

# BOOK REVIEW

## *The Law of Higher Education*

Dr Dennis Farrington & David Palfreyman

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The role of the law has increased exponentially in the 'brave new world' of higher education. The size of this book is, in part, testament to the extent of academic and judicial debate which the changes have prompted. It is now commonplace to talk of institutions such as universities as 'businesses' and students as 'consumers'. Today, universities and other institutions of further and higher education universally, combine providing education and engaging in research and scholarship, with trading as corporations operating multimillion dollar businesses. They are teachers, employers, property owners, marketers and entrepreneurs.

It is therefore both fortunate and timely that the two leading authors in the United Kingdom in the area of higher education and the law have joined forces to produce this latest edition of *The Law of Higher Education*. The result of such collaboration is a resource of great value for all administrators, lawyers, academics and those with an interest in higher education in whatever capacity.

*The Law of Higher Education* is a work of astonishing depth and breadth. If there is any criticism it is in the extent of the content which makes it difficult for the lay reader to delve into. It is however, worth the effort as it combines serious academic content with material of practicality and interest. The authors, Dennis Farrington and David Palfreyman, have a combined wealth of knowledge and experience from their careers in academia and in university administration. They have both written previous texts in this area, notably Farrington's *The Law of Higher Education* and Palfreyman and Warner's *Higher Education Management*, *Higher Education Law* and *The State of UK Higher Education*. In this latest publication the authors, assisted by an assembly of distinguished academics and law practitioners as consultant editors, have drawn together and built on the content of these previous publications.

In short, the book provides not only a comprehensive coverage of the background to the law of higher education, and the governance and management of higher education institutions in the UK, but also it provides analysis of many of the areas which have seen significant change in the last decades. All of this cannot be accomplished in small measure however and prospective readers should not be daunted by its serious and weighty appearance.

The last decade has seen many areas of significant change in the law's impact upon the university campus. These are noted by the authors in their preface, as they refer to the comments of Professors Kaplin and Lee, the authors of the book's recent US counterpart. While the focus of this book is on the UK, many of the issues which these changes give rise to, apply equally to higher education institutions in all the comparative jurisdictions including Australia and New

Zealand. Particular examples are given as: the recognition of the student/university contract and the application of consumer law to this relationship; the adjustments made for students with all manner of disabilities; affirmative action relating to the admission of disadvantaged students; the duty of care owed to students studying on university programs abroad; the quality of educational services, ownership of intellectual property, data protection and freedom of information. In recent years in Australia and New Zealand these issues have attracted much media attention. Here also disputes between students, staff and institutions are seemingly increasing, evidenced by reports of litigation, and of alternative resolution methods being employed.

The book addresses the many issues which relate specifically to the sector, and which have their roots in such fundamental questions as: what is the nature of a university today? What is the purpose of a university education? What is the basis of the relationship between a university and its students? The issues here relate to the organisation, governance and management of institutions, university members and their rights, the obligations and rights which attach to the university and its students and its academic staff, student unions, the research contracts and the entrepreneurial activities entered into and engaged in. As public bodies, universities are subject to requirements of accountability in respect of public funds. In addition, and in whatever terms they choose to see themselves, it is now a reality that modern institutions are, as businesses in a commercial world, subject to the general law which applies to all trading corporations who market and deliver services and employ staff.

The book is organised into eight parts. Part I provides the background to higher education institutions and to the law which provides the framework within which they operate. It provides an extremely detailed context for the remainder of the book. Chapters One to Three discuss the legal status of providers of higher education in the UK, the roles played by government, funding councils and quality assurance organisations. Chapter Four contains a useful outline of the impact of EU law and international obligations on higher education. It includes a discussion of the current process of reform of the European higher education systems in terms of the mobility of students and cross border recognition of qualifications founded in the Bologna Declaration of 1999.

Part II covers legal matters relating to the governance and management of higher educational institutions. While these parts draw on legislative material specific to UK universities, many of the general principles have application to Australian and New Zealand universities and higher education institutions. It canvasses areas of the potential liability of institutions as a result of delegation, agency and vicarious liability. The variety of problems which may arise in this context is demonstrated by several US cases.

Parts III and IV consider legal matters relating to the relationship between the higher educational institution and its staff and students and once again, many of the issues discussed here are universal. In relation to university staff it includes a comprehensive discussion of the employment contract (in Chapter 10), the statutory regulation of employment including complaint under anti-discrimination legislation (in Chapter 11) and dismissals and disputes (Chapter 12).

Chapters 13 to 15 analyse the legal relationship between the student and the higher education institution, and the impact of this upon the many areas of student/institution interaction. Many of the topics discussed here have, in recent decades, proved to be both vexed and controversial. The redefinition of the purpose of higher education and the accompanying perception of students as consumers have far-reaching consequences which have already been felt by many institutions in the comparative jurisdictions. The Chapters consider enrolment, the contract to educate, student complaints relating to academic judgement and discipline, educational malpractice, discrimination and dispute resolution including the use of judicial review to challenge university decisions.

Included here is a useful discussion of the newly instituted Office of the Independent Adjudicator in the UK. This initiative is of great interest to those considering approaches to dispute resolution in other jurisdictions.

The following Chapters (16 to 18) are devoted to discussion of issues such as academic freedom and HEI autonomy, ownership of intellectual property, data protection and freedom of information. These are perennial issues which focus on the balance between the rights of the institution and the individual rights and freedoms of their academic staff and students. However, the age of technology is requiring the revisitation of many of the policies and principles. These chapters do this bravely and comprehensively.

The following parts then cover many matters which have come into prominence through the commercialisation of higher education and the emergence of the trading companies. Part V considers the corporate, trading nature of higher education institutions. This discussion is of particular relevance in Australia where application of provisions of the *Trade Practices Act 1974 (Cth)* is dependent upon corporate status. Here this reader is reminded of a remark of Lee J at first instance in the Australian case of *Quickenden v O'Connor*:<sup>1</sup>

When the elements of constitutional law were taught in the Faculty of Law of the University forty years ago, it would not have occurred to the Dean of the Faculty, who delivered those lectures, that the institution assisting students to seek wisdom was a trading corporation, much less that the university would assert that it was.

Part VI addresses property and estate issues many of which are general to owners and occupiers of property, and many of which are specific to the nature of a higher education institution. It covers occupier's liability, disability discrimination, campus security, student residential accommodation, and the maintenance of health and safety on higher education institution premises. The diversity of the issues which this part addresses once again reminds the reader of the huge range of legal matters which impact upon higher education today.

As a logical progression, Part VII then considers risk management, preventative action and dispute resolution. In the words of the authors: 'The HEI manager is ultimately a manager of risk on a daily basis, from the routine to the strategic, from operational problems to grand vision'. (p. 533). The management of risk today takes HEI administrators outside the usual context of students and staff, and increasingly into the realm of business enterprise and its property. Its significance in all the comparative jurisdictions is huge. Chapter 27 discusses dispute resolution through litigation and the alternate methods such as mediation, increasingly recognised as desirable approaches.

Part VIII concentrates on many of the areas of higher education law which have been addressed in comparative jurisdictions. It considers the approaches taken to various issues outside the UK, in both common law and civil law jurisdictions. In terms of the 'globalisation' of higher education this part is of immense interest, not only to the UK reader, but universally.

The book concludes with an extensive list of further reading which concentrates on UK and US higher education law. In recognition of the rapidly changing and evolving nature of higher education law, the book has a companion website for updating the chapters between volumes. Details also are provided of the Armed Project for guidance on legal issues and a legal awareness service run through the authors' OxCHEPS base.

Decades ago, the words 'law' and 'university' would only have been associated in the context of legal education. Not so any longer. Today the law impacts upon universities in a multitude of ways which would never have been dreamt of by their forebears. It is impossible to overstate

this book. The authors are to be congratulated on the completion of a resource which is not only of immeasurable academic importance, but is also hugely practical. University governors, managers, administrators and academics will now be able to reach for this book, and its electronic updates, for guidance, secure in the knowledge that they are using the current position of the law as their authority.

#### ENDNOTES

1. *Quickenden v O'Connor* (1999) 166 ALR 385, 392-393.

**Dr Sally Varnham**

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