TO WHAT EXTENT SHOULD ACADEMIC FREEDOM ALLOW ACADEMICS TO CRITICISE THEIR UNIVERSITIES?

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The recent case of Schröder-Turk v Murdoch University *has thrown up questions in relation to the extent to which an academic is allowed to criticise the university at which they are employed. What freedom, if any, does an academic have to criticise the practices of their Australian university? Are there any limits to this freedom? Are these limits appropriate? These questions in turn raise questions as to the existence and nature of any right that an academic has to exercise academic freedom in Australia and the extent to which this right may provide an academic with more protection to criticise their university employer than they may have otherwise had and whether this may have unintended, detrimental consequences. Does this right to academic freedom allow academics to criticise their institution whether or not they have a reasonable basis for doing so and if so, should this be the case? This article explores these questions with particular reference to the effect of the Model Code for the Protection of Free Speech and Academic Freedom recommended by former High Court of Australia Chief Justice Robert French and proposes some amendments to this Code.*

I INTRODUCTION

In May 2019, Associate Professor Gerd Schröder-Turk, an academic staff member at Murdoch University and a staff representative on the Senate at the University, made statements on the Australian Broadcasting Corporation's *Four Corners* program in which he expressed concern about the policies of Murdoch University (and those of other Australian universities) in relation to international students. In particular, he expressed his discomfort with Murdoch University's waiving of English proficiency requirements in order to increase international student enrolments.[1] Murdoch subsequently removed Associate Professor Schröder-Turk

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1 'Cash Cows', *Four Corners* (ABC News, 2019) <https://www.abc.net.au/4corners/cash-cows/11084858>.

from its Senate body which resulted in his bringing an action against the University in which he made two claims against it. First, Associate Professor Schröder-Turk claimed that Murdoch University had breached s 340 of the *Fair Work Act 2009* (Cth) ('*FW Act*') in taking adverse action against him because he exercised his workplace rights including his right to academic freedom. Secondly, he alleged that the University had contravened the *Public Interest Disclosure Act 2003* (WA) ('*WA PID Act*') by taking detrimental action against him because of his disclosure of public interest information or 'whistleblowing'.[2] Murdoch University's response was to bring a cross-claim against the Associate Professor, alleging that he had breached his fiduciary duty to the university by his disclosure to journalists and claiming that as a result of this unfavourable media coverage, the university had suffered revenue loss from a reduction of international student enrolments and reputational damage to the university.[3] The university's response was met with disbelief by the academic community (and beyond) as it appeared to fly in the face of academic freedom with the university being petitioned to drop its cross-claim.[4] The university subsequently did withdraw its cross-claim, a fact that did not escape media attention,[5] and at the time of writing, it has resolved the remaining legal issues with the Associate Professor out of court, bringing the litigation to an end.[6]

Associate Professor Schröder-Turk's case is not the first of its kind in Australia. Indeed, there have been similar cases where academic staff have made accusations of wrongdoing occurring within their university. A notable example is that of Professor Ted Steele who was dismissed from, and then subsequently reinstated to, the University of Wollongong after he made allegations against it of 'soft marking' practices in favour of international full-fee paying students.[7] Another example is that of sessional lecturer Ian Firns who in 2003 raised concerns about the Graduate School of Business at the University of Newcastle in relation to their handling of plagiarism by overseas students. These concerns were ultimately investigated by

2 See *Schröder-Turk v Murdoch University* [2019] FCA 1152, [1]–[2] (Jackson J) ('*Schröder-Turk*').

3 Elise Worthington and Kyle Taylor, 'Four Corners Whistleblower Sued by Murdoch University after Raising Concerns about International Students', *ABC News* (online, 11 October 2019) <https://www.abc.net.au/news/2019-10-11/murdoch-university-sues-four-corners-whistleblower/11591520>. It is understood that the university filed its cross-claim on 27 September 2019: see *Schröder-Turk v Murdoch University [No 2]* [2019] FCA 1434.

4 Tara Reale, 'Justice for Murdoch University Whistleblower Associate Professor Gerd Schroeder-Turk', *Change.org* (Petition, 2019) <https://www.change.org/p/murdoch-university-justice-for-gerd>.

5 See, eg, Victoria Laurie, 'Uni Steps Back from Brawl with Academic', *The Australian* (Canberra, 4 February 2020) 6.

6 Associate Professor Schröder-Turk released a statement on 12 June 2020 announcing that he and Murdoch University had succeeded in resolving the proceedings: see Gerd Schröder-Turk, 'Settlement of the Federal Court Case WAD303/2019' (Public Statement, 12 June 2020) <http://gerdschroeder-turk.org/wp-content/uploads/2020/06/2020_06_12_ShortStatementAboutSettlement-FINAL-FOR-RELEASE.pdf>. See also Order of Jackson J in *Schröder-Turk v Murdoch University* (Federal Court of Australia, WAD303/2019, 19 June 2020).

7 *National Tertiary Education Industry Union v University of Wollongong* (2001) 183 ALR 592.

the Independent Commission Against Corruption ('ICAC') with two members of the University's staff being found to have engaged in corrupt conduct.[8]

These cases all throw up questions in relation to the extent to which an academic is allowed to criticise the university at which they are employed, and to whom they can disclose such criticism. What freedom, if any, does an academic have to criticise the practices of their Australian university? Are there any limits to this freedom? Are these limits appropriate? These questions in turn raise questions as to the existence and nature of any right that an academic has to exercise academic freedom[9] in Australia and the extent to which this may provide an academic with more protection to criticise their university employers than they may have otherwise had, and whether this may have any detrimental consequences. Does this right to academic freedom allow academics to criticise their institution whether or not they have a reasonable basis for doing so and if so, should this be the case? This article explores these questions. In doing so, it makes particular reference to the recent *Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers* ('*Review*')[10] led by the Hon Robert S French AC, former Chief Justice of the High Court of Australia, and its recommended 'Model Code for the Protection of Free Speech and Academic Freedom',[11] together with the subsequent amendments to it, being those amendments adopted by the University Chancellors Council ('UCC') (the 'Model Code').[12] Given the current pressure being placed on universities to adopt the Model Code, with its definition of academic freedom as explained further below, it is likely that the Model Code will be of primary relevance in the Australian higher education sector in the coming

8 Independent Commission Against Corruption (NSW), *Report on Investigation into the University of Newcastle's Handling of Plagiarism Allegations* (Report, June 2005) 6 <https://www.parliament.nsw.gov.au/tp/files/52273/Report%20into%20University%20of%20Newcastle%27s%20handling%20of%20plagiarism%20allegations%20-%20Operation%20Orion.pdf>. It is noted that there have been other recent Australian cases involving conflict between academic staff and their universities, such as that concerning Professor Peter Ridd and James Cook University. However, these other cases have not been triggered by academics making accusations of wrongdoing occurring within their universities. For example, Professor Ridd's case appears to have been prompted primarily by the Professor's alleged failure to respect the rights and reputations of his colleagues: see *Ridd v James Cook University* (2019) 286 IR 389; *James Cook University v Ridd* (2020) 278 FCR 566; *Ridd v James Cook University* (2021) 394 ALR 12.

9 As will be explained below, academic freedom is recognised to include the freedom of academics to criticise their institutions.

10 Robert S French, *Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers* (Report, March 2019) ('*Review*').

11 Ibid 230–6.

12 The subsequent amendments adopted by the UCC were made following the publication of the *Review* and following French's consultation with a working group of university chancellors: see Sally Walker, *Review of the Adoption of the Model Code on Freedom of Speech and Academic Freedom* (Report, December 2020) app B ('*Walker Review*') for the 'UCC version of the Model Code (marked up to show it varies from the Model Code)'. References to the Model Code in this article are references to that Code and these subsequent amendments unless indicated otherwise.

years.[13] However, an understanding of the freedom that academic staff would otherwise have to criticise the universities at which they are employed is necessary to fully appreciate the effect of the Model Code on this right.

As academic freedom is central to this article, the article begins by considering its meaning for Australian universities. It reflects on the reluctance of those involved in the establishment of the first universities in Australia to provide for any defined right of academic freedom or any demarcated limits on its expression by academic staff. It discusses the consequences of this reluctance as shown in Australian university history before examining the definition of academic freedom proposed by French in the *Review* and the Model Code. It then considers the extent to which an academic today would have the freedom at common law and under statute to criticise the practices of their universities independently of any right to academic freedom. Following this, it draws on the extensive examination of university legislation, enterprise agreements ('EAs') and policies conducted for the purposes of the *Review* in considering whether academic staff at Australian universities had any express or implied right to academic freedom prior to the Model Code and the extent to which any such right of academic freedom allowed an academic to criticise their university. Finally, it considers the extent to which the Model Code may provide an academic with more freedom to criticise their universities than they would have otherwise had and whether this may have any unintended, detrimental consequences. It makes recommendations as to how the Model Code could be amended to avoid any such consequences.

As stated in the *Review*, '[o]ne 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'.[14] It is hoped that this article will help to provide this aspect with greater prominence.

II WHAT IS ACADEMIC FREEDOM? THE NEED FOR A DEFINITION

A *The Consequences of a Lack of a Defined Right to Academic Freedom in the Early Years of Australian University History*

As stated in the *Review*, '[a]cademic freedom has a complex history and apparently no settled definition' although '[i]t is nevertheless seen as a defining characteristic

13 It is noted that, as pointed out in the *Walker Review*, although the headings to the *Review* and the Model Code refer to 'higher education providers', the terms of the Model Code are expressed to apply only to universities. Further, in the *Walker Review,* Professor (Emeritus) Sally Walker made it clear that the terms of reference for her review were limited to *university* responses to the Model Code and did not extend to those of other higher education providers and that the scope of the *Walker Review* was limited accordingly: Walker (n 12) 3. The primary focus of this article is similarly on universities.

14 French (n 10) 76.

of universities and similar institutions'.[15] Indeed, despite universities in Australia being granted significant independence from both church and state control, those involved in the establishment of universities in Australia do not appear to have deemed it necessary to define academic freedom as a protected right of academic staff.[16] Although it may have been considered that the security of a tenured position might provide this protection, such tenure was provided from 1851 to 1885 to exist for the initial professors of Australia's first university, the University of Sydney, only 'during good behaviour', with no guidance provided as to the meaning of 'good behaviour'.[17] The *Conditions of Appointment* for professors at the University of Sydney in the early 1900s were similar to the earlier tenure conditions but went slightly further, expressly providing that the Senate would have the 'power to remove the Professor from [their] office for misconduct'.[18] Again, there was no guidance provided as to the meaning of 'misconduct'.[19] The terms of appointment in the original contracts used by the University of Sydney were mirrored in the contracts used by the other Australian universities that were subsequently established, with only some minor differences.[20]

Given the lack of any defined right to academic freedom (or any right of academics to freedom of speech) and the lack of guidance as to the circumstances that would justify disciplinary action on the part of universities against their academic staff on the grounds of 'misconduct' or an absence of 'good behaviour', the disputes around

15 Ibid 18.

16 It is noted that academic freedom was not clearly provided for in the legislation establishing the first universities in Australia, but neither were the nature and functions of universities generally: see, eg, *University of Sydney Act 1850* (NSW). However, the definitions of a 'university' provided by various early Australian scholars appear to demonstrate their recognition of academic freedom being a function of universities in Australia: see Jim Jackson, 'Legal Rights to Academic Freedom in Australian Universities' (PhD Thesis, University of Sydney, March 2002) 53–65 ('Legal Rights'); Jim Jackson, 'Implied Contractual Rights to Academic Freedom in Australian Universities' (2006) 10 *Southern Cross University Law Review* 139, 151–3 ('Implied Rights').

17 Jackson, 'Legal Rights' (n 16) 199–201 (citations omitted). Lecturers did not have any such tenure and their positions could be terminated on six months' notice.

18 University of Sydney, *Conditions of Appointment to the Chair of Law* (at July 1909) cl 2(c), cited in Jackson, 'Legal Rights' (n 16) 202.

19 Perhaps it was believed that the common law would assist in providing a definition of 'good behaviour' and 'misconduct'. However, at that time, it was not considered that the relationship between a university and its academic staff was one of mere employment: see Jackson, 'Implied Rights' (n 16) 164–5. Thus, it is difficult to understand how the application of employment law cases (which is the realm of common law in which such terms are usually defined) could be justified in this context.

20 Even those contracts that were for a specific term and appeared to provide guidance as to the circumstances pursuant to which an academic could be removed from office seem, on closer inspection, to have provided very little, if any, assistance. For example, as referred to by Jackson, the contract of an English literature professor at the University of Adelaide in 1921 provided for a term of 5 years and allowed for dismissal where the 'continuance in [the professor's] office or in the performance of the duties thereof shall in the opinion of the Council be injurious to the progress of the students or to the interests of the University': Jackson, 'Legal Rights' (n 16) 210, quoting University of Adelaide, *Conditions of Appointment for the Jury Professorship of English Language and Literature* (at June 1921).

the conduct of academics that took place in the first 100 years of Australian university history as documented by Professor Jim Jackson are not surprising.[21] These disputes show both universities and staff grappling with the lack of guidance in both the legislation relating to universities and academic contracts. This lack of certainty was alluded to by two academic staff members that were involved in these disputes, Professor George William Marshall-Hall from the University of Melbourne in 1898 and Professor George Arnold Wood from the University of Sydney in 1902. Both professors had to defend themselves to their universities against allegations of wrongdoing that had been made against them as a result of the public expression of criticism by them, albeit that this criticism was in relation to matters unconnected with their universities.

Professor Marshall-Hall's alleged wrongful conduct involved speeches and published books of poetry which criticised both Australian musicians and Christian churches, on the basis of which the Professor had been accused of 'indecency, wanton insult to the public and impiety'.[22] In Marshall-Hall's letter to the University Council of the University of Melbourne, he referred to the lack of his understanding of his contract of appointment and his lack of knowledge that the public expression of certain views would not be acceptable to the university as follows:

> [B]efore I accepted the Ormond Professorship I had been given to understand by the then Agent General (Sir Graham Berry) that the University was entirely unsectarian; imposed no religious test upon its officers; and recognised the right of Professors to liberty of action outside their official duties, the only limitation be [sic] specifically imposed being that they were not to join a political association, or become members of Parliament … that therefore in publishing my books, and in making a certain public speech, I was only exercising my rights.[23]

Professor Wood made similar arguments in 1902 in seeking to defend himself against his censuring by the Senate of the University of Sydney as well as against the accusations made by other members of the public against him in the media in respect of his actions in publicly engaging in anti-war debate and activity in 1899 (specifically pertaining to the Boer War). He argued that he did not understand the conditions of his appointment to include any prohibition against the expression of political opinion. In his robust letter to the Sydney Morning Herald*,* he stated:

21 Jackson, 'Legal Rights' (n 16) ch 3. It is noted that depending on the definition accorded to 'academic freedom' and 'freedom of speech', many of these disputes might be considered to relate more to issues of freedom of speech than academic freedom. For example, those disputes concerning Professor Marshall-Hall and Professor Wood discussed below, would be considered to relate to 'academic freedom' under its original definition as proposed by French in the Model Code but not under the definition in the revised version of the Model Code adopted by the UCC. As explained below, the UCC removed from the definition of 'academic freedom' the element referring to the freedom of academic staff 'to make lawful public comment on any issue in their personal capacities' as it was considered to be more of an issue of 'freedom of speech'.

22 Ibid 86.

23 Letter from Marshall-Hall to Council of the University of Melbourne, 11 August 1898, quoted in Jackson, 'Legal Rights' (n 16) 87.

> I hold my chair under a written document which describes elaborately under eight heads the conditions by which I hold it. Had one of those conditions been that I should abstain from political discussion I should have accepted that condition and complied with it loyally, and, in this case at all events, gladly. But the conditions of my chair, so far as I can understand, contain no such limitation of the rights and duties of citizenship. I was, as I understand, free to speak, and under the circumstances, I should have been, so it seemed to me, a craven coward had I, for fear of inevitable abuse and misrepresentation and of possible loss forborne to speak.[24]

Notably, these disputes in the formative years of Australian universities show that it was not just the academic staff that were uncertain as to their rights to academic freedom (or freedom of speech) within their tenured positions — the universities themselves were just as unclear. Further uncertainty appears to have existed as to the extent of university disciplinary powers including, relevantly, the power to dismiss their academic staff, and when such powers should be exercised. Indeed, Jackson has cited the work of Joe Rich in explaining that the reason for the University Council's decision to let Marshall-Hall serve out the term of his contract and not reappoint him rather than to dismiss him was that the Council was itself uncertain as to its power to dismiss in circumstances where, among other things, Marshall-Hall's conduct did not occur in the course of his academic duties.[25] Yet, despite this uncertainty and the disputes that ensued as a result, the universities did not do enough to rectify it and provide more clarity on the issue. Indeed, there even seemed to be an unwillingness on the part of universities to define academic freedom and its limits (or to define any right on the part of their academic staff to freedom of speech). This can clearly be seen in the debates between the University of Melbourne Council and the Senate resulting from the Marshall-Hall affair referred to above as well as the debates in the University of Sydney Senate in relation to Professor John Anderson in 1931 as documented by Jackson.[26]

The reluctance of Australian universities in their first 100 years to define academic freedom and its limits (or to define any right on the part of their academic staff to freedom of speech) is most evident in the resolution of the Senate of the University of Sydney in response to the request of the NSW Parliament in 1943 to provide their opinion 'as to what limits it consider[ed] should be observed by the teaching staff of the University on religious or other controversial matters'.[27] The Senate

24 Letter from Professor Wood to Sydney Morning Herald, 26 April 1902, quoted in Jackson, 'Legal Rights' (n 16) 103–4.

25 According to Rich, the University Council was also uncertain whether such a dismissal may have contravened the legislative provisions against the imposition of religious tests: Joe Rich, 'The Liberal-Democratic Bias of Melbourne University and its Community Around 1900' in FB Smith and P Crichton (eds), *Ideas for Histories of Universities in Australia* (Australian National University, 1990) 31, cited in Jackson, 'Legal Rights' (n 16) 90.

26 Jackson, 'Legal Rights' (n 16) 120–2. Professor Anderson's impugned conduct involved public statements made by him in 1931 criticising war, war memorials and associated religious ceremonies, and then in 1943, he made further critical statements in relation to religious training in schools.

27 New South Wales, *Parliamentary Debates*, Legislative Council, 13 April 1943, 2354 (Henry Manning), quoted in Jackson, 'Legal Rights' (n 16) 136. See also Jackson, 'Implied Rights' (n 16) 182–3.

was 'strongly of the opinion that nothing but harm would follow the stifling in a university of the spirit of free inquiry' and further resolved that

> [a]s regards the imposing of limitations, the Senate has in the past relied, and must continue to rely, on the intellectual integrity, and the good taste and the good sense of its staff to approach all problems in an objective, disinterested, and scientific a spirit as possible, and so to state and argue them so as not to inflame people's minds to no good purpose.[28]

One wonders whether the Senate at the time would have considered criticism of the University of Sydney by one of its academic staff to be a permissible expression of academic freedom (or of their freedom of speech), demonstrative of the latter's 'intellectual integrity', 'good taste' and 'good sense' or whether they would view it as 'inflam[ing] people's minds to no good purpose'.

Jackson has suggested that '[t]he first 100 years of university history helps define academic freedom in Australia'.[29] However, a different conclusion that can be drawn is that the first 100 years of the existence of Australian universities shows the consequences of a lack of a defined right of academic freedom (or of freedom of speech) within these universities and the seeming unwillingness of these universities to provide any definition.

The need for academic freedom to be made into a defined right and any parameters prescribed arguably became more urgent after 1956 and the case of *Orr v University of Tasmania* ('*Orr*')[30] in which the Court found the relationship between Australian universities and their academic staff to be governed by a contract of employment, one of master and servant as distinct from a person holding a form of public office in lifetime tenure.[31] Indeed, Jackson regards the case of *Orr* as 'an important step in the application of the industrial relations system to, and the development of, unionisation in Australian universities' and the modern enterprise bargaining system.[32] The employment of most university staff is now covered by EAs,[33] with each EA generally having a maximum term of four years.[34] As will be explained further below, many of these university EAs (as well as university by-laws, regulations, statutes, rules, codes of conduct, policies and principles) expressly refer to the rights of academic staff to exercise academic freedom as well as containing provisions relating to freedom of speech. However, as will also be discussed, prior to the Model Code, there was still 'no settled definition' of

28 Jackson, 'Legal Rights' (n 16) 139 (citations omitted). See also Jackson, 'Implied Rights' (n 16) 183.

29 Jackson, 'Legal Rights' (n 16) 146.

30 [1956] Tas SR 155 ('Orr').

31 Ibid 158–60.

32 Jim Jackson, 'Orr to Steele: Crafting Dismissal Processes in Australian Universities' (2003) 7 *Southern Cross University Law Review* 220, 222.

33 Jacquie Seemann and Katie Kossian, 'Employment Law' in Sally Varnham, Patty Kamvounias and Joan Squelch (eds), *Higher Education and the Law* (Federation Press, 2015) 163, 165–6.

34 *Fair Work Act 2009* (Cth) s 186(5) ('*FW Act*').

academic freedom or any consensus as to its limitations across Australian universities.[35] French has sought to settle its definition and parameters in the Model Code, with this definition, as explained further below, expressly including 'the freedom of academic staff ... to express their opinions in relation to the higher education provider in which they work or are enrolled'.[36] In proposing the Model Code, French has endeavoured to, among other things, ensure that academic staff have the 'necessary freedom' 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.[37]

French considered it to be of 'fundamental importance' that academic staff have this freedom, giving them rights that go beyond those of employees in other contexts.[38]

The authors of this article accept the significance of a freedom being accorded to academics which 'transcend[s] their status as employees' due to the distinctive purpose of universities being, among other things, 'the creation and advancement of knowledge'.[39] Indeed, as explained by Carolyn Evans and Adrienne Stone in their recent book, *Open Minds*, '[a]cademic freedom is justified because the advancement of knowledge requires the free inquiry and systematic testing of ideas'.[40] Evans and Stone have further posited that the rationale behind this freedom extending to allow academics to criticise their universities is that

> academics, by virtue of their expertise in research and teaching, are best placed to understand the conditions in which those activities prosper and will be the most motivated to ensure that these activities occur freely and adhere to academic methods. Academic criticism of university governance is therefore essential to the flourishing of research and teaching and, consequently, the pursuit of knowledge.[41]

35 French (n 10) 18.

36 Ibid 230–1.

37 Ibid 216.

38 Ibid.

39 See *Higher Education Support Act 2003* (Cth) s 2-1(b)(ii) ('*HES Act*'). As will be explained later in this article, French found in the *Review* that many university statutes expressly provide for the promotion of 'free inquiry' and the 'advancement of knowledge' as objects and functions of the universities: French (n 10) 133.

40 Carolyn Evans and Adrienne Stone, *Open Minds: Academic Freedom and Freedom of Speech in Australia* (La Trobe University Press, 2021) 81.

41 Ibid 96.

B *The Definition of Academic Freedom as Proposed in the Review and the Model Code*

Arguably, the *Review* constitutes the most significant recent development for academic freedom and the protection of freedom of speech in the context of higher education in Australia. The *Review* was commissioned by the then Minister for Education, the Hon Dan Tehan MP, primarily in response to a number of high profile cases relating to protests against visiting speakers on Australian university campuses and attempts to *de-platform* them.[42] Although French did not find there to be 'a systemic pattern of action by higher education providers … adverse to freedom of speech or intellectual inquiry in the higher education sector', he considered that 'even a limited number of incidents … may have an adverse impact on public perception of the higher education sector'.[43] In the *Review*, French placed great significance on the need for academic freedom, referring to it as 'a defining characteristic of universities and similar institutions',[44] and proposed that the Model Code be adopted by universities and other higher education providers.[45] He also placed great significance on freedom of speech, noting 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'.[46] In French's view, the adoption of the Model Code by Australian higher education institutions would have the effect of safeguarding the academic freedom of staff and students and their freedom of speech by 'restrain[ing] 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'.[47] The Model Code, according to French, has three objects, which reflect the importance of 'freedom of lawful speech', 'academic freedom' and 'institutional autonomy'.[48] As explained below, the Model Code contains a definition of academic freedom and states that its object with respect to academic freedom is 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'.[49] As further explained below, French considered the freedom of academics to criticise the practices of the Australian universities at which they are employed to be an aspect of academic freedom as distinct from the general freedom of staff, students and third parties to speak freely. Thus, academic freedom is the focus of this article.

42 French (n 10) 18–19.

43 Ibid 217.

44 Ibid 18.

45 Ibid 229.

46 French (n 10) 108. Although French also assessed the status of the protection of freedom of expression generally within Australian higher education institutions, this article focuses on the adequacy of the protection of academic freedom.

47 Ibid 219.

48 Ibid 230.

49 Ibid.

In acknowledging the 'definitional diversity' in relation to academic freedom, French gave extensive consideration to an appropriate definition of academic freedom that could be applied consistently across Australian universities as part of the *Review*.[50] This was despite the term 'academic freedom' not appearing in the Terms of Reference of the *Review* due to the fact that the *Higher Education Support Act 2003* (Cth) ('*HES Act*') and the *Higher Education Framework (Threshold Standards) 2015* (Cth) ('*HE Standards*') regulating the higher education sector both used the term 'free intellectual inquiry' at that time.[51] French made it clear that while any definition of academic freedom must incorporate free intellectual inquiry, it must also go beyond it.[52] In the *Review*, French recommended that the terms 'academic freedom' and 'freedom of speech' replace the term 'free intellectual inquiry' in the *HES Act* and *HE Standards* for clarity and consistency with his proposed Model Code and that the *HES Act* and the *HE Standards* be amended to include his proposed definition of 'academic freedom' — these recommendations were subsequently adopted.[53]

French considered that, any definition of academic freedom should incorporate 'relevant aspects of freedom of speech, freedom of intellectual inquiry and institutional autonomy', hence 'embod[ying] its essential elements for Australian purposes'.[54] However, French explained that freedom of speech in this context is not used in a sense which is consistent with the 'general freedom of expression applicable on and off campus'.[55] According to French:

> 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

50 Ibid 116.

51 French (n 10) 224, discussing *HES Act* (n 39), as at 1 January 2019 and *Higher Education Standards Framework (Threshold Standards) 2015* (Cth).

52 Ibid 18.

53 Ibid 226–8. As will be explained below, in October 2020, the Australian Government introduced the Higher Education Support Amendment (Freedom of Speech) Bill 2020 (Cth) into the Commonwealth Parliament. This was enacted on 22 March 2021 amending the *HES Act* to replace the term 'free intellectual inquiry' with 'freedom of speech and academic freedom' and inserting French's proposed definition of 'academic freedom' with the minor amendments adopted by the UCC. Amendments were also made to the updated *Higher Education Standards Framework (Threshold Standards) 2021* (Cth) on 1 December 2021 to reflect changes made to the *HES Act*. For example, standard 6.1.4 was amended to require higher education providers' governing bodies to 'tak[e] steps to develop and maintain an institutional environment in which freedom of speech and academic freedom are upheld and protected' with the definition of 'academic freedom' to have the same meaning as in the *HES Act*: see 'Overview of Changes: *Higher Education Standards Framework (Threshold Standards) 2021*', *Tertiary Education Quality and Standards Agency* (Web Page) <https://www.teqsa.gov.au/overview-changes>.

54 French (n 10) 18.

55 Ibid.

> otherwise exist in an employer/employee relationship, that freedom of expression which is the accepted incident of the academic role.[56]

It is academic freedom, being 'that freedom of expression which is the accepted incident of the academic role' which is of central importance to this article.[57] Indeed, French made it clear that '[a]cademic freedom, for Australian purposes, embraces the freedom of intra-mural criticism of the university and its policies and administration', with intramural criticism being criticism about the university and the way in which it is governed.[58] His proposed definition of academic freedom in his original version of the Model Code reflected this, with 'academic freedom' being defined as:

- 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.[59]

56 Ibid 214. In using the term 'freedom of expression' in this way, French placed reliance on the definition of 'academic freedom' recommended by UNESCO in the 1997 UNESCO Recommendations concerning the Status of Higher-Education Teaching Personnel: see United Nations Educational, Scientific and Cultural Organisation, *Recommendation concerning the Status of Higher-Education Teaching Personnel*, 29th sess (11 November 1997) 10 [27], cited in French (n 10) 214.

57 French (n 10) 214.

58 Ibid 118. Arguably, the freedom of academics to criticise the practices of the Australian universities at which they are employed is also protected by those parts of the Model Code which protect the ability of staff and students to speak freely 'on university land or in connection with the university' and 'the freedom of academic staff … to make lawful public comment on any issue in their personal capacities' — however, this does not seem to have been French's intention: at 231, 233. As explained, French clearly saw freedom of speech and academic freedom as constituting 'two distinct concepts', with '[f]reedom of speech [being] 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': at 18, 214.

59 Ibid 230–1 (emphasis added). It is noted that the definition of academic freedom provided for in the Model Code is applicable to both academic staff and students, but not staff who do not have an academic role. This paper is limited to a discussion of the freedom of academic staff to criticise the universities at which they are employed and does not specifically address the

It is clear that the freedom of academic staff to criticise the practices of the university at which they are employed is included in this definition — specifically, in the part of the definition emphasised by the authors in italics above. Notably, and as referred to above, subsequent to the publication of the *Review* and following consultation with a working group of university chancellors, French agreed to a revised version of the Model Code which was adopted by the UCC. This revised version relevantly removed from the above definition of 'academic freedom' the element referring to the freedom of academic staff 'to make lawful public comment on any issue in their personal capacities'.[60] It was considered by the UCC that the inclusion of this element would confuse academic freedom with freedom of speech and therefore should be removed from the definition of 'academic freedom' and inserted into principle 2 of the 'Principles of the Code' section of the Model Code dealing with freedom of speech.[61] As Sally Walker has noted, 'accordingly … there is no substantive difference between the [original version of] the Model Code and the UCC version of the Model Code'.[62] In any event, even with this element removed, 'the freedom of academic staff ... to express their opinions in relation to the higher education provider in which they work' still falls within the definition of academic freedom in the (revised) Model Code.[63] It is this revised definition of 'academic freedom' that has been included in the *HES Act* subsequent to the enactment of the Higher Education Support Amendment (Freedom of Speech) Bill 2020 (Cth),[64] with the term 'free intellectual inquiry' being replaced with 'freedom of speech and academic freedom' throughout the Act.[65]

Subsequent to the release of the *Review*, Australian universities committed to align their policies with the Model Code (or at least its guiding principles) including its definition of 'academic freedom'.[66] A further review was called by the then Minister for Education to investigate whether universities were adopting the Model Code, with former Deakin University Vice-Chancellor Sally Walker tasked with heading up this review ('*Walker Review*').[67] The *Walker Review* was published in

> freedom enjoyed by students to criticise the universities at which they are enrolled. However, in considering the freedom of academic staff to criticise their universities, it identifies issues associated with providing relatively unlimited rights to express such criticism to both staff and students.

60 See Walker (n 12) app B.

61 Ibid 52.

62 Walker (n 12) 8.

63 Ibid 49.

64 See *HES Act* (n 39) sch 1 cl 1(1) (definition of 'academic freedom').

65 See ibid ss 2-1(a)(iv), 19-115.

66 Universities Australia, 'Government Backs Importance of Freedom of Expression' (Media Release, 7 August 2020) <https://www.universitiesaustralia.edu.au/media-item/government-backs-importance-of-freedom-of-expression/>.

67 Dan Tehan, 'Evaluating Progress on Free Speech' (Media Release, Ministers' Media Centre, Department of Education, Skills and Employment, 7 August 2020) <https://ministers.dese.gov.au/tehan/evaluating-progress-free-speech>; 'Independent Review of

December 2020 and found that while there still remain some universities yet to align their policies with the Model Code, many appear to have taken active steps to implement its principles.[68] Given the current pressure being placed on universities to adopt the Model Code with its definition of academic freedom and the active steps already taken by them to do so, it is likely that this definition and the rest of the Model Code will be of primary relevance in the Australian higher education sector in the coming years.[69] However, as has been mentioned, an understanding of the freedom that academic staff would otherwise have to criticise the universities at which they are employed is necessary to fully appreciate the effect of the Model Code on this freedom. In order to provide this understanding, this article first considers the freedom of an academic staff member to criticise the practices of their universities independently of any right to academic freedom, both at common law and under statute. It then goes on to consider the rights that academics had to academic freedom prior to the implementation of the Model Code and the extent to which these rights provided them with the freedom to criticise their universities, before focusing on the effect of the Model Code on this freedom.

III THE FREEDOM OF ACADEMIC STAFF TO CRITICISE THEIR UNIVERSITIES ABSENT ANY RIGHT TO ACADEMIC FREEDOM

A *Academic Staff as Employees*

As explained above, since the case of *Orr*,[70] the relationship between Australian universities and their academic staff has been recognised as being that of employer and employee at common law.[71] Therefore, a discussion of the freedom of an

Adoption of the Model Code on Freedom of Speech and Academic Freedom', *Department of Education* (Web Page, 23 May 2022) <https://www.dese.gov.au/higher-education-reviews-and-consultations/independent-review-adoption-model-code-freedom-speech-and-academic-freedom>.

68 According to the *Walker Review*, 33 of Australia's 42 universities advised they had completed their implementation of the Model Code, 8 advised they had not completed this work and 1 university, Carnegie Mellon University Australia, did not respond: Walker (n 12) 5. Of the 33 universities that advised that they had completed their implementation of the Model Code, it was found that 9 universities had policies that were fully aligned with the Model Code, 14 universities were mostly aligned, 4 were partly aligned and 6 had policies that were not aligned: at 27.

69 It is noteworthy that among its other recommendations, the *Walker Review* recommended that university governing bodies be required to publish a statement on their institution's alignment with the Model Code in their annual reports: see Walker (n 12) 36–9. The Australian Government has since endorsed all of the recommendations set out in the *Walker Review*: see Department of Education, Skills and Employment (Cth), *Review of Adoption of the Model Code on Freedom of Speech and Academic Freedom in Higher Education: Australian Government Response* (Report, 3 June 2021). Further, the UCC have agreed to their universities publicly reporting in their annual reports on their institution's alignment with the Model Code: see Alan Tudge, 'Universities Adopt Free Speech Code' (Media Release, Ministers of the Education, Skills and Employment Portfolio, 13 October 2021) <https://ministers.dese.gov.au/tudge/universities-adopt-free-speech-code>.

70 *Orr* (n 30) 158–60.

71 Jackson, 'Legal Rights' (n 16) 197. Indeed, university decisions made in relation to their staff have generally been viewed as being not administrative but are rather of a private and contractual

employee to criticise their employer is of relevance to this article. However, before engaging in this discussion, it should be noted that the establishment of an employer-employee relationship does not mean that academics only have one status, that of employee. It has been acknowledged that in addition to their status as employees of a university, the incorporation of Australian universities makes academics members of the university pursuant to company law principles,[72] arguably giving them the same rights as company shareholders.[73] It is notable that express reference is made to academics as members of universities in at least several of the current statutes which incorporate Australian universities.[74] The membership status of academics was referred to in the case of *University of Western Australia v Gray* as follows:

> [A]cademic 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.[75]

Yet, at this stage, the law is unclear as to what further rights this status may provide to academic staff members.[76] In view of the above and independently of any right to academic freedom, it would appear that academic staff have no clear additional common law or statutory freedom to criticise their university employer than other employees.[77] Therefore, the discussion of the ability of academic staff to criticise their universities independently of any right to academic freedom will be limited to a consideration of the extent to which an *employee* is generally permitted to criticise their *employer* at both common law and under statute.

nature and therefore, not subject to judicial review: see, eg, *Hall v University of New South Wales* [2003] NSWSC 669; *Whitehead v Griffith University* [2003] 1 Qd R 220; *Australian National University v Lewins* (1996) 68 FCR 87; *Australian National University v Burns* (1982) 43 ALR 25.

72 See, eg, Seemann and Kossian (n 33) 163–4, quoting *University of Western Australia v Gray* (2009) 179 FCR 346, 388 [185] ('*University of Western Australia*').

73 Seemann and Kossian (n 33) 164, citing Jim Jackson and Sally Varnham, *Law for Educators: School and University Law in Australia* (LexisNexis Butterworths, 2007) 28–9.

74 See, eg, *University of Tasmania Act 1992* (Tas) s 5; *Southern Cross University Act 1993* (NSW) ss 4, 26; *University of Wollongong Act 1989* (NSW) s 4.

75 (2009) 179 FCR 346, 388 [185] (Lindgren, Finn and Bennett JJ).

76 Seemann and Kossian (n 33) 164.

77 Jackson explains that 'old arguments that university staff have another status, that of "officer" have not survived the *Orr* case or the modern industrial law regulatory model controlling universities and their employees': Jackson, 'Legal Rights' (n 16) 197–8.

B *The Ability of Employees to Criticise Their Employers under Common Law and Statute*

1 *Common Law*

It is well known that employees owe implied duties to their employers at common law, such as the duty to render 'faithful performance of [their] obligations' to their employers.[78] The *duty of fidelity* (as it is sometimes known) overlaps with other implied common law duties owed by an employee to an employer such as the 'duties of obedience, cooperation and proper conduct' and confidentiality.[79] Absent any express provision to the contrary including, for example in an employment contract or other instrument, any criticism by an employee of an employer will generally be prohibited if it breaches these duties and may be grounds for termination of employment to the extent that it is 'repugnan[t]' to the employment relationship.[80] If this criticism is voiced outside of working hours, it may still be grounds for termination if it is 'of such gravity or importance as to indicate a rejection or repudiation of the employment contract by the employee'.[81] This will be so if: a) when 'viewed objectively, it is likely to cause serious damage to the [employment] relationship; b) it damages the employer's interests; or c) it is incompatible with the employee's dut[ies]'.[82] Indeed, there is no statutory or common law right to privacy which might protect employees against the intrusion of their employers into their private lives in this way.[83] Whether any criticism of an employer made by an employee will be considered a 'rejection or repudiation of the employment contract' would need to be determined on a case by case basis but it may significantly depend upon how *public* the criticism is. For example, in

78 *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66, 81 (Dixon and McTiernan JJ) ('*Blyth Chemicals*').

79 Andrew Stewart, *Stewart's Guide to Employment Law* (Federation Press, 6th ed, 2018) 295. See also ibid.

80 *Blyth Chemicals* (n 78) 81–2. For some examples of cases in which an employee's criticism of an employer was found to justify dismissal, see Jim Jackson, 'When Can Speech Lead to Dismissal in a University' (2005) 10(1) *Australia and New Zealand Journal of Law and Education* 23 ('Dismissal'). It is noted that further restrictions are imposed on the ability of public sector employees to criticise their employer: see, eg, *Public Service Act 1999* (Cth) s 13. This section sets out the Australian Public Service 'Code of Conduct'. The broader scope at law generally of employer control over private conduct in the case of public servants was recognised by the Federal Court in *McManus v Scott-Charlton* (1996) 70 FCR 16, 25 (Finn J), cited in *Starr v Department of Human Services* [2016] FWC 1460, [61] (Hatcher V-P). See also *Comcare v Banerji* (2019) 267 CLR 373, 420 [91] (Gageler J). However, a discussion of these further restrictions on public sector employees to criticise their employer is beyond the scope of this article.

81 *Rose v Telstra Corporation Ltd* [1998] AIRC 1592 (Ross V-P) ('*Rose*'), citing *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285, as applied in *North v Television Corporation Ltd* (1976) 11 ALR 599.

82 *Rose* (n 81) (Ross V-P).

83 Louise Thornthwaite, 'Chilling Times: Social Media Policies, Labour Law and Employment Relations' (2016) 54(3) *Asia Pacific Journal of Human Resources* 332, 340. Although an implied duty of mutual trust and confidence may have been argued as providing some protection, it was conclusively rejected by the High Court in the case of *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169.

the case of a social media post, the number of people who would be likely to access it would be relevant.[84]

However, it is recognised at common law that in some circumstances an employee will be justified in criticising their employer — specifically, when this would involve disclosing an 'iniquity'.[85] The 'iniquity rule' was first given expression by Wood V-C in the English case of *Gartside v Outram*, who found that confidentiality would not attach to the disclosure of iniquitous information.[86] Although the rule has traditionally operated as a defence to an action in breach of confidence, the authors see no reason why it could not be used as a defence by an employee against any claim that the employee had breached their other implied duties of employment.

Originally, the iniquity rule was rather limited, considered to be 'confined to crimes and frauds'.[87] This rule was widened in 1967 by the decision in *Initial Services Ltd v Putterill,* to extend to 'crimes, frauds and misdeeds'.[88] In 1987, Gummow J held in *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* that

> information will lack the necessary attribute of confidence if the subject-matter is the existence or real likelihood of the existence of an iniquity in the sense of a crime, civil wrong or serious misdeed of public importance, and the confidence is relied upon to prevent disclosure to a third party with a real and direct interest in redressing such crime, wrong or misdeed.[89]

Justice Gummow's approach would seem to be that followed by the High Court in *Minister for Immigration and Citizenship v Kumar.*[90]

84 See, eg, *Fitzgerald v Smith* (2010) 204 IR 292, in which it was found that the employee's Facebook page was set to private and so the relevant post was only accessible to her Facebook 'friends'. Further, there was no identification of the business and so there was minimal chance of the business being affected: at 300 [54]. See also *Vosper v Solibrooke Pty Ltd* [2016] FWC 1168, where the complaint was made by an employee to a relative on Facebook, who was one of only a limited number of persons able to access her profile and was thus held to not harm her employer's business; *Wilkinson-Reed v Launtoy Pty Ltd* [2014] FWC 644, in which the Fair Work Commission found that a private Facebook message was similar to a private conversation that would not normally be accessed by others.

85 *Minister for Immigration and Citizenship v Kumar* (2009) 238 CLR 448, 456–7 [25]–[27] (French CJ, Gummow, Hayne, Kiefel and Bell JJ) ('*Kumar*').

86 (1857) 26 LJ Ch 113, 114.

87 Christine Parker, Suzanne Le Mire and Anita Mackay, 'Lawyers, Confidentiality and Whistleblowing: Lessons from the *McCabe* Tobacco Litigation' (2017) 40(3) *Melbourne University Law Review* 999, 1038, citing Kaaren Koomen, 'Breach of Confidence and the Public Interest Defence: Is It in the Public Interest?' (1994) 10 *Queensland University of Technology Law Journal* 56, 57.

88 [1968] 1 QB 396, 405 (Lord Denning MR), quoted in Koomen (n 87) 58 and cited in Parker, Le Mire and Mackay (n 87) 1038–9.

89 *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434, 456.

90 *Kumar* (n 85) 456–7 [25]–[27] (French CJ, Gummow, Hayne, Kiefel and Bell JJ), discussing *A v Hayden* (1984) 156 CLR 532. It has also been applied in cases such as *AMI Australia Holdings*

Notably, the 'iniquity rule' will generally require disclosure to be to the proper authority such as the police if the conduct is criminal or some other agency with appropriate responsibility,[91] with disclosure to the media rarely considered by the courts to be appropriate.[92]

In view of the above, it would appear that at least at common law and subject to the existence of any express provision to the contrary, an employee, such as an academic staff member with no right to academic freedom, would be significantly limited in their ability to express any negative opinions in relation to their employer insofar as their opinions did not relate to a 'crime, civil wrong or serious misdeed of public importance' and were not voiced to a 'proper authority'.

However, an employee who criticises their employer may have broader scope to do so under statute, specifically under the *FW Act* and most significantly, under public interest disclosure legislation (or whistleblower protection legislation). Notably, this protection will be afforded to academic staff in their capacity as employees as both the *FW Act* and the whistleblower protection legislation apply to universities and their staff as will be explained further below.

2 *Statute*

(a) The FW Act

An employee who expresses any criticism of their employer may receive some statutory protection under the *FW Act* from disciplinary action being taken against them. For example, any disciplinary action taken against the employee by their employer could contravene the adverse action provisions in pt 3-1 of the *FW Act* if it was able to be proven that the action was taken against them 'because' of a prohibited reason.[93] Relevantly, the exercise of a workplace right is a prohibited reason,[94] with a 'workplace right' being defined in s 341 to include a situation where an employee 'is able to make a complaint or inquiry: (i) to a person or body [with] capacity … to seek compliance with [a workplace] law or … instrument'[95] or (ii) 'in relation to [their] employment'.[96] While the *FW Act* does not provide a definition of 'complaint', it has been defined in the case law as 'a communication which, whether expressly or implicitly, as a matter of substance, irrespective of the

Pty Ltd v Fairfax Media Publications Pty Ltd [2010] NSWSC 1395, [20] (Brereton J), citing ibid 445–6 (Gummow J).

91 *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408, cited in Stewart (n 79) 310.

92 In rare cases, the courts have recognised that there may be grounds for disclosure through the media: see, eg, *Lion Laboratories Ltd v Evans* [1985] QB 526, cited in Stewart (n 79) 310. In that case, the 'proper authority' had an interest in restricting disclosure of the information.

93 *FW Act* (n 34) ss 340, 346, 351. See generally Stewart (n 79) 327–32. *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500 is authority for the fact that the employer must prove that it did not take action against the claimant for the prohibited reason for it not to fall foul of the provisions in pt 3-1 of the *FW Act*.

94 *FW Act* (n 34) s 340(1)(a)(ii).

95 Ibid s 341(1)(c)(i).

96 Ibid s 341(1)(c)(ii).

words used, conveys a grievance, a finding of fault or accusation'.[97] It is noted that engagement in industrial activity is also a prohibited reason,[98] with 'engage[ment] in industrial activity' apparently being broad enough to include, for example, criticism that 'advance[s] the views, claims or interests of an industrial association'.[99]

While the *FW Act* would appear to provide significantly broader protection to an employee who criticised their employer to that provided by the common law, it is notable that in the event that the employee made a complaint or inquiry in the course of exercising a workplace right and it did not relate to their employment (but, for example, to the employment of others), the protection would only be enlivened if the complaint or inquiry was made to an external person or body who had the capacity to seek compliance with a workplace law or instrument, such as the Fair Work Ombudsman.[100] On the other hand, if the employee's complaint or inquiry related to their employment, they would not be restricted to directing it to an external authority with the power to require compliance and could for example, direct these complaints or inquiries to their employer[101] or legal advisor[102] and still be afforded protection under pt 3-1 of the *FW Act*. However, the protection provided by ss 340 and 341(1)(c)(ii) of the *FW Act* may be limited in other respects. For example, Dodds-Streeton J in the Federal Court case of *Shea v TRUenergy Services Pty Ltd [No 6]* ('*Shea*')[103] was of the view that for an employee's 'complaint' to fall within the scope of s 341(1)(c)(ii) and the protection provided by the legislation, the following requirements would need to be satisfied:

> (b) the grievance, finding of fault or accusation must be genuinely held or considered valid by the complainant;
>
> (c) the grievance, finding of fault or accusation need not be substantiated, proved or ultimately established, but the exercise of the workplace right constituted by the making of the complaint must be in good faith and for a proper purpose;
>
> (d) the proper purpose of making a complaint is giving notification of the grievance, accusation or finding of fault so that it may be, at least, received and, where appropriate, investigated or redressed. If a grievance or accusation is communicated in order to achieve some extraneous purpose unrelated to its notification, investigation or redress, it is not a complaint made in good faith for a proper purpose and is not within the ambit of s 341(1)(c)(ii);
>
> …

97 *Shea v TRUenergy Services Pty Ltd [No 6]* (2014) 314 ALR 346, 353 [29] (Dodds-Streeton J) ('*Shea*').

98 *FW Act* (n 34) s 346(b).

99 Ibid s 347(b)(v).

100 See, eg, *McCormack v Chandler Macleod Group Ltd* [2012] FMCA 231, [67] (Lucev FM).

101 See, eg, *Hodkinson v Commonwealth* (2011) 248 FLR 409, 440–1 [131] (Cameron FM); *Devonshire v Magellan Powertronics Pty Ltd* (2013) 275 FLR 273, 293 [63] (Lucev FM).

102 *Murrihy v Betezy.com.au Pty Ltd* (2013) 238 IR 307, 351–2 [142]–[143] (Jessup J).

103 *Shea* (n 97).

(f) a complaint that an employee is able to make in relation to his or her employment is not at large, but must be founded on a source of entitlement, whether instrumental or otherwise; and

(g) a complaint is limited to a grievance, finding of fault or accusation that satisfies the criteria in s 341(1)(c)(ii) and does not extend to other grievances merely because they are communicated contemporaneously or in association with the complaint. Nor does a complaint comprehend contemporaneous or associated conduct which is beyond what is reasonable for the communication of the grievance or accusation.[104]

In view of the above, it would appear that for pt 3-1 of the *FW Act* to offer protection to an employee who had disciplinary action taken against them as a result of their criticising their employer, the criticism would need to have been made in the exercise of a 'workplace right' and be in the form of a 'grievance, finding of fault or accusation': (i) made to an external authority capable of seeking compliance with a workplace law or instrument; or, (ii) if it related to the academic's employment, made in good faith and for the proper purpose of investigation or redress, with the 'grievance, finding of fault or accusation' genuinely held or considered valid by the academic. Alternatively, the criticism would need to advance the interests of an industrial association.

As referred to above, the *FW Act* applies to universities as it applies generally to all 'national system employers'[105] which include, inter alia, 'constitutional corporation[s]',[106] with universities constituting 'constitutional corporations', being incorporated under their own specific legislation and engaging in trading or financial activities.[107]

(b) The Whistleblowing Protection Legislation

The most significant statutory protection that may be afforded to employees who criticise their employers is under public interest disclosure legislation (or whistleblower protection laws).[108]

104 Ibid [29]. It is noted that on appeal, the Court questioned the need for a complaint to be 'genuine', querying whether such a requirement would be an unnecessary constraint on an employee's ability to freely exercise their right to make complaints although it was considered to be necessary to resolve this issue: *Shea v Energy Australia Services Pty Ltd* (2014) 242 IR 159, 163 [12]–[13] (Rares, Flick and Jagot JJ),. However, all three of the judges in the case of *PIA Mortgage Services Pty Ltd v King* (2020) 274 FCR 225 ('*PIA Mortgage*') seem to have endorsed the need for a complaint to be made genuinely, in good faith and for a proper purpose, to fall within the scope of s 341(1)(c)(ii) of the *FW Act*: at 232–3 [26] (Rangiah and Charlesworth JJ), 252–3 [137] (Snaden J).

105 *FW Act* (n 34) s 6(1).

106 Ibid s 14(1).

107 *Quickenden v O'Connor* (2001) 109 FCR 243, 261–2 [51]–[52] (Black CJ and French J). It is noted that while pt 3-1 of the *FW Act* uses the ordinary meaning of employee, the scope of the Part is restricted by a constitutional connection requirement: see *FW Act* (n 34) ss 15, 335, 338.

108 It is noted that the term 'whistleblower' does not appear to have a standard definition at common law or under statute: see Paul Latimer and AJ Brown, 'Whistleblower Laws: International Best Practice' (2008) 31(3) *University of New South Wales Law Journal* 766, cited in Ian Freckelton, *Scholarly Misconduct: Law, Regulation, and Practice* (Oxford University Press, 2016) 458.

Interestingly and as explained at the beginning of this article, in the action brought by Associate Professor Gerd Schröder-Turk against Murdoch University, the Associate Professor sought to rely on both the protections provided to him as a consequence of his right to academic freedom and those provided to him under the *WA PID Act*. The case would likely have been the first case considering the application of the *WA PID Act* had it proceeded to a final hearing.[109] However, Western Australia is not unique in having whistleblower protection legislation. All states and territories and the Commonwealth have legislation in similar terms, all (with the exception of the Northern Territory) going by the name *Public Interest Disclosure Act* or *Public Interest Disclosures Act* (together referred to in this article as '*Public Interest Disclosure Legislation*').[110] The purpose of these various Acts as set out in their long titles is to facilitate disclosure of 'public interest information' and to protect those who disclose such information, being the whistleblowers.[111]

However, a definition adopted by the *Whistling while They Work* study of public interest whistleblowing in Australian public sector agencies, being that of Marcia Miceli and Janet Near, is the 'disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action': Peter Roberts, AJ Brown and Jane Olsen, *Whistling while They Work: A Good-Practice Guide for Managing Internal Reporting of Wrongdoing in Public Sector Organisations* (ANU Press, 2011), quoting Marcia Parmerlee Miceli and Janet P Near, 'The Relationships among Beliefs, Organizational Position, and Whistle-Blowing Status: A Discriminant Analysis' (1984) 27(4) *Academy of Management Journal* 687, 689. This definition was described as a 'succinct academically recognised definition of whistleblowing' in the 2009 Standing Committee on Legal and Constitutional Affairs report on whistleblowing: House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Whistleblower Protection: A Comprehensive Scheme for the Commonwealth Public Sector* (Report, February 2009) 24 [2.19].

109 This was submitted by Associate Professor Schröder-Turk in his case against Murdoch University: *Schröder-Turk* (n 2) [47] (Jackson J).

110 *Public Interest Disclosure Act 2013* (Cth) ('*Cth PID Act*'); *Public Interest Disclosure Act 2012* (ACT) ('*ACT PID Act*'); *Public Interest Disclosures Act 1994* (NSW) ('*NSW PID Act*'); *Independent Commissioner Against Corruption Act 2017* (NT) ('*NT ICAC Act*') pt 6; *Public Interest Disclosure Act 2010* (Qld) ('*Qld PID Act*'); *Public Interest Disclosure Act 2018* (SA) ('*SA PID Act*'); *Public Interest Disclosures Act 2002* (Tas) ('*Tas PID Act*'); *Public Interest Disclosures Act 2012* (Vic) ('*Vic PID Act*'); *Public Interest Disclosure Act 2003* (WA) ('*WA PID Act*'). For protection of public sector employees: see, eg, *Government Sector Employment Act 2013* (NSW) s 69(1) (definition of 'misconduct' para (b)). For protection of whistleblowers who report corruption of trade unions or employer organisations or their officials: see, eg, *Fair Work (Registered Organisations) Act 2009* (Cth) ss 337A–337D. For protection of private sector whistleblowers: see, eg, *Corporations Act 2001* (Cth) pt 9.4AAA. However, this article confines its discussion of statutory whistleblowing laws to the *Public Interest Disclosure Legislation*.

111 However, it is noteworthy that the *WA PID Act* (n 110) is unique in that its long title states that its purpose is to also provide protection for the subject of public interest disclosures, being those against whom the whistle is blown. The long title of the *WA PID Act* states: '[a]n Act to facilitate the disclosure of public interest information, to provide protection for those who make disclosures and for those the subject of disclosures, and, in consequence, to amend various Acts, and for related purposes.'

The *Public Interest Disclosure Legislation* prohibit any reprisal against whistleblowers, making any such measures punishable as an offence.[112] Other protections provided to the whistleblower under the legislation include: the whistleblower being granted immunity from civil or criminal liability (including administrative processes such as disciplinary action) for simply having made the protected disclosure;[113] unenforceability of confidentiality provisions against the whistleblower which would have otherwise been breached due to the disclosure;[114] and a defence to defamation.[115]

However, the protection provided by the *Public Interest Disclosure Legislation* is limited in that it is only provided in circumstances where the information that is disclosed by the whistleblower is in the 'public interest' and is disclosed to a person nominated for the receipt of such disclosure by the public entity to which the disclosure relates (usually, the chief executive or public officer of the public entity),[116] or in the Northern Territory, to the established office of Independent Commissioner against Corruption.[117] What amounts to information that is in the 'public interest' is not uniformly defined across the jurisdictions. However, a common theme is conduct (variously referred to as 'improper conduct', 'corrupt conduct' or 'disclosable conduct') that has been engaged in by a public body or public personnel in relation to the performance of their public function involving illegal activity, maladministration, misuse of public resources, posing a danger to

112 *Cth PID Act* (n 110) ss 13–19A*; ACT PID Act* (n 110) ss 40–2; *NSW PID Act* (n 110) ss 20–20B; *NT ICAC Act* (n 110) ss 100–101; *Qld PID Act* (n 110) ss 40–2; *SA PID Act* (n 110) s 9; *Tas PID Act* (n 110) ss 19–22; *Vic PID Act* (n 110) ss 43–7; *WA PID Act* (n 110) ss 14–15.

113 *Cth PID Act* (n 110) s 10(1)(a)*; ACT PID Act* (n 110) ss 35(b)–(c); *NSW PID Act* (n 110) s 21(1); *NT ICAC Act* (n 110) s 99(1); *Qld PID Act* (n 110) s 36; *SA PID Act* (n 110) s 5(1); *Tas PID Act* (n 110) s 16; *Vic PID Act* (n 110) s 39; *WA PID Act* (n 110) s 13.

114 *ACT PID Act* (n 110) s 35(a)(i); *NSW PID Act* (n 110) s 21(2); *NT ICAC Act* (n 110) s 99(3); *Qld PID Act* (n 110) s 37; *SA PID Act* (n 110) s 5(2); *Tas PID Act* (n 110) s 17; *Vic PID Act* (n 110) s 40; *WA PID Act* (n 110) s 13(b)(iv). The *Cth PID Act* (n 110) does not expressly refer to confidentiality but provides that 'no contractual or other remedy may be enforced, and no contractual or other right may be exercised, against the individual on the basis of the public interest disclosure', which arguably may cover confidentiality provisions in contracts: at s 10(1)(b).

115 In some jurisdictions, this defence is provided for on the ground of privilege: see, eg, *Cth PID Act* (n 110) s 10(2)(a); *ACT PID Act* (n 110) s 36; *NSW PID Act* (n 110) s 21(3); *NT ICAC Act* (n 110) s 99(2); *Qld PID Act* (n 110) s 38; *Vic PID Act* (n 110) s 41. However, arguably, such a defence is available in all jurisdictions on the basis of general immunity to civil action: see, eg, *SA PID Act* (n 110) s 5(1); *Tas PID Act* (n 110) s 17; *WA PID Act* (n 110) s 13. These Acts do not have privilege provisions, but, like the other jurisdictions, have blanket civil immunity provisions.

116 *Cth PID Act* (n 110) s 26; *ACT PID Act* (n 110) ss 14–15; *NSW PID Act* (n 110) s 8; *NT ICAC Act* (n 110) s 93(1)(b)(xv); *Qld PID Act* (n 110) s 17(1); *SA PID Act* (n 110) ss 5(3)–(5); *Tas PID Act* (n 110) ss 6–7A; *Vic PID Act* (n 110) ss 12(1)–(2); *WA PID Act* (n 110) s 5(1).

117 See *NT ICAC Act* (n 110) ss 93(1)(a), (1)(b)(i). In a number of jurisdictions, disclosure can also be made to other public authorities such as, for example, the ombudsman: see, eg, *ACT PID Act* (n 110) ss 11, 15; *NSW PID Act* (n 110) s 11; *Tas PID Act* (n 110) s 7; *WA PID Act* (n 110) s 5 (referred to as the 'Parliamentary Commissioner'); *NT ICAC Act* (n 110) s 93(1)(b)(ii); *Vic PID Act* (n 110) s 13(2)(b); and corruption commissions: see, eg, *NSW PID Act* (n 110) s 10; *Qld PID Act* (n 110) s 19; *Vic PID Act* (n 110) s 13(2)(a); *WA PID Act* (n 110) s 5.

public health and safety, and the environment.[118] For example, s 3(1) of the *WA PID Act* defines 'public interest information' to mean

> information that tends to show that, in relation to its performance of a public function (either before or after the commencement of this Act), a public authority, a public officer, or a public sector contractor is, has been, or proposes to be, involved in —
>
> (a) improper conduct; or
>
> (b) an act or omission that constitutes an offence under a written law; or
>
> (c) a substantial unauthorised or irregular use of, or substantial mismanagement of, public resources; or
>
> (d) an act done or omission that involves a substantial and specific risk of —
>
> (i) injury to public health; or
>
> (ii) prejudice to public safety; or
>
> (iii) harm to the environment;
>
> or
>
> (e) a matter of administration that can be investigated under section 14 of the *Parliamentary Commissioner Act 1971*[119]

Further, the *Public Interest Disclosure Legislation* does place other restrictions on the disclosure of public interest information. Most relevantly, it generally restricts the disclosure of such information so that the whistleblower is only able to disclose it if they 'believe on reasonable grounds' that the information is true or may be true.[120] In New South Wales and Queensland, there is a further requirement that the whistleblower's belief in the truth of the information be 'honest'.[121] It is noted that the ACT, Tasmania and the Northern Territory do not appear to have anything in their legislation requiring an honest or reasonable belief (or any other form of belief) on the part of the discloser about the truth or possible truth of the matters proposed to be disclosed. However, in all jurisdictions, the 'whistleblower' will lose any protection provided under the legislation and may even be guilty of an offence if they knowingly make a false or misleading disclosure under the *Public Interest Disclosure Legislation*.[122]

118 *Cth PID Act* (n 110) s 29; *ACT PID Act* (n 110) ss 7–8; *NSW PID Act* (n 110) s 8; *Qld PID Act* (n 110) ss 12–13; *SA PID Act* (n 110) s 4 (definition of 'public interest information'); *Tas PID Act* (n 110) s 6; *Vic PID Act* (n 110) s 9; *WA PID* Act (n 110) s 3 (definition of 'public interest information').

119 *WA PID Act* (n 110) s 3(1) (definition of 'public interest information').

120 See, eg, *Cth PID Act* (n 110) s 26(1)(c)*; NSW PID Act* (n 110) ss 10–12D, 13–14; *Qld PID Act* (n 110) ss 12–13, 19; *SA PID Act* (n 110) s 5; *Vic PID Act* (n 110) s 21(1)(b)(ii); *WA PID Act* (n 110) s 5(2).

121 *NSW PID Act* (n 110) ss 10–12D, 13–14; *Qld PID Act* (n 110) ss 12–13, 19.

122 *Cth PID Act* (n 110) s 11; *ACT PID Act* (n 110) s 37; *NSW PID Act* (n 110) s 28; *NT ICAC Act* (n 110) s 92(2); *Qld PID Act* (n 110) ss 66–7; *SA PID Act* (n 110) s 10; *Tas PID Act* (n 110) s 87; *Vic PID Act* (n 110) ss 72–3; *WA PID* Act (n 110) s 24.

As explained, the *Public Interest Disclosure Legislation* only permits disclosure of 'public interest information' and only to a limited number of persons. Interestingly, in Western Australia, there is even effectively a statutory gag in place against the whistleblower once a complaint has been lodged prohibiting the disclosure of the identity of the target of the whistleblowing,[123] with a breach of these gagging prohibitions being a criminal offence with a penalty of $24,000, or 2 years imprisonment.[124] In certain jurisdictions, disclosure is permitted to a journalist but only if the relevant authority to whom disclosure has been made: fails to investigate the matter; or does not advise within a certain time period from when disclosure is made that it is going to investigate the matter; or fails to either complete the investigation within a certain time period or report on the outcome of the investigation upon its completion; or having investigated the matter, does not propose to take any action.[125]

In most jurisdictions, universities are defined as 'public sector' or 'public body' entities and are expressly subject to the *Public Interest Disclosure Legislation*.[126] Therefore, *Public Interest Disclosure Legislation* can provide protection for academics engaging in intramural criticism of the universities at which they are employed, but only insofar as: a) the criticism relates to 'public interest information'[127] and disclosure is only made to the appropriate authority and not to a journalist unless permitted; and b) the academic has a reasonable or honest and reasonable basis for their belief that the information on which their criticism is founded is true or may be true, or in ACT, Tasmania and the Northern Territory, at the very least, they do not knowingly make a false or misleading disclosure.

In view of the above, *absent any express right to criticise their employer, whether in the form of a right to academic freedom or otherwise,* it would appear that an academic staff member who expressed criticism in relation to their university would be seriously limited in doing so. At common law, their criticism would need to relate to a 'crime, civil wrong or serious misdeed of public importance' and be voiced to a 'proper authority'; under the *FW Act*, it would need to be made in the exercise of a 'workplace right' and: (i) made to an external authority capable of seeking compliance with a workplace law or instrument; or, (ii) if it related to the academic's employment, arguably made for the proper purpose of investigation or redress, with the 'grievance, finding of fault or accusation' genuinely held or

123 *WA PID Act* (n 110) s 16(3). There is no equivalent provision in other Australian jurisdictions. It is beyond the scope of this article to explore why this State has imposed such punitive measures to protect the privacy of those persons reported by whistleblowers.

124 Ibid.

125 See *ACT PID Act* (n 110) ss 27, 27A; *NSW PID Act* (n 110) s 19; *Qld PID Act* (n 110) s 20; *SA PID Act* (n 110) s 6; *WA PID Act* (n 110) s 7A(2).

126 See, eg, *Qld PID Act* (n 110) s 6(1)(h); *Tas PID Act* (n 110) s 4(1)(ga).

127 Associate Professor Gerd Schröder-Turk clearly considered his criticism relating to Murdoch University's waiving of English proficiency requirements in order to increase international student enrolments to be 'public interest information'. Although the specific basis he sought to argue this is unclear from the case, it is likely that he would have asserted that it involved 'improper conduct' or conduct involving possible maladministration and abuse of public funds.

considered valid by the academic; or constitute criticism made in the course of advancing the agenda of an industrial association; under the *Public Interest Disclosure Legislation*, it would need to be criticism that was 'public interest information' and only disclosed to the appropriate authority (and in certain limited circumstances, to a journalist) and generally be based on an honest and reasonable belief.

It now becomes necessary to explore whether academics have any express rights in their employment agreements allowing them to criticise their universities. As will be explained in the next part of the article, prior to the Model Code as found by French in his *Review*, academic staff generally did have express rights to academic freedom as provided for in their enterprise agreements (and other university documentation). However, these rights did not generally extend to allowing academics to criticise the university that employed them.

IV THE RIGHTS OF ACADEMIC STAFF TO ACADEMIC FREEDOM AND TO CRITICISE THEIR UNIVERSITIES PRIOR TO THE MODEL CODE

As explained in the *Review*, the *Australian Constitution* does not expressly provide for the protection of academic freedom.[128] Neither does academic freedom constitute a common law freedom.[129] Indeed, academic freedom has seldom been discussed in Australian courts.[130] Yet despite the lack of any constitutional or common law right to academic freedom, French found that references to academic freedom are incorporated into university statutes, delegated legislation, EAs, non-statutory codes of conduct, and policies and principles, albeit that these references lack uniformity.[131] It is noted that although academic freedom may also be referred

128 French (n 10) 123. French noted that there are countries in which constitutional protection is given to academic freedom. The *Australian Constitution* also does not provide for the protection of freedom of speech although there is an implied constitutional freedom of political communication which imposes limits on legislative and executive power which was first recognised by the High Court in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 and has since been affirmed and further developed in a line of authorities, notably *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1; *McCloy v New South Wales* (2015) 257 CLR 178; *Brown v Tasmania* (2017) 261 CLR 328; and most recently in *Comcare v Banerji* (2019) 267 CLR 373.

129 On the other hand, *freedom of speech* does constitute a common law freedom and has even come to be characterised by the High Court as a 'fundamental right' (albeit limited and not an absolute right): see *Cunliffe v Commonwealth* (1994) 182 CLR 272, 363 (Dawson J), cited in French (n 10) 102–3.

130 Several cases where academic freedom has been considered although not specifically defined, have included: *Burns v Australian National University* (1982) 40 ALR 707, 717–18 (Ellicott J); *R v McMahon; Ex parte Darvall* (1982) 151 CLR 57, 67 (Mason CJ); *University of Western Australia* (n 72); *Gramotnev v Queensland University of Technology* [2013] QSC 158; *Will v Deakin University* [2015] FWC 3130; *Christos v Curtin University of Technology [No 2]* [2015] WASC 72; *National Tertiary Education Industry Union v Griffith University* [2019] FWC 3488; *Ridd v James Cook University* (2019) 286 IR 389; *James Cook University v Ridd* (2020) 278 FCR 566; *National Tertiary Education Industry Union v University of Sydney* (2020) 302 IR 272.

131 French (n 10) 133–85.

to in an academic's employment contract, making any provisions relating to it enforceable under basic contract law principles, it is unlikely to be expressly included. Indeed, as Jackson has observed, 'modern academic contracts are generally standard form documents created in large and reasonably sophisticated university human resource offices'.[132]

Australian universities are established under legislation as corporate entities.[133] Universities and their staff and students are required to act in accordance with this legislation and any delegated legislation (eg regulations or by-laws) made under this legislation.[134] If this legislation provides for a right on the part of academic staff to exercise academic freedom including the right to criticise their universities, this right will be enforceable under the legislation.[135]

In the *Review,* French found that several of the statutes that have incorporated and regulate universities do contain provisions which refer directly or indirectly to academic freedom, with these references generally being found in the objects or functions clauses of this legislation.[136] Many of these clauses provide for the promotion of 'free inquiry' and the 'advancement of knowledge informed by … inquiry' as objects and functions respectively of the relevant universities.[137] Others provide for the university's functions to include the 'advanc[ement] and transmi[ssion] of knowledge, by undertaking research and teaching of the highest quality'.[138] However, these clauses would seem to be merely aspirational. Indeed, French observed that while these Acts 'acknowledge freedom of inquiry and academic freedom', '[t]hey do not, in terms, restrain rule-making powers by reference to those considerations'.[139] Similarly, French found that the delegated legislation of many Australian universities, such as their by-laws, regulations,

132 Jim Jackson, 'Express Rights to Academic Freedom in Australian Public University Employment' (2005) 9 *Southern Cross University Law Review* 107, 144.

133 For example, the University of Western Australia was established under the *University of Western Australia Act 1911* (WA) s 3 and is a body corporate pursuant to s 6 of the Act. Further examples include *University of Sydney Act 1989* (NSW) s 5; *University of Adelaide Act 1971* (SA) s 4(3); *Deakin University Act 2009* (Vic) s 4; *University of Queensland Act 1998* (Qld) s 4.

134 For a discussion of the establishment of universities and their governance structures, see Joan Squelch, 'The Legal Framework of Higher Education' in Sally Varnham, Patty Kamvounias and Joan Squelch (eds), *Higher Education and the Law* (Federation Press, 2015) 4.

135 This right could be enforceable either expressly or by necessary implication by the language used in the legislation itself or by prerogative writ such as mandamus or injunction if the legislation appeared to create a duty or legitimate expectation on the part of the university that they would recognise a right of academic freedom but failed to do so.

136 See, eg, *University of Sydney Act 1989* (NSW) s 6. See also French (n 10) 133, citing *Macquarie University Act 1989* (NSW), *Southern Cross University Act 1993* (NSW), *University of Newcastle Act 1989* (NSW) and *University of New England Act 1993* (NSW).

137 French (n 10) 133.

138 See, eg, *Australian National University Act 1991* (Cth) s 5, cited in ibid 134.

139 French (n 10) 137.

statutes and rules[140] also include references to academic freedom.[141] However, these references can again be seen as merely aspirational, providing for a commitment to, and a 'safeguarding' of academic freedom by Academic Boards,[142] although not imposing any specific duties on them or any specific rights on academic staff. The apparent findings of the *Review* were that neither the enabling nor the delegated legislation of Australian universities confer any express rights to academic freedom on academic staff.

However, French did find in the *Review* that most university EAs appear to contain provisions expressly relating to the rights of staff to academic freedom.[143] Indeed, French noted that 36 out of the 38 EAs that were examined contained such provisions,[144] albeit with limitations and taking slightly different forms. Many of these limitations could be interpreted as curtailing an academic's right to criticise their universities.[145] French observed that 18 of the 38 EAs considered in the *Review* included restrictions on any right of academic staff to academic freedom through misconduct clauses prohibiting staff from engaging in activities 'which injure the reputation, viability and profitability of the university'.[146] Although the question could be asked as to how injury to a university's 'reputation' or 'viability' is to be assessed,[147] public criticism of a university would likely fall within the ambit of these prohibitions. Other limitations on academic freedom as found in the *Review* that are contained in the provisions of many university EAs could also serve to restrict any denigration of a university by its staff. For example, these provisions typically include a right to 'freedom of opinion and expression',[148] albeit that this right is limited to conduct that does not 'harass, intimidate or

140 French noted that some of the university documents described as 'regulations' or 'rules' are not delegated legislation but merely administrative in nature: ibid 138.

141 Ibid.

142 See, eg, University of Sydney, *University of Sydney (Academic Board) Rule 2017* (at 1 January 2021) r 2.1, cited in French (n 10) 139. However, universities such as the Australian National University might argue that their *Academic Board Charter* goes further than this in providing for the Board's responsibilities to include the 'develop[ment] and promot[ion] [of] principles pertaining to academic freedom': see Australian National University, *Academic Board Charter* (at 5 October 2018) r 12, cited in French (n 10) 138.

143 French (n 10) 177. It is noted that in certain instances the term 'intellectual freedom' seems to have been used interchangeably with 'academic freedom' in these EAs.

144 French (n 10) 177. French identified the two university EAs in which references could not be found as being the *RMIT University Enterprise Agreement 2018* and the *University of Southern Queensland Enterprise Agreement 2014–2017*.

145 There was only one EA examined as part of the *Review*, being the *Victoria University Enterprise Agreement 2013*, that appeared to place no express restrictions on academic staff when exercising their rights: French (n 10) 180.

146 French (n 10) 180.

147 This was a question posed by French in relation to similar provisions in several university non-statutory codes. He asked: 'Is it the Vice-Chancellor's view or that of the governing body, or some university official, or a survey of public opinion?': French (n 10) 149.

148 See, eg, *University of Newcastle Academic Staff Enterprise Agreement 2014* cl 23.0, quoted in French (n 10) 177.

vilify'.[149] Criticism of a university could in certain circumstances be considered to be in contravention of a prohibition against conduct that 'vilifies'. Further, provisions limiting the right of academic staff to academic freedom only within their discipline areas could be interpreted as allowing, for example, a lecturer in management but not one in medicine to criticise the management practices of the university.[150]

In his *Review,* French found that other non-contractual, non-statutory documents issued by universities such as university codes of conduct also contain references to academic freedom. Twenty four of the 33 staff conduct codes examined by French contained provisions that concerned academic freedom, with several universities also having their own separate policies on academic freedom.[151] Twenty seven of these codes made reference to 'freedom of expression and public comment'.[152] As explained by French, the codes that expressly referred to academic freedom generally required academics to assume 'responsibilities and obligations' in relation to it,[153] such as a responsibility to refrain from 'derid[ing] or defam[ing] individuals, groups or the University', or from 'ignor[ing] the policies or decisions that have been formally made within the University community, or those which the University is required to observe at law'.[154] Relevant to this article, the *Review* found that several of the codes also contained provisions requiring their academic staff to '[uphold] institutional reputation'.[155] These included clauses such as the following: '[Y]ou 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.'[156] Although academic staff may be required to comply with these non-statutory instruments under their implied duty to obey their employer, the legal effect of these instruments will generally be dependent on whether they are incorporated into a university employment contract or EA (or the employment contract or EA is clearly on its terms intended to be interpreted and applied in accordance with the instrument, as was considered by Rangiah J to be

149 French observed that 34 of the EAs examined in the *Review* contained provisions restricting discussion by academic staff by prohibiting them from engaging in harassing, intimidating or vilifying conduct and requiring that they express their views consistently with the university's code of conduct: see French (n 10) 178–9.

150 This example is inspired by, and is very similar to, one given by Jackson: see Jackson, 'Dismissal' (n 80) 37–8.

151 French (n 10) 144. See also at 156–7.

152 Ibid 147.

153 Ibid 145.

154 See, eg, Federation University Australia, *Staff Code of Conduct* (at 1 December 2015), cited in ibid.

155 French (n 10) 144.

156 See Western Sydney University, *Code of Conduct* (at 27 August 2015) cl 12, quoted in ibid 148.

the case in *James Cook University v Ridd*)[157] and possess contractual or statutory status.[158]

In view of the above, prior to the Model Code, the primary sources of the protection of academic freedom in Australian universities were EAs,[159] albeit with significant limitations. As to the question of whether a contractual term incorporating principles of academic freedom could be implied into an academic's employment contract in the absence of any express right to academic freedom, French took the view that '[g]iven the lack of consensus on a precise definition, [an academic freedom term] is unlikely to be implied' in university employment contracts or EAs.[160] This was despite his recognition of the 'distinctive character' of universities and the 'distinctive relationship of academic staff and universities'.[161] Nevertheless, it is worth noting that others, such as Jackson, have previously argued that such a contractual term could be implied.[162] However, Jackson was of the view that any such term would be limited by a duty on the academic to act in a 'responsible and professional manner'.[163]

What is the situation where there is an express right to academic freedom but no express provision in a university employment contract, EA or binding non-statutory document limiting the ability of an academic to criticise the practices of the university at which they are employed? Would an academic be free in these circumstances to publicly call out any matter of concern that they perceived was taking place within the university or would such criticism be inconsistent with their implied duties to their employer, such as the duty of fidelity, confidentiality and the duty to obey a lawful and reasonable direction?[164] The tension between academic freedom and these implied employment duties was acknowledged by the

157 See Rangiah J's interpretation of the status of James Cook University's Code of Conduct in *James Cook University v Ridd* (2020) 278 FCR 566, 617–18 [249]–[250].

158 Jackson has explained that such non-statutory instruments may also be enforceable by means of an action for estoppel, unfair dismissal or other legal cause: Jackson, 'Legal Rights' (n 16) 226–8. Of course, the nature of the action brought will depend on the identity of the party seeking to enforce their terms.

159 Jackson, 'Implied Rights' (n 16) 139–40.

160 French (n 10) 41.

161 Ibid 18, 221–2. This is consistent with French J's views in *University of Western Australia v Gray [No 20]* (2008) 246 ALR 603, affd *University of Western Australia* (n 72).

162 In Jackson's view, his proposed 'qualified' academic freedom term would be likely to be implied in fact, using the business efficacy test, into an Australian university employment contract and could also be implied by law or as a result of the status of academics as 'members' of a university in addition to their status as employees, as explained above: see Jackson, 'Implied Rights' (n 16).

163 Ibid 198.

164 As noted by Helen Fleming, employees also owe their employers a 'duty of good faith' which includes a duty to alert their employer to any 'misconduct or corruption' occurring within the workplace: Helen Fleming, '"The Next Two Decades are Going to Be Transparency": Regulatory Challenges for Universities' in Sally Varnham, Patty Kamvounias and Joan Squelch (eds), *Higher Education and the Law* (Federation Press, 2015) 64, 71. However, as this paper is primarily concerned with public criticism being expressed by academics to people external to their employer, this paper extends beyond this duty.

Full Court of the Federal Court in *University of Western Australia v Gray*.[165] The Court made reference to academic freedom 'sit[ting] 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'.[166]

In line with his view that an academic freedom term might be implied into an Australian university employment contract, Jackson considered that in the absence of an express legally binding provision prohibiting the ability of an academic to criticise the practices of the university at which they are employed, an academic would have the right to criticise the university.[167] In his view, such criticism would be consistent with the university's 'knowledge discovery and dissemination' function generally referred to in the legislation incorporating universities and in this way, would not likely be limited by any implied duty of fidelity, confidentiality or to obey a lawful and reasonable direction.[168] However, in Jackson's words, 'academic freedom can never carry with it a right to tell an untruth'.[169] In his view, 'assertions about the management of a university would place a heavy onus on the academic to prove the assertion'[170] or 'at least that the claim was made in circumstances where an academic acting honestly and professionally would be justified in making the public assertion about their university'.[171] He argued that a failure of the academic to act honestly and professionally in making such a statement would possibly constitute misconduct because the criticism would unjustifiably adversely affect the credibility of their university and their academic colleagues and in this way, impede the academic freedom of these colleagues.[172]

In light of French's view that an academic freedom term is unlikely to be implied in an Australian university employment contract, it is unlikely that academics would have any additional implied right to criticise the practices of their employers than other employees without any express right to academic freedom unless it could be proven that their university membership status (as discussed above) provided them with such a right. In the event that an academic did have the benefit of an express right to academic freedom with no explicit limitations on the right to criticise, the extent of the academic's right to criticise their university would depend upon the construction of any express right that they had to academic freedom. The authors agree, though, with Jackson's abovementioned proposition

165 *University of Western Australia* (n 72).

166 Ibid 389 [186] (Lindgren, Finn and Bennett JJ).

167 Jackson, 'Dismissal' (n 80) 27–9, 40.

168 Ibid 37.

169 Ibid.

170 Ibid.

171 Ibid 40.

172 Ibid 37.

that 'academic freedom can never carry with it a right to tell an untruth',[173] and suggest that an express right to academic freedom should always be tempered by that consideration.

However, as explained, it was found in the *Review* that any express rights to academic freedom enjoyed by staff were generally subject to express limitations inhibiting their rights to criticise their universities. Therefore, prior to the Model Code, the freedom of academic staff to criticise their universities was limited to a very narrow range of situations and such criticism was generally only able to be voiced to a very narrow audience. Specifically, and as noted above, it would generally have needed to: (a) relate to a 'crime, civil wrong or serious misdeed of public importance' and be voiced to a 'proper authority' for any protection to be granted to them under common law; (b) be made in the exercise of a 'workplace right' in the form of a 'grievance, finding of fault or accusation' and: (i) made to an external authority capable of seeking compliance with a workplace law or instrument; or, (ii) if it related to the academic's employment, made to another but arguably only for the proper purpose of investigation or redress, with the 'grievance, finding of fault or accusation' genuinely held or considered valid by the academic; or constitute criticism made in the course of advancing the agenda of an industrial association for the *FW Act* to offer protection; or (c) be criticism that was 'public interest information' and only disclosed to the appropriate authority (and in certain limited circumstances, to a journalist) and generally based on an honest and reasonable belief to provide them with protection under the *Public Interest Disclosure Legislation*.

French has now prescribed the circumstances pursuant to which an academic should be free to criticise the university at which they are employed in the Model Code. The proposed effect of the Model Code on the freedom of academics to criticise their universities is considered below.

V THE EFFECT OF THE MODEL CODE ON ACADEMIC FREEDOM AND THE FREEDOM OF ACADEMIC STAFF TO CRITICISE THEIR UNIVERSITIES

As explained above, French considered that any Australian definition of academic freedom should encompass criticism of a university, with his proposed definition of academic freedom in the Model Code reflecting this, with 'academic freedom' being defined to include, relevantly '*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*'.[174]

173 Ibid.

174 French (n 10) 230–1 (emphasis added). As explained above, there was another element arguably relevant to criticism in the original definition proposed by French being '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', but this was subsequently removed in the revised version of the Model Code adopted by the UCC.

The authors note the ambiguity of the word 'opinion' — for example, it is unclear whether such 'opinions' of academic staff and students would need to have any factual basis.

Principle 3 of the Model Code provides that the enjoyment of academic freedom of academic staff and students (and therefore any right that they may have to criticise their university) is not restricted except by '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.[175]

As to those 'prohibitions, restrictions or conditions … imposed by the reasonable and proportionate regulation necessary to discharge the university's duty to foster the wellbeing of students and staff', the Model Code defines the 'duty to foster the wellbeing of students and staff' to include:

- 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; [and]

  …

- 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[176]

It further defines this duty as

> support[ing] reasonable and proportionate measures to prevent any person from using lawful speech which a reasonable person would regard, in the circumstances, as likely

175 Ibid 234. It is assumed that French intended the term 'regulation' to be interpreted in a broad sense and not in a narrow statutory one. The authors note that a determination of what might be a 'reasonable and proportionate regulation' in a particular situation is highly discretionary and very factually dependent and, in this way, might cause some uncertainty in academic circles. There is the possibility that academics might choose not to exercise academic freedom in certain circumstances out of fear that any of the restrictions imposed by a university on academic freedom might ultimately be deemed to be 'reasonable and proportionate' and constitute permitted 'prohibitions, restrictions or conditions' on academic freedom under the Model Code. However, further consideration of this issue is beyond the scope of this paper.

176 Ibid 232.

> to humiliate or intimidate other persons and which is intended to have either or both of those effects.[177]

However, this duty 'does not extend to a duty to protect any person from feeling offended or shocked or insulted by the lawful speech of another'.[178]

Notably, the Model Code expressly prohibits a university from finding the exercise of academic freedom, subject to the limitations referred to above, to constitute misconduct or impose any adverse consequences on any staff member or student who engages in it.[179]

It is clear that universities that meaningfully adopt the Model Code would be conferring a defined right on their academic staff members to academic freedom, including a right to express criticism of their university.[180] Although this right would not be unlimited, it is unclear whether any of its limitations would include those imposed on employees generally by common law and legislation. Specifically, in light of what has been discussed earlier in this article, would the academic need to ensure that any criticism related to either iniquitous conduct or was otherwise 'public interest information' or constituted a complaint made in the exercise of a workplace right for the proper purpose of investigation or redress or alternatively, that it advanced the agenda of an industrial association? Would they be limited to expressing this criticism to an appropriate authority and in limited circumstances, a journalist? Would they have to ensure they had a reasonable or honest and reasonable belief that the information on which their criticism was founded was true or could be true, or that their 'grievance, finding of fault or accusation' was genuinely held or considered to be valid? No such limitations are expressly contained in the Model Code.

It is useful to recall that the Model Code's objects provide for the removal of any unnecessary 'restrictions or burdens' to academic freedom[181] including upon the right of an academic to 'express their opinions in relation to the higher education

177 Ibid.

178 Ibid.

179 Ibid 234.

180 It is noted that the Model Code 'appears to preserve the paramountcy of [EAs] at the expense of the application of the Model Code' in that the Model Code does not contain any provision requiring universities to incorporate the principles of the Model Code into their workplace agreements: see Pnina Levine and Rob Guthrie, 'The Ridd Case and the Model Code for the Protection of Free Speech and Academic Freedom: Wins for Academic Freedom or Losses for University Codes of Conduct and Respectful and Courteous Behaviour?' (2020) 47(2) *University of Western Australia Law Review* 310, 323. However, French did intend that the 'code should also be at least a relevant consideration in the negotiation of enterprise bargaining agreements [and] employment contracts': French (n 10) 220. Given the limited enforceability of non-statutory documents as discussed earlier in this article, it may be that for a university to meaningfully adopt the Model Code and its principles, it would need to incorporate these principles in its EA.

181 French (n 10) 230.

provider in which they work or are enrolled'.[182] It is no surprise therefore that the scope of the proposed right of an academic to criticise their university as provided by the Model Code is extremely broad. This broad scope was confirmed by Professor (Emeritus) Sally Walker in the *Walker Review* with her recommendations that universities should remove from their definitions of 'academic freedom' any limitations that were not included in the Model Code's definition.[183] As referred to above, the Model Code does not even include what Jackson considered to be a vital constraint on any right to academic freedom, being, in effect, *the need to tell the truth or at least to act honestly and genuinely* (a need that has been acknowledged by Dodds-Streeton J in the Federal Court Case of *Shea*[184] and the Full Federal Court in the case of *PIA Mortgage Services Pty Ltd v King*[185] in relation to the *FW Act* and expressly recognised in the *Public Interest Disclosure Legislation*). It does not appear to impose any onus on an academic that publicly criticises the university to prove that their criticism is true or that the academic was acting 'honestly and professionally'[186] or, based on an 'honest' and 'reasonable' belief',[187] was justified in expressing it. Should the Model Code impose these limitations, or would they provide unnecessary restrictions on an academic's right to academic freedom?

Although there may be an argument that any regulation made by the university imposing a requirement of honesty and reasonableness on an academic that publicly criticises their university would be what is required for such regulation to be deemed 'reasonable and proportionate' and 'necessary to the discharge of the university's teaching and research activities',[188] whether such an argument would succeed is far from certain. Indeed, in the *Walker Review*, Professor Sally Walker distinguished between restrictions that are 'necessary' to achieve a purpose, and those that are 'desirable', commenting that the latter restrictions '[are] more permissive than the Model Code'.[189] It may be that a requirement for an academic to act honestly and reasonably in publicly criticising their university would be considered to be merely 'desirable' as distinct from 'necessary'.

It is the authors' view that there needs to be a balancing of the protection of the right of an academic to criticise their university and the protection of the reputation and credibility of these universities and the academic's colleagues. The need for such a balance has been recognised (and, as we have seen, applied) in the realm of whistleblowing protection. For example, in discussing whistleblowing in the 'scholarly sector'[190] as he described it, Professor Ian Freckelton QC stated:

182 Ibid 231.

183 Walker (n 12) 18.

184 *Shea* (n 97) 439 [623].

185 *PIA Mortgage* (n 104) 232–3 [26] (Rangiah and Charlesworth JJ), 252–3 [137] (Snaden J).

186 Jackson, 'Dismissal' (n 80) 37, 40.

187 See above nn 120–1.

188 French (n 10) 234.

189 Walker (n 12) 18 (emphasis omitted).

190 Freckelton (n 108) 497.

> This is not to create a system whereby those with grievances, malign vindictiveness, and rivalrous intent are given an unfair forum to make baseless accusations that can damage others' reputations and careers. It is important to acknowledge that the raising of such matters is intensely stressful, distressing, and potentially harmful to those the subject of such assertions. It needs to be clearly understood by all (and stated explicitly within any Bill of Whistleblowers' Rights) that accusations are no more than that and that the fact that they are raised by a colleague should not be regarded per se as lending them legitimacy. Such matters only have substance when they are properly proved within a system in which those the subject of whistleblowing have a fair and full opportunity to refute what is raised against them. In addition, where mala fides becomes apparent in the motives of whistleblowers, they must not be allowed to enjoy the benefit of protections of the usual legal kind, including immunity against defamation actions. This kind of balance (difficult though it is) is fundamental to a scheme that does not give undue weight to allegations and does not erode collegiality by creating a toxic culture of informing and informers.[191]

Surely, this is not the system that French desired to create with his Model Code either. Yet, examples do exist of academic staff making baseless, unjustified claims against universities[192] resulting in time consuming and costly litigation. Indeed, Freckelton has commented that 'a percentage of the "revelations" by whistleblowers are not well-founded'.[193]

The next section of this article proposes amendments to the Model Code to try and avoid some of the mischiefs identified by Professor Freckelton QC with respect to an academic taking advantage of the broad right to academic freedom provided to them under the Model Code to criticise their university (where they do so in such a way that does not enliven the *Public Interest Disclosure Legislation* as discussed with its relatively restrictive provisions). It is noted that although the laws of defamation may protect individuals from such mischief, these laws limit the ability of corporations and other organisations such as universities from suing for defamation.[194]

191 Ibid 498.

192 For example, the case of (former) Professor Paul Barach, who made serious allegations of corruption against the University of New South Wales after he was dismissed. After several years of litigation, Dr Barach unreservedly withdrew his allegations and issued written apologies to the university and several of its staff, which included an acknowledgment that these allegations were untrue: see a discussion of the matter in ibid (n 108) 489–90. Another example is that provided by Jackson, being the New Zealand matter of *Rigg v University of Waikato* [1984] 1 NZLR 149 ('*Rigg*'), in which Rigg, a senior lecturer, and a student, Buchanan, wrote an article in the student newspaper at the University of Waikato claiming that an isotope laboratory at the University had likely contributed to the deaths of several students from cancer. There was no evidence to sustain these claims and Rigg and Buchanan ultimately admitted to this in their written apologies: see Jackson, 'Dismissal' (n 80) 29–30, discussing *Rigg* (n 192). Interestingly and relevantly, the Commissaries tasked with writing the report on the matter by the University Visitor commented that academic freedom was not an 'uninhibited licence': *Rigg* (n 192) 207.

193 Freckelton (n 108) 490.

194 The defamation legislation in all jurisdictions provide that corporations that are not 'excluded corporations' (generally including non-for-profit corporations or corporations with fewer than

Before moving on, it is noted that as explained above, French considered it of 'fundamental importance' for academic staff to have the 'necessary freedom' 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.[195]

However, he did not consider that the same freedom should apply to academics holding senior administrative roles. In his view:

> 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.[196]

Perhaps French would not have an issue with the legality of Murdoch University's position in removing Associate Professor Schröder-Turk from its Senate body subsequent to his making public critical statements in relation to the university, given the Associate Professor's role as member of the University Senate. However, whether this is the case is unclear given that there was no suggestion (at least as far as the authors are aware) of Associate Professor Schröder-Turk having failed to commit to the implementation of any decision made by the Senate of Murdoch University.

VI RECOMMENDATIONS AND CONCLUSION

As has been explained in this article, it would appear that independently of any express right to academic freedom, academic staff have no clear additional common law or statutory right to criticise their university employer than other employees. Although prior to the Model Code, academic staff generally did have express rights to academic freedom as provided for in their enterprise agreements (and other university documentation), these rights did not generally extend to allowing academics to criticise the university that employed them.

The meaningful adoption of the Model Code and in particular its definition of academic freedom, a term thus far not clearly defined, will enhance the clarity of,

ten employees) have no cause of action in defamation: *Civil Law (Wrongs) Act 2002* (ACT) s 121; *Defamation Act 2005* (NSW) s 9; *Defamation Act 2006* (NT) s 8; *Defamation Act 2005* (Qld) s 9; *Defamation Act 2005* (SA) s 9; *Defamation Act 2005* (Tas) s 9; *Defamation Act 2005* (Vic) s 9; *Defamation Act 2005* (WA) s 9.

195 French (n 10) 216.

196 Ibid 118. As to a situation where criticism has been expressed by an academic who also holds a senior leadership position, French referred to the controversy resulting from the dismissal of the Executive Director of the School of Public Health at the University of Saskatchewan as a result of public complaints made by him in relation to 'resourcing cuts' by the university. Although the Professor was reinstated to his academic role, he was not returned to his administrative one: at 76.

and right to, academic freedom and also put beyond any doubt the fact that it includes the right of an academic to criticise their university with apparently little, if any, limitation. However, the authors question the desirability of having such an unrestricted right and whether providing an academic with far greater freedom to criticise their university than they would have otherwise had may have any unintended, detrimental consequences.

As has been explained above, the authors appreciate that French considered it of 'fundamental importance' for academic staff to have the 'necessary freedom' to 'transcend their status as employees effectively participating in the life of the institution' without being hamstrung by 'managerial concerns about "reputation" and "prestige" or the effect of their conduct on government and private sector funding or on particular philanthropic donors'.[197] However, the authors also recognise the need to protect the reputation and credibility of universities and their staff from 'baseless accusations' from 'those with grievances, malign vindictiveness, and rivalrous intent'.[198]

Stone and Evans have recently suggested that while the benefit of the doubt should be given to academics wherever possible, 'if an academic does do serious damage through malice, untruthfulness or reckless[ness] … then that conduct falls outside the protection of academic freedom'.[199] In keeping with these sentiments, the authors of this article suggest appropriate amendments to the Model Code to, at the very least, include a requirement for those criticising their universities to do so with integrity and accountability in much the same way as is expected under the *Public Interest Disclosure Legislation*. Hence, the definition of academic freedom contained in the Model Code[200] should be redrafted to read (proposed insertion is italicised):

> 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, *provided that where these opinions include matters of fact, that such opinions are based on the honest and reasonable belief that such facts are true.*

It is noted that the *Walker Review* did refer to some universities having 'included additional provisos or requirements that must be satisfied to support the exercise of freedom of speech or academic freedom' in their policies including, for example, requirements that freedom of speech and academic freedom 'must be "conducted reasonably, professionally and in good faith"'.[201] Others included a requirement 'to act "in a manner consistent with the University's values of integrity, respect, rational enquiry and personal excellence'" or a requirement that freedom of speech and academic freedom be exercised in accordance with the university's code of

197 Ibid 216.

198 Freckelton (n 108) 498.

199 Evans and Stone (n 40) 99.

200 French (n 10) 231.

201 Walker (n 12) 25.

conduct, which might include further requirements that staff: 'discharge their duties "for proper purpose"; engage in "constructive" criticism [or] "behave in a way that upholds the integrity and good reputation of the University"'.[202]

Professor (Emeritus) Sally Walker rejected these additional 'provisos and requirements' finding that:

> Provisos and requirements of this kind are imprecise; they could be interpreted so as to restrict the exercise of freedom of speech and academic freedom in a manner greater than that permitted by the Model Code. They leave room for evaluative judgments that are, as the French Review said, capable of eroding freedom of speech and academic freedom. [203]

While the authors agree that some of these additions do indeed 'leave room for the variable exercise of administrative discretions and evaluative judgments',[204] it is unlikely that the additional requirement for an academic who criticises their university to hold an 'honest and reasonable belief' as to the truth of any facts expressed as part of such criticism would leave much further room for the exercise of such administrative discretions and evaluative judgments than is already permitted by the Model Code. In this regard, it is worth noting that the word 'reasonable' already appears in the permissible restrictions to the enjoyment of academic freedom set out in the Model Code as referred to above. The Model Code also already allows for a consideration of a person's intention in making comment as part of these restrictions, defining the 'duty to foster the wellbeing of staff and students', as set out above, as including:

> [S]upport[ing] 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*.[205]

While recommending that the universities that had included the additional 'provisos and requirements' remove these limitations from their definitions of academic freedom, Sally Walker did leave open the possibility that these 'provisos' could be included as 'expectations'.[206] However, she was clear that there would be need for the university to clarify that any failure to meet these expectations would not constitute misconduct or result in any disciplinary action.[207] While this may seem ideal, it is difficult to see how any 'expectation' set by a university would be given any consideration by a disgruntled, vindictive staff member at a university who has reason to want to malign it and to damage its reputation, and that of their colleagues in the process. It is unlikely that any such 'expectation' would preclude

202 Ibid.

203 Ibid, citing French (n 10) 14.

204 French (n 10) 14.

205 Ibid 232 (emphasis added).

206 Walker (n 12) 26–7.

207 Ibid.

them from engaging in criticism of the university without any honest or reasonable belief in the matters to which that criticism pertains.

Although academic freedom should be 'treated as a defining value'[208] by universities, it surely should not serve as a licence for an academic to criticise with total impunity the university that employs them.

208 French (n 10) 230.