

# seminar



Gary Attle

Partner, Head of University

Business Group

t: 01223 222394

e: gary.attle@mills-reeve.com

## Fairness and funding

27 April 2010

### Introduction

Good afternoon everyone.

Can I start by saying what a pleasure it has been collaborating with HEPI over this last year as one of its corporate partners. Bahram kindly spoke at our annual conference last year as one of our guest speakers when we considered a range of legal and policy issues in the higher education sector. I am very grateful to the team at HEPI – Sarah Isles and Abi Broom – and the team at Mills & Reeve – Claire Banks and Sharon McCulloch – for the organisation of this event which represents our 9<sup>th</sup> annual higher education law conference.

Can I express my thanks too to Professor Janet Beer, Vice-Chancellor of Oxford Brookes University, and Dr Wendy Piatt, Director General of the Russell Group of Universities, for setting out many of the policy and practical issues in the area of access and admissions at another crossroads for the sector as the question of charging higher undergraduate tuition fees is debated again.

### Equality of opportunity

Access to higher education can create some difficult legal issues and can challenge us in our concepts of fairness. I think there is consensus that everyone should have an equal opportunity to experience the transformative effect of higher education, and indeed, enshrined in the European Convention on Human Rights, is a right not to be denied an education.

My colleague, Richard Sykes, will in a few moments give an overview of the new Equality Act which received Royal Assent on 8 April this year. That legislation gives legal rights not to be discriminated against unlawfully for those with “protected characteristics” but the Act does not make it unlawful for universities to discriminate on academic grounds - in admissions or in assessments. Nor does it legislate for inequalities in

MILLS  
&  
REEVE

www.mills-reeve.com  
0844 561 0011

# seminar

---

the take up of higher education by different socio-economic groups. Indeed the new duty on certain public bodies to have regard to socio-economic inequalities does not apply to universities.

Looking ahead, my view is that the area of access and admissions is likely to become more contested – which is not necessarily a bad thing as some difficult decisions will now have to be made when there are some competing influences at work: an imposed restriction on the number of university places available, a continued demand to undertake higher education in a recessionary climate, steps being taken to promote widening participation alongside a likely increase in tuition fees and the greater emphasis on “the student as consumer”.

## The US experience

We have not had major admissions legal test cases in the UK as they have had in the US, mostly relating to race and ethnic groups. Some will be aware that the US Supreme Court ruled that the University of Michigan's affirmative action admissions policy for its undergraduate College of Literature, Science and Arts was unconstitutional following a legal challenge brought by a white student who did not gain entry<sup>1</sup>. By contrast in a "companion case" brought against the University's law school<sup>2</sup>, their admissions policy survived the "strict scrutiny" applied to it by the judiciary given that race was not a determinative factor and there was an individualised assessment of all students, rather than the point-scoring system used for the University's undergraduate admissions. The US Supreme Court recognised in both cases, affirming earlier case law, that there was a compelling interest in promoting diversity on campus.

## The role of the OIA

Clearly we cannot transport that case as a precedent to the UK but it illustrates that some of these tensions will need to be worked out. That leads me to consider the legal forum for any such disputes. We know that student complaints and appeals are these days considered by the Office of the Independent Adjudicator but admissions cases are expressly excluded from the Student Complaints Scheme. The recent Pathways Report by the OIA also clearly rejects the possibility of taking on disputes about admissions. We should just pause for thought though as we may well see a rise in cases going to the OIA arising from pre-admissions statements made by universities. We know that the courts these days regard the university/student relationship as contractual<sup>3</sup>.

In my experience, many student complaints have their genesis in what is promised (ie before the student starts their course) and the complaint comes when that promise is broken. The legal analysis will focus on whether any pre-admission statements become terms of the “student contract” or are

---

<sup>1</sup> *Gratz v Bollinger* 539 US 244 (2003)

<sup>2</sup> *Grutter v Bollinger* 539 US 306 (2003)

<sup>3</sup> *Moran v University College Salford* (1994) ELR 187 and *Clark v University of Lincolnshire and Humberside* (2000) 1 WLR 1988, CA

# seminar

---

misrepresentations for which the law will also give a remedy. It seems that there is something of a push to include more information to prospective students – whether it be about “contact hours”, content of a course or otherwise. Universities will need to deliver on the statements they make.

## **Public, private and charity law**

I have said something about the private law aspects of the legal framework, but I should flag the public law and charity law aspects also for those institutions which are classified for these purposes as exercising public functions and having charitable status. I am conscious that some institutions represented here are either not charitable or not in receipt of HEFCE funding.

For those universities receiving HEFCE funding, it is likely that you will be subject to the supervisory jurisdiction of the Administrative Court by way of judicial review in respect of your admissions decisions for challenges which are not covered by the Equality Act 2010.

Here we do have some judicial insight. In 1998, UCL<sup>4</sup> was judicially reviewed by a prospective medical student. UCL turned him down and were successful in showing a proper exercise of an academic judgment in making their selection. However, we know from a Court of Appeal case in which we were involved that the courts will make a distinction between the academic judgment itself and the process leading to the judgment. A process can be challenged in public law if, for example, it was unfair from a legal perspective (such as allowing irrelevant issues to infect the decision-making) or was ultra vires.

Helpfully, there is a lot of good activity in the sector to help ensure that processes are fair, such as the work of SPA - Supporting Professionalism in Admissions - building on the Schwartz principles<sup>5</sup> of fair admissions; transparency, selection for merit, potential and diversity, reliability, validity and relevance, the minimising of barriers, and professionalism.

I'm conscious also that the QAA has a section of its Code dedicated to admissions<sup>6</sup>. The Code sets out 12 precepts<sup>7</sup> on general principles, recruitment and selection, information to applicants, complaints and appeals, and monitoring policies and procedures on fair admissions. They are as follows:

---

<sup>4</sup> *R v University College London, ex p Idriss* (1999) Ed. C.R. 462, (QBD)

<sup>5</sup> Schwartz, S. (2004) *Fair admissions to higher education: recommendations for good practice*, known as the Schwartz Report from the Admissions to Higher Education Review.

<sup>6</sup> QAA *Code of Practice for the assurance of academic quality and standards in higher education. Section 10: Admissions to higher education* - September 2006. All QAA's publications are available on their website - [www.qaa.ac.uk](http://www.qaa.ac.uk)

<sup>7</sup> *Supra*. See pages 7-20 for the precepts and explanations.

# seminar

---

## General principles

- 1 Institutions have policies and procedures for the recruitment and admission of students to higher education that are fair, clear and explicit and are implemented consistently.
- 2 Institutions' decisions regarding admissions to higher education are made by those equipped to make the required judgments and competent to undertake their roles and responsibilities.

## Recruitment and selection

- 3 Institutions' promotional materials and activities are accurate, relevant, current, accessible and provide information that will enable applicants to make informed decisions about their options.
- 4 Institutions' selection policies and procedures are clear and are followed fairly, courteously, consistently and expeditiously. Transparent entry requirements, both academic and non-academic, are used to underpin judgments made during the selection process for entry.
- 5 Institutions conduct their admissions processes efficiently, effectively and courteously according to fully documented operational procedures that are readily accessible to all those involved in the admissions process, both within and without the institution, applicants and their advisers.

## Information to applicants

- 6 Institutions inform applicants of the obligations placed on prospective students at the time the offer of a place is made.
- 7 Institutions inform prospective students, at the earliest opportunity, of any significant changes to a programme made between the time the offer of a place is made and registration is completed, and that they are advised of the options available in the circumstances.
- 8 Institutions explain to applicants who have accepted a place arrangements for the enrolment, registration, induction and orientation of new students and ensure that these arrangements promote efficient and effective integration of entrants fully as students.
- 9 Institutions consider the most effective and efficient arrangements for providing feedback to applicants who have not been offered a place.

## Complaints and appeals

- 10 Institutions have policies and procedures in place for responding to applicants' complaints about the operation of their admission process and ensure that all staff involved with admissions are familiar with the policies and procedures.
- 11 Institutions have policies in place for responding to applicants' appeals against the outcome of a selection decision that make clear to all staff and applicants whether, and if so, on what grounds, any such appeals may be considered.

# seminar

---

## Monitoring and review of policies and procedures

12 Institutions regularly review their policies and procedures related to student admissions to higher education to ensure that they continue to support the mission and strategic objectives of the institution, and that they remain current and valid in the light of changing circumstances.

Turning to charity law, the point to note here in describing the legal framework for admissions is that institutions which are charities have to be able to demonstrate that they are operating in accordance with the principles of public benefit. The Charity Commission has issued general guidance for the education sector and for fee charging charities.

There are two key principles of public benefit. The second principle requires that the benefit must be to the public, or a section of the public. One of the key factors that must be considered in meeting this is that:

“the opportunity to benefit must not be unreasonably restricted...by [the] ability to pay any fees charged. People in poverty must not be excluded from the opportunity to benefit.”<sup>8</sup>

The Charity Commission has published guidance on meeting the public benefit when a charity charges fees and this expressly states:

“[W] here a charity charges high fees that many people could not afford...[t]he charity trustee must therefore demonstrate that there is sufficient opportunity for people who cannot afford those fees to benefit in a material way that is related to the charity's aims.

In general, the higher the fees that are charged, the more people there are likely to be who cannot afford the fees, and the more the charity is likely to have to do to provide those people with sufficient opportunity to benefit.”<sup>9</sup>

This is charity law – rather than equality law – which tackles questions of socio-economic discrimination. More specifically in the higher education sector, HEFCE funded institutions need to set out in their access plans details about their bursary schemes and other measures to ensure that prospective students are not deterred from applying to them on financial grounds.

---

<sup>8</sup> Part of principle 2 as quoted in *The Advancement of Education for the Public Benefit*, Charity Commission guidance, December 2008.

<sup>9</sup> *Public Benefit and Fee-charging*, Charity Commission guidance, December 2008.

# seminar

---

## Conclusions

As we have seen, there are many difficult issues to address in this area to ensure that there is - and shall be - equal opportunity for all in accessing the benefits of higher education. However, perhaps I should turn to the wisdom of a hero lawyer from the world of literature to end on. In his closing speech to the jury in defending a young black man on a charge of rape, Atticus Finch in *To Kill a Mocking Bird* had this to say:

“One more thing gentlemen, before I quit. Thomas Jefferson once said that all men are created equal, a phrase that the Yankees and the ... Executive branch in Washington are fond of hurling at us. There is a tendency in this year of grace 1935 for certain people to use this phrase out of context, to satisfy all conditions. The most ridiculous example I can think of is that people who run public education promote the stupid and idle along with the industrious – because all men are created equal, educators will gravely tell you, the children left behind suffer terrible feelings of inferiority. We know that not all men are created equal in the sense that some people would have us believe – some people are smarter than others, some people have more opportunity because they are born with it...some people are born gifted beyond the normal scope of most men.”

As the sector strives to ensure that all under-represented groups are encouraged to seek a higher education experience and qualification, notwithstanding the fee level, it is likely that the law will support approaches which do not make certain non-academic characteristics the predetermining factors.

**Gary Attle, Partner**  
**27 April 2010**