

Does OFFA have teeth?

So, the 'OffToff' Tsar is appointed, in the form of Sir Martin Harris, ex-Vice Chancellor of Manchester and of Essex, as the first Director of the Office for Fair Access. As Michael Beloff (President of Trinity College, Oxford) tells Government to get its OFFA tanks off the manicured lawns of Oxbridge colleges, and as Chris Patten (Chancellor of Oxford University) sees OFFA as potentially adversely impacting on the autonomy of universities in selecting their students (one of Civilisation's crucial tests of a free Society, he rightly declares), it's worth checking the HMSO web-site to see just what the Law of the Land is actually saying and whether Sir Martin has teeth as a watchdog/regulator.

The Higher Education Act 2004 creates (s31) 'the Director of Fair Access to Higher Education' and then requires (s24) HEIs to agree 'approved plans' with OFFA before they can charge undergraduate tuition fees to UK/EU citizens that exceed 'the basic amount' (currently £1150) and that can range up to £3000 pa from 2006/2007 ('the higher amount'). In theory, the fees could also be variable down to £0! The Act in ss33-37 and 39 gives power for the Secretary of State for Education and Skills to make Regulations concerning such 'plans'. These Regulations are contained in SI 2004 No. 2473, The Student Fees (Approved Plans) (England) Regulations 2004, dated 20/9/04 and coming into force on 21/9/04. What do they say?

First, the HEI wanting to charge the new variable tuition fee must agree with OFFA 'a plan' which shall: (Regulation 3)

take, or secure the taking of, the measures set out in the plan in order to attract an increased number of applications from prospective students who are members of groups which, at the time when the plan is approved, are under-represented in higher education;

provide, or secure the provision of, bursaries and other forms of financial assistance set out in the plan to students undertaking a course at the institution;

monitor in the manner set out in the plan its compliance with the provisions of the plan and its progress in achieving its objectives set out in the plan by virtue of regulation 4; and

provide the Director with such information as he may reasonably require from time to time.

Regulation 4 states that 'a plan must set out the objectives of the institution, determined by its governing body, relating to the promotion of equality of opportunity'. Perhaps this is the Act's key concept, as defined in s33(7) of the Act: 'equality of opportunity' means equality of opportunity in connection with access to higher education... Moreover, OFFA should 'identify good practice relating to the promotion of equality of opportunity in connection with access to higher education' (s31(4)(a) of the Act). So, is this all about under-represented groups being encouraged

merely to apply to HEIs (the Government's role in HE access, with widening participation and equality of opportunity being limited to the creation of a level playing-field in the attempt to enter HE); or is it also about being admitted to HE (equality of opportunity in actually gaining HE places, and, of course, especially at the 'top' HEIs)? If the former, then OFFA is indeed worthy, but, arguably, unremarkable; if the latter, OFFA does in fact potentially threaten HEI autonomy (as Patten worries) and also Middle England's near-monopoly of elite HE as, under political pressure, these selector-HEIs gradually re-allocate undergraduate places...

Incidentally, 'the basic amount' (£1150 in 2004/2005) and 'the higher amount' (£3000 in 2006/07 at 2004 prices) may not be increased by more 'than is required to maintain the value of the amount in real terms' (s26, Higher Education Act 2004): does 'real terms' mean consumer price inflation or 'higher education inflation' which, as in any service industry, runs at about twice RPI? Parliament can, however, 'at any time after 1st January 2010', agree a greater increase for whatever £3000 has become by then 'in real terms'. In the meanwhile, 'the basic amount' can be increased by more than the amount needed to maintain its value in real terms if, and only if, the proposal of the Secretary of State via a SI is approved by both Houses.

Note also that the OFFA Director 'has a duty to protect academic freedom, including, in particular the freedom of institutions – a) to determine the contents of particular courses and the manner in which they are taught, supervised or assessed, and b) to determine the criteria for the admission of students and apply those criteria in particular areas...' (s32(2) of the Act). Is this enough to re-assure the Chancellor of Oxford University that OFFA is merely about influencing the applications part of the admissions process and not the actual selection amongst such applicants? Certainly Kim Howells, the Higher Education Minister, has been quick to stress that OFFA is about applications, not about 'social engineering' the admissions intake.

That said, the Director 'must, in the performance of his functions under this Part [the chunk of the 2004 Act concerning 'Student Fees and Fair Access'], have regard to any guidance given to him by the Secretary of State' (s32(3) of the Act). Moreover, s34(5) allows the Secretary of State, via Regulations, to 'specify matters to which the relevant authority [OFFA] is, or is not, to have regard in making any determination relating to approval [of a plan].' Quite how much power this gives the Secretary of State to intervene, whether via 'any guidance' or in specifying 'matters', remains to be seen, as does exactly how much Sir Martin and his successor(s) will 'have regard to' any such a steer from the politician making the OffTOff appointment. And it is worth noting that the Secretary of State appointing the first OFFA Director and currently able to provide him with 'guidance' is the same Secretary of State who is quoted as follows in *Hansard* (27/1/04): [T]he massive, vicious class differential in our higher education system has remained consistent... the appalling obscenity of the deep class difference that affects people who go to our universities... That is what the Office for Fair Access is about.' Moreover, the first OFFA Director is widely quoted in the media as labelling himself 'resolutely Old Labour'. Small wonder that the independent school heads are getting twitchy about OFFA!

In fact, the undated 'draft [sic] letter of statutory guidance' from the Secretary of State to the new OFFA Director can be seen on the OFFA web-site (www.offa.org.uk). It is not clear whose draft this is: Charles Clarke checking with Martin Harris whether his

‘expectations and suggestions’ as the Secretary of State were acceptable to him as Director; or Martin Harris himself proposing to Charles Clarke just what guidance from the Minister he, as the OFFA Director, would find tolerable? Perhaps we should be told who gets to initiate and who then comments in the world of the Regulator... Anyway, the Secretary of State underlines the Director’s ‘freedom to challenge institutions’ in a ‘well-focused and non-bureaucratic’ way, being ever ‘mindful of the principles of good regulation: transparency, accountability, proportionality, consistency and proper targeting’. This last term may relate to Charles Clarke urging the Director to be ‘robust in expecting more, in financial support and outreach activity, from universities whose records suggest they have furthest to go in securing a broad-based intake of students’ (note the phrase ‘intake of students’ and not merely, say, ‘range of applications’: perhaps the ‘social engineering’ of admissions *is* the hidden agenda and the OFFA tanks really will end up in Camford’s quadrangles!). But, he also warns, ‘the law puts... institutions’ admissions policies and procedures outside your remit’, and ‘you have a legal duty to protect academic freedom’. The (draft) letter does use the word ‘fine’ concerning the £500K sanction (see below). Finally, OFFA’s annual reports will be of interest, thinks the Secretary of State, to the Education Select Committees of each House, and also to the Commission that will review the variable fee in 2009 or so.

But back to the SI... Regulation 9(d) concerns the ‘enforcement of plans’ and states that, ‘where the Director has informed the governing body that he is satisfied that the governing body has failed to comply with a specified provision of the plan, the Director may inform the governing body that he is minded to do either or both of the following –

- (i) direct the Higher Education Funding Council for England or the Teacher Training Agency or both under section 37(1)(a) of the 2004 Act to impose on the governing body specified financial requirements under section 24(3) of that Act, or
- (ii) notify the governing body under section 37(1)(b) of the 2004 Act that on the expiry of the existing plan he will refuse to approve a new plan under section 34 of that Act during the period specified in the notification.’

Next Regulation 10 states that: ‘The Director may specify as the financial requirements by virtue of section 37(1)(a) of the 2004 Act all or any of the following reductions in the amount of the institution’s grant, loan or other payment mentioned in section 24(4)(b) or (c) of that Act –

- (a) subject to regulation 11, a specified amount which in the opinion of the Director approximately equals 110 per cent of the total amount by which fees charged to students have exceeded the relevant maximum fees permitted by the plan;
- (b) a specified amount which in the opinion of the Director approximately equals 110 per cent of the total amount by which in any year the expenditure incurred in compliance with provisions included in the

plan pursuant to regulation 3(a), (b) and (c) falls short of any expenditure levels set out in the plan , and

- (c) a specified amount which the Director considers appropriate in view of the severity of the governing body's failure to comply with the plan, up to maximum of £500,000.'

Regulation 11 says: 'Where fees charged to students have exceeded the higher amount as well as the relevant maximum permitted by the plan, then the Director must, in calculating the amount to be specified for the purposes of regulation 10(a), disregard any amount by which the fees exceed the higher amount.' It needs here to be recalled that the Teaching and Higher Education Act 1998 (s26) already gives Government the power to deduct £ for £ from HEFCE funding to an HEI any tuition fee charged to UK citizens which exceeds the approved UK/EU fee level(s): £1050 min/max back in 1998 ('the prescribed amount' in the 1998 Act) and now 'the basic amount' of £1150 in the 2004 Act, and also now £3000 as 'the higher amount' in the 2004 Act. Thus, the 2004 Act and its related SI 2004/2473 can be used to claw-back fee income above £1150 and up to £3000 pa, while the 1998 Act covers any amount over the £3000; with exercise of these powers in relation to the former being at the discretion of the Director of OFFA (having 'regard to any guidance' coming his way from the Government!) and with respect to the latter at the discretion of the Secretary of State alone. That said, interestingly s26 of the 1998 Act is to be repealed by ss49 & 50 of the 2004 Act (and its Schedules 6 (clause 7) & 7); but, so far, no date has been set for doing so, the decision on timing being left to the Secretary of State under s52(6)(a).

Regs 9-11 seem to mean that OFFA can declare the HEI to have failed to comply with the OFFA: HEI agreement for attracting an increased number of applications (note not admissions) from under-represented groups. As noted already, compliance may mean fulfilling 'a plan' that aims to achieve 'equality of opportunity' by also increasing admissions as well as applications from under-represented groups, and that begs the question of the legality of perhaps needing to apply 'affirmative action'/'positive discrimination' policies within the selection process as discussed below. If the HEI is unable to convince OFFA of its innocence, OFFA can tell HEFCE to punish the HEI financially by deducting from the HEFCE block-grant to the HEI the amount of the ill-gotten gains in excess tuition fees above £1150 as 'the basic amount', plus a further 10% of that extra income as a fine, and then up to £500K as an additional fine. If, however, the HEI refunds the excess fees to the students concerned, it *will* avoid a HEFCE clawback and the HEFCE 10% fine (Regulation 12); while (Regulation 14) it *might* also avoid the £500K extra fine. A separate issue is the constraint upon a HEI in charging above the £3000 as 'the higher amount' and so entering territory covered by the 1998 Act. (See below for the maths of 'Camford' challenging OFFA.)

The HEI can appeal OFFA's decision(s) 'to a person or panel of persons appointed by the Secretary of State' (Regulation 16) where (Regulation 19):

- a) the governing body presents a material factor for consideration to which for good reason it had not previously drawn the Director's attention;

- (b) the governing body considers that the Director had disregarded a material factor which he should have considered; or
- (c) the governing body considers that the provisional decision is disproportionate in view of all the relevant facts which were considered by the Director.

All in all, it looks like Sir Martin has teeth, but, of course, as with any Government/Quango/Regulator decision-making process, the HEI can seek judicial review of the fairness/propriety/reasonableness of that appeal process (and, doubtless, would do so if ‘the person or panel’ agreed with the compliant of the HEI but the Director refused – as he is indeed free to do (Reg. 18) – to revise his original decision).

Similarly, there is the issue of whether a HEI, in enthusiastically following its OFFA access plan and hence also handling the applications with an element of ‘affirmative action’ or ‘positive discrimination’ in selecting for actual admission from under-represented socio-economic groups, may become open to challenge under the Human Rights Act from other applicants (encouraged by their Middle England parents and with their legal costs met by their independent schools!), who would assert that such an admissions policy/process is illegally discriminatory: see the articles by Nick Saunders on ‘Widening Access to Higher Education: the Limits of Positive Action’, in *Education and the Law* (2004, 16:1), and on ‘Fair Admissions to Higher Education: Recommendations For Good Practice’, in *Education Law Journal* (2004, 5:4); and the Schwartz Report at www.admissions-report.org.uk. Also note the timely overlap with the recent ruling of the US Supreme Court that some degree of ‘differential treatment’ (if assessed strictly on an individual basis - ‘holistic assessment’ and ‘profiling’ - and not applied automatically) is legal given a university’s ‘compelling interest in obtaining the educational benefits that flow from a diverse student body’. Saunders asserts that there must be a real risk that ‘a disappointed male applicant from a public school... will invoke these provisions’ (that is a young male not otherwise covered by UK race/sex anti-discrimination legislation might invoke Art 14 and Art 2 of Protocol 1, ECHR).

Much, therefore, will depend on just how key phrases are defined in practice:

- a) ‘an increased number of applications’ (Does it matter if they are all then rejected? OFFA seems able, in the short-term, only to watch and wait (especially given s32(2) of the Act referred to above). In the long-term, however, presumably ‘under-represented’ kids will not bother to apply to a university becoming known to reject most such applicants and hence the HEI will not be able to construct a credible second-period plan to increase the number of such applicants? In this regard, it will surely be significant as to how long ‘a plan’ lasts.)
- b) ‘groups... under represented in higher education’ (OFFA will identify them? Here, surely it will not be simply a matter of expecting more State school applicants – and eventually admissions? After all, the socio-economic mix in the sixth-form at ‘a posh comp’ in leafy suburbia or especially at a selective maintained grammar in a nice

county may not be radically different from that at an independent school charging modest fees and providing an appropriate level of reduced-fee/free places in order to pass the proposed more stringent 'public benefit' test concerning the retention of charitable status and the related taxation advantages: see Palfreyman, 'Independent Schools and Charitable Status', in Walford (2004), 'British Private Schools'.)

- c) 'the promotion of equality of opportunity' (Opportunity to apply, note, as already discussed, not then necessarily to be admitted?)
- d) 'failed to comply' (Did not in the event adequately resource the plan?)
- e) 'the severity of the governing body's failure to comply with the plan' (Cynically and substantially under-resourced the plan? Or ruthlessly rejected all such applicants, applying no 'positive discrimination' as discussed in * below?)
- f) 'disregarded a material factor' (HEI VC to OFFA Director: 'Can't you count/read, you clot?')
- g) 'disproportionate' ('Look at Camford: why are they being let off? And/or 'You're clobbering us too heavily!')

The OFFA Director has now issued a guidance note for HEIs that gives some clues as to how these crucial phrases may be interpreted (November 2004/01 at the OFFA web-site). First, however, Sir Martin stresses that 'fair access is not about interfering with admissions' (despite that unfortunate reference to 'intake' in the (draft) letter of guidance referred to above); and that it is simply about HEIs making 'all reasonable efforts to ensure that their range of applications are as socially inclusive as their entry criteria permits'. Thus, OFFA will 'regulate' the charging of variable fees, not 'admissions policies'; and HEIs need not even address their 'admissions policies or criteria' in submitting an access plan to OFFA. That said, somewhat confusingly the guidance goes on to state that HEIs should indicate how they will 'support improvements in participation rates in higher education from under-represented groups': is such improved 'participation' merely being able to apply to a university or is it about an improved chance of being admitted to a university, and, if the latter, surely we are back to 'admissions policies or criteria' and that telling mention of 'intake' in the (draft) letter from the Secretary of State to the OFFA Director. In terms of being 'socially inclusive' and 'under-represented groups', there is frequent reference to 'students from low income groups' (note 'students', not just applicants); later the Glossary defines 'under-represented groups' as 'people from low income backgrounds, people from lower socio-economic groups, minority ethnic groups or sub-groups that are under-represented in HE, disabled people' ('in HE' surely means actual students).

An 'access agreement' will last up to five years, and it might, hints the OFFA guidance, propose that *a quarter to a third (sic) of the extra income* from the variable fees will be invested (Whitehall-speak for spent) on 'access measures' such as 'bursaries' and 'outreach work'. Note this 25%-plus is not anywhere in the Secretary of State's (draft) letter of guidance; this 25%-plus is all OFFA's own helpful idea of what HEIs should do with their cash, with those HEIs (Camford et al) that have

‘further to go’ in widening participation investing up to 35% in these ‘access measures’: so much for new money to compete globally with our well-funded US competitors on academic salaries and campus infrastructure... And any money spent on attracting high-achieving students through merit-aid scholarships going to those not from under-represented groups does not count towards the suggested 25%-35% investment in ‘access measures’: at this rate the posh/elite HEIs with ‘further to go’ will be lucky to see half the extra fee income available for improving teaching resources, for enhancing academic pay, for catching up on the maintenance backlog, and for replacing aging infrastructure...

Annexe D of the OFFA guidance is on ‘Potential sanctions’, and states that ‘sanctions will only be used where we consider there has been a serious and wilful breach of the access agreement’; and there is reference to OFFA being able to impose clawbacks/fines and/or deciding to ‘refuse to approve a new access agreement for a specific period’. The guidance fails to mention that, as noted above, the HEI can appeal OFFA’s imposition of such sanctions.

In all this use of an Act and a related Statutory Instrument leading on to the Minister’s letter of statutory guidance and the Regulator issuing guidelines, there may well be an analogy with the proposed charities legislation and the likely imposition of a public benefit test. How stringent will the test be in relation to private schools? Will the Charity Commission, as the theoretically independent quasi-judicial regulator/watchdog, be given ‘guidance’ from the Government, be told ‘to have regard to’ this and that, in deciding whether, say, Eton and Winchester at £20K pa fees are meeting the public benefit test in the way that Manchester Grammar School at £6K fees and many bursaries, and even more so Christ’s Hospital School at £12K fees but with very many pupils not required to pay them, at first sight rather more clearly do so? Will the independent schools have suggested to them that 25%-35% of their fee income may need to find its way to providing free/reduced-fee places in order for them to pass the public benefit test, and will such schools deemed to have ‘further to go’ (Eton and Winchester as the equivalent of Oxford and Cambridge) be required to invest at the higher end of the range while MGS gets by with the minimum? What then when their 17-year old pupils attending via free places and from ‘low income backgrounds’ or from ‘lower socio-economic groups’ apply to Camford university as non-State school applicants: do they count for OFFA purposes in relation to improving access to HE and help Camford meet its ‘access plan’ benchmarks/milestones? Or do they only count if they also come from those postcodes that are distinctly ‘the wrong side of the tracks’? Regulation and social engineering can get terribly complicated!

Plenty here, moreover, for ‘my learned friends’ to earn fees as they advise HEIs on whether OFFA has been ‘mindful of the principles of good regulation’ so usefully set out in that (draft) letter from the Secretary of State, and clearly (and cleverly and cynically?) scope for SI 2473 (2004) to be simultaneously presented to New Labour back-benchers as the sharp teeth of the OFFA Rotweiler and to HEIs as OFFA the Rotweiler being ‘harmless really’! Interestingly, no other OECD country has yet felt the need to create an OffToff – perhaps it’s the British fetish for over-regulation and micro-management? Indeed, a colleague involved in a forty country UNESCO HE project comments that not only does no other country find the need for an OFFA, but they regard the English as ‘peculiar’ in setting up something so expensively

bureaucratic and in having so little trust in the nation's universities. One suspects that these bemused, even amused, foreign observers would be reinforced in their view of the English as 'peculiar' if they read the 'draft letter of statutory guidance', digested the Statutory Instrument, and contemplated the OFFA guidelines for HEIs... Most other countries don't even have a widening-participation debate as an 'issue' – see Tapper & Palfreyman, 'Understanding Mass Higher Education: Comparative Perspectives on Access' (2004 forthcoming, RoutledgeFalmer/Taylor & Francis), and Palfreyman, 'The Economics of Higher Education: Affordability and Access; Costing, Pricing, and Accountability' (OxCHEPS, 2004, £9.99 p/bk; and also available to be read on-line and as updated on-line at the 'Papers' page (Item 10) of the OxCHEPS web-site, oxcheps.new.ox.ac.uk).

Possible Scenarios

Camford University Challenges OFFA... Suppose Camford agrees 'a plan' (Reg. 3) with OFFA and hence is allowed to charge £3000 as 'the higher amount' to its 3000 new UK/EU full-time undergraduates in 2006/07. This brings in £9m, or around £5.5m over the £3.5m raised by applying only 'the basic amount' (all calculations are in 2004/05 figures). Presumably around a third of the £5.5m will need to be invested in 'access measures', but perhaps Camford is unable to spend this amount effectively and is then deemed by OFFA to have 'failed to comply with a specified provision of the plan' (Reg. 9) and the Director imposes 'financial requirements' (Reg. 10) as Orwellian speak for fines and penalties. Camford does not bother to appeal the OFFA decision, or does so and loses (and then loses the judicial review of OFFA's decision-making). Initially, the OFFA penalty can be 'only' the £500K from the third leg of Reg. 10, leaving Camford £5m better off (less its spend on 'access measures'). Probably, however, OFFA refuses to agree a new plan with Camford so that now it can charge only the £1150 unless it blatantly defies the 2004 Act and SI 2004/2473. The dynamically led Camford decides to do just that and in 2007/08 continues to charge £3000 to by then its 6000 years 1 and 2 students (raising £18m, or £11m over its authorised £7m). The wrath of OFFA is again incurred and Camford is fined 110% of the £11m *and* the standard £0.5m, leaving it some £1.6m worse off against the £7m – or £1.6m against its HEFCE 'T' block-grant of roughly £45/50m. Camford remains defiant and in 2008/09 by when its new fees regime applies to all three years of its UK/EU undergraduates the figures are, respectively, £27m, £16.65m and £10.35m, again leaving it worse off by c£2.15m.

But supposing Camford 'privatises' itself: if it charges above £3000 there is no extra penalty (Reg. 11) under the 2004 Act and its related SI, so now it needs to continue to pay its annual fine of some £18.8m and also to recover the missing £2.15m to stand still in terms of where it would have been as a university levying 'the basic amount' and collecting its HEFCE public funds (taking fees to £3250); and then it needs to create real extra money by charging still higher fees (say, the £6K pa that many thought should have been in the Higher Education Bill so as to introduce a true market in HE, and hence giving Camford an additional £25m pa). Yet the 'sticker-price' will need to be higher, partly to ensure that the (?) 25% of Camford students who can within reason afford almost any fee are not being unnecessarily subsidised by Camford itself over and beyond the HEFCE 'T' allocation as public money and partly so as to provide cash for discounting from this 'sticker-price' in allocating varying amounts of financial aid/bursaries on the basis of need to (?) 40% of students.

Thus, the ‘sticker-price’ for rich Brits might approach £10K, or pretty well the mid-level of the fees charged at independent schools and the lower end of the range at US private universities and colleges, and why not indeed...

Well, one powerful reason why not is that the recent political furore over the £3000 echoes the row over Keith Joseph’s failed attempt to introduce even larger tuition fees some twenty years ago (and Mrs Thatcher’s only policy u-turn as ‘the Iron Lady’!), in that, as one US observer back then noted acutely and accurately: ‘Hell hath no fury like the middle class when its subsidies are at issue’. The alternative, however, to realistic fees at £7/8000 pa is for Middle England families, wedded to the Welfare State perk and ideal of their kids experiencing HE at an elite HEI, to find that the HEIs concerned have given up on recruiting as many uneconomic UK undergraduates (other than extra ones from lower socio-economic groups in order to satisfy OFFA), and have instead redeployed teaching resources and infrastructure capacity to the more profitable cliental of high-fee overseas undergraduates and also to postgraduates on fancy new taught-masters courses charging ‘full economic cost’ fees. At that point even Middle England might welcome the chance to sacrifice the second foreign holiday or the new Volvo over the next three years in order to avoid Jeremy and Jemima having to attend a ‘lesser’ HEI (just as these families may already have done by financing independent school fees for the past ten years or so to avoid State schooling). Or they could send J & J off to the USA, perhaps even accessing merit-aid funding as major rich US HEIs seek clever kids from Europe to boost the ‘peer effect’ learning of their undergraduate cohorts: will Leo Blair and his ‘chattering classes’ ilk be at Stanford by 2020? (After all, no UK HEI offers global ranking and ‘sun-n’-surf’!)

But, back to the financially struggling Camford and as noted above in discussing Reg. 11, there is still the 1998 Act and the power within it (albeit, as also noted above, subject to repeal at some as yet unspecified date) for Government to claw-back from HEFCE public funds any (and, in effect, probably all) private fee income above £3000 raised from UK full-time undergraduates, and hence is there likely to be a Camford taking on OFFA and especially the Government, and also risking being the only university in the marketplace charging above £3000 pa, even if that meant being able to provide more generous financial aid packages to some students than the Government’s grant/loan scheme and hence arguably encouraging greater access? Or could a Camford persuade OFFA and the Government that it still had in place a perfectly credible plan for increasing applications from and widening-participation for the *under*-represented even if fees not only above ‘the basic amount’ of £1150 but also well above ‘the higher amount’ of £3000 are being charged, albeit in the case of the highest fees only to a minority of students from socio-economic groups seemingly *over*-represented in higher education (and especially at the Camford end of the system), and hence financial penalties need not be imposed after all and at all, either under the 2004 Act and SI 2004/2473 or under the 1998 Act? Perhaps Camford will tell OFFA that it is receiving increased applications from those 17-year old pupils in free ‘public benefit’ places at the top independent schools and hence from ‘low income groups’, and thus it is in fact meeting its own ‘milestones’ in the OFFA approved ‘access plan’ despite not meeting simplistic HEFCE ‘benchmarks’ concerning the intake from State schools. Camford should probably then leave OFFA and HEFCE, conveniently sharing the same building in Bristol but each supposedly

independent of the other, to have a cosy chat and decide which Regulator will penalise Camford for what infringement of whose guidelines...

Or, in practice, will the OFFA Rotweiler, despite possessing a sharp set of regulatory teeth, end up being rather cuddly once we all get bogged down in carefully determining just how much of 'an increased number of applications' a Camford needs to get from exactly which allegedly 'under-represented' groups so as adequately to demonstrate reasonable compliance with its suitably ambitious 'approved plan' in terms of reaching the plan's 'milestones', and hence make a meaningful contribution towards a measurable improvement in 'equality of opportunity in connection with access to higher education'? And it might even be argued that OFFA is indeed not only a too-expensive and an over-bureaucratic new regulatory sledgehammer to crack an old social class/cultural capital nut (and one of a very similar size to be found in all OECD countries, including the fiercely egalitarian Holland and the Nordics), but also a sledgehammer being wielded clumsily and unnecessarily given the welcome progress just identified by the Sutton Trust: the number of poor, working-class students in elite universities has risen by 50% over the 5 years to 2002, and, specifically, at 'Camford' the intake from 'low-participation postcodes' has also increased dramatically. Given that the State schools' output of pupils from lower socio-economic groups who are also adequately qualified academically for entry to 'top' HEIs is pitifully small, this steady increase is all the more a sign that 'the system' is anyway getting there without the need for a Regulator dictating that certain HEIs should inefficiently splash around a sizeable proportion of the new fee income as part of a political spin on the fact that Government itself was not prepared to provide appropriate levels of State financial support for specific groups of students. In effect, the higher variable fees will be (yet another) hidden tax on Middle England, this time to fund a few kids from Poor England who do manage to struggle through the under-resourced State schools serving their 'low-participation postcodes' and make it to an elite HEI. The vast majority of Poor England kids reaching HE at all end up, however, at 'lesser' HEIs where they will get much less financial aid, and still less if studying part-time.

A cynical view would be that perhaps Camford and co, and Middle England families with school-age kids hoping to attend elite HEIs, have nothing to fear in that OFFA, as the creation of the 'peculiar' English fascination with regulation and despite the expensive bureaucracy co-habiting with HEFCE in Bristol, has already long-since fulfilled its true narrow and sole political purpose: securing the New Labour backbench votes for the second-reading of the Higher Education Bill. A more cynical perspective could be that OFFA will oblige elite HEIs to encourage more applicants from 'under-represented groups' who will then have to be rejected as academically weak (short of some degree of affirmative action in the admissions policy): that seems both cynical and cruel. The utterly cynical result could be the admission of such applicants after applying positive discrimination, and then their anticipated likely non-completion as they fail first-year exams (short of a serious effort in remedial teaching, including the offer of pre-university August/September preparation classes so that they can hit the academic deck running in October): that seems both very cynical and verging on the wicked, rather than merely cruel.

Now the more open, properly honest and really effective way to improve the participation of 'under-represented groups' is: first, to apply some evidence-based

intellectual rigour in identifying them ('working-class parents', 'low socio-economic families', 'low-participation postcode homes', 'State school educated', or some sophisticated amalgam of all these markers?), and to cut through all the semantics over whether the game is about applications alone or about applications *and* the consequential admissions; second, to address the issue holistically, from State schooling in deprived areas via full-time *and* part-time provision in further education and so to full-time and again part-time admissions to *all* HEIs, alongside, of course, continuing special efforts on the part of the Camfords by way of Summer Schools (as pioneered by the Sutton Trust) and other such 'widening participation' activities; third, to face up to the need for at least some affirmative action in admissions; but, crucially and fourth, such positive discrimination must be combined, if it is to be fair to the individual in whose supposed benefit it is being exercised, with the financial resources to deliver remedial teaching both pre-admission and post-admission, and money spent (sorry, 'invested' to use spin-speak) on such teaching should be allowed against the OFFA 25%-35% 'tax' on the extra fee income (as will, doubtless, that spent on Summer Schools and similar 'access measures').

None of this means a Regulator is vital; the Camfords could get their collective act together and present it as a convincing package for safe-guarding/enhancing access, in return for which OFFA would allow fees up to £3000 *and* the Secretary of State would get around to exercising his power under the 2004 Act to repeal the claw-back provisions contained in the 1998 Act concerning fees over £3000 (or at least he could promise the Camfords not to exercise that 1998 discretionary power to direct HEFCE to claw-back fee income above £3000 pa)... Watch this space!

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