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Letter

Dear Editor

Re: Whistleblowing

I read with interest Mr De Maria's article about whistleblowing legislation in Australia [(1995) 20(6) *Alt.LJ* 270]. I do not comment on what he has to say about other legislative efforts, but I find it necessary to correct his account of the South Australian legislation for the benefit of your readers.

1. In Table 1, Mr De Maria says that the qualifications for protection are 'Good faith disclosure to relevant authority'. Wrong. What is required is:
   (a) a belief on reasonable grounds that the information is true, or belief on reasonable grounds that there is warrant for further investigation;
   (b) disclosure to an appropriate authority; and
   (c) that the information is 'public interest information' as defined.
2. In Table 2, Mr De Maria says that a person is not protected if they disclose to the media. Wrong. A disclosure to the media will be protected if it is 'in the circumstances of the case, reasonable and appropriate' to disclose to the media.
3. In Table 2, Mr De Maria says that a person is not protected if they disclose 'involuntarily'. Wrong. The legislation makes no statement about this matter but applies to all disclosures which meet the tests set out above.
4. In Table 2, Mr De Maria says that a person is not protected if they disclose previous wrongdoing. Wrong. The Act specifically applies to disclosures made after it came into operation about events which took place at any time before it came into operation.
5. In Table 3, Mr De Maria says that a person is not protected from contravening secrecy enactments. Wrong. The Act says that a protected person incurs 'no civil or criminal liability by doing so'. Period.
6. In Table 3, Mr De Maria says that a victimised person has no access to an injunctive remedy. Wrong. The Act provides access for the victimised to a civil court or the Equal Opportunity system and both have injunctive powers.
7. In Table 3, Mr De Maria says that a person has no absolute privilege in a defamation action. Since the Act clearly says that a protected person incurs no civil liability in relation to the disclosure, the conferral of absolute privilege would seem superfluous.
8. In Table 4, Mr De Maria says that a victimised person has no access to damages. Wrong. The Act provides access for the victimised to a civil court or the Equal Opportunity system and both have powers to award damages.

Mr De Maria is, I suppose, entitled to publish the unsubstantiated assertion that the South Australian legislation is 'miserably conceived'. He would be much better placed to do so if he could perform the elementary task of reading an Act of Parliament. As it stands, he might be better advised to arrange for the printing of an apologetic series of corrections.

Matthew Goode
Senior Legal Officer, Attorney-General's Department, South Australia

Reply from Dr Bill de Maria

Like fridges that don't freeze and planes that don't fly, South Australia has a whistleblower protection law that doesn't work. Rather than face that fact Mr Goode faces me with technical pedantry.

The information in my tables was abbreviated. I can, however, assure the reader that the core material is there for all who would see.

1. Mr Goode contradicts my view of what is required in the South Australian Act (the Act) to warrant protection. Section 2(a) of the Act offers protection when three criteria are met:
   (i) belief on reasonable grounds that information is true, or
   (ii) information may be true, and

(iii) disclosure made to appropriate person.

I summarised this to: 'good faith disclosure to relevant authority'.

2. On the point of protection for media whistleblowers in South Australia Mr Goode says that they could technically be protected under s.(2)(b) of the Act. My point is that nowhere in the Act or the second reading speech on 26 November 1992 is there any specific reference to media protection. Instead there is an overbearing philosophy that protection may await the whistleblower who does the 'right thing' and discloses internally.

Perhaps Mr Goode should refresh his memory with respect to s.4 of the Act that sets out quite clearly (and rigidly) the disclosure pathways that must be trod by the whistleblower seeking protection. Deviate from the pathway (such as going to the media) and the Act won't protect you. It can, however, be used as garden mulch for the now unemployed whistleblower to grow vegetables. Like all other whistleblower protection instruments (bar the NSW Act) the SA Act shies away from the biggest test of legislative fair dinkumness — the protection of those who disclose to the media.

3. Mr Goode reads between the lines to proclaim that protection for involuntary disclosures is available under the Act. However, the SA Act does not *specifically* protect people who disclose, say, under oath, and so we are left with a dangerous level of ambiguity and uncertainty. It would be a very foolish person who made an involuntary disclosure with the expectation that the Act would automatically shield them from reprisal. Whistleblowers demand a level of statutory certainty because their disclosure acts are dangerous. They endanger their health, career and relationships. The last thing they want is a courtroom showdown where the employer's advocate can exploit statutory ambiguity.

4. Mr Goode takes me up on my point that previous wrongdoing is not the subject of protection. He says that the Act specifically applies retrospectively. If it is so 'specific' why didn't he cite the section which provides for this? There appears to be some confusion in the South Australian Government about whistleblower retrospectivity. I have a copy of a letter from the SA Ombudsman to a Senate committee secretary (20 April 1995) in which the Ombudsman unequivocally says: 'however, as a matter of statutory interpretation I am of the opinion that the *Whistleblower Protection Act* arguably does not confer protection for disclosures made prior to the commencement of the Act'. So I ask, who does the whistleblower believe?

5. Mr Goode argues that South Australian whistleblowers are shielded from actions for breaches of secrecy enactments, citing s.5(1): 'disclosure of public interest information incurs no civil or criminal liability by doing so'. He should have glanced to the left of this apparently catch-all protection because there sits the word 'appropriate' as in 'appropriate disclosure of public interest information'. He would argue that that word is critical to separate the genuine whistleblowers from the whingers, dobbers and ratbags that drafters of whistleblower instruments have nightmares about. I would, on the other hand, argue that 'appropriate' refers more to *process* than merit or motivation. This goes to s.4 where the 'appropriate' authorities to receive disclosures are set out. So South Australian whistleblowers be warned. If you breach secrecy you commit original sin. The Act has no redemptive powers.

6. On the question of injunctive relief, surely you could park a fleet of Mack trucks between a statute that explicitly offers such relief and a statute that sends you off to an unconnected forum (court) where you *might* get it.

7. On the issue of defamation protection Mr Goode goes back to his neat catch-all '. . . incurs no civil or criminal liability . . . ' to argue that the 'conferral of absolute privilege would seem superfluous'. However protection against defamation is uncertain and on the streets of Adelaide there are citizens with information about wrongdoing who will never come forward until 'superfluous' protection against defamation is there in lights. Recently, the Premier of South Australia (Deane Brown) received a formal complaint from a number of people concerned that the State Ombudsman too readily uses his discretion not to investigate whistleblower complaints. Those citizens, who believed they were acting in the public interest sought defamation protection under the *Whistleblower Protection Act* even though the Act does not specifically offer it. More importantly, they were expecting reprisals for acting in the public interest. We await the outcome of this matter with extreme interest.

8. With respect to the final point about damages I can only repeat what I said about injunctive relief.

The South Australian Act is often referred to as the 'oldest' or the 'first' whistleblower statute in Australia. I prefer to think of it as having a premature birth. It predates whistleblower consciousness which really started in Australia in 1993, the same year the Act was proclaimed. Unlike the 1994 NSW whistleblower law which is up for review now, the SA Act has not been reviewed and looks weak when compared to recent efforts, notably the Tasmanian Bill (which was too late for my analysis). Perhaps it's time to take a hard look at the question whether South Australians have the Act they need, let alone deserve.

Bill De Maria

Bill De Maria teaches in the Department of Social Work and Social Policy at the University of Queensland.

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