Couch Fires and Keg Parties: University Regulation of Student Conduct

James Christopher Little

A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (Honours) at the University of Otago, Dunedin, New Zealand

October 2015

ACKNOWLEDGMENTS

To my supervisor, Andrew Geddis, for your insightful feedback and rapid responses,

To my friends and flat mates over the past five years, for making my Otago experience truly incredible,

To Patrick Pethica, for being ever ready to discuss university discipline and provide critical feedback,

To Joel Clarke, for being a great friend as well as a considerate room mate,

To the members of the SOULS Harriers, for attending our revitalising Saturday morning runs,

And to Mary, Sam, mum and dad, for your last minute proof reading.

TABLE OF CONTENTS

INTRODUCTION

Universities are places of higher learning; places where degrees are earned and academic research is undertaken. In fulfilling this role, universities bring together thousands of students into one vicinity and thus provide the perfect conditions for young adults to cause mischief. Consequently, the residential areas surrounding a university are often places of debauchery, drinking and partying. This apparent dichotomy can be explained by two subcultures that reside within student culture: "academic" and "sociosexual".[1] The first refers to the official component of student life and the second to the unofficial "culture of partying, playing and partner pursuing".[2]

More often than not, mischief caused by students enjoying their sociosexual experience is harmless and in the name of good fun. At times, however, student antics cross into the realm of annoying or even criminal conduct that negatively affects the lives of other students and the local community. Media reports indicate that there has been no shortage of New Zealand university students who have transgressed into that realm in recent years. Christchurch City residents have blamed students from the University of Canterbury for vomit and faeces being left in public areas and bottle throwing;[3] students from Lincoln University were recently blamed for racial abuse at a rugby game;[4] students from the Victoria University of Wellington have been blamed for noisy music so unbearable that one resident reported "our quality of life has been

---

[1] Brett McEwan "Student culture and binge drinking" (Doctoral thesis, University of Canterbury, 2008) at 19, citing RD Ashmore and others *Dimensions and categories underlying thinking about college student types* (2007) 37(12) Journal of Applied Social Psychology at 2922.

[2] At 20, citing RD Asmore, FK Del Boca and M Beebe *"Alkie," "Frat Brother," and "Jock": perceived types of college students and stereotypes about drinking* (2002) 32(5) Journal of Applied Social Psychology at 885-907.

[3] "Wild Canterbury students plague neighbours" *Stuff.co.nz* (30 July 2015) < www.stuff.co.nz>.

[4] "Drunken Lincoln Uni mob blamed for racial taunts to Canterbury rugby player" *TVNZ* (28 July 2015) <www.tvnz.co.nz>.

affected";[5] and students of the University of Otago are regularly reported on in the media for couch burning[6] and out-of-control parties.[7]

As the number of students in the country increases, we might expect, all else remaining constant, that the incidence of student misbehaviour will also increase. The number of students between the ages of 18 and 24 enrolled in a bachelor's degree has risen by just over 15,000 between 2007 and 2014.[8] Addressing misbehaviour is therefore an increasingly important concern for universities and the communities within which they are placed.

Where conduct is criminal in nature it may attract police attention. However, there is another possible method with which to address student debauchery: university regulation. Under s 194(1)(a) of the Education Act 1989, universities have the power to make regulations for the "good government and discipline" of the university. Clearly this is intended to allow universities to make regulations governing behaviour in lectures, parking around campus, use of libraries and so on. Most universities in New Zealand exercise the power afforded under s 194 for exactly these kinds of purposes. Arguably, however, s 194 allows for more broad-reaching conduct regulations that tackle student misbehaviour both on-campus and in the community. The University of Otago has taken this very approach.

---

[5] Tommy Livingston "Battle between VUW students and neighbours" *The Dominion Post* (online ed, Wellington, 13 September 2015).

[6] "Otago students celebrate with couch fires" *3 News* (7 November 2012) <www.3news.co.nz>; Hamish McNeilly "Dunedin students' behaviour worse since controversial TV show aired: fire chief" *The Southland Times* (online ed, New Zealand, 21 February 2013); "Four arrests follow student couch fire party" *The New Zealand Herald* (online ed, Auckland, 21 February 2013); Hamish McNeilly "Heat turned up on couch fires" *Otago Daily Times* (online ed, Dunedin, 15 March 2013); and Timothy Brown, "Behave, students warned" *Otago Daily Times* (online ed, Dunedin, 6 February 2015).

[7] Michael Beaumont "Calls to end Dunedin scarfy party" *Stuff.co.nz* (28 February 2012) <www.stuff.co.nz>; Wilma McCorkindale "Planning to cork keg chaos" *The Southland Times* (online ed, New Zealand, 21 February 2013); Hamish McNeilly "Party students blamed for leaving Dunedin street 'like the Third World'", *The New Zealand Herald* (online ed, Auckland, 16 February 2015); "Hyde St party: Ambulance attack 'terribly disappointing'" *Stuff.co.nz* (22 March 2015) <www.stuff.co.nz>; and "Four arrests at drunken Dunedin party" *The New Zealand Herald* (online ed, Auckland, 20 April 2015).

[8] "Provider-based-Enrolments-2007-2014.xlsx" Education Counts <www.educationcounts.govt.nz>.

In 2007 the university changed its Discipline Regulations to include a Code of Student Conduct (The Otago Code).[9] This Code, with a few minor changes, is now contained within the University of Otago Student Discipline Statute 2011. The Otago Code applies both on-campus and off-campus.[10] Its introduction responded to escalating off-campus anti-social student behaviour and was not without opposition from students.[11] In 2006, just prior to The Otago Code coming into force, the Otago University Students' Association (OUSA) passed a motion opposing it on the basis that it was too harsh, risked exposing students to double jeopardy and did nothing to address issues in the student community.[12] Since it came into force, The Otago Code has been applied liberally to student conduct, including, for example, to disorderly behaviour in a central city bar and to fires lit by students outside of university property.[13] Other universities also have regulations that have the potential to be applied in a similar way, though these universities have not proceeded to do so.

In 2009, The Otago Code's validity was challenged in *Otago University Students' Association (Inc) v The University of Otago* (*OUSA v The University of Otago*).[14] OUSA contended that the university had acted beyond the powers conferred to it by the Education Act by regulating conduct that occurred off university premises at a non-university organised event. This proceeding brought university regulation of student behaviour into the limelight and received substantial national media attention.[15] The High Court interpreted the powers of universities under s 194(1)(a) broadly and held in favour of the university. The ruling brings to the forefront three issues that this paper will address:

---

[9] *University of Otago Calendar 2007* (University of Otago, Dunedin, 2006) at 221.
[10] University of Otago Discipline Statute 2011, cl 4.
[11] "University pours cold water on fiery antics with tough code of conduct" *The New Zealand Herald* (online ed, New Zealand, 13 September 2006) quoting Vice Chancellor David Skegg.
[12] OUSA Student General Meeting Agenda 13th May 2010 <www.ousa.org.nz>.
[13] See Chapter III (B).
[14] *Otago University Students' Association v The University of Otago* [2010] 2 NZLR 381 [*OUSA v The University of Otago*].
[15] Rebecca Todd "Student rioters could be expelled" *Stuff.co.nz* (15 September 2009) <www.stuff.conz>; "Court backs toga parade suspensions" *The New Zealand Herald* (online ed, Auckland, 6 November 2009); "Otago Uni code of conduct challenge abandoned" *3 News* (15 March 2010) <www.3news.co.nz>; and "Otago students drop code challenge" *The New Zealand Herald* (online ed, Auckland, 16 March 2010).

(1) the scope that universities should have to make regulations regarding conduct;

(2) the scope that universities currently do have to make regulations regarding conduct; and

(3) the way in which the law and regulations should be drafted in order to clarify point (2).

Because the University of Otago has been the most active university in pushing the scope of its regulatory jurisdiction, it plays an important role in analysing the above issues.

CHAPTER I: THE ROLE OF UNIVERSITIES IN MAKING CONDUCT REGULATIONS

A HISTORY AND INTERNATIONAL CONTEXT

Student misbehaviour and regulation by universities of student conduct are not new phenomena. Universities have been involved in disciplining students within and outside of university precincts for hundreds of years.

In medieval times universities enjoyed extensive and exclusive jurisdiction.[16] Scholars were viewed as a class removed from outside authority.[17] In 1390 Richard II confirmed the power of the chancellor to deal with:[18]

> "…all manner of personal pleas, of debts, accounts, and all other contracts and wrongs, of trespasses against the peace, misprisions and all other personal actions within the town of Oxford, its suburbs and any other place within the boundary of the University, excepting felony and mayhem, where a master or scholar ... is a party."

It has been suggested that students took advantage of this kind of exclusive jurisdiction in Britain and Europe to the extent that students "perpetuate[d] unlawful and criminal acts, atrociously wound[ed] or kill[ed] many persons, rape[d] women, oppress[ed] virgins, [and broke] into inns".[19] By the 19th century this kind of exclusive jurisdiction had become much less absolute.[20]

Moving forward in time to the 20th century, the medieval notion of universities as semi-autonomous jurisdictions was still evident. In Canada, at the University of Toronto, students' yearly initiations and Halloween celebrations were anticipated with

---

[16] Kelly Ke Luca "A Place Apart, University Students and Legal Authority in Toronto Circa 1900" (2014) 23 Educ & LJ 241 at 243.
[17] At 242.
[18] At 243 citing Calendar of the Charter Rolls Preserved in the Public Record Office, Vol. V (London: HMSO, 1916) at 320.
[19] At 243 citing "Criminal Clerks at Paris, 1269" in Lynn Thorndike *University Records and Life in the Middle Ages* (Columbia University Press, 1944; reprinted New York: Octagon Books, 1971) 19 at 79.
[20] At 244.

dread by the local community due to the brawls and property damage which invariably accompanied them.[21] Nevertheless the police would exercise leniency in relation to student misconduct, preferring to defer to the disciplinary procedures of the university.[22] In the United States universities also practiced wide disciplinary powers. Courts found that universities were justified in suspending students for contempt convictions[23] and because of an off-campus drug offence;[24] a university college was even held to have lawfully made a rule preventing its members from eating at a particular restaurant.[25] Other reasons for discipline or exclusion that have been upheld in the United States include fanatical atheism,[26] addiction to cigarettes,[27] and not being "a typical Syracuse girl".[28]

Misconduct at New Zealand universities has also been an ever-present issue that universities have at times taken upon themselves to deal with. In response to student misbehaviour the University of Otago Calendar of 1879 included among the functions of the Professional Board the responsibility "to deal with all questions relating to discipline of students".[29] Nonetheless "by 1900 the common view held by the Dunedin public, whether accurate or not, was that students as a whole were dissolute and drunken rouses…. This kind of public attitude has been commonplace throughout the university's history".[30] In 1894 the University of New Zealand even went as far as banning official graduation ceremonies due to bad student behaviour.[31]

Another example of an historical University of Otago regulation is a rule introduced to the Discipline Regulations in 1966 stating that students could only live in

---

[21] At 246.
[22] At 245 and 248.
[23] *Due v Florida Agricultural & Mechanical University* 233 F Supp (ND Fla 1963) at 396.
[24] *Paine v Board of Regents* 355 F Supp 199 (WD Tex 1972).
[25] *Gott v Berea College* 156 Ky 376, 161 SW 204 (1913).
[26] *In Robinson v University of Miami* 100 So 2d 442 (Fla App D3 1958).
[27] *Tanton v McKenney* 226 Mich 245, 197 NW 510, 33 ALR 1175 (1924).
[28] *Anthony v Syracuse University* 224 App Div 487, 231 NYS 435 (1928).
[29] D McLachlan "Students behaving badly: Student Discipline at the University of Otago" in *Culture of Change: Beginnings at the University of Otago* (University of Otago: Departments of English and History, Dunedin, 2006) 21 at 24, citing *University of Otago Calendar 1879* (Mills, Dick & Co, Dunedin, 1879) at 7.
[30] McLachlan, above n 29, at 26.
[31] David Lange "Capping it all off: A change of scene for the Capping Show" in *Culture of Change: Beginnings at the University of Otago* (University of Otago: Departments of English and History, Dunedin, 2006) 167 at 168.

residences the university approved of, except for their parents' house.[32] This particular clause was used by the university in 1967 to prevent a male from moving into a flat with three women students, a decision the Vice-Chancellor claimed was grounded upon the university's duty to create a "good environment" for students and because mixed flatting brought the university into disrepute. Students vigorously opposed this action as an intrusion upon their private affairs and basic right to determine their own living patterns. By 1990, however, the university had taken a much more minimalist approach to student regulation. The 1990 Discipline Regulations confined themselves to actions relating to disrupting teaching, obstructing academic work and misusing university property or services.[33] These regulations remained unchanged until 2007.[34]

Tensions relating to student conduct were not confined to the deep South. In 1967 the University of Auckland implemented comprehensive disciplinary regulations applying to behaviour both within and without the university precincts.[35] Included as prohibited conduct were actions having the effect of bringing the university or its members into disrepute.[36] Nonetheless, in the 1970s Auckland students "who simply wanted a good time asserted their place in the city with pub crawls and mass motorbike rides", which bar patrons resented and which caused publicans to complain of mess and breakages.[37]

B HOW UNIVERSITIES SHOULD REGULATE

---

[32] S Elworthy *Ritual Song of Defiance: A Social History of Students at the University of Otago* (Otago University Students' Association, Dunedin, 1990) at 105.
[33] *University of Otago Calendar 1990* (University of Otago, Dunedin, 1989) at 166.
[34] *University of Otago Calendar 2006* (University of Otago, Dunedin, 2005) at 211, compare with *University of Otago Calendar 2007* (University of Otago, Dunedin, 2006) at 211.
[35] *The University of Auckland Calendar 1967* (Auckland, 1967).
[36] Regulation 5(a).
[37] F Hercock *A Democratic Minority: A Centennial History of the Auckland University Students' Association* (Auckland University Press, Auckland, 1994).

For current purposes there are two different ways to conceptualise the relationship between a student and a university. Each justifies a different approach to regulation:[38]

Vision 1: Students are an integral component of the university. The university provides education services but is also a social institution and has an important role to play in the lives of those students who attend the university and in managing the impact that students have on the rest of society. Behavioural requirements are part and parcel of this extended social capacity.

Vision 2: The student is an external party, a client or consumer. The university is a commercial service provider that meets the needs of this consumer. Its primary purpose is simply to educate. Behavioural requirements should therefore be kept to a bare minimum. The Warehouse does not regulate customer conduct outside its stores, and nor should universities, except when the transaction between student and institution is taking place. Examples of conduct that are appropriately regulated are conduct during lectures, on university property and during exams. The creation of rules for the good of society in general or local communities should be left to central and local government.

Assessing the appropriate conception for a particular university and its relationship with students involves weighing up the effects of those regulations on the lives of interested parties. The medieval experience demonstrates that when Vision 1 is implemented in the extreme, with exclusive jurisdiction granted to universities, the outcome is unilaterally bad. Adherence to Vision 1 also carries the risk of overbearing regulation, such as that evidenced in 20th century United States. Nonetheless, adopting Vision 2 leaves no room for the societal benefits that may accrue if a university is able to effectively manage and reduce student misbehaviour.

1 The interests at stake

[38] See F Rochford "The Relationship between the Student and the University" 3(1) ANZJlLawEdu (1998) 28.

Regulations may impact considerably on the lives of students and the lives of those residing near a university. For students, the opportunity to study for a degree is incredibly valuable and an interest that should be carefully protected. Though not an outright explicit legal "right", there are enough domestic and international indicators to suggest that society attaches significant weight to the opportunity to partake in tertiary study. The right to "higher education" is protected in Article 26 of the United Nations Universal Declaration of Human Rights and the right to have access to education, and vocational and continuing training is protected in Article 14 of the Charter of Fundamental Rights of the European Union. Domestically, the Education Act in s 224(4) states that an eligible student (eligibility is dependent on criteria such as nationality and academic certification)[39] is entitled to be enrolled in a programme they apply for. This is subject to exceptions such as lack of good character, inadequate academic progress or disciplinary transgressions.[40]

The significance attributed to the opportunity to attend university is justified on the basis of equal opportunity, given that tertiary degrees have become increasingly important, almost crucial, to finding well-paid employment.[41] University regulations act as a potential threat to students' right to attempt to attain a degree. Universities are part of a select group of organisations that hold a monopoly over the granting of degrees in New Zealand.[42] Exclusion, suspension and denial of the right to graduate are common disciplinary penalties used by universities that obviously hinder a student in earning a degree.[43] Given the monopolistic power universities hold over this valuable certification, it is important to ensure that universities only stand between a student and the opportunity to earn a degree in justifiable circumstances.

---

[39] Section 224(1), (2) and (3).
[40] Section 224(12).
[41] Paul Mahoney, Zaneta Park, Roger Smyth *Moving on up – What young people earn after their tertiary education* (Ministry of Education, January 2013) at 1.
[42] Education Act, s 253B(1) and (2).
[43] See University of Otago Discipline Statute 2011, cl 7.5; University of Auckland Statute for Student Discipline 2013, cl 6(b)(vi) and (vii); Massey University Student Disciplinary Regulations 2010, Appendix I.

Because attendance at university is almost non-optional for many students, students also have an interest in the protection of their civil liberty. As mentioned above, the reality of modern day employment is such that many young adults have no real choice but to attend university and thus submit to university conduct regulations if they want to proceed in their chosen career field. Some of the penalties that universities employ are similar to criminal penalties such as fines, community service and requirements to attend educational programmes.[44] The hardship these penalties can place on students again makes it important to ensure they are justifiably applied.

Alongside the interests of individual students lies a wider community interest in preventing antisocial student behaviour in the areas surrounding a university. Those affected by misbehaviour include staff, other students and local residents. New Zealand has never taken a strict deontological approach to rights (as evidenced by ss 4 and 5 of the New Zealand Bill of Rights Act 1990 (NZBORA)) and it may be appropriate to infringe upon students' rights where the benefit to these stakeholders outweighs the harm to students.

2 The current position: a trend toward Vision 2 in New Zealand

The historical evidence presented above indicates that Vision 1 analysis was dominant in medieval history and also played an important role in Canada and the United States of America in the 20th century. Becoming a student was an adoption of a social class and a way of life governed closely by the university. In the context of present day New Zealand, academics have noted that there is a trend toward Vision 2.[45] This certainly seems to be reflected in the way that universities advertise themselves and in the fees students pay. New Zealand universities compete with each other for students domestically and with universities from across the globe for international students. They promote themselves vigorously including through television advertisements, on

[44] University of Waikato Student Discipline Regulations 2014, cl 16(8); University of Otago Discipline Statute 2011, cl 7.5.

[45] Sally Varnham "Guarantees for Degrees" (2001) 10 NZLJ 418; Patty Kamvounias and Sally Varnham "Getting What They Paid For: Consumer Rights of Students in Higher Education" (2006) 15 Griffith LR 306.

billboards, online, and in magazines.[46] Thus, although universities do not operate for a profit, they share many of the characteristics of a commercial enterprise.[47]

Just as universities have increasingly become commercially oriented, the choice to attend university can be seen as an investment decision for many students. University qualifications are an investment product that pays a dividend of greater earning potential in the future. Government is reinforcing this by providing information on the links between degrees and employment outcomes.[48] In 2013 the median earnings of young people who had completed a bachelor's degree was 53 per cent above the national median earnings and 46 per cent above the median for young people who only had school qualifications.[49] This increased earning potential comes at a significant price. Study costs for a Bachelor of Arts are roughly $5500 a year at most New Zealand universities.[50]

The commercial nature of the student-university relationship is also reflected in academic views on the application of consumer law to university education services. Sections 28 and 29 of the Consumer Guarantees Act 1993 provide important protection to "consumers" who are provided with "services" that are "in trade", requiring the services to be reasonably fit and provided with reasonable care.[51] Although the application of these two sections to teaching services has never been tested in court, it is most likely that tertiary education would be covered.[52] If the courts held university services are provided "in trade" the Fair Trading Act 1969 will

---

[46] "Otago TV Advert Campaign" University of Otago <www.otago.ac.nz>; "Our current campaign: 2013" University of Canterbury <www.canterbury.ac.nz>; "University of Auckland" YouTube <www.youtbe.com>; "Massey University" YouTube <www.youtbe.com>; and "The University of Auckland Brand Campaign" King St Advertising <www.kingst.co.nz>.

[47] All New Zealand universities but the Auckland University of Technology are registered as a charity under the Charities Act 2005 and s 201A of the Education Act also restricts how a university can use income and capital.

[48] "Compare Study Options" careersnz <www.careers.govt.nz>.

[49] Mahoney, above n 41, at 1.

[50] "Fees for Domestic Students 2015" Te Pokai Tara Universities New Zealand <www.universitiesnz.ac.nz>.

[51] Consumer Guarantees Act 1993, ss 28, 29 and 41.

[52] This view is held by both Stephen Kos "The View From the Bottom of the Cliff: Enforcement of Legal Rights between Student and University" (1999) 4 ANZJlLawEdu 18 at 21 and Kamvounias, above n 45, at 317 and 322.

also apply to universities.[53] Misleading promotional material or course information could thus create liability.[54]

Beside statutory consumer remedies, the Court has stated that a contract almost definitely exists between a student and a university, another commercial indicator.[55] American[56] and Australian[57] jurisprudence suggests this contract could include enrolment forms, course prospectuses, university rules and other advertisements.

Although the above might suggest that New Zealand has adopted a Vision 2 conception of the relationship between universities and students, the conduct regulations of many New Zealand universities do not reflect that conclusion.[58]

3 A contextual approach

Regardless of trends and factors in favour of a Vision 2 approach to student discipline, the individual context of a particular university may be such that the public good can be better served by Vision 1 disciplinary measures. Differing views of the role of universities are evident within staff attitudes, incidence of disciplinary cases, and conduct regulations themselves. This is likely a manifestation of the varying and unique contexts within which each university operates. The Otago Code, for instance, purports to apply to "off-campus as well as on-campus" activity with no explicit jurisdictional restrictions.[59] This can be contrasted with the University of California, Berkeley Campus Code of Student Conduct 2012, which reflects a Vision 2 approach. The code has four full paragraphs dedicated to jurisdiction and excludes off-campus activity except where the health, safety or security of another member of the

---

[53] Fair Trading Act 1969, s 2 definition of "trade" is materially the same as the Consumer Guarantees Act, s 2 definition of "trade".
[54] Kos, above n 52, at 23.
[55] *Grant v Victoria University of Wellington* 13 November 1997, HC Wellington, CP 312/96.
[56] Marry Morris "25 - Relationship between student and university" in *American Jurisprudence* (2nd ed, 2015); *Savoy v University of Akorn* 15 NE 3d 430 (Ohio App 10 Dist 2014)*; Bittle v Oklahoma City University* 6 P.3d 509, 514 (Okla Ct App 2000) 15; and *Gally v Columbia University* 22 F Supp 2d 199, 206 (SDNY 1998).
[57] *Bayley-Jones v University of Newcastle* (1990) 22 NSWLR 424.
[58] See Chapter II (B)(4).
[59] University of Otago Discipline Statute 2011, cl 4.2.

university community is affected or academic work is involved.[60] Even then the relevant acts must be of sufficient seriousness. A statement from the Deputy Dean at the University of Queensland reflects a similar minimalist sentiment: she says it is possible, though unlikely, that the university would exercise jurisdiction over off-campus conduct that reflected badly on the reputation of the institution.[61] In terms of actual disciplinary cases, 482 students were involved in disciplinary matters with the University of Otago Proctor's Office during 2014,[62] compared to a mere 30 to 40 disciplinary cases per year at the University of Sydney[63] (in 2014 the number of full time students at the University of Sydney was roughly double those at the University of Otago).[64]

In the context of Dunedin, an argument may be made that the Vision 1 approach to regulation is appropriate for the University of Otago. In 2013, students at the University of Otago made up roughly 16 per cent of the population of Dunedin (given that the city boundaries extend well outside the urban centre the concentration of students in central Dunedin is likely to be significantly higher).[65] By comparison, University of Auckland students make up roughly 2.4 per cent of the city population.[66] The potential effect that Otago students can have on the city of Dunedin, and the propensity for "town and gown" conflict, is thus much greater than in Auckland. Arguably this warrants rules such as requiring that no student shall engage in actions that "are unreasonably disruptive to other members of the University or the local community".[67] Such rules benefit local communities and also students

---

[60] Berkeley Campus Code of Student Conduct 2012, pt IV.
[61] Dutile Fernand "Law, Governance and Academic and Disciplinary Decisions in Australian Universities: an American Perspective" (1996) 13 Ariz J Int'l & Comp Law 69 at footnote 187.
[62] "Annual Report to the University of Otago Council: Cases Dealt with by the Proctor 2014" (obtained under Official Information Act 1982 Request to the University of Otago).
[63] Fernand, above n 61, at [102].
[64] "Quick Statistics" University of Otago <www.otago.ac.nz>: 18,830 full-time students in 2014; and "Total Student Enrolments 2014" University of Sydney < http://sydney.edu.au>: 41,322 full-time students in 2014.
[65] "2013 Census QuickStats about a place: Dunedin City" Statitics New Zealand <www.stats.govt.nz>; and "Quick Statistics" University of Otago <www.otago.ac.nz>.
[66] "2013 Census QuickStats about a place: Auckland Region" <www.stats.govt.nz>; and "Key Statistics 2010-2014" University of Auckland <www.auckland.ac.nz>.
[67] University of Otago Discipline Statute 2011, cl 4.4 (e)(ii).

themselves, who are likely the biggest victims of student misbehaviour because of the close-knit student community.[68]

The University of Otago Vice-Chancellor summarises the unique problems that face Dunedin City with respect to student behaviour in a 2015 media statement.[69] She states that the university has a particular set of circumstances: there is a high concentration of students living in one part of the city, and special events such as 'Orientation Week' (the week marking the beginning of the first semester) act as a magnet for students from other universities and non-students who come to join in with the "party atmosphere". Combined with a New Zealand-wide problem of excessive drinking, issues arise with respect to fires, broken glass, and parties. The Vice-Chancellor reports that the implementation of The Otago Code has led to improvement in student behaviour. Indeed before The Otago Code was first implemented, the Vice-Chancellor at the time, David Skegg, regarded antisocial behaviour as the most serious problem facing the university.[70] He was of the view that if a code was not adopted "the police will be forced to adopt methods of policing that have not been common in this city".

The disciplinary process at the University of Otago has proved to be particularly efficient and effective. The University Proctor,[71] Simon Thompson, stated that following a breach of The Otago Code it is not uncommon for him to meet with the student or students involved in an incident the very next day and impose a penalty on the spot or soon after.[72] A court proceeding could not possibly come close to rivalling such efficiency. The Proctor also stated that a policy of an immediate $150 fine on throwing a bottle has led to a dramatic decrease in incidence. The effectiveness of such immediate fines is partly due to the university's 24-hour pastoral care and security team, Campus Watch. Campus Watch patrol the campus and surrounding residential student flatting area as part of the Proctor's team and are cloaked with the

---

[68] McLachlan, above n 29, at 26.
[69] "Full statement from the University of Otago Vice Chancellor Harlene Hayne" *THEWIRELESS* (New Zealand, 11 March 2015) <www.thewireless.co.nz>.
[70] "University pours cold water on fiery antics with tough code of conduct" *The New Zealand Herald* (online ed, Auckland, 13 September 2006).
[71] See University of Otago Discipline Statute 2011, cl 6 for the powers of the Proctor.
[72] Interview with Simon Thompson, University of Otago Proctor (the author, 13 August 2015).

power to require students to identify themselves.[73] This team provides significantly more constant intelligence and manpower around the university than the police could ever hope to achieve.

The success of The Otago Code in quelling student misbehaviour in the unique University of Otago community indicates that it may be both sensible and desirable (though not necessarily legal)[74] for the university to have a wide jurisdiction in order to improve the quality of life of students and surrounding residents.

4 University or police

The University of Otago Proctor noted that he has fined or warned students for rowdy, off-campus flat parties under cl 4.4(e)(ii) of the University of Otago Discipline Statute, because they unreasonably disrupt members of the local community.[75] Without a wide approach to university discipline this activity could have had little or no consequences. On the other hand, the Proctor believes that the wide disciplinary reach of the university is responsible for some students being able to avoid prosecution by the police for allegations of criminal behaviour. In a recent case he dealt with a student who went running over the top of three cars. Instead of prosecuting the student, police referred the student to the Proctor who was able to establish the owners of the cars and the cost of repair, and discipline the student all within a short space of time. The Proctor terms this kind of referral the "prisoner exchange programme" whereby the police in Dunedin are sometimes willing to allow the Proctor to deal with minor criminal activity instead of prosecuting a student offender.

This sort of occurrence begs the question as to whether it is legitimate for a university to apply regulations to actions that one might think clearly fall within the realm of criminal law and police jurisdiction. The University of Queensland Vice-Chancellor is

---

[73] University of Otago Discipline Statute 2011, cl 4.4(g).
[74] See Chapter III.
[75] Interview with Simon Thompson, above n 72.

of the opinion that it is "the responsibility of the State authorities, rather than the university, to enforce laws affecting the citizens of Queensland", students being citizens of Queensland.[76] Although avoiding a conviction is clearly a positive outcome for a student, it seems unfair that a non-student would not have the same opportunity to avoid a charge. Such a double standard is at odds with basic Dicean principles associated with 'rule of law', which demand "equality before the law" such that every man is subject to the "ordinary law of the realm".[77]

5 Double jeopardy concerns

The principle that no person should be punished twice for the same offence is a basic and long-standing premise in New Zealand criminal law.[78] Although not strictly double jeopardy, if universities punish students for breaches of the criminal law, there is the potential for two punishments for the same "crime". A university is not alone in its ability to bring about repercussions for an individual as a result of criminal conduct. Other entities that fall into this category are employers and professional standards authorities.

(i) Employers

A conviction may lead to loss of employment.[79] Despite this, the ability of employers to effect "punishment" upon employees does little to justify university punishment in addition to criminal. Discipline of employees is incorrectly conceptualised as punishment in the criminal sense. An employer's right to dismiss a worker is not based upon the employer's role as a guiding force for desirable conduct in society. Instead, the ability to discipline and dismiss an employee is a vindication of an

---

[76] Fernand, above n 61.
[77] AV Dicey *An Introduction to the Study of the Law of the Constitution* (10th ed, The Macmillan Press Ltd, Honk Kong, 1959) at 193.
[78] New Zealand Bill of Rights Act 1990, 26(2).
[79] *Hodgson v The Warehouse* [1998] 3 ERNZ 76.

employer's right to employ whomever he or she pleases (restricted somewhat by the law to protect employees' competing interests).

A university does not have the same competing private interest and its penalties are generally more criminal in nature than dismissal: fines, community service and requirements to attend educational programmes.[80] Thus they are properly perceived as punishment in the criminal sense, particularly if applied for the purpose of securing social harmony rather than university operations.

(ii) Standards authorities

Criminal conduct can lead to discipline under professional conduct rules. For instance, r 1.4(d) of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 allows for the discipline of lawyers for offences which reflect on the fitness of the lawyer to practice. Similarly, a health practitioner may be disciplined if convicted of an offence that reflects adversely on his or her fitness to practice.[81] One can quickly discern why this is warranted in the context of professional practice. Practitioners such as doctors, dentists, and lawyers are entrusted with intimate responsibilities with respect to their patients or clients; it is therefore fundamental to the public that such individuals are of the required calibre. This maintains the level of service provided and also public trust in these professionals. The later concern also explains why actions that "bring the legal profession into disrepute" may attract disciplinary action for a lawyer.[82]

Students are not entrusted with individuals' legal concerns or health concerns. Students consume a service as opposed to providing one. The greater public interest in students having a reputation for trustworthiness and fitness of character is no greater than that for any other occupation. It may be possible to justify double

[80] University of Waikato Student Discipline Regulations 2014, cl 16(8); and University of Otago Discipline Statute 2011, cl 7.5.
[81] Health Practitioners Competence Assurance Act 2003, s 100.
[82] Lawyers and Conveyancers Act (Lawyers: Conduct and Cline Care) Rules 2008, r 1.4(c) and (d).

punishment, but arguments based on employment law or professional conduct requirements should carry little, if any weight.

6 Protecting a university's reputation

We have not yet discussed in detail the decision of *OUSA v University of Otago*, the leading case on university jurisdiction.[83] For the moment it suffices to note that the application of regulations was upheld because the conduct in question brought the university into disrepute and was therefore within the university's disciplinary jurisdiction.

Initially, it might seem a university should be able to protect its reputation in order to be commercially successful. Commercial success of its own though is not a legitimate end for a university to pursue. Universities are not-for-profit organisations and have no shareholders with rights and interests to protect.[84] In terms of the university persona itself, a university is much like a company and "lacking both a body to be kicked and a soul to be damned".[85] Therefore it cannot complain that damage to reputation is generally bad for the university.

There are, however, a number of legitimate benefits to protecting a university's reputation. To list a few: protecting the reputation of a university protects the value of degrees that people have already received from the university; retaining or increasing international student numbers brings money into the New Zealand economy; a large university that attracts many students provides jobs in the local community (amongst these cleaning, administrative and lecturing jobs); and a good reputation protects the interests of those publishing academic work from a university.

Maintaining its reputation has been a major issue for the University of Otago, more so than any other New Zealand university. The current Vice-Chancellor notes that the

---

[83] *OUSA v University of Otago*, above n 14.
[84] Charities Act and Education Act, above n 47.
[85] *Northern Counties Securities, Ltd v Jackson & Steeple Ltd* [1974] WLR 113 at 1143, with reference to a company.

media tends to be "on the hunt for stories about bad student behaviour".[86] The countless number of media articles published about antisocial student behaviour bears out this view.[87] The OUSA magazine, *Critic*, explains the phenomenon:[88]

> When a small number of students burn couches, the newspapers view students as a homogenous group, with headlines that proclaim "Students At It Again" collectivising us into 19,000 arsonists. The reason behind this is simple yet effective. It is to vilify a minority in order to gain readership and circulation of the publication among the majority, in this case locals.

In the light of the excess negative attention that the University of Otago seems to attract from the media, a case can be made that the university is in need of regulations which protect its reputation, as otherwise its domestic and international image could be irreparably damaged, leading to a downstream negative effect on the stakeholders previously mentioned.

7 Conclusion

In an ideal world the scope of each New Zealand university's conduct regulations would be determined independently using a contextual analysis to examine how the interests of all those affected by student conduct can be best served at each university. In some circumstances, such as those confronted by the University of Otago, the wider interests may be sufficiently assisted so as to outweigh concerns such as double jeopardy.

Putting this conclusion into written law however is another matter. The Education Act governs all universities. As a result, allowing for a contextual approach would require universities to be afforded a wide power to regulate. Doing so places trust in university councils to refrain from using this power to its full extent when minimal regulation is appropriate. The next two chapters will demonstrate that although New

---

[86] "Full statement from the University of Otago Vice Chancellor Harlene Hayne", above n 69.
[87] For examples see above n 6 and n 7.
[88] Joseph Highham "The Stories We're Sold" *Critic* (Online ed, Dunedin, 22 March 2015).

Zealand Parliament has taken a non-specific approach to empowering universities, the power does not grant universities unbounded discretion. Thus, in the case of the University of Otago, although wide-ranging disciplinary regulations may arguably be justified with regard to the interests discussed above, they may not be lawful.

CHAPTER II: THE CURRENT STATE OF THE LAW IN NEW ZEALAND

A THE EDUCATION ACT 1989

A brief explanation of the key applicable provisions of the Act follows.

The definition of "institution" in s 159(1) of the Act includes a "university". "University" is also defined in s 159(1) and includes all of New Zealand's eight universities:[89]

(1) Auckland University of Technology;
(2) Lincoln University;
(3) Massey University;
(4) University of Auckland;
(5) University of Canterbury;
(6) University of Otago;
(7) University of Waikato;
(8) Victoria University of Wellington.

Section 166 establishes universities as body corporates, capable of owning property, being sued and otherwise doing and suffering as a corporate body. Section 194 enables the council of a university to make regulations and is the crucial section for the purposes of this chapter:

> 194 Statutes
>
> (1) The council of an institution may make statutes, not inconsistent with this Act or the State Sector Act 1988, with respect to any of the following matters:
>
> (a) the good government and discipline of the institution:

[89] See Education Act, s 162(1)(a) and Part 1 of Schedule 13; and s 162(2) in conjunction with "About AUT" (21 August 2015) AUT < www.aut.ac.nz>.

(b) the imposition, by or on behalf of the council, of penalties upon staff or students of the institution for contravention of or failure to comply with a statute with respect to a matter referred to in paragraph (a):

B VALIDITY OF REGULATIONS MADE UNDER THE EDUCATION ACT

1 Validity of regulations generally

Subordinate legislation must meet four general requirements:

(1) it must be within the scope of its empowering Act – here s 194 of the Education Act (also know as the "four corners" rule);[90]
(2) it must not be repugnant with any Act of Parliament;[91]
(3) it must be sufficiently certain;[92] and
(4) it must not be unreasonable.[93]

In general terms, regulations that fail to meet these requirements are described as being 'ultra vires' or 'beyond the powers [of a person/organisation]'.

2 Case law on university regulations

There have only been two cases in New Zealand testing the validity of university regulations: *Moko-Mead v Victoria University of Wellington*[94] and *OUSA v University*

---

[90] Ross Carter, Jason McHerron and Ryan Malone *Subordinate Legislation in New Zealand* (LexisNexis, Wellington, 2013) at 246; *Brader v Ministry of Transport* [1981] 1 NZLR 73 (CA).
[91] Carter, above n 90, at 265; and *Combined State Unions v State Services Co-ordinating Committee* [1982] 1 NZLR 742 (CA) at 745.
[92] Carter, above n 90, at 288; and *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [40], citing *Transport Ministry v Alexander* [1978] 1 NZLR 306 (CA) at 311.
[93] Carter, above n 90, at 289; and *Turners & Growers Exports Ltd v Moyle* HC Wellington CP720/88, 15 December 1988 at 49.
[94] *Moko-Mead v Victoria University of Wellington* [1992] NZAR 337.

of Otago.[95] The first dealt with the Victoria University of Wellington's Statute on Sexual Harassment, established under The Victoria University of Wellington Act 1961. Section 22 of this Act empowered the university to make statues "as is necessary or expedient for the administration of the affairs of the University". The plaintiff argued that s 22 did not allow for the creation of the Statute on Sexual Harassment (along with other issues surrounding the effect of the Education Amendment Act 1990, which effectively repealed the 1961 Act) and that therefore the university had acted outside the scope of the empowering provision. The High Court held that the challenge to the Statute on Sexual Harassment (which, as the name suggests, forbade sexual harassment) raised difficult legal questions even without additional issues presented by the 1990 Act. Little analysis was undertaken and the Court was not required to make any more definitive statements of law.[96]

The more important case is *OUSA v University of Otago*.

3 *Otago University Students' Association (Inc) v University of Otago*

OUSA v University of Otago involved a first-year University of Otago student, Nathan Stewart, who was taking part in the 'Toga Parade' in 2009 – a now-defunct event that took place at the start of the university's academic year. OUSA organised the event in which first-year students would traditionally dress in togas and parade down the main street of Dunedin. In this particular year, students from other years threw eggs and similar objects at those in the parade.[97] Stewart, dressed in a toga, allegedly picked up a bag containing items that had been thrown at him and used them to break the window of a parked car.[98]

Stewart's actions were deemed to be a breach of The Otago Code, and he was excluded from enrolment at the university for a semester. Stewart sought a judicial

---

[95] *OUSA v University of Otago*, above n 14.
[96] *Moko-Mead v Victoria University of Wellington*, above n 94, at 14.
[97] "Court backs toga parade suspensions", above n 15; and "Call for end of toga parade after rampage" *The New Zealand Herald* (online ed, Auckland, 26 February 2009).
[98] *Stewart v University of Otago* HC Dunedin CIV-2009-412-629, 7 August 2009 at [4].

review of this decision, which the OUSA joined (and then continued after he abandoned the claim). It argued, amongst other issues, that the university acted outside of its statutory powers in making The Otago Code.

Gendall J's judgment does not examine specific provisions of The Otago Code, but rather addresses it in its entirety. As noted above, The Otago Code purports to apply to "off-campus as well as on-campus activity" and contains provisions that, prima facie, are of very wide application. Examples of these are requirements that no student may engage in actions that are "unreasonably disruptive to other members of the university or the local community"[99] or actions that "threaten, intimidate or harass another person or group".[100] The essential question to be answered in *OUSA v University of Otago* was whether the university, empowered to make regulations for the "good government and discipline of the institution", can make regulations which apply to the facts of the case: student conduct that occurs off university property, not in a university-sanctioned or organised event, and prior to the commencement of the academic year.

The Court begins by considering the empowering provision, s 194.[101] It states that the test for whether the university can regulate conduct under s 194(1)(a) is whether the conduct "occurs with a sufficient nexus to the legitimate concerns of the university".[102] In coming to this conclusion the Court dismisses a number of other possible limiting factors. The university's regulations cannot be restricted to activities that occur "on-campus".[103] The term "on-campus" is too difficult to define and the university is not defined as a geographical location but rather as an organisation practicing particular activities. Similarly the power to make regulations cannot be restricted to events organised by the university, given that events may affect the university regardless of whether they were organised by it or another party, or not organised formally at all.[104]

---

[99] University of Otago Discipline Statute 2011 cl 4.4(e)(ii).
[100] Clause 4.4(f).
[101] *OUSA v University of Otago*, above n 14, at [33].
[102] At [44].
[103] At [35]-[39].
[104] At [43].

The Court then concludes that The Otago Code itself is not ultra vires. Although, prima facie, The Otago Code does not explicitly limit its own application to matters that have "sufficient nexus" to the university, The Otago Code can and must be interpreted in a way that is consistent with the empowering provision.[105] Thus The Otago Code only purports to extend in application so far is as necessary for the "good government and discipline of the institution" and is not invalid.[106]

The Court goes on to say that "if the behaviour is such to bring the institution, association or profession into disrepute or to harm some or all of its members, or its reputation, so that it as the institution and its constituent members come to be regarded by reasonable members of the community with disdain and disapproval, then a sufficient nexus might in those circumstances exist".[107] Given the word "might" there is some ambiguity to this statement. In the very next paragraph, however, Gendall J, without reservation, states that The Otago Code "properly governs behaviour that tends to affect the reputation and standing of the University institution generally in the eyes of reasonable and responsible members of the public". [108] His Honour even states that "if members of the public regard the actions as discreditable to the individual student and lead them to think or conclude that the University should not condone such behaviour or find it to be acceptable", this could satisfy the test.

On the facts there was ample evidence that the university was brought into disrepute. This consequence, in conjunction with the fact that the event involved 2000 first-year university students taking part in an orientation week ritual, led the Court to the conclusion that there was a sufficient nexus to the university for The Otago Code to apply.[109]

4 Initial conclusions to be drawn from *OUSA v University of Otago*

[105] At [46], citing *R v Stockdale* [1995] 2 NZLR 129 and *Cinnamond v British Airports' Authority* [1981] WLR 582.
[106] At [47].
[107] At [49].
[108] At [50].
[109] At [51].

In order to conceptualise the decision in *OUSA v University of Otago* we can understand the Court as effectively 'reading in' s 194(1)(a) as a jurisdiction provision operating over top of the entire code. This jurisdiction provision could be put into words, reading something similar to "this code applies so far as the application of its provisions is for the good government and discipline of the institution". Logically the same 'read in' jurisdiction provision will apply to all regulations made by institutions under s 194(1)(a) of the Education Act. The one caveat to this is when an institution makes regulations that explicitly restrict their own application even more than s 194(1)(a) would otherwise do (for instance defining misconduct as including only actions that occur on university property). There are two New Zealand universities that do have detailed jurisdiction provisions.[110] Examples of provisions to which the High Court's analysis might apply, thus restricting their natural meaning (but not invalidating the provisions altogether), are those that: require accordance with New Zealand law generally;[111] relate to disrupting the local community;[112] relate to damaging the property of any person;[113] relate to discrediting a university;[114] and relate to jeopardising the health or safety of another person.[115]

The High Court does not provide a comprehensive interpretation of s 194(1)(a). Inherent in the analysis is that attracting the "disdain and disapproval of the community" (hereafter the Disdain Test), is simply one way of satisfying the "sufficient nexus" requirement. Another obvious point to bear in mind is that the High Court's approach may not be followed in a subsequent decision from the High Court,[116] or could be overruled by a superior court. The next subpart will examine the

---

[110] Victoria University of Wellington Student Conduct Statute 2001, cl 4.1; and Massey University Code of Student Conduct, cl 2.6.

[111] Victoria University of Wellington Student Conduct Statute 2001, cl 3, definition of "General Misconduct", sub-cl 1; University of Otago Code of Student Conduct 2011, cl 4.4(e)(iv); and Massey University Code of Student Conduct, 2(b).

[112] University of Otago Discipline Statute 2011, cl 4.4 (e)(ii).

[113] University of Otago Discipline Statute 2011 4.4 (e)(iii).

[114] University of Waikato Student Discipline Regulations 2014, cl 6(c); Victoria University of Wellington Student Conduct Statute 2001, cl 3, definition of "General Misconduct", sub-cl 5; and University of Auckland Disciplinary Statute 1998 [Partially repealed], cl 4(a)(i).

[115] University of Waikato Student Discipline Regulations 2014, cl 6(i).

[116] *Nicholl v Chief Executive of the Accident Rehabilitation & Compensation Insurance Corporation* HC Wellington AP27/00, 1 March 2000 at [9].

adequacy and ambit of the Disdain Test before the correct interpretation of s 194(1)(a) is addressed more generally in Chapter III.

C ADEQUACY AND AMBIT OF THE DISDAIN TEST

As a general proposition, good laws should make it clear when they do or do not apply.[117] The Disdain Test does not fit the description of clear, good law. "Disdain" and "disapproval" are relatively amorphous terms that operate on a sliding scale rather than as absolute categories. Individuals will have different views on when the "reasonable member of the community" will begin to associate a university and its members with those terms. What follows is an explanation of why the Disdain Test is bad law. The explanation draws upon employment law where a similar test is used.

1 Employment law

(i) The Employment Law "sufficient nexus" test

Conduct outside of work may suffice as grounds for dismissal when there is a "sufficient nexus" between the conduct and employment.[118] If conduct affects an employer's reputation and thus has the potential to negatively impact the employer's business it may satisfy the "sufficient nexus" test.[119]

In *Hallwright v Forsyth Barr Ltd,* Forsyth Barr relied upon damage to its reputation to satisfy the "sufficient nexus" test.[120] Hallwright was convicted of causing grievous bodily harm with reckless disregard in a road rage incident that attracted a large amount of media attention identifying him as a senior employee of Forsyth Barr. The

---

[117] See Lon Fuller *The Morality of Law* (revised ed, Yale University Press, London, 1969) at 39.
[118] *Smith v Christchurch Press Company Ltd* [2001] 1 NZLR 407 (CA) at [26].
[119] *Hallwright v Forsyth Barr Ltd* [2013] NZEmpC 202 at [46]-[53].
[120] *Hallwright v Forsyth Barr Ltd*, above n 119.

Employment Court held that Hallwright's conduct justified his dismissal because it had the potential to damage Forsyth Barr's reputation in the market place and therefore to negatively impact its business.[121]

The established employment law test thus mirrors the way s 194(1)(a) was interpreted in *OUSA v University of Otago*. The existence of an analogous test might suggest that the Disdain Test is a workable, adequate benchmark. Close analysis though shows that this is not the case.

(ii) Inadequacy of the Disdain Test

An ambiguously stated legal test may become clear in the presence of case law demonstrating how the test applies to particular fact situations. The "sufficient nexus" test in employment law is clarified in this way by supporting case law, something the Disdain Test lacks.[122] More court action challenging university decisions will not be forthcoming because of the financial costs involved, costs that students are not well placed to incur.

In addition to this, the test proposed by Gendall J seems to be somewhat wider and more uncertain than the "sufficient nexus" test used in employment law. At first glance *Hallwright v Forsyth Barr Ltd* is almost a direct employment analogue to *OUSA v University of Otago*.[123] Hallwright however was a senior investment analyst at a well-known firm made up of some 275 investment professionals.[124] His actions therefore reflect directly on the business. The same cannot be said for a humble first-year student and the effect of his actions on an entire university.

Two further cases also indicate the narrow construction of the employment "sufficient nexus" test. *Mussen v New Zealand Clerical Workers Union* held a Union employee

---

[121] At [46]-[53].
[122] For example *Smith v Christchurch Press Company Ltd*, above n 118; *Hallwright v Forsyth Barr Ltd*, above n 119; *Mussen v New Zealand Clerical Workers Union* [1991] 3 ERNZ 368; and *DB Breweries Limited v Hodgson* EMC Auckland AEC68/96, 14 October 1996.
[123] *Hallwright v Forsyth Barr Ltd*, above n 119.
[124] "About Forsyth Barr" Forsyth Barr <www.forsythbarr.co.nz>.

was validly dismissed for bringing her employer into disrepute after she spray painted slogans on the side of a building in opposition to new employment legislation.[125] The media and public are obviously inclined to view such conduct as being associated or even endorsed by the union itself given that unions are traditionally vocal with regard to employment legislation. In *DB Breweries Limited v Hodgson* an off-duty delivery driver, dressed in uniform, assaulted the manager of a tavern who was a client of his employer, resulting in loss of business from that tavern – again, the direct impact on the employer is obvious.[126]

Contrast these examples with the test of Gendall J, where actions that the university should "not condone" may possibly be sufficient to satisfy a "sufficient nexus", and the potential breadth of actions encompassed by the Disdain Test becomes clear.[127] The broad, uncertain test, stated and explained in two paragraphs of judgment, is one that no sensible person can properly interpret and use, certainly not with confidence that someone else would come to the same conclusions.

Although the employment law test seems to set a higher bar than Gendall J and is supported by case law, it is still imperfect. These imperfections are even more marked in the Disdain Test. The employment law test has been subject to academic criticism as being defined by "highly subjective employer perceptions".[128] Additionally because the test references public opinion it is influenced by media attention, and the degree to which an action attracts media attention is often a question of chance. This is evidenced in *Craigie v Air New Zealand Ltd* where the extent of media coverage of an employee's convictions under the Civil Aviation Act 1990 was itself an important factor in determining whether the convictions justified dismissal.[129] Applying the same reasoning to a university setting via the Disdain Test, we can see how the reins of university jurisdiction may be passed over to the media. It is difficult to think of any other examples of criminal-type punishments being applied on the basis of media reaction.

---

[125] *Mussen v New Zealand Clerical Workers Union*, above n 122.
[126] *DB Breweries Limited v Hodgson* ,above n 122.
[127] *OUSA v University of Otago*, above n 14, at [50].
[128] Gordon Anderson and others *Mazengarb's Employment Law (NZ)* (LexisNeixis, Wellington, online ed) at ERA103.38A.
[129] *Craigie v Air New Zealand Ltd* [2006] ERNZ 147 at [74].

As a final point, the relative ease with which employees can have employment disputes addressed by the Employment Relations Authority means that a loose test is less detrimental to employees than it could potentially be without such a readily available arbiter. If an employer inappropriately disciplines an employee the case may be resolved within a few weeks at a low cost.[130] Students who want a university decision to be reviewed by an independent third party have two possible avenues – a complaint to the Ombudsman,[131] or judicial review in the High Court. Making a complaint to the Ombudsman is free but slow – the Ombudsman website reports a completion time of around six months.[132] Recommendations of the Ombudsman are also non-binding on decision makers. In the High Court proceedings are also slow to resolve and costs can quickly escalate into the tens of thousands of dollars. Logically a student is therefore less inclined to contest a decision than an employee.

2 Conclusion

Gendall J's test, based on the good reputation and standing of a university, is problematic. The test is imprecise and very broad, yet must be relied on by universities on a day-to-day basis.[133] A similar "sufficient nexus" test is used in employment law however the case law indicates that this requirement is perceived more narrowly than in *OUSA v University of Otago*, and yet still has been subject to academic criticism. No doubt individuals who are in disciplinary positions and more concerned with the reputation of a university will honestly perceive the benchmark as

---

[130] "Forms and fees" Employment Relations Authority <www.era.govt.nz>: the application fee to the Employment Relations Authority is currently $71.56; and "Steps in the Authority process" Employment Relations Authority <www.era.govt.nz>: "It can take a few weeks or a few months for an application to be processed, heard, and determined by a member."

[131] Ombudsmen Act 1975, s 13: The ombudsman has the power to investigate decisions made by a Crown entity, and therefore a university (Crown Entities Act 2004, s 7(1)(e), Meaning of Crown entity and categories of Crown entities).

[132] "FAQs" Ombudsman < www.ombudsman.parliament.nz>.

[133] See for example "No action over drunken attack" *Otago Daily Times* (online ed, Dunedin, 5 September 2015): the University of Otago's Proctor relies on the High Court.

being met earlier than a student. This is a recipe for uncertainty on the part of students and for universities to overreach their lawful power.

CHAPTER III: THE SCOPE OF SECTION 194(1)(A)

Determining the correct interpretation of s 194(1)(a) and the scope of universities' regulating power is difficult because of the breadth of the phrase "good government and discipline of the institution". This paper does not attempt to exhaustively define s 194(1)(a) because there are innumerable possible situations in which it might be appropriate for a university to regulate conduct. Instead, general commentary is offered as well as analysis with respect to specific fact examples. Particular reference is made throughout as to whether actions should be amenable to university jurisdiction by virtue of the fact that they affect the university's reputation. It is crucial to determine the legality of such a wide gateway to establishing university jurisdiction.

A INTERPRETING SECTION 194(1)(A)

1 Judicial review of regulations by reason of being ultra vires

Analysis of s 194(1)(a) should not be undertaken as a purely theoretical exercise of interpretation, but rather in the context of a judicial review proceeding, which is where a regulation or its application would be challenged. The Court is generally reluctant to interfere with the exercise of a wide power to make regulations.[134] Section 194(1)(a) is a clear example of a wide empowering provision. Despite its breadth universities do not have free reign. In *Brader v Ministry of Transport* the Court of Appeal dealt with a similarly broad empowering provision.[135] The question was whether the power to make regulations "to promote the economic stability of New Zealand" enabled the Crown to make a carless day scheme.[136] The regulations were upheld but the Court noted that the broad regulatory powers in the Act should not be

---

[134] *Cropp v Judicial Committee*, above n 92, at [36].
[135] *Brader v Ministry of Transport*, above n 90.
[136] Economic Stabilisation Act 1948, ss 3 and 11.

used as an umbrella to cover regulations only remotely related to economic stability.[137] There is a similar danger that the expansive words of s 194(1)(a) will be used as an umbrella to include regulations that are not directly relevant to the government of a university. Determining the scope of s 194(1)(a) will, as in *Brader v Ministry of Transport*, be "a question of opinion and degree".[138]

In the realm of education, specifically schools, the Court of Appeal in *Edwards v Onehunga High School* viewed evidence of experience on the part of those sitting on a school board as weighing against an argument that the board had acted outside its powers.[139] This was despite the empowering provision being "objective" in nature (there being no terms allowing the board to regulate "when it is satisfied" or to similar effect).[140] This can be contrasted with the current empowering provision for school rules which allows for rules that "the board thinks necessary or desirable…"[141] Section 194(1)(a) is phrased objectively and so the degree of latitude given to an experienced board in *Edwards v Onehunga High School* can comfortably be applied to universities whose councils are made up of members such as senior academic staff, past or present students, local councillors, and a Māori representative.[142]

The importance of the observations made thus far is that although a regulation or its application might seem, prima facie, to fall outside the ambit of s 194(1)(a), if there is a tenable argument that the regulation serves the purpose of fulfilling the "good government and discipline of the institution", then the courts may be unwilling to invalidate the regulation or its application.

2 The legislative text

---

[137] *Brader v Ministry of Transport*, above n 90, at 83.
[138] At 78.
[139] *Edwards v Onehunga High School* [1974] 2 NZLR 238 (CA) at 244.
[140] At 243.
[141] Education Act, s 72.
[142] "University Council" Victoria University of Wellington < www.victoria.ac.nz>; "The University Council – Members" University of Canterbury <www.canterbury.ac.nz>; "Council" Lincoln University <www.lincoln.ac.nz>; and "The Council" University of Otago <www.otago.ac.nz>.

The starting point for interpreting any legislation is s 5(1) of the Interpretation Act 1999. This section states; "the meaning of an enactment must be ascertained from its text and in the light of its purpose". Sometimes the meaning of legislative text will be plain such that the "language does not support any other interpretation".[143] Because the words of s 194(1)(a) are non-specific this is clearly not the case. This fact makes it important to ascertain the purpose of s 194(1)(a) in the context of the Education Act. An empowering provision should not be read "in a way that achieves an effect which goes beyond the purposes for which the Act permits [subordinate legislation] to be made".[144] Section 194(1) reinforces this approach, stating that regulations must not be inconsistent with the rest of the Act.

Focusing first on the text of s 194(1)(a),[145] the courts have often found it helpful to use dictionary definitions as a starting point in statutory interpretation.[146] The dictionary meaning of government is "the action of governing; continuous exercise of authority over subjects".[147] The dictionary meaning of 'discipline' is "the system of order and strict obedience to rules enforced among pupils, soldiers, or others under authority".[148] "Government" and "discipline" are thus very wide concepts, they are couched however within the phrase "*good* government and discipline *of the institution*". Read in its entirety this expression implies that a university has the power to enforce conduct requirements upon 'subjects' (here students and staff) to the extent required for the university to run effectively and efficiently (thus the use of the word "good").

Prima facie this would exclude the application of regulations to conduct that occurs off a university campus, except where there is a direct link between that conduct and the operation of the university. Actions that affect a university's reputation only indirectly affect its operation, and would therefore be outside this requirement.

---

[143] *Siemer v Heron* [2012] 1 NZLR 309 (SC) at [31] per Blanchard J.
[144] *Cashmere Capital Ltd v Carroll* [2010] 1 NZLR 577 at [40].
[145] *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 205 ALR 1 (HCA) at [87] per Kirby J: "Ultimately, in very case, statutory construction is a text-based activity".
[146] *R v Ahmed* [2010] 1 NZLR 262 (CA) at [49]; *Bartle v GE Custodians Ltd* [2010] 3 NZLR 601 (CA) at [52]; and *Yandle v Done* [2011] 1 NZLR 255 (HC) at [34].
[147] *Shorter Oxford English Dictionary* (6th ed, Oxford University Press, 2007) vol 2, definition 1 of 'government'.
[148] Definition 5(b) of 'discipline'.

3 The legislative purpose

The conclusion above is reinforced by an analysis of other sections in the Act that indicate the purpose behind s 194(1)(a) and more generally the purpose of the parts of the Act which relate to universities.[149]

Section 160 states that:

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

Section 162(4)(a) lists four characteristics of universities. The first listed characteristic is that universities "are primarily concerned with more advanced learning, the principal aim being to develop independence".[150] The next three relate to teaching and knowledge. The last is that universities "accept a role as critic and conscience of society".[151] Section 162(4)(b)(iii) states that "a university is characterised by a wide diversity of teaching and research, especially at a higher level, that maintains, advances, disseminates, and assists the application of, knowledge, develops intellectual independence, and promotes community learning".

These provisions all emphasise the nature of universities as academic institutions, focused on obtaining and disseminating knowledge. In particular, s 160 indicates that s 194 is designed with the purpose of allowing universities to efficiently carry out this service as an academic institution. Thus, in order to be lawful, regulations must be shown to assist a university's operation as an academic institution, furthering the accumulating and dissemination of knowledge. A Vision 1 approach to regulation, with aims such as assisting societal harmony, increasing economic gain from more

[149] Education Act, pts 13 and 15.
[150] Section 162(4)(i).
[151] Section 162(4)(v).

international students and protecting the interests of old students, does not fit comfortably within this bound.

Sections 181(f) and 159AAA(d) are the only provisions to hint at a wider societal role. Section 159AAA(d) states that the object of the parts of the Act relating to tertiary education is to foster and develop a tertiary education system that "contributes to the sustainable economic and social development of the nation". Section 181(f) is reproduced here:

> 181 Duties of councils
>
> It is the duty of the council of an institution, in the performance of its functions and the exercise of its powers, -
>
> …
>
> (f) to ensure that proper standards of integrity, conduct and concern for –
>
> (i) the public interest; and
>
> (ii) the well-being of students attending the institution –
>
> are maintained.

The power to make statutes in s 194 is a power granted to the council of an institution and therefore fits squarely within the reference to "powers" in s 181. Read by itself, the reference in s 181(f) to "public interest" seems to impose a wide duty of furthering the public good generally. This phrase needs to be read however in the context of the rest of the Act, in particular s 160, 162(4)(a) and (b), and s 181(c) (which relates to maximising participation in education). The same applies to s 159AAA(d). All these provisions indicate the public interests referred to are those of informing and critiquing society, retaining and gathering knowledge and disseminating that knowledge. They do not indicate that universities should be able to regulate actions that affect their public reputation or that universities should take on a role of managing the relationship between the general public and university students.

An argument to the contrary may be made based upon the role of a university as a critic of society.[152] A critic with a terrible reputation is inclined to be less effective

[152] Section 162(4)(a).

and respected than one with a good reputation. This argument is somewhat stretched though because the public is unlikely to see the views of well-educated university academics as being tainted by questionable acts of students.

4 School cases

There are three cases in New Zealand where courts have addressed the power of schools to make regulations. The relevant statutory words in these cases are the "control and management of the school",[153] somewhat similar to the "government and discipline of the institution". In 1974, the Court of Appeal accepted that a school had the legislative power to make "a rule which restricts undue eccentricity of personal appearance".[154] In 1973 it was also held within a school board's power to require attendance at assembly whilst religious observation was taking place.[155] These regulations are intrusive by nature and indicate a judicial willingness to allow school boards considerable scope to regulate. Nonetheless those same regulations could possibly now be open to review since the enactment of the NZBORA. A school rule restricting hair length was challenged recently in *Battison v Melloy* for this very reason.[156] The High Court, though noting that this could be an issue, did not have to decide on whether the NZBORA affected the validity of the rule. Despite the *Battison v Melloy* case it is still common practice for schools to regulate things such as hair length and uniform.[157]

In assessing the relevance of these cases to s 194 it must be kept in mind that schools are not only educators, but also that they play a well accepted role of facilitating social and emotional development.[158] This is reflected by the common law doctrine of

---

[153] Formerly, Education Act 1964, s 61(1); now, Education Act 1989, s 72.
[154] *Edwards v Onehunga High School*, above n 139, at 243.
[155] *Rich v Christchurch Girls' High School Board of Governors (No 1)* [1974] 1 NZLR 1 (CA).
[156] *Battison v Mellloy* [2014] NZHC 1462.
[157] "School Rules" Auckland Grammar <www.ags.school.nz>; and "School Rules Expectations and Advice" Christchurch Boy's High <http://cbhs.sslsecurelink.com>.
[158] "Vision" (14 September 2007) Ministry of Education: The New Zealand Curriculum http://nzcurriculum.tki.org.nz/The-New-Zealand-Curriculum>.

'loco parentis' (now mostly redundant due to the Education Act), which gives teachers the powers of parents.[159] When children fight or harass each other the police are generally not the first to be called. Instead schools take a "parent" type role, enforcing punishments such as detentions or written apologies.

The words "management and control" in the statute are thus coloured by a school's traditional role. The same does not apply to universities and the words of s 194(1)(a). When university students commit criminal acts, normal police and criminal procedures can justifiably be applied, just as they could to anyone else of the same age. Given the difference in role it is almost certain that regulations requiring students to observe certain religious ceremonies or to wear specific attire would be ultra vires of s 194(1)(a). This is particularly true since the enactment of the NZBORA and rights within it such as freedom of expression and freedom of religion.[160] Further analysis on the application of the NZBORA to university regulations in the context of freedom of expression will follow.[161]

B CONCLUSIONS AND CURRENT UNIVERSITY PRACTICES

The general conclusion to be drawn from the above analysis is that universities only have the power to make regulations to prevent behaviour that directly inhibits furthering their services as an academic facility for the accumulation and disseminating of knowledge. For this reason this paper argues that the Disdain Test casts the net too wide to satisfy s 194(1)(a) and that therefore the Court was wrong to use it as a foundation for the decision in *OUSA v University of Otago*. The other key phrase employed by the High Court, "sufficient nexus", is useful shorthand for expressing the idea of 'related to the good government and discipline of', but in itself does not assist significantly in the interpretation of s 194(1)(a).

---

[159] *Laws of New Zealand* Education: Control of Students and Suspension, Expulsion and Standing-Down (online ed) at [65].
[160] New Zealand Bill of Rights Act, ss 13 and 14.
[161] See Chapter III (C).

On a more practical note, it seems, given the above analysis, that the University of Otago is currently disciplining students for actions that fall outside its disciplinary jurisdiction under s 194(1)(a). Before examining instances of this overreaching, it is appropriate to more specifically define what lies within the scope of s 194(1)(a). The general conclusion given above that regulation under the current law should be restricted to actions directly affecting a university is, admittedly, ill defined; a manifestation of the fact that there is no way to give an exhaustive list of the matters which are covered by s 194. Section 194 lends itself better to interpretation as applied to particular fact scenarios. There are many examples of New Zealand universities applying discipline regulations in a way that is clearly within the ambit of s 194(1)(a) when it is interpreted as above:

(1) a student at the University of Auckland was disciplined for behaving inappropriately toward a lecturer;[162]

(2) a student at the University of Auckland was disciplined for parking a car in staff parking and displaying a stolen/lost staff permit;[163]

(3) a student at the University of Auckland was disciplined for sending appalling and unacceptable email abuse from a university email address to an employee of a company that had offered a vacancy for a summer internship to current students;[164]

(4) a student at the University of Auckland was disciplined for displaying porn and masturbating in a university library;[165]

(5) a student at the University of Auckland was disciplined for downloading large quantities of copyrighted material and porn, locking the university

---

[162] A summary of disciplinary cases at the University of Auckland (obtained under Official Information Act 1982 Request to the University of Auckland), disciplinary meeting held on 8 April 2010.

[163] A summary of disciplinary cases at the University of Auckland (obtained under Official Information Act 1982 Request to the University of Auckland), disciplinary meeting held on 3 August 2010.

[164] A summary of disciplinary cases at the University of Auckland (obtained under Official Information Act 1982 Request to the University of Auckland), disciplinary meeting held on 14 March 2012.

[165] A summary of disciplinary cases at the University of Auckland (obtained under Official Information Act 1982 Request to the University of Auckland), disciplinary meeting held on 22 July 2008.

computers for days at a time and accessed computing resources using the login credentials of other students;[166]

(6) a student at the University of Canterbury was disciplined for threatening staff;[167]

(7) a student at the University of Otago was disciplined for assaulting a fellow student and a member of Campus Watch (a university employee);[168]

(8) a student at the University of Otago was disciplined for stealing from UniPrint (the university's printing service).[169]

We can broadly categorise the types of actions for which a "sufficient nexus" exists into four classes:

Class 1: Actions that affect a student or staff member of the university.

Take for example a scenario where one student assaults another student. This is an appropriate instance for a university to take action because an intimidated victim may feel much less inclined to attend university or feel threatened when they do attend.[170]

Class 2: Actions that occur on university property (land).

Universities should be able to regulate conduct on university property as this is required to properly manage the premises and run an efficient service. There will obviously be limits to the kind of actions that can be regulated. As previously discussed, rules on hair length and religious practices would not be lawful, while those relating to parking, alcohol consumption, or skateboarding on campus would be.

---

[166] A summary of disciplinary cases at the University of Auckland (obtained under Official Information Act 1982 Request to the University of Auckland), disciplinary meeting held on 16 October 2008.

[167] A summary of disciplinary cases at the University of Canterbury (obtained under Official Information Act 1982 Request to the University of Canterbury), events occurred 2014.

[168] " Memorandum RE: Vice-Chancellor's Discipline Report – 2014" (obtained under Official Information Act 1982 Request to the University of Otago), incident 5.

[169] "Memorandum RE: Vice-Chancellor's Discipline Report – 2014" (obtained under Official Information Act 1982 Request to the University of Otago), incident 11.

[170] See *Smith v Christchurch Press Company Ltd*, above n 118, at [26]-[27] where an employee was held justifiably dismissed for sexually assaulting a co-worker outside of work because of the potential this had to adversely affect the working environment.

Class 3: Actions that involve the use of university Internet or a university email address.

Much the same as with university property, universities need to be able to control the use of their online services.

Class 4: Actions that involve university property (chattels).

This refers, for instance, to stealing or defacing a university library book. The ability to prevent such an action allows a university to provide efficient library services and thus efficient education services.

No doubt there will also be other scenarios in which actions will be sufficiently linked to a university to legitimise application of its behaviour regulations.

This brings us to the analysis of those scenarios in which the application of university regulations is unlawful. Summaries of incidents that have gone through New Zealand university disciplinary processes indicate that the University of Otago stretches its jurisdiction further than any other university, arguably past breaking point.[171] The following three examples are directly quoted from summaries of discipline cases provided by the University of Otago. The fourth refers to multiple cases provided by the university with one case given as an example.

Incident 1: Three individuals, one first-year and two second-year students, who were arrested for disorderly behaviour and attempted to escape from the Police, were excluded for the second semester of 2014.[172]

Incident 2: A first year student who, following two prior incidents and a final warning from the University Provost, kicked the side of a taxi van, was excluded for the first semester of 2015 with the potential of commuting

[171] Requested from all of New Zealand's universities under the Information Act 1982 and provided by the University of Waikato, the University of Otago, the Victoria University of Wellington, the University of Canterbury and the University of Auckland.

[172] "Memorandum RE: Vice-Chancellor's Discipline Report – 2014" (obtained under Official Information Act 1982 Request to the University of Otago), incident 1.

this exclusion to 40 hours community service if certain conditions were met.[173]

Incident 3: A fourth year student who unlawfully entered the kitchen of a central city bar, causing damage and behaving in a grossly disorderly manner, was excluded for the second semester of 2011.[174]

Incident 4: Various students who set fires outside of university property have been excluded.[175] For example: A second year student who piled wooden materials onto the middle of a public street (populated by private student flats, but in close proximity to the University) then set them alight, was excluded for the second semester of 2012.[176]

Although the reports provided by the university are not particularly detailed, there is no indication that any of events occurred on university property, and none involved a student as a victim or a student organised event. The lack of these factors indicates that there is no "sufficient nexus to the legitimate concerns of the university".[177] The efficient operation of the university as an academic institute is hardly affected by a student, as in Incident 3, being disorderly some kilometres away from the university and no doubt late at night. The one possible exception to this conclusion is Incident 4, which may have resulted in other students being endangered by the fire. If this was the case, disciplinary action by the university would likely be legal. When a student is injured their ability to participate at university may be affected and therefore the university's ability to educate that student is also affected.

Even assuming the Court in *OUSA v University of Otago* was correct to interpret s 194(1)(a) in terms of the Disdain Test, it still is likely that the majority of the

---

[173] "Memorandum RE: Vice-Chancellor's Discipline Report – 2014" (obtained under Official Information Act 1982 Request to the University of Otago), incident 2.
[174] "Memorandum RE: Vice-Chancellor's Discipline Report – 2011" (obtained under Official Information Act 1982 Request to the University of Otago), incident 2.
[175] For example, "Memorandum RE: Vice-Chancellor's Discipline Report – 2014" (obtained under Official Information Act 1982 Request to the University of Otago), incident 7; and "Memorandum RE: Vice-Chancellor's Discipline Report – 2013" (obtained under Official Information Act 1982 Request to the University of Otago), incidents 1, 5 and 6.
[176] "Memorandum RE: Vice-Chancellor's Discipline Report – 2012" (obtained under Official Information Act 1982 Request to the University of Otago), incident 2.
[177] *OUSA v University of Otago*, above n 14, at [44].

incidents listed above would fall outside of the university's jurisdiction. Except for Incident 4, it would seem the incidents attracted very little, if any, media attention.[178] The basic starting point for an argument that the university was brought into "disrepute" would require either media coverage identifying the individuals as students or the students to have been observed by members of the community and identified as students. There is no evidence of the first and the second would most likely require that the culprits had worn university-marked attire – there is no indication that this was the case.

There is one further group of incidents that warrant discussion:

Incident 5: The Proctor of the University of Otago has fined or warned students for having reckless, loud parties under cl 4.4(e)(ii) of the University of Otago Discipline Statute, which states that students should not engage in actions that are "unreasonably disruptive to other members of the University or the local community".[179]

Assuming again that the Disdain Test is an appropriate interpretation of s 194(1)(a), it is still unlikely that this test is satisfied in the majority of instances. Some student parties have attracted significant media attention,[180] though this is the exception as opposed to the rule. In the absence of the Disdain Test, because the effect of actions on the local community and not the university or students is being relied upon as a reason to apply The Otago Code, it is questionable whether there is a "sufficient nexus" with the university. Protecting local residents from raucous parties can hardly be said to directly assist the university in its operation yet one student flat, some two kilometres from the university, reported a $1700 fine imposed by the university after a party in 2015.[181]

The University of Otago's overzealous approach to The Otago Code is reflected by a comment from the Vice-Chancellor (who under cl 8 of the University of Otago Discipline Statute has the power to exclude a student from the university) in relation

---

[178] See above, n 6, for examples of media articles relating to student fires.
[179] Interview with Simon Thompson, above n 72.
[180] "Party Central" *TVNZ Sunday* (10 May 2015) <www.tvnz.co.nz>.
[181] Interview with Andrew Benington, University of Otago student (the author, 25 September 2015).

to an accusation that students were harassing a local resident. The Vice-Chancellor said that "the student code of conduct states that any form of verbal harassment will not be tolerated, and these residents have every right to speak publicly about behaviour that affects them". [182] Presumably this claim relies on cl 4.4(f) of the University of Otago Discipline Statute, which requires that no student shall "threaten, intimidate or harass another person or group". The Vice-Chancellor may not have intended her statement to be interpreted literally, but nevertheless it certainly gives the impression that she views the university's jurisdiction as encompassing all activity that occurs between students and residents. Such a view, if held, is incorrect.

Nonetheless there is evidence to show that the university is mindful of overreaching. In 2015 a student drunkenly assaulted a woman in her home in a suburb some distance from the university.[183] The Proctor decided to take no action, basing his decision on the High Court requirement (in his words) that there must be "a nexus or connection between the offence and the University". There was no connection with the university other than the fact that the assailant was a student, and this was insufficient. Notably this incident was actually reported on in the local news media in a way that drew attention to the assailant's status as a student at the university, creating a tenable argument that the Disdain Test from *OUSA v University of Otago* was satisfied (and also highlighting the questionable role media attention plays in the Disdain Test).

C THE SPECIFIC CASE OF VERBAL CRITICISM

One particular area of interest is whether university regulations could be applied to a student who speaks out directly against his or her university. The Victoria University of Wellington has a specific provision prohibiting "behaviour" which is detrimental

[182] "They're not going to intimidate me' – Woman abused after speaking out against party flat", *One News* (online, 11 May 2015) <www.tvnz.co.nz>.
[183] "No action over drunken attack" *Otago Daily Times* (online ed, Dunedin, 5 September 2015).

"to the reputation of the University"[184] and the Waikato Student Discipline Regulations 2014 prohibit behaviour that "discredits the University".[185] On a plain reading of the text, these provisions would prohibit publicly criticising those universities. Despite this prima facie reading, it is unlikely that universities can apply their conduct regulations to criticisms made by students because of the NZBORA.

There is no single, settled way with which to apply the NZBORA in the context of statutory interpretation.[186] There are three important sections. Section 4 prevents a court from holding a provision of an "enactment" impliedly repealed or revoked by reason of it being inconsistent with a right in the NZBORA; s 5 states that, subject to s 4, rights and freedoms in the NZBORA are subject only to limits prescribed by law as can be demonstrably justified in a free and democratic society; and s 6 states that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the NZBORA, that meaning shall be preferred to any other meaning.

If, when constructed in accordance with the NZBORA, s 194(1)(a) does not allow for regulations restricting verbal criticism, then there is no question of relying on s 4 to protect the regulation (the term "enactment" in s 4 includes regulations).[187] Such a regulation would simply be ultra vires of the empowering provision. In addition the regulations themselves, when constructed in accordance with the NZBORA, may have a meaning that does not prohibit criticisms by students (even although the plain meaning of the regulations would indicate that they do).

The relevant right here is s 14; freedom of expression. Clearly regulations that prohibit criticism of universities will encroach on this right. The leading case on application of the NZBORA rights to statutory interpretation is *Hansen v R.*[188] In the context of general empowering provisions, however, the High Court in *Schubert v Wanganui District Council* held that a deviation from the approach in *Hansen v R* was

---

[184] Victoria University of Wellington Student Conduct Statute 2001, cl 3, definition of "General Misconduct", sub-cl 1.
[185] University of Waikato Student Discipline Regulations 2014, cl 6(c).
[186] *Hansen v R* [2007] NZSC, 7 [2007] 3 NZLR 1 at [61].
[187] *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) at [68]; Interpretation Act 1999, s 29; and Carter, above n 90 at 274.
[188] *Hansen v R*, above n 186.

appropriate because the words of the empowering provision had no established meaning to provide a starting point for interpretation.[189] The same logic applies here given the general nature of s 194(1)(a). The Court's view is that s 6 requires the Court to prefer the most NZBORA consistent meaning that can be given to the empowering provision.[190] This will be the meaning that does not unjustifiably restrict the relevant right so far as that meaning is "reasonably open" given the words of the statute.[191] The empowering provision in *Schubert* required bylaws to be "reasonably necessary". The Court gave this phrase a meaning that complied with the NZBORA by interpreting it to mean that infringements on the right to freedom of speech must be demonstrably justifiable in a free and democratic society.

A similar approach is likely here, interpreting the words "good government and discipline" as only allowing for regulations that infringe on NZBORA rights as far as can be demonstrably justified. This meaning is "reasonably open", particularly given the presence of the word "good" and the fact that the rights in the NZBORA are obviously those that Parliament views as being important to uphold in the government and discipline of New Zealand society.[192] The case for such an interpretation is even stronger than that in *Schubert* where the empowering Act in question, The Wanganui District Council (Prohibition of Gang Insignia) Act 2009, was designed for the very purpose of allowing bylaws that inhibit freedom of expression (by restricting the display of gang insignia). The Education Act has no such purpose; indeed to the contrary, the role of the university as a "critic and conscience of society" can hardly be reconciled with undue restrictions on freedom of speech.[193]

The next step in the interpretative process is to determine whether regulations restricting criticism of universities are a demonstrably justifiable restriction on the right to freedom of speech. The importance of being able to publicly criticise large, publicly funded organisations that affect a large portion of the public makes it

---

[189] *Schubert v Wanganui District Council* [2011] NZAR 233 (HC) at [85].
[190] At [83].
[191] At [140] citing *Hansen v R*, above n 186.
[192] The Long Title of the NZBORA states that it was enacted to affirm, protect and promote human rights and fundamental freedoms in New Zealand (as well as affirming international commitments).
[193] Education Act, s 162(4)(v).

unlikely such regulations could ever be justified, particularly because defamation may be available as a remedy for untrue statements if there is pecuniary loss.[194]

If s 194 were to be given a meaning that allowed for regulations restricting the ability to criticise universities, a further hurdle would likely prevent universities from applying provisions such as those put in place by the Victoria University of Wellington and the University of Waikato. These provisions do not explicitly prohibit criticisms but prima facie include such behaviour. Nevertheless it is "reasonably open" to give the word "behaviour" a meaning which excludes verbal criticisms. Given that it is unlikely restrictions on verbal criticisms would pass the s 5 "demonstrably justified" test, such a meaning would be adopted under s 6.

If a university were ever to introduce regulations that restricted clothing, hairstyle, religious observations, political association and demonstrations or other such matters then the validity and interpretation of such regulations would also be dependent upon analysis similar to that given above.

D HOW TO BEST ADDRESS JURISDICTIONAL ISSUES

Interpreting The Otago Code and other discipline regulations that do not contain jurisdiction clauses is difficult because discerning the ambit of many provisions requires constant reference to s 194(1)(a). Because s 194(1)(a) is general in nature a university can apply its regulations broadly and at least have an arguable case that such application falls within the ambit of s 194(1)(a). Combined with the fact that students often have minimal funds and universities have considerable funds, it comes as little surprise that no student has challenged a university decision on the grounds of jurisdiction since *OUSA v University of Otago,* and that this is only the second case of that nature in New Zealand history. A university is thus effectively able to decide its own jurisdiction on a case-by-case basis and students are unaware of the criteria used (if any is used at all) to determine whether events fall within the ambit of s 194(1)(a).

---

[194] Defamation Act 1992, s 6.

The best solution to this problem is to change the drafting of university regulations either by adding jurisdiction provisions or through more specific drafting of offence provisions. A good example of conduct provisions that are not restricted in their application by a jurisdiction clause but nonetheless have a clearly identifiable ambit are those found in cl 4 of the University of Auckland Discipline Statute 1998.[195] Every prohibited action except the first and ninth expressly requires a connection between the action and the teaching and research functions of the university, university employees or students, university property, university classes, university halls of residence or field trips conducted by the university.[196] For example:

> cl. 4(a) No student or Staff Member shall:
>
> …
>
> (iv) Wilfully obstruct any Authorized Person in the due performance of the functions or duties of that Authorized Person.
>
> (v) Wilfully create any nuisance in or on University Premises.

Although terms such as "create a nuisance" will still require some degree of interpretation, there is a clearly defined, finite scope as to where and when the provisions may apply.

The first prohibited action is unfortunately vague, requiring that no student or staff member "wilfully act (on University Premises or elsewhere) in a manner contrary to the good government of the University or so as to bring the University into disrepute".[197] This kind of catchall provision is exactly the kind that universities should avoid. Any range of actions could be brought under this provision as long as the s 194(1)(a) test is met.

A second method of drafting a more precise code is to include a jurisdiction provision. An example of a rather unhelpful jurisdiction provision can be found in cl 4.2 of the University of Otago Discipline Statute 2011: "Students are expected to

---

[195] University of Auckland Statute for Student Discipline 2013, cl 8: "…those prohibitions and directions which are set out in clause 4 of The Disciplinary Statute 1998 shall each be deemed to be included in this Statute as a Rule."
[196] University of Auckland Disciplinary Statute 1998, cl 4(a)(i) and (ix).
[197] Clause 4(a)(i).

conform to the standards contained in this Code of Student Conduct off-campus as well as on-campus". Students are given no indication whatsoever of the code's ambit, except that they had best be wary even when off university property. There are multiple examples of university conduct regulations both within New Zealand and overseas which spell out the extent of the university's jurisdiction, restricting application by various means such as by reference to geographic space, to events sanctioned by the university and to the relationship between the university and the student.[198] Such restrictions give students a point of reference before undertaking behaviour and also provide a more concrete criteria than s 194(1)(a) with which a student might bring a case in judicial review when a university stretches the ambit of its regulations.

Changing the actual wording of s 194 is not a tenable solution to making university regulations more certain because the nature of discipline regulations is such that the legislature is unable to detail every purpose for which regulations should be made. Regulations commonly canvas areas such as parking,[199] academic misconduct,[200] non-academic misconduct,[201] appeal processes,[202] libraries,[203] fees,[204] admission,[205] and delegation of powers.[206] If included in a statute these terms would require definitions and no doubt new, unmentioned areas requiring regulation would arise. The Court of Appeal in *Edwards v Onehunga High School* made the comment that "the behaviour checks necessary, let alone desirable for such control in the day to day running of the school may be infinite and incapable of complete codification".[207] The same applies to regulation of universities.

---

[198] University of California Los Angeles Student Conduct Code 2015, Part II(A); Victoria University of Wellington Student Conduct Statute 2001, cl 4.1; Berkeley University of California Berkeley Campus Code of Student Conduct 2012, Part IV; and University of British Columbia Discipline for Non-Academic Misconduct: Student Code of Conduct 2015, cls 3.1 and 3.2.
[199] University of Canterbury Parking and Traffic Statute 2003.
[200] University of Auckland Student Academic Conduct Statute 2012.
[201] University of Otago Discipline Statute 2011.
[202] University of Otago Appeals Statute 2011.
[203] The University of Auckland Library Statute 2007.
[204] University of Otago Fees Statute 2011.
[205] University of Waikato Admission Statute 2014.
[206] University of Waikato Delegation of Powers State 2014.
[207] *Edwards v Onehunga High School*, above n 139.

E THE POSSIBILITY OF MAKING CONTRACTUAL BEHAVIOURAL REQUIREMENTS

New Zealand courts are yet to properly address the nature of the contract that may exist between a student and university. The possibility of imposing behavioural requirements via contract is an important consideration because it potentially allows a university to circumvent the substantive limits of s 194(1)(a). Additionally, remedies in contract are different to those in public law,[208] though it seems likely that the exercise of contractual powers would still be judicially reviewable for reasons of process.

1 Establishing the existence of a contract

Section 192(1) of the Education Act gives universities the "rights, powers and privileges of a natural person" along with additional specific rights. As a corollary they have the ability to enter into contracts. It seems relatively clear that some kind of contract exists between a university and a student. The basic requirements of a contract are made out: an offer in the form of an offer to study, acceptance by the student of that offer, along with an intention to be legally bound (being a serious relationship between independent parties with no question of being frivolous or domestic)[209] and consideration in the form of fees paid and education services provided.

This view is supported by a decision of the High Court, *Grant v Victoria University of Wellington*, in which students argued that the university had breached a contract

---

[208] Contract law is unlikely to provide specific performance in the case of an on-going relationship: *Ryan v Mutual Tontine Westminster Chambers Association* [1893] 1 Ch 116; and *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC at 1. Reinstatement, on the other hand, may be available via judicial review.

[209] See *Fleming v Beevers* [1994] 1 NZLR 385 at 391.

between the university and themselves by failing to honour a course prospectus.[210] Ellis J stated, "I think it is beyond argument that the relationship between a student… and the University is partly based on contract and partly based on the Act itself".[211] The Court however had no need to determine the scope of such a contract and so its content remains unclear.

2 Substantive limits on a university's ability to contract

Some universities have attempted to clarify their contractual relationship with students. Massey University has a 'Student Contract'[212] and Victoria University has 'Terms and Conditions'.[213] Both purport to bind students to university conduct regulations.[214] The other New Zealand universities have no such documents. Nevertheless, the Court in Australia has suggested that university rules may be incorporated into the student contract even without express mention in a contract.[215]

In light of the Supreme Court's decision in *Quake Outcasts v Minister for Canterbury Earthquake Recovery (Quake Outcasts)*, it is likely that any attempt to create regulations via contract in New Zealand would be unsuccessful.[216] In *Quake Outcasts* the Crown purported to make a decision regarding the zoning of houses and compensation for owners in Christchurch after earthquakes and aftershocks that severely affected the Canterbury region during 2010 and 2011.[217] After the earthquakes the Canterbury Earthquake Act 2011 was passed specifically to deal with the aftermath and recovery.[218] Instead of making the relevant decisions using the machinery in the Canterbury Earthquake Act, the Crown claimed to have used its reserve, 'third source' powers, and that thus none of the requirements in the Act (such

---

[210] *Grant v Victoria University of Wellington*, above n 55.
[211] At 12.
[212] "Student Contract" Massey University <www.massey.ac.nz>.
[213] "Terms and conditions" Victoria University of Wellington <www.victoria.ac.nz>.
[214] Student Contract" Massey University <www.massey.ac.nz> at cl 5; "Terms and conditions" Victoria University of Wellington <www.victoria.ac.nz> at cl 3.
[215] *Bayley-Jones v University of Newcastle*, above n 57.
[216] *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27.
[217] At [1]-[3].
[218] Canterbury Earthquake Recovery Act 2001, s 3.

as consultation and using powers for the purposes of the Act) applied.[219] The Court however concluded that Parliament must have envisaged that the relevant decisions would be made under Canterbury Earthquake Recovery Act and that this fact excluded any room for third source powers.[220] This is made clear by the purpose of the Act and the safeguards with respect to the exercise of the powers that exist within it.[221]

Applying *Quake Outcasts* leads to the conclusion that s 194 limits s 192 such that the power to make statutes for government and discipline prevents the creation of contractual provisions for that same purpose. This is confirmed by the abundance of statutory provisions that inherently limit the general powers of s 192(1).[222] In the words of Glazebrook J, s 194 "covers the field" of disciplinary regulations.[223]

This is a desirable result given the imbalance in bargaining power that exists between a student and a university. Students have a narrow selection of universities to choose between (there being only eight in New Zealand) and some courses are only offered at a few or even one university (for example a Bachelor of Dental Surgery is only available at the University of Otago). Without the operation of s 194 this bargaining power could potentially be abused. Some of the earlier-mentioned disciplinary cases from America are good examples of exactly what New Zealand legislature should prevent, such as rules on what restaurant to eat at,[224] or disciplining a student for fanatical atheism,[225] addiction to cigarettes,[226] or not being "a typical Syracuse girl".[227]

3 Process requirements when exercising contractual powers

---

[219] *Quake Outcasts*, above n 216, at [102].
[220] At [111] – [121].
[221] At [114] and [118].
[222] For example: Education Act, ss 192(2) and 201A; and Crown Entities Act 2004, s 18.
[223] *Quake Outcasts*, above n 216, at [109].
[224] *Gott v Berea College*, above n 25.
[225] *In Robinson v University of Miami*, above n 26.
[226] *Tanton v McKenney*, above n 27.
[227] *Anthony v Syracuse University*, above n 28.

If a New Zealand university *was* able rely on contractual grounds to exclude a student from the university, the decision to do so would likely be amenable to judicial review for reasons of process in much the same way as exclusion under university regulations. The Court of Appeal in *Norrie v Auckland University Senate* held that the jurisdiction of the University Visitor (a now-defunct position)[228] did not prevent the Court from reviewing a decision to exclude a student.[229] Along with the self-evident interests of the student, the public interest in ensuring public money was not wasted by excluding a student improperly was such that requirements of natural justice applied.[230] While the position of Visitor has been abolished in New Zealand, the essential question still remains: may the courts intervene in a university decision made pursuant to internal assessment and appeal processes?[231]

The source of an exclusionary power, whether regulatory or contractual, is unlikely to affect the application of *Norrie v Auckland University Senate* in a modern context.[232] In enforcing natural justice requirements the courts have demonstrated that the subject matter rather than the source of a power will be decisive. The Court of Appeal in *Royal Australian College of Surgeons v Robert Francis Phipps* held that standards of procedural fairness applied to reviewers who had been contracted by the employers of a general surgeon, Mr Phipps, to determine the adequacy and appropriateness of Phipps' judgment and management of patients.[233] The Court held that such an examination was "exactly the type of situation in which high standards of procedural fairness are expected".[234] The process of investigating and potentially excluding a student for misconduct is directly analogous. The English Court of Appeal case, *Clark v University of Lincolnshire & Humberside*, confirms this conclusion, indicating that

---

[228] *Norrie v The Senate of the University of Auckland* [1984] 1 NZLR 129 at 131 citing Sir William Holdsworth *A History of English Law* (1926), vol IX at 58: the position of Visitor has its origins in England where a Visitor operated as the final judicial decision maker of a university.
[229] At 135.
[230] At 135 and 139.
[231] Sally Varnham and Patty Kamvounias "The Courts and university academic decisions" [2006] NZLJ 105 at 105.
[232] *Norrie v The Senate of the University of Auckland*, above n 228.
[233] *Royal Australian College of Surgeons v Robert Francis Phipps* [2000] 2 NZLR 513.
[234] At 12.

judicial review would most likely be available for actions of a university toward an individual student, even though an action existed in contract.[235]

[235] *Clark v University of Lincolnshire & Humberside* [2000] 1 WLR 1988.

CONCLUSION

When Parliament delegates its legislative functions to another body there is always some degree of imprecision – without imprecision, there would be no delegation. Imprecision is even more vital when entrusting a university with the duty to educate tens of thousands of students. Such a task inherently requires the power to be able to make rules for a large variety of topics. Detailing those topics in an Act of Parliament in any amount of specificity would hamstring universities and require continuous updates to the legislation. The existence of such imprecision leaves universities with a wide scope within which to exercise regulatory power.

Wide-ranging disciplinary regulations are not of themselves inherently bad. Universities understand student misbehaviour and have dealt with it for hundreds of years. From small indiscretions occurring when students have a little too much to drink, to more malicious conduct, universities can provide effective and efficient mechanisms for punishing and preventing antisocial behaviour. In the case of the University of Otago, it is almost undoubtedly true that the university's wide disciplinary reach has played an important role in promoting a liveable, crime-free environment both within university grounds and in the surrounding, student-dense district. Nevertheless there is cause for concern if universities act outside their legal powers in achieving such an outcome.

Parliament, historically and by way of its political accountability, is the legitimate forum for making law in New Zealand. Any persistent attempts to exercise power which is outside that conferred by Parliament should be viewed with utmost scepticism. Normally the courts will provide adequate recourse for keeping the use of delegated powers in check. This is a fundamental and long-standing constitutional role of the courts, carried out by way of judicial review. An examination of the disciplinary practices of the University of Otago indicates however that the courts are not proving to be an effective supervisor of university regulation. The only case that has come before the courts in recent years, *OUSA v University of Otago*, has, if anything, confused the situation and lent itself to subsequent overreaching by the University of Otago.

Each individual incident in which the university arguably overreaches its power affects few enough individuals and is insignificant enough that it is unlikely to warrant challenge. When the government makes a decision that excludes homeowners from potentially millions of dollars worth of compensation after an earthquake, it comes as no surprise when a proceeding in judicial review reaches the Supreme Court.[236] On the other hand, when a group of students is fined $1700 for a flat party, the individuals involved, by majority full-time students, do not even entertain the idea of challenging the decision in the High Court.[237] Similar fines can be handed down regularly for actions with similarly dubious "sufficient nexus", yet no one student is likely to take a legal stand. Perhaps in an exceptional case we can expect a student union to step up to the plate again, but OUSA's 2009 experience will serve to deter any such endeavour.

The end result is that the onus of ensuring universities act within their statutory powers falls almost always to the universities themselves. This state of nature is unsatisfactory, but unlikely to change; court action is a rarity and amendment to s 194(1)(a) is similarly improbable, having been unchanged since universities were first brought under the ambit of the Education Act in 1990.[238] The door is thus left open for universities to abuse their disciplinary powers, and, as evidenced, the University of Otago has not shied away from the threshold. For the foreseeable future, students can only resign themselves to the potential for illegal university discipline, and continue to hope that universities, one in particular, will take the law seriously.

---

[236] *Quake Outcasts*, above n 216.
[237] Interview with Andrew Benington, above n 181.
[238] Education Amendment Act 1990, section 37.

BIBLIOGRAPHY

A Cases

1 New Zealand

Bartle v GE Custodians Ltd [2010] 3 NZLR 601 (CA).

Battison v Mellloy [2014] NZHC.

Brader v Ministry of Transport [1981] 1 NZLR 73 (CA).

Cashmere Capital Ltd v Carroll [2010] 1 NZLR 57.

Combined State Unions v State Services Co-ordinating Committee [1982] 1 NZLR 742 (CA).

Craigie v Air New Zealand Ltd [2006] ERNZ 147.

Cropp v Judicial Committee [2008] 3 NZLR 774.

DB Breweries Limited v Hodgson EMC Auckland AEC68/96, 14 October 1996.

Drew v Attorney-General [2002] 1 NZLR 58 (CA).

Edwards v Onehunga High School [1974] 2 NZLR 238 (CA).

Fleming v Beevers [1994] 1 NZLR 385.

Grant v Victoria University of Wellington 13 November 1997, HC Wellington, CP 312/96.

Hallwright v Forsyth Barr Ltd [2013] NZEmpC 202.

Hansen v R [2007] 3 NZLR 1 (SC).

Hodgson v The Warehouse [1998] 3 ERNZ 76.

Moko-Mead v Victoria University of Wellington [1992] NZAR 337.

Mussen v New Zealand Clerical Workers Union [1991] 3 ERNZ 368.

Nicholl v Chief Executive of the Accident Rehabilitation & Compensation Insurance Corporation HC Wellington AP27/00, 1 March 2000.

Norrie v The Senate of the University of Auckland [1984] 1 NZLR 129.

Otago University Students' Association v The University of Otago [2010] 2 NZLR 381.

Quake Outcasts v Minister for Canterbury Earthquake Recovery [2015] NZSC 27.

R v Ahmed [2010] 1 NZLR 262 (CA).

R v Stockdale [1995] 2 NZLR 129.

Rich v Christchurch Girls' High School Board of Governors (No 1) [1974] 1 NZLR 1 (CA).

Royal Australian College of Surgeons v Robert Francis Phipps [2000] 2 NZLR 513.

Schubert v Wanganui District Council [2011] NZAR 233 (HC).

Siemer v Heron [2012] 1 NZLR 309 (SC).

Smith v Christchurch Press Company Ltd [2001] 1 NZLR 407 (CA).

Stewart v University of Otago HC Dunedin CIV-2009-412-629, 7 August 2009.

Turners & Growers Exports Ltd v Moyle HC Wellington CP720/88, 15 December 1988.

Yandle v Done [2011] 1 NZLR 255 (HC).

2 Australia

Bayley-Jones v University of Newcastle (1990) 22 NSWLR 424.

Network Ten Pty Ltd v TCN Channel Nine Pty Ltd (2004) 205 ALR 1 (HCA).

3 United Kingdon

Cinnamond v British Airports' Authority [1981] WLR 582.

Clark v University of Lincolnshire & Humberside [2000] 1 WLR 1988.

Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998] AC 1.

Northern Counties Securities, Ltd v Jackson & Steeple Ltd [1974] WLR 113.

Ryan v Mutual Tontine Westminster Chambers Association [1893] 1 Ch 116

4 United States of American

Anthony v Syracuse University 224 App Div 487, 231 NYS 435 (1928).

Bittle v Oklahoma City University 6 P.3d 509, 514 (Okla Ct App 2000) 15.

Due v Florida Agricultural & Mechanical University 233 F Supp (ND Fla 1963) at 396.

Gally v Columbia University 22 F Supp 2d 199, 206 (SDNY 1998).

Gott v Berea College 156 Ky 376, 161 SW 204 (1913).

In Robinson v University of Miami 100 So 2d 442 (Fla App D3 1958).

Paine v Board of Regents 355 F Supp 199 (WD Tex 1972).

Savoy v University of Akorn 15 NE 3d 430 (Ohio App 10 Dist 2014).

Tanton v McKenney 226 Mich 245, 197 NW 510, 33 ALR 1175 (1924).

B Legislation

Consumer Guarantees Act 1993.

Crown Entities Act 2004.

Canterbury Earthquake Recovery Act 2001.

Defamation Act 1992.

Economic Stabilisation Act 1948.

Education Act 1989.

Education Act 1964.

Education Amendment Act 1990.

Fair Trading Act 1969.

Health Practitioners Competence Assurance Act 2003.

Interpretation Act 1999.

New Zealand Bill of Rights Act 1990.

Ombudsmen Act 1975.

Lawyers and Conveyancers Act (Lawyers: Conduct and Cline Care) Rules 2008.

Massey University Student Disciplinary Regulations 2010.

University of Auckland Disciplinary Statute 1998.

University of Auckland Library Statute 2007.

University of Auckland Student Academic Conduct Statute 2012.

University of Auckland Statute for Student Discipline 2013.

University of Canterbury Parking and Traffic Statute 2003.

University of Otago Appeals Statute 2011.

University of Otago Discipline Statute 2011.

University of Otago Fees Statute 2011.

University of Waikato Admission Statute 2014.

University of Waikato Delegation of Powers State 2014.

University of Waikato Student Discipline Regulations 2014.

Victoria University of Wellington Student Conduct Statute 2001.

C International Documents

Charter of Fundamental Rights of the European Union.

United Nations Universal Declaration of Human Rights.

D Books

Gordon Anderson and others *Mazengarb's Employment Law (NZ)* (LexisNeixis, Wellington, online ed).

Ross Carter, Jason McHerron and Ryan Malone *Subordinate Legislation in New Zealand* (LexisNexis, Wellington, 2013).

Aswath Damodaran *Corporate Finance: Theory and Practice* (2nd ed, John Wiley & Sons Inc, 2001).

AV Dicey *An Introduction to the Study of the Law of the Constitution* (10th ed, The Macmillan Press Ltd, Honk Kong, 1959).

S Elworthy *Ritual Song of Defiance: A Social History of Students at the University of Otago* (Otago University Students' Association, Dunedin, 1990).

Lon Fuller *The Morality of Law* (revised ed, Yale University Press, London, 1969).

F Hercock *A Democratic Minority: A Centennial History of the Auckland University Students' Association* (Auckland University Press, Auckland, 1994).

David Lange "Capping it all off: A change of scene for the Capping Show" in *Culture of Change: Beginnings at the University of Otago* (University of Otago: Departments of English and History, Dunedin, 2006) 167.

D McLachlan "Students behaving badly: Student Discipline at the University of Otago" in *Culture of Change: Beginnings at the University of Otago* (University of Otago: Departments of English and History, Dunedin, 2006) 21.

Laws of New Zealand (online ed).

Marry Morris "25 - Relationship between student and university" in *American Jurisprudence* (2nd ed, 2015).

Shorter Oxford English Dictionary (6th ed, Oxford University Press, 2007) vol 2.

The University of Auckland Calendar 1967 (Auckland, 1967).

University of Otago Calendar 2007 (University of Otago, Dunedin, 2006).

University of Otago Calendar 2006 (University of Otago, Dunedin, 2005).

University of Otago Calendar 1990 (University of Otago, Dunedin, 1989).

E Journal Articles

Dutile Fernand "Law, Governance and Academic and Disciplinary Decisions in Australian Universities: an American Perspective" (1996) 13 Ariz J Int'l & Comp Law 69.

Patty Kamvounias and Sally Varnham "Getting What They Paid For: Consumer Rights of Students in Higher Education" (2006) 15 Griffith LR 306.

Stephen Kos "The View From the Bottom of the Cliff: Enforcement of Legal Rights between Student and University" (1999) 4 ANZJlLawEdu 18.

Kelly Ke Luca "A Place Apart, University Students and Legal Authority in Toronto Circa 1900" (2014) 23 Educ & LJ 241.

F Rochford "The Relationship between the Student and the University" 3(1) ANZJlLawEdu (1998) 28.

Sally Varnham "Guarantees for Degrees" (2001) 10 NZLJ 418.

Sally Varnham and Patty Kamvounias "The Courts and university academic decisions" [2006] NZLJ 105 at 105.

F News Articles

Michael Beaumont "Calls to end Dunedin scarfy party" *Stuff.co.nz* (28 February 2012) <www.stuff.co.nz>.

Timothy Brown, "Behave, students warned" *Otago Daily Times* (online ed, Dunedin, 6 February 2015).

Joseph Highham "The Stories We're Sold" *Critic* (Online ed, Dunedin, 22 March 2015).

Tommy Livingston "Battle between VUW students and neighbours" *The Dominion Post* (online ed, Wellington, September 13 2015).

Wilma McCorkindale "Planning to cork keg chaos" *The Southland Times* (online ed, New Zealand, 21 February 2013).

Hamish McNeilly "Dunedin students' behaviour worse since controversial TV show aired: fire chief" *The Southland Times* (online ed, New Zealand, 21 February 2013).

Hamish McNeilly "Heat turned up on couch fires" *Otago Daily Times* (online ed, Dunedin, 15 March 2013).

Hamish McNeilly "Party students blamed for leaving Dunedin street 'like the Third World'" *The New Zealand Herald* (online ed, Auckland, 16 February 2015).

Rebecca Todd "Student rioters could be expelled" *Stuff.co.nz* (15 September 2009) <www.stuff.conz>.

"Call for end of toga parade after rampage" *The New Zealand Herald* (online ed, Auckland, 26 February 2009).

"Court backs toga parade suspensions" *The New Zealand Herald* (online ed, Auckland, 6 November 2009).

"Drunken Lincoln Uni mob blamed for racial taunts to Canterbury rugby player" *TVNZ* (28 July 2015) <www.tvnz.co.nz>.

"Four arrests follow student couch fire party" *The New Zealand Herald* (online ed, Auckland, 21 February 2013).

"Full statement from the University of Otago Vice Chancellor Harlene Hayne" *THEWIRELESS* (New Zealand, 11 March 2015) <www.thewireless.co.nz>.

"Hyde St party: Ambulance attack 'terribly disappointing'" *Stuff.co.nz* (22 March 2015) <www.stuff.co.nz>.

"No action over drunken attack" *Otago Daily Times* (online ed, Dunedin, 5 September 2015).

"Otago students celebrate with couch fires" *3 News* (7 November 2012) <www.3news.co.nz>.

"Otago students drop code challenge" *The New Zealand Herald* (online ed, Auckland, March 16 2010).

"Otago Uni code of conduct challenge abandoned" *3 News* (15 March 2010) <www.3news.co.nz>.

"Party Central" *TVNZ Sunday* (10 May 2015) <www.tvnz.co.nz>.

"'They're not going to intimidate me' – Woman abused after speaking out against party flat", *One News* (online, 11 May 2015) <www.tvnz.co.nz>.

"University pours cold water on fiery antics with tough code of conduct" *The New Zealand Herald* (online ed, New Zealand, 13 September 2006).

"Wild Canterbury students plague neighbours" *Stuff.co.nz* (30 July 2015) < www.stuff.co.nz>.

G Thesis

Brett McEwan "Student culture and binge drinking" (Doctoral thesis, University of Canterbury, 2008).

H Government Publication

Paul Mahoney, Zaneta Park, Roger Smyth *Moving on up – What young people earn after their tertiary education* (Ministry of Education, January 2013).

I University Disciplinary Records

A summary of disciplinary cases at the University of Auckland (obtained under Official Information Act 1982 Request to the University of Auckland).

A summary of disciplinary cases at the University of Canterbury (obtained under Official Information Act 1982 Request to the University of Canterbury).

A summary of disciplinary cases at the University of Waikato (obtained under Official Information Act 1982 Request to the University of Waikato).

A summary of disciplinary cases at the Victoria University of Wellington (obtained under Official Information Act 1982 Request to the Victoria University of Wellington).

"Annual Report to the University of Otago Council: Cases Dealt with by the Proctor 2014" (obtained under Official Information Act 1982 Request to the University of Otago).

"Memorandum RE: Vice-Chancellor's Discipline Report – 2014" (obtained under Official Information Act 1982 Request to the University of Otago).

"Memorandum RE: Vice-Chancellor's Discipline Report – 2013" (obtained under Official Information Act 1982 Request to the University of Otago).

"Memorandum RE: Vice-Chancellor's Discipline Report – 2012" (obtained under Official Information Act 1982 Request to the University of Otago).

"Memorandum RE: Vice-Chancellor's Discipline Report – 2011" (obtained under Official Information Act 1982 Request to the University of Otago).

J Web Resources

"2013 Census QuickStats about a place: Dunedin City" Statitics New Zealand <www.stats.govt.nz>.

"2013 Census QuickStats about a place: Auckland Region" Statitics New Zealand <www.stats.govt.nz>.

"About AUT" (21 August 2015) AUT < www.aut.ac.nz>.

"About Forsyth Barr" Forsyth Barr <www.forsythbarr.co.nz>.

"Compare Study Options" careersnz <www.careers.govt.nz>.

"Council" Lincoln University <www.lincoln.ac.nz>.

"FAQs" Ombudsman < www.ombudsman.parliament.nz>.

"Fees for Domestic Students 2015" Te Pokai Tara Universities New Zealand <www.universitiesnz.ac.nz>.

"Forms and fees" Employment Relations Authority <www.era.govt.nz>.

"Massey University" YouTube <www.youtube.com>.

"Otago TV Advert Campaign" University of Otago <www.otago.ac.nz>.

"Our current campaign: 2013" University of Canterbury <www.canterbury.ac.nz>.

"OUSA Student General Meeting Agenda 13th May 2010" OUSA <www.ousa.org.nz>.

"Provider-based-Enrolments-2007-2014.xlsx" Education Counts <www.educationcounts.govt.nz>.

"Quick Statistics" University of Otago <www.otago.ac.nz>.

"School Rules" Auckland Grammar <www.ags.school.nz>.

"School Rules Expectations and Advice" Christchurch Boy's High <http://cbhs.sslsecurelink.com>.

"Steps in the Authority process" Employment Relations Authority <www.era.govt.nz>.

"Student Contract" Massey University <www.massey.ac.nz>.

"Terms and conditions" Victoria University of Wellington <www.victoria.ac.nz>.

"The Council" University of Otago <www.otago.ac.nz>.

"The University Council – Members" University of Canterbury <www.canterbury.ac.nz>.

"The University of Auckland Brand Campaign" King St Advertising <www.kingst.co.nz>.

"Total Student Enrolments 2014" University of Sydney < http://sydney.edu.au>.

"University Council" Victoria University of Wellington < www.victoria.ac.nz>.

"University of Auckland" YouTube <www.youtube.com>.

"Vision" (14 September 2007) Ministry of Education: The New Zealand Curriculum http://nzcurriculum.tki.org.nz>.

K International University Disciplinary Codes

Berkeley University of California: Berkeley Campus Code of Student Conduct 2012.

University of California Los Angeles Student Conduct Code 2015.

University of British Columbia Discipline for Non-Academic Misconduct: Student Code of Conduct 2015.