Letter

Dear Editor,

Re: Letters to the Editor on Whistleblower Legislation, April and June 1996

I'm scared. I don't know if the whole world is full of wise men bluffing, or fools who mean it!

I don't recall who uttered the quote, but it describes the first thought that crossed my mind after reading Matthew Goode's responses (April and June 1996) to Dr De Maria's article, 'Whistleblowing' (December 1995). In fact, Dr De Maria's reply to Goode appears almost prophetic — predicting precisely what was awaiting South Australians seeking protection under the *Whistleblowers Protection Act 1993* (SA) (WPA).

But firstly to the Ombudsman's letter (June 1996). If he were not a creature of the State, how is it he receives full legal representation *from the Crown Solicitor* in any actions against his office. No conflict of interest, he would suggest? Guilt by association, I'd say!

To illustrate just how 'miserably conceived' the Act has been; Goode insists that Dr De Maria was wrong to maintain that the WPA utilises the concept of 'good faith' to determine the merits of a disclosure. Goode was right! By design, 'good faith' has nothing to do with it, because the Crown reserves the right to act contrary to any such concept; lest the same criterion should be applied to judge its own actions, or call those actions and motives into question. To illustrate the point, recently two people brought their complaints before the Equal Opportunity Tribunal (EOT), seeking protection from victimisation by the Ombudsman under the WPA. Both complainants were accused by the Crown of acting vexatiously, but in so doing offered no evidence to support that allegation. The Crown's strategy was solely based on maligning the reputations of the complainants and challenging the Tribunal's own authority. By contrast, our members listed very specifically the exact nature of their grievances against the Ombudsman, and his response to their disclosures, without one reference to any perceptions of the Ombudsman's character or personality. The Crown, shamefully, went on to argue that the Ombudsman was entitled to decline dealing with 'purported disclosures'. Not surprising then, that the Ombudsman denies receiving any complaints from whistleblowers; but what does he really know of their 'purported' nature when he hides behind the cloak of 'discretion'? However, we know that 'discretion' is all too often used to justify quite deliberate acts of ommission or commission that result in victimisation, discrimination and detriment to others.

Consistent with this observation and Dr De Maria's concern that 'appropriate' refers to *process* rather than merit or motivation', on a number of occasions, the Crown's representative made reference to the fact that the merits of each case was not the issue in determining the Tribunal's jurisdiction and that evidence regarding individual cases should be presented *'when, and if,* the merits of the case are heard'. Here, we are left with little doubt that the merits of neither case were, in fact, ever investigated; nor were the findings of any such (even preliminary) investigations ever offered to the Tribunal to justify the accusation of vexation against the individuals.

Goode made at least two references to injunctive relief being available — either through the courts or EOT. Predictably, the Crown Solicitor's office fought tooth and nail to keep both actions *out of that forum* allegedly because the Tribunal did not have jurisdiction because the WPA does not *give* the Tribunal such jurisdiction. However, the Act states under s.9(2) that:

> An act of victimisation under this Act may be dealt with —
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> (a) as a tort; or
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> (b) as if it were an act of victimisation under the *Equal Opportunities Act 1984.*

Similarly, the Act *does not deny* the Tribunal jurisdiction, by implication or otherwise, in any other part of the Act. Section 5(2) even says that an 'appropriate authority' may not be the only authority to whom it may be reasonable and appropriate to make a disclosure. The Former Commissioner for Equal Opportunity, Ms Josephine Tiddy, was quoted in Hansard (27 January 1994) as saying to the Select Committee on Public Interest Whistleblowing, that she would personally undertake to hear complaints from whistleblowers about *victimisation by the Ombudsman.* Hence, the Former EO Commissioner had no question as to the clarity of her role in receiving such complaints or that such complaints might arise. Whilst the Former Commissioner dismissed the complaints brought before her, she did instruct that they be taken to the Tribunal if unhappy with her response. It was through this invitation that our members approached the Tribunal.

Indicative of the Tribunal's uncertainty about its powers and affirming Dr De Maria's comment that 'injunctive relief . . . is still an unfamiliar remedy for the courts and the process is bedevilled with formality and high costs', the Tribunal has reserved its decision on the matter of its jurisdiction. Hence, it appears that our members have indeed been sent to 'an unconnected forum' where they might get the relief they are seeking, but then again — might not!

However sagacious, I suspect even Dr De Maria could not have foreseen the extent of desperate argument that would be put up by the Crown to (as he put it) 'exploit statutory ambiguity' and, in turn, dismantle any authority contained by the WPA (as well as the very spirit in which Mr Goode would have us believe it was drafted). In an astounding, all-out effort to render the WPA null and void, the Crown argued that, *if taken literally,* protection cannot be afforded to a person under the Act if the act of victimisation is perpetrated by the 'appropriate authority' (namely, the authority to whom one makes a disclosure about wrongdoing) as illustrated by the following:

> The respondent submits that . . . [the] Act does not, as a matter of Statutory interpretation, *and cannot have been intended to,* include in the definition of 'a person' at the beginning of Section 9 the person who is 'an appropriate authority' . . . [If the definition] is expanded to include the full information for the definition of [Section 9] . . . it is clear that the appropriate authority is a different person from the person first named in Section 9. This section 9 would in effect read:
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> > A person (A) who causes detriment to another (B) on the grounds that [(B) made a disclosure] . . . to a person (C)

> [who is a reasonable and appropriate authority] . . . commits an act of victimisation. It is clear from the above paragraph that the persons (A), (B) and (C) are, *and are intended to be*, different persons and that Section 9 *does not apply to the 'appropriate authority'*. [emphasis added]

This is in spite of the fact that a 'public officer' (who may be the subject of a disclosure for wrongdoing under s.4(2)), is defined so exhaustively as to include *'any other officer or employee of the Crown'*. In offering South Australians this banal and misleading logic to neutralise the effects of the WPA, instead of acknowledging that persons A and C can be the same person, but at different points in time, the Crown once more demonstrates ill-faith in its actions. In fact, when I asked the Crown's representative whether our members could expect a similar challenge if they took their issues before a court, I was told that it was a loaded question, and that I would not get an answer. Suffice it to say, then, that Goode's own office *will not rule out* further challenges to attempts by our members to have their disclosures investigated — even by a court.

Even more frightening was the argument that 'appropriate authorities' should be exempt from actions against them under the Act because:

> authorities . . . appointed by statute . . . [and] persons with *high status in the community . . . must have been* selected on the basis that they are *presumed* to be persons who can be entrusted with the investigation process and *are unlikely to abuse tneir power. It is submitted that it is entirely unlikely that the fact that an authority receives a disclosure would motivate that authority to victimise the person making the disclosure, when it is their statutory duty to receive and deal with such disclosure.* [Emphasis added]

Is the Crown suggesting that there is some arbitrary socio-economic threshold of status that one much cross before being regarded as being of sufficiently 'high status' within the community as not to warrant (or preclude the public from carrying out) the scrutiny of their functions? If so, surely I have a right to be informed of the criteria for this obscure threshold; as I would like to know when I might cross it!

On the subject of defamation, Dr De Maria asserts that Goode's 'neat catch-all phrase ". . . incurs no civil or criminal liability . . ." does nothing to allay concerns of reprisals in the form of litigation. It is, however, anything but 'superfluous' to whistleblowers that they should be given absolute privilege against reprisals by the State, since the Crown has already threatened our members with legal costs — for pursuing their public interest disclosures. How sad that whilst Goode would have us believe we incur no liability for our actions under the Act, it can still be used to destroy us when we place faith in the good intent of the legislation and exercise our right to be heard.

Of further significance, and consistent with concerns expressed by Dr De Maria that the Act is too ambiguous and lacking the specifics necessary to protect whistleblowers, is the Crown's observation that:

> *The Whistleblowers Act is* ***silent*** *as to what any persons receiving a disclosure must do*, with the exception of section 5(5) where a disclosure of fraud or corruption must be passed on to the bodies named in that section. Section 6 *assumes* the relevant authority will carry out an investigation *but does not prescribe how and with what powers such an investigation will take place.* It is submitted that it will depend on the authority chosen and what powers and functions such authority has, whether by statute or otherwise. [emphasis added]

What on earth would these 'authorities' see as their responsibility and purpose, for goodness sakes? Is not the Ombudsman aware of his 'Royal Commission powers' or the implications of disclosure for whistleblowers and the community? Astounding! How does Goode propose the WPA can work when it does not compel authorities to investigate claims? If Goode had even the most basic understanding about the nature of whistleblowing and if he really did represent the whistleblower's best interests, he would advocate the needs of whistleblowers rather than becoming defensive about criticisms by Dr De Maria (who more truly represents the views whistleblowers). In so doing, he would also acknowledge that failure by authorities to investigate complaints is by far the most common/predictable form of reprisal (or act of victimisation) experienced by whistleblowers because it: denies the most preliminary access to justice; serves to contain the disclosure; perpetuates the collusions and deceptions generated by the wrongdoers; diminishes the apparent merits of the matters being disclosed with the passage of time and resultant destruction of vital evidence; demoralises and frustrates the messenger; and, prolongs their suffering in countless other ways (for example, financially, socially, emotionally).

Space does not permit further substantiation of massive problems, not just with the WPA, but Government accountability processes in general (or the lack thereof). Nevertheless, if something looks, walks, quacks and smells like a duck; in all probability, it is not a cow. We are, therefore, looking for a reason to believe that, what we perceive to be indicators of government corruption and maladministration, are in fact not so. In a truly accountable system of government (which the Westminster system is touted as being), we would have been given such reason by now. So, when Dr De Maria recently predicted that within a year Victoria would probably be the only State left in Australia without a whistleblower's act, I suspect he was once again wrong, as South Australia may very well have joined Victoria in this distinction from the rest of the country.

Matilda Bawden
National Secretary, Whistleblowers Australia Inc. on behalf of SA Branch

[Quoted passages are from 'Respondent's Outline of Argument' as submitted to the Equal Opportunity Tribunal (No. 31 of 1996), in the matter of Mrs Jean Sutton (complainant) and The State of South Aust (respondent), 18 June 1996, pp.2,3 and 3-4 respectively.]