



Our reference: D2013/009231

Julie Dennett
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Ms Dennett

Inquiry into the Public Interest Disclosure Bill 2013

Thank you for the invitation to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee's (Committee) inquiry into the Public Interest Disclosure Bill 2013 (Bill). The Office of the Australian Information Commissioner (OAIC) welcomes the opportunity to provide comments on the Bill for the Committee's consideration.

As you would be aware, the OAIC is an independent statutory agency, with advisory and regulatory responsibilities relating to privacy and freedom of information (FOI), and an advisory role with respect to open government and government information management.

The OAIC supports the introduction of a legislative framework that will encourage and facilitate reporting of wrongdoing by public officials in the Commonwealth public sector. Such a scheme will further strengthen Australia's commitment to transparent and accountable government.

The public interest disclosure (PID) scheme established by the Bill could be relevant to the OAIC in three capacities:

- as an agency that may be prescribed as an investigative agency to receive PID referrals (and complaints)
- as the national privacy regulator, and
- as an Australian Government agency that can be the subject of public interest disclosures.

The OAIC as an investigative agency

The Bill provides that an agency can be prescribed by PID rules made under cl 83 as an 'investigative agency' for the purposes of the Act (see cl 4). It is possible that the OAIC will be prescribed as an investigative agency, bearing in mind that it falls within the existing

jurisdiction of the OAIC to investigate complaints that fall within the definition of 'disclosable conduct' in cl 29. For example:

- under the *Privacy Act 1988* (Cth) (Privacy Act) the OAIC could investigate a complaint that a public official had wrongly accessed or misused personal information, and
- under the *Freedom of Information Act 1982* (Cth) (FOI Act) the OAIC could investigate a complaint that a public official had acted improperly to thwart an FOI request or to prevent disclosure of non-exempt information.

If the OAIC is prescribed as an investigative agency it will be able to receive a PID directly (cl 34(1)(d)) or on referral from another agency (cl 43).

The OAIC notes that the Bill establishes a flexible framework for investigation of matters that it may receive. For example:

- The OAIC would have discretion to investigate the PID under the PID Act, or under other legislation which grants relevant investigative powers to the OAIC, particularly the FOI Act and the Privacy Act (cl 49).
- The OAIC could decide not to investigate, or to terminate an investigation in specific circumstances (cl 48).
- If a matter is not investigated under the PID Act, the OAIC could nevertheless use the PID information in other investigative work; for example under the Privacy Act (cl 48(2)).
- The investigation would be conducted as the OAIC 'thinks fit' (cl 53).
- The OAIC could adopt the findings of an investigation by another agency (cl 54).
- Further guidance on the conduct of investigations under the PID Act could be provided in standards prescribed by the Ombudsman by legislative instrument (cl 74).

Interaction of the PID Act and other legislation administered by the OAIC

Working solely from the Bill, the OAIC is not entirely clear as to how the PID Act would interact with the FOI Act and the Privacy Act insofar as investigations of disclosable conduct are concerned. It may be that this uncertainty could be clarified by the guidance to be provided by the Commonwealth Ombudsman.

Clause 49(1) of the Bill speaks of an investigative agency acting under 'a separate investigative power in relation to the disclosure', rather than under the PID Act. The investigation powers conferred by the Privacy Act are premised upon a complaint being received under the Privacy Act. For example:

- s 40(1)(b) provides that the Information Commissioner shall investigate an act or practice that is the subject of a privacy complaint under s 36 of the Privacy Act
- s 40(1A) provides that the complaint should first be made to the respondent before it is investigated by the Commissioner, and

- s 44 confers investigation powers that can be exercised in relation to ‘an investigation under this Division’ (of the Privacy Act).

The FOI Act similarly refers to the OAIC obtaining information ‘relevant to an investigation under this Part’ (of the FOI Act) (s 79(1)).

The interaction of the different Acts could be clarified if the PID Act provided that an issue referred to the OAIC under that Act shall be regarded for investigation purposes as a complaint received under the FOI Act or Privacy Act. There may be a need for supplementary provisions to do with finalisation and reporting of investigations.

The OAIC is also unclear as to how it would be required to proceed if, during the course of an investigation, it transpired that some aspects of an allegation of disclosable conduct fell under the FOI or Privacy Acts, but others did not. Would the OAIC still have authority to continue with the entirety of the investigation, partly under the PID Act and partly under the FOI or Privacy Act? Or would concurrent investigations by two or more agencies be required?

The choice of which Act to proceed under could turn on the investigation powers needed for an investigation. The investigation powers conferred by the FOI and Privacy Acts are more extensive than those conferred by the PID Act. For example, under the FOI Act the OAIC can require that documents be produced for the purposes of an investigation (s 79) and that evidence be given under oath or affirmation (s 83). See also ss 44 and 45 of the Privacy Act. There are no similar powers that would be conferred by the PID Act.

The OAIC also draws the Committee’s attention to cl 52(1) of the Bill which provides that ‘an investigation under this Division must be completed within 90 days after the relevant disclosure was allocated to the agency concerned’; the period can be extended (cl 52(3)).

Presumably that time limit applies only if the investigation is conducted under the PID Act. If the investigative agency chose instead to conduct the investigation under its ‘separate investigative power’, the time limit would not apply.

We draw attention to this difference as the OAIC would experience difficulty (under current workloads) in completing all investigations within that presumptive period of 90 days. Quarterly statistics published on the OAIC website indicate that there is currently a substantial delay in allocation of new complaints and applications, and finalisation of matters.¹ This is due to budgetary constraints, and a steady annual increase in OAIC work.

The OAIC could only complete PID investigations within 90 days if they took priority over all other OAIC work, including FOI and privacy complaints and applications for Information Commissioner (IC) reviews. We understand there will be no separate or additional funding to the OAIC to enable it to undertake PID work.

¹ See the OAIC quarterly statistics, available at www.oaic.gov.au/about/corporate.html#oaic_stats, and OAIC Annual Reports available at www.oaic.gov.au/publications/reports.html#annual_reports.

The OAIC as the national privacy regulator

As the national privacy regulator, the OAIC is broadly concerned with promoting responsible privacy practices, and ensuring proper handling of personal information in accordance with the Privacy Act and other legislation.

The OAIC takes a particular interest in whether the Bill provides adequate privacy protection, and notes that specific privacy measures are contained in the Bill. For example:

- A disclosure can be made anonymously (cl 28(2)).
- It will be an offence to disclose information that identifies a person as someone who has made a PID (cl 20).
- An external disclosure may not include any more information than is 'reasonably necessary in the public interest' (cl 26(2)(f)).
- The Bill preserves the operation of restrictions on publication that are contained in other legislation, many of which aim to protect an individual's personal information from public disclosure (cl 40).
- The principal officer of an investigative agency must establish a confidential investigative process (cl 59(1)(b)).

We also note that the explanatory memorandum to the Bill states that:

The Bill also contains measures to ensure the content of public interest disclosures is protected. In some cases public interest disclosures will contain personal information relating to other public officials, and so it is appropriate that this information be protected (page 6).

It is unclear as to which specific provisions of the Bill that statement in the explanatory memorandum is referring to. It would reinforce the objective of the PID scheme of protecting personal information against unwarranted public disclosure if the explanatory memorandum provided a more specific reference to the relevant provisions of the Bill.

Privacy protection could be strengthened by other minor changes to the PID scheme, including the following:

- The obligation on a principal officer (cl 59(1)(b)) to establish procedures that provide for confidentiality of investigative processes could refer specifically to the need to ensure appropriate protection of personal information consistent with the Privacy Act and other legislation.
- The Ombudsman's power to prescribe standards for investigations (cl 74) could include a similar express reference to privacy.
- The explanatory memorandum could specifically explain the interaction of the PID Act with the Privacy Act, and in particular, note the definition of 'personal information' as set out in s 6 of the Privacy Act.

These measures are particularly important because the Privacy Act will not apply to the public official making the PID, as the Privacy Act does not cover individuals acting in a personal capacity. The Privacy Act is likely to apply only to the agency receiving or investigating the PID.

The application of the PID Act to the OAIC as a government agency

The OAIC accepts that, as an Australian Government agency, it will be open to a present or former public official to make a PID about the conduct of the OAIC or its officers. However, the application of the PID Act to the OAIC could be affected by cl 32(1)(c) which provides that conduct is not disclosable conduct if it is conduct of 'a member of a tribunal ... when exercising a power of the tribunal'.

The term 'tribunal' is not defined in the Bill or in the *Acts Interpretation Act 1901* (Cth). In contrast, the term is defined in the legislation of some other jurisdictions. The Australian Capital Territory *Legislation Act 2001* provides that 'tribunal' includes 'any entity that is authorised to hear, receive and examine evidence'.² Section 2 of The Victorian *Administrative Law Act 1978* provides that:

tribunal means a person or body of persons (not being a court of law or a tribunal constituted or presided over by a Judge of the Supreme Court) who, in arriving at the decision in question, is or are by law required, whether by express direction or not, to act in a judicial manner to the extent of observing one or more of the rules of natural justice.³

The OAIC, along with many other Australian Government agencies that have coercive investigation and hearing powers, may fit within both those definitions. The OAIC also has hearing and determinative functions that fit within the popular notion of a tribunal.

If the OAIC is a tribunal for the purposes of the PID Act, it would not be open to a present or former public official to make a PID against the Information Commissioner, and perhaps the Privacy and FOI Commissioners. The same result could apply to senior officers of other Australian Government agencies that have statutory powers to conduct investigations.

If this is not the desired policy outcome, the matter could be clarified by providing that cl 32(1)(c), exempting tribunal members from the operation of the PID Act, refers only to tribunals prescribed in regulations made under the Act.

I trust that these comments are of assistance to the Committee. If you have any questions, please do not hesitate to contact

[Redacted]

² See Dictionary, Part 1 'Meaning of commonly-used terms' in the *Legislation Act 2001* (ACT) available at: www.legislation.act.gov.au/a/2001-14/default.asp.

³ Available at: www.austlii.edu.au/au/legis/vic/consol_act/ala1978204/s2.html.

Yours sincerely

Prof. John McMillan
Australian Information Commissioner

30 April 2013