



office of the
independent
adjudicator

Public trust and the ombudsman: the case of the OIA



Paper 01

Rob Behrens

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I. Introduction

In this paper the role of the Office of the Independent Adjudicator for Higher Education (the OIA) is explored. The OIA is the 'classic' student ombudsman service for university students in England and Wales, providing redress, promoting good practice and helping to safeguard public trust in higher education. Its role is examined in the context of significant market reforms to the higher education system in England and Wales since 2010, and an erosion of public trust in the operation of many professions.¹

The OIA has a role in creating and sustaining public trust in higher education. Generalised talk of a 'loss of trust' is too simplistic but has certainly become what Baroness O'Neill, doyenne of writers on trust, has called 'a cliché of our times'.² Public trust in professionals is a tricky issue to get to grips with, but the relationship between a public, private or voluntary organisation³ and the users of its services is influenced by the degree of trust that service users, stakeholders and the wider public have in the organisation, its professional membership and staff.⁴

Perceptions about whether different professions can be trusted to tell the truth vary markedly both in the UK and more widely. Public trust in higher education academics to tell the truth is high in comparison to other professionals in the UK – only doctors and teachers fare better, with judges slightly behind, and tabloid journalists, civil servants and politicians far behind.⁵ This research is complemented by other evidence that user satisfaction of higher education remains high.⁶

The OIA is a 'classic'⁷ ombudsman scheme in a number of ways. First, the OIA is a complaints handler of *last resort* and is used where internal university complaints processes have been exhausted and the student or group of students remains dissatisfied. Secondly, its predominant role is in the redress of grievances, not some other regulatory purpose. Thirdly, it is concerned to promote good practice in the handling of student complaints and academic appeals, drawing on the experience of handling 10,000 complaints to set out written guidance for institutions.

Under the terms of Part 2 of the *Higher Education Act 2004* (UK) ('the Act')⁸, universities in England and Wales are required to join the OIA scheme, which must be independent, impartial and free to student users. The scheme looks at the acts and omissions of universities and applies tests to complaints including whether the university has abided by its own regulations, and even if it has, whether it has acted reasonably in all the circumstances. This is a wide remit, but the OIA cannot look at narrow academic judgments, issues relating to student admissions, or matters before a court.

From the start of 2010 until early 2015, the OIA reviewed more than 8,000 student complaints. Of these about 50

1 Anthony Seldon with Kunal Khatri, *Trust. How we lost it and how to get it back*, 2009, pp.31-47.

2 Accounts of what is a 'classic' ombudsman include: Trevor Buck, Richard Kirkham and Onora O'Neill, *A Question of Trust: The BBC Reith Lectures* (Cambridge University Press, 2002) p.9.

3 There is a definitional and cultural issue about whether or not universities in the UK are public organisations, but in terms of responsibilities under Equality legislation, and receipt of public money, universities are public bodies.

4 Committee on Standards in Public Life, *Getting the Balance Right. Implementing Standards of Conduct in Public Life* (CM 6407, 2005), pp.83-92.

5 Ipsos Mori, Veracity Index 2011, Research commissioned by the British Medical Association (June 2011) <http://www.ipsos-mori.com/Assets/Docs/Polls/Veracity2011.pdf>. There has been, in the UK, a clear, increased survey respondent perception over the period 2004-12 that standards in public life are 'quite poor' or 'very poor'. See Committee on Standards in Public Life, *Survey of public attitudes towards conduct in public life 2012* (2013) p.4.

6 See below, page 11, and footnotes 63 and 64.

7 Accounts of what is a 'classic' ombudsman include: Trevor Buck, Richard Kirkham and Brian Thompson, *The Ombudsman Enterprise and Administrative Justice* 2011; (on higher education) Tim Birtwistle, 'The Campus Ombudsman', *ENOHE News*, 2009/2, pp.11-17 http://wissenschaft.bmwfw.gv.at/fileadmin/user_upload/wissenschaft/2009_2_enohe_news-web.pdf, and from an Australian perspective Anita Stumhcke, 'The Evolution of the Classical Ombudsman: A View from the Antipodes' *International Journal of Public Law and Policy* 83, 2012,2(1).

8 *Higher Education Act 2004* (UK) Chapter 8 Part 2.

decisions of the OIA were subject to judicial review applications and only two cases succeeded (in part).⁹ The Act makes clear that the OIA is not a regulator in the sense of holding coercive power over universities. Universities are required to comply with the scheme rules but retain sovereignty not to comply with complaint outcomes. However, universities do comply. This is out of respect for OIA authority and an awareness that the scheme rules permit the OIA to publicly name non-compliant universities, and give details of the relevant cases.

A national scheme for adjudicating student complaints also operates in Austria and Sweden. In parts of western Europe, and much of North America, individual universities have a campus ombudsman. Many of these have no role in formal complaints adjudication but seek to resolve 'issues' through informal and often confidential resolution. The core point here is that the term 'ombudsman' covers a plurality of functions hiding a wide diversity of practice.¹⁰ As Deng Xiaoping put it (in another context), 'It doesn't matter whether the cat is black or white so long as it catches the mouse.'¹¹

The OIA's mandate runs to England and Wales only. Scotland has a separate system¹² where students and citizens have recourse to the Scottish Public Services Ombudsman for complaints but not issues related to academic appeals. In Northern Ireland, despite exhaustive review, universities still rely on the arcane Visitorial system, which was replaced by the OIA scheme in England and Wales in 2005.¹³

II. The role of an independent complaints process and how it can contribute to public trust

The first task of an independent complaints process is to provide redress for individuals and groups where there are evidential grounds for doing so. A recent study on what users want from complaints handlers showed that a key desired feature of a complaints handling system is a 'Quick resolution to my complaint'.¹⁴ However effective the leadership, however smart the mandate, however polished the office furniture, complaints handlers who fail to resolve complaints in reasonably short order are heading for choppy waters.

A second key requirement for a complaints handling organisation is to ensure that the service or profession over which it has oversight receives informed policy and operational feedback from complaints decisions. Policy and operational feedback should not necessarily interfere with the independent judgment of the profession, but should be capable of promoting professional and corporate development. This is difficult to achieve in part because of a (necessary) cultural divide between complaints handlers and professional practitioners.

9 *R (Cardao-Pito) v Office of the Independent Adjudicator for Higher Education and London Business School* [2012] EWHC 203 (Admin) (16 February 2012) and *R (Goprishkana) v. Office of the Independent Adjudicator for Higher Education and Leicester University et al.*, [2015] EWHC 207 (Admin) (6 February, 2015).

10 OIA survey of campus ombudsmen in OIA, *Pathway 3: Towards early resolution and more effective complaints handling* (2012) Annex pp.43-45; International Ombudsman Association, *What is an organizational ombudsman?* <http://www.ombudsassociation.org/resources/what-ombuds>.

11 I wrongly attributed the quote to Mao Zedong in Rob Behrens, 'Resolving to do better' (2013) *Times Higher Education* 11 April 2013. In a letter to *Times Higher Education* pointing this out Ros Allen (5 April, 2013) commented 'Mao would have been more likely to have said: "It doesn't matter whether a cat catches a mouse or not, as long as it is red."'

12 See the comprehensive account by Christian Gill, 'The Evolving Role of the Ombudsman: A Conceptual and Constitutional Analysis of the "Scottish Solution" to Administrative Justice'. *Public Law*, October 2014, pp.662-681.

13 Department for Employment and Learning, *Graduating to Success: A Higher Education Strategy for Northern Ireland* (24 April 2012) p.37 notes that 'The Department will continue to consider whether there is merit in extending the remit of the Ombudsman to include higher education grievances'. In the Visitorial system, the 'great and the good' at individual universities delegate oversight of complaints, which have exhausted internal processes, to administrative functionaries in a way which lacks transparency, consistency and independence.

14 KRC Research, *Bar Standards Board Survey 2009* (2009) p.3. 33 per cent. Sample size 2044 aged 18 and over in Great Britain, nationally representative. Online Fieldwork 9-11 March 2009.

Despite the difficulties, classic ombudsman schemes which are content to take action only after the event, when a detriment has occurred, are performing only half the role of their organisation. An important challenge is to work in partnership with institutions to promote good practice to avert detriments to individuals and groups. This is not easy as we have seen in the UK from the example of the Press Complaints Commission (PCC). As the Leveson Report made clear, no serious attempt was made by the PCC to use good practice codes to develop ethical awareness amongst newspaper journalists or to stamp out unethical behaviour once the pernicious practice of phone hacking was exposed to the wider public.¹⁵

In carrying out these core tasks – providing redress and giving feedback emerging from cases – complaints handlers have the opportunity of generating or retaining user confidence and wider public trust not only in themselves but also in the service provided by the institutions over which they have oversight. This has been described by Marc Hertogh as the ‘ombudsman-trust hypothesis’ in which by handling individual cases, the ombudsman will increase the level of confidence among complainants. Additionally, the ombudsman ‘could also strengthen the level of confidence among members of the general public’.¹⁶

III. Key elements of public trust

There are at least four key elements to public trust. One concerns the perceived honesty and independence of a profession and the ability of professionals to make public interest decisions unsullied by vested interest or political interference. In the UK, there has been reputational damage to a number of professions and institutions in this respect. Examples include Government Ministers and conflicts of interest, Members of Parliament and the misuse of expenses, bankers and a host of irregularities including mis-selling, market rigging and tax avoidance. In the case of the oversight of newspapers, the Press Complaints Commission failed because it was not an independent body and took no significant notice when the abuses of phone-hacking of private individuals took place.¹⁷ A recurring feature of this reputational damage has been the failure to provide a robust and independent investigation mechanism when the public or service users (or some other affected interest) wanted to make a complaint. Service users have clear preferences about the way in which complaints against professionals should be investigated. A ‘fair system led by independent people’ is the most important element.¹⁸

Secondly, even if independence is enshrined in practice, no profession is trusted unless it exhibits a core competence in serving its users and the wider public.¹⁹ There are a number of drivers of public satisfaction with the delivery of public services and, of these, ‘delivery’, or services delivering the outcomes promised, is the most important, followed by timeliness and available information.²⁰

Thirdly, there is continuing public support for ‘the development of a strong internal culture fostering standards and openness as means for improving professional integrity and increasing confidence in public institutions.’²¹ Here, in important evidence to the Leveson inquiry, Baroness O’Neill emphasised the value that ethical codes, when properly articulated, have in driving up the standards of professional behaviour.²²

15 Rt Hon Leveson LJ, *An inquiry into the culture, practices and ethics of the press* (The Stationery Office, HC 779, 2012).

16 Marc Hertogh ‘Why the ombudsman does not promote public trust in government: lessons from the low countries’ *Journal of Social Welfare and Family Law*, 2013, 35:2, p.249.

17 See Rob Behrens, *Three Cheers for Lord Leveson: Independent self-regulation – newspapers and universities compared* (HEPI Occasional Report 7, 2013).

18 KRC Research, *Bar Standards Board Survey 2009* (2009) p.3. Survey respondents made clear that the most important element of complaints handling was a ‘fair system led by independent people’ (52 per cent). The ‘chance to air my grievance’ (14 per cent) and phone access to the complaints department (13 per cent) were also considered important.

19 Committee on Standards in Public Life, *Getting the Balance Right. Implementing Standards of Conduct in Public Life* (CM 6407, 2005); Katherine Hawley, *Trust: A Very Short Introduction*, (Oxford University Press, 2012) p.64.

20 Ipsos Mori, *Public Sector Service Satisfaction Index. A report for Consumer Focus* (2010) p.7, p.19.

21 Committee on Standards in Public Life, *Survey of public attitudes towards conduct in public life 2012* (2013) p.6.

22 Rt Hon Leveson LJ, *An inquiry into the culture, practices and ethics of the press* (The Stationery Office, HC 779, 2012). Witness statement - written evidence from Prof. Onora O’Neill, June 2012, MOD400001154-66.

A fourth key element of public trust is the manifestation of 'active trust' and trustworthy behaviour by professions and oversight bodies alike. These bodies have to model trustworthy behaviour, treating people with dignity, respect and fair dealing to draw on citizen propensity to trust even where their disclosures to researchers suggest they do not or might not.²³

In this context, there is a great deal for the OIA ombudsman service to do to help safeguard public trust in the higher education sector. It needs to continue to use its independence to 'speak truth unto power', demonstrably (i.e. transparently) providing redress for individual students and groups of students. It must also promote good practice in universities in line with its role as a 'classic' ombudsman, using its experience to promote good practice and accepting complaints only once internal university procedures have been exhausted. It must operate efficiently and effectively so that it delivers the service it has responsibility for. And it must exhibit trustworthy behaviour in all its transactions and communications.

A. Trust, independence and transparency

The OIA is an independent complaints handler, required to be so by the Act, by the scheme rules, and deemed to be so by the Court of Appeal in England and Wales. If there have been periods of "long sleep" of judicial review,²⁴ they have not been noticeable in relation to OIA decisions, where there has been a good deal of litigation. The OIA is all the richer for this as its mandates have been clarified through judgments of the courts following largely unsuccessful complainant challenges to OIA decisions.²⁵

In a 2011 case, a medical student at Manchester University, Mr Sandhar, who argued for the award of medical qualifications without passing his final examinations, not only challenged the approach taken by the OIA to his complaint, but also challenged whether the OIA was appropriately independent to deal with student complaints.²⁶

In the Court of Appeal, Lord Justice Longmore noted that the OIA Board had an independent majority, that it had responsibility for preserving the independence of the scheme and the role of the Independent Adjudicator, and that there "is no evidence that the Board has ever failed to live up to that responsibility."²⁷ 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.²⁸

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."²⁹

While objectively, in terms of both mandates and operations, the OIA is an independent complaints handling organisation, the subjective perceptions of complainants are not so clear cut. Despite the disciplined record of university compliance to OIA decisions and recommendations, the first OIA survey of complainants in 2009 found that less than half of complainants surveyed had confidence that their own university would comply with an OIA formal

23 Onora O'Neill, *A Question of Trust: The BBC Reith Lectures* (Cambridge University Press, 2002) p.13: 'The evidence suggests that we still constantly place trust in many of the institutions and professions we profess not to trust.' See also, Katherine Hawley, *op.cit.* pp.13-20.

24 The Rt Hon Lord Justice Sedley, 'The Moral Economy of Judicial Review' in S. Sedley, *Ashes and Sparks: Essays on Law and Justice* (Cambridge University Press, 2011) p.251.

25 OIA, *Judicial Review challenges to the OIA* (2014) <http://oiahe.org.uk/about-us/judicial-review.aspx>.

26 *R (Sandhar) v Office of the Independent Adjudicator for Higher Education* [2011] EWCA Civ 1614.

27 *Ibid.* [32].

28 *Ibid.* [33].

29 *Ibid.* [34].

decision.³⁰ While many complainants saw the OIA process as independent, even more disagreed.³¹ Responses showed that just under half the sample saw the OIA as 'on the side of the HEI'.³² This research was conducted before the subsequent publication of three cases of university non-compliance, and before the change to scheme rules enabling publication of detailed and specific information about complaint outcomes.

The paradox of an objective reality of compliant behaviour by universities and a subjective reality in which complainants have not accepted that this is how universities behave is serious. This paradox is resolved (in part) by greater transparency. Through greater transparency we can illustrate the reality of the OIA calling universities to account for unfairness to students, and the excellent record of university compliance with recommendations set out in OIA adjudications. The paradox is resolved in part only because perceptions about how universities behave are drawn from much wider experience than their bilateral relations with the OIA.

That transparency is an aid to building trust is not necessarily the general view of Baroness O'Neill, as set out, more than a decade ago, in her seminal Reith Lectures.³³ For Baroness O'Neill,

"transparency certainly destroys secrecy: but it may not limit the deception and deliberate misinformation that undermine relations of trust. If we want to restore trust we need to reduce *deception* and lies rather than *secrecy*."³⁴

In the view of Baroness O'Neill, deceivers 'mislead intentionally, and it is because their falsehood is deliberate, and implies a deliberate intention to undermine, damage or distort others' plans to act, that it damages trust and future relationships.'³⁵ Deception is at the heart of fraud, embezzlement, theft, crimes of violence. It includes plagiarists, those who promote 'false history' and those who 'write false references for friends.'³⁶

So, entirely consistently with these views, Baroness O'Neill played an active role in encouraging Lord Woolf to recommend a form of zero tolerance of plagiarism in the wake of the Gaddafi affair at the London School of Economics.³⁷ However, the ordinary unreasonableness of universities in wrongly disciplining students, failing to abide by regulations, misusing 'fitness to practise' proceedings, not giving students a fair hearing, could, at least in one reading of Baroness O'Neill's lectures, go beneath the radar.

This may be a narrow reading of a brilliant, significant, short and therefore abstracted work which (understandably) does not cash in the abstractions with references to higher education practice. Indeed, the Reith Lectures do not attack transparency *per se* but the disposition that prioritises the quantity of information put into the public domain rather than its quality or significance. As Baroness O'Neill acknowledges (or at least implies) not every kind of transparency is bad for trust.³⁸

30 OIA, *The Pathway Report: Recommendations for the development of the OIA Scheme* (2010) paras. 5.43-5.44, p.48 and figure 8, p.49.

31 Ibid. table 8, p.47.

32 Ibid. para. 5.55, p.51 and figure 11, p.53.

33 Onora O'Neill, *A Question of Trust: The BBC Reith Lectures* (Cambridge University Press, 2002).

34 Ibid. Lecture 4, p.70.

35 Ibid. p.71.

36 Ibid. pp.71-72.

37 The Woolf Inquiry, *An inquiry into the LSE's links with Libya and lessons to be learned* (2011) para 2.108, footnote 140:B. "Professor Onora O'Neill told me that she recalls how one of the institutions she has been attached to applied the following practice 'the penalty for an undergraduate being found plagiarising was a mandatory zero mark, first time, mandatory expulsion the second time. So that's how you build your reputation.'"

38 Onora O'Neill, *op. cit.* pp.63-70. 'Some sorts of openness and transparency may be bad for trust... Transparency and openness may not be the unconditional goods that they are fashionably supposed to be'. In similar vein, EU Ombudsman Emily O'Reilly has pointed out that while 'transparency is the single most important element in the overall trust framework...it does not necessarily result in action or political engagement even when seriously unacceptable practices are disclosed.' <http://www.edelman.ie/eu-ombudsman-emily-oreilly-address-edelman-trust-barometer-event-trust-government-challenges/>

In any event, my experience as an ombudsman is that it is only by calling universities to account for their unreasonable actions in dealing with academic appeals and student complaints, and by placing in the public domain a record of this performance, that universities will take full responsibility for their actions. With focused, purposeful transparency, complaints handling ceases to be the 'private grief' it had tended to become in higher education.

B. Trust and delivery: redress for individuals and groups

Complaints to the OIA have grown from a very low base, but still constitute only 0.1 per cent of enrolled university students in England and Wales.³⁹ Even so, the numbers of complaints received have risen fast, quadrupling since the OIA's designation under statute in 2005.

Before the levelling off in 2013, the annual growth in the numbers of complaints received averaged 20-25 per cent. The growth has been accelerated by a range of factors including: the doubling and trebling of tuition fees since 2010; a new emphasis on the 'student experience' at university; policy-makers encouraging students to see themselves as 'consumers' of services by universities; and the tightening of the labour market, putting a premium on degree outcomes. In all these circumstances, the growth of complaints received by the OIA on an annual basis may continue in the medium term, but trend speculation is not simple, given the new emphasis on campus-based early resolution and the revised, case-related subscription model mentioned below.

Students whose courses lead directly or comprise a step towards a professional qualification remain the most likely to complain. The issues here are often about the need to pass practice placements and to be judged 'fit to practise'. Both constitute additional hurdles to formal academic tests. Postgraduates and international students from outside the European Union are proportionately more likely to complain than undergraduates and home students.

The majority of complaints - around two thirds - relate to academic status. This reflects the importance to students of achieving a first class or upper second class honours degree, or a postgraduate qualification. The OIA does not intervene in matters of narrow academic judgment,⁴⁰ but will look at all regulations and processes and their application in matters of academic progression, grading, appeal and misconduct. This includes whether or not the regulations are 'reasonable in all the circumstances.' Matters complained about include the practice of examinations boards and appeals panels, assessment and mitigating circumstances on grounds of disability, health or personal circumstance.

Overall, the proportion of cases that are Justified, Party Justified or are Settled each year is around 20 – 25 per cent. This means that the OIA provides redress for up to a quarter of students who use the scheme. Universities can take confidence from the fact that more than 50 per cent of cases contested by student complainants at the exhaustion of internal processes are Not Justified.

There is no point in the complaints handler making recommendations for changed behaviour if universities do not implement them. In the course of a year the OIA makes dozens of formal recommendations in its decisions. Only three times in OIA history has a university failed to comply. This happened twice in 2010 and once in 2012. All three universities complied promptly after being named publicly.

At the end of 2008, the OIA began a strategic and consultative review of the effectiveness of its operations and mandates and how they might be improved. In 2010 the OIA published the first of three iterations - the Pathway Report - setting out the results of these consultative enquiries and the policy changes and rules changes which were prompted by them.⁴¹

39 Based on Higher Education Statistics Agency 2011/2012 student statistics in England and Wales.

40 OIA, *Judicial Review* (2014) <http://www.oiahe.org.uk/about-us/judicial-review.aspx>.

41 OIA, *The Pathway Report: Recommendations for the development of the OIA Scheme* (2010).

While the views of our complainants about the effectiveness of the OIA are heavily dependent upon the outcome of their own case, there were common strands to the views of complainants about the processes used by the OIA:

- Handling times have been considered – rightly – as too slow.
- The largely paper-based, inquisitorial review process lacked an opportunity for the complainant to engage directly with their case handler.
- There was also strong support for the option to attend a mediated session between the complainant, the university and the OIA.
- Financial remedies did not reflect the seriousness of the detriment experienced or the distress and inconvenience suffered.

Universities dissented strongly only from the last of these points.

The Pathway 1 Report,⁴² with 28 Recommendations and 10 ‘Quick Wins’ addressing its mandates, operations, effectiveness and efficiency, kick-started a five-year reform programme which is still on-going. The principal steps taken are set out in Table 1 on page 9. Coincidentally, and happily, they reflect the required good practice recommended for individual schemes in a recent academic review of the future of ombudsmen.⁴³

Table 1 Modernisation of OIA business processes

Increasing front-line capacity (2012-13).
Creation of Assessment Team and introduction of Triage and telephone contact (2011).
Mediation and Settlement objectives (2012).
Targets for monthly closures (2012-13).
Development of Knowledge Management system (2012-14).
Publication of remedies guidance (2012).
Development of Good Practice Framework (2013-14).

Pathway 1 recommended specifically that the OIA should enhance its direct contact with users.⁴⁴ It also recommended that the OIA should consider seriously the option of offering mediation in the context of its role as an adjudicator and as part of a more flexible approach to complaints resolution.⁴⁵

The OIA now practises Triage routinely and uses early settlement opportunities wherever possible.⁴⁶ The pursuit of settlement or withdrawal requires the voluntary consent of the parties. Communication to generate consent is often by telephone and sometimes by email or in writing. It involves asking direct questions to gain a more informed

⁴² Ibid.

⁴³ Chris Gill, Jane Williams, Carol Brennan and Nick O’Brien, *The future of ombudsman schemes: drivers for change and strategic responses* (Queen Margaret University, Edinburgh, July 2013).

⁴⁴ Ibid. p.84, recommendation 14.

⁴⁵ Ibid. p.66, recommendation 2.

⁴⁶ The Triage process has a number of features. It is designed to determine the eligibility of a complaint as soon as possible after a complaint has been lodged, and within ten days. Where a complaint is eligible the case-handler will begin immediately to assemble the necessary information/documentation to conduct a review. In doing so, they will determine the most appropriate way to conduct the review. Where appropriate there will be an attempt at early resolution. A comprehensive survey on informal resolution trends is contained in Margaret Doyle, Varda Bondy, Carolyn Hirst *The use of informal resolution approaches by ombudsmen in the UK and Ireland: A mapping study*. www.ombudsresearch.org.uk, 2014.

understanding of the complaint and its circumstances. The OIA now has a Key Performance Indicator ('KPI') to settle 10 per cent of all eligible complaints without the need for full review.

The adoption of a more flexible approach has proved popular with OIA scheme users, as well as OIA staff. There was scepticism in some universities about the value of early settlement of a complaint at first but this has been assuaged by the clarity created by direct exchange with individual OIA case-handlers rather than sole reliance on formal paper-based exchanges. Many complainants also feel that this flexible approach is worthwhile, giving them the certainty that they have had the opportunity to explain their case directly to an OIA case-handler and being provided with the opportunity of mediation with the university with whom they have long been in dispute. These developments reflect the trend in reorganising services around users, inherent in the shift from a 'delivery' model to a 'relational' model.⁴⁷

As a result, prolonged, entirely paper-based review is no longer the norm. The OIA is using the discretion given to it by the courts to develop its case-handling conventions, and promote early settlement between the parties.⁴⁸ The OIA is also mindful of Lord Justice Mummery's comments in the Court of Appeal that the OIA is an informal complaints review body, not a court of law, and that 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."⁴⁹

The success of internal changes of course depends on the skill and professionalism of the people working to resolve complaints. The OIA has been able to recruit, develop and retain a skilled, highly motivated workforce. Many colleagues have benefitted from professional training provided by Queen Margaret University, and sponsored by the Ombudsman Association. The growth in size of the OIA, commensurate with the growth in complaint numbers, and its strong reputation, have attracted already-skilled candidates for case-handler positions from universities, students' unions and other regulatory and ombudsman bodies.

The reforms set out above have, in combination, had a significant impact on the OIA's ability to close cases and reduce unit costs. Unit costs have reduced by 35 per cent since 2010, and now bear favourable comparison with other ombudsmen services doing comparably complicated adjudication.⁵⁰ It remains to be seen what the reforms do for user satisfaction and trust in the OIA.

C. Trust and the promotion of good practice

The OIA has responded to a year-on-year rise in complaints received, together with the thrust of the UK Coalition Government's higher education reforms, by clarifying its own role and mission. As a complaint handler of last resort, it is clear that an effective service requires not only resolution of cases when they are received but also a preventive strategy. This means working with universities and students unions to promote good policy and practice in complaints and appeals handling.⁵¹

A key premise of good practice dissemination is that the ombudsman service is sufficiently transparent to enable service users to learn from case adjudications and recommendations beyond their own university. I was struck early on

47 Richard Simmons and Carol Brennan, *Grumbles, Gripes and Grievances: The role of complaints in Transforming Public Services* (Nesta, April 2013) p.18.

48 *R (Siborurema) v Office of the Independent Adjudicator* [2007] EWCA Civ 1365 (20 December 2007). Lord Justice Moore-Bick stated that: "It is for the OIA in each case to decide the nature and extent of each investigation required having regard to the nature of the particular complaint and on any application for judicial review the court should recognise the expertise of the OIA and is likely to be slow to accept that its choice of procedure was improper."

49 *R (Maxwell) v The Office of the Independent Adjudicator and Other* [2010] EWHC 1889 (Admin) (23 July 2010).

50 OIA, *Annual Report 2011* (2012). See Legal Services Consumer Panel, *Benchmarking the Legal Ombudsman*, November 2013, Chart 16, p.36.

51 OIA, *Annual Report 2012* (2013) Strategic Plan, p.28.

after joining the OIA at the weakness of the publication arrangements in the scheme rules. They were less demanding than the rules for Scottish universities or for other Ombudsman schemes.⁵²

Following two national consultations,⁵³ the scheme rules were changed in February 2012. As a result, in addition to continuing to publish details of university non-compliance, and regular, anonymised summaries of complaint outcomes, the OIA now publishes an Annual Letter to each university setting out its record in complaints in the previous year. The OIA also now publishes, by name of university, summaries of complaints, where there is a public interest in doing so.⁵⁴ The public interest test is set out in the guidance.⁵⁵ This is the sort of transparency that Baroness O'Neill might find unproblematic, given that for her it is the fetish of making information available without purpose that is objectionable.

The OIA has now commissioned and published two independent, quantitative surveys of the views of complainants about experience of university complaints and appeals handling processes, in 2009 (published 2010) and 2012 (published 2013). The broad findings in both surveys were similar. In the view of complainants, cases took too long to resolve (often a year or more), issues raised were not taken seriously by the university, complainants were not kept informed of handling progress and felt unsupported during the proceedings.⁵⁶

The OIA has been encouraging universities to reflect and act on these messages from complainants. The messages were a key prompt for the OIA's Pathway 3 Consultation. The Report⁵⁷ set out a number of initiatives to promote effective resolution of complaints on campus. First, the OIA launched an Early Resolution Pilot Initiative to explore and map the wide variety of ways in which early resolution can be achieved, including the use of mediation, student conciliators, and joined-up action involving student services offices and students' union advice centres. A number of universities ran pilot schemes – for example, Sheffield, Kingston, Huddersfield, and South Wales – and outcomes from these pilots were published in April 2014.⁵⁸ These pilot schemes have generated widespread interest and have kick-started other initiatives.

Secondly, and related, the OIA led a sector-wide project to devise and publish the first written Good Practice Framework on Complaints and Academic Appeals ('the Framework'), called for by 80 per cent of respondents to Pathway 3. Drawing on comparative experience in Scotland and Wales, and sitting alongside the more principles-based Quality Assurance Agency Quality Code,⁵⁹ the Framework constitutes an authoritative guide to good practice, covering the challenging issues in complaints and appeals including model architecture, due process, time-frames, and the handling of exceptional circumstances.⁶⁰

This initiative, the subject of a national consultation in 2014, and published in December 2014,⁶¹ becomes operational in September 2015 when the OIA will use the Framework as a key test against which to judge the reasonableness of university decisions. The Framework draws on the distilled wisdom of key sector groups including the National Union of Students (NUS), the Academic Registrars' Council (ARC), the Quality Assurance Agency (QAA), and the Association of Heads of University Administration (AHUA).

52 OIA, *The Pathway Report: Recommendations for the development of the OIA Scheme* (2010) table 22, p.105.

53 Ibid. See also OIA, *The Pathway Consultation: Second Round* (2010).

54 OIA, *Public interest cases* (2014) <http://www.oiahe.org.uk/decisions-and-publications/public-interest-cases.aspx>.

55 OIA, *Guidance for the Publication of Summaries of Decisions* (March 2013) <http://oiahe.org.uk/media/86768/guidance-for-publication-of-summaries-of-decisions.pdf>.

56 DJS Research, *OIA Complainant Satisfaction Survey* (2013) pp.11-13.

57 OIA, *Pathway 3: Towards early resolution and more effective complaints handling* (2012).

58 OIA, *Early Resolution Pilots Initiative* (2014) <http://www.oiahe.org.uk/guidance-good-practice-and-events/early-resolution-pilots-initiative.aspx>; See Annex 1: The Early Resolution Pilots Initiative in OIA, *Good practice framework for handling complaints and academic appeals. Draft for consultation* (2014) pp.29-31.

59 Quality Assurance Agency, *UK Quality Code for Higher Education – Chapter B9: Academic Appeals and student complaints*, (2013) <http://www.qaa.ac.uk/Publications/InformationAndGuidance/Documents/B9.pdf>.

60 <http://www.oiahe.org.uk/media/96361/oia-good-practice-framework.pdf>.

61 *The good practice framework for handling complaints and academic appeals*, OIA, December 2014 <http://www.oiahe.org.uk/media/96361/oia-good-practice-framework.pdf>.

There has been progress towards more effective case-handling and early resolution on campus since the publication of Pathway 3 in October 2012. The Early Resolution Pilots and the draft Framework have played their part in spreading awareness of good practice. In addition, the adoption (following consultation) of a case-related element to OIA subscription fees means that universities are now incentivised to seek to resolve complaints before they reach the OIA. The collective impact of these policies saw a levelling off of year-on-year complaints reaching the OIA in 2013 and 2014, marking a departure from six years of annual increases.⁶²

The wider impact on the student experience is not yet clear. The sector should take encouragement from indicators suggesting public and user confidence is already high.⁶³ For example, the National Student Survey (NSS) has gathered third year undergraduate students' opinions on the quality of their courses on an annual basis since 2005. Overall student satisfaction with their university course has stood consistently at over 80 per cent, with only 7 per cent dissatisfied or strongly dissatisfied in the latest survey.⁶⁴ Nevertheless, a recent report by Which? reiterated continuing student concerns with the way complaints are handled on campus.⁶⁵ In these circumstances the sector needs to face the reality that there is still much to be done to improve university complaints handling processes.

D. Active trust and trustworthy behaviour

Where 'Trusting is not a matter of blind deference, but of placing –or refusing –trust with good judgement'⁶⁶ organisations have to earn trust by exhibiting trustworthy behaviour. There is a mutuality in this, or as a district nurse working in a small rural village told Ronald Blythe long ago 'I had to feel my way, exchanging trust for trust'.⁶⁷

Active trust and trustworthy behaviour involve organisations ensuring that the inter-personal is not lost in the pursuit of challenges like, for example, developing key performance indicators (KPIs). KPIs are, after all, based on the summation of and abstraction from countless exchanges with service users. Here, continuous communication, rigorous expectation management, and unremitting respect for individual service users must be paramount for trust by users to be sustained. This is particularly challenging where students arrive at the OIA with what might be termed 'complainant fatigue,' wearied by the perceived struggle of already having taken their case through a long internal process without success.⁶⁸ This can have an adverse impact on their disposition towards the last-resort case-handler since their recent experiences with the university were often (as they described it in the 2009 survey) 'distressing', 'disappointing', and sometimes 'depressing'.⁶⁹

OIA communication with its users and stakeholders operates on a number of levels. Each year the OIA publishes an Annual Report and holds an Annual Open Meeting to ensure anyone who wants to can question the policies and practice of the Office. In addition to the national consultations and work on triage and settlement with individual complainants referred to above, the OIA holds regular regional forums for universities and students' unions. I have also visited around 100 universities and students unions in the last six years, seeking informal exchange and greater dialogue between ombudsman and users both to learn about the sector and to demystify our role.

Communications of this kind help to manage user expectations. Realistic user expectations are a key ingredient of generating active trust – the more a user knows about the role, remit, procedures and available remedies of the

62 OIA, *Annual Report 2013* pp.10-11.

63 See for example Ipsos Mori, *Veracity Index 2011, Research commissioned by the British Medical Association* (June 2011) www.ipsos-mori.com/Assets/Docs/Polls/Veracity2011.pdf and Committee on Standards in Public Life, *Survey of public attitudes towards conduct in public life 2012* (2013) p.4.

64 *National Student Survey*, <http://www.hefce.ac.uk/whatwedo/lt/publicinfo/nationalstudentsurvey/nationalstudentsurveydata/2014/>.

65 Which? *A degree of value: Value for money from the student perspective*, November 2014

66 O'Neill, 2002, Preface, p.vii.

67 Ronald Blythe, *Akenfield. Portrait of an English Village* (1969), 2005, p.199.

68 The general concept is dealt with in T.Buck, R.Kirkham and B. Thompson, *The ombudsman enterprise and administrative justice*, 2011, pp 102 -105.

69 OIA, *The Pathway Report: Recommendations for the development of the OIA Scheme* (2010), figure 4, p.43.

ombudsman, the more seriously they will be in a position to engage. The National Union of Students (NUS) with a Union and Advice Service on most campuses plays a critical role in educating its members about the possibilities and limitations of taking a case to the OIA, and our service is significantly stronger as a result.

Finally, unfailing respect for individual users is a cornerstone of sustaining trust. Notwithstanding the rhetoric of 'students as consumers', students do not enjoy having to complain or bring an academic appeal and for many it is a time of stress and an unpleasant experience.⁷⁰ University staff can also experience stress when their decisions are questioned. Regardless of the merits of an individual case, scheme users deserve respect and courtesy as a matter of course. This respect and courtesy needs to be reciprocated.

IV. Emerging issues

The purpose of the above analysis is not to suggest that the OIA has 'correct views on everything'.⁷¹ The OIA's accountability to judicial review in the courts takes care of that issue, or at least some of it. Rather, it is suggested that the student ombudsman service in higher education has strategic purposes as well as a core duty to individual and group complainants. These strategic purposes all touch on the issue of retaining trust in higher education whether it be the public, students or other stakeholders.

A number of issues emerge. First, while there is good evidence that trust of and in higher education is currently high in comparative terms, there is no room for complacency. There is a continuing risk of 'collateral' damage to trust in higher education from crises in other professions. It is no accident that the scores of professors in the Ipsos Mori Veracity Index survey fell markedly, like other professions, between 2009-11, in the context of scandals in other professions (MPs and bankers).⁷²

Secondly, there is the impact that the exceptionalism, or uniqueness, of higher education has on user and public trust. Universities in the UK have rejoiced in strong and long-standing institutional autonomy. While there are few timeless norms in this history,⁷³ a cornerstone of autonomy is the sovereignty academics enjoy over their own academic judgement. The status quo in this regard is not untenable, but it does come at a price.

While some academics in the UK consider themselves hard put upon in terms of legal and regulatory oversight, their counterparts in the legal profession have less immunity relating to the expression of their professional judgements in Court and to the relevant regulatory framework. So, even though an academic judgment is not – as some believe – whatever an academic says at any particular time and is fairly narrowly defined by the Courts,⁷⁴ academics are in a privileged position compared to barristers and solicitors in this respect. For many students this privileged position directly undermines the credibility of the OIA in providing redress. This may have implications for public trust, since the perceptions of scheme users are likely to impact on the wider student and public perception of the ombudsman scheme. Ultimately, this is an issue for Parliament.

Thirdly, while it is an important strategic aim that ombudsmen generate public trust not only in themselves but in the services which they hear complaints about, as Marc Hertogh has pointed out, the success of ombudsmen in western

70 Rachel Wenstone, then Vice-President of NUS, 'Putting Students at the heart of complaints and appeals' quoted in R. Behrens (ed), *Dispute Resolution in Higher Education in Turbulent Times* (Report of the tenth Annual Conference of the European Network of Ombudsmen in Higher Education, Oxford, UK, 11-13 April 2013, 2014) p.12.

71 Leslek Kolakowski, 'My Correct Views on Everything: A Rejoinder to E.P. Thompson' (1974) in *Is God Happy? Selected Essays* (Penguin Classics, 2011), pp.115-140.

72 Ipsos Mori, Veracity Index 2011, *Research commissioned by the British Medical Association* (June 2011) www.ipsos-mori.com/Assets/Docs/Polls/Veracity2011.pdf.

73 Stefan Collini, *What are Universities for?* (Penguin Books, 2012). Ibid. p.22. Collini warns about "the importance of not treating the situation thought to obtain at a given moment as any kind of timeless norm".

74 *R (Mustafa) v Office of the Independent Adjudicator for Higher Education* [2013] EWHC 1379 (Admin) (23 May 2013).

Europe in achieving this aim is far from proven.⁷⁵ The same must be said about the OIA in England and Wales, though this does not invalidate the strategic aim.

A number of the impediments to building trust identified by Hertogh in his study of national ombudsmen in Belgium and the Netherlands also apply to the OIA. Pre-existing 'complainant fatigue' from using first tier complaints procedures is one issue. Another is that arcane, legalistic, communication by the ombudsman which 'can be quite an alienating experience' in the Low Countries,⁷⁶ also has a resonance with users of OIA services. In addition, in any one year, complaint outcomes at the OIA that uphold at least part of the student's complaint have not exceeded 25 per cent. This diminishes what Hertogh calls any 'radiating effects'⁷⁷ on the wider population, the potential for which is already constrained by the legal restriction of OIA services to students and former students only.

And there may be one additional impediment for the OIA that does not apply in the Low Countries, though the empirical evidence available is slim. In writing about the national Ombudsman in the Netherlands, Hertogh notes that an important assumption of Dutch administrative law is 'the idea that complainants are not interested in the process but only in the outcome of a complaint procedure', whereas 'evaluation studies suggest that most complainants primarily want to be taken seriously and they want to be able to tell their side of the story'.⁷⁸ By contrast, despite the significant improvements to OIA complaints procedures reported above, student user satisfaction remains heavily tied to the outcome of individual cases.⁷⁹

Fourthly, there are trust-related issues in the strategic relationship between ombudsmen and regulatory functions. These grow as ombudsmen have accrued additional functions in addition to providing individual redress.⁸⁰ They cannot be waved away by a simple assertion of the independence of the ombudsman, who might not be a regulator but is still part of the joined-up regulatory framework. The test of whether or not a sector is effectively regulated is not limited to the competence of individual oversight bodies, and the developing professionalism of their staff,⁸¹ but includes how they join together to identify risks to the system. The apparent failure in England of either the Health Service Ombudsman or the Care Quality Commission to give priority to investigations following complaints about avoidable deaths in the health service undermined the trust of service users and underlines the dangers of lack of clarity about how institutional roles must complement each other.⁸²

The need for regulatory coherence has been a question that has been considered by recent enquiries into the regulation of higher education by the Institute for Public Policy Research, the Higher Education Commission, and (from an interest group perspective) Universities UK. All three studies concluded that there is a need for the OIA, the independent complaints handling body, to continue to operate as a separate institution within an overall regulatory framework, created by legislation.⁸³ The failure of the Coalition Government to introduce promised legislation to provide

75 Marc Hertogh, 'Why the Ombudsman Does Not Promote Public Trust in Government: Lessons from the Low Countries', *Journal of Social Welfare and Family Law*, 2013, 35:2, p.249.

76 *Ibid.*, p.249.

77 *Ibid.*, p.255.

78 *Ibid.*, p..252.

79 Hertogh, *op.cit.*, p.255. In 2009, (n=184), 77 per cent of complainants whose case was 'Justified' rated the OIA process as independent, compared to 58 per cent of those whose complaint was 'Partly Justified' and 17 per cent of those whose complaint was 'Not Justified'. In 2012, (n=209), in terms of overall satisfaction with the OIA, 71 per cent of those whose complaint was 'Justified' were satisfied with the decision, compared to 10 per cent of those whose decision was 'Not Justified'. *The Pathway Report: Recommendations for the development of the OIA Scheme*, 2010, para 5.39, p.47.; *DJS Research, OIA Complainant Satisfaction Survey*, 2013, p.35.

80 This phenomenon is usefully commented upon by Anita Stuhmcke (2012), and in the Scottish context by Christian Gill (2014).

81 Rob Behrens, "Sailing on the Boundless and Bottomless Sea": a view from the OIA Bridge, *Perspectives Policy and Practice in Higher Education*, 2015, p.4.

82 See, for example, Grant Thornton, *The Care Quality Commission re: Project Ambrose* 14 June 2013. http://cdn.basw.co.uk/upload/basw_32211-10.pdf and Parliamentary and Health Service Ombudsman, *Review of the Health Service Ombudsman's approach to complaints that NHS service failure led to avoidable death* (2013), and .

83 Institute for Public Policy Research, *A critical path: Securing the future of higher education in England* (2013); Higher Education Commission, *Regulating Higher Education* (2013). Universities UK, *Quality, equity, sustainability: the future of higher education regulation*. Report of the Universities UK Regulation Task and Finish Group, (2015)

this 'level playing field' left students studying with private suppliers at a significant disadvantage in terms of possibilities for redress for a long period. While an amendment to the Consumer Rights Bill towards the end of 2014 helpfully addressed the anomaly of the exclusion of students undertaking higher education outside universities being able to use the OIA,⁸⁴ wider, regulatory coherence is still missing. The non-statutory higher education Regulatory Partnership Group is no substitute and only 'sticking plaster' to cover a strategic hole.⁸⁵

Fifthly, it is, of course, important for practitioners to be circumspect when commenting on a concept like public trust, where philosophers and theorists have long thrown light and understanding. However, the rigorous separation of the modes of experience - history, science, practice, and poetry - as set out by Michael Oakeshott in his magisterial *Experience and its Modes* (1933)⁸⁶ is not conducive to effective public policy-making. This needs an argument about how to make public institutions more conducive to generating public trust, and practitioners should listen to and learn from philosophers but also respond with the lessons from their own practice. This is different from what, elsewhere, Oakeshott called a conversation, a more ethereal form where 'there is no "truth" to be discovered, no proposition to be proved, no conclusion sought.'⁸⁷ There is no room for reticence here, particularly amongst those whom exemplary parliamentary practitioner and theorist Tony Wright once called (mischievously) the 'grump' of ombudsmen. Just as universities should not be stuck in some timeless norm, neither should ombudsmen. Happily a key feature of the ombudsman 'enterprise'⁸⁸ is its ability to transform to meet developing needs.

I was told when I went into complaints handling that I would never be loved, and that, more important, I should never seek to be loved. I can confirm after seven years at the OIA that both comments are valid. However, the consolation is that the entire higher education sector – universities, student bodies, the wider public – has a strong interest in ensuring that it has a truly independent and transparent complaints resolution service to adjudicate on complaints by students about universities. In this way, the OIA makes a small but significant contribution to retaining public trust in higher education.

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Rob Behrens

The Independent Adjudicator and Chief Executive

OIA, Third Floor, Kings Reach, 38-50 Kings Road, Reading, RG1.3AA, UK

robert.behrens@oiahe.org.uk

84 John Morgan, 'Government Agrees To Extend Student Complaint Rights to Private Providers', Times Higher Education, November 11, 2014.

85 Nick Hillman, *Unfinished Business? Higher Education Legislation* (HEPI Report 65, 2014).

86 Michael Oakeshott, *Experience and its Modes*, Cambridge University Press, (first published 1933), 1966.

87 Michael Oakeshott, 'The Voice of Poetry in the Conversation of Mankind' in *Rationalism in Politics and other essays* (first published 1962), Methuen University Paperback, p.198. See Rob Behrens, op.cit, 2015, pp.1-6.

88 Buck, Kirkham and Thompson, op cit, 2011, pp 3-9

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**Office of the Independent Adjudicator
for Higher Education**



office of the
independent
adjudicator

Third Floor
Kings Reach
38-50 Kings Road
Reading RG1 3AA

Tel: 0118 959 9813
email: enquiries@oiahe.org.uk
www.oiahe.org.uk

Registered Company number: 04823842
Registered Charity number: 1141289

