



## **ANNUAL REPORT 2021**

### **THE OFFICE OF GENERAL COUNSEL (OGC)**



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### **INTRODUCTION**

The Office of the General Counsel (OGC) consists of a small team of professionals and was established on 1 January 2016. All the professional members are either admitted attorneys or corporate counsel under the Legal Practice Act 28 of 2014.

Prof O'Brien, General Counsel for the first five years of the existence of the OGC, concluded his term at the end of 2020. Prof Derek van der Merwe acted as General Counsel from January 2021 until 31 July 2021, after which Mr Dries Pretorius, as incoming General Counsel, took over the reins.

### **GENERAL ACTIVITIES**

The OGC seeks to be a trusted partner of UJ's governance and management structures, its office-bearers and employees, whom the Office sees as its clients, in respect of institutional affairs. It seeks to achieve this aim by being recognised for its creativity, expertise and commitment to the University's vision, mission, and values. The OGC assists its clients in conducting the University's business, insofar as this involves legal dimensions, effectively and in accordance with legal and policy requirements. The members of the OGC are not only experts on these requirements, but are problem solvers committed to helping resolve issues in a practical, timely and efficient manner and advising on proactive measures to mitigate problems. The OGC seeks to be alert to legal risks presented by proposed courses of action, while being sensitive to the responsibility of the University management to determine what level of legal risk is ultimately acceptable.

Moreover, the OGC emphasises the need for innovation and creativity by assisting the University in developing new and useful approaches to the challenges and opportunities presented to the institution. To this end, emphasis is placed on early involvement in emerging issues and activities. The objective is to provide legal services of a quality commensurate with the University's commitment to global excellence and stature in all of its activities, particularly as it asserts its leadership position in the Fourth Industrial Revolution.

The main subject matters to which the Office attended during 2021 included:

- Business transactions
- Commercial matters
- Educational affairs
- Contracts
- Litigation
- The legal impact of regulations made and directives issued under the Disaster Management Act 57 of 2002 (DMA) in response to the COVID-19 pandemic, on all activities and functions of the University.

The OGC assists all the faculties and divisions with their day-to-day legal challenges, ranging from litigation to amendment of policies and procedures and contract development. It advises them on legal dimensions in their dealings with third parties, and obtains and provides legal opinions regarding complex legal issues.

As could be expected, UJ's Mandatory Policy on Vaccinations created a significant amount of work for the OGC. This included staying abreast of all notices and regulations promulgated in terms of the DMA, advising thereon and drafting University documents to comply with the regulatory framework, including notices, policies and declarations, and dealing with the myriad of challenges against UJ's Mandatory Vaccination Policy Framework and Protocols.

### **Renewed focus**

During the second half of 2021, in-depth evaluation and planning were done in relation to the needs of UJ vis-à-vis legal services. A number of projects were identified with the view of implementation from 2022 onwards. Some of these projects are:

- A learning process for disputes – this ensures a formal evaluation of the root cause of disputes as to eliminate repeat incidents.
- A multiyear template development project that will not simply update UJ's templates but also address third-party repeat agreements. The focus is on reduction of risk and ease of use. Templates that have been identified to be addressed in 2022 are: 1) Standard Terms and Conditions for Procurement (including the tender and RFQ process); 2) A suite of agreements in support of core academic business, Confidentiality Agreements, Construction and Building agreements and a review of Student Agreements.
- A review of the privately owned student accommodation (POSA) accreditation and contracting process. This will include the review of the POSA Policy and ensuring alignment of agreements concluded with POSAs.

Various manual and automated systems will be implemented to support these initiatives.

Another area of focus will be the adequate resourcing of the OGC so as to equip it to deal with all its duties and address the relevant risks faced by UJ and the OGC effectively and productively.

### **Litigation**

South Africans are increasingly becoming an ever more litigious society. This was apparent in the higher education landscape as well, and the OGC managed a large number of active matters in the reporting year. Despite the ongoing COVID-19 restrictions imposed in terms of the National State of Disaster, the courts nevertheless continued to operate, even if not at total capacity, and mainly on an online basis. The litigation and disputes in which the University was involved covered a wide range of law, including construction law, the law of contract, constitutional law (human rights), and labour law. Litigation stemmed from both the University's academic activities and from support functions.

The OGC has dealt with various general matters of varying complexity, which included disputes with tenants in the Student Centres, disputes from unsuccessful tenderers, giving consideration to and advice on contentious clauses in contracts to which the University is a party, drafting termination notices, dealing with the NPA in respect of charges against a former student, reviewing applications from students, drafting and responding to letters of demand, assisting with legal input in student disciplinary matters, advising on PAIA requests and dealing with the legal issues of the various trusts to which the University is a party. These trusts include the UJ Trust, the Metlife Trust, BKM Trust, UJCLET Trust, and the UJ Entrepreneurial Trust.

The latter part of 2021 was geared towards putting plans in place to streamline the litigation space. Updated reporting formats were introduced, which provided greater clarity to the university stakeholders as to the status of matters being handled by the OGC. Proactive steps were undertaken by the OGC to begin a process of obtaining advice on evidence in respect of high-risk matters. The OGC continued to take the necessary steps to avert potential action by engaging with stakeholders and advancing mitigation strategies. Some of the high value matters and matters with reputational risks are highlighted below.

In the matter of the Auckland Park Theological Seminary and Wamjay Holdings (Pty) Ltd, the University sued successfully in the High Court for the eviction (no quantum) of the Auckland Park Theological Seminary and Wamjay Holdings Investment (Pty) Ltd from vacant land in Kingsway Avenue. In this regard, the University has received payment from the defendant for legal costs in the High Court to the amount of R951 523.75. Bills of cost in respect of the Supreme Court of Appeal and the Constitutional Court cases have been prepared, and we anticipate a further recovery of legal costs in this regard. Our attorneys took active steps to obtain a duplicate title deed in order to cancel the registered lease and cession.

A matter that piqued the interest of the University community is that of Ms Maria Magdalena Jun, who in her former position of Accountant: Cash Management and Investments, fraudulently misappropriated UJ funds seemingly in excess of R10 million over an extended period. She was found guilty on 242 charges. UJ, through its appointed forensic investigators, ultimately contributed to the successful conviction of Jun (during 2022). We have no doubt that this will send a strong statement to the UJ community and will go a long way in deterring similar behaviour by UJ stakeholders.

### **Contract vetting and development**

No contract is without risk, but when properly managed, contracts may maximise financial and operational performance of the University and may minimise risks and liability for the University. Contract retention obligations are imposed by legislation, and contracts provide evidence for use in possible litigation, mediation, arbitration and disciplinary hearings, and in such manner that their admissibility and/or evidential weight is not compromised. The University provides by way of the Policy on Contract Development, which incorporates the Standard Operating Procedure on Drafting of Contracts, a uniform framework within which the University concludes its contracts.

Despite the COVID-19 pandemic, there continues to be a significant increase in the number of contracts reviewed by the Office of the General Counsel (OGC). The OGC reviews and considers contracts for all faculties/departments, support divisions and UJ entities where UJ is a party; these include contracts within the realm of academic activities, focusing on teaching and learning, research and development, and community engagement. At the same time, high volumes of commercial contracts are concluded to ensure the smooth running of a modern city university.

The increasing pressure on the OGC to review contracts is illustrated by the fact that, on average during 2021, between 50-70 contracts were finalised and issued with a vetting certificate per month. This monthly figure excludes any new vetting requests received on a daily basis as well as pending contracts that have already been reviewed but are still being considered by counterparties. The past year came with numerous challenges within the contracts portfolio, including major resourcing challenges.

The high-value and potentially high-risk contracts that flowed through the OGC in the past financial year ranged from high-value funding agreements (some of these exceeding R50 million rand in value) to research and collaboration agreements with both local and international counterparties. The OGC also received a high number of service level contracts for the procurement of goods and services in 2021.

## Compliance (POPIA)

With the enactment of the Protection of Personal Information Act (POPIA), it has become even more important to ensure that contracts in terms of which data or personal information will be disclosed, collected or shared, must comply with the POPIA, as well as with the University's Policy on Privacy and Protection of Personal Information. Contracts with parties subject to the law of foreign jurisdictions may also be required to comply with the data protection laws of those jurisdictions. For example, contracting parties within member states of the European Union must comply with the European Union's General Data Protection Regulation (GDPR). Therefore, the OGC aims to ensure that in cases of collaboration with international universities involving the flow of information across borders, it assists its stakeholders to conclude binding contracts that ensure compliance both with the POPIA and with the applicable law of their jurisdictions, for example the GDPR.

