benefits of scientific progress and its applications;
 - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

³¹⁶ Ibid. Also referring to Simon Marginson and Mark Considine, *The Enterprise University: Power, governance and reinvention in Australia* (Cambridge University Press, 2000).

³¹⁷ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contexts and co-operation in the scientific and cultural fields.

Article 13 of the *Charter of Fundamental Rights of the European Union* provides:

The arts and scientific research shall be free of constraint. Academic freedom shall be respected.³¹⁸

The *European Convention on Human Rights* makes no express reference to academic freedom. Nevertheless, art 10 of the Convention which guarantees freedom of expression has been applied by the European Court of Human Rights to issues related to academic freedom.

In 1997, UNESCO published a report coupled with a recommendation that academic freedom be defined as:

The right, without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative academic bodies.³¹⁹

The elements of academic freedom thus defined, have been summarised as freedom of teaching, freedom of research, freedom of intra-mural expression and freedom of extra-mural expression.³²⁰

³¹⁸ *Charter of Fundamental Rights of the European Union* [2012] OJ C 326/391, art 13.

³¹⁹ UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel, (11 November 1997) [27].

³²⁰ 'Protecting academic freedom is as relevant as ever' *UNESCO* (Online News Article, 18 October 2017) <<https://en.unesco.org/news/protecting-acadenuc-freedom-relevant-ever>> quoting James Turk, Director

The UNESCO document also set out educational objectives and policies including the free publication and dissemination of research results obtained by higher education teaching personnel. Under the general heading ‘Institutional rights, duties and responsibilities’ it declared that:

The proper enjoyment of academic freedom and compliance with the duties and responsibilities listed below require the autonomy of institutions of higher education. Autonomy is that degree of self-governance necessary for effective decision making by institutions of higher education regarding their academic work, standards, management and related activities consistent with systems of public accountability, especially in respect of funding provided by the state, and respect for academic freedom and human rights.³²¹

Autonomy was characterised as ‘the institutional form of academic freedom and a necessary precondition to guarantee the proper fulfilment of the functions entrusted to higher-education teaching personnel and institutions’.³²² It was not to be used by higher education institutions as a pretext to limit the rights of their teaching personnel provided for in the Recommendation or in other international standards.³²³

Under the heading ‘Institutional accountability’ the UNESCO Recommendation recognised that Member States and higher education institutions should ensure a proper balance between the level of institutional autonomy and systems of accountability. Higher education institutions should endeavour to open their governance in order to be accountable for, among other things:

- (k) the creation, through the collegial process and/or through negotiation with organizations representing higher-education teaching personnel, consistent with the principles of academic freedom and freedom of speech, of statements or codes of ethics to guide higher education personnel in their teaching, scholarship, research and extension work ...³²⁴

of the Centre for Free Expression at the Faculty of Communication and Design, Ryerson University, (Canada).

³²¹ UNESCO Recommendation concerning the Status of Higher -Education Teaching Personnel (n 319) 3 [17].

³²² Ibid [18].

³²³ Ibid [20].

³²⁴ Ibid [22].

The Recommendation proposed that higher education institutions, individually or collectively, should design and implement systems of accountability, including quality assurance mechanisms to achieve the goals of the Recommendation without harming institutional autonomy or academic freedom.³²⁵

The UNESCO Recommendation stated that higher education personnel should enjoy those internationally recognised civil, political, social and cultural rights applicable to all citizens. They should therefore enjoy freedom of thought, conscience, religion, expression, assembly and association as well as the right to liberty and security of the person and liberty of movement. They should not be hindered or impeded in exercising their civil rights as citizens, including the right to contribute to social change through freely expressing their opinion of State policies and policies affecting higher education.³²⁶

It was also proposed that higher-education teaching personnel have the right to teach without any interference, subject to accepted professional principles including professional responsibility and intellectual rigour with regard to standards and methods of teaching.³²⁷ They should not be forced to instruct against their own best knowledge and conscience or to use curricula and methods contrary to national and international human rights. They should play a significant role in determining curricula.³²⁸ Today, the UNESCO Recommendation remains the most prominent international instrument dealing with academic freedom.

11.2 *The Hefei Statement on Academic Freedom in Research Universities*

In 2013 the Go8 joined with the Association of American Universities, the League of European Research Universities and the Chinese Universities to make the Hefei Statement setting out ten core characteristics of research universities.³²⁹

The purpose of the Statement was to identify key characteristics that make research universities effective and to promote a policy environment protecting, nurturing, and cultivating the values, standards and behaviours which underlie those characteristics and which facilitate their development. A concern was expressed, in the Statement of Purpose,

³²⁵ Ibid [24].

³²⁶ Ibid [26].

³²⁷ Ibid [28].

³²⁸ Ibid.

³²⁹ AAU, LERU, Go8 and C9, 'Hefei Statement on the Ten Characteristics of Contemporary Research Universities', *Group of Eight* (Statement, 10 October 2013) <<https://go8.edu.au/files/docs/10.10-hefei-statement-english-version.pdf>>.

about the increasing emphasis that many countries place on an instrumentalist view of universities that ties their roles and purpose to producing knowledge and skills necessary to operate in a modern economy and performing research that supports national development. This can lead to a focus on short-term specific outcomes which capture only a small portion of what universities contribute to society and general wellbeing and the ways in which they do that.

The characteristics of a research university set out in the Statement referred to the pursuit of excellence calibrated by disinterested assessment processes external to the university, a meritocratic system for selection of faculty staff and students and an internal environment nurturing learning, creativity and discovery. Other characteristics included a major research effort, commitment to research training, a commitment to teaching at both undergraduate and postgraduate levels, a dedication to the highest standards of research integrity, a commitment to support local and national communities and contribute to international wellbeing and an open and transparent set of governance arrangements. Three key characteristics relevant to academic freedom, including in that concept institutional autonomy, were those numbered 6, 7 and 8:

6. The responsible exercise of academic freedom by faculty to produce and disseminate knowledge through research, teaching and service without undue constraint within a research culture based on open inquiry and the continued testing of current understanding, and which extends beyond the vocational or instrumental, sees beyond immediate needs and seeks to develop the understanding, skills and expertise necessary to fashion the future and help interpret our changing world.
7. A tolerance, recognition and welcoming of competing views, perspectives, frameworks and positions as being necessary to support progress, along with a commitment to civil debate and discussion to advance understanding and produce new knowledge and technologies.
8. The right to set its own priorities, on academic grounds, for what and how it will teach and research based on its mission, its strategic development plans, and its assessment of society's current and future needs; and the right to determine who it will hire and admit, including an ability to recruit internationally to attract the best people to achieve these priorities.³³⁰

11.3 *Academic Freedom and the Constitution*

The *Australian Constitution* does not contain any provision which provides protection for academic freedom. There are a number of national constitutions around the world which contain protective provisions. They are:

- (a) Brazil – guaranteeing the expression of intellectual, artistic, scientific and communication activities, independently of censorship or license.³³¹
- (b) Japan – guaranteeing academic freedom.³³²
- (c) South Africa – providing for academic freedom and freedom of scientific research³³³ – a right which does not extend to advocacy of hatred based on race, ethnicity, gender or religion and that constitutes incitement to cause harm.³³⁴
- (d) Spain – providing for the right to academic freedom.³³⁵
- (e) Germany – arts and sciences, research and teaching shall be free.³³⁶

There are also many national constitutions which provide a guarantee of freedom of expression subject to public order or analogous constraints. These are of general application not specifically directed to freedom of expression in connection with higher education institutions. There has been some litigation in Canada about the application of the Charter to universities which remains uncertain.³³⁷

Having discussed generally the concepts of freedom of speech and academic freedom it is now necessary to focus upon the kinds of freedom of speech issues which may arise in higher education providers.

³³¹ *Constitution of the Federative Republic of Brazil* art 5(IX).

³³² *Constitution of Japan* art 23.

³³³ *Constitution of the Republic of South Africa Act 1996* (South Africa) art 16(1)(d).

³³⁴ *Ibid* art 16(2)(c).

³³⁵ *Constitution of Spain* art 20(1)(c).

³³⁶ *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany] art 5(3) which contains the qualification that the freedom of teaching shall not release any person from allegiance to the Constitution.

³³⁷ Report 129.

12 Unlawful and lawful speech

There are two categories of cases in which the issue of restrictions on freedom of speech on campus may arise. The first is unlawful speech. There is little room for controversy about that. A higher education provider cannot knowingly permit or be party to conduct on its premises or otherwise which contravenes or is likely to contravene the law, whether it be the criminal law or the civil law. That said, the question whether speech is unlawful does not always yield a clear answer. The law often uses terminology of an evaluative nature lacking clear definition. That language can pose a challenge to the university administrator trying to decide whether a proposed event involving speech or other expressive conduct could be unlawful. The category of unlawful speech would also cover speech made in breach of a duty of confidence imposed by the common law or by contract. As to the latter, it seems desirable that higher education providers should have academic freedom in mind when negotiating collaborative arrangements with third parties which may involve confidentiality provisions which are burdens on the freedom of speech of academic staff involved in such collaborations. Academic freedom should also be borne in mind in relation to any restrictions on publication of research in order to protect intellectual property rights, whether or not involving a third party.

This Review is primarily concerned with the second category — lawful speech on campus — that is on land and/or facilities owned or controlled by a university or other higher education provider. Universities and other higher education providers are entitled and obliged to ensure that conduct on their land and the use of their assets and facilities are consistent with and do not hinder the purposes for which that land and those assets are held. Conduct on campus, including speech, may be regulated to that end. That does not mean a university or other higher education provider has a roving licence to determine what speech content is acceptable and to be permitted on its land and what is not. Where there are competing claims for the use of land or facilities with limited availability because of resource constraints, the institution is entitled to determine priorities as between those who seek to speak on its land. It is plainly entitled to distinguish between visitors, the subject of bona fide invitations by academic staff or students on the one hand, and unsolicited approaches by

external organisations seeking to use publicly available university facilities for a visiting speaker.

A person or group may propose to use land and facilities to engage in speech which a university or some of its members or stakeholders regard as carrying a risk of positive harm to the institution, or to individuals or groups within it, or indeed to society as a whole. That raises the question — what kind of harm, flowing from lawful speech, would justify a higher education provider in preventing that speech from occurring on its premises or imposing sanctions after the event on account of its content? There are those who would argue that ‘harm’ includes the causing of emotional distress to individuals or groups and overt disrespect for the human dignity of particular individuals or groups. Reputational damage to the institution may also be said to be a harm flowing from its apparent or imputed association with, or toleration of, the opinions of a speaker.

Examples of arguable ‘harms’ abound. An event at which opponents of child vaccination wish to espouse scientifically discredited views that it is linked to a heightened risk of autism might be seen as enhancing a public health risk associated with non-vaccination. In addition such a presentation might involve a risk of reputational damage to the institution. Should a university provide a platform to such dangerous, unscientific views while remaining true to its purposes and ideals? Would it make a difference if an anti-vaccination proponent were invited to engage in a public debate with a public health expert on the academic staff of the university? There are few bright lines here. If providing a platform to the opponents of vaccination creates an unacceptable harm, do proponents of so-called ‘alternative medicine’ who encourage people to eschew ‘Western medicine’ fall into the same category? A person who argues that dangerous climate change has not been shown to be anthropogenic and is, in fact, a scientific hoax promulgated by a global conspiracy of pseudo-scientific social engineers, might be regarded by many as distracting attention from a global problem which requires urgent governmental responses around the world. Further, a reputational risk to the institution may be claimed where it is proposed that such a speaker be invited and permitted to speak on campus.

A person who advances the view that any or any particular religious belief is an historical form of delusion or who ridicules or parodies great religious figures may deeply upset and anger those for whom religious belief is central to their identity. Examples may be multiplied of cases and circumstances in which arguments may be put forward that

expressive conduct gives rise to group, individual, institutional or societal harms. The potential breadth of the class of ‘harmful’ speech suggests that restrictions of expressive conduct by reference to harmful effects, outside the restrictions imposed by the general law, should be very narrowly drawn.

Higher education providers have legal responsibilities for the safety and wellbeing of those using their land or facilities and for their staff and students.³³⁸ They have the common law duty of care in its various applications. They may also have relevant obligations under occupational health and safety and other Commonwealth or State regulatory regimes. In addition, the HE Standards require higher education providers to foster the wellbeing of staff and students.³³⁹ Providers are obliged to have regard to those responsibilities. They are also entitled to have regard to the administrative costs associated with particular uses of land and facilities, including the provision of security staff where there are reasonable grounds for believing that an event carries a risk of disruption, damage to property and/or injury to persons.

A university or other higher education provider may legitimately be concerned about extra-mural speech by a member of the academic staff or student which might convey an apparent connection or association of that person’s views with the institution. Such concern is only likely to arise when the speaker identifies himself or herself by their association with the institution. So far as extra-mural speech by academic staff is concerned, a university or other higher education provider is entitled to ask that they disclaim any attribution of their views to the university. Where such speech falls outside the scope of an academic’s area of discipline or expertise, it is reasonable for the academic’s institution to request that they not identify themselves as one of its staff or officers. That said, there is nothing to prevent a media outlet from identifying a speaker as a member of the academic staff of a university or other institution. It may be that in such a case the speaker should expressly indicate that he or she is not speaking on behalf of the university.

³³⁸ Legal responsibilities may arise under the common law, occupiers liability legislation and other statutes. The common law may be affected by provisions of Civil Liability Acts relating to the discharge of public functions.

³³⁹ HE Standards pt A [2.3].

13 The Circumstances in which Freedom of Speech Issues May Arise on Campus

Lawful speech on campus may occur in a number of circumstances and through a variety of media including social media. They include:

1. The teaching of students and the publication of academic research and scholarship by academic staff in the course of their employment and the discussion by staff and students which is part of or incidental to those activities — this includes the exercise of freedom of expression which is incidental to academic freedom. It may extend to topics the subject of research arrangements and be subject to constraints imposed by contract or otherwise under those arrangements.
2. Speech by academic staff and students on campus:
 - 2.1 on matters related to their respective areas of research, teaching and courses of study — again at least in the case of staff, an aspect of academic freedom;
 - 2.2 on matters which are not related to their areas of research, teaching or courses of study and which may include aspects of the governance and administration of the institution.
3. Speech by academic staff or students off campus:
 - 3.1 on matters relating to their respective areas of research, teaching and courses of study;
 - 3.2 on matters which are not related to their respective areas of research, teaching or courses of study.
4. Speech on campus by visitors invited by academic staff or students:
 - 4.1 on matters relating to areas of research and courses of study conducted at the university;
 - 4.2 on matters which are not so related.
5. Speech on campus by visitors who seek to use a university facility available for hire from time to time to members of the public.

Any umbrella principles, law or standards or model code relating to freedom of speech and academic freedom should be flexible enough to allow for relevant distinctions to be made by administrators between those different circumstances.

14 Higher Education Providers as Public Authorities

Unlike private individuals, public authorities do not have a general freedom to do anything that is not prohibited by the law. Any action they take must be justified by law. They may be given by law express powers to do things which, according to the nature of the institution may be broadly or narrowly defined and may or may not be subject to conditions. Other necessary powers may be implied. They may have powers to make regulations, rules or by-laws which are legislative in character. They may have managerial and administrative powers which enable them effectively to regulate the conduct of persons within the scope of those powers. They may have powers as employers under employment contracts or enterprise bargaining agreements. Any legal restrictions which a public authority, in the exercise of its powers, purports to impose upon the freedoms of individuals, whether by legislative rule or in the purported exercise of managerial, administrative or contractual powers, must be justified by law. That is particularly the case in relation to powers invoked to support restrictions imposed upon freedom of speech and expressive conduct generally.

Some public authorities have a statutory responsibility for the management of areas of land or facilities on land and are given rule making power to enable them to discharge those responsibilities. Such rules may limit the places, ways, and the circumstances in which people can exercise their freedom. An example of such a rule is seen in the judgment of the High Court in *Attorney-General (SA) v Adelaide City Corporation*.³⁴⁰ The Court there upheld, as a valid exercise of the Corporation's by-law making power, a by-law prohibiting people from preaching, canvassing, haranguing or distributing written material on any road vested in the Corporation without its permission. The by-law was within the statutory power and did not infringe the implied freedom of political communication. The power was typical of powers presently and historically invested in local authorities. Universities and other higher education providers have analogous powers in relation to the land and facilities they occupy.

Many public authorities are empowered by statute to do things which an individual could do such as buying, selling, hiring or leasing property or entering into contracts, including contracts of employment. A decision by a public authority, under a contract which it has made, may derive its legal force from the law of contract rather than from the statute

³⁴⁰ (2013) 249 CLR 1.

which empowers it to enter into contracts.³⁴¹ A similar point may be made about the exercise, by a public authority, of property rights in land or facilities which it holds pursuant to a statutory vesting or otherwise by acquisition through purchase, lease or bequest. Decisions about access to and use of its land and facilities may involve statutory powers. They may involve no more than the exercise of the rights derived from the general law of property.

In *Griffith University v Tang* (*Griffith University Case*), decided in 2005, a majority of the High Court held that a decision taken by Griffith University to exclude a person from her PhD candidature, was not a decision made ‘under’ the University’s Act for the purposes of the *Judicial Review Act 1991* (Qld) and was therefore not amenable to judicial review under that legislation. As Gummow, Callinan and Heydon JJ put it in their joint judgment:

If the decision derives its capacity to bind from contract or some other private law source, then the decision is not ‘made under’ the enactment in question.³⁴²

Similar results have been arrived at in cases involving termination of an academic appointment in 1982³⁴³ and the refusal of academic promotion in 1996.³⁴⁴ More recent judgments in this area have been delivered by single Justices of the Supreme Court of Queensland in 2002³⁴⁵ and the Supreme Court of New South Wales in 2010.³⁴⁶

Analogous questions have arisen in Canada in cases in which it has been argued that the Canadian Charter of Rights and Freedoms applies to universities which, for the most part in Canada, are statutory authorities. The Charter applies to Canadian and provincial legislatures and governments. Its application to universities was rejected in the 1990s.

³⁴¹ *Griffith University v Tang* (2005) 221 CLR 99, 128–29 [78]–[83] (Gummow, Callinan and Heydon JJ) and see generally Nicholas Seddon, *Government Contracts* (Federation Press, 2018) 438–40 [8.7]–[8.8].

³⁴² *Ibid* 128 [81].

³⁴³ *Australian National University v Burns* (1982) 43 ALR 25, a decision of the Full Court of the Federal Court of Australia.

³⁴⁴ *Australian National University v Lewins* (1996) 138 ALR 1.

³⁴⁵ *Whitehead v Griffith University* (2003) 1 Qd R 220, 225 [15].

³⁴⁶ *McGuirk v University of New South Wales* [2010] NSWSC 1471.

Recent decisions, however, concerning freedom of speech issues may indicate some judicial movement in favour of its application.³⁴⁷

Most higher education providers are statutory bodies and can be regarded as public authorities. For the most part they are the creation of State and Territory legislation which has some regulatory content. They are regulated, as higher education providers, by Commonwealth legislation which provides a framework for the accreditation of courses and the ability to offer and confer academic awards. They must meet statutory standards made under the HES Act. They are also subject to regulation under general laws of the Commonwealth, the States and the Territories on a variety of topics applicable to a range of entities. Within that framework, universities claim a degree of institutional autonomy, which is a dimension of academic freedom but is not constitutionally protected. Higher education providers are not emanations of government. They are generally not subject to ministerial control or direction. Nevertheless, there is little impediment to the enactment of statutes providing for such control. The constraint on any such enactment would be political rather than legal. Examples from other countries of ministerial direction and statutory prescriptions relating to freedom of expression and academic freedom have already been given in this Report in relation to the Province of Ontario in Canada, the Education (No 2) Act and laws enacted in a number of States of the United States.

In the *Griffith University Case*, Justice Michael Kirby set out in his dissenting judgment a non-contentious overview of the position of universities in Australia. He described them as having special characteristics distinguishing most of them from universities in other countries:

Even the oldest Australian universities (those at Melbourne and Sydney) were established by statute in colonial times. Until recently, all Australian universities have been ‘public institutions, heavily dependent on government funds’, governed in accordance with statute by a council or senate with power to make subordinate legislation and to establish policies consistent with the legislation, to carry into effect the public purposes of the law creating them.³⁴⁸

³⁴⁷ Lynda McKay-Panos, ‘Universities and Freedom of Expression: When Should the Charter Apply’ (2016) 5 *Canadian Journal of Human Rights* 59.

³⁴⁸ (2005) 221 CLR 99, 135 [106] (footnotes omitted).

Justice Kirby went on to point out that even private universities not publicly established, are subject to statutory regulation which sets conditions under which they can lawfully use the title of ‘university’ and confer university degrees and awards.³⁴⁹

The authority which Australian higher education providers have to restrict conduct on their lands and facilities or to impose codes of conduct on staff and students is generally not constrained in favour of freedom of speech by existing statute law save for the possible application of s 38 of the *Charter of Human Rights and Responsibilities 2006* (Vic) in Victoria, s 40 of the *Human Rights Act 2004* (ACT) in the ACT and s 58 of the *Human Rights Act 2018* (Qld), which apply the protection afforded by the rights set out in the legislation to the exercise of powers by public authorities. The valid exercise of statutory powers will not extend to the imposition of impermissible burdens on the implied freedom of political communication. There is a question whether the implied freedom may limit the scope of the power conferred on public authorities to enter into contracts or control the use of property in a way that burdens the freedom. Those limits may be relevant to the conditions which can be imposed upon the use of land or facilities or the terms of engagement of academic staff or admission of students to courses of study.³⁵⁰ Whether the implied freedom does apply in such cases directly or indirectly may be a matter for debate and ultimately judicial decision.

³⁴⁹ Ibid 136 [107].

³⁵⁰ See *Wootton v State of Queensland* (2012) 246 CLR 1.

15 State and Territory Statutes Relating to Higher Education Providers in Australia

A table of the statutes establishing and/or regulating higher education providers in Australia is set out in an Appendix to this Report.³⁵¹ Higher education providers are also subject to general regimes under State and Territory law relating to such matters as financial reporting, audit, employment relations and many others.

No university Act makes express reference to freedom of speech or expression although some refer to ‘public debate within the university and wider society’. There are provisions which relate directly or indirectly to academic freedom. Several Acts refer to freedom of inquiry, which may be taken as an element of academic freedom. Such references are found in objects or functions clauses. Many provide that free inquiry is an object of the university and that the advancement of knowledge informed by free inquiry is a function of the university. An example is s 6 of the *University of Sydney Act 1989* (NSW), which relevantly provides:

Objects and functions of the University

- (1) The object of the University is the promotion, within the limits of the University’s resources, of scholarship, research, free inquiry, the interaction of research and teaching, and academic excellence.
- (2) The University has the following principal functions for the promotion of its object:
 - ...
 - (b) the encouragement of the dissemination, advancement, development and application of knowledge informed by free inquiry,
 - ...

Provisions of the *Macquarie University Act 1989* (NSW), the *Southern Cross University Act 1993* (NSW), the *University of Newcastle Act 1989* (NSW), and the *University of New England Act 1993* (NSW) are phrased in near-identical terms. Similar wording is found in s 7 of the *Curtin University Act 1966* (WA), which relevantly provides:

³⁵¹ See Table in Appendix 3, University Acts.

Functions of University

- (1) The functions of the University shall include the following —
- ...
- (ga) to serve the Western Australian, Australian and international communities and the public interest by —
- ...
- (iii) promoting critical and free enquiry, informed intellectual discussion and public debate within the University and in the wider society ...

Section 7 of the *Edith Cowan University Act 1984* (WA) and s 6 of the *Murdoch University Act 1973* (WA) are phrased in similar terms, and variations of this formulation appear in many other University Acts.

Some University Acts define the university's functions by reference to the delivery of education, the provision of facilities for learning and research, and encouraging the advancement of knowledge. Section 5 of the *Australian National University Act 1991* (Cth) provides:

Functions of the University

- (1) The functions of the University include the following:
- (a) advancing and transmitting knowledge, by undertaking research and teaching of the highest quality;
- (b) encouraging, and providing facilities for, research and postgraduate study, both generally and in relation to subjects of national importance to Australia;
- (c) providing facilities and courses for higher education generally, including education appropriate to professional and other occupations, for students from within Australia and overseas;
- (d) providing facilities and courses at higher education level and other levels in the visual and performing arts, and, in so doing, promoting the highest standards of practice in those fields.
- ...
- (2) In the performance of its functions, the University must pay attention to its national and international roles and to the needs of the Australian Capital Territory and the surrounding regions.

Section 4A of the *University of Adelaide Act 1971* (SA) provides that the single object of that university is the ‘advancement of learning and knowledge, including the provision of university education’. The *Torrens University Act 2013* (SA) contains no objects or functions provision at all.

There are references to academic freedom in sections of some University Acts pertaining to the appointment of Council members. For example, s 12(3)(b) of the *Deakin University Act 2009* (Vic) requires that the Minister, when appointing Council members, must ‘have regard’ to appointing members who have ‘an appreciation of the values of a university relating to teaching, research, independence and academic freedom’. Section 13 of the Act is identical, but pertains to Council members appointed by the Council itself. Those two sections are replicated in all Victorian University Acts, but not in any other Act of any other State or Territory.

Many University Acts contain broad rule-making powers capable of supporting rules regulating expressive conduct on university land. These include powers to make by-laws and statutes with respect to the use of their property and conduct on it. Such powers are essential to the discharge of the functions of a university or other higher education provider and may also be seen as an incident of institutional autonomy. An example is s 28 of the *La Trobe University Act 2009* (Vic):

Council may make university statutes and university regulations

Subject to this Act, the Council may make any university statutes and university regulations with respect to any matter relating to—

- (a) the University; and
- (b) any person—
 - (i) entering or on land or other property of the University; or
 - (ii) using University facilities.

The La Trobe provision identifies the matters to which the University’s statutes and regulations may relate. It can be contrasted with provisions in other University Acts which specifically identify what type of conduct on university land can be regulated and the basis upon which it can be the subject of regulation. Section 29 of the *Edith Cowan University Act* provides:

Power to make by-laws applicable to lands

...

(3) The Council may, with the approval of the Governor, make by-laws for the purpose of managing, preserving, and protecting University lands and for the purpose of regulating the terms and conditions on which such lands may be visited or used by any persons whomsoever, and the conduct of such persons when on or upon such lands, and in particular may by by-laws —

(a) prohibit or regulate the admission to such lands of persons, vehicles or animals; and

(b) prescribe the times when and the purposes for which such lands may be used, and the times when and the purposes for which the same shall be open or closed, and prohibit the use thereof or access thereto at any other times, or for any other purpose; and

(c) prescribe fees to be charged to all or any persons for admission to or use of such lands; and

...

(e) regulate the conduct of persons using or being in or upon such lands; and

(f) prohibit any nuisance, or any offensive, indecent, or improper act, conduct, or behaviour on such lands; and

(g) prohibit the use of abusive or insulting language on such lands; and

...

(i) prohibit the writing or printing of any indecent words, or the writing, printing, or drawing, or affixing of any indecent or obscene picture or representation on such lands, or on any fence, wall, tree, shrub, or hedge thereon; and

...

(6) A by-law may impose a penalty of a fine not exceeding \$1000 for a breach of the by-law.

The power is expressed widely enough to allow for by-laws affecting speech on campus, albeit subject to the limits on the power imposed by the constitutional freedom of political communication.

Some University Acts directly penalise the use of university property in a way that causes a public nuisance. The *James Cook University Act 1997* (Qld) (James Cook University Act) provides that '[a] person must not be disorderly or create a disturbance on the

university's land'.³⁵² Security officers are empowered to direct persons causing a nuisance to leave the university's land or part of it. Failure to comply attracts a penalty.³⁵³ That provision is replicated in the *Central Queensland University Act 1998* (Qld), the *Griffith University Act 1998* (Qld), the *James Cook University Act*, the *Queensland University of Technology Act 1998* (Qld), the *University of Queensland Act 1998* (Qld), the *University of Southern Queensland Act 1998* (Qld), and the *University of the Sunshine Coast Act 1998* (Qld). Such a provision would probably support incidental by-laws or regulations under a general regulation or by-law making power.

Several University Acts prohibit discrimination in student admission and staff appointment processes based upon religion, politics, race or sex. Section 6 of the *Bond University Act 1987* (Qld) refers to this as the 'Principle of non-discrimination'. It provides:

- (1) No test of religion, politics, race or sex shall be administered to any person in order to entitle that person to be admitted as a student of Bond University or to hold any office therein or to graduate therefrom or to enjoy any advantage, benefit or privilege thereof.
- (2) No person shall be denied admission as a student of Bond University or be ineligible to hold office therein or to graduate therefrom or to enjoy any advantage, benefit or privilege thereof because of that person's religious or political views or beliefs, race or sex.

That provision may be seen as providing a safeguard for freedom of speech to the extent that a person's expression of religious or political beliefs or views cannot be used as a basis for denying them admission, graduation or any other 'advantage, benefit or privilege'. Similarly, the restraint against administering a test of religion, politics, race or sex means that a person's views on religion or politics cannot be a barrier to their enrolment as a student or their appointment as an office holder.

As appears from the preceding, a number of Acts acknowledge freedom of inquiry and academic freedom. They do not, in terms, restrain rule-making powers by reference to those considerations. The rule-making powers of universities under their Acts are generally wide enough to authorise rules imposing restrictions on expressive conduct subject to the implied constitutional freedom of political communication.

³⁵² *James Cook University Act 1997* (Qld) sch 1, item 11.

³⁵³ *Ibid* sch 1, item 12(2), (3).

16 Higher Education Provider Rules

Many higher education providers have the power to make statutes, by-laws, and regulations as species of delegated legislation.³⁵⁴ That said, not all documents issued by universities and designated ‘regulations’ or ‘rules’ are legislative in character. Some are administrative documents created by governing bodies, academic boards and councils, faculty bodies, student associations and student representative bodies. Many have express or implied application to freedom of speech and academic freedom. They include rules relating to staff and student conduct and discipline, the regulation of university land use and academic board rules.

16.1 *Freedom of expression and academic freedom*

Explicit reference to academic freedom and freedom of speech is apparent in some of the examined by-laws, regulations, statutes and rules. Section 12 of the ANU Academic Board Charter provides:

The Board’s responsibilities are:

...

- g. developing and promoting principles pertaining to academic freedom within the ANU and of its staff, students and official visitors ...

A commitment to the protection of academic freedoms and freedom of speech is also found in the Charles Sturt University’s University Governance Charter,³⁵⁵ The University of Melbourne’s Council Regulation,³⁵⁶ the University of Tasmania’s Governance Level Principle – No. GLP14³⁵⁷ and the University of Tasmania’s Council Charter.³⁵⁸

³⁵⁴ This is not apparently the case in Queensland where none of the universities has power to make delegated legislation.

³⁵⁵ Charles Sturt University, ‘University Governance Charter’, 2 February 2016.

³⁵⁶ The University of Melbourne, ‘Council Regulation’, 11 December 2018.

³⁵⁷ University of Tasmania, ‘Governance Level Principle – No. GLP14’, 27 June 2014.

³⁵⁸ University of Tasmania, ‘University of Tasmania Council Charter’, October 2015.

Academic Board Rules of eight universities were examined. Six contain references to academic freedom and freedom of expression. By way of example, Pt 2 of the *University of Sydney (Academic Board) Rule 2017* provides:

PURPOSE AND FUNCTIONS OF THE ACADEMIC BOARD

2.1 Principal responsibilities

...

- (2) The Academic Board has principal responsibility for:
- (a) assuring the highest standards in teaching, scholarship and research and, in so doing, safeguarding the academic freedom of the University ...³⁵⁹

Implied references to the protection of such freedoms are found in other university documents, such as the University of the Sunshine Coast Academic Board Terms of Reference which include ‘[t]o foster discourse and deliberation on issues related to higher education through informed and open discussion’.³⁶⁰ Similar phrasing is found in the ANU *Academic Board Rule 2017*.³⁶¹

16.2 Student misconduct and discipline

Of the universities examined, 16 make provision for student misconduct and discipline in the form of a by-law, regulation, statute or rule. An example typical of those provisions found is Pt A of Federation University Australia Regulation 6.1 – Student Discipline, which provides in parts applicable to expressive conduct:

Acts of General Misconduct

4. Acts of general misconduct include but are not limited to the following: -
- (1) behaviour which brings the University into disrepute;
- (2) behaviour which is considered unduly offensive or disorderly;

³⁵⁹ The University of Sydney, *University of Sydney (Academic Board) Rule 2017*, 23 July 2018.

³⁶⁰ University of the Sunshine Coast, ‘Composition and Terms of Reference’, 6 December 2018, s 2.

³⁶¹ The Australian National University, ‘*Academic Board Rule 2017*’, 1 December 2017.

- (3) failing to comply with a reasonable requirement or direction prescribed or given by a member of the University staff in performance of his or her duties or responsibilities;
- ...
- (6) gaining access to, or entering, a computer system or part of a computer system of the University without lawful authority to do so or engaging in illegal or inappropriate or offensive use of the internet, social media (including personal use as defined in the University's Social Media Guidelines), email or the University's network;
- (7) behaviour which interferes with the orderly conduct of any teaching group, assessment, examination or ceremony of the University or University accommodation residences or any meeting of the Council or a board, committee or any other body convened on University business or any other activity, function or program held at the University;
- ...
- (10) engaging in conduct which attacks, bullies, harasses, unlawfully vilifies, victimises, threatens or intimidates any person or attempts to attack, bully, harass, unlawfully vilify, victimise, threaten or intimidate any person; or
- (11) breaching a University Statute, Regulation, Policy, Procedure or code of conduct or behavioural agreement.³⁶²

There are a number of broadly defined behaviours constituting general misconduct for the purposes of that regulation capable of limiting freedom of speech, including, in particular, the terms 'unduly offensive', 'inappropriate' or 'offensive use of social media'. The width of the terms 'bully' and 'harass' to some extent may reside in the eye of the beholder.

The conduct of students which can amount to misconduct is broadly defined in many of the university rules which were examined. The definitions may involve contestable evaluative judgments with consequences for the scope of freedom of speech on the part of students.

Misconduct rules also generally contain procedures for the reporting and investigation of misconduct and disciplinary measures in relation to students found to have engaged in misconduct. The following excerpts from the Murdoch University Student Discipline Regulations are typical of provisions found:

³⁶² Federation University Australia, 'Regulation 6.1 – Student Discipline', 9 December 2014.

Reporting Misconduct

6. Any person may report any alleged misconduct by a student:
 - 6.1 where the allegation relates to General Misconduct, to the Director or to the School Dean (or delegate) of the School in which that student is enrolled; and
 - 6.2 where the allegation relates to Academic Misconduct, to the Unit Coordinator of the relevant Unit.

...

Initial Review of Misconduct

8. The Unit Coordinator must decide whether or not to refer an allegation to an Investigator within ten Business Days of becoming aware of the allegation.

...

Investigating Misconduct

12. The Investigator may either:
 - 12.1 consider that there is sufficient evidence in support of an allegation and that no further investigation is warranted, in which case an investigation will be deemed to have been completed for the purposes of Regulation 17 and notice may be issued in accordance with that Regulation;
 - 12.2 commence an investigation process in relation to the allegation; or
 - 12.3 decide that on the information available no offence was committed, and dismiss the allegation.³⁶³

Student discipline regulations and the process for the investigation of alleged misconduct and the imposition of penalties means that broad definitions of misconduct encompassing speech can have significant adverse consequences, which will depend upon administrative evaluations. Those evaluations may vary according to the values and perspectives of the administrators and organisational culture.

16.3 *Use of higher education provider lands*

Power to regulate the use of land is a common feature of university and other higher education provider statutes. Part 4 of the Edith Cowan University Lands and Traffic By-Laws is a typical example of such regulation. It provides:

³⁶³ Murdoch University, 'Student Discipline Regulations', 7 September 2018.

Prohibited acts on University lands

4.1 No person shall on University lands –

...

- (b) assault or attempt or threaten to assault any other person;
- (c) use abusive or insulting language or do or engage in any offensive, indecent or improper act, conduct or behaviour;
- (d) write, draw, publish or otherwise disseminate any indecent or obscene matter of any kind;

...

Behaviour which is prohibited without authority

4.2 No person shall, without authority on University lands –

- (a) behave in a manner which is likely to interfere with the enjoyment of any other person who is or may in the future be on University lands, or which interferes with the present or future enjoyment of any person on University lands;

- (b) post, paint or otherwise affix to University lands, or publish, display or distribute any placard, paper, notice or advertisement or other written, printed or graphic matter;

...

- (n) arrange, advertise or take part in –

...

- (ii) public speaking or preaching, unless such public speaking or preaching is allowed by law or practice.³⁶⁴

Similar phrasing is found in Flinders University By-Laws.³⁶⁵ Disorderly conduct is referenced throughout the relevant provisions in the By-Laws but is not defined. Rules of this kind directly affect conduct on institutional land. Rules regulating the use of such land and access to it, eg by visiting speakers, are referred to later in this Report.

³⁶⁴ Edith Cowan University, 'Edith Cowan University Lands and Traffic By-Laws', 29 November 2011.
³⁶⁵ Flinders University, 'By-Laws' (undated), ss 4, 20, 23.

17 Higher Education Providers' Non-statutory Codes of Conduct³⁶⁶

Non-statutory regulation of conduct in universities covers a broad range of policies and procedures. They set standards against which staff and student conduct is measured and regulate behaviour which may include speech and other expressive conduct.

One hundred and one policies from 41 universities pertaining to staff and student conduct, misconduct, disciplinary procedures and inclusiveness were examined. All but two of the policies, Deakin University's Rights and Responsibilities as a Student,³⁶⁷ and Swinburne University's People, Culture and Integrity Policy (Our Culture),³⁶⁸ are publicly available. The following summary focuses on key elements of staff and student conduct, complaints, grievances, misconduct and discipline.

17.1 *Staff conduct*

Thirty three codes and other staff conduct policies were examined. Two codes, from Charles Darwin University³⁶⁹ and University of Divinity,³⁷⁰ cover both staff and student conduct. Three important issues are addressed in those codes namely academic freedom, freedom of expression and, related to that, public comment.

A common statement found in staff codes appears in the following extract from the Queensland University of Technology Staff Code of Conduct:

Staff members must treat all people equitably and fairly. Staff members must not unlawfully make distinctions, or apply exclusions or restrictions based on sex, gender, sexuality, race, disability, religion, marital or parental status, age, political or religious conviction or any other factor that is irrelevant to a person's ability to work, study or access QUT services.³⁷¹

Southern Cross University describes in detail 'unacceptable' behaviours:

³⁶⁶ Set out in Appendix 5.

³⁶⁷ Deakin University, 'Rights and Responsibilities as a Student', (undated).

³⁶⁸ Swinburne University, 'People, Culture and Integrity Policy (Our Culture)', 5 July 2018.

³⁶⁹ Charles Darwin University, 'Code of Conduct', 15 December 2017.

³⁷⁰ University of Divinity, 'Statement of Rights, Responsibilities, and Conduct of the Members of the University', 4 December 2013.

³⁷¹ Queensland University of Technology, 'Staff Code of Conduct', 3 December 2014, cl 8.1.3(f).

- (17) Examples of behaviour that is unacceptable include (but is not limited to):
- a. screaming, rude or insulting behaviour or persistent sarcastic behaviour;
 - b. making decisions based on favouritism;
 - c. stalking, threatening or menacing behaviour; and
 - d. use of internet chat lines, Facebook, MySpace, Blogs, Wiki, or Twitter or similar vehicles to defame, stalk, threaten or menace.³⁷²

Rudeness, insult and sarcasm, are all terms which can cover a wide range of things said.

Several codes make reference to upholding institutional reputation. In some cases, this reference appears in connection with expressive conduct.³⁷³ In other cases, it is expressly connected to the exercise of freedom of expression and public comment.³⁷⁴ James Cook University's Code of Conduct provides, in its explanatory statement:

Staff must seek to maintain and enhance public confidence in the integrity of the University as a body receiving public funding, and our actions should not adversely affect the good standing of the University.³⁷⁵

17.2 *Academic freedom*

Twenty four of the staff codes examined contain provisions relating to academic freedom. In addition, a number of universities have separate policies on academic freedom which are discussed in the next part.³⁷⁶

A typical staff code provision relating to academic freedom is found in the following excerpt from the Deakin University Code of Conduct:

³⁷² Southern Cross University, 'Code of Conduct', 5 September 2016.

³⁷³ See, for example: The University of Melbourne, 'Appropriate Workplace Behaviour Policy', 19 October 2018; The University of Western Australia, 'Code of Ethics and Code of Conduct', January 2014; University of Wollongong, 'Code of Conduct', 28 July 2017 and The University of Notre Dame Australia, 'Staff Code of Conduct', undated.

³⁷⁴ See, for example: Australian Catholic University, 'Code of Conduct for all Staff', undated; Murdoch University, Staff Code of Conduct, 3 April 2017 and; Western Sydney University, 'Code of Conduct', 27 August 2015.

³⁷⁵ James Cook University, 'Code of Conduct – Explanatory Statement', 7 October 2015.

³⁷⁶ Appendix 6.

the University recognises and values the right to academic freedom as central to its endeavours in scholarship, teaching and research and is committed to its promotion and protection within the University. It supports the right of its scholars to engage in critical inquiry and robust and unfettered critical debate which extends to engagement with the media.³⁷⁷

The great majority of codes that explicitly mention academic freedom also set out responsibilities and obligations attaching to it. An example is the following statement from Federation University Australia:

Academic freedom does not include a protected privilege to speak out on any matter, to deride or defame individuals, groups or the University or to ignore the policies or decisions that have been formally made within the University community, or those which the University is required to observe at law.³⁷⁸

Three universities, Sunshine Coast, Royal Melbourne Institute of Technology³⁷⁹ and Newcastle³⁸⁰ do not in terms set out restrictions or obligations in the exercise of academic freedom. The University of the Sunshine Coast's policy states:

The Code of Conduct and having respect for the law and system of government, does not detract from the academic freedom of staff. Staff can assume the right to pursue critical and open inquiry and engage in constructive criticism on matters of public concern within their area of expertise.³⁸¹

The University of Western Australia's Code of Ethics and Code of Conduct provides a comprehensive statement:

Academic freedom is recognised and protected by this University as essential to the proper conduct of teaching, research and scholarship. Freedom of intellectual thought and enquiry and the open exchange of ideas and evidence are a University

³⁷⁷ Deakin University, 'Code of Conduct, 18 October 2018 [16].

³⁷⁸ Federation University Australia, 'Staff Code of Conduct', 15 December 2015, [g] Intellectual/Academic Freedom.

³⁷⁹ Royal Melbourne Institute of Technology, 'Code of Conduct', 14 March 2014.

³⁸⁰ University of Newcastle, 'Code of Conduct', 16 March 2017.

³⁸¹ University of the Sunshine Coast, 'Staff Code of Conduct – Governing Policy', 29 June 2018, [4.3.1].

core value. All academic and research staff should be guided by a commitment to freedom of inquiry and exercise their traditional rights to examine social values and to criticise and challenge the belief structures of society in the spirit of a responsible and honest search for knowledge and its dissemination.³⁸²

Western Sydney University states intellectual inquiry is free from unnecessary institutional interference, as addressed in the passage below:

The University is committed to the ideal of freedom to undertake intellectual inquiry and the pursuit of knowledge without undue interference or influence. While the individual and the University benefit from this, we acknowledge the social context and our responsibilities and accountability to peers, each other, and society in general.³⁸³

The La Trobe University code refers to the responsibility of staff to ‘[s]upport academic freedom and encourage innovation and creativity in our work performance/outcomes in the pursuit of knowledge, information and advancement’.³⁸⁴

Some universities such as Western Sydney University,³⁸⁵ The University of Western Australia,³⁸⁶ Deakin University,³⁸⁷ and Murdoch University³⁸⁸ focus on academic freedom as a fundamental right and ‘central to its endeavours in scholarship, teaching and research’.³⁸⁹ Others such as the Australian Catholic University (ACU),³⁹⁰ Charles Sturt University,³⁹¹ Federation University Australia³⁹² and Royal Melbourne Institute of Technology³⁹³ include a single line or shorter passages in their codes.

³⁸² The University of Western Australia, ‘Code of Ethics and Code of Conduct’, January 2014, [1.4].

³⁸³ Western Sydney University, ‘Code of Conduct’, 27 August 2015, [13].

³⁸⁴ La Trobe University, ‘Code of Conduct’, October 2016, 5.

³⁸⁵ Western Sydney University, ‘Code of Conduct’, 27 August 2015.

³⁸⁶ The University of Western Australia, ‘Code of Ethics and Code of Conduct’, January 2014.

³⁸⁷ Deakin University, ‘Code of Conduct’, 18 October 2018.

³⁸⁸ Murdoch University, Staff Code of Conduct’, 3 April 2017.

³⁸⁹ Deakin University, ‘Code of Conduct’, 18 October 2018, s 4 [16].

³⁹⁰ Australian Catholic University, ‘Code of Conduct for all Staff’.

³⁹¹ Charles Sturt University, ‘Code of Conduct’, 15 September 2017.

³⁹² Federation University Australia, ‘Staff Code of Conduct’, 15 December 2015.

³⁹³ Royal Melbourne Institute of Technology, ‘Code of Conduct’, 14 March 2014.

17.3 *Freedom of expression and public comment*

Twenty seven of the staff codes have provisions relating to freedom of expression and public comment. There are common themes in their language and approach.

Clauses relating to public comment provide, to a degree, an implied right to freedom of expression. However, eight universities include a separate passage regarding the right to freedom of expression, either explicitly or implicitly.³⁹⁴ An example of this appears in the University of Adelaide's Code, which states '[f]reedom of expression is uncompromisingly protected and different views are heard with civility.'³⁹⁵

Nineteen of the codes include guidelines on public comment by academic staff. Broadly speaking, the universities allow for public comment in both a public and private capacity. A common formulation is used by James Cook University:

[Staff] have the right to make public comment in a professional, expert or individual capacity, provided that we do not represent our opinions as those of the University unless authorised to do so.³⁹⁶

In some cases, public comment is seen as a right, and the university encourages staff to share their expertise with the media,³⁹⁷ as demonstrated in the following example:

Staff are encouraged to speak to the media about issues relating to their area of specialisation in teaching and/or research, as well as contribute to public debate about political and social issues. If commenting on matters outside of their discipline or area of professional expertise or on political or social issues staff may do so on their own behalf and must not claim such views represent the University.³⁹⁸

³⁹⁴ See, for example, Curtin University, 'Code of Conduct', 22 February 2017; Royal Melbourne Institute of Technology, 14 March 2014; Victoria University, 'Appropriate Workplace Behaviour Policy', 5 February 2018; University of Queensland, 'Code of Conduct', 21 May 2018.

³⁹⁵ University of Adelaide, 'Code of Conduct', September 2018.

³⁹⁶ James Cook University, 'Code of Conduct', 28 April 2016, 'Principle 1: Seek excellence as part of a learning community'.

³⁹⁷ See, for example, Deakin University, 'Code of Conduct', 18 October 2018; James Cook University, 'Code of Conduct – Explanatory Statement', 7 October 2015; Federation University Australia, 'Staff Code of Conduct', 15 December 2015; University of Sydney, 'Code of Conduct', 15 April 2008.

³⁹⁸ Federation University Australia, 'Staff Code of Conduct', 1 December 2015, [h] Public Comment.

Codes commonly state that staff members speaking publicly must make clear that the views they express are their own, and do not represent the university.³⁹⁹ That rule is hardly unique to the university context and would reflect the way in which any employer might seek to allow its employees to make public comments in their private capacity, but not have them attributed to the employer. The staff codes of four universities⁴⁰⁰ provide that when speaking in a professional capacity, staff ‘may identify themselves by their University appointment or qualifications and may, for that purpose, use the name of the University, at the same time making it clear that any views expressed are their own’.⁴⁰¹ Southern Cross University’s Code includes a provision that ‘[t]he University reserves the right to issue a public statement rejecting an officer or affiliate’s statements’.⁴⁰²

The staff codes of Deakin University and Southern Cross University include a clause stating that:

All officers and affiliates have the right to express unpopular or controversial views but this does not mean that they have a right to defame or slander, harass, vilify, bully or intimidate those who disagree with their views.⁴⁰³

The Codes of the ACU⁴⁰⁴ and Western Sydney University refer to the reputation of the university. The relevant clause in the Western Sydney Code states that:

you will restrict your public expression of opinion or comment to matters that will not risk damage to the University’s reputation and prestige and avoid representing a personal viewpoint as being that of the University.⁴⁰⁵

³⁹⁹ See, for example, Batchelor Institute of Indigenous Tertiary Education, ‘Code of Conduct’, 8 March 2014; University of the Sunshine Coast, ‘Staff Code of Conduct – Governing Policy’, 29 June 2018; University of Southern Queensland, ‘Code of Conduct Policy’, 15 June 2017; University of Canberra, ‘Charter of Conduct and Values’, 11 December 2011.

⁴⁰⁰ See, for example Edith Cowan University, ‘Code of Conduct’, May, 2011; James Cook University, ‘Code of Conduct – Explanatory Statement’, 7 October 2015; James Cook University, ‘Code of Conduct’, 28 April 2016; Murdoch University, Staff Code of Conduct, 3 April 2017; Southern Cross University, ‘Code of Conduct’, 5 September 2016.

⁴⁰¹ Murdoch University, Staff Code of Conduct, 3 April 2017, s 3 [12.1].

⁴⁰² Southern Cross University, ‘Code of Conduct’, 5 September 2016, [40].

⁴⁰³ Southern Cross University, ‘Code of Conduct’, 5 September 2016, [41]; Deakin University, ‘Code of Conduct, 18 October 2018, [16].

⁴⁰⁴ Australian Catholic University, ‘Code of Conduct for all Staff’.

These codes raise the question how the effect of an opinion on the ‘reputation’ or ‘prestige’ of the university is to be judged. Is it the Vice-Chancellor’s view or that of the governing body, or some university official, or a survey of public opinion?

17.4 *Student conduct policies*

The Review examined 46 student conduct policies across 38 institutions. As noted earlier, Charles Darwin University and the University of Divinity have a combined staff and student code. There are policies and codes of general application and policies and codes which relate to behaviour in particular areas.⁴⁰⁶ Many policies include a statement of guidelines and what the institution expects of students.⁴⁰⁷ There is commonly reference to diversity, to discrimination and to upholding the reasonable freedoms of others.

By way of example, Victoria University’s Student Charter Policy requires students to:

Respect the diversity of all students and staff and support an environment free from discrimination and harassment in accordance with Commonwealth and State Legislation and associated University policy.⁴⁰⁸

A corresponding provision in Deakin University’s Code states:

Students must:

...

- j. not engage in discrimination, sexual harassment, victimisation, bullying, child abuse or any form of interpersonal, psychological or physical violence ...⁴⁰⁹

⁴⁰⁵ Western Sydney University, ‘Code of Conduct’, 27 August, 2015 [12].

⁴⁰⁶ Discussed in the next part.

⁴⁰⁷ Edith Cowan University, ‘Student Charter’, 24 October, 2016; The University of Western Australia, ‘Charter of Students Rights and Responsibilities’, 1 April, 2015; University of South Australia, ‘Code of Conduct for Students’, 22 June, 2007.

⁴⁰⁸ Victoria University, ‘Student Charter Policy’, cl (12)c.

⁴⁰⁹ Deakin University, ‘Student Code of Conduct’, 18 October 2018, cl (4).

The Student Code of Conduct of the Batchelor Institute of Indigenous Tertiary Education provides that:

- (2) Students are expected to act at all times in a way that:
- ...
- (c) does not impinge on the reasonable freedom of other persons to pursue their studies, researches, duties or lawful activities in the Institute or Institute facilities ...⁴¹⁰

La Trobe University and James Cook University characterise some conduct by how it ‘may be reasonably perceived’.⁴¹¹ La Trobe University’s Student Code of Conduct requires students to:

1. Not engage in unacceptable behaviour such as violence, discrimination, harassment, bullying/hazing, violence, vilification and victimisation. This includes any behaviour which may be perceived as:
 1. attacking a person (physically, psychologically or sexually);
 2. verbally abusing a person or using offensive language;
 3. intimidating a person;
 4. causing injury to a person;
 5. harassing an individual or group;
 6. bullying/hazing an individual or group;
 7. placing the health and safety of anyone at risk;
 8. causing damage to La Trobe University property; and
 9. disparaging, deriding or defaming La Trobe University.

That language, of course, begs the question ‘perceived by whom?’. To that extent it leaves open the possibility of a range of viewpoints informing characterisation and the possibility of overreach adverse to freedom of speech in its application to things said or otherwise communicated.

A number of universities make provision in their Codes for the use of facilities by students. The La Trobe University’s Charter of Student Rights and Responsibilities reads:

⁴¹⁰ Batchelor Institute of Indigenous Tertiary Education, ‘Staff Code of Conduct’, 8 March 2014, cl 3(2)(c).

⁴¹¹ James Cook University, ‘Student Charter’, (undated).

You are responsible for:

...

- f. Using University property and resources safely, in a way which will not endanger others or cause unnecessary damage or reputational risk ...⁴¹²

An obligation to uphold institutional reputation appears in the policies of seven providers, which were examined. Typically there is a statement to the effect that students must behave in a way that ‘ensures that the reputation of the University is upheld.’⁴¹³ Reputational damage to the university is also seen as a qualifier on student freedom of expression in Murdoch University’s Student Code of Conduct which states:

Students, in exercising their right to freedom of expression, have a responsibility to give consideration to the reputation of the University and its orderly and safe functioning.⁴¹⁴

Again, this kind of language may beg the question — ‘reputation’ from whose point of view? A controversial opinion on a particularly contentious topic might be seen by some, who vehemently disagree with it, as damaging to the reputation of the university but not so seen by others.

La Trobe University and The University of Western Australia both make provision for student activism. La Trobe University’s Charter of Student Rights and Responsibilities provides:

- (5) You have a right to:

...

⁴¹² La Trobe University, ‘Charter of Student Rights and Responsibilities’, 23 January 2017 (6).

⁴¹³ See, for example, Australian Catholic University, ‘Student Conduct and Discipline Policy’, 6 February 2018; Batchelor Institute of Indigenous Tertiary Education, ‘Student Code of Conduct’, 25 February 2014.

⁴¹⁴ Murdoch University, ‘Student Code of Conduct’, 8 December 2012, cl 3.2.

- g. Assemble and engage in protests and activism on University grounds, which are conducted in a safe and peaceful manner.⁴¹⁵

In The University of Western Australia's Code of Ethics and Code of Conduct, students are expressly given 'the right to participate in political activities on campus'.⁴¹⁶

17.5 *Student policies — definitions of misconduct*

Actions and behaviours of students which may amount to misconduct are defined variously in university policies. They typically provide comprehensive lists of those actions and behaviours. One example is Deakin University's Student Misconduct Policy which states:

- 3. General Misconduct includes but is not limited to:
 - (a) breaching a Statute, regulation, policy or rule of the University;
 - ...
 - (c) behaving in a manner that is disorderly or detrimental to the interests and good repute of the University;
 - (d) obstructing or interfering with the proper use of any of the facilities of the University by any other member of the University or other authorised user;
 - (e) obstructing or disrupting the University's activities, whether conducted face to face or on-line;
 - (f) misusing the information technology communication infrastructure of the University or its wholly owned entities, including using networks and systems to:
 - (i) threaten, harass or menace any person; and/or
 - (ii) access data without authority;
 - (g) attacking, harassing or threatening to attack or harass, or intimidating any person, or causing another person to fear for their safety, security or wellbeing, whether face to face, by telephone or by the use of technology ...⁴¹⁷

⁴¹⁵ La Trobe University, 'Charter of Student Rights and Responsibilities', 23 January 2017 (5).

⁴¹⁶ The University of Western Australia, 'Code of Ethics and Code of Conduct', 29 August 2017.

⁴¹⁷ Deakin University, 'Regulation 4.1(1) – General Misconduct', 15 June 2017.

The terms ‘good repute’ and ‘causing another person to fear for their wellbeing’ involve the use of broad language capable of a range of applications affecting expressive conduct depending upon administrative discretions and evaluation. Detailed provisions are also found in La Trobe University’s Student Misconduct Statute.⁴¹⁸ References to reputation appear in a number of student conduct and discipline policies. Edith Cowan University’s Student Misconduct Rules treats conduct which may give rise to ‘serious detriment to the interests or reputation of the University’ as misconduct.⁴¹⁹ Similar wording is found in the staff and student conduct and discipline policies of the ACU University,⁴²⁰ Central Queensland University,⁴²¹ La Trobe University,⁴²² The University of Western Australia⁴²³ and Deakin University.⁴²⁴

Explicit reference to misconduct, in the context of protection of freedom of expression, is made in Macquarie University’s Student Code of Conduct, which provides:

Misconduct A student must not intentionally or recklessly:

...

- (c) disrupt or hinder the exercise of the right to freedom of expression by any member of the University community or any associate of the University
...⁴²⁵

Other student policies such as that of Central Queensland University define misconduct simply as any action or behaviour ‘[i]mpeding the ability of any member of the University Community to study or participate in any University activity.’⁴²⁶

⁴¹⁸ La Trobe University, ‘General Misconduct Statute 2009’, 7 December 2015.

⁴¹⁹ Edith Cowan University, ‘General Misconduct Rules (Students)’, 10 December 2015, cl 3.4.2.

⁴²⁰ Australian Catholic University, ‘Student Conduct and Discipline Policy’, 6 February 2018.

⁴²¹ Central Queensland University, ‘Student Misconduct Policy’, 1 June 2017.

⁴²² La Trobe University, ‘General Misconduct Statute 2009’, 7 December 2015.

⁴²³ The University of Western Australia, ‘Managing Misconduct Policy’, 19 December 2018.

⁴²⁴ Deakin University, ‘Regulation 4.1(1) – General Misconduct’, 15 June 2017.

⁴²⁵ Macquarie University, ‘Student Code of Conduct’, 31 July 2017.

⁴²⁶ Central Queensland University, ‘Student Behavioural Misconduct Procedure’, 9 November 2015, cl 6.5a).

17.6 *Reporting and procedures*

Most higher education provider policies establish procedures for reporting and determining whether misconduct has occurred. Monash University's Student General Misconduct Policy⁴²⁷ outlines a typical resolution process:

Stage 1 – Reporting an act of general misconduct. Reports can be made by any person and should be referred by the recipient to the Responsible Officer for General Misconduct (ROGM).

Stage 2 – Reviewing a report of general misconduct. For most matters, reports of general misconduct are reviewed, investigated and determined by the ROGM.

Stage 3 – Determination by a General Misconduct Panel (GMP). If the ROGM chooses to refer the matter, the GMP is responsible for hearing and determining the allegation of general misconduct.

Stage 4 – Appealing a decision. Decisions made by the ROGM may be appealed to the General Misconduct Appeals Panel (GMAP) and primary decisions of GMP may also be appealed to the GMAP.

Penalties may be imposed following a determination of misconduct. These may vary due to the severity of the misconduct committed as well as from institution to institution.

Appeal procedures are generally included. Thus the Murdoch University Student Appeals Policy lists the types of matters that can be appealed, including '[a]ny finding of or penalty for misconduct, made in accordance with University legislation.'⁴²⁸

17.7 *Student policies — academic freedom*

Seven universities make explicit reference to academic freedom in their student policies.⁴²⁹ The University of Newcastle's Code of Conduct provides that students must 'promote collegiality by behaving inclusively and openly, and fostering academic

⁴²⁷ Monash University, 'Student General Misconduct Policy', 26 February 2018.

⁴²⁸ Murdoch University, 'Student Appeals Policy', 17 January 2018, cl 4.1.9.

⁴²⁹ See, for example Charles Sturt University, 'Student Charter', 20 December 2018 and Macquarie University, 'Student Code of Conduct', 31 July 2017.

freedom’.⁴³⁰ In addition to those particular examples of course, many universities have policies, strategic plans and other statements pertaining to academic freedom.

17.8 *Student policies — freedom of expression*

Seventeen student-related policies either explicitly or implicitly refer to the promotion and protection of freedom of expression. Clause 1.3 of Murdoch University’s Student Code of Conduct provides:

The University recognises the rights of individuals to their own opinions, values the ideal of fair and open discussion and supports the principles of freedom of speech and expression. It is both reasonable and desirable that members of the University be able to participate in actively shaping the culture and enterprise of the University.⁴³¹

The University of Tasmania and the University of Melbourne have similar policies and codes. The University of Melbourne’s Student Conduct Policy relevantly provides:

respect the rights of other members of the University community to express dissent or different political or religious views, subject to those actions or views complying with the laws of Australia and not endangering the safety of other members of the community ...⁴³²

Southern Cross University’s policy relevantly states that:

Every student has the right to be free of University censorship of material they publish for academic purposes, whether for distribution within the university or elsewhere.⁴³³

⁴³⁰ University of Newcastle, ‘Code of Conduct’, 16 March 2017.

⁴³¹ Murdoch University, ‘Student Code of Conduct’, 8 December 2012, cl 1.3.

⁴³² University of Melbourne, ‘Student Conduct Policy’, 8 August 2017, cl 4.2(e).

⁴³³ Southern Cross University, ‘Student Rights and Responsibilities Charter’, 14 August 2012, s 4 ‘Content and Implementation’, 1.7.

18 Higher Education Providers Written Policies and Principles

In addition to the particular policies set out in the previous sections, the Review examined other written policies and principles created by Australian universities that made direct reference to academic freedom and freedom of intellectual inquiry. This aspect of the Review is relevant to s 19-115 of the HES Act, Standard 6.1.4 of the HE Standards and provider criterion B1.1.2 of the HE Standards which are set out later in this Report.

The policies and other documents examined included strategic plans, equal opportunity policies, policies concerning research, media and public comment, and standalone policies concerning either academic or intellectual freedom. One hundred and thirty two such policies and procedures were collected from 39 out of the 42 universities.

18.1 *Academic freedom and freedom of intellectual inquiry*

Thirteen universities have an individual policy or statement dealing with either academic freedom or intellectual inquiry. They frequently operate as an overarching framework, referenced within other policies and principles of the university. The University of Sydney's Charter of Academic Freedom states:

The University of Sydney affirms its institutional right and responsibility, and the rights and responsibilities of each of its individual scholars, to pursue knowledge for its own sake, wherever the pursuit might lead.⁴³⁴

The Charter is referenced within a number of University of Sydney's policies, such as the 'Contracting principles' section of the Research Agreement Policy 2011 dealing with the right to publish:

There should be no delays or restrictions on publication of research outcomes without good reason. No external funding body should have the right to alter,

⁴³⁴ The University of Sydney, 'Charter of Academic Freedom', 6 May 2008.

suppress or indefinitely delay publication of all or part of the outcomes of sponsored research consistently with the *Charter of Academic Freedom*.⁴³⁵

The adoption of a set of umbrella principles on freedom of speech and academic freedom, informing all other rules and policies, improves the accessibility of that important information to university decision-makers, other staff, students and the wider community.

18.2 *Written policies relating to use of media and public comment*

Eleven universities have policies that reference media and public comment. They generally concern university staff (rather than students). They provide guidance to staff on how to make comments about a particular issue to the media or in a public setting. They generally allow a staff member to make a comment as a member of their university for queries within their ‘academic expertise’. However, when making comments outside of their academic field in public, staff must not speak as members of the institution. Central Queensland University’s Media Relations Procedure provides:

This procedure does not limit the freedom of:

- University staff, as private citizens, to comment on community affairs as individuals, although one’s University position/title may not be quoted when so doing ...⁴³⁶

There is a risk that the freedom of speech of academic staff may be burdened by distinctions, drawn by university policies, between public and private comments. Minutes of a meeting of La Trobe University’s Academic Board in June 2016 indicated that staff had previously felt supported by the university when voicing their own opinions within the public space, but were finding increasing difficulty in applying the distinction between personal and other capacities when making comments in social media.⁴³⁷ Under the Media Policy issued by Edith Cowan University, staff making comment to the media in any capacity are advised

⁴³⁵ The University of Sydney, ‘Research Agreements Policy 2011’, Revised 8 June 2017, cl 7(1)(a).

⁴³⁶ Central Queensland University, ‘Media Relations Procedure’, 23 November 2017, cl 3.1.

⁴³⁷ La Trobe University Academic Board, ‘Minutes of the four hundred and eighty-eighth meeting of the Academic Board’. *La Trobe University* (Meeting Minutes, 8 June 2016) <https://www.latrobe.edu.au/_data/assets/pdf_file/0003/740559/June-2016.pdf>.

that they may be held personally accountable if any comments they make are found to be defamatory or harassing in nature.⁴³⁸

18.3 *Research policies*

Fourteen universities have policies related to research that reference academic freedom and freedom of intellectual inquiry in some form. For example, James Cook University has made an express commitment to respect freedom of expression and inquiry while maintaining a safe working environment for research projects and promoting the exchange of ideas between peers throughout the university, while not disregarding the safety of anyone involved in a research project of the university.⁴³⁹

Research policies dealing with the acceptance of donations from external sources for research projects also seek to promote principles of academic freedom. Particular policies are designed to safeguard academic freedom from external influence during research projects conducted by the university. Central Queensland University's Principles Governing the Acceptance of Offers of Research Income Policy states:

The University is committed to principles of academic freedom and will not support or engage in any decisive debate which seeks to have general embargoes placed on certain funding agencies and/or sources. It reserves the right to refuse research funds with unacceptable restrictions, as described in these principles.⁴⁴⁰

The policies elevate academic freedom and intellectual inquiry. Although there are a number of universities which adopt the Australian Code for the Responsible Conduct of Research as part of their own policies in relation to research, the Code itself does not contain any references relating to freedom of expression in its core principles.

18.4 *Diversity and inclusiveness policies*

Universities also have guidelines and policy documents which relate to inclusiveness, bullying, harassment and discrimination. At some institutions, 'inclusiveness' is also emphasised in value statements, strategic plans and cultural sensitivity documents.

⁴³⁸ Edith Cowan University, 'Media Policy', 28 September 2018, cl 4.6.1.

⁴³⁹ James Cook University, 'Code for Responsible Conduct of Research', 30 April 2018, cl 1.

⁴⁴⁰ Central Queensland University, 'Principles Governing the Acceptance of Offers of Research Income Policy', 18 April 2017, cl 1.1.

Approximately half of the university value statements and strategic plans examined for the purposes of this Review state the university's commitment to respect for diversity and inclusiveness. Values stated in the ANU Strategic Plan are typical of those provisions:

We are inclusive, open and respectful, reflecting the diversity of our nation.

We are committed to integrity and ethical behaviour.

...

We embrace informed risk-taking in pursuit of our objectives.⁴⁴¹

Approximately one quarter of universities have a policy outlining the institution's stance on equity, diversity and inclusion. For example, Griffith University's Equity, Diversity and Inclusion Policy states:

3. APPLICATION

The University is committed to promoting equity, diversity and inclusion by providing an environment that values and understands diversity in society.

3.1 Provision of Equity, diversity and inclusion

The University undertakes to promote and support equity in all its activities, through the following:

- eliminating discrimination on the grounds of a person's age, race, sex, intersex status, sexual orientation, gender identity, disability, marital/relationship status, parental status, family responsibilities, pregnancy, breastfeeding needs, religious belief or activity, political belief or activity, trade union activity, or a person's association with someone who identifies with any of these attributes;
- providing learning and work environments that are free from discrimination and harassment (including sexual harassment and assault), safe for staff and students, inclusive of all individuals and are characterised by respect;
- ...
- educating staff and students about acceptable behaviour at work and in an educational environment;

⁴⁴¹ Australian National University, 'Strategic Plan 2019-2022', 4.

- using non-discriminatory, inclusive language in all publications (including learning materials) and encouraging the same across the University ...⁴⁴²

Other policies merely require that staff, students, university officers and visitors must engage in behaviour that is inclusive and respectful of diversity within the community. Deakin University's Diversity and Inclusion Policy states:

The University will not tolerate or condone unlawful discrimination, sexual harassment, victimisation or vilification. It will provide avenues for resolving complaints of unlawful discrimination, sexual harassment, victimisation and vilification by informal resolution or formal investigation. The resolution process will be fair, consistent, transparent and timely.⁴⁴³

Some universities have incorporated 'inclusiveness' into other policies. Central Queensland University's Social Media Policy provides that:

5.23 The University will be inclusive in its approach towards delivering strategy and content for social media.

...

5.25 Content, posts and promotions are to use inclusive language, adopting a brand suitable tone-of-voice that encourages students, staff and the wider community to feel welcome to connect and engage online with CQUniversity. Content is to be considerate of the platform audience and contribute to the conversation rather than be of a hijacking or self-promoting nature.

5.26 Social Media Moderators are to endeavour to foster inclusive behaviour from fans and followers of the University with the aim to create inclusive social communities.⁴⁴⁴

Social media policies are separately considered later in this Report.

⁴⁴² Griffith University, 'Equity, Diversity and Inclusion Policy', 1 August 2018.

⁴⁴³ Deakin University, 'Diversity and Inclusion Policy', 22 October 2018, s 4 (6).

⁴⁴⁴ Central Queensland University, 'Social Media Policy', 12 April 2016.

Western Sydney University's Respect and Inclusion in Learning and Working Policy⁴⁴⁵ expressly balances intellectual and academic freedom with the need for inclusiveness by encouraging robust debate in the course of teaching, research and scholarship while also requiring that views be respectful of others.

18.5 *Inclusive language guides*

Six universities have guidelines which outline and encourage the use of inclusive and non-discriminatory language. These guides identify what type of language is to be used by the university, and why. An example is Curtin University's Inclusive Language Procedures, which provides:

In the interest of ensuring that communication is inclusive and reflects the University's commitment to valuing diversity all University community members will take all reasonable steps to:

- (a) ensure spoken, written and electronic communication of the University is free of bias and discriminatory language;
- (b) avoid stereotyping on the basis of sex; age; race; colour; national or ethnic origin; marital or relationship status; pregnancy or potential pregnancy; breastfeeding; political conviction; religious conviction; impairment; need for carers, assistance animals and disability aids; family responsibility or family status; gender; gender identity; intersex status; sexual orientation; or gender history.⁴⁴⁶

Paragraph (b) is a very wide ranging constraint given the scope of the concept of 'stereotyping' which is generally defined as involving 'over-generalisation'.

Similar provisions are found in Murdoch University's Non-Discriminatory Language Guidelines for Staff and Students,⁴⁴⁷ Southern Cross University's Inclusive Language Factsheet,⁴⁴⁸ University of Wollongong's Inclusive Language Guidelines,⁴⁴⁹ The University

⁴⁴⁵ Western Sydney University, 'Respect and Inclusion in Learning and Working Policy', 20 August 2013, s 3 (13).

⁴⁴⁶ Curtin University, 'Inclusive Language Procedures', 9 May 2017, cl 3.1.1.

⁴⁴⁷ Murdoch University, 'Non-Discriminatory Language Guidelines for Staff and Students', 2018.

⁴⁴⁸ Southern Cross University, 'Inclusive Language Factsheet', November 2017.

⁴⁴⁹ University of Wollongong, 'Inclusive Language Guidelines', 21 July 2017.

of Western Australia's Guidelines on the Use of Non-Discriminatory Language⁴⁵⁰ and Charles Sturt University's Communicating Without Bias Guidelines.⁴⁵¹

18.6 *Bullying, discrimination and harassment policies*

Many Australian universities have policies dealing with bullying, discrimination and harassment. All policies examined for the purposes of this Review indicate, not surprisingly, that universities do not tolerate such behaviours. Charles Darwin University's Bullying and Anti-Harassment Policy is typical. It states:

The University has a zero tolerance policy for harassment, bullying, violent acts or threats of violence against staff, students, faculty, or visitors. The University is committed to providing a workplace, learning, study, and social environment free of harassment and bullying and which is healthy, conducive to productivity, comfortable, where the rights and dignity of all members of the campus community are respected. This includes staff, students, faculty, and visitors to the University.⁴⁵²

Similar wording exists in the majority of bullying, discrimination and harassment policies. 'Bullying' and 'harassment' are terms which appear to cover a multitude of greater and lesser sins. The Australian Human Rights Commission in a 'Bullying Fact Sheet' indicates the many kinds of repeated behaviours that may fall under the heading of 'bullying':

- keeping someone out of a group (online or offline);
- acting in an unpleasant way near or towards someone;
- giving nasty looks, making rude gestures, calling names, being rude and impolite, and constantly negative teasing;
- spreading rumours or lies, or misrepresenting someone (ie using their Facebook account to post messages as if it were them);
- mucking about that goes too far;
- harassing someone based on their race, sex, religion, gender or a disability;
- intentionally and repeatedly hurting someone physically;

⁴⁵⁰ The University of Western Australia, 'Guidelines on the Use of Non-Discriminatory Language', 20 August 2017.

⁴⁵¹ Charles Sturt University, 'Communicating Without Bias Guidelines', 22 May 2014.

⁴⁵² Charles Darwin University, 'Bullying and Anti-Harassment', 1 May 2012.

- intentionally stalking someone;
- taking advantage of any power over someone else like a Prefect or a Student Representative.⁴⁵³

Types of bullying are said to include: face-to-face bullying, covert bullying and cyber bullying.

The policies of four universities are noteworthy for characterising the behaviour that may constitute bullying, discrimination or harassment in wide terms. Murdoch University's Violence, Aggression and Bullying in the Workplace Policy provides that the following could amount to harassment:

- 5.2.1. Overloading a person with work or not providing enough work;
- 5.2.2. Setting timelines that are difficult to achieve or constantly changing deadlines;
- 5.2.3. Constantly setting tasks that are below or beyond a person's skill level;
- 5.2.4. Ignoring or isolating a person.⁴⁵⁴

What may be regarded as 'sarcasm', referred to in the Flinders University No Bullying at Flinders policy,⁴⁵⁵ may be seen differently by different individuals. Some policies are expressed so broadly that it may be difficult for those who are bound by them to determine their limits. Ultimately, that will not be a relatively clear objective exercise but a prediction of how an administrator or human resources officer will interpret them. The Curtin University Discrimination and Harassment Prevention Procedures state:

The University does not condone *intentional* or *unintentional* discrimination or harassment displayed between members of the Curtin community, including between staff, between staff and students, or between students.⁴⁵⁶

⁴⁵³ <<https://www.humanrights.gov.au/what-bullying-violence-harassment-and-bullying-fact-sheet>>.

⁴⁵⁴ Murdoch University, 'Violence, Aggression and Bullying in the Workplace Policy', 3 April 2017.

⁴⁵⁵ Flinders University, 'No Bullying at Flinders', 9 August 2007.

⁴⁵⁶ Curtin University, 'Discrimination and Harassment Prevention Procedures', 8 October 2018, cl 3.1 (emphasis added).

There is an obvious question of definition about the concept of ‘unintentional discrimination or harassment’.

18.7 *Equal opportunity policies*

Equal opportunity policies support the promotion of equal opportunity in universities, both as a workplace and as an educational environment. The relevant policies detail equal opportunity principles in seeking employment with the institution and also include provisions relating to bullying, discrimination and harassment. The Batchelor Institute of Indigenous Tertiary Education’s Fair Treatment, Equal Benefits and Opportunity policy is typical and relevantly states:

Batchelor Institute of Indigenous Tertiary Education (The Institute) supports the concept of equal opportunity and is committed to providing all staff, students and potential students with a working and learning environment which values diversity, respects differences and provides an environment that is safe, healthy, positive, supportive and free from all forms of harassment, bullying and discrimination.⁴⁵⁷

18.8 *Curriculum policies*

The ACU and La Trobe University have policies requiring staff to develop curricula that reflect the universities’ values relating to inclusiveness. La Trobe University’s Developing Inclusive Curriculum policy includes outlines of criteria of an inclusive curriculum, stating:

An inclusive curriculum:

- recognises that prior experiences inform students’ expectations, and experiences of the course;
- acknowledges and values the culture, background and experience of all students;
- is inclusive of gender, cultural and socioeconomic background, age, sexuality, and differences related to ability and disability;

⁴⁵⁷ Batchelor Institute of Indigenous Tertiary Education, ‘Fair Treatment, Equal Benefits and Opportunity’, 20 August 2014, cl 1.

- is responsive and gives expression to the knowledge base of the students and staff in teaching and learning;
- acknowledges that any curriculum decision is a selection rather than a complete 'truth';
- makes explicit the rationales underpinning course design;
- makes clear the goals and standards, which include the key ideas or concepts of the discipline and the ways of arriving at an understanding of that discipline;
- provides fair access to and distribution of resources.⁴⁵⁸

Similar wording is found in the ACU Principles of Inclusive Curriculum.⁴⁵⁹

⁴⁵⁸ La Trobe University, 'Developing Inclusive Curriculum', October 2014, 2.

⁴⁵⁹ Australian Catholic University, 'Principles of Inclusive Curriculum', 14 May 2008, cl 1.

19 Social Media Policies

The social media policies of the 42 universities were examined for references to academic freedom and freedom of speech. Thirty eight of those contained such references. Not all were standalone social media policies. Some more general policies touch on social media (notably those concerning the acceptable use of information technology (IT) resources).

Several universities including ANU, Monash University and the University of Wollongong, have separate policies for staff and students in regard to social media use. A distinction common to both types of policy is made between social media use that relates to the user's affiliation with the university and social media use that is private. Academic staff, who have the credentials and professional obligation to engage in scholarly debates including on matters of public interest, are afforded broader latitude to associate themselves with their institution on social media than students who are merely learning. Therefore university policies often provide that academic staff may use the name of their institution and their professional title in social media interactions within their area of expertise. For example, Monash University's Social Media: Staff and Associates Use Procedures provide:

Where members of the University offer public comments, it is expected that the comments will relate directly to the individual area(s) of expertise of their appointments. In that case, staff members/associates may use the University's name and give the title of their University appointment in order to establish their credentials. This does not restrict the right of a staff member or associate to freely express opinions in their private capacity as an individual member of society, but statements made in this context should not include the University's name, or the title of the person's University appointment.⁴⁶⁰

The same university requires its students to be more circumspect in associating themselves with the University in using social media, regardless of whether use is in connection with their education or is private. Monash University's Social Media: Students Use Procedures provide that students must, when using social media 'in the context of education or research training, and when making identifiable personal use of social media',

⁴⁶⁰ Monash University, 'Social Media: Staff and Associates Use Procedures', 17 October 2016, cl 3.2.

expressly state that the views expressed ‘are those of the student and not those of the University (unless they are officially authorised by the University).’⁴⁶¹

Perhaps, given the inevitable difficulty of delineating personal social media use, Federation University Australia’s Social Media Procedure directly states that staff and students should avoid offering personal views.⁴⁶² That document further provides that staff and students should ‘only speak authoritatively on topics [they] are authorised to speak about’ and should ‘identify if [they] are speaking in a professional capacity.’⁴⁶³

Thirteen universities have policies which either encourage staff and students to participate in public discussion through social media, or expressly state that they have the right to do so. James Cook University’s Social Media Policy states the following:

The University:

- encourages and supports the ideal of the ‘engaged academic’, ‘engaged Student’ or ‘engaged Affiliate’ who, via Social Media and public commentary, are participating in the sharing of information, opinions and ideas that showcase the University’s research and scholarly expertise and the delivery of learning and support services, or otherwise contribute to public discourse ...⁴⁶⁴

Likewise, Western Sydney University’s Social Media Guidelines for Staff states:

The University supports and encourages constructive, open dialogue and the exchange of ideas between staff at all levels within the organisation and beyond. One channel of communication is through participation in social media.⁴⁶⁵

The social media policies of The University of Western Australia, University of New England and The University of Notre Dame Australia make clear that the policies themselves are not intended to limit or restrict intellectual freedom or freedom of speech. Notre Dame Australia’s Social Media Policy declares that it is not intended ‘to discourage

⁴⁶¹ Monash University, ‘Social Media: Students Use Procedures’, 13 June. 2013, cl 3d).

⁴⁶² Federation University Australia, ‘Social Media Procedure’, 23 November 2017, 2.

⁴⁶³ Ibid.

⁴⁶⁴ James Cook University, ‘Social Media Policy’, 18 October 2018.

⁴⁶⁵ Western Sydney University, ‘Social Media Guidelines for Staff, 2015, 3.

personal expression or the values of scholarly and intellectual debate, honesty or openness that are consistent with the University's Objects'.⁴⁶⁶

Social media policies impose some limits on social media use. Edith Cowan University's Social Media Policy provides that both staff and students may engage in social media in their university capacity or their private capacity. In doing so, staff must act in accordance with the University's Code of Conduct Policy, and students must act in accordance with the University's Rules and Statutes.⁴⁶⁷ Monash University's Social Media: Student Use Procedures provide that students must exhibit the same respect, courtesy and professionalism online as they would in person, and notes that students' online interactions must be consistent with University Rules.⁴⁶⁸

Fourteen universities make reference to social media within other policies. The UNSW's 'Acceptable Use of UNSW Information and Communication Technology (ICT) Resources Procedures', which covers the acceptable use of social media sites, states that:

The University upholds the principles of academic freedom. This right to academic enquiry and freedom of expression is tempered by the rights of others, including privacy; freedom from intimidation, discrimination or harassment; protection of intellectual property and copyright and ownership of data and security of information.⁴⁶⁹

Social media policies generally distinguish between private social media use by members of the university community and social media use that relates to the user's affiliation with the university.

Eighteen universities have social media policies which cover the responsibilities of a person affiliated with the university and who proposes to make public comment in that person's field of expertise. Charles Darwin University's Social Media Policy states that staff, students and authorised visitors are allowed to make public comments on social media if they identify the extent of their expertise, where their academic standing is relevant to the discussion. When the statement made is on a matter of public interest, the person making the

⁴⁶⁶ The University of Notre Dame Australia, 'Social Media Policy', 6 October 2014, cl 2.2.

⁴⁶⁷ Edith Cowan University, 'Social Media', 26 September 2016, cll 4.4.1 and 4.6.1.

⁴⁶⁸ Monash University, 'Social Media: Student Use Procedures', 13 June 2013, 1.

⁴⁶⁹ University of New South Wales, 'Acceptable Use of UNSW Information and Communication Technology (ICT) Resources Procedures' 27 September 2016, cl 4.

comment is required to make clear that they are expressing personal views and not those of the University unless expressly authorised to do so.⁴⁷⁰

⁴⁷⁰ Charles Darwin University, 'Social Media Policy', 13 December 2017, 5.

20 The Use of University Facilities

Freedom of speech issues arise in connection with the use of university land and facilities by visiting speakers and also by staff and students. Members of the university community or others may take objection to the content of a speaker's views and wish to protest against the expression of those views and/or against the appropriateness of the university providing a platform for their expression. Generally speaking, as a matter of law, no one has a positive right to use university lands or facilities to express their opinions. Principles and rules governing the use of facilities are embedded in university Acts enacted by Parliaments, and in rules and policies and other documents created by the institutions themselves.

Forty six documents relating to the use of land and facilities from 28 universities were examined for the purposes of this Review. The result is a snapshot of their variety rather than a complete audit. They include documents relating to: the hire of university facilities; conduct in university spaces; visitors to university campuses and security and damages.

This section is only concerned with university policies dealing with facilities in the sense of buildings, rooms, land and space. Many, if not all universities, also have policies relating to the use of ICT facilities, such as computers and the internet. They cover acceptable and unacceptable use, the type of language that is acceptable and deal with the use of email and social media.

20.1 *Statutory and by-law provisions relating to the use of land and facilities*

The powers of universities in relation to access and the use of their land and facilities are typically broad, as exemplified in the *Deakin University Act 2009* (Vic):⁴⁷¹

Subject to this Act, the Council may make any university statutes and university regulations with respect to any matter relating to—

- (a) the University; and
- (b) any person—
 - (i) entering or on land or other property of the University; or

⁴⁷¹ These exact words are also found, for example, in the *Federation University Australia Act 2010* (Vic) s 28, *La Trobe University Act 2009* (Vic) s 28, *Swinburne University of Technology Act 2010* (Vic) s 28, *Victoria University Act 2010* (Vic) s 82.

- (ii) using University facilities.⁴⁷²

Other university Acts refer specifically to conduct that is not permitted on university land, for example, the stipulation that ‘a person must not be disorderly or create a disturbance on the university’s land’.⁴⁷³ A comprehensive empowering provision in the *Edith Cowan University Act 1984* (WA), has been referred to earlier in this Report.

University Acts or by-laws made under them may empower a university officer to direct a person to leave the university’s land and provide for the imposition of penalties on persons who contravene the Act or the by-laws. Fines range from \$200 to \$1,000. The class of conduct which may attract a penalty is diverse. The *University of Tasmania Act 1992* provides that ‘any person or thing causing any danger, annoyance or inconvenience’ may be removed.⁴⁷⁴ Under the *Griffith University Act 1998* and the *Queensland University of Technology Act 1998*, a person may be removed from university land if ‘that person’s presence may pose a threat to the safety of someone else on, entering or leaving the land’.⁴⁷⁵

Section 23(1) of the *University of Adelaide Act 1971* permits the making of by-laws for the following specific purposes:

- (n) to prevent the interruption of lectures or meetings by noise or unseemly behaviour and to prevent undue noise from motor vehicles upon the University grounds; and
- (o) to regulate the conduct of meetings and assemblies within the University grounds ...

20.2 Hire of university facilities

When staff, students or external organisations wish to hold events on university land using a university facility, they are generally required to apply for the right to hold such an event. There are policies and procedures in place to regulate the use of university land for organised events. Universities generally seek to write in a discretion to refuse or cancel a

⁴⁷² *Deakin University Act 2009* (Vic) s 28.

⁴⁷³ *Central Queensland University Act 1998* (Qld), s 12. The same words are found, for example, in the *University of the Sunshine Coast Act 1998* (Qld) s 12, *Griffith University Act 1998* (Qld) s 12, *James Cook University Act 1997* (Qld) s 11, *Queensland University of Technology Act 1998* (Qld) s 12, *University of Queensland Act 1998* (Qld) s 12, *University of Southern Queensland Act 1998* (Qld) s 12.

⁴⁷⁴ *University of Tasmania Act 1992* s 2(b).

⁴⁷⁵ *Griffith University Act 1998* s 13(1)(d) and *Queensland University of Technology Act 1998* s 13(1)(d).

booking and to do so, in part, by reference to considerations relevant to the Terms of Reference of this Review.

An example of an overarching statement of principle in relation to a facility hire policy is James Cook University's Authorised Use of University Facilities, Premises and/or Grounds for Non-core Purposes Policy, which states:

Only activities compatible with the University's mission will be permitted to take place on University premises - the Deputy Vice-Chancellor, Services and Resources can provide guidance to those in doubt.

...

Except where there are genuine pedagogic reasons, speakers at public meetings should represent a range and balance of views reflective of Australian society at large.⁴⁷⁶

A similar example is found in the University of Technology Sydney's Facilities Hire Vice-Chancellor's Directive:

UTS facilities cannot be hired to conduct any activities judged to be illegal, inappropriate for a University venue, or conflicting with the University's mission, goals or values, or likely to bring the University's name into disrepute.⁴⁷⁷

The terms 'inappropriate' and 'conflicting with the University's mission, goals or values' cover a wide range of possible activities, including a very wide range of speech. So too does the term 'likely to bring the University's name into disrepute'.

Several universities have policies which cover their decision to refuse applications to hold an event. Another such policy is that of Charles Darwin University's Hire of University Facilities and Equipment Procedures which provides:

University facilities cannot be hired to conduct any activities judged to be illegal, inappropriate for a University venue, or conflicting with the University's mission, goals or values, or likely to bring the University's name into disrepute. The University reserves the right to refuse any application to hire a facility and/or

⁴⁷⁶ James Cook University, 'Authorised Use of University Facilities, Premises and/or Grounds for Non-core Purposes Policy', 30 April 2018.

⁴⁷⁷ University of Technology, Sydney, 'Facilities Hire Vice-Chancellor's Directive', 13 April 2015, cl 5.1.

equipment. The University is not required to explain its reasons for refusal of an application. The decision to refuse is at the University's discretion.⁴⁷⁸

Similar statements are found in the corresponding policies of the University of Wollongong and Victoria University.

Safety and security issues are also mentioned in university hire policies. An example is The University of Newcastle's 'Venue Hire Agreement – Terms and Conditions' which states:

- 2.2(a) The University may cancel a confirmed booking at any time if there are circumstances beyond the University's reasonable control, or any other event which in the reasonable opinion of the University, causes the Venue to be unsafe or inappropriate to hold the Function.

...

3.11 Objectionable or dangerous activities:

- (a) The University may at its sole discretion, prohibit, cancel or stop without notice any performance, function or activity which is objectionable, dangerous, illegal or detrimental to the reputation of the University.
- (b) The University reserves the right to remove any person from the Venue immediately if their behaviour is deemed by the University to be offensive, illegal, disorderly, riotous, dangerous or in breach of any relevant law.

Where a proposed event raises security issues, some universities require a contribution to security costs to be paid by the organisers. This was the case for an event held by the Sydney University Liberal Club in September 2018 inviting author Bettina Arndt to speak on the topic of rape culture at universities.^{479,480} The University of Sydney defended its decision to charge organisers moderate fees for additional security in an opinion piece in

⁴⁷⁸ Charles Darwin University, 'Hire of University Facilities and Equipment Procedures', 15 December 2017, 2.

⁴⁷⁹ Michael Koziol, 'You protest, you pay: Education Minister's bid to bolster free speech at universities', *The Sydney Morning Herald* (online), 22 September 2018 <<https://www.smh.com.au/politics/federal/you-protest-you-pay-education-minister-s-bid-to-bolster-free-speech-at-universities-20180921-p5057h.html>>.

⁴⁸⁰ Sammut (n 42).

The Australian newspaper.⁴⁸¹ In doing so it defended its commitment to academic freedom and being a forum for debate.

Flinders University undertake a similar approach and charges venue organisers for additional services. The Facilities Hire Conditions Policy provides that:

5 THE HIRER'S OBLIGATION

The hirer **MUST**:

...

5.2 provide adequate security controls and ensure generally the good order and conduct of the activities;

...

5.9 if required by the University, use the services of University staff and pay the cost of those services at the rates advised by the University from time to time.⁴⁸²

A similar statement is provided in Charles Darwin University's Hire of University Facilities and Equipment Procedures:

Any costs incurred for additional services (such as security, cleaning, electricity, air conditioning etc) for functions and/or activities held outside regular office hours (eg evenings, weekends, public holidays and semester breaks) will be charged to the hirer.⁴⁸³

The application of such policies to refuse permission to certain individuals or groups to hire or use university facilities in some cases has led to controversy about alleged restrictions on freedom of speech. The La Trobe Art Institute reportedly rejected a request, in August 2018, to hold an event for Babette Francis to speak about the 'health dangers of

⁴⁸¹ Michael Spence, 'Security the only cost in the marketplace of ideas', *The Australian* (online), 25 September 2018 <<https://www.theaustralian.com.au/opinion/security-the-only-cost-in-the-marketplace-of-ideas/news-story/863101b24337f80b5b78bb68cb422c9d>>.

⁴⁸² Flinders University, 'Facilities Hire Conditions Policy', August 2009.

⁴⁸³ Charles Darwin University, 'Hire of University Facilities and Equipment Procedures', 15 December 2017, 5.

promoting the ideology of transgenderism'.⁴⁸⁴ The reason allegedly provided was that the event would 'undermine the inclusive and diverse community that the University seeks to foster'.⁴⁸⁵

Queensland University of Technology is unique in identifying 'dedicated areas within its campuses for public speaking activities',⁴⁸⁶ a trend which is common in the United States and the United Kingdom.⁴⁸⁷

The 'Public Assembly on UTS Campus Vice Chancellor's Directive' refers to the hire of university facilities for public events in an affirmative manner (ie using 'can' or 'may' rather than 'cannot'). It is also the only university examined which stipulates that students are not entitled to take any action to prevent protestors from expressing their views:

5.2.1 Staff and students may conduct meetings, rallies and demonstrations in public areas of the University, provided they are orderly and peaceful and do not unreasonably disrupt the business of the University or disrupt, limit or prevent others from going about their normal business.

...

5.4. It is important that staff and students allow other groups within the University community to express their views peacefully without fear of retaliation or retribution. Staff and students who do not agree with protesting groups are not entitled to take action to prevent the expressing of those views. Under no circumstances should staff or students take it upon themselves to 'police' any demonstration, protest or civil disturbance.

In this sensitive area, it is prudent and useful for higher education providers to have in place in accessible ways overarching statements of the principles which govern their administrative judgments where denial of access to land or facilities may be characterised as burdening freedom of speech or academic freedom.

⁴⁸⁴ Sandra Caddy, 'Bendigo Advertiser Letters to the Editor: A request to hire a La Trobe venue has been declined', *Bendigo Advertiser* (online), 31 August 2018 <<https://www.bendigoadvertiser.com.au/story/5615273/why-cant-we-hire-la-trobe-art-venue-for-talk-your-say/>>.

⁴⁸⁵ Ibid.

⁴⁸⁶ Queensland University of Technology, 'Hire of University Space Policy', 13 October 2017.

⁴⁸⁷ Frank Furedi, 'Free speech is at grave risk on university campuses', *The Conversation* (online), 21 November 2016. <<https://theconversation.com/free-speech-is-at-grave-risk-on-university-campuses-68262>> and see also Michael Spence, 'Security the only cost in the marketplace of ideas', *The Australian* (online), 25 September 2018 <<https://www.theaustralian.com.au/opinion/security-the-only-cost-in-the-marketplace-of-ideas/news-story/863101b24337f80b5b78bb68cb422c9d>>.

Returning from the issue of visitors and their use of the land and facilities to relations between higher education institutions and their academic staff, it is appropriate to make reference to the interaction between freedom of speech and academic freedom and employment terms and conditions.

21 Terms of Employment

21.1 *Enterprise agreements and academic employment contracts*

Australian universities enter into enterprise or collective bargaining ‘agreements’ which cover the majority of their staff. Those agreements are negotiated between universities, staff and unions. In addition, specific contracts of employment may apply, particularly in relation to senior executive staff.

Agreements were accessed for 38 universities. Agreements for Bond University, Torrens University Australia and the University of Divinity could not be located. Thirty six of those agreements make explicit reference to the rights of staff to exercise academic freedom and freedom of speech.⁴⁸⁸ Clause 23.0 of the University of Newcastle Academic Staff Enterprise Agreement 2014 is typical of provisions found:

23.0 INTELLECTUAL FREEDOM

- 23.1 The parties to the Agreement are committed to act in a manner consistent with the protection and promotion of intellectual freedom within the University.
- 23.2 Staff members have the right to freedom of opinion and expression. This right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media, but does not include the right to harass, intimidate or vilify.
- 23.3 Staff members providing statements / public comment on behalf of the University may only do so in accordance with the appropriate authorisation / delegation and the University Code of Conduct.
- 23.4 Staff members have the right to pursue critical enquiry and to discuss freely, teach, assess, develop curricula, publish and research within the limits of their professional competence and standards, and consistent with their employment obligations and role.
- 23.5 The University will encourage staff to participate in governance of the institution. The University is committed to operating in a transparent manner.

Clause 58 of the Edith Cowan University Enterprise Agreement 2017, cl 10 of the University of Melbourne Enterprise Agreement 2013 and cl 47 of the Griffith

⁴⁸⁸ References could not be found in the RMIT University Enterprise Agreement 2018 and the University of Southern Queensland Enterprise Agreement 2014-2017.

University Academic Staff Enterprise Agreement 2017-2021 are phrased in terms similar to cl 23 of the University of Newcastle agreement and contain similar limits.

Approximately three quarters of the agreements provide for staff to express opinions on issues within their area of professional expertise or capacity, while others allow for staff to make comments and express opinions on matters inside and outside of their professional expertise or capacity. For example, cl A43 of the Flinders University Enterprise Agreement 2014–2017 provides:

A43 INTELLECTUAL FREEDOM

A43.1 Consistent with the principles of intellectual freedom, and subject to meeting their employment obligations, as expressed in A8 of this Agreement, staff members have the right to:

- pursue critical and open inquiry;
- participate in public debates and express opinions about issues and ideas related to their academic and professional areas which, notwithstanding the University’s intellectual property rights, will ordinarily include rights to publish the results of their work;
- participate in public debates about higher education issues as they affect their institution and higher education issues generally ...

Twenty three agreements define ‘intellectual freedom’ specifically. Clause 10.3 of The University of Melbourne Enterprise Agreement 2013, for example, provides:

Intellectual freedom means the freedom of academic staff, and, to the extent consistent with their employment obligations and role, professional staff, to engage in critical inquiry, intellectual discourse and public controversy without fear or favour, but does not include the right to harass, intimidate or vilify.

Thirty four agreements contain provisions which place limits on the exercise of free speech by staff. While these provisions allow for staff to engage in discussion outside the university, that allowance comes with caveats. Staff must not harass, intimidate or vilify others in the exercise of their freedoms, and views expressed must be consistent with

provisions in the relevant code of conduct. The University of Queensland Enterprise Agreement 2018-2021 prohibits staff from engaging in conduct that may harass, vilify, intimidate or defame others, but limits this to behaviour having an impact only on the University itself and staff, as opposed to the more general provisions in other agreements.

Three universities have provisions in their enterprise agreements which define academic freedom by reference to the academic's area of expertise. For example, cl 54 of the Charles Sturt University Enterprise Agreement 2013-2016 provides:

54 INTELLECTUAL FREEDOM

54.1 The University encourages and supports academic freedom of both enquiry and expression. While academic freedom is a right, it carries with it the duty to use the freedom in a manner consistent with a responsible and honest search for, and dissemination of, knowledge and truth. Within the ambit of academic freedom lies the traditional role of those within the academy to make informed comment on societal mores and practice, and to challenge held beliefs, policies and structures, within their discipline area.

54.2 All employees of the University have the responsibility to participate in the life of the University, in its governance and administration, through membership on committees, provided that this participation is consistent with the discharge of their primary responsibilities.

Similar phrasing is used in cl 1.10 of the Australian Catholic University Staff Enterprise Agreement 2013-2017 and cl 23.0 of The University of Newcastle Academic Staff Enterprise Agreement 2014.

The Macquarie University Professional Staff Enterprise Agreement 2018 and the Macquarie University Academic Staff Enterprise Agreement 2018 encourage staff to exercise rights to freedom of speech within the university and community. Both contain the following clause:

The University will encourage Staff to participate actively in the operation of the University and in the community. The University will take all reasonable steps to ensure that all governing bodies within the University operate in a transparent and accountable manner, encouraging freedom of expression and thought. This does not prevent a University committee from considering a matter 'in camera'.⁴⁸⁹

⁴⁸⁹ The relevant clause in both Agreements is cl 21.4.

Clause 576 of the Southern Cross University Enterprise Agreement 2016 allows the university to issue a public statement rejecting an employee's statement.

Eighteen enterprise agreements contain misconduct clauses, which broadly state that an employee cannot engage in activities which injure the reputation, viability and profitability of the university. Those clauses can be interpreted broadly. Misconduct may be alleged in circumstances in which academics are arguably exercising their academic freedom. The Victoria University Enterprise Agreement 2013 appears to be the only agreement found that places no express restrictions, such as those identified above, on staff when exercising their rights. Clause 8 provides:

8 Intellectual Freedom

- 8.1 The University values and encourages intellectual freedom and respects the intellectual property and moral rights of its staff.

That must be read with other provisions in the Agreement which may temper its apparent breadth.

Clause 7.1(d) of the La Trobe University Collective Agreement 2018 encourages staff to raise concerns relating to any alleged corrupt conduct or maladministration of the University.

The National Tertiary Education Union (NTEU) has a policy relating to terms of employment which is relevant in this area and is referred to in the next subsection.

21.2 Relevant policy of the National Tertiary Education Union

Extracts from the relevant 'NTEU Policy Manual 2018-19' (Policy Manual) are set out in an Appendix to this Report.⁴⁹⁰ Academic freedom is characterised in the Policy Manual as an essential and defining characteristic of the modern university. It includes the right of members of a university community, without administrative constraints or fear of retribution, to freely:

⁴⁹⁰ Appendix 7.

- Discuss, teach and assess, develop curricula, and engage in community service;
- Research and publish;
- Publish and speak in public debate constrained by a responsibility to reflect scholarly standards;
- Express opinions about the institutions in which they work or are enrolled; and
- Participate in decision-making structures and processes within the institution.⁴⁹¹

The Policy Manual identifies what it describes as ‘cumulative threats to academic freedom and free intellectual inquiry from both within and outside Australian universities.’⁴⁹²

These include:

- Stricter performance management;
- Institutional plans to strategically concentrate research strengths;
- institutional directions to staff to publish (or not publish) in specific journals
- A public policy climate adverse to public transparency particularly in relation to freedom of information, freedom of political speech on campuses, protection for whistle-blowers;
- A public policy climate increasingly willing to make exceptions to academic freedom on grounds of national security interests; and
- The propensity of universities to prioritise profitability, reputation and financial viability above core academic values, and to characterise as misconduct the exercise of academic freedom that may put those priorities at risk.⁴⁹³

Threats to academic freedom from government identified in the Policy Manual include conditioning funding on achievement of government policy objectives, ministerial interference in the allocation of research grants and legislative changes that have the effect of removing staff and students from structures of institutional governance.

⁴⁹¹ NTEU Policy Manual 2018–19, 57.

⁴⁹² Ibid 58.

⁴⁹³ Ibid.

The Policy Manual makes specific reference to funding arrangements in universities and external organisations, including commercial partners, which can restrict the ability of university staff to speak freely and critically about controversial issues. The Policy Manual also notes that universities may face pressure to constrain criticism of university management or that of external partners in the fear that it might harm future funding.

The Policy Manual proposes that universities should foster an atmosphere of academic freedom by establishing and enacting policies that reflect the values enunciated in the Policy Manual. It argues that lawful, genuine and judicious expression of an employee's intellectual freedom is a complete defence to any allegation of misconduct. It contends that the HES Act provisions that relate to intellectual freedom are not as strong as they might be. It proposes legislative change to provide for the promotion and enforceable protection of academic freedom.⁴⁹⁴

⁴⁹⁴ Ibid 59–60.

22 Student Association Policies

Few policies, guidelines and codes made by student associations were able to be examined for this Review as most were neither publicly accessible nor provided by the association when requested. None of those examined contained any express reference to freedom of expression. They did, however, make broad provision for diversity and inclusiveness, and for the avoidance and remediation of bullying, discrimination and harassment.

The Murdoch University Student Guild Social Media Engagement and Communications Policy⁴⁹⁵ is notable because the conditions it attaches to the use of social media by its members are similar to those found in the social media policies of universities themselves. Clause 6 of that policy is titled ‘Standards’ and cl 6.1.1 says ‘[d]o not mix the professional and the personal in ways likely to bring the Murdoch University Guild of Students into disrepute.’ The observations elsewhere in this Report about the potential interaction between social media policies and freedom of expression and the subjectivity of ‘disrepute’ clauses, are equally applicable here.

22.1 *Inclusiveness policies*

Of the relevant policies, guidelines and codes most contain provisions relating to inclusiveness. For example, Curtin University Student Guild’s Code of Conduct commits to ‘[demonstrating] a sense of community with respect for and acknowledgement of diversity.’⁴⁹⁶ Similar provisions are found in the Murdoch University Student Guild Regulations,⁴⁹⁷ and the Southern Cross University Student Representative Committee Rules.⁴⁹⁸ They are also to be found in university guidelines applicable to student clubs and societies made by the ACU. Those guidelines provide that a club may not make membership conditional on beliefs or backgrounds and that the clubs cannot affiliate with a political party. Further, they state that the university ‘does not seek in any way to restrict students’ personal freedom of political expression, association of affiliation.’

⁴⁹⁵ Murdoch University Student Guild, ‘Guild Regulation’, 31 August 2016.

⁴⁹⁶ Curtin University Student Guild, ‘Student Guild Code of Conduct’, 19 February 2015, 3.

⁴⁹⁷ Murdoch University Student Guild, ‘Guild Regulations’, 31 August 2016.

⁴⁹⁸ Southern Cross University Student Representative Committee, ‘Student Representative Committee – Rules’, 15 May 2018.

22.2 *Bullying, discrimination and harassment*

The policies, guidelines and codes of some student associations also make provision for preventing bullying, discrimination and harassment. La Trobe University Student Union's *Code of Conduct Regulations*⁴⁹⁹ provides an example:

3.1 All the parties named above will work collaboratively in support of the purpose of LTSU as outlined in Clause 3 of the LTSU Constitution, namely:

‘..... to advance the education of students at La Trobe University by:

- a) Enhancing the learning experience of students while at the University
- b) Representing students within and outside the University
- c) Co-ordinating and supporting the activities of students
- d) Providing amenities and services for students, other members of the University community and the public,

...

3.7 LTSU members shall not engage in discrimination, sexual harassment or intimidation against another LTSU member, prospective member, member of LTSU staff or La Trobe University students or staff. For the purposes of the last sentence, “discrimination” is taken to mean direct or indirect discrimination on the grounds of nationality, race, gender, gender identity, sexual orientation, age, gender identity, disability, marital status, parental status or status as a carer, physical features, political belief or activity, pregnancy or religious belief or activity.

The Swinburne Student Union Collective Agreement⁵⁰⁰ and the Curtin University Student Guild Code of Conduct⁵⁰¹ contain provisions with similar wording.

The Murdoch University Student Guild Social Media Engagement & Communications Policy⁵⁰² provides the following conditions on use of social media:

⁴⁹⁹ La Trobe University Student Union, ‘LTSU Code of Conduct Regulations’, undated.

⁵⁰⁰ Swinburne Student Union, ‘Swinburne Student Union Collective Agreement 2015’, 2015.

⁵⁰¹ Curtin University Student Guild, ‘Student Guild Code of Conduct’, 19 February 2015.

⁵⁰² Murdoch University Student Guild, ‘Social Media Engagement & Communications Policy’, 12 June 2015.

6. Standards

- 6.1. The following four standards apply to the use of social media, irrespective of whether it is Guild controlled or personal media.
 - 6.1.1. Do not mix the professional and the personal in ways likely to bring the Murdoch University Guild of Students into disrepute.
 - 6.1.2. Do not undermine your effectiveness at work.
 - 6.1.3. Do not imply a Guild endorsement of your personal views.
 - 6.1.4. Do not disclose confidential information obtained through work.

The Southern Cross University Student Representation Committee – Rules state that the Committee will ‘provide a forum for the dissemination, discussion and debate of information and knowledge about matters of student interest’.⁵⁰³

The preceding review of policies, rules and terms of employment is indicative of their range and variety. It is now necessary to turn to the way in which the Commonwealth Government regulates higher education providers relevantly to the Terms of Reference of this Review.

⁵⁰³ Southern Cross University, ‘Student Representation Committee – Rules’, 15 May 2018 cl (3)c.

23 Commonwealth Regulation of Higher Education Providers⁵⁰⁴

The history of Commonwealth involvement in the funding and regulation of higher education providers dates back to the Report of the Mills Committee,⁵⁰⁵ established by the Menzies Government in 1950. That Report led to the enactment of the *States Grants (Universities) Acts* of the 1950s⁵⁰⁶ which utilised s 96 of the *Constitution* to provide financial assistance to States for the operating expenses of universities. The condition was that State grants, coupled with university fees, held university incomes to specific levels.⁵⁰⁷

The recommendations of the Murray Committee,⁵⁰⁸ established by the Commonwealth Government in 1956, led to the creation of the Australian Universities Commission (AUC)⁵⁰⁹ and significantly increased recurrent grants which included capital funding. The AUC oversaw the grant process. It was succeeded in the early 1980s by the Tertiary Education Commission.⁵¹⁰

In 1961, the Committee on the Future of Tertiary Education in Australia (the Martin Committee) reviewed tertiary education in Australia, covering universities, institutes of technology, technical colleges, teachers colleges and specialist institutions. As a result of its report,⁵¹¹ the Commonwealth agreed to provide financial support to Colleges of Advanced Education⁵¹² and Teachers Colleges.⁵¹³ The Australian Advanced Education Commission was created in 1971 to provide advice.⁵¹⁴

⁵⁰⁴ This historical overview is largely taken from a paper by Dr Jim Jackson, 'Higher Education Funding Policy in Australia'.

<http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/hefunding>.

⁵⁰⁵ Commonwealth Committee on Needs of Universities (Australia) and Richard C Mills, *Interim Report by Commonwealth Committee on Needs of Universities* (Canberra, 1950).

⁵⁰⁶ *State Grants (Universities) Acts* of 1951, 1953, 1955, 1956, 1957.

⁵⁰⁷ See for example, *State Grants (Universities) Act 1951* (Cth) s 6.

⁵⁰⁸ Commonwealth of Australia, *Report of the Committee on Australian Universities (Murray Report)*, September 1957.

⁵⁰⁹ *Australian Universities Commission Act 1959* (Cth).

⁵¹⁰ *Tertiary Education Commission Act 1977* (Cth).

⁵¹¹ Committee on the Future of Tertiary Education in Australia, Commonwealth of Australia, *Tertiary Education in Australia: Report of the Committee on the Future of Tertiary Education in Australia to the Australian Universities Commission*, August 1964.

⁵¹² *States Grants (Advanced Education) Act 1966* (Cth).

⁵¹³ *States Grants (Teachers Colleges) Act 1967* (Cth).

⁵¹⁴ *Commission on Advanced Education Act 1971* (Cth).

In 1973, the Commonwealth agreed with the States that it would assume full financial responsibility for universities, colleges of advanced education and teachers colleges in conjunction with the abolition of tuition fees.⁵¹⁵ The Commonwealth became the principal policy driver in the sector through conditions attached to its funding. Two oversight bodies, the Universities Commission⁵¹⁶ and the Commission on Advanced Education⁵¹⁷ were established. They were merged in 1975.⁵¹⁸ In 1977, they and the Commission on Technical and Further Education were replaced by the Tertiary Education Commission with specialist councils for each of the tertiary education sectors.⁵¹⁹ In 1988, the Tertiary Education Commission and the Schools Commission were replaced by the National Board of Employment, Education and Training, reporting directly to the Minister. There were five advisory councils,⁵²⁰ including the Higher Education Council and the ARC.

Ministerial authority was entrenched with the enactment of the *Higher Education Funding Act 1988* (Cth) under which the arrangements known as the Unified National System were established. No distinction was to be drawn between universities and colleges of advanced education – all of which became members of the Unified National System created in 1989.⁵²¹ In 1990, a ‘Relative Funding Model’ was introduced following a report ‘Assessment of Relative Funding Position of Australia’s Higher Education Institutions’.⁵²²

Provision for fee-charging by higher education institutions began to be introduced in the late 1980s. 1989 saw the introduction of the Higher Education Contribution Scheme, established by the *Higher Education Funding Act 1988* (Cth).

Major changes to funding arrangements for higher education were announced in the Higher Education Budget Statement of 1996. A further independent review of Australian

⁵¹⁵ There was no detailed published agreement beyond the Prime Minister’s statement.

⁵¹⁶ *Australian Universities Commission Act 1959* (Cth).

⁵¹⁷ *Commission on Advanced Education Act 1971* (Cth).

⁵¹⁸ *Technical and Further Education Commission Act 1975* (Cth).

⁵¹⁹ *Tertiary Education Commission Act 1977* (Cth).

⁵²⁰ *Employment, Education and Training Act 1988* (Cth) s 23.

⁵²¹ This implemented the Commonwealth Government White Paper of July 1988 entitled ‘Higher Education: A Policy Statement’.

⁵²² John Dawkins, Australia, Department of Employment, Education and Training and Higher Education Council (Australia), *Assessment of the relative funding position of Australia’s higher education institutions*. (Department of Employment, Education and Training, Canberra, 1990).

higher education policy was undertaken under the chairmanship of Roderick West in 1998, again focussing on funding arrangements, student fees and a universal loans scheme.⁵²³

In 2000, the National Board of Employment, Education and Training and its associated councils were abolished, save for the ARC.⁵²⁴ The Australian Universities Quality Agency (AUQA) was established as an independent national agency to promote, audit and report on quality assurance in Australian higher education. It was a not-for-profit company limited by guarantee, created by the Ministerial Council on Employment, Education, Training and Youth Affairs, and comprising the nine ministers responsible for higher education in the Australian federation, each of whom was a member of the company.

In auditing Australian universities, the AUQA had regard to five national protocols which had been approved by the Ministerial Council. They contained criteria which an institution had to meet for recognition as a university. Protocol 1 which was entitled ‘Criteria and Processes for Recognition of Universities’ relevantly provided that an Australian university would demonstrate the following features (among others):

- commitment of teachers, researchers, course designers and assessors to free inquiry and the systematic advancement of knowledge
- governance, procedural rules, organisation, admission policies, financial arrangements and quality assurance processes, which are underpinned by the values and goals outlined above, and which are sufficient to ensure the integrity of the institution’s academic programs ...⁵²⁵

An audit manual prepared by the AUQA did not add anything in relation to freedom of speech, freedom of expression or academic freedom beyond the limited reference in the protocol to ‘free inquiry’.

Following an extensive review of Australian universities in 2002 at the direction of the then Minister, the Hon Brendan Nelson, the HES Act was enacted. The report of the

⁵²³ Roderick West, Department of Employment, Education, Training and Youth Affairs and Higher Education Financing and Policy Review Committee (Australia), *Learning for life: Review of Higher Education Financing and Policy, Final Report* [West Report] (Australian Government Publishing Service, Canberra, April 1998).

⁵²⁴ *Employment, Education and Training Amendment Act 2000* (Cth).

⁵²⁵ National Protocols for Higher Education Approval Processes approved by the Ministerial Council on Education, Employment, Training, and Youth Affairs, 31 March 2000, [1.14].

review ‘Our Universities: Backing Australia’s Future’, published in May 2003, did not refer to freedom of speech or academic freedom.⁵²⁶ An overview paper entitled ‘Higher Education at the Cross-Roads’ published at that time referred to the challenge, in relation to the commercialisation of university activities, ‘to reconcile the traditions of academic integrity and freedom with the more profit driven demands of the commercial world.’⁵²⁷ The HES Act provides the statutory authority which is relied upon today for the creation of a standards framework for higher education providers.

In 2008, a review of higher education under the leadership of Professor Denise Bradley recommended ‘major reforms ... to the financing and regulatory frameworks ...’ for higher education’ in order to enable Australia to compete globally.⁵²⁸ Among recommendations of the review was Commonwealth legislation providing for:

- accreditation for all higher education institutions and tightening of the criteria for the title of ‘University’ and the right to offer research degrees;
- the establishment of an independent national tertiary education regulatory body.⁵²⁹

In 2009, the Commonwealth Government announced that it would implement a number of reforms to the higher education sector including the establishment of the regulatory agency proposed by the Bradley Review. As was observed by Williams and Pillai in 2011:

Overall, the reforms proposed by the Commonwealth represent[ed] a move towards a more centralised regulation of higher education.⁵³⁰

TEQSA was created in 2011 as a result of the Bradley Review. It was established by the TEQSA Act.⁵³¹ It consists of a Chief Commissioner and not more than four other commissioners but does not have a legal identity separate from the Commonwealth. Among

⁵²⁶ The Hon Dr Brendan Nelson MP, Minister for Education, Science and Training, *Our Universities: Backing Australia’s Future* (Report, May 2003).

⁵²⁷ The Hon Dr Brendan Nelson MP, Minister for Education, Science and Training, Commonwealth Department of Education Science & Training, *Higher Education at the Crossroads: an overview paper* (Canberra, April 2002) 32 [155].

⁵²⁸ Commonwealth of Australia *Review of Higher Education* (Final Report, December 2008) xi.

⁵²⁹ *Ibid* xiii.

⁵³⁰ George Williams and Sangeetha Pillai, ‘Commonwealth Power over Higher Education’ (2011) 30 *University of Queensland Law Journal* 287, 291.

⁵³¹ TEQSA Act s 132(1).

its functions are the registration of higher education providers and the accreditation of courses of study in accordance with the Act. It is also charged with conducting compliance and quality assessments and accreditation assessments of courses. It can advise and make recommendations to the Minister on matters relating to the quality or regulation of higher education providers if requested by the Minister or on its own initiative.

In the same year, the HES Act was amended to include in its objects provision, a new object s 2-1(a)(iv):

to support a higher education system that:

...

- (iv) promotes and protects free intellectual inquiry in learning, teaching and research ...⁵³²

That amending legislation also enacted s 19-115 which requires higher education providers to have policies upholding free intellectual inquiry in relation to learning, teaching and research.

In relation to the new s 19-115 the then Minister for School Education, Early Childhood and Youth, the Hon Peter Garrett MP, said in his Second Reading Speech:

The bill will amend the Higher Education Support Act to promote free intellectual inquiry. Free intellectual inquiry is an important principle underpinning the provision of higher education in Australia. It is one that the government has committed to include in the act.

Free intellectual inquiry will become an object of the act. The government's funding arrangements should not be used to impede free intellectual inquiry.

Table A and Table B providers will be required to have policies that uphold free intellectual inquiry in relation to learning, teaching and research. This will be a new condition of funding.

Most universities already have such policies and I know they all wish to support research and teaching environments which promote free intellectual inquiry. It is fundamental to the scientific method and rigorous scholarship. It is necessary to enable evidence to be challenged, competing theories to be debated and facts to be

⁵³² *Higher Education Support Amendment (Demand Driven Funding System and Other Measures) Act 2011* (Cth) Sch 3 cl 1.

established. It provides the foundation for our understanding of the world and the accumulation of knowledge.⁵³³

That historical outline provides the context for reference to specific provisions of Commonwealth law currently in force which are relevant to freedom of expression and academic freedom in the higher education sector.

23.1 *The HES Act and the TEQSA Act*

As noted earlier, the HES Act has had, as one of its objects, since 2011, the support of a higher education system that ‘promotes and protects free intellectual inquiry in learning, teaching and research’.⁵³⁴ Another is to support a higher education system that is characterised by quality, diversity and equality of access⁵³⁵ and contributes to the development of cultural and intellectual life in Australia.⁵³⁶

An important object is support for the distinctive purposes of universities. These are enumerated:

- (i) the education of persons, enabling them to take a leadership role in the intellectual, cultural, economic and social development of their communities; and
- (ii) the creation and advancement of knowledge; and
- (iii) the application of knowledge and discoveries to the betterment of communities in Australia and internationally ...⁵³⁷

In defining those distinctive purposes the objects provision recognises that universities are established under laws of the Commonwealth, the States and the Territories ‘that empower them to achieve their objectives as autonomous institutions through governing bodies that are responsible for both the university’s overall performance and its ongoing independence

⁵³³ Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 2011, 4772.

⁵³⁴ *Higher Education Support Act 2003* (Cth) s 2–1(a)(iv).

⁵³⁵ *Ibid* s 2–1(a)(i).

⁵³⁶ *Ibid* s 2–1(a)(ii).

⁵³⁷ *Ibid* s 2–1(b).

...'.⁵³⁸ The recognition of that autonomy is recognition of an important element of academic freedom.

The protection of freedom of expression may readily be implied from the express reference to free intellectual inquiry in the objects clause and from the 'distinctive purposes'. Freedom of expression as an aspect of free intellectual inquiry is a free standing value to be applied by higher education providers and as an aspect of academic freedom.

The HES Act identifies higher education providers by reference to what are called 'Table A providers' and 'Table B providers'. The Table A providers are essentially Australian public universities, the Table B providers are private universities. The HES Act required that both classes of provider must have a policy that upholds free intellectual inquiry in relation to learning, teaching and research. Whether that requires a standalone policy is doubtful. A compliant policy may be an element of some larger policy framework.

Sub-division 19-G of the HES Act is entitled 'The compact and academic freedom requirements'. Section 19-110 provides that higher education provider must enter into a 'mission based compact' with the Commonwealth in respect of each year for which a grant is paid to the provider under the Act.

Section 19-115, mentioned earlier, was introduced into the Act in 2011 and provides:

A higher education provider that is a Table A provider or a Table B provider must have a policy that upholds free intellectual inquiry in relation to learning, teaching and research.

That requirement relates to academic freedom which, as already observed, is distinct from freedom of expression although overlapping with it.

Section 3 of the TEQSA Act sets out, among its objects, provision for national consistency in the regulation of higher education and regulation of higher education using a standards-based quality framework. As explained in the simplified outline of the TEQSA Act an entity must be registered before it can offer or confer Australian higher education awards or overseas higher education awards if they relate to courses of study on Australian

⁵³⁸ Ibid.

premises.⁵³⁹ Courses must be accredited before they can be provided in connection with regulated higher education awards. TEQSA registers providers and accredits courses of study. In its regulation of higher education it applies principles in relation to regulatory necessity, risk and proportionality and uses a standard-based quality framework. The quality framework is a series of standards made by the Minister on the advice of a Higher Education Standards Panel.

Part V of the TEQSA Act provides for the creation of the HE Standards. Relevantly, s 58 empowers the Minister, by legislative instrument, to make standards comprising the HE Standards. There are various classes of standard, including Provider Registration Standards, Teaching and Learning Standards, Information Standards and other standards against which the quality of higher education can be assessed.⁵⁴⁰ The Minister is also authorised to make Research Standards.

The Minister must not make a standard under the section unless a draft of the standard has been developed by the Higher Education Standards Panel and the Minister has consulted with the Ministerial Council, the relevant Research Minister and TEQSA. The Minister is required to have regard to the draft of the standard developed by the Panel and any advice or recommendations given to the Minister by the Panel, the Ministerial Council or TEQSA and by the Research Minister or the Minister (as appropriate).

Division 2 of Pt 5 provides for compliance with the Standards. TEQSA may review or examine any aspect of an entity's operations to assess whether a registered higher education provider continues to meet HE Standards, which are those referred to in pars (a) and (b) of s 58(1).

23.2 *The Higher Education Standards Framework*

The HE Standards made pursuant to s 58 of the TEQSA Act contains a number of provisions which are relevant to this Review. They include standards relating to diversity and equity and in particular in cl 2.2(1) under the general heading 'Diversity and Equity' they provide:

⁵³⁹ TEQSA Act s 4.

⁵⁴⁰ Ibid s 58(1).

Institutional policies, practices and approaches to teaching and learning are designed to accommodate student diversity, including the under-representation and/or disadvantage experienced by identified groups, and create equivalent opportunities for academic success regardless of students' backgrounds.

In cl 2.3, headed 'Wellbeing and Safety', there is a requirement that:

A safe environment is promoted and fostered, including by advising students and staff on actions they can take to enhance safety and security on campus and online.⁵⁴¹

These standards are arguably relevant to the provision of measures designed to take account of the vulnerabilities of particular groups of students deriving from their personal histories, or inherent attributes, including gender, race, cultural background, religious belief and sexuality.

Clause 2.4 provides for student grievances and complaints and is broadly stated:

Current and prospective students have access to mechanisms that are capable of resolving grievances about any aspect of their experience with the higher education provider, its agents or related parties.⁵⁴²

The HE Standards impose a standard of corporate governance in cl 6.1(4) which states:

The governing body takes steps to develop and maintain an institutional environment in which freedom of intellectual inquiry is upheld and protected, students and staff are treated equitably, the wellbeing of students and staff is fostered, informed decision making by students is supported and students have opportunities to participate in the deliberative and decision making processes of the higher education provider.

⁵⁴¹ HE Standards cl 2.3(4).

⁵⁴² Ibid cl 2.4(1).

Part B of the HE Standards is entitled ‘Criteria for Higher Education Providers’. In the introduction to that part it is stated that ‘[a]ll providers of higher education that gain registration by TEQSA through meeting the Higher Education Standards Framework become “Higher Education Providers”.’ Higher education providers can seek registration within a particular provider category under s 18(1) of the TEQSA Act. The criteria for higher education providers generally set out in criterion B1.1(2) include:

The higher education provider has a clearly articulated higher education purpose that includes a commitment to and support for free intellectual inquiry in its academic endeavours.

In the criteria applicable to higher education providers which are Australian universities it is required that:

The higher education provider demonstrates the commitment of teachers, researchers, course designers and assessors to the systematic advancement and dissemination of knowledge.⁵⁴³

A similarly worded standard applies to the Australian university college category.

23.3 *TEQSA Guidance Notes*

TEQSA has issued a number of guidance notes in relation to aspects of the Standards. They include a Contextual Overview issued on 1 January 2017. Its stated purpose is to summarise the intent of the Framework in plain language and to outline some key aspects of TEQSA’s approach to regulation against the Standards. It points to the regulatory principles which TEQSA must apply as articulated in s 13 of the TEQSA Act namely:

- The principle of regulatory necessity
- The principle of reflecting risk, and
- The principle of proportionate regulation.

⁵⁴³ Criterion B1.2 (4).

The TEQSA overview characterises the Standard relating to diversity and equity as focussing primarily on the creation of equivalent opportunities for academic success regardless of student background within a relevant policy framework and within the context of the provider’s mission. In relation to the ‘Wellbeing and Safety Standard’, TEQSA expects providers to tailor their response to the Standard according to the scale, scope and nature of their circumstances and offerings. In the case of online or blended learning the requirement for a safe environment also applies to security of internet communications and to policies and procedures relating to online harassment.

A Guidance Note on the Diversity and Equity Standard was issued on 11 October 2017. Relevantly under the heading ‘Intent of the Standards’ the TEQSA Guidance Note states:

The Standards necessitate that providers have: an understanding of the concepts of diversity and equity, and have considered the implications for their operations, including the creation of a culture that welcomes diversity (on campus and online). The individual mission of each provider gives the context for the development of institutional approaches to valuing diversity and supporting equity in its many forms. *Where students are expected to make a commitment to support that mission (for example through a Statement of Faith), this should also not contravene a provider’s obligation to support free intellectual inquiry (Category Criterion B1.1.2). Measures taken to accommodate diversity should also not contravene the pursuit of free intellectual inquiry, and more generally, freedom of expression.*⁵⁴⁴

The guidance note also refers to Australian legislation relating to diversity and equity including anti-discrimination legislation relating to race, sex, disability, gender and age.

A Guidance Note on the ‘Wellbeing and Safety Standard’ was issued on 8 January 2018. According to that Note the terms ‘wellbeing and safety’ are used in their ordinary meanings broadly encompassing ‘overall wellness’ and ‘freedom from harm’ respectively. The Standard is set to implicitly recognise that many factors may affect wellbeing (eg, social, financial, health, cultural, educational etc). Many would not be under the control of the provider. The Standard also implicitly acknowledges that safety is regulated in more detail through frameworks such as workplace-safety legislation. They do not seek to duplicate those mechanisms.

⁵⁴⁴ Tertiary Education Quality and Standards Agency, Australia, ‘Guidance Note: Diversity and Equity’ 11 October 2017, 2–3 (emphasis added).

There is reference in this context to sexual harassment, unwelcome approaches, assault, and alcohol and drug abuse. There are no specific references to mechanisms for dealing with harms said to be generated by speech or other expressive conduct.

24 Higher Education Providers and Other Submissions — First Round Responses

24.1 *Overview*

As at Thursday, 31 January 2019 the Review had received 59 responses providing information about relevant university policies, some of which included observations on matters covered by the Terms of Reference. The respondents included:

- 38 universities
- 6 State and Territory Ministers responsible for education
- 4 higher education peak organisations
- 5 student associations and national peak bodies
- 6 individuals offered unsolicited submissions

Two observations may be made about those responses:

1. There was a range of views. Some considered that this Review is redundant as there is no threat to freedom of expression or academic freedom on university campuses. Others said that there is an ‘urgent need’ for it.
2. A majority of the observations and submissions made by higher education providers and others acknowledged the need to do something, in particular, in the context of freedom of expression. Suggestions included:
 - (a) developing a Model Code, although some stakeholders doubted the effectiveness of such a code;
 - (b) developing a guidance note to be made and administered by the TEQSA;
 - (c) reconciling an overall commitment to freedom of speech with the wording of certain institutional policies, such as policies on equity and diversity, anti-bullying and codes of conduct; and
 - (d) inserting statements or principles in the existing HE Standards to make explicit reference to free expression, although there were some concerns

expressed about over-regulation and potential implications for implementation.

Those observations, relevant incidents to which some of the respondents referred, and current internal reviews conducted or being proposed by respondents, are summarised below.

24.2 *Respondents' views on the issues*

In the response to the invitation to offer observations relevant to the Terms of Reference, there was unanimous endorsement and affirmation of a commitment to the general principles of free speech at Australian universities. This commitment is best summarised in a statement from the Universities Australia Plenary on 30 October 2018:

Australian universities restate our enduring commitment to academic freedom and intellectual inquiry. We also restate our enduring commitment to freedom of expression on our campuses and among our staff and students.⁵⁴⁵

Approximately a third of the submissions of the universities and those from the peak organisations also argued that there is no substantive evidence of an alleged 'crisis' of academic freedom on Australian campuses. Universities already have, it was said, comprehensive policy frameworks in place to uphold free intellectual inquiry in Australian higher education in compliance with the requirements of the HE Standards.⁵⁴⁶

Student representative bodies expressed similar views. As noted earlier, TEQSA's Student Expert Advisory Group was of the view that 'in [our] experience freedom of expression did not seem to be under threat and was not a major issue'.⁵⁴⁷ That group comprises student leaders of national bodies at undergraduate and postgraduate levels from public and private higher education providers. The National Union of Students in its submission stated:

⁵⁴⁵ Universities Australia, 'University Leaders Reaffirm Longstanding Commitment to Founding Ideals' (Media Release, 7 November 2018) <<https://www.universitiesaustralia.edu.au/Media-and-Events/media-releases/University-leaders-reaffirm-longstanding-commitment-to-founding-ideals#.XEkCiWx7nmR>>.

⁵⁴⁶ HE Standards cl 6.1.4.

⁵⁴⁷ TEQSA Submission to Independent Review of Freedom of Speech in Higher Education Providers, 1.

NUS continues to affirm Universities Australia's statement that Australian campuses 'foster vigorous debate and encourage the contest of ideas' and believes Australian students are educated in an environment that broadly maintains freedom of intellectual inquiry.⁵⁴⁸

Six individuals in submissions to the Review expressed serious concerns relating to freedom of expression for students and staff on campus. The submission from the IPA has already been mentioned. It stated:

The IPA has found the existence of serious impediments to free speech within university policies, a growing number of concerning incidents, a worrying closed culture and lack of viewpoint diversity, and a failure of the existing legal framework. Until recently there has also been limited interest shown by the sector regulator, the Tertiary Education Quality and Standards Agency, on these issues.⁵⁴⁹

24.3 *Specific examples noted in submissions*

The submissions gave some examples of particular instances in which academic freedom and freedom of expression on campuses may have been challenged.

TEQSA referred to two cases which have been raised as complaints or concerns with it from providers or other stakeholders. They have been noted earlier in this Report.

Royal Melbourne Institute of Technology (RMIT) referred to the following:

- The controversial and ultimately unsuccessful proposal to establish the Bjorn Lomborg Consensus Centre at The University of Western Australia;
- La Trobe University's suspension and reinstatement of a staff member who was the co-founder of the Safe Schools Coalition;
- External complaints to RMIT from community groups upset about proposed or actual academic papers or conferences the content of which they found offensive; and

⁵⁴⁸ National Union of Students, Submission to *Independent Review of Freedom of Speech in Higher Education Providers* (January 2019) 3 (footnote omitted).

⁵⁴⁹ Institute of Public Affairs, Submission to *Independent Review on Freedom of Speech in Australian Higher Education Providers* (undated) 1.

- The invocation of the RMIT Staff Ethics and Integrity policy in July 2018 to assess a complaint regarding external speakers at a conference convened by an RMIT academic staff member.⁵⁵⁰

Edith Cowan University (ECU) noted four internal incidents:

- In 2017, ECU elected to reject a facilities hire application by an organisation proposing to hold a seminar on its campus related to pranic crystal healing. The decision was made on the basis that the seminar did not align with the University's evidence-based approach to teaching and research in dietetics and was inconsistent with their research activities in this discipline;
- An organisation sought to host an event on campus [recently- date not provided] for the purpose of showing a film in a language other than English and did not provide details of the content of the film to ECU. Following further discussions with the potential hirer, it was agreed that the content of the film would be vetted by an appropriate third party to ensure alignment with ECU's values and teaching and research activities; upon conclusion of the vetting process, the event then proceeded;
- An organisation sought to use ECU's facilities to present a course and intended to charge participants a fee for undertaking the course, in circumstances where ECU had waived its facilities hire fee for the organisation. ECU sought to determine how the funds raised by the organisation were to be applied to ensure that such application was not contrary to its values, or teaching and research activities; and
- A reputable organisation was unable to afford to safely secure the area it proposed to hire; following further discussions with the potential hirer the booking was ultimately rejected on the basis that it posed a potential safety risk to students, staff and visitors.⁵⁵¹

The University of Sydney mentioned an incident on its campus in October 2018, in relation to a speech delivered on campus entitled '*Is there a rape crisis on campus*' by Ms

⁵⁵⁰ Royal Melbourne Institute of Technology, Submission to *Independent Review of Freedom of Speech in Australian Higher Education Providers* (20 December 2018).

⁵⁵¹ Edith Cowan University, Submission to *Independent Review on Freedom of Speech in Australian Higher Education Providers* (21 January 2019) 4–5.

Bettina Arndt. The University set out its position to protect the principles of free speech and free expression, as well as the necessity of charging organisers moderate fees for additional security, in an Op-Ed in the Australian, post the event.⁵⁵²

In a widely publicised incident, Professor Peter Ridd was dismissed by James Cook University (JCU) in May 2018. He argued that his dismissal reflected an unjust application of JCU’s Code of Conduct and Misconduct policies,⁵⁵³ and JCU’s mistaken view that these policies override the University’s Enterprise Bargaining Agreement. He is now litigating his case in the Federal Circuit Court of Australia.

A submission on behalf of Australian Lesbian Health Coalition stated that:

there is an urgent need ‘to promote and protect freedom of expression’ and, *particularly, ‘freedom of intellectual inquiry in higher education’* – in the context of both national and international trans-activists’ efforts to *de-platform* feminists and lesbians from even being able to speak in public at universities.⁵⁵⁴

That submission referred to five incidents, including two associated with Australian speakers Dr Caroline Norma and Ms Barbary Clarke, speaking at university conferences or events.

24.4 *Internal reviews*

Seven universities advised that they have either undertaken or intend to undertake a review of the way in which they manage freedom of expression and academic freedom on campus. Those universities are:

- La Trobe University, whose Academic Senate has resolved to undertake an inquiry into academic freedom as a special project in 2019.
- University of Newcastle which will conduct an internal review in 2019.

⁵⁵² Op Ed, ‘Security is the only cost in the marketplace of ideas’, *The Australian* 25 September 2018. <<https://www.theaustralian.com.au/opinion/security-the-only-cost-in-the-marketplace-of-ideas/news-story/863101b24337f80b5b78bb68cb422c9d>>.

⁵⁵³ James Cook University Code of Conduct <<https://www.jcu.edu.au/policy/corporate-governance/code-of-conduct>>.

⁵⁵⁴ Australian Lesbian Health Coalition, Submission to *Independent Review of Freedom of ‘Speech in Australian Higher Education Providers* (17 January 2019) 1.

- The University of Western Australia – where the Vice-Chancellor has appointed a Freedom of Expression Working Group to recommend to the Academic Board and Senate an articulation of UWA’s values and position in relation to freedom of speech issues. The initial report will be provided in the first quarter of 2019.
- The University of South Australia whose Academic Board, at its October 2018 meeting, resolved to establish a working group to review and make recommendations regarding the University’s current position and policy environment on academic freedom and freedom of expression. This review will conclude in early 2019.
- RMIT which is undertaking a post implementation review of the RMIT Staff Ethics and Integrity Policy. It is intended to help staff to respond in a timely way to high risk, time sensitive matters, as well as mitigate the potential, perceived or actual conflict of interest for staff who may be required to exercise decisions and actions in a management capacity at a later point.
- The University of Wollongong (UOW) which undertook an External Review of the UOW Council in 2017, and looked into whether the University met its objects of upholding and safeguarding intellectual inquiry. Its main conclusion was: ‘The University has a culture of safeguarding the freedom of intellectual inquiry and a strong set of policies, principles and code of conduct to support this’.⁵⁵⁵
- ECU which undertook an internal review in 2017 of its facilities hiring policy and processes. This review was undertaken after the incident, mentioned earlier, in which ECU rejected a facilities hire application on the basis that the seminar proposed did not align with ECU’s evidence-based approach to teaching and research in a specific area and was inconsistent with its research activities in that discipline.

24.5 State legislation which may impact on freedom of expression on campuses

State and Territory defamation laws, anti-discrimination and racial and religious anti-vilification laws form part of the legislative context relevant to freedom of speech. As UNSW said:

⁵⁵⁵ University of Wollongong, Submission to *Independent Review of Freedom of Speech in Australian Higher Education Providers* (21 December 2018) 3.

various Australian jurisdictions have legal frameworks for addressing the inevitable tensions between protection of freedom of expression and protection against discrimination or violence. In NSW, section 93Z of the Crimes Act 1900 declares as criminal the intentional or reckless threatening or incitement of violence on certain grounds, including race, religion and sexual orientation. As an instrument of the criminal law, this section represents a series of lines in the sand drawn by the Parliament and applies to all speech in NSW, whether on or off campus.⁵⁵⁶

There are, of course, particular provisions in the Human Rights Legislation of the ACT, Queensland and Victoria which potentially affect universities and other higher education providers in those jurisdictions to the extent that they are ‘public authorities’.

24.6 *Other observations*

24.6(i) Diverse approaches in terms of university policies and regulations to uphold and protect freedom of speech on campus

Approaches to protecting academic freedom and intellectual inquiry vary from university to university in terms of the policies, statements, codes, by-laws and other mechanisms employed. For example, there are 14 universities, which, according to their responses, have a standalone policy on academic/ intellectual freedom or freedom of expression. All the other universities have relevant clauses in a range of documents, such as the Enterprise Agreement, University Act, Staff Code of Conduct, Research Code of Conduct, Student Charter, Misconduct Policy, Media Policy, Equity and Diversity Policy, Strategic Plan, Vision and Mission Statements. The range of relevant documents is illustrated in the submission from La Trobe University. It reported that 75 policies out of its 312 policies in the University Policy Library ‘take into account or relate to expression, speech and ideas.’⁵⁵⁷ Of those, five policies were included which expressly mentioned academic freedom or freedom of expression or freedom of enquiry. The University of Melbourne has a plan to develop a policy to clarify and consolidate existing guidelines, rules, practices and process related to freedom of speech. This policy will sit alongside the

⁵⁵⁶ University of New South Wales Submission to *Independent Review of Freedom of Speech in Australian Higher Education Providers* (10 January 2019) 2.

⁵⁵⁷ La Trobe University, Submission to *Independent Review of Freedom of Speech in Australian Higher Education Providers* (January 2019) 2.

University's existing Freedom of Academic Expression Policy, to be considered and approved by the University Council within the first quarter of 2019.

24.6(ii) Definitional issues

A range of respondents⁵⁵⁸ argued that the concepts of academic freedom and freedom of speech should not be conflated. There is a distinction, it was said, between the two freedoms where they apply to expressive conduct by staff, students or visitors engaging in public discussion. It was acknowledged that those categories may overlap, so that expressive conduct by staff or students can include commentary on academic and non-academic issues. Respondents also observed that a range of terminology appears in university legislation, policies and procedures (free inquiry, intellectual freedom, academic freedom, freedom of opinion, freedom of communication, freedom of expression), which sometimes are used interchangeably.

UNSW summarised the difference as:

It is crucial that 'freedom of speech' and 'academic freedom' are not conflated. Adapting the **Hefei Statement**, one can describe academic freedom or freedom of inquiry as the freedom of academic staff to "produce and disseminate knowledge through research, teaching and service without undue constraint within a research culture based on open inquiry and the continued testing of current understanding", and one might describe freedom of speech or expression as the freedom to present views or ideas (including contentious or unpopular ideas and the freedom to protest) without constraint by state authorities. The latter is always limited by competing concerns such as security, vilification and public order.⁵⁵⁹

24.6.3 Consideration of developing a Model Code

Around one third of the universities, in their first response to this Review, explicitly supported the development of a Model Code. However, they also acknowledged the challenges associated with it, particularly in its interaction with terms and conditions of

⁵⁵⁸ These stakeholders include University of New South Wales, University of Melbourne, University of Queensland, University of Wollongong, University of Divinity, Council of Australian Postgraduate Associations, and Group of Eight.

⁵⁵⁹ University of New South Wales Submission to *Independent Review of Freedom of Speech in Australian Higher Education Providers* (10 January 2019) 1.

employment of staff and other conduct policies. The University of the Sunshine Coast stated in its submission:

For example, the terms and conditions contained in industrial instruments such as Enterprise Agreements and employment contracts may prohibit consistency across the sector. A further complication is the associated policies and procedures that exist, in particular with respect to Codes of Conduct and disciplinary processes, where misconduct matters related to reputational risk or damage to an organisation occurs.⁵⁶⁰

Three respondents expressed opposition to a Model Code. There were the Council of Australian Postgraduate Associations (CAPA), La Trobe University and Queensland University of Technology (QUT). CAPA warned that some issues associated with workplace rights of staff would need to be carefully considered if a national code were to be implemented:

[The code of conduct] must be compliant with legislation including the Racial Discrimination Act 1975, and must not contravene on universities' obligations to provide a safe working environment.

universities must end insecure employment practices, providing the security for their researchers to investigate controversial or uncertain topics.⁵⁶¹

La Trobe University considered that 'Codes of conduct for staff are related to the local enterprise agreements and, in this context, a national code would be problematic.' It warns that 'any introduction of a sector wide code could impact on the principle of institutional autonomy, itself a safeguard for freedoms of expression and intellectual inquiry'.⁵⁶² Further, the university did not believe the Chicago Statement is 'fundamentally different from the protections already in place in Australia'. In similar vein, QUT argued that 'it is not apparent

⁵⁶⁰ University of the Sunshine Coast, Submission to *Independent Review of Freedom of Speech in Australian Higher Education Providers* (14 January 2019) 1.

⁵⁶¹ Council of Australian Postgraduate Associations, Submission to *Independent Review of Freedom of Speech in Australian Higher Education Providers* (January 2019) 4.

⁵⁶² La Trobe University, Submission to *Independent Review of Freedom of Speech in Australian Higher Education Providers* (January 2019) 3.

that a need exists for a “sector-led code of conduct”..., indeed, even a well-executed attempt at codification may risk diminishing the scope of current protections.’⁵⁶³

24.6(iv) Next steps

Looking forward, TEQSA pointed out that a key challenge will be reconciling an overall commitment to freedom of speech with the wording of institutional policies relating to equity and diversity, anti-bullying and conduct generally. There is no doubt that it is in this area that there is a need for accommodation of norms which can sometimes appear to be in tension.

The Go8 and Innovative Research Universities canvassed the idea of inserting an additional statement or principle into the existing HE Standards should the Review find that the current Framework is in some way deficient in this respect. However, Go8 warns ‘there would be significant issues with the implementation of this’. Go8 also suggested a guidance note to be developed by TEQSA to safeguard free expression.

⁵⁶³ Queensland University of Technology, Submission to *Independent Review of Freedom of Speech in Australian Higher Education Providers* (18 January 2019) 4.

25 Student Body Submissions

The National Union of Students (NUS), the Griffith University Student Representative Council (Griffith SRC), the National Association of Australian University Colleges (NAAUC), the University of Melbourne Student Union (UMSU) and the Council of Australian Postgraduate Associations (CAPA) were the only student bodies to have made submissions.

They contended that universities and their organisational cultures support freedom of speech and debate and that the right to protest forms part of this freedom. NAAUC expressed the cautionary view that freedom of speech ‘can be used to defend discriminatory beliefs and practices, or result in policies which may harm student’s welfare.’⁵⁶⁴ That concern was shared by the Griffith SRC, which stated that freedom of speech ‘does not mean in any way that individuals may articulate whatever they desire’ and that Griffith University ‘may restrict expression that violates the law, falsely defames an individual or speech that constitutes harassment, privacy, invasion or a breach of confidentiality.’⁵⁶⁵

All bodies, bar the Griffith SRC, in their submissions, explicitly asserted that the perception that there are threats to freedom of speech within their respective organisations and on campus is unfounded. The NUS stated that examples often referred to as impeding freedom of speech are either incidents in the United States of America, or a few high-profile cases of no platforming which have occurred on Australian university campuses. UMSU added that these high profile cases, as well as statements proposing that bodies or protestors should cover the cost of security fees, ‘represent the real threat to campus free speech’.⁵⁶⁶ CAPA asserted that this Review is based on ‘unsubstantiated panic’, ‘threatens universities’ autonomy and independence from government’ and is an ‘unwise use of money’.⁵⁶⁷

NUS and CAPA claimed that funding, or lack thereof, is impeding free speech on campus. CAPA claimed that cuts in research funding, such as an apparent incident of ministerial interference in the selection of ARC funded projects in 2018 ‘represents a serious

⁵⁶⁴ The National Association of Australian University Colleges, Submission to *Independent Review of Freedom of Speech in Australian Higher Education Providers* (21 January 2019) 1.

⁵⁶⁵ Griffith Student Representative Council, Submission to *Independent Review of Freedom of Speech in Australian Higher Education Providers* (15 January 2019) 2.

⁵⁶⁶ The University of Melbourne Student Union, Submission to *Independent Review of Freedom of Speech in Australian Higher Education Providers* (15 January 2019) 2.

⁵⁶⁷ Council of Australian Postgraduate Associations Incorporated, Submission to *Independent Review of Freedom of Speech in Australian Higher Education Providers* (January 2019) 3.

undermining of academic freedom.’⁵⁶⁸ NUS criticised proposals that student associations and protests should bear the security costs for events on campus, stating that ‘it would be chilling to essentially charge students for expressing their free speech’.⁵⁶⁹

CAPA and UMSU claimed that the existing legislative framework is adequate. Both bodies rejected any suggestion of a need for additional legislative oversight. In its submission, UMSU stated:

Any additional legislative intervention to impose “protective rules” on universities will paradoxically have the effect of limiting freedom of speech and academic freedom. Universities are centres of research and are grounded in a long tradition of rigour and evidence. Combating ignorant and baseless hate speech is among the fundamental objects of higher education. Consequently, any interventions which threaten universities’ capacity to counter these forms of speech are ultimately more likely to achieve the very opposite of protecting freedom of expression and intellectual inquiry.⁵⁷⁰

CAPA offered two responses to the proposal for a model code. It rejected a replication of the Chicago Principles. Such a code ‘would provide inadequate protections for university communities’ as the Chicago Principles is ‘quite general and lacks ... detail.’⁵⁷¹ It raised the question of how ‘hate speech’ would be defined under a model code as distinct from merely controversial or unpopular statements. Who would define speech as ‘hate speech’, and which individuals or groups would be protected by the code. CAPA also referred to the legal obligations of universities to provide safe and secure working environments for research staff in exercising their rights to academic freedom and freedom of expression in the course of their employment.

On the question of ‘hate speech’ it should be pointed out that there are difficulties of definitional overreach, discussed earlier in this Report. That does not mean that conduct falling short of ‘hate’ in its ordinary meaning cannot be the subject to particular policies. Whether or not it should be the subject of such policies is a separate question.

⁵⁶⁸ Ibid 8.

⁵⁶⁹ National Union of Students Incorporated, Submission to *Independent Review of Freedom of Speech in Australian Higher Education Providers* (8 January 2019) 2.

⁵⁷⁰ University of Melbourne Student Union, Submission to the *Independent Review of Freedom of Speech in Australian Higher Education Providers* (15 January 2019) 3.

⁵⁷¹ Council of Australian Postgraduate Associations, Submission to *Independent Review of Freedom of Speech in Australian Higher Education Providers* (20 January 2019) 5.

26 First Draft Model Code — Responses

A first Draft Model Code was sent to representative bodies and higher education providers in the course of this review and their responses were invited. Its text and the covering letter that went with it are set out in an Appendix to this Report.⁵⁷² A number of responses were received.

26.1 *Regulator's response*

The Chief Commissioner of TEQSA, Professor Saunders, advised that TEQSA welcomed clarification of the distinction made between freedom of speech and academic freedom. He also welcomed the proposed use of the draft Model Code as an optional resource to support institutional approaches to these matters, while preserving institutional autonomy to deal with these matters in the context of institutions' relevant obligations.

26.2 *Sector responses*

Sector responses to the Draft Code came from:

- Universities Australia, the Group of Eight and the University Chancellors Council.
- The National Tertiary Education Union
- The Council of Australian Post-Graduate Associations
- Royal Melbourne Institute of Technology University Student Union
- The South Australian, West Australian and ACT Ministers for Education.
- Twenty four universities.
- Five other higher education providers.

The sector responses to the first Draft Model Code included:

- out-right rejection of any need for a Code;
- preference for a high level statement of principles;

⁵⁷² Appendix 15.

- acceptance of the concept of a Model Code, subject to various amendments in terminology and application;
- acceptance.

Universities Australia, following a plenary session of its members, referred in its response to:

- the complex interplay of policies and industrial instruments and the importance of upholding institutional autonomy and diversity while formulating shared high level principles;
- the risk that a Model Code could override a broad range of university policies and procedures carefully constructed — balancing rights and responsibilities — over many decades by university governing councils;
- the need to deal with the increasing use of social media platforms by academic staff and students.

Universities Australia pointed to the benefit of ‘further interrogation of the detail in these proposals by the sector drawing on expertise in our midst’. The Universities Chancellors Council agreed with Universities Australia in its response and questioned the need for a voluntary code.⁵⁷³

The Go8, in its response, endorsed the position taken by Universities Australia. It emphasised the need for a set of high level principles ‘to establish a framework within which institutional autonomy on these issues can be both preserved and fostered’. It sought ‘clarity on how these might be structured, articulated and arrived at’. The Go8, like Universities Australia, said that further discussion and close engagement on these essential issues is required. It expressed its eagerness to engage constructively in this context.⁵⁷⁴

The commitment to an ongoing development process by both Universities Australia and the Go8 is consistent with the concept of a Model Code as a resource from which the sector can develop common or shared approaches capable of adaptation to the needs of individual institutions. A collective project looking to ‘high level principles’ may yield benefits. However, a difficulty with ‘high level principles’ is that the term ‘high level’

⁵⁷³ Universities Chancellors Council, Letter in response to Draft Model Code (8 March 2019).

⁵⁷⁴ Group of Eight, Letter in response to Draft Model Code (1 March 2019).

implies a high level of abstraction. Such principles may look like motherhood statements and in fact offer little practical guidance in the difficult decision-making which is inevitable in this area of universities' governance.

Protagonists, such as the IPA, have called for the adoption by universities of the Chicago Principles — the approach undertaken as a common form response by colleges in Ontario to the demands of the Provincial Government. The CAPA in its first round submission contended that the Chicago Principles are 'quite general' and that they lack detail. Those Principles are favoured by some, possibly because on their face they make little, if any, complicating concession to concerns about such issues as diversity and inclusion.

A first answer from the perspective of this Review to the desire for consideration of 'high level principles' as a way forward is that the 'principles of the Code' along the lines of those in the Draft could, in a modified form, operate as standalone principles without the purpose, application and operational infrastructure provided by the rest of the Code. That said, the sector will have to give serious consideration to the manner of operationalising any statement of 'principles'. Absent such consideration, they are likely to lack credibility. More importantly, they may not diminish the risk of at least ad hoc overreach of power, official and unofficial, that presently exists.

Some respondents expressed a concern that the Model Code might evolve into a form of regulation imposed on the sector. As the covering letter accompanying the Code tried to make clear, it is proposed as a voluntary code which could be adopted with or without modification or not at all. It is not recommended that the Code be given legislative force. The response from TEQSA indicates a correct understanding of the nature of the proposal in that respect. That does not preclude the possibility that individual institutions might decide to adopt a code, with or without modifications, as an exercise of delegated law-making power.

Flinders University expressed a concern that 'there will be a strong expectation on the part of government for most, if not all, universities and higher education providers to adopt the Code.' That concern is unwarranted. At present there is a variety of ways in which the existing statutory standards can be met. The proposed Code is one way of doing that and should also comply with the Act and Standards, if they were to be amended along the lines proposed in this Report.

Some respondents said that the designation of ‘freedom of speech’ as a ‘paramount value’ in the Draft Code placed that freedom above other rights and interests when it was but one among many. As this Report has sought to explain, freedom of speech has a special, legal and societal significance in Australia, as it does in other common law jurisdictions and at international law. The Report has also acknowledged however, that it is subject to limitations imposed by law, including limitations which may be assumed voluntarily under contractual arrangements.

The use of the term ‘paramount’ accords the freedoms to which it applies a priority, which is not absolute, over other values and interests. That usage is neither novel nor unusual in Australia. It was seen in the judgment of Sir Anthony Mason in *Victoria v Builders Labourers Federation*⁵⁷⁵ in 1981 in which he referred to a decision of the European Court of Human Rights ‘that the paramount principle of freedom of expression must prevail except in the case of a pressing social need.’ Another example of the usage appeared in 1993 in *Pervan v North Queensland Newspaper Co Ltd*⁵⁷⁶ in a passage from a judgment of the High Court, quoted earlier in this Report. The Court made reference to ‘the paramount importance of encouraging and protecting freedom of expression and discussion especially in relation to matters of public interest.’ Freedom of speech can be described as paramount yet subject to limitations imposed by law and reasonable and proportionate limitations imposed by an institution to enable it to discharge its functions. As noted earlier, Yale University’s Statement on Freedom of Expression refers to its protection as a ‘paramount obligation of the University’.

Some respondents seem to favour treating freedom of speech as just one value to be considered among a number of competing values. If that view is reflected in existing administrative approaches anywhere in the sector, then its combination with broadly worded policies and rules affecting expressive conduct, presents a risk of erosion of the freedom in the face of administrative and managerial imperatives and/or the restrictive demands of particular groups asserting that their interests underpin values which should be given priority over freedom of speech.

Another related concern was that the Code would override other university policies, rules and procedures. Plainly, a non-statutory code cannot override existing university Acts

⁵⁷⁵ (1981) 152 CLR 24, 96.

⁵⁷⁶ (1993) 178 CLR 309, 328.

nor the terms of statutorily backed enterprise bargaining agreements. It could only affect delegated legislation made by a university if it is itself enacted as delegated legislation and expressed to override or amend other university statutes or by-laws.

Where, however, a university or other provider or its officers are given broad powers and discretions, whether under a university Act or by delegated legislation or otherwise those instruments may be taken to have contemplated that the institution will make policies about their administration and application. That is a commonplace in the field of administrative law.

Thus, where an Act, statutory rule or agreement confers a discretion upon a decision-maker, the decision-maker can develop a policy about the way in which that discretion will be exercised provided that the policy is consistent with the purpose and text of the legislation or rule or agreement as the case may be. Ordinarily, any such policy must allow for flexibility so that it does not fetter the discretion by imposing a rigid quasi-legislative rule of its own. It must be able to allow for individual cases. The drafting of the Code leaves that possibility open.

There were concerns about freedom of speech being treated as an aspect of academic freedom and whether this leads to conflation of two different concepts. The definition of 'academic freedom' does not seek to import the general freedom of speech enjoyed by all as an element of academic freedom. That would be a conflation of two distinct concepts. Rather, it seeks to protect, from constraints that might otherwise exist in an employer/employee relationship, that freedom of expression which is the accepted incident of the academic role. That usage of 'freedom of expression' is reflected in the 1997 UNESCO Recommendation referred to in the body of this Report which picks up, among other things, freedom of teaching and discussion, freedom in disseminating and publishing the results of research and freedom to express opinions about the institutional system in which academic staff work. It also extends to freedom from institutional censorship. It does not confer freedom to break the law, criminal or civil, nor to breach legal duties of confidentiality including duties of confidentiality voluntarily assumed as part of a commercial or other collaboration. It will not extend to a freedom to breach confidentiality necessarily incidental to the purposes of the institution and the privacy of individuals.

The freedom of expression which is an aspect of academic freedom should not be restricted by broadly drawn staff conduct policies such as those which would sanction

expressions of opinion or comment said to create a risk of harm to the university's 'reputation' or 'prestige'. The creation of any such rule or policy goes hand-in-hand with the creation of a power on the part of some decision-maker or decision-makers to enforce it — the more broadly drawn the policy, the greater the power.

In this connection, one university, in its response to the draft code read it rather restrictively and argued:

Organisations, employers and property owners outside the higher education sector, do not have any of these restrictions imposed on their rights and powers. They are not required to treat free speech as a 'paramount value' in their dealings with employees, members, customers, business associates, suppliers and others, nor are they required to interpret their contractual and property rights and powers in such a way as to give effect to free speech. They are also able to take disciplinary action against employees who breach their employment obligations by bringing the employer into disrepute through their comments and opinions. The terms of the code clearly goes beyond the principle of ensuring that all staff and students in Australian universities have the same freedom of speech as 'any other person in Australia'.

This was a surprising response. A university which owns property is not just another property owner. It is a public authority created by public law for the benefit of the community and inheriting a long historical tradition. In the particular context of its status as an employer with respect to its academic staff, it is worth recalling the observations of the Full Court of the Federal Court of Australia in *University of Western Australia v Gray*:

A ... distinctive feature of many, but not all universities ... is that their academic staff are part of the membership that constitutes the corporation and as such are bound by the statutes, regulations, etc of the university. Their membership is integral to their status and place in the university. To define the relationship of an academic staff member with a university simply in terms of a contract of employment is to ignore a distinctive dimension of that relationship.⁵⁷⁷

The judgment of the Full Court went on to say:

⁵⁷⁷ (2009) 179 FCR 346,388 [185] (Lindgren, Finn and Bennett JJ).

The ‘seeming’ freedom to choose the subject or line of research and the manner of its pursuit and the freedom to decide when and how to publish the products of one’s research to the extent that these subsist, sit uneasily with employment notions such as the implied duty of an employee to obey all lawful and reasonable instructions of the employer within the scope of the employee’s employment, or to maintain the secrecy of confidential information generated in the course of employment. Yet they are apparent manifestations of the contested value of ‘academic freedom’.⁵⁷⁸

The preceding remarks about sector responses to the Draft Model Code comment on general concerns expressed by a number of respondents. There were, in addition, a considerable number of drafting suggestions advanced. Griffith University and Sydney University provided particularly helpful comments in this respect. Without traversing their proposals and the proposals of others in detail, the Draft Model Code has been reviewed and a number of suggestions implemented.

The timeframe within which this Review has had to be conducted and completed does not allow for an extended iterative process of engagement with the sector. That, it is suggested, is a process which the sector itself could and should pursue.

The questions about ‘freedom of speech’ and ‘academic freedom’ relevant to the Terms of Reference, go well beyond the high profile incidents, which are surrounded by the battle colours of ‘right’ and ‘left’ and which appear to have provided initial impetus for the Review. Freedom of speech is of fundamental importance as a general value and is particularly important to the defining characteristics of higher education institutions. Also of fundamental importance is the necessary freedom of academic staff, particularly at universities, to transcend their status as employees effectively participating in the life of the institution and beyond — without unnecessary restrictions on their freedom to express themselves, imposed by reason of managerial concerns about ‘reputation’ and ‘prestige’ or the effect of their conduct on government and private sector funding or on particular philanthropic donors.

⁵⁷⁸ Ibid 389 [186] (citation omitted).

27 General conclusions

Reported incidents in Australia in recent times do not establish a systemic pattern of action by higher education providers or student representative bodies, adverse to freedom of speech or intellectual inquiry in the higher education sector. There is little to be gained by debating the contested merits of incidents which have been the subject of report and controversy. Nevertheless, even a limited number of incidents seen as affecting freedom of speech may have an adverse impact on public perception of the higher education sector which can feed into the political sphere. And as the Joint Committee on Human Rights of the House of Commons and the House of Lords observed in its report in March 2018, they may have a ‘chilling effect’ on the exercise of freedom of speech in some places.⁵⁷⁹

The emphasis in this Review has been upon the statutory framework and Standards applicable to higher education providers and their rules and policies, which may affect freedom of expression and academic freedom. Also relevant are constraints on freedom of expression and academic freedom arising out of employment terms and conditions in the higher education sector and constraints imposed by collaborative arrangements with third parties and conditions attaching to major donations.

Constraints upon freedom of speech under the general law often require difficult judgments about which reasonable minds may differ. Laws affecting freedom of speech, both by way of protection and qualification of the freedom, often use rather general language. Its application can create challenges for administrators and law enforcement agencies and ultimately by courts. In the case of the domestic rules and policies of higher education providers the broader the terminology used to describe the circumstances in which expressive conduct can be constrained, the wider the potential application of constraints and the greater the risk of overreach even if resulting from ad hoc decisions short of a systemic approach.

Many of the higher education rules and policies mentioned in the Report use broad language capable of impinging on freedom of expression. They have been outlined in the preceding sections of this Report. One example from among many, but not atypical, is a Discipline Rule, which defines ‘misconduct’ to include conduct that ‘demonstrates a lack of

⁵⁷⁹ Joint Committee on Human Rights (n 119).

integrity or a lack of respect for the safety or wellbeing of other members of the University community'.⁵⁸⁰ It extends that definition to conduct that is otherwise:

- (i) a contravention of the values set by the Council for the University; or
- (ii) prejudicial to the good order and government of the University; or
- (iii) reprehensible conduct for a member of the University community to engage in.⁵⁸¹

Specific instances of misconduct are set out in the Rule. They include behaving in a way to another member of the university community which creates a hostile study, research or work environment.⁵⁸² The terms 'lack of respect', 'prejudicial' and 'reprehensible' are wide. That is not to say that they have not been and are not being sensibly administered. However, it does not require much imagination to apply them to a considerable range of expressive conduct.

Terminology of that kind, when used in statutes or in the common law, fits into what Professor Julius Stone described as 'legal categories of indeterminate reference'. They allow 'a wide range for variable judgment in interpretation and application approaching compulsion only at the limits of the range'.⁵⁸³ Courts, in applying such language generally, operate within parameters established by long-standing practice and precedent coupled with a degree of visibility in relation to their decision-making. Even then their decisions can involve contestable and not always visible normative choices. Administrative application may be informed by more variable and less visible perspectives.

That kind of terminology in rules and policies, which may affect expressive conduct, is rife on university campuses in Australia. It makes the sector an easy target for those who would argue that the potential exists for restrictive approaches to the expression of contentious or unwelcome opinions or opinions which some may find offensive or insulting. The potential for overreach tending to erosion of important freedoms equates to a non-trivial risk of that erosion. The risk can never be eliminated but it can be reduced by appropriately

⁵⁸⁰ Australian National University, Discipline Rule 2018 r 6(a).

⁵⁸¹ Ibid 6(c).

⁵⁸² Ibid 6(2)(d).

⁵⁸³ Julius Stone, *Legal System and Lawyers' Reasoning* (Maitland Publications, 1968) 263–4.

limiting language in higher education rules and policies. Beyond that measure, a determining factor will be the culture of the institution. A culture powerfully predisposed to the exercise of freedom of speech and academic freedom is ultimately a more effective protection than the most tightly drawn rule. A culture not so predisposed will undermine the most emphatic statement of principles. The recitation of a generally expressed commitment to freedom of speech and academic freedom does not of itself provide strong evidence of the existence of such a culture.

Given their nature and diversity and the range of subject matters upon which they touch, an immediate global review of all higher education provider rules or policies to narrow their application to freedom of speech and academic freedom would be like cleaning the Augean Stables. For this reason, it is recommended that higher education providers adopt at least umbrella principles operationalised in a code applicable to cases in which freedom of speech and academic freedom may be in issue. It is not proposed that such a code be enacted as a species of delegated legislation. Not all institutions have the power to make delegated legislation. As a non-statutory code it would be applied to guide the exercise of powers and discretions, formal and informal, when their breadth allows for its application. Essentially, its purpose is effectively to restrain the exercise of overbroad powers to the extent that they would otherwise be applied adversely to freedom of speech and academic freedom without proper justification.

The development of a common voluntary code is not a novel proposition. In January 2018 in testimony to the Joint Committee on Human Rights of the House of Commons and the House of Lords, Sir Michael Barker, Chairman of the Regulator, the Office of Students, said that some codes of practice in the higher education sector, designed to preserve free speech, are too complicated and too bureaucratic. It was not up to the Office of Students to come up with a model code. He said however:

I do not think you need any government related agency making single codes of practice on freedom of speech. It feels altogether wrong. However, if university leaders and students' unions got together and came up with a simplified code of practice, that might be a very good idea.⁵⁸⁴

⁵⁸⁴ Quoted in Beech (n 137) 12.

In February 2019, the Equality and Human Rights Commission of the United Kingdom, following a collaborative exercise with the sector, published a common guide for higher education providers, outlined earlier in this Report. That guide provides an approach to the discharge of statutory duties relating to freedom of speech in the sector in the UK. It also has relevance for Australia even without equivalent statutory obligations.

A model code embodying a set of umbrella principles could be adopted, with or without modification, by individual institutions. It could also be adopted across the sector. Such a code is likely to enhance the authority of the sector in its self-regulation in this important area. It could also give rise to a body of experience in its application able to be developed and shared as a sector-wide resource. Given the importance of freedom of expression as a cultural and constitutional value in our society and to the proper functioning of higher education providers themselves, any such code must lean powerfully against limitation of the freedom by reference to the content of speech. It should cover academic freedom particularly those aspects of it which relate to freedom of expression and freedom of intellectual inquiry as well as the protection, at least within existing limits, of institutional autonomy. The code should also be at least a relevant consideration in the negotiation of enterprise bargaining agreements, employment contracts, collaborative arrangements with third parties and the conditions upon which major philanthropic gifts are accepted.

Any code or principles must acknowledge the limits on speech imposed by the law and those limits which can be justified as necessary to the higher education provider's mission. That mission includes responsibility for the maintenance of scholarly standards in teaching, learning and research. It includes the provision of effective teaching and learning experiences which may require conventions and practices about mutual communication between students and teachers, and between students in classroom or learning spaces, including digital learning spaces. Any code or principles must also allow for compliance with the institutional duties of care at common law and duties which are imposed by statute, including the HE Standards relating to equitable treatment of students and staff, and the fostering of their wellbeing.⁵⁸⁵ Suitably framed diversity and inclusion policies are no doubt referable to those HE Standards but should be conservative in their application to expressive conduct.

⁵⁸⁵ HE Standards cl 6.4.

Any code or statement of principle should be framed in the recognition that it is concerned with an academic institution. A particular aspect of that distinctive character may be the institution's responses to visits by off-campus speakers. The question may be asked whether a higher education provider should be obliged to host any intellectual rubbish that wants to cross its threshold. There is certainly an abundance of it. The challenge in this area is that sometimes one person's intellectual rubbish is another's profound wisdom. What is intellectual rubbish today may be received wisdom tomorrow and vice versa. In 1950, Bertrand Russell wrote an essay entitled 'An Outline of Intellectual Rubbish'. In that category he included the attribution of value to gold, and the notion that Aristotle was wise.⁵⁸⁶ Some, of course, may see positive benefit in exposing students to the proponents of intellectual rubbish, including racist opinion, so as to better identify it, understand how it is propagated and how to challenge it effectively. The EHRC Guide in the United Kingdom offers some useful, practical advice in that respect.

There is difficulty in drawing a line around the concept of 'intellectual rubbish' as much as there is in drawing a line around the concept of a resulting 'harm' which would warrant refusing entry to a speaker. Some refusals seem reasonable and essentially uncontroversial, at least where ideological perspectives are not involved. In 2017, Edith Cowan University rejected a facility hire application by an organisation proposing to hold a seminar on its campus related to 'Pranic crystal healing'. Following letters of concern from members of the public the university conducted inquiries into the organisation and the content of the seminar and determined that the seminar did not align with the university's evidence-based approach to teaching and research in dietetics and was inconsistent with its research activities in that discipline.⁵⁸⁷

There are cases in which there may be strong 'harm' arguments for not providing a platform for the lawful expression of an opinion. As a matter of general principle, the class of speech to be characterised as 'harmful' for the purpose of a model code should be as small as possible and, by its very definition, offer justification for the imposition of a restriction. None of the above is inconsistent with the determination of priorities by a higher education institution for the purpose of deciding who will be permitted to use its facilities. Nor is it inconsistent with a higher education provider applying priorities governing the extent to

⁵⁸⁶ Bertrand Russell, 'An Outline of Intellectual Rubbish' in Bertrand Russell (ed) *Unpopular Essays* (Routledge, 1950) 69.

⁵⁸⁷ Edith Cowan University Submission to *Independent Review of Freedom of Speech in Australian Higher Education Providers* (21 January 2019).

which it will bear costs associated with the conduct of any event involving an off-campus speaker.

The Terms of Reference of this Review require consideration of existing statutory Standards with respect to their ‘effectiveness’. The term ‘effectiveness’ in relation to the protection of freedom of speech and intellectual inquiry is normative and depends upon some common understanding of what limits on the freedom are appropriate and what is necessary to provide an acceptable level of protection of the freedom within those limits. Any statutory regime has to allow room for distinctions to be made between different classes of case and circumstances. A detailed prescription would provide a platform for undesirably intrusive regulatory supervision of the formulation and application of institutional policies. An example is the *Campus Free Speech Protection Act 2017* of Tennessee, referred to earlier in this Report.

Arming a regulator with a detailed statutory prescription would probably require additional compliance resourcing for the regulator. It would impose on the regulator the burden of contestable evaluative and normative judgments. It would diminish institutional autonomy. A statutory standard, beyond the level of generality presently reflected in the HE Standards made under the TEQSA Act, is at risk of being disproportionate to any threat to freedom of expression which exists or is likely to exist on Australian university campuses for the foreseeable future.

Effective statutory standards can and should be confined to broadly expressed requirements that higher education providers have in place policies reflected in their domestic rules or principles and applicable to student representative bodies, the objectives of which are the protection of freedom of speech as a free-standing value and academic freedom which encompasses freedom of expression peculiar to the distinctive character of higher education institutions and their academic staff in particular. On that model, the existence of an institution-wide policy which could reasonably guide administrative action consistently with the HE Standards should constitute compliance with them. ‘Effective policies’ in this context must at least mean policies which reflect and give effect to a strong presumption in favour of freedom of speech and academic freedom. External review of the existence of such policies and of their administration should be sufficient to provide public accountability without the need to impose financial penalties which are hardly likely to benefit anybody in the higher

education sector. That said, the present HE Standards could be improved with a more precise formulation directed to freedom of speech and academic freedom.

Consistently with that approach, the statutory standard presently established under the HES Act and the TEQSA Act which relates to ‘free intellectual inquiry’ should be amended to refer instead to freedom of expression and academic freedom, coupled with a definition of the term ‘academic freedom’. The HES Act itself should be amended to support that change.

A more far-reaching measure, in relation to freedom of speech generally, would be the imposition of a statutory duty on higher education providers in relation to freedom of expression which is modelled on the duty imposed on public authorities under the human rights legislation of Victoria, the ACT and now Queensland and in the United Kingdom under the *Human Rights Act 1998* (UK). Freedom of speech and expression in that statutory context are terms which are the subject of an extensive body of domestic and international law which has worked out their application and limits case-by-case over many years. The imposition of such a statutory mandate would not involve the application of a novel legal standard although it would be necessary to ensure that its application to the decision-making of higher education providers covered the exercise of statutory discretions and the application of domestic rules and policies. The proposed Model Code should provide a way of responding to such a statutory duty in those places in which it already applies.

Some might say — if a law of the Commonwealth were to create a statutory mandate along the lines of the existing Victorian, Queensland or ACT provisions applicable to higher education providers — why should it not apply to all public authorities throughout Australia? Such an application would appear to be within the constitutional authority of the Commonwealth Parliament to make laws with respect to external affairs, given the inclusion of freedom of expression in the *International Covenant on Civil and Political Rights* to which Australia is a party. This Review does not propose a general statutory duty of the kind imposed in Victoria, Queensland and the ACT as one of its recommendations. Such a proposal would have policy implications with which it is not necessary to engage for present purposes. The recommendation of a Model Code, operationalising umbrella principles, coupled with cognate amendments to the HES Act and the HE Standards should be sufficient unto the day.

28 Response to the Terms of Reference

In summary the response to the Terms of Reference, reflected in the body of this Report, the General Conclusions and the Recommendations is as follows:

1. The effectiveness of the HES Act and the HE Standards to promote and protect freedom of expression and freedom of intellectual inquiry depends upon how they are interpreted by higher education providers and by TEQSA.

Their interpretation and therefore their effectiveness is made difficult by the uncertain scope of the term ‘free intellectual inquiry’ and its relationship to freedom of expression generally, freedom of expression as an aspect of academic freedom, and academic freedom generally. They must also be interpreted and applied consistently with other standards requiring higher education providers to accommodate student diversity, to promote and foster a safe environment and to foster the wellbeing of students and staff.

2. The policies and practices of higher education providers which arguably respond to the standards are diverse. They use broad language such that their practical operation in relation to freedom of speech and academic freedom depends upon their interpretation by those who are required to apply them and also upon the exercise of evaluative judgments and discretions. There is no evidence, on the basis of recent events, which would answer the pejorative description of a ‘free speech crisis’ on campus. Nevertheless, the diversity and language of a range of policies and rules give rise to unnecessary risks to freedom of speech and to academic freedom. And even a small number of high profile incidents can have adverse reputational effects on the sector as a whole.
3. There is a range of approaches in other countries to the protection of freedom of expression and academic freedom that range from legislative prescription to codes of practice to statements of high level principle. The most relevant of those is found in recent consideration of the application of statutory requirements in the United Kingdom. The principles-based approach adopted by a number of universities in the United States is also instructive and potentially applicable in Australia.

4. The most realistic and practical options are those for which the sector can claim ownership under the general coverage of the HES Act and HE Standards, rather than more prescriptive legislative requirements. The protection of freedom of speech and academic freedom in the sector can be made more effective by the adoption of a statement of principles, preferably operationalised by an overarching code. Such a code should be pitched at a level sufficient to allow for reasonable flexibility in its application but providing greater guidance to decision-makers and others than presently exists. These measures can be supported by minor amendments to the HES Act and the HE Standards to distinguish freedom of speech and academic freedom and to define academic freedom by reference to generally accepted elements. Such principles and a code of practice, which is owned by the sector, offer more promise in supporting a culture disposed to the freedoms than imposed prescription.

29 Recommendation — Statutory Amendment

Amendment of the existing HES Act and HE Standards is not essential to support a Model Code for the sector directed to ‘freedom of speech’ and ‘academic freedom’. Nevertheless, it would be preferable that the HES Act and the HE Standards be clarified with the use of that terminology. It is therefore suggested that consideration be given to amending the HES Act along the following lines:

1. Substitute for the objects set out in s 2-1(a)(iv):

To support a higher education system that:

- (iv) promotes and protects freedom of speech and academic freedom.

2. Introduction of a definition of ‘academic freedom’ as follows:

“Academic freedom”, for the purposes of this Act and the *Tertiary Education and Quality Standards Agency Act* and any standards made under that Act, comprises the following elements:

- the freedom of academic staff to teach, discuss, and research and to disseminate and publish the results of their research;
- the freedom of academic staff and students to engage in intellectual inquiry, to express their opinions and beliefs, and to contribute to public debate, in relation to their subjects of study and research;
- the freedom of academic staff and students to express their opinions in relation to the higher education provider in which they work or are enrolled;
- the freedom of academic staff, without constraint imposed by reason of their employment by the university, to make lawful public comment on any issue in their personal capacities;
- the freedom of academic staff to participate in professional or representative academic bodies;
- the freedom of students to participate in student societies and associations.

- the autonomy of the higher education provider in relation to the choice of academic courses and offerings, the ways in which they are taught and the choices of research activities and the ways in which they are conducted.

3. Amend s 19-115 of the HES Act to read:

A higher education provider that is a Table A provider or a Table B provider must have a policy that upholds freedom of speech and academic freedom.

30 Recommendation – Amendment of the Standards

1. The relevant HE Standard, 6.1 at par 4, be amended consequentially to read:

The governing body takes steps to develop and maintain an institutional environment in which freedom of speech and academic freedom is upheld and protected, students and staff are treated equitably, the wellbeing of students and staff is fostered, informed decision-making by students is supported and students have opportunities to participate in the deliberative and decision-making processes of the higher education provider.

2. A consequential amendment to the criteria for higher education providers set out in Part B of the Standards would have B1.1 reading:

The higher education provider has a clearly articulated higher education purpose that includes a commitment to and support for freedom of speech and academic freedom.

3. There would probably be a need for consequential amendments to the TEQSA guidance note on the diversity and equity statement issued on 11 October 2017.
4. The existing HE Standards, if amended, would be consistent with a Model Code which is expressed in terms of freedom of speech and academic freedom as distinct but overlapping concepts rather than in terms of freedom of intellectual inquiry. However, the Model Code proposed below should not require an amendment to the HES Act or the relevant HE Standards to render it compliant with them.

31 Recommendation – A Model Code — Preliminary Note

A Model Code is proposed in the following terms. The code is drafted, as a non-statutory instrument, in such a way as to avoid conflict with statutory obligations, whether or not derived from existing delegated legislation or other legal duties imposed on the university by law. The Code could also be adapted to enactment as a statutory law of the university itself, but that is not necessary for its efficacy. The draft below uses the term ‘university’ but is capable of application to other higher education providers, albeit there may be differences requiring adjustments to other elements of the draft.

The Code should be read with the definitions in mind. They have been drawn to pick up some important limitations on the freedoms to which it is directed. The definition of the term ‘imposed by law’ ensures that restrictions imposed by law extend to contractual obligations, duties of confidentiality and restrictions arising from intellectual property rights.

A Model Code for the Protection of Freedom of Speech and Academic Freedom in Australian Higher Education Providers

Objects

The objects of the Code are:

- (1) To ensure that the freedom of lawful speech of staff and students of the university and visitors to the university is treated as a paramount value and therefore is not restricted nor its exercise unnecessarily burdened by restrictions or burdens other than those imposed by law and set out in the Principles of the Code.
- (2) To ensure that academic freedom is treated as a defining value by the university and therefore not restricted nor its exercise unnecessarily burdened by restrictions or burdens other than those imposed by law and set out in the Principles of the Code.
- (3) To affirm the importance of the university's institutional autonomy under law in the regulation of its affairs, including in the protection of freedom of speech and academic freedom.

Application

- (1) The Code applies to the governing body of the university, its officers and employees and its decision-making organs, including those involved in academic governance.
- (2) The Code also applies to student representative bodies to the extent that they have policies and rules which are capable of being applied to restrict or burden the freedom of speech of anyone, or academic freedom.

Definitions

'academic freedom' for the purposes of this Code comprises the following elements:

- the freedom of academic staff to teach, discuss, and research and to disseminate and publish the results of their research;

- the freedom of academic staff and students to engage in intellectual inquiry, to express their opinions and beliefs, and to contribute to public debate, in relation to their subjects of study and research;
- the freedom of academic staff and students to express their opinions in relation to the higher education provider in which they work or are enrolled;
- the freedom of academic staff, without constraint imposed by reason of their employment by the university, to make lawful public comment on any issue in their personal capacities;
- the freedom of academic staff to participate in professional or representative academic bodies;
- the freedom of students to participate in student societies and associations.
- the autonomy of the higher education provider in relation to the choice of academic courses and offerings, the ways in which they are taught and the choices of research activities and the ways in which they are conducted.

‘academic staff’ all those who are employed by the university to teach and/or carry out research and extends to those who provide, whether on an honorary basis or otherwise, teaching services and/or conduct research at the university.

‘external visiting speaker’ any person who is not an invited visiting speaker and for whom permission is sought to speak on the university’s land or facilities.

‘imposed by law’ in relation to restrictions or burdens or conditions on a freedom include restrictions or burdens or conditions imposed by statute law, the common law (including the law of defamation), duties of confidentiality, restrictions deriving from intellectual property law and restrictions imposed by contract.

‘invited visiting speaker’ any person who has been invited by the university to speak on the university’s land or facilities.

Note: The definition of ‘university’ which limits this class of visitor.

‘non-statutory policies and rules’ means any non-statutory policies, rules, guidelines, principles, codes or charters or similar instruments.

‘speech’ extends to all forms of expressive conduct including oral speech and written, artistic, musical and performing works and activity and communication using social media; the word ‘speak’ has a corresponding meaning.

‘staff’ for the purposes of this Code ‘staff’ includes all employees of the university whether fulltime or part-time and whether or not academic staff.

‘the duty to foster the wellbeing of staff and students’;

- includes the duty to ensure that no member of staff and no student suffers unfair disadvantage or unfair adverse discrimination on any basis recognised at law including race, gender, sexuality, religion and political belief;
- includes the duty to ensure that no member of staff and no student is subject to threatening or intimidating behaviour by another person or persons on account of anything they have said or proposed to say in exercising their freedom of speech;
- supports reasonable and proportionate measures to prevent any person from using lawful speech which a reasonable person would regard, in the circumstances, as likely to humiliate or intimidate other persons and which is intended to have either or both of those effects;
- does not extend to a duty to protect any person from feeling offended or shocked or insulted by the lawful speech of another.

‘the university’ means the university as an entity and includes its decision-making organs and officers, its student representative bodies, undergraduate and post-graduate, and any entities controlled by the university.

‘unlawful’ means in contravention of a prohibition or restriction or condition imposed by law.

Operation

- (1) The university shall have regard to the Principles of this Code in the drafting, review or amendment of any non-statutory policies or rules and in the drafting, review or amendment of delegated legislation pursuant to any delegated law-making powers.
- (2) Non-statutory policies and rules of the university shall be interpreted and applied, so far as is reasonably practicable, in accordance with the Principles of this Code.
- (3) Any power or discretion under a non-statutory policy or rule of the university shall be exercised in accordance with the Principles in this Code.
- (4) This Code prevails, to the extent of any inconsistency, over any non-statutory policy or rules of the university.
- (5) Any power or discretion conferred on the university by a law made by the university in the exercise of its delegated law-making powers shall be exercised, so far as that law allows, in accordance with the Principles of this Code.
- (6) Any power or discretion conferred on the university under any contract or workplace agreement shall be exercised, so far as it is consistent with the terms of that contract or workplace agreement, in accordance with the Principles of this Code.

Principles of the Code

- (1) Every member of the staff and every student at the university enjoys freedom of speech exercised on university land or in connection with the university subject only to restraints or burdens imposed by:
 - law;
 - the reasonable and proportionate regulation of conduct necessary to the discharge of the university's teaching and research activities;

- the right and freedom of others to express themselves and to hear and receive information and opinions;
 - the reasonable and proportionate regulation of conduct to enable the university to fulfil its duty to foster the wellbeing of students and staff;
 - the reasonable and proportionate regulation of conduct necessary to enable the university to give effect to its legal duties including its duties to visitors to the university.
- (2) Subject to reasonable and proportionate regulation of the kind referred to in the previous Principle, a person's lawful speech on the university's land or in or in connection with a university activity shall not constitute misconduct nor attract any penalty or other adverse action by reference only to its content.
- (3) Every member of the academic staff and every student enjoys academic freedom subject only to prohibitions, restrictions or conditions:
- imposed by law;
 - imposed by the reasonable and proportionate regulation necessary to the discharge of the university's teaching and research activities;
 - imposed by the reasonable and proportionate regulation necessary to discharge the university's duty to foster the wellbeing of students and staff;
 - imposed by the reasonable and proportionate regulation to enable the university to give effect to its legal duties;
 - imposed by the university by way of its reasonable requirements as to the courses to be delivered and the content and means of their delivery.
- (4) The exercise by a member of the academic staff or of a student of academic freedom, subject to the above limitations, shall not constitute misconduct nor attract any penalty or other adverse action.
- (5) In entering into affiliation, collaborative or contractual arrangements with third parties and in accepting donations from third parties subject to

conditions, the university shall take all reasonable steps to minimise the restrictions or burdens imposed by such arrangements or conditions on the freedom of speech or academic freedom of any member of the academic staff or students carrying on research or study under such arrangements or subject to such conditions.

- (6) The university has the right and responsibility to determine the terms and conditions upon which it shall permit external visitors and invited visitors to speak on university land and use university facilities and in so doing may:
- (a) require the person or persons organising the event to comply with the university's booking procedures and to provide information relevant to the conduct of any event, and any public safety and security issues;
 - (b) distinguish between invited visitors and external visitors in framing any such requirements and conditions;
 - (c) refuse permission to any invited visitor or external visitor to speak on university land or at university facilities where the content of the speech is or is likely to:
 - (i) be unlawful;
 - (ii) prejudice the fulfilment by the university of its duty to foster the wellbeing of staff and students;
 - (iii) involve the advancement of theories or propositions which purport to be based on scholarship or research but which fall below scholarly standards to such an extent as to be detrimental to the university's character as an institution of higher learning;
 - (d) require a person or persons seeking permission for the use of university land or facilities for any visiting speaker to contribute in whole or in part to the cost of providing security and other measures in the interests of public safety and order in connection with the event at which the visitor is to speak.

- (7) Subject to the preceding Principles the university shall not refuse permission for the use of its land or facilities by an external visitor or invited visitor nor attach conditions to its permission, solely on the basis of the content of the proposed speech by the visitor.
- (8) Consistently with this Code the university may take reasonable and proportionate steps to ensure that all prospective students in any of its courses have an opportunity to be fully informed of the content of those courses. Academic staff must comply with any policies and rules supportive of the university's duty to foster the wellbeing of staff and students. They are not precluded from including content solely on the ground that it may offend or shock any student or class of students.

Appendix 1

Commonwealth higher education legislation and standards

Higher Education Support Act 2003 (Cth).

Tertiary Education Quality and Standards Agency Act 2011 (Cth).

Higher Education Standards Framework (Threshold Standards) 2015 (Cth).

Appendix 2

Tertiary Education Quality and Standards Agency Guidance Notes

Tertiary Education Quality and Standards Agency, Guidance Note: Academic Governance, [<https://www.teqsa.gov.au/latest-news/publications/guidance-note-academic-governance>].

Tertiary Education Quality and Standards Agency, Guidance Note: Academic Integrity, [<https://www.teqsa.gov.au/latest-news/publications/guidance-note-academic-integrity>].

Tertiary Education Quality and Standards Agency, Guidance Note: Corporate Governance, [<https://www.teqsa.gov.au/latest-news/publications/guidance-note-corporate-governance>].

Tertiary Education Quality and Standards Agency, Guidance Note: Diversity and Equity, [<https://www.teqsa.gov.au/latest-news/publications/guidance-note-diversity-and-equity>].

Tertiary Education Quality and Standards Agency, Guidance Note: Wellbeing and Safety, [<https://www.teqsa.gov.au/latest-news/publications/guidance-note-wellbeing-and-safety>].

Appendix 3

University Acts

Australian Catholic University Act 1990 (NSW).

Batchelor Institute of Indigenous Tertiary Education Act (NT).

Bond University Act 1987 (Qld).

Central Queensland University Act 1998 (Qld).

Charles Darwin University Act (NT).

Charles Sturt University Act 1989 (NSW).

Curtin University Act 1966 (WA).

Deakin University Act 2009 (Vic).

Edith Cowan University Act 1984 (WA).

Federation University Australia Act 2010 (Vic).

Griffith University Act 1998 (Qld).

James Cook University Act 1997 (Qld).

La Trobe University Act 2009 (Vic).

Macquarie University Act 1989 (NSW).

Monash University Act 2009 (SA).

Murdoch University Act 1973 (WA).

Queensland University of Technology Act 1998 (Qld).

Royal Melbourne Institute of Technology Act 2010 (Vic).

Southern Cross University Act 1993 (NSW).

Swinburne University of Technology Act 2010 (Vic).

The Australian National University Act 1991 (Cth).

The Flinders University Act 1966 (SA).

The University of Adelaide Act 1971 (SA).

The University of Melbourne Act 2009 (Vic).
The University of Notre Dame Act 1989 (WA).
The University of Queensland Act 1998 (Qld).
The University of Sydney Act 1989 (NSW).
The University of Western Australia Act 1911 (WA).
Torrens University Australia Act 2013 (SA).
University of Canberra Act 1989 (ACT).
University of Divinity Act 1910 (Vic).
University of New England Act 1993 (NSW).
University of New South Wales Act 1989 (NSW).
University of Newcastle Act 1989 (NSW).
University of South Australia Act 1990 (SA).
University of Southern Queensland Act 1998 (Qld).
University of Tasmania Act 1992 (Tas).
University of Technology, Sydney, Act 1989 (NSW).
University of the Sunshine Coast Act 1998 (Qld).
University of Western Sydney Act 1997 (NSW).
University of Wollongong Act 1989 (NSW).
Victoria University Act 2010 (Vic).

Appendix 4

Relevant regulations, by-laws, rules and other statutory instruments created by universities (other than those relating specifically to staff and student conduct)

Edith Cowan University, Edith Cowan University Lands and Traffic By-Laws,
[<http://policysearch.ecu.edu.au/WebDrawer.PolicySearch/Record/172/file/document>].

Edith Cowan University, University Statute No. 4 Rules of the University,
[<http://policysearch.ecu.edu.au/WebDrawer.PolicySearch/Record/187/file/document>].

La Trobe University, Academic Integrity Statute 2015,
[https://www.latrobe.edu.au/_data/assets/pdf_file/0020/633116/Academic-Integrity-Statute-2015.pdf].

Macquarie University, Academic Senate Rules 2017, [https://www.mq.edu.au/about/about-the-university/governance/macquarie-university-council/calendar-of-governance,-legislation-and-rules/2017-rules/Academic_Senate_Rules_06042017.pdf].

Monash University, Monash University (Council) Regulations,
[https://www.monash.edu/_data/assets/pdf_file/0007/1644955/Monash-University-Council-Regulations-as-at-11-February-2019.pdf].

Monash University, Monash University (Vice-Chancellor) Regulations,
[https://www.monash.edu/_data/assets/pdf_file/0006/471183/monash-university-vice-chancellor-regulations.pdf].

Murdoch University, By-Laws,
[<https://policy.murdoch.edu.au/dotNet/documents/?docid=1551&public=true>].

Royal Melbourne Institute of Technology, RMIT Statute No.1 (Amendment No. 2),
[<https://www.rmit.edu.au/about/governance-and-management/statutes-and-regulations/rmit-statute>].

Swinburne University of Technology, Academic and Student Affairs Statute,
[<https://www.swinburne.edu.au/about/leadership-governance/policies-regulations/statutes-regulations/academic-student-affairs/>].

The Australian National University, Academic Board Rule 2017 (Cth),
[<https://www.legislation.gov.au/Details/F2017L01584/Download>].

The Flinders University of South Australia, By-Laws Made Under the Flinders University of South Australia Act 1966,
[<https://www.flinders.edu.au/integritygovernancerisk/policyandsecretariat/by-laws.cfm>].

The University of Adelaide, By-Laws,

[<https://www.adelaide.edu.au/policies/231/?dsn=policy.document;field=data;id=226;m=view>].

The University of Melbourne, Council Regulation,

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Appendix 14

List of Australian University Actions referred to in the Institute of Public Affairs Free Speech on Campus Audit 2018

What follows is a list of alleged incidents referred to in the 2018 IPA Audit and in some cases redrafted for clarity. That list does not involve any acceptance of the truth of any of those allegations.

1. *Australian National University*

- The sub-editor of a student newspaper at the Australian National University censored student opinion pieces following the election of Donald Trump as President of the United States.
- The University of Sydney, University of Western Australia, and the Australian National University, cancelled events which included speakers associated with pan-Islamic political organisation, Hizb ut-Tahrir.
- In June 2018, the Australian National University was criticised for rejecting the Ramsay Centre for Western Civilisation following internal opposition.

2. *Deakin University*

- Deakin Young Socialist Alliance members were asked by Deakin University Student Association to remove t-shirts critical of Prime Minister Abbott.
- Former Prime Minister Tony Abbott was forced to cancel a visit to Deakin University following security and logistical issues posed by protests.

3. *Edith Cowan University*

- The University of Adelaide, University of South Australia and Edith Cowan University refused to allow a ‘nutrition expert,’ Christine Cronau, to hold events on campus.

4. *Flinders University*

- Academics at Flinders University rejected the university’s plan to host a Bjørn Lomborg-run Research Centre with \$4 million of Federal Government money, labelling Lomborg as ‘infamous’ for his views on climate change.

5. *James Cook University*

- Students were expelled from a residential college at James Cook University in response to jokes about religion during a skit at a music competition.
- Climate sceptic scientist, Bob Carter, was ousted from his adjunct professorship at James Cook University.

- James Cook University dismissed Peter Ridd following his public statements about the state of science about the Great Barrier Reef.
6. ***La Trobe University***
- La Trobe University refused to allow anti-transgender speaker, Babette Francis to book a venue for an event.
 - La Trobe University initially refused to allow Bettina Arndt to speak on campus. The University then allowed Arndt to speak while charging students for security. The University then reversed its position and decided to cover security fees. The Arndt event was still opposed by the La Trobe Student Union which aggressively protested on the day.
7. ***Macquarie University***
- John Hunter, holder of Macquarie University's Fellowship for Indigenous Researchers, declared he would not attend a presentation by an Israeli because of 'the Human Rights abuses currently occurring in Gaza'. Hunter was joined by other academics who proudly announced their support for the 'Boycott Divestment Sanctions Against Israel', asserting Israel's responsibility for 'gross human rights abuses'.
8. ***Monash University***
- Monash University withdrew a textbook that included a quiz question which offended Chinese students. The Monash academic who set the quiz was temporarily suspended and voluntarily left the university following the furore.
 - Monash University has become Australia's first to introduce trigger warnings in formal university policy.
9. ***Murdoch University***
- Murdoch University was willing to host 'nutrition expert' Christine Cronau despite a backlash and cancellations by the University of Adelaide, University of South Australia and Edith Cowan University.
10. ***Queensland University of Technology***
- Queensland University of Technology students faced years of procedural run-ins, which culminated in a Federal Court case under s 18C of the Racial Discrimination Act for expressing opposition to the existence of a computer lab on campus reserved for Aboriginal students.
11. ***University of Adelaide***
- The University of Adelaide, University of South Australia and Edith Cowan University refused to allow a 'nutrition expert,' Christine Cronau, to hold events on campus.
 - Chinese international students at the University of Adelaide were threatened with being reported to the Chinese Embassy for campaigning against communism during student elections.

12. ***University of Melbourne***

- Conservative students launched a membership drive and a posse of Melbourne University academics cried ‘Racists!’ and had the conservative students thrown off campus.
- Former Liberal MP Sophie Mirabella was shouted down and physically confronted during a guest lecture at the University of Melbourne.
- The University of Melbourne Student Union held workshops on ‘male privilege’.

13. ***University of New South Wales***

- UNSW told students not to use the term ‘marriage’ when referring to the well-known ‘marriage theorem’ in mathematics because this could cause ‘offence’.

14. ***University of Newcastle***

- At the University of Newcastle, a lecturer who listed Hong Kong and Taiwan as separate territories faced social media condemnation and even Chinese consulate pressure.

15. ***University of Queensland***

- University of Queensland Student Union banned the Newman Society, a Catholic student group, from conducting pro-life activity.

16. ***University of South Australia***

- The University of Adelaide, University of South Australia and Edith Cowan University refused to allow a ‘nutrition expert,’ Christine Cronau, to hold events on campus.

17. ***University of Sydney***

- In the past, the student union attempted to ban student clubs such as the Brotherhood Recreation and Outreach Society and threatened to deregister Christian clubs. The presence of speakers has attracted violent protests and in other cases speakers have been banned from campus. Academics have been dismissed, and the university almost refused to host the Dalai Lama.
- A Q&A-style event to be hosted by the Sydney University Muslim Students Association (SUMSA) entitled ‘Grill a Muslim’ last week was cancelled at the personal request of the Vice-Chancellor Michael Spence.
- A China-born academic was forced out of the University of Sydney for posting online politically-charged remarks about his countrymen, re-igniting accusations that Beijing is using its presence inside global campuses to exert soft power.
- A student was told he could not link anti-Israel sentiment to anti-Semitism.
- The University of Sydney refused to provide students with a venue to host Australian Christian Lobby head Lyle Shelton.
- The student union attempted to block the screening of the controversial *Red Pill* film because it was claimed that showing the film could ‘physically threaten women on campus’.

- A student protest against ‘No’ campaigners in the same-sex marriage referendum in 2017 turned violent, requiring police attendance.
 - An anti-sugar campaigner was asked to leave a conference.
 - The University of Sydney succumbed to demands for censorship, apologising after complaints were made by Chinese international students about a map in a lecture which showed disputed territory inside India.
 - University of Sydney students were told they will have to pay to hire security guards if they want to run events spruiking conservative ideals – including pro-coal ideas.
 - The University of Sydney suspended a student for a semester after they partook in an anti-abortion protest on campus.
 - The University of Sydney sacked senior lecturer, Tim Anderson, for a ‘disrespectful and offensive’ graphic featuring the Nazi swastika imposed over the flag of Israel.
 - Former Foreign Minister Julie Bishop was interrupted and subsequently physically assaulted during a visit to the University of Sydney.
 - Anti-Israel protestors stood on chairs at an event, began to push students and shout loudly at those who objected to their behaviour.
 - Former Israeli Navy SEAL, Yoaz Hendel, was protested against while speaking at the University of Sydney.
 - The University of Sydney refused to answer questions relating to its short-lived decision to ban a Palestinian American activist, amid claims administrators singled him out for his support of boycotts against Israel.
 - Around 60 students with several megaphones, rainbow flags, and a trombone, drowned out portions of the Catholic Society event with chants of ‘queer pride saves lives’ and ‘bigots are not welcome here’, in a protest organised by the SRC’s Queer Action Collective.
 - Armed police were called to the University of Sydney because of violent protests against an event featuring Bettina Arndt. The University of Sydney also charged students a security fee to host the event. University of Sydney Vice-Chancellor, Michael Spence, in a piece defending the charging of security fees to organisers and controversial speakers, denied that a problem exists.
 - The Ramsay Centre entered into talks with the University of Sydney after it failed to reach agreement with the Australian National University in relation to a proposed course. The talks were opposed by staff at the University of Sydney.
18. ***University of Technology Sydney***
- Armed with two megaphones, members of the Socialist Alternative stormed a University of Technology Sydney building protesting the federal government’s higher education cuts and plan to hike student fees.
19. ***University of Western Australia***
- The University of Western Australia rejected the establishment of the Australia Consensus Centre led by Danish author and environmentalist Bjørn Lomborg following a public campaign against the centre.

- A planned lecture by a controversial Muslim activist was cancelled after public criticism.
- The University of Western Australia cancelled a talk by a transgender sceptic Quentin Van Meter following protests from students.
- The University of Western Australia Student Guild retrospectively passed a motion to express concerns about an earlier visit by the Dalai Lama on campus because of the ‘negative impact’ his presence could have on Chinese students.

20. ***Victoria University***

- Victoria University cancelled an event featuring the screening of *In the Name of Confucius*, a film critical of the China-funded Confucius Centre.

Appendix 15

Letter and original Draft Model Code.

The Hon Robert S French AC

8 February 2019

Dear

In the course of conducting the Independent Review of Freedom of Speech in Higher Education Providers, I have, as foreshadowed in previous correspondence with the sector, prepared a Draft Model Code. The Code is capable of application as a standalone set of principles for any higher education provider which may wish to adopt it with or without modification. It is also designed to provide the basis for a common set of principles which higher education providers might consider as capable of application across the sector.

In my opinion the provisions of the HES Act and the Standards are pitched at a level of generality such that the Code would be compliant with them and, on one view, extend beyond them. In my final report I will suggest minor amendment to the HES Act and the Standards to align them textually with the Code but those amendments will not be necessary to its viability.

Of course, regardless of any recommendation I may make, the question of amendment to the HES Act will ultimately be a matter for the Government. The question of amendment to the Standards will be a matter to be first considered by the Higher Education Standards Panel.

The Act and the Standards currently refer to 'freedom of intellectual inquiry' and 'free intellectual inquiry'. Under that rubric freedom of speech and academic freedom are sometimes conflated as they certainly have been conflated in public debate. The proposed Code uses the terms 'freedom of speech' and 'academic freedom' instead of 'freedom of intellectual inquiry'. They are intended to distinguish between freedom of speech as a common societal freedom and freedom of speech and intellectual inquiry as aspects of academic freedom.

It is accepted that there is no definition of 'academic freedom' which reflects a universal consensus. There are, however, essential elements to the concept recognised, inter alia, in the UNESCO Recommendation 1997. One of those elements which I have thought it appropriate to emphasise is that of 'institutional autonomy'.

While I have not been persuaded of the existence of a 'free speech crisis' the exercise of institutional autonomy in the sector has given rise to diverse rules, principles and codes. A number of them are broadly framed and are capable of burdening freedom of speech and academic freedom. Where broadly framed terms are used their effect upon those freedoms is liable to depend upon administrative discretions and interpretations informed by the

organisational culture of the day. Some of the terminology in some institutional rules and codes makes the sector an easy target for those who wish to assert that freedom of speech is under threat in the sector.

The Code is expressed in terms of principles which are capable of application to diverse institutional rules and policies and contractual and workplace agreements with staff. It makes express provision for the existing duty under the Standards to foster the wellbeing of students and staff. In that connection the point is made in the Code that its principles are not inconsistent with full disclosure of course content to prospective students nor special measures to support particular groups of students, including by the provision of designated meeting places. Particular manifestations of measures of this kind have attracted the polemically loaded terms 'trigger warnings' and 'safe spaces' which have attracted some rather confused debate under the rubrics of freedom of speech and academic freedom. By referring them to the existing Standard and the duty for which it provides, it is intended to emphasise the legitimacy of full disclosure and special support measures.

These proposals do not involve the creation of a statutory foundation for a more intrusive regulation of the sector. They are intended to create an opportunity for the sector to respond to an area of risk bearing in mind that it is subject to legislative regulation not only at Commonwealth level but also by State and Territory Parliaments. Importantly, the Code is not drafted on the premise that it can only operate as a common code. However, the adoption of a common code, drafted at the level of umbrella principles, would lend it greater authority and create a framework for the sharing of experiences and for consistent application in practice.

I look forward to receiving your response and would be grateful, having regard to the timeframe of the Review, if you could provide your response within the next 14 days. I appreciate, however, that some institutions may require a little longer to consider the proposal.

I emphasise that support for a Model Code along the lines proposed, or some variant of it, does not involve commitment to it. A Model Code will be recommended in my Report as an optional resource available to the sector to adopt either on an institutional or collective basis and able to be varied or qualified by institutions or collectively.

I would be grateful also if you could advise whether you have any objection to your response to this letter and to my previous letter being published on the departmental website after publication of the final Report.

Yours sincerely,

Robert S French AC

Draft Recommendation – A Model Code

A Model Code is proposed in the following terms, preferably to be incorporated in an institutional statute or regulation and thus superior to administrative policies and codes. The draft below refers to universities but is capable of application to other higher education providers.

Objects

The objects of the Code are:

- (1) To ensure that the freedom of lawful speech of staff and students of the university and visitors to the university, which they share with all people, is treated as a paramount value and is not restricted nor its exercise burdened by limits or conditions other than those imposed by law or by reasonable regulation of access to and use of the university's land and facilities and the discharge of its legal duties of care to those who come on to its land whether as staff, student or visitors and its duty to foster the wellbeing of students and staff.
- (2) To ensure that freedom of speech and intellectual inquiry as aspects of academic freedom are treated as paramount values by the university.
- (3) To affirm the importance which the university accords to its institutional autonomy under law in the regulation of its affairs, including in the protection of freedom of speech and academic freedom.

Application

The Code applies to the governing body of the university, its officers and employees and its decision-making organs, including those exercising academic governance, responsibilities and the student representative body.

Definitions

‘**academic freedom**’ for the purposes of this Code comprises the following elements:

- the freedom of academic staff to teach, discuss, and research and to disseminate and publish the results of their research without restriction by established scholarly consensus or institutional policy, but subject to scholarly standards;
- the freedom of academic staff and students to engage in intellectual inquiry, to express their opinions and beliefs, and to contribute to public debate, in relation to their subjects of study and research;
- the freedom of academic staff and students to express their opinions in relation to the university in which they work or are enrolled free from institutional censorship or sanction;
- the freedom of academic staff and students to make public comment on any issue in their personal capacities, not speaking either on behalf of the university or as an officer of the university;
- the freedom of academic staff to participate in professional or representative academic bodies;
- the freedom of students to participate in student societies and associations;
- the autonomy of the university which resides in its governors, executive and academic staff in relation to the choice of academic courses and offerings, the ways in which they are taught and the choices of research activities and the ways in which they are conducted.

‘**external visiting speaker**’ any person who is not an invited visiting speaker and for whom permission is sought to speak on the university’s land or facilities.

‘**invited visiting speaker**’ any person who has been invited by the university or by a student society or association or group of students or representative body or by a

member or members of the academic staff of the university to speak on the university's land or facilities.

'speech' extends to all forms of expressive conduct including oral speech and written, artistic, musical and performing works and activity; the word 'speak' has a corresponding meaning.

'the duty to foster the wellbeing of staff and students';

- includes the duty to ensure that no member of staff and no student suffers unfair disadvantage or unfair adverse discrimination by reason of their inherent attributes;
- includes the duty to ensure that no member of staff and no student is subject to threatening or intimidating behaviour by another person or persons on account of anything they have said in exercising their freedom of speech;
- supports reasonable and proportionate measures to prevent any person from using lawful speech which is intended to insult, humiliate or intimidate other persons and which a reasonable person would regard, in the circumstances, as likely to have one or more of those effects;
- does not extend to a duty to protect any person from feeling offended or shocked or insulted by the lawful speech of another.

'the university' means the university as an entity and includes its decision-making organs and officers, its student representative body and entities controlled by the university.

Operation

- (1) The university shall have regard to the principles of this Code in the drafting of delegated legislation pursuant to its delegated law-making powers.
- (2) Any power or discretion conferred on the university or on any person or body by a law made by the university in the exercise of its delegated law-making powers shall be exercised so far as the text and purpose of the law allows, in accordance with this Code.

- (3) This Code prevails, to the extent of any inconsistency, over any non-legislative rule, code, guidelines, principles or policies of the university and of any of its organs and of the student representative body.
- (4) Any power or discretion conferred on the university or the student representative body including powers or discretions conferred under contract or workplace agreements or deriving from property rights, whether as to real or other property, shall be exercised, so far as is reasonably practicable, in accordance with this Code.

Principles of the Code

- (1) Every member of the staff and every student at the university has the same freedom of speech in connection with activities conducted on university land or otherwise in connection with the university, as any other person in Australia subject only to the constraints imposed by:
 - the reasonable and proportionate regulation of conduct necessary to the discharge of the university's teaching and research activities;
 - the right and freedom of all to express themselves and to hear and receive information and opinions;
 - the reasonable and proportionate regulation of conduct to enable the university to fulfil its duty to foster the wellbeing of students and staff.
- (2) Subject to reasonable and proportionate regulation of the kind referred to in the previous principle, a person's lawful expressive conduct on the university's land or in or in connection with a university activity shall not constitute misconduct nor attract any penalty or other adverse action by reference only to its content or manner of delivery.
- (3) The exercise by a member of the academic staff or of a student of academic freedom shall not constitute misconduct nor attract any penalty or other adverse action.
- (4) In entering into affiliation, collaborative or contractual arrangements with third parties and in accepting donations from third parties subject to

conditions, the university shall take all reasonable steps to minimise the constraints imposed by such arrangements or conditions on the freedom of speech or academic freedom of any member of the academic staff or students carrying on research or study under such arrangements or subject to such conditions.

- (5) The university has the right and responsibility to determine the terms and conditions upon which it shall permit external visitors and invited visitors to speak on university land and use university facilities and in so doing may:
- (a) require the person or persons organising the event to comply with the university's booking procedures and to provide information relevant to the conduct of any event, and any public safety and security issues;
 - (b) distinguish between invited visitors and external visitors in framing any such requirements and conditions;
 - (c) refuse permission to any invited visitor or external visitor to speak on university land or at university facilities where the content of the speech is or is likely to:
 - (i) be unlawful;
 - (ii) prejudice the fulfilment by the university of its duty to foster the wellbeing of staff and students;
 - (iii) involve the advancement of theories or propositions which do not meet scholarly standards to such an extent as to be detrimental to the university's character as an institution of higher learning.
 - (d) in the case of an external visitor, require the person or persons seeking permission for the use of university land or facilities to contribute in whole or in part to the cost of providing security and other measures in the interests of public safety and order in connection with the event at which the external visitor is speaking.

- (6) Subject to the preceding principles the university shall not refuse permission for the use of its land or facilities by an external visitor or invited visitor solely on the basis of the likely content of the proposed speech by the visitor.
- (7) Consistently with this Code the university may take reasonable and proportionate steps to ensure that all prospective students in any of its courses has an opportunity to be fully informed of the content of those courses, and to seek advice about their content, provided that academic staff are not precluded from including content on the grounds that it may offend or shock any student or class of students.
- (8) Consistently with the principles set out in this Code, the university, in the discharge of its duty to foster the wellbeing of students, may provide special support including dedicated rooms or places for any particular group of students which is likely to benefit from such support.