

# SAILING ON THE ‘BOUNDLESS AND BOTTOMLESS SEA: A VIEW FROM THE OIA BRIDGE

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*“In political activity men sail a boundless and bottomless sea; there is neither harbour for shelter nor floor for anchorage, neither starting point nor appointed destination. The enterprise is to keep afloat on an even keel; the sea is both friend and enemy; and the seamanship consists in using the resources of a traditional manner of behaviour in order make a friend of every hostile occasion.”<sup>1</sup>*

## **Introduction**

The Office of the Independent Adjudicator for Higher Education (OIA) is now established as a Classic Ombudsman Scheme, an independent complaints handler of last resort with a vision to focus on both prevention and cure. The prevention involves encouraging universities to adopt policies and good practice that make complaints unnecessary or resolve them at the earliest possible point. The cure is providing redress for students either by conciliation and settlement or through the adjudication process. The OIA is also emphatically outward-facing with a long record of listening carefully to views across the sector, reaching out to universities and students’ unions, benchmarking beyond higher education and developing good practice accordingly. It has a sound record in closing cases (now more than 2000 cases each year), and has an excellent record in defending challenges in Judicial Review.

All of this is good, but institutions cannot stand still, particularly in the context of the trends that are re-shaping the higher education sector.

### **The external environment**

For the OIA, the external environment is complicated, and fast-changing. There are, as a minimum, three sets of over-lapping environmental conditions which impact on its status and operation. First there is developing thinking about the delivery of public services and the relationship of this delivery to the role of the state. This thinking has been conditioned by responses to fiscal crisis, and the retreat or demise of key elements of the Welfare State.

In concise terms, we are moving from a 'delivery state' to a 'relational state'. In this there is a shift away from standardised, prescriptive, non-transparent, service delivery led by professionals. In its place are more flexible and diverse solutions using, as Simmons and Brennan (2013) report, the insights of service users and front-line staff to facilitate solutions rather than impose them.<sup>2</sup>

Second, there are the lessons to be learned from the operations and experiences of other ombudsmen and regulators. Here, the dark night of failure of regulatory oversight (banks, Members of Parliament, hospitals and newspapers to name but a few) cannot be assumed to be over. But there are already many lessons to be learned. These include the supine behaviour of the Press Complaints Commission (PCC) – now defunct ombudsman in the newspaper industry - in the face of outrageous, illegal activity by newspaper journalists. The absence of meaningful independence from the structures of the PCC was central here, but, as the Report of the Leveson inquiry (2012) pointed out

the PCC was also under- resourced and had no mechanisms for incentivising appropriate ethical behaviour amongst journalists or editors.<sup>3</sup>

In the Health Service, the apparent reluctance of the Health Service Ombudsman to investigate the circumstances around the care of baby Joshua Titcombe at Furness General Hospital, and many other cases involving patient death, has generated searching questions. One was about the inter-connectedness between the regulator (the Care Quality Commission and its predecessors) and the Ombudsman to address operational failure (Grant Thornton 2013<sup>4</sup>; Review of Health Service Ombudsman 2013<sup>5</sup>). Another concerned the assessment and eligibility policies of the Health Service Ombudsman which in 2012 investigated only 222 of around 13000 complaints about hospitals (Jarman, Brian, BBC Radio 4, The Report<sup>6</sup>). Under intense scrutiny, including from the media, this latter policy has now changed. While zealous and over-restrictive eligibility policies 'solve' the problem of backlog, they raise fundamental concerns about organisational clarity of purpose and responsibility for the public interest as well as citizen redress. They also undermine public trust.

Third, there are the singular developments in higher education driven by Coalition Government reform. As Collini (2012, 21-22) has pointed out the higher education environment is historically institutionally unstable and the pace of institutional change to higher education has been very fast since 1945.<sup>7</sup> This is illustrated by the fact that 'almost two-thirds of the degree-granting institutions operating in the UK in 2011 did not even exist (at least as universities) as recently as twenty years ago' and underlines the importance of not treating the situation thought to obtain at a given moment as any kind of timeless norm.<sup>8</sup>

The marketisation approach of the Coalition Government established in 2010 has a number of well-recorded features. Legislation to allow the doubling and trebling of tuition fees financed by student loans precipitated a withdrawal of central teaching subsidies

from universities. Universities compete for fee income by attracting students and are assisted by the easing of number controls. Private suppliers are encouraged to join this competition to widen choice. And students are put 'at the heart of the system' with new emphasis on enhancing student experience and clarifying their rights and duties and the performance outcomes of universities.

What was missing until late 2014 was delivery of the Government's promise to produce a level playing-field between public and private suppliers so that regulatory oversight would be equitable. The combination of marketisation and enhancing the student experience makes an independent ombudsman service for students philosophically and politically attractive to a wide range of parties in the sector. It was no surprise then, but long over-due, that the Coalition Government responded to a Labour Opposition Amendment to the Consumer Rights Bill in the House of Lords, in November 2014, to table its own Amendment.<sup>9</sup> This has the effect of amending the 2004 Higher Education Act, and requires alternative/private suppliers in receipt of public funds and Further Education Colleges with students in higher education to join the OIA Scheme from September 2015.<sup>10</sup>

In addition to marketisation, the development of IT capacity has brought MOOCs (Massive Open Online Courses), with their ability to engage with hundreds of thousands of students remotely, to mainstream provision. This significance is enhanced by the further internationalisation of higher education with cross-border alliances and provision now routine.

### **Institutional History**

Introspection was an early cultural trait of the OIA. In general, relentless dealings with people's complaints and problems discourage hyperbole. More specifically, the OIA was born 'on the other side of the blanket' (or below stairs) with unresolved questions about its identity and independence and without a small pot of gold to ameliorate the formative

years. Three successive national consultations (the Pathway series), and regular, routine visits to scores of universities and students' unions since 2008 have given the OIA an outward face, a disposition to listen and learn, and an opportunity to benchmark its progress against stakeholder and user expectations. They have also given the OIA a confidence derived from being seen to consult, understanding the wider picture, and acting upon it.

In the circumstances, the OIA has done well, but there is no room for complacency. The questions of identity are mostly resolved. First, despite the reservations of a small number of Vice-Chancellors and others at the time and since – reservations derived from concern to protect the sovereignty of universities from consumerism, as Frank Furedi observed (2009)<sup>11</sup> - the Scheme is now widely recognised and referred to as an Ombudsman scheme. The OIA is also now a full member of the Ombudsman Association. The sky has not fallen in.

Second, the OIA is robustly independent. The first Chair of the OIA told a Labour Minister in 2009 that the OIA was created as if owned by universities. If that were the case – and it is a moot point - it is no longer, and has not been so for some years. There is now a majority of independent Board members, including an independent Chair, recruited under Nolan Rules of fair and open competition. The Board plays no role in the adjudication of individual cases and has never sought to constrain the Independent Adjudicator's responsibilities and wide discretion in this regard.

This governance arrangement was at the core of an unsuccessful Judicial Review challenge in the Court of Appeal in 2011. In the judgment in the case of Mr Sandhar, a medical student at Manchester University, Lord Justice Longmore commented that "There is no evidence that the Board has ever failed to live up to that responsibility [to preserve the OIA's independence]". He also saw nothing in the funding mechanism of

the Scheme, where resource is levied from university subscriptions, to tie a case-handler to a particular university. Lord Justice Longmore concluded, and the other Judges agreed, “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.”<sup>12</sup>

There is also related evidence of strong sector support for the OIA as an independent body which takes seriously the need for the high quality and equitable experience of students at university.<sup>13</sup> This support includes the National Union of Students, UUK, GuildHE and other sector bodies. All of this adds to the legitimacy and authority of the OIA as an independent body.

### **The nature of complainants and complaints**

Who complains to the OIA? The evidence is that, where degrees are vocational and where there is an additional, fitness-to-practise element to study, students are more likely to complain. Although direct comparison with HESA data is not possible it is evident from figures for student enrolment that students in Law, Medicine and Dentistry, subjects allied to Medicine, Nursing, Social Work and Business and Administration are proportionately the most likely to complain to the OIA. Law students, for example, are three times more likely to complain than students in any other discipline.

International students from outside the European Union are proportionately more likely to complain than EU and home students. These students make up 13 per cent of students in England and 15 per cent in Wales, but account for 22 per cent of

complainants to the OIA. (2013 figures). International students are also more likely to complain about certain issues. There is a particularly marked difference in the proportion of complaints from students from outside the European Union compared to other students that relate to academic misconduct, plagiarism and cheating. This suggests that further work may be needed to ensure that international students are supported in understanding regulations relating to academic misconduct. Here the issue is effective induction not cultural imperialism.

Postgraduates are more likely than undergraduates to complain, though the gap has narrowed over time. 23 per cent of students in England and Wales study at postgraduate level, but postgraduate students account for 38 per cent of complaints to the OIA (2013 figures).

The OIA receives around 2000 cases a year. The majority of 'complaints' (64 per cent in 2013) relate to *academic status*, typically around academic appeals related to progression between years and final degree or postgraduate outcomes. A further six per cent concern academic misconduct, plagiarism and cheating. In effect this means issues related to academic status heavily outweigh service complaints (nine per cent). The OIA cannot interfere with academic judgment but it can look at procedural errors, unfair processes and delays, and recommend to the university that it re-marks an assessment or reconsiders an appeal<sup>14</sup>. It can also recommend financial compensation even if the academic outcome does not change

The overall proportion of cases in which the OIA upheld all or part of the complaint, or identified grounds on which to request the university to reconsider, increased from 18 per cent in 2012 to 25 per cent in 2013. This reflects a number of developments. One is that the cases that reach the OIA are becoming more complex. Another is that

universities are putting greater focus on resolving complaints and appeals internally. And third, the OIA has put a lot of resource into identifying cases for settlement (where appropriate) to save time and effort otherwise spent on adjudication. Settlement possibilities are discussed with the university and the student since settlement is voluntary and must be agreed by both sides. In 2013 settlements which the OIA brokered included payments of £60,000.

Where a complaint is Justified the OIA will often recommend that the university change its practice or procedures. This is a means of preventing similar complaints arising in the future. Recent examples of OIA recommendations have involved universities changing guidelines on supervision to clarify the approach to allowing students to choose or change supervisor; changing the process on closing a student's complaint so that the student is advised what actions have been taken; incorporating time-frames into disciplinary processes; keeping records of preliminary review panels to note what evidence has been considered.

Since inception the OIA has recommended financial compensation to students of around £1 million. In 2013, £313,750 was awarded in compensation, an increase of almost two thirds from 2012. Larger payments (£5,000 – £20,000) universities were asked to make included compensation:

- to a research postgraduate student to refund fees, following problems with supervision and research facilities
- to a PhD student in the light of procedural errors in the appointment of a supervisory panel, the appointment of examiners and review of his thesis
- for errors in considering a complaint regarding the outcome of a Fitness to Practise process, leading to delays in a student gaining a professional qualification



- for course cancellation not notified to a student until after she had attended an induction course at the start of term, incurring expenses.

Compliance with recommendations is excellent, with 90 per cent of student-centred recommendations complied with within the recommended timescale and the rest complied with after prompting from the OIA. There have only ever been three cases of non-compliance to report publically, and in each case the university reversed its decision once the OIA had put details in the public domain.

### **Resource management**

The professionalisation of the OIA beyond a core excellence has proceeded apace, and has needed to. The core activity – resolving complaints – is organised along functional lines with Enquiries, Assessment and Adjudication teams. Case quality and consistency is overseen by an Approvers team of senior managers. There is a line of sight incorporating Mission, Vision, Strategic and Operating Plans. These are developed by a decentralised management process, and performance objectives and training.

Case handling is supported by a small cadre of professional staff across human resources, operations, policy and communications. Rigorous financial management is now firmly embedded in organisational culture and practice. The OIA has also made a significant investment in IT infrastructure and systems since 2013. To enable the OIA to continue to be a credible ombudsman, especially in the HE sector, a continued investment in IT is essential.

The OIA's position will be impaired without continued demonstrable progress on efficiency and effectiveness of the kind achieved annually since 2010. The ability to hold down unit costs over this period is testimony to the organisational success of closing rising volumes of complaints in- year. The next priority is to address the timeliness

required by the provisions of the 2013 Directive of the European Union on alternative dispute resolution, which is operational from July 2015. This requires (with exceptions) 'the outcome of the ADR procedure is made available within a period of 90 calendar days.'<sup>15</sup>

All of the above will be reliant on effective people skills development and effective succession planning. Without recruitment and retention of a skilled, highly motivated workforce, the OIA will be unable to meet its strategic goals. Happily, three, parallel developments have combined to give priority to people development. First, the growth in size of the OIA – the workforce has doubled since 2008 – and the emphasis of decentralisation of responsibilities have created plentiful opportunities for work-based development. Second, the growing reputation of the OIA within the higher education sector and in the wider ombudsman/regulatory world has created a tranche of already-skilled candidates for case-handler positions from universities, students unions and other regulatory bodies. Third, the OIA has taken full advantage of the professional training programmes delivered by Queen Margaret University and sponsored by the Ombudsman Association.

### **Forward strategy in context of emerging trends**

Future gazing is a hazardous business. As Geoff Mulgan (2013) has warned: "There are many futurists, and a limitless number of people with views about what the future will bring ... most experts perform very poorly as predictors."<sup>16</sup> Given that the Coalition Government's marketisation of higher education has had the character of an experiment, spotting trends to inform future strategy of the higher education ombudsman service is especially difficult. However, the future is not 'dark', as Elton suggested,<sup>17</sup> but only murky given a cautious interpretation of current trends.

### ***Clarity of purpose in face of changing sector boundaries***

One key issue concerns the OIA's clarity of purpose in the context of the growing interconnectedness between higher education and further education. The incorporation from September 2015 into the OIA Scheme of Further Education Colleges (FECs) and alternative providers providing higher education and alternative suppliers goes some way to establishing the principle that the OIA is available to all students studying on higher education programmes, regardless of the type of institution they study in. Nevertheless, the current absence of any type of independent ombudsman service for students on further education programmes in FECs has already prompted stakeholders to invite the OIA to launch a pilot scheme for further education students, and this conversation is likely to continue following the general election of May 2015.

***Unambiguous independence in the face of regulatory twitch.***

Recent policy proposals on a reconfiguration of higher education regulatory arrangements after the 2015 have happily contained none of the simplistic, evidence-light, super-quangoism of Chapter 6 of the ill-fated Browne Report.<sup>18</sup> Both the Institute for Public Policy Research<sup>19</sup> and the Higher Education Commission<sup>20</sup> have been careful to recognise the independent role and function of the OIA, whilst recognising that the Regulatory Partnership Group of sector regulators created in the wake of the 2011 Higher Education White Paper cannot be considered more than what Nick Hillman (2104) called a 'sticking-plaster' to cover a strategic hole.<sup>21</sup>

Even if the OIA is not under institutional threat, its current governance arrangements are likely to be scrutinised closely, and rightly so. The convention of having a board composed of a minority of sector nominees (Nominated Directors) and a clear majority of Chair and Independent Directors appointed through fair and open competition has worked particularly well for the OIA since its inception and has been judged properly independent by the Court of Appeal. Nevertheless, there are alternative governance

models. One featured in the overhaul of Legal Services regulation in 2007 with the creation of a Legal Ombudsman Board consisting of independent members only.

As the Committee on Standards in Public Life (2005) pointed out, “aligning governance arrangements with public expectations of good conduct is a key requirement in the regeneration of trust.”<sup>22</sup> Any arrangement for the governance of propriety on non-executive boards depends upon striking a balance between the need for public perception of independence of that board and the need for the board to have relevant sector experience. This balance is unlikely to be struck without continual risk-assessment, a handling strategy for resolving emerging perceived conflicts of interest, and continual public monitoring of public perception of the body concerned.<sup>23</sup>

### ***Addressing rising volumes of complaints.***

Next, there are rising volumes of academic appeals and complaints at universities. Predicting the end of an upward trend is always tricky. Annual increases of complaints to the OIA of between 20-25 per cent were a consistent feature of five years of recent OIA experience, from a low base in the early years after inception in 2005. The rise was stemmed in 2013 and 2014 for a number of reasons. These include a change to the OIA subscription model thereby incentivising universities to resolve complaints and academic appeals before they reach the OIA. In parallel, the OIA has run a sustained campaign to promote the use of conciliation and mediation to maximize the possibility of early resolution. In line with the Pathway 3 Report,<sup>24</sup> the OIA launched its Early Resolution Pilots Initiative in January 2013. Universities and Students’ Unions were invited to trial initiatives in their institutions to address early resolution in the widest operational sense.<sup>25</sup> A small cadre of universities and students unions ran pilots in 2013 to work through the possibilities of conciliation and mediation.

However, with the cadre of students paying (circa) £9k completing their third and final year in 2015, with student expectations (encouraged by Coalition Government policy) apparently rising, with the development of MOOCs and their likely fusion into existing degree offerings, and with OIA publishing more case outcomes each year, planning for significant increased volumes still seems the only game in town.

The strategic ambition to seek to engage in preventive action through case fees, the Early Resolution Pilots and the adoption of the Good Practice Framework on Handling Complaints and Academic Appeals<sup>26</sup> may already be having an impact. In any event, this preventive action must be long-term and sustained.

The first element is financial restraint. Many universities in England and Wales are cash rich and many have large surpluses. Their marketing budgets have risen significantly. They have escaped the fiscal crisis, a funding 'valley of death', which Professor Sir Steve Smith postulated during the tuition fees debate.<sup>27</sup> 'Nevertheless, the legitimacy of the OIA as a supplier of services is intimately tied up with proven financial discipline, which must be continued and developed.

Second, there is user satisfaction in the context of public trust. The rubric that 'the customer is always right' cannot apply in higher education where academic judgment is concerned. Complaints to the OIA relating to academic appeals are therefore always addressed on narrow grounds of reasonableness, procedure or due process. This does not make students content. A challenge for the OIA is to separate perceptions about the handling of individual complaints from the substantive outcome. This is immensely difficult to achieve. Yet perceptions by users that complaints processes have integrity are an important dimension of public trust.

At the heart of strategic development to address complaints volumes is the Good Practice Framework, created by sector-wide consultation under the auspices of a steering group led by OIA and including representations from the Academic Registrar's Council (ARC), the National Union of Students (NUS), the Quality Assurance Agency (QAA) and the Association of Heads of University Administration (AHUA).

The Framework is rooted in the OIA's experience over ten years in dealing with student complaints and appeals, and in discussing practice with universities, students' unions and student complainants. It builds on two extensive rounds of consultation with the higher education sector: the Pathway 3 consultation in 2011 and 2012 and the consultation on the draft framework earlier in 2014. In total, we received more than 200 written responses which were supplemented by conferences, workshops and informal exchanges.

The Framework, now published and to be adopted in September 2015, will inform the way the OIA considers complaints and academic appeals from students about matters that first arise and are raised with the university from the academic year 2015 – 2016 onwards. It does not provide an exact template for dealing with every complaint and academic appeal. Each university and college remains free to draft its own policies and procedures to fit its own size and context. Where a university or college chooses to depart from the framework, the OIA will consider whether the process it follows is reasonable when it reviews individual complaints.

There is no blueprint or nautical map for dealing with complaints and academic appeals. But there are certain key principles – independence, transparency, fairness, a commitment to early resolution – that guide the day-to-day work of institutions, students' unions and the OIA alike in keeping students on an even keel on the stormy seas of higher education.

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- <sup>2</sup> Simmons, Richard, and Carol Brennan. "Grumbles, Gripes and Grievances: The Role of Complaints in Transforming Public Services." Nesta... April 1, 2013.  
[http://www.nesta.org.uk/sites/default/files/grumbles\\_gripes\\_and\\_grievances.pdf](http://www.nesta.org.uk/sites/default/files/grumbles_gripes_and_grievances.pdf).
- <sup>3</sup> Report of the Leveson Inquiry: Culture, Practices and Ethics of the Press. 2012
- <sup>4</sup> Review of the Health Service Ombudsman's approach to complaints that the NHS service failures led to avoidable deaths. 17 January 2013.  
[http://www.ombudsman.org.uk/\\_data/assets/pdf\\_file/0008/19664/Fritchie\\_report\\_FINAL.pdf](http://www.ombudsman.org.uk/_data/assets/pdf_file/0008/19664/Fritchie_report_FINAL.pdf)
- <sup>5</sup> Grant Thornton. The Care Quality Commission re: Project Ambrose, 14 June 2013.  
[http://cdn.basw.co.uk/upload/basw\\_32211-10.pdf](http://cdn.basw.co.uk/upload/basw_32211-10.pdf)
- <sup>6</sup> <http://www.bbc.co.uk/programmes/b036w3b3>
- <sup>7</sup> Collini, Stefan. *What Are Universities for?* (Penguin, 2012) 21-2.
- <sup>8</sup> Ibid, 21-2.
- <sup>9</sup> Grove, Jack. "Labour to Table Lords Amendment on Private Colleges." *Times Higher Education*, September 11, 2014;
- <sup>10</sup> Morgan, John, Government agrees to extend student complaint rights to private providers, *Times Higher Education*, 11 November 2014 [deed done 24 November 2014]
- <sup>11</sup> Furedi, Frank. "Now Is the Age of the Discontented." *Times Higher Education*, June 4, 2009
- <sup>12</sup> Ibid, R (Sandhar) v Office of the Independent Adjudicator for Higher Education [2011] EWCA Civ 1614 para 34 [http://www.oiahe.org.uk/media/42671/sandhar\\_court\\_of\\_appeal\\_judgment.pdf](http://www.oiahe.org.uk/media/42671/sandhar_court_of_appeal_judgment.pdf)
- <sup>13</sup> Pathway Report: Recommendations for the development of the OIA Scheme, February 2010, Chapters 3, 4, and 5. OIA.
- <sup>14</sup> Mustafa and OIA, Queens Bench Division, [2013] EWHC 1379 (Admin)  
<http://www.oiahe.org.uk/media/88120/mustafa-judgment.pdf>
- <sup>15</sup> Directive 2013/11/EU of the European Union, of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) L165/63, Official Journal of the European Union, 18.06.2013, Chapter 2, Article 8.

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<sup>16</sup> Mulgan, Geoff. "Three ways to think about the Future", Nesta, September 2013  
<http://www.nesta.org.uk/blog/three-ways-think-about-future>

<sup>17</sup> Elton, G. R. *The Practice of History*. (Sydney: Sydney U.P,1967), 11.

<sup>18</sup> Securing a sustainable future for higher education: An Independent Review of Higher Education funding & student finance, (12October 2010), <https://www.gov.uk/government/publications/the-browne-report-higher-education-funding-and-student-finance>

<sup>19</sup> A Critical Path: Securing the Future of Higher Education in England. IPPR June 1, 2013.  
[http://www.ippr.org/assets/media/images/media/files/publication/2013/06/critical-path-securing-future-higher-education\\_June2013\\_10847.pdf](http://www.ippr.org/assets/media/images/media/files/publication/2013/06/critical-path-securing-future-higher-education_June2013_10847.pdf).

<sup>20</sup> Regulating Higher Education, Higher Education Commission, 9 October 2013.  
<http://www.policyconnect.org.uk/hec/research/report-regulating-higher-education>

<sup>21</sup> Hillman, Nick *Unfinished Business? Higher Education Legislation* (HEPI Report 65, 2014).

<sup>22</sup> *Getting the Balance Right. Implementing Standards of Conduct in Public Life*, Tenth Report, Cm 6407, January 2005

<sup>23</sup> Ibid

<sup>24</sup> *Pathway 3* Towards early resolution and more effective complaints handling, October 2012

<sup>25</sup> Ibid, paras 4.22-4.25

<sup>26</sup> *Good Practice Framework for Handling Complaints and Academic Appeals*, OIA, December 2014.

<sup>27</sup> 'Our universities are standing on the brink of catastrophe' The Observer 13 June 2010,  
<http://www.theguardian.com/commentisfree/2010/jun/13/university-funding-cuts>].