

**OxCHEPS Occasional Paper No. 39**

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***Re: OFFA and £6000-9000 tuition fees***

**In the 2006 edition of ‘The Law of Higher Education’ (Oxford University Press; second edition due 2012) we reviewed the legislation relating to ‘Fair Access and OFFA’ (pages 60-64). The Law remains the same and it is worth reminding ourselves what it is as the political rhetoric around tuition fees and access is ratcheted up with every day that passes and especially with alarming talk of ‘benchmarks’, ‘targets’, and ‘quotas’ for university admissions.**

**To quote from our text (but we will not here cite the sections of the relevant Acts, as detailed in our book): ‘Ministers are excluded from certain areas of detailed intervention within the control of institutions considered to be matters for academic judgement... [including ‘the criteria’] for the admission of students... [and while OFFA can indeed] identify good practice relating to the promotion of equality of opportunity in connection with access to higher education... [the] OFFA Director has a duty to protect academic freedom, including in particular the freedom of institutions... to determine the criteria for the admission of students...’.**

**In fact, we carefully noted that ‘the first statutory guidance from the Secretary of State’ to the Director warned him that ‘the law puts institutions’ admissions policies and procedures outside your remit [and that] you have a legal duty to protect academic freedom in respect of admissions’. This guidance letter came from a Labour minister. And so OFFA can certainly monitor whether a university has a credible and robust plan that aims ‘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’ (but note the word is ‘applications’ and not ‘admissions’ in the relevant legislation; and also note that it is a matter of under-representation in higher education generally and not necessarily about a particular mix of students at any individual university).**

**If a university fails to meet its OFFA-approved plan (in terms of increasing ‘applications’ from, but not necessarily achieving actual ‘admissions’ from, ‘under-represented’ groups), it can be ‘fined’ the amount of fees which have been collected in over and above ‘the basic amount’ (back then in 2004 set at £1150, and now to become £6000) as the most it could legally charge without having agreed an access plan with OFFA and the actual amount that has been charged somewhere up to and including ‘the maximum amount’ (initially £3000, and now to be £9000) as agreed with OFFA. It can next be fined up to an extra 10% of that excess amount AND also fined up to another £500,000 according ‘to the severity of the [University’s] governing body’s failure to comply with the plan’.**

**Note, however, that any university which does not want funding from HEFCE can, as a private corporation, charge whatever tuition fees it likes (exactly as does, say, the University of Buckingham or BPP University College). Under existing legislation and outside of the influence of the HEFCE-funding mechanism upon universities, Government can no more control university tuition fees than it can dictate the price of socks in Marks & Spencer. Universities are not part of the State and they are not part of the public sector; Government has no reserve powers of intervention even in a failing institution.**

**There is within the relevant Act an appeal process against any OFFA penalty, and, as we also noted in the 2006 treatise, this appeal mechanism ‘does not appear to limit the possibility of a subsequent application for judicial review of the decision of OFFA or of the appointed [appeal] person or panel’ – since, we would assert (as indeed we did re the OIA), that OFFA, having been created (like the OIA) under the 2004 statute, is indeed subject to public law. Hence, a university, or in fact any individual or any entity deemed to have locus, could seek judicial review in the High Court of the legality, the fairness and the reasonableness, and (in relation to the Human Rights Act) the proportionality, of OFFA’s decisions or policies – or even, of course, of the Government’s ‘guidance’ to OFFA.**

**We completed this review of the Law relating to OFFA as at 2006 (and indeed still as at 2011) by adding: ‘The undecided issue is whether an institution following its OFFA access plan, and hence [perhaps] also handling the [resultant increased] applications with an element of ‘affirmative action’ or ‘positive discrimination’ in selecting**

**for actual admission from under-represented socio-economic groups, may [thereby] become open to challenge under [the Human Rights Act] from other applicants who would assert that such an admissions policy/process is illegally discriminatory'. We noted that OFFA's 2004 Guidance Note to universities carefully and wisely stressed that 'fair access is not about interfering with admissions' and is only about universities making 'all reasonable efforts to ensure that their range of applications are as socially inclusive as their entry criteria permits'. This last phrase is significant: sensibly, OFFA did not, say, expect University X to waste resources encouraging applications from individuals who are not likely to be able to meet the entry standards of the institution as to be set solely by University X; and OFFA does not (or at least used not to) expect, and certainly nor can it require, a university to adjust its 'entry criteria' in any way.**

**We will address in the 2012 edition whether the Equality Act 2010 may now make less challengeable the utilisation by universities of 'positive discrimination' in the making of decisions about admissions where a university may wish (and indeed properly be required by OFFA) to seek a wider range of applications, *and* then also may (but *entirely* at its own discretion and *well* beyond the remit of OFFA) be willing to accept reduced grades for entry from certain applicants. (In connection with this summary of the legal position there is further detail on whether the OFFA watchdog really has teeth at the Papers page of the OxCHEPS website: Item 16, [oxcheps.new.ox.ac.uk](http://oxcheps.new.ox.ac.uk) .)**

**Such was - and is - the Law.**

**Now, however, we have, in the context of the current 'heavy' politics surrounding the shift to higher tuition fees, the February 2011 letter to OFFA from the Government that provides its Director with further 'guidance' and which, interestingly, uses such language as: '... the Government believes it would be appropriate for every Access Agreement to include a quantified assessment of the improvement the institution intends to make against appropriate benchmarks...' (such 'benchmarks' are later defined as including, inter alia, 'the percentage of students from state schools or colleges': clearly here 'students' means those already admitted, not 'benchmarks' simply to do with the 'range of applications'). The Director is urged 'to monitor a range of information on [universities'] applications as well as their admissions', checking whether there is indeed progress towards 'a more balanced and representative student body' and 'a properly diverse student body': again, here we see reference to admissions and to students, and not just concern over applications.**

**He is also guided to review 'offers made to applicants, including the grades and subjects required', and to consider whether 'students from under-represented groups' are finding their way onto an institution's 'more selective courses': yet again, the focus is being extended from just applications to actual admissions – and not only admissions within higher education nationally or just at the university overall but also to particular degree courses at any one individual university... and, in addition, on the basis of both what grades are sought in offers and also those grades in relation to what specific subjects are being required at A-level (or similar). Clearly, all this is a significant shift towards invasive micro-management, and hence would take OFFA a long way from its previous and**

**proper stance (as noted above) that ‘fair access is not about interfering with admissions’.**

**The above language in the recent letter should be interpreted in the light of our assessment of the legislation that set up OFFA, and that still firmly denies Government any authority or ability at all to interfere in university admissions. One may ask whether the recent ‘guidance’ crosses the boundary from being legitimately focussed on increasing ‘applications’ from ‘under-represented groups’ to higher education generally to being, it seems, improperly concerned with actual ‘admissions’ of students from such groups (and indeed of any and all social backgrounds when talking, as it does, of a ‘properly diverse’ mix of students) at individual universities, down to even considering particular entry grades required from which applicants and for what specific degree subjects (as well as delving into the entry criteria set by a university by way of the A-level subjects being required).**

**If the Government really deems it necessary now to intervene to any such extent (or, in fact, to any extent at all) in the detailed admissions policies and processes of, and also the exact entry criteria set by, universities, institution by institution, rather than having the previous and entirely legal focus, via its arms-length quango-like agency in the form of OFFA, solely on applications, then, clearly, it will need, in its impending White Paper on higher education, to consult over awarding itself appropriate powers under new legislation – since at present the Government simply has no authority in Law to seek to become involved, via the work of OFFA, in the way seemingly implied in the February 2011 letter of ‘guidance’.**

**Indeed, the OFFA Director is obligated by Law to resist any attempt by Government to intervene, by way of issuing to him inappropriate guidance, in his process and criteria for agreeing access plans with universities if the Government's intervention seems to be aimed at the generation of access agreements that purport to address the issue of admissions as opposed to only the proper and limited remit of OFFA in relation to applications.**

**Such new legislation would have to come close to the virtual nationalisation of our universities and would also bring the Government into direct conflict with the widely acclaimed international measure of university independence and of academic autonomy within a free society as being partly based on the ability of universities to select their own students. All this we discuss in our Chapter 16 on 'Academic Freedom and HEI Autonomy', where we cite a 1957 US Supreme Court landmark case in which it was noted that 'the four essential freedoms of a university [are] to determine for itself on academic grounds who may teach, what may be taught, how it should be taught, and who may be admitted to study...'**

**These four pillars of university independence have been the lodestar of declarations by various international bodies ever since on what must be protected or strived for in a nation's government-universities relationship, especially within totalitarian states or ones emerging from centralised rigid political control of their universities. It would be sad and regrettable, indeed shameful, for a country that, along with the USA, has been hitherto deemed, long-term, to have the most free and in fact also among the most successful universities globally to be seen**

**to mess with student admissions in order to fulfil vague short-term social engineering objectives.**

**It seems that the Government really intends to try and influence, if not virtually dictate, university admissions policies (down even to entry grades and A-level subjects required for admission, degree course by degree course, and also setting what come quite close to quotas for this kind of student and that kind of student so as to achieve what the Government's February 2011 letter of 'guidance' refers to as a 'properly diverse' and 'more balanced and representative' student body in any and each university - presumably a student body deemed, by at present not entirely clear criteria in the form of benchmarks or targets, to be acceptable to Government via OFFA). If this is indeed the case, it would perhaps be useful if the Director of OFFA speedily took expert legal advice concerning the 'guidance' he has just received. On the basis of that advice, he may be obliged to reject the guidance as being potentially an improper attempt to interfere with universities' academic freedom over their policies, processes, and criteria for student admissions.**

**After all, as we have noted above, the Director has a legal duty, imposed by Parliament, 'to protect academic freedom' including 'the freedom of institutions' inter alia 'to determine the criteria for the admission of students and apply those criteria in particular areas' (s32(2), Higher Education Act 2004). The February letter seems to guide the Director towards becoming rather too closely involved in the detail of admissions and the resultant nature of the socio-economic mix of the student body at individual universities, and it also seems to wish to shift the range of**



**the Director's work from solely being concerned with 'fair access' in terms of the opportunity for all segments of society to apply to enter university, to in addition seeking what looks like 'fair admissions' and even what might be termed a 'fair student body' – whatever that may mean. The Director seems to have been put in a very difficult position by this latest guidance which goes further than early guidance from a different Government.**

**In short, neither the Government nor OFFA has the legal power to require changes in university admissions' policies that seem to be expected in the rash statements issued by certain politicians, and not least by the Deputy Prime Minister – all of whom can only be ignorant of the fact that universities are private chartered or statutory corporations and that even the existence of OFFA gives no mechanism for controlling or merely influencing the creation of whatever ministers, with doubtless every good intention, may believe to be a 'properly diverse' and 'balanced' student body at any particular university. And, in fact and in Law, the duty of OFFA is to stop ministers trying to do so, not to aid them.**

**If OFFA fails to fulfil its statutory duty of defending universities against improper and illegal Government interference in admissions, then perhaps the collective of university lay chairs of university councils/boards and the coterie of vice-chancellors will seek judicial review of OFFA's neglect of duty in an attempt to fulfil, in turn, the clear obligation upon such university officers to defend university autonomy and academic freedom in relation to admissions. If these university offices fail in their duty, it will have to be determined individuals who seek to have**

