

## **A national university grievance handler? Transporting the United Kingdom Office of the Independent Adjudicator for Higher Education (OIA) to Australia**

**ABSTRACT:** Complaints made to external agencies about Australian universities are rising in both number and complexity. Recent debate has therefore focused upon how to improve grievance handling in the Australian higher education sector. One suggested 'solution' is the creation of a national Australian university ombudsman. The United Kingdom has recently introduced such a national student complaint body – the Office of the Independent Adjudicator for Higher Education (OIA). The OIA is a 'world first'. This paper examines the structure and operation of the OIA and highlights the advantages and pitfalls of introducing an equivalent office into the Australian higher education sector. It argues that on balance there are advantages in a national university ombudsman.

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### **Introduction**

The Australian higher education sector has recently undergone profound change. Like most industrialised countries, since the 1980s the Australian system of higher education has been transformed from an 'elite' to a mass system with the sector now being '...characterized by: reductions in public expenditure; increased emphasis on efficiency of resource utilization and management; and a strengthening of the policy and planning role of individual institutions.' (Meek & Wood, 1997, p.12).

The current focus upon efficiency and quality at the level of the individual higher education institution has resulted in the perhaps unintended consequence of the sector now fostering a plethora of institution specific grievance handling bodies. Some examples include Student Ombudsman, Dean of Students, Student Equity Officers and Grievance Managers. Currently, the external review of these internal grievance handling bodies by Australian universities – whether they originate from staff or student complaints – is undertaken by institutions such as: state public law ombudsman; anti-discrimination tribunals; industrial tribunals, the courts; and other relevant agencies such as anti-corruption and administrative review tribunals.

The issue raised in this paper is whether a national ombudsman institution such as that of the OIA which was recently introduced in the UK would improve grievance handling and/or facilitate review of decisions made at an institutional level in Australian universities. The aim of this paper is to question whether an adaptation of the OIA into the Australian higher education setting is possible and/or desirable. The term ombudsman

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is used throughout this paper as being derived from its Swedish origins and being gender neutral.

### **Grievances: complaining hard and often in the Australian higher education sector**

Over the last decade the handling of complaints from both students and staff in Australian universities is an increasing focus of concern. This is evidenced by two developments. Firstly, claims by external agencies that complaints in the higher education sector are growing both in number and complexity and secondly, the escalation of external inquiries into the issue of grievance handling in Universities. Each of these is briefly discussed below.

#### *Complaints growing in number and complexity*

1. the growing number of complaints received about the higher education sector by external agencies:

In an unprecedented step, on the 27 April 2005, seven of the eight Australian public law government ombudsman wrote a joint letter to the editor of *The Australian*, (a major Australian national newspaper) highlighting concern about both the quality of university complaint handling and claiming that the number of complaints received by ombudsman have increased (Ombudsman Letter to the editor, 2005, p.34). The following data drawn from the Annual Reports of Ombudsman (Table 1) indicates that this assertion is broadly true:

TABLE 1. Number of complaints against universities received by Ombudsmen

<b>Total Complaints Received</b>	<b>97-98</b>	<b>98-99</b>	<b>99-00</b>	<b>00-01</b>	<b>01-02</b>	<b>02-03</b>	<b>03-04</b>	<b>04-05</b>	<b>% Change*</b>
NSW			34	46	56	60	78	60	77% Increase
Northern Territory					10	14	13	22	120% Increase
South Australia						40	25	27	33% Decrease
Victoria**									
Western Australia		17	22	10	19	32	23	30	77% Increase
Queensland							71	74	4% Increase
Tasmania						3	5	3	
ACT***	3	5	6	8	5		2	2	33% Decrease

*Note:*

\*The percentage change is that of the earliest recorded number of complaints compared to the most recent number.

**\*\*According to the Review of Complaint Handling in Victorian Universities (May 2005, p. 2), “the number of complaints [against universities] is increasing, doubling in three years from 2001...”**

**\*\*\*Including FOI.**

Of course, due to the sheer raw number of students studying higher degrees there will always be a significant number of grievances about university decision making. As the Victorian Ombudsman notes, in his state of Victoria alone at any given time:

...some 200,000 students are being taught by some 20,000 or more academics. The wide scope of degree and diploma courses, the vast variety of individual subjects and the complexities of curriculum and assessment mean that literally millions of academic transactions occur each year. These involve a vast number of “administrative actions” which could be the subject of complaints to me (Victorian Ombudsman, 2005, p. 4).

That noted the issue to be addressed is not why disputes occur in universities, or even why there may be more disputes within universities. Rather the question is why there is an escalation in the numbers of grievances being brought from the institution to external review by ombudsman.

Reasons for this increase in external review of university grievance handling have been suggested in general literature and include:

- (a)** the high level and fast pace of change in the higher education sector (Astor, 2005, p.51). This has resulted not only in a globalization of the higher education marketplace but also a ‘feeling’ by academics that their academic freedom may be or has been compromised- perhaps here the rise in complaints comes from staff who are challenged by change;
- (b)** the introduction and growth of fee paying students which results in the expectation of a ‘fee for service’ or consumer culture transforming universities, the implication being that students who pay are more ready and willing to complain (NSW Ombudsman, 2004-2005, p.72);
- (c)** deregulation increasing the potential for maladministration – this is the case in both the increase in numbers of institutions which results in increasing students and staff and therefore more complaints (Field & Barnes, 2003);
- (d)** an increase in student numbers in the last five years (see Martin & Karmel, 2002) with a dramatic increase in the make-up of the student body as international students increasing as a proportional group with the inference being institutions do not cater as well as they might to the needs of this sector of the student body (DEST, 2004a);
- (e)** lack of university attention to developing and implementing acceptable complaints policy and procedures (Ombudsman Letter to the Editor, 2005).

It must be noted that it is only the final point on the above list which is within the direct control of an institution. This signals that not only will the issue be ongoing but also that

it will not be possible to alter the underlying causes of rising complaints to external agencies at the local institutional level of the university.

## 2. The increasing complexity of grievances

A related issue is the protracted and involved nature of complaints received about the higher education sector. All Australian ombudsman '...agree that these [university complaints] are amongst the most difficult and resource intensive of complaints, in part because they are not initially handled well by the University and by the time they reach us, may be protracted and entrenched.' (Victorian Ombudsman, 2005, p.2). In addition, there are well documented individual instances which illustrate that when higher education grievance handling is poorly applied the outcomes can be disastrous (see Astor 2005; De Jersey, 2002, p.6; Education Guardian, 2002).

Again, while there is no single reason for the complexity of higher education grievances a number of arguments are identifiable within the literature as to why this may be the case – again these reasons are outside the control of the individual institution:

- (a) that universities are '...unique, having their own culture and ways of handling conflict' (Astor, 2005, p.50). The implication of this is that a grievance is made more complex due to the norms and ideosyncracies of an institution;
- (b) a lack of student flexibility of choice gives rise to a somewhat novel position where '...for all intents and purposes students are 'internal' to the organization in the sense that they 'work' there (though they are not normally on the university payroll' (NSW Ombudsman, 2004-2005, p.2). This makes grievance resolution more complex as the position of grievance handler may become one of balancing academic quality against administrative error;
- (c) research and the academic freedom to pursue research (see Astor, 2005). This relates to the possibility of research fraud, research misconduct or poor academic research performance – up to and including a reference to where a University may disagree with the politics of a member of staff's views (see Dick, 2005);
- (d) people who investigate grievances in universities often do so without formal training and 'on top' of their normal workloads. This raises issues as to the quality and timeliness of complaint handling;
- (e) universities may find in handling staff grievances that they simultaneously owe duties of care which may conflict – a duty to the individual being investigated not to be unfairly treated which may not sit well with a duty to provide quality of teaching to the student body;
- (f) confidentiality is an issue given the bureaucratic nature of file keeping in institutions;
- (g) the variation in the student body itself which encompasses undergraduate, postgraduate, international and local students. Victorian figures show that

postgraduate students are less likely to complain than undergraduate students and similarly international students are more reluctant to complain than local students.(Victorian Ombudsman, 2005, p.12). There are persistent issues about the applicability of a one size fits all grievance handling system.

### *Escalation of external inquiries into the issue of grievance handling in Universities*

The second development which highlights that grievance handling in Australian universities is a concern is the growing number of external inquiries into the issue. Since 2001 there have been three major inquiries into the effectiveness of complaint handling in Universities. The two most recent have been at state level.

In 2004, the NSW Ombudsman issued a discussion paper on complaint handling across all 10 public NSW universities and in May 2005, the Victorian Ombudsman issued a similar report. The Victorian report titled *Review of Complaint Handling in Victorian Universities* originated in a government review of the governance and accountability of universities in Victoria. It identifies a need for a review of the higher education sector's understanding of the Ombudsman's powers and functions and associated procedures.

The NSW discussion paper on *Complaint Handling in NSW Universities* aims to set a minimum standards scheme for university complaint handling and states that the benefit of such a system is that "[G]iven universities now often operate in a competitive market, particularly for overseas students, effective complaint handling will have a direct effect on long term financial health" (NSW Ombudsman, 2004, p.1).

Of most relevance to the issue under discussion in this paper however is the 2001 federal inquiry where the report of the Federal Senate Committee, *Universities in Crisis* supports creating a national Australian university ombudsman "...with the power to call for papers and to conduct *in camera* interviews with parties to disputes over issues that commonly arise in universities" (Senate Committee, 2001, p. 136).

The Committee states that:

There is a precedent for such an arrangement: the Private Health Insurance Ombudsman was established in 1996 to deal with complaints from across Australia in relation to private health insurance arrangements. The Committee believes that were such an institution to be established it would relieve some of the burdens currently carried by academics who believe themselves to be in a helpless position in their dealings with university authorities on issues of governance. Universities should welcome an ombudsman as an institution able to measure their performance in the management of disputes, and as an indicator of the effectiveness of their own grievance procedures (Senate Committee, 2001, pp. 136-7).

The report suggests that this national ombudsman be funded by the Commonwealth, cover off-shore students and have the power to ‘investigate ancilliary fees and charges and to conciliate complaints’ (Senate Committee, 2001, p. 137). This recommendation was accepted by the Government senators who wrote a criticism of the report stating that “Government senators support the establishment of a University Ombudsman, but only after consultations with the universities.’ (Senate Committee, 2001, p. 138).

This suggestion for a national ombudsman had widespread support. For example, Dr David Woodhouse, the Executive Director of the Australian Universities Quality Agency, believes such a position as a universities ombudsman, would help protect the integrity of the sector (Senate Committee, 2001, p. 136 citing Contractor, 2001) and on the 22 October 2001 the *Sydney Morning Herald* reports:

Since the idea of a higher education ombudsman was raised in the Herald earlier this year, it has gathered force. Academics, students, state auditors-general, vice-chancellors, even the director of the newly formed Australian Quality Agency, have given the idea an in-principle thumbs –up (Wells, 2001, p.16).

### **The model of the Office of the Independent Adjudicator for Higher Education**

Given the call for a national ombudsman, it is therefore timely that in response to similar issues facing Australian higher education institutions, the United Kingdom recently passed legislation (Higher Education Act 2004) to implement an Office of the Independent Adjudicator for Higher Education to make provision about complaints by students against institutions providing higher education. The government’s plan for an independent adjudicator for higher education was revealed in the White Paper of January 2003, *The Future of Higher Education*, which states:

Reforms to give students a greater voice must include providing them with a fair, open and transparent means of redress when things go wrong, a safeguard that will be especially important in a freer system...(DFES, 2003, 4.11-4.12)

The Office of the Independent Adjudicator for Higher Education (OIA) was named as the designated operator of a student complaints scheme in December 2004. The appointed Independent Adjudicator is Dame Ruth Deech. whose role is in effect to be the ombudsman of the organization.

All adjudicators and case handlers in the Office are legally qualified (OIA, 2004a, p. 48), although no members of staff apart from the Independent Adjudicator herself, have experience in the higher education sector. It is interesting to note in line with observations about the ‘special’ environment of a university outlined in the first part of this article that Dame Ruth Deech observes that adjudicators without higher education experience may be more critical of higher education institutions than those adjudicators with that experience (Deech, 2006).

### *The structure of the OIA*

To attain independence, the OIA was established as a company limited by guarantee, incorporated on 7 July 2003. In this sense, the OIA is structured similarly to industry Ombudsman introduced in both Australia and the United Kingdom.

The Board of Directors are responsible for the appointment and removal of the Independent Adjudicator and Deputy Adjudicators; the development, application and administration of the Scheme; determining the powers; procedures to be used; oversight of the performance of and effectiveness of the Independent Adjudicator and other staff; the determination of the level of subscriptions payable in each year by Higher Education Institutions (HEIs) which participate in the Scheme; funding the Company's operations; approving annual estimates of income and expenditure; and setting a framework for the pay and conditions of service of all staff of the Company. In addition to its accountability to the Board, the OIA is accountable to the Secretary of State and the Welsh Assembly. The powers of the Higher Education Act 2004 could be used to remove the OIA's designation as the approved complaints scheme. (Higher Education Act 2004 UK s 6 & Schedule 4)

Similarly to industry ombudsman the OIA aims to be independent, but funded by the university sector and be non-government and non-profit (Stuhmcke, 2002, p. 72). The institutions or 'qualifying institutions' it governs are defined in section 11 of the Higher Education Act and includes any Higher Education Institution (HEI) in England or Wales. Every qualifying institution must comply with any obligation imposed upon it by the OIA, including the obligation to pay fees to the designated operator (Higher Education Act, 2004, s15). Although the Department of Education and Skills funded the setting up of the OIA, the operational costs are shared by each HEI paying a subscription based on a scale calculated according to the number of full time and part time higher and further education students at each HEI. In 2005 a HEI with less than 500 students paid 150 pounds while one with 30,000 students paid 9,790 pounds. No fee is charged to a student lodging a complaint. Qualifying complaints are defined in section 12 and a student or former student of a qualifying institution may lodge a complaint about an act or omission of that institution. Section 12 also covers students or former students of institutions (whether or not a qualifying institution) undertaking a course of study or programme of research, leading to the grant of one of the qualifying institution's awards

Again, similar to most ombudsman, before taking a complaint to the OIA, a student must have exhausted the internal complaints procedure of the HEI. The HEI is required, at the end of that procedure to issue a letter (Completion of Procedures Letter). The student then has three months from the date of the letter to lodge the complaint with the OIA. The OIA may reject a complaint where the Completion of Procedures letter is issued more than 3 years after the substantive event complained about. (OIA, Rules of Student Complaints Scheme) Complaints which relate to matters of academic judgment are excluded by subsection 2 of section 12. A student who has had a complaint handled by the OIA and is not satisfied with the outcome may seek a judicial review. If a matter has

already been considered by the Courts it can not be taken to the OIA. If legal proceedings were commenced by the complainant after a complaint has been taken on by the OIA, the investigation would be discontinued or withdrawn.( OIA,2004 b,p.4) Notably, lawyers may be involved in representing the complainant or the HEI. However, this has been identified as causing the issues of a grievance to become more adversarial and protracted (OIA, 2004a, p.10).

### *The powers of the OIA*

Article 15.2 of the Articles of Association provides:

The Independent Adjudicator shall have such powers as shall be necessary to carry out his or her remit under these Articles and without restriction on the generality of the foregoing the Independent Adjudicator's remit shall be to adjudicate any complaints referred to him or her by any HEI which has been admitted to the Scheme or any eligible complainant.

The stated aim of the OIA is that of resolving student complaints that cannot be settled by the HEI itself, as speedily and fairly as possible. In most cases the OIA will make its decision based on the documents submitted and will not proceed to a hearing. The Rules of the Scheme provide that the Reviewer will issue a Formal Decision and any Recommendations the Reviewer decides to make, to the complainant and the HEI as soon as is reasonably practicable (OIA, 2006b, Rules of the Student Complaints Scheme, Rule 7). Rule 7.4) sets out recommendations which include, but are not limited to;

- 7.4.1 that the complainant should be referred back to the HEI for a fresh determination because its internal procedures have not been followed in a material way;
- 7.4.2 that the complaint would be better considered in another forum;
- 7.4.3 that compensation should be paid to the complainant , including, at the Reviewer's discretion, an amount for inconvenience and distress;
- 7.4.4 that the HEI should take a course of action that the Reviewer considers to be fair in the circumstances;
- 7.4.5 that the HEI should change the way it handles complaints;
- 7.4.6 that the HEI should change its internal procedures or regulations.

There does not appear to be an upper limit to the monetary compensation which the OIA may recommend. Recent decisions by the OIA reveal compensation ranging from 50 to 3000 pounds (OIA, 2006a, Recent Decisions).

The Rules further provide that the OIA 'expects the HEI to comply with the Formal Decision and any accompanying Recommendations in full and in a prompt manner' (Rule 7.5) This raises the question of the action which the OIA could take if an HEI refused to comply. The only remedy the OIA has is to report any non compliance to the Board and to publicise it in the Annual Report. The Annual Report of 2004 indicates that there had been no cases of refusal to accept recommendations made by the OIA in the year under



review (OIA, 2004a, p.9). The Independent Adjudicator, Dame Ruth Deech has commented that the Office would be very reluctant to go down the path of naming and shaming (Deech, 2006).

### *Impact of the OIA*

The OIA reports it has had a positive impact upon the operation of HEIs in relation to complaint handling. The Deputy Adjudicator & Chief Executive of the OIA, Michael Reddy identifies the following positive impacts:

- the review of internal procedures;
- evidence that HEIs have been dealing with systemic delays in handling complaints;
- ensuring staff understand the complaints handling process;
- have improved record keeping and
- adoption of good practice recommendations (Reddy, 2005).

### *Criticisms of the OIA*

As the Office has been established for only two and a half years it is too early to make an assessment of whether dissatisfied students will proceed to litigation. Clearly though it is open to HEIs to argue that the OIA provides an additional layer of legal recourse to students. Indeed HEIs are required to invest further time and resources in fulfilling the statutory duty to provide the OIA with the information which is requested. Students could view the lodging of a complaint to the Office as a step (free for students) along the way to a judicial review if the outcome is not favourable to them. Conversely, it is not known at this stage whether successful student complainants will seek a court order to enforce an IOA recommendation on a reluctant HEI.

### **Introducing the IOA to Australia?**

Practically, as Australia is a federal jurisdiction there is a constitutional question as to how an equivalent body to the OIA would be created. There are two possibilities. Firstly, to be a statutory body as is the OIA the Australian national ombudsman would need constitutional validity through either agreement of all the states to allow the Federal government to introduce legislation or secondly, and perhaps more likely, the Federal Government could tie the creation of a such a scheme into funding and quality control and enter into direct agreements with individual institutions.

More theoretically, given the comparative youth of the IOA it is difficult to draw conclusions as to whether such an office would halt and reverse the increasing rate and complexity of complaints made to external agencies about Australian universities. That noted, it is possible to evince a number of considerations relevant to whether an office structured along similar lines to the OIA should be introduced:

### *International competition*

There are external drivers such as international competition for students and researchers which may favour the introduction of a national ombudsman. The benefit of such an institution then being a 'selling point' of high standards maintained by Australian higher education. The Australian federal government has made such a push apparent by issuing a discussion paper so that 'the future of higher education in Australia...be considered in the broader international context' (DEST, 2006, pp.1-2). This paper is a direct response to the Bologna process (whereby 45 European countries are working towards a 2010 deadline of greater consistency and portability in their higher education systems).

It is clear that grievance handling is an important part of ensuring quality in higher education. Notably, a result of the Bologna process is the creation of a European Network for Ombudsman in Higher Education (ENOHE). ENOHE states that it is a direct response to the 'quality assurance' objectives of the Bologna process' (ENOHE Website). ENOHE is an adaptation of similar United States, Canadian and Australian grievance handling associations.

### *Quality Assurance*

Complaints management and bodies such as ombudsman contribute positively to a quality assurance process. The Australian Universities Quality Agency (AUQA) which is an independent, not-for-profit national agency aims to promote, audit, and report on quality assurance in Australian higher education. Although individual student complaints can not be lodged with AUQA, student complaints and appeal procedures come within the scope of AUQA's audits of universities and other institutions. From this perspective, a national university ombudsman could add to quality assurance in Australia universities which are subject to audits by AUQA.

### *Uniformity*

While a national complaints code exists in Australia for VET (Vocational Education and Training) education (DEST, 2004b) the higher education sector is unregulated in establishing dispute resolution systems. All Australian higher education institutions therefore develop and implement idiosyncratic grievance policy and procedures.

The higher education sector today offers a myriad of different complaint handling bodies from individual university ombudsman and grievance procedures through to Commonwealth and State or Territory Ombudsman (see DEST FAQs). It follows that the individuals and units responsible for handling complaints differ widely between institutions. While a number of these grievance handling organizations such as the industrial unions function across the entirety of the sector, each higher education institution also provides its own organically grown and modified dispute handling units or areas. There may therefore be merit in standardizing complaint handling through a national ombudsman.

### *Precedent*

Despite being a federal system Australia has shown a ready acceptance of national ombudsman, particularly in areas where government has withdrawn its traditional provision of services. Areas where government decision making was formerly subject to public law administrative review have now been replaced by private law mechanisms such as industry ombudsman which exist in the Telecommunications Industry and the Australian Banking Industry.

Arguably the university sector in Australia is in a similar position to that of many former government industries. As government has deregulated the university environment and reduced funding a similar environment exists in the university sector. Combined with university management seeking ways to cut costs (Alexander, 2006b) and the impact of Voluntary Student Unionism which was introduced in July 2006, student services may diminish. One likely outcome of this environment combined with increasing fees for full fee degrees (Alexander, 2006a) is that while student grievances increase, services to support students within Universities will decrease.

### *Unique university culture*

The special complexity of Australian universities justifies the establishment of a national grievance handler dedicated to dealing with grievances related to higher education institutions. It may be argued that a university grievance handler must possess an appreciation and understanding of the structures and cultures of universities. Such attributes may enhance the advancement of quality assurance in Australian universities.

Of course there are also disparate views as to whether there is a need for a national university ombudsman, as the NSW Ombudsman states:

A number of calls have been made for a national University Ombudsman, including from a number of vice chancellors of NSW universities. It is interesting that this has come at a time when our scrutiny of universities has increased. A national Ombudsman for universities would create a duplication of roles because State universities are already subject to scrutiny by State Parliamentary Ombudsman (NSW Ombudsman, 2000, p.78).

Further, the OIA deals solely with student complaints. The rise and complexity in Australian complaints is not limited to student only complaints and indeed arguably a national grievance handler should have jurisdiction over both.

### **Conclusion**

The OIA provides a model for a national university ombudsman. Beyond this point, it becomes difficult to clearly identify whether there is a 'need' for a national Australian ombudsman. Indeed, there are at least three possible responses with respect to the identified increase in the volume and complexity of university complaints identified in the first part of this article:

- i. existing internal university mechanisms be strengthened;
- ii. State ombudsman continue to scrutinize universities and/or create specific sectors in their offices; and
- iii. Create a national ombudsman.

The above three suggestions may of course be complementary to one another.

In Australia the proliferation of specialist handling grievance units reflects the duality that '...the management of Australia's universities is on a scale of complexity equal to that of large corporations in the private sector' (Meek & Wood, 1998, p.166) combined with the reality that '...higher education institutions do have their own particular norms and values that must be taken into account in devising effective management structures and practices..' (Meek & Wood, 1998, p.25). An advantage of a national ombudsman is that it allows for the one system to be used across the sector. It will provide for 'an effective complaints system with clearly stated objectives, definitions of what constitutes a complaint and the imperative of continuous service improvement that underpins encouragement of a culture in which people should not feel inhibited about lodging complaints' (NSW Ombudsman, 2004-2005, p.6). A disadvantage is that even with such a national external review body there will remain need for internal university grievance handling systems.

At minimum, university stakeholders will be served through improved grievance handling. Clearly in the UK the introduction of the OIA has required individual institutions to reconsider their complaint resolution processes – this outcome alone is a desirable attribute to import to Australian universities.

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