

EDUCATIONAL ACCOUNTABILITY – DO TERTIARY STUDENTS NEED MORE ACADEMIC PROTECTION IN NEW ZEALAND?

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Around the world, students are becoming more assertive in their relationships with tertiary institutions. There is growing expectation among students that rights to access tertiary study, to receive a quality education and to exert increasing influence over what and how they are taught should be protected both within the University system and through external judicial and legislative processes. This article examines the extent of such 'academic protection' afforded to New Zealand tertiary students and considers the fine balance between strengthening and reinforcing those rights without compromising the essential academic freedom of institutions. A review of some aspects of students' rights and academic protection in the United States, the United Kingdom and Australia provides a context within which to assess the checks and protective measures, legal and otherwise, that currently exist to protect New Zealand students. Overall, despite some areas for improvement, accountability requirements, consumer protection legislation and the role of students in institutional evaluation appear to provide a broad range of safeguards in New Zealand. Any move to suggest a United States-style Student Bill of Rights is necessary is clearly premature.

I INTRODUCTION

Interest in this topic was sparked off by musings that education strangely is now included as a consumer item traded in the marketplace alongside other goods and services. Education services were included in the new services negotiations under the World Trade Organisation (WTO) which began in January 2000.¹ In the negotiations, the importance of the role of the government in the education sector was recognised. A participating country noted that policy objectives must ensure maintenance and improvement of the quality of education to guarantee protection of students, so that as consumers they are not damaged by services of low quality. Measures must also be provided to ensure international equivalence of degrees and diplomas.²

Where once education was the pursuit of knowledge for societal progress, and academic freedom reinforced the universities' role as the 'critic and conscience' of society,³ education is now widely regarded as a service business. With consumerism rising to the fore there is a call for greater accountability on the part of educators. Questions have been raised about the quality of a service supplied by a 'university' in one country not necessarily matching that supplied by a university elsewhere, due to differences in higher education systems, in addition to concern at the issue of 'degree mills' churning out graduates.⁴

While the WTO round of negotiations does give cause to contemplate how education could be a 'commodity' in a commercial sense,⁵ the reality of the 'increasing commodification of education'⁶ does loom large. Students in New Zealand are already covered under the *Consumer*

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Guarantees Act 1993 and the *Fair Trading Act 1986*. This environment provides an interesting platform to address the topic of educational accountability and whether tertiary students require more academic protection in New Zealand. Correspondingly, it allows us an opportunity to address concerns as to whether these ‘protective measures’ would make inroads into the freedom of universities to determine who may teach, and what and how to teach, as spelt out in s 161(2) of the *Education Act 1989* (NZ).⁷ At the same time, the writers seek to assert that rising consumerism in the education sector need not necessarily justify or equate to the need for more academic protection for tertiary students in New Zealand.

There is evidence that over the last twenty years, around the world, the relationship between tertiary institutions, their students, and other stakeholders is changing. Students are starting to assert their rights to access tertiary study, to receive a quality education, and to have an increasing influence on how and what they are taught. This set of rights can be described as ‘academic protection’. Our investigations into the extent of academic protection for New Zealand tertiary students began on the premise that, in New Zealand, as in other similar countries, the current emphasis on accountability of tertiary institutions together with wide reaching consumer protection legislation must go a long way towards ensuring a quality education for tertiary students. This simple proposition requires some clarification.

It is important to determine the parameters of this debate and establish the aspects of ‘protection’ about which we are concerned. Do students require protection from unscrupulous institutions bent on charging high fees and failing to deliver the courses as promised? Does lack of transparency regarding the standing and workings of institutions impinge on students’ rights? Should students be protected from discrimination over access to courses or for holding views different from the institution? The courts and legislators from various jurisdictions have considered all these potential areas of concern for students and are developing a range of measures to address such concerns.

These issues, as noted, form part of a wider debate on the accountability of tertiary institutions and throughout this discussion it is pertinent to consider this continuing dialogue concerning the degree of legal responsibility. Many have questioned to what extent tertiary institutions should be accountable to their students and cite overriding responsibilities towards the funding government and society as a whole. Such considerations beg the far broader question of the current role of the university and other similar institutions, and the dilemma of retaining a high degree of academic freedom for the institutions all the while delivering to the educational consumers, the services they demand and deserve.

This article will briefly review the current situation in respect of student rights and academic protection in a number of countries to provide a context for the examination of the various checks and protective measures, both legal and otherwise, that exist in New Zealand to ensure students are able to receive a ‘quality education’ and fair treatment during the course of their study. The influence of students in the evaluation of their tertiary education and the difficulties of providing a definitive description of ‘quality’ education, particularly where it forms the basis of any legal action, will be highlighted.

II ACADEMIC PROTECTION IN OTHER JURISDICTIONS

A *Student Bills of Rights*

In the United States (US), students have driven moves over the last decade to gain legislative protection for what many students see as frequent violations of their academic freedom stemming from differences between their beliefs or ideologies and those of their tertiary institution.⁸ This can be seen as a reaction to the political and religious conservative elements that are starting to influence the tertiary education sector in the US.⁹ An attempt to have a federal law enacted encapsulating a student bill of rights, to cover all higher educational establishments in the US, has not been successful to date. This student bill of rights was included in the 2004 legislation to re-authorise the Higher Education Act but has not yet become law. Nevertheless, its provisions concerning commitment to ‘intellectual pluralism’¹⁰ along with a respect for diversity and dissent, have been mirrored in state legislation across the US, ranging from California to Washington State. In some states, tertiary institutions are developing their own student bills of rights while others are relying on memoranda of understanding to deal with issues of the rights of students to express diverse viewpoints.¹¹

There is concern among academics that these efforts to protect students may spread too far into the classroom and impinge on the traditional rights of the institutions to dictate course content and style of delivery.¹² Challenges to this aspect of academic freedom are in addition to the other limitations placed on institutions and individuals such as those stemming from reliance on a single funding agent or commercial backing for research.¹³ Indeed it is feared that authority for classroom decisions may shift from the educational professionals to students, governments or the courts if bills of rights become a formalised part of the student-institution contract. It is conceivable that a breach of contract could be proved where a lecturer failed to provide adequate diversity of perspectives in the content of a course. By extension, despite previous reluctance to intervene in matters of academic judgment,¹⁴ academic bills of rights could force courts to become involved in evaluating the curriculum and performance of academic staff, an area conventionally reserved for the institution.¹⁵

The situation in the United Kingdom (UK) is equally complex. Palfreyman has determined that some university staff have a measure of legal protection for a certain level of intellectual freedom under the *Education Reform Act 1988* s 202(2)(a), whereby they may hold unpopular points of view and be free to express dissenting opinions.¹⁶ In addition, the *Higher Education Act 2004* s 32(2) confers on the Director of the Office of Fair Access an obligation to uphold institutional academic freedom in respect of admission criteria and the content and delivery of courses. A corresponding requirement exists under s 22(4) of the *Education Act 1994* for institutions to draw up a code of practice ensuring freedom of speech for students, employees and visiting speakers. The acceptable balance between the rights of the academics to determine course content and those of the students to require varied perspectives has not been tested to date. It appears that students in the UK are not clamouring for further legislative enhancement of these rights as is the case in the US. If the same concerns that are being voiced in the US are applied to the UK, it remains possible that students may challenge course content or assessment criteria if it is seen to breach s 22(4) of the *Education Act 1994* by failing to allow students to express opposing views.

B *Liability of a Tertiary Institution in Contract*

Although the contractual nature of the student-faculty relationship has been recognised in the UK,¹⁷ it is not yet clear how the courts will interpret the rules set out in university charters as providing express terms conferring rights and obligations on both parties. To overcome the uncertainty around enforcement of some of these rules (such as the requirement that students must behave reasonably) it may be possible for the courts to treat these as implied terms or to include the concept of reasonableness in any dealings between the institution and its students.¹⁸ Indeed this sentiment is expressed in the case *Jex-Blake v Senatus Academicus of the University of Edinburgh*¹⁹ and Middlemiss argues that the concept of reasonableness could be extended to an implied term of co-operation between the student and the institution, which in turn could require an institution to provide a student with reasonable support during the course of their studies.²⁰

A recent case in the UK, although settled out of court, was based on a breach of contract, arising from a failure to provide the ‘learning excellence’ portrayed in the University of Wolverhampton’s Prospectus.²¹ The student maintained that the poorly constructed examination questions, overcrowded lecture halls and harassed tutorial staff were among the factors that did not match the high level of education the University advertised. Onsmann notes that apart from the changing relationship between students and tertiary institutions, this case highlights the emergence of legal experts who advertise their services as specialising in protecting and promoting the legal rights of tertiary students.²²

Middlemiss considers moreover, that although, potentially, recourse to statutory remedies for students is available in the UK under antidiscrimination and privacy legislation, these statutes are not designed specifically to uphold the rights of students and have not been tested in the courts. Protection through human rights legislation extends to students — but breaches may be hard to prove where decision-making is not transparent in universities.²³ The student–institution contract would be a surer basis for any legal action but there remain issues surrounding the interpretation of some express terms relating to the complex student–institution relationship. US courts have also signalled the possibility of contractual liability for failing to provide the education represented to students. Limitations exist here too in regards to the interpretation of terms and the extent to which the quality of courses can be determined.²⁴

Consumer legislation in the UK will certainly apply to student–institution contracts. A particular example is the possibility of students availing themselves of the protection from unfair terms afforded by the *Unfair Terms in Consumer Contract Regulations SI 1999/2083*. Corresponding state legislation in the US, such as Minnesota’s *State Consumer Fraud & Uniform Deceptive Practices Act*, has been applied where students have taken legal action for compensation for substandard levels of teaching.²⁵ Australian courts have also recognised consumer protection legislation as a sound basis for claims that tertiary institutions have failed to deliver promised services and products.²⁶

The courts in the UK are still reluctant to set precedents in this area. A suggestion to overcome these hurdles, and provide opportunities for students to obtain redress, is legislation specifying students’ rights, set alongside reforms in student complaints procedures. Despite the trend towards increasing student litigation, these moves to promote transparency in dealings with students are aimed at providing an environment where legal remedies would be seen as the last resort for resolution of student complaints.²⁷ Nevertheless, actions in contract currently provide students with a measure of protection in common law jurisdictions alongside the existing general statutory protection for consumers.²⁸

C *Liability of a Tertiary Institution in Tort*

Along with the statutory and contract law remedies that can be claimed, universities in many jurisdictions are beginning to ponder the likelihood of successful claims in tort for the general failure to teach.²⁹ A duty of care in relation to physical harm resulting from negligence by an educational establishment is relatively easy to establish. Claims for negligent misstatement where misleading information has been provided to students by an institution or its servants prior to entry into the institution may also succeed where economic loss can be proved.³⁰

The extension of such claims to assertions of ‘intellectual’ damage resulting in lost career opportunities provides a greater challenge. A thorough examination by Rochford³¹ of Australian and UK cases concerning issues of such ‘damage’ and those of causation in respect of failure to learn, indicate that conceptually a university may be liable to a student in negligence, but the breach and consequential damage would need to be very specific and clear rather than a more general ‘failure to teach’. Subsequent studies reveal little development in this area in Australia, however the United Kingdom is clearly moving towards greater opportunities for educational negligence cases to succeed.³²

An attempt to sue an institution for negligence on the basis that the teaching was poor and that the number of teaching staff was insufficient, has been considered recently in the US.³³ In that case, the court declined to recognise any liability either in tort or in contract, however the dissenting judgment of Judge Plotkin reflects the increasing recognition by many in the judiciary, of consumerism and corresponding consumer rights in tertiary education. Judge Plotkin noted that the cost of tertiary study and uncompromising marketing strategies of tertiary institutions require more legal protection for students. Based on the contractual principles of good faith and fair dealing, Judge Plotkin asserted that this protection could be afforded to students, all the while preserving the academic freedom of the institutions and encouraging greater institutional accountability to all stakeholders.³⁴

In recognition of the growing likelihood of litigation for failure to deliver the standard of education promised, whether in tort or contract, there is evidence that Australian universities are starting to moderate their advertising language.³⁵ It has been noted that a leading Australian university, Monash, on its website, has moved away from specific claims of highest quality teaching in 1999, to a more general declaration of its search for advancement in knowledge in 2006. Onsman notes the avoidance of any assertions regarding the outcomes being promised and the University going no further than aiming to ‘strive’ to realise high quality teaching.³⁶ There is not necessarily any indication that these institutions are delivering inferior courses but equally the legal pressures to limit any declarations of excellence do not appear to encourage institutions to improve their performance.

III EDUCATIONAL ACCOUNTABILITY IN NEW ZEALAND

In New Zealand, as elsewhere, with yearly increases in course fees, students’ expectations increase proportionately to the investment they put in, particularly their expectation that there will be returns to this investment in terms of their learning. In its negotiation proposal in 2001 under the WTO General Agreement for Trade and Services (GATS), New Zealand recognised that, notwithstanding certain sensitivities, international trade in education services continues to expand.³⁷ The WTO negotiations aside, with education now protected under consumer legislation in New Zealand, there exists between students and universities a contractual liability besides their rights under tort and judicial review. Section 160 of the *Education Act 1989* expressly recognises

the ‘demands of accountability’ by academic institutions such as universities.³⁸ It further stresses the need for accountability by tertiary institutions in the exercise of their academic freedom under s 161 and the proper use by institutions of resources allocated to them.³⁹ The *Education Amendment Act 1990* sought further to reform the administration of tertiary education. Alongside the demands for accountability, it advocated a consistent approach to the recognition of qualifications in academic and vocational areas and the promotion of excellence in tertiary education, training, and research.⁴⁰

Demands for accountability do raise the question as to whether the rise of consumerism in the field of education compromises what was once a quintessential quest for knowledge. It is a fine line to consider as this could give rise to a litigious breed of students who wish to get what they pay for. On the one hand, while institutions must recognise the rights of students to ensure that the service they have purchased is delivered with reasonable skill and care and fit for the particular purpose,⁴¹ this should not be confused with the right to dictate who may teach or what and how they are to be taught. Market forces should not regulate academic course content while they do regulate demand for education services. Demand for education cannot guarantee completion and graduation. At the contractual level, students must heed the fact that they have accepted an offer by the university to teach them based on the curriculum advertised to the standards and criteria laid out for assessment. In the event of a failure of any due considerations there is the entire gamut of regulation to assist the student experience.

Academic protection of the students must be looked at from the point of view of what their intellectual teachers are entitled to as well. Historically, academic freedom has been regarded as fundamental to the health of the university to allow members of staff to exercise free criticism and independent judgement in the interests of the university and the various communities it serves. As preserved under the *Education Act 1989*,⁴² academic freedom rests on two fundamental principles, one being the freedom of the tertiary institution in the delivery of its courses and correspondingly the freedom of students to learn.⁴³ Traditionally, one can formalise the idea of academic freedom from the perspective of ‘the topics on which academic staff teach courses as determined by the established processes of governance’.⁴⁴ However, university staff members do have complete freedom over the content of their lectures, subject to whatever accountability procedures apply, in the light of proven professional ability as teachers or researchers. In the same spirit, students are graded not according to the views they hold, but according to the quality of the arguments that they bring to their defence.⁴⁵

University autonomy and academic freedom are perceived to be overtaken by new priorities, principles and mechanisms as government regulates to cut costs and fosters ‘market’ determination of what are relevant functions and outcomes of education. The ‘critic and conscience’ role of the university is under attack, and the vision of academic freedom as a vital investment in a democratic future is becoming blurred with reviews, funding crises, structural upheaval and philosophical challenges.⁴⁶ Surely this erosion of academic independence diminishes the experience for students.

A Governmental Control

It is indisputable that ultimate control of tertiary education in NZ resides with the Crown. Legislative requirements to provide Charters and Strategic Plans (s159N *Education Act 1989*), funding control over the purchase of student places and research income, together with the accreditation of courses, all point to the central role of Government in shaping tertiary education in this country. Such control provides another level of monitoring and accountability that must

afford some protection for students in terms of the good governance and ‘commitment to excellence in teaching and scholarship’ that the Government requires.⁴⁷

Deficiencies in university governance in New Zealand were detected by research conducted by Locke, notably in the area of the university councils’ self-review. Improvements were recommended to strengthen the quality of advice furnished to councils, particularly in regards to policy and a focus on outcomes that meet strategic plans.⁴⁸ On the basis that sound policy and strategies for tertiary education have been set, compliance with these directions will benefit students as the receivers of education.

IV ACADEMIC PROTECTION OF NEW ZEALAND STUDENTS

Academic protection for students in New Zealand, as in the other jurisdictions considered, is available through judicial review, tort and contract law. It would appear that the academic protection of students as consumers is increasing in the New Zealand context with provisions of the *Fair Trading Act* and the *Consumer Guarantees Act* mentioned earlier being applied to the student–tertiary institution relationship. Contractual claims may be based on misleading conduct and breaches of guarantees under both Acts. The *Consumer Guarantees Act* sets out minimum guarantees for students that education service providers supply their services with reasonable skill and care and that the services are fit for the particular purpose, while the *Fair Trading Act* requires that these services be delivered as advertised. Tertiary institutions have paid heed to all of this and some have made conscious efforts to create awareness by including these provisions as part of its orientation programmes for new staff members.

Student welfare in New Zealand has been given utmost priority with tertiary institutions providing an all round approach through mediation, advocacy support and counselling. Mediation and advocacy services provide representation for student disputes with parallel support through counselling for particular reasons. Anti-harassment networks exist on campuses to ensure awareness of issues. Speaking from past experience, championing student rights was not compromised with voluntary student unionism in a university where one of the writers was based. The student charters of individual institutions also provide guidelines for fair treatment of students and, as noted earlier, could potentially be regarded as containing implied contractual terms.

In-house, tertiary institutions in New Zealand have set up discipline procedures. The university calendar in some universities sets out clear transparent processes for applications for extension, compassionate and aegrotat considerations. Some universities provide for reconsideration of assessments. Added to this is the raft of legislative support open to students as citizens, in the form of the Privacy Act 1993, the Human Rights Act 1993, the New Zealand Bill of Rights Act 1990 and the Ombudsmen Act 1975. The Ombudsmen’s Office has a Tertiary Education Officer specifically to investigate student grievances from universities. Additionally, under the Official Information Act 1982, students may request a statement of reasons for their grades.

Pastoral care for international students is provided with the establishment of the International Education Appeal Authority under the Education Act 1989. The Authority has the power to investigate and determine complaints from international students in respect of alleged breaches of the code of practice for the pastoral care of international students (the Code). The University of Auckland was investigated under the Code for the provision of inadequate or misleading information relating to living and course related costs, lack of advice about refund provisions, failure to assess appropriately accommodation recommended or provide safe accommodation.

There were also allegations of inadequate induction into the programme and failure to provide information and advice regarding harassment, appropriate counselling services or advocacy.⁴⁹ While the University was finally found liable for two relatively minor breaches, the case is evidence of the changing climate in the delivery of education services and protection of students.

The hallmark of accountability is openness, which is dealt with in the universities through student and paper evaluation as well as graduate surveys. At the same time, disciplinary procedures for academic honesty or plagiarism are part of this structure to ensure ethical conduct on the part of students themselves. If any tertiary student feels threatened as to the extent of his academic freedom or his right to protection, processes for student evaluation of teaching staff as well as courses are standard practices carried out in New Zealand universities. A closer examination of the role of students in the accountability of tertiary institutions is included in this article.

The Academic Staff Tertiary Education (ASTE) Union plays a collaborative role by encouraging staff to adhere to these processes. The opportunity for students to evaluate those who teach them makes the accountability process very transparent. The ASTE in fact encourages students' appraisals as a reciprocal commitment and responsibility on the part of academic staff involved in teaching. Student evaluation of papers provides a constructive vehicle for course development rather than compromise in terms of course content and delivery.

The divide indeed is subtle — on a commonsense basis if institutions argue that they are to be able to uphold academic freedom and remain the true critic and conscience of society, the reciprocal aspect must then hold true with regards to the rights of students for more academic protection. The pressure exerted on academic institutions to be answerable to students' demands might in itself benefit student consumerism in terms of enhanced choice forcing institutions to be competitive.

The writers see no evidence to justify the need for special statutory protection, such as a Student Bill of Rights, as is the trend in the US. Protection is already available in the student charter in some universities, in addition to their rights as individuals under the New Zealand *Bill of Rights*. There is greater merit, though, in ensuring that student unionism is made compulsory rather than voluntary, and that the provision of mediation services for students be external to the university rather than in-house. This would avoid any potential conflict of interest between students' needs and the mediator as an employed staff member. Likewise, advocacy services should be funded from fees under a compulsory student union model rather than be dependent on funding from the university.

A *What are the New Zealand Courts Doing?*

It is fairly entrenched in New Zealand that courts recognise students' rights for protection and redress in contract, tort and judicial review as long as these do not impinge on academic freedom and independence of the institutions. New Zealand courts have paid heed to judicial review for procedural impropriety allowing review of any decision making process, procedural unfairness and legitimate expectation in student issues. Claims have extended from assessment of the quality of teaching to the quality of the course prescription alleging misrepresentation or breach of contract.⁵⁰ Universities and the Ombudsmen have jurisdiction for 'in-house issues', but matters of contract, tort and judicial review remain properly determinable by the courts.

As asserted in *Norrie v Senate of the University of Auckland*⁵¹ in 1984, Woodhouse P placed 'double consideration' on the personal interests of the individual affected by a publicly funded institution.⁵² The actual jurisdiction of the Courts should not be ousted just because the University

then had a Visitor to act on it. The University did not have exclusive jurisdiction over disputes between the University and one of its members, such as a student. The scrutiny of the courts would help to justify the right of a final year medical student to know that the University had decided to end his potential career for reasons that were based entirely on a fair process. There was also a public interest in seeing that the large investment of public money in taking the student so far would not be wasted except for good and substantial reasons.⁵³

In *Grant v Victoria University of Wellington*⁵⁴ in 1997, a group of students, dissatisfied with the quality of a postgraduate degree course on Environmental Studies, alleged that the University had failed to honour its published prospectus ('Practicum Guide') and was in breach of the agreement or contract and liable for misrepresentation. The plaintiffs had completed the course of study and had been awarded the degree of Master of Arts (Applied) in Environmental Studies. The University sought to defend itself in terms of accountability under its in-house procedures which provided for the students to bring complaints to the immediate teaching staff and then on to the Head of Department, Dean of the Faculty, Faculty Board, Vice-Chancellor and the Academic Board before resorting to the University Council. Again, it was argued that the courts had no part to play in such a dispute.

Following the same line of reasoning in *Norrie*, the Court in *Grant* dismissed the University's application to strike-out and held that the former Visitor of the University⁵⁵ did not have exclusive jurisdiction over disputes between the University and its students. The University and the Ombudsmen would have jurisdiction on 'in-house issues' but Ellis J asserted that 'matters properly determinable by the courts such as contract, tort and judicial review remain within the courts' jurisdiction'.⁵⁶ The relationship between a student and the University was partly based on contract and partly based on the *Education Act*. The courts could not intervene in areas that were exclusively within the independent jurisdiction of the University itself. Nevertheless, those areas might be within the jurisdiction of the Ombudsmen in place of the Visitor as defined by a consideration of the *Education Act* and ss 160 and 161.⁵⁷

As to tort, in line with English law, there was no principle which required denial of a common law duty of care, which would otherwise exist, merely because a statutory scheme addressed the same problem. There was no inconsistency or incompatibility between the statutory scheme and the duty owed by educators and advisers to give careful advice and to exercise the skill and care based on a reasonable standard.⁵⁸

In *Lamb v Massey*,⁵⁹ the plaintiff had studied for her Diploma in Teaching but failed the teaching practicum. She did not apply for reconsideration of her failed course and subsequently sought judicial review and alleged a breach of contract by Massey University. The High Court discussed the contractual aspects but dismissed the claim, accepting that the University did not breach the contract during the period of enrolment. Lamb did not avail herself of the procedures in place to enable her to seek redress. The application for judicial review failed too and on further appeal was dismissed.⁶⁰

Academic protection for students in New Zealand has been fair in contrast to the *Griffith University v Tang (Tang)*⁶¹ decision in the High Court of Australia. Ms Tang, the respondent student, was denied judicial review of the University's decision.⁶² Griffith University had initially sought (unsuccessfully) to have the action dismissed in both the Queensland Supreme Court⁶³ and the Court of Appeal.⁶⁴ In the further appeal to the High Court, it was held that Ms Tang was not entitled to a review under the *Judicial Review Act 1991 (Qld)* (the Review Act) as the decision to exclude her from her PhD studies was not made 'under an enactment' as required by the Review Act. The University's decision to terminate its relationship with Ms Tang thus did not

take legal force from the *Griffith University Act* but rather under the general law and the terms and conditions agreed between the University and Ms Tang.

The Court had adopted a rather narrow focus on the availability of judicial review in the exercise of public power, which Kirby J said in his dissenting judgement to be another ‘wrong turn’ in the law.⁶⁵ The Griffith–Tang debacle might be best confined to its facts as Kamvounias and Varnham consider that its application ‘may be as narrow as the narrow view taken by the majority’.⁶⁶ There is comfort that the narrow interpretation of the Review Act might be limited to students seeking redress against universities in Queensland, Tasmania and the Australian Capital Territory, leaving them with a continued right under the common law to seek judicial review.⁶⁷

In New Zealand, based on the precedents set by *Norrie*, *Grant* and *Lamb*, Ms Tang’s case is unlikely to be confined to a narrow interpretation. The *Judicature Amendment Act 1972* provided a simplified statutory review procedure but it was not intended to transform the inherent nature of the court’s jurisdiction or its scope.⁶⁸ Instead it streamlines review for decisions made under a statutory power to be at least as wide as that available at common law.⁶⁹ This broader approach mirrors that of the English courts, in accepting a wider common law basis for judicial review.⁷⁰ Arguably, it remains mere conjecture at this point whether the outcome might be against the student on the facts as in *Lamb*.

V STUDENTS’ ROLE IN INSTITUTIONAL EVALUATION

In the quest to improve ‘quality’ in tertiary institutions, students have become increasingly involved in the evaluation of different aspects of their higher education. A significant aspect of this evaluation is the collection of student ratings of teaching for use in the assessment of teacher effectiveness and of the quality of teaching delivered by individuals, departments or courses. In many cases such student rating is the primary source of data used for the recruitment and retention of teaching personnel.

As with any set of data, it is not only the validity and integrity of the data itself that must be assured, but of equal importance is the reliability of the interpretation and the use to which it is put.⁷¹ Students themselves have indicated that they find evaluation in this way a useful exercise, in terms of improving the quality of the relationship between academic staff and students.⁷² Many studies have concluded that the data provided by student evaluations is generally fair but Kwan voices the mounting concern that the summative use of such data can ignore the significant impact of factors outside the control of either teachers or institutions on the outcomes of ratings.

Further studies from a wide range of countries have confirmed that instructional settings and the discipline in question will have a considerable impact on the rating given to any particular teacher. The reasons for the influence of these variables are still to be investigated, but such results do suggest a note of caution should be applied when using such data to assess ‘quality’ in teaching and courses.

Another area for concern is the weighting put on student evaluations as a measure of quality in terms of any possible litigation for failure to deliver a standard of education that has been contracted for.⁷³ In many countries, funding is linked to student ratings and consequently the low ranking of an institution may be a significant factor in determining the success of any contractual claim for failure to deliver a programme. As this tendency for university league tables to be a measure of relative quality becomes widely accepted, it is considered that legal action relating to poor quality of education taken against a lowly ranked institution is more likely to succeed than if

the institution is highly placed on the league table. This begs the question of the validity of such tables in providing a measure of the 'quality' of programmes.

The action taken by the University of Auckland and Victoria University of Wellington against the Tertiary Education Commission⁷⁴ for judicial review of a decision to publish comparisons ranking research of New Zealand tertiary institutions against British universities demonstrates the concerns many institutions have over the use of ranking and these sorts of comparisons. It could be argued that such comparison may motivate New Zealand institutions to perform to a higher standard to compete with their international rivals and thus lift the quality of the education provided. At the same time however, concerns have been expressed that confining such comparisons to research, demeans the importance of teaching to a high standard so that students do not always receive 'quality' course delivery.

A Quality Measurement Tools

The debate about the use of what are essentially business tools to measure quality in an educational context has focussed to a large extent on the benchmarking of one institution against another. The aim of the benchmarking is to highlight areas for improvement by making direct comparisons between tertiary institutions. Studies have shown that there is merit in some external accountability, particularly where there is competition for state funding. However, benchmarking as a business tool, relying on concrete performance measures, can only be valuable where those measures are designed and implemented with a deep understanding of the differences between the academic and business worlds.⁷⁵ It is commonly acknowledged that education benefits society in a way not easily measured and hence a final definition of 'educational quality' in strictly commercial terms is not possible.⁷⁶ The long-term benefits of a tertiary education will not necessarily be evident at graduation and thus the quality of that education is hard to evaluate at a set time.⁷⁷

The question of educational 'quality' has been examined in terms of the Total Quality Management (TQM) model and the shortcomings of its application to the education sector, particularly its negative impact on encouraging innovation and learning.⁷⁸ Scrabec maintains that it is more appropriate to label a student as a 'recipient' of education than a 'customer' and that the focus in assessing quality education should not be simply on the student as customer, but also on other beneficiaries such as professions, parents, industry, society, and the nation. He has devised a Total Quality Education (TQE) model that provides a more balanced measure for quality in education by introducing factors other than purely student satisfaction measures. The requirements of the larger group of 'beneficiaries' are central to this model and allow for student evaluations to be part of a wider process. This goes some way to avoiding the danger of emphasising student satisfaction at the expense of other quality attributes.⁷⁹

If Scrabec's model were to achieve general recognition and 'educational quality' were regarded as a broader concept than merely satisfying students' requirements, such measures may impact on the legal definition of 'quality' in relation to both contractual disputes between educational establishments and their students and in relation to other consumer legislation.

B Demand for Information About Programme Quality

The increasing influence of student opinion on programme quality is emanating also from a market-driven desire for information. This drive for transparency and clearer information on

institutional performance comes as students and funding bodies attempt to make comparisons to assist decision-making in a very competitive arena.

In the US, league tables and ranking are commonplace at all levels of education but the 2006 Commission on the Future of Higher Education expressed alarm over the lack of reliable information available concerning true costs and quality of teaching programmes.⁸⁰ A similar concern in the UK sparked a response by the Department for Education & Skills which set up the national Teaching Quality Information (TQi) web site displaying the results of a student survey conducted annually. The National Student Survey (NSS) includes satisfaction ratings of students and forms an important part of the website although the site also contains other institutional information.⁸¹ The primary users of the website are identified as prospective students and their advisers and reviews of the operation of the site have stressed that this must be kept in mind, along with the main object of the purpose of providing the information, which is to assist prospective students in making an informed choice of where to study.⁸²

The value of these information sites and the importance of student input to them in terms of improving the quality of education are questionable. Ostensibly they promote greater transparency for students and allow them more honest opportunities to provide appraisals of their places of study, which in turn might encourage institutions to focus on the student learning experience.⁸³ This 'baring all' approach must be regarded with cautious approval. As with the ratings of individual teaching effectiveness, studies have examined the difficulty of establishing a common understanding of 'quality' in tertiary education and therefore finding agreement on how it may be measured.⁸⁴ The size of any response group must have an impact on its reliability as must the inferences that can be drawn from qualitative questions about the level of teaching that can be influenced by the personal characteristics of the respondent.

Brown et al.⁸⁵ conclude that the demand for easily understandable data on the 'quality' of tertiary institutions is a product of the intense 'marketisation' of the tertiary sector but in practice the information provided may not furnish all the answers those stakeholders seek. Students are inevitably putting tertiary institutions in the limelight and raising awareness of their programmes, but the effect of such scrutiny on effective teaching and hence the provision of enhanced learning for students is not clear.

VI ANECDOTAL DISCUSSIONS

Personal experience of one of the writers relates particularly to the sentiment expressed by Kirby J in his dissenting judgement in *Tang* concerning the unique position of universities with their special responsibility to uphold high academic standards. Members of the academic staff will often be more cognisant than judges on issues such as the marking of an examination paper, the academic merit of a thesis, contents of a course or particular styles of teaching and the organisation of course timetables. Such matters are unsuitable for adjudication in the courts as they are issues of an academic nature.⁸⁶ One writer with experience advocating for students has noted that the rights asserted and sought by students are wide ranging. One example found a student wanting a lecturer to teach like 'a previous professor' who had since moved to another university. Another right asserted was that a student should be entitled to choose to behave in class as he pleased, without censure, since he had paid for the service, even whether to pay attention or not with his earphones on. It is felt that these are not rights that a Student Charter could argue for as to do so would be against the interests of the student body.

VII CONCLUSION

This article has attempted to demystify what appears to be a perception that the academic protection of students in New Zealand may be compromised and that additional protection such as a United States-style 'Student Bill of Rights' may be necessary. Government requirements for educational accountability, consumer protection legislation, student evaluation and feedback, and current internal standards appear to provide sufficient safeguards for students. A competitive tertiary market need not necessarily threaten an academic institution's ability to maintain standards while at the same time retain a market share. Students themselves are discerning purchasers of services offered. For those who need protection, the raft of legislative support and internal structures within the tertiary institutions themselves are, on the whole, adequate. There is no evidence in New Zealand that political or other forces are posing any threat to the freedom of expression of students or academics. In fact rather than worrying that enforcement of students' rights might compromise the quality of course content or teaching, one could argue that measures to uphold student rights enhance educational quality.

Competition in the education service sector represents a mechanism for academic protection of students as tertiary institutions are no longer monopoly powers conferring degrees. The demand for comparative information about institutions by students and government will keep pressure on institutions to perform to a high level, although there is concern that some rankings may not be a true reflection of educational quality. The influence exerted by students over course content and teaching appraisal must 'protect' students to a certain extent, but it is essential that this protection does not come at the expense of a dynamic and innovative learning environment.

Courts throughout the common law world, including New Zealand, have acknowledged the susceptibility of the administrative decisions of universities to judicial review and public scrutiny.⁸⁷ It seems likely that the liability of tertiary institutions in contract and tort will continue to be tested as students and their legal advisors gain confidence in asserting such legal rights. It is conceded that students should be made more aware of their rights, and, as the case between the International Education Appeal Authority and the University of Auckland shows, more effort to provide information about advice and support and/or advocacy would enhance the accountability of tertiary institutions.

It is apparent therefore that no immediate reason exists for New Zealand tertiary students to require additional legal protection for their academic rights. It may be, however, that constraints on the ability of universities to achieve more financial and academic freedom and the focus on research above pedagogy are affecting the delivery of a true quality education which equates to the 'value' educational 'consumers' are seeking for their investment. The debate continues over whether a valid measure of educational quality is the number of graduates enrolling in a course, the number finding high paying employment on the completion of their studies, or the highest student satisfaction ratings. The inability to find any clear definition of such 'quality' will affect the willingness of courts to adjudicate on the level of quality of education being provided to tertiary students.

Any increase in student protection raises the question whether this would eventually threaten the ability of tertiary institutions to provide courses that are challenging and of a high standard. The right of the institution to academic freedom carries with it the duty to use that freedom responsibly, and any abuse of this right may lead to its loss.⁸⁸ For students and other stakeholders in tertiary education, to gain the maximum benefit from their investment, a balance must be achieved between upholding the academic freedom of the institution and institutional accountability.

Keywords: academic protection; tertiary students; accountability.

ENDNOTES

- 1 World Trade Organisation (WTO) website at http://www.wto.org/english/tratop_e/serv_e/education_e/education_e.htm (at 14 May 2009). Participating countries during Phase 1 included New Zealand, Australia, United States, Switzerland and Japan. Note: Article I(3) of the General Agreement for Trade and Services excludes services 'supplied neither on a commercial basis, nor in competition with one or more service suppliers'.
- 2 *Communication from Japan — Negotiating Proposal on Education Services* WTO Doc S/CSS/W/137 (2002) [4] (Council for Trade in Services - Special Session).
- 3 *New Zealand Education Act 1989* s 162(4).
- 4 WTO, above n 2.
- 5 Tim Birtwistle, 'Higher Education and the General [lack of] Agreement on Trade in Services: From Doha to Hong Kong and Beyond' (2006) 18 *Education and the Law* 295, 306.
- 6 Patty Kamvounias and Sally Varnham, 'In-house or In Court? Legal Challenges to University Decisions' (2006) 18 *Education and the Law* 1, 13.
- 7 *Education Act 1989* s 161 (2) states that 'academic freedom' in relation to an institution, means:
 - (a) The freedom of academic staff and students, within the law, to question and test received wisdom, to put forward new ideas and to state controversial or unpopular opinions;
 - (b) The freedom of academic staff and students to engage in research;
 - (c) The freedom of the institution and its staff to regulate the subject matter of courses taught at the institution;
 - (d) The freedom of the institution and its staff to teach and assess students in the manner they consider best promotes learning; and
 - (e) The freedom of the institution through its chief executive to appoint its own staff.
- 8 Cheryl A. Cameron, Laura E. Meyers and Steven G. Olswang, 'Academic Bill of Rights: Conflict in the Classroom' (2005) 31 *Journal of College and University Law* 243, 244.
- 9 David Palfreyman, 'Is Academic Freedom under Threat in UK and US Higher Education?' (2007) 19 *Education and the Law* 19, 31.
- 10 *College Access and Opportunity Act 2004* H.R. 4283 § 103, 108th Congress.
- 11 Cameron, Meyers and Olswang, above n 8, 246.
- 12 *Ibid* 247.
- 13 Palfreyman, above n 9, 23.
- 14 See discussion by Justice Stevens in *Regents of the University of Michigan v Scott E Ewing* 88 L Ed 2d 523; 106 S Ct 507; 474 US 214.
- 15 Francine Rochford, 'Suing the Alma Mater: What Loss Has Been Suffered?' (2001) 13 *Education and the Law* 319; Cameron, Meyers and Olswang, above n 8; Kamvounias and Varnham, above n 6.
- 16 Palfreyman, above n 9, 24.
- 17 Sam Middlemiss, 'Legal Liability of Universities for Students' (2000) 12 *Education and the Law* 69, 70.
- 18 *Ibid* 85.
- 19 *Jex-Blake v Senatus Academicus of the University of Edinburgh* (1873) 11 M 84.
- 20 Middlemiss, above n 17, 85.
- 21 Andrys Onsmann, 'Tempering Universities' Marketing Rhetoric: A Strategic Protection Against Litigation or an Admission of Failure?' (2008) 30 *Journal of Higher Education Policy and Management* 77.
- 22 *Ibid*.
- 23 Middlemiss, above n 17.
- 24 Ralph D. Mawdsley and J. Joy Cumming, 'Educational Malpractice and Setting Damages for Ineffective Teaching: A Comparison of Legal Principles in the USA, England and Australia' (2008) 20 *Education & the Law* 25, 28.

25 *Alsides v Brown Institute, Ltd.*, 592 N.W.2d 468 [134 Ed Law Rep 778] (7th Cir, 1992).

26 Mawdsley and Cumming, above n 24.

27 Middlemiss, above n 17, 88.

28 Kamvounias and Varnham, above n 6.

29 Rochford, above n 15, 322.

30 *Ibid.*, and Middlemiss, above n 17.

31 Rochford, above n 15.

32 See a comprehensive discussion of UK cases in Mawdsley and Cumming, above n 24.

33 *Miller v Loyola University of New Orleans* 829 So 2d 1057, 2002-0158 (La App 4 Cir, 9/30/02).

34 Cameron, Meyers and Olswang, above n 8, 287.

35 Onsmann, above n 21.

36 *Ibid.*

37 *Communication from New Zealand — Negotiating Proposal on Education Services* WTO Doc S/CSS/W/93 (2001) [4] (Council for Trade in Services - Special Session) - Education exports are the fourth largest services sector export earner, and fifteenth largest foreign exchange earner overall.

38 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. [ss 160 to 164 were inserted, as from 23 July 1990, by s 36 of the Education Amendment Act 1990 (1990 No 60)].

39 *Education Act 1989* s 161(3).

40 *Education Amendment Act 1990* No 60.

41 *Consumer Guarantees Act 1993* ss 28, 29.

42 *Education Act 1989* s 161.

43 Donald C Savage, 'Academic Freedom and Institutional Autonomy in New Zealand Universities' in Rob Crozier (ed), *Troubled Times: Academic Freedom in New Zealand* (2000) 7.

44 Roger Kerr, 'The University in the 21st Century' (speech delivered for the New Zealand Business Roundtable at the University of Auckland Winter Lectures, 18 Aug 1998).

45 *Ibid.*

46 Rob Crozier (ed), above n 43.

47 Tertiary Education Advisory Committee (TEAC), Ministry of Education, *Shaping a Shared Vision* (2000) 1.

48 Stuart Locke, 'Governance in New Zealand Tertiary Institutions: Concepts and Practice' (2001) 23 *Journal of Higher Education Policy and Management* 33, 46.

49 *University of Auckland v International Education Appeal Authority & Anor* (2007) 18 PRNZ 444.

50 See judgements in *Grant v Victoria University of Wellington* [2003] NZAR 185 and *Lamb v Massey University* Unreported, High Court of New Zealand, Palmerston North Registry (CIV 2003 454 336 & 337), Wild J, 19 Oct 2004.

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

52 *Ibid* 135.

53 *Ibid.*, Woodhouse P at 134-135; Cooke J at 140.

54 *Grant v Victoria University of Wellington* [2003] NZAR 185.

55 The ancient office of Visitor had been abolished by Parliament when it enacted the Education Act 1989. Instead, the Ombudsmen were given jurisdiction to enquire into complaints by s 50(4) of the Education Amendment Act 1990. In the United Kingdom, the House of Lords did not accept the view expressed by Woodhouse P and Cooke J in *Norrie* that the jurisdiction of the Visitor was subject to, rather than exclusive of, the jurisdiction which otherwise might be exercised by the courts of justice. This issue would no longer arise since in New Zealand the ancient office of Visitor has been abolished.

56 *Grant v Victoria University of Wellington* [2003] NZAR 185, 190.

57 *Ibid* 189 - 190.

58 *Ibid* 190, referring to a claim in tort (not at the tertiary level) before the House of Lords in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633.

- 59 *Lamb v Massey University* Unreported, High Court of New Zealand, Palmerston North Registry (CIV 2003 454 336 & 337), Wild J, 19 Oct 2004.
- 60 *Lamb v Massey University* Unreported, Court of Appeal (CA 241-04), William Young P, Hammond & Allan JJ, 13 Jul 2006.
- 61 *Griffith University v Tang* [2005] HCA 7.
- 62 Ibid [57], referring to *Tang v Griffith University* [2003] QCA 571 at [29].
- 63 *Tang v Griffith University* [2003] QSC 22.
- 64 *Tang v Griffith University* [2003] QCA 571.
- 65 *Griffith University v Tang* [2005] HCA 7, see Kirby J's dissenting judgement at [99-100].
- 66 Patty Kamvounias and Sally Varnham 'Doctoral Dreams Destroyed: Does *Griffith University v Tang* Spell the End of Judicial Review of Australian University Decisions?' (2005) 10 *Australian & New Zealand Journal of Law & Education* 5, 11.
- 67 Ibid 12, 15.
- 68 P. A. Joseph *Constitutional & Administrative Law in New Zealand* (3rd ed, 2007) 822 & 1113.
- 69 Ibid. *The Judicature Amendment Act 1972* (as amended by the *Judicature Amendment Act 1977*) made the ambit of review under the Act at least as wide as at common law.
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- 74 *University of Auckland v Tertiary Education Commission* [2004] 2 NZLR 668.
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- 76 Ibid. See also Quentin Scrabec, 'A Quality Education is Not Customer Driven' (2000) *Journal of Education for Business* 298; Peter Karmel, 'Public Policy and Higher Education' (2001) 26 *Australian Journal of Management* 123,123-145; Andreas Hoecht, 'Quality Assurance in UK Higher Education: Issues of Trust, Control, Professional Autonomy and Accountability' (2006) 51 *Higher Education* 541, 541-563.
- 77 Karmel, above n 76.
- 78 Scrabec, above n 76.
- 79 Ibid.
- 80 Final report of the commission appointed by Margaret Spellings, 'A Test of Leadership — Charting the Future of US Higher Education' September, 2006.
- 81 Roger Brown et al. 'Recent Developments in Information About Programme Quality in the UK' (2007) 13 *Quality in Higher Education*, 173.
- 82 Ibid.
- 83 Ibid.
- 84 Ibid 179. See also Scrabec, above n 76.
- 85 Brown et al., above n 81, 181.
- 86 *Griffith University v Tang* [2005] HCA 7, see Kirby J's dissenting judgement at [165].
- 87 *Norrie v Senate of the University of Auckland* [1984] 1 NZLR 129, 135.
- 88 Association of University Staff Policy on Academic Freedom (1995) ss 2.5 & 2.6.