



**G – 07 PROTECTED  
DISCLOSURE PROCEDURE**

## 1. INTRODUCTION

This procedure has been developed in line with the *Protected Disclosure Act 2012* which is available from the Independent Broad-based Anti-corruption Commission (IBAC) website - <http://www.ibac.vic.gov.au/resources/legislation>.

## 2. DEFINITIONS

The following abbreviations and key terms are used within these procedures:

*The Act*                      *Protected Disclosure Act 2012*

*cooperators*              A person or persons who have cooperated or intend to cooperate with an investigation of a protected disclosure complaint

*discloser*                      A person who makes a complaint, allegation or disclosure under the Act

*disclosure*                      Any complaint, concern, matter or allegation made in accordance with part 2 of the Act.

The term 'disclosure' is interpreted under the Act in the ordinary sense of the word as a 'revelation' to the person receiving it.

the *IBAC*                      Independent Broad-based Anti-corruption Commission

## 3. PROTECTED DISCLOSURE ACT 2012

The Act is intended to enable people to make disclosures about improper conduct within the public sector without fear of reprisal. The Act aims to ensure openness and accountability by encouraging people to make disclosures and protecting them when they do.

The Act provides protection for people who make disclosures and creates obligations of confidentiality preventing the disclosure of the identity of the person who has made a disclosure and the content of the disclosure (except in some particular circumstances). Identification of a discloser or the content of their disclosure (that is not covered by any specified exceptions) is a criminal offence.

## 4. WHAT IS NOT A PROTECTED DISCLOSER?

A complaint or allegation that is already in the public domain will not normally be a protected disclosure (for example, if a matter has already been subject to media or other public commentary).

## 5. HOW TO MAKE A PROTECTED DISCLOSURE

The PPWCMA is unable to receive, assess or investigate disclosures.

Under the Act, the IBAC has the primary role in receiving, assessing and investigating disclosures.

The IBAC's contact details are:

Phone

1300 735 135

Street address

Level 1, North Tower, 459 Collins Street, Melbourne, VIC 3000

Postal address

GPO Box 24234, Melbourne, VIC 3001

### 5.1 What is a protected disclosure?

Under the Act, a disclosure may be made about two things:

- a) improper conduct of public bodies or public officers; and
- b) detrimental action taken by public bodies or public officers in reprisal against a person for the making of a protected disclosure.

The conduct or action being disclosed about may be one which has taken place, is still occurring or is believed is intended to be taken or engaged in. Disclosures may also be made about conduct that occurred prior to the commencement of the Act (ie. prior to 10 February 2013).

The following are *not* protected disclosures under the Act:

- a) a disclosure that has not been made in accordance with all of the procedural requirements of Part 2 of the Act and the prescribed procedures in the *Protected Disclosure Regulations 2013* (the Regulations);
- b) a disclosure made by a discloser who expressly states in writing, at the time of making the disclosure, that the disclosure is not a disclosure under the Act;
- c) a disclosure made by an officer or employee of an investigative entity in the course of carrying out his or her duties or functions under the relevant legislation, unless the person expressly states in writing that the disclosure is a disclosure and the disclosure is otherwise made in accordance with Part 2 of the Act.

### 5.2 Who can make a disclosure?

A disclosure may only be made by a person (or a group of individuals making joint disclosures). Disclosures cannot be made by a company or an organisation;

### 5.3 How can a disclosure be made?

A disclosure may:

- a) be made anonymously, orally or in writing;
- b) be made even where the discloser is unable to identify precisely the individual or the organisation to which the disclosure relates; and
- c) also be a complaint, notification or disclosure (however described) made under another law.

All disclosures must be made in private.

Generally:

- a verbal disclosure may be made:

- in person;
- by telephone;
- by leaving a voicemail message on a particular telephone answering machine;  
or
- by any other form of non-written electronic communication.
- The IBAC recommends that written disclosures to the IBAC be made via its online form available from:

<https://www.ibac.vic.gov.au/report-corruption-or-misconduct/online-form>

Disclosures cannot be made by fax.

A disclosure made by email from an address from which the identity of the discloser cannot be ascertained will be treated as an anonymous disclosure.

If a person wishes to make a disclosure, they must make that disclosure directly to the IBAC. Advice received by the PPWCMA from the IBAC is that a disclosure attempted or purported to be made to the PPWCMA will not be a disclosure because the Act does not permit the PPWCMA to receive disclosures.

## 6. WHAT IS IMPROPER CONDUCT?

A disclosure may be made about improper conduct by a public body or public official in the performance of their functions as a public body or public officer.

Central to the notion of improper conduct is the notion of the “public trust”.

“Public trust” is a concept that provides the basis *‘for obligations of honesty and fidelity in public officers that exist to serve, protect and advance the interests of the public’*.

A person acting in their official capacity is exercising ‘public power’ that is derived from their holding of public office and may be controlled or influenced by legislative provisions, administrative directions or constitutional principles or conventions. There is an expectation that members of the community may rely on and trust their public bodies and officials to act honestly. The expectation is that public officers will not use their positions for personal advantage or use the influence of their public office for improper purposes where there is a duty to act objectively and impartially.

Disclosers will need to identify that there is a link between the alleged improper conduct of a person or an organisation and their function as a public officer or a public body.

Improper conduct is defined in the Act to mean either corrupt conduct or specified conduct. Misconduct in Public Office may also be considered as improper conduct.

### 6.1 Corrupt Conduct

Corrupt conduct can be any of the following:

- a) conduct of any person that adversely affects the honest performance by a public officer or public body of his or her or its functions as a public officer or public body;
- b) conduct of a public officer or public body that constitutes or involves the dishonest performance of his or her or its functions as a public officer or public body;

- c) conduct of a public officer or public body that constitutes or involves knowingly or recklessly breaching public trust;
- d) conduct of a public officer or a public body that involves the misuse of information or material acquired in the course of the performance of his or her or its functions as a public officer or public body, whether or not for the benefit of the public officer or public body or any other person; or
- e) conduct that could constitute a conspiracy or an attempt to engage in any of the conduct referred to above; **and**

if that conduct could be proved beyond reasonable doubt at a trial, amounts to:

- f) an indictable offence; or
- g) one of the following 3 types of common law offences committed in Victoria:
  - perverting the course of justice
  - attempting to pervert the course of justice
  - bribery of an official.

## 6.2 Specified Conduct

Specified conduct is any one of the types of conduct listed at 6.1 **or** conduct that involves substantial mismanagement of public resources, risk to public health or safety or risk to the environment which **would not** constitute “corrupt conduct” but would nevertheless, if proved, constitute either:

- a) a criminal offence; or
- b) reasonable grounds for dismissing or terminating the employment of the officer who engaged or is engaging in that conduct.

It should be noted the risk in relation to mismanagement or public health and safety or the environment must be “substantial”, requiring significant or considerable mismanagement or significant or considerable risks to public health, safety or the environment

## 6.3 Misconduct in Public Office

Misconduct in public office is any conduct by a public sector employee which is unlawful or fails to meet ethical or professional standards required in the performance of duties or the exercise of powers entrusted to them. Examples include:

- a) deliberately falsifying accounts to conceal or obtain a benefit;
- b) entering into a secret commission with another person while acting in an official capacity;
- c) colluding with other public officers to share profits with tender recipients and concealing over-valuation of tenders;
- d) using public office to deceive a member of the public to gain a financial advantage; or
- e) misusing power to harm, oppress or disadvantage a person.

## 7. WHAT IS DETRIMENTAL ACTION?

It is an offence under the Act for a public officer or body to take detrimental action against a discloser in reprisal for making a protected disclosure. There are two components to this: firstly whether there is “detrimental action” as defined by the Act and secondly whether that action is

being taken in reprisal against a person for making or being connected with a protected disclosure.

### 7.1 Detrimental Action

Detrimental action as defined by the Act includes:

- a) action causing injury, loss or damage;
- b) intimidation or harassment; and
- c) discrimination, disadvantage or adverse treatment in relation to a person's employment, career, profession, trade or business, including the taking of disciplinary action.

In addition, a person can have taken detrimental action without having taken the action itself but just by threatening to take such action. Further, the detrimental action need not necessarily have been taken (or threatened to be taken) against a person making a protected disclosure, but against any person connected with a protected disclosure.

Examples of detrimental action prohibited by the Act include:

- threats to a person's personal safety or property, including intimidating or harassing a discloser or the discloser's family or friends or otherwise causing personal injury or prejudice to the safety or damaging property of a discloser or the discloser's family or friends;
- the demotion, transfer, isolation or change in duties of a discloser due to his or her having made a disclosure;
- discriminating or disadvantaging a person in their career, profession, employment, trade or business; or
- discriminating against the discloser or the discloser's family and associates in subsequent applications for promotions, jobs, permits or tenders resulting in financial loss or reputational damage.

### 7.2 Taken in reprisal for a protected disclosure

The person (or the person incited to take detrimental action) must take or threaten the detrimental action because, or in the belief that, the:

- other person or anyone else has made, or intends to make the disclosure;
- other person or anyone else has cooperated, or intends to cooperate with an investigation of the disclosure.

This belief must be a 'substantial' reason for taking that action or it will not be considered to be detrimental action.

## 8. WELFARE MANAGEMENT

The protection of persons making genuine protected disclosures is essential for the effective implementation of the Act. In addition, the Act extends the need for welfare management to cooperators.

The PPWCMA cannot receive disclosures and therefore may not know that a person has made a protected disclosure. Confidentiality obligations require a person who has made a protected disclosure not to discuss the matter with any other person except with the IBAC (or another investigative entity to which the IBAC may have referred the disclosure). Therefore, the PPWCMA will only be made aware that a person requires protection under the Act if that

information has been provided to the PPWCMA by the IBAC or the Victorian Inspectorate (when assessing whether a disclosure is a protected disclosure complaint) or by the investigative entity investigating a protected disclosure complaint.

The PPWCMA is committed to the protection of genuine disclosers. The PPWCMA is also committed to the welfare of persons who are the subject of allegations.

If the PPWCMA has been made aware of the identity of a discloser, and any other relevant information about the protected disclosure, the PPWCMA will keep all information it receives confidential and will manage the welfare of any relevant persons in accordance with its obligations under the Act.

The PPWCMA must, where it is aware of or has been provided the identities of disclosers and cooperators, ensure they are protected from any direct and/or indirect detrimental action being taken against them in reprisal for the protected disclosure. The PPWCMA will ensure its workplace culture supports disclosers and cooperators. Such support will extend to the relevant persons regardless of whether they are internal to the organisation (eg. employees, Members, other officers) or external members of the public. However, different legislative responsibilities (including those external to the Act) apply to persons internal to the organisation. These responsibilities derive from various legislative and administrative obligations to:

- ensure the health and wellbeing of employees of a public sector body under laws including those relating to Occupational Health and Safety, the *Charter of Human Rights and Responsibilities Act 2006*, the *Public Administration Act 2004*, and various Victorian Public Sector Codes of Conduct (as relevant); and
- comply with various relevant laws, policies and practices when making administrative and other decisions or taking particular actions affecting a customer, client or user of the public body's services. The IBAC uses the example of a public housing tenant client of the Department of Human Services (DHS) to illustrate this point. If the tenant makes a disclosure about an officer of the DHS allocating a house to a relative of the officer, without them having to go through the normal application process, then the IBAC's view is that the DHS has legislative and administrative obligations to meet in handling the welfare of the discloser.

Generally, for internal persons, the PPWCMA will ensure a supportive work environment and respond appropriately to any reports of intimidation or harassment against these persons. For external persons, the PPWCMA will take reasonable steps to provide appropriate support. The PPWCMA will discuss reasonable expectations with all persons receiving welfare management in connection with a protected disclosure.

### 8.1 Transfer of employees

An employee of the PPWCMA who has made a protected disclosure and believes on reasonable grounds that detrimental action will be, is being, or has been taken against them may request a transfer of employment.

After making a disclosure, an employee can be transferred internally to another part of the PPWCMA or to another public service body or public entity on similar terms and conditions of employment. This can only happen if they request, or consent to, a transfer and the following other conditions apply:

- the Chief Executive Officer of the PPWCMA has reasonable grounds to suspect detrimental action will be, is being, or has been taken against the employee;

- the Chief Executive Officer of the PPWCMA considers that the transfer will avoid, reduce or eliminate the risk of detrimental action;
- if transfer to another public body is proposed the head of that other public body consents to the transfer.

The transfer can be temporary or permanent and if the employee is moved to another public body, the employee's service in the new body is regarded as continuous with their pre-transfer service at the PPWCMA.

## 8.2 Welfare management of persons who are the subject of protected disclosures

When made aware of a person being the subject of a disclosure, the PPWCMA will also ensure the welfare needs of a person who is the subject of a protected disclosure are being met. It is important to note that, until a protected disclosure complaint is resolved, the information about the person is only an allegation.

### 8.2.1 Welfare services

A person who is the subject of a disclosure and who is made aware of their status as such may have a welfare manager appointed by the PPWCMA or be referred to the PPWCMA's Employee Assistance Program for welfare assistance. Alternatively, IBAC will provide support and advice to a person who is the subject of a disclosure, particularly in relation to their rights and obligations under the Act, these procedures, and any other relevant law or code of conduct. The PPWCMA will consider each matter on a case by case basis, taking into account the information it has been provided by the investigative entity and the person's particular circumstances.

### 8.2.2 Confidentiality

In line with the PPWCMA's confidentiality obligations under the Act, the fact that a disclosure has been made will not be divulged, any information received from the IBAC (or another investigative entity) will not be divulged, and the identities of persons involved will not be divulged.

The PPWCMA will take all reasonable steps to ensure the confidentiality of the subject of a disclosure at all times. Where the disclosure is dismissed or investigations do not substantiate the allegations made against the person, the fact that the investigation was undertaken, its results, and the identity of the person subject of the disclosure (to the extent that the PPWCMA has been provided that information by an investigative entity) will be kept confidential by the PPWCMA.

### 8.2.3 Natural justice

The PPWCMA will afford natural justice to the subject of a disclosure prior to any decision being made about the allegations. If the matter has been investigated by an investigative entity, then the investigative entity will be responsible for ensuring consultations with the subject include the provision of natural justice to him or her. The IBAC has noted that affording a subject of a disclosure natural justice in this context means that if a decision is to be made about their conduct this person has the right to:

- be informed about the substance of the allegations against them;
- be given the opportunity to answer the allegations before a final decision is made;

- be informed about the substance of any adverse comment that may be included in any report arising from an investigation; and
- have his or her defence set out fairly in any report.

#### 8.2.4 Wrong or unsubstantiated allegations

The PPWMCA will support a person who is the subject of a disclosure where the allegations contained in a disclosure are wrong or unsubstantiated. In those circumstances, the PPWCMA and any investigative entity involved will ensure that there are no adverse consequences for the person arising out of the disclosure or its investigation. This is particularly important in a situation where there has been publicly disclosed information identifying the subject or where such information has become well-known across the PPWCMA and the subject is an employee, member or associate of the PPWCMA.

Further, if the matter has been publicly disclosed by the PPWCMA, the Chief Executive Officer will consider any request by that person to issue a statement of support setting out that the allegations were clearly wrong or unsubstantiated.

## **9. PUBLIC ACCESS TO THIS POLICY**

The PPWCMA is required to publish information about how these procedures may be accessed in its annual reports.

## **10. REVIEW**

These procedures will be reviewed on a regular basis or upon significant change to the Act or the Regulations.