

# CRISIS RESPONSE

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# When legal advice goes wrong: US universities and reputational crises

In the face of a crisis, there is no question that any CEO, crisis manager or communicator should seek out and listen to legal advice, says **Tony Jaques**

**T**he question is whether the legal advice is sound in the circumstances; whether it recognises the difference between the court of law and the court of public opinion; and whether it properly balances the many other non-legal considerations.

While those questions are hardly new, they were starkly exposed in the recent reputational crisis that engulfed three of America's best-known universities.

With war raging in Gaza between Israel and Hamas, sometimes violent anti-Israel demonstrations were reported on various American campuses. And in early December 2023, the presidents of three universities – Harvard, University of Pennsylvania and MIT – found themselves before a congressional hearing into rising antisemitism.

Under white-hot cross-examination by New York Republican Congresswoman Elise Stefanik, all three stumbled, falling back on legalistic explanations, which created a storm of protest and calls for resignation.

A closely related legal lesson was the failure to recognise the nature of the environment. A congressional hearing is primarily political theatre, not a courtroom. The testimony prepared here may have been appropriate in a court where the witness has a lawyer to object to bullying and leading questions and a judge to enforce the rules

It is worth reproducing part of the actual testimony of UPenn President Dr Elizabeth Magill to capture the nature and tone of how the reputational crisis unfolded.

Stefanik: "Does calling for the genocide of Jews violate Penn's rules or code of conduct, yes or no?"

Magill: "If the speech turns into conduct, it can be harassment."

Stefanik: "I am asking, specifically: Calling for the genocide of Jews, does that constitute bullying or harassment?"

Magill: "If it is directed and severe, pervasive, it is harassment."

Stefanik: "So the answer is yes."

Magill: "It is a context-dependent decision, Congresswoman."

Stefanik: "That's your testimony today? Calling for the genocide of Jews is depending upon the context?"

Predictably, the unfortunate phrase 'context-dependent' was soon trending on social media. Democrat Senator Bob Casey of Pennsylvania was echoing many critics and commentators when he described Magill's responses as offensive: "The right to free speech is fundamental," he said, "but calling for the genocide of Jews is antisemitic and harassment, full stop."

Facing the same question about whether calling for the genocide of Jews would violate campus policies on bullying and harassment, President Dr Claudine Gay of Harvard gave a remarkably similar, seemingly scripted, response: "It could be harassment, depending on the context," she said.

In the same vein, MIT President Dr Sally Kornbluth said it would be considered harassment: "Only if it's targeted at individuals, not making public statements," and if it was "pervasive and severe." She added: "I've heard chants which can be antisemitic depending on the context when calling for the elimination of the Jewish people."

The fallout was immediate and brutal. *The New York Times* headlined its report: "College presidents under fire after dodging questions about antisemitism." And the House of Representatives passed a bipartisan resolution by 303-126 votes calling on the presidents to resign.

Some legal experts argued that the statements about context were 'technically correct,' but of course that meant nothing in the face of the storm they created.

Following the equivocal hearing performance came the clarifications. The next day, Magill, a qualified lawyer, explained in a video posted to social media: "In that moment, I was focused on our university's long-standing policies aligned with the US Constitution, which say that speech alone is not punishable. I was not focused on, but I should have been, the irrefutable fact that a call for genocide of Jewish people is a call for some of the most terrible violence human beings can perpetrate. It's evil, plain and simple. In my view, it would be harassment or intimidation."

With Representative Stefanik being an ardent Trump supporter and longtime crusader against 'woke, leftwing universities,' it was no surprise that she labelled the UPenn President's explanation a: "Pathetic PR clean-up attempt."

"No statement will fix what the world saw and heard yesterday," she asserted.



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Scott Bok, Chair of the Magill's Board of Trustees, defended his CEO: "She was not herself... Over-prepared and over-lawyered, given the hostile forum and high stakes, she provided a legalistic answer to a moral question and that was wrong." Within days, both Magill and Bok had resigned.

Harvard's Dr Claudine Gay made several attempts to rectify her testimony: "I got caught up in what had become, at that point, an extended, combative exchange about policies and procedures," she said. "Let me be clear: Calls for violence or genocide against the Jewish community, or any religious or ethnic group, are vile. They have no place at Harvard, and those who threaten our Jewish students will be held to account."

She, too, of course, was too late to defuse the crisis. The Harvard Corporation, which runs the university, initially supported Gay as she resisted calls for her resignation. But following four weeks of relentless pressure, she resigned after only six months in the role, finally forced out by unrelated but highly damaging revelations of reported plagiarism in her doctoral dissertation.

Kornbluth did not offer any apology or explanation, although MIT issued a statement supporting her.

## Legal limbo

In the wake of what Politico labelled a 'flamboyant debacle,' the obvious question was: Who had briefed the three university presidents for their Congressional hearing?

The headline on an opinion piece in the Boston Globe said it all: "Who should prep university presidents? Crisis managers, not lawyers." The sub-heading added: "No competent crisis managers would have permitted the presidents of Harvard, Penn and MIT to come across as human automatons."

The headline in *Politico* was even more blunt: "Crisis communicators face blowback after disastrous college hearing." Their report went on to ask: "Who got paid to give advice on one of the most disastrous public relations moments in modern memory?"

While this historical comparison was undoubtedly exaggerated, *Politico* observed that the presidents' testimony: "Sparked an uproar that reverberated among the high-powered legal and public relations firm that helped prepare them."

It quickly emerged that the same well-credentialed law firm had prepared the presidents of both Harvard and UPenn and had a discussion on the subject with MIT. Moreover, lawyers from the firm were sitting in the front row immediately behind the witnesses as they gave testimony.

Perception about who led the process was reinforced when several news outlets also reported that the lawyers: "Sidelined three public relations and media strategy firms in the prep sessions," including a prestigious global PR consultancy hired by Harvard's department of public affairs and communication.

As *Forbes* magazine concluded: "Using a law firm to prepare for the congressional hearing did not cause the crisis. It was the firm's decision to keep crisis communication experts out of the mix that doomed the testimony. The prep sessions needed strategic communicators. They knew how to craft empathetic messaging that spoke to important stakeholders instead of legally vetted remarks that ignored them."

While the law firm itself declined to comment publicly, there were judiciously placed anonymous leaks from sources close to the hearing preparation that the presidents had been instructed to lead with empathy and values and stay away from legal jargon. And specifically, Magill's response: "Did not reflect the guidance she received."

But as Edward Rock, a professor in law at New York University, commented: "Once they were in the box, I think they stuck with their preparation. That's why they came across so wooden. And then afterwards, they realised it was a terrible answer."

Whatever the truth about how the three women were prepared and whether they followed instructions, the bottom line was that their badly misjudged testimony capped off what was already a growing reputational crisis. It is easy to be wise after the event from the comfort of your favourite armchair, as opposed to being in the hot seat in front of a congressional hearing.

But there are important lessons for crisis managers and communicators everywhere. The most obvious lesson is that legal advice was allowed to prevail over all the many other non-legal considerations that were in play.

It is well known that many executive groups tend to default to advice from lawyers. That way, they argue, management can always claim to have pursued 'good governance,' irrespective of the outcome and irrespective of the values of the organisation.

Although lawyers, by training and inclination, are often seen as people who take charge, independent legal experts and experienced crisis managers tend to agree that it is most often best if the lawyer is not in charge.

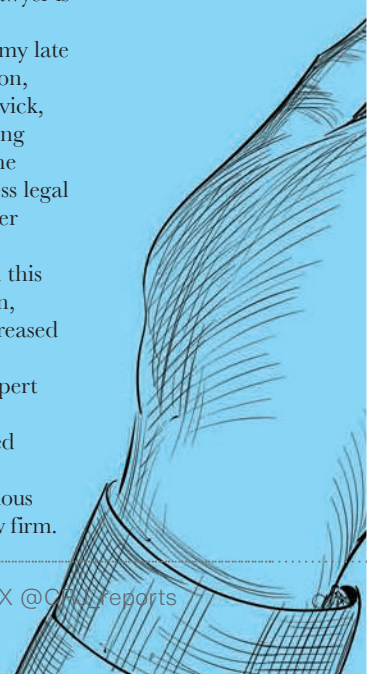
For example, my late friend, Washington,

DC-based attorney and crisis authority Richard Levick, believed it came down to the question: Who is driving the bus? "Legal counsel in a crisis is essential and the lawyer needs to be on the bus," he wrote, "But unless legal exposure is the single greatest market cost, the lawyer shouldn't be in the driving seat."

The senior counsel who briefed the presidents in this instance was a member of the Harvard Corporation, which hires and fires senior staff, which further increased the danger of having lawyers in charge. And it was reportedly he who sidelined the university's own expert communication consultants.

The decision to exclude one of the most experienced and celebrated public relations experts in the US was unforgivable. In addition, it was almost certainly a serious mistake for all three to rely on advice from just one law firm.

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The reality is that while lawyers know the law and some may use words very well, they are not necessarily experts in effective communication, where overuse of legal language may lead to a serious assault on reputation.

A closely related legal lesson was the failure to recognise the nature of the environment. A congressional hearing is primarily political theatre, not a courtroom. The testimony prepared here may have been appropriate in a court where the witness has a lawyer to object to bullying and leading questions and a judge to enforce the rules. But in a public forum, with no such protection and a highly politicised agenda, it was, as one commentator quipped, like taking a knife to a gunfight.

Moreover, the presidents appeared at a time when elite universities have had few friends on either side of politics in the US. This leads to another key lesson, which is about messaging. Right or wrong, unlike a courtroom, a congressional hearing is about sound bites and snappy answers, not legalistic and nuanced discussion about complex and subtle policy questions. The presidents should have been armed with sharp, clear positions and talking points.

Preparation for any communication in a crisis should have a Q&A that does not just focus on what you want

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to say, but also on what you are likely to be asked, including the most difficult and challenging questions. Given her background and well-known political position, Representative Stefanik was sure to come with well-prepared 'gotcha' questions, and there should have been equally well-prepared answers.

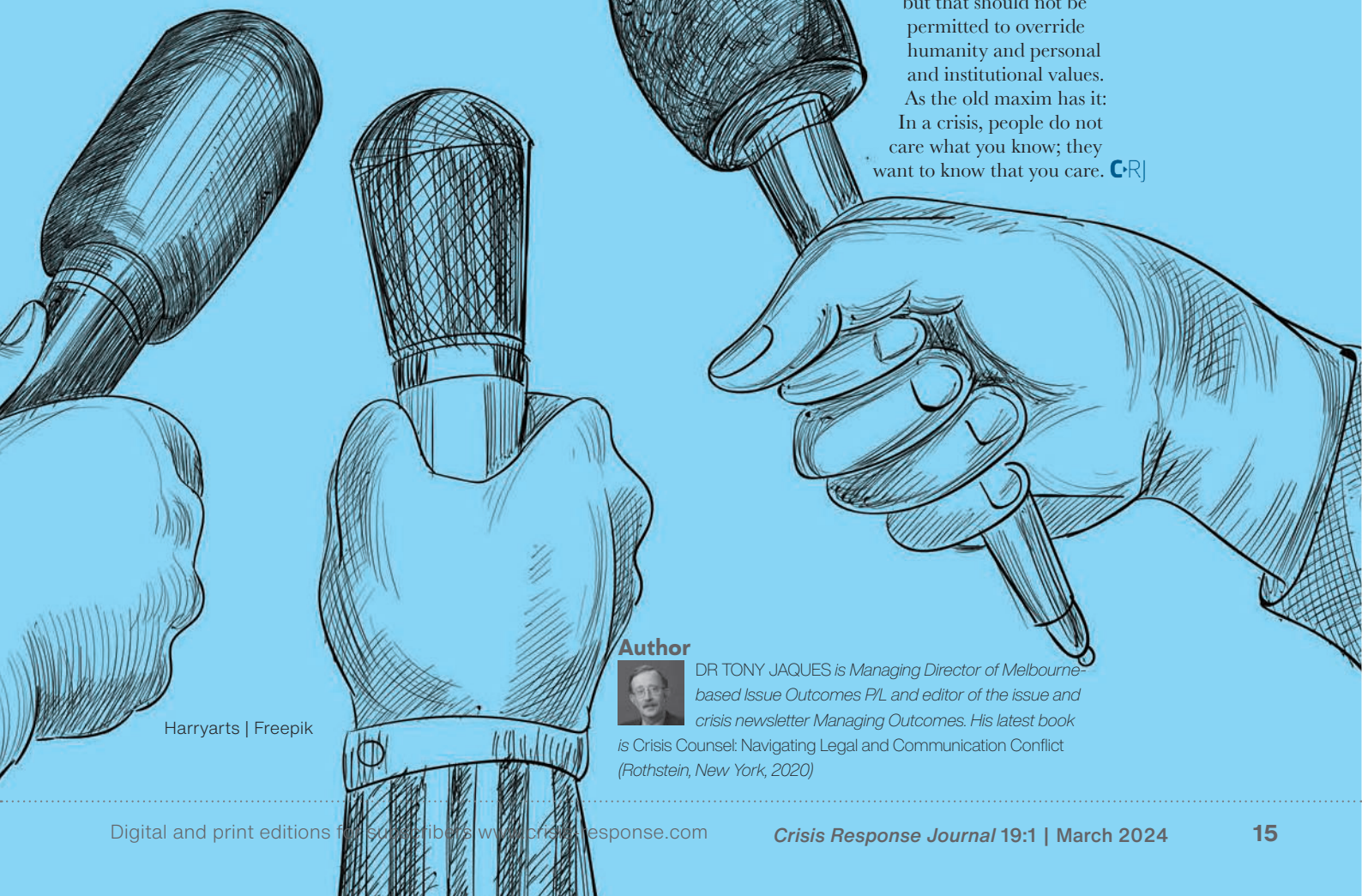
In a *New York Times* op-ed published immediately after her resignation, Gay

conceded she made mistakes in her initial response at the congressional hearing, and that she: "Fell into a well-laid trap." But this was a pretty obvious trap that proper crisis preparation could have, and would have, identified.

The conclusion here is what I wrote in my recent e-book *Ten Things Law Schools Doesn't Teach about Crisis Management*: "Using the right language may require less focus on legal precision and more on what's best for the organisation."

While objective commentators confirmed that all three university presidents were intelligent, personable women, their preparation and delivery

prioritised dense legal jargon over values. Of course, the communication needs to be legally correct but that should not be permitted to override humanity and personal and institutional values. As the old maxim has it: In a crisis, people do not care what you know; they want to know that you care. 



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#### Author



DR TONY JAQUES is Managing Director of Melbourne-based Issue Outcomes P/L and editor of the issue and crisis newsletter *Managing Outcomes*. His latest book is *Crisis Counsel: Navigating Legal and Communication Conflict* (Rothstein, New York, 2020)