Submission No 55

INQUIRY INTO PROTECTION OF PUBLIC SECTOR WHISTLEBLOWER EMPLOYEES

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UNSW

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The Hon Frank Terenzini MP
Chair, Committee on the ICAC
Parliament House
Macquarie Street
SYDNEY NSW 2000

Email: *icac@parliament.nsw.gov.au*

Dear Mr Terenzini

SUBMISSION OF UNSW IN RESPONSE TO THE DISCUSSION PAPER ON THE PROTECTION OF PUBLIC SECTOR WHISTLEBLOWER EMPLOYEES

1. UNSW wishes to respond to proposals 6, 7 and 10 of the discussion paper on the protection of public sector whistleblower employees.

2. Proposals 6 and 7 would provide those who have made a protected disclosure and allege that have suffered detrimental actions substantially in response to that protected disclosure, redress by way of:

   (a) injunctive relief and/or
   (b) damages.

3. Paragraph 10 contains a proposal which would make the taking of such detrimental action a disciplinary offence.

4. Persons seeking an injunction or damages must make a case on the balance of probability. The *Protected Disclosures Act 1994* however creates a reverse onus of proof in relation to whether or not there is an offence of taking detrimental action substantially in reprisal for the making of a protected disclosure (Section 20 of the *Protected Disclosures Act 1994*). In other words, it is up to the public authority to prove that any detrimental action is **not** taken substantially in reprisal for a protected disclosure. A reverse onus of proof would make it extremely difficult and certainly not feasible, for a public authority to resist a claim for an injunction or damages. At the very least, it would result in significant pressure to settle such claims however unfounded they might be.

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5. If allegations based on a reverse onus of proof can be grounds for disciplinary action, the rights of persons accused of victimisation will be severely adversely affected leading to significant unfairness.

6. The difficulties raised by the proposed recommendations, if a reverse onus of proof applies, are compounded by the fact that:

(a) There is no time limit on when victimisation may take place, ie a person could take action for a detrimental action or perceived detrimental action years after the protected disclosure has been made and dealt with.

(b) There is a low threshold for the making of a protected disclosure. The scope of matters which may be a protected disclosure is wide and vague.

(c) Whether a matter is or is not a protected disclosure is not always clear.

(d) A protected disclosure may be totally misconceived and unsubstantiated but nevertheless a valid protected disclosure.

(e) While complaints made to avoid disciplinary action, or made vexatiously or frivolously do not fall within the definition of a protected disclosure, these exclusionary factors are difficult to establish except in extreme cases.

7. The proposed recommendations, if implemented without addressing the question of the burden of proof, may lead to abuse of the protected disclosures legislation as a means of obtaining ongoing protections from proper workplace management and/or damages. It may also create significant unfairness and inequity if it is used as the basis of disciplinary action.

Yours sincerely

Professor Richard Henry AM
Deputy Vice-Chancellor (Academic)