THINKING ALLOWED IN THE ACADEMY: INTERNATIONAL HUMAN RIGHTS LAW AND THE REGULATION OF FREE SPEECH AND ACADEMIC FREEDOM UNDER THE '*MODEL CODE*'

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The recent Review of Freedom of Speech in Australian Higher Education Providers ('the Review'), overseen by the Hon Robert French AC, identified areas for improving freedom of speech and academic freedom, and to that end proposed the adoption of umbrella principles embedded in a Model Code. The Review's engagement with international human rights law standards was confined, even though many are binding on Australia. As universities consider implementing the Review's recommendations, this article reflects on the Model Code in the light particularly of the standards established by the International Covenant on Civil and Political Rights ('ICCPR'). If the drafters of the Model Code had paid closer regard to the ICCPR and other international standards, the result may have been a scheme that more clearly and predictably distinguishes permissible from impermissible restriction on free speech and academic freedom, and gives greater priority to promoting the human rights of those in the academic community than to the institutional power to limit them.

I INTRODUCTION

The Principal recommendation of the Report ('*Report*')[1] released in April 2019 following the *Independent Review of Freedom of Speech in Australian Higher Education Providers* (the 'Review'), was that protection for freedom of speech and academic freedom be strengthened by universities voluntarily adopting umbrella principles embedded in a *Model Code of Practice* ('*Model Code*'). As universities

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1 *Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers* (Report, March 2019) ('*Report*'), which contains the Model Code of Practice ('*Model Code*') 230–36.

form consultative groups to consider how best to implement the Review's recommendations, this article reflects on the *Model Code* in the light of the standards established under international human rights law. The most relevant to Australia, and binding on it, are those set by art 19 of the *International Covenant on Civil and Political Rights* ('ICCPR') on freedom of expression. Art 19 provides an important, objective and universally recognised measure against which to ask whether the *Model Code* adequately protects or unjustifiably undermines free speech in universities. It also models a means of differentiating between restrictions that are permissible and impermissible.[2]

The Review was steered by the Hon Robert French AC, former Chief Justice of the High Court of Australia, and it offers an incisive, cool-headed critique of academic freedom in Australian universities, traversing numerous sensitive issues capable of erupting into overheated controversies. While the general conclusion was that concerns about restrictions on free speech in universities do not to reach the threshold of a 'free speech crisis', as some had claimed,[3] it was conceded that there are a number of areas in which Australian universities 'could do better'. The question that this article tackles is how the settings for free speech expressed in the *Model Code* fit with standards well established by the ICCPR. (The terms 'free speech' and 'freedom of speech' used in the Review and *Model Code* may be taken to equate to 'freedom of expression' under art 19.)

Article 19 has not yet been incorporated into Australian domestic law. Like any treaty, the ICCPR only becomes a direct source of rights and obligations by legislative enactment (so as not to usurp the role of Parliament). The ICCPR has nevertheless been binding on Australia since its ratification in 1980. Australia has bound itself to many other United Nations ('UN') human rights treaties to signal its position among the community of nations. It is with added significance, therefore, that Australia was elected a member of the UN Human Rights Council for 2018–20. As a State Party to the ICCPR, Australia remains answerable to the UN Human Rights Committee, the ICCPR's monitoring body, both for proper

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[2] Article 19:
(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.

[3] Matthew Lesh, 'Free Speech on Campus Audit' (Research Paper, Institute of Public Affairs, December 2018).

implementation of the ICCPR and for violation of the obligations thereby undertaken. The primary commitment under art 2 of the ICCPR is to 'respect and to ensure to all individuals within its territory and subject to its jurisdiction' all ICCPR rights.

Australia must therefore prevent public and private sources of encroachment on ICCPR rights. Since the *Model Code* has the potential to be highly influential in shaping institutional self-regulation, it is important to be aware if it departs from accepted ICCPR standards. The command of the Review's Terms of Reference was to '[a]ssess international approaches to the promotion and protection of free expression and free intellectual inquiry in higher education settings and consider whether any of these would add to protections already in place in the Australian context'.[4] In the event, the *Report*'s engagement with art 19 was limited. The *Report* presented its apologies for offering only a few basic remarks on art 19 and related provisions, explaining that '[a]n 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.'[5] The UN Educational, Scientific and Cultural Organisation's 1997 *Recommendation Concerning the Status of Higher-Education Teaching Personnel* ('UNESCO *Recommendation*') did, however, influence the *Model Code*, particularly in defining academic freedom. That Recommendation gives clear support to the ICCPR, among other UN conventions, and so it is all the more perplexing that such little notice was taken of it in the Review.

The reason why the Review may have marginalised the impact of freedom of expression under international law was hinted at by the Group of Eight ('Go8'), a coalition of world-leading research-intensive Australian universities, when it pointed out in its submission that Australia is unlike many other countries that give constitutional protection to freedom of expression and, 'if there is a need in Australia to ever guarantee freedom of speech, this may be best protected through Constitutional reform, rather than regulation'.[6] This provokes the important questions (not answered in this article) whether there is indeed a need to 'guarantee freedom of expression', and whether it may be possible to do so in a manner consistent with Australia's international law obligations. It also exposes a tricky challenge faced by the Review. It is not an easy task to express in a model code highly nuanced alignment of human rights with personal and institutional academic freedom and the various interests that daily coexist in the university setting. It is almost impossible when universal principles of international human rights law do not correspond with Australian domestic law, which provides the

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4 *Report* (n 1) 15.

5 Ibid 113.

6 Vicki Thomson, 'Go8 Submission: Review of Freedom of Speech', *Group of Eight Australia* (Web Page, 19 December 2018) 3–4 <https://go8.edu.au/go8-submission-review-of-freedom-of-speech>.

legal environment in which the *Model Code* is to be given effect. In any case, the Review was not the occasion for guaranteeing freedom of expression in domestic law, or thereby to reform any deficiencies that may currently exist in domestic law.

The expectations of any form of free speech regulation are that it should be clear, and in its operation predictable; conduct restricted by it should be foreseeable; and in settling appropriate terms for supporting free speech it should define with some precision the permissive scope for restricting free speech. Article 19 provides a powerful and highly relevant exemplar for achieving this. This article argues that the *Model Code* failed to meet such expectations. The *Model Code*'s main tool for actuating institutional restriction is the concept of 'reasonable and proportionate regulation', which is qualified by the term 'necessary' with such inconsistency and ambiguity as to obscure its intended purpose. This contrasts with art 19(3), which applies a strict standard of 'necessity' to permissible restrictions as part of the essential protection that art 19 accords. The *Model Code* instead appears to favour the restriction rather than promotion of rights, and to admit a broader range of restrictions even than domestic law generally allows. The reputational safeguards for the university built into the *Model Code*'s control of external and invited visitors lack a convincing basis for restricting certain forms of expression. Relevant extracts from the *Model Code* are in the Appendix.

In short, this article examines whether particular principles from the international human rights law domain may usefully inform the substance and operation of the *Model Code*. Part II uses art 19 and the UNESCO *Recommendation* (among other sources) to describe academic freedom and to explain how freedom of expression interfaces with the personal academic freedom of staff and students. In doing so, it makes certain distinctions between freedom of expression and academic freedom. It also identifies the scope of institutional academic freedom needed for the university to fulfil its responsibilities. Part III critiques the *Model Code*'s scheme for protecting and restricting freedom of speech and academic freedom, which in Part IV is contrasted with the approach adopted under art 19 and certain other ICCPR provisions. In Part V, some brief observations are made about university culture, which formed an important part of the background to the Review, though is touched on only partially in the *Model Code*.

Because it is binding on Australia, the ICCPR is the principal reference source for applicable international standards. Also relevant is the International Covenant on Economic, Social and Cultural Rights ('ICESCR'), similarly ratified by Australia, which has a bearing on the university's responsibilities towards students given their right to education and the manner in which it is to be secured.

Because the *ECHR* is not binding on Australia,[7] European sources are merely noted where they have parallel relevance, and include decisions of the European Court of Human Rights under the *ECHR*, and recommendations within the Council of Europe.

II Scene-Setting: The Contribution of International Law Sources to Understanding Freedom of Expression and Academic Freedom

The UNESCO *Recommendation* is important because the *Report* and *Model Code* depended on it,[8] and it usefully elucidates the scheme for academic freedom by which institutional obligations, the interests of staff and students, and the fundamental human rights of all concerned are integrated. It gives art 19 a clear position within academic freedom, and more broadly in the campus context, and identifies those to whom particular responsibilities are owed.

A *Institutional and Public Interests*

The Recommendation was one of the earliest comprehensive statements on academic freedom. It exposes the anatomy of academic freedom in an explanation of how universities are both burdened with certain duties and responsibilities and require a manageable degree of institutional autonomy to fulfil their mission. They need that autonomy for effective decision-making in establishing proper academic standards (quality and excellence in teaching, scholarship and research), consistent with their obligations of public accountability (especially for public funding). The Recommendation treats autonomy for these purposes 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. The freedom of speech available to staff and students is confined by institutional oversight of course content and assessment criteria. There is inevitably some tension between the level of autonomy given to universities and their systems of accountability, including for finances.[9] The

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7 *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) ('*European Convention on Human Rights*').

8 *Report* (n 1) 118–21, 230 (*Model Code* definition of 'academic freedom').

9 United Nations Educational, Scientific and Cultural Organization, *Recommendation Concerning the Status of Higher-Education Teaching Personnel*, UNESCO, 29th sess (adopted 11 November 1997) [17]–[22] ('UNESCO *Recommendation*'). The Council of Europe, Committee of Ministers,

Recommendation recognised that not all sources of interference with institutional autonomy are State-initiated, and issued a reminder that the State is charged with protecting higher education institutions from threats to their autonomy from *any* source.[10]

When describing the institutional interests to be protected, the Recommendation does not place any great store on the reputational concerns, which appear to be a high priority in the *Model Code* for excluding external visitors and invited speakers.

B *The Human Rights of Staff*

The Recommendation signalled strong support for the full range of internationally recognised human rights of academic staff, who (like all others) should enjoy their civil, political, social and cultural rights: 'maintaining these [international standards] should be upheld in the interest of higher education internationally and within the country'.[11] For this to be achieved, the principle of academic freedom should be scrupulously observed.

Academic freedom is to be enjoyed by teaching personnel in its familiar dimensions: teaching, discussion, research, disseminating and publication of results, participation in professional or representative academic bodies, freedom to criticise their home institution,[12] freedom from institutional censorship, freedom from discrimination, and fear from oppression. This depends on a conducive 'democratic atmosphere'.[13]

The corollary to any teaching opportunity is the obligation on staff to meet accepted professional criteria, including 'professional responsibility and intellectual rigour'. However, they should not be forced to instruct against their

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Recommendation CM/Rec(2012)7 of the Committee of Ministers to member states on the responsibility of public authorities for academic freedom and institutional autonomy, 1146th meeting, 20 June 2012, [4] ('*Recommendation CM/Rec(2012)7*') noted that academic freedom and institutional autonomy rely on a balance that can only be provided through deliberation and consultations involving public authorities, higher education institutions, the academic community of staff and students, and all other stakeholders. The Committee is the Council of Europe's decision-making body.

10 *Recommendation CM/Rec(2012)7* (n 9) placed the rationale for academic freedom and institutional autonomy on a different plane when it asserted that both 'are essential for universities, and that continued observation of those values is for the benefit of individual societies and humanity in general'.

11 UNESCO *Recommendation* (n 9) [26]–[27].

12 Committee on Economic, Social and Cultural Rights, *CESCR General Comment No 13: The Right to Education (Art 13)*, 21st sess, UN Doc E/C.12/1999/10 (adopted on 8 December 1999) [39] ('*CESCR General Comment No 13*'). For *European Convention on Human Rights* authority, see, eg, *Hassan Yazıcı v Turkey* (European Court of Human Rights, Chamber, Application No 40877/07, 15 April 2014) [55].

13 UNESCO *Recommendation* (n 9) [26]–[27].

own best knowledge and conscience, or to use curricula and methods contrary to national and international human rights standards — an important qualification that received no mention in the *Model Code*. It is expected that staff will play a significant role in determining the curriculum.[14]

The Recommendation cautioned against institutional autonomy being used 'as a pretext to limit the rights of higher education teaching personnel provided for in this Recommendation or other international standards', including those set out in the ICCPR.[15] Institutional autonomy only permits self-governance that is necessary for specific university activities and which accords with 'respect for academic freedom and human rights'.[16] These limiting qualifications similarly are not reflected in the *Model Code*.

In short, UNESCO ascribed a crucial role of the institution as gatekeeper, responsible for upholding academic freedom and, within its own functions, international human rights standards.[17]

C *The Human Rights of Students*

The *Report* referred to art 15 of the ICESCR, but art 13 is also germane to the human rights of students, in particular their right to education. In its *General Comment* on art 13, the Committee on Economic, Social and Cultural Rights (the 'CESCR Committee'), which is the monitoring body for that convention, described this provision as the 'most wide-ranging and comprehensive article on the right to education in international human rights law'.[18] The text of art 13(1) implies that, in the interests of the student, education is to be provided in an environment that itself is strongly supportive of respect for human rights and fundamental freedoms, and promotes tolerance in diversity. On the subject of academic freedom, the *General Comment* noted that 'the right to education can only be enjoyed if accompanied by the academic freedom of staff and students'.[19]

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14 Ibid [28]–[29].

15 Ibid [20].

16 Ibid [17].

17 The *Recommendation CM/Rec(2012)*7 (n 9) Preamble paragraphs described academic freedom and institutional autonomy as intrinsic values of higher education, and 'fundamental rights', essential to the overarching values of democracy, human rights and the rule of law. Echoing the UNESCO *Recommendation*, it recognised (at [5]–[7]) freedom from outside interference to be an essential condition for the search for truth, by both academic staff and students. University staff and/or students should be free to teach, learn and research without the fear of disciplinary action, dismissal or any other form of retribution.

18 *CESCR General Comment No 13* (n 13) [2].

19 Ibid [38].

D *Certain Distinctions between Freedom of Expression and Academic Freedom*

It is hopefully already clear that although academic freedom operates concurrently with the freedom of expression (and other fundamental human rights) of staff and students, the two do not always coincide. The error in equating freedom of expression and academic freedom seems to be the result of giving selective attention to a subset of the functions of academic staff, such as dissemination/publication of results and public comment. Within this narrow field of activities, *their* 'academic freedom' appears indistinguishable from *their* freedom of expression. Such externally directed work of academics is obviously the product of their exercising their freedom of expression, and is well attested by the numerous decisions of the European Court under the *European Convention*'s freedom of expression provision, art 10.[20] Some European Court Judges have gone as far as suggesting that speech by academics in their field of expertise must enjoy the 'utmost protection under Article 10'.[21] In these instances, the academic freedom of the individual and their freedom of expression directly correspond.

However, this is not always the case. Certain day-to-day outputs of academic staff may legitimately be constrained by virtue of their employment responsibilities, for example in conforming to institutionally-established academic standards, course content and assessment criteria, and in support of students' right to education. It is well acknowledged that, under the ICCPR, employee duties and employer responsibilities may support certain restrictions that impinge upon an employee's fundamental human rights.[22] Nevertheless, as the UNESCO *Recommendation* made clear in its discussion on academic freedom, no diminution is intended of the full enjoyment of human rights by academic staff, like all other citizens.[23]

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[20] *Açik v Turkey* (European Court of Human Rights, Chamber, Application No 31451/03, 13 January 2009) [45]–[46]; *Cox v Turkey* (European Court of Human Rights, Chamber, Application No 2933/03, 20 May 2010) [44]; *Sapan v Turkey* (European Court of Human Rights, Chamber, Application No 44102/04, 8 June 2010) [34]; *Hassan Yazıcı v Turkey* (European Court of Human Rights, Chamber, Application No 40877/07, 15 April 2014) [55].

[21] *Mustafa Erdogan v Turkey* (European Court of Human Rights, Chamber, Application Nos 346/04 and 39779/04, 27 May 2014) [8] (concurring opinion of Judges Sajó, Vučinič and Kūris).

[22] For an example of a justified employee restriction, see Human Rights Committee, *Views: Communication No 208/1986*, 37th sess, UN Doc CCPR/C/37/D/208/1986 (9 November 1989) [6.1] ('*Bhinder v Canada*'). In that case, workplace safety legislation required the author, a Sikh, to wear a helmet.

[23] *UNESCO Recommendation* (n 9) [26]: 'Higher-education teaching personnel, like all other groups and individuals, should enjoy those internationally recognised civil, political, social and cultural rights applicable to all citizens … [including] … freedom of thought, conscience, religion, expression, assembly and association … They should not suffer any penalties simply because of the

The position is no different for students. Their academic freedom is confined when it comes to course content and assessment criteria, but they otherwise enjoy on campus the same fundamental human rights that are available generally under international law. A number of decisions of the Human Rights Committee found violations of the rights of students in the enforcement of school or university regulations concerning religious dress. Even in the institutional context the critical issue in such cases was whether the restriction fell within the scope permitted by the relevant ICCPR provision.[24]

The Go8's submission to the Review usefully pointed out that academic freedom and freedom of speech should not be conflated, and it teased out the difference by depicting academic freedom as a very distinct principle derived from the university context, and free speech as generally applicable and regulated in the general legal framework. It noted that free speech at a university campus is the same as the right to free speech across society external to universities, and that universities offer no special environment where free speech is, or should be, especially enabled or restricted.[25] Although the *Report* echoed the conflation point, it noted (more hesitantly) that 'the definition of "academic freedom" does not seek to import the general freedom of speech enjoyed by all as an element of academic freedom'.[26] International sources are unequivocal that all human rights protection continues unabated, including that under the ICCPR, in spite of the requirements of academic freedom, the constraints in which higher education is provided, or other campus conditions. That environment may inform whether any human rights restriction is justified in the circumstances, applying ICCPR standards and observing the limitation provisions of applicable ICCPR provisions, but it does not mean that those standards or terms of limitation cease to apply.

In the light of this discussion, the *Model Code* could at least have confirmed among its general provisions that it does not intend that staff, students or anyone else in the university community should suffer any diminution in their enjoyment of fundamental human rights, which are available generally. Perhaps one

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exercise of such rights' (cited at *Report* (n 1) 121). See also the final Preamble paragraph of the Recommendation that it is to 'complement existing conventions, covenants and recommendations contained in international standards set out in the appendix', including the ICCPR.

24 For a finding of violation of ICCPR art 18(2), see Human Rights Committee, *Views: 931/2000*, UN Doc CCPR/C/82/D/931/2000 (5 November 2004) ('*Hudoyberganova v Uzbekistan*'); for an analysis of the art 18(3) limitation provision, see Human Rights Committee, *Views: Communication No 1852/2008*, 106th sess, UN Doc CCPR/C/106/D/1852/2008 (1 November 2012) ('*Bikramjit Singh v France*'); for an example of non-discrimination findings under arts 3 and 26, see Human Rights Committee, *Views: Communication No 2274/2013*, 123rd sess, UN Doc CCPR/C/123/D/2274/2013 (17 July 2018) ('*Türkan v Turkey*').

25 Thomson (n 6) 3–4.

26 *Report* (n 1) 214–15.

difficulty in it doing so is the lack of correspondence between Australian domestic law and ICCPR standards. The *Model Code* could nevertheless have given assurance that the liberties generally available under Australian domestic law are undiminished by the *Model Code*, if that were the intended position.

E *Functional Importance of Freedom of Expression or Academic Freedom*

In both the *Report* and the *Model Code*, 'academic freedom' is treated as a 'defining value'. The *Report* recognises the 'paramount importance' of free speech at common law, and the *Model Code* gives freedom of lawful speech 'paramount value'.[27]

The Human Rights Committee's *General Comment No 34*, which summarises its practice concerning art 19, speaks of the freedoms of opinion and of expression as indispensable conditions for the full development of the person, essential for any society, and constituting the foundation stone for every free and democratic society. Freedom of expression is a necessary condition for the realisation of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.[28]

Council of Europe sources make their own distinct contribution on the subject of 'education for democratic citizenship', aimed at empowering individuals to exercise and defend their democratic rights and responsibilities in society.[29] The need for it was exemplified vividly when hundreds of colleges, universities and professional associations joined in their opposition in 2017 to Hungary's measures to close the Central European University ('CEU'). As CEU's Rector and President, Michael Ignatieff, stressed at the time, academic freedom depends on the health of democratic institutions, and that, to survive, universities need to do whatever they can to strengthen those institutions that

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27 Ibid 101, 230 (*Model Code*, Objects (1)).

28 Human Rights Committee, *General Comment No 34: Article 19 Freedoms of Opinion and Expression*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) ('*General Comment No 34*') [2]–[3].

29 Council of Europe, Committee of Ministers, *Recommendation CM/Rec(2010)7 of the Committee of Ministers to member states on the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education*, 120th sess, 11 May 2010, [5.g], [7] exhorted them to promote, with due respect for the principle of academic freedom, the inclusion of education for democratic citizenship and human rights education in higher-education institutions, in particular for future education professionals, because 'one of the fundamental goals of all education for democratic citizenship and human rights education is not just equipping learners with knowledge, understanding and skills, but also empowering them with the readiness to take action in society in the defence and promotion of human rights, democracy and the rule of law'.

protect them, not for self-serving purposes but for the benefit of fellow citizens.[30] Seen in the light of such challenges, the importance of freedom of expression, as well as the range of permissible restriction on the freedom, reach into fundamental democratic values.

III The Model Code's Scheme for Protecting and Restricting Freedom of Speech and Academic Freedom

This part examines the scheme for the protection and restriction of freedom of speech and academic freedom under the *Model Code*, in preparation for a comparison, in Part IV, with the approach taken under the ICCPR. The terms of the *Model Code* are far from straightforward.

A *The 'Subject only to' Provisions*

Principles (1) and (3) of the *Model Code* address, respectively, freedom of speech and academic freedom.

In Principle (1), the *freedom of speech* of staff and students may be exercised 'on university land or in connection with the university', 'subject only to restraints or burdens' that are imposed: by law; by the 'reasonable and proportionate regulation of conduct necessary' to the discharge of the university's teaching and research activities, or to enable the university to give effect to its legal duties, including its duties to visitors to the university; or by the 'reasonable and proportionate regulation of conduct' to enable the university to fulfil its duty to foster the wellbeing of students and staff. Freedom of speech is additionally subject to restraints or burdens imposed by 'the right and freedom of others to express themselves and to hear and receive information and opinions'. This presumably includes restraint intended to prevent one person's freedom of speech drowning out another's. Included within that other's rights is the protection of ICCPR art 19(2) to 'seek, receive and impart information and ideas of all kinds'.[31]

Following a similar format, in Principle (3) academic staff and students enjoy *academic freedom* subject only to constraints that are imposed to the same ends as

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30 Michael Ignatieff, 'Defending Academic Freedom in a Populist Age', *Facts and Arts* (Web Page, 6 August 2017) <http://www.factsandarts.com/current-affairs/defending-academic-freedom-in-a-populist-age/>.

31 It is also possible to conceive of another scenario that the European Court had in mind when it acknowledged that in extreme cases the effect of freedom of expression by one person in opposing or denying the beliefs of another can be such as to inhibit the latter from exercising their freedom to hold and express those beliefs: *Otto-Preminger-Institut v Austria* (European Court of Human Rights, Chamber, Application No 13470/87, 20 September 1994) [47].

in Principle (1), save that they are described as 'prohibitions, restrictions or conditions' (rather than 'restraints or burdens'), and the means by which they may permissibly be imposed differ slightly. Academic freedom may be enjoyed subject only to prohibitions, restrictions or conditions that are imposed by law, or by 'the reasonable and proportionate regulation necessary' to the discharge of the university's teaching and research activities, or to discharge the university's duty to foster the wellbeing of students and staff. The term 'necessary' is dropped when the purpose is to enable the university to give effect to its legal duties (even though it applies for that purpose when exercising freedom of speech). An additional ground of restriction in Principle (3) applicable only to academic freedom is that 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'.

Taking these provisions as a whole, there is a good measure of inconsistent use of the term 'necessary'. It applies to restrictions imposed on *freedom of speech* following the phraseology 'the reasonable and proportionate regulation of conduct' for some purposes (teaching and research activities, and legal duties including those to visitors), but not others (to fulfil its duty to foster the wellbeing of students and staff). It applies to restrictions imposed on *academic freedom* following the phraseology 'the reasonable and proportionate regulation' for some purposes (teaching and research activities, and the duty to foster the wellbeing of students and staff), but not others (to enable the university to give effect to its legal duties). Neither the 'reasonable and proportionate regulation' qualification, nor any consideration of necessity, applies when restrictions are 'imposed by law', or to the university's reasonable requirements as to the courses to be delivered and the content and means of their delivery. There is also inconsistency in applying the 'necessary' qualification to restrictions imposed by the reasonable and proportionate regulation to discharge the university's duty to foster the wellbeing of students and staff: 'necessary' applies in those circumstances to *academic freedom*, but not to *freedom of speech*.

This prompts the question what role 'necessary' serves when it is used in the *Model Code*. Is it merely an appurtenance or does it serve an important substantive purpose? The reason this is important is that 'necessary' serves a fundamental and central purpose under art 19(3) in distinguishing between justified and unjustified restrictions on freedom of expression. This is discussed further in Part IV below.

B *Protection against Adverse Action*

The *Model Code* provides at Principle (2) that, '[s]ubject to reasonable and proportionate regulation of the kind referred to in [Principle (1)], a person's lawful speech on the university's land 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.' Similarly, at Principle (4): 'The exercise by a member of the academic staff or of a student of academic freedom, subject to the above limitations [ie at Principle (3)], shall not constitute misconduct nor attract any penalty or other adverse action.' The intended operation of the term 'subject to' here is not crystal clear, but the implication is that a penalty or other adverse action may ensue, and the conduct concerned may constitute misconduct for anyone who contravenes the terms of regulation established for Principles (1) and (3).

It is not possible to understand Principles (2) or (4) without first fully grasping Principles (1) or (3), respectively, and the scheme of those is not the most felicitous. There is also some uncertainty as to whether the reference in Principle (2) to 'reasonable and proportionate regulation of the kind referred to in [Principle (1)]' applies only to those items that in Principle (1) are prefixed with the terminology 'the reasonable and proportionate regulation of conduct [etc]'. That would exclude restraints or burdens imposed by law, or by the right and freedom of others to express themselves and to hear and receive information and opinions. Given the implicit threat of penalty or other adverse action, this sort of ambiguity is unattractive.

What is missing from these Principles is any coherent and clear assurance of the limits of the university's powers to impose restrictions. That, after all, is the essence of 'freedom', of the sort guaranteed for freedom of expression by art 19. The Objects clause speaks in generous terms of freedom of speech and academic freedom as important values justifying constraint on institutionally imposed restriction, in disaccord with operative Principles that are complex, inconsistent, ambiguous and somewhat minatory.

C *Imposed by Law Provisions*

Principles (1) and (3) permit restraints that are 'imposed by law'. That term is defined to include a contractually imposed condition, regardless of its reasonableness or proportionality, that is, without the standards that moderate appropriately the degree of restriction that may be exerted under most of the Principles. The 'imposed by law' definition goes beyond the usual range of restrictions for which one might expect a degree of strictness, to make provision for statute, confidentiality obligations, defamation or intellectual property (these matters are already addressed in the same definition). It presumably extends to restrictions in an employment contract, in an enterprise agreement, in a contract for hiring university property, and in any other contract that by some means incorporates non-statutory policies and rules reflecting the *Model Code*.

Principle (6) entitles the university to refuse permission to any invited or external visitor where the content of speech is likely to be 'unlawful' — a term that also includes anything in contravention of a measure 'imposed by law', that

is, contractually. The concern is that nothing in the *Model Code* appears to confine what may be 'imposed by contract' (within the 'imposed by law' definition) such as to ensure that the contractual terms are 'necessary', or otherwise have some justifiable basis for restricting freedom of speech or academic freedom.

IV The Principles of Art 19 that Distinguish when Restrictions Are and Are Not Permitted

It is important to consider the contribution that the Human Rights Committee's approach to art 19 and related provisions might usefully make.

A *Emphasis in Art 19(3) on the Need for Strict Justification for Restrictions*

As already noted, the *Report* did not engage in a detailed discussion on art 19 beyond emphasising, rather asymmetrically, the power available to limit or restrict freedom of expression, when commenting that

> 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 … The provisions referred to [express limitation provisions],32 however, demonstrate the existence of limits which are not susceptible of precise definition but which do involve the application of proportionality principles.[33]

The last sentence requires closer examination, particularly if it provides the rationale for abbreviating any further examination of the operation of limitation provisions. It conflicts with the stress placed by the Human Rights Committee in its *General Comment* on art 19, on the need for strict justification of restrictions on freedom of expression.[34] Any such restriction must be 'necessary' to achieve one of the purposes stated in art 19(3). It must be applied only for the purpose for which it was prescribed, it must be directly related to the specific need on which it was predicated, and it must not be overbroad. The principle of proportionality

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32 The provisions referred to were arts 17–22, to highlight the existence of limitation provisions within arts 18 (freedom of thought, conscience and religion), 19, 21 (freedom of assembly) and 22 (freedom of association), and the operation of art 17 (protection against attacks on honour and reputation, as a brake on freedom of expression), and art 20 (prohibition against hate speech), particularly within the limitation ground of art 19(3) 'the rights or reputations of others'.

33 *Report* (n 1) 112–13.

34 *General Comment No 34* (n 29).

is imported in the sense that the restrictive measure must be appropriate to achieve its protective function, it must be the least-intrusive means of achieving it (among others capable of doing so), and it must be proportionate to the interest to be protected. The principle must be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law.[35] The Human Rights Committee has also repeatedly stressed that the 'relation between right and restriction and between norm and exception must not be reversed'.[36] Of course, this regime of limitation does not apply to freedom of opinion, which admits no permissible form of restriction whatever.

Under art 19(3) and similar limitation provisions (freedom of religion (art 18(3)), freedom of assembly (art 21), and freedom of association (art 22(2))), any restriction must be 'prescribed by law' or 'provided by law' as an essential precondition for legitimate restriction. The Human Rights Committee's *General Comment* on art 19 stipulated a number of requirements concerning the properties of the law on which any restriction must be based. The law must be formulated with sufficient precision to enable an individual to regulate their conduct accordingly. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. The law must provide sufficient guidance to those charged with its execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not. The law must not only comply with the strict requirements of art 19(3), but must itself also be compatible with the provisions, aims and objectives of the ICCPR.[37]

Other relevant principles applied to the limitation of rights under the ICCPR include: the importance of being guided by the aim of facilitating a right, rather than seeking unnecessary or disproportionate limitations to it when aiming to reconcile an individual's right and interests of general concern;[38] that content restrictions, aimed at the message itself, are particularly egregious;[39] and that it is difficult to find any justification for restrictions on freedom of expression imposed on someone solely for exercising their rights under the ICCPR. The Committee has also frequently reiterated certain fundamental principles concerning the meaning of a democratic society.[40] The message common to all of

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35 Ibid [22] and [34].

36 Ibid [21].

37 Ibid [24]–[27].

38 Human Rights Committee, *Views: Communication No 1864/2009*, 110th sess, UN Doc CCPR/C/110/D/1864/2009 (20 March 2014) [9.7] ('*Kirsanov v Belarus*').

39 Human Rights Committee, *Views: Communication No 1873/2009*, 109th sess, UN Doc CCPR/C/109/D/1873/2009 (25 October 2013) [9.6] ('*Alekseev v Russian Federation*').

40 Human Rights Committee, *Views: Communication No 1039/2001*, 88th sess, UN Doc CCPR/C/88/D/1039/2001 (17 October 2006) [7.2] ('*Zvozskov et al v Belarus*'); Human Rights Committee, *Views: Communication No 1274/2004*, 88th sess, UN Doc CCPR/C/88/D/1274/2004 (31

these cases is that strict and specific justification is needed to support restrictions on these freedoms.

B *The Range of Rights that Might be Relevant to Free Speech Restrictions: The More Generous Approach under Art 19(3)*

The ground of limitation under art 19(3) that answers the most common risk of harm in the present context would be 'respect of the rights and reputations of others'. Article 17 of the ICCPR requires protection against unlawful attacks on a person's *reputation*, and, as the *Report* rightly acknowledged, personal reputational damage is a harm warranting protection under the Code.[41] The generic term 'rights … of others' includes human rights as recognised in the ICCPR and more generally in international human rights law. Among relevant rights, therefore, is the right to education, where education is to be provided inclusively (as noted earlier in the CESCR Committee's *General Comment* on ICESCR art 13), in an environment that itself strengthens respect for human rights and fundamental freedoms, and promotes tolerance. This is expressed in the text of art 13(1) in terms of 'tolerance and friendship among all nations and all racial, ethnic or religious groups'. The UNESCO *Recommendation* stipulates 'that students be treated fairly and justly, and without discrimination'.[42] That term must take account of the prohibition against status-based discrimination under arts 2, 3 and 26 of the ICCPR, reflecting important developments in the Human Rights Committee's approach to status-based discrimination since the ICCPR, the ICESCR and the UNESCO *Recommendation* were concluded.

'Hate speech' causes obvious harm but has a particular meaning under art 20(2), which ICCPR Contracting States are bound to prohibit under domestic law (ie 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'). Examples given in the *Report* of types of 'harm' comparable to hate speech include a person who advances the view that any, or any particular, religious belief is a historical form of delusion. This is reminiscent of the unsuccessful art 19 claim in *Faurrison v France* by a Holocaust denier whose statements were justifiably limited under art 19(3) because they were of a nature as to raise or strengthen anti-Semitic feelings, and their restriction served the respect of the Jewish community to live free from fear of an

October 2006) [7.3] ('*Korneenko et al v Belarus*'); Human Rights Committee, *Views: Communication No 1478/2006*, 102nd sess, UN Doc CCPR/C/102/D/1478/2006 (20 July 2011) [8.4] ('*Kungurov v Uzbekistan*').

41 *Report* (n 1) 106.

42 UNESCO *Recommendation* (n 9) [22(f)].

atmosphere of anti-Semitism.[43] In its more recent decision in *Ross v Canada*, the Committee used the hate speech art 20(2) to give greater substantiation to its finding that disciplinary action against a school teacher for his off-duty anti-Semitic remarks was justified under art 19(3) in order to uphold the right of those of Jewish faith to have an education in the public school system free from bias, prejudice and intolerance. There was evidence of significant acts of intolerance inflicted on particular school children.[44] There is scope for justified restriction of speech under art 19(3) that does not qualify as hate speech under art 20(2), provided the relevant criteria for restriction are met.

In its discussion on the tension between protection for freedom of speech and the university's duty of care towards students and staff and to foster their wellbeing, the *Report* concluded that rules against 'hate speech' broadly defined have a correspondingly broad impact on freedom of speech.[45] The *Rabat Plan of Action* acknowledged the same phenomenon,[46] but put the position much more firmly. It contains recommendations for implementing art 20(2). Among its conclusions were that the broader the definition of incitement to hatred in domestic legislation, the more it opens the door for arbitrary application of the laws. It was concerned that terminology on incitement was becoming increasingly vague, and new categories of restrictions or limitations to freedom of expression were being incorporated, which had contributed to the risk of misinterpretation of art 20 and additional limitations to freedom of expression not even contained in art 19.[47]

Further bases of limitation under art 19 (beyond 'respect of the rights and reputations of others') are 'the protection of national security or of public order (ordre public), or of public health or morals'.

Article 5 of the ICCPR is an interpretive provision that at least deserves mention. It prevents anything in the ICCPR implying support to anyone engaging

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43 Human Rights Committee, *Views: Communication No 550/1993*, 58th sess, UN Doc CCPR/C/58/D/550/1993 (8 November 1996) [9.6] ('*Faurisson v France*') (the author's two offending statements were: 'I have excellent reasons not to believe in the policy of extermination of Jews or in the magic gas chambers … I wish to see that 100 per cent of the French citizens realize that the myth of the gas chambers is a dishonest fabrication' ([9.5])).

44 Human Rights Committee, *Views: Communication No 736/1997*, 70th sess, UN Doc CCPR/C/70/D/736/1997 (18 October 2000) [10.5]–[10.6], [11.6]–[11.8] ('*Ross v Canada*').

45 *Report* (n 1) 61.

46 *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*, A/HRC/22/17/Add.4, Appendix (2013).

47 Human Rights Council, *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General*, 22nd sess, Agenda Item 2, UN Doc A/HRC/22/17/Add.4 (11 January 2013) annex ('*Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*') [15]–[18].

in activities aimed at the destruction of any ICCPR rights and freedoms, or at their limitation to a greater extent than the ICCPR itself provides. It is relevant because, as the *Report* mentions, a number of universities cancelled events that included speakers associated with the pan-Islamic political organisation, Hizb ut-Tahrir.[48]

The Model Code does not refer to the 'rights of others' generally as the basis for 'reasonable and proportionate regulation', and this might be considered unduly narrow set against art 19(3). Some rights are clearly contemplated by the Model Code within 'the duty to foster the wellbeing of staff and students' or the university's 'legal duties' (notably protection against discrimination and speech likely to humiliate or intimidate). However, certain rights are not so obviously safeguarded by the Model Code, either to acknowledge their existence in positive terms, or as a basis for restricting freedom of speech. These include the right to education in the terms already noted, protection for an individual's honour and reputation, which the *Report* took to impose obvious harm, freedom of religion,[49] and freedom of assembly. The ICCPR treatment of freedom of assembly expresses a particularly important principle. When concurrent rights are asserted, for example in the right to demonstrate and to counter-demonstrate, the official response in a democratic society is to put in place effective measures to protect against attacks aimed at silencing those exercising their rights.[50] The Model Code only gave passing acknowledgment to the freedom of assembly without further

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48 Article 17 of the *European Convention* is in broadly similar terms to art 5 of the ICCPR. By virtue of art 17, speech that is incompatible with the values proclaimed and guaranteed by the Convention is not protected by art 10 of the European Convention (freedom of expression): see, eg, *Delfi AS v Estonia*, Application No 64569/09, European Court of Human Rights (Grand Chamber), 16 June 2015, [136]. Article 17 was also successfully invoked in *Hizb ut-Tahrir v Germany* (European Court of Human Rights, Chamber, Application No 31098/08, 12 June 2012) [72]–[75] to render the organisation's freedom of association complaint incompatible *ratione materiae* with the provisions of the Convention because of the content of what was advocated, namely, the violent overthrow of governments and the creation of an Islamic caliphate. In *Refah Partisi v Turkey* (European Court of Human Rights, Grand Chamber, Application Nos 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003) and other cases (*Kasymakhunov and Saybatalov v Russia* (European Court of Human Rights, Chamber, Application Nos 26261/05 and 26377/06, 14 March 2013) [104]–[105])) the European Court also usefully made a distinction between the activities of a political organisation that promote change by legal and democratic means, and those directed at bringing about the destruction of democracy. For discussion of the effect of the UK *Counter-Terrorism and Security Act 2015* on on-campus expression, see IG Cram and H Fenwick, 'Protecting Free Speech and Academic Freedom in Universities' (2018) 81(5) *Modern Law Review* 825.

49 For examples of art 18(3) usage, see Human Rights Committee, *Views: Communication No 2747/2016*, 123rd sess, UN Doc CCPR/C/123/D/2747/2016 (17 July 2018) [8.4]–[8.12] ('*Yaker v France*') ('the fundamental rights and freedoms of others' was not properly invoked to restrict freedom of religion when the specific fundamental rights affected, and the persons affected, had not been identified); Human Rights Committee, *Views: Communication No 2807/2016*, UN Doc CCPR/C/123/D/2807/2016 (17 July 2018) [7.7] ('*Hebbadj v France*') ('public safety' and 'public order' grounds could not be relied on when the State needed but failed to describe how banning the *niqab* posed 'a real and significant threat').

50 *Alekseev v Russian Federation* (n 40) [9.3].

discussion. The freedom in art 19(2) 'to seek, receive and impart information and ideas of all kinds' is of self-evident importance in an academic environment, yet it too is not addressed positively in the Model Code. It features primarily to supply the justification in Principle (1) for restraints or burdens on freedom of speech imposed by 'the right and freedom of others to express themselves and to hear and receive information and opinions'.

C *The Principle of 'Necessity' under the Model Code*

As already observed, the term 'necessary' in art 19(3) is pivotal to distinguishing between permitted and violative restriction. The inconsistent use of that term in the *Model Code* has also been touched on. It obscures the point at which freedom of speech may be subjected to 'restraints and burdens', and academic freedom to 'prohibitions, restrictions or conditions'. To take one example, 'necessary' is not a precondition for freedom of speech restrictions in Principle (1) imposed by the reasonable and proportionate regulation of 'conduct to enable the university to fulfil its duty to foster the wellbeing of staff and students', but it is in the equivalent Principle (3) for restrictions on *academic freedom* imposed by the reasonable and proportionate regulation 'necessary to discharge the university's duty to foster the wellbeing of staff and students'. One reason for its omission in Principle (1) might be to avoid upsetting for freedom of speech the comparatively low standard of 'reasonable and proportionate measures' established within the definition of 'the duty to foster the wellbeing of staff and students'. Even if this is the case, the inconsistency poses a number of difficulties. For example, how is the term 'necessary' as it appears in Principle (3) to be understood when on its own terms the duty to foster the wellbeing of staff and students supports the lower standard of 'reasonable and proportionate' measures? Also, when the conduct of academic staff simultaneously constitutes freedom of speech and academic freedom, how is the omission of 'necessary' from Principle (1) to be treated when it is included in Principle (3) and both apply?

The positioning of the term 'necessary' generates a further issue. Where 'necessary' does appear in the text, it attaches to 'the reasonable and proportionate regulation of conduct', rather than the particular 'restraints or burdens' imposed on freedom of speech and 'prohibitions, restrictions or conditions' on academic freedom. On one interpretation, the 'regulation of conduct' may refer to the empowering means for such 'restraints or burdens', etc, such as non-statutory policies, rules and similar instruments, rather than restrictions taken under them. There is a key difference between that and the scheme of art 19(3), which requires that *restrictions* on freedom of expression *themselves* be 'necessary', on the stated grounds. Is the *Model Code* to be interpreted as requiring merely that such policies and rules (or other form of regulation) be 'reasonable and proportionate', rather than the specific

restrictions imposed? Ultimately what matters is that the particular restrictions imposed be properly and individually justified.

The *Model Code* breaks new ground in one key respect. The definition of 'the duty to foster the wellbeing of staff and students' 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'.[51] For the reasons given in the *Report*, it 'does not extend to a duty to protect any person from feeling offended or shocked or insulted by the lawful speech of another'.[52] In certain respects the 'humiliate or intimidate' terminology reflects the signature language of the racial vilification s 18C of the *Racial Discrimination Act 1975* (Cth) ('*RDA*') ('offend, insult, humiliate or intimidate'). Section 18C is notorious for being the subject of a controversial tug of war, with many on one side arguing for its curtailment and on the other its extension. It applies to 'acts ... done because of the race, colour, national or ethnic origin of the other person or persons'. The *Report* notes that '[m]uch 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.'[53] Since this issue seems to be one of the main connecting points between the *Report* and the *Model Code*'s 'humiliate or intimidate' text, a number of discrete observations should be made on the extent to which the *Model Code* reflects existing domestic law, or permits novel restriction on freedom of speech. Much of Australia's anti-vilification legislation outside s 18C (which applies only to race) adopts the more exacting standards in the regulation of speech and other conduct that 'incites hatred against/towards, serious contempt for, or severe ridicule of, another person or class of persons'.[54] The 'offend, humiliate or intimidate' formula is different, and features most commonly in sexual harassment provisions across Australian jurisdictions to

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51 *Report* (n 1) 232.

52 Ibid 105–6, drawing on *Monis v The Queen* (2013) 249 CLR 92, 175 [223].

53 *Report* (n 1) 108.

54 *Discrimination Act 1991* (ACT) s 67A; *Anti-Discrimination Act 1977* (NSW) ss 20C (racial vilification), 38S (transgender vilification), 49ZT (homosexual vilification), 49ZXB (HIV/AIDS vilification); *Racial and Religious Tolerance Act 2001* (VIC) ss 7 (racial vilification) and 8 (religious vilification); *Anti-Discrimination Act 1991* (Qld) s 124A (race, religion, sexuality or gender identity vilification); *Anti-Discrimination Act 1998* (Tas) s 19 (race, disability, sexual orientation or lawful sexual activity, religious belief or affiliation or religious activity, gender identity or intersex variations of sex characteristics). For criminal provisions, see *Racial Vilification Act 1996* (SA) s 4 (race) and *Criminal Code 1913* (WA) ss 76–80.

address unwelcome sexual advances and other offensive sexual conduct.[55] Section 17(1) of the *Anti-Discrimination Act 1998* (Tas) ('*ADA*') stands out for being a low-threshold anti-vilification provision that uses 'offends, humiliates or intimidates' phraseology for all the broad ranging grounds on which discrimination is prohibited under that Act,[56] with certain exceptions.[57] (The *ADA* also contains a more conventional high-threshold hatred provision in s 19.) The *Model Code*'s definition of 'the duty to foster the wellbeing of staff and students' represents a narrower basis of restriction than the *ADA* and *RDA* provisions: by not replicating from *RDA* s 18C or *ADA* s 17 the words 'offend' and 'insult', or from *ADA* s 17 the word 'ridicule' (out of concern for such terminology as aired in the *Report*); by adopting an objective measure of whether speech is within a prohibited category;[58] and, importantly, by requiring intention. The definition represents a wider basis of restriction than the *ADA* and *RDA* provisions: by not referring to the public purpose defences available in *RDA* s 18D and *ADA* s 55 and other anti-vilification legislation (allowing fair reporting, or good-faith academic, artistic, scientific, research or public interest purposes of significance in this context); and by operating in a generalised way, not limited to any specified grounds (such as those found in the *RDA* s 18C or *ADA* s 17). It authorises restriction of 'lawful speech' — in other words, speech that is not rendered unlawful by anti-vilification or anti-discrimination legislation at federal or state/territory level, or at common law, suggesting that it constitutes an intentional expansion on existing generally applicable restrictions. The *Model Code* does not therefore sit comfortably with the *Report*'s statement that

> [t]he 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

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55 *Sex Discrimination Act 1984* (Cth) s 28A (which provided the model for s 18C as reflected in the Explanatory Memorandum, Racial Hatred Bill 1994 (Cth) 10); *Anti-Discrimination Act 1977* (NSW) s 22A; *Equal Opportunity Act 2010* (Vic) s 92; *Anti-Discrimination Act 1991* (Qld) s 119; *Equal Opportunity Act 1984* (SA) s 87; *Discrimination Act 1991* (ACT) s 58(1); *Anti-Discrimination Act 1998* (Tas) s 17(2)–(3). That formula is not adopted for sexual harassment in the *Equal Opportunity Act 1984* (WA) s 24.

56 Age, disability, gender, breastfeeding, family responsibilities, parental status, marital status, relationship status, gender identity, sexual orientation, intersex variations of sex characteristics, lawful sexual activity. 'A person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person.'

57 The exceptions are those concerned with political or religious belief, affiliation or activity, irrelevant criminal or medical records, industrial activity, and association with any person who has the relevant attributes.

58 *Report* (n 1) 108.

> education rule or policy should make it more difficult to exercise the freedom on campus than off it.[59]

It is noticeable, too, that a qualified acknowledgement that featured in the previous draft *Model Code* was abandoned, that '[e]very 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'.[60]

There are many good reasons for limiting speech, and this principle lies at the heart of art 19(3). High among them is to ensure inclusive access to education, a priority emphatically supported by the UN bodies already mentioned, from which the Code could have drawn dependable support. The case hardly needs to be made for limiting conduct that is repugnant for undermining an individual's dignity and causing them to question whether they belong in the institution altogether, especially as a member of an identity group, as the *Report* notes.[61] However, if the *Model Code* intends a degree of speech regulation extending beyond that set by the broader legislative environment in Australia, well traversed by anti-vilification and equality legislation, there would be real value in highlighting the deficiencies that need to be made good in that framework. More detailed discussion would therefore have been welcomed in the *Report* on the practical issues encountered in that area of deficiency, especially where they recur, both to reinforce the normative value of the *Model Code* and to enhance predictability.

In connection with the legal responsibilities that higher education providers have towards those using their land or facilities and for their staff and students, the *Report* gave two further examples of harm. One was of 'an event at which opponents of child vaccination wish to espouse scientifically discredited views that it is linked to a heightened risk of autism'.[62] The harms are said to subsist in the reputational damage to the institution in combination with enhanced public health risks associated with non-vaccination. The *Report* posed the question, '[s]hould a university provide a platform to such dangerous, unscientific views while remaining true to its purposes and ideals?'[63] The other was of the 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. It is undoubtedly the case that opponents of child vaccination and climate sceptics are almost universally considered in the academy to be modern-day flat-Earthers. However, any subject-matter embargo

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59 Ibid.
60 Ibid 298.
61 Ibid 109, citing Sigal Ben-Porath, *Free Speech on Campus* (University of Pennsylvania Press, 2017) 42.
62 *Report* (n 1) 125.
63 Ibid.

should be regarded as extremely serious. The question under art 19 would be the extent to which any such restriction is 'necessary', and this in turn depends on less-restrictive alternatives being unavailable. The university should realistically be able to avoid the implication that it endorses any position propounded by a visiting speaker, or that it vouches for the standard of any visitor's scholarship. It is also important to observe that the art 19(3) limitation ground 'respect of the rights and reputations of others' has limited application to institutional reputation, since the term refers both to ICCPR rights and those more generally recognised in human rights law.[64] Perhaps the most powerful reason for not inhibiting discussion on such issues was expressed by John Stuart Mill:

> The peculiar evil of silencing the expression of opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.[65]

In short, the *Model Code*'s principles of 'reasonableness' and 'proportionality', as expressed in the definition of 'the duty to foster the wellbeing of staff and students' and in Principles (1) to (4), do not align with art 19(3), which is harnessed to the stricter requirement of 'necessity' of restrictions, in the manner already described for freedom of expression. In the decision in *Handyside v United Kingdom*, which the *Report* mentioned when describing freedom of expression as 'a bounded concept',[66] the European Court went out of its way to distinguish the adjective 'necessary' within art 10(2) (equivalent to art 19(3)) from more flexible notions found elsewhere in the *European Convention* such as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'.[67] The adoption of terminology that departs from 'necessary' found within the freedom of expression limitation provisions of both the ICCPR and *European Convention* is therefore a matter of considerable importance.

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64 *General Comment No 34* (n 29) [28].

65 John Stuart Mill, *On Liberty* (1859) ch 2.

66 *Report* (n 1) 105, referring to the application of the freedom 'not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"'.

67 *Handyside v United Kingdom* [1976] ECHR 5 [48]–[49] ('*Handyside*').

V University Culture

The Go8's submission illustrates the importance of positive university culture. It contended that university autonomy is critical in protecting academic freedom and that intrusions into university autonomy are likely the greatest danger to academic freedom. It gave as an example the Nobel Prize discovery of the causative link between the helicobacter pylori bacteria and stomach ulcers by Professors Marshall and Warren, which was only able to overcome stringent opposition from peers and industry because of a university environment which strongly supported their academic freedom. The Marshall–Warren example also well demonstrates the 'democratic atmosphere' espoused by UNESCO necessary for conflicting ideas to be aired when they are hotly tested, without institutional self-defence or other intrusion.

The question of university culture also arose in connection with the rejection by the Australian National University ('ANU') of an offer from the Ramsay Centre for Western Civilisation of funding of $50 million, owing to concerns about academic freedom resulting from controls over course content and delivery. The ANU's action prompted allegations of a 'rampant anti-western bias' and the proposal that 'the government should tie funding to compliance with the requirement to uphold the fundamental values of free speech, academic freedom and viewpoint diversity'.[68] Something which the *Report* does not dwell on at length, and the *Model Code* does not address specifically, is the potential adverse impact of university culture. Principle (5) of the *Model Code* contemplates excessive donor conditions and it charges the university to take all reasonable steps to minimise restrictions or burdens on freedom of speech or academic freedom in funding arrangements. The concern of some, however, is that this merely strengthens a university's dominating culture when the purpose of particular funding is to attract competitively qualified and motivated staff to research areas to stimulate heterodoxy or pluralist thought where it might be notably lacking, or to take research in a particular direction. It is a pity that the *Report* did not engage with this further, at least to explore possible approaches to promoting viewpoint diversity in universities where dependent on such funding, in a way that does not compromise academic freedom.

One further incident in Australia which was underpinned by concerns of political bias related to the alleged treatment of the political theorist Dan Avnon,

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[68] James Paterson, 'ANU and Western Civilisation Course: Time to Punish Unis that Limit Freedom of Thought', *The Australian* (18 June 2018)<https://www.theaustralian.com.au/commentary/opinion/anu-and-western-civilisation-course-time-to-punish-unis-that-limit-freedom-of-thought/news-story/6bfc31e03935c63b12334121e5256e37>.

whose request for a visiting fellowship at the University of Sydney's Center for Peace Studies was initially declined for what appeared to be his political stance.[69] In Australia the incident is more noted for the actions taken independently of Professor Avnon, and without his support, by the organisation Shurat HaDin, which agitated a complaint to the Australian Human Rights Commission, and filed proceedings in the Federal Court.[70] It is not the purpose of this article to address the significance of cultural mores and dominant political values in universities more broadly than the issues specifically raised in the *Report* and *Model Code*. The question of institutional culture is nevertheless an important one to raise, and it should be within the responsibility of every university to ensure that any predominant culture does not inhibit free speech or lead to non-inclusivity, or to subtle forms of discrimination in recruitment and promotion, particularly on grounds of political or other opinion.

VI Conclusion and Recommendations

The *Model Code* does not adopt the lingua franca of the ICCPR's universal standards, nor even the core principles of art 19, to produce clear rules for differentiating between permitted and unjustified forms of restriction on freedom of expression, to give it efficacy as a freedom. Freedom of expression is crucial to academic freedom, but the two are distinct. This article demonstrates what a linguist might describe as the polysemy of the term 'academic freedom'.[71] In its multiple meanings, academic freedom has a central origin: the university. Its meanings are manifest in the functional variety of academic freedom: answering the separate interests of staff, students and the university that coexist in a state of tension like molecular quarks and gluons; demanding institutional independence from political and other interference in various roles and responsibilities such as course delivery and in meeting conditions in which the right to education is to be provided (inclusively); securing (as an element of academic freedom) the right of staff to research and disseminate the product of their labours by publication; and entitling them to remain critical of their institutions. Each of these elements of academic freedom contributes to an understanding of the others.

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69 Dan Avnon, 'BDS and Self-Righteous Moralists', in Andrew Pessin and Doron Ben-Atar (eds), *Anti-Zionism on Campus* (Indiana University Press, 2018) ch 1 — a book comprising numerous accounts of prevailing institutional culture inimical to academic freedom and free speech.

70 *Shurat HaDin—The Israel Law Center v Jake Lynch*, New South Wales Registry, 20 December 2013.

71 For the technical requirements of that term, see Charles J Fillmore and BTS Atkins, 'Describing Polysemy: The Case of "Crawl"', in Yael Ravin and Claudia Leacock (eds), *Polysemy: Theoretical and Computational Approaches* (Oxford University Press, 2000) ch 5.

The subtly textured interaction of rights, responsibilities and environmental conditions across a diversely composed academic community does not easily yield to a human rights analysis. Nevertheless, in the academic community, like any other, fundamental human rights, including freedom of expression under art 19, are to remain undiminished. The purpose of this article was to reflect on the effectiveness of the *Model Code* in assuring freedom of speech and academic freedom, in the light of the contribution made by art 19 standards, at the level of principle rather than detail.

The *Model Code* certainly does not lack strength in the degree of institutional regulation achieved. Freedom of speech and academic freedom of staff and students are both expressed in positive terms, and are enjoyed 'subject only to' specified forms of restraint. A firm approach is to be expected. The university needs a strong mandate both to support those freedoms and to fulfil its protective role, in fulfilling its functions, and towards its community members. The question is whether the settings for promoting and restricting freedom of speech and academic freedom are coherent and appropriate. The conclusion is that they are not, especially given the potential impact on free speech of uncertainty, and that one of the principal recommendations was that protection for both freedoms be strengthened. The *Report* emphasises the capacity for permissible restriction of those freedoms rather more than safeguards against undue restriction. The terminology adopted by the *Model Code* further cements that impression. The principled approach taken by the Human Rights Committee under art 19 could have provided valuable guidance but, in the event, it has little counterpart in the *Model Code*. Instead, the term 'necessary', central to art 19(3), is used in the *Model Code* inconsistently, suggesting that it is not vested with a clear and stable meaning.

A number of suggestions are therefore advanced. The first is that those universities contemplating adopting a code might consider what art 19 offers as a universal reference point, that both strongly promotes freedom of expression and clearly distinguishes justified from unjustified restriction. It provides an objective standard that receives the firm endorsement of those UN sources that address academic freedom in all its dimensions, including those that emphasise the need to promote the wellbeing of staff and students,

The second suggestion is related: to correct the imbalance of emphasis in both the *Report* and the *Model Code* in support of restriction. If protection and regulation represent two sides of the same coin, they are stated in the *Model Code* in a somewhat intimidating way — on the one hand assuring protection for freedom of speech and academic freedom if it occurs within the bounds of regulation reserved to the university; on the other warning of exposure to penalty, other adverse action and attribution of misconduct even for lawful speech. Such an approach provides little reassurance for free speech on campus..

Thirdly, the rights of others affected by the exercise of free speech on campus could be broadened in the definition of 'the duty to foster the wellbeing of staff

and students'. They could include the right to education that, according to the CESCR Committee, is to be provided in an environment that itself is strongly supportive of respect for human rights and fundamental freedoms, and promotes tolerance in diversity. There is no reason why they could not also extend to other clearly relevant human rights, consistently with art 19(3), including against personal reputational attack.

Fourthly, the *Model Code* might give positive recognition to the right 'to seek, receive and impart information and ideas of all kinds' in art 19(2), especially since it is such an important component of academic freedom and freedom of expression. At present this right receives emphasis as a basis for justifying restrictions on free speech. The *Model Code* might also positively acknowledge the freedom of assembly, and note the obligations that apply under art 21 to put in place effective measures to protect against attacks aimed at silencing those exercising their rights.

Fifthly, the reputation-based justifications for refusing to allow visitors to speak using university properties and facilities lack cogency given other available options for managing the underlying concerns. The *Model Code* could therefore be conformed to what the UNESCO *Recommendation* considered necessary by way of institutional protection, primarily for specific university activities, in accord with respect for academic freedom and all applicable human rights.

Some of the difficulties faced when devising a *Model Code* for Australian universities stem from the fact that there is not a freedom of expression guarantee comparable to that in art 19, and in Australia's constituent jurisdictions there are differing models for protecting against free-speech harms. Perhaps this is the time to reassess the standards of free speech generally under Australian law, compared with those demanded by the ICCPR, to ensure compliance with Australia's obligations at international law.

Appendix

Extracts from A Model Code for the Protection of Freedom of Speech and Academic Freedom in Australian Higher Education Providers

Definitions

'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.

'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.

'unlawful' means in contravention of a prohibition or restriction or condition imposed by law.

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.