## PUBLIC INTEREST DISCLOSURES AMENDMENT (EXTENSION OF PROTECTIONS) BILL 2013

**Bill introduced on motion by Mr Paul Lynch, read a first time and printed.**

### Second Reading

**Mr PAUL LYNCH** (Liverpool) [10.04 a.m.]: I move:

That this bill be now read a second time.

The object of this bill is to extend the protections from adverse consequences that the Public Interest Disclosures Act 1994 provides for those persons who make disclosures in the public interest about public sector wrongdoing. It does it by a number of ways. It extends those protections to all persons making disclosures, removing the current limitation that only defined public officials can be protected. It expands the type of public sector wrongdoing about which a person can make a disclosure and be protected from adverse consequences. It also extends the requirements to investigate and deal with disclosures about such wrongdoing so as to include the following: scientific misconduct by public authorities or their officers; acts or omissions of public authorities or their officers that create risks to the environment, including the carrying on of activities in an environmentally unsatisfactory manner; and acts or omissions of public authorities or their officers that create risks to public health or safety, or both. It extends the circumstances in which a public interest disclosure made directly to a journalist or member of Parliament will be protected so as to include circumstances when a person could not first report to any other investigating authority or body.

It further protects those who make public interest disclosures against detrimental action being taken or threatened against them in a number of ways. It makes it an offence whenever detrimental action is taken or threatened against a person for reasons that include reprisal for the fact that the person made a disclosure; it allows civil penalties for compensation to be pursued for damages for detrimental action for reasons that include reprisal for making a disclosure; and it allows those civil remedies to be pursued in the Industrial Relations Commission.

The bill is an attempt to improve the protections provided to whistleblowers in New South Wales. It incorporates proposals included in legislation and reports from other jurisdictions. That is entirely appropriate granted the age of the New South Wales legislation and the failure of this Government to make any substantial alteration to the current regime. Indeed, despite the grandiose rhetoric of the Premier and others in his Coalition, this Government has merely nibbled at the edges of current legislation—a point I made in debate on the Public Interest Disclosures Amendment Bill 2013 earlier this year.

The protection of whistleblowers in legislative form has its genesis in the Protected Disclosures Act 1994. That Act is now somewhat dated and would benefit from a rewrite in plain English, frankly. That cannot be done from opposition, but we can take the current legislative provisions and propose improvements based upon them. Since the first introduction of whistleblowing protections in New South Wales much has changed. There has, for example, been the national research project "Whistling While They Work: Enhancing the Theory and Practice of Internal Witness Management in Australia's Public Sector." This involved empirical work in the Commonwealth, New South Wales, Queensland and Western Australian public agencies, including significant survey work. Associated with that was,

among other things, the book in 2008 *Whistleblowing in the Australian Public Sector* edited by Professor A. J. Brown, who was the project leader of Whistling While They Work. I should add that I have found the work of Professor Brown, and my discussions with him, particularly helpful in this field.

Whistleblowing is the public interest reporting of illegal, immoral and illegitimate wrongdoing by public officials. It is important at many levels. It is an essential means for rectifying wrongdoing in the public sector. It is not just about identifying specific instances of wrongdoing; it is also about identifying systemic organisational issues and cultures, and ensuring efficient and effective governmental structures into the future. Some of the findings of Whistling While They Work are worthwhile reporting for this debate. The reporting of wrongdoing is a more common and routine activity than is usually understood. Evidence from public employees shows that, in general, whistleblowing is widely recognised as important to achieving and maintaining public integrity. However, there is a significant inaction rate: 29 per cent of employee survey respondents who had observed very serious or extremely serious wrongdoing did not report it. Rates vary between different agencies. One important finding deserves to be quoted:

> There is little evidence that employees who report wrongdoing are predisposed to conflict or are likely to be disgruntled or embittered employees, driven to report by perverse personal characteristics.

The main reason for not reporting—unsurprisingly—was a belief that no action would be taken or a fear of reprisal, or that management would not protect them. To quote once again:

> These results show that the best ways to ensure that staff will speak up are by demonstrating that if wrongdoing is reported, something will be done and whistleblowers will be supported.

The Whistling While They Work findings contained other useful information: 97 per cent of public interest whistleblowers reported internally to their agency to begin with; only 2.9 per cent reported externally in the first instance; only 9.7 per cent involved an external agency at any stage; less than 1 per cent went to the media at any stage, and that was usually only as a last resort. To quote the report:

> The bulk of whistleblowing begins and ends as an internal process …

Interestingly the report also says this:

> Internal and external whistleblowers indicated high levels of organisation citizenship behaviours further challenging the stereotype of an external whistleblower as a disgruntled, organisationally unhappy employee

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The report shows that it is not inevitable whistleblowers will suffer from their actions. However, 22 per cent of respondents said they were treated badly by management and co-workers. Another interesting conclusion was:

> Contrary to widespread public expectations and the larger logic of whistleblower protection, only one Australian jurisdiction (New South Wales) has legislative provisions dealing with circumstances under which a whistleblower may take a public interest disclosure outside official channels. Even in New South Wales, the provisions are inadequate.
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> While the research has confirmed that public whistleblowing is statistically

> infrequent in comparison with internal whistleblowing, it nevertheless does arise—legitimately. Recognition of this fact is of continuing importance to the successful management of whistleblowing as a process, including to the confidence of employees and the understanding of agencies that if authorities fail to act, a further disclosure may well be justified and protected.

I should add that New South Wales now is not the only jurisdiction with whistleblower legislative provisions, but the report's point stands. The report called for a number of particular actions, of which one recommendation was:

> Legislative action to provide more effective organisation systems and realistic compensation mechanisms, and to recognise public whistleblowing.

Since that report, significant developments have occurred in the Commonwealth and Australian Capital Territory—the Dreyfus report, the Wilkie bill and government legislation in both jurisdictions show what more can be done. This State's legislation has been renamed the Public Interest Disclosures Act. In 2011 the Government introduced with great fanfare amendments to that legislation. The Opposition did not oppose these minor and modest amendments, but they hardly meant a dramatic increase in the degree of protections to whistleblowers. Terminology was changed, the Information Commissioner was added to the Public Interest Disclosures Steering Committee and public authorities had to prepare quarterly reports to the Ombudsman on compliance with legislative obligations.

Earlier this year the Government introduced further equally worthy and just as equally modest amendments that were proposed by the Public Interest Disclosures Steering Committee. These included tweaking the definition of "public official"—something that inevitably will be needed if one adheres to a model of restricting protections to defined public officials. These amendments extended from two years to three years the time in which prosecutions for reprisal actions can be taken, included the Public Service Commissioner on the Public Interest Disclosures Steering Committee, extended protections to whistleblowers whether or not disclosures were made voluntarily, and exempted some public authorities from their public interest disclosure policy requirement to acknowledge receipt of a disclosure and provide a copy of their policy to the whistleblower. Having gone briefly through those two tranches of this Government's amendment, it is worth showing just how minute and modest they were. In the meantime, two things happened.

Significant developments occurred in other jurisdictions that have expanded considerably the types of protection beyond that introduced in this State in 1994. That includes other legislative regimes in other Australian jurisdictions and proposals such as the Dreyfus report at a Federal level. In a sense, other jurisdictions have leapfrogged over the New South Wales position. The second thing is that instances remind us of the inadequacy of present laws. Various revelations indicate a number of situations when public officials did not feel confident in the system to report behaviour we all wish had been reported: the Campbelltown nurse who has been adversely treated for telling the truth, the circumstances surrounding the current inquiry into the NSW State Emergency Service, and the witch-hunt in the Department of Family and Community Services over the leaking of the Ernst and Young report. The other jurisdictions to which I have referred have a range of features that New South Wales does not. Other jurisdictions provide protections for disclosures that are broader than the subject matter of those protected in this State.

One model provides for protection being given to someone disclosing to a member of Parliament or journalist without reporting elsewhere. The Dreyfus report recommended proceedings for detrimental action being pursued in Fair Work Australia. Other places have a

lesser threshold to establish the offence of detrimental action. Protections have been extended explicitly to those who disclose anonymously in other jurisdictions and to those who are not public officials. The current legislation sets out various types of wrongdoing in the public sector about which whistleblowers can make disclosures and, in certain circumstances, be protected from adverse consequences. The types of wrongdoing the legislation originally focused upon were corrupt conduct, maladministration, and serious and substantial waste. The objects clause of the current Act extends also to the disclosure of government information contravention and local government pecuniary interest contravention.

This bill extends those categories further to include disclosures about scientific misconduct by public authorities or their officers and acts or omissions of public authorities or their officers that create risks to public health and safety or to the environment. This expansion modernises the New South Wales regime and is modelled upon provisions or proposals in other jurisdictions and includes a change to the objects clause of the bill and to the bill's long title, and the Environment Protection Agency in the scheme of the bill as an agency to which disclosures can be made and from which protections flow. Logically, provision is made for the Environment Protection Agency to be represented on the Public Interest Disclosures Steering Committee. The categories of whistleblowers to which protections are available are expanded. One of the perennial issues in this area relates to how to define "public official". The Government previously moved amendments to expand this category. As I said in the second reading debate, no doubt the need will arise for further amendments. As soon as we think we have a definitional solution and legislate it, another problem will present itself of yet someone else slipping through the net of protections.

The Dreyfus report grappled with this by proposing a solution that decided whether a disclosure was protected only after the disclosure was made—an approach with manifest problems. An obvious solution is to remove the definitional issue altogether and provide protections to anyone who makes a disclosure. This is the approach of some other jurisdictions. Obviously, this will provide the protections of the Act to those who are not, in anyone's view, public officials. I do not see any particular difficulty in that, although it may mean that some adverse consequences visited upon whistleblowers simply are not applicable to people in this category. The criticism of such an approach is that it moves away from the primary focus of protecting public sector whistleblowers. I understand that, but as the wrongdoing to be disclosed remains public sector wrongdoing, the vast majority of whistleblowers will still be public officials. Extending the protections to non-public officials is not undesirable and will avoid people being unreasonably excluded by definitional problems.

The only other criticism is that it will encourage unmeritorious disclosure. That means simply that investigative agencies need to be robust enough to deal with disclosures properly and unmeritorious disclosures accordingly, which should be the case. The other respect in which this bill expands the categories of whistleblowers is by extending the protections explicitly to those who complain anonymously. In a sense, they may well be the category most needing the protection of the regime. If someone is sufficiently apprehensive of the consequences of disclosure to make a disclosure only anonymously, the protections of the regime should be available. This bill modifies the offence of taking detrimental action. At present, the offence is made out if the making of the disclosure was the substantial reason for the detrimental action to be taken. This bill will alter that situation so that an offence occurs whenever detrimental action is taken against a person for reasons that include the fact the person made a disclosure. A similar change is made in relation to civil remedies for compensation. The bill

allows also for these civil remedies to be pursued in the Industrial Relations Commission.

Referring briefly to the main provisions of the bill, the bulk of it amends the Public Interest Disclosure Act. These amendments are contained in schedule 1 to the bill. The long title of the Act is amended to reflect the provisions of the bill, as are the objects of the bill. Of course, that reflects the substantial nature of the changes in this bill. Item [4] of schedule 1 amends the definition provisions of the Act, reflecting the expanded range of public misconduct concerning which whistleblowing is protected and involving the Environment Protection Agency. Item [13] of schedule 1 increases the membership of the Protected Disclosures Steering Committee. New section 7A expands the category of those who can make a disclosure to avoid definitional problems. Further amendments consistent with this appear in other sections.

Section 11 is amended to provide for disclosures to the Ombudsman, not just of maladministration but also relating to public health. Section 19 concerning disclosure to a member of Parliament or a journalist is replaced. Under this bill, a whistleblower is protected from disclosure to a journalist or a member of Parliament if official channels have been exhausted or if there are exceptional circumstances. The provisions relating to the exhaustion of official channels largely conform to the present regime. Exceptional circumstances allow a direct disclosure to a journalist or member of Parliament if there is a significant risk of detrimental action to the whistleblower by using normal official channels and if it would be unreasonable to do so. Section 20 is amended by item [33] of schedule 1 to set prosecutions for detrimental action at a more sensible level. Proposed section 20 (1A) provides:

> In determining whether a reason that detrimental action was taken or threatened against a person was in reprisal for that person making a public interest disclosure it is sufficient if such reprisal was one of the reasons for taking a threatening detrimental action and it does not matter that there were other reasons for taking detrimental action.

Subsection 1B reverses the onus of proof on the defendant. Section 20AA deals with disciplinary action against a public official involved in detrimental action. Item [35] of schedule 1 provides jurisdiction to the Industrial Relations Court for action of detrimental action. Part 7 is inserted into the Act to deal appropriately with aspects of retrospectivity. Schedule 2 deals with the amendment of other legislation necessarily following from the purposes of the bill. Speaking out against wrongdoing in the public sector—blowing the whistle—is important, critical for the transparency of government and crucial for democratic accountability. It also can be very risky. It is important that laws mitigate the risk to the whistleblower.

The law protecting whistleblowers in New South Wales now looks distinctly moth-eaten. Several lots of amendments were made recently, but not much by way of increasing protections for whistleblowers. Other jurisdictions have strengthened their frameworks and New South Wales has been leapfrogged by those evolutions. We should aim to enshrine in agencies and legislation the principle of "if in doubt, can report".

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Whilst this does not propose an entire rewriting of the bill, there are substantial changes that can be introduced to the current New South Wales regime. Disclosable conduct about which

whistleblowing is protected should be more broadly defined. It should be made clear that protections extend to disclosures made anonymously. The current New South Wales legislation protects a whistleblower who discloses information directly to a journalist or to a member of Parliament, only if a complicated and lengthy process is followed. Professor A. J. Brown has been critical of this State's "excessively high threshold". Certainly direct disclosures raise issues concerning procedural fairness, confidentiality and the importance of internal agency disclosure. However, the current legislative process should be improved. A whistleblower should be able to disclose information directly to a journalist or to a member of Parliament where there is a risk of detrimental action and it is unreasonable to be reported normally under the Act. The criminal offence of taking detrimental action against a whistleblower is established currently where the action is substantial reprisal for the disclosure. That is too high a bar. It should rather be established if the disclosure was a contributing factor to detrimental action.

Proceedings for damages for detrimental action should be able to be pursued in the Industrial Relations Commission rather than civil courts. Some jurisdictions have no restrictions about who can claim protections under a scheme. New South Wales legislation restricts the claimed people defined as public officials. That is justified on the basis that those commonly regarded as public officials are more likely to make the most valuable disclosures and need the most protection. While that is certainly true it does not resolve the difficulty of finding a broad and adequate definition. New South Wales legislation was amended earlier this year to try to resolve the problem of categories of whistleblowers falling through the cracks.

The difficulty with such definitions is that neither the Attorney General nor Parliamentary Counsel are sufficiently wise to contemplate every conceivable circumstance that may arise. A better alternative is to avoid the definitional imbroglio altogether. Of course the existing legislative provision on false claims remains. Adequate measures to protect whistleblowers are one part of the integrity framework necessary in a contemporary society. They are, in a sense, part of what John Keane several years ago called monitory democracy. It is important that we get them right and that includes making them efficient and contemporary. That is what this bill aims to do and I commend it to the House.

**Debate adjourned on motion by Mr Daryl Maguire and set down as an order of the day for a future day.**