



**Submission by the
Commonwealth Ombudsman**

**INQUIRY INTO THE
PUBLIC INTEREST DISCLOSURE BILL 2013**

**BY THE STANDING COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS**

Submission by the Commonwealth Ombudsman, Colin Neave
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INTRODUCTION

The Commonwealth Ombudsman ensures that the Australian Government's administration is fair and accountable by:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- developing policies and principles for accountability
- assisting people to resolve complaints about government administrative action.

The Commonwealth Ombudsman holds a unique position in the Australian administrative law landscape and is provided with an understanding of many individual experiences of members of both the public and public sector, who are dissatisfied with the way that government has dealt with their issue. We have a particular interest in both the Australian community's access to Government and the accountability mechanisms within Government that ensure administrative action is fair and appropriate.

The Public Interest Disclosure Bill 2013 will promote the integrity and accountability of the Commonwealth public sector through the protection of disclosers and creation of a framework to ensure timely and effective investigation of serious matters. It also provides indirect benefits to the community by helping to ensure the efficient, effective and ethical delivery of government services; thereby promoting confidence in the Australian public sector. Direct benefits to Commonwealth public sector agencies include:

- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- developing policies and principles for accountability
- maintaining a positive corporate reputation
- avoiding financial loss and inefficiency
- improving accountability
- early identification of unacceptable behaviour and flawed or weak systems that need correction
- early proactive management of unacceptable behaviour and/or flawed systems, thereby reducing potential of financial loss, criticism or legal action
- reducing the risks to the environment, health or safety of employees or the community.

This purpose, and our role within the scheme, will complement our oversight role in relation to review of administrative action and our ongoing engagement with agencies, and we are fully supportive of both our role and the introduction of the public interest disclosure (PID) scheme.

BACKGROUND

The Government asked the House of Representatives Standing Committee on Legal and Constitutional Affairs (the Committee) to consider and report on a preferred model for legislation to protect public interest disclosures within the Australian Government public sector in mid July 2008. On 25 February 2009 the committee released its report.

The Government responded to the Committee's report on 17 March 2010 accepting most of the Committee's recommendations. Those recommendations which were accepted included a role for the Commonwealth Ombudsman to implement, oversight and play a significant role in the operation of the scheme.

PURPOSE OF THE SCHEME

At its heart, a PID scheme is about removing barriers that currently prevent people working within the public sector from speaking up about serious problems/issues that impact on public administration. Through this it seeks to build a culture that encourages early internal disclosure and pro-active management of identified problems by agencies. An effective PID scheme works to do this by:

- protecting a discloser from civil, criminal or administrative liability for making a protected disclosure
- providing disclosers with legal remedies to address reprisal actions
- making it an offence for a person to take reprisal action against a person on the grounds that they have or intend to make a disclosure
- creating a framework to ensure that public interest disclosures are properly assessed and, where appropriate, investigated and actioned.

In doing so, it is important to ensure clarity so that potential disclosers are not discouraged from making a disclosure or acting in a manner that will jeopardise their protection under the scheme.

An effective PID scheme also needs to place responsibility on the agency with the problem to ensure that the matter is properly investigated and, to the extent possible, resolved. By placing responsibility on agencies, it promotes early disclosure and proactive management of issues by agencies. It also creates an environment in which an acceptance of whistleblowing is more likely to take root. It is for this reason that I support the devolved responsibility model, established by the Bill.

However, empirical evidence from the *Whistling While They Work* project shows that successful implementation of protected disclosure schemes is uneven when done agency-by-agency and not readily open to accountability.¹ A strong central agency role is still required. The Bill provides such a role to the Ombudsman and Inspector General Intelligence and Security and strikes, in our view, a good balance between our oversight of the scheme and our day to day involvement in the operation of the scheme.

¹ Brown, AJ (ed.) 2008, Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations, Australia and New Zealand School of Government, p. 235

We do not consider that the office will need to see every PID in the first instance or make all substantive decisions, in order to provide strong and effective oversight. As discussed below, in addition to the broader oversight role and functions the office gains through the PID Bill, the powers that attach to the investigation of complaints and the conduct of own-motion investigations under the *Ombudsman Act 1976* will be available to the Ombudsman for investigation of disclosures and related problems. When combined with the requirement for agencies to keep records and provide information to the Ombudsman, which will be determined by legislative instrument, our ability to discern the existence of and investigate problems will be considerable.

OUR ROLE

The roles envisaged for the Commonwealth Ombudsman under the Bill will be key enablers in ensuring the legislation meets its objectives by assisting agencies and disclosers; raising awareness of the scheme; providing oversight of agency decisions; providing disclosers with greater certainty when making an external PID; and providing greater transparency and accountability by reporting to Parliament on the operations of the scheme. Our principal functions are set out below.

Setting Standards

Under s 74 of the Bill, the Ombudsman may set standards relating to:

- procedures, to be complied with by the principal officers of agencies, for dealing with internal disclosures
- the conduct of investigations under the Bill
- the preparation of reports of investigations under the Bill
- the provision of information and assistance and the keeping of records for the purposes of the Ombudsman's annual reporting.

These standards establish obligations against which the Ombudsman can test the compliance of agencies. The standards will need to anticipate the wide cross section of agencies that will be required to administer the Bill and will be designed to avoid conflict with existing legislative and other established requirements. This will help reduce the risk of the integrity of an investigation or report being compromised, where an agency has otherwise exercised sound judgement in the circumstances.

Advice and Guidance

Under s 62 of the Bill, the Ombudsman is required to assist principal officers, authorised officers, public officials, former public officials and the Inspector General Intelligence and Security in relation to the operation of the Bill. The Ombudsman will perform this function by providing guidelines and fact sheets on the operation of the Bill tailored to meet the needs of the different stakeholders. The Ombudsman will also provide a point of contact for the provision of more specific advice to agencies in the management of their obligations and those people who are thinking about or who have already made a disclosure under the scheme.

Educate and Promote

Under s 62 of the Bill, the Ombudsman is required to conduct education and awareness programs for agencies, public officials and former public officials in relation to the operation of the Bill. The Ombudsman will perform this function by providing e-

learning, fact sheets and other promotional material and face-to-face educational and promotion sessions.

Receive and Investigate PIDs

Under s 34 of the Bill, the Ombudsman will be authorised to receive disclosures and, under s 49, investigate those disclosures. While the intention is for the majority of investigations to be conducted by agencies into matters that arise within their agency, where the matters are particularly complex or involve multiple agencies, it is likely that the Ombudsman (or another investigative agency) will investigate the matter. Where the Ombudsman investigates, the office will bring considerable expertise and all the powers of an own-motion inquiry, under the *Ombudsman Act 1976*, to the task.

Report to the Minister and Parliament

Under s 76 of the Bill, the Ombudsman must provide to the Minister for tabling in Parliament an annual report on the operation of the scheme. In order to give effect to this requirement, the Ombudsman will issue standards, under s 74 of the Bill, on the provision of information and assistance and the keeping of records by agencies.

Oversight

The statutory requirement for agencies to provide information and assistance to the Ombudsman will provide intelligence on the number and status of each disclosure made under the scheme, allowing the Ombudsman to exercise strong oversight. Consequential amendments to the *Ombudsman Act 1976* will deem PID related matters to be matters of administration, providing the Ombudsman with very broad jurisdiction to inquire into problems, using own-motion powers, and resolve complaints about the management and investigation of PIDs by agencies. Under s 52 of the Bill, the Ombudsman will be required to determine extensions of time for the investigation of disclosures, providing a further safeguard against inaction and delay.

USING THE EXISTING INVESTIGATIVE FRAMEWORK

Perhaps one of the most important and well developed aspects of the Bill is the recognition of the existing integrity framework within the Commonwealth Government. In many ways a PID is simply a label given to a problem, which is in the public interest to resolve, and that label affords protections to the person who raised the problem. It should not be the case that the investigatory process is dependent upon how the problem came to notice; the investigatory process should be determined by the nature of the problem.

Mechanisms already exist for the investigation of most serious problems. These mechanisms are generally subject-specific and bring specialist expertise to the investigation. Indeed, any attempt to introduce a generalist investigation process is to ignore the availability of more well developed and capable systems. Rather than create a new investigative scheme, encouraging the utilisation of existing investigation mechanisms together with oversight should be preferred for the investigation of PIDs.

The Bill recognises the unique position of investigative agencies, including the Australian Commission for Law Enforcement Integrity, Information Commissioner, Human Rights and Equal Opportunity Commission and Australian Public Service Commission. The Bill provides for agencies to refer appropriate matters to these

agencies for investigation, with consent, and also for disclosures to be made directly to these agencies. This process allows the existing framework to operate, while providing the necessary protections to disclosers.

The Bill also allows for PID investigations to be conducted under the process and procedures relating to other schemes and laws. A PID about a fraud matter will be dealt with as a fraud matter under the Fraud Control Guidelines. A PID about a code of conduct violation should be investigated in accordance with the procedures established by the Australian Public Service Commission. Alternatively, where the issues are not clear or there are peripheral issues, a more general administrative investigation may be conducted and recommendations flowing from that investigation may indeed recommend further investigation under such schemes.

We believe this is a very flexible approach and recognises the benefits of allowing existing investigative process, and the experiences and expertise that go with them, to be best utilised for the investigation of PIDs and will ensure the most beneficial outcomes. In reaching this view we note the advice of the Victorian Ombudsman in his Annual Report for 2010-11:

After more than seven years experience with the Act, I consider it essential that it be simplified to provide greater clarity to both whistleblowers and agencies. The Act should be solely concerned with the protections given to whistleblowers, while investigations would be conducted by integrity bodies using the investigation powers provided by their empowering legislation, in my case the Ombudsman Act 1973. This is a position I have advocated over a number of years.²

TIMING

The PID scheme will affect all Government agencies and their employees and contracted service providers. It places a significant onus on principal officers of agencies to put in place procedures and appoint authorised personnel to manage the scheme within their agency. The Ombudsman's office needs to issue guidance and conduct education once the legislation is settled. A period of time between the Bill's passing and the Act's commencement will also be required by the Ombudsman to formally determine standards under s 74 of the Bill. It is therefore important to the success of the scheme that there is a reasonable period of time between the passing of the Bill and commencement.

RESOURCING

The PID scheme applies to the entire public sector (not just APS employees) including contractors, consultants, Defence, AFP and Parliamentary service employees as well as former public officials. No information is currently collected on the number of public interest disclosures that are currently raised within the Australian Government. This creates a high level of uncertainty in terms of the workload and effort that will be required to implement and oversight the scheme. Further, given recent changes to our roles and responsibilities, which have not been fully considered in terms of resourcing impact, it would be beneficial to review resourcing for our office 6-12 months from commencement of the scheme.

² Victorian Ombudsman Annual Report 2011 – Part 1, p. 52

CONCLUSION

The Public Interest Disclosure Bill 2013 will promote integrity and accountability within the Commonwealth public sector and we are fully supportive of the introduction of the scheme and the role envisaged for our office.

The Bill provides the Ombudsman with a role that strikes the right balance between oversight and day to day involvement in the operation of the scheme. This will ensure that the scheme operates consistently and effectively while placing responsibility on agencies to rectify their problems and is more likely to generate a cultural shift toward accepting the benefits of disclosures than a centralised scheme. Importantly, the Bill recognises the existing integrity framework within Government, and does not seek to displace specialist mechanisms that are working.

I am, of course, available to discuss this submission at greater length at the Committee's convenience. You should also be aware that I have made the same submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs for the purposes of its inquiry into Bill.