

TAKING A FRESH LOOK AT DISPUTES IN HIGHER EDUCATION

A toolkit

Improving Dispute Resolution
A HEFCE Leadership Governance and Management Fund Project



Foreword

Disputes are a risk factor for the whole institution. They are costly; they take up administrative time; they damage reputation.

Practice and procedure in dispute-resolution need to be kept under constant review in a fast-changing higher education world of expanding options, collaborative arrangements including international partnerships, employer-led curriculum design, 'business-facing' outreach and knowledge transfer.

Disputes do not now fall tidily into categories such as 'student complaints' or 'staff grievances' which can safely be referred to separate administrative sections of an HEI. They are becoming ever more complex in the ways they cross boundaries and a 'whole-institution' approach to dispute resolution increasingly makes sense.

Nor is there yet a clear way forward for HEIs anxious to ensure that when a dispute reveals an underlying 'systemic' problem, or a 'cause for concern', that is promptly and effectively addressed.

The assumption should no longer be made that because disputes begin adversarially they need to be resolved adversarially. There is often a place for 'alternative dispute resolution' which may be speedier, less costly and offer a much wider range of options for resolution. HEIs which are trying this, particularly mediation, report an encouraging rate of success. It makes 'proportionate' dispute resolution a realistic objective for many HEIs.

The suggestions in the Toolkit provided here are for consultation and for selection by HEIs to meet their own varying needs. The features of suggested good practice listed here will need to be set in the HEI's own institutional context. Even if one size could fit all on the date of publication, the rapid growth and change throughout the sector and its essential diversity would mean that it would soon be out of date. We hope to stimulate reflection and the sharing of ideas and experience, so as to encourage regular internal review of 'whole-institution' dispute resolution, and the habit of actively seeking to learn from what other HEIs are doing.

The Improving Dispute Resolution Project was awarded funding by the HEFCE Leadership, Governance and Management Fund in 2007 for three linked purposes.

'To determine HEIs' experience with mediation and other forms of alternative dispute resolution' ('Strand A')

'To discuss with HEIs ways of identifying disputes which are suitable for mediation' ('Strand B')

'To work with HEIs to develop training needs assessments for mediation' ('Strand C')

Our activities have included inviting institutions to complete our questionnaire, (referred to in what follows as our 'audit'), follow-up by telephone, visits, forming email interest-groups, meetings with a variety of leaders in HE, attendance at workshops and conferences run within the sector, holding workshops (of which more are planned).

HEIs are asking for guidance in setting up in-house mediation services. We are planning a workshop to provide support for this purpose, to be run by our project partners Eversheds on 20 November 2008.

The terminology used in connection with 'disputes' and 'dispute-resolution' in higher education urgently needs clear and consistent definition. Provisional definitions of some key terms are included here for consultation. We intend to hold a workshop on this theme with our project partners Mills and Reeve in the autumn of 2008.²

In this interim report we describe our findings so far, provide a working toolkit for HEIs to select from in overhauling their own dispute resolution provision, and seek to identify directions for further work. We shall be grateful for comment.³ We intend to hold a major sector-wide conference in the Spring of 2009 and to publish a final Report.

G.R.Evans
Project Leader
September 2008

1 www.staffs.ac.uk/idr

2 Watch the project website for forthcoming details.

3 Comment should be sent to the Project Administrator, via Contact on the project website, www.staffs.ac.uk/idr.

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Summary

Snapshots: Viewing ‘disputes’ as a risk factor for the whole institution

Stating the Problem

1. No HEI welcomes disputes. For the individuals involved they can be destructive of careers and prospects and health and family life. They can be warning signs that all is not well in the HEI’s conduct of its affairs. They are expensive and time-consuming for the institution.
2. It is difficult - but important - to put a positive construction on them. HEIs are increasingly aware of the need to improve their dispute resolution. In our informal ‘audit’ by ‘Strand A’ questionnaire, and in conversation and correspondence with those working in HEIs, we have noted many examples of good practice and we expect to encounter more as the ‘audit’ proceeds. This interim report with its Toolkit makes positive proposals to help HEIs review their institutional protocols and practice across the board.
3. The title ‘Improving Dispute Resolution’ was chosen for the project because the term ‘dispute’ is capable of embracing a wide range of types of controversy. Of the available terms, it best reflects the complexity of the real problems encountered in and by HEIs when students or staff or any of an increasingly a wide range of academic, public and commercial ‘partners’ become involved in disagreements with an institution.
4. In meeting the increasingly complex administrative needs of HEIs, there is a widespread tendency to fragment administrative arrangements. This can make it difficult to keep track of institution-wide patterns in the handling of disputes and improve practice. Seeing a ‘dispute’ in the round within a full system of dispute-resolution makes it easier to foresee and prevent complications, and to avoid making procedural mistakes which then themselves become the subject of dispute.
5. The first section of the report provides a preliminary orientation to this approach. It asks ‘what it is like’ for those in institutions seeking to make a complaint and those who handle them on behalf of the institution.

Pathways: Routes to system-wide identification of potential disputes

From the bottom-up

6. It has been apparent since the publication of the Second Report of the Committee on Standards in Public Life (the ‘Nolan Report’, Cm 3270, 1996) that better mechanisms were needed to enable concerns to be raised and addressed effectively in higher education, where they related to systemic problems in an institution rather than solely to individuals with complaints or grievances. This issue has become highly topical with the hearing of the IUSS Select Committee on 17 July 2008, the publication of the Quality Assurance Agency’s revised and extended ‘causes for concern guidance’ on 1 August 2008 and the consultation published in July by Research Councils UK, on a Code of Conduct and Policy for Governance of Good Research Conduct.

From the top down

7. The ultimate authority in a university lies with its governing body. Recent trends in the work of the Committee of University Chairmen encourage concentration on top-level strategic planning and the delegation of monitoring of operational matters. The ‘key performance indicators’ listed include only incidental passing reference to potential disputes. There is no attempt to see disputes as a ‘whole-institution’ risk factor in a way which will help to ensure that ‘systemic’ failings are regularly picked up and addressed.
8. New Clerks and Secretaries to governing bodies of HEIs who are also Registrars will wish to be careful to avoid conflict of interest between their roles in the handling of disputes involving public interest disclosure or the raising of causes for concern.
9. Fragmentation of the administrative arrangements of HEIs and the appointment of specialist professional administrators may make ‘whole-institution’ dispute-resolution policies more difficult to implement with respect to the identification of systemic problems.

10. The task of overseeing or monitoring disputes which have or may have an ‘academic’ dimension is structurally and administratively formidable because of the complexity of the question whether ‘academic judgement’ is being challenged.

Taking an overview: Designing a ‘whole institution’ system

Saving costs in a unified system

11. There appears to be considerable variation in the arrangements made by HEIs for monitoring expenditure on legal fees and administrative costs in dealing with disputes. ‘Whole-institution’ dispute resolution provides an opportunity to review these arrangements against a revised institutional policy.

Designing a system for the prevention as well as the resolution of disputes

12. Some HEIs appear to find ‘fire-fighting’ of their relatively few complex and expensive disputes preferable to designing a system which will help to prevent them, including in-house provision for alternative dispute resolution options. This approach may benefit from rethinking.

Designing procedures: meeting a practical need in a principled way

13. It is sometimes complained that the requirement to follow procedures impedes speedy dispute resolution. Procedures are depicted as bureaucratic, burdensome, time-consuming, a positive roadblock on the way to the desired destination of a final outcome. For those who need either to access or to implement dispute-resolution procedures the level of detail they tend to contain is a practical problem.

14. The QAA provides a model which brings together the advantages of simplicity with the need for detailed working out of procedural requirements. This involves distinguishing ‘precepts’ or principles and a commentary, guidance or explanation on their detailed application:

The ‘Campus Ombudsman’ option

15. Introducing ‘campus ombudsmen’ as a regular thing in HEIs in the UK seems likely to be a long-term objective, and it may not be right for all institutions. There are also potential problems in making such an ombudsman useful in connection with collaborative arrangements. Nevertheless, a campus ombudsman could perform a range of useful functions, advising, informing, providing a reality check for potential complainants and also for the institution’s managers, in the hope of ending disputes at the outset.

Introducing alternative dispute resolution in your HEI

16. We are working with HEIs which are seeking guidance on the best way to organize in-house training for mediators. Commercial mediation training remains unregulated and is still not quality-assured. It remains a matter of concern that HEIs wishing to arrange training for in-house mediators or to approach experienced mediators to help in the resolution of disputes are having to make choices without a reliable point of reference about professional standards.

17. Commercial mediation training typically provides a short courses of a few days, Providers cannot offer a ‘qualification’, merely inclusion of approved candidates on their own list. These courses can, however, offer a good practical start to training, and there is comment to that effect on our website under Strand C. Some providers are willing to organise in-house courses for HEIs, which is likely to be less expensive than paying for the training of individuals at several thousand pounds each.

18. Some HEIs are informally ‘sharing’ their in-house teams. There are clear advantages to doing so, in terms of the costs savings of being able to pool specialist expertise and the better opportunities to learn from experience by sharing lessons learnt.

Looking to the future: New aspects, new areas

New aspects of disputes involving students: Student complaints and causes for concern

19. The relationship between student complaints and causes for concern needs to be rethought in the context of in a ‘whole institution’ approach to dispute resolution. Some HEIs already make provision in their student complaints procedures for a student to make a complaint in a form which would fit the QAA’s definition of a ‘cause for concern’.

New aspects of disputes involving students: Staff-student disputes

20. HEIs report an increase in disputes which involve both staff and students. This presents particular problems in finding a means of resolving such disputes under a procedure which can deal with both those on employment contracts and those who have ‘student contracts’ with the institution.

New aspects of disputes involving students: Collaborative provision and student disputes

21. There are now extensive ‘higher education in further education’ collaborative arrangements, under which students may take courses in further education colleges leading to degrees awarded by higher education institutions. The potential for systemic problems to arise here is manifestly greater because more than one institution is involved.

22. An analogous potential problem area in collaborative arrangements involving overseas “providers” was touched on in the IUSS Select Committee hearing of 17 July.

New aspects of disputes involving students: New dimensions to challenging academic judgements

23. Further elements in the ‘academic judgement’ equation have come into view as a result of work conducted in the context of the Bologna Process ‘Diploma Supplement’, by the Burgess Group⁴ and on behalf of the Quality Assurance Agency, with the objective of providing students with an ‘academic transcript’.

New approaches to employment disputes

24. For employees of HEIs recent legislative change has reduced rather than enlarged the avenues of recourse. The 2004 Act does not provide for staff any counterpart of the OIA for students, which might be able to consider general causes for concern emerging from individual grievances when they relate, for example, to the way in which an HEI has followed its procedures.

Disputes involving commercial partners, intellectual property rights and research ethics

25. A number of concerns were identified by a group commissioned in January 2007 by the Director General of Research Councils, which produced a report Streamlining University / Business Collaborative Research Negotiations: An Independent Report to the “Funders’ Forum” of the Department for Innovation Universities and Skills⁵ later in 2007, with an introduction by Keith O’Nions, Chair of the Research Base Funders Forum. These concerns have a bearing on the considerations to be weighed in designing a ‘whole-institution’ dispute resolution system.

26. Many HEIs have codes under which concerns may be raised about misconduct in research. Research Councils UK, ‘the strategic partnership of the UK’s seven Research Councils’ has recently published Governance of Good research Conduct: Consultation on a Code of Conduct and Policy.⁶ In addition to the code of conduct in preparation through this consultation, is a practical guidance document being designed by the UK Panel for Research Integrity in Health and Biomedical Sciences, which is supported by the UK Research Integrity Office (UKRIO).⁷

4 Beyond the Honours Degree Classification: Burgess Group Final Report, UUK, October 2007, http://bookshop.universitiesuk.ac.uk/downloads/Burgess_final.pdf.

5 www.dius.gov.uk/publications/streamlining-august07.pdf

6 www.rcuk.ac.uk/review/grc/default.htm

7 www.ukrio.org.uk/home/.

Consultation questions

Is the toolkit useful?

How can we improve it?

Do you have suggestions for additional items for the checklists?

Do you have suggestions for better wording of items on the checklists?

How can we improve the background and commentary information?

Please use the form at www.staffs.ac.uk/idr/contact.html to respond or write directly to the Project Leader (gre1001@cam.ac.uk)

Towards Defining Terms

‘Grievance’ and ‘Complaint’

By convention, students make ‘complaints’ and employees have ‘grievances’, though this terminology is not used in this way consistently by all HEIs. There is an argument for using different terms to reflect the fundamentally different types of contract which are formed between an institution and a student and between an institution and an employee, with the consequence that the relationship and the mutual obligations have different aspects. But in the interests of creating a ‘whole institution’ system of dispute-resolution it may make sense to use the single term ‘complaint’.

It is a disadvantage that both terms have a negative ring about them. There can be strong positive and constructive drivers when someone makes a complaint. The complainant is often motivated as much by a wish not to allow ‘the same thing to happen to anyone else’ as by a sense of personal injustice. There is considerable variation among HEIs in the kinds of matter which may be raised under a given procedure. Both the staff grievance and the student complaint procedures of an HEI should allow the complainant to raise systemic concerns as well as complaints that the individual has suffered a wrong.

‘Appeal’

‘Appeal’ is routinely used for the final stage of a complaint or grievance procedure or for a final-stage challenge to a finding under a disciplinary procedure (both students and employees).

Appeals may also be made about the outcome of an examination and then it is usual to distinguish them from ‘complaints’, which should be made before taking the examination. A student who has not previously complained about some aspect of the provision of the course should not normally be allowed to claim after the examination that the outcome of the examination was affected by a failure in the provision. This distinction is harder to draw in modular courses; where a student transfers credits, and where an HEI provides an ‘academic transcript’ which includes descriptions of the course as well as evaluations of the student’s performance.

‘Cause for concern’

The Quality Assurance Agency has recently proposed a definition of causes for concern which fall within its own remit:

‘A Cause for Concern can be defined ... ‘as any policy, procedure or action implemented or omitted by an institution that appears likely to jeopardise the academic standards and quality of its higher education programmes and/or awards’

(QAA Guide to Causes for Concern, 1 August, 2008)⁸

With appropriate adjustments to accommodate the wider range of aspects of its work, this appears to provide a sound basis for defining a ‘cause for concern’ in the operation of an HEI at large.

For example, Research Councils UK is exploring a similar need to clarify what should constitute a reportable ‘cause for concern’ with reference to research in its Code of Conduct and Policy on the Governance of Good Research Conduct, Public Consultation Document (July - October 2008):

‘A key issue at this stage in the development of good research conduct and research integrity policies in the UK is the scale of the perceived problem. Only a very low number of cases are reported to R[esearch] C[ouncil]s each year. However, other evidence suggests that this may not reflect the full extent of the problem. This seems to be supported by evidence from other countries with robust systems for monitoring and reporting poor research conduct, such as the US and Germany, assuming that there are similar issues in the UK to other countries.’⁹

⁸ www.qaa.ac.uk/causesforconcern/guide.asp.

⁹ www.rcuk.ac.uk/cmsweb/downloads/rcuk/reviews/grc/consultation.pdf

‘Systemic’

The term ‘systemic’ has been adopted in this report broadly in the sense used by the OIA in its Annual Report of 2007, where it describes the ‘systemic complaint handling issues’ it has observed in some HEIs.¹⁰ ‘Systemic’ problems are those which seem to reflect a general lack of care, rigour or ‘joined-up thinking’, or to presage damage to student or employee welfare, the integrity of the academic infrastructure or reputational damage to an HEI. The current QAA and RCUK work just referred to is relevant here too. ‘Systemic’ should be contrasted with ‘personal’ or ‘individual’ in that a dispute with ‘systemic’ dimensions needs to be handled by an HEI with a genuine willingness to identify and correct mismanagement or maladministration, possibly at a senior level. The resolution of ‘systemic’ problems may go beyond what it is appropriate to agree in a mediation and what can be provided for in a complaint or grievance or disciplinary procedure. It asks an HEI to be honest with itself in finding fault and fearless in putting right any mistakes which come to light.

‘Alternative Dispute Resolution’

Alternative dispute resolution includes any method of arriving at resolution which allows the parties to step to one side from formal adversarial procedures and seek a voluntary agreement. There is a span of possibilities extending to variants which involve independent adjudication, but the forms most likely to transform dispute resolution in HEIs lie at the other end of the spectrum where the parties to the dispute are helped to agree a solution. Where it appears that there is a ‘systemic’ problem, an HEI may undertake to look into it as one of the outcomes of a mediation. This is often helpful to achieving a resolution.

‘Mediation’ and ‘Conciliation’

In mediation the parties step to one side from formal adversarial procedures and seek a voluntary agreement with the aid of an independent mediator whose task is to facilitate their discussion.

‘Mediation’ is defined - and described in some detail - on the project website.¹¹ A definition drafted from the employment point of view is also to be found on the ACAS website:

Mediation is the most common form of alternative dispute resolution. It’s completely voluntary and confidential. It involves an independent, impartial person helping two or more individuals or groups reach a solution that’s acceptable to everyone. The mediator can talk to both sides separately or together. Mediators do not make judgements or determine outcomes - they ask questions that help to uncover underlying problems, assist the parties to understand the issues and helps them to clarify the options for resolving their conflict.

The aim is to restore and maintain the employment [or student] relationship if possible. This means the focus is on working together to go forward, not determining who was right or wrong in the past. Most kinds of dispute can be mediated if those involved want to find a way forward. It can be used at any stage in a dispute but is most effective if used early on.¹²

The Government is actively promoting mediation through the court and employment tribunal services and its own further ‘user-friendly’ definition may be read online:

‘In mediation, an impartial expert talks to both sides separately, as well as together if needed and helps come up with a solution that both can accept. It’s usually quicker than taking legal action, often lasting less than one day and almost always less expensive and stressful. Both sides must agree to mediation.

10 www.oiahe.org.uk/docs/OIA-Annual-Report-2007.pdf

11 www.staffs.ac.uk/idr/whatismediation.html.

12 www.acas.org.uk/index.aspx?articleid=1680.

*The mediator doesn't just tell you what you should do, but advises on issues, asking questions that help people look at their own behaviour.*¹³

If a mediation or conciliation 'succeeds' and the parties agree, the details of the agreement can be embodied in a binding written form. The HEI should normally pay for a student to take legal advice before signing an agreed form of words, and that is a requirement in the case of compromise agreements in employment cases.

If a mediation or conciliation fails, the parties can return to the adversarial process and continue as before, but further mediation or conciliation attempts can be made at later stages. It is normally part of the agreement to try mediation that everyone undertakes not to 'use' anything revealed in the discussions if there has to be a return to an adversarial process.

'Conciliation' is sometimes used as an alternative term, particularly in connection with the work of ACAS. It is by no means certain that there is a difference, though a Government website definition suggests that:

'Conciliation is similar to mediation but is normally used when there is a particular legal dispute, rather than more general problems. A conciliator will normally be there to encourage the two sides to come to an agreement between themselves whereas a mediator will often suggest their own solution.

Conciliation through ACAS is free of charge and is automatically offered if you make an Employment Tribunal claim (or an Industrial Tribunal claim in Northern Ireland). If your claim might go to Employment Tribunal, you can also ask for conciliation before you put in a claim. Both you and your employer have to agree to conciliation before it can happen.

The decision of an Employment Tribunal is not affected by your decision to try conciliation. So if you decide not to go through conciliation, or if you try it but it doesn't work, this does not make any difference.

A trained conciliator:

talks through the issues with each side

explains the legal issues involved

looks at opportunities for settling the case

helps you and your employer agree a legally binding agreement

The conciliator is impartial and independent (so they are not on anyone's side, and have nothing to gain), and your discussions are confidential. They'll try to help you make your thoughts clear, and look at ideas you may have for sorting out the problem.

The benefits are that:

you'll get a better understanding of the issues

you might sort the problem out without a tribunal hearing

you could reach a solution on your own terms

*a settlement can include things that won't be covered in a tribunal judgement (like getting a good reference)*¹⁴

13 www.direct.gov.uk/en/Employment/ResolvingWorkplaceDisputes/DG_10028132

14 www.direct.gov.uk/en/Employment/ResolvingWorkplaceDisputes/DG_10028132

The **Disability Conciliation Service** is operated through the Disability Rights Commission. Their website explains that:

'Disability Conciliation offers a 'win/win' approach whereby both parties and an independent conciliator come together in a one-off meeting to try and find their own solutions.

It is an alternative to court action and should be used before court proceedings are issued.

Discussing the issues gives both parties the opportunity to try and find workable, agreeable solutions. The aim is to achieve a resolution which is decided by and acceptable to both parties. Disability Conciliation is based on the fact that rights and obligations exist between the parties. It places the rights of disabled people as a non-negotiable issue within the conciliation process.

*The conciliator will be active in ensuring that the disabled person's issues are addressed and in suggesting ways in which the service or education provider might meet their obligations. The conciliator will also be clear as to whether a proposed solution would uphold the disabled person's rights.'*¹⁵

'Adjudication' and 'Arbitration'

'Arbitration' takes place outside a court but it differs from 'mediation' and 'conciliation' in that the parties agree to accept - or are required to accept - the decision of an independent 'judge'. Arbitration may take place under the Arbitration Act 1996. An arbitration agreement is entered into. Arbitrators unlike mediators are members of a regulated body. The Chartered Institute of Arbitrators provides approved professional training for arbitrators in compliance with the legislation. 'Adjudication' is an informal counterpart to arbitration in which the parties agree in advance to be bound by the decision of an independent adjudicator who may be appointed in various ways and does not have to be a qualified arbitrator.

A Government website definition of 'arbitration' includes the following points:

'Arbitration uses an impartial outsider (an arbitrator) to decide between two claims. The arbitrator acts like a judge, making a firm decision on a case. The two sides of the dispute will normally agree in advance whether the arbitrator's decision will be legally binding (so they have to go along with the decision) or not (so they can still decide to go to a court or tribunal).

Arbitration is often used in collective disputes. For example, if a trade union is considering strike action because they simply can't agree with an employer, then they may agree to get an independent arbitrator in ... to look at the situation and make a reasoned decision.

Arbitration can also be used to settle individual disputes. ...

*Both sides have to agree to go to arbitration.'*¹⁶

ACAS also have an arbitration scheme:

'ACAS run a free arbitration scheme that can decide cases of unfair dismissal and disputes about flexible working, where there are no complex legal issues. Both sides must agree to arbitration. You'll have to sign an agreement, having taken advice from ACAS or an independent adviser like a lawyer. Once you've signed, your claim can't go to an Employment Tribunal. You can pull out of the process after you've signed the agreement, but you can't then go to an Employment Tribunal. Your employer can't pull out unless you agree. You and your employer can still reach an agreement before the arbitration hearing.'

15 http://83.137.212.42/sitearchive/drc/About_Us/conciliation_service.html

16 www.direct.gov.uk/en/Employment/ResolvingWorkplaceDisputes/DG_10028132

1.Snapshots:

Viewing ‘disputes’ as a risk factor for the whole institution

Stating the Problem

No HEI welcomes disputes. For the individuals involved they can be destructive of careers and prospects and health and family life. They can be warning signs that all is not well in the HEI’s conduct of its affairs. They are expensive and time-consuming for the institution.

It is difficult - but important - to put a positive construction on them. HEIs are increasingly aware of the need to improve their dispute resolution. In our informal ‘audit’ and in conversation and correspondence with those working in HEIs, we have noted many examples of good practice and we expect to encounter more as the ‘audit’ proceeds. This interim report with its Toolkit makes positive proposals to help HEIs review their institutional protocols and practice across the board.

Why use the word ‘disputes’?

The Committee on Standards in Public Life recommended in its Second Report (the ‘Nolan’ Report) that:

The higher education funding councils, institutions, and representative bodies should consult on a system of independent review of disputes. A similar process of consultation should be undertaken by the equivalent further education bodies.¹⁷

The title ‘Improving Dispute Resolution’ was chosen for the present project because, as the Nolan Report implies, the term ‘dispute’ is capable of embracing a wide range of types of controversy. It reflects the complexity of the real problems encountered in and by HEIs when students or staff, or any of an increasingly a wide range of academic, public and commercial ‘partners’, become involved in disagreements with or within an institution. Working on this broad canvas, which also includes ‘causes for concern’ and ‘systemic’ problems, makes it necessary to take stock before putting disputes in separate administrative boxes for handling.

Nevertheless, there is a widespread tendency to fragment administrative arrangements in meeting the increasingly complex administrative needs of HEIs. It may be convenient to allocate staff to look after disputes in ‘boxes’ called , for example, ‘student complaints’ or ‘staff grievances’. This may be helpful in ensuring that the relevant legal requirements are met, but in reality disputes frequently cross the boundaries between categories. Examples of common breakdowns of ‘communication’ between segments of administrative arrangements are common. Not all HEIs seem yet to have tackled the need to make systematic provision to deal with disputes between staff and students. It is not unknown for an in-house mediation service to be set up by Personnel for staff use only, without the Academic Registrar responsible for student disputes being aware of its existence.

Seeing a ‘dispute’ in the round within a full system of dispute-resolution has many advantages.

- It makes it easier to foresee and prevent complications, and to avoid making procedural mistakes which then themselves become the subject of dispute.
- It is a means of maintaining equality of arms, so that the individual student or member of staff with a problem does not feel ‘up against’ a huge and powerful institution, and consequently disadvantaged. It is right for an HEI to be seen to protect the dignity of the inherently weaker parties, the students and employees. To do so can give impact to a ‘dignity at work’ policy - and help to ensure ‘dignity for students’ too.
- Seeing disputes in the round may also help an HEI to avoid the common error of automatically ‘identifying senior staff with the institution’, and even paying for legal representation for them, when a student with a complaint or an employee with a grievance has made an allegation against the senior individual personally.

We have therefore sought to include all sorts of disputes in taking an overview of the problem as a whole, from the familiar territory of disciplinary processes, student complaints and staff grievances (with the concomitant equal opportunities and harassment matters, complaints of victimization,

and resort to employment tribunals), to allegations that a university has not followed its published procedures, and including expensive litigation arising out of alleged breaches of contract with commercial funders of research, alleged breaches of health and safety legislation and other statutory requirements.

What happens in your institution when a dispute begins?

Our 'audit' by questionnaire suggests that disputes may be brought to the attention of an HEI when a procedure for complaint, grievance or discipline is initiated internally, or when a member of the public or, for example, a bar-owner or shopkeeper dealing with misbehaving students of an HEI, makes a complaint.

When a dispute begins it may be difficult for the HEI to get to know about it in time to prevent it escalating. On the other hand, there are advantages in encouraging dispute-resolution at so early a stage that there is no need for official cognizance to be taken of it. One advantage is that staff and students are more likely to want to make use of a 'help' system if they know that nothing will go down on the record. Anecdotal evidence suggests that students in particular are afraid of becoming known as 'troublemakers'.

In this connection it seems that there is mixed practice about encouraging the reporting of minor spats to line-managers at an early stage (and about identifying the appropriate person to report or to receive such a report); and also about ensuring that there is cross-referencing of disputes to relevant other 'parts' of the HEI's organization so that the left hand knows what the right hand is doing.

Where do staff or students go for advice? HEIs usually have counselling services. They all have student unions. They all have a range of trade unions (but variable levels of staff membership). They do not as a rule have officers identifiable as 'campus ombudsmen'.

How easy is it to find out what procedures to follow? A student or a member of staff with a complaint or grievance may find procedures and guidance on the institution's website, often only in the intranet, which may create difficulties for someone needing to access them from home, or for members of the public with potential complaints about the behaviour of students.

Even if they are publicly available, it is not always easy to find the procedures quickly on the web. A potential complainant should have been told of the existence of procedures and where to find them, or given a booklet at the time of the offer of a place (students) or at registration/enrolment, or in an HR pack in the case of an employee. This does not always happen, especially in the case of students involved in collaborative arrangements. Some HEIs are trying to ensure that 'partner college' literature includes this information.

Some HEIs identify a member of the HR department who can be asked, either how to find the procedures or how to decide which it may be appropriate to initiate in a given dispute. This may not be appropriate for students.

Not all HEIs ensure that members of staff can rely on the independence of such assistance. For example, if an HR specialist is allocated to each department, and is regularly working with the head of department, a member of staff may not feel 'safe' in asking for help in finding the grievance procedures or initiating the process. Students have the support of the student union but that does not necessarily include a permanent member of staff who has long-term experience of the institution.

Some HEIs expect a member of staff to go to a head of department for guidance but this does not allow for the possibility that the complaint or grievance may concern the head of department, the common situation where a head of department is not required to have undertaken the appropriate training, or the complexities for a member of staff who wants to explore a situation off the record and not have something kept on file about the enquiry.

Toolkit for self-evaluation

Getting started checklist

- How easy is it for a student or member of staff who wants to make a complaint or raise a concern to find out from your website what to do and where to go?
- How clear do you make it that alternative dispute resolution may be an option at any stage if everyone involved agrees to try it?
- Does your website help the complainant distinguish between personal complaints or grievances and systemic causes for concern. Does it recognise that a problem may be both personal and systemic?
- Are your systems designed to pick up concomitant systemic problems when an individual complaint or grievance is raised and ensure that they are addressed?
- How do you ensure that staff know what to do when a complaint or concern is brought to them?

Background and comment

Put yourself in the complainant's shoes

'Should I say anything?'

The complainant may not be sure whether what is alleged to have happened is a matter which it is appropriate to 'raise' at all:

Our observation on the basis of our 'audit' so far is that it may not be easy to identify a single authority in a university who will know the answer - or even where to find the answer. We designed a questionnaire which could be filled in in sections - and in part - precisely because we realized that it was unlikely that any single administrator in a university would be able to answer all the questions in a 'general' questionnaire. And so it has proved.

If a student is unclear about the appropriate procedure for lodging a complaint involving a member of staff, he or she should first discuss the matter informally with a friend, Personal Tutor, Director of Studies, Student Counsellor or Students' Union Officer/Adviser. If the consensus is that there is a case to answer, the student should raise the matter.... (University of Bath)¹⁸

'Who should I ask about this?'

The first thing a person with a problem needs to know is where to go for help in getting it resolved. This means identifying a route to the right person to ask.

Complaints of a minor nature should be raised immediately with the member of staff responsible or alternatively, via one or more of the following channels in turn:

- *Personal Tutor/Research Supervisor/Director of Studies*
- *Service provider in Support Service or Facility*
- *Staff/Student Liaison Committee (SSLC) or relevant support liaison committee if applicable*
- *Student representatives on Board of Studies*
- *Feedback such as student evaluation questionnaires.*

(University of Bath)

Our observation on the basis of our ‘audit’ so far is that it may not be easy to identify a single authority in a university who will know the answer - or even where to find the answer. The ‘audit’ of current dispute-resolution practice to be conducted by the Improving Dispute Resolution project as its first task HEFCE presented us with a challenge in designing a questionnaire which could be filled in in sections and in part, precisely because it was apparent that it was unlikely that any single administrator in a university would be able to answer all the questions in a ‘general’ questionnaire. And so it has proved.

Someone has come to you with a complaint; what do you do?

The ‘person asked’ has to know what to do, what his or her own authority and role in the situation is, what discretion he or she has (to advise or to act). There is a need for informed clear-headedness:

Recipients of student concerns or informal complaints are responsible for addressing them promptly and fairly. The recipient will normally let the student know within a week of receiving the initial complaint what steps will be taken to address the complaint and the expected timescale.

(University of Bath)

The ‘person asked’ may also experience some difficulty in knowing where to turn, for the structures of universities are complex, and delegation of powers not always clear. It is not always the case that new staff are adequately briefed about the way the University is governed or its operational framework.

Why mishandling may make a dispute worse

A frequently encountered phenomenon is the small dispute which has grown large and complicated and protracted because of the way it is handled. Sometimes a dispute develops a wider reference where the HEI has failed to follow its procedures correctly or appropriately, so that the focus shifts from the original problem to the behaviour of the institution. There is often, as a dispute develops, a further complaint of ‘systemic’ problems which consist not in matters which form the context for the original complaint, but in a failure to following published procedures.

2. Pathways:

Routes to system-wide identification of potential disputes

Picking up potential disputes from the bottom-up: the raising of causes for concern

Toolkit for self-evaluation

Checklist: For identification of potential disputes ‘from the bottom-up’ with a view to prevention or catching a problem early

- When did you last revise your public interest disclosure code ?
- Is it clear that it is intended to provide a route for the raising of ‘systemic’ concerns
 - by students
 - by staff
 - by others
- Have you defined ‘systemic’ for the purposes of your code?¹⁹
 - have you added to the list in the public interest disclosure legislation in the light of the current ‘dispute-resolution’ needs of your HEI?
 - have you included Financial Memorandum-related matters as identified in HEFCE’s public interest disclosure procedure?²⁰
 - have you included ‘any policy, procedure or action implemented or omitted by an institution that appears likely to jeopardise the academic standards and quality of its higher education programmes and/or awards’ as defined by the Quality Assurance Agency in its ‘causes for concern’ provisions?²¹
 - have you included research misconduct,²² intellectual property disputes, disputes arising in connection with the funding of research?
- Have you made provision to ensure that when a student complaint is received the possibility is actively considered that there may be an underlying ‘systemic’ problem?
- Have you made provision to ensure that when a staff grievance is received the possibility is actively considered that there may be an underlying ‘systemic’ problem?
- Do you have ‘champions’ or other nominated persons entrusted with the responsibility of ensuring that individual complaints and grievances are looked at as possible indicators of ‘systemic’ problems?
- Do you have ‘champions’ or other nominated persons who can be consulted in confidence by anyone considering raising a concern and who can help clarify whether the matter is personal or systemic or both?
- Do you have robust protections against reprisal for students as well as staff or others raising concerns in good faith?
- Have you made it clear how and in what circumstances concerns may be raised by those who are not current students or staff?

19 For definitions see Defining Terms section

20 www.hefce.ac.uk/finance/assurance/public.asp

21 1 August, 2008, www.qaa.ac.uk/causesforconcern/guide.asp.

22 www.rcuk.ac.uk/cmsweb/downloads/rcuk/reviews/grc/consultation.pdf

Toolkit: Background and comment

It has been apparent since the publication of the Second Report of the Committee on Standards in Public Life (the 'Nolan Report', Cm 3270, 1996) that better mechanisms were needed to enable concerns to be raised and addressed effectively in higher education, where they related to systemic problems in an institution rather than solely to individuals with complaints or grievances.

The Committee noted that:

'We have received a considerable quantity of evidence from individuals about the difficulties and harassment they or other employees in higher and further education have faced when raising issues of concern...it would be unfair to form conclusions about the reliability of information which is necessarily incomplete. Yet some of the material we received was disturbing'.

Among its recommendations were that:

Recommendation 7, Institutions of higher and further education should make it clear that the institution permits staff to speak freely and without being subject to disciplinary sanctions or victimisation about academic standards and related matters, providing that they do so lawfully, without malice, and in the public interest.

and that although confidentiality clauses should in the main be avoided:

Recommendation 8, Where it is absolutely necessary to include confidentiality clauses in service and severance contracts, they should expressly remind staff that legitimate concerns about malpractice may be raised with the appropriate authority (the funding council, National Audit Office, Visitor, or independent review body as applicable) if this is done in the public interest.²³

In making these recommendations, the Committee expressly confined itself to employees. It was also anxious to ensure that students had an avenue of recourse, but it does not appear to have envisaged that students might also have wider causes for concern to raise. Nor did it address the problem of hybrid 'disputes', where staff and students might both be involved, and possibly other parties such as partner institutions or employers or commercial funders of research, and where the personal and the 'systemic' might become entangled in a complex and long-running dispute.

The employment-related recommendations of the Committee on Standards in Public Life were addressed in part by the Public Interest Disclosure Act of 1998 (PIDA). Since this came into force there has been an expectation that each university will have a 'public interest disclosure' code. Some of these do not seem to have been revised since they were introduced nearly a decade ago. For example, the code of Manchester Metropolitan University says it was 'made by the Board of Governors on 12 January 1999', with a 'review date' of 12 January 2005 but no indication that a review of the code has yet taken place.²⁴

In law PIDA remains an employment protection and although universities have been encouraged by Universities UK to include provision for students to raise concerns too - and to enjoy the same protection against victimization within their HEI - students cannot take a victimization claim to an employment tribunal because they are not employees. Manchester Metropolitan's code sets a good example here. It is expressly designed to be used by:

'all members of the University to express concern/disclose information at an appropriate level when it is believed that there is evidence of malpractice and it is in the public interest that the matter be exposed.

23 www.archive.official-documents.co.uk/document/parlment/nolan2/nolan2.htm#furt

24 www.mmu.ac.uk/policy/policy.php?id=49.

This code promises that no disciplinary action will be taken against a member of the university raising a concern who is deemed to be acting in good faith:

No action will be taken against any member of the University who makes an allegation in good faith which is not subsequently substantiated. If, however, an individual is adjudged to have made malicious or vexatious allegations, then disciplinary action may be taken against her/him.

But reprisal amounting to victimisation may take many forms beyond disciplinary action. Only an employee could take a victimization claim to an employment tribunal. It is not clear what a student could do if he or she suffered detriment as a consequence of raising a concern. Yet there may be a good deal at stake for a student who seeks to raise a concern. For example, research students raising ethical concerns about the conduct of research projects in which they hold doctoral funding and dependent upon the goodwill of the leader of the project for postdoctoral positions, may be putting their future careers at risk with no available remedy.

There is a wide range of matters on which concerns may legitimately present themselves within universities which do not appear on the PIDA list. To borrow once more from the Manchester Metropolitan PIDA code:

concerns may include:

- *financial malpractice or fraud*
- *failure to comply with a legal obligation or with the Rules and Regulations of the University*
- *dangers to health and safety or the environment*
- *criminal activity*
- *miscarriages of justice*
- *attempts to conceal any of the above.*

Matters which do fall squarely under the PIDA legislation may not be spelt out in sufficient detail to enable the would-be raiser of a 'systemic' concern to realise that the university's code provides an avenue of recourse. The most important example is the failure to follow complaints or grievance procedures properly or to provide an academic course in the manner promised. Such lapses could constitute 'failure to comply with a legal [contractual] obligation or with the Rules and Regulations of the University'.

Going outside

The 'Toolkit' is designed in the expectation that HEIs will wish to ensure that they have effective mechanisms for resolving disputes internally, including systemic concerns. If that fails, several avenues of recourse exist for those who want to take matters further. It is important for HEIs to be aware of the scope of each of these and to seek to make sure that they do not expose themselves to the risk of being found to have conducted themselves in a less than satisfactory way in the prevention and handling of relevant disputes.

HEFCE's Public Interest Disclosure policy

The limitations of the PIDA legislation for HEI use are recognized in part by the Higher Education Funding Council for England, whose public interest disclosure protocols²⁵ are designed both to allow concerns to be raised by individuals who are not employees of the HEI in question; and to extend across the whole range of matters over which HEFCE has statutory responsibility through its Financial Memorandum. The Higher Education Funding Council for England has a public interest disclosure code, it explains, to enable it to deal with 'allegations of financial irregularity or impropriety, mismanagement, waste and fraud in higher education institutions, from a variety of sources'. 'Our guiding principle for dealing with allegations can be summarised as follows,' it notes:

'Institutions are independent bodies and we do not interfere unnecessarily in their operations. However, our relationship with institutions is governed by the Financial Memorandum, which sets out the terms and conditions for the payment of funds to the governing body of each institution. The Financial Memorandum also lays down requirements for the governance and management of institutions. Where allegations are received that these requirements are not being met, we must satisfy ourselves that the matter has been investigated, appropriate action taken, and relevant people informed.'

HEFCE lists appropriate topics and appropriate avenues to be used by those seeking to raise a concern about a particular institution. It explains that the code excludes concerns which 'relate to an individual or collective personnel dispute for which there are established routes of complaint and remedies' and that if the matter relates 'to an academic dispute between a student and the institution, guidance on complaints of this nature can be found in the Code of Practice on Student Complaints to be found on the web-site of the Quality Assurance Agency for Higher Education'.

The intention is therefore to separate 'individual' complaints from complaints about systemic failings. There does not seem to be clear provision to accommodate types of concern which begin as 'individual' but point to systemic problems.

The Office of the Independent Adjudicator and 'systemic concerns'

For students, Recommendation 9 of the Second Report of the Committee on Standards in Public Life that 'Students in higher education institutions should be able to appeal to an independent body' has been implemented. Student complaints procedures were introduced in all universities in the wake of Recommendation 25 of the Dearing Report.²⁶ The Operator of the Student Complaints Scheme which became the Office of the Independent Adjudicator, was set up under the Higher Education Act 2004.²⁷ Its remit was designated by statute in such a way as to limit its function. The OIA explains on its website²⁸ that its primary task is to 'handle individual complaints against higher education institutions'. Where it finds that an individual complaint suggests the existence of systemic problems, it 'may also publish recommendations about how they deal with complaints and what constitutes good practice':

Where a complaint is wholly or partly justified the Reviewer may recommend that the higher education institution does something or refrains from doing something. For example, we might recommend that the institution should take steps to assist the student in some way; we might refer the complaint back to the higher education institution to be looked at afresh because the internal procedures of the institution have not been properly followed; we might recommend that the institution should change the way it handles complaints, or change its internal procedures.

It is apparent from the published case studies of the OIA that it is not unusual for such a systemic problem to emerge. To take a single set of such examples, in Case 2, the OIA 'recommended that the University should consider redrafting the regulations on extenuating circumstances to remove any ambiguity'. In Case 9, the OIA 'recommended that the staff should be given more training in complaints handling and that the University of KK should consider whether its appeal process was too complex'. In Case 11 it was found that 'the University's internal investigation of the complaint was protracted, lacked transparency and failed to keep L informed'. In Case 16, 'the University had, as it admitted, failed to follow its own procedures in its initial handling of the allegation of plagiarism against him'. In Case 20, it was found that 'under the university regulations the Disciplinary Panel was not entitled to withhold academic credits for a purely disciplinary matter, and the time taken to address the issues was excessive'. In Case 21, the OIA recommended 'that there should be training for staff on the legal aspects associated with the provision of references.' In Case 22, 'The OIA found that there were shortcomings in the course; that the University had failed in its communication of problems to the students; and that the complaints procedure was not handled in a timely way'. In Case 23, it was found that there had been breaches of the expectation of the QAA Code of Practice

26 www.leeds.ac.uk/educol/ncihe/, though the effectiveness of these is now under review by the National Union of Students.

27 www.oiahe.org.uk/

28 www.oiahe.org.uk/

that if there were changes to the course, the university had a duty ‘to inform prospective students and in particular freshers’. ‘The changes to the course had been agreed before registration but no effort had been made to inform upcoming students nor was the website updated until after W complained.’ In Case 32, ‘the University did not follow its own procedures in rejecting the option of conciliation facilitated by the Disability Conciliation Service’.²⁹

Useful though this extension of the remit of the OIA is in ensuring that underlying ‘systemic’ problems are identified and recommendations made, in the nature of things, this can happen only in the course of consideration of a complaint made by a student after all internal avenues in the HEI have been exhausted, and as an obiter dictum of the OIA in its adjudication. It remains essentially incidental, recommendations cannot be enforced, and they may well come too late to help other students who may have been adversely affected by the systemic failure.

The Quality Assurance Agency and ‘Causes for Concern’

The Quality Assurance Agency was established in 1997 as an independent body, ‘funded by subscriptions from UK universities and colleges of higher education, and through contracts with the main UK higher education funding bodies’; it exists ‘to safeguard the public interest in sound standards of higher education qualifications and to inform and encourage continuous improvement in the management of the quality of higher education’.³⁰

While the OIA can deal only with individual complaints, the QAA cannot deal with individual complaints at all. It has neither the jurisdiction nor the resources. It has, however, instituted a procedure for ‘Handling causes for concern in English higher and further education institutions’,³¹ launched in March 2007 to fill a perceived accountability ‘gap’ and supplemented on 1 August 2008 by a further procedure for Welsh HEs.³² A schema was also provided on 1 August to help those who wish to raise a concern decide whether the problem is systemic or individual, explaining which route to follow as appropriate.³³ This provides an avenue of recourse, designed at first to be used by or through a list of approved bodies and not by individual members of staff or students, though if an individual raises a concern and provides appropriate evidence the QAA can implement its procedure by acting as an ‘approved body’ itself.

Research Councils UK and the need for an agreed framework within which representations may be made about misconduct in research

Research Councils UK is ‘the strategic partnership of the UK’s seven Research Councils’. In July 2008 it published a Consultation on a Code of Conduct and Policy³⁴ on good research conduct ‘as part of [its] commitment to the highest possible standards in good research conduct and research integrity’, inviting ‘responses from organisations that we fund, research foundations and associations, academies, and journal editors...other organisations and individuals’:

‘The consultation concerns not only core issues of plagiarism and falsification of data, but also such areas of proper representation of credentials and findings, conflicts of interest, access to data for replication, abuse of peer review, and informed consent and protection of research subjects. It also covers concern about whether weaknesses and cases of poor conduct which have been identified are fully pursued and publicly available, so they are unlikely to be repeated.’

This consultation is discussed later in the present report under ‘Disputes and research ethics’.

29 www.oiahe.org.uk/case-reports.asp#4.

30 www.qaa.ac.uk/aboutus/

31 www.qaa.ac.uk/aboutus/policy/concern.asp.

32 www.qaa.ac.uk/causesforconcern/default.asp.

33 www.qaa.ac.uk/causesforconcern/guide.asp.

34 www.rcuk.ac.uk/cmsweb/downloads/rcuk/reviews/grc/consultation.pdf

From the top down: monitoring and the exercise of oversight

Toolkit for self-evaluation

Checklist: Governing body monitoring

- Does your governing body treat disputes and dispute-resolution as a ‘whole institution’ risk factor?
- Is effective dispute-resolution treated as one of your HEI’s key performance indicators?
- Does dispute resolution appear routinely on the agenda of governing body meetings with provisions for direct regular monitoring?
 - does the monitoring include assessment of the effectiveness of the handling of disputes arising in the institution?
 - does the monitoring include the costs incurred, including estimated opportunity cost in administrative time?
 - does the monitoring include reporting the outcome if any disclosure relating to your HEI is made to HEFCE under its public interest disclosure procedure?
 - does the monitoring include reporting any ‘systemic’ concern about your HEI identified by the Office of the Independent Adjudicator in its findings on a student complaint referred to it?
 - will the monitoring include reporting any concern about your HEI identified by the QAA under its ‘causes for concern’ procedure?
 - does your HEI publish an annual summary of reported systemic failings, causes for concern and public interest disclosures?
- Do the governors have a right to see documentation relating to dispute-resolution in your HEI?
- What is your HEI’s procedure if a governor asks for information on the progress of a particular dispute?
- What provision is there for the Vice-Chancellor to be asked to leave the meeting while the governors discuss the conduct of a dispute or disputes in the HEI?
- Have you ensured that there is no danger of confusion of roles in the following of dispute resolution procedures where the Clerk to the Governors is the same individual as the Registrar?

Toolkit: Background and comment

The governing body as monitor of disputes

Key performance indicators and the danger of remote governance

‘Most institutions have a risk management process which helps governors to monitor a small number of high-level strategic risks monitored by governors. They may also have a much larger risk register which is a more comprehensive list of operational risks.’³⁵

The ultimate authority in a university lies with its governing body, which has a duty to monitor the performance of the institution with attention to risk management, accountability, the protection of reputation and the 'brand'. We have noted a variety of provision for reporting dispute-related information to boards of governors but there seems to be neither consistency nor coordination in the recorded practice of many HEIs.

Recent trends in the work of the Committee of University Chairmen have implications here. The Report on the Monitoring of Institutional performance and the Use of Key Performance Indicators (2006)³⁶ has been followed in the summer of 2008 by a Report on the Implementation of Key Performance Indicators: Case Study Experience.³⁷ The 'key performance indicators' (KPIs) listed include only incidental reference to potential disputes. There is no attempt to see disputes as a 'whole-institution' risk factor.

The Key Performance Indicators approach as it is developing at present seems to present the danger of elevating the governing body's angle of view still further above the details of the activities of the institution and encouraging it to gaze at the horizon, look at outcomes, outputs, results, and to monitor by 'performance' identified in such terms, concentrating on strategic planning rather than operational effectiveness. This could encourage governing bodies to operate increasingly in 'high-level' supervisory mode, and routinely to delegate the task of watching over the detailed operation of the institution to those doing the work. If they then rely on their reports of what they themselves are doing there is an obvious danger of inadequate accountability. Most HEIs can tell stories of too much trust being placed in the vigilance and competence of the committee or managers below by decision-makers with limited personal knowledge of what is involved, warning signals being ignored and the overriding by the majority of tentative expressions of concern by a single governor. These represent familiar patterns of conduct on high-level committees everywhere.

Our audit suggests that policy-formation disconnected from a full hands-on understanding of the way the institution works may have unanticipated drawbacks, some of which may lead to future disputes. A recent example involved admitting such a high proportion of international students to a course that native English speakers complain that the teaching is being geared to the needs of a majority of students with limited English, and they are suffering as a consequence. If a governing body has limited understanding of present operational practice it is less likely to recognize potential dangers in 'going forward' in new directions. This also makes it more likely that causes for concern will arise without their being noticed by the supreme authority in the university until damage has been done. This was a notable feature of the 'Southampton Institute' case on which both the Public Accounts Committee and the National Audit Office published reports.³⁸

The recent KPI follow-up Report suggests still further reduction of the aspects of the university's activities on which the governing body will focus directly. Selectivity is actively recommended:

'Institutions should not feel any obligation to make the KPIs comprehensive, or to choose everything off the "menu" in the CUC Guide.'

It is also envisaged that the focus may shift over time:

'An alternative approach is to have KPIs which cover areas of particular concern to governors at any time. These will probably change over time, and the Board may adopt a different mechanism for reviewing other areas of university performance.'

It is, however, suggested that there should be:

'a link to performance so something really happens ("what gets measured gets done" to quote one chair of a case study university).'

36 www.shef.ac.uk/cuc/pubs.html (KPI (2006))

37 www.shef.ac.uk/cuc/pubs.html (KPI (2008))

38 Roger Brown, 'The Governance of the New Universities - Do We Need To Think Again?' Perspectives (Summer 2001), Vol 5, No 2.

Alongside this increased selectivity has gone a recommendation of increasing delegation of the monitoring role. This is in tune with widespread trends. The use of bullet-points is almost universal in power-point slides; there is an untested assumption here that making a point which is capable of being stated in a word or phrase is a powerful tool for communicating an understanding even of complex matters. The 2006 KPI Report recommended radical reduction of the volume of papers the governors would routinely receive by way of reports on operational matters in line with this type of summarizing:

The Report to Governors

1.45 Governors would periodically receive a one-page summary monitoring report which would show the status of each of the ten top-level KPIs as discussed above.

1.46 An example of what this presentation might look like is shown as Figure 1.

1.47 This one-page presentation would be supported by the back-up schedules, as illustrated in chapter 3, which give further detail so that governors who wished to could “drill down” in some or all of the “top ten” performance areas.

1.48 The full suggested performance monitoring pack for governors could therefore potentially be approximately 25-30 pages long (1-page summary, plus 2-3 pages for each of 10 top-level performance areas).

The suggestion is that:

This is probably too much material, and governors would not need to read all of this on each occasion. The one-page summary would show at a glance where any potential problems lie and individual governors could choose to refer to the particular back-up pages for the areas of interest.

1.49 Governing bodies will choose how to manage this, but a possible approach to reduce the volume of paper is to circulate to all governors only the institution’s top-level summary (equivalent of Figure 1) plus the relevant schedules for any “super KPIs” (equivalent to KPIs 1 and 2 in the guide). This would imply a total of only about 6-8 pages for all governors to read.

In response to the expression of concerns that the original KPI Report went too far in reducing contact with the operational business of the HEI, the Report of 2008 comments:

3.4 A key point here is that the Guide was not intended to suggest that all the complexity of a university either can or should be captured on one page, nor of course that high-level strategic monitoring by governors will be the only monitoring done in the institution. The purpose, as much as anything is to help governors to ask relevant questions and to fulfil their role in high-level monitoring of institutional performance.

Nevertheless, it is not evident that governors always know enough about their institutions to ‘ask relevant questions’. That makes the widespread delegation of monitoring a high-risk strategy. The second KPI Report (2008) found that ‘It is generally the case that some aspects of performance measurement are delegated: 79 institutions reported arrangements of this kind’ (5.29). There seems to be some unevenness in the thoroughness with which governing bodies make a reality of the duty to supervise the exercise of delegated powers:

(3.21) Most boards have committees dealing with finance, estates and facilities, and human resources. Where these exist, it makes sense for them to advise the board on the performance of the institution in their areas of responsibility. This means that some of the initial consideration of KPIs would take place in these committees, with perhaps just a periodic or high-level report to the board.

There also appear to be grounds for the concern noted above that governing bodies too easily trust the administrative arms of their HEIs to report on their own operational activities. In answer to the question ‘Who prepares the performance data for the Governing Body?’ the following answers were received by the CUC review group producing the KPI Report (2008), which could see that they did not give a very clear or convincing picture:

5.27 The variety of replies and of titles given suggests that the analysis below may not be very illuminating:

- 28 replies indicated that a variety of offices were called on to provide the data; in four instances it was reported that the data was signed off by the Vice-Chancellor or Principal (but this may be the case in other universities in this group);*
- 22 replies suggested that it was the Planning Office (or Corporate Affairs Office or similar) which provided the data;*
- In a further 8 cases the Planning Office (or equivalent) had a co-ordinating role, drawing on other offices for some data;*
- In 12 cases the Vice-Chancellor’s office or SMT (or similar) provided the data whilst in a further 8 institutions a Deputy Vice-Chancellor or Pro-Vice-Chancellor prepared the data (in practice these are probably very similar arrangements); in one of these instances the data is cleared with the Planning and Resources Committee;*
- In 11 cases the Registrar and Secretary or Clerk to the Governing Body was responsible for the data; in one instance it was reported that the data was signed off by the Principal;*
- At 5 institutions the responsibility lies with the Finance Director (or equivalent);*
- 1 university reported that the data was prepared automatically through the dashboard methodology.*

The CUC KPI review group notes the importance of ensuring that these delegated responsibilities are properly discharged, but this is not seen as requiring governors to scrutinize the evidence for themselves:

(3.22) 79% of universities responding to the survey reported that they have delegation arrangements of this kind. Case study universities have noted the importance of having a particular individual or group who take ownership of individual KPIs and are responsible for validating data and assessments on behalf of the board.

If operational supervision is in effect delegated to the operational level of the university the likelihood of potential disputes being picked up early by the governors diminishes. Yet the policy-trend is to reduce the monitoring expectation still further. The distinction is made more explicit still in the new KPI document between the delegation of responsibility for the actual running of the institution (‘governors have an ultimate responsibility, but would normally expect to delegate almost all the work to the executive, with only a need for limited periodic monitoring - often on an exception basis’), and the hands-on role, where:

‘(3.5)... governors would be expected to become personally engaged in debates about the direction of the university’.

Here the increasing selectivity envisaged appears to pose still greater risk:

(3.8) “KPIs can help us to focus on what makes us distinctive - they do not need to cover all the things that every university does anyway”.

This widening gap between strategic planning and watching over the daily operational realities is expressly considered in ‘risk management’ terms in the KPI documents but again only within the overarching framework of encouraging simplification and selectivity. One of the suggestions made in the original KPIs document was the use of ‘traffic light’ indicators showing ‘current status’ and ‘direction of travel’:

Green: Good: this is on track, low risk

Amber-Green: Satisfactory: this is broadly on track with some concerns which need to be addressed.

Amber: Mixed: some significant concerns which could be damaging if not addressed, medium risk.

Red: Problematic: serious concerns threaten this area, serious risk to the institution's overall performance.

Traffic lights had a mixed reception in the HEIs involved in the recent review. 'See-at-a-glance' monitoring by governing bodies can create the illusion that all is well in an institution even while disputes occurring there continue frequently to be prolonged and costly.

The role of the clerk to the governing body: avoiding conflict of interest

The CUC Guide for Members of Higher Education Governing Bodies in the UK, published in 2004³⁹ includes no mention of public interest disclosure or causes for concern. Neither does the original Key Performance Indicators document (2006) or the KPIs review Report (2008). There is, however, some reference to public interest disclosure in the 'A guide for new clerks and secretaries of governing bodies' produced by the Leadership Foundation.⁴⁰

*'7.21 Public interest disclosure (PID often called 'whistle-blowing') is an important process and arises from the recommendations of the Nolan Committee and the Public Interest Disclosure Act 1998. Each HEI should have a clear policy or procedure in place.'*⁴¹

The Leadership Foundation Guide says that 'it is likely that the clerk will have a role in most instances where a PID is made', without differentiating between the role of the Clerk to the governing body and the Registrar in an institution's Public Interest Disclosure procedure. The Manchester Metropolitan Code states that 'the disclosure should be made to the Designated Person, who would normally be the University Secretary and Clerk to the Board of Governors.' The University of York code says that 'the employee may make an internal disclosure to the Registrar and Secretary and such a disclosure will be deemed a qualifying disclosure'.⁴²

Here the Leadership Foundation Guide may be potentially misleading on an important point of principle. The CUC Guide makes it clear that the Clerk or Secretary must be careful to 'maintain a separation of functions' where he or she is also the Registrar:

'Normally the secretary combines this function with a senior administrative or managerial role within the institution. The institution and the secretary must exercise care in maintaining a separation of the two functions.'

A guide for new clerks and secretaries of governing bodies produced by the Leadership Foundation⁴³ also gives advice about the handling of 'student' and 'employee' disputes at the level where the governing body is involved:

7.22 A growing area of activity in all HEIs is the handling of academic appeals, student complaints and discipline, and the clerk may be heavily involved in this.

The Clerk may also have a role in his or her capacity as Registrar here. Other potentially conflicting roles for the Clerk are envisaged:

Processes should be thorough and fair, but not unduly longwinded. They will usually include at least two stages to allow the student to appeal against the original decision: the first should be carried out as near to the point of impact as possible (eg the head of department, the exams office etc), and it is unlikely that the clerk will be involved other than to keep a formal record of incidents (there

39 www.shef.ac.uk/cuc/pubs.html.

40 www.lfhe.ac.uk/search?SearchableText=raising+concerns&go=Go%21

41 It is not clear what passage is being referred to here.

42 www.york.ac.uk/admin/hr/resources/policy/public_interest.htm#7

43 www.lfhe.ac.uk/search?SearchableText=raising+concerns&go=Go%21

may be a requirement to report incidents and statistics to the governing body) or to give advice. If an issue cannot be resolved, then a second stage is likely which will become increasingly formalised and may involve a panel or tribunal (often with the clerk as secretary).

It is unlikely to be acceptable in terms of the basic rules of fairness for the same individual to discharge all these functions in connection with a single dispute.

There is a hint of confusion in the Leadership Foundation Guide's account of the rules of natural justice which is also important in this connection:

7.23 At this more formal stage, the clerk must ensure that the event is conducted according to the rules of natural justice, that is to say 'no surprises' with appropriate records kept.

The two essential rules of natural justice are to be glimpsed in what follows but they are never clearly identified:

All parties must have access to all information in advance, and have ample opportunity both to put their case and to answer points made by other parties. The clerk must do everything possible to remain neutral, and if pressurised to give guidance to the person representing the institution, it would be advisable to find someone else who can assist, perhaps a senior member of the academic administration who is familiar with the regulations involved.

Clarity on these points is essential to fairness and also to the avoidance of disputes caused by procedural muddles in the handling of a complaint. Because it is a duty of the Clerk to 'alert the governing body' to systemic failings, it is of the first importance to ensure that the Clerk is perfectly clear on such points:

'The chair and members of the governing body should look to the secretary for guidance about their responsibilities under the charter, statutes, articles, ordinances and regulations to which they are subject, including legislation and the requirements of the Funding Council, and on how these responsibilities should be discharged. It is the responsibility of the secretary to alert the governing body if he/she believes that any proposed action would exceed the governing body's powers or be contrary to legislation or to the Funding Council's Financial Memorandum. (Note: the head of the institution is formally responsible for alerting the governing body if any action or policy is incompatible with the terms of the Financial Memorandum but this cannot absolve the secretary from having this responsibility as well.)

From the top down: monitoring and the exercise of oversight

Toolkit for self-evaluation

Checklist: Operational and administrative arrangements generally

- Do your administrative charts and diagrams make it easy for anyone visiting your website to see whom to approach with a concern?
- Are there clear routes for cross-reference to ensure that when a concern is raised or a complaint or grievance initiated all relevant parts of the administrative structure will be enabled to consider the matter as appropriate?
- Do you have 'champions' or other nominated persons to whom concerns are automatically referred when they are raised, and with whom administrators may discuss the most appropriate route to follow?
- Have you revised your rules about confidentiality to ensure that appropriate care is taken and there is due compliance with the data protection legislation where concerns, complaints or grievances mention individuals?
- Have you revised your rules about forwarding emails relating to disputes internally, to ensure that appropriate care is taken to respect confidentiality in doing so, and that there is due compliance with the data protection legislation where concerns, complaints or grievances mention individuals?

Checklist: Operational arrangements relating to academic matters and the academic infrastructure

- Have you reviewed the relationship of your academic and other operational arrangements to ensure that you are equipped to avoid and if necessary deal with disputes relating to QAA's definition of a cause for concern as:

'any policy, procedure or action implemented or omitted by an institution that appears likely to jeopardise the academic standards and quality of its higher education programmes and/or awards'.

Toolkit: Background and comment

Three-dimensional chess: the administration of a university

A student may also be an employee and 'come under' both human resources and student support. If the student becomes involved in a 'dispute', say in a laboratory, it may not be clear whether employee or student procedures should be followed. If the student who is also an employee complains that the HEI has entered into a contract with the commercial funder of the research project in which he is doing research for a PhD which denies him access to research data essential to the completion of his thesis, the dispute may engage further areas of the university's administration, such as an intellectual property officer or a research services manager.

An example of fragmented monitoring:

Monitoring Student Complaints

- *9.1 Departments/Schools will be responsible for making an annual report to the Academic Registrar, providing a qualitative and quantitative record of the number of formal written complaints received, actions taken and/or proposals for future enhancement. Statistics to enable monitoring of equal opportunities (i.e. ethnic origin, gender) may be gathered where the complainant has disclosed such information for this purpose. The Academic Registrar will also receive reports from franchise partners*
 - *9.2 Complaints on other matters will be reported to the Head of Student Services, providing a qualitative and quantitative record of the number of formal written complaints received, actions taken and/or proposals for future enhancement. Statistics to enable monitoring of equal opportunities (i.e. ethnic origin, gender) may be gathered where the complainant has disclosed such information for this purpose. The Head of Student Services will be responsible for making an annual report on formal student complaints received to the Student Experience and Strategy Committee.*
 - *9.3 A summary of student complaints and their outcomes via both these routes will be considered by the Council/Senate/Students' Union Committee in its annual review of student complaints and reported to Senate.*
 - *9.4 The Quality Assurance Committee will be responsible for monitoring and reviewing these procedures.*
- (University of Bath)*

Running a university is like playing three-dimensional chess. Governance and management arrangements have to make provision for manifold activities with multiple interconnections to be

carried out efficiently. This is usually done by dividing up areas of responsibility. As the example above illustrates, that is not easily achieved without some likelihood that there will overlap between the 'areas'.

The tendency is for the administrative structures of an HEI to take a pyramidal form with the Vice-Chancellor at the peak as Chief Executive, placing a considerable responsibility upon a single individual for the oversight of a vast range of activities, many of which he or she will perform or have to delegate, to Pro-Vice-Chancellors and others who are not executive members of the Board of Governors in their own right. It will be impossible for reports of all that happens to pass under his or her eye for approval. He or she, as the single executive member of the governing body, has even more to oversee than his or her fellow but non-executive members.

Diagrams and explanations of the interrelationship of administrative branches can be viewed on many university websites by an enquirer with a potential complaint or concern such as our research student above. Bath offers a good example of the attempt to create a graphic representation of the administrative tree. A new member of staff at Bath can find a diagram on the web easily enough. He or she can also read an outline account in words.

The diagram indicates that a Director of Estates, directly under the Vice-Chancellor, is in charge of estate management and maintenance and also capital development. The University Secretary supervises the legal advisers. A Pro-Vice-Chancellor for Teaching and Learning directly supervises 'student services' and the 'learning and teaching enhancement office'; he also has under him an Academic Registrar who is responsible for supervising (or supporting; it is not clear which) 'recruitment and admissions', 'student records and exams' and the 'careers advisory service'. The Director of Human Resources seems to come directly under the Vice-Chancellor, with no intervening specialist Pro-Vice-Chancellor, and has charge of personnel, health and safety, the staff development unit and childcare services. The Director of Finance is directly responsible under the Vice-Chancellor for the 'research support unit' and 'purchasing' and through the head of Accommodation and Hospitality Services, for 'catering', 'residences' and 'security'. The Director of Marketing and Communications directly under the Vice-Chancellor, deals with 'public and media relations' and the 'print unit'. The Director of Development and Alumni Relations deals with these areas, again directly under the Vice-Chancellor. A Deputy (not a Pro-) Vice-chancellor supervises the Director of Sports Development, who deals with 'facilities and operations management', 'coaching and sports development', 'teaching and sports science support'. In this diagram a Pro-Vice-Chancellor (Strategic Developments) has responsibility solely for 'creative arts'.

One consequence of the practice of dividing up responsibility has been a tendency to appoint 'professional administrators', often with specialist qualifications, replacing the old 'generalist' university administrators. (The University of Bath has a chart of what it describes as 'professional services'.)⁴⁴ There are advantages in this, because in a world of increasingly complex legal requirements, qualified specialists should be less likely to make mistakes in their own areas of responsibility. A human resources administrator who understands employment law is clearly an asset. But it also tends to create walls between specialist departments and to diminish the natural flow of communication.

Within sections or areas, there is usually a line-management structure with up-down reporting lines. But line management is essentially two-dimensional and not necessarily well-designed for the running of three-dimensional structures of great complexity, especially when disputes begin which cross from one area to another.

Bath Spa University, the University of Bath's post-1992 cousin, has a chart of institutional structures on the web, and a list, and a diagram of line-management responsibilities, in which

line management responsibility for 'graduate studies and research management' comes under one deputy Vice-Chancellor whereas Library and Information Services' comes under another and outside the remit of the 'Academic Office', while 'International Activities' comes under yet another management structure. If we postulate that an international research student has a complaint about library resources, where would he take it?⁴⁵

Management of academic matters

Alongside this administrative pyramid, particularly in the chartered and ancient universities, is a 'parallel universe' in which the conduct of academic affairs is intended to take place. The line between the two is increasingly blurred. The University of Bath's website recognises complexity of this duality and the interpenetration of remits it can involve:

'Administrative duties form a part of the work of many academic staff. In particular, the Deans of Faculty and the Heads of Department have a direct responsibility for the efficient running of academic departments, while Directors of Studies and Heads of Groups carry a responsibility for the administration of academic matters. Nevertheless, much University policy is implemented through the Administration.'

At Bath the governing body is called the Council. The Council directly and solely supervises:

*Audit
Council Appeals*
Estates
Investment
Nominations
Remuneration
Finance
Grievance**

Jointly with the Senate the Council oversees the:

*Senior Academic Appointments Committee
Council/Senate/Students' Union
Honorary Degrees
Equalities and Diversity
Committee on the Office of Vice-Chancellor*
Academic Staff Promotion Appeals**

And down a different ladder in the diagram:

*Boards of Studies
Standing Committee for Lifelong Learning
Quality Assurance
Learning and Teaching
Research
Ethics
Academic staff
University Research Students
Awards/ Prizes/ Blues*

**The Senate Appeals, Student Academic Appeals and Disciplinary Committees are not standing committees, but convened only when required.*

The task of overseeing or monitoring disputes arising which have or may have an academic dimension is structurally and administratively formidable.

The CUC Guide's Statement of Primary Responsibilities for governing bodies does not mention anything 'academic' at all:

4. The institution's governing body shall adopt a Statement of Primary Responsibilities which should include provisions relating to:

- *approving the mission and strategic vision of the institution, **long-term business plans, key performance indicators (KPIs) and annual budgets, and ensuring that these meet the interests of stakeholders***
- *appointing the head of the institution as chief executive of the institution and putting in place suitable arrangements for monitoring his/her performance*
- *ensuring the establishment and monitoring of systems of control and accountability, including financial and operational controls and risk assessment, clear procedures for handling internal grievances and for managing conflicts of interest*
- *monitoring institutional performance against plans and approved KPIs, which should be, where possible and appropriate, benchmarked against other institutions.⁴⁶*

The original KPI guide suggested two 'super KPIs', covering 'institutional sustainability', and 'academic profile' but these are reported in the KPI Report of June 2008 to have had a mixed reception.

The essential separateness of the academic and the administrative functioning of a university was recognized by Andrew Cubie, then the incoming Chairman of the Committee of University Chairmen, in a paper on The Monitoring of Institutional Performance and the Use of Key Performance Indicators given at the CUC Conference held in 2006 in the course of the launch of the Key Performance Indicators project. KPIs, he said, were to build on the statement of primary responsibilities of the Governing Body in the CUC's Guide for Members of Higher Education Governing Bodies in the UK: Governance Code of Practice and General Principles (2004),⁴⁷ which, as he paraphrased it, **adding in the academic**, include:

*'to approve the mission and strategic vision of the institution, **long term academic and business plans and KPIs and ensure these meet the interest of stakeholders**'.*

This lack of required engagement by the governing body with the current academic activities of the university appears to reflect the intention of the governance arrangements set up for the former polytechnics which became statutory corporations under the Further and Higher Education Act 1992, that governors should not, preponderantly, be academics themselves. It is not clear that it is now in the interests of HEIs seeking to design a 'whole institution' system of dispute resolution in the circumstances of today.

⁴⁶ Nor does the Guide mention anywhere the need to make provision for raising concerns except in the reference to 'procedures for handling internal grievances'.

⁴⁷ www.shef.ac.uk/cuc/

3. Taking an overview:

Designing a 'whole institution' system of dispute resolution

Toolkit for self-evaluation

Checklists: For creating a 'whole institution' system

a. Checklist: For saving costs in a unified system

- Have you revised your protocols for the approval of expenditure on legal costs?
- How frequently and at what thresholds do you require approval for further expenditure?
- Is expenditure on legal costs in your HEI authorized by a single individual or a single committee able to note comparative expenditure on different types of dispute?
- What are your arrangements for monitoring patterns of expenditure?
- Is there a threshold at which authorization for further expenditure is referred to the board of governors?
- How do you quantify the cost of administrative time spent on dealing with disputes?
- Do you have salaried in-house lawyers to advise on early-stage handling of disputes throughout the institution?
- On what basis (hourly or otherwise) do you pay outside lawyers and could you make less expensive arrangements?
- Have you compared costings for using mediation?
 - setting up an in-house mediation service
 - making arrangements with another HEI to share theirs
 - creating a panel of experienced higher education mediators approved for use within your HEI

b. Checklist: For designing a system for the prevention as well as the resolution of disputes

- Have you considered how to avoid excessive fragmentation of arrangements for dealing with disputes?
- How do you ensure that staff and students are made aware of patterns of conduct in the institution which could lead to disputes and know who to go to to discuss problems at an early stage?
- Do you ensure (for example by requiring preliminary training) that those in authority clearly understand the basic rules of fairness and the limitations on the exercise of their discretion?
- Do you make it a condition of exercising decision-making powers attracting additional salary that senior administrators and heads of departments and faculties and line-managers demonstrate that they understand the basic rules of fairness and the limitations on the exercise of their discretion?

c. Checklist: For designing procedures

- Have you reviewed your procedures for dealing with complaints, grievances, causes for concern and appeals, to ensure that they are clear, unequivocal and easily understood?
- How often do you update your procedures?
- How do you ensure that your procedures are kept up to date so as to comply with changes in legislative requirements and expectations?
- Do you make sure students and staff are informed of any changes and of their right to have a complaint or grievance considered under the version of the procedures in force at the time they entered your HEI?
- How easy will it be for international students to understand the purpose of your procedures and what they can expect if they make a complaint or raise a concern?
- Have you considered using a 'precept and commentary' structure on the model of the QAA's infrastructure code so as to keep the list of essential points short?
- If you adopt a 'precept and commentary' framework will you expect those entrusted with the implementation of procedures to 'internalise' the precepts?
- Have you built in the option of considering alternative dispute resolution in disputes where several procedures may potentially be engaged or there are counter-accusations?
- Have you built in the option of considering alternative dispute resolution in all appropriate procedures?
- Do you appoint 'champions' or other nominated persons to advise 'across the board' on design of procedures to ensure that your HEI has a coordinated system?

d. Checklist: The 'Campus Ombudsman' option

- Have you considered the cost-effectiveness of setting up an in-house mediation service?
- Have you considered working with other HEIs in your area to provide a shared service?
- Have you ensured that the availability and expertise of your in-house mediation service is not confined to a single category of disputes (for example employment disputes)?
- Have you considered designing an in-house service in which an experienced mediator may work in tandem with someone with specialist knowledge of the type of dispute (for example, research funding problems)?
- Have you made sure the option of trying alternative dispute resolution is included in all appropriate published procedures and in the minds of those with decision-making and line-management authority?
- Do you ensure that a reference note explaining the different alternative dispute resolution options is easy to find on your website?

e. Checklist: For introducing alternative dispute resolution in your HEI

- Have you considered appointing a campus ombudsman or setting up an ombuds office in your HEI?
- Have you identified the following tasks and roles and allocated 'champions' to be responsible for them either in full-time posts or as part of their duties:
 - A 'champion' in a 'safe place' role, who will be trusted by students and staff, to whom they can go to get advice about how to frame a complaint or concern and where to take it next ?
 - A 'champion' to whom administrators and academic line-managers can go to get advice on how to deal with a complaint or grievance or an event which seems likely to lead to a dispute?
 - A 'champion' who can provide or organize training for staff in line-management roles to ensure that they understand the procedures they have to follow, the rules of natural justice and the extent of their discretion?
 - A 'champion' who can advise the board of governors, the Clerk to the Governors and the Vice-Chancellor and Pro-Vice-Chancellors about ways to improve whole-institution dispute-handling?
 - A 'champion' who can maintain a whole-institution register of disputes raised and resolved, and monitor patterns and trends and any repetitions?

Toolkit: Background and comment

Saving costs in a unified system

Our audit suggests that

The question of the cost benefit of different approaches to dispute resolution is always complicated and never more so than within the higher education sector. These costs include not only the direct costs of paying compensation but also the transactional costs of in-house or external lawyers. Crucially, the opportunity cost of management involved in extensive and protracted disputes such as those that can take place in the employment tribunal are rarely captured.

The project has as yet not picked up from higher education institutions evidence that they share the level of understanding about alternative dispute resolution which is currently shown by most commercial institutions. Whereas higher education institutions understand the importance of alternative dispute resolution in the context of continuing relationships this does not extend to the potential for alternative dispute resolution to reduce the costs, broadly described, of the dispute resolution process to the institution. Further information from higher education institutions is being sought and is invited.

Administrative costs in dealing with disputes are often not formally quantified. HEIs report times of several months - even years - taken in resolving disputes, which must indicate considerable investment of management time.

A variety of officers is identified as having authority to approve expenditure on legal fees or settlements, for example a legal advisor or a director of HR; the University Solicitor 'in consultation with the Vice-Chancellor where appropriate' (though this seems to mean that the University Solicitor may be approving his own charges).

HEIs do not always have a rule that there must be further authorization at intervals before further costs are incurred though some do, with limits reported as ranging from £5,000 to £25,000 Overseas Operations, Governance and Management at Southampton Institute, Committee of Public Accounts, Twenty-Sixth Report, 1999, recommended £15,000 as an appropriate threshold for a check, at that date.

Some HEIs are instructing external lawyers and paying bills the expensive way, monthly by hours recorded (or in a variety of ways within the same institution), often with no system for raising awareness of what a dispute has cost so far or is likely to cost if it proceeds.

Some HEIs seek to save costs by having in-house lawyers on salaries although they also instruct external lawyers as appropriate. Not all HEIs have in-house lawyers, and sometimes the ‘team’ consists of a single individual. (Legal expense insurance may be relied on to cover legal costs, leading to a lack of tight control of expenditure. In particular where senior staff have been found to have acted ‘in their capacity as a university employee’ their legal expenses may be paid by the HEI.)

In particular where senior staff have been found to have acted ‘in their capacity as a university employee’ their legal expenses may be paid by the HEI.

The legal costs typically incurred during an employment dispute in one institution range from £5,000-£30,000; another reports up to £58,000 plus, but others are not able to give figures. Sometimes there is a budget from which external solicitors may be instructed, and in the case of estates matters the legal costs are quantified as a proportion of the budget for the project.

Designing a system for the prevention as well as the resolution of disputes

Two of us visited the C[onsortium] on N[egotiation] and C[onflict] R[esolution of Georgia State University] summer institute in August 2007. ...In summary we learned:

- *The need to focus on **good system design** and the involvement of stakeholders at this stage.*
- *A broad approach involving a variety of **measures customised by and for each higher education institution**.*
- *The need for some **central support by way of advice, system support, training and an emphasis on looking after the sustainability of the initiative.***⁴⁸

Some institutions deliberately allocate resources to dealing with disputes rather than to preventing them. Prevention may represent better risk management.

Disputes expand and multiply and become complicated as a result of delay or any untidiness in the way they are handled. The ultimate scale of a dispute may easily be in inverse proportion to the initial problem. It is unwise to see any dispute as a fixed and self-contained entity. Good handling is essential to the prevention of the distortion and escalation of disputes, with concomitant stress and possible psychological injury, sometimes including the beginnings of an obsession on the part of the complainant, with rising costs and waste of administrative time.

A common reason for a dispute to escalate is an early administrative mistake in handling or the following of a procedure, so that a complainant begins to complain about unjust treatment in addition to the subject of the original complaint.

Adjusting for scale: special needs of smaller institutions

The question whether the dispute-resolution needs of a small institution may be different from those of a large one has been raised with the project. There may be significant factors to be considered in

48 A talk by David Bleiman at the seminar on “Mediation in higher education: UK and USA perspectives” hosted by HR department, University of Edinburgh on 11 March 2008. www.staffs.ac.uk/idr/projectpurpose.html#b, ‘More Information’

approaching the needs of a small institution s a ‘whole’. For example, it is pointed out by our respondents that it may be difficult in a small institution to find a senior figure who has not been involved in the dispute already, who would be able to act as an independent chairman or adjudicator in an appeal. The special problems of small institutions are also noted in the response of one institution recorded in the CUC’s KPI review:

*‘Given our small size....we have finally decided to divide responsibility among members of our Senior Management Group and to assign responsibility for KPIs to committees. The Senior Management group will oversee the formulation of the super KPIs, which the top level indicators of institutional health will feed into, and to produce the summary report for Council’.*⁴⁹

Designing procedures: meeting a practical need in a principled way

It is sometimes complained that the requirement to follow procedures impedes speedy dispute resolution. Procedures are depicted as bureaucratic, burdensome, time-consuming, a positive roadblock on the way to the desired destination of a final outcome. For those who need either to access or to implement dispute-resolution procedures the level of detail they tend to contain is a practical problem. No one can reasonably be expected to remember it all, and it is easy for administrators to make mistakes. From mistakes can come escalation, as a complainant feels that alleged unjust treatment has been compounded by further unjust handling of the complaint.

One way of dealing with this is to keep things simple, by reducing the rules to a minimum. However, that must be attempted with caution and a clear head. Here we see in another area of activity the dangers already noted in recent work on the Key Performance Indicators, and any number of power-point slides prepared for conferences and seminars. These favour the use of a few bullet points, quickly jotted down and deemed to give a reliable overview of a matter for busy people with responsibilities. The bullet-point approach has the advantage that the content is made more memorable, the disadvantage that it may tend to over-simplify.

The seven principles of public life articulated by the Committee on Standards in Public Life^{50 51} have been embedded in the governance expectations of HEIs through HEFCE’s audit requirements about good governance. They are few enough in number for it to be a reasonable requirement that they become an ‘internalized’ list in the mind of anyone carrying the responsibilities to which they relate. But they are pitched at a high level of abstraction and focus on only one main aspect of the conduct of managers in higher education, that of propriety:

Selflessness - Holders of public office should act solely in terms of the public interest. They should not do so in order to gain financial or other benefits for themselves, their family or their friends.

Integrity - Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might seek to influence them in the performance of their official duties.

Objectivity - In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.

Accountability - Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.

Openness - Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.

49 KPI (2008) 5.28.

50 www.public-standards.gov.uk/about_us/the_seven_principles_of_life.aspx

51 First Report of the Committee on Standards in Public Life MPs, Ministers and Civil Servants, Executive Quangos (Cm 2850, 11 May 1995)

Honesty - Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.

Leadership - Holders of public office should promote and support these principles by leadership and example.

There is a clear advantage in brevity and simplicity and memorableness but it is important that these are not achieved at the expense of practical usefulness and clear-headedness about the realities of the need to be met. It is possible to use inappropriate marketing language as well as language which is too abstract. This may be unhelpful to clarity about what, in practical terms, is expected. John Lauwerys, Secretary and Registrar, Southampton, addressed the CUC Conference of 2006 before the introduction of Key Performance Indicators, with a Southampton Case Study. He noted that in December 2004 'KPIs based on strategic aims' had been presented to the University's Council, while in September 2006 'Revised KPIs based on critical success factors' had been presented to the Council.⁵² 'Strategic aims' and 'critical success factors' are fine language but it is not obvious how they will butter the parsnips.

The QAA provides a model which brings together the advantages of simplicity with the need for detailed working out of procedural requirements. This involves distinguishing 'precepts' or principles, and a commentary, guidance or explanation on their detailed application:

*Each section of the Code of practice indicates the key issues that an institution should consider in the respective areas of activity. The **precepts** encapsulate the matters that an institution could reasonably be expected to address through its own quality assurance arrangements. The accompanying **guidance/explanation** suggests possible ways by which those expectations might be met and demonstrated.*⁵³

The QAA is concerned strictly with those matters which fall within its remit and relate to the 'academic infrastructure' but the principle-and-explanation or precept-and-guidance approach is self-evidently more generally applicable. The Agency's rationale for using this structure is given below:

The Code of practice does not, of course, cover all the activities of a higher education institution. Nor does it explicitly identify all the circumstances in which a particular section would be relevant - to do so would be impossible for a complex and innovative sector in which new developments take place all the time. However, there are a number of principles that appear throughout the sections of the Code of practice; an awareness of, and commitment to, these key principles will help an institution to assure itself and others that it has developed and is applying good practice for its wide range of activities.

The main principles identified in the Code of practice as underpinning good practice in assuring quality and standards in higher education are:

A clear definition of responsibilities

The responsibilities within a particular area of activity of, for example, committees and boards, departments, units and staff members, together with the responsibilities of students and others, should be clearly defined.

Consistent application of policies and practices that are underpinned by principles of fairness and equality of opportunity

Policies and procedures should be clear and explicit and applied consistently. Such explicitness supports fairness, secures equality of opportunity and engenders public confidence.

52 www.shef.ac.uk/cuc/30nov2006.html

53 www.qaa.ac.uk/academicinfrastructure/codeOfPractice/fullintro.asp.

The availability of clear and accessible information

Information on policies, procedures, responsibilities and opportunities should be clear, up to date and accessible to all the potential audiences. Information should help students to understand what they should expect from their particular higher education experience and staff members to ensure that they are contributing effectively, and working within, the arrangements in place to secure quality and standards.

The competence of staff

All staff need to be supported to ensure their competence to fulfil their particular roles and responsibilities.

Monitoring and review of policy, procedures and practices

Policies, procedures and practices need to be monitored and reviewed from time to time to ensure their effectiveness and to identify and correct any consequences that might undermine the assurance of quality, standards, fairness or equality of opportunity.⁵⁴

Keeping procedures up to date

Ensuring that an HEI has procedures which embody good practice and help to prevent disputes arising and deal with them effectively if they do, is not straightforward. The needs to be met by procedures change with changes in legislative requirements and climates of public expectation. An example at the time of writing is allowing parents to become involved in university admissions processes, a practice that will rapidly require adjustments to procedures. Ensuring that there is regular view of existing procedures itself becomes a matter of good practice, though it can be onerous.

Responses to our 'audit' questionnaire suggest that some institutions overhaul their procedures regularly, some 'reactively' in response to changes in the applicable legislation or mainly when lessons have been learned from the conduct of a dispute which may have been a 'bad experience' for an HEI.

Which procedure should I use?

Many HEIs are aware of the difficulties which may be created by procedural overlap and seek to ensure that a dispute is correctly allocated to be dealt with under the appropriate procedure. For example, a complaint of harassment or sexual, racial or disability-related discrimination may be excluded from a general 'grievance' procedure and the complainant directed to the appropriate special procedure.

This avoids the danger of a complaint being started under several headings at once, but it has the disadvantage that the complainant's view of the leading edge of the matter may not coincide with that of the administrator dealing with the dispute. That can lead to escalation of the complaint and even to a defiant scattergun attempt to raise complaints under a number of headings.

Counter-allegations: grievance versus disciplinary procedures

A particular difficulty is commonly experienced when an attempt to raise a grievance is countered by the initiation of a disciplinary process against the complainant, or vice versa. It is not always clear which should, in fairness, be dealt with first. Counter-allegations may also lend themselves particularly well to alternative dispute resolution, where the question is not 'under which procedure shall we adjudicate between these adversaries and determine who is in the right?', but 'how can we agree a resolution of this matter which is in everyone's interests including those of the institution?'

The 'Campus Ombudsman' option

To all intents and purposes, the University Visitor was removed as a 'player' in dispute resolution in universities by the Higher Education Act 2004, and in any case only the chartered universities and the Oxford and Cambridge colleges had ever had Visitors. Four years on it is possible to begin to see what

gaps in provision have been left and think afresh about the needs to be met. One possibility which might fill the gap would be the appointment of an ‘ombudsman’ by each HEI to perform a range of functions, including those once discharged by the Visitor.

In Canada there have been regular conferences for ombudsmen since the late 1970s.⁵⁵ They have them in Australia, too, and in the USA and other parts of the world, as well as in Europe. The pros and cons of introducing the ‘campus ombudsman’ in the UK (the office is already a commonplace in other parts of the world) were the subject of a conference held by the OIA in April 2008 on behalf of the European Network for Ombudsmen in Higher Education (ENOHE).

Introducing ‘campus ombudsmen’ as a regular thing in HEIs in the UK seems likely to be a long-term objective. It is not yet clear that it is a desirable addition to a ‘whole institution’ dispute resolution system. Nevertheless, a campus ombudsman or a series of ‘champions’ with defined special responsibilities could perform a range of useful functions, advising, informing, providing a reality check for potential complainants and also for the institution’s managers, in the hope of preventing disputes and ending at the outset those which do begin.

A range of possible roles

Important questions of role and of definition remain to be addressed. Ombudsmen in higher education world-wide perform a range of functions, not necessarily all mutually compatible and impossible to combine in a single office in an HEI. In some countries Ombudsmen are adjudicators; in others they are mediators; in others they perform the function of ‘appeal judges’. Elsewhere they have a role of liaison with and education of institutional managers, and as institutional ‘champions’ of good practice in dispute resolution.

It is not an easy matter to combine such functions with those of a ‘triage nurse’ who can consider the presenting symptoms of a complainant and help to identify what the problem really is. In the ‘casualty unit’ of university disputes in some parts of the USA, campus ombudsmen are there at the start, to ‘provide confidential, informal assistance to individuals and groups, and help identify problems and facilitate the fair resolution of problems that arise in their organizations’, as the State University of New York puts it.

A group of ombudspersons or ‘champions’ with distinct roles in an HEI might create a rounded support system able to meet several of these needs. A campus ombudsman or ombuds ‘office’ could help raise awareness throughout the institution, work with the community at all levels, tactful, respected, quietly inculcating habits of fairness and reasonableness, knowledgeable about all sorts of ground-rules, from the HEI’s legal obligations to its procedures, the way academic politics work, the things that matter to student. An ombudsman might be trusted enough to be approached at an early stage of a conflict, be able to make sensible suggestions about the quickest way to a resolution and get everyone involved to try them, propose mediation here, an apology there, or referral to a committee which can revise the existing procedures; he or she could suggest using the complaints or grievance procedures if there is no quicker way, but make sure they are followed properly. The pros and cons of the proctorial systems of Oxford and Cambridge deserve careful study as models.⁵⁶

⁵⁵ www.uwo.ca/ombuds/accuoeng/history.htm.

⁵⁶ The duties of these officers are described on the Oxford and Cambridge websites. The Oxford Proctors make a public annual report. See for 2008, www.ox.ac.uk/gazette/2007-8/supps/2_4840.pdf.

“Campus Ombuds” Project Questionnaire.

Where there are boxes please mark with a cross .

(1) What is your title in your Institution?

How would you describe your role in 20 words:

(2) Who appointed you to your role or voted for your appointment?

(3) How long is the appointment for?

(4) Are you responsible for any or all of the following disputes:

- (a) between staff and the institution
- (b) between staff
- (c) between students and the institution,
- (d) between students
- (e) between a student and member of staff

(5) Do you keep written records of the cases you deal with?

Yes No

Are the records kept with the consent of the parties?

Yes No

Do the parties get to see the records?

Yes No

(6) Do you write an annual report outlining the types of case dealt with and the resolution achieved?

Yes No

(7) Is the report such that the parties to a dispute cannot be identified from the report?

Yes No

(8) Is your role to do some of the following (please tick as many boxes as necessary):

- (a) act as a source of information
- (b) act as a mediator
- (c) act as an arbitrator
- (d) tell others how to settle the dispute
- (e) act as a counsellor

(9) Was your role set up as because of:

- (a) national legislation
- (b) the university's statutes
- (c) a local initiative

(10) If you make findings (if you reach some) are they binding on the parties?

Yes No

(11) How long has your role been established?

(12) How many cases have you been involved with in total over the following periods:

(a)2007/08

(b)2006/07

(c)2005/06

If possible can you break these down into categories of disputes:

(13) How many of the cases you were involved in were settled as a result of your intervention (in % terms)

(14) Are you involved in a network of persons holding a similar role?

Yes No

If “Yes” can you please pass a copy of this questionnaire on to your colleagues and ask them to respond.

4. Introducing alternative dispute resolution

Toolkit for self-evaluation

Checklist: For introducing alternative dispute resolution in your HEI

- Have you considered the cost-effectiveness of setting up an in-house mediation service?
- Have you considered working with other HEIs in your area to provide a shared service?
- Have you ensured that the availability and expertise of your in-house mediation service is not confined to a single category of disputes (for example employment disputes)?
- Have you considered designing an in-house service in which an experienced mediator may work in tandem with someone with specialist knowledge of the type of dispute (for example, research funding problems)?
- Have you made sure the option of trying alternative dispute resolution is included in all appropriate published procedures and is in the minds of those with decision-making and line-management authority?
- Do you ensure that a reference note explaining the different alternative dispute resolution options is easy to find on your website?

Toolkit: Background and comment

Training for mediators including in-house training and the question of wider professional training needs

Our 'audit' reveals that

Training in dispute resolution or at least the handling of complaints, grievances and disciplinary is usually made available for managers, but it is not as a rule required. It may include training in 'handling difficult people/situations'.

It is likely to be brief, a one-day course.

It may be delivered by HR staff with external legal trainers or other external assistance.

Training in mediation is being explored by some HEIs, often using commercial training providers. There seems to be limited awareness of the limitations of these courses or the level at which they are 'accredited' (Open College Network example). Some already have established in-house mediation services.

A number of HEIs are seeking guidance on the best way to organize in-house training for mediators, or to identify appropriate outside mediators to approach when they need them. Commercial mediation training remains unregulated and is still not externally quality-assured. Providers cannot offer a 'qualification', merely inclusion of approved candidates on their own list.

To try to regularize if not regulate this situation, the Civil Mediation Council was formed as an association of members, initially to provide a forum for those seeking to meet the needs of commercial mediation of claims in the county court. The CMC has recently begun an Accreditation Pilot Scheme for 'providers'. These 'providers' maintain lists of their own 'approved' mediators, usually those trained and assessed by themselves. Approval of the 'provider' by the CMC therefore carries implicit approval of the mediators on its list. The initial impetus of this scheme included the wish to meet the needs of the courts for lists of reliable mediators who be recommended in court-approved mediation schemes. The list of such 'providers' so far approved can be found on the CMC

website,⁵⁷ but HEIs should be aware that there is as yet no oversight of quality and standards of the kind they would look for in the provision of their own courses and which professional bodies would expect.

The CMC is now reviewing the success of this scheme and considering whether to extend it in the direction of providing some form of externally moderated 'qualification' for mediators and quality assurance for courses:

As part of the review of the mediation provider organisation accreditation process, the CMC is seeking views from members and others as to how if at the process should be changed, strengthened, or maintained. Comments or proposals should be emailed to the Secretary (secretary@civilmediation.org) by 10th September 2008 so that they can be taken into account in the drafting of proposals.

It remains a matter of concern that HEIs wishing to arrange training for in-house mediators or to approach experienced mediators to help in the resolution of disputes are having to make choices without a reliable point of reference about professional standards. It is to be hoped that the CMC will move in the direction of encouraging higher professional aspiration in the world of mediation training. A copy of this interim project report is being sent.

The CMC believes that its pilot scheme has been a broad success but is keen to ensure that it develops with the changing needs of mediation users, and is referred to in context by all users. It was seen when it was introduced as very much a low threshold inclusive starting point and not as a demanding "gold standard" for the profession. Some now advocate more stringent tests, while others believe that there should be a broader recognition of good practice. Others suggest that there may be different levels which organisations might want to achieve depending on their work.

Accordingly reasoned observations on what if at anything should be changed or enhanced, toughened or relaxed would be welcomed.

The CMC is in parallel looking at the question of accreditation schemes for individual mediators and for training courses. The outcome of these debates, and of the pilot scheme review, should be announced at the AGM in December.⁵⁸

At present, commercial mediation training typically provides a short course of a few days, which can often be offered to an HEI by arrangement to enable it to obtain training for a group of its staff. This is likely to be less expensive than paying for the training of individuals at several thousand pounds each. Some providers are willing to organise in-house courses for HEIs to meet special requirements. These courses can offer a good practical start to training, and there is comment to that effect on our website under Strand C. There is still, however, a shortage of specialist knowledge in the mediation training world, with the concentration still heavily upon commercial and family mediation and the statutory Special Educational Needs mediations at school level.

Training for Arbitrators is offered by the Chartered Institute of Arbitrators with a more developed set of requirements in keeping with the statutory framework under which arbitration is conducted.⁵⁹

We are in process of conducting a search of websites in order to establish a full picture of the developing provision of modules in mediation which we are aware are being provided in some law and legal practice and Bar vocational courses. We tend to the view that these might form a basis for future development of quality-assured training for mediators at a level appropriate to HEIs. We welcome comment on this possibility and further suggestions.

A project workshop to be offered by Eversheds is planned for the autumn of 2008, at which we hope to address concerns raised by a number of HEIs anxious to set up provision in-house.⁶⁰

57 www.civilmediation.org/page.php?page=4. There is a further list of specialist 'higher education' mediators at <http://oxcheps.new.ox.ac.uk/MainSite%20pages/mediation.html>.

58 www.civilmediation.org/news.php?nid=101.

59 www.arbitrators.org/

60 At their new London offices, 1 Wood St. EC2, Thursday 20 November.

Exchange of mediators with other HEIs

Concerns have been raised about the need to be able to provide mediators visibly independent of the HEI where the dispute has arisen, without resort to senior professional mediators who may be expensive. Students in particular may be nervous on this point. Some HEIs are informally 'sharing' their in-house teams. There are clear advantages to doing so, in terms of the costs savings of being able to pool specialist expertise and the better opportunities to learn from experience by sharing lessons learnt. It can work well to use two mediators, one of whom is a trained and experienced mediator and the other familiar with the area of the dispute from a technical or administrative point of view.

Court-approved and Employment Tribunal services

A Court Mediation Service Toolkit is available online. HEIs are encouraged to explore with their local ET office the provisions available in their area in connection with applications to employment tribunals.⁶¹

⁶¹ www.dca.gov.uk/civil/adr/court-mediation-service-toolkit.pdf, Please note that live updated versions of this document can be found on both the DCA and HMCS websites at: www.dca.gov.uk/civil/adr/index.htm#6 and <http://libra.lcd.gsi.gov.uk/portal/Corp-functions/Civil-family/pdr/toolkit.htm>

5. Looking to the future:

New aspects, new areas

a. New aspects of disputes involving students

Our audit suggests that:

In some institutions with high proportions of such students, disputes involving part-time and mature students are particularly numerous.

Mental health problems are a growing area of concern in dealing with student disputes.

Disputes about ‘academic judgement’ remain common.

Some HEIs report a substantial number of disputes arising from timetabling or resource-provision problems (including libraries) Some report disputes over the communication of examination results, including complaints of inaccuracy.

Multi-party’ and multi-jurisdiction disputes seem not to be identified as a general problem but there is evidence of an increase in disputes involving EU and international students.

In some HEIs students and staff involved in collaborative arrangements are made aware which procedures apply. Where there are collaborative arrangements HEIs may direct students to use the complaints procedure of the institution providing the course rather than the degree-awarding body. There appears to be some variation on this point even with institutions. There may be a memorandum of agreement which makes it clear that the complaints procedure of the degree-awarding body is to be used.

An increasing range of disputes involving both staff and students is being noted.

Toolkit for self-evaluation

Checklist: Student complaints and ‘causes for concern’

- Have you revised your student complaints procedures to provide a clear avenue of recourse for students wishing to raise a ‘cause for concern’?
- Have you provided for the possibility that a complaint may be both ‘personal’ and also point to possible ‘systemic’ failures?
- How easy is it for a prospective or new student to find a complaints procedure and a ‘causes for concern’ procedure by searching on your website?
- How ‘user-friendly’ for students (without sacrificing clarity) is the language of your procedures?
- How do you ensure that a student is not afraid to complain or raise a concern?
 - Do you include the assurance that they will not be penalised for so doing?
 - How do you ensure that that assurance has hard currency in practice?

Toolkit: Background and comment

Student complaints and causes for concern

The relationship between student complaints and causes for concern needs to be rethought in the context of in a ‘whole institution’ approach to dispute resolution. Some HEIs already make provision in their student complaints procedures for a student to make a complaint in a form which would fit the QAA’s definition of a ‘cause for concern’.

Toolkit for self-evaluation

Checklist: Staff-student disputes

- Do you have a clear avenue of recourse for everyone involved where a student complains about the conduct of an employee or an employee about the conduct of a student?
- What are your arrangements to ensure that human resources or personnel staff liaise with the academic registrar or others with special responsibilities for students in such cases?
- Do you make positive use of 'alternative dispute resolution avenues in such 'mixed' cases?

Toolkit: Background and comment

Staff-student disputes

HEIs report an increase in disputes which involve both staff and students. Mixed disputes come in many forms.

Bath makes an attempt at definitions which include the possibility of staff-student disputes: A student complaint is defined as a criticism levelled by a student against another student, member of staff, service or facility of the University.

A student grievance is defined as an acknowledged disagreement between a student and a member of, or department within, the University over an alleged deficiency in conduct, provision or process. Grievances should only arise once all avenues for resolving complaints have been exhausted.

Toolkit for self-evaluation

Checklist: Collaborative provision and student disputes

- Do you ensure consistency across the range of your institutional partnerships in your arrangements for dealing with disputes arising within collaborative arrangements?
- Do you make sure students know from the outset which institution's complaints procedures apply to them and to their course?
- Do you make sure students know how to raise a concern about a course delivered in one institution for an award of another?
- Are you involving employers and representatives of professional, statutory and regulatory bodies in approval, monitoring and review of collaborative provision in your HEI as appropriate?
- Are you involving employers and representatives of professional, statutory and regulatory bodies in curriculum design in your HEI as appropriate?
- Are you working with employers and representatives of professional, statutory and regulatory bodies in reviewing your complaints and other relevant dispute-resolution procedures as appropriate?

- Are you working with employers and representatives of professional, statutory and regulatory bodies with which you are engaged in collaborative so as to monitor quality assurance and standards, including assessment?
- Are you working with employers and representatives of professional, statutory and regulatory bodies in the delivery of public information about your HEI's collaborative provision with them?
- Are you thinking through the implications of the use of e-learning both on campus and when it is delivered as a form of distance-learning, from the point of view of preventing disputes and making provision for dispute resolution?

Toolkit: Background and comment

Collaborative provision and student disputes

There are now extensive 'higher education in further education' collaborative arrangements, under which students may take courses in further education colleges leading to degrees awarded by higher education institutions. The potential for systemic problems to arise here is manifestly greater because more than one institution is involved.

An analogous potential problem area in collaborative arrangements involving overseas 'providers' was touched on in the IUSS Select Committee hearing of 17 July 2008 (Q.115) where a question was asked about the maintenance of standards when 'degrees ... are franchised abroad.' In answer, on behalf of the QAA, Stephen Jackson replied:

'in the past we have been quite critical of a number of institutions and the way in which they are managing those things because we recognise that there is a degree of risk associated with partnership arrangements - we have detailed in our code of practice how we expect institutions to manage those relationships and we have procedures for following up any identified issues which come out of our audit activity, so we are very conscious of the reputational risk associated with this type of activity.'

The University of Bath has designed procedures which aim to ensure that students are clear which institution's complaints procedure apply when a course is delivered in one institution leading to the award of another. It does not however require consistency in the framing of collaborative agreements:

'These procedures may be varied under the terms of an Institutional Agreement where a programme of study is delivered as a collaborative initiative with a partner institution, if the Agreement provides for such variation.'

Or:

'The Institutional Agreement may state that complaints should be dealt with according to the franchise partner's procedures unless they relate to a University service.'

But it may not be easy for a student to get an appeal considered if the appeal procedure is conducted within the awarding institution, although Bath makes a good fist of providing for this contingency.

Where variation is allowed in the arrangements about the use of either institution's complaints procedure, provision is needed (as attempted at Bath) to ensure that if the complaints procedure of the partner institution is to be used, 'the complaints procedures of the franchise partner will be evaluated as part of the Institutional Agreement'.

There is also a monitoring and reporting requirement:

'The franchise partner institution will submit an annual report to the Academic Registrar detailing any complaints made by students registered on programmes of study leading to an award of the University of Bath.'

This is a particularly rapidly developing area from the point of view of potential disputes and HEIs should keep a close eye on emerging problem areas.

The outcome of Loughborough's recent QAA audit drew attention to potential dangers. Loughborough is advised to:⁶²

- *review the management of assessment, progression and degree classification procedures to ensure that they test that programme learning outcomes are met and that equitable treatment of students across the institution is assured.*
- *review the strategic oversight and overall management of collaborative provision to ensure that procedures and practice take appropriate account of the precepts of Section 2 of the Code of practice for the assurance of academic quality and standards in higher education (Code of practice), Section 2: Collaborative provision and flexible and distributed learning (including e-learning).*

It is also noted that it would be desirable for the University to

- reflect on the processes of programme approval, monitoring and review with a view to ensuring that the opportunities for enhancement afforded by external involvement are capitalised upon and the outcomes of the processes are fully reported so that good practice is effectively captured and quality enhancement supported.

The QAA's outline of principles to be applied in the 'collaborative audit process' is timely and relevant.⁶³

There are also potential areas of dispute involving complaints from EU and international students coming to the UK and complaints from UK students who spend periods studying abroad, for example on transnational campuses of a UK home university.

The QAA has now published in its 'Outcomes from institutional audit' series two more important papers on aspects of collaborative provision. Institutions' work with employers and professional, statutory and regulatory bodies⁶⁴ became available on August 26 2008:

Features of good practice

6 The 59 institutional audit reports published between December 2004 and August 2006 noted the following features of good practice:

- the active engagement of Industrial Advisory Panels in quality management and course development [Cranfield University, paragraph 196 i; paragraphs 47, 55, 76, 125, 137 and 145]
- the development of Employer Liaison Fellows [University of Luton, paragraph 251 i; paragraph 92]
- the University's regional agenda as evidenced in particular both by student recruitment and by the links with local employers, agencies and practitioners [University of Derby, paragraph 294 ii; paragraphs 114 and 118]
- the role and use of professional advisers, and links with employers and professional bodies [Harper Adams University College, paragraph 189 iii; paragraphs 36, 56 and 61]
- the use of a broad range of external peers, including industrialists and academic staff from institutions in Europe, in periodic review of undergraduate programmes [Imperial College of Science, Technology and Medicine, paragraph 302 i; paragraph 67]

62 www.qaa.ac.uk/reviews/reports/institutional/Loughborough08/summary.asp#action

63 www.qaa.ac.uk/reviews/institutionalAudit/collaborative/supplement/default.asp

64 www.qaa.ac.uk/reviews/institutionalAudit/outcomes/series2/PSRB08.asp

- the strong engagement of the College with industry, as evidenced through the involvement of employers in curriculum design, delivery and review [Birmingham College of Food, Tourism and Creative Studies, paragraph 229 v; paragraphs 70-1 and 101-2]
- the effective integration of professional expertise into all appropriate aspects of the curriculum [University of the West of England, Bristol, paragraph 257 ii; paragraph 94]
- the receipt and consideration at institutional level of the reports of professional, statutory and regulatory bodies [Sheffield Hallam University, paragraph 202 iv; paragraph 63].⁶⁵

Some of the Toolkit items suggested here are based on this document but HEIs may find it helpful to read the full discussion on the QAA website.

The QAA has also published an ‘Outcomes from institutional audit’ paper on E-Learning,⁶⁶ defined by the QAA in 1999 as ‘a way of providing higher education that involves the transfer to the student’s location of the materials which form the main basis of study, rather than the student moving to the location of the resource provider’, and by the Joint Information Systems Committee (JISC) as ‘learning facilitated and supported through the use of information and communications technology’.

This is a growth area, and one in which an HEI can become heavily engaged. The QAA paper reports that ‘in one institution, three-quarters of taught postgraduate students were on distance-learning programmes at the time of the audit and in another about half of all students were reported to participate in some form of e-learning.’ It is potentially a minefield from the point of view both of complaints arising and of the difficulty of dealing with disputes when the complainant is a distance-learning student who may be geographically remote from the campus.

Some of the features of good practice identified in the QAA paper

- the **strategic approach** to the development of e-learning which, while recognising the opportunities for students in general, brings particular benefits for distance-learning students through the ability to provide support in an increasingly coordinated way [University of Leicester, paragraph 287 i; paragraph 40]
- the **framework for the quality management of distance-learning programmes** - particularly in relation to assuring the quality of distance-learning materials, specifying the functions and managing the work of agents, and defining the roles and responsibilities of associate tutors [University of Leicester, paragraph 287 iii; paragraph 121]
- the **comprehensive, accurate and accessible information provided to students** including the Student Portal which allows seamless access to a variety of e-learning resources [University of Nottingham, paragraph 302 iii; paragraphs 102, 139, 166, 187, 204, 223 and 240]
- the University’s **coherent and comprehensive strategy for the development and implementation of e-learning** [University of Ulster, paragraph 215 iv; paragraph 101]

Toolkit for self-evaluation

Checklist: New dimensions to challenging academic judgements

- If you are using ‘academic transcripts’ or the ‘diploma supplement’ have you reviewed your rules for excluding challenges to ‘academic judgement’ to ensure that a student is able to request corrections to ensure the accuracy of the parts of an academic transcript which do not involve academic judgements (for example those which are merely descriptive either of the course taken or of activities undertaken by the student while at the HEI which did not contribute to the award of the degree, such as holding office in the Student Union).

65 www.qaa.ac.uk/reviews/institutionalAudit/outcomes/series2/PSRB08.asp

66 www.qaa.ac.uk/reviews/institutionalAudit/outcomes/series2/SupportforElearning08.asp

Toolkit: Background and comment

New dimensions to challenging to omit second to academic judgements

The traditional challenge to an academic judgement has come from a student who believes he or she deserved a higher mark in an examination. A flurry of media coverage in the summer of 2008 was triggered by allegations that some universities had deliberately adjusted their standards so as to produce a more impressive list of results, a list featuring a higher proportion of first class degrees. In both cases, the question is whether an expert ‘academic judgement’ of the standard of the work has been arrived at, or whether the mark awarded has been contaminated, for example by a procedural flaw in the case of an individual student’s result; or by systemic flaws (including policy directives unrelated to the objective standard of the students’ performance) in the case of institutions.

The courts, and more recently the Office of the Independent Adjudicator, have been unwilling to intervene where the mark a student wants to challenge reflects a pure academic judgement. However, they have a role in determining whether they have jurisdiction because the judgement is not purely ‘academic’. ‘While the OIA has no remit over issues of academic judgment, it is for the OIA to determine whether an issue is one of academic judgment or not.’⁶⁷

Yet even if procedural or systemic contamination can be shown to have happened, it may not be possible to trace a chain of cause and effect from a finding that there has been a procedural or systemic flaw, to the inference that had it not happened, the student or students would have got a different ‘result’. In its case studies the Office of the Independent Adjudicator provides some useful illustrations of the way this particular difficulty should be addressed for both ‘individual’ and ‘systemic’ alleged contamination. In one instance, affecting an individual student it:

‘found that the University, as a matter of academic judgment, had the right to impose conditions upon D before allowing him to rejoin the course. However, it found that such conditions should have been made fully clear in the original decision letter. If that had been the case, and if D had been unhappy with such conditions, he would have been able to avail himself of the next stages of the appeals procedure.’ (Case 1).⁶⁸

In another (Case 7) overall changes in regulations had been made with a clear potential to affect the final classification of students:

U registered as a student in 2001 and in 2005 was awarded a 2:2 degree under new university academic regulations. He complained that his profile under the old regulations would have resulted in a 2:1 award, and that final year students had been assured that the new regulations would not affect them. The regulations were prefaced by the statement that “It is not envisaged that any revision will disadvantage students either in their progression through or conferment of awards.” Under the old regulations U’s marks would have resulted in an overall mark of 60.71%, the minimum requirement for a 2:1, whereas under the new calculations they amounted only to 56.98%. The University said that there was no guarantee that U would have been awarded a 2:1 under the old regulations and that this was a matter of discretion and academic judgment. The OIA found the complaint justified in part. The degree was properly classified as 2:2 under the new regulations but those regulations were misleading in suggesting to students that they would not be disadvantaged by their introduction.

This ‘systemic’ dimension of the problem of academic judgement is not new in itself; it is, however, gaining a new prominence with the current enlargement of the scope of the existing avenues of recourse for raising concerns in higher education.

Further elements in the ‘academic judgement’ equation have come into view as a result of work conducted in the context of the Bologna Process ‘Diploma Supplement’, by the Burgess Group⁶⁹

67 www.oiahe.org.uk/case-reports.asp#4.

68 www.oiahe.org.uk/case-reports.asp#4.

69 Beyond the Honours Degree Classification: Burgess Group Final Report, UUK, October 2007, http://bookshop.universitiesuk.ac.uk/downloads/Burgess_final.pdf.

and on behalf of the Quality Assurance Agency, with the objective of providing students with an ‘academic transcript’.

‘By academic transcript we mean an authoritative and official record of a learner’s programme of study, the grades they have achieved and the credit they have gained.’ (*Beyond the Honours Degree Classification: Burgess Group Final Report*, October 2007.

Some of the content of an academic transcript would be descriptive of, for example, course requirements and activities the student had engaged in, to which no value judgement was attached, but which would have a place in demonstrating the range of a student’s skills and achievements. The whole would add up to a profile of the student’s achievement. A student may wish to challenge the accuracy of some part of the content which did not contain an academic judgement by way of a grade, but was merely descriptive.

b. Growth-areas and new problems in disputes involving staff

Toolkit for self-evaluation

Checklist: Disputes involving staff

- Do you ensure that your staff discipline and grievance procedures are followed with care?
- Have you revised your staff discipline and grievance procedures to include options for alternative dispute resolution at each stage?
- If your HEI is a chartered university, have you sought to ensure that staff discipline and grievance procedures are comparable for ‘Model Statute’ and other staff and that disputes arising across the categories can be handled in a single forum?
- Are you working with the campus unions at your HEI to engage them in the use of alternative dispute resolution options as appropriate?
- Are you monitoring personal grievances to ensure that you pick up possible ‘systemic’ problems?

Toolkit: Background and comment

New approaches to employment disputes

Trends observed in our audit

A great deal of effort has gone into improving equality of opportunity and trying to prevent discrimination.

Unclassified ‘disputes among staff’ are common. There are reported to be more fixed term contract cases, more grievances, particularly grievances ‘raised by staff against managers trying to tackle performance issues’.

Some HEIs note that academic staff involved in management of departments and faculties may be offered training in dispute resolution, but this does not seem to be a priority.

HEIs find variation across academic disciplines in the number and types of disputes arising in different parts of the institution.

Trade unions are sometimes involved in mediations as representatives. This has prompted the comment that this may affect the ‘dynamics of the mediation’.

Some HEIs tell us that they have clear objectives in framing procedures for staff, for example, ‘that they are user friendly to operate’; offer fast and effective procedures which specify good practice and embody the requirement of employment law’; ‘unify as far as possible the procedures across different staff groups’. This last is a particular problem for the pre-1992 HEIs which have to provide Model Statute cover for a category of academic and senior administrative staff. Not all institutions have implemented the proposed changes to the Model Statute, which have themselves now been overtaken by recent legislative.

The recent overhaul of expectations

Statutory dispute resolution procedures were set out in the Employment Act 2002 and the Employment Act 2002 (Dispute Resolution) Regulations. These came into force in October 2004. The intention was to ensure that employers followed a fair procedure in dealing with discipline and grievances and in making employees redundant. Higher education institutions already had elaborate staff disciplinary and grievance procedures (including where appropriate the Model Statute), when the requirement on all employers to provide and follow such procedures was introduced.

However, the operation of the 2004 procedures is acknowledged to have had ‘unforeseen consequences’. The 2004 guidelines have not had the desired effects of improving standards of dispute resolution in the workplace, reducing the number of employment tribunal claims, and making it more likely that the employment relationship would be enabled to continue. The chief problem has been that the emphasis on fairness has if anything heightened awareness of the adversarial character of the proceedings set out in disciplinary and grievance procedures. The 2004 requirements have tended to lead to disputes becoming ‘formalized, and lawyers getting involved, at an earlier stage than had previously been the case’.⁷⁰

In March 2007 the Department of Trade and Industry (DTI) published an independent review of employment dispute resolution in the UK, carried out for it by Michael Gibbons and now known as the ‘Gibbons Review’.⁷¹ Gibbons recommended that the statutory dispute resolution procedures should be repealed and replaced by clear, simple, non-prescriptive guidelines on grievances, discipline and dismissal in the workplace. Employment tribunals were to have a wider discretion when making awards and cost orders, to take into account the reasonableness of the parties’ behaviour including the following of appropriate procedures before dismissal. There was to be active encouragement to attempt early dispute resolution, in various forms such as in-house mediation, early neutral evaluation. The inclusion in contracts of employment of a requirement to attempt to resolve disputes by informal means in the first instance was to be encouraged. It was also proposed that ACAS should provide a suitably well-resourced helpline, the use of which was possibly to be required as a gateway to making an employment tribunal application, with a free early dispute resolution service (including mediation, where appropriate) which would have to be used before an application could be lodged with an ET. Once a claim was lodged ETs were, it was proposed, to have greater case-management powers.

In response to the Gibbons review, the DTI issued a consultation paper (2007) setting out its proposed reforms and new measures,⁷² and a new Employment Bill began to be drafted. The 2002/2004 requirements are now to be abolished under the current Employment Bill, though if the employee complains that the procedures have not been properly followed and that a dismissal is consequently unfair there will remain in the new arrangements provision for an employment tribunal discretion to ensure that this is reflected in any award.⁷³

ACAS is now developing its enhanced helpline service in readiness for the anticipated removal of the statutory dispute resolution procedures in April 2009.⁷⁴

70 www.publications.parliament.uk/pa/cm200708/cmbills/117/en/08117x-.htm#index_link_4

71 www.berr.gov.uk/consultations/page38508.html

72 www.berr.gov.uk/consultations/page38508.html

73 www.publications.parliament.uk/pa/cm200708/cmbills/117/en/08117x-.htm#index_link_4

74 www.acas.org.uk/index.aspx?articleid=1364

Among their recommendations is that employers:

- train managers to handle difficult conversations with employees
- encourage open expression of opinions
- recognise the importance of feelings
- listen to what people have to say
- focus on interests not positions and personalities
- have clear discipline, grievance and dispute procedures for dealing with conflict consider outside help where necessary, for example, to engage a mediator⁷⁵

It should be noted that when ACAS conciliate an agreement and a COT3 form is signed (or an agreement reached even verbally), the employee is bound to accept the agreed compensation and cannot subsequently make a claim at an employment tribunal. In the case of a 'compromise agreement' the agreement must be in writing, and the employee must have taken specialist advice from someone who has appropriate insurance, usually a lawyer. The HEI will normally pay the cost of the employee's obtaining this advice.⁷⁶

The Model Statute

In pre-1992 universities there remains the difficulty that one category of staff has to be dealt with under a distinct set of procedures embodied in the Model Statute. The Model Statute was created by the University Commissioners under s.202 of the Education Reform Act 1988, and was embodied in the statutes of each university with appropriate minor variations. Its primary purpose at the time it was made a requirement was to ensure that the removal of academic tenure by the ERA 1988 would not result in dismissals of academics for the expression of lawful but unpopular opinions. It was, in short, intended to protect academic freedom:

'to ensure that academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions'

It applied only to the pre-1992 universities and only to staff defined as academic, a definition which in all cases included lecturers, senior lecturers and professors and in some places wider groups such as research staff and senior administrative staff.

The Model Statute rapidly grew out of date. The legislative framework continued to develop, and a number of features not foreseen in 1988 had to be attended to by HEIs, including expanding anti-discrimination and equal opportunities expectations, the Public Interest Disclosure Act, and changes to the rights of short-term contract workers as a result of EU requirements. The Model Statute procedures were revised in 2002 by a committee of UCEA and UUK chaired by Graham Zellick.⁷⁷ The University and College Union website expresses a number of reservations about the resulting version.⁷⁸ In any case, the recommended changes were not incorporated into their statutes by all HEIs, the situation remains patchy and there has been no further systematic update or attempt to ensure that all HEIs should meet similar expectations in the way they handle their employees.

The Zellick model has itself been overtaken by further developments in employment legislation and a consortium of the Scottish pre-1992 universities has therefore entered into discussions with UCU Scotland with the aim of developing a simpler and more durable model and proceeding by way

75 www.acas.org.uk/index.aspx?articleid=1662

76 www.direct.gov.uk/en/Employment/ResolvingWorkplaceDisputes/DG_10028132

77 www.hr.qmul.ac.uk/policiesandprocedures/RMS21.html

78 www.ucu.org.uk/index.cfm?articleid=2529

of agreement with the union. This is expected to involve an employment statute applicable to all employees, with certain additional procedures embedded for those whose academic freedom needs to be protected.

The most conspicuous lack in the Model Statute is provision for alternative dispute resolution. This is not expressly excluded but the task of building it in as an option is not straightforward.

The need for an 'OIA for staff'?

For employees of HEIs recent legislative change has reduced rather than enlarging the avenues of recourse. Despite the fact that the Committee on Standards in Public Life recommended in its Second Report that:

Recommendation 10. The higher education funding councils, institutions, and representative bodies should consult on a system of independent review of disputes. A similar process of consultation should be undertaken by the equivalent further education bodies,⁷⁹

Yet provision for independent review of disputes for staff has actually diminished. The Higher Education Act s.46 excluded the jurisdiction of the University Visitor in relation to staff complaints. Prominent among the duties in the historic role of a Visitor is to oversee and interpret the domestic legislation of the body to which he is Visitor. This role is unaffected by the Act, except that in the case of staff the exclusion of the Visitor's jurisdiction expressly includes (s.46 (1)):

(c) any dispute as to the application of the statutes or other internal laws of the institution in relation to a matter falling within paragraph (a) or (b).

(a) and (b) cover:

(a) any dispute relating to a member of staff which concerns his appointment or employment or the termination of his appointment or employment,

(b) any other dispute between a member of staff and the qualifying institution in respect of which proceedings could be brought before any court or tribunal.

So the 2004 Act does not provide for staff thus left without a historic avenue of recourse, any counterpart of the OIA for students, which might be able to consider general causes for concern emerging from individual grievances when they relate, for example, to the way in which an HEI has followed its procedures. And it expressly creates a presumption that the Visitor will not have jurisdiction:

(3) In determining whether a dispute falls within subsection (1)(b) it is to be assumed that the visitor does not have jurisdiction to determine the dispute.

The removal of the Visitor's jurisdiction is important because the Visitor was a substitute in chartered universities for the right to seek judicial review which was open to staff in the statutory corporations and at Oxford and Cambridge. The 2004 Act strengthens the presumption that a claim that domestic legislation has not been complied with will be treated as a private (employment) law matter and a mere breach of contract. It makes it very difficult for concerns to be raised about a university's failure to follow its own rules.

So neither in intention nor in realization has recent legislation assisted the employee of an HEI when a systemic failure to follow internal procedures has emerged in the course of the conduct of an employment dispute involving a grievance or a disciplinary procedure. There is nothing analogous to the protection students enjoy through the OIA (late in the day though this may be able to be activated). And it is not always the case that an employee will be reinstated even if an employment tribunal finds that a dismissal was unfair and recommends reinstatement, so the consequences for an individual may be grave. This is particularly important for an academic, who is likely to find it

difficult to obtain another post in a specialist field where ‘everyone will know’ that he has left a previous HEI after a dispute.

The role of the unions

Unions have complex and multiple objectives in the handling of individual workplace disputes. Alongside the interests of the individual member concerned, the union has also to consider collective interests and policies oriented around organisational change. Cases may be dealt with in a variety of ways including by lay representatives, full time officials and union lawyers. There has been some use of mediation but it is not yet part of the regular experience of union officials and representatives. Unions are likely to have a comparable potential to the employers to save on legal costs where disputes which might otherwise go to court or tribunal are suitable for mediation. We expect that unions will have relevant views and experience to contribute to our thinking as the project develops.⁸⁰

c. Disputes involving commercial partners, intellectual property rights and research ethics

Toolkit for self-evaluation

Checklist: Disputes involving commercial partners and intellectual property rights

- Do you ensure that confidentiality, access to research data and patenting agreements in funding contracts allow doctoral students to have their theses examined when they are completed and to publish and discuss their work at conferences?
- Have you taken advice on the inclusion of intellectual property clauses in your student contract to ensure that they will not be deemed unfair contract terms if challenged?
- Do you explain the full implications of your intellectual property clauses to students when they apply for admission and give them the opportunity to refuse to sign up to them?
- Have you revised your intellectual property clauses to remove any claim to control of the student’s intellectual property rights with reference to work carried out beyond the end of the course?

Checklist: Disputes and research ethics

- Have you liaised with Research Councils UK and the UKRIO to ensure that your ‘misconduct in research’ procedures are well-drafted, effective and regularly updated to deal with new dimensions of difficulty, particularly those arising in collaborative, partnership and commercial funding arrangements?
- Do you maintain a database of cases where misconduct in research has been found to have occurred?
 - Is this anonymised?
 - If you retain names, do you give the individuals concerned opportunity to have ‘their side of the matter’ recorded in the list?

80 www.staffs.ac.uk/idr/sbiv_unions.html. David Bleiman is now working with Fiona O’Donnell, Legal Counsellor to the University of Dundee and with campus unions at Dundee, on union input to their developing mediation scheme.

- Have you identified the principles on which it may be appropriate to identify researchers found guilty of misconduct in any reference provided to a prospective future employer or funder?
- Do you have a clear published policy about including mention of any finding of misconduct in your references provided for members of your staff or students found guilty of misconduct and state how long you will continue to do so?
- Do you regularly update your plagiarism policy to meet the needs created by an internet-using student population?

Toolkit: Background and comment

Disputes involving commercial partners, intellectual property rights and research ethics

FB build up a large and successful research group within an HEI, developing a device which showed considerable promise for spin-out purposes. Possible commercial collaborators and funders showed an interest. It was proposed that the academic research team should make 'knowledge' available for commercial R and D and some of the profits should come back to the team. A company was set up for this purpose on the independent initiative of the academic team leader and the business in question.

The academic turned to his University's administration for help and advice, since he knew nothing about the world of commerce. He had always made the results of his research freely available at conferences and had not attempted to patent outcomes of the initial research which was now proving commercially valuable.

The University was anxious to take a proportion of the profits, as owner of the academic's IP, since it was his employer. It also wished to clarify the future ownership of the work to be done in the spin-out company, since this promised to involve considerable sums of money. But there was no one in the administration who really understood the science. Its section dealing with this aspect of the University's affairs was new and inexperienced and inadequately staffed. There were lengthy delays. The University did not have procedures which would allow it to accept the capital sum. Would-be funders and potential senior managers of the new company lost money while the company struggled to function without the University's interest being clarified. The business people involved became impatient and set up a parallel company, issuing shares to the academic scientist without his knowledge and putting him in a compromising position with his employer. Squabbles at the business end led to attempts to get the University to take sides. The academic's 'involvement' through shares he did not know had been allocated to him led to disciplinary action being taken against him.

He left the University. The attempted collaboration failed. The University was not able to exploit the work and the academic scientist ceased to develop it.
(Recent anonymised case)⁸¹

A number of concerns were identified by a group commissioned in January 2007 by the Director General of Research Councils, which produced a report *Streamlining University / Business Collaborative Research Negotiations: An Independent Report to the "Fundlers' Forum"* of the Department for Innovation Universities and Skills⁸² later in 2007, with an introduction by Keith O'Nions, Chair of the Research Base Funders Forum. These concerns have a bearing on the considerations to be weighed in designing a 'whole-institution' dispute resolution system.

‘Three problem-areas were identified:

1. Overemphasis on IP. *It is important that adequate protection is made for Intellectual Property, but we feel that both universities and businesses are guilty on occasions of putting excessive emphasis on ensuring their own ideal outcome from the negotiation in relation to IP, when it is often not even the most important aspect of the research collaboration.*

2. Unclear messages. *There is still a lack of clarity over some important high level messages coming both from Government and public funders. For example, there is confusion as to whether the primary aim of collaborative research should be to generate income for universities or to create benefit for the wider economy; and it is not always clear what public research funders expect to see as an appropriate outcome in relation to IP.*

3. Need for good practice in negotiating process. *We have identified a number of aspects of good practice in the process of negotiations, such as understanding the motivations of the other party and having appropriate escalation procedures. Whilst some of these are commonly recognised practices that are self-evidently sensible, it is clear that they are often not followed.*

The group gives guidance on principles to be followed in negotiation of contracts and dangers to be avoided at:

(3.5) Approach to negotiations. *We heard evidence of good and bad practice in the way that both sides approach negotiations.*

This can be summarised in the following four areas:

- entrenched positions*
- understanding the other side*
- creativity / flexibility*
- escalation and decision making*

This guidance is developed in the main text of the report and also in Annex B.

The group called for the development of an institutional strategy:

(3.3) Clear Institutional Strategy. *Whatever the official position of Government and funders may be, the senior management of each University will have its own particular strategy in relation to collaborative research with businesses and other research institutions. It is this strategy that will tend to feed through to those negotiating with companies and those taking the final decisions on contracts.*

The group identified a series of good practice principles, including the following, which are potentially helpful in ensuring that disputes are avoided. First come a series of points about the importance of not allowing objectives to become confused:

- That ‘university / business interaction’ should be designed ‘to improve the knowledge base and increase the economic impact of research, rather than generating extra funding for universities’.
- That ‘Research Councils should ensure there is clear and well publicised guidance on the handling of IP in collaborative research which they co-sponsor - ideally this should be coordinated through RCUK to ensure consistency.’ Other public funders of research such as Government Departments were also encouraged to ‘give clear guidance on the purpose of their contribution to collaborative projects and expectations in relation to IP.’
- ‘Senior management in each university should issue clear policy statements setting out their aims for collaborative research relationships with industry, so that there are clear messages to academic staff and those staff negotiating on their behalf. This should ideally be endorsed by the University’s appropriate Governing body.’

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- ‘University senior management should check that their own internal targets and metrics do not inadvertently drive the wrong type of behaviour in negotiations on collaborative research.’

A second main area of recommendations touches on the vexed question of the role of the administrative divisions which have been set up in many HEIs to oversee the formation of research contracts and in which the line between academic and financial benefit can easily become the subject of expensive disputes:

- ‘University senior management should ensure there is clarity over the balance between facilitator and gatekeeper roles for Research Contract Offices (including where the decision making lies).’...’They should also ensure that there is sufficient senior management visibility of contracts, clear direction on desired outcomes, appropriate escalation procedures, and that decisions are taken at the right level, so that strategic considerations can be taken into account.’

The Report also identified areas of ambiguity in Research Councils’ rules on ownership of intellectual property seen from an international perspective, and calls for clarification of the principles which should obtain in collaborations with industrial funders. It recognized this to be an international issue:

‘Indeed, we found that this is a ‘hot topic’ in other countries as well. The European Commission’s recent Green Paper on the European Research Area noted that: “European universities and other public research institutions should be given incentives to develop skills and resources to collaborate effectively with business and other stakeholders, both within and across borders. A major hindrance is the inconsistent, and often inadequate, rules and approaches for managing intellectual property rights (IPR) resulting from public funding.”

Protecting the interests of research students in collaboratively-funded research projects

Research students holding doctoral studentships within collaboratively-funded research projects may be exposed to the danger of disputes affecting the completion and examination of their theses. It is important to ensure that research students do not fall between the ‘research’ and ‘teaching’ stools when HEIs design procedures.

Disputes and research ethics

Publications, research and books are these days what counts to secure a job and rise through the ranks. The pressure on academics to publish and research may well indeed compromise findings But publications and research are only valuable if one is sourcing truly original material and if this somehow feeds into the undergraduate and graduate courses and not just exist for personal or commercial gain. The findings from research are often very detached from the actual students who attend an academic institution, even though student work may well be an inspiration for a research project, knowledge should be feeding back to students (Comment from reader posted on Times Higher Education website, 2 August, 2008)

Many HEIs have codes under which concerns may be raised about misconduct in research. Research Councils UK, ‘the strategic partnership of the UK’s seven Research Councils’ has recently published Governance of Good research Conduct: Consultation on a Code of Conduct and Policy:⁸³

The consultation concerns not only core issues of plagiarism and falsification of data, but also such areas of proper representation of credentials and findings, conflicts of interest,

access to data for replication, abuse of peer review, and informed consent and protection of research subjects. It also covers concern about whether weaknesses and cases of poor conduct which have been identified are fully pursued and publicly available, so they are unlikely to be repeated.

In addition to the code of conduct in preparation through this consultation, is a practical guidance document being designed by the UK Panel for Research Integrity in Health and Biomedical Sciences, which is supported by the UK Research Integrity Office (UKRIO):

UKRIO has reviewed the existing codes and guidance documents and is producing a practical guidance document - The Code of Practice for Research. This will provide the research community with practical advice on the issues which need to be addressed to enable researchers and employers of researchers to effectively discharge their responsibilities regarding integrity in research. A separate document will address issues concerning allegations of misconduct in research.⁸⁴

Concerns are sometimes expressed that HEIs may not be sufficiently rigorous in policing their own requirements. It is therefore proposed that an external ‘research integrity’ body might be set up ‘on a voluntary basis to:

- establish common guidance on codes of conduct;
- desirable management systems to ensure best practice;
- procedures for dealing with problematic cases;
- sanctions/penalties for varying failures in conduct.

Such a body might also oversee and advise on investigations into serious allegations of misconduct, and liaise with non-UK national authorities on cases of cross-border misconduct.

There is also a suggestion that ‘a central repository of information on cases of proven misconduct’ might usefully be set up, though how this might be established and managed is open for consultation. HEIs and others could consult such a list. This would identify those found guilty of misconduct and the penalties imposed, with the objective of further discouraging corrupt practice among academic researchers and ensuring that no researcher previously found guilty of research misconduct is unknowingly appointed by an HEI. UKRIO has told Times Higher Education that it prefers to build up a database of ‘wholly anonymised’ cases.

Checklist: For embedding better dispute resolution in your HEI

- Do you keep a central anonymised record of disputes and ensure that you learn from your mistakes?
- If your HEI has made the same mistake more than once (for example receiving the same ‘systemic improvement recommendation from the OIA on more than one occasion) has this been reported to the governors and provision made to ensure that it does not happen again?
- Do you expect administrators to look the raising of a concern as a potentially helpful suggestion rather than an attack?

- Do you ensure that new staff are adequately briefed about the way the University is governed and its administrative structure?
- Do you ensure that specialist and professional administrators have an understanding of the work of other parts of the administration and that channels of communication between them are open and well used?
- Do you make it a condition of accepting a senior administrative position or a senior academic post which carries line-management responsibilities that appropriate training is undertaken?
- Do you ensure that those entrusted with decision-making and line-management powers are clear about the exact delegation of those powers and the extent of their discretion?
- Do you ensure that those entrusted with decision-making and line-management powers are given a practice-run-through with guidance before they take over new responsibilities, so that they can recognize danger-areas?
- Have you overhauled monitoring of dispute-resolution in your institution?
- Have you unified your monitoring arrangements?
- Do you publish your procedures for dealing with disputes on the open web?
- Do you identify individuals as 'champions' to keep an eye on particular aspects of administrative conduct?
- Do you admit mistakes and put them right at once. The QAA sets a benchmark of 'Professionalism' in these terms: 'We aim to achieve high professional standards and provide a cost-effective service. We aim to get it right first time. Where we get something wrong, we will acknowledge it, correct it and learn from it.'⁸⁵
- Do you avoid 'spin'; does your HEI tell itself the truth about its shortcomings as an institution and avoid covering up mistakes?

Note on the Strand A questionnaire: How are institutions handling disputes at present?

The project questionnaire⁸⁶ has been filled in by a number of HEIs, in whole or in part, and further completed questionnaires are steadily arriving. Many have responded helpfully to follow-up enquiries, giving detailed information about aspects of their own provision. Types of institution responding so far include pre-and post 1992 institutions, large and small HEIs. We are grateful to busy administrators for their help.

The questionnaire was designed in recognition of the fact that the administrations of HEIs tend to be divided into specialist sections. Sections of institutions duly responded in only one or more sections, with a preponderance of 'HR' or 'Personnel' responses. It is especially difficult to get participation in fact-finding about patterns of dispute resolution from academics and information covering students is patchy. Only some respondents felt able to identify themselves as answering with 'knowledge of the institution as a whole'.

The description of patterns in the present interim Report is based on the information received so far, supplemented by research on websites and further sampling. We intend to publish a detailed analysis shortly.

⁸⁵ www.qaa.ac.uk/aboutus/purposes.asp
⁸⁶ www.staffs.ac.uk/idr

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