Ms Helen Donaldson
Secretary,
Finance and Public Administration Legislation Committee
Australian Senate
Parliament House
CANBERRA ACT 2600

Dear Ms Donaldson

Thank you for your invitation to make a written submission to the Committee with respect to the *Public Interest Disclosure Bill 2001.*

I generally endorse the principles embodied in the Bill. Comprehensive and effective whistle blowers' protection is essential for effective corruption prevention in the Public Service.

My views are canvassed in the attached article *Ethics and Principled Dissent in the Queensland Public Sector: A Response to the Queensland Whistleblower Study* published in the Australian Journal of Public Administration, Volume 54, No. 4., and also in *Report 353,* Joint Committee of Public Accounts, September 1997.

I would be happy to provide further detail to the Committee at a hearing should that be required.

Yours sincerely

(Mr) Howard Whitton
19.10.46

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ETHICS AND PRINCIPLED DISSENT IN THE QUEENSLAND PUBLIC SECTOR: A RESPONSE TO THE QUEENSLAND WHISTLEBLOWER STUDY

Howard Whitton*

William De Maria's paper argues that two peculiarly Queensland phenomena — its "public sector ethics movement" on the one hand, and the "worksite dissent movement" (whistleblowers) on the other — are on a collision course. If correct, it bodes ill for public administration in Queensland. This response examines both the individual elements of De Maria's argument, and the argument itself.

As to its elements, I argue that De Maria's challenge is misconceived: the "Queensland public sector ethics movement", as identified by De Maria, is no more than a straw person. I also argue that De Maria significantly misrepresents the relevant reports and findings of the Electoral and Administrative Review Commission (EARC 1992), and the Parliamentary Committee for Electoral and Administrative Review (PCEAR 1993). I conclude that the argument itself is fundamentally flawed in three ways: in its composition, its misleading and tendentious use of source material, and its failure to take any account of the Whistleblowers Protection Act 1994.

As to the form of the argument, I suggest that De Maria's paper is about two related arguments: somewhat simplified, these are as follows:

- Some public officials do corrupt things; all public officials work in the public sector: therefore the public sector is inherently corrupt.
- Whistleblowers challenge "evil" in the public sector; codes of conduct, as "ethical rituals", will render evil in public sector organisations less obvious; therefore codes of conduct will make it harder for whistleblowers to be believed, and easier for evil to flourish unchecked.

The evident non sequitur in the first argument needs no comment from me. My response to the second argument takes up most of this paper. I will deal with De Maria's more significant errors in the order in which they appear; I will not attempt to deal with the many misconstructions and the merely rhetorical devices which colour his argument, especially in the first half of the paper.

The Queensland "public sector ethics movement"

In one of the *Peanuts* series, Charlie Brown and Lucy are watching cloud formations pass overhead. Lucy identifies one particularly interesting formation as (if memory serves) "The Stoning of St Stephen". Charlie Brown is nonplussed; all he can see is a camel and a duck.

Truth is well known to be a slippery customer. De Maria may well see a particularised version of the titanic struggle between Good and Evil, but I believe a simpler interpretation is available.

It is this: instead of a conspiracy of narrowly focused interest-groups, I see a lengthy process of community consultation, and ultimately legislation, reflecting a broad consensus about the fundamentals of what we in Queensland expect by way of "good public administration" in 1995. Instead of systemically corrupt bureaucracy, I see a system staffed by individual human beings, whose conduct may often be less than perfect, and is occasionally reprehensible and/or

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unlawful. The system itself has undergone enormous cultural and organisational change in the past five years. Instead of naked self-interest, I see unsurprising evidence that most public officials choose to work in the public sector out of a commitment to the public good.

De Maria asks, "Who will control the definition of ethical behaviour?", and sees a sinister involvement by "the state" in the ethical regimentation of its officials. To argue, as De Maria does, that the state's nefarious purposes are concealed in the Public Sector Ethics Act, is to ignore the mostly public processes which EARC and the parliamentary committee reflected in their reports before the Public Sector Ethics Bill saw the light of the Legislative Assembly chamber.

According to De Maria, the "public sector ethics movement" aids an "estrangement from the truth about the structure of political power", first, because the movement is not characterised by suffering or angry people, and second, because any reliance on the Fitzgerald analysis requires placing "a 1950s' faith" in the institution of government (in contrast with the views asserted to be held by the majority of Australians about the "deep, irreversible, irreconcilable conflict" between governments and the people).

At this point it is worth noting that De Maria is not clear about what the "'public sector ethics movement" is: it may include EARC or the parliamentary committee, senior bureaucrats, or applied ethics academics, or all of these. Whatever it is, the "public sector ethics movement" is not a "street-level" phenomenon, according to De Maria, that is, it is not "real".

This strikes me as a somewhat partial analysis. The government has created no new permanent body to implement the new legislation, despite EARC and PCEAR recommendations that it should do so, and has severely limited the role of consultants. Individual agencies will have to develop their own codes of conduct as public documents, and make them work for both disciplinary and aspirational purposes at all levels in an organisation: this will not be easy. Both Queensland University of Technology and Griffith University have been teaching Applied Ethics courses to increasing numbers of undergraduate and postgraduate students for some years. If these are not real concerns, what could be?

I find no recognition by De Maria that the "public sector ethics movement" is other than a parochial Queensland phenomenon — a localised response to the Fitzgerald factor. This narrowness of viewpoint ignores both a very large body of professional literature, and the emergence in the past decade of "public administration ethics", which Willa Bruce has called "a burgeoning study that is fast becoming a free-standing discipline" (Bruce 1995: 112). EARC's code of conduct review took account of this development, drawing extensively on one of the three new books reviewed by Bruce in that article, of which she says: "taken together, they describe state-of-the-art public administration ethics" (Bruce 1995: 111). The De Maria account ignores the many contributors to the Australian debate about administrative ethics over the past two decades — contributors such as John Uhr, Michael Jackson, Paul Finn, Colin Hughes, Peter Wilenski, John Nethercote, David Corbett and Gerald Caiden, whose research and teaching have advanced our understanding of the ethics issues raised explicitly by the Coombs Royal Commission on Australian Government Administration in 1976.

Fitzgerald, EARC and the parliamentary committee

In mid-1989 the Fitzgerald Commission of Inquiry recommended a program of detailed and wide-ranging reconsideration of important aspects of our system of government and public administration in Queensland, a reconsideration which was well overdue. One of the Goss government's first acts on election in December 1989 was to create the Electoral and Administrative Review Commission as proposed by Commissioner Fitzgerald.

EARC, under its Chair Tom Sherman (and later David Solomon) and five commissioners drawn from the Queensland community, worked through the Fitzgerald agenda for electoral and public administration reform for the next four years, until it lapsed in 1993 in accordance with the sunset clause in its legislation. EARC relied heavily on community consultation in all of its references. Its recommendations were in the main endorsed by the bipartisan PCEAR.

EARC commenced its consideration of the codes of conduct reference in March 1991 and delivered its report in May 1992. The PCEAR reported in May 1993. Typical of the contemporaneous evaluations of EARC and its work is Ken Wiltshire's assessment:

> EARC has been a model organisation in terms of administrative reform. It has been completely open in all of its work. EARC has been perfectly accountable for its action both to its Parliamentary Committee and to the wider public at large. it has been neutral in its methodology. ... The work of the EARC has always been client focussed ... The EARC remains an agent of Parliament rather than of the Executive. All in all, the EARC has been a corner stone of the reform process ... and one of the most successful innovations introduced into Westminster systems during the twentieth century (Wiltshire 1992: 265).

EARC received 39 submissions on the code of conduct reference, including one from the Department of the Premier, Economic and Trade Development, representing the consolidated views of most Queensland public service departments and agencies.

Of those 39, eight were received from local government councils or councillors and the Local Government Association of Queensland. Three were from various lobby groups, two from professional bodies, one from the National Party of Australia (Queensland Branch), one from the Queensland State Services Union and one each from the Independent Commission Against Corruption (NSW) and the Criminal Justice Commission of Queensland. The balance came from private citizens. Over 70 people attended EARC's one-day public seminar on public sector ethics. EARC also conducted a survey of over 260 public sector employees in Brisbane and in all regional centres.

The PCEAR received 36 submissions and held discussions with individuals, invited submissions from universities, and commissioned its own expert advice. When the bill was introduced into the parliament over a year later it had been the subject of further consideration by a committee of officials in the major public service departments, and unions.

This can hardly be described as "a short consultation process", nor can it be faulted for being "driven by interest groups", unless Dr De Maria is suggesting that anyone with an interest in public sector ethics should have been excluded from the process of developing the bill.

De Maria condemns what he sees as my "1950s' faith in the institution of government" and cites in support a paragraph from my chapter in Preston's *Ethics for the Public Sector: Education and Training*. The passage selected is incomplete: the view I expressed there was explicitly a summation of EARC's conclusions, rather than my own position. What I said was:

> Ethical conduct by officials is not appropriately a matter for a "risk management" approach. As EARC pointed out, high standards of public sector ethics are fundamental to what we mean by "good government": if there is a failure of public confidence in the integrity of our government and business institutions, and in the individuals who have control of them, it seems inevitable that we will find ourselves facing a difficult and uncertain future as a nation (Whitton 1994: 159).

De Maria also condemns the "public sector ethics movement" for being out of touch with Australia's future, and enlists social commentator Hugh Mackay in support. While De Maria identifies no particular statement of Mackay's at page 255 of *Reinventing Australia*, I take it that this is the paragraph he has in mind:

> There is a deep mistrust in the Australian community of the idea that powerful organisations could be expected to behave with responsibility and restraint. ... Precisely the same thing can happen when a society allows too many rules and regulations to be imposed on it. The belief that "everything is under control" can easily stultify the development of an active moral sense (Mackay 1993: 255).

Mackay's key concern, set out on page 223, is that Australians need to decide "what we wish to become". This has been a recurring concern for Mackay over the years; compare this version from 1989, which EARC cited in its issues paper (EARC 1991a:17):

> the ethical dilemmas arising in Australian business and professional life are inextricably linked to the ethical dilemmas arising in the broader Australian community. ... Perhaps that classical ethical question, "What ought I to do?" may have to wait. The more pressing question may be, "Who am I?" or, more correctly, "Who are we?" and, in turn, "What kind of community do we want to become" (Mackay 1989: 83-92)?

EARC drew on this earlier version of Mackay's question to prompt submissions on the relevance of "traditional values". EARC asked:

> Are the traditional Westminster principles of government and public administration, summarised in Table 1, relevant to the responsibilities of elected representatives and appointed officials in public sector organisations in Queensland today? If not, or to the extent that they are not, what other principles could be more relevant (EARC 1991a: 21)?

This passage provides a part answer to De Maria's next challenge, namely that "the glaring foregone conclusion in EARC ... is the automatic critique-free acceptance of the Westminster model (of public administration)". De Maria refers to a recent Time-Morgan poll showing "widespread disaffection" with "the very context that the ethics debate has been constructed to proceed in" — elected, responsible parliamentary government. Again he appears not to have troubled to read the EARC report on codes of conduct, which at page 151 discusses a 1986 article by David Solomon which raised precisely this issue. Solomon observed:

> Australian parliamentarians may work hard and be well paid for their labours, but they do not enjoy great public esteem. ... While doctors, dentists and bank managers rate over 60 per cent, federal politicians were down to 13 per cent in the 1985 poll. More surprisingly, the rating of politicians has slumped over the past decade. In 1976 their rating was 19 per cent. No other occupational group, apart from state parliamentarians, had undergone such a substantial fall in public perception (Solomon 1986: 123-4).

Far from demonstrating "appalling ignorance" on this issue, EARC was clearly very aware of its centrality, and prompted its readers to consider precisely the question which De Maria now accuses the commission of avoiding.

De Maria is critical of the Fitzgerald Commission's treatment of public administration matters, particularly the report's treatment of theories of government and public administration, and cites with approval John Nethercote's conclusion that Fitzgerald had demonstrated little grasp of the nature of public administration or management practices which could promote the value of ethics. It should be noted that Nethercote was writing in 1989, and his predictions of Fitzgerald's likely impact and EARC's likely contribution may now be seen to be somewhat pessimistic, but perhaps not unreasonably so given the history of such commissions of inquiry in Australia.

Either way De Maria is clutching at straws in arguing that Fitzgerald's theoretical basis for EARC's public sector ethics proposals was insufficient or flawed. The proof of the pudding is the pudding, not the recipe, much less the job advertisement for the cook.

The Public Sector Ethics Act and the Whistleblowers Protection Act became necessary, not, as De Maria would have it, to impose "ethical eugenics ... a form of ethical fascism", but to re-state for a new generation a set of conventions and values which until recently in Queensland have been the subject of convention alone. Indeed both acts proceeded from an explicit demand for greater certainty about what was expected of officials in the workplace (EARC 1991a: Appendix B). This demand was not focused on grand and lofty principles such as "democracy", but rather on more workaday concerns about fairness, equity and the expectation that official wrongdoing will be effectively countered by the system itself.

Another aspect of the special pleading in the De Maria paper stems from its notion that the ethics movement ought to be about "redemocratisation of the workplace". This matter was not in EARC's (nor Fitzgerald's) charter but, that aside, such a demand fails to take account of the fact that public servants are employees first and private individuals second. These legal duties of employment cannot be simply assumed away. On the other hand neither do they prevent principled dissent in the workplace. Dissent should not be simplistically equated with refusal to act as directed. De Maria argues that the subversion of bad laws by conscience-driven officials should be a duty, and calls up the late Justice Lionel Murphy's views expressed in his decision in A v. Hayden (1985) No. 2 59 ALJR: 6-36, better known as the "Sheraton Hotel ASIS Training Raid Case".

In both of its issues papers and reports on ethics and whistleblower protection, EARC considered at length the question of principled organisational dissent. Possible responses to unlawful orders and improper official directions

were the focus of these considerations. Precisely the paragraph cited by De Maria from A v. Hayden was in fact cited by EARC in its discussion of principled dissent and the potential for clash between professional codes of ethics and public service employment expectations. Most public sector codes of conduct in Australia, Queensland's included, have long recognised the right of an individual official to refuse to act unlawfully if so directed by a supervisor.

In relation to workplace dissent, De Maria is critical of the "moral authoritarian" position represented by the Premier's Department's consolidated submission to EARC on behalf of the public service departments. Again the source is treated selectively, and the submission's arms-length position on the minority viewpoint which it reports is not acknowledged in De Maria's version: the paragraph referred to appears in the EARC Report as follows:

> The most commonly preferred solution was to take up the matter with one's manager. If no solution is reached, the officer could take it further up the line to the Chief Executive or seek advice from the PSMC. If no satisfaction is obtained, then the matter could be taken to the officer's union. Some saw a solution in shifting the responsibility for the decision away from the officer who has a conflict. There was minority support for the idea that an officer should always decide in favour of the agency. The basis of this is that if an officer was made aware of the standard before commencing employment, that officer is effectively personally committed to that standard by accepting employment (EARC 1992: 49).

De Maria is also critical that EARC found the minority position "valid". What EARC actually endorsed was the logic of the argument, with reservations. EARC commented:

> The argument advanced by the Joint Submission (S15), namely that officers informed of agency standards prior to their joining that agency effectively commit themselves to those standards upon joining, is valid, but may go too far in that in many situations the application of these standards may be unclear. In the Commission's view it is important to recognise that an official's personal ethical standards may be relevant to public administration, and that officials should be encouraged to apply their personal ethics standards in appropriate circumstances. Officials are not bound to follow official instructions which are clearly unlawful or immoral (EARC 1992: 50-52).

Whistleblowers as ethical fugitives

The second half of De Maria's paper is devoted to an analysis of the research conducted by his Queensland Whistleblower Study in the period 1990-93. I would not wish to minimise the pain and suffering which has undoubtedly been the experience of many of those who have in the past made public interest disclosures which were not appreciated by their employers or colleagues.

However, two points need to be made about the study. The first is that the definition of "whistleblower" used by the study is self-serving, such that whistleblowers who have been victimised are likely to be over-represented in the survey results. The advertisement seeking volunteers for the study proffered the following invitation:

> Whistleblowers! Have you come across something at work that you don't think is right? For example ... do you claim to be victimised because of your gender, sexual preference, colour, personal values?; are accountability arrangements at work breaking down and giving certain people too much unanswerable power? (sic) ... we want to know about the process you were in: how it started, what impact you have made, what retribution has occurred (De Maria 1994a: 3).

The second point to make about the Queensland Whistleblower Study is that it relates to the period prior to 1993. De Maria entirely fails to recognise that the government responded to EARC's recommendations and the PCEAR report with the Whistleblowers Protection Act in November 1994. The act provides extensive protections to whistleblowers and, in particular, makes reprisal-taking a criminal offence punishable by two years imprisonment (Whistleblowers Protection Act 1994: Part 5).

In my view, the study compromises an assumption which is evident in the advertisement above, that whistleblowers will have been victimised. The first half of the advertisement may have dissuaded from volunteering many who had made a disclosure and not been victimised, or who made a disclosure and found

that the accountability arrangements at work did not break down. It seems that this stance was not deliberate, the words of the advertisement notwithstanding. On the question of reprisal the authors come to the following extraordinary conclusion:

> We now think that the existence of reprisal is an important component in the definition. In other words we think that one must actually suffer reprisal to earn the title whistleblower (De Maria 1994b:12).

This inclusion of victimisation within the definition of "whistleblower" in my view constitutes a significant narrowing of the definition, therefore the study's sample, to the point where the study cannot be meaningfully represented as a study of "the whole whistleblower process" or indeed of whistleblowers as a class.

The claims of those responding to the advertisement for the study were not objectively validated, either as to the substance of the claimed disclosure or the nature of the reprisals alleged to have occurred. Only disclosures about past events were included: those who had sought to disclose likely future events were excluded from the study (De Maria 1994a:2).

Perhaps not surprisingly, given the terms of the advertisement, some 71% of the sample claimed to have suffered reprisal (De Maria 1994b:13). Whether these claims are objectively supportable is open to doubt: it is a notorious and intractable fact that management action that is represented as reprisal against a whistleblower may have been lawful and appropriate, and undertaken for unrelated legitimate purposes. This study does not appear to have controlled for such "reprisals".

It is worth noting that 50% of the study's cases occurred in the Corrective Services Commission, Queensland Department of Health (including hospitals) and universities. Some 20% of the other disclosures concerned the police service, local government councils, TAFE colleges and schools (De Maria 1994a:10). These are institutions which generally have in common the features of closed organisational culture, a regulatory or custodial framework, hierarchical and/or authoritarian decision-making, and an extreme power imbalance between officials and their "clients". Thus something like 70% of the study's (relatively small) sample were not drawn from the core public service, and yet De Maria generalises his conclusions to the public service at large.

Finally, it needs to be asked whether De Maria is not inappropriately aligned with the subjects of the study. This piece of polemic appears in the summary at the end of *Unshielding the Shadow Culture*:

> these Australians with impeccable ethical standards must capture our sympathy, but more than that, they must capture our anger. ...[workplace] democracy is on a life-support system — it is nearly dead, propped up by the illusions woven by ignorant and power-obsessed politicians and senior bureaucrats ... In every era a movement comes along, into whose hands is thrust the sacred implements (sic) of democracy ... Whistleblowing, the new workplace dissent movement, could be on the verge of an historical call to protect democracy and further its fragile mission (De Maria 1994a:39).

Any comment from me would be superfluous.

Conclusions

De Maria speculates that with the implementation of the ethics act it may be more difficult for whistleblowers to be believed because of an uncritical assumption that "evil" has thereby been removed from the public sector. De Maria's argument fails to recognise, let alone deal with, the fact that agency codes of conduct under the act will not be externally imposed, and that chief executives are required by the act to ensure that their agency's administrative practices and procedures reflect their code of conduct, and the act. To represent the development of agency codes of conduct under the act as "the cleansing rituals of the ethics movement" is to significantly misread the legislation's extensive requirements for workplace consultation, training and education, and effective implementation.

In relation to whistleblower protection, De Maria assumes that the pre-1993 experiences of a small number of respondents to the Queensland whistleblower study will prove to be reliable indicators of the future behaviour of public sector managers, the Whistleblowers Protection Act notwithstanding. To sustain such a position, I would expect evidence or argument showing that the act is in some way significantly

flawed. It cannot be simply ignored.

Despite De Maria's claims for it, the study demonstrates nothing more than that what has happened to some whistleblowers elsewhere is claimed to have happened to whistleblowers here. That comes as no surprise, but it tells us little about the future for principled disclosure of official wrongdoing under Queensland's now radically changed conditions.

More importantly perhaps, De Maria fails to deal with the thrust of the Whistleblowers Protection Act, which focuses not on the whistleblower, but on the disclosure.

The basis of the Queensland Whistleblowers Protection Act is that whistleblowing is to be understood as a positive contribution to public sector transparency and accountability, and is not an end in itself: it is irrelevant, for this purpose, whether a whistleblower is believed or not, and their state of mind and motivation are likewise irrelevant. The whistleblower serves only as a vehicle for bringing to attention a matter which an appropriate body already has the power to investigate: the only matter which is of relevance is the substance of the disclosure. Neither should it be assumed that a whistleblower will be the subject of reprisal, especially given the protections now available.

De Maria's position is typical of those pro-whistleblowers'-rights lobbyists who focus uncritically on the whistleblower to the exclusion of all else — the "whistleblower-as-the problem" approach. In bringing the focus back to the whistleblower, as the Queensland Whistleblower Study does, it damages the cause of whistleblower protection in Queensland. Focusing on the whistleblower rather than the public interest disclosure encourages the mind-set which enables the demonisation of whistleblowers to continue.

REFERENCES:

Bowman, James 1991. *Ethical Frontiers in Public Management*. Jossey Bass, San Francisco.

Bruce. Willa 1995. "Ideals and conventions — ethics for public administrators", *Public Administration Review*, 55(1).

De Maria, William 1994a. *Unshielding the Shadow Culture*, Queensland Whistleblower Study, Result Release One, Department of Social Work and Social Policy, University of Queensland

— 1994b. *Wounded Warriors*, Queensland Whistleblower Study, Result Release Two, Department of Social Work and Social Policy, University of Queensland.

EARC (Electoral and Administrative Review Commission) 1991a. *Issues Paper — Codes of Conduct for Public Officials*, Queensland Government Printer, Brisbane.

— 1991b. *Whistleblowers Protection*, Queensland Government Printer, Brisbane.

— 1992. *Review of Codes of Conduct for Public Officials*, Queensland Government Printer, Brisbane.

Mackay, Hugh 1989. "The individual — comment", in Ethics Management in the 1990s — Surviving in the Corporate Era (unpublished symposium proceedings), St James Ethics Centre, Sydney.

—1993. *Reinventing Australia*, Angus & Robertson, Sydney.

PCEAR (Parliamentary Committee for Electoral and Administrative Review) 1992. *Report — Whistleblowers Protection*, Queensland Government Printer, Brisbane.

—1993. *EARC Review of Codes of Conduct for Public Officials*, Queensland Government Printer, Brisbane.

Preston, Noel (ed) 1994. *Ethics in the Public Sector: Education and Training*, The Federation Press, Sydney.

Solomon, David 1986. *The People's Palace: Parliament in Modern Australia*, Melbourne University Press, Carlton South, Vic.

Whitton, Howard 1994. "Rediscovery of professional ethics for public officials", in Preston 1994.

Wiltshire, Kenneth 1992. "Reform of the bureaucracy", in Andrew Hede, Scott Prasser & Mark Neylan (eds), *Keeping Them Honest*, University of Queensland Press, St Lucia.