

EXPLANATORY STATEMENT

Issued by authority of the Commonwealth Ombudsman

Public Interest Disclosure Act 2013

Public Interest Disclosure Amendment (Review) Standard 2023

Section 74(1) of the *Public Interest Disclosure Act 2013* (the PID Act) provides that the Commonwealth Ombudsman may, by legislative instrument, determine standards in relation to specific matters, including procedures concerning internal disclosures, the conduct of and reporting on investigations under the PID Act, and annual reporting.

Purpose and operation of the Instrument

The purpose of the *Public Interest Disclosure Amendment (Review) Standard 2023* (the Amendment Instrument) is to ensure the *Public Interest Disclosure Standard 2013* (the Standard) is consistent with the PID Act as amended by the *Public Interest Disclosure Amendment (Review) Act 2023* (the Amendment Act). Specifically, the Amendment Instrument ensures that the standards are updated to reflect changes to notification and reporting obligations in the PID Act as amended by the Amendment Act, as well providing for additional record-keeping obligations and some minor technical amendments.

The Amendment Act commences by Proclamation on 1 July 2023 to coincide with the commencement of the National Anti-Corruption Commission (the NACC). The Amendment Instrument's commencement is contingent upon the commencement of the amendments made by the Amendment Act.

The Amendment Instrument enables the Ombudsman, in consultation with the Inspector-General of Intelligence and Security (the IGIS), to provide agencies covered by the PID Act with guidance intended to support good administration of the PID scheme. Having these changes in place on 1 July 2023 will support agencies understanding of and compliance with notification and reporting obligations under the amended PID Act.

Subsection 74(3) of the PID Act requires the Ombudsman to ensure that standards are in force under each of paragraphs (1)(a), (b) and (c) at all times after the commencement of that section. This requirement is met by the Standard and the Amendment Instrument.

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 provided by subsection 33(3) to amend the Standard.

Consultation

In accordance with subsection 74(2) of the PID Act, the Ombudsman consulted the IGIS before determining the Standard.

On 7 June 2023, the Ombudsman consulted all 176 PID agencies on a limited circulation exposure draft of the Amendment Instrument. On 9 June 2023, at the PID Community of Practice meeting, the Office of the Commonwealth Ombudsman facilitated a question-and-answer session with attending PID agencies. Consultation closed on 14 June 2023, with written comments concerning editorial and other minor and technical matters received from 3 PID agencies.

Public consultation on the exposure draft was not necessary, as the Amendment Instrument only concerns obligations on PID agencies.

The Amendment Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*. The Amendment Instrument is subject to disallowance.

Details of the Amendment Instrument are set out in [Attachment A](#).

A statement of Compatibility with Human Rights is at [Attachment B](#). The Amendment Instrument does not raise any human rights issues.

The Office of Impact Analysis (OIA) has been consulted (OIA ref: OIA23-05091) and agreed that the changes effected by the Amendment Instrument are unlikely to have more than minor impact and so an Impact Analysis is not required.

Details of the *Public Interest Disclosure Amendment (Review) Standard 2023*

Section 1 – Name

This section provides that the name of the instrument is the *Public Interest Amendment (Review) Standard 2023* (the Amendment Instrument).

Section 2 – Commencement

The Amendment Instrument commences on the later of, the start of the day after the instrument is registered on the Federal Register of Legislation and immediately after the commencement of Schedule 4 to the *Public Interest Disclosure Amendment (Review) Act 2023* (the Amendment Act). The intention is to ensure that the Amendment Instrument cannot commence until after the commencement of the amendments in the Amendment Act, including the consequential amendments which relate to the National Anti-Corruption Commission (NACC) in Schedule 4 to the Amendment Act.

Section 3 – Authority

The Amendment Instrument is made under subsection 74(1) of the *Public Interest Disclosure Act 2013* (the PID Act).

Section 4 – Schedules

This section provides that each instrument that is specified in the Schedules to this Amendment Instrument are amended or repealed as set out in the applicable items in the Schedules, and any other item in the Schedules to this Amendment Instrument has effect according to its terms.

Schedule 1 - Amendments

Items 1, 2, 3, 5, 13 and 16

The items amend the handful of references to “this standard” or “standard” throughout the Amendment Instrument to refer to “this instrument” or “instrument”. This change provides consistency with current drafting practice and is minor and technical in nature.

Items 4 and 6

For consistency with modern drafting standards, terms that are defined in the Standard are repealed and replaced with a note to section 4 directing users to the relevant definitions in the PID Act. The affected terms include “another law or power”, “disclosure investigation”, “IGIS (short for the Inspector-General of Intelligence and Security)”, “investigative agency”, “stop action direction under the *National-Anti Corruption Commission Act 2022*” and “separate investigative power”. This change is minor and technical in nature.

Item 7

Section 5 of the Standard requires principal officers to ensure that their agency provides appropriate means for officials to contact authorised officers. The current note to section 5 advises users on how this could be achieved, including by the publication of contact details of authorised officers on agency websites. Item 7 repeals and replaces this note.

A new “Note 1” is inserted to emphasise that agency websites should make clear how both current and former officials can contact authorised officers of the agency. This change will make the information in the note consistent with the Office of the Commonwealth Ombudsman’s current best practice advice for agencies.

A new “Note 2” is inserted which points users to the *Agency Guide to the Public Interest Disclosure Act 2013* (the Agency Guide) on the Office of the Commonwealth Ombudsman’s website for further guidance. This replaces the previous note text which reproduces the text of the Agency Guide and therefore future proofs the note against changes to the Agency Guide’s text.

Item 8

The item repeals the existing section 6, replaces it with a new section 6 and adds a new section 6A.

Section 6 currently requires that procedures established by a principal officer under subsection 59(1) of the PID Act (to become subsection 59(3) following commencement of the Amendment Act) must require an authorised officer to keep a written record of certain matters when they make a notifiable decision to allocate a disclosure to one or more agencies. This includes keeping a written record of the decision, the reasons for the decision and the consent of the recipient agency. Section 6 currently also requires that procedures established by a principal officer must require that an authorised officer provide notice to a discloser of matters in section 44 of the PID Act as soon as reasonably practicable and that records are kept of this notification.

This item repeals section 6 and replaces it with a new section 6 to establish new record-keeping obligations that reflect changes to the PID Act, as amended by the Amendment Act. These record-keeping obligations concern allocation decisions under the PID Act. Relevantly, the PID Act, as amended, requires the authorised officer to:

- notify disclosers and the Ombudsman or the Inspector-General of Intelligence and Security (the IGIS) (as appropriate) of decisions to allocate, reallocate or not allocate a disclosure
- notify the Ombudsman or the IGIS (as appropriate) where the authorised officer is prevented from allocating a disclosure because of a stop action direction issued by the NACC, and
- obtain the consent of another agency if the authorised officer proposes to allocate a disclosure to that agency, unless the authorised officer belongs to an investigative agency, in which case the authorised officer is only required to consult with the other agency.

The new section 6 extends the record keeping requirements that apply to decisions to allocate a disclosure to also apply to decisions to reallocate or not allocate a disclosure, and circumstances where allocation is prevented because of a stop action direction issued by the NACC Commissioner. The new section 6 also requires that procedures established by a

principal officer under subsection 59(3) of the amended PID Act must require an authorised officer to keep a written record of:

- the allocation decision—including allocation, reallocation, or a decision not to allocate, and reasons for the decision
- any consultation with and, if required, the consent of the recipient agency prior to an authorised officer allocating a disclosure to another agency, and
- in the case of a stop action direction issued by the NACC Commissioner that prevents allocation to an agency, the details of the stop action direction, including when the direction was made and ends.

The new section 6A provides that the procedures established by a principal officer under subsection 59(3) of the amended PID Act must also require that an authorised officer retain appropriate records relating to notice to disclosers of an allocation decision, including a decision to reallocate or not allocate a disclosure, and circumstances where allocation is prevented because of a stop action direction issued by the NACC Commissioner. Under the new section 6A, procedures established by a principal officer under subsection 59(3) of the amended PID Act must require an authorised officer to keep a written record of:

- whether the discloser was informed of the decision, and if not the reasons why
- the circumstances of that notice, including the day and time the discloser was notified, the means by which the discloser was notified and the content of the notification, and
- in the case of a stop action direction issued by the NACC Commissioner, whether the relevant principal officer considered notice to the discloser of the stop action direction reasonably practicable or appropriate.

The repeal of the existing section 6 also removes the requirement on an authorised officer to inform a discloser of certain matters as soon as reasonably practicable, as this requirement will be included in the PID Act following commencement of the Amendment Act.

Items 9 and 18

These items amend existing references to sections in the PID Act which are amended by the Amendment Act. Specifically, the current reference in section 7 of the Standard to subsection “59(1)” of the PID Act is changed to subsection “59(3)”, consistent with item 54 of the Amendment Act. Additionally, the current reference in paragraph 10(1)(d) of the Standard to section “57” of the PID Act is changed to “Part 2” of the Act. The changes are minor and technical in nature.

Items 10, 11, and 14

Under the Standard, a *disclosure investigation* means: (a) an investigation under Part 3 of the PID Act; or (b) an investigation, in relation to a disclosure that is allocated under Division 1 of Part 3 of the PID Act, by an investigative agency under a separate investigative power.

Item 7 of Schedule 1, Part 2 of the Amendment Act changes the location references within the definition of *disclosure investigation* to: (a) an investigation under Division 2 of Part 3 of the PID Act; or (b) an investigation, in relation to a disclosure that is allocated under Division 1 of Part 3 of the PID Act, by an investigative agency under a separate

investigative power. This is because Division 2 is concerned with the obligation to investigate disclosures.

The Standard is amended to be consistent with the new definition. This change is minor and technical in nature.

Item 12

A minor and technical amendment of subsection 8(2) of the Standard ensures the term *disclosure investigation* is used instead of “investigation of a disclosure” for consistency with defined terms in both the Standard and the PID Act.

Item 15

Note 2 to section 8 of the Standard currently provides that this standard does not apply to an investigative agency which uses a separate investigative power to investigate a disclosure, as defined by the PID Act.

Item 15 amends Note 2 in section 8 to remove the references to the PID Act which were previously included to alert users to the meaning of the terms “investigative agency” and “separate investigative power” for the purposes of section 8.

The terms “investigative agency” and “separate investigative power” are now signposted in the new note that is inserted by Item 4 of the Amendment Instrument. The change is minor and technical in nature.

Item 17

Item 17 amends section 9 of the Standard to refer to the power to refer the disclosure for investigation under “another law or power” consistent with new paragraph 48(ga) and new paragraph 50(2)(b), both inserted by the Amendment Act (Schedule 1, items 19 and 23).

Item 19

Part 5 of the Standard concerns the provision of information and assistance from agencies to the Ombudsman to support the Ombudsman’s annual reporting function under the PID Act. Item 19 amends sections 14 and 15 of Part 5 of the Standard to reflect the:

- Ombudsman’s new obligation under section 76A of the PID Act to prepare six-monthly reports to Parliament for the period 1 July to 31 December each year, and
- additional information required to be provided by principal officers to the Ombudsman to assist in the preparation of their reports to Parliament, consisting of an annual report under section 76, and six-monthly reports under section 76A.

Section 15 now requires the principal officer of an agency to provide the following additional information to the Ombudsman for their reporting:

- Number of disclosures allocated to the agency during the relevant reporting period (new subparagraph 76(2)(a)(ia) of the PID Act, inserted by item 66 of the Amendment Act).

- Time taken to conduct those disclosure investigations (new subparagraph 76(2)(a)(iiia) of the PID Act, inserted by item 67 of the Amendment Act).

Item 20

Item 20 inserts a new section 17 into the Standard which provides the application of amendments made by the Amendment Instrument, notably amendments to Part 2 and the repeal and substitution of Part 5. The new section 17 will make clear that:

- the changes to Part 2 of the record keeping requirements on authorised officers to be included in agency PID procedures apply to allocation decisions and stop action directions that are made or given after commencement of the Amendment Instrument, and
- the changes to the information and assistance provisions in Part 5 will only be enlivened when the first reports are due under the amended PID Act, at least 6 months after commencement.

Statement of Compatibility with Human Rights

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

Public Interest Disclosure Amendment (Review) Standard 2023

The *Public Interest Disclosure Amendment (Review) Standard 2023* (the Amendment 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

Section 74(1) of the *Public Interest Disclosure Act 2013* (the PID Act) provides that the Commonwealth Ombudsman may, by legislative instrument, determine standards in relation to specific matters, including procedures concerning internal disclosures, the conduct of and reporting on investigations under the PID Act, and annual reporting.

The Amendment Instrument amends the *Public Interest Disclosure Standard 2013* (the Standard), which is made under section 74(1) of the PID Act).

The purpose of the Amendment Instrument is to ensure the Standard is consistent with the PID Act as amended by the *Public Interest Disclosure Amendment (Review) Act 2023* (the Amendment Act). Specifically, the Amendment Instrument ensures that the standards are updated to reflect changes to notification and reporting obligations in the PID Act as amended by the Amendment Act, as well providing for additional record-keeping obligations and some minor technical amendments.

The Amendment Act is intended to commence by Proclamation on 1 July 2023 to coincide with the commencement of the National Anti-Corruption Commission. The Amendment Instrument's commencement is contingent upon the commencement of the amendments made by the Amendment Act.

The Amendment Instrument enables the Ombudsman, in consultation with the Inspector-General of Intelligence and Security, to provide agencies covered by the PID Act with complementary guidance intended to support good administration of the PID scheme. Having these changes in place on 1 July 2023 will support agencies understanding of and compliance with notification and reporting obligations under the amended PID Act.

The Amendment Instrument is of a minor technical and procedural nature, and the requirements it imposes are on the agencies covered by the PID Act to support good administration of the PID scheme, not upon individual citizens in a private capacity. Therefore, the Amendment Instrument does not engage any of the applicable rights or freedoms.

Human rights implications

The Amendment Instrument does not engage any of the applicable rights or freedoms.

Conclusion

The Amendment Instrument is compatible with human rights as it does not raise any human rights issues.