

## JUDGING THE UNIVERSITIES

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Jeremy Bentham was responsible for convincing me to stay with law studies at a time when I seriously considered changing to sociology. It came about like this. I started my undergraduate law degree at the LSE (largely because when choosing universities, my headmistress had advised us that we were free to go anywhere we liked, except the LSE, because it was a hotbed of radicalism and rebellion, and she refused to write references for it). I was attracted to that sort of thing in those days and found myself at the LSE. Our Roman Law lectures were given at UCL by Professor Raphael Powell. I trailed reluctantly to them, but after the hour was over I would stop by Jeremy Bentham and reinvigorate myself to carry on with the law, recalling the societal side of law that I loved so much and which he embodied, rather than the Roman black letter law.

There can be no topic that would have appealed to him more than the one I address tonight, which is how the law deals with student complaints. For he was a complainer and, famously, a young student and one who applied legal techniques to the issues of his day. Complaints about higher education are not new – Bentham’s tuition at Oxford was also hampered by fees. According to C. W. Everett’s *The Education of Jeremy Bentham* (New York 1931): “As to Jeremy’s relations with his tutor, there is some uncertainty. Sixty years later he complained to Bowring that his father had placed him under the inferior teaching of that ‘gloomy Protestant monk’ Jefferson, to save money, since Jefferson’s fee was six guineas and Mr. Fothergill’s was eight” (although his father’s journal shows that in fact Jefferson was paid £8). He formed a rooted dislike for the lecturing performance of Sir William Blackstone. The result was that Bentham cared little for his formal education, insisting that “mendacity and insincerity . . . are the only sure effects of an English university education,” and he cared even less about succeeding as a

practising lawyer. He preferred to read and write papers on legal reform. This will strike a chord with some in this room. Nevertheless, he was a true Blairite, or should it be Brownite, in strongly believing that education should be made more widely available, and not only to those who were wealthy and members of the established church, as was the case then at the traditional universities of Oxford and Cambridge. As the first English university to open its doors to all, regardless of race, creed or political belief, UCL went a long way to fulfilling Bentham's vision of what a university should be. He was instrumental in securing the appointment of his pupil John Austin as the first professor of Jurisprudence at UCL, and 130 years later during one summer vacation I settled down to read *The Province of Jurisprudence Determined* as the first book on my Jurisprudence reading list. What I have to say tonight is accordingly informed by both of those great associates of UCL.

Today Bentham would undoubtedly have applied to my Office, the Office of the Independent Adjudicator for Higher Education (OIA), to have his complaint against Oxford settled. In his day, it was the Visitor of the College who fulfilled this role and in his case it was the Archbishop of York, *ex officio* Visitor of the Queen's College ("a poison-instilling seminary"). The Visitors have however been stripped of their role in resolving student complaints by s.20 of the Higher Education Act 2004, which introduces the new scheme for resolving complaints in their place.

Moving from Bentham's youth to my generation, school and college regulations reigned supreme. Things had moved on from *Tom Brown's Schooldays* and Dotheboys Hall, but not that much! We enjoyed the postwar spirit, conjured up unforgettably by Willans' *Molesworth*, Richmal Crompton's *Just William*, Angela Brazil's girls' boarding school stories and, most recently Alan Bennett's *The History Boys*: an atmosphere of fun, perhaps, but with an underlying tow of authority, the fun lying in trying to get the better of the authorities. There is little literature covering university life of that period; *Brideshead Revisited* was still relevant albeit that it conjured up the prewar existence. In the days to which I refer, you were taught what school and college thought was relevant and conducive to advancement, and you trusted

them. Pupils were expelled for known and sometimes unknown offences, and pastoral care was light touch. This was illustrated memorably by Rattigan's *The Winslow Boy*, a play based on the true story of George Archer-Shee, who was expelled from The Royal Naval College on suspicion of stealing and encashing a postal order. His family fought in court to clear his name. Today he, too, would be making a complaint to the OIA.

The strength of authority went too far. In my day women were sent down from university for harbouring a man in their college room overnight, and stigmatised as immoral for doing so, whereas the man would be rusticated for a mere two weeks or so. In *Ward v. Bradford Corporation* [1972] 70 LGR 27 Lord Denning castigated just such a woman as "quite an unsuitable person" for the teacher training course from which she had been ejected. Her expulsion was upheld by the court despite admitted breaches of natural justice and college procedures. Today this would unhesitatingly give rise to litigation based on gender discrimination, human rights and procedural breaches. Indeed, I think my generation should have been more vocal, but we were being given a first rate education at no cost to ourselves, we were in a tiny fortunate minority and we knew it. Today the relationship of student and university has changed, not least because of the spread of mass higher education and the fact that some of the cost is borne by the students. The relationship is more legal than pastoral.

We know that a student has a contract with his or her university but I wonder whether universities realise quite how much legislation affects that relationship. Some modern legislation specifically targets universities; other legislation affects them unintentionally. Universities were singled out for freedom of speech guarantees after a number of incidents in the 1980s where right wing speakers were heckled and jostled on campus visits. The Education (No.2) Act 1986, s.43, requires them to secure freedom of speech *within the law* for members and visitors. There has to be a university Code of Practice on Freedom of Speech. By provisions of the Education Act 1994 the university has to draw the attention of the students' union to that Code annually, and fresh responsibilities are imposed on universities in relation to

students' unions and on unions towards their members. I have the impression that universities may not realise that the scope of freedom of speech *within the law* has been narrowed in recent years by e.g. the Terrorism Acts of 2000 and 2006, the Racial and Religious Hatred Act 2006 and the Protection from Harassment Act 1997.

Universities and students have special relationships in relation to discrimination. The Race Relations (Amendment) Act 2000 places a positive duty on universities – although possibly not on students' unions – to foster good relations between different race groups on campus. This is reinforced by the Racial and Religious Hatred Act 2006 and the Equality Act 2006. Disability is strongly protected by Disability Discrimination Acts 1995 and 2005 and the Special Educational Needs and Disability Act 2001, and the requirements made of universities are complex and proactive, and a fruitful field of dissatisfaction and need for interpretation.

Other Acts inadvertently have significant effect on the student-university relationship: the Protection from Eviction Act 1977, the Unfair Contract Terms Act 1977, the Data Protection Act 1998 and the Freedom of Information Act 2000. The consequences of the enactment of the last two on universities can hardly have been considered. The provisions of the DPA have ended the practice of publishing complete lists of degree results (in Oxford) and have rendered written references next to otiose as well as legally sensitive. The DPA enables students to obtain much more information about their examination scripts, short of the script itself. The Act has opened up university records and files to students and the FOI Act has brought to light much general and statistical information about examination and general policy that informs the student's view of whether he or she has been fairly treated. Bursaries, as introduced in the Higher Education Act 2004, may yet come to be another source of legal disputes. I am not convinced that all universities have studied their obligations and taken steps to meet them. No wonder then that the resolution of student complaints came to be seen as an urgent issue for reform in the 1990s.

## History

The roots of my jurisdiction, as Independent Adjudicator for Higher Education, lie in the visitatorial system which originated in medieval times. It stood the test of time. While well tried and acceptable in itself, the Visitor's jurisdiction came to be regarded as deficient in applying modern standards of openness and human rights to the resolution of complaints. The existence of "new" universities, many of which had no Visitor, the extension of higher education from a privileged few in, for example, the 1950s to over 40% of school leavers, changes in attitudes towards the function of higher education and, not least, the introduction of fees, made urgent the establishment of a universal scheme to guarantee a fair resolution to those students who remained dissatisfied with the decisions of their universities. Comments by Lords Nolan and Dearing in their respective reports (Nolan *Standards in Public Life* 1996, recommendation 9; Dearing *Report of the National Committee of Inquiry into Higher Education* 1997 recommendation 60) called for an independent adjudicator and this was taken up by the CVCP (as it was then) and the White Paper, *The Future of Higher Education*, 1993, Cmd 5735, para, 4.11.

Unquestionably there should be the possibility of independent review for the settlement of student complaints. This principle of independence is now almost universally accepted across the public sector, but before 2004 its application varied from university to university. Some universities have reacted with caution to the establishment of the OIA, fearing that there would be another expensive regulator to contend with in the already over regulated field of higher education. I wish to assure them that it is the aim of the OIA to save universities and students from expensive and protracted legal battles. The cost of a few visits to counsel and to solicitors quickly escalates beyond the annual subscription to the OIA, which covers unlimited applications by students. Individual universities remain free to design their own complaints and appeals procedures, but the OIA tries to spread good practice and knowledge about, for example, the role of natural justice in disciplinary hearings, and the need for speed and informality.

We should all be sensitive to the need of students for a speedy, economic and efficient end to disputes with universities. 6 months may not seem very long to a university but students' needs are driven by the cycle of the academic year and the urgency of returning or registering elsewhere by September in any given year. There have been OIA decisions where there is little, if any, merit on the part of the complainant but the delays by the university in determining the dispute have been such that the student has lost an extra year or two, and there we have recommended compensation. It is not good enough for university administrators to plead that the long vacation prevents the answering of letters or the progressing of a disciplinary procedure between May and October.

The OIA is free to students and it is an alternative to litigation. If a dispute has already been taken to court, then, under our Rules, we will not accept it for investigation by the Office. As with all ombudsman-type schemes we need a spirit of openness and cooperation from the parties in order to maximise our effectiveness. Some academic registrars have told us that they really welcome our existence, as the interpretation and application of institutional rules in an atmosphere that may be tense or hostile can be a lonely and difficult job; others are less willing to cooperate, fearing an encroachment on the important dominion of academic judgment and becoming impatient with the need to provide so many documents. Some have even asked me: "Do students have human rights?"

Academic judgment is, rightly, outside our remit, but we retain the right to decide what its scope is: otherwise many a dispute could be withdrawn from our determination by the decision of the university that it was exclusively a question of academic judgment. My Deputy claims that academic judgment is the opposite of the proverbial elephant: even when you see it there will be different views as to what it is. It is a term difficult to define, and it does not embrace every judgment made by an academic about a piece of work. I suggest that it involves an judgment about a matter that can only be made by one with academic training and professional involvement. Fitness to practise, course content and the finding of plagiarism are examples. Consequently, the

OIA never recommends that grades be uplifted or degree classifications changed.

We also take care to avoid “commercial” attitudes. It is true that the student has a contract with the university, based on the prospectus and the regulations accepted on registration, but students are not simply “customers” as, regrettably, some of them see themselves. They are learners and they have to prove themselves worthy of the qualification that they seek. Just as staff have clear obligations to their students, so do students have obligations to their teachers and the other members of the university and to the maintenance of academic standards. The student contract is one where the outcome cannot be guaranteed. It was suggested at the start of the OIA scheme, that the relationship between student and university was akin to that of the holidaymaker and the package holiday company. On the basis of a prospectus with colour photographs, the argument ran, the holidaymaker (student) chooses a destination and relies on the promises of facilities, stimulating experiences and a happy conclusion. If they do not materialise he is entitled to sue. The analogy is misconceived, in my view, because the holiday contract is a commercial one with appropriate costing and the deficiencies in experience are objectively assessable in general. The student contract, however, is one where there are obligations on both sides and successful interaction and application are crucial to the result. It is more like the arrangement entered into by a person who joins a health club: in return for the fee, the club will provide adequate facilities and training but the desired outcome is achieved, if at all, by the hard work and regular attendance of the member. Nevertheless, the pressure of modern university life means that sometimes things go wrong and not all staff live up to the obligations imposed on them by their roles. We know how much emphasis is placed nowadays on research rather than good teaching. It is also the case that some universities will have a more than average number of students with inherent problems, because they are for example, trying to earn a living for many hours of the week, have no family support and may themselves be carers. Other universities will have a student population with strong family support and few financial worries. For that reason, it is unfair in my view to have a league

table of universities against which complaints are made, and in any case it is the complaints that are upheld that are statistically significant, not just the raw numbers of issues brought to us for adjudication.

### **Casehandling**

About 150 English and Welsh universities fall under our jurisdiction. Their total income exceeds £15 billion and they look after nearly 2,000,000 students, approximately 19% of whom are overseas. Each university has one representative appointed to deal on its behalf with the OIA. In 2006 we received over 550 complaints of which approximately 75% were eligible for investigation under our Rules (available on our website [www.oiahe.org.uk](http://www.oiahe.org.uk).) All universities have a statutory obligation to participate in the scheme. It takes an average of 6 months for the OIA to investigate a complaint and write a decision, which is sent in draft to the parties for comment before being finalised. Complaints from international students form around 25% of the whole. Around 30% of complaints are upheld.

Our range of remedies includes apology, the rehearing of an appeal or the remark of a paper, following through a recommendation for a change in the rules, and compensation, but really as a last resort. (£260K total in 2005). It is the appropriate remedy when matters have moved on too far for the university to be able to provide the unhappy student with the education he claims to have missed. Compensation is not granted on speculation that the student would by now have a successful career in the city had the disputed grade been higher. Where there is a definite job offer, based say, on successful completion of an accredited professional course, which was lost because of a procedural irregularity on the part of the university, that definite salary loss might be taken into account. The level of tuition fees paid sometimes guides the amount of compensation where there has been a failure to provide promised facilities and lectures. We have the power to hold hearings but have not so far found it necessary because a complaint will certainly have been investigated at several levels within the university before it comes to us. It is a requirement that all internal procedures be completed before eligibility. Our decision will be a written one running to several pages.

The most common subject of complaint is examination results or a degree level, accounting for some 43% of complaints; 33% relate to contract (accommodation, facilities, lectures); 7% to discipline, ranging from student union elections to violence; discrimination forms 8%, and plagiarism, although very significant, amounts to only 3%. Bentham would have been keen to hear about that, as a victim of plagiarism himself. Talleyrand said of him “Pille par tout le monde, il est toujours riche”, referring to the way in which his writings were taken up by others. Today the internet provides the source of plagiarism and the plagiarised are, it seems, willing victims when they write the required essay to order, with the result that not even the most sophisticated specialised software can detect the copying. In the typical plagiarism case that comes to us, the student admits quite freely that he or she copied the work; the dissatisfaction is with the penalty, which is regarded as disproportionately severe, and with the lack of consistency between departments and between universities.

Postgraduates are five times more likely to complain than undergraduates, and usually about thesis failures blamed on poor or non-existent supervision. Non-Eu students and students studying subjects allied to medicine were more likely to complain, followed by students studying business administration and law. We receive many complaints from nursing students which usually relate to mitigating circumstances or disability, most commonly dyslexia. Philosophy, mathematics and veterinary science students are the least likely to complain, either because they are busy thinking and out or about or because they are least in need of facilities provided by the university! Many complaints involve disability issues. Of the complainants with disclosed disabilities, 36% have dyslexia, 21% mental health issues, 10% mobility issues, deafness and visual impairment 8%, and unseen ailments such as diabetes 8%. Some very difficult issues arise from the extension of disability legislation to universities, with positive duties to anticipate disability and make adjustments, with a saving only for competence standards. Universities cope very readily with adjustments required for physical disabilities, but mental ones are more problematic. In some cases dyslexia is not diagnosed, for

whatever reason, until just before finals. Should the examination board be required, once the assessment has been made, to go back to the affected candidate's examination results of the first and second year and reconsider them in the light of the candidate's now established disability? Is acute examination panic a disability and if so, what adjustment should be made? What if a disabled student makes life in a hall of residence unbearable for other students? When should medical procedures be applied by the university rather than disciplinary ones? At what level of dyslexia will the need to safeguard competence standards prevail over the duty to make adjustments?

Fitness to practise and professional placements present many problem cases. Medical students are not officially signed up to the GMC code of conduct for doctors until the point of registration, which may be some 5 years after starting to study medicine. Yet a drugs offence for example, early in university years, may be of no particular concern to the university but may, a few years down the line, prevent the student from practising as a doctor. The universities logically should be applying those medical professional standards to their students from the outset, but the concept does not fit well with the general tenor of university regulations.

Mitigating circumstances regulations differ from university to university in width, timing and effect. Typically, they are required to be evidenced by supporting medical evidence, although many college regulations are vague about what this should refer to, or even whether it is always necessary; mitigating circumstances have to be notified, according to nearly all regulations, before the relevant meeting of the examination board unless there are good reasons for late submission. This is where difficulties present themselves to my Office. Very often the student does not raise these circumstances until after he or she is notified of a disappointing degree result. The university is likely to reject the submissions as too late and the appeal to the OIA is based on the student's dissatisfaction with the finding that there were no good reasons for late submissions, coupled with argument that the circumstances were compelling and should lead to the award of a higher

degree classification. Hardly any university will respond to a good case by raising marks; they are more likely to consider class boundary provisions or allow a resit, but students have formed the impression that a variety of sad personal circumstances will result in a better grade if the facts of the situation are strongly urged on the examiners. On the one hand rules must be followed and every student given a fair opportunity to show what he or she can achieve; on the other, academic standards and parity of assessment are stake.

Overseas students feature largely, as has been mentioned, in our complainants. Frequently we make no finding that the university has behaved in any way outside its procedural requirements, and yet the casehandler is left with a sense of unease and it is clear that the student is unhappy with their British university experience. Some of it is to do with language skills. There have been cases of students without sufficient command of English to be able to follow the proceedings of disciplinary panels before which they appear. Plagiarism is more commonly found in the work of overseas students and while the university is clear that it has occurred – indeed, can prove it with the aid of software – the student claims that it is simply a failure to reference properly. Mitigating circumstances are often cited, but in logic there is no way that mitigating circumstances can excuse plagiarism although they may well be relevant to the choice of sanction. One also suspects that there are cultural differences in ways of learning that explain plagiarism. Could it be that in China, for example, there is more veneration of professors (an attitude long since vanished from these isles) and that it is expected that his words will be extensively quoted; while this practice is not well regarded here. The consequences of going home without the expected degree may be not just expensive in money terms for overseas students but also catastrophic in terms of local expectations and support.

Everyone is in favour of exchange of students: English students going abroad for a part of their course, which they seem to be rather reluctant to do, and overseas students coming here for a short period. The difficulties of switching countries and cultures may be underestimated. I have concluded from the

complaints that I have seen that far more preparation on the part of the sending university and the receiving one is needed, as well as more realistic expectations and a more rigorous English language requirement. The work of the OIA will be important as the Bologna process moves on and the European Union grows in size. European students will be expecting a first class experience here and the role of the OIA is to ensure that they get what they were led to expect, and that there is a remedy for British students who are sent abroad without sufficient preparation and mentoring. Comparability and quality come together in the consideration of complaints.

### **Natural justice and human rights**

It was argued that the visitatorial system was defective in failing to comply with the principles of natural justice. We have felt bound to consider carefully what is actually required from universities by way of legal principles in dealing internally with complaints and appeals. Natural justice entails that universities have a duty to deal fairly with students and this means that the student must be given adequate notice of the allegation against him or her, given all the documents that the panel will have, given an adequate hearing (not necessarily oral) and that the appeal panel must be unbiased and give reasons for their decision. We have come across instances of university appeal panels being chaired by the very professor against whom an allegation had been made; or of students being given by email only a day or two's notice that a hearing is to be held.

It has emerged that the most difficult concept for universities to deal with is the requirement of natural justice; a notion so familiar to lawyers and yet so rarely spelled out or explained in university regulations. The word "bias" has been taken at face value by some universities, who believe that a procedural flaw can be found only if there is evidence of actual prejudice against the complainant on the part of a member of the panel; the very word has a pejorative meaning, all the more so when the professor involved is a person of academic distinction. The OIA has taken the position on bias reached in legal judgments: "The real question is whether the fair minded observer, having considered the facts, would conclude that there was a real possibility that the

tribunal was biased.” [*Magill v. Porter* 2001]. So even though a particular professor, against whom an allegation had been made by the complainant, is in fact fair-minded, or the allegation had been dismissed as unfounded, the presence of that professor on a hearing panel will be deemed by us to be bias in law. Some students make sweeping allegations against the entire department’s staff – here some commonsense has to be applied. Universities not infrequently give insufficient information about their decisions to enable students to formulate their appeal. We are all familiar with the shorthand of busy examination boards at the height of the summer examination season, but efforts need to be made. This applies frequently to the dismissal of mitigating circumstances appeals. Nevertheless it is hard not to feel some sympathy for the long serving panel member who has heard every mitigating circumstance known to man/woman.

The impact of the human rights legislation on student hearings remains unclear. Taking Article 6, the right to a fair and public trial, it is unclear whether students’ issues are “civil rights and obligations” and whether a public hearing needs to be oral. A failure to achieve a degree was held not to concern a civil right in *R (Varma) v HRH The Duke of Kent* [2004] EWHC 1705. A narrow interpretation of the applicability of Art. 6 was adopted in *R (Thompson) v Law Society* [2004] 2 All ER 113. From this judgment we concluded that even if students’ issues are within Art. 6, which they might be held to be if, for example, an adverse decision by a university could impact on a planned professional future life, the OIA is nonetheless human rights compliant itself. This is because of the recognition in this case that the requirements were met if an oral hearing was available, as an exception, if fairness required one, to resolve a core disputed issue of fact. This reflects the OIA’s scheme. The judgment in *Thompson* also made it clear that the procedural requirements of Art.6 may be met by taking into account the whole process of a complaint – the internal university procedure, the consideration by the OIA, possible judicial review by the courts – and that the discrete elements of human rights fairness may be found to be present spread across that whole range, without being required to be present at every single stage. Thus the higher standards of Art. 6, if deemed applicable, may be met by all

the components of the spectrum of remedies open to a student who is prepared to seek them all.

### **The OIA and the courts**

“Ombudsmen offer distinct advantages. They are free, confidential and accessible and perceived by the public as independent. They offer a range of remedies, including financial redress, which make take the form of payments of money owed or compensation for quantifiable losses, losses of a non-monetary kind, “botheration” and lost opportunity . . . Although determinations made by an ombudsman are not binding, this did not present a problem in the vast majority of cases. Ombudsmen schemes also seek to promote good administration by considering the standards to be expected of public authorities and framing their decision-making accordingly, as well as providing feedback and advice to ensure that errors are not repeated”. [Ann Abraham, “Ombudsmen and Administrative Justice” (2006) *Amicus Curiae* 18]. This makes a great deal of sense in relation to the adjudicator and the university. It puts the case well for respect for the decision of an adjudicator in the context of possible judicial review. And yet one should be wary of placing higher education in the same ombudsman frame of reference as gas, banking and telephones. In a student complaint, the career of the student may be on the line and so are the university’s academic reputation, integrity and standards. The OIA is still finding its rightful place in the spectrum of legal and informal method of settling disputes in English public law and is keenly aware of the competing interests to be balanced and the educational context.

### **Judicial review**

With some despair, I turn to the influence of judicial review on our work and on the working practices of universities. Issues of higher education are important to lawyers and are becoming a significant new litigation field. There are interesting issues of law relating to the setting up of overseas partner institutions, contract, freedom of speech and discrimination, landlord and tenant – the university campus is a microcosm of the world outside it. The OIA has made it clear from the start in its publications and presentations that the involvement of lawyers and legal aid on behalf of complainants may

exacerbate the disagreements and greatly extends the time taken to resolve the dispute. We are an alternative dispute resolution scheme and as such favoured by the Government, in theory at least, as part of its cost cutting exercises.

However, one needs to consider the attractiveness of this field of work to solicitors, who may be in receipt of a block grant of legal aid for allocation as they wish. Its use is supposed to be scrutinised but there is little evidence that this is readily done. Some quotes from solicitors' websites illustrate how hard it is to keep students and the OIA out of the clutches of the legal aid enriched establishment.

*If you are accused of anything within the institution whether it be discipline, failure to submit extenuating circumstances, failure to inform the university of your whereabouts or whether you have a complaint against a member of staff or even sometimes another student, you can invoke internal appeal procedures. . . . We are able to assist with the internal appeal procedures . . . this way you have the best chance of achieving the outcome you are seeking.*

*Our services provide an excellent knowledge base on tactics and approaches that can assist with a smoother university or college education. . . . We have a 90% success rate in returning students to their courses, obtaining compensation or finding ways in which the student can complete their degrees.*

*Your tutor owes you a duty of care generally to ensure that your experience as a student is fulfilling and that you are achieving what you set out to achieve when you joined the university. In the event that they fail to fulfil this duty of care you may have a negligence claim against the university. This is particularly where any negligence by the university or its members has caused you damage.*

*We are able to assist with drafting the appeals to the OIA, considering the public laws grounds in any decision made against the student, instructing*

*specialist barristers to consider the appeal and assisting the student with the appeals process. If the OIA decision is against the student, the student can bring a claim in the county courts for breach of contract against the university or alternatively can challenge the decision of the OIA by way of judicial review in the High Court.*

*A young and vibrant team come together to bring a new and fresh perspective to education law. The department's creative culture has allowed these professionals to push the boundaries of education law and pioneer arguments to form a frontier of justice for all students who have been failed by the system.*

This must be irresistible to students in trouble, but it is an attitude that is inimical to the foundations of the OIA. It was set up to be a free alternative dispute resolution scheme for students and to save money for universities, and it is provided in the statute that its decisions are actually recommendations, not binding on universities or on students, for that matter, who are indeed free to seek alternative remedies. The involvement of lawyers has turned some of our decision into battlegrounds with tactics of delay in responding to requests, template arguments about public law, and legalisms of the most petty nature. They cannot readily be given the dismissal that might be their due, however, because of the shadow of judicial review falling over the OIA and consequently the universities.

It is hard to achieve a swift, reasonable and efficient solution to relatively minor disputes when complainants are represented by solicitors and even harder when dissatisfied clients seek judicial review of the OIA's decision against them. It is an inefficient approach for, after all, it is only the university, not the OIA, that can give the student the desired outcome, which may be another chance on the course or a different outcome. Another consequence of the involvement of lawyers and the threat of judicial review is that the OIA has behaved more legalistically than is desirable and has had to resort to legal advice. Additional staff costs and the costs of defending cases, where there is no hope of recovering them from the legally aided unsuccessful

student, will have in the end to be passed on to the universities, who fund the OIA. We have struck back as best we can, always seeking costs, and refusing to delay our decision making while the complainant awaits confirmation of legal aid. Students tend to be under the impression that in judicial review procedure the court can substitute its own findings and remedy in place of those in the decision reviewed: however the court could only require the OIA to reconsider its own findings and even then the recommendations might not be accepted by the university.

Judges have taken every opportunity in recent years to encourage within reasonable bounds the use of ADR and so has the Government. The OIA is a form of ADR, but the practice will be undermined if its decisions become the subject of court proceedings brought by disappointed applicants. This is not to deny that we take seriously the need for the Office to act fairly and in accordance with our own Rules. We note too that resort to litigation is almost unknown in overseas universities.

So far there has been little success by way of judicial review. The courts may be reluctant to entertain complaints from students against universities in the light of recent cases supporting the use of ombudsman and adjudication schemes, where they exist, rather than the courts, to deal with complaints about maladministration [*Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406.] So far 3 dissatisfied complaints have unsuccessfully sought judicial review of decisions by the OIA. One of them has appealed twice, on legal aid. In these cases, the decision to reject was made on the substance; the full extent to which judicial review may be asserted over our decisions remains to be seen. On the one hand, it is pointless because we can only make recommendations; on the other, we are likely to be regarded as a public body with statutory limits that must not be transgressed. In one case a judge expressed a preference for the student complainant to use the OIA rather than the courts, where the choice existed.

Given that the OIA can only make recommendations, how are its decision to be enforced against universities? There is a case for saying that that was not

intended by the scheme, which explicitly refrains in its statutory foundations from enforcement. In one case only, a university was determined on principle not to accept the recommendation of the OIA relating to a student, which involved a modest amount of compensation. The student went to the courts and sought judicial review of the university's actions and an order that it carry out the OIA recommendation. The university settled with the student, the reason given being that there was likely to be a waste of public money in continuing to fight in the courts. Indeed, the costs incurred in settling with the student at that stage greatly outweighed the amount of compensation initially recommended by the OIA in that case. It represented a way of enforcing our recommendation. We also have the power to name and shame.

We are concerned about the use of that scarce resource, legal aid, in supporting students who do not need legal representation (student union officers do the job very well) and where judicial review is in reality pointless. Given the constraints on legal aid, we cannot see why there should be any priority in the allocation of legal aid for students dissatisfied with their results and who have recourse in any case to a free ADR service. Universities too have to spend their limited resources on legal advice in response. It seems to us that legal aid should not be used to thwart the fundamental purposes of ADR. We will continue to pinpoint for the Legal Services Commission case that we believe should not be supported.

There is cause for concern in the ever widening scope of judicial review. Even though the decisions that the OIA has been involved in have always proved to be sensible (the opinion one forms on winning) it may be that judges do not realise how deeply into the system the threat of judicial review reaches. Time does not permit of an analysis of the parallel effects of the Data Protection Act and the Freedom of Information Act on the universities and on our work. Their combined effect is to cause the most microscopic attention to be paid to the rules; to disclose matters that probably would be better forgotten; to delete emails or to resort to handwritten notes and the shredder; to call for efforts for more detailed minute taking and the disclosure of mountains of paper. It is not uncommon for a student complaint to our

office to be accompanied by four ring files, and that is just at the start. A clear statement by the courts that judicial review is not suitable for higher education cases, and parallel attention to legal aid distribution, would do much to speed up the decision making process. It would allow us to see the wood rather than the trees. It is in all our interests that academic integrity be supported, that our students have a good and honest educational experience, that lecturers be allowed to get on with their tasks and that we remain attractive to overseas students. The OIA recognises that it has to earn the respect of judges by its standards of decision-writing.

### **The future**

It is too early to make firm recommendations to this end but we have seen much virtue in the US and Australian systems of having ombudsmen on every campus. The approaches vary, but in general campus ombudsmen (known on some overseas campuses as “ombuds” – hence, “to ombuds” – or “ombuddies”) represent a one-stop shop for the initial handling of complaints, holding out the hope of a totally confidential and informal resolution. Universities also need to capture for future use what they have learned in any one year’s complaints handling, by publishing an annual report with statistics and lessons learned; by making sure that Councils are aware of the importance of this work and that it is properly funded and informed. Universities need to simplify their procedures and go through them swiftly. We came across one university with an 11-tier system! And above all they need to embed natural justice into all their procedures.

I have every confidence that the OIA will never be out of business. 40 years ago the word “complaint” was entirely absent from the vocabulary of students. Now that university education is no longer a privilege, but the passport to a good job and almost a right of school leavers, for which they are paying part of the cost, there has to be a remedy when things go wrong.