

## **INQUIRY INTO PROTECTION OF PUBLIC SECTOR WHISTLEBLOWER EMPLOYEES**

**Organisation:** NSW Department of Health

**Name:** Professor Debra Picone

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D08/1804

Mr Frank Terenzini, MP  
Chair  
Committee on the Independent  
Commission Against Corruption  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

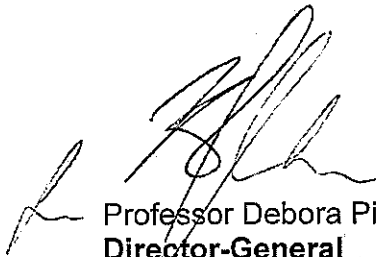
Dear Mr Terenzini

I am responding to your request to make a submission for the consideration of the Committee conducting an inquiry into the protection of public sector whistleblower employees.

Please find attached for your consideration a response based on consultations with key branches within the NSW Department of Health.

Thank you for the opportunity to provide input into the inquiry.

Yours sincerely



Professor Debora Picone AM  
Director-General

20.11.08

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**NSW Department of Health**

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Submission to the

**NSW Parliament**

**Committee on the Independent Commission  
Against Corruption**

**Inquiry into Protection of Public Sector  
Whistleblower Employees**

## INTRODUCTION

The Committee on the Independent Commission Against Corruption is conducting an inquiry into the protection of public sector whistleblower employees, and has identified NSW Health as an agency that it wishes to take evidence from at the next round of hearings for the Inquiry.

The terms of reference for the committee are as follows:

*"That the Committee on the Independent Commission Against Corruption, which is a joint statutory committee, inquire into and report on the effectiveness of current laws practices and procedures in protecting whistleblower employees who make allegations against government officials and members of Parliament."*<sup>1</sup>

NSW Health is one of fifteen case study agencies involved in the Whistling While They Work three-year collaborative national research project led by Griffith University. Participation in this project has afforded NSW Health some early insights into how NSW Health processes for managing disclosures and protecting whistleblowers compare with other state and federal agencies. NSW Department of Health is currently reviewing the findings from this research project to determine whether any action can be undertaken to improve protected disclosure processes across NSW Health.

In 2005, NSW Health made a submission to the committee in the review conducted of the Protected Disclosures Act 1994. This submission outlines generally how protected disclosure policies operate within NSW Health. A number of the issues raised by NSW Health in that submission remain relevant to the current inquiry and are included in this submission.

## NSW HEALTH MANAGEMENT OF PROTECTED DISCLOSURES

The term NSW Health is used to describe the Department of Health, public health organisations and other entities that are under the control and direction of the Director - General or Minister for Health.

Each entity is required to have a Protected Disclosure policy in place. The Department also first issued an Investigation Manual in 1995 to all health service internal audit units that included details of the Protected Disclosures Act and highlighted matters (mainly Act extracts) that investigators should consider when managing a Protected Disclosure.

To complement this Manual an Investigator's Toolkit was subsequently issued in 2006 to the Health Services.

## DEPARTMENT OF HEALTH POLICY

The NSW Department (Department) of Health Protected Disclosures Policy currently in use was originally issued in 2002. The Policy is based on the requirements set out in the Protected Disclosures Act 1994 (Act) and the guidelines issued by the NSW Ombudsman in 2002.

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<sup>1</sup> Legislative Assembly Votes and Proceedings, No 79, Thursday 26 June 2008, item 22  
Legislative Council Minutes, No 62, Thursday 26 June 2008, item 37



The Department's policy identifies the major principles of the Act:

- The forms of disclosures that can be protected under the Act
- The forms of disclosure that are not protected
- The requirement to maintain the confidentiality of information that may lead to identification of the public official making a disclosure and the processes to be undertaken if the release of the name is required (including obtaining the written consent of the officer making the disclosure)
- That protection against reprisal is to be afforded to the person making the disclosure, including penalties (both managerial and under the Act) for taking detrimental action against a person making a disclosure
- The rights of person/s the subject of the disclosure
- The consequences for public officials who make a disclosure who are implicated in misconduct.

The policy also sets out the procedures for making a disclosure, internally or externally and the steps to be taken by the Department's nominated officer (the Manager Internal Audit) in assessing, investigating and responding to a disclosure.

The final section in the Department's policy details the specific responsibilities applicable to a principal officer, managers (supervisors) and staff of the organisation.

The principal officer for the Department is the Director-General and the Manager Internal Audit is the nominee for receiving and taking initial action.

### **OTHER NSW HEALTH ENTITY POLICIES**

The Department of Health in 1998 issued a circular to NSW Health entities titled "Policy and Guidelines for the Development of Protected Disclosures Procedures in Health Services". This circular directed that the Chief Executive, as "principal officer", of each entity develop and promulgate a Protected Disclosures policy and procedures:

- To ensure all staff in Health Services have access to appropriate communication channels to make protected disclosures;
- To ensure Health Services advise staff in their Health Service of the availability of communication channels for protected disclosures;
- To outline Health Service responsibilities in preventing detrimental action against staff who make protected disclosures; and
- To satisfy legislative requirements.

The Departmental circular was based on the requirements of the Protected Disclosures Act 1994, the Ombudsman guidelines and took into account the results of the 1997 ICAC study that were reported in the publication entitled "Monitoring the Impact of the NSW Protected Disclosures Act 1994".

### **OPERATION OF THE PROTECTION DISCLOSURES POLICY**

The NSW Health policies stipulate reporting channels available for staff to make disclosures and the procedural elements are clearly documented in respect to receiving and managing protected disclosures. Communication strategies for the policies were also implemented to educate staff eg posters, induction packages etc.

Both policies have the Manager/Director of Internal Audit as one of the main points of contact for the making of protected disclosures and this ensures, due to their experience, a degree of confidence in proper processes being followed in both undertaking investigations as well as maintaining confidentiality. Under the Department's policy the Manager Internal Audit (who is the Director-General's nominated senior manager) is also required to regularly brief the Director-General on any protected disclosures in relation to the NSW Department of Health.

Each public health organisation is accountable for the administration of NSW Health policies. A survey of public health organisations and the Department of Health identified that in the 4 years up to 2005 there was an average 26 protected disclosures received per year. In 2006/07, 40 protected disclosures were received and 54 disclosures in 2007/08. This increase is attributed to additional awareness training undertaken by health services and investigation agencies and possibly to elevated levels of publicity surrounding the Whistling While They Work project.

The Whistling While They Work project team conducted a review of written procedures for managing protected disclosures from 175 public sector agencies across Australia including NSW Health. Agency procedures were assessed against the basic requirements of the Australian Standard and also an extended set of standards developed by the project.

The review found that generally agency procedures were skewed toward encouraging reporting and setting in place the investigative responses to those reports rather than the management of the welfare of those involved. Procedures tend to be geared towards meeting the interests of the organisation rather than the needs of the employees who come forward with reports.

The Whistling While They Work project will issue best practice guidelines for agency procedures as part of their second report in 2009. NSW Health will review its policies to reflect these guidelines.

## **PERTINENT MATTERS FROM THE 2005 REVIEW**

### **MALADMINISTRATION**

As raised in the Department's 2005 submission the broadness of the current definitions of what constitutes protected disclosures (particularly maladministration) has resulted in attempts to use the Act for matters that were better managed by the organisations' grievance policies.

Amendment is recommended to the definition of maladministration to indicate that it has to involve "public interest" not "personal interest".

### **DEFINITION OF PUBLIC OFFICIAL**

In November 2006 the NSW Parliamentary Committee on the Independent Commission Against Corruption made its report on the Protected Disclosures Act 1994. Recommendation 6 from that Report recommended that formal advice be sought from the Crown Solicitor as to whether the current definition of "public official" in the Act applies to area health service staff employed under the Health Services Act and if it did not then application should be made to have the definition in the Act amended so that it does.



The Crown Solicitor has advised that whether an employee of an area health service meets the definition of "public official" will depend on the functions and capacities of the individual employee. As such, the Crown Solicitor advises that while an individual employee may fall within the definition of "public official" (depending on their official functions), the Crown Solicitor cannot state whether all employees of an area health service would fall within the definition.

As the matter remains unclear the Department has written to the Department of Premier and Cabinet requesting consideration be given to amending the Act to ensure it covers area health service staff employed under the Health Services Act.