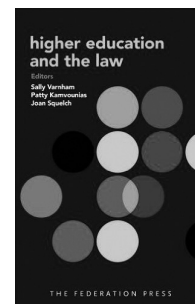


REVIEWS

I fought the law, and the law won... (Bobby Fuller Four, 1965)

***Higher Education and the Law* by Sally Varnham, Patty Kamvounias & Joan Squelch (eds).**

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Reviewed by Pamela O'Connor

University academic and administrative managers operate in a highly complex legal and regulatory environment. While universities are established under separate Acts which confer wide powers on them, they are subject to many constraints imposed by other statutes and the general law. Universities face significant challenges in educating their office bearers and staff about the sources and limits of their powers and the nature of their legal duties. *Higher Education and the Law* was published to serve the need for a comprehensive work that surveys the variety of legal principles and issues which arise in the governance and management of Australian universities.

The editors are legal academics with a particular interest in the law as it applies to higher education. The other 23 contributing authors are drawn from a range of backgrounds and include academics from the disciplines of law, education and public policy, university in-house counsel, barristers and legal practitioners who advise or litigate in relevant matters, student ombuds, investigators, mediators and adjudicators, student representatives and advocates. The book seeks to do more than provide an overview of the relevant areas of law. It highlights the challenges for law in redefining the relationships between universities, government, staff and students in a time of rapid regulatory and social change.

The broader context and themes are established by Part I, which starts with Joan Squelch's overview of the legal framework for the regulation of universities in Australia, encompassing the principal State and Commonwealth Acts and statutory instruments, regulatory agencies and funding. Sally Varnham's chapter on university governance summarises the trend of recent changes to the sector as 'massification, commodification and corporatisation aided by the accelerating impact of technology', associated with the move to a 'market-driven model, commercialisation and competition' (pp. 16-17). In her chapter co-authored with Jade Tyrrell, Varnham examines regulatory changes

which, pursuant to the market-driven model, give central importance to the student experience and student voice. Indigenous academics Irene Watson and Marcelle Burns contribute a chapter on the development of strategies and policies for embedding indigenous knowledges in university curricula. Gaby Ramia's chapter shows how the regulation of educational services marketed to overseas students has driven regulatory reforms benefiting both domestic and international students, while the welfare of international student welfare in extramural areas such as work rights is neglected. Helen Fleming concludes Part I with an examination of the large array of administrative statutes to which universities are subject as public authorities, and finds that universities have responded with a risk management approach.

Based on these broad themes, Part II comprises 20 chapters by different authors, each examining one area of law as it applies to higher education and noting any unresolved questions. Francine Rochford's chapter goes to the heart of the relationship between universities and their students, asking whether it is governed wholly or partly by contract. The relationship was traditionally considered to be one of 'status', in which a student was a member of the university and subject to its governing rules. Disputes were resolved by the university visitor or, more recently, by a court applying university legislation and administrative law. Rochford finds no authoritative ruling in Australia which confirms the widely held assumption that a contract exists. An opportunity to consider the point was missed in *Griffith University v Tang* (2005) 221 CLR 99, as both parties agreed that the enrolment of Ms Tang as a PhD candidate of the University did not give rise to a contractual relationship (although Justice Kirby suggested, at para 30, that 'detailed evidence might have shaken this'). Rochford concludes that a contractual relationship remains a 'theoretical possibility', but questions the reliance placed upon the contractual analysis (pp. 90-91).

Seven chapters of Part II examine the legal regulation of the relationship between universities and their students. Penny Kamvounias' chapter discusses the application of the Australian Consumer Law 2011 to the relationship, including the provisions relating to unfair contract terms, consumer guarantees and misleading and deceptive conduct. She observes that the relationship must be contractual for the Australian Consumer Law to apply, and agrees with Rochford that there is overseas authority but no clear Australian authority that this precondition is satisfied (pp. 93-94).

In his chapter on Student Conduct and Discipline, Bruce Lindsay finds that while universities have wide delegated law-making powers to maintain order through disciplinary rules, the law sets limits to the scope of what can be designated 'misconduct'. The understandable desire of universities to conduct disciplinary proceedings in an informal manner may lead then to adopt procedures which may fall short of what natural justice requires in some circumstances.

The next two chapters respectively examine procedures for internal resolution of student complaints, and the external resolution of complaints against the public universities by public sector ombuds. Kamvounias reports that the number of complaints reaching the ten external ombuds is small but increasing. Ombuds can recommend redress for individuals, systemic changes and some can undertake investigations of their own motion, such as the Victorian Ombudsman's 2011 investigation into how universities deal with international students. A related chapter by Myles Stillwell recommends that consensual dispute resolution processes should be emphasised in dealing with disagreements between members of the university, both staff and students, and that universities should support these processes through in-house mediation services and staff training.

Two chapters are devoted to examining the obligations of universities to students under equal opportunity law. Joy Cumming and Ralph Mawdsley conclude that universities should be able to withstand a challenge based on direct discrimination in undertaking special measures to address disadvantage and need. However, they will need to ensure that students admitted under special measures are then supported to succeed. Elizabeth Dickson considers the scope of the university's duty to make 'reasonable adjustments' for students with a disability in accordance with the Commonwealth's Disability Standards for Education (2009). While she finds no litigated cases involving higher education providers,

some guidance on the scope of the duty is gleaned from cases in the compulsory education sector.

Five chapters of the book shift the focus to the relationship between the university and its staff. In their chapter on employment law, Jacque Seemann and Katie Kossian observe that the relationship differs significantly from other employment relationships due to factors which are peculiar to the university context. These include the special nature of universities as corporations with academic functions, the status of academics as members of the university, and the provisions for academic freedom. The authors discuss how the courts have taken account of these unique features, and give examples of recent decisions of industrial tribunals in the university employment context.

In the next chapter, Joan Squelch outlines the model Work Health and Safety Act which represents a co-operative federalism initiative towards a national legislative scheme which has been adopted by most Australian jurisdictions.

Nigel Stobbs' chapter on academic freedom explores one unique aspect of the university employment relationship which is recognised in international instruments, Commonwealth legislation, enterprise agreements and university codes of conduct. Stobbs cautions that 'disputes about perceived or actual breaches of academic freedom tend to arouse passions and cause damage disproportionate to the incident which triggered the dispute' (p. 204). He suggests that managers should take seriously staff perceptions of threats to academic freedom, and seek to reframe the debate about the scope of academic freedom to focus on the dignity of all members of the university (p. 212). In the current climate of increasingly polarised public debate, universities would do well to heed Stobbs' advice.

Two chapters deal with intellectual property issues. Mary Wyburn considers the nature of the intellectual property rights likely to arise from commercialised research by universities, and discusses the legal principles applied in determining claims to the rights. Universities commonly make their own rules for ownership of intellectual property created by their staff and incorporate the rules into employment contracts. Copyright represents one type of intellectual property right. Michael Fraser's chapter deals with the ownership of copyright in materials generated by university employees. He argues that university policies and contracts should disclaim university ownership of teaching materials, as they generally do in relation to scholarly works.

A chapter by Robert Horton, Kerry Smith and Abigail Tinsley discusses the extent of a university's potential

liability in the tort of negligence, in relation to students and other persons. The authors discuss the Civil Liability Act regimes introduced by most Australian states in 2002-03. They find relatively little Australian authority on the scope of a university's duty of care to its students. The chapter includes an interesting discussion about whether a university may be liable in negligence for failure to educate a student to an appropriate standard. The authors find that, while such 'educational negligence' claims have been rejected in the US on public policy grounds, a claim on behalf of a school student with disabilities has succeeded in the UK.

The book provides a handy reference for university counsel, advisers, managers, committee members, and student advocates. The links between topics covered by the different chapters are explained, and cross references included. While there is no bibliography, footnotes provide references to additional sources.

I will be very glad to take a copy of the book to meetings of university committees.

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