

The Law of Higher Education (2nd edition)

Dennis J. Farrington
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Higher education in the United Kingdom underwent a transformation in the years following the Robbins Report of 1963.ⁱ The expansion which occurred resulted in a system which today is diverse in both its character and, not least, in its legal structure. There are presently some 115 “universities” in the United Kingdom. Some are venerable institutions established under royal charter or Act of Parliament. Farrington, in this new edition of probably the leading work on its subject, explains that the oldest universities of all, Oxford and Cambridge, are “civil or common law corporations by prescription or immemorial custom” (p.41). A number of modern universities, such as Keele or Loughborough, were established in the decade following Robbins. Their modern campuses and often technological bias reflected a new age (Prime Minister Harold Wilson’s oft-cited comment that Britain was experiencing the “white heat of the technological revolution” being a particular reference pointⁱⁱ). Nevertheless, these universities became integrated within a general academic tradition originating in these more ancient seats of learning. This period also witnessed an expansion of vocational and professional education, and by the early 1970s many local colleges of technology, commerce or art had been amalgamated into “polytechnics” or “colleges of higher education”. Their degrees were awarded via a national body (the Council for National Academic Awards) or (particularly in the case of former teacher training colleges which had expanded into offering degree courses in the arts, humanities and environmental sciences) by an established university to which the college was affiliated. The *Further and Higher Education Act* 1992 removed the so-called binary line between the polytechnics/colleges and universities. The former polytechnics and some of the colleges were able to use the title “university” and award their own degrees.

As Farrington explains, the “old” and “new” (ie post-1992) universities have very distinct legal structures, which are reflected in, and have consequences for, their systems of governance (see Chapter 1). Moreover, most of the “chartered” universities, in the pre-1992 university category, have a “visitor”, the nature of whose role in relation to disputes between students or staff and the university authorities, and in particular the exclusivity of whose jurisdiction over such matters, has received considerable judicial scrutiny in recent years. Farrington provides (at pp.216-235) not only an informative account of the origins of the office of visitor, but also a useful review of the cases.

The evolving legal relationships between students and universities are, not surprisingly, one of the major themes of the book. They are encountered again in Chapter 3 (on *Funding and Quality*), where Farrington discusses the increased relevance of common law negligence as a means to redress for students who are the victims of professional incompetence by university staff. Farrington acknowledges (at p.285) the potential implications of the House of Lords’ landmark

ruling in *X and others (Minors) v Bedfordshire County Council* [1995] E.L.R. 404, but perhaps could have explored them further, particularly the issue of how to quantify loss for the purposes of remedying a breach of the duty of care to exercise reasonable skill in the performance of a professional duty. Nevertheless, the nature of the professional duties of university staff is fully discussed. The university-student relationship is considered more fully in Chapter 4 (*Students, Scholars, Clients and Customers*). The expansion of higher education in the United Kingdom has been accompanied by a cultural shift. The 1992 Act was sandwiched between the launch of the *Citizen's Charter* in 1991 and the publication of the draft *Higher Education Charter* in 1993. The Conservative government sought to improve the quality and efficiency of public services by making them consumer-led rather than producer-dominated. Public services, such as universities and schools, were to become more accountable to their clients: there would be more public information about the standards of performance achieved by service providers (referable to performance indicators), and "league tables" would reinforce the competitive environment which would help to drive up standards; there would also be more effective redress mechanisms, such as complaints procedures. With the central funding of almost all higher education institutions linked to indicators of quality and market forces (particularly student recruitment numbers), universities and colleges could not escape from the general trend affecting public service providers. Farrington explains that today "students are in effect consumers contracting with an institution to purchase services" (p.307). The contractual nature of the relationship between students and universities is complex, not least because it takes different forms (in particular, there is a "contract of admission" and, subsequently, a "contract of matriculation"). It also remains contentious, despite important recent court decisions clarifying aspects of it. But it is of crucial importance. Farrington, in effect, urges universities to acknowledge that, in his words, "the status of students has changed irrevocably" (ibid.). Many universities, alive to the risk of litigation, are now paying much more careful regard to the wording of course literature and their own student charters. Farrington stresses, in a thought-provoking concluding chapter looking to the future of this area of the law, that "the more overt the contractual arrangements between students and institutions become, the more likely it is that complaints and grievances will be raised and that institutions will have to have proper procedures in place to deal with them" (p.558). These procedures would doubtless have to be fully included in the "regular legal audits" which Farrington recommends institutions should undertake (p.561).

The book is written from the perspective of a senior university administrator. Not surprisingly, therefore, many parts of the book deal with issues relevant to the management of a modern university. Moreover, the book includes, as appendices to some of the chapters, model documentation for adaptation and use in various practical situations. Chapter 5 covers, comprehensively, the law on the employment of staff (although health and safety law is mostly covered in Chapter 2). Chapter 6 (on *Information, Higher Education and the Law*) offers a competent review of the law on confidentiality, copyright, patents, trade marks and data protection. Farrington rightly sees this as an area of growing importance, particularly with regard to the development of information technology and the increasing use and exploitation of on-line

data sources: “It is the area of information technology which above all others will influence the way higher education develops and the legal issues it generates will have far-reaching consequences” (p.560). Appearing at the end of the book, this discussion of the brave new world of higher education in the United Kingdom in the future stands in marked contrast to the book’s earlier historical accounts of universities and the age-old traditions which are still reflected in the ordinances and governance structures of many of the pre-1992 institutions (the University of Cambridge, for example, has had an office of Vice-Chancellor since 1276), despite these universities’ current, and enforced, preoccupation with budgetary issues. Farrington provides many insights into the arcane world of university governance which will be of interest and assistance to academics and administrators alike.

The Law of Higher Education is a fully referenced text, and provides some critical analysis; yet its central aim, as identified in the author’s foreword, is to “be a comprehensive and practical guide to the way in which the law underpins and relates to the daily work of academic and other staff, students and other customers of higher education in the United Kingdom”. It largely succeeds in this aim, with one reservation: there are some legal issues (such as the status of visitors or the student contract with a university) which are inherently not all that amenable to this approach because of their complexity (hence Farrington’s necessarily more detailed analysis of them), while one or two areas of the law (such as the law of real property, discussed at pp.194-202) are so broad or dense as to require too much economy of coverage in a work of this nature. Indeed, while the encyclopaedic nature of the work is in some ways a strength (and reflects the not inconsiderable accomplishment, skill and thoroughness on the part of the author), one wonders whether a slightly more selective approach might actually be more effective, because the author would be able to discuss in greater depth more of the key issues he covers. That said, Farrington’s *The Law of Higher Education* is without doubt an essential source of reference for anyone with an academic or professional interest in this complex and diverse subject. Subsequent editions will undoubtedly make it even more so, if Farrington’s prediction of an ever more closely regulated higher education system in the future (see p.557) proves accurate.

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Endnotes

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- i *Report of the Committee on Higher Education*, Cmnd 2154 (Her Majesty’s Stationery Office, 1963).
 - ii N. Timmins, *The Five Giants. A Biography of the Welfare State* (London: Harper Collins, 1995), pp.156 and 201