

# **Guidelines for making and handling protected disclosures**

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The Independent Broad-based Anti-corruption Commission (IBAC) is required to issue and publish Guidelines under Part 9 of the *Protected Disclosure Act 2012* (Vic) (the PD Act). These guidelines are issued pursuant to sub-section 57(2) of the PD Act in relation to welfare management of persons associated with a protected disclosure and under sub-section 57(1)(c) in relation to the protection of persons from detrimental action.

There are three main purposes of the PD Act:

1. To encourage and assist people to make a disclosure of improper conduct and detrimental action by public officers and public bodies
2. To provide certain protections for people who make a disclosure, or those who may suffer detrimental action in reprisal for a disclosure
3. To ensure that certain information about a disclosure is kept confidential – the identity of the person making the disclosure, and the content of that disclosure.

These guidelines should be read in conjunction with IBAC's *Guidelines for protected disclosure welfare management* which are located on IBAC's website [www.ibac.vic.gov.au](http://www.ibac.vic.gov.au)

IBAC must make sure its guidelines are readily available to the public, Victorian government entities required to establish their own procedures for handling disclosures, each member, officer and employee of these entities, and each member of police personnel.

These guidelines are not a substitute for reading the relevant legislation, the PD Act, and Protected Disclosure Regulations 2013. It may also be necessary to seek your own legal advice or advice from IBAC when determining how to manage welfare for disclosers and others.

## Table of contents

<b>1. About the guidelines</b>	<b>4</b>
<b>2. Developing internal processes and procedures</b>	<b>5</b>
<b>3. Making a disclosure</b>	<b>6</b>
What is a disclosure?	6
What is not a disclosure	7
Who can make a disclosure?	7
How can a disclosure be made?	8
About whom can a disclosure be made?	10
To whom can a disclosure be made?	11
Entities that may receive disclosures	12
About what can a disclosure be made?	13
Detrimental action	16
<b>4. Handling disclosures</b>	<b>20</b>
Receiving a disclosure	20
Assessing a disclosure	20
Assessment decisions	21
Notification to IBAC	21
Protection for public officers	22
<b>5. IBAC assessment</b>	<b>23</b>
IBAC's determination	23
Further contact about investigations	25
Providing information at the conclusion of an investigation	25
The <i>Freedom of Information Act</i>	25
Protections for persons making disclosure	26
Additional limitations on protections	27
Offences for making an unauthorised disclosure	27
<b>Appendix 1 – Glossary of terms</b>	<b>29</b>
<b>Appendix 2 – Civil and criminal penalties under the PD Act</b>	<b>30</b>

# 1. About the guidelines

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These guidelines are a resource for:

- disclosers - any person who wants to make a disclosure about improper conduct by a public officer or public body, and this includes any member of the public
- investigating entities – the Chief Commissioner of Police and the Ombudsman
- Victorian public service bodies and other public bodies to which a disclosure can be made about their actions
- Victorian public sector organisations about which a disclosure can be made to IBAC or other investigating entities, but which are not able to receive a disclosure.<sup>1</sup>

These guidelines cover:

- developing internal procedures
- making a disclosure
- assessing a disclosure
- handling a disclosure
- notifying a disclosure to IBAC and action IBAC can take
- protections provided to disclosers
- protecting disclosers from detrimental action.

For information regarding managing the welfare of disclosers, witnesses and any person who is the subject of a protected disclosure investigation refer to the *Guidelines for protected disclosure welfare management* available at [www.ibac.vic.gov.au](http://www.ibac.vic.gov.au)

These guidelines do not cover making:

- disclosures to the Victorian Inspectorate about the IBAC or an IBAC officer. The Victorian Inspectorate is responsible for establishing its own protected disclosure procedures
- disclosures about members of Parliament
  - disclosures about members of the Legislative Assembly must be made to the Speaker of the Legislative Assembly
  - disclosures about members of the Legislative Council must be made to the President of the Legislative Council
  - IBAC may only issue guidelines about the making of these disclosures with the agreement of the relevant Presiding Officer.

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<sup>1</sup> Further explanation of these last two categories can be found in section 3

## 2. Developing internal processes and procedures

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It is important for public service and other public bodies who may receive disclosures and investigating entities who conduct protected disclosure complaint investigations to have effective processes and procedures for managing the receipt of information, its assessment and notification. This also includes effective processes for looking after people who have made protected disclosures, those who are the subject of the protected disclosure and those who might be witnesses in an investigation.

Entities that can receive disclosures are required to develop internal procedures to facilitate, handle and manage disclosures, including notifications to IBAC, as well as establish procedures for protecting people against detrimental action.

Public bodies that are not able to receive disclosures must still establish procedures for protecting people against detrimental action that might be taken against them in reprisal for the making of protected disclosures.

Procedures must be established within six months of the commencement of the PD Act which was on 10 February 2013.

Public service bodies and investigating entities' processes and procedures should also include:

- secure information management systems for the receipt, storage, assessment and notification of protected disclosures, including:
  - an internal reporting structure
  - identification of the roles and responsibilities of those in the reporting structure
- a secure process for receiving verbal or written disclosures
- the selection of a person(s) identified as a person who can receive disclosures (Protected Disclosure Coordinator)
- a secure means of notifying IBAC of assessable disclosures
- education and training for selected personnel in receipt, handling, assessing and notifying of disclosures, and welfare management of persons associated with a protected disclosure
- the collection and collation of statistics on protected disclosures for the purpose of their annual reporting.

Except for the procedures of the Victorian Inspectorate or the Ombudsman, IBAC can review procedures at any time to ensure they are consistent with the PD Act, the PD Regulations and IBAC's guidelines.

### 3. Making a disclosure

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#### What is a disclosure?

A disclosure is a report made by a person about improper conduct of public bodies or public officers to any of the organisations specified in Part 2 of the PD Act. A disclosure can also be made about detrimental action against a person by public bodies or public officers in reprisal for the making of a protected disclosure by any person.

A complaint or allegation that is already in the public domain will not normally be a protected disclosure, for example if the matter has already been subject to media or other public commentary. The term 'disclosure' is interpreted under the PD Act in the ordinary sense of the word as a 'revelation' to the person receiving it.

The disclosure can relate to improper conduct or detrimental action against a person that may already have taken place, may be occurring now, or the public officer or public body may be going to do it in the future. Disclosures can be made about conduct that occurred prior to the commencement of the PD Act on 10 February 2013.

A disclosure made in accordance with the requirements of Part 2 of the PD Act, may also be a complaint, notification or disclosure made under another Act.

In relation to Victoria Police specifically, a complaint made in accordance with section 86L(2A) of the *Police Regulation Act 1958* (Vic) is defined as a 'protected disclosure' by the PD Act. These complaints **must** be made by a member of the force about the conduct of another member of the force if he or she has reason to believe the other member is guilty of serious misconduct. A member of the force in this case is what is known as a 'sworn member', and does not include members of police personnel who are employed in the office of Chief Commissioner under Part 3 of the *Public Administration Act 2004*.

A 'police complaint disclosure' is a complaint made by a member of the police force to the Chief Commissioner of Police, IBAC, or to another member of the Force of the police force of more senior rank and referred to the Chief Commissioner of Police under s86L of the Police Regulation Act. Such a complaint is considered to be a disclosure for the purposes of the PD Act.

For a disclosure to be a protected disclosure it must be made in accordance with the requirements of Part 2 of the PD Act, and in accordance with the prescribed procedure, as outlined below.

#### Procedures for making a disclosure

Who can make a disclosure	– The disclosure can only be made by certain persons
How to make a disclosure	– Must be made verbally, in writing, or in some cases, online, in accordance with specific procedures
Who to make a disclosure to	– The disclosure can only be made to certain persons
Who disclosures can be made about	– Must be made only about the conduct of public bodies or public officers performing public functions
What disclosures can be made about	– Must be about improper conduct or detrimental action taken against a person

## What is not a disclosure

It **will not** be a protected disclosure if it is:

- made to an entity that cannot receive disclosures, or notified to IBAC by such an entity because such disclosures or notifications do not meet all the requirements under Part 2 of the PD Act
- the disclosure was made about a Public Interest Monitor, the Victorian Inspectorate, a Victorian Inspectorate Officer, or a court
- the discloser expressly states in writing that the disclosure **is not** a disclosure under the PD Act
- the disclosure is not a disclosure under the PD Act if it was made by an officer or employee of an investigating entity in the course of his/her duties or functions **unless** this person expressly states in writing that it **is** a disclosure and the disclosure is otherwise made in accordance with the PD Act requirements.
- the disclosure does not meet all the requirements under Part 2 of the PD Act and the prescribed procedures in the Regulations outlined above.

An entity receiving a disclosure that does not meet all these requirements is not required under the PD Act to consider whether it is a protected disclosure. However, to ensure that disclosers are not deprived of the opportunity to receive protection, an entity that receives what appears to be a disclosure about improper conduct or detrimental action which has not met all the requirements of the PD Act should consider whether to tell the person about the correct way to make a disclosure, so they have an opportunity to meet the legislative requirements.

In addition, section 11 of the PD Act provides that a disclosure may also be a complaint, notification or disclosure (however described) made under another Act. This enables the entity to consider whether a disclosure that does not meet the requirements under Part 2 of the PD Act could be treated as a complaint, notification or referral to their organisation if it has been made in accordance with their own legislative or administrative requirements.

## Who can make a disclosure?

Any person can make a disclosure about improper conduct by public bodies and public officers<sup>2</sup>. This includes a person who is a member, officer or employee of a public body or public officer. However, the making of disclosure is not limited only to 'internal' disclosers.

A company or a business cannot make a disclosure. The person making the disclosure must be an individual or a group of individuals making joint disclosures.

Making a joint disclosure overcomes the following limitation on the protections provided by the PD Act. The protections in sections 39, 40 and 41 in Part 6 of the PD Act are only provided to the person who makes a disclosure. This means that if a person makes the disclosure by 'notifying' the organisation on behalf of another person, then it is the 'notifier' who may receive those protections, not the person on whose behalf they have made the disclosure. The person on whose behalf the disclosure has been made will only be entitled to protection against detrimental action taken against them in reprisal for a disclosure made by the 'notifier'.

A disclosure can be made anonymously. However, this creates potential difficulties in being able to assess whether a complaint is a disclosure.

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<sup>2</sup> 'Public officer' and 'public body' are defined for the purposes of section 3 of the PD Act by reference to section 6 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) (IBAC Act)

A person can also make a disclosure in circumstances where they cannot identify the person or the organisation to which the disclosure relates.

### **How can a disclosure be made?**

A person may make a disclosure under Part 2 of the PD Act verbally or in writing. The disclosure may also be anonymous.

#### ***Verbal disclosure***

A person can make a verbal disclosure:

- in person
- by phone
- by leaving a voice mail message
- by any other form of electronic communication that does not require writing (note that an email is considered to be a written disclosure).

The disclosure **must** be made in private. This means that the person making the disclosure must reasonably believe that only the following people are present or able to listen to the conversation:

- the person making the disclosure
- a lawyer representing the person (if any)
- one or more people to whom a disclosure can be made under the PD Act or Regulations.

This does not preclude a group of individuals making of a joint disclosure at the one time.

If the disclosure is made verbally, the public body should ensure that the person receiving the disclosure makes notes at the time recording the disclosure. This person could also record the conversation, but should only do so with the discloser's permission or by giving prior warning that the conversation will be recorded.

#### ***Written disclosure***

A written disclosure can only be provided to the relevant organisation by:

- personal delivery to the office of the organisation
- mail addressed to the office of the organisation
- email to the email address of the office of the organisation, or to the official email address of a person nominated in the organisation's procedures or in the PD Regulations to receive a disclosure.

IBAC and the Ombudsman can also accept a written disclosure via an online form. Disclosures cannot be made by fax.

#### ***Anonymous disclosure***

A discloser need not identify themselves to the organisation to make a disclosure to that organisation under the PD Act.

An anonymous disclosure can be made by using unverifiable email addresses, through anonymous phone calls or in a face-to-face conversation or meeting where the person refuses to identify themselves (provided that meeting or conversation takes place 'in private' in accordance with the PD Regulations).

If the disclosure comes from an email address where the identity of the person making the disclosure cannot be determined, the disclosure should be treated as an anonymous disclosure.

## Who can receive disclosures

### Officers in an organisation who can receive disclosures

- The Commissioner
- A Deputy Commissioner
- The Chief Executive Officer
- An IBAC employee
- An IBAC staff member assigned from another public body



**IBAC**

- An Ombudsman Officer



**Ombudsman**

- A police member with a rank, including acting rank, of sergeant or above



**Victoria Police**

- Head of the relevant public service body
- A person defined in the public service body's procedures as a person who can receive disclosure about that body e.g. Protected Disclosure Coordinator
- Manager or supervisor of the discloser
- Manager or supervisor of the person who is the subject of the disclosure



**Public service body**

- Chief Executive Officer
- A person identified in the Council's procedures as a person who can receive disclosure about that Council (eg Protected Disclosure Coordinator)
- Manager or supervisor of the discloser
- Manager or supervisor of the person who is the subject of the disclosure



**Council**

- The Speaker of the Legislative Assembly (disclosure about the Assembly)
- The President of Legislative Council (disclosure about the Council)



**Presiding officer of  
Legislative Assembly and  
Legislative Council**

## About whom can a disclosure be made?

Disclosures can be made about public bodies or public officers.

**Public bodies** include:

- public sector bodies (a public service body<sup>3</sup>, a public entity<sup>4</sup> and a special body<sup>5</sup>)
- incorporated or unincorporated bodies established for a public purpose, including universities
- Electoral Boundaries Commission
- a Council (established under the *Local Government Act 1989*)
- a body performing a public function on behalf of the State or a public body or public officer.

**Public officers**<sup>6</sup> include:

- the Governor, Lieutenant-Governor or Administrator of the State
- Members of Parliament, including Ministers
- Ministerial officers, Parliamentary advisers and officers, electorate officers
- judicial officers, including coroners, members of VCAT, associate judges, judicial registrars
- statutory office holders, including the Auditor-General and the Ombudsman, the Director of Public Prosecutions
- public servants, including IBAC officers
- local government Councillors and Council employees
- university employees and teachers
- police personnel.

Further information about the types of public bodies and public officers about whom disclosures can be made can be found in the *Public Administration Act 2004*, and the *Independent Broad-based Anti-corruption Commission Act 2011* (IBAC Act), as well as on the State Services Authority website [www.ssa.vic.gov.au](http://www.ssa.vic.gov.au)

Some disclosures about certain public bodies or public officers are not disclosures under the PD Act. Section 9 of the PD Act provides that disclosures may not be made about the conduct or actions of a court, a Public Interest Monitor or the Victorian Inspectorate or its officers.

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<sup>3</sup> 'public service body' is defined in section 4 of the *Public Administration Act 2004* (Vic)

<sup>4</sup> 'public entity' is defined in section 5 of the *Public Administration Act 2004* (Vic)

<sup>5</sup> 'special body' is defined in section 6 of the *Public Administration Act 2004* (Vic)

<sup>6</sup> 'public officers' are defined in section 6 of the IBAC Act

## To whom can a disclosure be made?

Sections 14 to 19 of the PD Act provide that disclosures about some particular public bodies or public officers **must only be made** to particular entities. (see diagram)

Subject of the disclosure	Report to
<ul style="list-style-type: none"> <li>– Chief Commissioner of Police</li> <li>– Director of Public Prosecutions</li> <li>– Chief Crown Prosecutor</li> <li>– Solicitor-General</li> <li>– Governor</li> <li>– Lieutenant Governor or Administrator</li> <li>– Director, Police Integrity</li> <li>– Electoral Commissioner</li> <li>– A judicial officer</li> <li>– A member of VCAT who is not a judicial officer</li> <li>– A judicial employee</li> <li>– A Ministerial officer</li> <li>– A Parliamentary adviser</li> <li>– An electorate officer</li> <li>– A Parliamentary officer</li> <li>– Minister of the Crown who is not a member of Parliament</li> <li>– A person to whom the Governor in Council has issued a commission under s 88B of the <i>Constitution Act 1975</i></li> <li>– A member of a board appointed by the Governor in Council under s 88C of the <i>Constitution Act 1975</i></li> </ul>	→ IBAC
<ul style="list-style-type: none"> <li>– A Councillor</li> <li>– Freedom of Information Commissioner</li> <li>– Privacy Commissioner</li> <li>– Health Services Commissioner</li> <li>– Commissioner for Law Enforcement Data Security</li> </ul>	→ IBAC or the Victorian Ombudsman
<ul style="list-style-type: none"> <li>– The Chief Examiner or an Examiner appointed under s 21 of the <i>Major Crimes (Investigative Powers) Act 2004</i></li> <li>– An Ombudsman officer</li> <li>– A Victorian Auditor General Office officer</li> </ul>	→ IBAC or the Victorian Inspectorate
<ul style="list-style-type: none"> <li>– A member of police personnel (other than the Chief Commissioner)</li> </ul>	→ IBAC or a prescribed member of police personnel
<ul style="list-style-type: none"> <li>– Member of Parliament (Legislative Council)</li> </ul>	→ President of the Legislative Council
<ul style="list-style-type: none"> <li>– Member of Parliament (Legislative Assembly)</li> </ul>	→ Speaker of the Legislative Assembly
<ul style="list-style-type: none"> <li>– IBAC, including its officers</li> </ul>	→ Victorian Inspectorate

Under section 13 of the PD Act, unless required to be made to a particular entity under sections 14 to 19, disclosures may be made to IBAC or to the other investigating entities, the Chief Commissioner of Police, the Ombudsman and the Victorian Inspectorate. Disclosures to investigating entities apart from IBAC are limited to disclosures that the investigating entity would, if the disclosures were protected disclosure complaints, be authorised to investigate under another Act.

Public service bodies and Councils as set out in section 13 of the PD Act, may only receive disclosures that relate to the conduct of themselves, their own members, officers or employees. Such disclosures may also be made to IBAC, or to the Victorian Ombudsman (if within the Ombudsman's jurisdiction to investigate).

#### Entities that may receive disclosures

Entities	Sub-entities
<b>Investigating entity</b>	<ul style="list-style-type: none"> <li>– IBAC</li> <li>– The Ombudsman</li> <li>– The Chief Commissioner of Police</li> <li>– The Victorian Inspectorate</li> </ul>
<b>Public service body</b>	<ul style="list-style-type: none"> <li>– A Department</li> <li>– An Administrative Office</li> <li>– The State Services Authority</li> </ul>
<b>A Council</b>	<ul style="list-style-type: none"> <li>– Nil</li> </ul>

This is a more limited group of entities able to receive disclosures than was provided for in the *Whistleblowers Protection Act 2001* (WP Act). The WP Act defined a broader group of 'public bodies' that could receive disclosures.

The only organisations that can currently receive disclosures under the PD Act, in addition to investigating entities are:

- public service bodies within the meaning of section 4(1) of the *Public Administration Act 2004*, being Departments, Administrative Offices, or the State Services Authority
- a Council (as established under the *Local Government Act 1989*).

If an entity receives a disclosure about an employee, officer or member of another public body, the disclosure has not been made in accordance with Part 2 of the PD Act.

### Example

The Department of Health receives a disclosure from a person about the conduct of a hospital employee working at a Victorian public hospital.

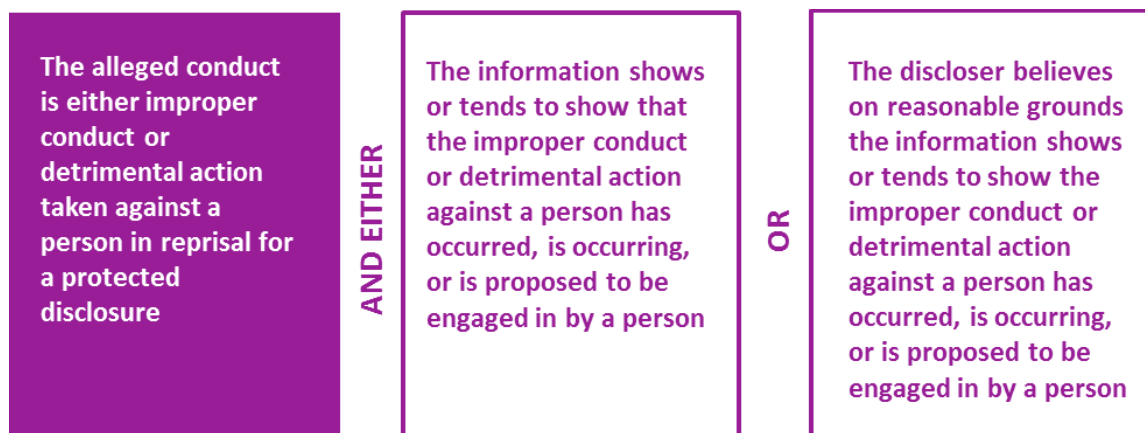
This is not a disclosure about the Department of Health, but about a public health provider.

This disclosure cannot be made to the public hospital - it must be made to IBAC.

The entity should, if possible, advise the person or body where the disclosure should be made. In such circumstances the entity should generally advise the person to make their disclosure to IBAC.

## About what can a disclosure be made?

A disclosure must be about the conduct of a person, public officer or public body in their capacity as a public body or public officer as outlined in the following diagram.



In assessing whether there is improper conduct or detrimental action, look critically at all information about the alleged conduct and about the discloser. Useful preliminary questions include:

- What is the discloser's connection to the alleged conduct – are they a victim, a witness, or a participant?
- How did they come to know about the conduct – were they directly involved in it, did they observe it happening to another person, did someone else tell them about it?
- How detailed is the information provided – is there sufficient information to enable you to consider whether there is improper conduct or detrimental action?
- How reliable is the information – is it supported by other information?

### ***Improper conduct by a public body or public officer in the performance of their functions as a public body or public officer***

Corrupt conduct and specified conduct definitions both limit improper conduct of a person, public officer or public body in the 'performance of their functions' as a public officer or public body, to circumstances in which they have breached 'public trust'.

A person acting in their official capacity is exercising 'public power' that is derived from their public office holding and may be controlled or influenced by legislative provisions, administrative directions, or constitutional principles or conventions.

### **Example**

A member of the Police Force of Victoria swears an oath to 'prevent to the best of my power all offences against [Her Majesty's peace] and 'will to the best of my skill and knowledge discharge all the duties legally imposed upon me faithfully and according to law'.

'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'<sup>7</sup>.

*Members of the community must rely on and trust their officials to act honestly, impartially and disinterestedly. In doing so, expectations are held that officials will not use their official position for personal advantage, or exercise the powers or the influence of office for collateral or extraneous reasons nor in a manner that is partisan where there is a duty not to favour a person or group.*<sup>8</sup>

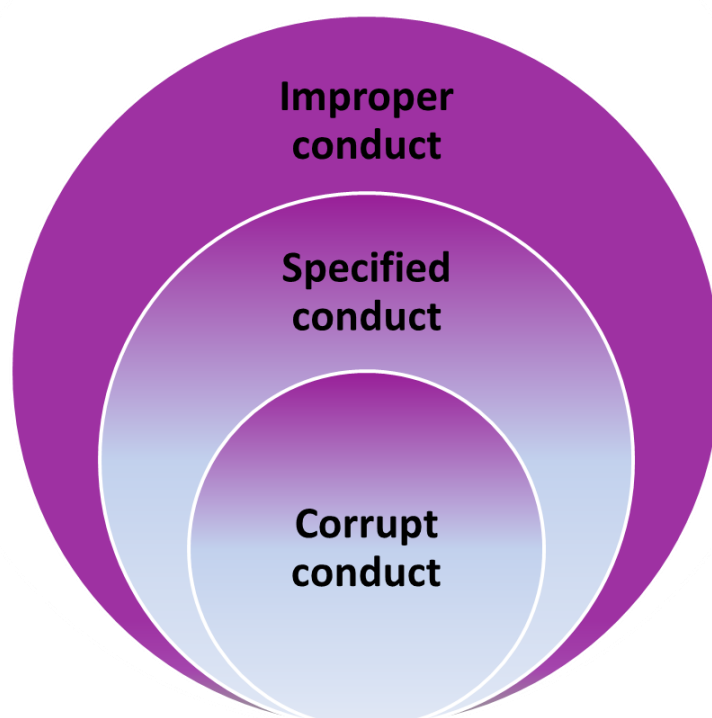
You need to identify that there is a link between the person's alleged improper conduct and their function as a public officer.

### **Defining improper conduct**

Improper conduct is defined in section 4 of the PD Act to mean:

- corrupt conduct (as defined in the *IBAC Act*), or
- specified conduct.

There is an overlap in the definitions of 'corrupt conduct' under the *IBAC Act*, and specified conduct under the PD Act. Essentially, all types of corrupt conduct are types of specified conduct, and improper conduct encompasses both corrupt and specified conduct (see diagram).



<sup>7</sup> *R v Bembridge* (1783) 99 ER 679.

<sup>8</sup> Hall, Peter M, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedures*, Lawbook Co, 2004 @ pp 9-10

## Types of corrupt conduct or specified conduct

### Public officers or entities

- the dishonest performance of a public officer or public official of their functions
- knowingly or recklessly breaching public trust by a public officer or public official
- misuse of information obtained by a public officer or public official in that capacity
- a conspiracy to commit or attempt to commit the above conduct
- Conduct that implies:
  - a substantial mismanagement of public resources
  - a substantial risk to public health or safety
  - a substantial risk to the environment

### Any person

- conduct adversely affecting the honest performance of a public officer or public official of their functions

The nature of the alleged conduct needs to be considered in order to determine whether it might be improper conduct or detrimental action. This includes considering not just whether the conduct constitutes or involves the types of improper conduct set out above, but also the seriousness of the conduct in terms of consequences.

Three types of ‘substantial’ specified conduct are specified in the PD Act. The use of the word ‘substantial’ has the effect of limiting these types of conduct to situations in which there is significant or considerable mismanagement, or significant or considerable risks to health, safety or the environment.

### ***Consequences of improper conduct***

Under the *IBAC Act*, **corrupt conduct** is conduct that would, if proved beyond reasonable doubt at trial, constitute a relevant offence. Relevant offences are:

- indictable offences, or
- the common law offences of attempt to pervert the course of justice, pervert the course of justice or bribery of a public official.

The relevant offences specified above are more serious crimes; offences punishable by imprisonment for five years or more are presumed to be indictable offences.

By contrast, **specified conduct** under the PD Act is conduct that would, if proved, constitute a criminal offence or reasonable grounds for dismissal.

This means that improper conduct which can be either corrupt or specified conduct must, at its lowest threshold level, be either criminal conduct or conduct serious enough to result in a person’s dismissal.

## Detrimental action

### ***Nature of alleged detrimental action***

The PD Act creates an offence for a person to take detrimental action against another person in reprisal for someone making a protected disclosure. You will need to consider not just the nature of the detrimental action, but also whether it is being taken in reprisal for a protected disclosure. The person(s) taking the detrimental action must be a public officer or body.

Section 3 of the PD Act defines detrimental action by a person as including the following:

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

The person need not have actually taken the action, but can just have threatened to do so.

The person need not have taken or threatened to take the action against the person themselves, but can have incited someone else to do so.

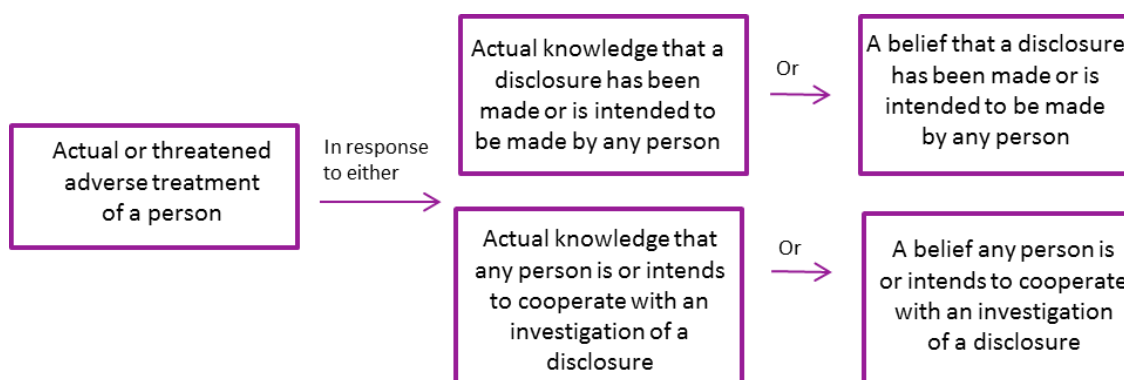
The detrimental action need not be taken against a discloser, but against any person.

### ***Detrimental action taken in reprisal for a protected disclosure***

The person (or the person they have incited) must take or threaten the 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.

### **The essential elements linked to detrimental action**



The reason for the person taking action in reprisal must be a 'substantial' reason, or it is not considered to be detrimental action (section 43(3) of the PD Act).

## Examples of detrimental action

Some types of detrimental action could involve threats to a person's personal safety and property. This might include intimidation or harassment, causing personal injury or prejudice to safety, property damage or loss, done directly or indirectly against the discloser, his or her family or friends.

A public body is not allowed to discriminate or disadvantage a person in their career, profession, employment, trade or business.

Actions by an employer including demotion, transfer, isolation in the workplace or changing the duties of a discloser due to the making of a disclosure, might be detrimental action.

A public body which discriminates against a discloser, his or her family and associates in subsequent applications for jobs, permits or tenders may be taking detrimental action resulting in financial loss or reputational damage.

## Examples of when it is not detrimental action

A manager may take management action against an employee who has made a protected disclosure, provided the making of the disclosure is not a substantial reason for the management action.

Action by a person against the discloser is not detrimental action if the discloser has made a false disclosure or provided false further information relating to a disclosure.

### ***Tests for improper conduct or detrimental action***

There are two alternative tests under subsection 9(1) of the PD Act for determining whether there is a disclosure of improper conduct or detrimental action (the alleged conduct) that falls under Part 2 of the PD Act.

#### **Test 1**

##### **Does the information show or tend to show there is improper conduct or detrimental action?**

Does the information itself show or tend to show improper conduct or detrimental action. The information needs to be assessed as to whether it satisfies the 'elements' of either improper conduct or detrimental action, as defined in the PD Act, and whether any of the exceptions apply.

If it is not clear that the information disclosed does show or tend to show that there is improper conduct or detrimental action, then the second test can be applied.

#### **Test 2**

##### **Does the discloser believe on reasonable grounds that the information shows or tends to show there is improper conduct or detrimental action?**

This means that the person must actually believe that the information shows or tends to show there is improper conduct or detrimental action, and his or her belief must be 'reasonable'. This means that the person's belief is based on facts that would be sufficient to make a reasonable person believe there was improper conduct or detrimental action

This reasonable belief does not have to be based on actual proof that the improper conduct or detrimental action in fact occurred, is occurring, or will occur, but there must be some information supporting this belief. The grounds for the reasonable belief can leave something to surmise or conjecture, but it must be more than just a reasonable suspicion, and the belief must be probable.

However simply stating that improper conduct or detrimental action is occurring, without providing any supporting information, would not be a sufficient basis for having a reasonable belief. A belief cannot be based on a mere allegation or conclusion unsupported by any further facts or circumstances. For example, it would not be sufficient for a person's disclosure to consist just of a one sentence statement 'I know X is corrupt'.

Other matters that can be considered in determining whether there are reasonable grounds for the discloser's belief is the reliability of the information they have provided, even if it is second or third hand. You can consider how the person would have obtained the information and the amount of detail that has been provided.

You can also consider the credibility of the discloser, or of those people who have provided the discloser with information.

At the conclusion of your assessment, you will be in a position to decide what you intend to do with the disclosure. If you consider it to be a protected disclosure, then you must notify IBAC. If you do not consider it to be a protected disclosure, then it may be a matter that you deal with through your complaint management processes.

## 4. Handling disclosures

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For the purposes of these guidelines, the reference to an ‘entity’ in this section is an entity who may/must receive disclosure under sections 13 to 19 inclusive of the PD Act. Public bodies that cannot not receive disclosures should also read this section, since they will need to identify whether complaints, reports or allegations made to them might be protected disclosures by people whom they need to re-direct to IBAC or another investigating entity.

### Receiving a disclosure

When an entity receives a complaint, report or allegation of improper conduct or detrimental action, the first step is to determine whether the disclosure may be a protected disclosure by going through the assessment process set out in the previous section.

The discloser does not need to specifically request the protections of the PD Act, or refer to the PD Act at all. The initial assessment is made on the nature of the information disclosed or on the belief that the discloser has about the nature of the information, and not the discloser’s intention.

If the disclosure is considered to fall under Part 2 of the PD Act or is a police complaint disclosure, then those receiving the disclosure need to be aware that protections apply to the discloser under Part 6 of the PD Act.

### Assessing a disclosure

Where an entity receives a disclosure relating to the conduct of an employee, member or officer of that entity, it **must** assess whether the disclosure may be a protected disclosure. The same applies to disclosure received by the Ombudsman and the Chief Commissioner/prescribed member of police personnel.

The entity should make this assessment as to whether the disclosure meets all of the requirements for a protected disclosure in Part 2 of the PD Act and the PD Regulations. If the disclosure does not meet all the requirements, then it is not a protected disclosure and the organisation may be able to deal with it under its own complaint handling process.

There are two exceptions to this. If a complaint has been made in accordance with s86L (2A) of the Police Regulation Act, then it is a protected disclosure as defined in section 3 of the PD Act.

In the case of police complaint disclosure made by a member of the force to the Chief Commissioner, IBAC or another member of the police force of more senior rank who refers the complaint to the Chief Commissioner under section 86LA of the *Police Regulation Act 1958* (Vic), these complaints are considered to be disclosures for the purposes of the PD Act. They are only complaints by a member of the force against another member of the force if they have reason to believe that the other member is guilty of serious misconduct within the meaning of section 86A of the *Police Regulation Act 1958*. Such a complaint does not need to meet the requirements of Part 2 of the PD Act.

### ***When urgent action is required while an assessment is still being made***

In some circumstances, the disclosure may be about improper conduct that may pose an immediate threat to health and safety of individuals, preservation of property, or may consist of serious criminal conduct.

Examples could include a child protection worker allegedly sexually assaulting children in care, a council worker allegedly lighting bush fires or a person threatening to poison the water supply.

In these cases an entity can take immediate action while considering whether or not it is an assessable disclosure that must be notified to IBAC or awaiting IBAC's decision on a notified matter.

It may be necessary to report criminal conduct to Victoria Police for immediate investigation, or take management action against an employee to prevent future conduct.

Section 52(3)(a)(iii) of the PD Act allows disclosure of the content of the disclosure by a person or body *'to the extent necessary for the purpose of taking lawful action in relation to the conduct that is the subject of an assessable disclosure including disciplinary process or action'*. However, this does not allow the identity of the discloser to be revealed. Reporting the alleged conduct to the Victoria Police as criminal conduct, or taking legitimate management action against the subject of the disclosure in order to prevent future conduct, may be appropriate courses of action in these circumstances.

### **Assessment decisions**

If the entity does not consider the disclosure to be a protected disclosure, then it must provide the discloser with the following information in writing within 28 days after the disclosure was made, that:

- the entity does not consider the disclosure to be a protected disclosure
- the disclosure has not been notified to IBAC for assessment, and
- the protections under Part 6 of the PD Act apply, regardless of whether the disclosure is notified to IBAC for assessment.

However, the entity does not have to provide the discloser with the above information unless the discloser has indicated to the entity, or it otherwise appears to the entity, that the discloser wishes to receive the protections that apply to a protected disclosure under this Act.

The entity receiving the disclosure is **not** required to notify a disclosure to IBAC if it does not consider it to be a protected disclosure. It may also decide to deal with the matter as a complaint directed to their entity for resolution.

If the entity considers the disclosure may be a protected disclosure, then it is required to notify the disclosure to IBAC for assessment and to notify the discloser. These notifications can be done by persons specified in the Protected Disclosure Regulations 2013 as persons who can receive disclosures. Such a disclosure is called an 'assessable disclosure'.

### **Notification to IBAC**

The entity must provide the discloser with information in writing within 28 days after the disclosure being made that:

- the disclosure has been notified to IBAC for assessment; and
- it is an offence under section 74 of the PD Act to disclose that the disclosure has been notified to IBAC for assessment under the PD Act.

The entity must notify IBAC in writing within 28 days after the disclosure was made that:

- the entity considers the disclosure may be a protected disclosure, and
- the entity is notifying the disclosure to IBAC for assessment.

The entity that notifies an assessable disclosure to IBAC may also provide IBAC with any information they have obtained regarding the disclosure in the course of their inquiries leading up to the notification. This information can be provided at the time of notification or at any later time.

### **Protection for public officers**

A public officer is given specific protections under the PD Act to provide information to other public officers or IBAC in dealing with a disclosure they have received. The public officer does not commit an offence under section 95 of the *Constitution Act* or other Act imposing a duty to maintain confidentiality, or breach confidentiality obligations or information disclosure restrictions when he or she acts in good faith and in accordance with the PD Act and Regulations and these guidelines.

## 5. IBAC assessment

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Once a notification is made to IBAC, then IBAC must assess whether, in IBAC's view, the assessable disclosure is a protected disclosure. If IBAC is of the view that the assessable disclosure is a protected disclosure, then it must determine that the protected disclosure is a 'protected disclosure complaint'.

In making its assessment, IBAC may seek additional information from the notifying entity or from the discloser if IBAC considers there is insufficient information to make a decision.

If IBAC is of the view that the assessable disclosure is not a protected disclosure, then it is not a 'protected disclosure complaint'.

Whether or not IBAC determines the disclosure to be a protected disclosure complaint, the protections under Part 6 of the PD Act apply to the discloser.

Once IBAC has determined that a disclosure is a protected disclosure complaint, the discloser cannot withdraw that disclosure (section 55(4) of the IBAC Act). An ordinary complaint made to IBAC differs in that it can be withdrawn at any time after making it. However, under section 68(2)(e) of the IBAC Act, IBAC **can decide not to investigate** a protected disclosure complaint if the discloser requests that it not be investigated.

### IBAC's determination

Once IBAC has determined whether or not the assessable disclosure is a protected disclosure complaint, then it determines what action it might take under the IBAC Act. Under section 58 of the IBAC Act, IBAC may dismiss, investigate, or refer a matter.

If IBAC dismisses a disclosure, then it must do so on one of the grounds set out in section 68 of the IBAC Act, and sub-sections 68(2), (3) and (4) which specifically relate to the dismissal of protected disclosure complaints. In particular, IBAC **must** dismiss a protected disclosure complaint if the matter disclosed is a matter than neither IBAC nor an investigating entity may investigate.

IBAC may choose to investigate the alleged conduct if it is reasonably satisfied that it is 'serious corrupt conduct' (ss60(2) of the IBAC Act).

IBAC may also choose to refer the protected disclosure complaint to the relevant investigating entity: disclosures about police personnel conduct to the Chief Commissioner of Police, and other disclosures to the Victorian Ombudsman. Any disclosures received by IBAC about the conduct of IBAC or IBAC officers must be referred to the Victorian Inspectorate, and disclosures about the conduct of the Victorian Ombudsman, or the Auditor-General or their officers may be referred to the Victorian Inspectorate.

Once IBAC has made a determination in respect of an assessable disclosure notified to it, then IBAC has a responsibility to advise the relevant notifying entity of its determination, and the action IBAC intends to take. This advice must be provided within a reasonable time of the action being taken, or an investigation commenced.

IBAC is also responsible for advising disclosers who have made their disclosures directly to IBAC, or who have had their disclosures notified to IBAC, of the determination and the action IBAC intends to take. This advice must be provided within a reasonable time of the action being taken, or an investigation commenced. See the table over for further information that IBAC will provide to a discloser.

If IBAC determines that the disclosure is not a protected disclosure complaint, it may advise the discloser that they should make a complaint directly to the public body about when they have made a disclosure. If this is the case, IBAC will also advise the relevant notifying entity that the discloser has been given this advice.

## IBAC's obligations



### If it is a protected disclosure complaint

IBAC must advise the discloser of this determination and the action proposed to be taken. This includes advising the discloser of whether IBAC has decided to dismiss, investigate or refer the protected disclosure complaint. This is to be done in writing and within a reasonable time.

Depending on the action IBAC has decided to take, IBAC has to provide certain information to a discloser:

- If IBAC decides to dismiss the protected disclosure complaint it must give reasons for its decision.
- If IBAC decides to investigate or refer the protected disclosure complaint it must provide a written statement advising the discloser that it is an offence under section 184 of the IBAC Act to disclose IBAC's action.

IBAC may decide not to notify the discloser or the entity that has notified the disclosure if it considers that notifying would have one of the adverse consequences set out in subsection 59(4) of the IBAC Act. These adverse consequences include putting a person's safety at risk, or prejudicing an investigation under the *IBAC Act*.



### If it is not a protected disclosure complaint

Where the disclosure has not been determined to be a protected disclosure complaint, IBAC must advise the discloser in writing within a reasonable time, that:

- IBAC has determined that their disclosure is not a protected disclosure complaint
- the disclosure will not be investigated as a protected disclosure complaint
- the confidentiality provisions under Part 7 of the PD Act no longer apply in relation to the disclosure.

In this case, IBAC may also advise the discloser:

- that the entity to whom they made their disclosure may be able to deal with their disclosure
- if the person wants to pursue the matter, the person should make a complaint directly to that entity.

IBAC will also advise the notifying entity of its determination.

IBAC may also consider whether or not to treat the assessable disclosure as a notification made to IBAC under the *IBAC Act*.

## Further contact about investigations

If IBAC or another investigating entity is conducting an investigation of a protected disclosure complaint, it may be in contact with the public body about which the disclosure has been made. This will be for the purpose of conducting investigative inquiries.

The public body or public officer will be able to disclose information about the protected disclosure complaint to the investigating entity without breaching the confidentiality requirements of the PD Act.

IBAC or the relevant investigating entity may also disclose the identity of the discloser and the content of the disclosure if necessary to do so for the purposes of their investigative action. If this is the case, then the public body or public officer to whom the information has been disclosed, is bound by the confidentiality requirements of Part 7 of the PD Act.

In addition, if the public body or public officer is advised of the identity of the discloser, then they will be required to look after the welfare of the discloser and provide protection against possible detrimental action.

## Providing information at the conclusion of an investigation

At the conclusion of its investigation, IBAC must provide the discloser with information about the results of its investigation, including any action taken by IBAC and any recommendation by IBAC that action or further action be taken.

IBAC may provide written information about the commencement, conduct or result of an investigation, including any actions taken and any recommendation made that any action or further action be taken to the relevant principal officer. However, IBAC must not provide any information that is likely to lead to the identification of a discloser.

IBAC does not have to provide this information to either the discloser or the relevant principal officer if it considers that the disclosure might result in any of the possible adverse outcomes specified in section 163(4) of the *IBAC Act*.

The Ombudsman must inform the discloser of the result of the investigation or other action taken, the recommendations he has made and comments on them (in certain specified circumstances). The Ombudsman may also disclose any additional information that they consider proper to disclose.

The Ombudsman does not have to provide this information to the discloser if they consider that the disclosure might result in any of the possible adverse outcomes specified in section 24(3) of the *Ombudsman Act*.

The Chief Commissioner must inform the discloser of the outcome of the investigation unless they consider that to do so might result in any of the possible adverse outcomes specified in section 86ZE of the *Police Regulation Act*.

## The Freedom of Information Act

The *Freedom of Information Act 1982* does not apply to any document in the possession of any person or body that relates to a protected disclosure, an assessable disclosure or that is likely to lead to the identification of a person who made an assessable disclosure (section 78 of the PD Act). Public bodies should ensure that any of its officers handling freedom of information requests are aware of this section. A public body should contact IBAC prior to providing any document originating from IBAC or relating to a protected disclosure, if requested under the *Freedom of Information Act*.

## Protections for persons making disclosure

Part 6 of the PD Act sets out the protections provided to persons who make a disclosure that is a 'protected disclosure' made in accordance with Part 2 of the PD Act.

The protections apply to a disclosure made under Part 2 of the PD Act from the time at which the disclosure is made to any of the public bodies specified, or IBAC. They apply even if the public body receiving the disclosure does not notify the disclosure to IBAC, and whether or not IBAC has determined that it is a protected disclosure complaint.

The protections also apply to further information relating to a protected disclosure made by the original discloser, if the further information has been provided, verbally or in writing, to:

- the entity to which the protected disclosure was made
- IBAC, or
- an investigating entity investigating the protected disclosure.

An employee of a public service body or public entity 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.

However, a discloser is not protected if they commit an offence under section 72 or 73 of the PD Act, as follows:

- a person must not provide false or misleading information, or further information that relates to a protected disclosure, that the person knows to be false or misleading in a material particular, intending that the information be acted on as a protected disclosure (penalty = 120 penalty units or 12 months imprisonment, or both)
- a person must not claim that a matter is the subject of a protected disclosure knowing the claim to be false (penalty = 120 penalty units or 12 months imprisonment, or both)
- a person must not falsely claim that a matter is the subject of a disclosure that IBAC has determined to be a protected disclosure complaint (penalty = 120 penalty units or 12 months imprisonment, or both).

## Protections provided under Part 6 of the PD Act

### Protection provided

- He or she is not subject to any civil or criminal liability or administrative action (including disciplinary action) for making the disclosure
- He or she is not committing an offence against the Constitution Act 1975 or any other Act that imposes obligations of confidentiality or any other restriction on the disclosure of information
- He or she is not breaching any other obligation (made by oath, rule of law or practice) requiring him or her to maintain confidentiality or otherwise restrict confidentiality
- He or she cannot be held liable for defamation in relation to information included in a protected disclosure

### Limitation on protection

- If the person has made a false disclosure or provided false information, the person is not protected

## Additional limitations on protections

A person who makes a disclosure is not protected against legitimate management action and will still be held liable for their own conduct that they disclose as part of the protected disclosure.

The person making a protected disclosure is not subject to criminal or civil liability for making the disclosure under section 39 of the PD Act, but section 42 of the PD Act specifically provides that a person remains liable for their own conduct even though the person has made a disclosure of that conduct under the PD Act.

## Offences for making an unauthorised disclosure

Part 11 of the PD Act contains a number of offence provisions relating to unauthorised disclosure of information by either disclosers or persons who have received disclosures.

Disclosers commit an offence if they disclose that:

- their disclosure has been notified to IBAC for assessment, subject to specific exceptions
- IBAC or the Victorian Inspectorate has determined their disclosure to be a protected disclosure complaint, subject to specific exceptions.

Both of these offences carry a penalty of 60 penalty units or six months imprisonment, or both. These offences can also be committed by other people who receive the above types of information from the discloser, subject to the same exceptions as apply to the discloser.

The PD Act also contains offences that might be committed by persons who take certain actions against a person who has made a disclosure. Public bodies must ensure all nominated officers and staff are aware of the criminal offences created by the PD Act and other legal action that may be taken against them for any breach by them.

The offences, their penalties and applicable defences or limitations are set out in Appendix 2.

Taking disciplinary or other action against a person who has made a protected disclosure invariably creates the perception that it is being taken in reprisal for the disclosure. In all cases where disciplinary or other action is being contemplated, the chief executive officer or other responsible public officer must be able to clearly demonstrate:

- the fact that a person has made a protected disclosure is not a substantial reason for their taking of the action against the employee
- there are good and sufficient grounds that would fully justify action against any other person in the same circumstances
- there are good and sufficient grounds that justify exercising any discretion to institute disciplinary or other action.

If a public body cannot demonstrate that the above preconditions have been met, it leaves itself open to allegations of taking detrimental action against a person making a protected disclosure in reprisal for making the disclosure. A public body may wish to obtain legal advice prior to taking any action against the person making a protected disclosure.

Care should be taken to thoroughly document the process including recording the reasons why the disciplinary or other action is being taken, and the reasons why the action is not in retribution for making the disclosure.

The person making a protected disclosure should be clearly advised of the proposed action to be taken and of any mitigating factors that have been taken into account.

## Appendix 1 – Glossary of terms

<b>Assessable disclosure</b>	a disclosure that must be made directly, or notified, to IBAC or the Victorian Inspectorate, and includes a police complaint disclosure. In the case of a disclosure notified to IBAC it is a disclosure that the notifier considers may be a protected disclosure
<b>Discloser</b>	a person who makes a disclosure of improper conduct or detrimental action in accordance with the requirements of Part 2 of the PD Act
<b>Entity that can receive disclosure</b>	a public service body within the meaning of section 4(1) of the <i>Public Administration Act 2004</i> , a Council (established under the <i>Local Government Act 1989</i> ), a public body or public officer prescribed for the purposes of section 13 of the PD Act
<b>Investigating entity</b>	IBAC, the Ombudsman, the Chief Commissioner of Police and the Victorian Inspectorate. Only these entities can investigate a protected disclosure complaint
<b>Police complaint disclosure</b>	a complaint made by a member of the force about another member of the force involving allegations of serious misconduct
<b>Presiding Officer</b>	the Speaker of the Legislative Assembly or the President of the Legislative Council
<b>Protected disclosure</b>	a) A disclosure made in accordance with Part 2 of the PD Act; or b) A complaint made in accordance with section 86L(2A) of the <i>Police Regulation Act 1958</i>
<b>Protected disclosure complaint</b>	a disclosure that has been determined by IBAC under section 26 of the PD Act to be a protected disclosure complaint
<b>Public body</b>	a public body within the meaning of section 6 of the <i>Independent Broad-based Anti-corruption Act 2011</i> , IBAC or any other body or entity prescribed for the purposes of this definition
<b>Public officer</b>	a public officer within the meaning of section 6 of the <i>Independent Broad-based Anti-corruption Act 2011</i> , an IBAC officer or any other person prescribed for the purposes of this definition
<b>Public sector</b>	the sector comprising all public bodies and public officers
<b>Public service body</b>	a Department, an Administrative Office, or the State Services Authority

## Appendix 2 – Civil and criminal penalties under the PD Act

	Specific offences	Penalties	Limits on liability / defences
Criminal offences	<b>Detrimental action</b>		
	<p><i>Liability of an individual</i></p> <p>It is an offence for a person to take or threaten action in reprisal when:</p> <ul style="list-style-type: none"> <li>a protected disclosure has been made</li> <li>a person believes a protected disclosure has been made</li> <li>a person believes that another person intends to make a protected disclosure</li> </ul>	<ul style="list-style-type: none"> <li>Criminal penalty: 240 penalty units or 2 years imprisonment or both AND (if person is convicted or found guilty of an offence)</li> <li>Civil penalty: Order of court for offender to pay appropriate level of damages to compensate for injury, loss or damage</li> </ul>	<ul style="list-style-type: none"> <li>Reason for taking detrimental action is not a 'substantial' reason</li> <li>Discloser has made false disclosure or provided false information</li> <li>IBAC has determined the disclosure is not a protected disclosure complaint and the person taking detrimental action knew about that determination</li> </ul>
	<p><i>Vicarious liability of their employer</i></p> <p>Employer may also be held to be jointly and civilly liable for the detrimental action of their employee or agent</p>	<ul style="list-style-type: none"> <li>Criminal penalty: 240 penalty units or 2 years imprisonment or both AND (if person is convicted or found guilty of an offence)</li> <li>Civil penalty: Order of court for offender to pay appropriate level of damages to compensate for injury, loss or damage</li> </ul>	<ul style="list-style-type: none"> <li>Public body proves on balance of probabilities that it took reasonable precautions to prevent the employee/agent from taking detrimental action</li> <li>Policies, procedures and systems will assist in establishing reasonable precautions have been taken</li> </ul>
	<b>Disclosure of content of assessable disclosure</b>		
	A person/body must not disclose content of assessable disclosure or information about content	<ul style="list-style-type: none"> <li>120 penalty units or 12 months imprisonment or both (person)</li> <li>600 penalty units (body corporate)</li> </ul>	<ul style="list-style-type: none"> <li>Exceptions as set out in ss52(3) and s54 PD Act</li> </ul>
Civil action	<b>Disclosure of identity of person making assessable disclosure</b>		
	A person/body must not disclose information likely to lead to the identification of a person who has made an assessable disclosure	<ul style="list-style-type: none"> <li>120 penalty units or 12 months imprisonment or both (person)</li> <li>600 penalty units (body corporate)</li> </ul>	<ul style="list-style-type: none"> <li>Exceptions as set out in ss53(2) and s54 PD Act</li> </ul>
	<b>Detrimental action</b>		
	<p>A person who takes detrimental action may be subject to proceedings in tort in any court of competent jurisdiction</p> <p>Injunction or interim injunction can be granted by the Supreme Court if the Court is satisfied that a person has taken or intends to take detrimental action against another person in reprisal for a protected disclosure</p>	<ul style="list-style-type: none"> <li>Civil penalty: Court order for damages for any injury, loss or damage, including exemplary damages</li> </ul>	



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Published June 2013