

EXPLANATORY STATEMENT

Public Interest Disclosure Amendment (Conduct of Investigations) Standard 2014

Issued by the Commonwealth Ombudsman

Background

The *Public Interest Disclosure Act 2013* (the PID Act) commenced on 15 January 2014.

The PID Act's primary purpose is to establish a legislative scheme for the investigation of allegations of wrongdoing in the Commonwealth public sector, and to provide protections for both current and former public officials who make certain types of 'disclosures'.

Subsection 74(1) of the PID Act gives the Commonwealth Ombudsman (the Ombudsman) the power to determine standards in relation to certain matters, including the conduct of investigations under the PID Act. Consequently the Ombudsman determined the *Public Interest Disclosure Standard 2013* (the Standard). Part 3 of the Standard deals with the conduct of investigations.

Commencement of the *Public Governance, Performance and Accountability Act 2013* (the PGPA Act) changes the framework for dealing with fraud related matters for Commonwealth bodies covered by that Act. Under the PGPA Act there will be no legislative instrument called the 'Fraud Control Guidelines'. This will be replaced by a requirement to act in accordance with rules made for the purposes of fraud under the PGPA Act. Consequential amendments have been made to the PID Act to reflect those changes, requiring the Standard to be amended by this legislative instrument (the Amendment Standard).

Legislative authority

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

The Ombudsman relies upon the authority conferred by subsection 33(3) to determine the Amendment Standard.

Purpose and operation of the Amendment Standard

The purpose of the Amendment Standard is to amend Part 3 of the Standard that deals with the conduct of investigations, to reflect the changes made to section 53 of the PID Act by sections 86 to 89 of the *Public Governance, Performance and Accountability (Consequential and Transitional) Act 2014*.

Part 3, as amended, will continue to operate alongside existing investigation procedures in place for dealing with fraud related matters and alleged breaches of the Australian Public Service Code of Conduct (see subsections 53(4) and (5) of the PID Act). The Amendment Standard operates to remove references to the Commonwealth Fraud Control Guidelines in Part 3 of the Standard, and replaces them with references to the rules relating to fraud for the purposes of the PGPA Act (Subsection 53(4) of the PID Act).

Consultation

Subsection 74(2) of the PID Act requires the Ombudsman to consult with the Inspector-General of Intelligence and Security (the IGIS) before determining any standards under subsection 74(1). The IGIS was consulted on the Amendment Standard for the purposes of complying with this provision.

Regulatory impact

The Office of Best Practice Regulation (the OBPR) has advised the Ombudsman that as the change effected by the Amendment Standard is machinery in nature, no further analysis of it (in the form of a Regulation Impact Statement) is required.

Statement of compatibility with human rights

The Ombudsman has considered whether or not the Amendment Standard is compatible with human rights for the purposes of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A relevant statement of compatibility with human rights is attached.

NOTES ON THE INSTRUMENT

Section 1—Name of standard

Section 1 provides that the name of the Standard is the *Public Interest Disclosure Amendment (Conduct of Investigations) Standard 2014*.

Section 2—Commencement

Section 2 provides that the Standard will commence on the day after it is registered.

Section 3—Authority

Section 3 identifies the legislative authority for the determination of the Standard as being section 74 of the *Public Interest Disclosure Act 2013*.

Section 4—Schedule 1

Section 1 repeals subsection 8(2) of the *Public Interest Disclosure Standard 2013* and replaces it to provide that, despite the application of Part 3 of the Standard to principal officers conducting an investigation of a disclosure, in cases where a principal officer is required to act in accordance with any rules relating to fraud that are made for the purposes of the *Public Governance, Performance and Accountability Act 2013*, the Standard will apply only to the extent that it is not inconsistent with those rules. In other words, any rules made under the *Public Governance, Performance and Accountability Act 2013* are to be given preference when conducting an investigation of an alleged case of fraud.

Section 2 repeals Note 1 to subsection 8(2) of the *Public Interest Disclosure Standard 2013*, and replaces it with a new Note 1 that explains the legislative authority that requires principal officers to act in accordance with any rules relating to fraud (Subsection 53(4) of the PID Act).

Section 3 adds a new Part 6 which contains transitional provisions. Part 6 provides for the continued application of section 8 of the *Public Interest Disclosure Standard 2013* to investigations not completed prior to 1 July 2014. That is to say, the Standard in its unamended form will continue to apply to investigations where, by virtue of section 87 of the *Public Interest Disclosure Act 2013*, a principal officer is still required to act in accordance with the Commonwealth Fraud Control Guidelines.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Public Interest Disclosure Amendment (Conduct of Investigations) Standard 2014

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

This Legislative Instrument amends Part 3 of the *Public Interest Disclosure Standard 2013* (the Standard) relating to the conduct of investigations under the *Public Interest Disclosure Act 2013* (the PID Act).

The Standard, including Part 3, is largely mechanical or procedural in nature. It addresses such things as what a principal officer needs to include in his or her procedures for dealing with internal disclosures (for example, requirements around contact with disclosers, decision-making and record-keeping), what a principal officer of an agency needs to do when interviewing a person during an investigation, and what details need to be included in a report of an investigation that is conducted under the Act.

As contemplated by the PID Act, the Standard is effectively directed at principal officers of agencies that are affected by the operation of the PID Act—namely, agencies that are, broadly speaking, related to or managed by the Australian Government. The Standard does not impose any requirements upon individual citizens in a private capacity. The amendment to Part 3 of the Standard, made by this legislative instrument, does not alter the mechanical or procedural nature of the Standard.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

Colin Neave
Commonwealth Ombudsman