

EXPLANATORY STATEMENT

Issued by the authority of the Presiding Officers

Parliamentary Service Act 1999

*Parliamentary Service Amendment (Public Interest Disclosure and Other Matters)
Determination 2014*

The *Parliamentary Service Act 1999* ('the Act') establishes the Parliamentary Service. Subsection 71(1) of the Act provides that the Presiding Officers may make determinations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act. Subsection 71(1) specifies that the Presiding Officers may make determinations after consulting the Parliamentary Service Commissioner.

Purpose of the amendments

The *Parliamentary Service Amendment (Public Interest Disclosure and Other Matters) Determination 2014* ('the Amendment Determination') amends *Parliamentary Service Determination 2013* ('the Principal Determination') which came into effect on 1 July 2013.

Public interest disclosures

The *Public Interest Disclosure Act 2013* ('PID Act') establishes a framework to encourage and facilitate reporting of wrongdoing by public officials in the Commonwealth public sector. It makes provision for the making of 'public interest disclosures', for the investigation of such disclosures, and for the protection of disclosers. The *Public Interest Disclosure (Consequential Amendments) Act 2013* ('PID Consequential Act') repeals the Parliamentary Service whistleblowing scheme in section 16 of the Act, as well as the functions of the Parliamentary Service Commissioner ('Commissioner') and Parliamentary Service Merit Protection Commissioner ('MPC') of inquiring into whistleblower reports, and inserts new functions for the Commissioner and MPC (new paragraphs 40(1)(c) and 48(1)(a) of the Act) to inquire, subject to determinations, into public interest disclosures as defined in the PID Act, to the extent that the disclosures relate to alleged breaches of the Parliamentary Service Code of Conduct ('Code of Conduct'). The PID Act and the PID Consequential Act came into effect on 15 January 2014.

The principal purpose of the Amendment Determination is to provide details of how the new inquiry powers of the Commissioner and the MPC in paragraphs 40(1)(c) and 48(1)(a) of the Act operate alongside the inquiry powers set out in the PID Act.

Code of Conduct

The Principal Determination provides for the actions a Secretary may take following a recommendation by the MPC in relation to a review of action that relates to a Parliamentary Service employee's employment (including a review of a finding of a breach of the Code of Conduct and/or a sanction decision). The Amendment Determination requires a Secretary to follow the written procedures established under subsection 15(3) of the Act if the Secretary makes a breach determination or sanction decision that is different from the Secretary's original decision or from the MPC recommendation following the review by the MPC.

Other changes

The Amendment Determination also makes minor changes to the Principal Determination, to clarify provisions in relation to requiring employees to attend medical examinations and to make reference changes consequential on the commencement of the *Privacy Amendment (Enhancing Privacy Protection) Act 2012*.

Consultation

This Amendment Determination was made by the Presiding Officers after they had consulted with the Commissioner in accordance with the requirement under subsection 71(1) of the Act mentioned above.

Regulation Impact Statement

No regulation impact statement is required for the measures contained in this Amendment Determination.

Notes on clauses

Notes on the clauses of the Amendment Determination are set out at [Attachment A](#)

Statement of Compatibility with Human Rights

A Statement of Compatibility with Human Rights has been completed for the Amendment Determination in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's assessment is that the Amendment Determination is compatible with human rights: it promotes a number of human rights, and, to the extent that it may limit any human rights, those limitations are reasonable, necessary and proportionate. The Statement is at [Attachment B](#).

This Determination is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Authority: Subsection 71(1) of the *Parliamentary Service Act 1999*

Notes on clauses

Clause 1—Name of Determination

This clause names the Determination as the *Parliamentary Service Amendment (Public Interest Disclosure and Other Matters) Determination 2014*.

Clause 2—Commencement

This clause provides that the Determination will commence as follows:

- (a) sections 1 to 4 and anything in the Determination not elsewhere covered by the commencement table will commence on the day after the Determination is registered;
- (b) Schedule 1 will commence on the day after the Determination is registered;
- (c) Schedule 2 will commence at the same time as sections 3 to 83 of the *Public Interest Disclosure Act 2013* commence; and
- (d) Schedule 3 will commence on 12 March 2014.

Clause 3—Authority

This clause provides that the Determination is made under the *Parliamentary Service Act 1999*.

Clause 4—Schedule(s)

This clause provides that the *Parliamentary Service Determination 2013* is amended or repealed as set out in a Schedule to the Determination.

Schedule 1—Amendments commencing day after registration

Item 1

This item amends clause 44 by substituting a new subclause 44(1).

New subclause 44(1) provides that, if a circumstance mentioned in subclauses 44(2) to (4) applies, a Secretary may, in writing, direct an employee in the Secretary's department to do either or both of the following:

- (a) undergo an examination by a nominated medical practitioner, either at a time, or within a period, specified by the Secretary in the direction;
- (b) give the Secretary a report of the examination.

Item 2

This item inserts new subclauses 104(3A) and (3B).

Clause 104 applies where a Secretary receives a recommendation from the Merit Protection Commissioner(MPC) under clause 100 or 103.

New subclause (3A) provides that, if, after the MPC's recommendation:

- (a) the Secretary considers making a finding of a breach of the Code of Conduct; and
- (b) the Secretary had not made the finding before the recommendation was made; and
- (c) the finding was not mentioned in the recommendation;

the Secretary must comply with the procedures established under subsection 15(3) of the Act before deciding whether to make the finding.

New subclause (3B) provides that if, after the MPC's recommendation:

- (a) the Secretary considers imposing a sanction, for breach of the Code of Conduct' that the Secretary had not imposed before the recommendation was made; and
- (b) the sanction was not mentioned in the recommendation;

the Secretary must comply with the procedures established under subsection 15(3) of the Act before deciding whether to impose the sanction.

Schedule 2—Amendments commencing at the same time as sections 3 to 83 of the *Public Interest Disclosure Act 2013* commence

Item 1

This item inserts a new Part 10A.

New Part 10A comprises a new clause 112A which establishes the Commissioner's functions in relation to inquiries into public interest disclosures that relate to alleged breaches of the Code of Conduct.

Subclause 112A(1) provides, for paragraph 40(1)(c) of the Act, that clause 112A relates to the function of the Commissioner to inquire into a public interest disclosure (defined as the *disclosure*), to the extent that the disclosure relates to one or more alleged breaches of the Code of Conduct.

Subclause 112A(2) provides that the Commissioner may inquire into the disclosure if the Commissioner is satisfied that it would be inappropriate for the discloser to make the disclosure to a Secretary.

Subclause 112A(3) provides that the Commissioner may inquire into the disclosure if the discloser:

- (a) has made the disclosure to a Secretary; and
- (b) is not satisfied with the outcome that followed the disclosure.

Subclause 112A(4) provides that the Commissioner may decide to decline to inquire into the disclosure, or to decline to inquire further, if the Commissioner concludes that conducting or continuing the inquiry would not be justified in all the circumstances.

The following examples of circumstances that may exist in a particular case are provided:

- (a) the disclosure has been, or is being, considered by the MPC;
- (b) the disclosure would be dealt with more appropriately by another means;
- (c) the disclosure is vexatious, frivolous, misconceived, or lacking in substance;
- (d) the discloser has provided insufficient detail;
- (e) the disclosure does not to any extent concern serious disclosable conduct;
- (f) it would not be practical to inquire, or inquire further, because the discloser has not consented to the use or disclosure of identifying information about the discloser.

Subclause 112A(5) provides that, if the Commissioner inquires into the disclosure, the Commissioner must:

- (a) consider, having regard to all the circumstances, whether to give a person about whom the disclosure has been made an opportunity to be heard in relation to the disclosure; and
- (b) take reasonable steps to report the outcome of the inquiry to the discloser and the relevant Secretary.

A Note mentions that inquiring into public interest disclosures is a function of the Commissioner and refers to section 65AA of the Act deals with circumstances in which the Commissioner may make a record of, disclose or otherwise use certain information for the purposes of, or in connection with, the performance of his or her functions. The Note also mentions that, if the Commissioner gives a person about whom a disclosure has been made an opportunity to be heard in relation to the disclosure, the Commissioner may give the person information identifying the discloser to the extent the Commissioner considers appropriate in the circumstances.

Item 2

This item repeals a note to subclause 113(2).

Item 3

This item adds a new clause 113A.

New clause 113A which establishes the MPC's functions in relation to inquiries into public interest disclosures that relate to alleged breaches of the Code of Conduct.

Subclause 113A(1) provides that, for paragraph 48(1)(a) of the Act, clause 113A relates to the function of the MPC to inquire into a public interest disclosure to the extent that the disclosure relates to one or more alleged breaches of the Code of Conduct.

Subclause 113A(2) provides that the MPC may inquire into the disclosure if the MPC is satisfied that it would be inappropriate for the discloser to make the disclosure to a Secretary.

Subclause 113A(3) provides that the MPC may inquire into the disclosure if the discloser:

- (a) has made the disclosure to a Secretary; and
- (b) is not satisfied with the outcome that followed the disclosure.

Subclause 113A(4) provides that the MPC may decide to decline to inquire into the disclosure, or to decline to inquire further, if the MPC concludes that conducting or continuing the inquiry would not be justified in all the circumstances.

The following examples of circumstances, some or all of which may exist in a particular case, are provided:

- (a) the disclosure has been, or is being, considered by the Commissioner;
- (b) the disclosure would be dealt with more appropriately by another means;
- (c) the disclosure is vexatious, frivolous, misconceived, or lacking in substance;
- (d) the discloser has provided insufficient detail;

- (e) the disclosure does not to any extent concern serious disclosable conduct;
- (f) it would not be practical to inquire, or inquire further, because the discloser has not consented to the use or disclosure of identifying information about the discloser.

Subclause 113A(5) provides that, if the MPC inquires into the disclosure, the MPC must:

- (a) consider, having regard to all the circumstances, whether to give a person about whom the disclosure has been made an opportunity to be heard in relation to the disclosure; and
- (b) take reasonable steps to report the outcome of the inquiry to the discloser and the relevant Secretary.

A Note mentions that inquiring into public interest disclosures is a function of the MPC and refers to section 65AB of the Act which deals with circumstances in which the MPC may make a record of, disclose or otherwise use certain information for the purposes of, or in connection with, the performance of his or her functions. The Note also mentions that, if the MPC gives a person about whom a disclosure has been made an opportunity to be heard in relation to the disclosure, the MPC may give the person information identifying the discloser to the extent the MPC considers appropriate in the circumstances.

Item 4

This item repeals Part 12.

Item 5

This item introduces the following new definitions into the Dictionary:

discloser has the same meaning as in the *Public Interest Disclosure Act 2013*.

public interest disclosure has the same meaning as in the *Public Interest Disclosure Act 2013*.

Item 6

This item repeals the definition of *whistleblower*.

Item 7

This item repeals the definition of *whistleblower report*.

Schedule 3—Amendments commencing 12 March 2014

Item 1

This item amends clause 147 by repealing subclauses 147(7) and (8) and substituting new subclause 147(7) which provides that the use or disclosure of personal information under clause 147 is authorised for the purposes of Australian Privacy Principle 6.2(b) under the *Privacy Act 1988*.

Statement of Compatibility with Human Rights

Overview of the Legislative Instrument

The *Parliamentary Service Amendment (Public Interest Disclosure and Other Matters) Determination 2014* ('the Amendment Determination') amends clause 44 of *Parliamentary Service Determination 2013* ('the Principal Determination') to clarify that, when giving an employee a direction to attend an examination by a medical practitioner, a Secretary may specify a time for the employee to attend.

The Amendment Determination amends clause 104 of the Principal Determination to provide certainty for Parliamentary Service employees that all findings of a breach of the Parliamentary Service Code of Conduct ('Code of Conduct') or the imposition of sanctions by a Secretary must be made in accordance with the procedures established by the Secretary under subsection 15(3) of the *Parliamentary Service Act 1999* ('the Act') for determining Code of Conduct breaches, and sanctions where appropriate. The amendment deals with circumstances in which the Parliamentary Service Merit Protection Commissioner ('MPC') has reviewed a department's decision in respect of a Code of Conduct determination or sanction decision, and, following the review, the Secretary proposes to make a Code of Conduct finding or a sanction decision that was not the same as either the Secretary's original decision or the MPC's recommendation. In those circumstances, clause 104, as amended, requires the Secretary to follow the subsection 15(3) procedures in making the new finding or deciding the sanction.

The Amendment Determination amends the Principal Determination by inserting new clauses 112A and 113A to give effect to provisions of the *Public Interest Disclosure (Consequential Amendments) Act 2013* ('PID Consequential Act'). Notably, the Amendment Determination clarifies the functions of the Parliamentary Service Commissioner ('Commissioner') and the MPC in dealing with public interest disclosures.

The PID Consequential Act repealed section 16 and paragraphs 40(1)(c) and 48(1)(a) of the Act, which dealt with whistleblower reports, and inserted new paragraphs 40(1)(c) and 48(1)(a), which give the Commissioner and MPC respectively the function of inquiring, subject to determinations, into public interest disclosures as defined in the *Public Interest Disclosure Act 2013* ('PID Act'), to the extent that the disclosures relate to alleged breaches of the Code of Conduct. The amendments in the Amendment Determination: set out the circumstances in which the Commissioners may decide to inquire into disclosures; make provision for the Commissioners to decline to inquire, or inquire further, into disclosures; and make provision for the process of inquiry.

The PID Act and the PID Consequential Act came into effect on 15 January 2014.

The Amendment Determination also makes a minor technical amendment to clause 147 of the Principal Determination, to come into effect on commencement of the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* ('Privacy Amendment Act') on 12 March 2014. This amendment will make no substantive change to the clause, and will simply ensure that the clause is consistent with the *Privacy Act 1988* as amended by the Privacy Amendment Act in referring to Australian Privacy Principles rather than Information Privacy Principles.

Human rights implications

The Amendment Determination engages the following human rights.

Right to freedom of expression

The right to freedom of opinion and expression is contained in Article 19 of the International Covenant on Civil and Political Rights (ICCPR). Article 19(2) protects an individual's freedom of expression in any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising. The right protects not only the ability to impart information or ideas but also the ability to receive them. Under Article 19(3) freedom of expression may be limited only where provided for by law and when necessary to protect the rights or reputations of others, national security, public order or public health or morals.

The amendments in the Amendment Determination relating to public interest disclosures support and facilitate the making of such disclosures by public officials, and support the aim of the PID Act that public officials who make disclosures are protected from adverse consequences. In providing a further avenue for public officials to make protected disclosures—i.e. to the Commissioner and MPC—the Amendment Determination engages and promotes the right to freedom of expression.

Right to privacy and reputation

The right to privacy is contained in Article 17 of the ICCPR. Article 17 prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence. It also prohibits unlawful attacks on a person's reputation. In order for an interference with a right not to be 'arbitrary', the interference must be for a reason consistent with the relevant Convention and reasonable in the particular circumstances. Reasonableness, in this context, involves notions of proportionality, appropriateness and necessity.¹

The amendments in the Amendment Determination relating to public interest disclosures support the right to privacy and reputation and the intention of the PID Act to allow a person to make a disclosure in confidence and without fear of reputational damage if they do not wish their identity to be known, while permitting limited disclosure of identity in order to conduct an investigation. In such cases the limited disclosure of the person's identity is reasonable and necessary because, without it, an investigation of the alleged wrongdoing could not be conducted effectively (or, in some cases, at all).

The Amendment Determination provides that the Commissioner or MPC may decide not to inquire, or inquire further, into a disclosure if he or she concludes that conducting or continuing the inquiry would not be justified in all the circumstances. The Amendment Determination provides examples of circumstances that could arise which may be considered relevant to an assessment of whether to decline to inquire, or to inquire further, into a disclosure. These include where it would not be practical to conduct, or continue, an inquiry because the discloser has not consented to the use or disclosure of identifying information about the discloser. While the Commissioner and MPC would be expected to take care to ensure that a discloser's identity was protected to the extent that was reasonably possible, this provision recognises that in some circumstances identifying information may need to be disclosed in order to undertake an inquiry. Similarly, the Amendment Determination includes provisions that require the Commissioner and MPC to consider, having regard to all the

¹ Human Rights Committee, General Comment 16, (Twenty-third session, 1988), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 21 (1994).

circumstances, whether to give a person about whom a disclosure has been made an opportunity to be heard in relation to the disclosure, and notes that if the Commissioner or MPC does do so, they may give the person information identifying the discloser to the extent that they consider appropriate in the circumstances.

This limited disclosure is reasonable and necessary, goes only so far as is needed to achieve its purpose, and serves a legitimate purpose—namely, the investigation of misconduct by public officials consistent with the principle of procedural fairness.

The Amendment Determination also makes a minor technical amendment to clause 147 of the Principal Determination, to come into effect on commencement of the Privacy Amendment Act on 12 March 2014. This amendment will make no substantive change to the Principal Determination, but will simply ensure that the Principal Determination is consistent with the *Privacy Act 1988* as amended by the Privacy Amendment Act in referring to Australian Privacy Principles rather than Information Privacy Principles.

Right to work and rights in work

The right to work and rights in work is contained in articles 6(1) and 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 6 provides for the right to work, including a right to the opportunity to gain a living by work which is freely chosen or accepted. Article 7 provides for the right of everyone to the enjoyment of just and favourable conditions of work.

1. Amendments relating to public interest disclosures

The amendments in the Amendment Regulation relating to public interest disclosures support these rights by providing a further avenue of disclosure to public officials seeking to make a disclosure that relates to a suspected breach of the Parliamentary Service Code of Conduct. The amendments allow public officials to make such disclosures to the Commissioner or MPC in circumstances where the Commissioner or MPC is satisfied that it would be inappropriate for the discloser to make their disclosure to a Secretary, or where the discloser has already made the disclosure to a Secretary and is not satisfied with the outcome. These provisions allow for disclosures relating to the Code of Conduct to be considered by an independent, expert authority in these matters, and provide an additional means of disclosure for public officials in circumstances where, for example, they do not wish, or are not able, to make an ‘external disclosure’ under the PID Act.

The Commissioner and MPC may make recommendations to a department, or may take other action consistent with their powers and functions, as a consequence of an inquiry into a disclosure.

2. Amendments relating to Code of Conduct procedures

The amendment to clause 104 of the Principal Determination promotes Parliamentary Service employees’ rights in work by clarifying the drafting of the provision to ensure that it meets its policy intention.

The policy principles underpinning the legislative framework for responding to suspected misconduct in the Parliamentary Service operate on the premise that a department must follow publicly available standards that meet minimum procedural requirements, including the requirement to afford procedural fairness. The requirement for published mandatory procedures ensures transparency and provides certainty for employees in the event that they are investigated for something that has the potential to affect their employment rights and interests as significantly as an investigation of suspected misconduct.

Clause 104 applies after a Secretary receives a recommendation from the MPC about a review of action by the MPC (including a review of a finding of a breach of the Code of Conduct and/or a sanction decision). Subclause 104(1) requires the Secretary to consider the recommendation and to make a decision about it. Subclause 104(2) enables the Secretary to confirm or vary the relevant action or to set the action aside and substitute a new action. In the absence of the amendments, clause 104 appears to provide an avenue for a Secretary to make a new finding of a breach of the Code of Conduct or to impose a new sanction without necessarily following the mandatory procedures. As amended, clause 104 requires a Secretary to follow the published mandatory procedures made under subsection 15(3) of the Act if they are minded to make a finding of a breach or make a sanction decision after MPC review that is different from their original decision or from the MPC recommendation.

For these reasons, the amendment to clause 104 would promote Parliamentary Service employees' rights in work.

Conclusions

The Amendment Determination is compatible with human rights. It promotes a number of human rights, and, to the extent that it may limit any human rights, those limitations are reasonable, necessary and proportionate.