



UNILINK

Legal and Risk Newsletter

Issue 1, February 2009

"Linking us with you and Legal and Risk Projects"

UNILink is the Legal and Risk newsletter. As we pilot and launch three key projects for 2009 we want to keep you informed, help you understand the link between Compliance, Contract Management and Risk Management and improve our links with you.

In this issue we'll be providing you with information about changes to legislation, introducing you to our new team members and outlining the legal, compliance, insurance and risk projects that impact the University. We'll be looking at Travel Insurance, dispelling a few myths about defamation and clarifying the sometimes confusing world of contracts.

What's in a name?

You've probably noticed by now that Prudential Services has been re-named *Legal and Risk*.

To be honest, most people seemed a little baffled as to what Prudential Services actually meant and we felt that the new title best describes what we deal with on a daily basis.

Legal and Risk provides professional advice and support to help the University "act with prudence" in making its decisions and planning and implementing projects.

The services and skills we offer include help with ground level detail, and "big picture" advice on the implications of decisions within the broader University context.

We strive to provide high quality, timely and relevant advice across the Faculties and Divisions, and encourage early engagement of our services in the planning and execution of projects, agreements or proposals. We serve as an objective sounding board for ideas or challenges, while you continue to manage and drive your projects, assess and manage your risks and compliance requirements.

We bring together people and ideas to identify, create, represent, distribute and enable adoption of insights and experiences.

We focus on organisational objectives such as improved performance, competitive advantage, innovation, the sharing of lessons learned, and continuous improvement of what we do and how we do it.

Our support is tailored to help you maximise opportunities and benefits, and minimise risk and unintended consequences.

Our mission is to engage with the University community to enhance its approach to compliance, governance and sound decision-making, and to empower individuals within the University to confidently pursue the University's objectives in learning, teaching, research and community engagement.

We aim to be collaborative, responsive, objective and independent, solution oriented and supportive in all of our University endeavours.

New Website

There have been so many changes in our area recently: new projects, new staff, new names and new locations. Please visit the Legal and Risk website www.adelaide.edu.au/legalandrisk/ to see the latest developments and how the changes may help you.

There is currently a redirection in place so that anyone trying to access the site through the old prudential address will be redirected to the new address. However, we are asking that all Faculties and Divisions update their links in the coming weeks - including all reference to Prudential Services, as the redirection will be removed at some stage.

Download UNILink from <http://www.adelaide.edu.au/legalandrisk>

New Faces

With the departure of staff in 2008, a number of new (and some familiar) faces joined the Legal and Risk team to help facilitate the projects under development.

Joe Di Pinto (Manager Compliance) began working with Legal and Risk late last year, bringing with him a wealth of compliance knowledge and risk management experience from years as State Manager of Allianz.

Richard Boyer, formerly of Financial Services, has a strong audit and compliance background and moves to Legal and Risk to take up the position of Compliance Co-ordinator.

Paul Thomas (Project Manager) has joined the team for one year to assist in the implementation of the Legal Compliance Project and its link to the Risk Management Safety System (RMSS). Paul was ITS Project Manager for the OHS RMSS implementation which was awarded "Best Project" in last year's Divisional Service Excellence Awards.

Phillipa Schliebs is a Communications and Journalism Graduate from Newcastle University who began working with Legal and Risk last September as an Administrative Assistant. This year, Phillipa will act as Project Officer for the Legal Compliance Project.

We warmly welcome Joe, Paul, Richard and Phillipa and they all look forward to helping you throughout the coming year.

Location, Location, Relocation

New staff members and a new year brought about the need for a re-shuffle of the Legal and Risk Office. So in December of 2008, General Counsel, Celine McInerney, relocated to the basement offices (B03) of the Mitchell Building, along with the rest of the Legal team - Kim Evans, Geraldine Haese and Jackie Morris.

Bob Reilly and Tom Pontt from Insurance and Risk are located in G12 of the Mitchell Building and the Compliance Officers; Joe Di Pinto, Richard Boyer and Phillipa Schliebs are in G07 of the Mitchell Building. The meeting room remains in G07.

*From the
General
Counsel*



Welcome to the first edition of UNILink, the Legal and Risk newsletter.

2009 is shaping up to be a busy year for all of us. A number of University-wide projects are already underway, there are staff changes to our team and our insurance, legal and legislative case loads and services continue to be monitored and managed.

With all this activity, Legal and Risk is launching this UNILink newsletter, designed to provide a timely and accessible way to actively link how we can help you and provide information to you.

UNILink newsletter is our way of making sure we make it easier for you to know how we can support your daily planning and decision making.

The newsletter has been designed to give staff the opportunity to provide their feedback, contact the Legal and Risk team to find out more, as well as tell us what you want to know or hear more about.

UNILink also supports Legal and Risk Service Charter objectives of recognising that the University's complexity, diversity and size gives rise to unique challenges in identifying and managing risk and obligations. And that Legal and Risk exists to empower the University community to understand and confidently manage individual and institutional obligations and actively support good decision-making, that will contribute to the achievement of ensuring we are a great research University.

I hope you find the first edition of UNILink informative and I look forward to your feedback.

Celine McInerney (General Counsel)



Legal and Risk

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The University of
Adelaide was the
first to...

admit women to
academic courses
(1881)

ahead of Oxford
(1920) & Cambridge
(1948)

LEGAL EAGLES

What we do

We advise on a range of legal issues that arise from the University's diverse learning, teaching and research endeavours - from the simple to the very complex.

We strive to be as responsive as possible to the needs of the University community, and to provide the level of practical advice and assurance appropriate to individual circumstances.

When would you need to contact us?

There are many reasons why you may seek our advice or support. Some of these are:

- To report an adverse event (see Reporting Guide www.adelaide.edu.au/legalandrisk/insurance/)
- If you want to know you are on the right track (e.g. your School wants to undertake a new activity but wants to be sure it has covered all potential legal implications)
- If you simply seek validation of a proposed course of action (e.g. determining whether a proposed letter is suitable for issue)
- If you are required by a collaborator or manager to seek advice in order to show a level of diligence (e.g. an external party has provided a contract for signature)

We are always available to assist but experience shows that early involvement usually means a better and more rewarding process and outcome for you.

WHAT'S IN STORE FOR 2009

The majority of the work we undertake is confidential. However, we have a number of University-wide strategic projects scheduled for implementation in 2009 that many of you will be directly involved in and all of you will be affected by. These projects will be underpinned by new University policies on Contracts and Agreements, Risk Management and Legal Compliance.

Contract Management Framework

Every area of the University enters contracts and agreements, and while they are of varying magnitude and complexity, they all impose obligations on the University as an institution.

The *Contract Management Framework* will establish a comprehensive and holistic approach to contract classification, drafting, execution and management within the University.

A contract negotiation and management toolkit, along with precedents, will be available on the Legal and Risk website in the coming months.

Risk Management Framework

All members of the University community have a significant role in the management of risk, and it is important this process takes place within a consistently designed and monitored framework. The *Risk Management Framework* will provide a structured basis for risk management and an auditable trail

for decision-making across the University.

The framework will improve awareness of risk management, including through the publication of a Risk Management Handbook, and will be supported by the roll out of an enterprise-wide risk management software solution (RMSS), to facilitate identifying and managing the reporting of risks.

For more information about RMSS visit www.adelaide.edu.au/hr/ohs/rmss/

Legal Compliance Project

The *Legal Compliance Project* has been initiated to assist the University in managing its compliance obligations imposed by legislation, regulations and mandated codes.

With approximately 300 pieces of legislation and a broad range of regulatory obligations that apply in some way to the University's activities, the aim of the Legal Compliance Project is to improve awareness of this legislation, foster a strong compliance culture at the University and ensure maximum protection (for the organisation and you as individuals) from risks of non-compliance.

No matter is too small – if you think that something may have legal repercussions, don't hesitate to ask. It is better to be safe than sorry.



Some examples of the day-to-day questions that we receive are:

- We want to do an electronic mail-out to prospective students who attended Open Day... are there any issues with this?
- We want to engage an external consultant... how do we go about this?
- Some equipment we purchased does not work as we expected it to... can we request a refund?
- We are hosting a science workshop for high school students... can we take photos of them to put on our Faculty website?

How you can contact us

If you have a query or wish to seek advice on a legal, business or risk issue, you either contact any of the lawyers directly or through our general email address: helpdesklegal@adelaide.edu.au. Initial contact can also be made to any of our email addresses or to reception at 8303 5033.

Whatever the nature of your enquiry, we will help you work out how to approach the problem and what mechanism will be most effective in solving it. If we are unable to provide the advice from our own resources, we will assign the matter to external legal firms.

A key element of the project is the implementation of a Legal Compliance Framework, which provides a consistent approach to managing compliance and risk. This framework of systems, processes and governance activities, enables those with compliance responsibilities, at both local and management levels, to more effectively monitor and manage compliance.

In 2009 the project team will be conducting a pilot of the Compliance Framework in the following Schools:

- School of Medical Sciences (Faculty of Health Sciences)
- School of History and Politics (Faculty of Humanities and Social Sciences)

Project Milestones:

- Pilot briefing — March 2009
- Pilot compliance discovery & processes — April / May 2009
- Compliance framework & system training — May / June 2009
- Conduct Pilot — July to September 2009
- Pilot Review — October / November 2009

For any information on the project, contact Joe Di Pinto (Manager Compliance) on 34635 or Paul Thomas (Project Manager) on 34132.

A CONTRACT BY ANY OTHER NAME

Why do we need a contract? Can't we just have an agreement?

Some organisations and industries are in the habit of using the terms "agreement" and "contract" to apply to different types of arrangements. For example, some industries use the term "contract" only when referring to consultancy services.

Legally, there is no difference between a "contract" and an "agreement". For example, Works Contracts, Consultancy Services Agreements, Confidentiality Deeds and Leases are all just different types of contracts. Any legally enforceable promise is a "contract" even if it is only by way of correspondence or even when it's an agreement that is spoken and not recorded formally.

There are specific legal principles which determine whether a promise or undertaking will be legally enforceable, and those principles apply equally regardless of the name given to an arrangement.

If you enter into negotiations in a commercial setting and reach agreement – whether in writing or orally – unless there is a clear indication otherwise there will be a strong presumption that you and the other party have formed a legal contract.

Therefore, in most cases, in making an agreement on behalf of the

University with another party, you will be entering into a contract.

Whether you call it a 'contract' or just an 'agreement' does not change its effect. The legal implications of it will depend on its content and drafting, *not* its title.



What about MOUs?

Memoranda of Understanding (also sometimes called Heads of Agreement or Letters of Intent) are commonly used by parties to record their intention to negotiate or explore potential business or collaboration opportunities.

MOUs are generally not intended to be legally binding and as such should contain a clause which explicitly negates any intention to create a binding legal relationship or states that it is "subject to contract".

If the document is called an MOU but actually contains rights and obligations on the parties then it may be construed as a contract anyway.

Do not assume that if a document is titled "MOU" it is merely a statement of intent and has no legal significance.

Conversely, if it is your intention to create enforceable rights and obligations, then call your document a contract or agreement so that all parties are clear about its purpose, and that will also drive its content.

Yes in Deed

Occasionally you may encounter "Deeds". Deeds are more formal contracts which are used in specific circumstances such as in some property transactions or where the obligations are all given by one party to another party.

In the past, the University seal would have been required to be affixed to a Deed, but modernisation of legislation has largely removed this requirement. Deeds can usually be executed (signed) in the same way as any other type of contract.

If you are given an agreement, contract, Deed or MOU for review or signature, please seek legal advice before committing to it.

For those of you wanting to know more about the *Contract Management Framework*, stay tuned for information about an Education, Training and Awareness Program currently under development.

The program is likely to begin mid-year and will consist of presentations, brochures and additional website information.

For further information and assistance please contact Kim Evans, Senior Legal Counsel on 36103 or Geraldine Haese, University Legal Counsel on 35244.

INSURANCE and RISK

The most commonly asked question

What is the one Insurance question we get asked almost every week?

... "I'm travelling overseas for work and I'm leaving tomorrow... Do I have insurance cover?"

The simple answer is YES. As a staff member, you have automatic cover under the University travel insurance policy providing that:

- Travel is for a University purpose
- Your travel has been approved by Head of School or the Executive Dean
- Your travel does not exceed a total of 180 days
- Any personal holiday time spent with the approved University travel does not exceed 50% of the total travel time up to a limit of 4 weeks.

Note that should family members wish to join you for a portion of the trip, they will *not* be covered under the University program and will be required to purchase their own insurance at their own expense.

The University provides a facility whereby you can access the University insurance broker, who can provide your family with the same level of benefits available under the University policy and with the same insurer, but at your own cost.

This is of benefit should there be an unfortunate event that results in you and a member of your family needing to access travel insurance at the same time, as there will be no dispute as to who is insured with whom.

A certificate of insurance is available and can be emailed to you.

In addition, AHI (Accident and Health International) Assist cards can be collected from the Legal and Risk Office prior to departure.

This card provides the number for reverse charge calls direct to the insurer should you have a General Medical Inquiry, or find yourself in need of Medical Evacuation or Hospitalisation while overseas.



A multitude of information, including the 2009 Insurance Policy Guides and a number of Frequently Asked Questions relating to all manner of Insurance issues, can be found in the Insurance section of our website. www.adelaide.edu.au/legalandrisk/insurance

For further information and assistance please contact the University Insurance and Risk Manager Bob Reilly on 35804 or Finance and Insurance Officer Tom Pontt on 33878.

Legal and Risk

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The University of
Adelaide was the
first to...

grant degrees in
Science



The University of Adelaide was the first to graduate...

- Australia's first female surgeon

- the first woman elected to a University Council in Australia

- & the first woman to be a Governor of an Australian State

Defamation—To Kill a Mocking Word

The rarefied halls of education, research and academia can sometimes feel like a battle field for the cut and thrust of robust communications. An academic review of a colleagues paper, a complaint from an Honours Student about inappropriate behaviour on the part of a supervisor or an issue which is escalated through the University HR Branch will almost inevitably contain material which is, on its face, defamatory. That threshold is crossed as soon as a statement lowers a person's standing amongst right-thinking members of society.

From a legal point of view, the question is not whether a communication is defamatory but rather whether or not it is an actionable defamation. When appropriately conveyed, each of the communications in the examples above will access one or more defences which would make any legal action unsustainable.

This is because the development of defamation law - which has its most recent manifestation in uniform legislation across all States and Territories – places limits upon the extent that the law impinges upon freedom of expression, especially when it comes to depriving the public of information on matters of public importance. This is particularly important to discourse within a University where freedom in teaching, debate, research, peer review and dissemination of information should not be unnecessarily restricted by the threat of legal action for defamation.

The new legislation adopts the long established position that it is a

defence to prove that a defamatory meaning in a publication is substantially true. It is unusual for a complaint about a publication to get off the ground when the content of the publication is plainly accurate. However there are many situations, including the examples outlined above, where establishing 'truth' - a question of fact that needs to be established by evidence - is far from simple.

In those cases it is necessary to look at other defences which may be available. One of the more useful defences (and one which hoists the interests of free speech high upon the flag pole) is the defence of honest opinion. However in outlining a safe path for review and criticism, the defence of honest opinion also presents pitfalls if the commentator does not tread carefully.

Firstly, the material on which the comment is based must be stated along with the opinion, unless it is a matter of general notoriety. Next, the person who is expressing the opinion needs to distinguish between the opinion and the facts on which the opinion is based. The opinion needs to be related to a matter of public interest and the actual material on which the opinion is based needs to be substantially true.

Having met those criteria, the defence will still fail if it is established that the opinion was not honestly held by the commentator at the time the opinion was published - for example if the "opinion" emanated from some improper motive or malice on the part of the commentator.

The defence of qualified privilege is founded on public policy grounds and encompasses a variety of good faith communications which are made in the performance of a legal, social and moral duty to protect a legal, social or moral interest. A statement made by a person who is under a duty to make the statement in question to a person who has either a duty to receive the information in question or an interest in receiving it will attract the defence. It will apply to statements made in good faith for the purpose of resolving conflict at the University - such as an issue affecting the welfare of students, the efficient operation of the University or professional relations between staff.

Again, malice will defeat the defence, and the maker of the statement needs to have a genuine belief in its truth. Because the special interest of the recipient is important to the defence, it is important that the communication of potentially defamatory material is restricted in its audience or recipient.

In summary, a carefully constructed, good faith communication which is either true, or is a statement of opinion, or is carefully targeted on a matter of special interest, is more likely to protect a defendant (which might be you) from defamation proceedings.

This article was supplied by Kevin Lynch. Kevin is a Senior Associate at Johnson Winter & Slatery who specialises in defamation.

NEXT ISSUE

In the next issue of UNILink...

- Legal Compliance Project update
- Copyright Conundrums explained
- Your Say
- Privacy Protection

A Questionable Precedent or a Licence to drink?

Peru's top court has ruled that workers cannot be fired for being drunk on the job, a decision the Government has criticised for setting a dangerous precedent.

The Constitutional Tribunal ordered that Pablo Cayo Mendoza be given back his job as a janitor for the municipality of Chorrillos — He had been fired for being intoxicated at work.

The firing was excessive because even though Mr Cayo was drunk, he could still speak and write, and he did not hurt anybody, Justice Fernando Calle said.

Justice Calle said the court would not revise its decision, despite complaints from the labour ministry.

Reuters (15/1/2009)

YOUR SAY

Would you like to contribute to the next Legal and Risk Newsletter?

We encourage feedback of any kind, from questions or queries to comments, gripes or grumbles. We'd like to hear what you think about our service, staff, projects, newsletter and website.

If there is a specific legal, risk, insurance or compliance matter you would like discussed in the next issue, email us at phillipa.schliebs@adelaide.edu.au.

