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**National Tertiary Education Union**  
Po Box 1323, South Melbourne  
Victoria, Australia 3205  
Tel 03 9254 1910  
Fax 03 9254 1915

**NTEU Submission**  
  
**to the**

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**House of Representatives Standing Committee on Legal and  
Constitutional Affairs Inquiry into**

**Whistle-blower Protections within the  
Australian Government Public Sector**

**Organisation:** National Tertiary Education Industry Union

**Contacts:** Dr Carolyn Allport, President, NTEU

Terri Mac Donald, Policy and Research Officer

**Details:**

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The National Tertiary Education Union (NTEU) welcomes the opportunity to make a formal submission to the *Inquiry into Whistleblower Protections within the Australian Government Public Sector* being conducted by the House of Representatives Standing Committee on Legal and Constitutional Affairs.

The NTEU represents the industrial and professional interests of 25,000 staff employed at Australia's universities. While we understand that the scope of the Inquiry encompasses all publicly funded institutions, the Union's submission is focused specifically on whistleblower protections and processes within the context of the higher education sector.

### **1. Whistleblower Provisions within the University Sector**

The University sector is unique in that, unlike other forms of employment, the fundamental right of academic freedom is considered as integral to the employment relationship. The United Nations Educational, Scientific and Cultural Organization (UNESCO) *Recommendation Concerning the Status of Higher-Education Teaching Personnel* (11 November 1997) makes note of this right in a number of provisions, in particular stating that

*27. The maintaining of the above international standards should be upheld in the interest of higher education internationally and within the country. To do so, the principle of academic freedom should be scrupulously observed. Higher-education teaching personnel are entitled to the maintaining of academic freedom, that is to say, the right, without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative academic bodies. All higher-education teaching personnel should have the right to fulfil their functions without discrimination of any kind and without fear of repression by the state or any other source. Higher-education teaching personnel can effectively do justice to this principle if the environment in which they operate is conducive, which requires a democratic atmosphere; hence the challenge for all of developing a democratic society.*

**UNESCO, VI. Rights and freedoms of higher-education teaching personnel Section A. Individual rights and freedoms: civil rights, academic freedom, publication rights, and the international exchange of information, 1997.**

[http://portal.unesco.org/en/ev.php-URL\\_ID=13144&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13144&URL_DO=DO_TOPIC&URL_SECTION=201.html)

Furthermore, under *Section D: Duties and Responsibilities of Higher Education Teaching Personnel*, the UNESCO recommendation highlights the obligation of staff to ensure their conduct is professional and accountable, particularly in relation to research, that processes are open and transparent, and that they contribute to the public accountability of their institution (effectively their employer):

*36. Higher-education teaching personnel should contribute to the public accountability of higher education institutions without, however, forfeiting the degree of institutional autonomy necessary for their work, for their professional freedom and for the advancement of knowledge.*

**UNESCO, VI. Rights and freedoms of higher-education teaching personnel Section D VII. Duties and responsibilities of higher education teaching personnel, 1997.**

[http://portal.unesco.org/en/ev.php-URL\\_ID=13144&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13144&URL_DO=DO_TOPIC&URL_SECTION=201.html)

Ensuring academic freedom within the employment relationship is also a requirement of the *National Guidelines for Higher Education Approval Process, National Protocols A and D*, which describe the requirements and processes institutions must meet and adhere to in order to operate as an Australian university<sup>1</sup>:

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<sup>1</sup> *The National Protocols and the National Guidelines apply to all higher education institutions operating, seeking to operate or purporting to operate in Australia. No institution may operate or purport to operate as a higher education institution in Australia or offer a higher education course in Australia without approval.*

16.2.4 The institution has policies, procedures and practices in place which encourage academic integrity and honesty as well as free intellectual inquiry in the teaching, research and scholarship activities of the institution.

(Evidence to be provided by initial applicants includes):

- Evidence that academic freedom and a commitment to free inquiry are built into employment conditions
- Academic policies and procedures which relate to academic integrity and honesty, and free intellectual inquiry with examples of how these policies are implemented and understood by staff.

MCEETYA, *National Guidelines for Higher Education Approval Processes - Guidelines for establishing Australian universities (relating to National Protocols A and D), Section 16.2 Goals and culture of the institution (D3, A2, A3), 2007.*

[http://www.mceetya.edu.au/verve/resources/NationalGuidelinesOct2007\\_AandD.pdf](http://www.mceetya.edu.au/verve/resources/NationalGuidelinesOct2007_AandD.pdf)

In addition to provisions for academic freedom, processes for the protection for staff wishing to make a disclosure in the public's interest are found within the relevant collective agreement of the institution, which prevail to the extent of any inconsistency. State whistleblower legislation also applies in the event that an agreement is silent on a particular aspect of public interest disclosure, or where the agreement specifically refers to the state legislation. NTEU notes that, with the exception of the Northern Territory (which is currently seeking to introduce whistleblower protection legislation) all states and territories have legislation that deals with whistleblower activity:

- New South Wales – *Protect Disclosure Act 1994*
- Australian Capital Territory – *Public Interest Disclosure Act 1994*
- Queensland – *Whistleblowers Protection Act 1994*
- Victoria – *Whistleblowers Protection Act 2001*
- Tasmania – *Public Interest Disclosures Act 2002*
- Western Australia – *Public Interest Disclosure Bill 2002*

## **2. Concerns Over the Coverage of Universities by Federal Whistleblower Legislation**

The terms of reference for the current inquiry include the university sector as public sector entities due to their statistical classification as such by the Australian Bureau of Statistics (ABS). However, the Union does not believe that alone, the ABS' preliminary classification is sufficient reason for their inclusion, and urges the Committee to consider the fact that, unlike the majority of public sector institutions (for which this legislation is clearly intended to cover), universities already have several tiers of public policy and legislation relating to public interest disclosure.

Furthermore, NTEU notes that whilst there are legitimate arguments for improved whistleblower protections for the public sector in general, an *ad hoc* application of a 'one size fits all' policy to the university sector would cause unnecessary complications and potentially undermine those existing arrangements that would apply to any university member seeking to make a disclosure in the public interest.

This is due to the fact that university sector is unique in that current industrial arrangements, via each institution's NTEU negotiated collective agreement, already provide mechanisms to deal with various types of disclosures.

NTEU believes these forms of protection are the best way of achieving a fair and equitable balance between all parties concerned. NTEU's aim in bargaining for collective agreements is to supplement existing protections is to ensure that whilst there are appropriate protections and support for the 'whistleblower' in place, the principles of natural justice and procedural fairness for the party against which a claim has been made also apply. These principles, as embodied in university collective agreements, mean that if an allegation or disclosure leads to the initiation of disciplinary procedures against a staff member on the grounds of misconduct, the identity of the

whistleblower will need to be disclosed to the staff member and the latter has the right to hear the evidence against her or him, to question the person making the allegation against her or him, and to challenge that evidence.

These provisions fall under a number of different industrial areas, depending upon the nature of the allegation being made and the circumstances of those involved. The Committee will note that universities are unique and diverse institutions with considerable operational complexity – for example, a typical university's activities will involve teaching, research, administration, governance, collaboration with external organisations (including the various tiers of government) and community engagement. Therefore, situations that may be considered to be 'whistle blowing' may not only be covered by specific whistleblower provisions but may also encompass an institution's policy, principles and regulations around academic freedom, freedom of speech, research integrity, official misconduct and discipline processes, as well as relevant state legislation.

To illustrate this point, attached to this submission is a briefing paper outlining NTEU's current model clause on intellectual freedom, which also encompasses research conduct, discipline processes and whistleblower activities. Also attached are examples of clauses from a number of university institutions that deal with whistleblower activity and protection.

### **3. The Committee's Proposed Model**

In addition to the Union's general concern over the university sector being included in any broad public sector whistleblower legislation, there are a number of specific issues we wish to raise in relation to the Committee's preferred model.

**Point 2 of the preferred model** defines the types of disclosure that should be protected, stating:

**2. the types of disclosures that should be protected:**

**a** these could include allegations of the following activities in the public sector: *illegal activity, corruption, official misconduct involving a significant public interest matter, maladministration, breach of public trust, scientific misconduct, wastage of public funds, dangers to public health and safety, and dangers to the environment; and*

**b. the Committee should consider:**

- i). whether protection should be afforded to persons who disclose confidential information for the dominant purpose of airing disagreements about particular government policies, causing embarrassment to the Government, or personal benefit; and**
- ii). whether grievances over internal staffing matters should generally be addressed through separate mechanisms;**

The majority of our current collective agreement provisions for dealing with misconduct (particularly research misconduct) are procedurally well defined and industrially robust, and the application of federal whistleblower legislation to this area would cause unnecessary complexities. Moreover, there are a number of other concerns with this clause. Specifically, if the test to determine whether disclosure of suspected activities should occur is listed under sub-point **2a** then the Union would argue that there should be no further requirement (as listed under sub point 2b), as either inappropriate activity has occurred and thus should be investigated as appropriate, or has failed the test and would be deemed to not apply under this legislation.

Furthermore, within the university context, the Union notes that the provisions under point **2b i)** risks conflict with existing provisions within university collective agreements, as well as institutional policy and practice, concerning the protection of intellectual and academic freedom. Clause **2b ii)** may also overlap with existing processes (again, as defined within existing industrial instruments and in institutional policy and practice) for misconduct.

The Union also holds a number of related concerns with point 3, which states:

3. *the conditions that should apply to a person making a disclosure, including:*
  - a. *whether a threshold of seriousness should be required for allegations to be protected, and/or other qualifications (for example, an honest and reasonable belief that the allegation is of a kind referred to in paragraph 2(a)); and*
  - b. *whether penalties and sanctions should apply to whistleblowers who:*
    - i). *in the course of making a public interest disclosure, materially fail to comply with the procedures under which disclosures are to be made; or*
    - ii). *knowingly or recklessly make false allegations;*

As the test for whether an allegation should be investigated is defined under **Point 2a**, we believe that the additional test cited under **Point 3a** is unnecessary. Instead, the Union believes that, should the allegation be proven, then an assessment of the seriousness of the charge should be reflected in the penalty handed down.

**Point 3 b i)** is more complex, particularly in a university context, as it could potentially undermine existing provisions for academic freedom and critical debate. The Union also notes that, in relation to **Point 3 b ii)**, the intent of this clause has already been provided for within universities via industrial clauses and institutional policy that outline discipline processes and penalties.

**Point 4** states that:

4. *the scope of statutory protection that should be available, which could include:*
  - a. *protection against victimisation, discrimination, discipline or an employment sanction, with civil or equitable remedies including compensation for any breaches of this protection;*
  - b. *immunity from criminal liability and from liability for civil penalties; and*
  - c. *immunity from civil law suits such as defamation and breach of confidence;*

The Union notes that, while we support such provisions as an important element of whistleblower protection in general, our current collective agreements, in conjunction with various university procedures and policies, already deal with instances of victimisation, discrimination, discipline or employment sanction, and provide for appropriate remedies.

Finally, NTEU notes the provisions of **Point 5**, which state:

5. *procedures in relation to protected disclosures, which could include:*
  - a. *how information should be disclosed for disclosure to be protected: options would include disclosure through avenues within a whistleblower's agency, disclosure to existing or new integrity agencies, or a mix of the two;*
  - b. *the obligations of public sector agencies in handling disclosures;*
  - c. *the responsibilities of integrity agencies (for example, in monitoring the system and providing training and education); and*
  - d. *whether disclosure to a third party could be appropriate in circumstances where all available mechanisms for raising a matter within Government have been exhausted;*

NTEU is also concerned that, should the provisions within **Point 5** be directly applied to universities, there would be considerable problems in managing the complexity that these additional procedural requirements under Federal legislation would bring. Furthermore, the proposed involvement of external agencies in addition to those already created under state based whistleblower legislation could also create further levels of convolvement.

#### **4 The University Environment and Academic Freedom**

Finally, it should also be noted that, within the university environment, allegations of misconduct and/or illicit activity may not always be clear cut. To illustrate this point, consider a situation in which an allegation of 'soft marking' of international students has been levelled against a academic

staff member. While initially this allegation may be proven as correct; it is revealed later that it is institutional policy (be this official or otherwise, such as the result of a specific direction or suggestion from a manager to an individual employee) that 75% of international students should pass their nominated subjects and that failure to meet this target has repercussions. The question may be asked "Has any official misconduct occurred?" If so, is the academic guilty of misconduct, or is the manager, or is it the institution?

Extending this example, should this academic decide to voice his or her concerns in the context of academic debate around teaching quality, (such as expressing concerns that the institution's nominated percentage may not accurately reflect the academic level of those students) the question of whether this situation would constitute protection under the proposed whistle blower model must be considered (or would instead the individual be excluded under sections **2 b**, or even risk penalty as under **3b i**)?

#### **5. NTEU Summary and Recommendation:**

Whilst the Union believes the role played by whistleblowers is valuable and more should be done to support such individuals, in a university context the application of the proposed model causes unnecessary complications and, in a number of instances, overlaps with current provisions within collective agreements. Furthermore, the application of the model proposed may have unintentional consequences for the fundamental tenets of academic freedom and critical inquiry, rights considered essential within the context of the westernised university model. The Union believes that, should the proposed model apply to universities, there is a risk that this legislation could undermine these basic academic rights.

NTEU makes the following recommendations to the Committee:

- 1. That, given the organisational complexity of university institutions and the potential ramifications such legislation could have on rights of academic freedom and critical inquiry, university institutions are excluded from the proposed whistle blower model (as per the model's definition of public sector bodies);**
- 2. That universities be allowed a period of 2 years to internally review their current arrangements, including collective agreements, policy and procedures relating to whistleblower activity, and to report by the end of 2010;**
- 3. Following this period, the Federal Government should consult the relevant parties to examine whether these arrangements provide an appropriate regime of protections.**