

MEETING STUDENT EXPECTATIONS: CONTRACT OR PARTNERSHIP

The Role of Alternate Dispute Resolution in the era of higher student fees

Rob Behrens

Independent Adjudicator and CEO, OIA

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*"We cannot be certain about every step. But the journey will be worthwhile." David Willetts
MP, 26 May 2011.*

"We shall have to wait and see" HH Asquith.

"The future is dark" GR Elton, The Practice of History.

"It doesn't matter whether the cat is black or white as long as it catches the mouse"

Mao Zedong

FEATURES OF THE NEW ERA (1)

WHAT WE DON'T KNOW

- Lack of clarity about **prospects for legislation** in setting out the joined-up regulatory framework and role of HEFCE as lead regulator;
- Consequent lack of clarity about status of institutions with hybrid features;
- Long-term location of Higher Education in allocation of Ministerial responsibilities.

FEATURES OF THE NEW ERA (2)

WHAT WE KNOW

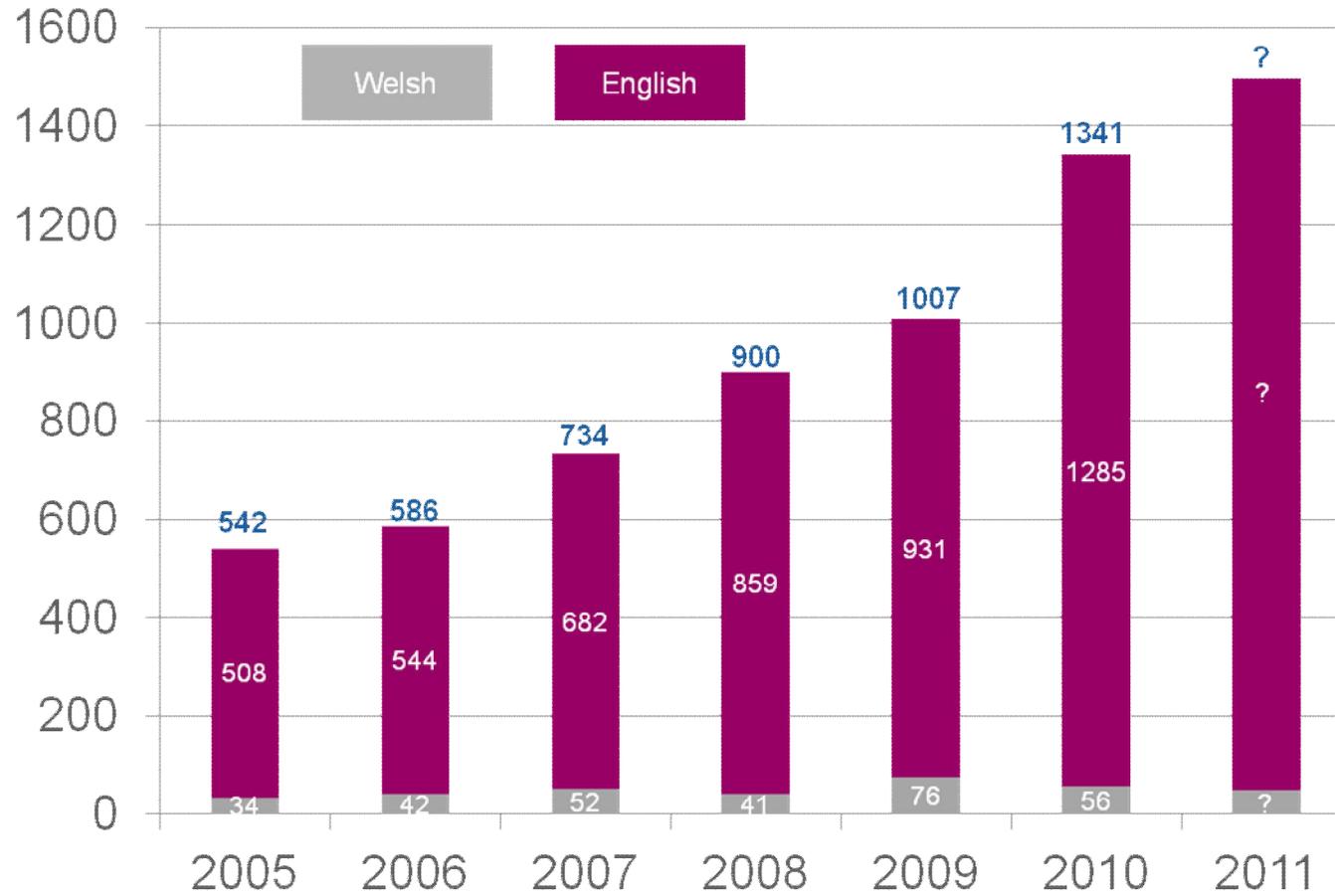
Student expectations raised by significant fee rises, invitation to become 'consumers', and Charter Initiatives;

Transparency will be/is a key element in market approach. Publication of OIA Summaries of Formal Decisions from April 2012;

Complaints already **rising** (from low base) annually at 25-30 per cent;

Continuation of rise of **Fitness-to-Practise, disability issues** and complaints from **international students** outside the EU, add to volume.

NUMBER OF COMPLAINTS RECEIVED BY OIA



FEATURES OF NEW ERA (3): ROLES OF COURTS AND OIA

Maxwell Judgement. Court of Appeal - 27 October 2011, Lord Justice Mummery

- Claim that the OIA should have made a finding on whether the University had discriminated against her. And that by failing to do so, OIA erred in law and failed in duty to promote equality.
- Court ruled decision was “adequately reasoned decision in accordance with its procedures ... The law and as a proper exercise of its wide discretion”
- Procedures for review and resolution of student complaints under free of charge and inquisitorial OIA Scheme under the 2004 Act, are different from civil proceedings
- Issue for OIA was not to decide whether Ms Maxwell victim of disability discrimination or whether the University is liable for such discrimination. Task was to review complaint, which included a complaint of discrimination, to see whether the University’s decision was reasonable in all the circumstances and was justified and, if so, to what extent, and what recommendations should be made to the University. [32]
- **“In a sentence what Ms Maxwell is seeking to do by these proceedings is for the courts to turn the OIA into something that it is not i.e. a court of law. [36] ...The judicialisation of the OIA so that it has to perform the same fact-finding functions and to make the same decisions on liability as the ordinary courts and tribunals would not be in the interests of students generally. [37]”**
- “Most people would agree it is not in the interests of students, or of the HEIs ... to engage in a stressful and expensive activity like litigation, when something more fulfilling, as higher education aims to be, is a more attractive long-term investment for life. This is particularly so when Parliament has ... facilitated the provision of a less formal and affordable out-of-court scheme for reviewing and remedying justified complaints by students.” [7]

FEATURES OF NEW ERA (3. continued)

Sandhar Judgement. Court of Appeal 21 December 2011, Lord Justice Longmore

- Mr Sandhar challenged whether the OIA was appropriately **independent** to deal with students' complaints. He also challenged the approach taken by the OIA to his complaint
- Mr Sandhar was studying for a medical degree when he failed (twice) two elements of his final examinations. He re-sat the two papers and failed both papers again by a narrow margin, and was then excluded from the programme. After completing the university's internal procedures Mr Sandhar brought his complaint to the OIA
- Mr Sandhar suspended his complaint, and sought to challenge the OIA's independence, on grounds of its funding model and the constitution of its Board of Directors
- Lord Justice Longmore stated that the Claimant's contention concerning the constitution of the OIA's Board was wrong, because Independent Directors constituted a majority. He said that the OIA Board has *"responsibility for (inter alia) preserving the independence of the scheme and the role of the Independent Adjudicator. There is no evidence that the Board has ever failed to live up to that responsibility..."* [32]
- He continued: *"As far as funding is concerned, it is correct that the funds come from subscriptions made by the participating HEIs, as expressly envisaged by section 15 (3) of the [Higher Education Act 2004]... It is clear that the wages of individual case-handlers are not paid by the university against whom the complaint is levelled but come from the funds generally available to the OIA from all HEIs."* [33] ***In all these circumstances I just do not see how it can be said that any fair-minded and informed observer could say that there was a real possibility that the OIA in general or its Independent Adjudicator or any individual case-handler was biased in favour of the HEI under scrutiny in any particular case or lacked independence in any way.***

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effective complaints handling



October 2011

FEATURES OF THE NEW ERA (4): PATHWAY 3 AND EARLY COMPLAINTS RESOLUTION

- In context of White Paper's endorsement of independent role and status of OIA.
- Government wanted OIA to help HEI's resolve complaints "at the earliest possible stage. [3.25]. So, invites OIA consultation with the sector on:
 - Campus Ombudsmen
 - Mediation on Campus
 - OIA Standard Framework of Good Practice on Complaints and Appeals
- Time targets for case resolution with subsequent OIA intervention in 'exceptional' cases
- OIA Kitemark
- Case Fees as element in annual subscription

FEATURES OF THE NEW ERA (4. continued)

- 108 substantive submissions.
- Adjudication is only one aspect of ADR which also embraces Arbitration, Mediation and Ombudsmen Schemes.
- Mediation is an under-used (and un-regulated) resource on campus.
- A number of alternative models promoting early resolution on campus including Student Conciliators (Glamorgan), Graduate Interns, (Bedfordshire), Students' unions, and Student Services.
- Some of these are credible alternatives to Campus Ombudsmen, notwithstanding international experience.
- Key indicators of utility include but are not confined to Independence. Also include compatibility with OIA Scheme (“**We have a campus ombudsman. It is the OIA**”), Seniority and Authority of interventions, and familiarity with Regulations. (“**It doesn't matter whether the cat is black or white as long as it catches the mouse**”)

TOWARDS A CONCLUSION (1)

- Trend in **increased annual volumes of annual complaints** very likely to accelerate;
- Urgent need for clarification of the nature and scope of the Regulatory Framework in the absence of 2012 primary legislation;
- Greater clarity about relationship between Courts and OIA adjudication is welcome: “Recent years have seen the growth of alternative processes of inexpensive dispute resolution: they are not intended to be fully judicial, or to be operated in accordance with civil law trial procedures, or to be dependent on what is fast becoming a luxury of legal advice and representation. **The new processes have the advantage of being able to produce outcomes that are more flexible, constructive and acceptable to both sides than the all-or-nothing results of unaffordable contests in courts of law.**” [39]

TOWARDS A CONCLUSION (2)

- Continued emphasis on Early Resolution in complaints handling on campus and OIA.
- Students' unions are invaluable partners in educating students and managing expectations.
- The antidote to haphazard handling is not an overly legal approach.
- Litigation should be a last resort.
- Prevention is better than cure (and less expensive than Judicial Review).
- Justice Delayed is Justice Denied.