



12 DECEMBER 2013

PUBLIC INTEREST DISCLOSURE SCHEME

GOVERNMENT AGENCIES

IS YOUR AGENCY PREPARED FOR THE NEW PUBLIC INTEREST DISCLOSURE ACT?

The *Public Interest Disclosure Act 2013 (Cth) (Act)*, which establishes a new public interest disclosure scheme for the Commonwealth public sector, comes into force on 15 January 2014.

By then, Commonwealth agencies should have ensured that:

- agency officers with functions under the Act understand the nature and extent of their responsibilities;
- agency staff and contractors understand their rights and their obligations under the Act; and
- they have procedures in place to facilitate public interest disclosures.

THE PUBLIC INTEREST DISCLOSURE SCHEME

The new Act aims to promote integrity and accountability in the Commonwealth public sector by:

- establishing a robust legislative framework to encourage and facilitate disclosure of wrongdoing;

- ensuring that Commonwealth agencies properly handle, investigate and respond to disclosures; and
- ensuring that persons who make public interest disclosures are protected from reprisals and other adverse consequences.

The new scheme extends beyond central agencies to a range of Commonwealth entities, including GOCs, statutory authorities and contracted service providers. The Act also deals with protected disclosures in the intelligence context (although these are not discussed in this bulletin).

The Commonwealth Ombudsman is responsible for promoting awareness and understanding of the Act and monitoring its operation.

WHAT IS A PUBLIC INTEREST DISCLOSURE?

A disclosure of information is protected under the Act as a "public interest disclosure" if:

- the discloser believes, on reasonable grounds, that the information tends to show one or more instances of "disclosable conduct";

- the discloser is a current or former "public official"; and
- the information has been disclosed to the proper recipient as set out in the Act.

Public official is broadly defined in the Act, and includes:

- any person employed or appointed by the Australian Government;
- staff of Commonwealth companies and statutory authorities;
- statutory office holders; and
- persons who provide service providers under contract to the Commonwealth.

Disclosable conduct is, essentially, conduct of an agency, public official or contracted Commonwealth service provider (in connection with the contract) that:

- contravenes a law;
- is corrupt;
- relates to perverting the course of justice;
- constitutes maladministration;
- involves an abuse of public trust;
- results in wastage of public money or property;
- constitutes misconduct relating to scientific research, analysis or advice; and
- unreasonably endangers, or risks endangering, the health or safety of one or more persons or the environment.

The Act also provides that disclosable conduct includes conduct of a public official that:

- involves an abuse, or is engaged in for the purpose of abusing, his or her position; or
- if proved, could give reasonable grounds for disciplinary action against the public official.

Disclosures made before 15 January 2014 are not covered by the Act. However, a disclosure made after that date can relate to disclosable conduct which occurred at any time.

MAKING A DISCLOSURE

A public interest disclosure must be made to one of the persons specified in the Act as being a person to whom that type of disclosure may be made.

Public interest disclosures may be made orally or in writing, and may be made anonymously.

The most common type of disclosure is likely to be "internal disclosure". An internal disclosure must be made either to an "authorised internal recipient" or supervisor of the discloser.

An internal authorised recipient will generally be either the principal officer of the agency or a public official officer of the agency who the principal officer appoints as an authorised officer for the purpose of the Act. However if the discloser believes on reasonable grounds that it would be appropriate for the disclosure to be investigated by the Ombudsman or another investigative agency, an internal disclosure can also be made to the Ombudsman or that other investigative agency.

Where a public official has previously made an internal disclosure about a matter, the person may disclose the information to a person outside the agency (other than to a foreign public official), if he or she reasonably believes that a prior investigation or response was inadequate, or the investigation has not been completed within 90 days, provided that:

- the external disclosure is not, on balance, contrary to the public interest;
- no more information is publicly disclosed than is reasonably necessary to identify the disclosable conduct; and
- the information does not relate to intelligence matters.

The Act sets out matters to which regard must be had in determining whether a disclosure would be contrary to public interest.

Provision is also made for:

- disclosures to be made outside the agency in urgent circumstances where there is an imminent danger to health or safety or the environment; and
- disclosures to be made to a lawyer for the purpose of obtaining advice about making a public interest disclosure.

PROTECTION OF DISCLOSERS

The Act gives a person who makes a public interest disclosure a number of legal protections, including:

- the discloser is immune from civil, criminal or administrative liability for making a public interest disclosure;
- it is an offence to take a reprisal, or to threaten to take a reprisal, against a discloser because of a public interest disclosure; and

- it is an offence (subject to limited exceptions) to disclose the identity of a discloser without their consent.

An individual that takes or threatens reprisal action may be ordered to compensate the discloser for loss, damage or injury suffered as a result of the reprisal. The individual's employer may also be held liable, but will have a defence if it took reasonable precautions and exercised due diligence to avoid the reprisal or threat.

Additional orders, such as an injunction or an apology, are also available remedies under the Act.

The public interest disclosure scheme is designed to supplement, rather than replace, employee protections enshrined in the *Fair Work Act 2009* (Cth). However, an individual is not entitled to a remedy under both Acts.

PROCEDURES AND INVESTIGATIONS

If a public interest disclosure is made to an authorised officer of an agency (either directly, or indirectly through a discloser's supervisor), the officer must allocate the handling of the disclosure to one or more agencies unless the authorised officer is satisfied, on reasonable grounds, that there is no reasonable basis on which to consider the disclosure an internal disclosure.

The authorised officer is required to inform the principal officer of each agency to which the handling is allocated, and the principal officer is then required to investigate the disclosure, and prepare a report, within a specified time limit. However, the principal officer has a discretion not to investigate, or to not continue with an investigation, in specified circumstances, including where:

- the discloser is not and has not been a public official;
- the disclosure does not concern serious disclosable conduct; or
- the disclosure relates to matters which are or have been subject to other investigations.

The Act sets out a range of record keeping and notification obligations that apply to the allocation and investigation processes. It also allows the Ombudsman to determine standards relating to procedures for dealing with disclosures, conduct of investigations, preparation of reports, giving information about disclosures and keeping records. It is understood that standards determined by the Ombudsman will be published shortly.

OTHER AGENCY OBLIGATIONS

The Act imposes a range of further obligations on principal officers, authorised officers, public officials and their supervisors.

Agencies should note in particular that the principal officer of an agency must establish (in accordance with standards determined by the Ombudsman) procedures for facilitating and dealing with public interest disclosures relating to the agency. Procedures must provide for assessing risks of reprisals against the persons who make disclosures and the confidentiality of investigative processes.

HOW DLA PIPER CAN ASSIST

DLA Piper has extensive experience advising on whistleblower and public interest disclosure legislation. We have a range of services that can assist agencies preparing for commencement of the *Protected Disclosure Act 2013*, including:

- advice on compliance and implementation;
- preparation or review of procedures;
- protection of persons making disclosure;
- training for principal and authorised officers; and
- general staff training.

MORE INFORMATION

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