
Book reviews

Editor: Greg Weeks

HIGHER EDUCATION AND THE LAW

Higher Education and the Law, by Sally Varnham, Patty Kamvounias and Joan Squelch (eds), Federation Press, 2015, 259 pages + xxvii tables: ISBN 9781760020255. Softcover \$99.00.

Higher education is a complex project involving large numbers of people, significant economic impact including as one of Australia's largest export markets and its regulation and relationship with the law is similarly complex. In Australia, higher education includes the university sector, upon which most of this book concentrates, and the vocational and educational training (VET) sector.

Defining universities or their goals has as its classic antecedent John Henry Newman's *The Idea of the University*, in which he focused on the idea of the cultivation of the mind ("the intellect ... properly trained and formed to have a connected view or grasp of things") as the central focus of the university (see Ian Ker, "Newman's Idea of a University and its relevance for the 21st century" (2011) 18 *Australian eJournal of Theology* 18, 20). Many academics still retain this worthy aspiration as an aspect of the public purpose which is sought to be regulated by the law. It is a pity that this book relatively under-discusses the importance of universities' public role, a greater sense of which might have lifted it from a somewhat disparate set of essays focused more on the regulatory aspect of universities than on what is being regulated. That said, this is an important book which for the first time brings together expert knowledge of the profound role of the law in its regulation of higher education and in particular the university sector in Australia.

The book is divided into two sections – "The Law of Higher Education" and "The Law and Higher Education". This separation is intended to divide the law which regulates higher education institutions overall, including their statutory base and the federal and State structures of governance, from the law as it might operate within those institutions. The latter section is much larger than the former.

In the first section, "The Legal Framework of Higher Education" by Joan Squelch, introduces the federal system of management of higher education (including by the Tertiary Education Quality and Standards Agency and Australian Qualifications Framework) and how it interacts with the incorporation of universities and State legislation. The funding arrangements alone are complex and detailed. This is not an exciting chapter but it sets out the fundamentals clearly and comprehensively. Then, "University Governance: Responsibility and Accountability" by Sally Varnham, re-covers some of the same ground but with a focus on responsibility and accountability. Varnham notes the movement to the entrepreneurial model of the university and the push to student-driven models. Chapter 3, Jade Tyrrell and Varnham, discusses the student voice in university decision-making. Their argument is that the student/university partnership is the key to universities being internal democratic cultures. They rightly point out the danger of the characterisation of student as consumer and argue instead for students as "co-producers". This is a huge topic and the chapter does not have time to consider the complexity of student participation in the university and how to balance students' right to contribute with their relative lack of knowledge and academics' need for freedom to determine some aspects of curricula.

Irene Watson and Marcelle Burns' chapter, "Indigenous Knowledges: A Strategy for First Nations Peoples Engagement in Higher Education" seems to me to be more sophisticated than some of the other chapters. The theoretical background of the authors manages to make itself felt despite the tight word limits so that it is a joy to read. It critiques higher education policy as more likely to promote assimilation than to respond to Indigenous people's desires and need for meaning. It also points out that the legal curriculum incorporating Indigenous knowledge is still not discussed in terms meaningful to Indigenous peoples. The Australian Learning and Teaching Council's Standards Statement on the LLB was constructed without evident consultation with Indigenous peoples and with minimal Indigenous input. Similarly, the "Priestley 11" ignores Indigenous peoples and their knowledge. The difficulties of incorporating this material are not ignored, but the authors point to the

need for a sophisticated theory of pluralism which includes an Indigenous theoretical response. This is a very significant chapter which deserves to be well read.

Gaby Ramia engages with “The Regulation of International Higher Education” in Ch 5, noting the interactions between education and migration and how they vary according to rationales of the particular national regime. The last chapter (by Helen Fleming) in the first part considers new regulatory challenges for universities in the areas of freedom of information, whistleblower protection and privacy of personal information. Universities are often very large organisations and these issues require management, but Fleming argues that transparency should be a central value in the management of these matters, and that transparency should be a central value in a university anyway. This welcome reference to the values universities should be espousing brings us full circle for this section of the book, which is densely packed with information and covers the field very thoroughly with respect to universities. The VET sector does not get the same treatment. It might have been better to leave that sector out entirely rather than to mention it only marginally.

The second section considers various aspects of the law as it might operate within the university itself, or between individuals within and with universities. A short review like this cannot hope to grapple with every chapter. Francine Rochford’s chapter on students’ contracts with universities thoroughly looks at a relatively unconsidered topic. Other chapters which consider an area of law as it applies within the university context include “Students and the Australian Consumer Law” (Kamvounias), “Disability Standards for Education” (Elizabeth Dickson), “Workplace Health and Safety” (Squelch), “Diversity, Affirmative Action and Higher Education” (Joy Cumming and Ralph Mawdsley), “Employment Law” (Jacquie Seemann and Katie Kossian), “The Tort of Negligence and Higher Education” (Robert Horton, Kerry Smith and Abigail Tisbury), and “Alternative Dispute Resolution in Higher Education” (Myles Stilwell). These comprehensive chapters are useful in distilling the aspects of these areas of law which are particularly pertinent to higher education.

Other chapters consider issues which are more central to the universities themselves. Bruce Lindsay’s chapter, “Student Conduct and University Discipline” is a fascinating consideration of the way universities have (and have not) used procedural fairness in their dealings with student misconduct. He shows that the sector is messy and that disciplinary hearings vary widely in their connection to administrative law, between something court-like, using quasi-criminal procedure and its safeguards, to a much less rigorous process. For lawyers this is an intrinsically interesting aspect of university discipline. Similarly, Ch 10, “Resolution of Student Grievances within Universities” (Anita Stuhmcke, Bronwyn Olliffe and Maxine Evers), considers the extensive regulation which exists and which may actually be less complied with than is required. Kamvounias’ chapter, “Public Sector Ombudsmen and Higher Education” completes this trilogy of chapters on complaints and discipline with a consideration of whether there should be a national university Ombudsman. The chapter includes a useful table of complaints received by public ombudsmen about universities and points out that such complaints can only be made in relation to public universities and institutions, leaving grievances about private institutions in limbo.

Three chapters consider the treatment of intellectual property in universities, a vital matter encompassing questions of academic freedom as well as revenue. Nigel Stobbs discusses “Academic Freedom and University Autonomy”, a topic no book on higher education could ignore. He considers the “romance and reality” of academic freedom, conceiving it both as a right and an obligation and then goes into a detailed study of the legal instruments which are sources and guarantees of academic freedom, including international and domestic legislation, contractual agreements and institutional policies. This gives a thorough grounding for consideration of disputes about academic freedom which have played out in the courts.

A significant issue is emerging where academic material with military significance is disseminated. Since 2015, legislation has made this an offence unless the Minister gives permission. This is a real incursion on academic freedom which is of grave concern. “Copyright Law and Higher Education” by Michael Fraser, considers issues concerning copyright where the university employs the academic, which may raise the statutory exception to individual copyright ownership embedded in the *Copyright Act 1968* (Cth). There is some uncertainty about how this works in different universities and

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how their contracts affect academics' rights to their intellectual property. As universities increasingly stake their claims, academics may find themselves squeezed: the question of whether materials are created "within the course of employment" is perennial. Mary Wyburn considers another aspect of this in her chapter, "Intellectual Property Rights and Commercialisation of Research in Higher Education", which builds on material covered in Fraser's chapter to ask "what happens when research is commercialised?" The uncertain question of who owns what continues to bedevil this issue and commercialisation simply exacerbates the problem.

The lack of a concluding chapter to the book seems to me to be an oversight. Both a stronger introduction, setting out the themes and important factors and the theoretical basis for consideration of higher education, and then a conclusion that could pull the chapters together again would have been beneficial. However, this book's coverage and detailed consideration of the legal issues concerning higher education and especially universities make a significant and welcome contribution to legal scholarship on higher education. Academics, students, business people working with universities, researchers and indeed anyone who has contact with universities will find this book a valuable reference work, disentangling the complexities of the legal environment within which they operate.

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