

IN RE: OMBUD'S 2019 REPORT TO COUNCIL

MEMORANDUM OF ADVICE

Private and Confidential

Adv M O'Sullivan

8 April 2020

Furnished to:

FAIRBRIDGES WERTHEIM BEKKER

c/o ADELA PETERSEN

INTRODUCTION

1. I have been requested to furnish the Chairperson of Council with advice in respect of the Ombud's 2019 report to Council, which relates to the period 1 July 2018 to 31 June 2019.
2. In particular I have been asked to advise on:
 - 2.1 Does the 2019 Ombud's report exceed her mandate and the Ombud's Terms of Reference?
 - 2.2 If so, in what substantive and procedural respects?
 - 2.3 What are the legal implications of releasing the report of the Ombud to Council in the face of the objections of the Vice Chancellor, Professor Mamokgethi Phakeng of UCT ('the VC')? In particular:
 - 2.3.1 Even if this is deemed a confidential report to Council, does the mere circulation of the report to a 30 person Council, 60% of whom are external members and 40% internal (including staff and student members) result in prejudice to the VC?
 - 2.3.2 Does Council's proposal to afford the VC, the Executive and Deans who are implicated in the report an opportunity to

respond to the report after the fact, cure any prejudice to those persons if the Ombud's 2019 report is tabled in Council?

- 2.4 In the circumstances, ought the report to serve before Council in its present format?
- 2.5 Can Council rescind its previous decision that the report ought to serve before it?
- 2.6 What are the Chairperson and Council's powers *vis-a-vis* the Ombud, i.e. can he/they instruct her to vary or amend her report in light of the independence of her office?
- 2.7 Are there other steps Council ought to consider in order to address this situation?
- 2.8 What are the legal / other risks to Council / the University?

THE RELEVANT FACTS

The ombud's 2019 report

3. The 'Message from the Ombud' contained in the introduction to the Ombud's 2019 report (at p 1-6) differs in material respects from her introduction to the previous reports (from 2012 to 2018), as elaborated upon below. The second part of the 2019 report (p 7-17) adopts the format and style of her previous reports, using aggregate data, and commenting on trends and concerns within the University.
4. This opinion concerns only the 'Message from the Ombud'.

The Message from the Ombud

5. In what the Ombud describes as '*an honest reflection on my experiences within the reporting period*', she claims that during the current reporting period the situation at UCT changed dramatically.

'The scrutiny and feedback no longer seemed welcome, at least from the highest office at UCT. It seems that I was naive to assume that there would be cooperation and continuity from the new administration, given that its executive was largely drawn from within the university.'

6. She elaborates as follows:

'The office of the Vice Chancellor, Deans and Executive Directors (not excluding other senior members of staff) are important offices for the success of my office. Not only do they sometimes make decisions or calls of judgement that appear to be unfair, which lead to complaints to my office, they are also the people I often go back to with recommendations on how I think a particular issue could have been handled and why. The nature of my feedback and approach, in line with an organisational ombuds approach, has

been to meet and engage, explain what I see as unfair or unreasonable in the decision taken, and discuss how it can be remedied. Sometimes this leads to changes in policy or in a process that was followed. In the past I generally appreciated these engagements because they fostered careful thinking on my part and engendered respect and legitimacy for my office and its unique role on campus.'

7. She claims that in this reporting period it seemed that she was not to be trusted:

'However in this reporting period, suddenly it seemed that I was not to be trusted. Instead my office seems to be seen by the VC herself as supporting transgressions and advocating for wrongdoing. In a brief "meet and greet" encounter following the appointment of the VC, I told her that I had noted that there was a case she suggested be brought to my attention and another that she seemed to have finalised. I told her that my view on both cases was that there were considerations that were not explored fully. I proposed that we meet so that I could explain my views. I do not know what this might have triggered since she became angry and made false assertions about my office and its mandate. She underlined her views by stating, in referring to two specific cases which we were discussing, that she was ready to meet these students in court.'

8. She includes the following specific complaint relating to the VC:

'During this reporting period a number of work-related complaints came to me about professional interactions with the VC where people felt bullied, silenced, undermined, rebuked and/or treated unfairly. Their pain was visible. Some affected bystanders also came to express fear and told me how they were impacted individually by different incidents. My usual approach is to be guided by the visitor on what they want to achieve by bringing the issue to my attention. Not one of those who brought these issues wanted me to approach the VC as they feared retaliation. The bystanders said they would not want to experience what they saw first-hand happen to others. What concerned me was how the visitors came in different capacities but all spoke about the same fear. As a result of their not wanting me to approach the VC, I focussed chiefly on the visitors' own well-being, their capacity to deliver in terms of working conditions, and the general expectations of human dignity, respect, fairness, social justice upon which the university values are based as also enshrined in the Constitution.'

9. She contends that the VC's conduct is contrary to UCT's values:

'A quote from the UCT Values states:

'To refrain from speech or conduct that demeans or humiliates others'. Many of the UCT-based visitors told me that this was not their experience with the VC. They reported that

she used words that were experienced as combative and violent – such as ‘fighting in a ring’ and that she, as the VC, would ultimately ‘win while the other is destined to lose’. Knowing this was unfolding, I became increasingly concerned about a number of things, including the bullying policy that the university has not yet finalised, and the myriad of UCT communications that speak about UCT being a community.

I see these communications as using the word ‘community’ in a false and inauthentic way. Communities are built, they are not created automatically wherever there is a group of people with a common mandate. The experiences highlighted here do not happen and go unchecked in real communities, especially not in the healthy ones. Politeness and acting as if ‘everything is fine’ creates an illusion that is difficult to sustain since it is a false reality. Deluding oneself about what is true grows into a culture of not questioning things. The visitors said that their compelling commitment to the university was what kept them going despite these experiences. I doubt this will be sufficient in the long run. Where there are undiscussables, problems persist and worsen. The need for genuine feedback to achieve true collaboration is painfully apparent.’

10. She also identified an occurrence which was outside the reporting period which she thought:

‘reflects the current executive’s seeming aim to silence, erase my office or change its mandate was the request to explain the interface between my role and academic decisions. Drawing from the Terms of Reference of the office, the job description and how the work should be done, I explained my role at UCT. It became apparent that the Executive did not understand the role of the Ombud, that they had not been reading the reports, or that they wanted to recreate the role in a manner that did not interfere with academic decisions’

11. She complained about negative views from the VC about her office and in addition that:

‘I have also felt that when views are not accepted, this non-acceptance sometimes has less to do with the validity of the point of view offered than with a readiness to deal with alternative viewpoints or a resistance to being seen as having failed or missed key considerations in evaluating an issue.’

12. She claims that notwithstanding the scepticism from some members of the Executive, she has continued to enjoy support and strengthened collaborations from many members of the University. Although she at times has worried that the views of the Executive might influence other members of the University engaged with her office, except for push-back from some Deans, she states that the commitment to help deliver fair outcomes across the University has grown. She reiterates that she is liberated by the fact that she is an independent office and reports to the chair of Council and to a certain degree expresses gratitude for the emergence of the difficult working relationship with some members of the Executive. She also expressed gratitude to the outgoing Chairperson of Council, Mr Sipho Pityana ('the Chair') and the outgoing Deputy Chairperson, Ms Debbie Budlender ('the Deputy Chair') for their counsel, guidance and leadership in respect of the role of the office and their interactions.

The role of the Ombud

13. By way of background, the office of the Ombud at UCT was established in 2011, and Ms Zetu Makamandela-Mguqulwa was appointed as Ombud ('the Ombud'). She has been the incumbent for more than nine years. UCT was one of the first universities in South Africa to appoint an Ombud.

14. The UCT Ombud is a so-called 'organisational ombud', which is often found within University structures. The Ombud was not established by a statute, but rather through the governance structure of the University, its Council. Council approved

the Terms of Reference which spell out the Ombud's authority and responsibilities ('the TOR'), as well as her initial job description.

15. An organizational ombud is distinguishable from a 'classical ombud' which is ordinarily established through a statute, with the power to investigate complaints and the authority to publish findings and '*assumes a clear set of standards and criteria by which an action or inaction by an administrative agency can be judged right or wrong*'.¹ The investigative / adjudicative process of a classical ombud are subject to procedural fairness.
16. The Ombud has been established by Council as an organizational ombud - an internal mechanism through which grievances and conflicts can be addressed informally in an impartial manner by an independent person who is neutral with regard to the various factions, interest groups or status within the University.
17. Because the Ombud lacks an investigative or adjudicative function and her work is dependent upon voluntary co-operation of the parties, as she has no formal authority to compel compliance, her effectiveness depends upon the respect which the Ombud (as an institution and an individual) command within the University, as well as upon the independence of the office and its ability to be free of direct attempts at political influence.²

¹ Howard Gadlin "The Ombudsman: What's in a Name?" Negotiation Journal January 2000, at p 42-43.

² Howard Gadlin "The Ombudsman: What's in a Name?" Negotiation Journal January 2000, at p42 (This article affirms that investigations are ordinarily subject to due process).

18. An organisational Ombud is generally established in the hope of '*creating non-authoritive, non-judgmental approaches to addressing grievances and disputes*' which are '*concerned with addressing the interest that underlies many grievances and disputes*'.³
19. The Ombud's mandate is to provide an informal dispute resolution service to the university community (all staff; current and past students; visitors to the university and contractors) predicated on the principle of fairness.
20. Prior to the establishment of the Ombud's office, the following guidelines served before Council in relation to its role:
 - **The Ombud should not be the primary reference point in dispute resolution.** Employees should be encouraged and required to attempt first to use the normal HOD/Dean channels and only when that fails to resort to the Ombud. Similarly, where there is an existing policy (e.g. Sexual Harassment or Racial Harassment) staff and students should be required to use these policies first, and only turn to the Ombud when there is no satisfaction with that channel.
 - The **Grievance Procedure** should not be replaced by an Ombud; the Ombud should as a policy avoid participation in the Grievance Procedure.
 - **The Ombud should, as a consequence, direct the staff or student to the correct channels before intervening.**
 - This is not to say that the Ombud should not help identify and evaluate options for resolution with all parties. The Ombud should maintain resource files on campus policies, procedures and services so as to help a party to follow the appropriate procedure.
 - However there will be **exceptional circumstances** where there are valid reasons why there is distrust in the established policies and procedures and in these cases the Ombud can be the first point of reference. In these circumstances the Ombud can serve as a neutral facilitator or conciliator in problem-solving and conflict resolution.
 - There may also be circumstances where there is **no university policy**. Parties might simply be in an inter-personal dispute. In these circumstances, the Ombud could

³ Ibid p 43.

facilitate the mediation of the dispute. The draft Mediation policy will provide a structure for such mediation.

- The following Guideline on what an Ombud does and does not do should form part of the publicity that will accompany the launch of the office.

What does an Ombud do?

Handles disputes:

- Hears concerns and complaints
- Helps identify and evaluate options for resolution with all parties, investigating when appropriate
- Serves as neutral facilitator or conciliator in problem-solving and conflict resolution
- In collaboration with Discho, ensures the training of on-campus mediators

Provides Information:

- Maintains resource files on campus policies, procedures, services
- Provides referrals to other resources

Serves as Consultant:

- Conducts forums and workshops
- Offers recommendations regarding changes in policies, procedures, and resolution structures

What does an Ombud *not* do?

- Advocate for specific outcomes
- Breach confidentiality
- Determine "guilt" or "innocence"
- Make binding or administrative decisions
- Participate in formal grievance procedures
- Make university policy
- Maintain official records
- Give legal advice

Job description of Ombud

21. These aspects were elaborated upon in the job description for the office of the Ombud dated 13 May 2010 ('the job description'). The 'position summary' states as follows:

'A university ombud is a designated neutral or impartial dispute resolution practitioner whose major function is to provide confidential and informal assistance to constituents of the university community (this may include students, staff, faculty and/or administrators).

The ombud role has a long and honorable tradition as a safeguard against abuse, bias and other improper treatment or unfairness. The ombud deliberately assumes a neutral position with respect to the individual and to the organisation itself in which he or she serves. He or she is an advocate for fairness who acts as a source of information and referral, and aids in answering individual's questions, and assists in the resolution of concerns and critical situations. In considering any given issue or concern, the rights of all parties that might be involved are taken into account. This office supplements, but does not replace, the university's existing resources for conflict resolution.'

22. In terms of the Ombud's reporting function:

'The ombud function is independent of existing administrative structures and is accountable to the University Council and will be expected to provide the Vice-Chancellor with regular reports.'

23. In relation to the periodic report of the Ombud the following is stated:

'While maintaining confidentiality of communications, the ombud may prepare a periodic report to the university community. Based on anonymous aggregate data, this report discusses trends in the reporting of grievances and concerns, identifies patterns or problem areas in university policies and practices, may recommend revisions and improvements, and may assess the climate of the campus.'

24. The critical skills and characteristics required of an Ombud include that '*An Ombud endeavours first of all to do no harm.*'

25. The conflict resolution skills identified as necessary include the following:

'The skills used to assist inquirers resolve their conflicts include: helping people learn how to deal with the matter directly if they wish to do this, serving as a communication conduit between the parties (shuttle diplomacy), informally bringing the parties together, bringing them together through an informal mediation process, approaching the conflict generically (especially when the inquirer is afraid of retaliation), and influencing systems change which could obviate the individual problem.'

26. Under the requirement of integrity the following is stated:

'An ombud's office is based on the offer of near absolute confidentiality. Therefore, the ombud must keep information confidential and must use good judgement about when and how such information can be shared, while being mindful of maintaining professional standards that are consistent with the Code of Ethics and Standards of Practice of The Ombudsman Association, and the Ethical Principles of the International Ombudsman Association. An ombudsman should not be risk-averse and should understand that this position may, on occasion, challenge even the highest levels of the administration in an effort to foster fair and just practices.' (underlining added)

27. The requirements relating to dispute resolution/consultation and referral include the following:

- Provide impartial and confidential consultation to members of the university community who are aggrieved or concerned about an issue
- Remain independent, neutral and impartial, and exercise good judgement
- Assist inquirers in interpreting university policies and procedures
- Provide assistance to inquirers by clarifying issues and generating options for resolution
- Facilitate the inquirer's assessment of the pros and cons of possible options
- If direct action by the ombud may be an appropriate option, obtain the inquirer's agreement and permission before proceeding
- If necessary, and while maintaining confidentiality, conduct appropriate informal fact-finding in order to better understand an issue from all perspectives
- Consult with managers/faculty to develop cooperative strategies for complaint resolution
- With the inquirer's permission, consult with all parties to clarify and analyze problems, focus discussions, and develop a mutually-satisfactory process for resolution
- When appropriate, facilitate group meetings, use shuttle diplomacy, or negotiation skills to facilitate communication among parties in conflict
- Encourage flexible administrative practices to maximize the institution's ability to meet the needs of all members of the campus community equitably
- Whenever possible and appropriate, provide referrals to other resources

28. Under the heading policy analysis and feedback, the following aspects are included:

- Serve as a campus resource for officials in formulating or modifying policy and procedures, raising issues that may surface as a result of a gap between the stated goals of the institution and actual practice

- Review periodically the patterns of grievances. Make appropriate recommendations for policies or practices that would reduce or eliminate recurring grievances
- Act as a liaison between individuals or groups and the campus administrative structure, serving as a communicator or informal facilitator, as appropriate
- Function as a sensor within the campus community to identify problems or trends that affect the entire campus or significant parts of the community; if appropriate, recommend creative ways to address these concerns
- Provide early warning of new areas of organizational concern, upward feedback, critical analysis of systemic need for improvement, and make systems change recommendations

29. The Ombud is responsible for on-going education and communication about the office's role to all potential inquirers as well as to University leadership. The role also includes the design and conduct of training programs for the campus community in dispute/conflict resolution, negotiation skills in theory, civility, and related topics.

30. The Ombud is appointed as a PASS (Professional, Administrative Support & Service) staff member. Although the grievance policy for PASS staff members applies to the Ombud, I advise below that it is not appropriate for the Ombud to invoke the grievance policy in these circumstances, in respect of her complaints concerning the VC and Executive, and why such complaints ought to be dealt with in a separate process by Council, in the first instance by the Chair or Deputy Chair or a sub-committee.

The Ombud's Terms of Reference

31. The Ombud's role is also formalised in the TOR, which are drawn from the IOA Standards of Practice, IOA Code of Ethics and IOA Best Practices: a Supplement

to IOA's Standards of Practice. I set out the key aspects of the TOR below. Certain extracts from the TOR are underlined for emphasis.

The role of the Ombud within the University hierarchy

32. The Office of the Ombud is outside of the usual university academic and administrative structures. It is a neutral, independent, informal and confidential resource to facilitate fair and equitable resolutions to concerns and problems raised by any member of the university community.
33. Insofar as reporting is concerned, the Ombud reports to the University Council through the Chair of Council. A written report is submitted annually to Council through the Chair on a date agreed upon by the Council and the Ombud.
34. The Office of the Ombud functions independently with respect to case handling and issue management but it reports to the Vice-Chancellor for administrative and budgetary purposes. To fulfil its functions, the Office of the Ombud shall have a specific allocated budget, adequate and functional space and sufficient resources to meet operating needs and pursue professional development. On an ongoing basis, the Ombud will provide feedback, while maintaining confidentiality, to the Vice-Chancellor and other leadership team members to inform them of the kinds of issues and trends the Ombud may be hearing about and to explain the relevance of such information, and to provide guidance.

35. The office of the Ombud reports general trends of issues and provides organisation wide feedback while recommending system change when appropriate without disclosing confidential information.

Confidentiality

36. The Office of the Ombud does not keep records about individual cases for the University. Use of the Office of the Ombud shall always be voluntary and not a compulsory step in any grievance or University policy.
37. This includes not disclosing confidential information about matters discussed in the Office of the Ombud with anyone in the organization, including the person to whom the Office of the Ombud reports.
38. The Office of the Ombud holds all communications with those seeking assistance in strict confidence and takes all reasonable steps to safeguard confidentiality. The Ombud does not reveal and must not be required to reveal the identities of the people who contact her.

Impartiality, informality and confidentiality

39. The three principles upon which the Ombud's mandate rests are impartiality, informality and confidentiality.

40. The office of the Ombud shall not take sides in any conflict, dispute or issue but shall consider the interests and concerns of all parties involved in a situation impartially with the aim of facilitating communication and assisting the parties to reach mutually acceptable agreements that are fair and equitable, and consistent with the policies of the University.
41. The purpose and scope of the Ombud services is described as follows:
 - 41.1 The principal role of the Office is to be available as an impartial resource for the review of all decisions and actions that fall within the ambit of university life.
 - 41.2 The Ombud seeks to provide a neutral, informal, confidential and independent environment within which complaints, inquiries or concerns about alleged acts, omissions, and any problems as they are experienced by university members may be surfaced.
 - 41.3 The Office of the Ombud performs a variety of functions. These include listening and providing a respectful and safe place for people to discuss their problems freely, helping them to clarify concerns and develop options, explaining university policies and procedures, making referrals to other offices and coaching visitors on how to help themselves, looking into issues by gathering data and perspectives of others and engaging in shuttle diplomacy. In addition, the Office of the Ombud serves as a resource for information and makes available to the University dispute

resolution expertise. It also seeks to be a catalyst for institutional change.
The Ombud assists parties in reaching resolutions that are consistent with
the ideals of the University.

Privilege

42. Communications between the Ombud and others (made while the Ombud is serving in that capacity) are considered privileged. The privilege belongs to the Ombud and her Office, rather than to any party to an issue. Others cannot waive this privilege. The only exception to this pledge of confidentiality is where the Ombud determines that there is an imminent risk of harm to human life. The Ombud shall not be required to give evidence before a University tribunal about anything that she may have learnt in the exercise of her duties. The University will endeavour to protect the Ombud from subpoena by others, both inside and outside the university.

Not an investigative role

43. The Office of the Ombud supplements but does not replace or substitute for the formal, investigative or appeals processes that are currently in place in the University. Use of the office is voluntary.

44. The Ombud functions on an informal and off-the-record basis and shall be a resource for informal dispute resolution services. The Office of the Ombud shall not investigate, arbitrate, adjudicate or in any other way participate in any internal

or external formal process or action. Whenever practical, the Ombud shall seek the resolution of the problem at the lowest level within the organisation.

Standards and ethics

45. The Office of the Ombud staff shall adhere to the International Ombudsman Association (IOA) Code of Ethics and Standards of Practice. The IOA code requires that the Ombud shall function independently of the organization, to be confidential and neutral, and to limit the scope of its services to informal means of dispute resolution.⁴
46. The IOA Standards, Code, and Best Practices delineate minimum standards, and require that the Office of the Ombud shall always strive to operate to “best practices” and to serve the best interests of all concerned. The Ombud shall establish consistent procedures which shall be made available upon request.
47. Independence is essential to the effective functioning of the Office of the Ombud.
The Office of the Ombud shall be, and shall be seen to be, free from interference
in the performance of its duties. This independence is achieved primarily through the reporting structure of the office, neutrality and organizational recognition and respect for its independent role. To ensure objectivity, the Office of the Ombud shall function independently from administrative authorities.

⁴ The standards and ethics of the Ombud are addressed in paragraph 4 of the TOR

Exclusions and limitations of authority

48. The exclusions, authority and limits of the office of the Ombud are dealt with in paragraph 5 of the TOR, and are not repeated here. Save to state that they reiterate that the Office of the Ombud will have no actual authority to impose sanctions or to enforce or change any policy, rule or procedure.

49. The limitations on the Authority of the Office of the Ombud in respect of receiving Notice for the University are as follows:

'Communication to the Office of the Ombud shall not constitute notice to the University. The Office of the Ombud shall publicize its non-notice role to the university. If a user of the Office of the Ombud would like to put the University on notice regarding a specific situation, or wishes for information to be provided to the University, the Ombud will provide that person with information so that the person may do so her/himself. In extremely rare situations, the Office of the Ombud may have an ethical obligation to put the University on notice. This will take place only when there is no other reasonable option.'

50. The TOR reiterates that the Office of the Ombud shall not conduct formal investigations of any kind.

51. The Ombud may maintain non-confidential statistical data to assist in reporting trends and giving feedback.

52. Insofar as adjudication of Issues are concerned, 'the Office of the Ombud shall not have authority to adjudicate, impose remedies or sanctions, or to enforce or change policies or rules.'

53. The Ombud shall avoid involvement in cases where there may be a conflict of interest. A conflict of interest occurs when the Ombud's private interests, real or perceived, supercede or compete with his or her dedication to the impartial and independent nature of the role of the Ombud. When a real or perceived conflict exists, the Ombud should take all steps necessary to disclose and/or avoid the conflict.

Retaliation prohibited

54. Finally, the TOR deals with retaliation against the Ombud or service users as follows:

54.1 All members of the constituencies served by the Office of the Ombud shall have the right to consult the Office of the Ombud without fear of retaliation or reprisal.

54.2 The Office of the Ombud should be protected from retaliation (such as elimination of the Office or the Ombudsman, or reduction of the Ombud budget or other resources) by any person who may be the subject of a complaint or inquiry.

IOA Best practices

55. The TOR refers to the IOA Standards, many of which are incorporated into the TOR. The IOA supplement to their Standards of Practice, Version 3, October 2013

includes certain standards of practice which are also relevant here, and I set these out below.

56. Section 1.3 states '*The Ombudsman exercises sole discretion over whether or how to act regarding an individual's concern, a trend or concerns of multiple individuals over time. The Ombudsman may also initiate action on a concern identified through an Ombudsman's direct observation.*'
57. This is elaborated upon as follows: '*The Ombudsman should bring to the attention of the appropriate office those policies, programs, procedures or practices which may be problematic for the organisation which negatively affect people's health, safety or rights. The Ombudsman should issue periodic reports summarising activities, problem areas identified, and recommendations for systemic change. Ombudsman office materials should state that all such reporting is conducted in a manner that protects the identity of the individuals and does not place the organisation on notice.*'
58. Clause 3.2 requires the Ombudsman to be a designated neutral reporting to the highest possible level of the organisation and operating independently of ordinary line and staff structures. The Ombudsman should not report to or be structurally affiliated with any compliance function of the organisation.
59. Confidentiality is dealt with in clause 3.1, which requires that the Ombudsman holds all communications with those seeking assistance in strict confidence and takes all reasonable steps to safeguard confidentiality, including the following:

'The Ombudsman does not reveal information provided in confidence that could lead to the identification of any individual contacting the Ombudsman office, without that individual's express permission, given in the course of informal discussions with the Ombudsman. The only exception to this privilege of confidentiality is where there appears to be imminent risk of serious harm, and where there is no other reasonable option. Whether this risk exists is a determination to be made by the Ombudsman.'

60. The Ombudsman charter for each organisation should specify what types of events give rise to the level of '*imminent risk of serious harm*'. Best practice is to interpret '*imminent risk of serious harm*' as narrowly as possible – for example, imminent risk to human life.
61. Clause 3.4 provides that '*if the Ombudsman pursues an issue systematically (e.g. provides feedback on trends, issues, policies and practices) the Ombudsman does so in a way that safeguards the identity of the individual*' and '*It is not appropriate for an organisation to take any adverse action on the basis of information reported informally through the Ombudsman. The Ombudsman may coach the manager on how to make reporting channels more accessible or how to gather information himself or herself.*'
62. An Ombudsman may place the organisation on 'notice' when the Ombudsman evaluates the circumstances and specifically elects to place the organisation on notice by identifying an appropriate point of contact within the organisation in communicating to that point of contact specific information which the Ombudsman expressly intends to share for the purpose of placing the organisation on notice of a specific concern or specific situation. If an Ombudsman makes such an intention notice communication, confidentiality is waived only with regard to the specific

communication made with the point of contact for purposes of the notice communication.

63. It is the conversation between the Ombudsman and the appropriate point of contact within the organisation that constitutes notice and not the conversation between the Ombudsman and the visitor. Thus, under no circumstances, is the original communication with the Ombudsman part of the notice communication. All Ombudsman offices should have a well-defined and generally available procedure detailing the limited circumstances and the processes under which the Ombudsman may provide notice. If the Ombudsman elects to place the organisation on notice under the conditions above, the Ombudsman should follow the protocol of the particular Ombudsman office regarding this unusual action. The protocol should include specific steps so that it is clear that the Ombudsman made an intentional decision to make a note of disclosure.⁵
64. Clause 4.6 requires that the Ombudsman '*identifies trends, issues and concerns about policies and procedures, including potential future issues and concerns, without breaching confidentiality or anonymity, and provides recommendations for responsibly addressing them.*'
65. The best practices reiterate that '*the Ombudsman should be particularly careful to maintain neutrality when making recommendations for system change.*'

⁵ The UCT TOR does not include a specific protocol for such notice. The Ombud does not suggest that she has sought to place the University on notice.

66. The IOA code of ethics requires as follows:

'The Ombudsman shall be truthful and act with integrity, shall foster respect for all members of the organisation he or she serves, and shall promote procedural fairness in the content and administration of those organisations' practices, processes and policies.'

The events which preceded the 2019 report

Reporting to the Council

67. Historically, the reporting of the Ombud to the Council has occurred through both formal and informal channels.

68. Formal reporting to the Council has taken place once a year since 2012. These reports to Council have not previously been treated as confidential. They are available on the Ombud's website.

69. Since her appointment, the Ombud has met with the Deputy Chair every month, first at the recommendation of the then Chair, Archbishop Njongonkulu Ndungane, and from 2016, during the tenure of the present Chair.

70. The format of the monthly meetings included an agenda of issues the Ombud wished to alert the Deputy Chair to and/or discuss, most of which related to the issues that visitors had brought to her. This system was part of the early warning system in place to alert the Chair and Council (through the Deputy Chair) to issues of concern. The Ombud notes in her 2016 Report that the '*Ombud's office reports*

to the office of the chair of Council that has access to the senior leadership group of the University to discuss emerging issues and conflicts'.

71. The Ombud also had sporadic meetings with each of the Chairs. The Deputy Chair was not present at these meetings except for a meeting in December 2019, where the Ombud specifically requested a joint meeting.
72. The meetings with the Chairs did not include a discussion of individual cases, in the way that these were discussed with the Deputy Chair. However, over the last period, the meetings with the current Chair included discussions about the challenges the Ombud reported in relation to her relationship with the current VC, and complaints from UCT staff. The meeting in December 2019 focused primarily on this issue.

The informal reporting to the Chair and Deputy Chair

73. In October 2018, the Ombud approached the Chair and Deputy Chair in relation to two doctoral students whose thesis had been rejected on the grounds of plagiarism. The ombud had unsuccessfully sought to intervene with the VC, and sought their assistance.
74. In March 2019 the Ombud expressed concerns in some detail to the Deputy Chair, who in turn informed the Chair, about the complaints which she had received concerning the VC's manner of dealing with UCT staff members, including public humiliation.

75. At that stage the Ombud informed the Deputy Chair that many at UCT were asking how Council intended to deal with this issue.
76. It is evident from a letter sent by the Ombud to the Chair of Council, that by September 2019 the relationship between the VC and the Ombud was severely impaired. The letter states as follows:

‘While I would ordinarily offer feedback to and be available to think together with both the Vice-Chancellor and the Dean of the relevant Faculty, I am unable to do so at this point. The Vice-Chancellor has told me explicitly that she trusts neither me nor my office. She views recommendations from my office as bullying, to a point of calling me a “school principal”. While this does not necessarily deter or affect all my work and its efficacy, where the VC is involved, including other senior members of staff, I am presented with a wall of negativity. This has affected and continues to affect relationships that I had established over time, through which I had successfully navigated my work in the past. The questioning of my involvement with academic concerns further prevents my feedback with these types of concerns from being heeded. Thus I am writing to you.’

77. The Chair and Deputy Chair considered how to address the impaired relationship between the VC and the Ombud in October 2019.
78. An email chain in November 2019 indicates that there was a meeting held between the Ombud and the University’s Executive (the VC, DVC’s and Registrar) to discuss the Ombud’s role in academic decisions, and that the Executive viewed this meeting as having produced some positive results.
79. However, it was evident that the problems persisted during the meeting between the Ombud, Chair and Deputy Chair in December 2019.

80. I am advised that Council was not informed previously of (a) the breakdown in the relationship between the VC and Ombud, nor of (b) the complaints received by the Ombud concerning the VC.
81. However, I am instructed that Council had established an ad hoc committee of Council to consider the issue that the VC herself raised about feeling that she did not enjoy the trust of the Council. The concerns that were before this ad hoc committee were different to those complaints that had come through the Ombud. .

Attempts to repair/address the relationship between Ombud and VC

82. Attempts were made by the Chair and Deputy Chair to address the breakdown in the relationship between the VC and Ombud.
83. The matter was raised by the Chair and Deputy Chair in a meeting with the VC – in particular, what had allegedly occurred during the first meeting of the VC and Ombud after the VC's appointment, where the Ombud reported that the VC had told the Ombud explicitly that she (the VC) did not trust her (the Ombud).
84. The VC and Ombud subsequently met, but there are conflicting reports of what had been said in the meeting between the Chair, Deputy Chair and VC meeting as well as what happened in the VC Ombud meeting.⁶

⁶These issues have been elaborated upon by the VC and the Ombud in their further responses detailed in the Opinion.

85. Of significance, prior to receipt of the Ombud's report it appears that neither the Chair nor Deputy Chair, nor the Ombud had raised with the VC the complaints from staff members received by the Ombud concerning the VC. The VC has accordingly not had any prior opportunity to consider or respond to those issues.

The Ombud's 2019 Report

86. On 27 February 2020 the Ombud sent her 2019 report to the Chair and Deputy-Chair, as required by the TOR.

87. The report was forwarded to the VC by the Deputy Chair on the same date informing her that the report was an agenda item for the 14 March 2020 meeting of Council. The report was sent to her in advance in order that the University Executive could, if it wished, to prepare a response. This was consistent with the previous practice of the Council. The VC forwarded the Ombud's report to the UCT Executive on that day, suggesting it be included in the agenda of the Executive's meeting scheduled for the following week.

The VC's initial response

88. On 2 March 2020, the VC responded to the Chair raising certain concerns regarding the report of the Ombud. In summary, she indicated that she was shocked that the Ombud had submitted a report which implicates the VC and the Executive without giving either an opportunity to respond to such allegations. She

also indicated her concerns about a report being circulated to Council members without her being offered an opportunity to respond. She states as follows:

'It is true that I have disagreed with the Ombud and my disagreements with her had nothing to do with my respect or lack thereof for the office. We, however have also had amicable meetings and so I am surprised that she chose to raise issues in this manner, which in my view contradicts the role of her office. As I understand an Ombud is a person designated as a neutral or impartial dispute resolution practitioner, whose major function in this capacity is to provide confidential and informal assistance as a counsellor, shuttle diplomat, mediator, fact-finder and agent for orderly systems change.'

89. She also suggested that the tone of the report and the manner in which it is submitted raised certain questions about the motives of the Ombud.
90. Finally, the VC requested that the Ombud retract, with an apology, the report she submitted so that a proper process can be followed and confidentiality ensured.
91. The VC's response was forwarded to the Ombud by the Chair of Council on 7 March 2020.
92. The Ombud responded that evening, indicating that she found the response of the VC '*shocking*'.
93. On 8 March 2020 a holding response was received from the UCT Executive sent by DVC, Professor Feris, which did not respond in substance to the report but instead noted the Executive's response during the meeting of 3 March 2020, as follows:

'Executive noted the report and discussed the process that would unfold now that the report was concluded. It agreed that it was appropriate for the Council to receive the report as the Ombud reported directly to the Chair of Council and Council. The Executive felt it was appropriate for Council to first engage with the report, and to then determine a process by which it wants to deal with the matters contained in the report.

It was agreed that the Executive expected that it would be subsequently approached by Council for comment on the content of the report and that it would be appropriate for the Executive to then give Council a comprehensive response on the different elements of the report and a reflection on how the Executive plans to deal with the matters raised. This would be as per previous years.

The Executive agreed that because several comments in the report pertained to the Vice-Chancellor directly, it was appropriate for the Vice-Chancellor to respond to those matters within a process as determined by Council. The Executive felt that right to respond was a non-negotiable as it relates to the Ombud's Report more broadly and specifically, the VC has the right to directly respond to those matters pertaining to the VC. It agreed that the broader executive could not respond to those elements that refer directly to the VC.

The Executive agreed that a small number of comments in the report pertained to "the Executive". The executive members agreed not to discuss the detail of those comments at the meeting but agreed to respond to it when Council has determined the process to address the Ombud's Report.

In general, the Executive was of the view that the Ombud's report in this instance was significantly different in nature (the foreword) to previous reports. The Executive agreed to reflect on that when it considers its comprehensive response. The Executive also agreed to ensure it reflected on the details of the report in good time, so that it was ready with response when Council so requests it.

It was and remains our view that Council should receive and engage the report, (perhaps as a confidential pink paper report as it contains names and serious allegations). Council must determine a fair and procedurally sound process to deal with the report (or elements of it) including ensuring the right of reply.'

The VC's further response

94. On 8 March 2020 the VC submitted a formal response to the report of the Ombud.

The VC's response is 13 pages long, in which she analyses the Ombud's report and raises concerns in relation to the format and approach of the report. Her general complaints are as follows:

'The 2019 Annual Report of the Ombud is unusual. It is presented as an annual report of the grievances reported to and resolved by the office, and yet it is, in substance, an evaluation of the current university leadership which I head in comparison with the previous leadership and, perhaps more astonishingly, it is for the most part a compilation of untested and unproven allegations made by the Ombud in her personal capacity against my office, the Executive in general and Deans. These allegations have been given the sanctity of fact by packaging them as a report to Council.

The allegations are uncharacteristically vague and unsubstantiated. In the report the Ombud presents her office as a complainant and judge in her own case. I was never notified of the allegations. Neither was I afforded an opportunity to be heard before the report was compiled. I believe also that none of the other officers against whom allegations have been made were notified of the allegations and given a chance to be heard.

By cloaking her untested personal grievances in the form of a formal report of the office to Council, the Ombud has abused her office in the most flagrant manner, and acted in violation of the principles that govern her office and indeed every known basic principle of natural justice. The disproportionate prominence given to the untested allegations in the report suggests mala fides on the part of the Ombud.

I believe that this abuse of office and disregard for the law is unprecedented, brazen, and dangerous. It has severely undermined my leadership and my dignity.'

95. The VC's response starts off as follows:

'(a) Dramatic change in attitude to the scrutiny and feedback from the Ombud.

The Ombud alleges that during the reporting period of 1 July 2018 to 30 June 2019, the situation of respect for the office of the Ombud 'changed dramatically'. The report states:

'The scrutiny and feedback no longer seemed welcome, at least from the highest office at UCT. It seems that I was naive to assume that there would be cooperation and continuity from the new administration, given that its executive was largely drawn from within the university.'

The report further alleges 'a difficult working relationship with' and 'scepticism' from 'some members of the Executive'.

96. The VC complains that none of these allegations are substantiated in the Ombud's report. There is no evidence showing how many recommendations were made against the Executive as a whole or against the VC's office and how many were implemented and how many are not. The VC indicates that she is only aware of two cases which the Ombud raised with her about which they had a difference of opinion. She maintains that if there was a dramatic change in respect for the Ombud in 2019 as the reports suggests, the Ombud had several options including the following:

- '(i) At the time she concluded that there was dramatic change, she could have brought this to the attention of the Executive as a collective.
- (ii) If her recommendations were not being respected by my colleagues, she could have brought this concern to their attention directly and sought an explanation why her recommendations were not being followed.
- (iii) If this did not bring about improved compliance, she had the option of bringing her concerns to their line manager or my office.
- (iv) If she was concerned that my office was not respecting her recommendations, she had the option of letting me know about this concern and asking for my explanation.
- (v) If my explanation was irrational, she had the option of bringing her concern to the Chair of Council.

Throughout 2019 until now, the Ombud did not raise with me the problem of dramatic change in attitude to her office, and of systematic recalcitrance and disrespect for her office by the leadership. The Ombud did bring to my attention, on separate occasions, a handful of instances where she was engaging with some office holders on particular issues. I duly advised her on how to deal with those instances.'

97. The VC claims that her office has not harboured any scepticism about the office of the Ombud. On the contrary, she has enthusiastically promoted, respected and protected the office, because she fully understands the important role it plays in

promoting and advancing a cultural of fairness in decision-making, combating maladministration and promoting respect for one another in the University.

98. The VC denies that her office has maintained a difficult working relationship with the office of the Ombud and indicates that she has encouraged and invited the office of the Ombud to engage with the executive and other office holders to improve co-operation and mutual understanding. She identifies the second complaint of the Ombud as '*the Executive does not understand the role of the Ombud*':

'The report makes this allegation by referring to an unspecified 'occurrence' the Ombud, by her own admission, claims to have taken place outside the reporting period. Nevertheless, the report alleges that this occurrence 'reflects the current executive's seeming aim to silence, erase my office or change its mandate was the request to explain the interface between my role and academic decisions'

The report does not describe the 'occurrence'. Neither does it describe the facts supporting the striking allegation that the Executive does not understand her role. The report projects on the Executive an intention to 'erase her office'. This is a serious allegation that is unsupported by facts. Since the report cites in the pejorative sense lack of understanding by the Executive of her role, it does not explain why it is bad for the Executive to invite her to explain her role or why she does not consider it her responsibility to raise awareness or improve understanding about her office throughout the University including among the Executive.

My office is not aware of, and has not taken or supported, any action to erase the office of the Ombud.'

99. The VC highlights the three specific allegations made against her office. She deprecates the fashion in which these have been made as follows:

'Unlike all others, these allegations single out my office and the report assigns guilt on me in the most unfair fashion and contrary to the cardinal principle of confidentiality that governs the office of the Ombud. I believe that naming and shaming do not form part of UCT's dispute resolution mechanisms especially the Ombud's which is supposed to

provide alternative dispute resolution that avoids adversarialism and taking sides but promotes amicable solutions.'

100. The VC deals with each of these in turn:

'(c) Lack of trust in the office

The report falsely accuses my office of 'supporting transgressions and advocating for wrongdoing'.

The report states:

In a brief "meet and greet" encounter following the appointment of the VC, I told her that I had noted that there was a case she suggested be brought to my attention and another that she seemed to have finalised. I told her that my view on both cases was that there were considerations that were not explored fully. I proposed that we meet so that I could explain my views. I do not know what this might have triggered since she became angry and made false assertions about my office and its mandate. She underlined her views by stating, in referring to two specific cases which we were discussing, that she was ready to meet these students in court.

According to her account, the Ombud went to see me on the pretext of a 'brief meet and greet'. However, she introduced into this brief meeting two critical cases on which she presented her views. By her own account, her view was that the decisions were wrong. greet'. However, she introduced into this brief meeting two critical cases on which she presented her views. By her own account, her view was that the decisions were wrong.

The Ombud's account paints a problematic picture of how she handled the two cases. Her account shows that her office did not notify my office of the two complaints and that she did not give me a chance to be heard before she made her 'recommendations'.

In her report, the Ombud notes: '... my office does not judge, a point that I reiterate every time I engage with members of the University. Engaging with respect and suspending judgement are among the main characteristics of my office.' Yet on this occasion, the Ombud's account shows that she judged in these two cases and judge she did, way before she had met and spoken with me.

Within the confines of confidentiality, I will attempt to provide some general details about the two cases.

Contrary to what the report suggests, I engaged with the Ombud constructively about both cases. With respect to one, the student eventually received a positive outcome. With respect to the second, the student did not receive a positive outcome. There is nothing inherently wrong with this.

One case concerned a PhD student who had been excluded on academic grounds. When the student appealed to the Vice Chancellor (VC), the appeal was delegated to me as Deputy Vice Chancellor (DVC) responsible for research at the time. After considering the letter of appeal, I upheld the student's appeal. Subsequently, the Faculty brought to my attention that the student has plagiarized the entire letter of appeal. The Faculty's claim was found to be true. Because the appeal letter was plagiarized, there was no appeal and so I retracted my initial decision since it had been procured by fraud. The Ombud brought this case up during the meet and greet when I became VC. She was adamant that my decision was wrong. She had not heard from me before she came to this conclusion. While I disagreed with her position during this meeting, much later the Ombud brought up this issue again. This time she invited the student to the meeting, which was in her office. By this time, the student was able to demonstrate that her circumstances had significantly changed which provided a reasonable basis for reconsidering the student's status. Indeed, this engagement resulted in a decision to re-register the student.

The other case concerned a doctoral thesis which had been flagged by an external examiner for plagiarism. When the Doctoral Degrees Board (DDB) considered the examiners' reports, it denied recommending the candidate for the award of the doctoral degree. The supervisor appealed the decision to me in my capacity then as chair of the DDB and DVC responsible for research. Upon considering the appeal for leniency, I decided to turn down the appeal, citing as the reason the fact that the plagiarism was significant and unacceptable. This matter would later be referred to two other DVCs and back to the DDB. On separate occasions, all of them duly considered the candidate's appeals and found that they could not approve the award of a doctorate for a thesis which had been plagiarized substantially.

Ignoring all this meticulous decision making, the due process that had taken place and the applicable rules, the Ombud sought to make me change the decision of the DDB. She did this without first seeking my views on the case. As Vice Chancellor at this stage, I was being asked to reverse the decision made by the entire DDB and to approve a thesis for the award of a doctoral degree that had been found to have been plagiarized. I found it difficult to accede to the Ombud's instruction. Firstly, I had become *functus officio* since I had considered the matter when I was DVC. I could not re-claim jurisdiction in the matter simply because I had now become Vice Chancellor. Secondly, my predecessor had already considered the matter and referred it to a different DVC, who had upheld the decision of the DDB. Thirdly, to award the degree in this case would have violated University rules and practices including the main yardstick for awarding a doctoral thesis – that the thesis must make an original contribution to knowledge, and the plagiarism policy. Neither my office nor the office of the Ombud can compel the DDB to take a decision that is inconsistent with University rules and policies. In this case, the Ombud strayed way out of her jurisdiction by accusing the DDB and my office of making a wrong decision on plagiarism. My understanding is that her office can look into the fairness of the procedures, but her office cannot substitute her decision for that of the lawful decision-maker, in this case the DDB. applicable rules, the Ombud sought to make me change the decision of the DDB. She did this without first seeking my views on the case. As Vice Chancellor at this stage, I was being asked to reverse the decision made by the entire DDB and to approve a thesis for the award of a doctoral degree that had been found to have been plagiarized. I found it difficult to accede to the Ombud's instruction. Firstly, I had become *functus officio* since I had considered the matter when I was DVC. I could not re-claim jurisdiction in the matter simply because I had now become Vice Chancellor. Secondly,

my predecessor had already considered the matter and referred it to a different DVC, who had upheld the decision of the DDB. Thirdly, to award the degree in this case would have violated University rules and practices including the main yardstick for awarding a doctoral thesis – that the thesis must make an original contribution to knowledge, and the plagiarism policy. Neither my office nor the office of the Ombud can compel the DDB to take a decision that is inconsistent with University rules and policies. In this case, the Ombud strayed way out of her jurisdiction by accusing the DDB and my office of making a wrong decision on plagiarism. My understanding is that her office can look into the fairness of the procedures, but her office cannot substitute her decision for that of the lawful decision-maker, in this case the DDB.

If these two cases are the source of the Ombud's wide-ranging allegations against the Executive and my office, then they lack merit in substance, not just because of the glaring violations of procedural rights that have taken place. As the facts revealed above show, in one case the engagement with the Ombud resulted in a positive outcome for the student. In the other case, there were justifiable grounds for not following the recommendation of the Ombud.

I deny that in my meetings with her I made false accusations about her office. I agree that I was firm in my belief that the University had treated the students fairly and that if challenged in court, the University was entitled to defend both cases.'

101. She deals with the Ombud's allegations of bullying, silencing and unfair treatment as follows:

'(d) Bullying, silencing and unfair treatment

These allegations fall into two broad categories. One has to do with the Ombud vocalizing her own grievances and the other with her purporting to channel other people's grievances. Neither are substantiated.

The report states: 'During this reporting period a number of work-related complaints came to me about professional interactions with the VC where people felt bullied, silenced, undermined, rebuked and/or treated unfairly. Their pain was visible. Some affected bystanders also came to express fear and told me how they were impacted individually by different incidents.'

The report further alleges: 'Not one of those who brought these issues wanted me to approach the VC as they feared retaliation. The bystanders said they would not want to experience what they saw first-hand happen to others. The visitors said that their compelling commitment to the university was what kept them going despite these experiences.' commitment to the university was what kept them going despite these experiences.'

This is by far the most serious allegation made by the Ombud. I am entitled to believe that these allegations are made in bad faith. Lofty and emotive words are used to describe them, and yet no evidence and details are given to support them, no verification or vetting of the allegations took place, and the absence of a credible verification process is seemingly justified by further unproven allegations.

These allegations are highly prejudicial. Yet they are presented in a manner that makes it impossible for me to respond to them. As far as they relate to the complaints of members of staff other than the Ombud herself, it can be said that the Ombud has chosen to weaponize confidential information she has received in her official capacity by trying to use them to bolster her own grievances against my office. She knows that her office is bound by confidentiality and cannot be compelled to reveal the details of the allegations so that I can consider and respond to them.

The Ombud seems to have sat on the allegations (both her own and those of others) for a considerable period. She has a wide range of tools for dispute resolution, all of which she has ignored. UCT policies prioritize amicable resolution of disputes. By weaponizing her grievance mechanism, she has raised a reasonable suspicion of vindictiveness, bad faith, and abuse of office.

I deny that I have bullied or silenced the Ombud. Neither have I treated her office unfairly. There is no evidence, and I deny, that I have victimized any person who has lodged a complaint against me to any office in the University. While I disagreed with the Ombud about the two cases the report refers to, such disagreement cannot be conflated with unfair treatment or silencing of her office.'

102. Finally, she deals with '*making negative remarks about her office*' as follows:

(e) Making negative remarks about her office

The report alleges that I made negative remarks about her office on several occasions. She 'wonder(s) how these views might impact the University's capacity to deliver on fair outcomes where her office is involved as well as potential watering down of my effectiveness and the gains of the office over the years'.

This allegation is, like all others, unsubstantiated. I have not made negative views about the office as alleged. Nor have I influenced any of my colleagues and other members of the University community to disrespect the office of the Ombud. I repeat my earlier comments that, contrary to what is alleged, I have avidly supported, promoted, and protected the office of the Ombud.

The irony is that while the Ombud accuses me of making negative remarks about her office, her report makes numerous unpleasant remarks about my office and leadership including the following:

- That my leadership does not understand the Ombud's role;
- That my leadership is worse than the previous leadership;
- That my disagreement with her has to do with egos; and
- That I become angry easily and without justification.

I am surprised and disappointed that the Ombud views my office and leadership in this unflattering manner.'

103. The VC's response also addresses what she describes as violations of the law and internal policy. Citing case law and the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), the VC claims that certain precepts of the basic tenets of fairness have been violated:

103.1 The right to be notified of the allegation prior to publication;

103.2 The right to be given a reasonable opportunity to be heard;

103.3 The rule against bias which would ordinarily prevents a decision maker from being the complainant and judge in her own cause;

103.4 Abuse of office and violation of TOR of her office;

104. The VC also alleges that the Ombud acted in bad faith.

105. Finally, the VC claims that the report is unlawful because whilst the Ombud in her individual capacity is entitled to bring her own grievances, she has no right to

submit them to herself and incorporate them into an Ombud's annual report to Council.

106. In conclusion, the VC states that the annual report of the Ombud is in fact not a report, it is an amalgam of a report and the personal allegations that she has against certain officers including the VC. She claims that the report to the extent that it contains unproven and untested allegations is *ultra vires*.

107. In conclusion, the VC makes the following demands:

'That the report is withdrawn unconditionally so that all offensive parts are removed.

- The revised report must meet my approval before it is submitted to Council.
- The Office of the Ombud should make a written apology to my office.

I would like to believe that the Ombud has opened herself up to possible disciplinary action.

In my opinion, she has acted in a perverse manner and violated all the fundamental principles that govern her office. Her actions are divisive and have precipitated an unnecessary tension and crisis. I will leave it to your office to decide how best to proceed in the light of these violations.'

108. Finally, the VC indicates that she is open to mediation between her office and the office of the Ombud, if the chair of Council has reason to believe that this is a plausible way of repairing her relationship with the Ombud. She requires this to be facilitated by an independent person external to UCT, whom she must pre-approve.

Ombud's initial response to VC

109. The Ombud's initial response to the Chair and Deputy Chair is contained in a report dated 13 March 2020 ('the Ombud's initial response'). The Ombud claims that:

- 109.1 The reporting process from the Ombud to the Council is standardised and has been since 2012. The 2019 report followed the same route. The rationale for this approach is to give the VC an opportunity to respond to the report.
- 109.2 The Ombud claims that '*this report and the previous report have raised concerns about particular officers and/or persons within the University community*'. As a part of the office of the Ombud's job specification, the Ombud is expected to '*provide early warnings of new areas of organisational concern, upward feedback, critical analysis of systemic mood for improvement, and make systems change recommendations.*'
- 109.3 The Ombud claims that the confidentiality clause in the TOR primarily safeguards communications with visitors to her office.

110. The Ombud disputes that the VC's claim that she does respect her office. She claims that the VC has told her '*I don't trust you*' and "*I don't trust your office*", and that amounts to an utter lack of respect for her person and her office, hence not wanting to support her office or work with her.

111. In response to the amicable meetings which the VC alleges occurred, the Ombud responds that '*the report covers the period from 1 July 2018 to 30 June 2019, thus recent meetings to not affect the report*'.

112. The Ombud reiterates that the VC is premature in making assertions about her office, as the Ombud is of the view that the VC is yet to understand the Ombud's mandate.

113. The Ombud relies upon her job specification: '*an Ombud should not be risk averse and should understand that this position may, on occasion, challenge even the highest levels of the administration in an effort to foster fair and just practices.*'

114. The Ombud also claims that she has exercised the items listed in the VC's definition of her role, namely '*neutral or impartial dispute resolution practitioner, whose major function in this capacity is to provide confidential and informal assistance as a counsellor, shuttle diplomat, mediator, fact-finder and agent for orderly systems change*', to no avail. She claims that this instead became a meeting the VC later denied having happened, hence she claims that the entire discussion and its spirit were ineffective.

115. In response to the allegation questioning the motives of the Ombud, she responds as follows:

'As an independent office, I have no reason to be personally invested, while I am convinced that if the office of the Ombud at UCT is fighting for its legitimacy, the University Council as the employer ought to know. Furthermore, as an IOA (Ombudsassociation.org) certified Ombudsman practitioner with a portfolio to oversee and support the Africa region

cluster, I am entrusted to safeguard and embody the standard of practice and code of effort.'

116. She considers the VC's request that she retract the 2019 report, and tender an apology, unreasonable.

Meeting of EXCO

117. The Chair convened a meeting of the external members of the Council's Exco to discuss the Ombud's report and the VC's response. The members requested that the Ombud make additional information available concerning the 2019 report.

Meeting of Council – 14 March 2020

118. The Deputy Chair resigned prior to the Council meeting in part due to the lack of resolution of these issues. She claimed that her resignation was on a matter of principle, because the Ombud's 2019 report had not being included as an agenda item. She circulated a letter to that effect to members of Council, in advance of the meeting, stating that '*we should not be interfering with the Ombud fulfilling her accountability duty to Council and Council fulfilling their responsibility of overseeing the Ombud, engaging with the Ombud, reflecting on what she reports, and determining what this means for the University. Further, given that the Ombud is meant to be independent, neither the executive nor the Council should be determining what the Ombud can or cannot say*

119. At the Council meeting on 14 March 2020, the Council resolved that a special meeting would be convened to discuss the Ombud's 2019 report, and that report would be circulated to Council in advance of the meeting, together with the response from the VC, the Executive of the University and the Deans.

Ombud's further response to VC

120. On 17 March 2020 a further response was received from the Ombud in response from a request from Exco to make available additional information pertaining to the issues that she had raised in the annual report for 2019. She confirms that having re-read the report in her view it contains sufficient information to help direct the University towards what needs fixing.

121. She also maintains that her reports can only be used as an early warning system as she operates according to the IOA standards of practice and codes of ethics. One of the fundamental principles of Ombudsing is the protection of confidentiality that visitors to the office enjoy, as that is the bedrock of the Ombud's function. She accepts that the only exception to the pledge of confidentiality is where the Ombud determines that there is an imminent risk of harm to human life. She indicates that she is prohibited from divulging further details around specific visitors and their issues. However, she informs the Council of the following:

- ‘1. 37 visitors complained about the VC, these were drawn from different levels of the university community, such as Faculty, PASS, Students, and some externals.

2. While the Ombud does not generally accept surrogate complaints, some of the people mentioned above were affected by the public humiliation of other people in their presence.
3. Every internal visitor complained about debilitating fear in one form or another, while some expressed disappointment and confusion especially since the occurrences seemed to happen randomly.
4. In 2018, I recommended that the university develops a policy on the Office of the Ombud that explains the service, the requirements for the Office to do its work (information etc.), and the sanction that will follow if staff or students who use the services of the Office are victimised.4 • As much as this recommendation was to myself, I had envisaged a Vice-Chancellor as delegated authority by Council to be the holder of this policy in support of my office. Given the current climate, it would have been futile to develop this document.

However, over the years, an email to this effect was sent regularly to the university community, but in the recent past not even this was done.

5. The Vice-Chancellor and I met at least three times in the reporting period for the latest annual report, and none of the meetings were event free. If anything, they confirmed a near impossible working relationship. For example:
 - a. In one meeting she exploded about her lack of trust in me, my office, and its mandate.
 - b. In the next meeting, she told me that she keeps a black book in which she notes all the names of the people who do not like or support her. She explained that I had made it to also be named in her black book.
 - c. I received feedback from the Deputy Chair of Council, that in a meeting with the Deputy and the Chair of Council, the Vice-Chancellor told them that I bully her.
 - d. In our next meeting, I tried to discuss the above with the Vice-Chancellor, and she told me that the Chair and the Deputy were lying, and that the Chair and the Deputy did not allegedly want the Vice-Chancellor and the Ombud to work together productively.
 - e. My preference is that all staff meet with me in my office, I have always alternated meeting venues with the Vice-Chancellor. When I raised this with the current Vice-Chancellor, she told me that I am a “principal” and that she is a “learner”. And “no principal goes to a learner’s office”.
6. I have attempted to raise these issues with both the Deputy Chair and the Chair of Council without a prompt or suitable outcome.’

Further responses from Deans and Executive

122. On 1 April 2020 a further response from a response from the DVCs and Chief Operating Officer was sent to the Chair as follows:

'It is our view that the 2019 Annual Report of the Ombud deviates from previous reports of the Ombud in that it contains serious allegations of a very specific and personal nature about the Vice Chancellor as well as comments about the 'executive'. The allegations against the VC carry a governance risk for the university and as such we cannot comment on the report in the absence of a clearly articulated process developed and communicated by Council. We note that such a process has not as yet been agreed upon by Council, or if agreed upon, been communicated to the executive.'

We remain, as communicated on 8 March, committed to provide Council with a comprehensive response on the different elements of the report and a reflection on how the executive plans to deal with the matters raised, once a process has been communicated. It must be made clear, however, that this response will not reflect on the matters pertaining to the allegations against the VC, but will focus on the areas that fall within the respective DVC and COO portfolios. It is our view, based on information we have at our disposal as of 31 March 2020, that the way this matter has been dealt with since 27 February 2020 presents a major risk to the university. These include at the individual level personal and professional risks; and at the institutional level include legal, reputational and governance risks. We therefore request that, as a matter of urgency, Council formally prescribe the way it intends to deal with this matter both substantively and procedurally'

123. On 1 April 2020 a response was also received from the Deans:

'We, the Faculty Deans, have been asked by the Vice Chancellor, on behalf of the Chair of Council, to respond to the references made to Deans in the 2019 Ombud's report. We have not had the benefit of reading the whole report. The Vice Chancellor sent us two extracts from it in which the Deans are mentioned:

*The office of the Vice Chancellor, **Deans** and Executive Directors (not excluding other senior members of staff) are important offices for the success of my office. Not only do they sometimes make decisions or calls of judgement that appear to be unfair, which lead to complaints to my office.*

*I have at times worried that the views of the Executive might influence how other members of the University engage with my office. However, except for push-back from some **Deans**, commitment to help deliver fair outcomes across the university is growing.*

Our collective response is based on our individual interactions with the Ombud. Recently appointed Deans have consulted with their predecessors and drawn on their experiences.

Without the benefit of the whole report and specific grounds and facts on which the Ombud raises these issues, our response cannot be regarded as being complete. We therefore reserve our rights to respond more fully should the specific details of the Ombud's concerns be given at any point in future.

General response

In general, we all believe that the relationship between the Ombud and the Deans has always been marked by professionalism and cordiality. We appreciate the role of the Office, its independence and oversight and we have generally responded in a timely manner to issues raised by the Ombud.

Overall, we agree that the Office of the Ombud provides a valuable service for staff and students. We are particularly mindful that the Office of the Ombud 'provides a safe and objective place where people can air their concerns, receive referrals, find out about relevant policies and procedures, and discuss formal and informal options for addressing their concerns'.

Specific responses

In response to the issues raised in the extracts:

1. *'Not only do they sometimes make decisions or calls of judgement that appear to be unfair.'*

We understand that this is precisely the reason for the role of the Ombud. Despite our best efforts to provide a caring and supportive environment for staff and students, at times our decisions are not able to adequately address the particular situation. We are often expected to make judgement calls, and in some cases, get these wrong. In these cases, the role of the Ombud is very important in providing the space for concerns to be aired and for people to be directed to the appropriate channels.

We recognise that the University has a complex system of checks and balances where decisions are taken by various persons, committees and offices with appropriate review or appeal mechanisms to correct and rectify maladministration. As Deans, our role includes improving administrative and management systems and accountability mechanisms in our faculties and beyond.

2. *'I have at times worried that the views of the Executive might influence how other members of the University engage with my office.'*

The Deans can confidently respond that we have not been "influenced by the views of the Executive" in our interactions with the Ombud. We have engaged with the Ombud's office individually in a professional and collegial manner. We have not been party to any discussions with the Executive about their views with respect to the Ombud. We also do not know how the Executive has interacted with the Ombud.

3. *'except for push-back from some Deans, commitment to help deliver fair outcomes across the university is growing...'*

We are committed to delivering fair outcomes in our respective faculties. We do not have any recollection of “pushing back” in the face of cases that have been brought to our attention. We have engaged with the Ombud in the spirit of mutual respect and cooperation for the advancement of just and fair decision making in the University.

This does not mean that there haven’t been instances where some of us have differed with the opinions of the Ombud. Where this has been the case, there have always been good reasons and an open conversation with the Ombud. This has happened in the spirit of the Ombud’s Terms of Reference which state that “[t]he Office of the Ombud shall not have authority to adjudicate, impose remedies or sanctions, or to enforce or change policies or rules.”

The fact that we have a collegial working relationship with the Office of the Ombud does also not mean that some of us have not entertained questions about the reach of the Ombud’s powers in academic matters and the Office’s operational methods. These questions can be discussed in a constructive spirit so that all our dispute resolution mechanisms learn from their experience and improve.

Final remarks

We welcome the opportunity the Chair of Council has afforded us to respond to the issues raised by the Ombud. We reiterate our commitment to working with her office for the advancement of just and fair decision making at UCT. We would like to encourage the Ombud to feel free to raise any concerns her Office may have with any of us directly and, if that does not address the concerns, to our line Manager, then the Vice Chancellor and then Council. This could help to resolve any concerns she has in a timely manner.’

124. Finally, on 6 April 2020 the following clarification was received from the Deputy Vice-Chancellors and the Chief Operating Office:

‘First, we want to make explicit our unequivocal support for the Vice-Chancellor. We believe that it is our responsibility to perform our duties in a way that supports the office of the vice-chancellor and that we function at all times in the interest of the university. We are furthermore fully supportive of the process of deep and rapid transformation that commenced in June 2018. We remain committed to these principles.

Second, we have decided to develop this response as the three DVCs and COO in view of the fact that the VC has made use of her individual right to reply and in doing so has already responded to the content of the report. We believe that the full executive team should respond to the report, but that it must be as part of a process delineated by Council once Council has received and engaged with the Ombud report. It is for this reason that we as DVCs and COO developed a submission that speaks to the need for process.

Three, we reiterate our stance that it is premature to respond to the Ombud report. It is our view that the current Ombud report deviates from previous reports in a significant way, which warrants the need for Council to provide direction on how it wants to deal with it,

including the actual status of the Ombud report as it currently exists Our view is based on the following:

- The Ombud is appointed by and reports directly to Council. Council is therefore the only body that make a decision on whether to accept the report or whether it warrants a further process.
- We acknowledge that in previous years, the Ombud has provided the VC with an early copy of the report and the VC responded to the report as part of the discussion at Council. However, for the first time in her report, the Ombud in her message speaks very directly to her working and personal relationship with the VC. She also refers to her relationship with the executive. In previous years her message referred to the university. It is our position that the nature of the statements and allegations made in the message warrant scrutiny by Council and a decision on how it wants to deal with the report.
- We note that the full Council has not yet received the report. It is our position that good governance requires that Council views the report and decide on a way forward with respect to the report. We can therefore only respond once Council has taken a position on the report and directs us to respond to the report as it stands or to specific parts of it, if it chooses to do so.'

ADVICE

Does the Ombud's 2019 report exceed the mandate and powers of the Ombud?

125. The Ombud's report is characterised in the job description as follows: '*While maintaining confidentiality of communications, the ombud may prepare a periodic report to the university community. Based on anonymous aggregate data, this report discusses trends in the reporting of grievances and concerns, identifies patterns or problem areas in university policies and practices, may recommend revisions and improvements, and may assess the climate of the campus.*'

126. The job description and TOR require '*impartiality*' and '*neutrality*' – the Ombud '*shall not take sides in any conflict, dispute or issue*' and is required to take all parties rights and interests into account. The Ombud is required to act fairly, not to judge and to '*do no harm*'.

127. The ‘Message from the Ombud’ in the 2019 report does not ascribe to these principles. It is neither impartial nor neutral.

128. In this respect, this aspect of the 2019 Report differs materially from the 2012 to 2018 reports. The previous reports address the Ombud’s concerns relating to UCT at an institutional level, without ascribing fault to specific individuals. By way of example:

128.1 In the 2016 Report the Ombud noted that *‘the University has been slow to implement some of my previous recommendations. The policy on bullying is yet to be finalised. The number of bullying complaints doubled in this reporting period. The University, in failing to address the problem of staff who bully others, is losing staff that would be beneficial to retain, as well as not providing the protection staff should be able to expect.’*

128.2 The Ombud explained that:

‘It is my role to observe the life of the University with a view to noting the trends (especially based on the visitor count) in respect of substantive or procedural unfairness and to report the trends to the University administration.

While it is unrealistic to hope to solve all of the problems that occur on campus, it is realistic to aspire to identify issues and try to manage and address conflicts once they occur. One of the ways my office does this is by keeping track of trends and patterns of issues brought to the Ombud’s office.’

128.3 The policy on bullying was not introduced during the next reporting period.

The 2017 Ombud's report highlighted '*that it is negligent on the part of the university to delay a process that will address a phenomenon that leads to devastation and serious health issues among its members.*'

128.4 The 2017 report made recommendations concerning the University's treatment of mental health issues:

'The university has covered some ground in dealing with mental illness on campus but a dedicated effort must be made to train those directly responsible in supporting students and staff to know what is available and how to access assistance; the same applies to sexual harassment and rape prevention workshops, and what to do should this be necessary.'

The statistics in this report indicate that levels of care and support on campus (especially in evaluative and administrative interactions) could be improved upon. I have noticed that often aggression is camouflaged. What people say, and how they say it, are potential triggers to pre-existing wellness conditions, which may not be evident at that point since mental illness is often invisible. Fairness is everybody's business. Furthermore, often communication provided by the university to current and prospective students as well as staff could be improved upon by communicating with empathy. I suggest that the wording of all standard correspondence be reviewed and that staff be encouraged to communicate thoughtfully and empathetically, whether the content is positive or negative.'

128.5 The 2018 Reports notes that '*When I look at complaints that reveal failings, I also try to establish why things have gone wrong. If it is a once off shortcoming, then other than recommending redress for the individual, there may be nothing more to be done. However, quite often, it is evident that what happened to one individual could easily happen to others." In other instances, there may be processes or procedures which need to be changed, and I will then work with the body responsible to ensure that*

these changes happen. Finally, on some occasions it will be obvious that the rule or absence of it is inadvertently causing injustice, and I will draw this to the attention of the relevant Dean, Executive Director or Registrar etc and ask for changes to be made.'

129. These generalist recommendations and comments in previous reports are in stark contrast to the 'Message from the Ombud' in the 2019 report, which:

- 129.1 criticises the response of the VC, primarily and to some extent the Executive, to issues raised by the Ombud, claiming that there has been a dramatic change in attitude on the part of the new Executive towards the Ombud;
- 129.2 claims that the VC and Executive do not understand the role of the Ombud and they mistrust the Ombud;
- 129.3 claims that the Ombud has received repeated complaints from UCT staff members concerning the VC's behaviour, all of whom did not want the Ombud to approach the VC;
- 129.4 claims that the VC has made negative remarks about the Ombud; and
- 129.5 claims that the Executive has sought to undermine her role in relation to academic decisions.

130. The criticism levelled is not only contrary to the principles of impartiality and fairness, the ‘Message from the Ombud’ is also in contravention of the cardinal principle of ‘*confidentiality*’ in the job description and TOR, which is at the heart of the Ombud’s function.
131. According to the job description: *‘An ombud’s office is based on the offer of near absolute confidentiality. Therefore, the ombud must keep information confidential and must use good judgement about when and how such information can be shared, while being mindful of maintaining professional standards that are consistent with the Code of Ethics and Standards of Practice of The Ombudsman Association, and the Ethical Principles of the International Ombudsman Association.’*
132. According to the TOR, this includes not disclosing confidential information about matters discussed in the Office of the Ombud with anyone in the organization, including the person to whom the Office of the Ombud reports.
133. Communications between the Ombud and others (made while the Ombud is serving in that capacity) are considered privileged. The privilege belongs to the Ombud and her Office, rather than to any party to an issue. Others cannot waive this privilege. The only exception to this pledge of confidentiality is where the Ombud determines that there is an imminent risk of harm to human life, addressed further below.

134. The Ombud functions on an informal and off-the-record basis and is a resource for informal dispute resolution services.

135. Accordingly, the TOR requires the office of the Ombud to report on general trends and issues, to provide organisation wide feedback while recommending system change when appropriate, without disclosing confidential information.

136. It is clear from the job description and the TOR that the requirement of confidentiality attaches not only to visitors who seek the Ombud's assistance, but equally to the respondents in respect of such issues/complaints.

137. In her initial response, the Ombud claims that the confidentiality clause in the TOR primarily safeguards communications with visitors to her office.

138. However, any attempt to limit the confidentiality provision only to visitors/complainants entirely undermines the Ombud's role and function, which is designed to encourage respondents to participate in off the record informal processes in order to resolve issues. Moreover, if the confidentiality of respondents (but not visitors / complainants) can be breached the Ombud would not operate on an impartial basis.

139. Indeed, in the 2014 Annual Report when addressing the TOR, the Ombud has previously confirmed this to be the case, namely that '*information kept in the office of the Ombud is unofficial, is off the record and is maintained in a manner that does not divulge the identity of either the visitor or respondent.*'

140. The 'Message from the Ombud' has breached this cardinal principle of confidentiality in two respects in the 2019 Report:

140.1 first, by disclosing that she had attempted to address two complaints with the VC, and the VC's response thereto, and

140.2 second, by disclosing the general nature of complaints she had received against the VC from staff members, where all such complainants have refused to permit the Ombud to approach the Vice-Chancellor to address these issues.

141. In these crucial respects, the Ombud has exceeded her mandate contained in the TOR and acted contrary to the principles contained therein, as well as the requirements of her job description.

142. The Ombud has confirmed that she has had three meetings with the VC during the reporting period. Yet, the Ombud did not advise the VC of the complaints referred to in paragraph 140.2 above.⁷ This is despite the TOR's requirement that the Ombud provide feedback, while maintaining confidentiality, to the Vice-Chancellor and other leadership team members to inform them of the kinds of issues and trends the Ombud may be hearing about and to explain the relevance of such

⁷ It appears that the VC was also not informed subsequently. There has been a significant delay between the complaints, which relate to the reporting period from July 2018 to June 2019, and the report in late February 2020.

information, and to provide guidance. She had previously reported that she has meetings at least twice a year with the Executive team, all Deans, Executive Directors and other key stakeholders, and that she has met with the University Executive in order to '*to identify trends in their respective areas in a way that does not break confidentiality. I have been told that this input helps the executive to deal with issues before they escalate into bigger problems.*'⁸

143. Such meetings are designed to identify trends and concerns, and act as an early warning mechanism for the VC and the Executive, and to encourage the resolution of problems at the lowest level possible before they escalate. The VC maintains that if there was a *dramatic change* in respect for the Ombud in 2019, the Ombud ought to have availed herself of these options, and if her recommendations were not being respected by the Executive and Deans, she could have brought this concern to their attention directly and sought an explanation why her recommendations were not being followed, or have approached the VC or the Council.
144. The Ombud claims that she could not approach the VC directly in order to address these issues. In her initial response she claimed that she had attempted to function in accordance with the VC's definition of her role, as '*neutral or impartial dispute resolution practitioner, whose major function in this capacity is to provide confidential and informal assistance as a counsellor, shuttle diplomat, mediator,*

⁸ The Ombud's 2015 Report

fact-finder and agent for orderly systems change', to no avail. She describes 'a near impossible working relationship' characterized by lack of trust.

145. The Ombud claims that the tenuous nature of her relationship with the VC and her perceived lack of trust in the Ombud, meant she could not act in her intended capacity. Significantly, the Ombud instead notified the Chair and Deputy Chair of Council of these issues, and she claims that they had not addressed or responded appropriately to her concerns.
146. But if, for purposes of this opinion, I accept that such attempts were made, that does not justify the Ombud acting contrary to her job description and the TOR and breaching their confidentiality requirements in the annual report. One only has to consider what the position would be if the Ombud had chosen to disclose the identity of a visitor/complainant in her annual report (in a case where she had unsuccessfully sought the intervention of the Chair or Deputy Chair), to reach the conclusion that their perceived failure to respond appropriately cannot justify disclosures of this nature in the annual report to Council. I deal further below with an appropriate mechanism to address this issue.
147. According to the TOR, the only exception to the Ombud's pledge of confidentiality is where the Ombud determines that there is an imminent risk of harm to human life.
148. Notably, the Ombud has not sought to justify the disclosures contained in her report on such a basis, and in my view she could not do so. The IOA advises that best

practice is to interpret '*imminent risk of serious harm*' as narrowly as possible – for example, imminent risk to human life. In a case where such concerns exist, confidentiality would be breached in order for the Ombud to avert the life threatening risk. However, the details of the issue (and identity of those involved) would nevertheless remain confidential for purposes of the Ombud's annual report.

149. Instead, the Ombud's justification relates to two aspects:

149.1 First, that the Ombud is expected in terms of the job description to '*provide early warnings of new areas of organisational concern, upward feedback, critical analysis of systemic mood for improvement, and make systems change recommendations.*'

149.2 Second, the requirement of her job description that: '*an Ombud should not be risk averse and should understand that this position may, on occasion, challenge even the highest levels of the administration in an effort to foster fair and just practices.*'

150. Whilst that is undoubtedly the case, the job description (which pre-dated the TOR) does not suggest that in doing so, the Ombud should act contrary to the foundational principles of the job description, or the TOR. In this instance the Ombud has also acted contrary to the guidance of the best practices which reiterate that '*the Ombudsman should be particularly careful to maintain neutrality when making recommendations for system change.*'

151. Hence, these requirements do not provide a justification for the Ombud's violations of the TOR.
152. Had the Ombud brought these complaints to the VC's attention, she would still be prohibited by the TOR from disclosing them (or the VC's response) in this manner in her Report.
153. As elaborated above, the Ombud is an organisational Ombud – the TOR are explicit - the Office of the Ombud shall not investigate, arbitrate, adjudicate or in any other way participate in any internal or external formal process or action.
154. The TOR state that the office of the Ombud '*will have no authority to impose sanctions or enforce or change any policy, rule or procedure*'. They also state: '*Use of the Office of the Ombud shall always be voluntary and not a compulsory step in any grievance or University policy*'.
155. The Ombud does not take 'decisions'. Her role is limited to confidential and informal assistance as a counsellor, shuttle diplomat, mediator, fact-finder and agent for orderly systems change. Her role in ensuring fairness in disputes does not include taking decisions of an administrative nature. The permissible limits of

her role do not fall within the definitions of a ‘decision’⁹ or ‘administrative action’¹⁰ for purposes of PAJA, and nor is the TOR an ‘empowering provision’ for purposes of that definition in PAJA, as it expressly prohibits the Ombud from taking decisions in that she may not investigate, arbitrate, adjudicate or in any other way participate in any internal or external formal process or action.

156. It is this informal nature of the process which entitles the Ombud where she considers it appropriate to adhere to the requests of her visitors / complainants, and not to approach a respondent, in this instance the VC, in relation to specific complaints. It is precisely because the Ombud does not take decisions or sides, or sit in judgment, that she is not required to follow procedural fairness or due process. She is accordingly not obliged to afford the respondent an opportunity to address specific complaints in all circumstances, where the visitor/complainant seeks to use the Ombud as a sounding board and expressly requests that she does not inform the respondent of the particular issue.

157. It is these features of the TOR and her position which make the disclosures in the 2019 Report concerning complaints about the VC’s behaviour all the more

⁹ “decision” means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to (a) making, suspending, revoking or refusing to make an order, award or determination; (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission; (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument; (d) imposing a condition or restriction; (e) making a declaration, demand or requirement; (f) retaining, or refusing to deliver up, an article; or (g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly.

¹⁰ “administrative action” means any decision taken, or any failure to take a decision, by a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect. The definition of “empowering provision” means a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken.

prejudicial. The VC is not informed of the individual complaints and is precluded from responding to them by virtue of the process adopted by the Ombud, nor is she informed of them in generalist terms, and yet they are disclosed to Council.

158. The disclosures in this manner are also unfair because of the Ombud's preserve of confidentiality - she cannot be called to justify these allegations.
159. This disclosure is contrary to the Ombud's mandate – she has not sought to consider the interests of all parties involved in the situation in order to assist them in reaching mutually acceptable agreements that are fair, as well as consistent with the University's mission and values.
160. Instead, in this instance without following any process she has seemingly pronounced in judgment on these issues. Critically, the VC (and the Executive and Deans) have not been afforded an opportunity to be heard, to address or to remedy the allegations.
161. This is plainly contrary to the obligation in the TOR:

'The office of the Ombud shall not take sides in any conflict, dispute or issue but shall consider the interests and concerns of all parties involved in a situation impartially with the aim of facilitating communication and assisting the parties to reach mutually acceptable agreements that are fair and equitable, and consistent with the policies of the University'.

162. The TOR also requires that whenever practical, the Ombud shall seek the resolution of the problem at the lowest level within the organisation. In their response, the Deans invite the Ombud to raise any concerns her Office may have

with them directly and, if that does not address the concerns, their line Manager, then the VC and then Council. The VC also suggests that this would have been an appropriate approach in these circumstances.

163. The Ombud has similarly exceeded her mandate in her criticisms of the Executive and certain Deans. She has sought to distinguish and deprecate the approach of the current Executive of UCT, in comparison with the previous Executive.
164. She claims that the current Executive is seeking to '*silence, erase my office or change its mandate*' and that they wanted to recreate the role of Ombud in a manner that did not permit the Ombud to interfere with academic decisions.
165. These very serious claims need to be addressed. But disclosure in this manner is inconsistent with the TOR for the reasons advanced above.
166. In conclusion, the 'Message from the Ombud' exceeds the powers, authority and mandate of the TOR, and the reporting requirements of the job description, and breaches the foundational principles of the office of the Ombud. The Ombud has no power to make such pronouncements.

What avenues are available to address these issues?

167. The Ombud is an important institution within the University. The office of the Ombud fulfills a vital function in reducing and speedily resolving conflict in an informal manner, through the early detection of problems. By all accounts (including the responses from the VC, the Executive and the Deans), the UCT

Ombud has served the institution well during her tenure. Her annual reports indicate the extent to which staff and students have benefitted from her assistance and intervention.

168. It is critical that the independence of the Ombud is protected by the University, and in particular by the Council.
169. The Ombud's 2019 Report raises serious issues of institutional concern and highlights that there appears to have been a significant break down in the relationship between the Ombud and Executive. Although there are some indications on the part of the VC (and to a lesser extent the Ombud), that matters may have improved slightly since July 2019, it is critical that these issues are investigated and addressed, and the relationships repaired.
170. It is notable that in her nine-year tenure the Ombud has not previously reported in this manner, outside of the TOR.
171. It is evident that the informal reporting channel of the Ombud to the Chair and Deputy Chair in which she has raised these issues has not resulted in effective measures being taken to address the Ombud's systemic and institutional concerns, or the concerns relating to the VC.
172. The Ombud is entitled to submit grievances under the Grievance procedures for PASS staff. However, the grievance policy is plainly not designed to address complaints of this nature which relate to institutional concerns, and not to typical

conditions of employment. In any event, the grievance procedure requires reporting to a line manager, which is not appropriate in this instance.

173. It appears that what is lacking is an effective mechanism to address issues of this nature. These are systemic issues which require urgent attention. I recommend that where the Ombud has raised such institutional concerns with the Chair or Deputy Chair, effective separate processes are established to deal with these, outside of reporting in the annual report to Council, in order to prevent them from escalating in this manner in the future.

What are the legal implications of releasing the report of the Ombud to Council in the face of the objections of the VC?

174. At its meeting on 14 March 2020 Council resolved that the Ombud's 2019 report ought to serve before it at the Special meeting.
175. Notionally, this could be dealt with as a confidential report to Council (as a pink paper). However, this would still involve the circulation of the report to a 30 person Council, sixty percent of whom are external members and forty percent are internal (including staff and student members).
176. I am instructed that the response of the VC, the Executive and Deans to the Ombud's report may also be tabled at the special Council meeting.
177. The former Deputy Chair has implied that any decision taken by Council (or the Chair) to withhold the report would constitute '*interfering with the Ombud fulfilling*

her accountability duty to Council' and interfering with 'Council from fulfilling their responsibility of overseeing the Ombud', She claims that as 'the Ombud is meant to be independent, neither the executive nor the Council should be determining what the Ombud can or cannot say.'

178. The VC has requested that:

178.1 the report is withdrawn unconditionally so that all offensive parts are removed;

178.2 the revised report must meet her approval before it is submitted to Council; and

178.3 the Office of the Ombud should make a written apology to her office.

179. The VC has also indicated that she is open to mediation between her office and the office of the Ombud if the Chair of Council has reason to believe that this is a plausible way of repairing her relationship with the Ombud, provided that the process takes place in a context of mutual respect and fairness and is facilitated by an independent person external to UCT, whom the VC pre-approves.

180. The Deputy Vice-Chancellors and the Chief Operating Officer have suggested that the report ought to serve before Council, which must then determine the further process:

'The allegations against the VC carry a governance risk for the university and as such we cannot comment on the report in the absence of a clearly articulated process developed and communicated by Council. We note that such a process has not as yet been agreed upon by Council, or if agreed upon, been communicated to the executive.'

...It is our view, based on information we have at our disposal as of 31 March 2020, that the way this matter has been dealt with since 27 February 2020 presents a major risk to the university. These include at the individual level personal and professional risks; and at the institutional level include legal, reputational and governance risks. We therefore request that, as a matter of urgency, Council formally prescribe the way it intends to deal with this matter both substantively and procedurally.'

181. I advise that the 'Message from the Ombud' ought not to serve before Council in its present form.
182. The job description of the Ombud only authorizes her to report based on '*anonymous aggregate data*'. Similarly, the TOR permits the Ombud to maintain non-confidential statistical data to assist in reporting trends and giving feedback. Only the second part of the 2019 report serves this purpose and is consistent with the Ombud's powers.
183. I furnish this advice not in order to silence the Ombud, or to limit her independence but because the 'Message from the Ombud' breaches the foundational principles of the Ombud's TOR and the requirements of the job description, in multiple respects. In reporting in this manner, the Ombud has acted outside of her powers and mandate and the extent of her authority.
184. I advise that the obligation upon the Chair (or the Council) to respect the Ombud's independence does not include an absolute obligation to permit the Ombud's report to serve before Council, regardless of its content. The Ombud's independence in respect of her reporting function is circumscribed by the TOR and

the job description. Where certain content of the annual report contravenes the principles of the TOR and is inconsistent with the reporting function in the job description, as in the present instance, the Chair is permitted to refuse to publish those aspects of the report, and in doing so does not impinge on the Ombud's independence. In fact, by taking such action the Chair will also preserve the future integrity of the Ombud as an institution.

185. The dissemination of the report to Council will simply serve to undermine the VC and the Executive. Permitting the response of the VC, Executive Officers (Deputy Vice-Chancellors and Chief Operating Officer) and Deans to serve before Council will not cure the prejudice suffered, if the Ombud's 2019 report is tabled in Council. Their reputation, and in particular that of the VC will be impaired, and the University as a whole will suffer potentially irreparably. I agree with the caution sounded by the DVC's in this regard.
186. Whilst the institution of the Ombud and her autonomy and independence ought to be protected by the Council (and the Chair), that does not require publication at such costs of a report which is contrary to the TOR and job description.
187. The Council is mandated to act in the best interests of the University as a whole. Further publication of the 'Message from the Ombud' in this format at this stage will not serve the interests of UCT. This is the more so, as there are alternative options available to the Chair. In particular, the VC has expressed a willingness for these issues to be mediated.

The Council's powers

188. The Council is constituted and mandated by the Statute of the University of Cape Town ('the UCT Statute') and the Higher Education Act 101 of 1997 ('the Act') as amended. Subject to Senate's academic authority, the Council governs the University in terms of the Act and the UCT Statute. It has responsibility for the affairs of the University and must ensure effective management.
189. The VC is the chief executive officer of the University, appointed in terms of the UCT Statute. The Ombud is appointed by Council, and authorised to operate in terms of the TOR in a manner consistent with the job description.
190. The Council protects the institutional autonomy of the University, upholds the academic freedom of its members, and deliberates on the nature and role of the University.
191. The Code of Council requires that whilst performing these tasks, the Council commits itself to:
 - 191.1 good governance, which includes transparency, responsiveness, and accountability, and preserving institutional autonomy;

- 191.2 the vision, mission and stated values of the University;
- 191.3 governing in such a way as to enable the members of the University to realise their full potential as academics, researchers, students, and support staff; and
- 191.4 acting with the duty of care and skill that is owed to the University of Cape Town.

192. Council is required *inter alia* to:

- 192.1 always act in the best interests of the University as a whole, and accept that this obligation precedes any duty a member may owe to the person or institution that elected or appointed him or her to the Council in all Council matters;
- 192.2 act in good faith, honestly, truthfully and for proper purpose;
- 192.3 exercise appropriate care and diligence in decision making; and
- 192.4 be diligent in performing Council responsibilities.

193. The Council has to act within the powers lawfully conferred on it in terms of the UCT Statute.

194. The Council is bound to act in a manner consistent with these obligations – it has a duty to act fairly, reasonably and lawfully in relation to the VC, its Executive and the Ombud.
195. Permitting the publication of the allegations relating to the VC and the Executive contained in the ‘Message from the Ombud’ in the 2019 Report to the Council will undoubtedly precipitate a crisis within the University. That is not in the best interests of the University.
196. There is nothing in this instance that precludes the Chair (and Council) from directing instead that:
 - 196.1 the Ombuds 2019 report in its entirety, alternatively the ‘Message from the Ombud’ ought not to serve before Council in its present format, given its contents and the legal advice received;
 - 196.2 the issues raised in the Ombud’s report and the VC / Executive’s response be formulated in a TOR to be referred to a mediation process between (a) the VC and Ombud and (b) the Executive and Ombud under the auspices of an independent and neutral third party, whom all parties agree to appoint, and
 - 196.3 in the event that the mediation is unsuccessful, referring the issues raised to a formal grievance mechanism to be established by Council, preferably of a sub-committee of the Council for resolution.

197. This would however require Council to rescind its previous decision that the Ombud's 2019 report ought to serve before it.

198. Section 20(5)(g) of the UCT Statute permits Council to rescind a resolution of the Council within 12 months after it was passed, and requires -

- (i) a majority of two thirds of the members present and voting or failing that;
- (ii) a simple majority of the members present and voting at two consecutive ordinary meetings of the Council.

What are the Chair and Council's powers vis-a-vis the Ombud, i.e. can they request her to vary or amend her report in light of the independence of her office?

199. The Council can furthermore authorize the Chair to request that the Ombud amend/redact 'the Message from the Ombud' so that it does not breach confidentiality, and presents the information in a neutral manner that does not disclose the complaints or the identity respondents, consistent with the requirements of the job description and TOR, if necessary.

200. This recommendation may not require implementation if this is in any event an outcome of the mediation or the more formal dispute resolution process.

What are the legal / other risks to Council / the University?

201. There are a number of risks to the Council and the University if this matter is not handled appropriately. The issue is divisive both for the Council and the University community.
202. If the item serves before Council and is treated as confidential – Council will have to ensure that confidentiality is maintained.
203. Council will need to ensure that if the report serves before Council that it will not become public. Any such publication will cause permanent and irreparable damage to the VC, and to the University. In such circumstances, the VC may ultimately decide that she has no alternative but to take steps to protect her reputation, resulting in litigation against the Ombud (and perhaps the University).
204. On the other hand, if the item does not serve before Council, there is a risk that the Ombud may resign in protest. If so, the risk exists that the reasons for her resignation may become public. However, given her lengthy association with the University and her reputation (internally and externally), it is more likely that she may agree to participate in a mediation / informal dispute resolution process, and in my view, this should be canvassed with her off the record as soon as possible.

CONCLUSION

205. Council is the governance structure responsible for matters relating to the VC and the Executive and ought to be informed where issues of concern exist. However, such issues ought only to be raised after following due process, and not in this manner in the annual report of the Ombud.
206. I recommend that these systemic and institutional issues are properly dealt with by the Chair (and Council) through an independent mediation process, and if that is unsuccessful, a formal dispute resolution process could also be considered.
207. I advise accordingly.

Michelle O'Sullivan

Cape Town

8 April 2020