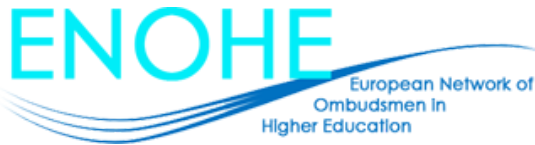


# BEING AN OMBUDSMAN IN HIGHER EDUCATION

by Rob Behrens

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In this study of higher education ombudsmen, Rob Behrens reviews the lived experience of ombudsmen in 18 countries. Having had unique access to ENOHE archives and drawing on a network-wide survey, he has produced the comprehensive account of European practitioners.

Higher education ombudsmen operate from a wide variety of institutional contexts, from singleton operations within individual universities to national ombudsman schemes. They are bound by a strong adherence to the principles of independence, impartiality, confidentiality and informality, and by a broad consensus including giving advice to (mainly) students, disseminating information and being agents of change.

Where higher education ombudsmen disagree is over the interpretation of operational principles. Many use adjudication to resolve disputes, whereas many others reject adjudication and rely on the soft power of mediation to enable disputants to resolve their own conflicts. Additionally, there is strong disagreement about whether campus ombudsmen, operating from within universities can ever be properly independent from the universities they have oversight of.

Behrens analyses the ways in which ombudsmen assert their independence and discovers ombudsmen as robust, assertive and properly distant from university authorities or government structures. However, he reports on a small number of ombudsmen whose mandates have been insufficient to prevent interference and obstruction. He argues that higher educational ombudsmen need to develop the professional nature of their activity to ensure commonality of qualifications, competency, and continuing professional development.

ENOHE President, Dr Josef Leidenfrost, Austrian Student Ombudsman, commented:

“This is a landmark study which highlights the strength and flexibility of higher education ombudsmen across the European Higher Education Area and beyond.”

Rob Behrens added:

“It is important to understand the different ways in which Ombudsmen operate in different countries and university systems so that we can learn from each other and, ultimately, improve the services we provide. I hope my study will spark a constructive debate about these differences in operations.”

ENOHE holds its Annual Conference this year in Strasbourg at the European Parliament from 28-30 June 2017.

This monograph will be discussed and debated at the Conference.



Rob Behrens wrote this study while visiting Professor at University College London (UCL). He was Independent Adjudicator for Higher Education in England and Wales from 2008-16. He is currently Parliamentary and Health Service Ombudsman (PHSO) in the UK. For further information, please contact the PHSO press office on +44 (0)300 4267 or email: [press@ombudsman.org.uk](mailto:press@ombudsman.org.uk)

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# BEING AN OMBUDSMAN IN HIGHER EDUCATION

A Comparative Study

Rob Behrens

June 2017

**ENOHE**

European Network of Ombudsmen in Higher Education



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# A NOTE ON THE AUTHOR

Rob Behrens is Visiting Professor at UCL Institute of Education, Chair of ENOHE, and a member of the Board of UCAS, the University admissions service in the United Kingdom. He was Independent Adjudicator and Chief Executive of the OIA (the Office of the Independent Adjudicator for Higher Education in England and Wales) between 2008 and 2016, and a member of the Bar Standards Board between 2012 and 2017. Rob became Parliamentary and Health Service Ombudsman in the UK in April 2017. He was made a CBE for 'services to higher education' in the Queen's New Year's Honours List in 2016. He has supported Manchester City FC since 1952.

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This project began in 2015 and there are many debts of honour to be paid. At the OIA I am grateful to Judy Clements, Ben Elger, and Sarah Liddell for encouraging and facilitating the study's production. Ellen Wilkinson, a Nottingham University intern at the OIA in 2016, designed, administered and analysed the questionnaire with precision and skill. Terry Hardie managed the data base (and the intern) with skill and good humour. Steve du Cros applied his customary magic to designing and formatting the text.

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**Rob Behrens**

London, June 2017

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# INTRODUCTION

The questionnaire for higher education ombudsmen was designed under ENOHE (the European Network of Ombudsmen in Higher Education) auspices in summer 2015, and disseminated and administered in the autumn of 2015. The research includes an analysis of and reflection on the questionnaire responses. These responses were compiled and analysed quantitatively by Ellen Wilkinson, using an SPSS package.

The questionnaire is at Annexe 1. Respondents were given the option of returning the questionnaires anonymously, and more than half did so. Occasionally, where permission exists, individual ombudsmen are cited by name or position in the references. All quotations used in the text from the questionnaire returns are referenced by alphabetical lettering (indicating the order in which they were received at OIA) and the date on which they were received. For example, the first return was 'A.9.1.2015', and the last return was 'BL.2.11.2015'.

# CHAPTER ONE

## AN EXISTENTIAL STRUGGLE

### Introduction

Ombudsmen in higher education are a growing and distinct cadre. They perform a vital function of safeguarding students against unfairness, discrimination and poor service delivery during their days at university or college.<sup>1</sup> As this international study of 60 ombudsmen in 18 countries shows, they 'speak truth unto power', aim to operate with impartiality and independence, confidentiality and informality and act with the benefit of authority or 'moral suasion' rather than coercive power. At the same time, they disagree about what they should be called, key aspects of their role, and they are often under-resourced. Most important of all, a number struggle for the independence which is essential for their function and upon which user and public trust depends.

During the time researching this study, a small number of practitioners have either been sacked or not had their contracts renewed or they have resigned in the face of intractable conflict with higher education institution authorities. This has been in response, they report, to making findings inimical to their (higher education) employers in Europe. What this means is that while independence may be the 'golden thread' running through the governance of higher education ombudsmen, sometimes it is more talked about than practised. This goes to the heart of the integrity of the ombudsman project.

Altogether, the lived experience of higher education ombudsmen as reported in this comparative study is demanding, sometimes chastening, certainly character-building, and often a struggle. In the words of an early American practitioner, 'The ombudsman is not snake oil',<sup>2</sup> and certainly not a panacea to the ills of higher education today.

### This study

This study focuses on but is not confined to Europe. The evidence is derived from a wide variety of sources. First, from a 2015 survey of contemporary practice amongst the members of ENOHE (the European Network of Ombudsmen in Higher Education). Because ENOHE is not only reasonably representative of European higher education ombudsmen, but also benefits from members in North and South America, Australia and elsewhere, the survey findings pose interesting questions for comparative analysis and for the wider perception and role of the higher education ombudsman institution.

The second set of sources includes ENOHE archives, conference papers, reports and publications dating back to 2003. There is also a study of relevant ombudsman developments outside higher education to ensure a wide context for the study of higher education ombudsmen.

And finally, the study draws on experience as an ombudsman practitioner with eight years running the higher education ombudsman service in England and Wales (OIA), and two years as an ombudsman in legal services. Of course, we need to bear in mind that

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1 Much higher education takes place away from universities, in colleges and other types of provider. In this study, the term 'higher education institution' is used to cover universities, colleges and others as suppliers of higher education.

2 Randy H Hamilton, 'The Ombudsman in Perspective' in **The Ombudsman in Higher Education: advocate or subversive bureaucrat**, Papers from a conference, Burlingame, California, 4 May 1969, California, July 1969, p.15.



practical knowledge is but one mode of experiencing the world,<sup>3</sup> and can be remembered (mis-remembered) romantically.<sup>4</sup> So, circumspection is necessary, but undue deference is inadvisable.<sup>5</sup> The practitioner perspective, especially when weaved into an academic framework, can give a powerful granularity to what otherwise might become 'armchair speculations of what must be the case'.<sup>6</sup>

The survey of practitioners revealed a very wide range of activities covered by higher education ombudsmen in their working lives, making them more generalist than is sometimes assumed. There was important consensus about operational principles, the most important roles carried out, and the most challenging case issues to be addressed. There was also significant new evidence on the biggest challenges to respondents in their role as ombudsmen. Of particular importance are 'challenges to personal growth', 'lack of independence,' and 'access to resources'. These suggest more of an existential struggle than is commonly recognised.

The one area where there was no consensus was on the question of whether ombudsmen in higher education should engage in adjudication to resolve complaints. This is more than an operational disagreement and for some practitioners more like an ideological divide. It goes to the heart of the identity of the ombudsman in higher education.

In general, then, ombudsmen in higher education constitute a resilient but threatened, evolving, non-legal form of dispute resolution. Their focus has been largely (but not exclusively) on addressing perceived unfairness and wrong-doing to students in their higher education life. This is an on-going challenge: 'Grievances will arise within universities... across any one of the vast array of activities a university undertakes'<sup>7</sup> and conflict is endemic to higher education institutions as to all complex organisations with multiple pursuits, competing interests and stakeholders.

The cultural importance of autonomy and freedom of academic judgement in higher education institutions<sup>8</sup> (across all western nations) has two important impacts on the nature and roles of ombudsmen in higher education. First, it has constrained their oversight role and restricted them largely to matters outside the academic and professional judgement of higher education scholars as teachers and supervisors.<sup>9</sup> Here the emphasis is on the word 'constrained' since an academic judgement is much narrower than 'whatever an academic says at any time' however much she or he would wish that to be the case. As Lord Justice Sedley explained in the English and Welsh context:

'This is not to say for a moment that academic decisions are beyond challenge. A mark, for example, awarded at an examiners' meeting where irrelevant and damaging personal factors have been allowed to enter the evaluation of a candidate's written paper is something more than an informed exercise of academic judgement.'<sup>10</sup>

3 Michael Oakshott, **Experience and its Modes**, Cambridge University Press, 1978.

4 "Other people understand me. In my public life I am a success." Mrs Jaraby laughed. "You are past public life now. Did you have a public life once? I had not noticed." William Trevor, **The Old Boys**, Penguin Books, London, 2014, p.122.

5 Rob Behrens, **Public trust and the ombudsman: the case of the OIA**, OIA 10th anniversary series, Paper 01, Reading, March 2015, p.14.

6 Jeffrey Stanyer, 'Irresistible Forces: The Pressures for a Science of Politics', **Political Studies**, 1976, vol. 24, 3, pp. 237-252.

7 Anita Stuhmcke, Bronwen Olliffe and Maxine Evers, 'Resolution of Student Grievances within Universities' in Sally Varnham, Patty Kamvounias and Joan Squelch (eds), **Higher Education and the Law**, The Federation Press, Sydney, 2015, p.114.

8 Stefan Collini, **What Are Universities For?**, Penguin Books, London, 2012; Conrad Russell, **Academic Freedom**, Routledge, London, 1993.

9 **The Pathway Report: Recommendations for the development of the OIA Scheme**, OIA, Reading, 2010, paras 7.17-7.22, pp.64-65.

10 R v Higher Education Funding Council ex parte Institute of Dental Surgery [1994] CA.

Nevertheless, in a number of jurisdictions, and in comparison to other professions – health and law are good examples – higher education teachers enjoy extensive protection from a questioning of their professional judgement.<sup>11</sup> This is a critical difference or exceptionalism which marks higher education ombudsmen out from their counterparts in other sectors.<sup>12</sup> Interestingly, it is not an exceptionalism that is popular with student complainants, and there is at least the possibility that it undermines the perceived effectiveness of the ombudsman role.

Secondly, the autonomy of higher education institutions within a wide variety of legal, structural and cultural conditions across the world puts a limit on the commonality of complaints and appeals processes, and therefore the character of independent redress. Even the term ‘complaint’ is a contested one. While a complaint may be ‘the expression of a specific concern about matters that affect the quality of a student’s learning opportunities’,<sup>13</sup> some practitioners regard this as overly pejorative and are clear that they deal with ‘issues’ or ‘problems’ which can be less specific.<sup>14</sup> It is no exaggeration to question whether the attempt to systematise redress systems in higher education is unproductive given the diversity of arrangements. Within single countries arrangements in individual higher education institutions are hugely variable, and the term ‘hodgepodge’ preferred to ‘system’.<sup>15</sup> In a comparatively new and emerging set of arrangements (beginning only in the early 1960s), the invitation to ‘Let 1000 flowers blossom’,<sup>16</sup> an embellishment from Chairman Mao Zedong’s more modest instruction in 1957 to ‘let 100 flowers blossom’, looks apt.

**Chapter 2** looks at the history, role and operational context of higher education ombudsmen. Examining the early history across three continents, the influence of student voices and students’ unions in the creation of new structures is an important theme. What higher education ombudsmen do and why they matter is then addressed, and their work is located in the context of the work of students’ unions and higher education institutions’ services. The chapter explores (in vain) the possibility of a definition of higher education ombudsmen and maps the diversity of the variable organisational forms, settling on a minimum of five discrete types.

**Chapter 3** examines the lived experience of higher education ombudsmen. Drawing on survey work, higher education ombudsmen are shown to have a common respect for the core operational principles of independence, neutrality and impartiality, confidentiality and informality. Beneath these principles higher education ombudsmen undertake a very wide range of activities – they facilitate, resolve complaints, advise, mediate, counsel, act as change agents, represent, promote good practice, train, research and report. Giving advice, disseminating information and being a change agent are regarded as the most important aspects of the role.

While ombudsmen agree on the importance of resolving complaints, there is a continuing dispute about whether or not ombudsmen should adjudicate. For some, usually in the

11 Dennis Farrington and David Palfreyman, **The Law of Higher Education**, OUP, Oxford, 2006, Chapter 13, para 13.33; see Bruce Barbour, ‘Handling Student Grievances: What lessons are there for institutions in the cases brought before the Ombudsman in Australia’, **Responding to Student Expectations**, OECD, Paris, 2002, p.145.

12 **The Pathway Report: Recommendations for the development of the OIA Scheme**, op.cit., 2010, para 2.16, p.22.

13 **UK Quality Code for Higher Education**, Chapter B9: Academic Appeals and Student Complaints, QAA (Quality Assurance Agency), 2013, p.4.

14 American university ombudsman, Y.9.10.2015.

15 Barbara Finlay, **Watchdogs Bark**, Address to Canadian University Press National Conference, Toronto, 9 January 2016, <https://www.ombudsman.on.ca/Files/sitemedia/pdf/Watchdogs-Bark--January-2016-web.pdf>.

16 Josef Leidenfrost and Dolores Gomez-Moran, **Let 1000 flowers blossom: 10 years of the European Network for Ombudsmen in Higher Education**, Paper presented to the International Ombudsman Association Annual Conference, Miami, USA, 2013.

'classical' tradition of being complaints handlers of last resort, adjudication is a routine part of the tools of alternative dispute resolution, a key part of accountability and an adjunct to deliberative democracy.<sup>17</sup> For others, often in the tradition of organisational ombudsmen, adjudication is rooted in the 'adversarial tradition' of dispute resolution which sidelines disputants, leaving the adjudicator as the decision-maker. It is therefore a negation of 'soft power' which (it is suggested) should characterise ombudsman practice.<sup>18</sup> This enduring dispute is honourably contested but either potentially damaging to aspirations to develop ombudsmen as an embryonic profession or a necessary progression on the way to resolution.

**Chapter 4** looks at one of the biggest perceived challenges to higher education ombudsmen – a lack of independence. Since independence is the 'golden thread' underpinning ombudsman authority and therefore a generator of user and public trust, the absence of independence is an existential matter. Drawing on survey responses, the evidence suggests that the independence of the ombudsman is dependent on key variables: the nature of the mandate; the method and terms of appointment; potential role conflict in the execution of ombudsman duties; operating and reporting arrangements; available resources; and (intangibly) leadership issues.

While there is much good practice in independent action and in entrenching independence in governance arrangements, there are key deficits in a minority of mandates, methods of appointment, and reporting arrangements. This leads to potential for serious role conflict as higher education ombudsmen seek to engage with students and staff. We must not exaggerate the small number of assaults on independence but nor should we make 'allowances for the fear that kept the truth obscure'.<sup>19</sup>

**Chapter 5** asks to what extent higher education ombudsmen make an impact, and what are the metrics for evaluating the extent to which they do. This is not without its challenges. First, there are subjective accounts of competence from service users which are often in tension with (more) normative accounts of whether or not (for example) procedural justice has been delivered. Secondly, contextual developments in and beyond the higher education world – marketisation, fiscal crisis, the decline of deference – have changed the dynamic of complaints handling. They make comparison with pioneer approaches (1960s-1980s) unsatisfactory because now ombudsmen must demonstrate their utility. In any event, even if assessment of effectiveness is a messy business, it is a core element in ensuring ombudsmen retain authority and consent.

There are ways of assessing the extent to which higher education ombudsmen deliver their core functions. These ways include tests of competence which measure outcomes in terms of numbers of cases examined, students assisted, cases resolved and the quality of feedback to higher education institutions. They also include assessment of user opinion. This last is methodologically tricky. The (few) surveys produced suggest that complainants view ombudsman competence less generously than ombudsmen do themselves, and that higher education ombudsmen's contribution to sustaining and developing user trust is less satisfactory than is intended. From the authoritative study of public trust of ombudsmen in Europe by Naomi Creutzfeldt, we learn that trust is not allocated randomly and that certain types of ombudsman behaviour are more likely to elicit trust than others.<sup>20</sup> Indeed, there are national distinctions in expectations of ombudsmen: while German service users expected

17 Higher education ombudsman in England and Wales, AB.17.9.2015.

18 Canadian university ombudsman, K.4.9.2015.

19 William Trevor, **Nights at the Alexandra**, Penguin Books, London, 2015, p.20.

20 Naomi Creutzfeldt, **Trusting the middle-man: Impact and legitimacy of ombudsmen in Europe**, University of Westminster/ESRC, June 2016 and **What people expect from ombudsmen in the UK: A report on the findings of the project 'Trusting the middle-man: impact and legitimacy of ombudsmen in Europe'**, University of Oxford/ESRC, 2015.

legal and formal procedures, in the United Kingdom service users valued being listened to, preventing others from having the same problem and being treated with respect.<sup>21</sup> So this is about policy and operations, not chance or fortune.

In the concluding chapter (**Chapter 6**), the future development of higher education ombudsmen is addressed against the background of the overall survey findings. There is much to celebrate in the history of ombudsmen pioneers and practitioners, and current practice teems with professionalism and commitment. Argument is a feature of a world in which passionate, committed people collide; it is not a symptom of decline. This is particularly the case in a practice (higher education ombudsmen) which is only 60 years old. Nevertheless, the enterprise appears disjointed, lacking in investment, and uncertain about the training and development building blocks for more effective practice. It is also uncertain about whether or not specifically professional practice is a legitimate goal. Following Elie Wiesel, 'There is much to be done, there is much that can be done.'<sup>22</sup>

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21 Creutzfeldt, op.cit., 2016.

22 Elie Wiesel, acceptance speech on the occasion of the award of the Nobel Peace Prize in Oslo, 10 December 1986, [https://www.nobelprize.org/nobel\\_prizes/peace/laureates/1986/wiesel-acceptance\\_en.html](https://www.nobelprize.org/nobel_prizes/peace/laureates/1986/wiesel-acceptance_en.html).

# CHAPTER TWO

## HISTORY, ROLE AND CONTEXT

### A brief history of the emergence of higher education ombudsmen

Martine Conway, long-standing Canadian higher education ombudsperson, has observed that 'knowing and disseminating our history' helps ombudsmen 'better understand the distinct nature of the role and how to fulfil its promise.'<sup>1</sup> The conventional account is that higher education ombudsmen institutions began to appear in the mid-1960s in North America, in response to rising conflict on campus. They spread to Australia in the 1970s and to Europe and South America in the 1980s.

Very recently however, Daniel Rugass, a Norwegian historian, has unearthed evidence (as yet unpublished) of higher education student ombudsmen operational in the Student Welfare Organization (studentsamskipnad, Studentkar) Sweden in 1960.<sup>2</sup> This would pre-date North American experience by several years.

One powerful, recurring, theme that runs through this study is the important influence students' associations and students' unions have had in campaigning for the creation, development and support of higher education ombudsmen. This is the case with the creation of campus ombudsmen in Canada and the United States, and with Defensores elected by Claustros, populated for the most part by staff and students, in Spain. It is also the case much more recently with the establishment of student ombudsmen in England and Wales, Norway, Croatia and Germany. Interestingly, it has been suggested that the absence of a powerful unionised student voice has been a factor in the restricted development of higher education ombudsmen in parts of Europe, notably the Netherlands.<sup>3</sup>

Campus ombudsmen emerged in North America in the mid-1960s in the context of civil rights movements, public protests and (again) all-important student advocacy.<sup>4</sup> The first North American higher education ombudsman was established at Simon Fraser University, Canada by the students' society in 1965.<sup>5</sup> This was, according to a student newspaper, 'the best answer for the little man's grievances against maladministration'.<sup>6</sup> Similar offices were established at a number of other Canadian universities soon afterwards, notably at Sir George Williams University, Montreal (now Concordia University). This was in the wake of serious disorder – the 'Computer Riot', beginning with the occupation of the computer laboratory by 400 students – in protest at alleged racism and unfair grading of six West Indian students.<sup>7</sup>

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1 Martine Conway, 'Canadian and US Ombuds: What Are We Doing and Why Are We Doing It?', **The Journal of the California Caucus of College and University Ombuds**, 2013, <http://calcaucus.com/5/post/2013/11/canadian-and-us-ombuds-what-are-we-doing-and-why-are-we-doing-it.html>.

2 Information from Daniel Rugass, University of Oslo, Norway, 2016.

3 Paul Herfs, 'Ombudsing at Canadian Universities Through the Eyes of a Dutch Ombudsman', **The Journal of the California Caucus of College and University Ombuds**, 2016, <http://ejournal.calcaucus.com/article-2-ombudsing-at-canadian-universities-through-the-eyes-of-a-dutch-ombudsman1.html>.

4 Conway, op.cit., 2013.

5 Ibid.

6 Martine Conway, Jenna Brown, Patricia Begne, Marta Elena Alonso de la Varga and Josef Leidenfrost, **Looking back: pioneering past**, Paper presented to 12th ENOHE Annual Conference, Innsbruck, Austria, 28-30 May 2015, p.2.

7 <http://www.cbc.ca/news/canada/montreal/a-look-back-at-montreal-s-race-related-1969-computer-riot-1.2538765>.

Several of the Canadian higher education ombudsmen created were 'funded by students before being jointly funded with the institution. For example, the Simon Fraser Ombuds remained student-funded until 2007 and the University of Victoria Ombuds until 2004.'<sup>8</sup> Conway and Robillard have noted that 40 per cent of university ombuds offices in Canada remain jointly funded by students and the higher education institution.<sup>9</sup>

In the United States of America, campus ombudsmen emerged directly as a response to violence on campus emerging from protest at the war in Vietnam and the struggles for civil rights. The Nixon presidency's Scranton Commission and the Carnegie Commission on Higher Education nudged policy direction towards the institution of ombudsmen on campus.<sup>10</sup> But the first higher education ombudsman was created at Michigan State University in 1967 before both the Scranton and Carnegie Commission reports. At Michigan State the Ombudsman, Carolyn Stieber, became an exemplar for many other universities. Stieber undertook impartial investigations, had access to everyone on campus and to almost all records, and alerted the university to issues in a culture where 'contrary to what one might expect, students are often considered to be a necessary nuisance'. She also constantly bargained, negotiated and mediated.<sup>11</sup>

In Australia, the first university ombudsman office was established at the University of New England in 1977, leading to the creation of offices in 12 other universities.<sup>12</sup> In South America, the National Autonomous University of Mexico (UNAM), with 275,000 students, created a university ombudsman (Defensor) in 1985, leading to the creation of ombudsmen in ten other universities.<sup>13</sup> The Mexican ombudsman concept was formed in an explicitly human rights tradition, and to guarantee human rights in universities.<sup>14</sup> It has spread to Honduras, Brazil, Peru, Columbia, Panama, El Salvador and Argentina.<sup>15</sup>

In Europe, the first higher education ombudsman office was presumed (until recent information about Swedish practice emerged) to have been established at the University of Leon, Spain in 1988. This was followed in the same year by ombudsman offices at Granada and Valencia universities.<sup>16</sup> This development preceded the Spanish Organic Law for Universities (2001) stating that each university must install an ombudsman.<sup>17</sup> The legislation precipitated the creation of ombudsmen at a number of Spanish universities, 21 before 2000 and currently 54 overall.<sup>18</sup>

8 Conway, op.cit., 2013.

9 Quoted in Conway et al, op.cit., 2015, p.11.

10 William W. Scranton, **The Report of The President's Commission on Campus Unrest**, Library of Congress, September 1971, pp.204-6, <http://files.eric.ed.gov/fulltext/ED083899.pdf>;

**Dissent and disruption: proposals for consideration by the campus: a report and recommendations by the Carnegie Commission on Higher Education**, Carnegie Commission on Higher Education, 1971.

11 Carolyn Stieber, **Variation on a Classical Theme: the Academic Ombudsman in the United States**, International Ombudsman Institute, Occasional Paper 38, March 1987, pp.3-4.

12 Anita Stuhmcke, Bronwen Olliffe and Maxine Evers, 'Resolution of Student Grievances within Universities' in Varnham, Kamvounias and Squelch (eds), op.cit., 2015, pp.117-118.

13 **University Ombudsman: The Mexican Model**, UNAM, Second Edition, 2010.

14 Conway et al, op.cit., 2015; Jorge Tinoco, **27 years of academic ombudising at the National Autonomous University of Mexico**, Paper presented to 10th ENOHE Annual Conference, Oxford, UK, 11-13 April 2013.

15 Ibid, p.4.

16 Marta Elena Alonso de la Varga, **30 years of Solitude? Looking back into the Spanish Ombuds pioneering institution**, Paper presented to 12th ENOHE Annual Conference, Innsbruck, Austria, 28-30 May 2015.

17 Jose Manuel Bayod, 'The University Ombudsman in Spain under the New University Law of 2001' in Kristl Holtrop and Josef Leidenfrost (eds), **Student-Institutional Relationships in Times of New University Management: Academic Ombudsmen in European Higher Education**, second edition, 2006, p.58.

18 Marta Elena Alonso de la Varga and Jose Manuel Palazon Espinosa, **The Spanish Case: one Ombuds office in each university by law**, ENOHE webinar, 29 September 2016, <http://www.enohe.net/wp-content/uploads/2016/09/2016-Webinar-Programme-1.pdf>.

Elsewhere in Europe, an ombudsman office was established at a technical university in the Netherlands in 1996 with the encouragement of the Dutch Ministry of Education, Culture and Science.<sup>19</sup> However, it was not until 1999 that a sustainable ombudsman office was set up at the University of Amsterdam under Kristl Holtrop. This followed the passage of a national law requiring that public academic institutions install a complaints officer or committee for students and personnel.<sup>20</sup>

The Austrian Student Ombudsman (ASU) was originally established inside the Federal Ministry for Science and Transport (BMWV) in 1997. Key stimuli to the further development of the ASU were the vision and charisma of the founding Student Ombudsman, Dr Josef Leidenfrost. Additionally, although the Office was created in skeletal form in 1997 around a central information switchboard service, a key acceleration took place in 2001 with the reintroduction of tuition fees in Austrian higher education. This prompted the development of a complaint and conflict resolution service.<sup>21</sup> In the words of the Minister then responsible for the Office, 'What costs something must be worth something. The Ombudsman has to control that.'<sup>22</sup> Discussions for the legal entrenchment of the Office began after 2008, and new independent status backed by legislation was granted in 2012. The Ombudsman offers guidance and help with problems and in difficult situations can act as a mediator between students and universities.<sup>23</sup>

In Belgium, an ombudsman was established at the University of Antwerp after a Flemish decree of 2004 required an ombudsman service to be established at all Flemish universities.<sup>24</sup>

The Office of the Independent Adjudicator for Higher Education in England and Wales (OIA) is a comparative newcomer to the higher education ombudsman scene, having been established voluntarily in 2004 and entrenched in legislation a year later. In one reading, the history of the creation of the OIA was 'the conversation of the people who counted.'<sup>25</sup> This included grandees like Lord Nolan, and Lord Dearing, who produced the germ of the idea for a national scheme, and academics like Professor Norman Gower (the first OIA Chair) who worked up the details with a working committee of the Committee of Vice-Chancellors and Principals.<sup>26</sup> But it was persistent student campaigning which created the evidence, momentum and urgency for action.

Before being reformed by legislation in 2004 requiring universities to join the OIA Scheme, complaints handling across universities in England and Wales lacked independence, consistency and transparency, according to a National Postgraduate Committee survey in

19 Kristl Holtrop, 'Ombudsmen at the Institutions of Higher Education in the Netherlands' in Holtrop and Leidenfrost (eds), *op.cit.*, 2006, p.55.

20 *Ibid*, p.55.

21 Josef Leidenfrost, 'Student Complaints and Appeals – Comparative Approaches of the Courts: A View from Austria' in Michael Reddy and Josef Leidenfrost (eds), **Universities, Students and Justice**, ENOHE, Occasional Paper 5, 2009, pp.335-338.

22 Information from respondent, 1.10.16.

23 <http://www.hochschulombudsmann.at/about/>.

24 Patrick Cras and Josef Leidenfrost, 'The Ombudsman in Higher Education: Counsellor, Student Advocate, Watchdog?' in Patrick Cras and Josef Leidenfrost (eds), **The Ombudsman in Higher Education: Counsellor, Student Advocate, Watchdog?**, ENOHE, Occasional Paper 4, 2007, pp.2-4.

25 G.M. Young, **Victorian England: Portrait of an Age**, Oxford University Press, 1969, p.vi.

26 See Rob Behrens, **Three cheers for Lord Leveson: Independent self-regulation – newspapers and universities compared**, published in association with the Higher Education Policy Institute, OIA, June 2013, pp.3-5. Other influences included reports from the Committee on Standards in Public Life, **Local Public Spending Bodies**, Second Report, Cm 3270-1, 1996, Recommendation 9 and The Dearing Report, **Higher Education in the learning society**, London, HMSO, 1997, Recommendation 60. See Lord Dearing, 'The University Experience' in Reddy and Leidenfrost (eds), *op.cit.*, 2009, pp.50-57.

1998.<sup>27</sup> More than a third had no formal complaints procedure, and those that did were arcane and of variable quality. A 'head in the sand' attitude towards complaints was commonplace, with students' unions criticising the lack of process and transparency: 'Students are being denied access to even the basic rights of complaint and avenues of appeal. In too many cases the current systems of complaint in operation in modern universities belong in the Dark Ages.'<sup>28</sup>

Until the creation of the OIA, complaints against older universities were heard ultimately by Visitors. This was a 'bizarre, byzantine and archaic' set of arrangements whereby the 'great and the good' were appointed by universities to review complaints from students and staff but delegated their duties to administrative functionaries.<sup>29</sup>

In Germany, there has been no national higher education ombudsman initiative, and instead there is a diversity of ombudsmen approaches. Nevertheless, where ombudsmen do exist in individual universities, they are highly segmented with separate ombudsmen for students, scientific misconduct and international students:

'In Germany, we have two types of ombudsmen: On the one hand, we have ombudsmen for good scientific practice at nearly every research university. Additionally, there is a central Ombudsman für die Wissenschaft (ombudsman for science) at the Deutsche Forschungsgemeinschaft (DFG). On the other hand, there are ombudsmen for students at least at some universities. Additionally, some universities have ombudsmen especially for foreign students.'<sup>30</sup>

Goethe Universität Frankfurt was the first German university which installed an ombudsman for students in 2004, far earlier than other universities. The initiative came from a student member of the senate. Complaint management remains a comparatively new topic for German universities and

'there are a lot of different approaches, depending on the culture of the specific university ... complaint management is established only at a few universities yet and ... is in most other cases not highly professionalized yet.'<sup>31</sup>

Following legislation to introduce autonomy, student ombudsmen, literally ombudsmen who are students, were introduced into Croatian universities in 2008-9.<sup>32</sup> In Portugal, the University of Minho created a student ombudsman office in 2010. In Poland, a University Ombudsman was appointed for the first time in 2011 at the University of Warsaw.<sup>33</sup> And enabling legislation

27 Don Staniford and Tim Brown, **Complaints in Practice: Complaints in Crisis**, National Postgraduate Committee, Troon, 2003, p.12, based on a complaints survey carried out by the National Postgraduate Committee and the Union of UEA Students, 1998.

28 Ibid, p.12.

29 General Secretary of the National Postgraduate Committee quoted by John Crace, 'Just in Time', **The Guardian**, 5 September 2000; and Staniford and Brown, op.cit., 2003, p.16.

30 [http://www.microsofttranslator.com/bv.aspx?ref=SERP&br=ro&mkt=en-GB&dl=en&lp=DE\\_EN&a=http%3a%2f%2fwww.uni-frankfurt.de%2f47859932%2fombuds\\_studierende](http://www.microsofttranslator.com/bv.aspx?ref=SERP&br=ro&mkt=en-GB&dl=en&lp=DE_EN&a=http%3a%2f%2fwww.uni-frankfurt.de%2f47859932%2fombuds_studierende); Wolf Hertlein, **Approaches to Complaint Management at German Universities**, Paper presented to 10th ENOHE Annual Conference, Oxford, UK, 11-13 April 2013.

31 Ibid.

32 Luka Juros, 'The most current status of the introduction of the student ombudsman in Croatia – actors, roles, messages' in Ulrike Beisiegel and Josef Leidenfrost (eds), **Lost in Transition? Defining the Role of Ombudsmen in the Developing Bologna World**, ENOHE, Occasional Paper 6, 2010, pp. 135-141.

33 **Report on the activities of the Ombudsman for student and personnel affairs** (for the period from 1 January to 31 December 2014), University of Warsaw, 2015, p.1, <http://ombudsman.uw.edu.pl/documents/6117946/0/Report+2014.pdf>.



to create an Office of the Ombudsman for Academic Ethics and Procedures in Lithuania was passed in 2011.<sup>34</sup>

The University of Oslo Ombud for Students was established in 2012 and became operational in 2013 following a long gestation period. The idea had originally been floated by the Student Parliament in 1958. It was included in the Rector's election platform for the period 2009 to 2013 after the idea had been relaunched by the Student Parliament in the 2000s.<sup>35</sup> Today there are six university ombudsmen in Norway.<sup>36</sup>

The University of Copenhagen established a Student Ambassador in 2013, the first and only one in Denmark. The establishment of this post followed the well-publicised case of a research professor at the University who had allegedly falsely accused a student of stealing. Interestingly, when the University's Board of Directors considered the proposal to establish a position of student ambassador in 2011, a minority of members were opposed to allocating DKK 2.2 million for the purpose. They feared then 'that it was in the process of building up an unnecessarily large bureaucracy that will look in all nooks and crannies for new cases to take up in order to legitimize its own continued existence.'<sup>37</sup> Significantly, the Legal Affairs Committee of the Danish Parliament did not give permission for the use of the 'ombudsman' title in this case.<sup>38</sup>

## 'Ombudsman' or 'Ombuds'?

A catalogue of the various national terms for higher education ombudsmen can be found at Annexe 2. Historically, and well past the 1960s, the term 'ombudsman' was used uncritically and the assumption was that ombudsmen were (mostly) men:

'He [the higher education ombudsman] operates informally and expediently. His principal weapons are publicity and persuasion, criticism and reporting. He does not have the power to punish maladministrators or to reverse administrative decisions ... He is a high level officer. He is free and independent of both the agencies he may criticize and the agency that appoints him.'<sup>39</sup>

This became increasingly irritating to some higher education practitioners (amongst others), for whom the term 'ombudsman' is a reflection of gender bias. They preferred the terms 'ombuds' or 'ombudsperson'. As one American higher education 'ombudsperson' explained in 1998:

'I found myself repeatedly having to justify, explain and support the rationale for using ombudsman and it was getting tedious; and...the etymology of the word becomes irrelevant at some point if we're talking about modern English usage at a time when we know the effects of non-gender neutral language.'<sup>40</sup>

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- 34 Statute of Higher Education and Research of the Republic of Lithuania (No. XI-242 of 30 April 2009); <http://www.etika.gov.lt/about-us/history/>; BL.2.11.2015.
- 35 **Annual Report 2015**, University of Oslo Studentombudet, p.4, <http://www.uio.no/english/about/organisation/student-ombudsperson/annualreport2015ombudforstudentsuio.pdf>.
- 36 Marianne Høva Rustberggard, **The Growing Scheme in Norway**, ENOHE Webinar, 29 September 2016, <http://www.enohe.net/wp-content/uploads/2016/09/2016-Webinar-Programme-1.pdf>.
- 37 **University [of Copenhagen] Post**, 6 December 2016, <http://universitypost.dk/article/denmarks-first-student-ambassador-quits-job>.
- 38 Tina Kaare, **The first Student Ambassador in Denmark: why not 'Student Ombudsman' and why not sooner?**, Paper presented to 11th ENOHE Annual Conference, Warsaw, Poland, 15-17 May 2014, pp.2-5.
- 39 Hamilton, op.cit., 1969, p.17.
- 40 Exchange of correspondence between university ombudsmen at Concordia University, Canada and the Swedish Ombudsman, quoted in Tim Moore, **Ombudsman Gender Neutral?**, Northern Ireland Assembly Research and Information Service Briefing Paper, 9 June 2015, <http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2015/ofmdfm/8115.pdf>.

In this vein,

'titles of office, that presume maleness as the norm ('chairman', 'policeman' etc) have an impact in the context of underlying gender bias in society and women's lack of representation in public roles.'<sup>41</sup>

But the issue is contested. There is also a strong etymological defence of ombudsman as a literal, non gender-biased translation from the original Norse (not Swedish) by one Scandinavian survey respondent.<sup>42</sup> And the term ombudsman is regarded as gender-neutral and indicative of a positive 'brand' by the International Ombudsman Association, the UK and Ireland Ombudsman Association,<sup>43</sup> and (so far) the European Network of Ombudsmen in Higher Education. In the words of the (then) Western Australian Ombudsman:

'the term Ombudsman has become increasingly popular because it is a unique and trusted brand name, a name that connotes impartiality, fairness, integrity and independence.'<sup>44</sup>

## Organisational forms of higher education ombudsmen

In terms of operation, higher education ombudsmen schemes enjoy a variety of governance arrangements. Some take their character from the classic parliamentary ombudsman schemes. These are Scandinavian in origin, and handle complaints independently, externally, and as 'a last resort' when first-line bodies have failed to give redress to the satisfaction of the complainant. Others take their character from the American variant, private sector in origin – the organisational ombudsman.<sup>45</sup> DC Rowat called this, pejoratively, a 'distorted form'.<sup>46</sup> The organisational ombudsman also operates independently but inside organisations whose employees (and students) are entitled to complain.

Higher education ombudsmen who follow the classic model unambiguously receive and review complaints as well as advise and mediate. Those in the organisational ombudsman tradition – mostly campus ombudsmen – often eschew adjudication and focus on reconciliation, mediation, advice and empowerment. This distinction was not clear-cut in the formative years of higher education ombudsmen,<sup>47</sup> but has become increasingly marked in recent years.

A number of factors bind the two, distinct, organisational forms – classic and organisational – together. Both owe their creation and development to student campaigning (including violence and civil disorder) in numerous countries at times of national crisis. This is the case even if technically the institutions were created by grandees, mandarins, and higher education policy makers. Both predominantly (but not exclusively) focus on student complaints or concerns, though some do review complaints from staff. Both are free to complainants to use, and both make non-binding decisions.

41 Varda Bondy and Margaret Doyle, "'Manning" the ombuds barricades', **Ombuds Research: Studying the work of Ombuds men and women and complaint handlers**, 9 June 2015, <https://ombudsresearch.org.uk/2015/06/09/manning-the-ombuds-barricades/>.

42 Correspondence with Norwegian survey respondent, 27.1.2017. Paradoxically, this practitioner is called 'studentombudet' or student ombud.

43 Moore, op.cit., 2015; Bondy and Doyle, op.cit., 2015.

44 Chris Field, **Independence – A key principle**, Presentation to the Australian and New Zealand Ombudsman Association Biennial Conference 2010, Wellington, New Zealand, 6 May 2010, [http://www.ombudsman.wa.gov.au/Publications/Documents/speeches/060510\\_Presentation\\_by\\_Chris\\_Field\\_to\\_ANZOA-2010.pdf](http://www.ombudsman.wa.gov.au/Publications/Documents/speeches/060510_Presentation_by_Chris_Field_to_ANZOA-2010.pdf).

45 Charles L. Howard, **The Organizational Ombudsman: Origins, Roles and Operations: A Legal Guide**, American Bar Association (ABA), Chicago, 2010.

46 Donald C Rowat, 'The American distortion of the ombudsman concept and its influence on Canada', **Canadian Public Administration**, Vol.50, No.1, Spring 2007, pp.42-52.

47 Stieber, op.cit., 1987, pp.2-6.

In the absence of coercive power, the 'moral suasion' of the higher education ombudsman is key here, though sometimes higher education institutions comply with decisions for the less elevated reason that they fear adverse publicity reporting their dissent.

In an important article, Howard Gadlin, formerly ombudsman at the University of Massachusetts, USA, has reflected on the force of moral suasion:

'Perhaps the single most striking lesson for me in this job has been that not having power is a benefit. The ombudsman cannot force, order, command or require anyone to do anything ... Yet this absence of direct power still gives us considerable influence, in some instances more influence than those who hold power. Lacking power also enhances our ability to elicit cooperation.'<sup>48</sup>

Additionally, and across the board, higher education ombudsmen subscribe to the totemic principles of their trade – independence, impartiality, confidentiality, and informality.

Critically, almost all higher education ombudsmen are constrained from reviewing the academic judgements of higher education teachers. Immunity from the consequences of making academic judgements is a highly cherished feature of higher education.<sup>49</sup> This constraint has important implications, which are examined in Chapter 5.

Collectively, ombudsmen have been referred to as a 'blessing' and a 'grump'.<sup>50</sup> There is a certain grumpiness in the way that higher education ombudsmen disagree about what their guiding principles mean in practice. For many in the 'organisational' tradition adjudication is incompatible with confidentiality and informality. For many in the 'classic' tradition an internal ombudsman is a contradiction in terms.

## What higher education ombudsmen do and why they matter

There are a number of ways in which higher education ombudsmen can add value to higher education life. They symbolise and can often deliver an institution's commitment to being fair, to promoting a constructive and user-friendly approach to conflict resolution, to avoiding long and costly litigation and to helping identify policy weaknesses and gaps in the system.<sup>51</sup> All this is done in a way which is free to users, informal, and relatively quick.

The importance of the function of higher education ombudsmen is emphasised by the central role they play in helping to provide redress for students in higher education. Individual student pursuit of redress within a hierarchical institution can be intimidating, notwithstanding the tradition of higher education institutions encouraging the challenge of individual views.<sup>52</sup> Many of those who approach an ombudsman feel vulnerable particularly when making serious allegations.<sup>53</sup> It is this perceived (and real) absence of power which makes the availability of independent ombudsman redress mechanisms to students so

48 Howard Gadlin, 'Reflections on the role of the Ombudsman', **California Caucus of College & University Ombudsmen**, 1988, <http://ombuds.uci.edu/files/2014/09/UCI-Ombudsman-The-Journal-1988.pdf>.

49 Russell, op.cit., 1993.

50 Ann Abraham, former Parliamentary and Health Service Ombudsman in the UK refers to a group of ombudsmen as 'a blessing'. Tony Wright prefers the term 'grump'. Wright is a former MP and Chair of the UK House of Commons public administration select committee and is quoted in Rob Behrens, **Public trust and the ombudsman: the case of the OIA**, OIA 10th anniversary series, Paper 01, Reading, March 2015, p.14.

51 Association of Canadian College and University Ombudspersons, [http://www.uwo.ca/ombuds/accuo\\_aoucc/english/faqs.html](http://www.uwo.ca/ombuds/accuo_aoucc/english/faqs.html).

52 Ewa Gmulrzynska, University of Warsaw, Poland, quoted in **Higher Education Ombudsmen and Empowerment: How to make it work**, Report of the 11th ENOHE Annual Conference, Warsaw, Poland, 15-17 May 2015.

53 [http://www.anzoa.com.au/assets/anzoa\\_media-release\\_essential-criteria-for-use-of-the-term-ombudsman.pdf](http://www.anzoa.com.au/assets/anzoa_media-release_essential-criteria-for-use-of-the-term-ombudsman.pdf).

important.<sup>54</sup> And in the view of students, the absence of independence undermines the ombudsman's legitimacy and potential for use.<sup>55</sup>

At core, ombudsmen in higher education are engaged in helping to safeguard, as far as possible, a positive student experience at higher education institutions. The issues at stake are sometimes routine, and this is not surprising given the nature of higher education life:

'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.'<sup>56</sup>

Indeed, two survey respondents from national ombudsman services working across a number of functional areas believed that higher education complaints were less problematic than those in other areas:

'We have a broad jurisdiction which goes far beyond university or college cases including health and prisons. University or college complaints are rarely the most challenging.'

'Issues concerning healthcare typically [are more challenging]'<sup>57</sup>

While the complexity and bureaucratic nature of higher education life makes an element of the emerging issues routine, complaints handled by higher education ombudsmen can be a curious mixture of the routine and the serious:

'This mandate encompassed over 800 recorded complaints in two years, dealing with everything from [staff] tenure disputes to sit-ins, arrests and parking tickets. God bless parking tickets ...'<sup>58</sup>

And in this mixture, ombudsmen also have to address serious and potentially life-changing events, which are complex and sensitive. The seriousness of these issues needs to be factored into any study to compare the through-put of cases across functional boundaries. Sometimes it is not.<sup>59</sup> As this study shows (see below pp.35-39), despite the exclusion of narrow academic judgements, higher education ombudsmen have to deal with academic-related issues, particularly disagreements and dysfunctional relationships between supervisors and their graduate students, but also plagiarism and other aspects of academic misconduct. In addition there are occasional instances of 'mobbing in the workplace' – a collective form of threatened or actual violence<sup>60</sup> – and cases of 'severe disturbances in behaviour in institutes'.<sup>61</sup> There are

54 Bastian Baumann, 'Students' view on ombudsman and the importance of their activities for the basic values and principles of the university' in Beisiegel and Leidenfrost (eds), *op.cit.*, 2010, p.17.

55 Bernard Lane, 'University ombudsman lacks trust', **The Australian**, 10 December 2008: 'Sadly the students are telling us they don't trust [campus ombudsmen or deans of students] that sort of person isn't necessarily seen as independent'. Report on study of Australian Learning and Teaching Council into campus ombudsmen.

56 **Review of Complaint Handling in Victorian Universities**, Report of Ombudsman, Victoria, No.131, May 2005, pp.2,6,8,11,13, <https://www.ombudsman.vic.gov.au/getattachment/c81c53b4-62ff-4e3a-9303-14ba40aeef44>.

57 Ombudsman of Ireland, BF.25.9.2015; BK.1.10.2015.

58 Francis Koster, **A Paper on the Role of the Ombudsman in Higher Education**, American Association for Higher Education, 28th National Conference, Chicago, 1973, p.7.

59 **Benchmarking the Legal Ombudsman**, Legal Services Consumer Panel, November 2013.

60 Spanish university Defensor, BE.24.9.2015.

61 Ombudsman in German university, AU.23.9.2015; Also Ombudsman, Polish university, X.10.9.2015.

also claims of discrimination, particularly concerning mental health, disability and sexual harassment. Sexual harassment was reported as being challenging for ombudsmen in higher education in Germany, Poland, Sweden, England and Wales, Canada, Mexico and the USA.

Dealing with all these complex and sensitive issues – mediation, adjudication, empowerment are all options – is difficult enough but ombudsmen in higher education must do much more. They must be accessible and give advice, sometimes to habitual complainers who can be 'emotional, dominant, manipulative, verbally aggressive [and] paranoid'.<sup>62</sup> Additionally, and, critically, ombudsmen provide feedback to the bodies they have jurisdiction over to enable the institutions to learn from experience. Higher education institutions have not always welcomed this feedback, sometimes depicting it as 'mission creep' away from traditional complaint handling and interference in their autonomy.

In response, ombudsmen have developed thick skins and a range of mechanisms including training and ad hoc seminars, and more systematically, written frameworks of good practice on complaints and appeals. These may or may not have statutory backing, but they constitute (when constructed appropriately) essential guides for dedicated and (sometimes) perplexed professionals.

In short, being an ombudsman in higher education is 'nur für die Schwindelfreien' and 'that should depress only those who have lost their nerve'.<sup>63</sup> But the lived experience of the practitioners is not solely defined by the cases they address. For some practitioners, daily life is an existential struggle. A number of respondents, mostly those on campus, and interestingly including those with responsibility for handling staff complaints, reported that institutional line management had interfered with their work, away from the light of public scrutiny. This has compromised their independence.

## Context of higher education ombudsmen work – students' unions and higher education institutions' services

Not all dispute resolution in higher education institutions is carried out by ombudsmen. Students' unions provide advice centres and tangible support to students, where they are strong and well organised. Unfortunately, however, 'student representation is not always as well developed as for example in Austria, the United Kingdom or Finland',<sup>64</sup> even though the umbrella body, the European Students' Union, has 11 million student members in 37 countries.<sup>65</sup>

For students, 'going through a complaint or academic appeal is an incredibly stressful time' and unpleasant experience. The availability, on campus, of an independent students' union advice service goes some way towards redressing the balance of power between a student and his or her institution.<sup>66</sup> Where practice is good, these advice services work in partnership with higher education institutions to ensure that systems are fit-for-purpose and 'to try to put provisions in place to stop students being in the position of feeling the need to make a formal complaint or appeal.' Where the partnership does not exist, or breaks down, or where the student is determined to escalate the case or an institution 'drops the ball', the student

62 Lies Poesiat, **How to improve the necessary ombudsman skills: the Dutch experience**, Paper presented to 10th ENOHE Annual Conference, Oxford, UK, 11-13 April 2013, p.5.

63 Michael Oakeshott, 'Political Education' in **Rationalism in Politics and other essays**, University Paperbacks, London, 1981, p.127. 'Schwindelfreien' are those who do not like heights. Oakeshott was characterising politics.

64 Baumann, op.cit., 2010, p.17.

65 Andrea Blaettler, 'ESU and its Perspective on Student Rights and Ombudsmen in Higher Education' in Martine Conway and Josef Leidenfrost (eds), **Common Objectives, Different Pathways: Embedding Ombudsman Principles and Practices into Higher Education Institutions**, ENOHE, Occasional Paper 7, May 2011, p.11.

66 Rachel Wenstone, **Putting students at the heart of complaints and appeals**, Paper presented to 10th ENOHE Annual Conference, Oxford, UK, 11-13 April 2013.

has recourse to external independent redress.<sup>67</sup> There are dangers of overlap, duplication and potential conflict between the higher education ombudsmen and students' unions. This is paradoxical, given that student movements have played a fundamental role in the creation of higher education ombudsmen. Conflict can only be avoided by consultation, cooperation and a shared understanding of the core role of each entity.<sup>68</sup>

Higher education institutions themselves offer support and guidance through a wide variety of means. This includes a range of initiatives at both strategic and operational level designed to assist students who believe they have experienced a detriment. Examples include Proctors, elegantly described by Oxford University, England, as 'an impartial and discrete institution within the University, with a scrutiny role,'<sup>69</sup> deans of students, complaints managers, grievance officers,<sup>70</sup> and student services centres which offer advice on (for example) immigration and visas, finance, accommodation and course-related issues.<sup>71</sup>

Some of these can overlap with or to some extent duplicate the roles of ombudsmen in higher education,<sup>72</sup> and sometimes they differ from the work of ombudsmen only in the absence of independence from their make-up.<sup>73</sup> These institutional roles are resourced by cadres of committed professionals who in many higher education institutions provide valuable advice and support to students seeking help.<sup>74</sup> Higher education ombudsmen complement this resource with an independent contribution, and are key players in facilitating conflict resolution, saving 'time money and stress for both the university and the complainant and possibly ... the reputation of the university.'<sup>75</sup>

## Higher education ombudsmen – searching for a definition

Endless search for a definition of ombudsman and higher education ombudsmen may be a function of insecurity, not so pronounced in other, older, occupations,<sup>76</sup> but there is need for some clarity.

While the word ombudsman is a powerful 'brand', for one scholar 'it actually contains no prescription as to usage.'<sup>77</sup> There is certainly no one universally accepted definition amongst practitioners and their associations. Guidance on conferring the title 'ombudsman' proliferates from national ombudsman associations in (for example) Great Britain and Ireland,<sup>78</sup> where

67 Ibid.

68 Potential conflict was addressed by Andreas Weikart, Legal Adviser to the Central Office of the Austrian League of Students, 'Student Organizations and Ombudging: Between Partisanship and Impartiality' in Josef Leidenfrost (ed), **Change Management and New Governance in European Higher Education: Ombudging as a Contribution to Quality Assurance**, ENOHE, Occasional Paper 2, February 2006, pp.120-126.

69 <https://www.admin.ox.ac.uk/proctors/>.

70 Dolores Gomez-Moran, 'Student Rights and Grievances – A Short Outlook' in Beisiegel and Leidenfrost, op.cit., 2010, p.145; James G. Jackson, Helen Fleming, Patty Kamvounias and Sally Varnham, **Student grievances and discipline matters project: final report to the Australian Learning and Teaching Council**, Sydney, 2009; Stuhmcke, Olliffe and Evers, op.cit., 2015, p.118.

71 Jill Wilson, Director of Student Services at Aston University, England, in Rob Behrens (ed), **Dispute Resolution in Higher Education in Turbulent Times**, Report of the 10th ENOHE Annual Conference, Oxford, UK, 11-13 April 2013, 2014, p.13.

72 Anita Stuhmcke, 'Grievance Handling in Australian Universities: the case of the university ombudsman and the dean of students', **Journal of Higher Education Policy and Management**, Vol.23, No.2, 2001, p.184.

73 Evidence of 1994 Group, **Pathway 3: Towards early resolution and more effective complaints handling**, OIA, Reading, October 2012, para.44, p.13.

74 Stuhmcke, Olliffe and Evers, op.cit., 2015, p.116.

75 Ibid.

76 Gadlin, op.cit., 1988.

77 Anita Stuhmcke, 'A Snapshot in Time: The Changing Systemic Role of the Australian Commonwealth Ombudsman', **Journal of Law and Social Sciences**, Vol.4, No.1, December 2014, p.101.

78 **Schedule 1 to the Rules: Criteria for the recognition of Ombudsman Offices**, Ombudsman Association, 2011, <http://www.ombudsmanassociation.org/docs/BIOA-Rules-New-May2011-Schedule-1.pdf>.

the policy is endorsed by the UK Cabinet Office,<sup>79</sup> Canada,<sup>80</sup> and Australia and New Zealand.<sup>81</sup> There is also guidance from international associations (for example, the International Ombudsman Association). Most of these authorities were referenced by survey respondents.<sup>82</sup>

At a high level of principle, there is a broad consensus about what higher education ombudsmen do and how they do it. A higher education ombudsman:

'provides accessible and independent mechanisms for addressing disputes or complaints respectfully and constructively. Through its provision of information, education, problem-solving interventions, investigations and recommendations, an ombuds office helps to address grievances fairly, assists in resolving conflict before it escalates and provides a feedback loop for the pro-active improvement of policies, procedures and practices on campus.'<sup>83</sup>

Equally important, an ombudsman has, in contrast to a regulator, no coercive power, but relies on a combination of authority, 'the power of personality'<sup>84</sup> and sometimes in terms of power relations, 'While we cannot bind universities to our decisions, in practice they comply for fear of adverse national publicity.'<sup>85</sup>

Further, higher education ombudsmen should be committed to core principles in their operations including, but not confined to, Independence, Impartiality, Confidentiality and Informality.<sup>86</sup> With an eye to 'new' public management and a focus on effectiveness and efficiency, the (British and Irish) Ombudsman Association's Criteria for Recognition of Ombudsman Offices adds Fairness, Effectiveness, Openness and Accountability.<sup>87</sup> The Forum of Canadian Ombudsman Statement of Ethical Principles adds Credibility.<sup>88</sup>

Beneath this consensus, there is an emphatic lack of agreement about what constitutes independence and whether or not investigation and adjudication are appropriate for an ombudsman. On the subject of independence, the (American-dominated) International Ombudsman Association (IOA) notes:

'The Ombudsman is independent in structure, function, and appearance *to the highest degree possible* within the organisation.' [emphasis added]<sup>89</sup>

79 **Ombudsman Schemes: Guidance for Departments**, Cabinet Office, April 2010, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/61197/guide-new-ombudsman-schemes.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61197/guide-new-ombudsman-schemes.pdf).

80 **ACCUO's Ombuds Toolkit: Setting-up and operating an Ombuds office in a Canadian postsecondary institution**, Association of Canadian College and University Ombudspersons (ACCUO), 2014, [http://www.uwo.ca/ombuds/accuo\\_aoucc/english/ACCUO-OmbudsToolkit2014.pdf](http://www.uwo.ca/ombuds/accuo_aoucc/english/ACCUO-OmbudsToolkit2014.pdf).

81 **Essential criteria for describing a body as an Ombudsman: Policy statement endorsed by the Members of the Australian and New Zealand Ombudsman Association (ANZOA)**, ANZOA, February 2010, [http://www.anzoa.com.au/assets/anzoa-policy-statement\\_ombudsman\\_essential-criteria.pdf](http://www.anzoa.com.au/assets/anzoa-policy-statement_ombudsman_essential-criteria.pdf).

82 For example: 'I adhere to the ACCUO [Association of Canadian College and University Ombudspersons] standards of practice and the Forum of Canadian Ombudsman statement of ethical principles.' Ombudsperson, Canadian University, M.5.9.2015; Executive Director, CNCR, University of Georgia, N.5.9.2015.

83 **ACCUO's Ombuds Toolkit: Setting-up and operating an Ombuds office in a Canadian postsecondary institution**, op.cit., 2014, p.3.

84 Ombudsman, Goethe University, Frankfurt, AU.23.9.2015; Australia, BI.28.9.2015.

85 Ombudsman, England and Wales, AB.1.9.2015.

86 **IOA Code of Ethics**, International Ombudsman Association, [http://www.ombudsassociation.org/IOA\\_Main/media/SiteFiles/Code\\_Ethics\\_1-07.pdf](http://www.ombudsassociation.org/IOA_Main/media/SiteFiles/Code_Ethics_1-07.pdf).

87 **Schedule 1 to the Rules: Criteria for the recognition of Ombudsman Offices**, op.cit., 2011.

88 **Statement of Ethical Principles**, Forum of Canadian Ombudsman, 2014, [http://www.ombudsmanforum.ca/en/?page\\_id=157/](http://www.ombudsmanforum.ca/en/?page_id=157/).

89 **IOA Code of Ethics**, International Ombudsman Association, 2007, [https://www.ombudsassociation.org/IOA\\_Main/media/SiteFiles/Code\\_Ethics\\_1-07.pdf](https://www.ombudsassociation.org/IOA_Main/media/SiteFiles/Code_Ethics_1-07.pdf).

By contrast, in Australia and New Zealand:

'An office set up within a company or government agency as an 'internal ombudsman' is not independent.'<sup>90</sup>

The suggestion here is that for ANZOA (the Australian and New Zealand Ombudsman Association) the use of the term 'internal ombudsman' is a 'contradiction in terms',<sup>91</sup> whereas in the tradition of the organisational ombudsman the IOA countenances internal office holders.

As far as adjudication as a form of dispute resolution is concerned, the International Ombudsman Association Standards of Practice notes that:

'The Ombudsman, as an informal resource, does not participate in any formal adjudicative or administrative procedure related to concerns brought to his/her attention.'<sup>92</sup>

Again and by contrast, guidance from a number of other authorities, for example Canada, England and Wales, Ireland, Australia and New Zealand, explicitly acknowledges that adjudication is a legitimate tool of ombudsmen. In Canada, ombuds activities include:

'providing information and referrals; coaching and advising people with complaints or concerns; problem-solving and mediating; investigating *and making recommendations*'. [emphasis added]<sup>93</sup>

For the Ombudsman Association (UK and Ireland) under the principle of Fairness, adjudication is explicitly countenanced:

'The Ombudsman should make *reasoned decisions* in accordance with what is fair in all the circumstances, having regard to principles of law, to good practice and to any inequitable conduct or maladministration.' [emphasis added]<sup>94</sup>

And in Australia and New Zealand:

'The Ombudsman must be able *to investigate whether an organisation within jurisdiction has acted fairly* and reasonably in taking or failing to take administrative action or in providing or failing to provide a service.' [emphasis added]<sup>95</sup>

These disagreements have implications for higher education ombudsman practice as we shall see below. At the most serious level, they have led to appointees losing their jobs for having

90 **Essential criteria for describing a body as an Ombudsman: Policy statement endorsed by the Members of the Australian and New Zealand Ombudsman Association (ANZOA)**, media release, ANZOA, May 2010, [http://www.anzoa.com.au/assets/anzoa\\_media-release\\_essential-criteria-for-use-of-the-term-ombudsman.pdf](http://www.anzoa.com.au/assets/anzoa_media-release_essential-criteria-for-use-of-the-term-ombudsman.pdf).

91 Stuhmcke, Olliffe and Evers, *op.cit.*, 2015, p.116.

92 **IOA Standards of Practice**, International Ombudsman Association, 2009, [http://www.ombudsassociation.org/IOA\\_Main/media/SiteFiles/IOA\\_Standards\\_of\\_Practice\\_Oct09.pdf](http://www.ombudsassociation.org/IOA_Main/media/SiteFiles/IOA_Standards_of_Practice_Oct09.pdf).

93 **ACCUO's Ombuds Toolkit**, *op.cit.*, 2014, p.3.

94 **Schedule 1 to the Rules: Criteria for the recognition of Ombudsman Offices**, *op.cit.*, 2011.

95 **Essential Criteria for describing a body as an Ombudsman**, *op.cit.*, February 2010.



produced recommendations 'unacceptable' to their governing bodies. And the disagreements are not easily susceptible to resolution, since only in New Zealand is the term Ombudsman protected by legislation.<sup>96</sup> In the view of ANZOA:

'The term Ombudsman is understood by the public as signifying an independent office, which primarily has a complaint handling and investigative function. Using the term 'ombudsman' to describe an office with regulatory, disciplinary and/or prosecutorial functions confuses the role with that of a regulatory body ...'<sup>97</sup>

As a result, the concept of Ombudsman has been 'stretched' and public confidence in the role and independence of the institution 'is at risk of being undermined and diminished.'<sup>98</sup>

## Mapping the diversity of ombudsmen in higher education

Christian Gill has pointed out with reference to the wider ombudsman institution that 'The literature is replete with typologies, taxonomies and metaphors that seek to account for the multifaceted nature of the ombudsman institution'.<sup>99</sup> The range of organisational forms of higher education ombudsmen is equally diverse, but probably even less susceptible to brigading into a typology. In some countries ombudsmen in higher education either do not exist, or are embryonic in development. This is only to be expected in parts of Europe where liberal democracy and accountability systems arrived only slowly after the collapse of the Soviet Union. Even where higher education ombudsmen offices now exist, in some countries their existence is under threat, often from higher education institution grandees who find their independent judgement inconvenient.

The term 'embryonic' is perhaps best used in some countries where higher education ombudsmen operate, because they are new, thin on the ground or arrangements defy ordered presentation. Another term used to describe the lack of system and consistency of arrangements is 'idiosyncratic'.<sup>100</sup> This is not a criticism, merely an observation consistent with relatively new organisational forms.

In Germany, for example:

'universities are in transition ... with regard to complaints. Rather different approaches have been installed, but universities with student ombudsmen are still rather limited ... Complaint management is a new topic for German universities ... We often hear: "I didn't know there is complaint management at our university, a fellow student told me".'<sup>101</sup>

96 S28A of the Ombudsmen Act 1975, New Zealand: '(1) No person other than an Ombudsman appointed under this Act may use the name "Ombudsman" in connection with any business, trade, or occupation or the provision of any service, whether for payment or otherwise, or hold himself, herself, or itself, out to be an Ombudsman except pursuant to an Act or with the prior written consent of the Chief Ombudsman. (2) Every person commits an offence and is liable on summary conviction to a fine not exceeding \$1,000 who contravenes subsection (1) of this section', <http://www.legislation.govt.nz/act/public/1975/0009/193.0/contents.html>.

97 **Essential criteria for describing a body as an Ombudsman**, media release, op.cit., May 2010.

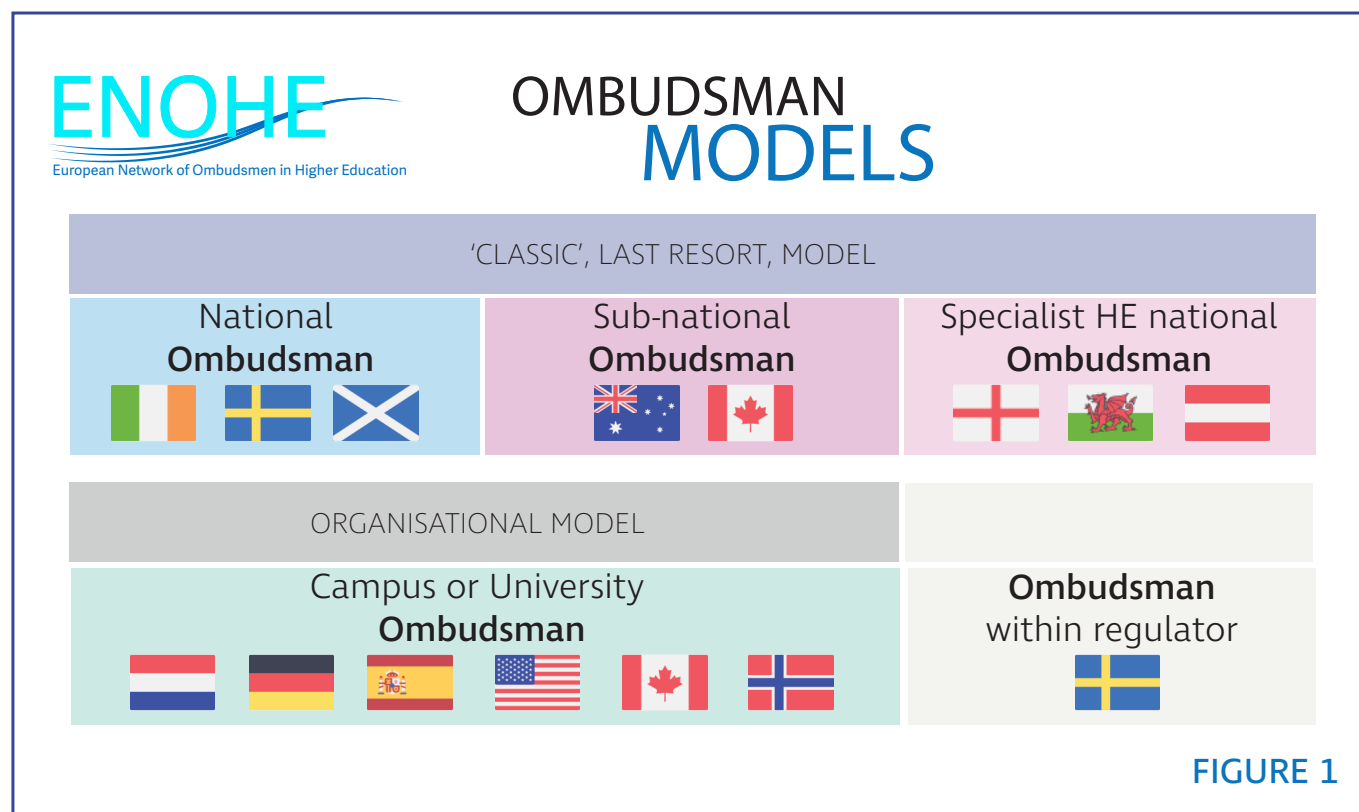
98 Ibid.

99 Christian Gill, 'The Evolving Role of the Ombudsman: A Conceptual and Constitutional Analysis of the "Scottish Solution" to Administrative Justice,' **Public Law**, October 2014, p.667.

100 Stuhmcke, Olliffe and Evers, op.cit., 2015, p.124.

101 Hertlein, op.cit., 2013.

There has been a small amount of academic study of higher education ombudsmen in North America,<sup>102</sup> some in Australia,<sup>103</sup> but very little in Europe.<sup>104</sup> From these studies, and from this current research, there are at least five variants of higher education ombudsmen. Often, more than one variant is present in any one country since not every higher education ombudsman is an ombudsman of last resort, resulting in the decisions of one ombudsman being referred to another.



First, national ombudsmen (eg Ireland, Scotland, Sweden, Northern Ireland, and Malta) with responsibility across a number of functional fields have accrued higher education into their jurisdiction. These national ombudsmen are based on the 'classical' ombudsman model with 'last resort' functions for higher education disputes. This means reviewing cases where the complainant has either had no redress from the higher education institution or is not satisfied with the redress received.

In Ireland, the Ombudsman is also (inter alia) the Information Commissioner, and Commissioner for Environmental Information.<sup>105</sup> Oversight of higher and further education was only added with the Ombudsman Amendment Act 2012, and a commencement date of 2013.<sup>106</sup> In Scotland, the Scottish Public Service Ombudsman (SPSO) was created through an amalgamation of four functional ombudsman organisations in 2002,<sup>107</sup> including the Scottish Parliamentary Commissioner, and redress services for health, local authorities and housing. The SPSO's jurisdiction was extended to Scottish Further and Higher Education in

102 See for example, Fred G Janzen, **A Historical Study of the Campus Ombudsman in United States Higher Education**, Texas Tech University, Doctor of Education Thesis, May 1971; Mary J Newhart, **Ombudsmen in Higher Education: Similarities, Divergences and the Rise of Alternative Dispute Resolution**, Cornell University, Master of Science Thesis, August 2007.

103 Stuhmcke, op.cit., 2001, pp.181-189.

104 Tim Birtwistle, **Legal aspects of higher education in an international context: Disputes, resolutions, methods and safeguards**, EAIE Occasional Papers, Amsterdam, 2008; Josef Leidenfrost, 'Ombudsmen in Higher Education: Helping the Single Student, Contributing to the Universities' Institutional Challenges', **Creative Education**, 2013, Vol.4, No.7a2, pp.8-10, <http://www.scirp.org/journal/PaperInformation.aspx?PaperID=34177>.

105 BX.10.1.2015.

106 Emily O'Reilly, 'University challenge for ombudsman', **Irish Times**, 1 May 2013.

107 Scottish Public Services Ombudsman Act 2002, s.26(1)Sch7(2)(1).

2005.<sup>108</sup> In Sweden, the Parliamentary Ombudsman reviews a small number of cases from the Higher Education Authority which itself reviews a small number of original higher education institution decisions.<sup>109</sup> In Northern Ireland, universities were included in the jurisdiction of the new Public Services Ombudsman under legislation enacted in 2017.

Secondly, there are a number of sub-national, provincial or state ombudsmen (eg in Australia and Canada) handling complaints across a number of functional areas including public universities. These ombudsmen are also based on the classical model, and they review cases arising out of universities (some of whom also have campus ombudsmen) within their territory.<sup>110</sup> A key issue here is to ensure effective communication and relationships between the sub-national ombudsman and (where the post exists) the ombudsman at university level. The Acting Ombudsman in Ontario put it in refreshingly blunt terms, albeit at the commencement of jurisdiction:

'We're not looking to replace university ombuds. We certainly do not want to put them out of their jobs. We want them to be strong. We want them to be effective. And in my own view, complaints are best dealt with at the local level. If you can resolve a problem with a university Ombudsman or a university can resolve a problem itself without it having to get to us, I think that's a very good thing and something we're really encouraging.'<sup>111</sup>

Even with this model one should not over-emphasise uniformity. In Canada, for example, not every Province or Territory has an ombudsman, and unlike in Australia there is no federal ombudsman at the apex of 'the system'. Some Canadian Provincial Ombudsmen have only very recently taken responsibility for reviewing complaints from universities – Ontario with more than 20 publicly funded universities, began in 2016.<sup>112</sup>

In Australia, sub-national (State and Territory) Ombudsmen have oversight of the majority of student complaints, though the Commonwealth (national) ombudsman reviews complaints about the Australian National University and within the Commonwealth Ombudsman office, the Overseas Student Ombudsman reviews a limited number from international students about private providers.<sup>113</sup>

Australian sub-national ombudsmen have played an important role in drawing attention to and rooting out weaknesses in university complaint handling. Using 'own motion' powers, the Ombudsman of Victoria criticised the eight universities within its jurisdiction in 2005 for multiple complaints-related failures. These included: failure to recognise the value of learning from complaints to aid system improvement; poor centralised record-keeping; low levels of awareness of the need for fair procedures in handling complaints; confusion about the role of the State Ombudsman in providing redress; over-complex and under-used formal complaints procedures; and the absence of fairness in decision-making by academic staff.<sup>114</sup> A parallel study in New South Wales came up with similar findings.<sup>115</sup>

108 Further and Higher Education (Scotland) Act 2005 s.27(1)(b).

109 Information from respondent, 5.9.2016. See <http://www.jo.se/en/> and the criticisms of Stockholm University by the Parliamentary Ombudsman, 10.1.2017.

110 Patty Kamvounias, 'Public Sector Ombudsmen and Higher Education' in Varnham et al, op.cit., 2015, pp.125-136.

111 Finlay, op.cit., 2016.

112 Ibid.

113 Kamvounias in Varnham et al, op.cit., 2015, pp.126-136.

114 **Review of Complaint Handling in Victorian Universities**, op.cit., 2005, pp. 2,6,8,11,13.

115 New South Wales Ombudsman, **Complaint Handling at Universities: Best Practice Guidelines**, December 2006, quoted in Varnham et al, op.cit., 2015, p.127.

Thirdly, there are a small number of specialist national higher education ombudsmen (Austria, England and Wales, Lithuania) established under legislation.<sup>116</sup> In the cases of England and Wales and Austria, these were not self-evidently fully-fledged ombudsman schemes at inception, but have developed as such over time. Commenting soon after the passage of relatively conservative legislation in 2004 to create the OIA, Professor Tim Birtwistle noted drily: 'It may just be that the OIA is an ombudsman in disguise.'<sup>117</sup>

Fourthly, most higher education ombudsmen in North America and in continental Europe are campus ombudsmen. These follow the form of the 'organisational ombudsman' in the private sector focusing on dispute resolution and mediation.<sup>118</sup> Most campus ombudsmen work in small offices with very few co-workers. Campus ombudsmen 'may get involved in dispute resolution by a variety of means, for example "shuttle" contacts, informal problem analysis and discussion, mediation etc as opposed to final adjudication.'<sup>119</sup> Campus ombudsmen do not always investigate complaints themselves 'but act as a resource for staff and students who experience difficulties and might be considering raising a formal grievance.'<sup>120</sup>

Last, some ombudsmen are located within national higher education regulatory bodies. For example, the Swedish Higher Education Authority (UKA) is the regulatory authority, scrutinising public sector higher education institutions to ensure they comply with the laws and statutes that apply to higher education. At the same time, UKA adjudicates on complaints from individuals or organisations, mostly students and students' unions.<sup>121</sup> Complaint decisions of UKA – there were 154 in 2015 – can be reviewed by the Swedish Parliamentary Ombudsman.<sup>122</sup> Separately, but related, the Higher Education Appeals Board (ONK) will hear appeals – 1400 cases in 2015 – relating to cases which cover matters relating to academic judgement.<sup>123</sup> There is no appeal against ONK appeal decisions. While the UKA is the 'host authority' (vardmyndighet) for the Higher Education Appeals Board, handles ONK administrative duties and prepares cases for hearing, ONK (founded in 1992) is legally separate. The President of the Board (which includes a student member) is chief judge of a district court.<sup>124</sup>

In summary, as institutional forms, higher education ombudsmen are tricky things to get to know. They originate from student unrest and dissent, and from a determination to level power relationships in higher education institutions. They focus largely on redress for students through informal means. They exist variously as national, sub-national, and higher education institution-based organisations, operating within manifestly different political and cultural entities. In this fragmented landscape, it is pertinent to ask if the office holders have any commonality of views about their practice. To this we now turn.

116 Leidenfrost, 'Ombudsmen in Higher Education: Helping the Single Student, Contributing to the Universities', op.cit., 2013.

117 Tim Birtwistle, Addendum to 'The UK to Adopt the Role of Ombudsman for Higher Education? Late and on a Voluntary Basis' in Holtrop and Leidenfrost (eds), op.cit., 2006, p.54.

118 Howard, op.cit., 2010.

119 Tim Birtwistle, 'The Campus Ombudsman', **ENOHE News**, 2009/2, p.11.

120 Margaret Doyle, Where do campus ombuds fit in?, Domar Mediation, 2012, <https://domarmediation.co.uk/2012/09/07/where-do-campus-ombuds-fit-in/>.

121 <http://english.uka.se/student-rights/supervision-by-the-swedish-higher-education-authority.html>. See also Paul Greatrix, 'Students at the heart of the system: the Swedish approach', **Wonkhe**, 16 November 2015, <http://wonkhe.com/blogs/students-at-the-heart-of-the-system-the-swedish-approach>.

122 <http://www.jo.se/en/Search/?searchType=decision&query=universities&caseNumber=4420-201>.

123 Information provided by Swedish respondent, 5.9.16 and information provided by Swedish Higher Education Authority, 12.9.2016; <http://english.uka.se/student-rights/supervision-by-the-swedish-higher-education-authority.html>.

124 Ibid.

# CHAPTER THREE

## LIVED EXPERIENCE

### Introduction

This Chapter reviews the lived experience of ombudsmen in higher education, based on the survey of ENOHE network members in 2015. In some ways, ombudsmen are the Cinderellas of higher education – they rarely go to the ball, are seldom loved or appreciated, but do perform an important, house-keeping, function. Their commitment to impartiality requires a critical distance from contesting parties to a dispute or complaint. Dressed in the rhetoric of what one early practitioner called ‘a priggish mantle, like a hair shirt you wear around campus for the common good ... you speak in lofty phrases such as “fairness” and “academic freedom” and “due process” and “professional ethics”’. As a result, ‘Almost inevitably you become respected, but not liked.’<sup>1</sup> This study’s questionnaire returns show that beneath this impressionistic account is a seriousness and angst which reflects the status and challenges of an embryonic profession, hugely challenged and with significant internal disagreements about what constitutes good practice.

### The 2015 ENOHE survey

There were 60 responses to the questionnaire from 18 countries. The response rate was 39 per cent. 74 per cent of respondents were based in Europe (Belgium, England and Wales, Ireland, Germany, Lithuania, Malta, the Netherlands, Norway, Poland, Scotland, Spain and Sweden), 15 per cent in North America, 4 per cent in Australia and 4 per cent from elsewhere. 58 of the 60 respondents were serving ombudsmen at the time of completing the questionnaire. 68 per cent of respondents worked for a single institution (usually a university) and 32 per cent worked for a national agency. 58 per cent had been in post for 5 years or less.

In cross-country analysis, language and terminology is always sensitive. The vast majority of survey respondents – 87 per cent – used the term ‘ombudsman’ and accepted it as legitimate, notwithstanding challenges to the term on grounds of gender equality. 52 per cent had an official title ‘ombudsman’, 12 per cent (Spain and Mexico) Defensor, and 8 per cent ‘ombudsperson’.

Other terms need to be used with equal caution. The sensitivity of using ‘complaint’ was noted in Chapter 1. In addition, in relation to general ombudsman practice, research covering 48 institutions by Doyle, Bondy, and Hirst has provided compelling evidence that terms such as mediation, informal and early resolution are used in non-standard and very variable ways by practitioners.<sup>2</sup> With telling irony the authors quote Lewis Carroll: “When I use a word,” Humpty Dumpty said in rather a scornful tone, “it means just what I choose it to mean — neither more nor less.”<sup>3</sup>

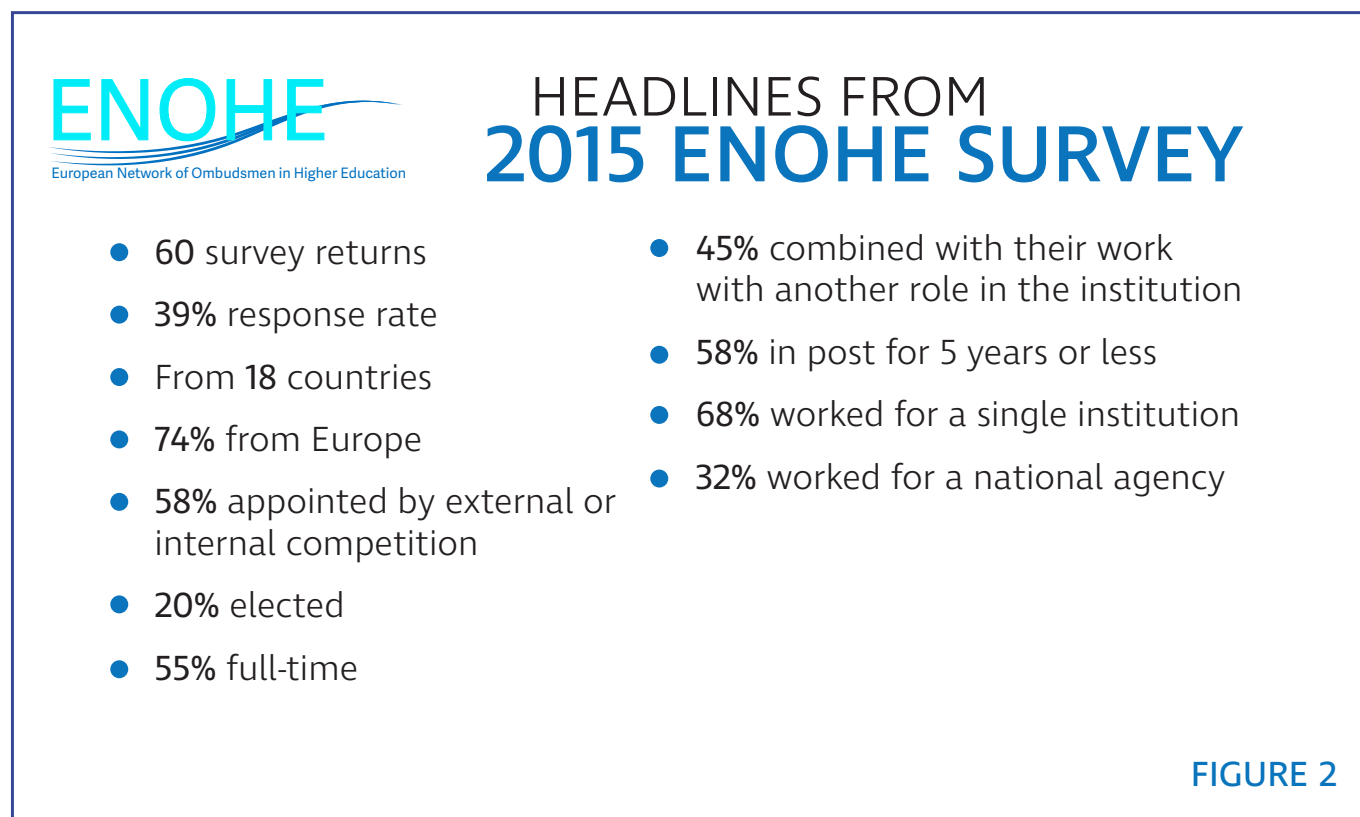
With this in mind, the questionnaire assisted respondents by setting out brief and generally accepted definitions of adjudicator, arbitrator, and mediator. In adjudication, an independent third party considers the claims of parties in dispute, and makes a decision based on the

1 Koster, op.cit., 1973, pp.8-9.

2 Margaret Doyle, Varda Bondy, and Carolyn Hirst, **The use of informal resolution approaches by ombudsmen in the UK and Ireland: A mapping study**, October 2014, <https://administrativejusticeblog.files.wordpress.com/2014/10/the-use-of-informal-resolution-approaches-by-ombudsmen-in-the-uk-and-ireland-a-mapping-study-1.pdf>.

3 Ibid, quoting Lewis Carroll, **Through the Looking Glass, and What Alice Found There**, 1872.

(usually written) information provided. The decision is not binding on the student or the higher education institution. By contrast, an arbitrator is an independent third party who makes a decision, normally binding, that seeks to resolve a dispute between the parties.<sup>4</sup> A mediator is generally an independent and impartial third party who helps parties with a dispute to meet and reach an agreement between themselves.<sup>5</sup>



## Core operational principles

In terms of questionnaire responses, and on a level of principle, there was a very high degree of consensus about the operational principles covered by the higher education ombudsman role. Asked 'which of the following operational principles does your role cover?', respondents answered: independence (85 per cent), neutrality and impartiality (88 per cent), confidentiality (88 per cent), and informality in process (78 per cent). In general, the principles have totemic status, though interestingly, 12 per cent of respondents answered specifically that independence was not part of their operational role.

The core principles are described variously as:

'the basis of my work' (the Netherlands)<sup>6</sup>

'These principles [independence, neutrality and impartiality, confidentiality, and informality in process] -- individually and in combination -- deeply inform what I do and how I do it, the services I provide and how I work with the people that approach me and

4 Drawn from ENOHE Questionnaire 2015; see also **Pathway 3 Consultation: Towards early resolution and more effective complaint handling**, OIA, Reading, October 2011, p.10; and [www.adrnow.org.uk](http://www.adrnow.org.uk).

5 Ibid.

6 1.4.9.2015.

the institution. For example, “independence” means that I am not an agent of and cannot speak for the institution. The University must speak for itself ... “Informality” means I am likely to pick up the phone to ask a question of that key person. “Confidentiality” means that if a student doesn’t want his/her identity to be known, and with the permission of that key person, I may allow a student to listen in to that call. “Informality” may also allow me to be available to a student who is confused or scared about a University process.’ (USA)<sup>7</sup>

‘imperative to ... effective operation. Independence has been confirmed by the Court of Appeal. Legislation requires impartiality between the parties. Confidentiality is important, but all material submitted by complainants has to be shown to the university during adjudication. We promote Informality through mediation and settlement of cases in advance of adjudication, and in the way we gather evidence. We are not a court, and do not use adversarial approaches.’ (England and Wales)<sup>8</sup>

and

‘the foundations of our practice and are described to all who speak with us prior to beginning a consultation. We reflect constantly on how we are conceptualizing and implementing these principles and how we can improve in these areas.’ (Canada)<sup>9</sup>

This indicates that at least on a general level of principle there is resounding consensus amongst practitioners about what higher education ombudsmen do.

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## Range of activities

The range of activities higher education ombudsmen carry out is extensive and constitutes a rich tapestry of endeavour. Looking across the questionnaire responses, higher education ombudsmen are engaged in multi-tasking. They facilitate, resolve complaints, advise, mediate, counsel, act as change agents, represent, promote good practice, train, research and report.

A Swedish student ombudsman

‘Provides qualified advice and support; represents students in disciplinary matters; pursues negotiations and mediation between the concerned parties; runs investigations and surveys to give a better understanding of the issues and trends; arranges courses and workshops; and gives consultative support to the University, eg work environment policy and the equal treatment plan.’<sup>10</sup>

In Poland, a university ombudsman

‘[promotes] high ethical standards and innovative methods of conflict resolution in the academic environment; [provides] assistance in the resolution of conflicts and reducing their negative effects ... gathers and disseminates information regarding applicable university regulations and general rules of operation; [and] identifies sources of problems which hinder the proper functioning of the university.’<sup>11</sup>

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7 Y.9.10.2015.

8 AB.17.9.2015.

9 Ombudsperson, Canada, K.4.9.2015.

10 T.8.9.2015.

11 Student Ombudsman, X.10.9.2015.

In Germany, the ombudsperson at University of Stuttgart, Frankfurt, is engaged in

'meeting complainants and people concerned to get to know their issues, mediation between students and staff, gathering information concerning complaints, initiating and managing (university-wide) processes for preserving and further enhancing quality standards in teaching.'<sup>12</sup>

And in Canada, a university ombudsman is responsible for

'recruiting, interviewing, hiring, training, mentoring, supervising and evaluating the Graduate Ombudsperson and Undergraduate Ombudsperson; and two full-time student interns; Develop[ing] all policy and protocol for ombuds, including updating office protocol, training manuals; statistical and best practice reports; ... statistical data reporting, reports, archival records and FOIP inquiries.'<sup>13</sup>

The ombudsman's facilitative role is emphasised by a number of respondents.<sup>14</sup> It is about 'assisting individuals to understand routes available to handle the concerns themselves.'<sup>15</sup> The ombudsman 'is a resource to help people navigate the university.'<sup>16</sup> This can mean being 'a comprehensive campus information service,'<sup>17</sup> finding 'the people within our organisation that might be able to solve the problem. And let them know about it.'<sup>18</sup> It can also mean being 'an independent support person for students who are considering taking up issues related to their study situation,'<sup>19</sup> and providing 'a safe and confidential space to explore conflicts, problems and concerns.'<sup>20</sup>

Close to, and over-lapping with, this role is complaints resolution. Many ombudsmen examine complaints. Being the first point of contact that students can turn to in relation to study-related complaints is a common (but not universal) role.<sup>21</sup> This might be done nationally or within a single institution. Complaints resolution carried out nationally across a range of institutions is found in (for example) Ireland, Austria, Scotland, England and Wales and Malta.<sup>22</sup>

There are also many examples of complaints resolution within a single institution. At Tel Aviv University, in Israel, the ombudsman examines 'all complaints by students or candidates to become students regarding claimed wrongs done to each one of them by University bodies or personnel'.<sup>23</sup> At the Nicolaus Copernicus University in Toruń (NCU), Poland, the Academic Ombudsman assists 'parties in conflict resolution based particularly on help in diagnosing the problem and determining the solution, or resolution of the problem on one's own'.<sup>24</sup>

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12 University of Stuttgart, Frankfurt, ombudsperson, S.8.9.2015.

13 Canada, W.9.9.2015.

14 Professor, University of Technology, Sydney, Australia, BI.28.9.2015; AK.22.9.2015; AQ.22.9.2015.

15 K.4.9.2015. Also M.5.9.2015.

16 Y.9.10.2015.

17 Student Ombuds, BA.23.9.2015.

18 Feedback Manager, AQ.22.9.2015.

19 Studentombud, University of Oslo, Norway, R.7.9.2015.

20 Studentombud, University of Bergen, Norway, BJ.1.10.2015.

21 Ombudsman, Austrian University, AM.22.9.2015.

22 Ombudsman of Ireland, BK.1.10.2015; Office of the Parliamentary Ombudsman, Malta, E.4.9.2015; Ombudsman of Ireland, BK.1.10.2015.

23 Ombudsman, Tel Aviv University, Israel, V.8.9.2015; Also, Investigations Manager, Scottish university, G.4.9.2015.

24 BG.28.9.2015.



Similarly, at one Swedish university the role is to receive and investigate complaints and make recommendations.<sup>25</sup>

Some ombudsmen deal with staff complaints only.<sup>26</sup> In one Dutch university, this includes PhD students who are members of staff in the Dutch higher education system.<sup>27</sup> A Swedish university has an ombudsman, '*doktorandombudsman*', for doctoral students only.<sup>28</sup> Others deal with both staff and student complaints. There are examples of this in the Netherlands and in Spain where the Defensor at Universidad Carlos 111 de Madrid addresses 'the complaints about students, administration staff and professors at the University.'<sup>29</sup>

A third key, related, role for higher education ombudsmen is to give advice. In order to give advice, the ombudsman has to be known about, and there are imaginative examples of how this is done:

'At the University we have something that we call "Talking about Student Rights". This is an activity that I do together with the Student Union and the Administrator of disciplinary matters. We go out to students at lunchtime every Thursday at the Student Square and talk to students. We introduce ourselves and bring on a "Question of the week" that can be a question concerning rules, regulations and policies at the University. The question has always something to do with "popular questions" among students. The question is an icebreaker for our chat with students ... We also work with the new group of teachers that are employed during the year. We have presentations for them concerning University rules and the support that students get. We have group activities where we bring real examples to the teachers to work with and they discuss how the matters should have been handled instead of what happened.'<sup>30</sup>

At the University of Gavle in Sweden:

'All students ... can turn to the studentombudsman for advice and tips on laws, rules and guidelines related to the studies. I answer questions about everything from the schedule, exams and tests to harassment and disciplinary matters. Students can contact me if they end up in a situation at the university [where] they for various reasons want help. They might feel unfairly treated by a lecturer or the university administration.'<sup>31</sup>

At Gothenburg University in Sweden, the Ombudsman assists and helps 'students at all levels who encounter difficulties and problems with their education'<sup>32</sup> while at another Swedish university the Studentombud provides 'qualified advice and support'.<sup>33</sup>

Advice is a widely reported role as the following examples from Norway, Germany, Belgium and Poland demonstrate:

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25 AP.22.9.2015.

26 Ombudsman, the Netherlands, I.4.9.2015; Ombudsman staff, AG.21.9.2015.

27 Vertrouwenspersoon (confidential advisor), Utrecht University, Netherlands, O.6.9.2015.

28 AE.21.9.2015.

29 University Ombudsman, the Netherlands, AW.23.9.2015; Ombudsman, Dutch university, BD.24.9.2015; Spain, Z.14.9.2015.

30 Student Ombudsman, Boras University Sweden, J.4.9.2015.

31 Studentombud, Gefle Studentkar, the Student Centre in Gavle, BC.24.9.2015.

32 H.4.9.2015.

33 T.8.9.2015.

'The Ombudsperson for Students at Oslo University College is an impartial person giving advice and assistance to students in matters concerning the study situation. For example, questions about complaints, problems regarding admission, examination or practice, psychosocial environment, cases of cheating or suitability issues. ... I cannot tell anyone what to do, but I can give advice both to the organization and to the students.' (Norway)<sup>34</sup>

'Pleading and advising students problems with examinations office, with professors with other students discussing all types of difficulties arising from university life (e.g. whether to continue or to terminate) how to cope with supervisor problems during doctoral studies' (Germany)<sup>35</sup>

'Advising academic staff and students in case of emerging conflicts.' (Belgium)<sup>36</sup>

'providing proper information on legal regulations applicable at the University' (Poland)<sup>37</sup>

Many ombudsmen go beyond advice. A very small number do suggest they offer counselling, but the term is ambiguous and was not defined in the questionnaire. For example, one ombudsman reported that he 'counselled', but it is not clear if he used the term as synonymous with 'advice' or to refer to quasi-clinical engagement.

Some ombudsmen, including a number in Sweden, carry out a representational role.<sup>38</sup> For example, at Gothenberg University, the Ombudsman supports students who are called to face disciplinary boards.<sup>39</sup> Similarly, at the University of Gavle, the Studentombud notes 'It is my job to defend the students' rights and represent the student in cases when they do not want to participate.'<sup>40</sup> This is an activity which might be in tension with the principle of independence, but constitutes concrete support for service users at a critical time.

Many more higher education ombudsmen offer mediation. Mediation is carried out at some French universities,<sup>41</sup> though no French practitioner took part in the survey. Cited examples of mediation include:

'I can mediate between students and faculty members or administration.' (Norway)<sup>42</sup>

'I attend discussions with both conflict parties and try to mediate' (Germany)<sup>43</sup>

'I mediate between staff members who have conflicts' (the Netherlands)<sup>44</sup>

'recommending and organising mediation ... promoting alternative methods of dispute

34 D.4.9.2015.

35 Ombudsman, Goethe University, Frankfurt, Germany, AU.23.9.2015.

36 Institutional Ombudsperson, Ghent University, Belgium, AH.21.9.2015.

37 Academic Ombudsman, Nicolaus Copernicus University in Toruń (NCU), Poland, BG.28.9.2015.

38 Studentombud, Swedish university, T.8.9.2015.

39 Ombudsman, H.4.9.2015.

40 BC.24.9.2015.

41 Georges Fournier, 'University Mediation à la Française: The Rennes Example' in Reddy and Leidenfrost, op.cit., 2009, pp.118-125.

42 Studentombud, Oslo and Akershus University College of Applied Sciences, Norway, D.4.9.2015.

43 AQ.22.9.2015.

44 Vertrouwenspersoon (confidential advisor), Utrecht University, the Netherlands, O.6.9.2015.

resolution in the academic environment.' (Poland)<sup>45</sup>

'Enquiries, Complaints and Mediation' (Spain)<sup>46</sup>

While the examples above come from campus ombudsmen, national higher education ombudsmen have increasingly turned their attention to this process. Mediation is one of the key features of the work of the Austrian Student Ombudsman.<sup>47</sup> Following nationwide consultations and early resolution pilots, mediation has also been promoted and developed by the Office of the Independent Adjudicator (OIA) for Higher Education in England and Wales as part of the skills set of OIA complaints handlers.<sup>48</sup> This work has also been developed on campuses and reviewed for its effectiveness by Susan Watson and colleagues at Kingston University, London (see Chapter 5).

A very large number of respondents saw themselves as not simply complaints resolvers, but also as change agents. This is related to using the experience, material and outcomes of complaints resolution to educate and influence decision-makers about better policy and operations. It is about making recommendations for improved policies and procedures and providing input about topics of concern.<sup>49</sup> This requires 'a listening ear ... with an awareness of the concerns of the individual as well as the concerns of the institution'.<sup>50</sup> It requires an analytical ability to gauge what are system-wide or systemic issues,<sup>51</sup> how these can be fed-back through the institution,<sup>52</sup> and also how to use fairness principles to develop policy.<sup>53</sup> This can be a sensitive activity. For campus ombudsmen it can mean 'briefing and advising the Rector in the area of necessary changes aimed at improving the operation of the university'<sup>54</sup> after things have gone wrong. 'Speaking truth unto power' requires steel and determination.

Additionally, to be effective change-agents, ombudsmen have to be evidence-based in their approach to change. This means, for example, 'running investigations and surveys' on campus 'to give a better understanding of the issues and trends.'<sup>55</sup> This approach is just as relevant for national ombudsmen as for campus ombudsmen. The modernisation and development of the OIA was rooted in a recurring series of national consultations seeking user and stakeholder opinion on the path for strategic change.<sup>56</sup>

Another key, common, role for higher education ombudsmen is to be disseminators of good practice in complaints and academic appeals handling. There is a large body of evidence to suggest that this activity is being engaged in with imagination and insight, and this is examined in Chapter 5.

45 Academic Ombudsman, Nicolaus Copernicus University in Toruń (NCU), Poland, BG.28.9.2015.

46 Aldezle (Champion), F.4.9.2015.

47 Austrian Student Ombudsman, B.1.9.2015; see Josef Leidenfrost, **(In-House) Mediation as a Tool in Higher Education Conflict Management: The Austrian Experience**, ENOHE, Occasional Paper 10, May 2015; and Josef Leidenfrost, 'Conflict resolution at universities: Ombudsman mediation as a tool?', **Perspective/Focus**, February 2015, pp.101-106.

48 <http://www.oiahe.org.uk/media/91473/mediation-a-guide-for-students.pdf>.

49 Ombudsperson, Canada, M.5.9.2015; Student Ombudsman, Australia, P.7.9.2015; Ombudsman, Austrian university, AM.22.9.2015.

50 Student Ombuds, Canada, BA.23.9.2015.

51 Director, Office of Student Ombudsman, University of Alberta, Canada, W.9.9.2015.

52 Ombudsperson, University of California, Los Angeles, AS.22.9.2015.

53 Ombudsperson, Canada, K.4.9.2015.

54 Ombudsman, Polish university, X.10.9.2015.

55 Studentombud, Swedish university, T.8.9.2015.

56 Rob Behrens, 'Sailing on the 'Boundless and Bottomless Sea': a view from the OIA Bridge', *Perspectives: Policy and Practice in Higher Education*, 2015, pp.2-3.

## THE MOST IMPORTANT ASPECTS OF YOUR ROLE

- ① Giving advice
- ② Information dissemination
- ③ Being an agent of change
- ④ Mediating disputes
- ⑤ Counselling
- ⑥ Arbitrating
- ⑦ Advocating on behalf of a single party
- ⑧ Making binding decisions

FIGURE 3

When it comes to respondent views of the most important aspect of an ombudsman's role, there is a similar consensus. Respondents ranked 'Giving advice', 'Information dissemination' and 'Being an agent of change' as the three most important activities (Figure 3).

The findings are similar to those of the much smaller OIA survey associated with and prompted by the 2011 UK Higher Education White Paper. This found that the three most cited aspects of the ombudsman role were 'Providing information to interested parties', 'Giving Advice' and 'Act[ing] as a mediator.'<sup>57</sup>

### Most challenging cases

When respondents wrote about the most challenging types of cases they had to deal with, there was again a commonality of view. The two most challenging case issues referred to were academic-related issues (59 per cent) and discrimination issues (26 per cent).

Most higher education ombudsmen are not allowed to review cases involving narrow academic judgements. This is a key 'exceptional' feature of their remits. However, they can review the processes involved in setting out for students what and how they will study, and what the supervision and marking arrangements will be. In the view of practitioners the most challenging academic-related cases reported included issues about evaluation, teacher-student relations and the question of fairness:

'conflicts between (groups of) students and lecturers about the difficulty and fairness of a written exam' (Germany)<sup>58</sup>

'students about evaluation' (Spain)<sup>59</sup>

57 **Pathway 3: Towards early resolution and more effective complaints handling**, op.cit., 2012, Figure 1, para A9, p.44.

58 Beschwerde- und Verbesserungsmanager (Complaints and Improvement Manager), Germany, AN.22.9.2015.

59 Defensor, Universidad Carlos III de Madrid, Z.1.9.2015.

'The most challenging cases are those where students feel bullied or mistreated by a teacher, administrative employee or a trainer in practice. These cases are always very emotional, academically challenging and usually full of twists and turns' (Norway)<sup>60</sup>

'Issues where there is challenging behaviour and/or allegations of unfairness from more than one party (e.g. student and instructor, or student and department)' (Canada)<sup>61</sup>

Interestingly, a significant number of these cases involved postgraduate supervision:

'Complaints of PhD students about their supervisor' (Belgium)<sup>62</sup>

'Supervisor conflicts' (Canada)<sup>63</sup>

'Exit trajet[ories] and supporting PhD students' (the Netherlands)<sup>64</sup>

'Problems between students and teacher and especially at PhD level' (Sweden)<sup>65</sup>

'The most challenging are those that involve dysfunctional relationships between graduate students and their academic supervisors.' (Canada)<sup>66</sup>

'Students: study delay because of poor thesis guidance.' (the Netherlands)<sup>67</sup>

Some of these cases related to fitness to practise issues where a student is studying for a vocational or professional qualification such as doctor, nurse, or teacher:

'In Norway we also have a law that gives the Universities the right to advise or, in worst case expel, students of certain studies (i.e. nurse, teacher, kindergarten teacher) if they are not suitable for the job. This is in order to protect patients and children from unsuitable students in practice. These cases are also usually very challenging.'(Norway)<sup>68</sup>

'cases involving Fitness-to-Practise issues where there is a need to balance professional judgement and due process for the complainant.'(England and Wales)<sup>69</sup>

Further, and unsurprisingly, in some countries, respondents reported that the most challenging issue was around defining the boundary between what is an academic judgement and what is not:

'where there is disagreement if a case is academic or not' (Norway)<sup>70</sup>

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60 Studentombud, Oslo and Akershus University College of Applied Sciences, D.4.8.2015.

61 University Ombudsperson, Canada, M.5.9.2015.

62 Institutional ombudsperson, Ghent University, AG.21.9.2015.

63 Director, Office of the Student Ombuds, University of Alberta, W.9.9.2015.

64 Dutch university, O.6.9.2015.

65 Ombudsman, Gothenberg University, H.4.9.2015.

66 Ombudsperson, Canada, K.4.9.2015.

67 Dutch university ombudsman, AZ.23.9.2015.

68 Studentombud, Oslo and Akershus University College of Applied Sciences, D.4.8.2015.

69 England and Wales, AB.17.9.2015.

70 Studentombud, University of Oslo, R.7.9.2015.

'Intransigent faculty members ... trying to convince students [the] matter is of academic judgement and out of your jurisdiction – advising on proper avenues of complaint or appeal.' (Australia)<sup>71</sup>

'Students feel treated unfairly by professors and professors state that their students just don't work hard enough.' (Germany)<sup>72</sup>

A range of discrimination cases were viewed as the second most challenging behind academic-related issues. There may well be an element of under-reporting here since in some European higher education institutions (in the Netherlands and Norway, for example) there is a person responsible for handling specific allegations of discrimination and these colleagues – outside ENOHE – were not included in the survey. Similarly, in the United States, Title IX Coordinators, not ombudsmen, are now deployed on campus to deal specifically with allegations of sexual violence and harassment.<sup>73</sup>

The issue of sexual harassment was reported widely in questionnaire responses:

'Discrimination and harassment ... sexual misconduct and stalking' (Canada)<sup>74</sup>

'sexual harassment' (Poland)<sup>75</sup>

'rape and sexual harassment, rampage' (Germany)<sup>76</sup>

'Cases involving sexual harassment or alleged assault' (England and Wales)<sup>77</sup>

'Violations to human rights to education. Discrimination problems. Sexual harassment.' (Mexico)<sup>78</sup>

Sexual harassment has escalated into a significant policy and operational issue at higher education institutions around the world. A recent survey of more than 150,000 students in the United States found that more than 20 per cent of women undergraduates at 27 elite universities reported being victims of sexual assault or misconduct within the previous year.<sup>79</sup>

In the UK, **The Guardian** newspaper has published a series of articles based on rigorous use of Freedom of Information Act returns by universities. These document a worrying number

71 Professor, University of Technology, Sydney, 28.9.2015.

72 Feedback manager, German university, AQ.22.9.2015.

73 **Sexual Misconduct/Title IX Policy**, Boston University (USA), 2015, <http://www.bu.edu/safety/sexual-misconduct/title-ix-bu-policies/sexual-misconducttitle-ix-policy/>.

74 W.9.9.2015.

75 X.10.9.2015.

76 S.8.9.2015.

77 AB.17.8.2015.

78 AR.22.9.2015.

79 Nick Anderson and Susan Svrluga, 'What a massive sexual assault survey found at 27 top U.S. universities', **Washington Post**, 21 September 2016, [https://www.washingtonpost.com/news/grade-point/wp/2015/09/21/what-a-massive-sexual-assault-survey-showed-about-27-top-u-s-universities/?utm\\_term=.75229e47a9ce](https://www.washingtonpost.com/news/grade-point/wp/2015/09/21/what-a-massive-sexual-assault-survey-showed-about-27-top-u-s-universities/?utm_term=.75229e47a9ce). See also Nicole Westmarland and Jennifer Doyle, 'We can't run away from rape', **Times Higher Education**, 19 November 2015, <https://www.timeshighereducation.com/features/we-cant-run-away-from-rape>. From Australia, see also Nina Funnell, 'Police reveal what the 'secretive' universities didn't want you to know', **news.com.au**, 6 December 2016, <http://www.news.com.au/lifestyle/real-life/news-life/police-reveal-what-the-secretive-universities-didnt-want-you-to-know/news-story/0dbef6b5d42ed402e39b47010e570f1c>.

of allegations made by students of sexual harassment by staff'.<sup>80</sup> They also show extensive use of non-disclosure agreements by universities which hide from public view the extent of sexual harassment on campus.<sup>81</sup> Incidents of sexual harassment and sexual violence have been similarly reported by women at German universities.<sup>82</sup> There has been a stream of high-profile cases in other European countries too involving so-called 'lad culture' on campus, but also sexual misconduct by academic staff in relation to students.<sup>83</sup> This unacceptable behaviour has prompted much-needed student campaigning<sup>84</sup> and policy development,<sup>85</sup> the latter being very late in the day.

There was also reporting of disability-related cases, with references to both physical disabilities and mental health issues. Higher education institutions often have a cultural problem in setting aside the principle of treating everyone the same in order to ensure the greater goal of equal treatment for all:

'Accessibility for disabled persons. Often different laws oppose each other in this field.'(Germany)<sup>86</sup>

'Entrenched cases and ones involving disabilities' (England and Wales)<sup>87</sup>

'where there is an admitted or suspected mental health issue for the complainant' (Scotland)<sup>88</sup>

A small number of practitioners, three from the Netherlands, highlighted the challenge of confronting hierarchies either within or outside the higher education institution:

'operating independently in the organization' (the Netherlands)<sup>89</sup>

'Issues on power and integrity (manager versus staff member)' (the Netherlands)<sup>90</sup>

'complaints of staff members about leadership of a superior' (the Netherlands)<sup>91</sup>

80 David Batty, Sally Weale and Caroline Bannock, 'Sexual harassment 'at epidemic levels' in UK universities', **The Guardian**, 5 March 2017, <https://www.theguardian.com/education/2017/mar/05/students-staff-uk-universities-sexual-harassment-epidemic>.

81 David Batty and Sally Weale, Sexual harassment of students by university staff hidden by non-disclosure agreements, **The Guardian**, 26 August 2016, <https://www.theguardian.com/education/2016/aug/26/sexual-harassment-of-students-by-university-staff-hidden-by-non-disclosure-agreements>.

82 Katrin List, 'Sexual violence and harassment against female students in Germany', **Rivista di Criminologia, Vittimologia e Sicurezza**, Vol.VII, N.2, Maggio-Agosto 2013, [http://www.vittimologia.it/rivista/articolo\\_list\\_2013-02.pdf](http://www.vittimologia.it/rivista/articolo_list_2013-02.pdf).

83 Jim Dickinson, 'Time to get real about sexual harassment on campus', **Wonkhe**, 25 November 2015, <http://wonkhe.com/blogs/time-to-get-real-about-sexual-assault-on-campus/>.

84 **Lad Culture Audit Report: A look into the findings from our audit of higher education institutions and students' unions work on lad culture**, National Union of Students, UK, 2015, <http://www.nusconnect.org.uk/resources/lad-culture-audit-report>.

85 Annalee Lepp (Chair), **Working Group on Sexualized Violence Programs and Policy Development Interim Report and Preliminary Recommendations**, Victoria University, Canada, 28 September 2016; **Changing the Culture: Report of the Universities UK taskforce examining violence against women, harassment and hate crime affecting university students**, UUK, 21 October 2016.

86 AG.22.9.2015.

87 AC.17.9.2015.

88 G.4.9.2015.

89 BB.24.9.2015.

90 AG.21.9.2015.

91 AZ.23.9.2015.

'In a small island ... where everyone practically knows everyone else, it is challenging to be - and to appear to be - absolutely independent and unbiased.' (Malta)<sup>92</sup>

While ombudsmen raised substantive issues as the most challenging, a number also noted that students as service users could be challenging.

'When visitors are ill suited to informal or facilitative approaches due to their communication skills or anger, or otherwise inability to communicate or be open to flexible solutions.'(USA)<sup>93</sup>

'Cases where the complainant is absolutely in the wrong but cannot or refuses to see reason.' (Malta)<sup>94</sup>

'The review of decisions issued by the final appeal body of the University (the Senate Appeals Committee) for academic misconduct and grade and standing appeals can also be difficult if the appellant cannot understand that we are doing a fairness review rather than acting as another level of appeal of the merits of their case.' (Canada)<sup>95</sup>

'challenging behaviour from the student and unclear or unfair procedures from the university unit.'(Canada)<sup>96</sup>

Where ombudsmen also deal with complaints from members of the public, there is also a challenge of managing expectations in the light of the constrained remit for a university ombudsman.<sup>97</sup>

## Adjudication

Below these levels of consensus, there is an important divide when it comes to the main duties carried out by higher education ombudsmen.

Adjudication takes place in four sorts of jurisdictions. First, in a number of countries where there are national higher education ombudsmen (England and Wales, Austria, and Lithuania) usually created by statute. Secondly, where national or state ombudsmen have been granted jurisdiction over complaints about higher education (Scotland, Ireland, Australia, Malta). In both of these situations the ombudsman scheme is 'classic' in the sense of being a complaints resolver of last resort, and included in the ombudsman function is an ability to adjudicate on cases and make recommendations on outcome.

Thirdly, adjudication takes place where the national higher education regulator has responsibility for resolving complaints (Sweden). And fourthly, within a number of European higher education institutions, notably in the Netherlands and Spain. In one large Dutch university, for example, while the ombudsman 'has the means to investigate a grievance formally and to issue a judgement' the emphasis is on mediation, and only if this is unsuccessful will a formal investigation begin'.<sup>98</sup> So, here, adjudication tends to be the exception rather than the rule. At another Dutch university:

92 E.4.9.2015.

93 Ombudsman, University of Connecticut, C.1.9.2015.

94 Commissioner for Education, Office of the Parliamentary Ombudsman, Malta, E.4.9.2015.

95 Ombudsperson, Canada, K.4.9.2015.

96 University Ombudsperson, Canada, M.5.9.2015.

97 Scottish university, G.4.9.2015.

98 The Netherlands, AZ.23.9.2015.



'Students as well as employees can complain about the organisation or people of the organisation because they get no answer. Obviously people feel this as injustice. It's my job to get new communications channels and, if it is necessary, to give a judgement about the situation.'<sup>99</sup>

By contrast, there is an extensive list of countries where higher education or campus ombudsmen do not, under any circumstances, adjudicate. This list includes (but is not confined to) the USA, Canada, Norway, Belgium, Germany and Poland.

In the USA, following the tradition of the organisational ombudsman, adjudication is not practised by higher education or campus ombudsmen. Interestingly, this has not always been the case and a study of California campus ombudsmen reported in 1974 that amongst the principal reported duties were receiving and responding to complaints and investigating them.<sup>100</sup>

In the 2015 survey, at one American university, 'The Ombuds is a resource to help people navigate the University' providing 'a confidential and informal assistance to anyone having a problem'.<sup>101</sup>

At another American university:

'I provide a confidential, neutral resource for staff, faculty, and graduate students to express concerns, identify options to address workplace conflicts, facilitate productive communication, and surface responsible concerns regarding university policies and practices. I do not have authority to change or make decisions but can help individuals reach solutions by serving as an intermediary or in coaching or assisting people in developing their own self-advocacy strategies.'<sup>102</sup>

In Belgium, the campus ombudsman at one university has 'interaction' with student services dealing with 'recurring university-wide problems'. He also 'negotiates' or mediates between doctoral students and university committees. In Germany, the ombudsman is essentially an advisor, mediator, even a counsellor:

'meeting complainants and people concerned to get to know their issues, mediation between students and staff, gathering information concerning complaints, initiating and managing (university wide) processes for preserving and further enhancing quality standards in teaching'<sup>103</sup>

'advising students problems with examinations office, with professors with other students discussing all types of difficulties arising from university life (e.g. whether to continue or to terminate) how to cope with supervisor problems during doctoral studies mediation in case of problems within an institute (professors, co-workers)'<sup>104</sup>

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99 Hogeschool van Arnheim en Nijmegen, the Netherlands, AW.23.9.2015.

100 Ralph Poblano, 'The Campus Ombudsman', **Improving College and University Teaching**, Vol.22, No.2, Accountability, Spring 1974, pp.97-99.

101 Y.9.10.2015.

102 Jim Wohl, Ombudsman, University of Connecticut, C.1.9.2015.

103 University of Antwerp, Belgium, L9.4.15; Ursula Meiser, Ombudsperson, University of Stuttgart, Germany, S.8.9.2015; also Germany AN.22.9.2015.

104 Bereiter Hahn, Ombudsman, Goethe University, Frankfurt, Germany, AU.23.9.2015.

Here again, the ombudsman will focus on university-wide processes in seeking reform. In all of this, the key words are 'problems' or 'issues' not complaints, and the interventions are negotiation, mediation and advice.

For many higher education ombudsman colleagues, the issue about no adjudication is not a second-order question, but a fundamental principle. Whether or not adjudication is a legitimate role is an essentially contested<sup>105</sup> dispute. On one side, in the words of a North American ombudsman, 'an Ombuds should never serve as an adjudicator and have binding authority as that is contrary to the essential characteristics of the role.'<sup>106</sup>

There are two reasons set out for this important viewpoint. The first is that the 'soft power' that emerges from the ombudsman's responsibility to convince interested parties of the accuracy and validity of report conclusions and recommendations 'results in a highly disciplined and effective means of developing feasible, practical and effective outcomes.' The second is that adjudication is 'rooted in the 'adversarial' tradition of dispute resolution' whereas the ombudsman role 'should be firmly situated on the alternative dispute resolution continuum.'<sup>107</sup>

This eloquent and principled theoretical position is a commonly-held view amongst many North American higher education ombudsmen. It is also hard-wired into the International Ombudsman Association's Standards of Practice,<sup>108</sup> but it is not a position that is necessarily sustained either by the evidence of practice, or by the logic of theory.

Beginning with the evidence of practice, many advocates of adjudication do not themselves reject mediation or advice-giving, but regard them as complementary tools for dispute resolution. As seen above (p.34) a number of 'classic' ombudsman schemes including the Student Ombudsman in Austria, the SPSO in Scotland, the OIA in England and Wales, and state ombudsmen in Australia have extended their practice in the last five years to add mediation and early resolution to their operations. Rather than rule out mediation, these practitioners have embraced it as having co-equal status with adjudication and have commended its effectiveness.<sup>109</sup>

Secondly, there is an element of the 'straw man' (or person) argument in the view that an ombudsman 'should never serve as an adjudicator and have binding authority...'. One or two higher education ombudsmen do have this authority,<sup>110</sup> but most survey respondents, including those who adjudicate, make it clear that they do not in fact have binding authority, and most do not want it (see below, pp.62-63).

Thirdly, while there is a happy consensus that the ombudsman role 'should be firmly situated on the alternative dispute resolution continuum', the argument that adjudication, at least as practised by higher education ombudsmen, is necessarily rooted in the 'adversarial' tradition of dispute resolution is poorly evidenced.

Certainly, in terms of the mandate of the OIA in English and Welsh law, OIA adjudication processes are *inquisitorial* not adversarial. In the landmark case of Maxwell, a student at Salford University with narcolepsy, Lord Justice Mummery in the Court of Appeal in England and Wales emphasised that:

105 W. B. Gallie, 'Essentially Contested Concepts', **Proceedings of the Aristotelian Society**, New Series, Vol.56, 1955-1956, pp.167-198.

106 K.4.9.2015.

107 Ibid.

108 **IOA Standards of Practice**, op.cit., 2009.

109 Susan Watson, Jane Lindsay, Konstantina Kalogeropoulou, Michelle Proyer and Susan Scott-Hunt, **A study of the effectiveness of using early resolution methods to resolve student complaints in Higher Education**, January 2016, <http://eprints.kingston.ac.uk/33996/1/Watson-S-33996.pdf>.

110 Egbert Hulshof, ombudsman, Hogeschool van Arnheim en Nijmegen, the Netherlands, AW.23.9.2015.

'...the practice and procedures for the review and resolution of a wide range of student complaints under the independent scheme operated free of charge and largely as an inquisitorial on a confidential basis by the OIA under the 2004 [Higher Education] Act, is quite different from civil proceedings. *Its informal inquisitorial methods, which are normally conducted on paper without cross examination and possibly leading to the making of recommendations in its Final Decision, mean that the outcome is not the product of a rigorous adversarial judicial process dealing with the proof of contested facts, with the application of legislation to proven facts, with establishing legal rights and obligations and with awarding legal remedies...* '

'...it is contrary to the whole spirit of a scheme established for the free and informal handling of students' complaints that the outcomes under it should replicate judicial determinations, which continue to be available in civil proceedings in the ordinary courts, for which the OIA is not and was never intended to be a substitute.'<sup>111</sup> [emphasis added]

In summary, whilst recognising the force of the argument that if adjudication is carried out in an adversarial manner it could take on a quasi-judicial character inimical to the exercise of 'soft' power, there is nothing necessarily adversarial about adjudication. Indeed, the established practice of using an inquisitorial process as the basis for (emphatically non-binding) decision-making confirms that adjudication can be squarely situated on the alternative dispute resolution continuum.

Turning to the related issue of theory, it is of contextual importance to note that there has been a continuing argument about the legitimate role of ombudsmen in general for the last 50 years. In Europe, at least, the role of the ombudsman in democratic society

'has been to help redress any imbalance so that the "little man" (or woman) is not denied that measure of recognition in daily life that representative democracy affords him or her at election time.'<sup>112</sup>

This is an explicitly socio-political function, albeit an entirely disinterested one. Critically there is a larger social purpose associated with this activity than mediation (for example) allows, making bodies under jurisdiction publicly accountable through adjudicative, non-binding, decisions, and pressurising/nudging organisations to address systemic weakness elucidated by documented case handling.<sup>113</sup>

These responses to complaints are to ensure that

'Citizen grievance ... is to be taken as an especially privileged route to the enhancement of democratic value, so that democratic practice is more than 'the mere exercise of franchise at election time'<sup>114</sup>

111 R (Maxwell) v the Office of the Independent Adjudicator for Higher Education [2011] EWCA Civ 1236, 26 July 2011, paras 32 and 34. See also Felicity Mitchell, **The OIA and Judicial Review: Ten principles from ten years of challenges**, OIA 10th anniversary series, Paper 02, Reading, December 2015.

112 Nick O'Brien and Mary Seneviratne, **Ombudsmen at the Crossroads: The Legal Services Ombudsman, Dispute Resolution and Democratic Accountability**, Palgrave Macmillan, London, 2017, pp.10-14.

113 Ibid, p.95, p.93.

114 Ibid, p.100.

The adjudication involved is not the formal, adversarial court-room kind which brings 'closure' but an adjunct to deliberative democracy<sup>115</sup> where informality is not lost and what is 'reasonable in all the circumstances' has prominence. Returning to the words of Lord Justice Mummery:

'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.'<sup>116</sup>

Although this approach became subordinated to private and individualised settlements and dispute resolution associated with private sector ombudsmen under a consumerist thrall,<sup>117</sup> it did not disappear. It has been kept alive by public ombudsmen in general and in higher education by bodies like the OIA in England and Wales. What its advocates seek is not hegemony for their model, but co-equal status with other forms of dispute resolution such as mediation, so that the skills set of ombudsmen are developed and grown to the public benefit.

In all these circumstances, the present writer's contention is that adjudication is one of a number of processes available to ombudsmen in higher education, and that it should lose its potential for pariah status.

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## Conclusion

The lived experience of higher education ombudsmen involves a constant transfer between ethical, operational, inter-personal, didactic, diplomatic and public management domains. This is a heady mixture and extremely demanding, not least because it combines a requirement of acute judgement, sensitive handling and iron resolution in the face of higher education and complainant intransigence and unreasonableness (when they manifest themselves). In addition, the collegiality of ombudsmen is diminished by (often) working in isolation and genuine disagreement about what constitutes the core role. We now turn to the added challenge of independent operation, something assumed to be the hallmark of good practice, but in reality (it seems) not always so.

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115 Ibid, pp.100-101.

116 R (Maxwell) v the Office of the Independent Adjudicator for Higher Education, op.cit., 2011, para 37.

117 O'Brien and Seneviratne, op.cit., 2017, pp.94-95.

# CHAPTER FOUR

## BEING INDEPENDENT

The question of independence, the hallmark of an ombudsman,<sup>1</sup> is addressed in this chapter. Ombudsmen are independent or they are not ombudsmen, but independence has many dimensions and is hard to pin down.<sup>2</sup> Further, it is not only ombudsmen who must be independent. For professionals ombudsmen watch over, independence is also a *sine qua non* of their activity, so regulatory oversight is complicated and has to be negotiated. When asked to place in rank order 'the biggest challenges to your role as an ombudsman', the responses were as set out in Figure 4 below. Significantly, respondents placed a 'Lack of independence' ahead of all other challenges apart from 'Challenges to personal growth' (see Chapter 6).

Most professions share a conviction that each is a special case and that each requires, on 'public interest grounds', professional autonomy, or independence. In higher education this focuses on institutional autonomy and unfettered academic judgement.<sup>3</sup> Effective governance and regulation must pay regard to the characteristics of legitimate activity in the specific sector it is designed for, so it is unsurprising that institutional autonomy is a salient issue that requires sensitive and expert handling by policy-makers, regulators and ombudsmen.<sup>4</sup>

But sensitive and expert handling is not the same thing as unthinking acceptance of a professional veto of regulatory challenge. This is because independence is necessary for regulators and ombudsmen, just as much as for older professions like teaching and medicine. Without independence, ombudsmen cannot operate effectively:

'the one [characteristic] I deem most essential for every ombudsman institution – independence.'<sup>5</sup>

'Independence – the ability to think and act within a mandate without interference from vested interests – is a theoretical attribute of all ombudsmen, though not always evident in practice.'<sup>6</sup>

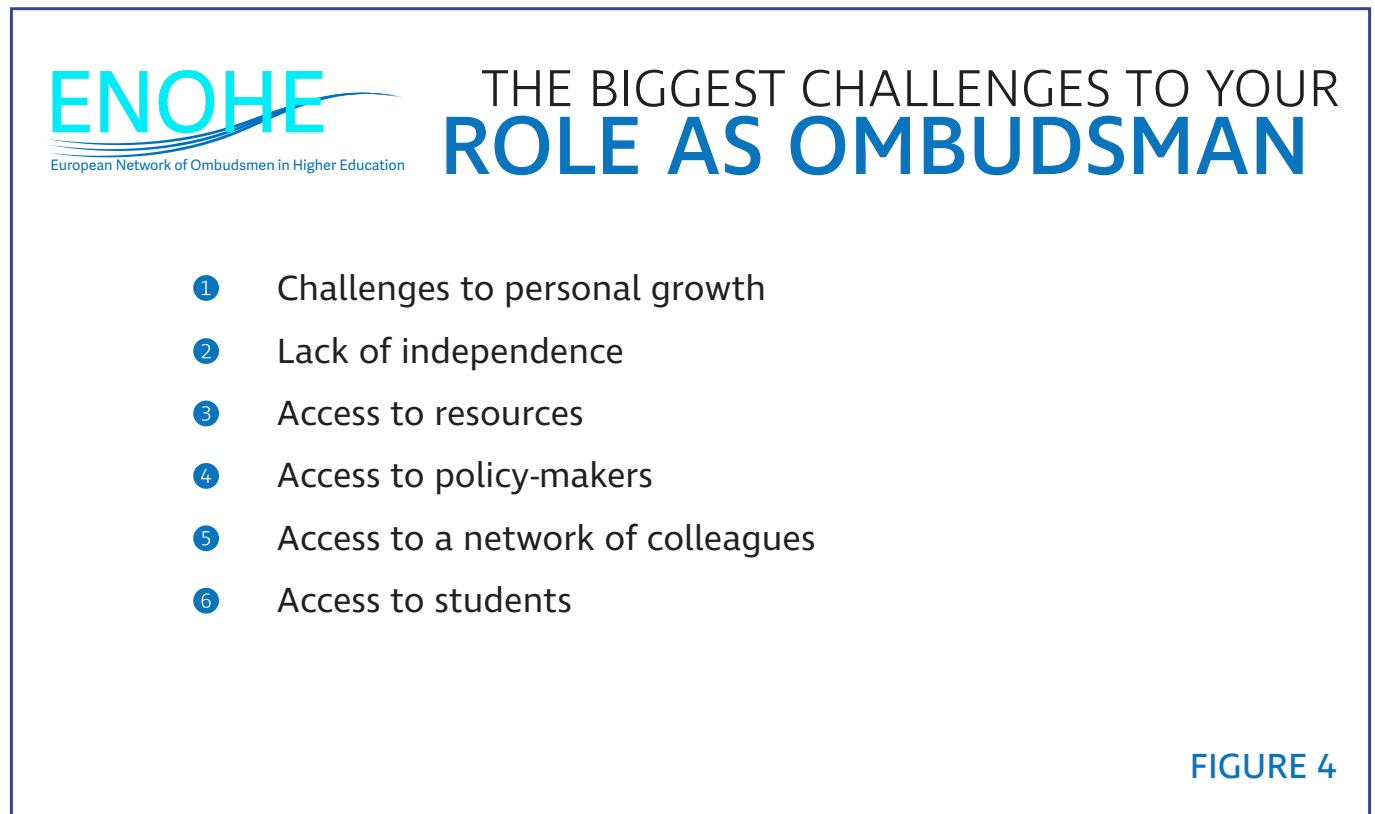
'Why is independence so important for Ombudsmen? - because without independence there can be no confidence that our investigations, either their choice, conduct or conclusions, have not been tainted by influence.'<sup>7</sup>

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- 1 Laura Pettigrew, **Foundations of Ombudsman Law**, Forum of Canadian Ombudsmen, 2011, <http://www.ombudsmanforum.ca/en/?p=571>.
  - 2 Ram Gidoomal, **Governance that Empowers**, Paper presented to 11th ENOHE Annual Conference, Warsaw, 15-17 May 2014.
  - 3 Collini, op.cit., 2012, p.7.
  - 4 Behrens, **Three cheers for Lord Leveson: Independent self-regulation – newspapers and universities compared**, op.cit., 2013.
  - 5 Marten Oosting, **The Independent Ombudsman in a democracy governed by the rule of law**, International Ombudsman Institute, Occasional Paper 66, September 1998, <http://www.theioi.org/search/?q=The%20Independent%20Ombudsman%20in%20a%20democracy%20governed%20by%20the%20rule%20of%20law>.
  - 6 Mariteuw Chimère Diaw, 'Ombudsmen, People's Defenders and Mediators: Independence and administrative justice in state transformation', Case Study 7, **Verifor**, January 2008, <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4478.pdf>.
  - 7 Field, op.cit., 2010.

With reference to higher education specifically, one practitioner noted:

“independence” means that I am not an agent of and cannot speak for the institution. The University must speak for itself. I can identify the University’s published policies and procedures, and involve the appropriate people to answer questions about them ... Yes [I am accountable], directly [to] the senior-most administrator of the university. Indirectly: the university community.’<sup>8</sup>

All of this reflects a general public insistence that in making a complaint against a professional, ‘a fair system led by independent people’ is the most important ingredient.<sup>9</sup>



Of course, independence without competence is a wasted or over-rated asset, and can undermine public trust. The confusion of disinterested amateurism with rigorous independence has led to a succession of leadership posts taken by candidates ill-equipped to scrutinise and call bodies in jurisdiction to account. Independence without expertise is an unedifying spectacle.<sup>10</sup> As we learn from the history of the former newspaper ombudsman in the UK, the absence of genuine independence generates unenquiring minds and uncritical support for entrenched vested interests.<sup>11</sup>

All this was demonstrated by Lord Leveson in his authoritative study of the Press Complaints Commission (PCC), following well-documented, but poorly investigated, scandals of phone-hacking by journalists in the United Kingdom.<sup>12</sup> According to Lord Leveson, the PCC

8 USA, Y.9.10.2015.

9 KRC Bar Standards Board Survey, 2009, p.3. Sample size 2044 aged 18 and over in Great Britain, nationally representative. Online Fieldwork 9-11 March 2009.

10 **Getting the Balance Right: Implementing Standards of Conduct in Public Life**, Tenth Report of the Committee on Standards in Public Life, Cm 6407, London, January 2005, paras 4.20-4.25, pp.86-87.

11 Nick Davies, **Hack Attack: How the truth caught up with Rupert Murdoch**, Chatto & Windus, London, 2014.

12 Rt Hon Leveson LJ, **An inquiry into the culture, practices and ethics of the press**, HC 779, The Stationery Office, 29 November 2012.

proved to be a failure with 'numerous structural deficiencies' which had hamstrung the organisation. Foremost of these was a lack of independence: in the nature of the mandate; in the appointments process; in its flawed, one-sided investigations processes – when it did investigate major issues it sought to head off or minimise criticism of the press and its investigation of phone-hacking allegations lacked any credibility; in its lack of resources; and in its 'woefully inadequate' approach to remedies. As a result: 'In practice, the PCC has proved itself to be aligned with the interests of the press, effectively championing its interests.'<sup>13</sup>

Comparative analysis is valuable but difficult. Debates about governance and regulatory arrangements tend to go one of two ways. One is that they are sector-specific and exclude experience from other sectors (or countries). The alternative is that policy proposals are presented in giant baskets in which regulatory arrangements in one sector or country are proposed wholesale for those in other sectors or countries without due regard to institutional or cultural differences. Creutzfeldt's study revealing different user expectations of ombudsmen in a number of different European countries demonstrates the fallacy of this approach (see above, Chapter 1, pp.10-11). Both variants are flawed, but there is value in ombudsmen in higher education looking beyond their sector in thinking about the appropriateness of their own arrangements.

Although most commentators and practitioners accept that independence is a core principle or hallmark of being an ombudsman, there are varying degrees of independence.<sup>14</sup> The degree of independence depends not only on the mandate of the office, but also on other factors (also identified by Lord Leveson and others) including method of appointment, operating and reporting arrangements and access to resources.<sup>15</sup>

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## Criteria for independence

While practitioners have set out general criteria for the independence of ombudsmen<sup>16</sup>, this study addresses criteria for the independence of higher education ombudsmen specifically. On the basis of practitioner experience reported below (Figure 5), there are key governance variables in determining the extent to which ombudsmen in higher education are independent. Collectively, these variables are the building blocks that help to impact on the power relations between the ombudsman on the one hand and the higher education institution on the other. The variables include: the nature of the mandate given to the ombudsman; the method and terms of appointment; potential role conflict where ombudsmen combine their role with another function – a number of respondents are also members of the teaching faculty; the operating and reporting arrangements of the ombudsman; and the resources available for operational use. A sixth variable is a *sine qua non* - leadership.

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13 Ibid, Executive Summary, paras 41,45,44.

14 Pettigrew, op.cit., 2011.

15 Chimère Diaw, op.cit., 2008.

16 Field, op.cit., 2010, has set out 12 criteria to judge the independence of classical parliamentary ombudsmen.



## FACTORS WHICH DETERMINE BEING INDEPENDENT

- Nature of mandate
- Method and terms of appointment
- Operating and reporting arrangements
- Potential role conflict
- Resources available
- Leadership issues

FIGURE 5

### i. Mandate

Mandates for higher education ombudsmen are variable. Strong mandates typically include legislative backing which sets out clear jurisdiction. Less strong mandates emerge from individual higher education institution decrees or regulations. Weaker mandates are inherent where there are only informal arrangements. In the 2015 survey, respondents derived their mandates as shown in Figure 6 below.



## MANDATES

WHERE DOES YOUR MANDATE DERIVE FROM?	% RESPONDENTS
National Law	27%
Individual University Statute	58%
Both National Law and Individual University Statute	10%
Other	5%

FIGURE 6



Most national higher education ombudsmen and generic national/sub-national ombudsmen have a statutory basis. For example, Scottish universities came under the scrutiny of the Scottish Public Service Ombudsman through legislation in 2005 (see above, p.26, footnote 108), Irish universities came under the national Ombudsman in 2012 (see above p.25). Australian universities came under legislative jurisdiction of sub-national parliamentary ombudsmen at various times in the 1970s.<sup>17</sup> Beginning with Alberta in 1967 and ending with Ontario in 2014, all Canadian provinces have enacted legislation giving them oversight over universities.<sup>18</sup>

National higher education ombudsmen in Austria and England and Wales began as voluntary arrangements but developed into schemes strengthened by legislation. The Austrian Student Ombudsman, set up in 1997, derives his legal mandate from the 2011 Act on Quality Assurance in Higher Education, amended in 2015. This sets out the operating principles of the Ombudsman whose office (s.31(1)) 'is not bound by any instructions' and 'is not subject to any higher authorities in higher education and can hence act freely.'<sup>19</sup> At the same time, the Austrian Student Ombudsman is also a civil servant with a reporting line to (and accountability to) the Minister of Higher Education.<sup>20</sup> This creates a potential constraint where (hypothetically) the Minister wishes to influence the operational decisions of the Ombudsman.

In Austria, under the legislation of 2011, each student enrolled or in the process of applying 'shall have the right to turn to the student ombudsman for information and advice on matters related to degree programmes, teaching, examinations, and administration at higher education institutions.'<sup>21</sup> Information and advice includes handling individual and group complaints and making recommendations concerning the around 600 'concerns' a year received.<sup>22</sup> Under a legislative amendment of 2015, the Student Ombudsman can now take up cases and issues 'upon his own motion' ie without having received a specific complaint or concern.<sup>23</sup>

Although the Student Ombudsman 'is not subject to any higher authorities in higher education and can hence act freely,'<sup>24</sup> any complainant from a higher education institution can also address the national ombudsman:

'Anyone from HEIs [Higher Education Institutions] can address either ASU or the public ombudsman; a few people do it in parallel, some are sent from ASU to them, some from them to us ... The better and more detailed expertise in higher education is, of course, with ASU. But yes, it can happen, that we both are dealing with the same cases either in parallel ... or consecutively.'<sup>25</sup>

The Office of the Independent Adjudicator for Higher Education in England and Wales (OIA), established as a voluntary scheme in 2004 derives its mandate from the 2004 Higher Education Act, amended in 2015. It is a classic scheme, an independent ombudsman of last resort reviewing complaints from students at higher education institutions where the complaints have been reviewed but the complainants remain dissatisfied.<sup>26</sup> Decisions of the

17 See Patty Kamvounias, 'Public Sector Ombudsmen and Higher Education' in Varnham, Kamvounias and Squelch, op.cit., 2015, pp.125-136.

18 Conway, op.cit., 2013; <http://www.theioi.org/ioi-news/current-news/ombudsman-welcomes-historic-expansion-of-mandate>.

19 Austrian Student Ombudsman, B.1.9.2015.

20 Ibid.

21 'Austrian Student Ombudsman's Office Relaunched', **ENOHE News**, 2012/1, pp.1,3-4.

22 <http://www.hochschulombudsmann.at/english/>.

23 Austrian Student Ombudsman, B.1.9.2015.

24 Ibid.

25 Information from respondent, 1.10.16.

26 Behrens, 'Sailing on the 'Boundless and Bottomless Sea': a view from the OIA Bridge', op.cit., 2015, pp.4-9.

OIA are not reviewed by the Parliamentary and Health Service Ombudsman, but can be taken to judicial review. While the OIA is subject to judicial review, the Court of Appeal has noted that courts should have regard to the 'expertise' of the OIA, and few claimants are granted permission to bring a judicial review claim.<sup>27</sup>

As the survey showed, most university or campus ombudsmen have a mandate deriving from a university decree. In Spain, Belgium,<sup>28</sup> Croatia and Israel,<sup>29</sup> legislation also underpins the creation of ombudsmen in universities. In Spain, for example, following the democratic transition beginning with a new Constitution in 1978, a national 'Organic Law for Universities' was enacted in 2001 requiring each university to install an ombudsman, but leaving everything else to the by-laws of the universities.<sup>30</sup> In Croatia, again following democratic transition, an Act of 2007 created student ombudsmen in universities to hear student complaints and discuss them with university administrations.<sup>31</sup> The ombudsman must literally be a student, appointed by the Student Council for a (renewable) one-year term.<sup>32</sup>

The countries cited in the above paragraph aside, most higher education institution ombudsmen rely on higher education institution decrees alone for their mandates. In Germany, for example, no legislation forces higher education institutions to install complaint management mechanisms. Higher education institution decrees alone account for the mandates of higher education ombudsmen in the USA, Canada, Denmark, Norway, and Poland.

In North America, these decrees seem to operate in a way which gives higher education institution ombudsmen an ability to operate with clear authority, but this has not always been the case in Europe. Most recently, for example, Tina Kaare, the Student Ambassador at the University of Copenhagen (Denmark), resigned, apparently after disagreement with the University over her mandate. According to the independent university newspaper:

'The question is whether a student ambassador should only offer guidance to students who themselves make a request regarding their rights, duties and complaints, or whether she should play a more active role. According to the mandate defining her job, the student ambassador ... cannot make decisions in cases, act as a student lawyer, or be party to a case ... The issues include whether she should take part in students' meetings with the university as an observer, and in the timing of her interventions in an administrative process. The compromise ended up being that the student ambassador should only exceptionally be allowed to participate in meetings, and that the ambassador should only "make requests of the university to seek solutions to a student's challenges where there is a need for it," the [2015] annual report stated.<sup>33</sup>

While this development is disappointing, it is hardly surprising given long-standing disputes over the role of the Ambassador since before the post's inception.<sup>34</sup> The learning point is that

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27 Mitchell, *op.cit.*, 2015.

28 L.4.9.2015.

29 V.8.9.2015: 'Under National law, I'm empowered to deal with students and candidates to become students' complaints. Although the above mentioned law empowers merely to make recommendations to the University authorities, these authorities have so far adopted all my decisions.'

30 Bayod, *op.cit.*, 2006, p.58.

31 Juros, *op.cit.*, 2010.

32 Croatian Higher Education Law 2007, **ENOHE News**, 2009/1, p.12.

33 University [of Copenhagen] Post, *op.cit.*, 6 December 2016.

34 'Students get complaints officer', **University Post**, 3 November 2011, <http://universitypost.dk/article/students-get-complaints-officer>; 'Board votes in favour of new Complaints Officer', **University Post**, 2 February 2012, <http://universitypost.dk/article/board-votes-favour-new-complaints-officer>; 'Students to get an 'ambassador'', **University Post**, 16 March 2012, <http://universitypost.dk/article/students-get-ambassador>.

a contested mandate, not backed by law, can undermine even exemplary colleagues.

There are two further dimensions of mandate to point out. The first concerns ownership and funding, and there is a degree of diversity here. In one Swedish university, the ombudsman is employed by the Student Union alone. For the ombudsman concerned, impartiality is less important than utility:

'This allows for a larger degree of freedom to pursue cases as compared to an ombudsman employed by the university. It means I'm taking my cues from the students rather than the university administration. It also means that I have no direct arbitration or adjudication powers. The role is more reminiscent of a mediator, although it can't be seen as impartial as my focus is to help the students.'<sup>35</sup>

Elsewhere (Croatia, for example), it is the student who is the ombudsman. This creates immense challenges for students, who are elected for one year by student representatives. They are without remuneration, initially have low levels of knowledge about their tasks and are uncertain of their reception by university administrations.<sup>36</sup>

Perhaps joint-funding and co-ownership is a more satisfactory model. This is a concept which began in Canada in the 1960s (see above pp.12-13) and became more widely adopted in the 1980s and 1990s. Canadian higher education institutions continued to adapt the model, creating a mix of jointly-funded and institutionally-funded ombudsman offices. The '50-50 plan' where students and institution would create 'a completely joint office' was an attractive model favoured by commentators, to ensure that the ombudsman was 'in the middle', that is neither an agent of the students nor of the institution.<sup>37</sup>

Secondly, mandate is also about width of jurisdiction, or the groups that can use the ombudsman service. While the vast majority of the survey respondents were confined to examining student grievances, a small but important group looked at staff as well as student grievances or exceptionally at staff grievances alone. The staff ombudsman is found in around ten universities in the Netherlands, some of whom also hear complaints from students. This Dutch experience has been analysed by two highly experienced university ombudsmen, Paul Herfs and Sytske Teppema.<sup>38</sup> Staff ombudsmen deal with issues relating to the legal status of employees, performance reviews, working conditions, dismissal and redundancy issues, problems affecting PhD candidates (who are classed as staff in Dutch universities), and clashes with colleagues.<sup>39</sup> They do this, from outside of human resources management and report to the Executive Board of the University. The sensitivity of the issues that staff ombudsmen deal with make them – it seems – more susceptible to conflict with university hierarchies. In the carefully chosen words of Paul Herfs:

'Incidents that have been addressed by the [staff] ombudsperson might be the basis of dismissal of the [staff] ombudsperson.'<sup>40</sup>

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35 AE.2.9.2015.

36 Jure Marinovic, 'An overview of the Student Ombudsman at the University of Zagreb', in Conway and Leidenfrost (eds), op.cit., 2011, pp.125-130.

37 Conway, op.cit., 2013, p.2; Rowat, D. C. & Wallace, G. citing Rowat and Wallace, 'The Campus Ombudsman in North America' in G. E. Caiden (ed), **International Handbook of the Ombudsman: Evolution and Present Function**, Greenwood Press, Westport, Connecticut, 1983, pp.151-156.

38 Paul Herfs and Sytske Teppema, 'The merits of a staff ombudsman in higher education: A plea for the widespread introduction of a Staff Ombudsman in the higher education system in the Netherlands', **The Journal of the California Caucus of College & University Ombuds**, Vol.X1, 2014, pp.18-25.

39 Ibid, pp.18-19.

40 Herfs, op.cit., 2016; see below, pp.56-57.

Finally, in addition to ombudsmen with both staff and student complainants, a number of student ombudsmen are not responsible for the entire student body, but share responsibilities with others for certain groups of students or complaint issues. At one university in the Netherlands, for example, where the Student Ombudsman also looks at staff complaints, the issues of harassment and discrimination complaints are the responsibility of separate confidential advisers, and there is a separate Ombudsman for Academic Integrity dealing with alleged academic misconduct.<sup>41</sup> At the University of Stuttgart (Germany) the ombudsman works alongside an ombudsman for 'best practice in science.'<sup>42</sup> In Sweden there are universities with separate ombudsmen for doctoral students only.<sup>43</sup> This segmentation can be said to reflect a need for specialism in service delivery, but it also has the potential to 'Balkanize' the student ombudsman's operational space, and with it, reduce the student ombudsman's authority.

## ii. Method and terms of appointment

From Figure 2 (see p.29), 58 per cent of respondents were appointed either by external or internal competition, and 20 per cent were elected.

Critical distance from higher education institution management is facilitated by competitions for external or internal appointment of ombudsmen, since these are hallmarks of appointment on merit. The election of ombudsmen (Defensores) by the Claustro in Spain is a unique country-specific arrangement.<sup>44</sup> A Defensor is elected by the Claustro, a body consisting of around 300 students and staff members, with the Rector and two other high officials presiding. 25 per cent of its members need to nominate a person for election or any person may put himself or herself forward.<sup>45</sup> Election of ombudsmen also takes place at a small number of universities in Sweden and Germany, in Croatia and elsewhere, giving an important critical distance to office-holders and underlining the legitimacy of the post.<sup>46</sup>

In total, 78 per cent of all ENOHE survey respondents were appointed in ways that can be seen – in principle – to facilitate independent action. However, 22 per cent of survey respondents were not appointed either through external or internal competition or through an electoral process. They report that they were asked, often by the Rector of their university, or they volunteered:

'I was working at the university before and was asked whether I would like to change jobs and fill the open position' (Germany)<sup>47</sup>

'Asked' (the Netherlands)<sup>48</sup>

41 **Student Ombudsman Annual Report 2014**, Vrije Universiteit Amsterdam, p.6, [http://www.vu.nl/en/Images/Student\\_ombudsman\\_annual\\_report\\_2014\\_UK\\_tcm270-656027.pdf](http://www.vu.nl/en/Images/Student_ombudsman_annual_report_2014_UK_tcm270-656027.pdf).

42 S.8.9.2015.

43 AE.21.9.2015.

44 Luis Espada Recarey, **The Ombudsman for Spanish Higher Education Institutions**, Universidade de Vigo, 2006. Mostly called 'Defensor', but in ten universities in Catalonia and Valencia 'Sindic de Greuges'.

45 Ombudsman of Universidad de Cantabria, Spain; Ombudsman of Universidad Murcia, Spain; Ombudsman of University of Valladolid, Spain, cited in **Pathway 3: Towards early resolution and more effective complaints handling**, Annex A Survey of Campus Ombudsmen in continental Europe, North and South America, and Australia and New Zealand, op.cit., 2012, p.43.

46 AU.23.9.2015; under the Organic Acts on Universities (2001, 2007) every university must have an ombudsman and 83 per cent are elected by the Faculty; *ibid*, pp.30-2, appointment/election of Defensores in Spain under Spanish law and university practice.

47 AU.22.9.2015.

48 BB.24.9.2015.

'appointment by the Rector' (Poland)<sup>49</sup>

'appointed by the rector' (Belgium)<sup>50</sup>

'Appointed by personal request from the Rector' (Israel)<sup>51</sup>

'Volunteered - took on new role and it grew' (Scotland)<sup>52</sup>

'I was asked to take the assignment' (Sweden)<sup>53</sup>

Whether or not this compromises independence is a moot point, but it is a method of appointment that does nothing to enhance the critical distance of the position-holder from the higher education institution.

### iii. Operating and reporting arrangements

There are good examples of operating and reporting arrangements to remove the ombudsman from undue influence by government and/or higher education institutions. As far as 'classic', national ombudsmen are concerned, these are set out in legislation and scheme rules.

In Scotland, for example:

'Our powers and responsibilities are set out in terms of the Scottish Public Services Ombudsman Act 2002 which provides for our independence, that we must investigate in private and gives us the ability to decide our own process within some legal limitations'.<sup>54</sup>

In England and Wales, the higher education ombudsman (the Independent Adjudicator) has 'powers under national legislation to require universities and other [higher education] providers to join the Scheme, pay a subscription annually, receive student complaints and make findings'. The ombudsman also has powers under scheme rules 'to award financial remedies, to publish details of non-compliance by universities and their record in case-handling'.<sup>55</sup> Crucially, and in addition, the Independent Adjudicator has operational freedom from the independent-majority OIA Board which is required to protect the Independent Adjudicator's independence.<sup>56</sup>

As far as ombudsmen in higher education institutions are concerned, the picture is mixed, with a combination of reporting lines to strategic leaders, representative bodies, but also the institution's line management, where freedom of action is more constrained. This diversity of reporting lines is similar to the findings of a previous survey of ENOHE members by Josef Leidenfrost and Dolores Gomes-Moran in 2013.<sup>57</sup> A number of respondents to the 2015 survey considered that they had no accountability within the institution at all.

49 BG.28.9.2015.

50 AH.21.9.2015.

51 V.8.9.2015.

52 G.4.9.2015.

53 J.4.9.2015.

54 Scottish Public Services Ombudsman, BF.25.9.2015.

55 AB.17.9.2015.

56 **OIA Scheme Rules**, revised 2015, especially paragraphs 13 and 14, <http://www.oiahe.org.uk/media/100294/oia-rules-july-2015.pdf>.

57 Leidenfrost and Gomez-Moran, op.cit., 2013.

## REPORTING LINES OF UNIVERSITY OMBUDSMEN

15. 'Are you accountable to anyone in your institution for your work programme?' [N=52]

- RECTOR/PRESIDENT or OFFICE or UNIVERSITY BOARD - 39%
- CLAUSTRO/SENATE - 10%
- SENIOR LINE AND OTHER MANAGEMENT - 15%
- ADVISORY STUDENT-STAFF COMMITTEE - 5%
- NOT ACCOUNTABLE - 17%
- NO ANSWER - 14%

FIGURE 7

A significant number of campus ombudsmen have well-developed governance arrangements to protect them from the constraints of the institution's regular line management, and thus to protect their independence. A large minority report to the Rector/President of the institution or to their Offices, or to the institution's Board (39 per cent). This facilitates operational freedom:

'I report to the Rectorate but my independence was never questioned.' (Germany)<sup>58</sup>

'I'm accountable to the Rector.' (Poland)<sup>59</sup>

'Yes [I am accountable], directly [to], the senior-most administrator of the university. Indirectly: the university community.' (USA)<sup>60</sup>

'I am accountable to the Vice-Provost, who is part of the senior administration. I think this is an appropriate reporting structure that enables me support when I need it, keeps me accountable, yet allows me to remain independent and neutral.' (Canada)<sup>61</sup>

'In theory to the Rector directly, but very rarely we discuss Ombuds cases with her if the university reputation might be at stake.' (Belgium)<sup>62</sup>

'Report to Dean of Students and Vice-Provost of University but operate at arm's length ...' (Canada)<sup>63</sup>

58 S.9.9.2015.  
59 BG.28.9.2015.  
60 Y.10.9.2015.  
61 BA.23.9.2015.  
62 AQ.22.9.2015.  
63 W.9.9.2015.

'Yes. Chairman of the Board.' (the Netherlands)<sup>64</sup>

'Independence: direct access to the university board, office with own entrance and by itself, own budget, no socialization with university staff'. (Norway)<sup>65</sup>

'Yes. We are accountable to the University Council and the Rector (the Principal).'  
(Mexico)<sup>66</sup>

Spanish Defensores have a unique, country-specific, reporting line to the Claustro which facilitates independent operation. 10 per cent of survey respondents had this arrangement.

'We must inform the Claustro about our work programme every year.'<sup>67</sup>

'I have to report to the Claustro every year.'<sup>68</sup>

It is a model reflecting the importance of the student voice in governance arrangements, and is worthy of consideration for adoption in other jurisdictions. A half-way house, without the democratic element, but including the student voice in governance without compromising operational freedom, is the vehicle of the advisory student-staff committee (5 per cent).

In one university in Canada the advisory committee is firmly entrenched:

'The office is funded by undergraduate and graduate students (through student fees) and by a grant from the university. The office reports functionally through an advisory committee (OAC). The OAC is made up of students, staff, faculty and administrators and receives the annual report before its dissemination online. The committee has no access to ombuds case files. The ombudsperson can only be dismissed for cause.' (Canada)<sup>69</sup>

Some ombudsmen report to senior line management within the university:

'I sit within the University, but not within a specific section of it, and therefore am not closely aligned to e.g. Registry or any other department ... I report to the Deputy Secretary - Student Experience.' (Scotland)<sup>70</sup>

But there are a variety of alternative reporting line arrangements for university ombudsmen which could be less optimal in terms of freedom of operation without essential leadership skills. One survey respondent reports to the University Attorney.<sup>71</sup> A Swedish ombudsman is:

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64 AG.21.9.2015.

65 R.7.9.2015.

66 AR.22.9.2015.

67 Z.14.9.2015.

68 AO.22.9.2015.

69 M.5.9.2015.

70 G.4.9.2015.

71 AS.22.9.2015.

'Not exactly accountable. I have been working with this so many years now that my work program is known to many teachers and students inside of the University. It is also presented at our website and also presented for the new students every semester. In *the evaluation chats that I have every year with the head of my department* we discuss any possible changes that I may have for the forthcoming year. For example "Talk about Student Rights" was an idea that came up about three years ago.' [emphasis added] (Sweden)<sup>72</sup>

And, worryingly, in one US university with multiple ombudsmen, while some report to the President, Provost or Dean of Students:

'some [ombudsmen] are accountable to human resource department heads, which we do not believe is good practice.'<sup>73</sup>

Reporting to a human resource department head appears to place the ombudsman in jeopardy of having a line manager with a conflict of interest, since raising student complaints and having a specific remit to implement university policy can clearly be in tension.

Interestingly, seven colleagues (14 per cent), five from Scandinavia, provided a 'nil return' in answer to the question about accountability for work programmes. There may have been an element of cross-cultural misunderstanding or poor drafting here, with a Canadian respondent noting 'I don't know what the term "work programme" means in this context.'<sup>74</sup> Similarly, 17 per cent of university ombudsman survey respondents believed they were not really accountable to anyone within the higher education institution they worked in.

'No. I am completely independent in this area.' (Poland)<sup>75</sup>

'No. I decide which actions I take and when.' (the Netherlands)<sup>76</sup>

Unfortunately these accounts were not developed in other parts of the questionnaire returns. In the same category, but with telling nuance, a German respondent suggested he was accountable 'only in theory, not in practice.'<sup>77</sup>

#### iv. Role Conflict

45 per cent of respondents (27 ombudsmen) combined their work as an ombudsman with some other responsibility. Christian Gill, using recent Scottish developments, and Anita Stuhmcke, drawing on Australian examples, have written about the impact this might have on the role of national and regional ombudsmen across functional boundaries.<sup>78</sup> The questionnaire focused on the potential conflict for campus ombudsmen when they combine their ombudsman jobs with other roles.

72 J.4.9.2015.

73 N.5.9.2015.

74 K.4.9.2015.

75 X.10.9.2015.

76 BD.24.9.2015.

77 AN.22.9.2015.

78 Gill, *op.cit.*, 2014, pp.662-681; Anita Stuhmcke, 'The Evolution of the Classical Ombudsman: A View from the Antipodes', *International Journal of Public Law and Policy*, 2012 2(1).



Spanish ombudsmen tend to combine their ombudsman (Defensor) role with an academic function, often professor,<sup>79</sup> teaching and research.<sup>80</sup> This practice is not confined to Spain but occurs in Belgium where in one university the ombudsman also holds a full-time academic post and is departmental chair,<sup>81</sup> Poland,<sup>82</sup> the Netherlands,<sup>83</sup> Israel<sup>84</sup> and Mexico.<sup>85</sup>

In Germany, where the higher education ombudsman function is relatively new, the role combination is more eclectic. Ombuds functions are carried out in tandem with quality roles (feedback manager) and student counselling,<sup>86</sup> in post-retirement as chair of a university foundation,<sup>87</sup> and with a communications role within the university.<sup>88</sup>

A key issue here is whether a duality of function in any way compromises the perception of independence of the ombudsman role.

One very experienced ombudsman with a plurality of roles, including university ombudsman, saw this as unproblematic:

'I only act after consent of the student, I speak on behalf of the student, but I will not be manipulated, I have a career of 30 years at this university and I have an important network that I can use to negotiate'.<sup>89</sup>

Notwithstanding the personal integrity or standing of the ombudsman quoted above or any individual ombudsman, there remains a strong possibility that a student who wishes to complain or raise an 'issue' about a faculty member feels less inclined to do so if the ombudsman herself or himself is also (for example) a faculty member.

From the evidence in this chapter, it is clear that independence cannot always be taken for granted in terms of the governance arrangements for higher education ombudsmen. Despite cited examples of good governance practice, there are challenges for ombudsmen without explicit or formal or sufficiently developed governance safeguards against co-optation by higher education institutional hierarchies. These often come down to power relationships.

For example, a number of European respondents, including some with responsibility for staff complaints, wrote in their questionnaire responses that university line management had interfered with their work. One spoke of 'Issues on power and integrity [involving a case about a] manager versus staff member.'<sup>90</sup> A second wrote of the difficulty of 'operating independently in the organisation'.<sup>91</sup> And a third wrote about the challenge of 'complaints of staff members about leadership of a superior'.<sup>92</sup>

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79 Z.14.9.2015; AD.17.9.2015.

80 AO.22.9.2015; AA.14.9.2015.

81 L.4.9.2015.

82 BG.28.9.2015; X.10.9.2015.

83 'I am appointed 0,2 fte Ombudsman and 0,3 university lecturer', BD.24.9.2015.

84 V.8.9.2015.

85 AR.22.9.2015.

86 AT.23.9.2015.

87 AU.23.9.2015.

88 BH.23.9.2015.

89 Belgium, L.4.9.2015.

90 AG.21.9.2015.

91 BB.24.9.2015.

92 AZ.23.9.2015.

During the period of researching this study, a number of practitioners have either been sacked or not had their contracts renewed, or have resigned in the context of intractable conflict with institutional authorities. This has been in response, they report, to making findings or taking actions inimical to their (higher education) employers in Europe. The circumstances of these cases are instructive. In one case in Europe, the ombudsman was removed because the university alleged a lack of impartiality in a sensitive investigation.<sup>93</sup> In litigation, this ruling was overturned, but the lack of trust on all sides meant that the ombudsman did not return to the university.<sup>94</sup> In a second case, the contract of the ombudsman was not renewed after the ombudsman expressed a wish to look at allegations of fraud in the university. And in a third case an ombudsman's contract was not renewed after the ombudsman was 'warned off' by a university official and the ombudsman wrote in protest to the university board.<sup>95</sup> Additionally, as already mentioned above the Student Ambassador at the University of Copenhagen (see p.49) resigned without public comment at the end of 2016. Informed speculation suggested that the resignation was prompted by the University placing narrow limits on the Ambassador's role in complaint handling and investigation.<sup>96</sup> A replacement Student Ambassador was appointed in March 2017.

More than one of these cases, but not all, concerned ombudsmen for staff. It may be that the sensitivities are heightened where the ombudsman has jurisdiction to look at complaints by staff against university colleagues. As one respondent put it:

'You are always the bringer of bad news. If you say, "we have structural problems" they don't want to hear that. [University] managers want to hear solutions not problems.'<sup>97</sup>

The wider point, applying to both staff and student ombudsmen, is that independence becomes an issue, particularly where the mandate is contested, ambiguous and not entrenched in statute. In these situations, a very great deal depends on mutual trust between ombudsmen and university executive boards. This is often a complex ambiguity:

'The Ombudsman is an internal university function. (not anchored in the national law). Mediation and advising is my core business. *My authority depends on back up by the Executive Board and my skills as an Ombudsman.*'<sup>98</sup> [emphasis added]

'It can be a tricky job. People have opinions ... if there is no trust from the Executive Board that you can do your job properly, then you are a sitting duck.'<sup>99</sup>

It can also precipitate profound self-questioning and psychological stress in ombudsmen at the sharp end of conflict. This was the theme of a paper by Matthieu Heemelaar who spoke at the 2015 ENOHE Annual Conference on 'cases where decisions or recommendations made by ombudsmen had led to their removal from the system.'<sup>100</sup>

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93 AG.21.9.2015.

94 Interview with survey respondent, 3.6.2016.

95 Ibid, 3.6.2016.

96 Claus Baggersgaard, 'Denmark's first student ambassador quits job', **University [of Copenhagen] Post**, op.cit., 6 December 2016, <https://uniavisen.dk/en/denmarks-first-student-ambassador-quits-job/>.

97 Interview with survey respondent, 3.6.2016.

98 The Netherlands: 'I have no complaints about my own employer in this respect. When I advise the Executive Board they normally follow up my remarks and suggestions', BD.24.9.2015.

99 Interview with survey respondent, 3.6.2016.

100 Matthieu Heemelaar, **Solitude in staff-ombudsman's land**, Paper presented to 12th ENOHE Annual Conference, Innsbruck, Austria, 28-30 May 2015; Jean Grier, Jim Wohl and Josef Leidenfrost, **Thirty Years of Solitude? University Ombudsmen's Pioneering Past, Confident Present, Challenging Future**, Report of the 12th ENOHE Annual Conference, Innsbruck, Austria 28-30 May 2015, p.6.

There are other varieties of higher education ombudsmen where the issue of independence needs close scrutiny too. These include national higher education ombudsmen (eg Austria) who are civil servants working in government departments. Further, while the OIA ombudsman in England and Wales is not a civil servant and not directly answerable to Ministers, under the 2004 Act, the UK Minister and his Welsh counterpart retain the right to change the operators of the ombudsman scheme and to call for a report when appropriate. This power has never been invoked. They also include ombudsmen (eg Scotland, Ireland) who work in national agencies, whose remit goes beyond the ombudsman function and into explicit regulation, and who may have acquired interests along the way that complicate the resolution of individual cases.<sup>101</sup>

## v. Resources

The absence of adequate resource has an important constraint on the independence of an ombudsman. In the words of an experienced Australian practitioner:

'Even more worrying, perhaps, is the mechanism for funding the Office. If one wanted to curb the Ombudsman, the most effective way to do it, short of repealing the legislation, is to starve the office of resources.'<sup>102</sup>

A majority of respondents (55 per cent) believed that extra resources would assist them in their work, compared to a minority (45 per cent) who believed that they wouldn't. An overwhelming majority (93 per cent) had an office (7 per cent did not) and a large majority had access to senior decision makers (83 per cent), training and development (77 per cent) and an institutional database (59 per cent). While 70 per cent of respondents had access to an independent budget, 30 per cent did not.

The reality is higher education ombudsmen vary considerably with respect to resources, and that access to resources is often a proxy for the larger battle to be independent. On campus, and in a number of European countries, most ombudsmen are emphatically the poor relation in comparison to counterparts in recruitment or marketing.<sup>103</sup> The paradox here is that some higher education institutions appear to be more interested in securing future students than in providing effective mechanisms to resolve the complaints and disputes of existing students. All of this adds to the pressure on ombudsmen.

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101 Gill, op.cit., 2014, p.667.

102 John T. D. Wood, **The Commonwealth Ombudsman – Time for Independence?**, Democratic Audit of Australia, January 2005, <http://apo.org.au/files/Resource/ombudsman.pdf>.

103 **Trends in Higher Education Marketing, Recruitment, and Technology**, Hanover Research, 2014, <http://www.hanoverresearch.com/media/Trends-in-Higher-Education-Marketing-Recruitment-and-Technology-2.pdf>.

## Conclusion

At the end of the 2014 ENOHE Conference at the University of Warsaw, the 'Warsaw Resolution' was passed unanimously. This was directed at the upcoming Ministerial Conference and Bologna Policy Forum 2015 in Yerevan, Armenia, and stated that ombudsmen in higher education:

'should have the necessary authority in their fields and autonomy (i.e. their offices should be free from instructions and orders from other organs or authorities within their institutions) - in order to improve relations between the student body, academic and administrative organs as well as their staff, officers and representatives, within and outside the academic sphere.'<sup>104</sup>

It is not clear that this Resolution had the desired effect. A year later, and following further cases of higher education institution incursions into ombudsman independence, the Innsbruck Conference adopted, again unanimously, a less sanguine motion:

'This Association endorses the cardinal principles of operational independence of university ombudsmen and their legitimate protection from arbitrary dismissal.'<sup>105</sup>

The issue remains alive, and is of concern.

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104 'The Warsaw Resolution', as agreed upon at the 11th ENOHE Annual Conference in Warsaw, Poland on 17 May 2014, <http://www.enohe.net/wp-content/uploads/2014/06/Warsaw-Resolution-for-Bologna-Ministerial-Conference-2015-FINAL.pdf>.

105 'The Innsbruck motion', 12th ENOHE Annual Conference, Innsbruck, Austria, 28-30 May 2015, <http://www.enohe.net/wp-content/uploads/2013/12/ENOHE-Innsbruck-Motion.pdf>.

# CHAPTER FIVE

## MAKING AN IMPACT: COMPETENCE AND TRUST

### Introduction

Judging the impact and effectiveness of ombudsmen is problematic, what Anita Stuhmcke calls 'a source of puzzlement'.<sup>1</sup> There is no accepted methodology for judging impact in processes teeming with the necessity of assessing both user-based or 'subjective' and professional-based or 'normative' judgements.<sup>2</sup> As Stuhmcke has pointed out, 'the objectives of ombudsman are not to make citizens happy with their services necessarily' but to ensure due process and fair outcomes.<sup>3</sup> The two objectives are not the same and can be in tension with each other.<sup>4</sup>

However problematic it may be, evaluation is necessary to ensure scrutiny and accountability for meeting (or not meeting) strategic aims, and to test whether or not there is utility in planned activity to address developing trends in service use. The tools of evaluation must take into account both subjective and normative assessments.

The impact of ombudsmen in higher education today is assessed in the context of the strategic and operational aims of the office. At a strategic level, ombudsmen in general, and higher education ombudsmen in particular, have three core tasks. One is either to provide redress for individuals and groups where there are evidential grounds for doing so, or to assist individuals and groups in seeking resolution of a detriment or concern.

A second is to ensure that the service or profession of which the ombudsman has oversight (in this case higher education institutions) receives informed policy and operational feedback from ombudsman interventions or complaints decisions. This feedback should not necessarily interfere with the independent judgement of the profession but should be capable of promoting professional and corporate development.

Third, in carrying out the above, ombudsmen 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 higher education institutions of which they have oversight.<sup>5</sup> This has been described by Marc Hertogh as the 'ombudsman-trust hypothesis' in which, by handling individual cases, the ombudsman can increase the level of confidence amongst complainants and also members of the public.<sup>6</sup> Importantly, and in the context of higher education, 'users' are not only students, but higher education institutions themselves.

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1 Anita Stuhmcke, **Evaluating the effectiveness of an ombudsman: a riddle, wrapped in a mystery inside an enigma**, Paper presented to 10th World Conference of the International Ombudsman Institute, Wellington, New Zealand, 2012, <http://www.theioi.org/publications/wellington-2012-conference-papers>.

2 **The Pathway Report**, Table 1: Constructing consultation – elements of need, op.cit., 2010, p.15.

3 Stuhmcke, op.cit., 2012.

4 Mark Liddiard, 'Social Need and Patterns of Inequality', in J. Baldock, S. Vickerstaff and N. Mannering (eds), **Social Policy**, OUP, Oxford, 2007, Chapter 5.

5 Behrens, **Public Trust and the Ombudsman**, op.cit., 2015, pp.3-4.

6 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.

## Contextualising assessments of competence

Higher education ombudsmen, like all ombudsmen, have to demonstrate competence in complaints handling and the giving of advice. This is easier to state than deliver and has been made difficult by a number of contextual factors. First, there have been a cluster of labour market changes: the marketisation of higher education; fiscal crisis in the last decade; and the developing idea of service users as 'customers'.<sup>7</sup> A combination of marketisation and fiscal crisis has had a profound impact on available resource for investment in complaint handling and on students' perception of their relationship with higher education institutions. So, national schemes have received either less funding or additional funding conditional on a demonstrable impact on volume of cases closed, time taken to close them, and the unit cost for the handling of cases.<sup>8</sup>

Service users as 'customers' is a contextual development for all ombudsman schemes.<sup>9</sup> Student perceptions of their relationship with their higher education institution remain country-specific, but the general shift from students as learners or co-learners to students as customers has been unmistakable.<sup>10</sup> It carries with it an accelerated end to post-World War 2 deference, and the rise of an assertiveness which sees the right to have redress in the face of poor service or unfair treatment in academic assessment. In some (but not all) countries this is accelerated by sharply raised tuition fees.<sup>11</sup>

In return, higher education institutions have not been slow to act out their role as suppliers of scarce 'resources' in a fiercely competitive market. One associated mantra is to press government for the de-regulation of 'bureaucratic burden' – an ill-disguised code for cutting the costs of the regulatory framework to which they are subjected and to which national higher education ombudsmen belong.<sup>12</sup>

These contextual developments have not always been welcomed by ombudsmen. For one Australian university ombudsman, the concept of rights and entitlements is in danger of becoming 'the thin end of the wedge' leading to a 'customer is always right' attitude. This puts a premium on non-adversarial interventions and seeking resolution by consensus.<sup>13</sup> More positively, for an Austrian practitioner, continuous communication and student participation in higher education life must be routine and this raises the threshold standards for higher education ombudsmen too.<sup>14</sup>

Secondly, all higher education ombudsmen have to deal with their truncated remit, brought about by deference to the principle of academic freedom. Unsurprisingly, there is evidence that service users seem to be more appreciative of complaints handlers who resolve cases to

7 Behrens (ed), **Dispute Resolution in Higher Education in Turbulent Times**, op.cit., 2014, pp.6-12; Rob Behrens, **Keeping afloat on tumultuous seas: the case of the OIA and the crisis of UK higher education**, Paper presented to 9th ENOHE Annual Conference, Madrid, Spain, June 2011, pp.2-11.

8 Behrens, 'Sailing on the 'Boundless and Bottomless Sea': a view from the OIA bridge', op.cit., 2015, pp.1-2.

9 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, 15 July 2013, pp.14-22; Merfyn Jones, 'Student Complaints: the New Culture' in Josef Leidenfrost and Michael Reddy (eds), **Universities, Students and Justice**, ENOHE Occasional Paper 5, 2009, pp.58-60.

10 Behrens (ed), **Dispute Resolution in Higher Education in Turbulent Times**, op.cit., 2014, pp.7-14.

11 Barbara Kehm, 'How Germany managed to abolish university tuition fees', **The Conversation**, 13 October 2014, <http://theconversation.com/how-germany-managed-to-abolish-university-tuition-fees-32529>.

12 **Quality, equity, sustainability: the future of higher education regulation**, Report of the Universities UK Regulation Task and Finish Group, London, 2015.

13 Cliff Picton, 'Alternative Dispute Resolution in the Rights Era of University Education', quoted in Behrens (ed), **Dispute Resolution in Higher Education in Turbulent Times**, op.cit., 2014, p.13.

14 Doris Kiendl-Wendner, 'The effect of student participation in quality assurance on student complaints', quoted in Behrens (ed), **Dispute Resolution in Higher Education in Turbulent Times**, op.cit., 2014, pp.13-14.

their own (complainant) satisfaction – David Palfreyman has called this ‘doing what it says on the tin’ test<sup>15</sup> – than those who are more likely to find a case not justified.<sup>16</sup> And one of the reasons why cases which, in common sense terms, might be considered potentially justified *on their merits* result in not justified decisions, is that higher education ombudsmen do not venture into issues of narrow academic judgement. As a survey respondent noted this is hard to communicate to student complainants:

‘The review of decisions ... for academic misconduct and grade and standing appeals can also be difficult if the appellant cannot understand that we are doing a fairness review rather than acting as another level of appeal of the merits of their case.’ (Canada)<sup>17</sup>

In short, the truncated remit of higher education ombudsmen, which, as we see below, is not popular with students, makes perceived competence more difficult to attain.

Thirdly, there needs to be agreement about what exactly ombudsmen are being competent at. This is about clarity of role definition. The absence of consensus about what constitute core operational tasks for higher education ombudsmen is a key finding from the survey (Chapter 3, pp.39-43) and increases the potential range of tasks to be measured in any assessment of competence.

Fourthly, there is the issue of ombudsmen making non-binding decisions. Even when higher education ombudsmen believe that there is evidence to justify redress for complainants, the practice of making non-binding decisions means that higher education institutions have an element of ‘wriggle-room’ in complying.<sup>18</sup> Non-binding decision-making is part of the cultural architecture of classic ombudsman schemes.<sup>19</sup> It places considerable weight on the non-coercive authority of ombudsmen to persuade bodies under jurisdiction to comply with recommendations, and it does distinguish an ombudsman from a regulator who has coercive power. But it has the potential to diminish the ombudsman’s competence in the view of the complainant (see below, p.62), since a recommendation ignored by a higher education institution suggests to the complainant a lack of ombudsman utility.

There is evidence from questionnaire respondents that one or two ombudsmen respondents believe that being able to issue binding decisions would be beneficial and improve demonstrable competence. This was the view of the Austrian Student Ombudsman.<sup>20</sup> Another ‘classic’ ombudsman in Europe certainly viewed the absence of binding authority with ‘mixed feelings’:

‘My Final Opinions are not binding, but carry the moral strength of the Ombudsman’s Office. Furthermore, either party can take the case forward to the Parliamentary Ombudsman if either are unsatisfied with the outcome or my recommendations. In the vast majority of cases, however, my Final Opinions and recommendations are accepted and adhered to. I have mixed feelings about the current position where my Final Opinions

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15 David Palfreyman, ‘UK HE Law Update: Baked Beans but no Pork Sausages!’ in Reddy and Leidenfrost (eds), op.cit., 2009, pp.12-15.

16 Creutzfeldt, op.cit., 2015.

17 Ombudsperson, Canada, K.4.9.2015.

18 A flustered Vice-Chancellor once demanded ‘wriggle-room’ from the Independent Adjudicator in England and Wales faced with the prospect of a legitimate public notice of non-compliance with a Justified decision concerning his university.

19 Nick O’Brien, **No end of searching: A comment on the draft Public Service Ombudsman Bill 2016**, The UK Administrative Justice Institute (UKAJI), 2 February 2017, <https://ukaji.org/2017/02/02/no-end-of-searching-a-comment-on-the-draft-public-service-ombudsman-bill-2016/>.

20 Josef Leidenfrost, Austrian Student Ombudsman, B.1.9.2015.

and recommendations are of a recommendatory, ie not binding, basis. It is sometimes frustrating when something obviously needs to be done, but the institution concerned drags its feet.'<sup>21</sup>

However, this respondent pointed out that:

'On the other hand, the moral force of the Ombudsman Office is quite strong'<sup>22</sup>

And most ombudsman respondents, unlike student complainants, did not see the absence of binding authority for adjudications (where they took place) as a barrier to impact and competence. One commented:

'As an institutional 'ombudsman', I think the current powers and responsibilities are about right and work well.'<sup>23</sup>

This is, in part, because 'moral' authority and persuasion are regarded as a powerful substitute:

'I think my position lives from the fact that I do not have any powers that might hurt. It is a position of working together for the University, not telling anyone what to do.'<sup>24</sup>

Similarly, as far as the OIA in England and Wales is concerned, no adjudication is binding on either a higher education institution or a complainant, and this is not regarded as problematic. The only sanction on a non-compliant institution is that the OIA can place the non-compliance in the public domain. On the three occasions on which this has happened, the university concerned has acted swiftly to comply in light of the consequential reputational damage associated with adverse publicity. Complainants can reject OIA decisions and are never identified in reported cases.<sup>25</sup>

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## Competence in providing redress or facilitating the redress process

Within the context set out above, complaint volumes across most countries have grown significantly. This has put a premium on the modernisation of complaints processes, and the re-invention of complaints handling in a way which accentuates direct contact with complainants and an emphasis on targets for closure times, rapid assessment and triage to explore eligibility and early resolution. Much of this has demanded a refreshed and expanded skills set for complaints handlers.<sup>26</sup>

Higher education ombudsmen are routinely very good at reporting statistical outcomes relating to their work output and engagement. Exemplars of this practice are found in

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21 Office of the Parliamentary Ombudsman, Malta, E.4.9.2015.

22 Ibid.

23 G.4.9.2015.

24 Germany, AQ.22.9.2015.

25 OIA (2015) Scheme Rule 11, <http://www.oiahe.org.uk/media/100294/oia-rules-july-2015.pdf>.

26 Behrens, **Public trust and the ombudsman**, op.cit., 2015, pp.7-9.



the Netherlands,<sup>27</sup> Norway,<sup>28</sup> Poland,<sup>29</sup> Belgium,<sup>30</sup> and Canada<sup>31</sup> amongst higher education institution ombudsmen. In a recent ENOHE webinar, Lies Poesiat set out the lessons of having produced 11 annual reports during her time as Ombudsman at Vrije University, Amsterdam. The strategic value of reports is that through dissemination they can lead to a better understanding of the ombudsman's role. They are also (Poesiat suggests) a compensation for not being able to share the success of individual cases because of confidentiality restrictions.<sup>32</sup> With more resource, national higher education ombudsmen are also able to set out their records in comprehensive annual reports.<sup>33</sup> Some link them with an annual open meeting so that service users can question the ombudsman's account face-to-face.<sup>34</sup>

Notwithstanding this rigour, user assessment of the impact and competence of higher education ombudsmen, where it exists, is mixed. This applies to both higher education institutions and to student complainants. Gauging satisfaction of student users of ombudsmen services is tricky. At a higher education institution level, student time constraints and concern for confidentiality limit potential interviewees from agreeing to be interviewed.<sup>35</sup> For national higher education ombudsmen who look at cases as a last resort, students are elusive beings:

'this population is extremely hard to reach. The addresses held for them at the time of their complaint are in many instances no longer valid, as this is a highly mobile population. Telephone numbers are also generally invalid, and potential respondents, even where contactable by telephone, were unlikely to engage in research. Similarly, where email addresses were held by the OIA, many were no longer valid, and where contactable by email, respondents again proved unlikely to engage in research. The population of students who had contacted the OIA but never pursued a complaint – a group we had initially hoped to include – could not feasibly be included for these reasons. Nor was a telephone survey a feasible methodology.'<sup>36</sup>

They also have concerns about confidentiality. In addition,

'we established that many students felt so negatively about the whole complaints process (within their HEI [Higher Education Institution] and continuing at the OIA) that it would be extremely difficult to engage them in responding to a survey from the OIA.'<sup>37</sup>

27 Vrije Universiteit Amsterdam, the Netherlands, AZ.23.9.2015, [http://www.vu.nl/en/Images/Jaarverslag-studentenombudsman-2015-EN\\_tcm270-787504.pdf](http://www.vu.nl/en/Images/Jaarverslag-studentenombudsman-2015-EN_tcm270-787504.pdf).

28 Studentombud, University of Oslo, Norway, R.7.9.2015; the University of Oslo, <http://www.uio.no/english/about/organisation/student-ombudsperson/annualreport2015ombudforstudentsuio.pdf>.

29 The University of Warsaw, <http://ombudsman.uw.edu.pl/documents/6117946/0/Report+2014.pdf>.

30 Institutional ombudsman, Ghent University, Belgium, AH.21.9.2015.

31 Director of Student Ombuds Office, University of Alberta, Canada, W.9.9.2015; Ryerson University, [http://www.ryerson.ca/content/dam/ombuds/documents/reports/OMBUDSPERSON%20ANNUAL%20REPORT%20FOR%202015\\_16.pdf](http://www.ryerson.ca/content/dam/ombuds/documents/reports/OMBUDSPERSON%20ANNUAL%20REPORT%20FOR%202015_16.pdf).

32 Lies Poesiat, **Annual reports: worth the effort?**, ENOHE Webinar, 29 September 2016, <http://www.enohe.net/webinar-2016/>.

33 See, for example, the Annual Report of the Austrian Student Ombudsman, <http://www.enohe.net/wp-content/uploads/2013/12/ASO-report-summary-14-15.pdf>; and of the OIA in England and Wales, <http://www.oiahe.org.uk/media/109675/oia-annual-report-2015.pdf>.

34 <http://www.oiahe.org.uk/media/99913/aom-speech-2015.pdf>.

35 Tyler R Harrison, 'What is Success in Ombuds Process? Evaluation of a University Ombudsman', **Conflict Resolution Quarterly**, 21 (3), March 2004, p.317.

36 Debora Price and Anne Laybourne, **Student Satisfaction with the Office of the Independent Adjudicator for Higher Education: Report of the OIA Student Survey 2009**, Kings College, London, February 2010, p.19.

37 Ibid, p.19.

There have been studies of student satisfaction with higher education ombudsmen in a number of countries including the USA, Australia, and England and Wales. In terms of impact and assessment, one-off studies are of limited value, since a key challenge is to establish benchmarks for establishing the measurement of changes in opinion over time. In addition, studies of user opinion are generally critical of service providers. This can be disheartening to case handlers and ombudsmen who believe in the integrity and utility of their service. Nevertheless, external evidence of this kind is important for constructing change agendas. Further, ombudsmen who seek this evidence should not be pilloried for what users say, but judged against what steps are taken over time once the evidence has been gathered, analysed and disseminated.

In the USA, one study involved interviews with 50 users of the ombudsman service at a southern university with 35,000 students.<sup>38</sup> More than 50 per cent of cases in the study ended with students getting some or all of the remedies they sought and (in a small sample) more than 80 per cent were satisfied with the process, regardless of outcome. Students with more serious cases, often post-graduates who were 'highly vested in their academic careers', came to the ombudsman 'angrier and more hostile' than other complainants and were less likely to be satisfied. These cases took a long time (longer than six months) and with no powers of compliance they were harder for the ombudsman to resolve.<sup>39</sup>

The much larger study in Australia included a sample of 1577 respondents (826 completed all the questions) at 14 universities.<sup>40</sup> The context of the study was 'a widespread concern among students that university staff are not prepared to listen objectively to their concerns and make genuine efforts to resolve them.' Processes were viewed as overly complex, unfair and took too long. This left students feeling 'disheartened', 'demoralised' and with 'a sense of futility'. For one student it was an experience of 'David and Goliath proportions'.<sup>41</sup>

Campus ombudsmen at Australian universities (where they existed) were not 'generally perceived as independent sources of assistance for students' either.<sup>42</sup> And there was frustration when a small number of students pursued their complaints to external ombudsmen in Australia where:

'In those cases that were finalised, most students were dissatisfied with the process (and the length of time involved) and/or the result. One student commented that even though the complaint had been resolved by mediation, the university had later "renege" on the agreement reached.'<sup>43</sup>

In England and Wales, an independent study of complainant views was commissioned from researchers at Kings College, London and undertaken between December 2008 and June 2009,<sup>44</sup> in advance of a multi-year change programme. After a pilot survey and interviews, questionnaires were sent to 684 student complainants to the OIA, with 215 completed survey returns. A further 29 students responded declining to fill in complete surveys and 18 completed surveys too late to include in the statistical database. The researchers therefore heard back from 38 per cent with 31 per cent participating in the questionnaire.<sup>45</sup>

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38 Harrison, *op.cit.*, 2004, p.316.

39 Ibid, pp.321, 326.

40 Jackson et al, *op.cit.*, 2009.

41 Ibid, p.6, p.34.

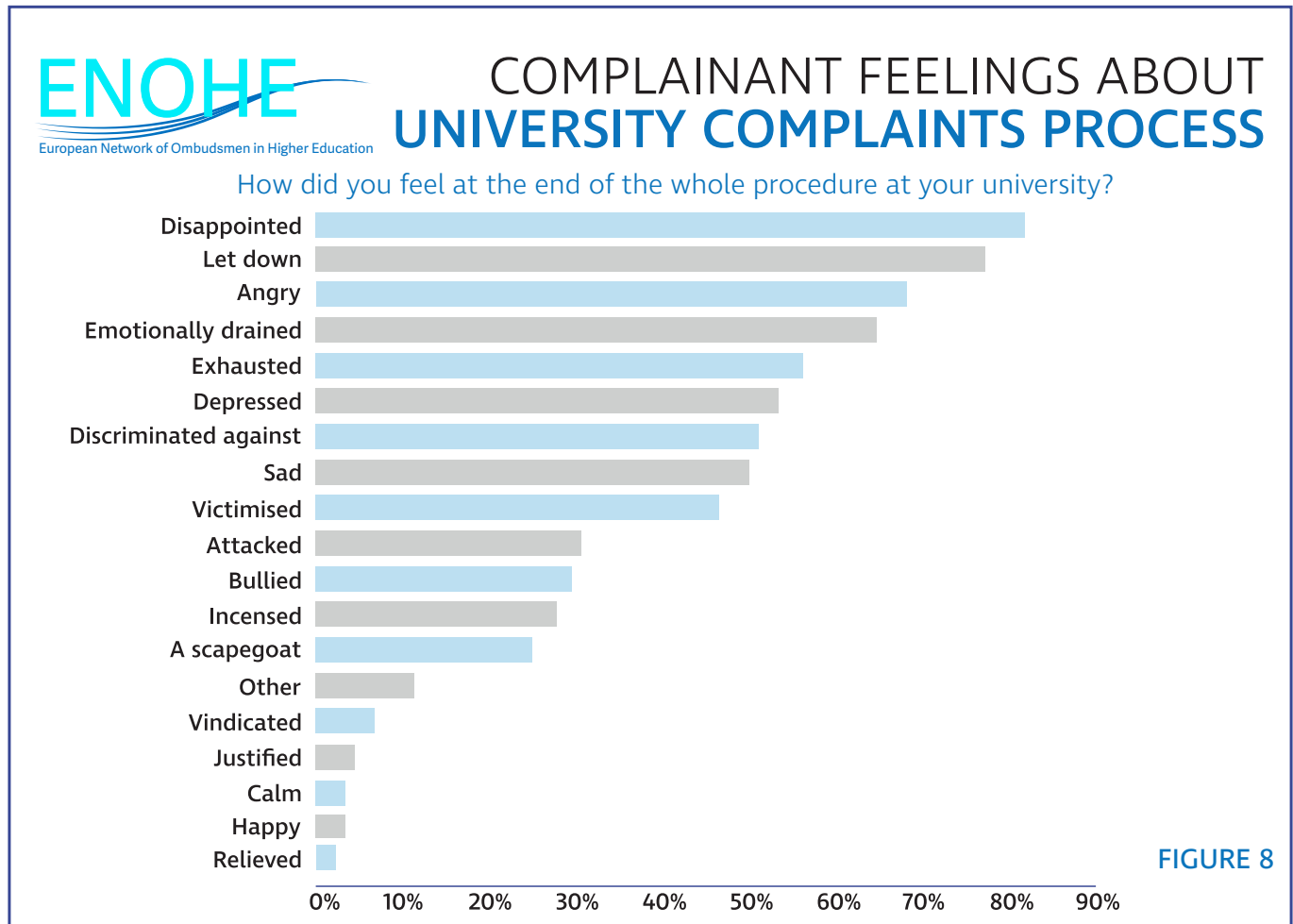
42 Ibid, p.xii, p.34.

43 Ibid, p.34.

44 Price and Laybourne, *op.cit.*, 2010.

45 Ibid, pp.19-20.

As far as complaints handling in universities was concerned, there were many parallels with students' experience of the Australian university system. More than 60 per cent of students surveyed said it was difficult to find the procedures to follow, 60 per cent felt the university had not taken their issue seriously, and 79 per cent believed they had not had a fair hearing.<sup>46</sup> The intense feelings of disappointment, anger and exhaustion are set out in Figure 8.



As far as evaluation of the OIA ombudsman is concerned, students were reasonably satisfied with OIA operational processes but 78 per cent would have liked the opportunity (not then available) to tell someone at the OIA about the impact of these events on their lives. More than 40 per cent thought that the OIA lacked independence and in the absence of enforcement powers for remedies, 59 per cent did not believe that universities were properly held to account by the OIA.<sup>47</sup>

University views were no less forthright, though understandably focused on different issues. Strengths of the ombudsman service were seen to be its independence, the clarity and consistency of its mandate and operations across the higher education sector, its transparent and accessible systems, and the quality of its decisions making it an effective alternative to the Courts.<sup>48</sup> Some of these judgements were directly in contrast with complainant views. There was more consensus about the weaknesses of the Scheme. Here, like student complainants, universities criticised the time taken to complete case reviews. There was also criticism of the 'burdensome' amount of documentation required in case review, an alleged failure to manage student expectations of what was realistic in redress, and a suggestion of occasional systemic bias towards students.<sup>49</sup>

46 Ibid, p.16.

47 Ibid, pp.32-36.

48 **The Pathway Report: Recommendations for the development of the OIA Scheme**, op.cit., 2010, pp.27-31.

49 Ibid, pp.31-34.

In summary, at the end of the process with the OIA, complainant feelings were not radically different from those expressed at the end of the university process.<sup>50</sup> Indeed, complainants did not see their experience with the ombudsman as structurally separate from the university process, but as part of one long continuum.<sup>51</sup> Secondly, the restrictions on mandate imposed on the OIA by 2004 legislation – not being able to look at academic judgement, and not being able to impose remedies on universities – were distinctly unpopular with student service users, and (to some extent) undermined confidence in the ombudsman's operations:

'many of the sources of student dissatisfaction are with the limited remit and limited scope and powers of investigation of the OIA. These matters are beyond the control of the OIA as constituted and indicate dissatisfaction with the whole institutional framework within which the OIA is operating, rather than the way that the OIA is operating within its statutory remit.'<sup>52</sup>

Thirdly, and crucially, user views about OIA fairness and independence and whether or not it was on the side of the university, were significantly influenced by the outcome of the case the student had brought:

'On the issue of independence, 77 per cent of those whose cases were found Justified believed the OIA to be independent, compared to 58 per cent of those whose cases were Partly Justified, and 17 per cent of those whose cases were Eligible but Not Justified.'<sup>53</sup>

The conflation between complaint outcome and views about fairness and independence raises big challenges for all ombudsmen. It is particularly problematic for higher education ombudsmen who adjudicate. This is because restricted remit relating to academic judgement diminishes the potential for finding complaints justified. The OIA, for example, routinely finds only about 25 per cent of cases either justified or partly justified,<sup>54</sup> leaving huge scope for complainant dissatisfaction perhaps susceptible to change only by a different decision outcome.

While the message from student complainants in England and Wales may have been chastening, the strategic point to note is that the feedback from both students and universities gave the ombudsman service large clues about the elements of a necessary change plan which underpinned a radical transformation over a five-year period.<sup>55</sup> In line with good practice the consultation with the higher education sector became an ingrained part of OIA strategy with two further Pathway consultations,<sup>56</sup> and a separate, repeat survey of complainants.<sup>57</sup>

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50 Ibid, Figure 12, p.53.

51 Price and Laybourne, op.cit., p.71.

52 Ibid, pp.66-7.

53 **The Pathway Report: Recommendations for the development of the OIA Scheme**, op.cit., 2010, p.47.

54 **OIA Annual Report 2015**, Reading, 2016, p.10.

55 Behrens, 'Sailing on the 'boundless and bottomless sea': a view from the OIA bridge', op.cit., 2015, pp.4-8.

56 **The Pathway consultation: second round**, OIA, Reading, December 2010, elicited 152 written submissions: [http://www.oiahe.org.uk/media/28018/oia\\_pathway\\_consultation\\_2nd\\_round.pdf](http://www.oiahe.org.uk/media/28018/oia_pathway_consultation_2nd_round.pdf) and outcomes reported at <http://www.oiahe.org.uk/news-and-publications/pathway-reports/pathway-second-round.aspx>; **Pathway 3: Towards early resolution and more effective complaints handling**, op.cit., 2012.

57 **OIA Complainant Satisfaction Survey**, DJS Research, March 2013, <http://www.oiahe.org.uk/media/91448/complainant-survey-13.pdf>.

## Informed policy and operational feedback: fostering standards

Higher education ombudsmen have good stories to tell about giving policy and operational feedback to higher education institutions and academics. Much of this is about encouraging the institution to improve complaints handling processes and disseminating case studies to promote learning.

One approach is for campus ombudsmen to take ad hoc, individual measures. This might be to arrange or conduct training programmes not only about (for example) student rights,<sup>58</sup> but also to train higher education staff in preventative fashion on how to make fair decisions.<sup>59</sup>

Another approach, used in Germany, is to link dissemination explicitly to quality assurance. At Stuttgart University, the Ombudsman is 'Initiating and managing (university-wide) processes for preserving and further enhancing quality standards in teaching.'<sup>60</sup> In another German university there is 'Processing of ideas and problems of students in their studies – let the influx result in quality management in teaching and learning.'<sup>61</sup> Similarly, in Poland, one university ombudsman is engaged in 'Gathering and disseminating information regarding applicable university regulations and general rules in operation.'<sup>62</sup>

A complementary approach is for campus ombudsmen to use written guidance drawn up by their national network. The Association of Canadian College and University Ombudspersons (ACCUO) adopted an outline Standards of Practice in June 2012.<sup>63</sup> This has been built on to produce a comprehensive guide, **Fairness is Everyone's Concern: A Sampling of Practices and Resources on Cultivating Fairness**,<sup>64</sup> edited by Natalie Sharpe at the University of Alberta.

A third approach is for written good practice to be set out by national higher education ombudsmen or relevant regional ombudsmen. There are statutory and non-statutory variations of this. In Scotland, the approach is statutory. The Public Services Reform (Scotland) Act 2010 gave the SPSO the power to lead the development of 'model' complaints handling across the public sector and a model procedure (CHP) was developed for higher education.<sup>65</sup> Institutions are required to be compliant with the model CHP, which supersedes guidance provided in the Quality Code of the Quality Assurance Agency. This work is overseen and monitored for compliance by the SPSO's Complaints Standards Authority.<sup>66</sup>

In England and Wales, Australia and Austria, the approach is non-statutory. **The good practice framework for handling complaints and academic appeals in England and Wales** was published and disseminated in December 2014, and has subsequently been revised (December 2016) and new sections added (March 2017 and ongoing).<sup>67</sup> The framework is a guide to handling complaints and academic appeals in higher education and sets out principles and

58 Ombudsperson for Students, Oslo and Akershus University College of Applied Sciences, Norway, D.4.9.2015; T.8.9.2015.

59 Ombudsperson, Canada, K.4.9.2015.

60 Ombudsperson, S.8.9.2015.

61 AV.23.9.2015.

62 X.10.9.2015.

63 **Standards of Practice**, ACCUO, June 2012, [http://www.uwo.ca/ombuds/accuo\\_aoucc/english/resources\\_introduction.html](http://www.uwo.ca/ombuds/accuo_aoucc/english/resources_introduction.html).

64 Natalie Sharpe (ed), **Fairness is Everyone's Concern: A Sampling of Practices and Resources on Cultivating Fairness**, ACCUO, May 2015, [http://www.uwo.ca/ombuds/accuo\\_aoucc/english/FairnessGuide2015.pdf](http://www.uwo.ca/ombuds/accuo_aoucc/english/FairnessGuide2015.pdf).

65 **Guidance on a Model Complaints Handling Procedure**, SPSO, February 2011, <http://www.spsso.org.uk/news-and-media/model-complaints-handling-guidance-published>.

66 <http://www.valuingcomplaints.org.uk/>.

67 **Good Practice Framework for handling complaints and academic appeals**, OIA, December 2016, <http://www.oiahe.org.uk/providers-and-good-practice/good-practice-framework.aspx>.

operational good practice but does not include prescriptive detail. The framework builds on two extensive rounds of consultation with the higher education sector: the Pathway 3 consultation in 2011 and 2012,<sup>68</sup> and the consultation on the draft framework earlier in 2014.<sup>69</sup> In total, the OIA received more than 200 written responses which were supplemented by conferences, workshops and informal exchanges:

'Dissemination of good practice is an essential part of the strategic role of the classic ombudsman service. Our role is to encourage the resolution of complaints at university level, and that means a partnership with universities and students unions to improve their own processes. We now have a much-needed and admired written Good Practice Framework, honed through national consultation, to encourage reform and modernisation.'<sup>70</sup>

In Australia and New Zealand, good practice guidelines for complaint handling by higher education institutions were developed collaboratively following concerns raised in 'own motion' investigations of universities by parliamentary ombudsmen in Victoria and New South Wales.<sup>71</sup>

In Austria, the approach is less formal but still vibrant:

'Through intensive stakeholder seminars the Austrian Student Ombudsman raises issues of common concern, invites experts from the field to speak there and invites all HEI [higher education institution] members to participate in these special thematic seminars to also bring in good/bad practice.'<sup>72</sup>

And in Lithuania, the Ombudsman

'Give[s] recommendations to higher education and research institutions on the development and improvement of codes of academic ethics and other measures of academic ethics.'<sup>73</sup>

In summary, there is a large body of evidence from the questionnaire and elsewhere to suggest that the development of cultures inside higher education institutions is being engaged in by higher education ombudsmen with imagination and insight.

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68 **Pathway 3 consultation: Towards early resolution and more effective complaints handling**, op.cit., 2012.

69 **Good practice framework for handling complaints and academic appeals: Draft for consultation**, OIA, April 2014, <http://www.oiahe.org.uk/media/92676/good-practice-framework-consultation.pdf>.

70 AB.17.9.2015; Adjudication Manager, OIA, AC.17.9.2015.

71 *Complaint Handling at Universities: Australasian Best Practice Guidelines*, Victorian Ombudsman, 2014, <https://www.ombudsman.vic.gov.au/Publications/Guidelines/Complaint-handling-at-universities-Australasian-be>.

72 Austrian Student Ombudsman, B.1.9.2015.

73 BL.2.11.2015.

## What is public trust?

Generalised talk of a 'loss of trust' is too simplistic but has certainly become what Baroness O'Neil has called 'a cliché of our times'.<sup>74</sup> Public trust in professionals is a tricky issue to get to grips with, but the relationship between a public, private or voluntary organisation 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.<sup>75</sup> Perceptions about whether different professions can be trusted to tell the truth vary widely. Public trust in higher education academics to tell the truth has been high in comparison to other professionals in the UK – only doctors and teachers fared better, with judges slightly behind, and tabloid journalists, civil servants and politicians far behind.<sup>76</sup> Sadly, academics as professionals have now been dropped from this comparative analysis, in favour of hairdressers and lawyers.<sup>77</sup> Research of this kind is complemented by other evidence that user satisfaction of higher education is high. In the annual National Student Survey of all final year undergraduates in the UK the satisfaction rate for students has risen over the last decade and in 2016 remained high with 86 per cent of students in agreement with the statement 'Overall, I am satisfied with the quality of my course'.<sup>78</sup> Significantly however, scores for Assessment and feedback, an area covering marking of essays and assignments, have remained and remain 15 percentage points behind overall satisfaction.<sup>79</sup>

## Developing public trust

Given the necessary pre-conditions for establishing trust – liberal values, political stability, an open society, and effective accountability mechanisms<sup>80</sup> – its development in a number of former authoritarian societies has been hampered. But even in western liberal democracies, higher education ombudsmen have difficult challenges to establish trust. One is to be perceived as honest, independent and transparent, capable of making public interest decisions unsullied by vested interest. Second, even if independence is enshrined in practice, the ombudsman must demonstrate a core competence in serving users and the wider public. Thirdly, there is continuing public support for 'the development of a strong internal culture fostering standards and openness as a means of improving professional integrity and increasing confidence in public institutions.'<sup>81</sup>

74 Onora O'Neill, **A Question of Trust: The BBC Reith Lectures**, Cambridge University Press, 2002, p.9.

75 **Getting the Balance Right: Implementing Standards of Conduct in Public Life**, op.cit., 2005, pp.83-92.

76 **Ipsos Mori Veracity Index 2011**, Research commissioned by the British Medical Association, Ipsos Mori, June 2011, <http://www.ipsos-mori.com/Assets/Docs/Polls/Veracity2011.pdf>.

77 Gerard Kelly, 'What do the public really think about academics?', **Times Higher Education**, 1 June 2016, <https://www.timeshighereducation.com/blog/what-do-public-really-think-about-academics>.

78 **The National Student Survey 2016: Student participation on the rise, satisfaction scores remain high**, Ipsos Mori, 10 August 2016, <https://www.ipsos-mori.com/newsevents/latestnews/1800/The-National-Student-Survey-2016-Student-participation-on-the-rise-satisfaction-scores-remain-high.aspx>.

79 Ibid.

80 Geoffrey Hosking, **Trust: A History**, Oxford University Press, Oxford, 2014.

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



## OMBUDSMEN & PUBLIC TRUST

- ① Perceived honesty and independence of profession and oversight mechanisms;
- ② Core competence in serving users and the wider public;
- ③ Development of strong internal cultures fostering standards and openness;
- ④ Manifestation of 'active trust' and trustworthy behaviour by profession and oversight mechanisms

FIGURE 9

A fourth key element is to elicit what is called 'active trust' and trustworthy behaviour in professions and oversight bodies alike. People – users, complainants and stakeholders – have to be treated with dignity, respect and fair dealing.<sup>82</sup>

The analysis so far has addressed issues of independence, competence, and developing standards through feedback from cases and promotion of good practice. The additional requirements of developing public trust are that ombudsmen must be honest and transparent (as well as independent) and that they must exhibit trustworthiness in all that they do.

### Honesty and transparency

Accusations of dishonesty or wrong-doing by ombudsmen are not entirely unheard of, but they are rare in occurrence. Where they have occurred, they are more about the misapplication of a mandate or procedural irregularity rather than venality.<sup>83</sup> This applies to higher education ombudsmen too, and surveys of complainants do not routinely ask if the ombudsman is perceived as honest. For example, the comprehensive survey of complainants to the OIA by researchers at Kings College, London, published in 2010, gave respondents 29 possible ways of describing the OIA (including 'obstructive', 'unprofessional', 'impatient' and 'biased against me') but 'dishonest' was not one of the options.<sup>84</sup>

Ombudsmen in higher education also need to be transparent in reporting their operations and concerns, without compromising the identities of individual complainants or service users. Transparency has an important role in generating trust amongst complainants, users and stakeholders. This is a view in tension with the classic account of public trust which downgrades much transparency to a chimerical irrelevance.<sup>85</sup> But downgrading transparency

82 O'Neill, op.cit., 2002, p.13.

83 <https://www.lawgazette.co.uk/news/chief-legal-ombudsman-quits-after-accounts-probe/5045175.article>.

84 Figure 11: What do you think of the OIA overall? in **The Pathway Report: Recommendations for the development of the OIA Scheme**, op.cit., 2010, p.53.

85 O'Neill, op.cit., 2002.



is not a sound guide to practice in higher education. Transparency reassures users of the integrity of the complaints process, it prevents complaints from remaining the 'private grief' of higher education institutions, and it is a vehicle for promoting good practice.<sup>86</sup> Further, and critically, transparency ensures that 'reputation management' does not belong solely to the higher education institutions complained against, so that (for example) institutions understand that non-compliance has its consequences.<sup>87</sup>

The survey shows variable practice here and a degree of reticence amongst European practitioners in particular (with noted exceptions). As pointed out above (pp.63-64), higher education ombudsmen have a strong record of transparent reporting. Lies Poesiat at the Vrije University, Amsterdam has pointed out that this helps to develop trust with service users.<sup>88</sup> However, this is not a straightforward issue. Ombudsmen are (rightly) wary of inadvertently naming complainants in case reviews,<sup>89</sup> while being pressured to demonstrate evidence of public value to student stakeholders (and others) who campaigned for their creation.<sup>90</sup> This is an acknowledged challenge for a number of European practitioners.

## Trustworthiness

Finally, there is the central question of trustworthiness. Like everyone else, higher education ombudsmen 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.'<sup>91</sup> The effectiveness of strategies used by ombudsmen to promote respect of service users is vital, notwithstanding the targeted criticism and abuse of ombudsmen by a small number of disaffected complainants on social media. Creutzfeldt and Gill have written persuasively on this subject.<sup>92</sup>

Active trust strategies need continuous communication, rigorous expectation management and unremitting respect for individual service users.<sup>93</sup> Communication strategies – as survey respondents reported – are of varying nature: having a visible presence on campus; periodic public reporting; regional or national consultation; and direct communication with service users both complainant and those complained against.

Throughout all engagement there must be unfailing respect for individual service users. This includes simple, intelligible and courteous letters and e-mails. In the words of Martin Cutts of the Plain Language Commission, 'everyone who writes for an ombudsman' should recognise a dividing line 'between what they regard as civilized text and the savage utterances of knuckle-dragging barbarians.'<sup>94</sup> This is excessively emotional language for an exponent of plain language, but the point is a good one.

86 Rob Behrens, 'Confidentiality and Transparency', Paper presented to 2015 ENOHE Conference, Innsbruck, Austria, May 2015, quoted in Grier, Wohl and Leidenfrost (eds), *op.cit.*, 2016, p.12.

87 Ibid.

88 Poesiat, *op.cit.*, 2016.

89 Interview with a European university ombudsman, 3 June 2016.

90 Interview with American university ombudsman, 22 June 2016.

91 Ronald Blythe, **Akenfield: Portrait of an English Village**, Penguin Classics, London, 2005, p.43. For a poetic account, see Mark Behr, **Kings of the Water**, Abacus, London, 2015, p.172: 'At the heart of human relationship is language and the notion of solidarity, two things melded together to constitute what we call trust.'

92 Naomi Creutzfeldt and Chris Gill, **Critics of the Ombudsman System: Understanding and Engaging Online Citizen Activists**, University of Oxford/ESCR, 2015.

93 Behrens, **Public trust and the ombudsman**, *op.cit.*, 2015, pp.11-12.

94 Martin Cutts, 'How not to write like a barbarian', **The Ombudsman**, Issue 38, August 2009, p.8.

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## Conclusion

Operating in the world of assessing the impact of higher education ombudsmen requires an ability to manage disappointment, ambiguity and downright contradictions. 'Disappointment' in part because the small amount of hard evidence gives less than overwhelming endorsement from service users, particularly student complainants. This is not simply about available resource. Even large and impressive ombudsman programmes have failed to incorporate measurable evaluation into their strategic thinking, neglected dialogue with key decision-makers inside the higher education institution and failed to learn how to refresh their weary conflict management champions.<sup>95</sup> 'Ambiguity' because effective evaluation of ombudsman schemes requires an element of comparison with similar types of operation. Yet there is not only a wide variety of organisational forms but multiple variations within each of these forms, making comparison difficult. Even more challenging, there remains an absence of consistency in the use of key terms like 'early resolution'<sup>96</sup> and mediation, thus rendering meaningful comparison a hazardous enterprise.

And 'contradictions' because subjective (eg student complainants) and normative (eg ombudsman judgement) views sometimes clash even on the basis of the same evidence. Further, higher education institutions, driven by positional conservatism, often have different views on ombudsman outcomes from student complainants, albeit both are service users. Despite these difficulties, there is no other world for ombudsmen to inhabit. The alternative space of 'no evaluation' is reserved for unenquiring minds.

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95 Lin Inlow, **A Retrospective: Eighteen Years of Managing Conflict in The University System of Georgia**, Paper presented to the 10th ENOHE Annual Conference, Oxford, UK, 11-13 April 2013.

96 Watson et al, op.cit., 2016.

## CHAPTER SIX

# BEING PROFESSIONAL

This study has examined the history, context, lived experience, challenges, disputes, independence and effectiveness of higher education ombudsmen. The landscape is fragmented and heterodox and anything but standardised. It has benefited decisively from the thinking and interventions of student union and student representative voices over 60 years. Most higher education ombudsmen surveyed are independent, but a minority are not. Most higher education ombudsmen are competent in terms of their key performance indicators, but this view of competence is not replicated where there is monitoring of the views of complainants. And most higher education ombudsmen promote the development of standards (and internal higher education institutional culture) in diverse ways.

There may be struggle, occasional trauma associated with the dark deeds of vested interests, and importantly, a small number of lost jobs and careers. However, the tenacity and commitment of higher education ombudsmen is not in doubt. I am proud to have been one of them. Few have access to a magic wand like the one kept in the office of the ombudsman at Concordia University (Canada) since the year 2000,<sup>1</sup> but most give the impression that they do. As the ombudsman at Massachusetts University (USA) put it long ago (and more prosaically):

'At the time it seemed like an interesting challenge ... I had no idea, when I began, how satisfying this new work would become; nor could I have anticipated how thoroughly revitalizing an experience this job would prove to be.'<sup>2</sup>

There is a need for all varieties of ombudsmen to transform to meet changing needs,<sup>3</sup> and higher education ombudsmen are no different. Indeed, the relative newness of the enterprise, and the 'hotch potch' of organisational arrangements across and within nations places a premium on continued innovative thought and development. This is not from a desire for symmetry but because user needs change and ombudsmen must change with them. This is the price to be paid for relevance.

Contemporary practitioners recognise this. As reported above (p.45), survey respondents placed the need for personal growth above all other challenges. The importance of networking and development is emphasised not just by the sensitive, pioneering work undertaken by higher education ombudsmen, or the toll it leaves on individuals, but by other factors. One is the fact that many ombudsmen work alone inside higher education institutions. 61 per cent of survey respondents reported that they were the only ombudsman in post at their own institution. A second is that 60 per cent of respondents had been in post for five years or less at the time the survey was administered, so are still at the stage of exploring the potential of their role and themselves within it.

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1 Tom Peacock, **People need an opportunity to tell their story**, Concordia University, 3 December 2014, <http://www.concordia.ca/cunews/main/stories/2014/12/03/people-need-an-opportunity-to-tell-their-story.html>

2 Gadlin, op.cit., 1988.

3 John McMillan, **Future Directions for Ombudsman Offices – Four Trends, Two Reflections**, presentation to the Australian and New Zealand Ombudsman Association (ANZOA) Conference, Wellington, New Zealand, 30 April 2014, <https://www.oaic.gov.au/media-and-speeches/speeches/future-directions-for-ombudsman-offices-four-trends-two-reflections>.

But unlocking the key to personal growth and development is complex and is conditional on a number of issues, some of which go to the heart of the status of higher education ombudsmen as an embryonic profession. First, and purely pragmatically, in some countries, a number of practitioners report that access to relevant development and training is either extremely limited or non-existent:

'I don't have access to training programmes.' (Germany)<sup>4</sup>

'No. [I rely on] My previous experience.' (Sweden)<sup>5</sup>

'In the Netherlands no training for ombudspersons exists.'<sup>6</sup>

Secondly, a small number of practitioners reject the need to 'professionalise' since their professionalism (they suggest) lies in their academic experience not in the status of higher education ombudsmen as an emerging profession which is denied:

'I don't ... need any training: I have been professor for more than 30 years, experience with students, colleagues and some leadership experience. Adding a little bit of common sense was sufficient up to now.'<sup>7</sup>

A difficult question to ask is whether 'a little bit of common sense' is enough.

This is not to suggest that most higher education ombudsmen reject development and training, or that there are no opportunities available. The International Ombudsman Association runs an impressive tranche of programmes, resourced by experienced organisational ombudsmen volunteers, and used by survey respondents.<sup>8</sup> And in the UK and Ireland, the Ombudsman Association commissions the Consumer Dispute Resolution Centre at Queen Margaret University (QMU) Edinburgh to run peripatetic professional Award and Certificate programmes. Recently QMU launched a Masters degree in Dispute Resolution.<sup>9</sup> In Canada, the Forum of Canadian Ombudsman has recently developed 'Ombuds Essentials,' a five-day certificate programme in conjunction with Osgoode Hall Law School. This is highly valued by a number of survey respondents.<sup>10</sup>

There are also a number of extensive flourishing, cross-national and multi-functional networks. The European Network of Ombudsmen in Higher Education (ENOHE) was launched in late 2002 by the ombudsman of the University of Amsterdam, Kristl Holtrop. In February 2003, representatives of more than 30 higher education institutions and governmental central offices from several European countries met in Amsterdam to participate in the founding conference of ENOHE. The initiative for this network was supported by the Dutch Ministry for Education, Culture and Science.<sup>11</sup> ENOHE is 'a genuinely enabling network, devoid of hierarchy, attracting interesting, talented and challenged colleagues to reflect and speculate in a way which is useful in binding wounds from the year past and raising morale for the struggles to come.'<sup>12</sup> It is highly valued by its network members:

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4 AT.23.9.2015; also the Netherlands, AZ 23.9.2015.

5 J.4.9.2015.

6 Herfs, op.cit., 2016.

7 Reinhard Haberfellner, University Ombudsman, Gratz, Austria, AX.23.9.2015.

8 <https://www.ombudsassociation.org/conferences-professional-development/professional-development>; USA, N.5.9.2015.

9 <http://www.qmu.ac.uk/be/Disputes.htm>; UK respondents endorsed QMU programmes, AB.17.9.2015.

10 Canada, K.4.9.2015; Canada, M.5.9.2015.

11 Holtrop and Leidenfrost (eds), op.cit., 2006, p.5.

12 Behrens, Grier and Wohl (eds), op.cit., 2015, p.13.

'the interaction with other ombuds at ENOHE has been most helpful in the past.'<sup>13</sup>

And in a 2013 survey, more than 90 per cent of network members surveyed endorsed the view that ENOHE and other association activities provided them with guidance, support and a valuable forum for the exchange of information and ideas.<sup>14</sup>

American, Canadian, and Spanish networks are more long-standing. The history of North American ombudsman networks is well documented by Martine Conway in the online Journal of the California Caucus of College and University Ombuds,<sup>15</sup> and is not repeated in detail here. It began in 1973 with yearly (and still continuing) ombudsman meetings in Asilomar and the foundation of the California Caucus of College and University Ombudspersons (CCCUO). In 1984, US ombudsmen founded the University and College Ombuds Association (UCOA). In a parallel development the Corporate Ombuds Association (COA) was established in 1982, later known as The Ombuds Association (TOA). In 2005, UCOA and TOA merged into an organisation that became the International Ombudsman Association. IOA claims to be the largest international association of professional organisational Ombudsmen practitioners in the world, representing almost 900 members from the United States and across the globe. About 240 of those members belong to the academic sector.<sup>16</sup>

The Canadian network, the Association of Canadian College and University Ombudspersons (ACCUO), was founded in 1983 and has been exemplary in combining space for personal support with policy development. It currently has 41 members, representing 25 universities and eight colleges.<sup>17</sup>

The Network of Organizations that Defend University Rights (REDDU) was founded by six Mexican universities in 2004 and currently has members in 20 higher education institutions in South America. It was created in the spirit of achieving collaboration between emerging higher education ombudsmen in Mexico and Spain.<sup>18</sup>

The Spanish network, Conferencia Estatal de Defensores Universitarios (CEDU), was formed in 2007. It is a network which brings together Defensores, active in 61 different Spanish higher education institutions.<sup>19</sup>

There are newer national networks in the Netherlands, Germany and Austria, and a cross-national network in Scandinavia. The German network has members in 37 higher education institutions. It aims to promote and maintain close and confidential exchanges between colleagues on common themes, and to promote a culture of fairness at German higher education institutions.<sup>20</sup> The Dutch network (De Vereniging Ombudsmannen Hoger Onderwijs – VOHO) has members in 13 institutions.<sup>21</sup>

The Scandinavian network has now held three annual meetings, most recently in Lund (2015) and Oslo (2016). In 2016 there were 30 participants from 13 higher education institutions in three Scandinavian countries. The 2016 programme included sessions on whistle-blowing,

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13 Professor Patrick Cras, Centrale Ombudsman, University of Ghent, Belgium, L.4.9.2015.

14 Leidenfrost and Gomez-Moran, op.cit., 2013.

15 Conway, op.cit., 2013.

16 Ibid; <http://www.ombudsassociation.org/About-Us.aspx>; <https://www.sc.edu/ombuds/doc/AnnualReport2011final.pdf>.

17 **Celebrating Ombuds in Higher Education: ACCUO 1983-2013**, ACCUO, 2013, [http://www.uwo.ca/ombuds/accuo\\_aoucc/english/ACCUO30En.pdf](http://www.uwo.ca/ombuds/accuo_aoucc/english/ACCUO30En.pdf); Conway, op.cit., 2013.

18 Patricia Begne, **30 Years of University Ombudsmen in Mexico**, Paper presented to 12th ENOHE Annual Conference, Innsbruck, Austria, 28-30 May 2015.

19 <http://www.cedu.es/cedu-2>.

20 Netzwerk des Beschwerde- und Verbesserungsmanagements und des Ombudswesens, <http://www.beveom.de/index.html>.

21 <http://www.enohe.net/netherlands-de-vereniging-ombudsmannen-in-het-hoger-onderwijs-voho/>.

challenges for students with special needs, and how to get the most out of social media.<sup>22</sup> In Austria, campus ombudsmen for students as well as ombudsmen for safeguarding good scientific practice set up a joint network in summer 2016.<sup>23</sup>

The sheer number of higher education ombudsmen networks – some less than five years in existence – is a testimony to the vibrancy of networking and peer support. It is also an indication of current strategic weakness. The networks are mostly sisterly towards each other, but also largely uncoordinated or in tension in terms of the promotion of cross-national competencies. As Bruce MacAllister has pointed out:

'One has only to look at other somewhat more mature professions to see that they each zealously define and defend their titles and practice requirements.'<sup>24</sup>

This does not happen effectively in the world of ombudsmen or the narrower sphere of higher education ombudsmen. As a result, the state of professional development amongst ombudsmen is 'remarkably unchanged from what I observed twenty years ago'.<sup>25</sup> Further, the bifurcation of ombudsman practice – to adjudicate or not – continues to exist and can create a degree of anxiety or confusion amongst practitioners about what constitutes good practice and whether or not it is being followed.

This variable practice means that there are problems or challenges about whether or not there is the possibility of a common, cross-national, training and development pathway for higher education ombudsmen. Nowhere is the challenge more acute than at the International Ombudsman Association (IOA) which rejects adjudication as a legitimate tool of ombudsmen, but accepts 'individuals and whole programs that clearly disregard even the most core concepts of the [IOA] standards.'<sup>26</sup>

There is a gleam of an opening here for European and Australasian members of ENOHE who adjudicate. An important conversation is overdue with the International Ombudsman Association and other networks that reject adjudication. While one response might be (misquoting Groucho Marx) 'I don't want to join a club that wouldn't have me as a member', the issue is too serious to be reduced to Groucho Marxism.

In fact, the conversation centres on the legitimate tools available to higher education ombudsmen in dispute resolution. It is about the assertion that adjudication carried out by ombudsmen is a 'third way' between formal adversarial techniques used by lawyers in court, and negotiated justice by means of mediation and other forms of alternative dispute resolution. In their pulsating book, Nick O'Brien and Mary Seneviratne have called this 'third way' an exercise in 'ombudsprudence'

'finally deployed to expose what is at stake for the future of the Ombuds institution as it finds itself at a fork in the road between consumer dispute resolution and democratic accountability models of practice.'<sup>27</sup>

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22 <http://www.enohe.net/news-updates/>.

23 [www.hochschulombudsnetz.at](http://www.hochschulombudsnetz.at).

24 Bruce MacAllister, 'Five Current Challenges that pose opportunities to improve and consolidate the Ombuds profession', **The Journal of the California Caucus of College and University Ombuds**, 2016, <http://ejournal.calcaucus.com/article-1-five-current-challenges-that-pose-opportunities-to-improve-and-consolidate-the-ombuds-profession.html>.

25 Ibid.

26 Ibid. Examples include 'A nationally recognized program that until recently also managed the formal review process, including gate-keeping and case processing.'

27 O'Brien and Seneviratne, op.cit., 2017, pp.91-103.

Another possibility (not mutually exclusive) is to pursue the idea of Professor Argimiro Rojo Salgado, university ombudsman at the University of Vigo, Galicia, Spain. At the ENOHE Conference 2013 he argued for 'the creation of worldwide organisations ... and forums for university ombudsmen ... in keeping with times.' A bottom-up convergence strategy is needed to bring existing regional networks together to facilitate the sharing of 'information and ideas among ombudspeople in the field of higher education.'<sup>28</sup>

The issue goes beyond core competencies for higher education ombudsmen. It extends to the whole range of issues that define whether or not a 'trade' becomes a profession. This includes entry criteria and necessary qualifications, induction, career progression, continuing professional development and discipline for wrong-doing.

For example, is a law degree required to become a higher education ombudsman?<sup>29</sup> What constitutes an appropriate path of professional development?<sup>30</sup> How should higher education ombudsmen be disciplined when they fall seriously short of high ethical standards?

Change managing the whole higher education ombudsmen enterprise requires tenacity, imagination and leadership. There is a need to convince sceptical colleagues that professionalism cannot come from academic standing alone. Nor is the pursuit of professional status any longer an elaborate dance with the purpose of creating monopolies and the demarcation of particular areas of work, all with acquiescence of the state.<sup>31</sup> The days of professional self-regulation spooned with teaspoons of user deference are long gone, banished by the grim outcome of vested interests failing the public on numerous, well-documented, occasions.<sup>32</sup> Modern professionalism, what higher education ombudsmen should be investing in, is more concerned with channelling vocation. This is to safeguard consistent standards of entry, and continuing professional development and oversight to ensure that 'the public interest' is not a rhetorical device to mask self-interest, but literally in the interests of the public or user groups who use professional services.<sup>33</sup>

Happily, practitioners are not by disposition dreamers prone to 'delightful insanity' and 'sweet solipsism'. They do not 'readily believe, like Shelley, that to have contracted a habit is to have failed.'<sup>34</sup> On the contrary, practitioners are serious, focused and innovative in identifying challenges to their role as ombudsmen including a lack of independence in a minority of operations, the absence of agreement about core operational tasks and variable access to resources.

So, leadership is not in short supply but it is elusive of substantive content and is certainly not to be found in a formula or a book. It was adopted by Lord Nolan as one of the 'Seven Principles of Public Life' and minimally and delphically defined as 'the promotion and support of the other six Principles.'<sup>35</sup> While elements of leadership are intangible, there is no doubt that

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28 Quoted in Behrens (ed), **Dispute Resolution in Higher Education in Turbulent Times**, op.cit., 2014, p.7.

29 Caroline Adams, 'Ombuds: Degree Required?', **The Journal of the California Caucus of College and University Ombuds**, 2 March 2017, <http://journal.calcaucus.com/article-3-ombuds-degree-required.html>.

30 Wolf Hertlein, **Refining one's work: How to become a professional Ombudsman**, ENOHE Webinar, 29 September 2016, <http://www.enohe.net/webinar-2016/>.

31 O'Brien and Seneviratne, op.cit., 2017, pp.7-10.

32 Behrens, op.cit., 2013.

33 Ibid, pp.7-10.

34 Michael Oakeshott, 'On being Conservative' in **Rationalism in Politics and other essays**, op.cit., 1981, p.195.

35 Lord Nolan (Chair), **Standards in Public Life**, First Report of the Committee on Standards in Public Life, Cm 2850-1, Volume 1: Report, London, 1995, p.14.

'The personality of the occupant is a major factor in the performance and function of the [ombudsman] institution itself.'<sup>36</sup>

Survey respondents reported the importance of being an effective role model as higher education ombudsmen, especially given the absence of coercive powers:

'It is the power of personality which counts. More official power might be of negative influence, fear is not a good helper in mediation. Problems are better solved in dialogue not by command'.<sup>37</sup>

'Relies quite strongly on individual personalities in the roles to reach satisfactory solutions ie working in a conciliatory style with both students concerned and academics and helping them to see the issues.'<sup>38</sup>

However important, the focus on the interpersonal element of leadership can only take us so far. For example, its application can do only so much to impact on power relations where these heavily favour the higher education institution over the ombudsman, or where inside higher education institutions 'large, system changes are cloaked in a disguise of meaningful innovation and creative problem solving' when in reality they are 'motivated by economic exigencies'. This exacerbates conflict, promotes change fatigue and makes ombudsman operations and conflict management even more challenging.<sup>39</sup>

This study is evidence-based, critical, but essentially optimistic despite the structural challenges. Leadership includes 'making a friend of every hostile occasion'<sup>40</sup> and higher education ombudsmen have sailed relentlessly through stormy seas that might have capsized others. There is significant consensus about core operational principles for higher education ombudsmen and the most challenging case issues. There is also a marked new focus by classical ombudsman on mediation and early resolution, to bring them closer to the practice of campus ombudsmen colleagues in North America.

What is needed in addressing all the challenges and arguments referred to above is a sense of historical perspective. Despite the longevity of the ombudsman institution, higher education ombudsmen are relatively recent on the scene and embryonic in development of practice. Further, talk of the term ombudsman having a multiplicity of uses that diffuse and weaken the institution has been around for more than 40 years.<sup>41</sup> It is at least possible that the thunder of disputation is an indication of the commitment, passion and resilience of colleagues.

While painting a portrait of higher education ombudsmen in struggle, often falling short of and arguing over the operational principles of their ombudsman trade, the seriousness and quality of the work undertaken is not in doubt, and is evidenced throughout. As Richard Kirkham and colleagues have pointed out, a key feature of the ombudsman 'enterprise' is an

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36 Wood, op.cit., 2005.

37 Ombudsman, Goethe University, Frankfurt, AU.23.9.2015.

38 Australian professor, BI.28.9.2015.

39 Inlow, op.cit., 2013.

40 Michael Oakeshott, 'Political Education' in **Rationalism in Politics and other essays**, op.cit., 1981, p.127.

41 Poblano, op.cit., 1974, p.7.



ability to transform to meet changing needs.<sup>42</sup> Higher education ombudsmen are no different. More than ever, in the world of marketisation, globalisation, reputation management, the decline of deference and the rise of citizen and student advocacy, Lord Dearing was perceptive in pointing out that:

'an aggrieved complainant with a cause may make far more noise than a hundred others who were reasonably satisfied with their experience'.<sup>43</sup>

There is no golden age to refer to, only the application of the lessons from lived experience, and the digestion of the views of service users and stakeholders. The struggle continues.

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42 Trevor Buck, Richard Kirkham and Brian Thompson, **The Ombudsman Enterprise and Administrative Justice**, Ashgate, Farnham, 2011.

43 Lord Dearing, in Reddy and Leidenfrost, *op.cit.*, 2009, p.50.



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# ANNEX 1: QUESTIONNAIRE



office of the  
independent  
adjudicator

## ENOHE Questionnaire 2015

The Office of the Independent Adjudicator for Higher Education (OIA) is the statutory body handling student complaints in England and Wales. The OIA is a full member of and participant in ENOHE. The OIA also runs the ENOHE secretariat.

This survey follows the 2011 study in which the OIA surveyed ENOHE members about the role and status of ombudsmen in higher education in Europe, the Americas, Australasia and elsewhere. Please complete this short questionnaire in order to assist us in understanding and mapping the strength and diversity of ombudsmen in higher education.

Please note, we are using the term 'ombudsman' as a generic, frequently used term. We accept that some colleagues prefer the term 'ombuds' or 'ombudsperson.'

\* Required

**Name:**

**Which of the following do you work for:**

- A single institution
- A group of institutions
- A national institution

**Institution or University:**

**Country:**

**1. What is your official title?**

**2. How were you appointed to your present role?**

Open External Competition

Internal Competition

Election

Other:

**3. Is the ombudsman role you fulfill a full time one?**

Yes

No

Other:

**4. Which of the following would you describe your job as?**

Permanent

Time Limited

Other:

**If your role is time limited please specify its duration:**

**5. How long have you been in your current job?**

Less than 1 year

Between 1 and 5 years

More than 5 years

**6. Do you combine your role as an ombudsman with any other function inside the institution?**

Yes

No

**6.i. If you answered yes to the above, please expand:**

**7. Please describe your main duties as an ombudsman?**

**8. Please rank below your perception of the importance of the listed activities to your ombudsman role with 1 given to the least important and 8 to the most important.**

\*Arbitrator: An independent third party who makes a decision that resolves the dispute. In many cases the Arbitrator’s decision is legally binding on both parties. \*\*Mediator: An independent third party who helps parties with a dispute reach an agreement. The mediator is both independent and impartial.

\*\*\*Adjudication: An independent third party considers the claims of both sides and makes a decision based on the information provided to them. The adjudication decisions are usually binding on the university but not the student.

	1	2	3	4	5	6	7	8
Giving Advice	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Acting as a counselor	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Acting as an arbitrator*	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Acting as a mediator**	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Providing information to interested parties	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Making binding decisions or adjudications**	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Being an agent for change	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Advocating on the behalf of a single party	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

**8.i. If your role allows for adjudication please expand on what authority you possess to undertake this task below:**

**9. Where does the mandate\* for your role as an ombudsman derive from?**

\*Mandate: An official order or commission to undertake a certain task.

- National law
- Individual university statute or standard procedures
- Other:

**10. As an ombudsman, can you look at issues/complaints brought by more than one student? (i.e. group complaints or issues)**

- Yes
- No
- Other:

**11. Please comment on the extent to which you can address issues not brought to you directly:**

**12. As an ombudsman which of the following operational principles does your role cover?**

- Independence
- Neutrality and impartiality
- Confidentiality
- Informality in process

**12.i. Please comment on the current operation of these principles in your work:**

**13. Where the university fails to adopt a recommendation from your office what further steps, if any, can you take?**

- Issue a binding decision
- Issue a public comment pointing out a failure to comply
- Issue a notice to an external or national authority
- Other:

**13.i Please comment and tell us if your position as an ombudsman would benefit from further powers or responsibilities?**



**14. Does your role as an ombudsman include the dissemination of good practice? If so, please expand.**

**15. Are you accountable to anyone in your institution for your work program?**

If yes, please specify to whom you are accountable.

**16. Is there scope for an independent, external review of any decision about a complaint that you make?**

Yes

No

Other:

**17. Are you the only ombudsman in post at your institution?**

Yes

No

Other:

**18. In terms of resources do you have access to the following?**

An office

An annual budget and financial resources

Access to senior decision makers

Training and development

Your institutions database or online system

**19. What are the most challenging types of cases or issues that are brought to you?**

**20. What are the biggest challenges to your role as an ombudsman?**

1 ought to be given to the least challenging factor and 6 to the most challenging

	1	2	3	4	5	6
Independence	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Resources	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Access to students	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Access to policy makers	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Personal and professional development	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Access to a network of ombudsman colleagues	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

**21. If you have access to a general training programme for your current role as an ombudsman, please identify its source and content below:**

**22. Are there any resources you need but cannot access? If so, please expand.**

**23. Would you define yourself as an ombudsman?**

- Yes
- No

**Please share any other general comments or comments regarding this survey below:**

The general purpose of this survey is to produce aggregate statistical information. Occasionally however, we might wish to quote from respondents comments. Please select the box below if you would prefer comments by you to be presented in an anonymised form (i.e. withholding your name) \*

This is a required question

Submit

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# ANNEX 2: TITLES OF HIGHER EDUCATION OMBUDSMEN BY COUNTRY

-  **Azerbaijan:** tələbələr üçün (ombudsman)
-  **Australia:** ombudsman
-  **Austria:** ombudsstellen für studierende, ombudsstellen für gute wissenschaftliche praxis, ombudsman
-  **Belgium:** ombudsman
-  **Croatia:** studentski pravobranitelj
-  **Canada:** ombuds, ombudsperson
-  **Denmark:** student ambassador
-  **England/Wales:** office of the independent adjudicator for higher education
-  **France:** médiateur/défenseur académique
-  **Georgia:** ომბუდსმენის ოფისი
-  **Germany:** ombudspersonen für studierende; DFG-ombudsman für die wissenschaft, ombudsman
-  **Ireland:** ombudsman
-  **Israel:** סנדוטס רוביצ תנולת ביצן, ombudsman
-  **Italy:** difensore degli studenti
-  **Lithuania:** ombudsman
-  **Malta:** university ombudsman
-  **Mexico:** defensor
-  **The Netherlands:** ombudsman / ombudsfrouw
-  **New Zealand:** ombudsman
-  **Northern Ireland:** public services ombudsman
-  **Norway:** studentombudet
-  **Poland:** rzecznik akademicki
-  **Portugal:** provedor do estudante
-  **Russia:** студент омбудсмен (student ombudsmen)
-  **Scotland:** public services ombudsman
-  **Spain:** defensor universitario / defensor de los estudiantes, sindic de greuges
-  **Sweden:** ombudsman för studenter; Universitetskanslerämbetet, studentombud, ombudsman
-  **Switzerland:** studentenombudsmann
-  **Ukraine:** омбудсмен для студент
-  **United States of America:** ombuds

# ENOHE

A stylized white graphic consisting of three curved lines that sweep from the bottom left towards the right, passing behind the letters of the acronym ENOHE.

European Network of Ombudsmen in Higher Education