

# The Office of the Independent Adjudicator and its Role in Administrative Justice in Higher Education in England and Wales

## Introduction

As a result of recommendations from the Nolan<sup>1</sup> and Dearing<sup>2</sup> reports consultations on an independent body for students to make complaints to began. A White Paper<sup>3</sup> in 2003 set out the government goal of establishing the body via legislation. The Office of the Independent Adjudicator for Higher Education (OIA) was established in 2003 and began running a voluntary scheme in 2004 with it becoming the designated operator of the student complaints scheme in 2005 under s 20 Higher Education Act 2004. The University of Bradford subscribes to the scheme.

Prior to the establishment of the OIA, universities offered internal complaint processes but there was a widespread belief that these were frequently ineffective and often perceived by students as impractical. Recourse had to be had to the courts if matters could not be resolved on campus. A consequence of the OIA scheme has been a marked improvement in universities' own internal complaints systems in order to reach satisfactory conclusions without need for appeal to the OIA. This Law in Brief is designed to give an overview of why and how the OIA came into being and of some of its work in its early years.

## The original scheme

The current remit of the OIA is limited to those complaints that have first been taken through the procedures of a Higher Education institution's own internal system without reaching a satisfactory conclusion in the view of the complainant student. All complaints to the OIA must be made within three months of the conclusion of the internal investigation by the Higher Education institution, which should usually have resulted in issue of a 'Completion of Procedures' letter giving details of how to refer the matter to the OIA. All Higher

Education bodies are required to abide by the rules of the OIA scheme and some private institutions have joined or are joining it. The OIA looks at a wide range of procedural issues but it does not adjudicate on academic issues. It functions by a transparent process, seeking information from both complainant and the Higher Education Institution and allowing each party to comment. Results can include payment of compensation from the Higher Education Institution where the complaint is upheld and so far compensation payments have exceeded £700,000 with the largest single award to date being £45,000 awarded in 2010 following a university's "substandard" handling of a case in which a PhD candidate became embroiled in a legal battle over allegations of harassment. The Independent Adjudicator is required to report to the Board and publish in his Annual Report any non-compliance with Recommendations by a University.

There is little doubt that society in general has become more litigious and students, particularly since the introduction of tuition fees in Higher Education in 1998 have mirrored this. The introduction of the OIA scheme, together with tightening up of 'contracts' and 'service agreements' HEIs have with students have headed off much of the threatened litigation, but the OIA scheme has its limitations – in particular as follows:

- 1 OIA is entirely funded by the HEIs that a student can complain about.
- 2 The OIA trains HEIs on how to handle complaints, whilst only offering tips on their website to complainants.
- 3 Each year the OIA finds approximately 3 in 4 student complaints to be unjustified.

- 4 The OIA controls which student feedback examples are published on its website and in doing so, it publishes only a small sample.
- 5 The OIA does not require the HEI to substantiate any notes (sometimes handwritten, undated and/or unsigned) which are included in the file which is submitted to it by the HEI following a complaint being accepted for adjudication. It seems content to accept unsupported claims which the HEI makes about its defence to the complaint when directly corresponding with the OIA. This means that the HEI can say that it consulted internally about how best to address the complaint and show some superficial notes of this, without having to show all of the materials which support that claim, even when there are clear gaps and missing materials that could be expected to be seen in a 'best practice' investigation.
- 6 The complaint file system lacks transparency about the HEI's audit trail. The OIA does not require the HEI to disclose a complete list of advisors it has consulted, or the brief given to the advisors or all of the advice received, or a complete audit trail of what materials the internal advisors were shown and not shown, following any of the advisor's 'advice' or 'comments' that were included in the complaint file. Furthermore, the OIA does not insist that the HEI provides a complete audit trail of materials that show how it came to its internal conclusions about the complaint or the complainant. It is thus relatively easy for a HEI to generate and submit a complaint file whose contents superficially seem to show it has tried to sort out the complaint when in fact it has arranged the contents of the file to discredit the complaint, albeit unfairly. The complaint file system potentially lacks objectivity by allowing HEIs to attack the character of the complainant without actual evidence. In addition, the OIA does not insist that the HEI include only the materials that it relies upon to defend its position to the OIA, so HEIs are allowed to include any material of an irrelevant but derogatory nature about the complainant without questions or criticism from the OIA for that material's inclusion or accuracy.
- 7 The OIA drafted its own rules (with the assistance of Eversheds, a firm of solicitors reputed for representing HEIs) which were based on deciding the outcome of a complaint according to the standard administrative law criterion of whether the HEI followed its own rules or not when deciding the complaint internally. The OIA does this primarily by reviewing the contents of the complaint file and without seeking full disclosure of how the

contents were compiled. The OIA has absolute discretion on which individual items of evidence they consider or not when reviewing a complaint. In light of this unregulated complaint file system, the opportunity for manipulating the complaint file's contents is vulnerable to abuse by HEIs, both in the HEI's claims about its handling of the complaint and about any attacks it chooses to make on the complainant's character or motives; and both for making a complaint to the OIA and the initial complaint to the institution.

### **The 2010 Pathway Report**

Despite the above, the scheme was generally welcomed as providing a standard framework for complaints and it was taken to be a 'first step' in the process. In October 2008 the OIA launched the Pathway Project to consult on the next phase of its development. This drew on independent qualitative and quantitative research to find out the view of complainants, their representatives, Higher Education Institutions, student bodies and other interested parties.

The evidence based report and recommendations by Robert Behrens was published on 11 February 2010. The OIA received 91 submissions from universities, 15 from students' unions and 19 from key stakeholders. The survey of complainants produced 215 completed surveys from a sample of 776 complainants, whose profile was a reasonable match to complainants to the OIA. The Report identified a number of "quick wins", implementation of which began before the Report was published, recommendations for immediate implementation following OIA Board agreement and report publication and other more substantial changes which should be subject to further consultation with sector users and stakeholders.

The 2010 Report concluded that there was widespread support for the remit of the scheme as set out in the Higher Education Act 2004. This excludes issues of academic judgment even though a substantial proportion of complainants are complaining about assessment issues. The Report recommended no change save that there should be more guidance provided as to the OIA's interpretation of when issues of academic judgment were involved. This would be part of a strategy for communicating the OIA's role and the legitimate expectation of scheme users more clearly. A significant proportion of complainants believed the OIA favours institutions, with this perception increasing for complainants whose complaints are found wholly or partly not justified.

## Challenges to the OIA by means of Judicial Review

So, if the aim and indeed outcome of the OIA has been to divert cases from formal court proceedings, how has this succeeded? The OIA has certainly, as a public body, been the subject of several Judicial Review claims. So far, it has resisted quite successfully the scrutiny of the courts. The judgments, discussed below, provide a strong body of support for the OIA's approach to its role and remit.

### The leading cases

The leading case is *Siborurema*<sup>4</sup> in which the Court of Appeal decided that Decisions of the OIA are subject to Judicial Review, but the scope of any Review will be limited and it is unlikely that many claims will get through the permission "filter" stage. The court will be "very slow" to interfere with the exercise of judgment leading to a Decision that a complaint is Not Justified. The Court of Appeal also decided that the OIA has a broad discretion to determine the nature and extent of its own reviews.

In the case of *Maxwell*<sup>5</sup>, Ms Maxwell sought to challenge the approach taken by the OIA in complaints raising the issue of disability discrimination. The OIA found Ms Maxwell's complaint against the University to be justified and recommended the payment of compensation of £2,500, and changes to the University's procedures.

The essence of Ms Maxwell's judicial review claim was that the OIA ought to have made a finding on whether the University had discriminated against Ms Maxwell. Such a finding would, she claimed, have benefited her and the University, and would have informed the level of compensation awarded to her. Ms Maxwell claimed that by not making such a formal finding, the OIA erred in law, failed in its duty to promote equality, and had no rational basis upon which to make its decision. Foskett J dismissed the claim at first instance and endorsed the approach of the OIA on this and other disability discrimination cases. Ms Maxwell applied for permission to appeal. On 24 February 2011, the hearing of Ms Maxwell's application for permission to appeal came to the Court of Appeal. Mummery LJ refused permission on the ground that there is not any real prospect of success but adjourned to the full court the application for permission on the ground that there may be a compelling reason for granting permission.

He said:

*"First, I do not consider that this appeal would have a real prospect of success. It seems to me that it is not a legal requirement of the scheme and certainly not an abuse of power on the part of those who operate the scheme that they should have to express views about such contentious matters as allegations of disability discrimination. ..."*

*"However, there is the alternative ground on which I will adjourn this case to a full hearing before the tribunal. It seems to me that there is probably a compelling reason for the court to hear this case. I am not going to say that it is sufficiently compelling for me to grant permission today, but it seems to me that there is enough of a case to justify having a fuller hearing on notice about the question of the role of the OIA. ..."*

*"It seems to me that the general public, in particular students who are entitled to make complaints to the OIA, and the OIA itself, might benefit from a full hearing of which all the arguments were presented and a judgment or judgments could be given clarifying the role of the OIA and clarifying its procedures."*

The application was heard by a panel of three judges on 24 and 25 July 2011 and in October 2011 leave was refused.

### Other claims

The *Siborurema* case has been followed by judges in other judicial review applications. In *Arratoon*<sup>6</sup>, the judge gave a useful summary of the principles identified by the Court of Appeal in *Siborurema*. He emphasised the considerable degree of discretion afforded to the OIA, and the degree of deference which should be shown to the expertise of the OIA. Once again the Court declined to interfere with the OIA's Decision, and endorsed its approach.

In *Budd*<sup>7</sup>, Ockelton J considered the claim that the OIA ought to have called for the student's examination script, and ought to have conducted a "full merits review" of his claim, and held an oral hearing. The Judge rejected the claim. He said:

*"The OIA does its task properly if it continues its investigation until it is confident that it has all the material it needs in order to make a decision on the individual complaint, and then makes its decision. The exercise of a discretion in this context is simply the continuous consideration of whether any more information is needed in order to make a decision on the particular complaint."*

### About the Author

Three other Judicial Review claims have been issued against decisions of the OIA since August 2010. In each of those cases, the judge has refused permission to bring the claim on the papers but the claimants have renewed their applications for permission.

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### Conclusions

Students litigating against their university is odious, messy and costly for all. The trend, be it in negligence, contract or other area of the law was, anecdotally, upwards, borne on the wings of an

increasingly litigious population and increasing fees. To try to stop this must be seen to be for the general good – in costs to time, reputation and the uncertainty of lengthy litigation. The OIA scheme seems to have been a fair success and, with its changes post-2010, even greater success is anticipated. Universities can be dragged into compliance with its decisions by ‘naming and shaming’ but, one would hope, abiding by decisions it may not like but which do not set a precedent as such must be better than risking litigation.

Whether mediation closer to the point of dispute, in some ‘campus ombudsman’ type scheme, would help remains to be seen. Independence and funding are two obvious points of contention, but it seems any widespread adoption of such a scheme is some time away.

The OIA is here to stay, approved by Parliament and increasingly widely used. Even though unsuccessful complainants may see it to be flawed, the courts are, to date, content with the way it operates and have not attacked any of decisions. This is an instance of non judicial administrative justice, born into a fairly hostile atmosphere, that can be said to have succeeded and forms a model that others could do well to copy.

### Some statistics

Rob Behrens, Independent Adjudicator and Chief Executive of the OIA presented his Annual Report for 2010 at the OIA’s Annual Open Meeting in London on Tuesday 14 June 2011 He reported that:

- The Office received a record 1341 complaints against universities in England and Wales. This represents a 33 per cent increase on the previous, record, year. This is a significant rise, but still constitutes a very small proportion of the number of enrolled students.
- 20 per cent of Formal Decisions were either Justified (6 per cent) or Partly Justified (14 per cent) and 53 per cent were found to be Not Justified. The proportion of Justified and Partly Justified decisions rose in comparison to 2009 (when a total of 14 per cent of decisions were Justified or Partly Justified).
- For the first time, two universities are named in the Annual Report for not complying with Recommendations in OIA Formal Decisions. (Southampton and Westminster)
- The OIA published and began implementing the Pathway Report which set out key recommendations for the future development of the Scheme. As a result, the OIA was able to reform its case-handling processes putting greater emphasis on the early resolution of complaints. Following a second round of consultation, the OIA now has broad support for a revised publishing scheme, including publishing summaries of a number of Formal Decisions by name of university, from January 2012.
- Private providers were welcomed to the Scheme with two private colleges joining as „Non-Qualifying Institutions“.

### References

- <sup>1</sup>Standards in Public Life: First Report of the Committee on Standards in Public Life (1995) Cm2850
- <sup>2</sup>Dearing, R. A National Committee of Inquiry into Higher Education, report 1997
- <sup>3</sup>The Future of Higher Education cmd 5735, January 2003
- <sup>4</sup>R (oao Siborurema) v OIA [2007] EWCA Civ 1365
- <sup>5</sup>R (oao Shelley Maxwell) v Office of the Independent Adjudicator [2010] EWHC 1889 (Admin)
- <sup>6</sup>R (aoa Arratoon) v OIA [2008] All ER (D) 160 (Nov)
- <sup>7</sup>R (oao Budd) v OIA [2010] EWHC 1056 (Admin)

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