

Privileges Committee

Citizen's Right of Reply

(UNSW)

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Terms of reference

The inquiry was conducted in accordance with standing orders 202 and 203.

Committee membership

The Hon Trevor Khan MLC	The Nationals	Chair
The Hon Amanda Fazio MLC	Australian Labor Party	Deputy Chair
The Hon John Ajaka MLC	Liberal Party	
The Hon Jenny Gardiner MLC	The Nationals	
The Hon Matthew Mason-Cox MLC	Liberal Party	
Revd the Hon Fred Nile MLC	Christian Democratic Party (Fred Nile Group)	
The Hon Peter Primrose MLC	Australian Labor Party	

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Report

- 1.1 Standing orders 202 and 203 of the Legislative Council provide a mechanism for a person who has been adversely referred to by a member of the Legislative Council in proceedings of the House to seek a right of reply through the incorporation of a response in *Hansard* or in the *Minutes of Proceedings*.
- 1.2 On 27 March 2012, the President of the Legislative Council, the Hon Don Harwin MLC, received a submission from Ms Carol Kirby, University Solicitor and General Counsel, University of New South Wales (UNSW), requesting the incorporation of a response under standing orders 202 and 203.
- 1.3 The submission referred to comments made by Dr John Kaye MLC concerning UNSW during debate in the Council on 22 November 2011.¹ The President, having considered the submission under standing order 202(2), referred it to the Privileges Committee on 28 March 2012.
- 1.4 The Committee met in private session on 2 April 2012, and decided, according to standing order 203, to consider the submission. The response, which the Committee now recommends for incorporation in *Hansard*, has been agreed to by UNSW and the Committee in accordance with standing order 203(4)(b).
- 1.5 The Committee draws attention to standing order 203(3)(b) which requires that, in considering a submission seeking a citizen's right of reply, the Committee must not consider or judge the truth of any statements made in the House or in the submission.
- 1.6 The Committee recommends:

Recommendation 1

That a response by Ms Carol Kirby, University Solicitor and General Counsel, UNSW, in the terms specified at Appendix 1, as agreed to by UNSW and the Committee, be incorporated in *Hansard*.

The Hon Trevor Khan MLC
Chair

¹ *LC Hansard* (22/11/2011) 7531-7532.

Appendix 1 Reply to comments by Dr John Kaye MLC in the Legislative Council on 22 November 2011

The University of New South Wales makes this response to statements made by Dr John Kaye on 22 November 2011 in the Legislative Council, relating to the termination of Paul Barach's probationary employment at the University.

At no stage has Dr Kaye taken any step to verify with the University the accuracy of matters alleged in his statement. The statement contains multiple errors of fact and false assertions. It is difficult to understand how such errors were made.

Dr Kaye alleged that:

1. *'In June 2009, University of New South Wales senior management closed ranks around Vice-Chancellor Fred Hilmer and dismissed world-leading safety science expert Dr Paul Barach on what can only be described as trumped-up charges... The University of New South Wales acted in retribution because Dr Barach formally notified his superiors of complaints of gross mismanagement and potentially unlawful behaviour against Andrew McIntosh, director of the University of New South Wales children's gait laboratory. Associate Professor McIntosh is Professor Hilmer's son-in-law. The speed with which the University acted, the pettiness and inaccuracy of the allegations against Dr Barach and the subsequent threats and victimisation directed against Dr Barach and others are testament to a corrupt and prejudiced environment of nepotism and retribution that has gripped the University of New South Wales.'*

This is not correct. The probationary employment of Paul Barach was terminated on the grounds that he was not a suitable person to hold a senior position within UNSW. Paul Barach was found to have provided inaccurate information concerning his employment history, academic qualifications and publication credentials in his curriculum vitae and in grant applications submitted to the Australian Research Council (ARC) and the National Health and Medical Research Council (NHMRC). These are extremely serious matters and included findings that:

- he claims in an ARC Discovery Grant application and a NHMRC grant application information about his current appointments that was inaccurate and/or misleading;
- in a grant application to the ARC he claimed to have a PhD, which was false;
- in grant applications to the ARC and NHMRC he claimed appointments variously as a Professor and Visiting Professor at the University of South Florida, which was false;
- he included in his curriculum vitae at the time of recruitment to UNSW and in grant applications to the ARC and NHMRC false claims of authorship of certain books.

Allegations made by Paul Barach regarding his dismissal were referred by the University to the Independent Commission Against Corruption (ICAC) in July 2009. In October 2009 ICAC found that there was 'no indication that corrupt conduct was involved in the investigation and subsequent disciplinary action' against Paul Barach and 'determined not to take any action.'

In summary, the termination of Paul Barach's probationary employment was not linked to the reporting of complaints against Andrew McIntosh. The University scrupulously handled each matter on its own merits and in accordance with required processes. Dr Kaye's attack on the conduct and

reputation of the Vice Chancellor and other senior managers involved in these processes has no basis in fact.

2. ***'The dismissal of Dr Barach on trumped-up charges stands as an indictment on the senior management of the University of New South Wales, as does Professor Hilmer's entirely deceitful dismissal of the independent review that should have seen Associate Professor McIntosh dismissed.'***

This is not correct. The Vice-Chancellor had no role in any decision-making process regarding Andrew McIntosh. The University dealt with complaints against Andrew McIntosh in accordance with the University's policies and procedures and its Enterprise Agreement. Complaints relating to workplace issues were referred to an independent external investigator, who made no finding of misconduct (see points six and seven below).

The complaints process involving Andrew McIntosh was overseen and endorsed by the Chair of the Audit Committee of Council.

3. ***'...Professor Hilmer and Chancellor David Gonski successfully avoided Council debate on the matter.'***

This is not correct. The UNSW Council was briefed on the matter and, after discussion which Professor Hilmer did not attend, resolved that it would not intervene.

4. ***'Senior academic managers, including Professor Richard Henry, acted to protect Associate Professor McIntosh... Instead they colluded to smear and victimise Dr Barach.'***

This is not correct. These matters are the subject of claims Paul Barach has brought in the Supreme Court. UNSW and the individual University employees strenuously deny, and are defending, the claims made against them.

5. ***'Professors Archer and Reed [sic] were dismissed from their dean chairs... When the dismissal is motivated by revenge and a desire to cover up the malfeasance of the boss's son-in-law it says something appalling about the management culture of the institution.'***

This is not correct. Professor Mike Archer was not dismissed. Mike Archer resigned from the position of Dean of Science in order to pursue research interests. Mike Archer remains a Professor in the School of Biological Earth and Environmental Sciences. Roger Read was Associate Dean (Research and International) and stepped down from that position in March 2009. Following the termination of Paul Barach's probationary employment Roger Read was appointed Acting Head School of Risk and Safety Science until the school was closed in late 2010 at which time he retired.

6. ***'These serious allegations [against A/Prof McIntosh] were investigated by Dr Barach ... A subsequent independent review upheld all the allegations.'***

This is not correct. Paul Barach did not investigate allegations against Andrew McIntosh. There was no subsequent independent review that upheld allegations against Andrew McIntosh. In May 2009 an independent review of the Sydney Children's Hospital Motion Analysis Service (MAS), operated from the UNSW Biomechanics and Gait Laboratory was jointly commissioned by the University and Sydney Children's Hospital. The review made certain recommendations about the operation of the MAS. The review found that most of the issues addressed in the review were minor. This review had no authority to consider allegations of misconduct against any UNSW staff. Such issues are dealt with as a matter of law under the University's Enterprise Agreement.

Paul Barach's role was as follows: In February 2009 he reported concerns regarding the MAS to the Deputy Vice-Chancellor (Research). Those concerns were dealt with in accordance with the University's usual policies and procedures. In May 2009 as Acting Head of the School of Risk and Safety Science he reported concerns regarding Andrew McIntosh and workplace issues to the Dean of Science, Mike Archer. Some of these issues had already been addressed by the previous Head of School and Mike Archer.

7. *'Senior academic managers, including Professor Richard Henry, acted to protect Associate Professor McIntosh when he should have been dismissed and subjected to police investigation.'*

This is not correct. Complaints made against Andrew McIntosh were fully investigated including by an external independent reviewer who found that there were no instances that could give rise to a finding of misconduct or serious misconduct. The suggestion that there was any basis for Police investigation is unwarranted.

8. *'There is evidence that results were altered and records were not kept in an appropriately secure environment.'*

This is not correct. Sydney Children's Hospital was responsible for all clinical data. The storage and location of research and gait data (including video images) was in compliance with UNSW policies and procedures for handling research material and data. The MAS review report referred to the possibility that clinical data had been re-processed, but stated: 'it was not clear how this has occurred or who was responsible.' It also acknowledged that reprocessing of clinical data may be justified under certain circumstances, while recommending that clear protocols should be put in place.

9. *'It is possible that operations on hundreds of children were based on misleading medical data, potentially leading to lifelong injury.'*

This is not correct. A further review of the MAS conducted by NSW Health in 2010 stated: '... there is no evidence of any adverse impact on the care and treatment of patients as a result of the measurement error detected at the Motion Analysis Service in 2008.' Further, 'medical' (clinical) data were not the responsibility of Andrew McIntosh, or the University.

10. *'...hundreds of cerebral palsy children went without a gait analysis service for almost two years.'*

The University gave the Sydney Children's Hospital five months' notice of its decision to withdraw from the MAS and it was a matter for the Sydney Children's Hospital to relocate the MAS. It was not the responsibility of Andrew McIntosh, or the University to relocate the MAS.

11. *'The day after the review was returned the University responded by sacking Dr Barach on trumped-up charges that he had falsified one element of two grants.'*

This is not correct. The report of the review into the MAS is dated 23 June 2009, the same day Paul Barach's employment was terminated. However, the review report was not provided to the University until 25 June 2009. This report was in any case irrelevant to the University's consideration of Paul Barach's fitness for continued employment at the University. The issues that were relevant to Paul Barach's fitness for employment were brought to the University's attention under the Protected Disclosures Act in May and June 2009.

12. *'Those who stood up for Dr Barach were subjected to a campaign of intimidation.'*

This is not correct. There was no campaign of intimidation. Dr Kaye includes in this allegation an inaccurate reference to Mike Archer's evidence before Fair Work Australia. These matters are the subject of claims Paul Barach has brought in the Supreme Court. UNSW and the individual University employees strenuously deny, and are defending, the claims made against them.

In summary:

1. Complaints relating to research and conduct involving Andrew McIntosh were dealt with in accordance with the University's policies, procedures and Enterprise Agreement.
2. Issues raised concerning Paul Barach under the Protected Disclosures Act were dealt with appropriately and in accordance with the University's Enterprise Agreement.
3. The Vice-Chancellor was not involved at any stage with the investigation or disciplinary processes relevant to Andrew McIntosh or Paul Barach.
4. In his letter terminating Paul Barach's probationary employment, Deputy Vice-Chancellor (Academic) Professor Richard Henry found that Paul Barach was 'not who you have made yourself out to be' and 'not a suitable person to hold a senior position within UNSW.'