

# The View From the Bottom of the Cliff Enforcement of Legal Rights between Student and University

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## Introduction

The view from the *top* of the cliff is always better. The sun shines there more brightly. The air is purer. Perspectives and directions are easier to define. No backbreaking climb lies ahead. Above all, there is time.

But when things go wrong, those affected do not find themselves at the top of the cliff - at least not for long. When problems arise in the relationship between educational institution, teacher and student, one does not start at the top of the cliff. One starts at the bottom. We do not fly. We climb.

There are two major points of focus in this article. The first is on the *source* of rights. I have called this "Theory" - because it is really the view from the top of the cliff. I argue that the basic underlying rights of student and institution are *contractual* - much like any other supply of services for a fee. Contractual rights are, of course, modified by other legal regimes - in particular, statute. The other major focus is on the *enforcement* of rights. I have called this "Practice". It is the view from the bottom of the cliff.

The relationship between university and student begins as one of absolute goodwill. It is difficult to imagine any supply environment where the mutual enthusiasm - of supplier and consumer - is greater. When legal disputes arise it is generally because what has happened is that someone has *got into a mess* - muddle being the motherlode of education disputes.

It is also important to bear in mind that there are at least three distinct interest groups in education disputes. These are:

- (a) the student;
- (b) the institution;
- (c) the teacher.

The teacher tends to get overlooked. Yet action taken by the institution to resolve the dispute with its student may result in it taking action infringing the employment rights of the teacher. This alone is a powerful reason to ensure that:

- (a) there are effective academic grievance procedures in place which are sensitive to the different interest groups involved in the dispute; and
- (b) that these procedures are properly mandated in the relationships between the university and its students and the university and its teachers.

The problem is in *resolving* the “muddle”. As a litigator I can say, unequivocally, that litigation is the worst option. It is the ambulance at the bottom of the cliff. It is slow - unless there is a clear breach of rights which would entitle student, institution or teacher to an interim injunction. It is overpowered and overpowering (but under-performing - much “revving in neutral”). And - as in the United States - you pay for the ride.

### **Theory (The Sources Of Rights)**

In discussing the sources of rights it is helpful to start with the proposition that there are four conceptual sources:

- (a) statute law (specific);
- (b) statue law (general);
- (c) tort (law of negligence);
- (d) contract.

### **Statute law (specific)**

The tertiary sector is governed in the first instance by specific statute law: the *Education Act 1989*. This law cannot be displaced by private bargain. Any contractual relationship must therefore accommodate the primacy of governing statute law.

Of first importance are Parts XIII to XX - inserted by the Education Amendment Act 1990. Section 160 provides:

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.

This innocuous provision defines the arena of conflict. In any educational dispute involving issues of resourcing (eg in the *Victoria University* case), conflicts arise between the demands of:

- (a) autonomy;
- (b) efficiency; and
- (c) “accountability”.

Section 161(1) declares Parliament’s intention to preserve and enhance the “academic freedom and the autonomy of institutions” - with “academic freedom” however defined in a *conditional* way:

- (a) freedom of expression “within the law” (section 161(2)(a));
- (b) in particular there is section 161(3):

In exercising their academic freedom and autonomy, institutions shall act in a manner that is consistent with -

- (a) The need for the maintenance by institutions of the highest ethical standards and the need to permit public scrutiny to ensure the maintenance of those standards; and
- (b) The need for accountability by institutions and the proper use by institutions of resources allocated to them.

[emphasis added]

“Accountability” is an ever-present restraint - one which universities and teachers chafed against in the education reform process following the Hawke Report and Government reports (such as *Learning for Life 1 & 2*)<sup>1</sup>. See for example the remarks of Dr Jim Evans (of the Auckland Law Faculty)<sup>2</sup>:

I do not get the impression when reading this bill that its proposers have deliberately set out to subvert academic freedom of opinion and enquiry in the universities. Rather their concern has been to achieve control, partly for economic reasons, partly because of a belief in the importance of a particular management style, and partly, perhaps, from the human desire to intermeddle. They have also been dominated by a concern to apply the same legal structure to all tertiary institutions. Their sin or folly - for it is not clear which it is - is that they permit the autonomy of universities, and

consequently academic freedom, to be sacrificed to the pursuit of these aims.

In the *Victoria University* case, the university submitted that the combination of legislative protection of academic freedom, together with explicit reference to “autonomy” (albeit with references to “public” accountability) conferred:

a real independence on the “what”, “how” and “who” of tertiary education.

I do not think that the university submission was well founded. The 1990 Amendment Act, in its context, was seen by universities as *impairing* academic freedom rather than enhancing it. In the *Victoria University* case, the university advanced the statute as if its thrust was to give primacy to academic freedom and independence, at the expense of accountability. The true position, which everyone recognised in 1990 - the universities most of all - was the reverse.

Education-specific legislation (such as the Education Act 1989) is of course expressed in lofty and general principles. But it is not the only specific statutory governance that applies. Perhaps of most importance is the power of the universities (and other tertiary institutions) to develop their own *subordinate legislation*. Section 194 of the Education Act 1989 gives the Councils of tertiary institutions very broad powers to make statutes (not inconsistent with the Education Act 1989 and the State Sector Act 1988) with respect to good government and discipline of the institution, penalties upon staff or students for contravention of university statutes, enrolment, courses of study and training, and numerous other matters. In addition, Councils are given a general power under section 193 of the Act to provide courses of study or training, admit students, and prescribe fees.

These powers lie in the realm of *public law*. The Courts have always exercised a supervisory jurisdiction over the exercise by universities of statutory powers of decisions<sup>3</sup>:

- (a) judicial review where there is a sufficient substantive or procedural error;
- (b) judicial review of the validity of subordinate legislation passed by universities.

But, there is of course, a fundamental resistance on the part of Courts to second-guessing policy decisions by bodies given wide discretion by statute, particularly discretions relating to the distribution of resources.

### **Statute law (general)**

First, the *Consumer Guarantees Act 1993*: academic teaching services are a “service”, and subject therefore to statutory guarantees as to their being “carried out with reasonable care and skill” (section 28) and of “reasonable fitness” (section 29).<sup>4</sup> The Act did not, in this

respect, really create new law. Rather, it simply restated common law obligations (and precluded contracting out in consumer transactions: section 43). None of the universities made submissions on the Act while it was a bill in select committee, so its potential impact was either unrecognised or conceded.

Secondly, provided that academic services are supplied “in trade” (and the definition in section 2(1) is wide - “any ... profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of ... services ...”), universities will be covered by the *Fair Trading Act 1986*. This last issue remains controversial. In *Plimer v Roberts*<sup>5</sup> a member of the Australian Skeptics group alleged that a lecturer had engaged in misleading and deceptive conduct in trade or commerce, contrary to the provisions of the equivalent Fair Trading Act of New South Wales. The lecturer in that case was an historical researcher who delivered unpaid public lectures on behalf of an unincorporated association known as the Noah’s Ark Research Foundation. Its purpose was to encourage interest in an investigation of a boat-shaped geological formation near Mount Ararat. The association charged entry fees for Dr Roberts’ lectures, and sold video and audio tapes of the lectures to the public at the lecture meeting. It was held that Dr Roberts had made false representations to the effect that he had personally carried out certain archaeological and scientific investigations relating to the site. However, the representations were *not* made “in trade or commerce” because:

- (a) Dr Roberts was not paid (and was not a member of the association);
- (b) the subject matter of Dr Roberts’ lectures was of a non-commercial nature;
- (c) the misrepresentations were as to content, rather than as to the sale of tickets and recordings; and
- (d) Dr Roberts’ goal in delivering the lectures was to encourage interest in the site and the creationist view of history rather than to obtain financial gain.

Branson J noted that if the Act were held to have applied, it would:

... provide a significant deterrent to intellectual and religious debate in this country, at least so far as it is carried on through commercial avenues.<sup>6</sup>

Elsewhere in the decision, Lindgren J said<sup>7</sup>:

The delivery of the lectures was not inherently a trading or commercial activity. The misrepresentations, made in the course of the giving of them, were not in the nature of a promotion of NARF’s selling of door tickets or videotapes or audio cassettes. The misrepresentations were no different, in the present respect, from misrepresentations made in the course of the giving of lectures or addresses in many familiar factual settings. A

professor delivers a lecture to university students; an academic or other person presents a paper at a conference or seminar held for the practitioners of a profession; a public figure addresses a crowd in a hall. Assume that in each case the speaker is not paid but understands that the institution or organisation which has arranged the event is making an admission charge or will sell various recorded forms of the lecture or address, or both. In such cases, what is said in the course of the delivery of the lecture or address will not ordinarily be “in” trade or commerce, even if the charging and selling by the institution or organisation is.

However, such observations give little comfort to universities, in relation to liability arising from misleading *promotional material or course information*, because:

- (a) students pay substantial fees to become members of the university and participate in courses;
- (b) universities operate in a competitive environment and issue such material with a view to inducing students to select a particular course, and to select the university as a whole; and
- (c) students clearly act in reliance upon that sort of material.

### **Tort (law of negligence)**

In addition to specific and generally applicable statute law, the law of negligence can apply to the provision of educational services.

By offering, marketing and promoting a course and accepting enrolments, a university accepts a duty to provide educational services to the students. Because the university has accepted that duty, then it must take care in the way it carries it out. Careless provision of educational services amounts to common law negligence quite independently of the fact that the provision of such services occurs under statutory authority. In *X Minors v Bedfordshire County Council*<sup>8</sup> the House of Lords held:

The claim is based on the fact that the authority is offering a service (psychological advice) to the public. True it is that, in the absence of a statutory power or duty, the authority could not offer such a service. But once the decision is taken to offer such a service, a statutory body is in general in the same position as any private individual or organisation holding itself out as offering such a service. By opening its doors to others to take advantage of the service offered, it comes under a duty of care to those using the service to exercise care in its conduct. The position is directly analogous with a hospital conducted, formerly by a local authority

now by a health authority, in exercise of statutory powers. In such a case the authority running the hospital is under a duty to whom it admits to exercise reasonable care in the way it runs it.<sup>9</sup>

In my judgment a school which accepts a pupil assumes responsibility not only for his physical well being but also for his educational needs. The education of the pupil is the very purpose for which the child goes to the school. The head teacher, being responsible for the school, himself comes under a duty of care to exercise the reasonable skills of a headmaster in relation to such educational needs. If it comes to the attention of the headmaster that a pupil is under-performing he does owe a duty to take such steps as a reasonable teacher would consider appropriate to try to deal with such under-performance. To hold that, in such circumstances the head teacher could properly ignore the matter and make no attempt to deal with it would fly in the face, not only of society's expectations of what a school will provide, but also of the fine traditions of the teaching profession itself. If such head teacher gives advice to the parents, then in my judgment he must exercise the skills and care of a reasonable teacher in giving such advice.<sup>10</sup>

There is a community expectation that educational institutions will provide educational services properly and according to a reasonable standard. Imposing a duty of care on a university does not cut across any existing statutory scheme for the maintenance of educational standards. Imposing a duty of care on the university would not have a negative impact on existing bases for university liability<sup>11</sup>. Nor would it discourage the performance by the university of its educational functions. The Education Act 1989 does not clearly articulate how students and others can ensure the university is "accountable" in exercising its academic freedom. In the absence of any such articulation, the students are entitled to assume that where the university's internal processes to ensure the careful teaching of courses have failed, claims are justiciable according to normal processes (such as Court proceedings).

The issues in such cases should *not* be *justiciability*, but defining the scope of the duty, establishing breach and causation of loss. None of these will be easy<sup>12</sup>. As Hopkins notes<sup>13</sup>:

Establishing the causal link is a matter of proof, and it could be a difficult problem in many cases, but this is not a reason for excluding all educational malpractice problems from the Courts. In some cases causality might not be a problem and, in any event, the Courts are accustomed to attempting to unravel complex and technical situations, for

example in medical negligence, or cases involving fraud and myriad financial transactions. Where the causal link is difficult to prove, it will act as a big disincentive to potential plaintiffs who are contemplating the stress and expense of litigation.

In the United States, there has been a tendency to view educational malpractice cases as non-justiciable. Such cases have generally fallen into two types - a plaintiff sues his or her academic institution for:

- (a) tortiously failing to provide adequate educational services<sup>14</sup>;
- (b) tortiously failing to diagnose educational impediments<sup>15</sup>.

However, even in the United States, the Courts reserve some supervisory role. In *Gupta v New Britain General Hospital*<sup>16</sup> it was recognised that:

Educational discretion is nonetheless, not limitless ... in exercising its professional judgment, an educational institution does not have license to act arbitrarily, capriciously or in bad faith. Such a substantial departure from academic works may implicate substantive due process.

In New Zealand, Ellis J has held that a claim of negligence in teaching and course administration *is* justiciable.<sup>17</sup>

The law of negligence does not require perfection, but simply reasonable care. The prospect of litigation would impress on education authorities the need to have clear goals, and to ensure that adequate resources are available in systems in place to meet those goals. In short, better educational administration might result.

## **Contract**

In the university context, the rights of students (and of faculty members) derive from *both* contract and statute. In a 1983 article, C B Lewis states<sup>18</sup>:

The university-student relationship is a complex, hybrid one which, it seems, is better regulated partly by contract and partly under the rubric of public law. In certain areas of the relationship, especially those involved with the payment of fees or with students misled by the university as to the academic requirements of a degree, contractual remedies in the form of damages seem most suitable. Contract can also be viewed both as a source of university authority and as the basis of the student's claim for natural

justice (by means of the much overworked “implied term”). Even where a university seeks expressly to exclude natural justice, this can be prevented by holding the term to be “contrary to the public policy”.

In other areas of the relationship, the contractual analysis may not be the most appropriate one, especially in light of the remedies offered to the student. Where, for example, a student wants reinstatement and the observance of proper procedures before expulsion, monetary compensation is not satisfactory. Moreover the courts may be reluctant to order specific performance of a contract involving personal relationships. The contract theory can do nothing for applicants who are treated arbitrarily or discriminatorily since they have no contract until they are admitted.

And, in his *Law of Higher Education* Dr Farrington states<sup>19</sup>:

The principal message of this chapter will be that the status of students has changed irrevocably. The change has been from one of being in a subordinate role in the *studium generale* to one of a consumer of services. The consumer contracts with an institution to purchase those services which are themselves provided under a separate contract with the state. In 1989, when the Association of University Teachers threatened industrial action over a pay claim, the pre-1992 universities began to appreciate the importance of defining the terms of the institution-student contract. The advice given by leading counsel to one university was crystal-clear:

In my opinion ... there is no doubt that the failure by the University to provide each student with the examination system described in the Faculty Handbook in accordance with the Regulations would amount to a breach of contract for which the student would be entitled to claim damages.

There is nothing unusual in coexistent sources of rights: a ready comparison exists in the coexistence of plaintiffs’ rights in contract and tort. The coexistence of statutory powers and contractual rights is to be found in New Zealand life in all manner of bodies. Consumers are already familiar with the overlay of statute on contractual relationships (and, where permitted, vice versa). The courts in the United Kingdom have dealt with the conjunction of private and public law rights in a series of cases, including *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee*<sup>20</sup> where a robust approach is commended.<sup>21</sup>

In the case of universities in New Zealand, the source of their contract-making power is statutory: sections 166(1) (establishing universities as bodies corporate) and 192(1) (giving universities the rights and powers of a natural person) of the Education Act 1989. That is no different to any company formed under the Companies Acts. Universities are legal corporations capable of entering into contractual relationships with faculty and students.

In Canada, the authorities support the conclusion that the student university relationship is primarily contractual: see *Akhtar v Dalhousie University*<sup>22</sup> and *Sutcliffe v Acadia University*<sup>23</sup>. In the latter case, the university sued in contract to recover unpaid residence fees, relying on provisions in the university calendar. The Court of Appeal of Nova Scotia held that:

There was clearly a contract ... between the appellant and the university and it is this contract which governs the relationship between the parties.

To similar effect, in Scotland, is *Joobeen v University of Stirling*<sup>24</sup> where a student sought judicial review of a university's refusal to allow him to complete a course, on the grounds that he had failed to pay the required fee. Lord Prosser held that the university was entitled to "rescind its contract with the student for non-payment"<sup>25</sup>.

In England, in *Sammy v Birkbeck College*<sup>26</sup> it was acknowledged that the relationship was contractual. Marshall J reached the same conclusion in *D'Mello v Loughborough College of Technology*<sup>27</sup>. Sir William Wade has said<sup>28</sup>:

The legal relationship of a university with its members is much more suitably governed by the ordinary law of contract and by the ordinary contractual remedies.

Lord Devlin reached the same conclusion in 1972<sup>29</sup>:

Contract is the foundation of most domestic or internal systems of discipline .... The power to discipline should be derived from the acceptance of it by the student in the contract of matriculation.

This approach was accepted by Ellis J in the *Victoria University* case<sup>30</sup> where His Honour said:

I think it is beyond argument that the relationship between the student (who is a member of the University: s163) and the University is partly based on contract and partly based on the [Education] Act itself ... It is therefore on the basis of contract, tort or judicial review that a student may

seek redress against the University ... The Court will not adjudicate upon matters which impinge on academic freedom and independence, but they will entertain an action brought by a student based on tort or his or her contract with the University which does not so impinge.

In my view it is unfortunate that universities have not recognised this reality sooner - and embraced a more formal contractual relationship, with all its associated advantages of mutuality and certainty.

Universities continue to pretend that the institution-student relationship is the same as it was before cases like *Victoria University* focused on its contractual underpinning. It is difficult to imagine any other major service provider taking so relaxed and chaotic an approach to defining the duties and responsibilities of a contractual relationship. This is especially so when the reality is that universities have the ability to dictate terms (the student-university relationship is not negotiated) and to reinforce or supplement contractual terms with subordinate statutes. Yet if you ask a simple question - what *is* the student-university contract? - the answer is not found in a single sensible instrument but in a multitude of ephemera.

Universities, in common with other service providers in a competitive world, market extensively - without focusing on the legal effect of that material, which in many cases will amount to pre-contractual representations enforceable in contract and under the Fair Trading Act 1986. Universities publish more conventional course material, prospecti, charters and teaching plans that may have the same legal effect as more obvious marketing material - and indeed may be seen to have an even *more* obligatory nature (given that no issue of puffery arises). In the *Victoria University* case, the student plaintiffs relied particularly on statements made in a prospectus and in a practicum guide published by the university.

The purely unilateral nature of this sort of contractual material creates serious disadvantages for the *universities*, because the universities thereby assume obligations, without necessarily securing any form of counter-performance obligations by the students. The students do not sign or undertake anything in particular. Students make few if any pre-contractual representations. So the student can point to a wide range of material and allege breach by the university; the university can only point to enrolment forms and argue that there are implied duties of diligence or intellectual fitness and that want of these have caused the muddle which has then caused the dispute.

A more formalised contractual relationship would result in more *certainty* as well as a mutuality. In particular, it is thereby possible to confine the obligations of the university and to exclude other representations (and in particular the importation of other representations through marketing and other ephemeral material). Put simply, in a relationship which the law declares to be contractual, and which is of a consumer-supplier

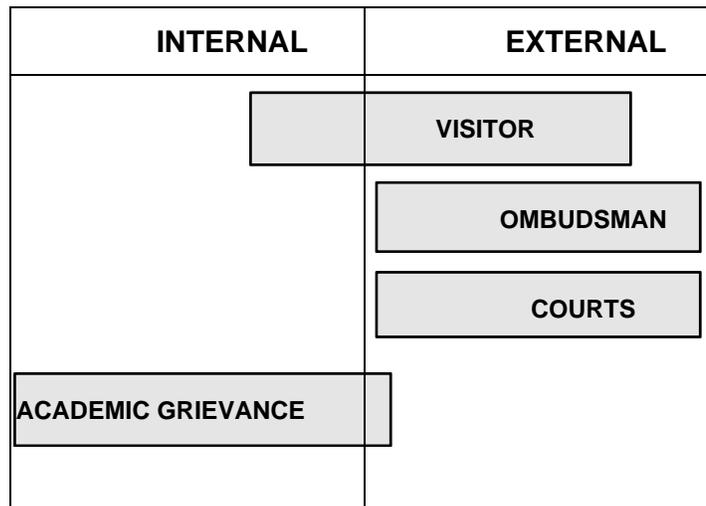
nature (albeit of a specialised kind), it is preferable that the parties know just where they stand.

As noted earlier, a university entering a contractual relationship with its students is in a position to prescribe the terms upon which it is prepared to offer its services. Such terms could, conceivably, include exclusionary or limitation clauses. Of course, in offering its services on that basis (and thereby restricting, to some extent, their attraction) a university would take the risk that others providing like services would not follow its lead and would attract more students as a result. As Lewis points out<sup>31</sup>:

[T]he student has no real choice about accepting the rules: he either registers and is bound by them or he seeks education at a university where the rules are more favourable.

### Practice : The Enforcement Of Rights

I turn now to *practice*: the processes by which the rights of students (and universities) are enforced as between each other. The first point to be made is that there is broadly a divide between *internal* and *external* processes:



### Visitor

The Visitor stood at the divide between internal and external processes, and the abolition of the Visitor is much to be lamented. The Visitor's jurisdiction was typically defined:

**Visitor of the University** - The Governor-General shall be the Visitor of the University, and shall have all the powers and functions usually possessed by Visitors.<sup>32</sup>

The “usual powers and functions” of the Visitor have been explained in a number of cases<sup>33</sup> and in New Zealand constituted a non-exclusive jurisdiction to deal with internal disputes between:

- (a) the university (as a corporation);
- (b) members of staff; and
- (c) members of the student body,

even where the disputes raised “contractual or other issues of law”<sup>34</sup>.

In *Norrie* the Court of Appeal acknowledged that in some cases the visitatorial and judicial jurisdictions were mutual, but that recourse should first be had to the Visitor - “the domestic remedy”.

Most importantly (because it meant that there was no necessary advantage in going to Court) the Visitor had the power to award *compensation*: *Thomas v Bradford University*<sup>35</sup>:

I can see no reason why the Visitor as judge of the laws of the foundation should not have the power to right a wrong done to a member or office holder in the foundation by the misapplication of those laws. The Visitor would be a poor sort of judge if he did not possess such powers. Suppose, first, a case in which on appeal the Visitor concluded that there had been no “good cause” for the dismissal of a member of the academic staff and ordered a reinstatement of the member: I cannot entertain a doubt that the Visitor would have power to order payment of arrears of salary between the date of dismissal and reinstatement. Suppose, secondly, a case in which the Visitor concluded there had been no “good cause” for the dismissal but relations between the dismissed member and the other members of the academic staff had so deteriorated that it would be inimical to the general health of the university to order reinstatement. Why in these circumstances should the Visitor not proceed to right the wrong done to the member by ordering that a monetary recompense should be paid by the university in lieu of reinstatement. No doubt in calculating the sum he would be guided by those principles that the courts have worked out in cases of wrongful dismissal in which the courts refuse to enforce a contract of service wrongfully terminated but give monetary recompense instead, which the law labels as damages. To deny a Visitor

such a power is to deny him one of the fundamental functions of a judge which is to right a wrong, in so far as money can.<sup>36</sup>

How came the untimely death of the Visitor? The Report of the Working Group on Post-Compulsory Education and Training, 31 July 1988, (the “Hawke Report”) does not refer to the Visitor issue at all. *Learning for Life* - an outline of the decisions of Cabinet after it considered the recommendations in the Hawke Report<sup>37</sup> - stated:

The powers of the “Official Visitor” will be transferred to the Office of the Ombudsman. Currently, the Governor-General, by virtue of his or her office, holds the position of “Official Visitor” to each of the universities in New Zealand. Similarly, the Minister of Education is the “Official Visitor” to Lincoln College. The “Official Visitor” is called upon from time to time to adjudicate in disputes which have arisen between a university and its staff or students. The function is essentially a judicial one and both parties in the dispute are usually represented by legal counsel. The transfer to the Office of the Ombudsman will make both the powers for settling disputes and the process for doing so clearer.

After *Learning for Life* was released in February 1989, the Minister of Education set up a number of working groups. The issue of the transfer of powers of the Visitor to the Ombudsmen was considered by at least two of these working groups, the Institutional Framework Working Group and the Review and Audit Functions Working Party.

The Institutional Framework Working Group was chaired by Sir Kenneth Keith and included another noted lawyer, Professor John Burrows. Its report addresses the proposal in *Learning for Life* that the powers of the Visitor be transferred to the Ombudsmen, by recognising that the Visitor was one means among several for handling disputes arising within universities. The Working Group stressed the importance of institutions having their own internal procedures, which handle the great bulk of such cases. The report continues<sup>38</sup>:

... consideration should also be given to establishing a residual procedure to handle those conflicts which do not fall within the standard category. Some disputes will however require an external remedy. Several external remedies are already available - the regular courts where question of legal rights arise, the Labour Court for some staff disputes, the Race Relations Conciliator, the Human Rights Commission, and the Ombudsmen generally for the polytechnics and colleges of education and specifically for official information matters both for those institutions and for the University. The Visitor is relevant only to the universities and handles a

varied range of cases. That office has a power of decision, while the Ombudsmen can only recommend.

The Institutional Framework Working Group recommended that instead of transferring the powers of the Visitor to the Ombudsmen, the jurisdiction of the Ombudsmen should be extended to cover the universities. This despite explicitly recognising<sup>39</sup> that the Ombudsmen's extended jurisdiction would not completely equate with the jurisdiction of the Visitor<sup>40</sup>.

*Learning for Life Two* elaborated the decisions made in *Learning for Life* after the Government had considered the working groups' responses, and was given legislative form in the Education Amendment Act 1990. The powers of the Visitor were not transferred to the Ombudsmen. Instead, the Ombudsmen's jurisdiction was extended<sup>41</sup>.

The only other parliamentary consideration of the Visitor during the passage of the Education Amendment Bill 1990 occurred when John Luxton MP unsuccessfully moved to restore the Visitor<sup>42</sup>:

9.37pm

**JOHN LUXTON** (Matamata) moved to add the following proposed new section:

**161B Visitor of each university.** The Governor-General shall be the Visitor of each university and shall have all the powers and functions usually possessed by Visitors.

Amendment negatived.

On the whole, one might well wish Mr Luxton's initiative had succeeded.

### **Ombudsman**

The discussion regarding the Visitor's demise deals largely with the position of the Ombudsman. There are advantages and disadvantages, but on the whole the Visitor was a superior procedure:

- (a) the Ombudsman is an informal and inexpensive procedure;
- (b) the Ombudsman is wholly external to the institution.

On the other hand:

- (a) the Visitor could award compensation (the Ombudsman's powers are recommendatory only, though doubtless persuasive);

- (b) the existence of the Visitor made recourse to the Courts largely superfluous. For instance, the *Victoria University* case could and would have been referred to the Visitor (had the office still existed) when internal procedures failed to achieve resolution.

Since the extension of the Ombudsmen's jurisdiction in 1991, that office has dealt with a number of disputes where students or others consider they have been adversely affected by action of a university<sup>43</sup>. While the Ombudsmen's recommendations are seldom rejected, the fact remains that their powers are recommendatory only, and unless an institution agrees to make an *ex gratia* payment, there is no assurance of compensation for demonstrable wrong. This role - one in effect betwixt the provinces of Ombudsmen and Judges - was best reposed in the Visitor; and thus my lament for the passing of the Visitor is little allayed.

### **Courts**

As a seasoned litigator I have little to say in favour of recourse to the Courts in this sort of dispute. As I said earlier, it is the ambulance at the bottom of the cliff. The Courts are:

- (a) slow - unless there is a case for interim relief; and
- (b) expensive.

They have the merits of complete independence, and consistency of outcome is protected by the existence of rights of appeal (more cost, more delay).

In the *Victoria University* case, High Court proceedings were issued when internal initiatives broke down. A statement of claim was filed on 27 November 1996. The University applied for further particulars on 17 December 1996. The plaintiffs filed an amended statement of claim on 14 February 1997. The University applied to strike out the claim on 14 March 1997. The application was heard on 25 September 1997. The Court's judgment (rejecting the University's strike-out application) was delivered on 13 November 1997. The University appealed to the Court of Appeal, but abandoned its appeal on 11 June 1998. The year since then has been spent on discovery and other pre-trial matters.

None of this is to criticise the University: its actions were entirely appropriate for a litigant. The point is that it serves neither student nor University at all for the only effective recourse to be litigation. Hence my enthusiasm for the Visitor. Absent the Visitor, one must look instead to effective academic grievance procedures.

### **Academic Grievance Procedures**

A number of universities now provide extended written academic grievance procedures, and this development is to be welcomed. There is much variation among the models.

Those of Massey and Waikato Universities are sophisticated, detailed and specific. Other models are briefer. Some form part of specific regulations; others are less clearly mandated. In my respectful view, to be fully effective and worthwhile such procedures need to embrace seven distinct qualities.

First, they must be *duly mandated*. That is, such procedures should usually be obligatory. The only way to achieve that is to so provide in a subordinate statute, or enter that obligation in the contracts between university and students, and between university and staff.

Secondly, academic grievance procedures should *commence informally*. They should encourage grievances to be raised directly with the staff concerned, but also provide procedures where that is inappropriate. In a number of cases a disputes facilitator or co-ordinator is appointed by the university, and counterpart by the students' association, to assist that process. Mediation by that officer may be appropriate.

Thirdly, there needs to be provision for *escalation*. But not too much. Some procedures simply have too many levels of escalation - from staff member to HOD to Dean to Academic Convenor to Deputy Vice-Chancellor to Academic Grievance Committee in one case. One wonders *why* so many layers are needed, and whether the net effect is not delay and distraction. Better perhaps that there are up to *four* levels: informal approach to the staff member; escalation to departmental *or* faculty level thereafter; reference then to central Registry level (pro, assistant or deputy vice-chancellor level); and then to an adequately independent academic grievance committee.

Fourthly, the procedures need to be *effective or final*. They should not be a staging process on the way to litigation or continued complaints. At the end of the process the complainant's only further recourse should be if the procedures have not themselves been followed. To achieve such finality depends on a number of other elements mentioned here: due mandating of the process by contract or subordinate statute, independence in the final layer and a sufficient range of available remedies.

Fifthly, in my view the final layer - usually an academic grievance committee - should have an *external independent chair* with a casting vote. This to avoid challenge to the outcome for want of natural justice, or "bias". In some cases there are student and university appointees, but the chair is a pro, assistant or deputy vice-chancellor. That is not, I believe, satisfactory either in appearance or effect if a real pretext for challenge is not to be squared away.

Sixthly, the procedures need to be *sensitive to staff employment rights*. Action taken in the course of resolving a student's complaint may result in unjustifiable action for the purposes of employment law, with the result that the staff member has a personal grievance<sup>44</sup>. Indeed it may be better that there are distinct investigations of the complaint and the consequences for the staff member as an employee. Staff affected need to be

party to the process and be adequately informed of the complaint and ensuing procedures<sup>45</sup>.

Finally, there needs to be an *adequate range of remedies* available. In my view this should include the power to compensate students who have suffered loss as the result of some irregularity by the university. As noted earlier, this power was possessed by the Visitor of old. The Ombudsmen lack it. It should not be necessary for a student to have to go to court (or the Disputes Tribunal) to achieve monetary redress.

## Conclusion

The nature of the student-university legal relationship is fundamentally contractual. In this it has much in common with other contractual relations entered for the supply of services. The framework of specific statutory and regulatory instruments governing tertiary education in New Zealand probably has relatively limited impact: while it restates academic freedom as a primary goal, it also states the necessity for “accountability”, without defining clearly what that is or how it is to be achieved. In eliminating the ancient office of the Visitor, the legislation appears to convey the ultimate responsibility to ensure accountability to either the Ombudsmen (subject, however, to the limits of their powers) and otherwise to the Courts. In the latter respect, there is consistency with other service supply contracts.

The reality that the legal relationship with a student is at base contractual, might be expected to encourage universities to address urgently the *form* of those contracts - which I have criticised as generally being based on a multitude of ephemera, rather than a single sensible instrument. It should also encourage universities to improve their internal academic grievance procedures - in order that the Courts need not embark on the task of sweeping up wreckage from the bottom of the cliff.

## Endnotes

1. See Butterworth & Tarling *A Shakeup Anyway: Government and the Universities in a Decade of Reform* (Auckland, 1994), chapters 8 and 9.
2. Quoted in Butterworth & Tarling at 213.
3. See eg *University of New Zealand v Solicitor-General* [1917] NZLR 353; *Syme v University of New Zealand* [1931] NZLR 952; *Avery v University of New Zealand* [1934] NZLR 95; *Clifford v University of New Zealand* [1945] GLR 396; *Lagan v University of New Zealand* [1946] NZLR 83; *Norrie v Senate of University of Auckland* [1984] 1 NZLR 129.
4. See Varnham (1998) 3 ANZJLE 3, 13-16.
5. (1997) 150 ALR 235.

6. Ibid, 245.
7. Ibid, 258.
8. [1995] 2 AC 633. (See, however, the case note by Shorten pp 65-71 of this issue of ANZJLE – Ed).
9. At 762-763.
10. At 766.
11. See eg Ramsay (1988) 11 UNSWLJ 200; Hopkins (1996) 4 Journal of Educational Administration 39.
12. See eg *Phelps v Hillingdon London Borough Council* [1999] 1 WLR 500.
13. Op cit, n.11 at 52.
14. Eg *Peter W v San Francisco Unified School District* 60 Cal App 3d 867 (1976).
15. Eg *Donohue v Copiague Union Free School District* 418 NYS 2d 375 (1979).
16. 687 A 2d 111 (1996).
17. *Grant v Victoria University of Wellington* (Unreported, High Court Wellington, CP 312/96, 30 November 1997).
18. (1983) 15 Ottawa L Rev 249, 272.
19. London 1994 at 319.
20. [1992] 1 AC 624.
21. See also 1 *Chitty on Contracts* (27<sup>th</sup> ed, London, 1994), paragraphs 1-082 to 1-084.
22. 21 NSR (2d) 593 (1975).
23. 95 DLR (3d) 95 (1978).
24. [1995] SLT 112.
25. At 122.
26. *The Times*, 3 November 1964.
27. *The Times*, 17 June 1990.
28. (1969) 85 LQR 468, 471. See also (1974) 90 LQR 157.
29. Report on the (Garden House Hotel) Sit-In, Cambridge University Reporter ciii Special No. 12.
30. Unreported, High Court, Wellington, CP312/96, 30 November 1997.
31. At 259.
32. Section 5, Victoria University of Wellington Act 1961.
33. *Norrie v Senate of University of Auckland* [1984] 1 NZLR 129; and *Rigg v University of Waikato* [1986] 1 NZLR 149: see Caldwell (1982) 1 Cantuar L Rev 307.
34. *Norrie* at 136, per Woodhouse P.
35. [1987] 1 AC 795, 823-824 per Lord Griffiths.

36. Also *Wong v University of Toronto* (1989) 79 DLR (4<sup>th</sup>) 652, 665-666.
37. Paragraph 3.1.12.
38. Paragraph 124.
39. Paragraph 126.
40. The Review and Audit Function Working Party reached the same conclusion.
41. Schedule I to the Ombudsmen Act 1975 (listing the departments and organisations to which that Act applies) was amended to include “institutions established under part XIV of the Education Act 1989”, as from 1 July 1991, by s 50(4) of the Education Amendment Act 1990.
42. See 509 NZPD 2703 (10/7/90).
43. Approximately 12 such cases annually: advice from Ombudsman Anand Satyanand to the author.
44. See for example *Lenart v Massey University* [1997] ERNZ 253, where behaviour in the nature of sexual harassment pursuant to section 29(1)(b) Employment Contracts Act 1991 was held to have taken place, but (being at the borderline) was not sufficient to justify dismissal.
45. <sup>45</sup> In *Lenart*, the staff member concerned:
  - (a) offered an “innocent” explanation which was regarded as irrelevant;
  - (b) was not provided with all the relevant documentation; and
  - (c) was not clearly informed that a section 36 enquiry was being undertaken, nor that there was a real possibility of dismissal.