

Guidelines for protected disclosure welfare management

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.

The guidelines should be read in conjunction with IBAC's *Guidelines for making and handling protected disclosures* which are located on IBAC's website 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.

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1. About the guidelines

These guidelines are a resource for:

- 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
- any person who is a witness in an investigation of a protected disclosure complaint
- any person who becomes aware that their conduct is the subject of a protected disclosure
- any person who thinks that they may have detrimental action taken against them in reprisal for making a protected disclosure
- 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 is not able to receive disclosure.

These guidelines should be read in conjunction with IBAC's *Guidelines for making and handling protected disclosures* which can be found on IBAC's website www.ibac.vic.gov.au

The guidelines cover managing the welfare of:

- any person who makes a protected disclosure
- any person who is a witness in an investigation of a protected disclosure complaint
- any person who is the subject of such an investigation.

These guidelines cover the management of the welfare of any of the above persons in relation to protected disclosures made to any entity under Part 2 of the PD Act, except to a Presiding Officer of either House of Parliament. These guidelines also cover welfare management relating to disclosures made to the Victorian Inspectorate and the Chief Commissioner of Police.

2. Who can 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*).

Investigating entities are IBAC, the Ombudsman, the Chief Commissioner of Police and the Victorian Inspectorate.

Further information about who can receive disclosures is in IBAC's *Guidelines for making and handling protected disclosures*.

Organisations that cannot receive disclosures under the PD Act should make their staff aware that they can make disclosures directly to IBAC. If a person contacts the organisation and appears to be attempting to make a disclosure, then the organisation needs to advise the person of their ability to make a disclosure to IBAC.

3. Workplace processes and procedures

Dealing with the disclosure of wrongdoing in the workplace needs to be done quickly and appropriately. Public bodies that can receive disclosures should create and support a workplace culture where the making of protected disclosures is valued by the organisation and taken seriously.

Organisations can encourage staff to disclose by:

- being clear about what conduct is unacceptable
- raising awareness of responsibilities to disclose and how to do this
- advising staff of their right to disclose to their own organisation and other appropriate authorities
- making sure that there is information readily available on how to make a disclosure, and ensuring staff members are familiar with their organisation's protected disclosure policies, procedures and codes of conduct
- letting staff know they can seek advice confidentially and anonymously from the Protected Disclosure Coordinator, or from the head of the organisation
- reassuring staff that detrimental action will not be tolerated and they will be protected
- initiating disciplinary action against staff who are involved in the taking of detrimental action
- ensuring the Protected Disclosure Coordinator knows how to receive and manage a protected disclosure and what to do with it
- ensuring that the organisation handles protected disclosures consistently and appropriately
- being visible, approachable, openly communicating and leading by example.

It is also important for management to treat those who are the subject of a disclosure fairly.

Developing internal processes and procedures

Any entity that may receive disclosures is required to develop internal procedures to facilitate and manage the making of disclosures by people, and the handling of these disclosures, including notification to IBAC. They must also 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 people in reprisal for the making of protected disclosures.

It is important for those 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.

They must also have effective processes for looking after the welfare of persons who have made protected disclosures, those who are the subject of the protected disclosure and those who might be witnesses in the investigation.

All the procedures referred to above must be completed within six months of the commencement of the PD Act which commenced on 10 February 2013.

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

- a secure information management and reporting system 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
- the selection of a person(s) identified as a person who can receive disclosures (Protected Disclosure Coordinator) and their roles and responsibilities
- a secure process for receiving verbal or written disclosures
- 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 in their annual reports.

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.

4. Welfare management

The protection of persons making genuine protected disclosures about improper conduct or detrimental action is essential for the effective implementation of the PD Act. In addition, the PD Act extends the need for welfare management to those people who have cooperated or intend to cooperate with an investigation of a protected disclosure complaint.

The public service body is responsible for ensuring both those who disclose and those who cooperate are protected from direct and indirect detrimental action. They must make sure that their workplace culture supports people making protected disclosures and people who cooperate with protected disclosure complaint investigations.

In circumstances where an organisation cannot receive disclosures or may not know when a person has made a protected disclosure, this information may be provided to the executive or management of an organisation by IBAC or the Victorian Inspectorate who are assessing whether a disclosure is a protected disclosure complaint, or by an investigating entity that is investigating a protected disclosure complaint. Having been made aware of the identity of a discloser, and/or the contents of their disclosure, the organisation will be required to keep that information confidential.

People who need protection – disclosers and cooperators

A person making a protected disclosure may be employed by a public body or may be a member of the public. A person cooperating with an investigation into a protected disclosure complaint will also fall into one of the same categories.

Public bodies have obligations to protect people both from inside or outside the public body from detrimental action taken in reprisal for the making of the disclosure. Public bodies in this case include those organisations that cannot receive a disclosure, but can be the subject of a disclosure made to IBAC or other specified organisations.

If the disclosure is determined as a protected disclosure complaint by IBAC, these public bodies have further obligations with respect to the discloser. They must protect the identity of the discloser and the content of the person's disclosure to ensure confidentiality.

The management of both types of persons making protected disclosures or cooperating with protected disclosure complaint investigations may, however, be different. There are different legislative responsibilities placed on a public body for looking after their employees, than there are for looking after members of the public, even if those people may be clients or users of the public body's services.

The senior management of a public body has a responsibility for the welfare of a person making a protected disclosure or cooperating with a protected disclosure complaint investigation. The employer has legislative and administrative obligations to ensure the health and wellbeing of employees of a public body under Occupational Health and Safety legislation, the *Charter of Human Rights and Responsibilities Act 2006*, the *Public Administration Act 2004*, the Victorian Public Sector Code of Conduct and the Victorian Public Sector Code of Conduct for Special Bodies.

A discloser who is a member of the public may be a client or user of services provided by the public body about whom they are making the disclosure. Likewise, a member of the public who cooperates with a protected disclosure complaint investigation may be a client or user of services provided by the public body under investigation.

Example

A public housing tenant, a client of the Department of Human Services, makes a disclosure that an officer of the Department has allocated a house to relative without them having to go through the normal application process.

If the discloser is in this category, then the relevant public body has legislative and administrative obligations to meet in handling the welfare of the discloser.

Appointing a welfare manager

Public service and other bodies that can receive disclosures should consider the appointment of a welfare manager for any person making a protected disclosure, following due consideration of any risks faced by either an internal or external discloser. At the same time, there may also be welfare needs for other people who may be involved in the investigation.

The following matters should be taken into consideration in deciding whether or not a welfare manager should be appointed in a particular case:

- are there any real risks of detrimental action against the person, taking into account their particular circumstances?
- can you ensure that you will take the person seriously and treat them with respect?
- can you ensure that you will give the person effective support, including keeping them informed of the status of their disclosure?
- can you protect the person from suffering repercussions, by dealing with the matter discreetly and confidentially, and responding swiftly and fairly to any allegations that the person has in fact suffered retribution?

If the answer to the first question is 'yes' then the appointment of a dedicated welfare officer is probably appropriate. If the answer to the first question is 'no' and you can meet the needs set out in the remainder of the questions, there may be no need for a welfare officer.

A welfare officer can monitor the specific needs of the discloser/cooperator and provide practical advice and support. However, in most circumstances, a welfare officer will only be required where a protected disclosure complaint proceeds to investigation, but each case needs to be assessed on its own merits.

A welfare manager (if appointed) of an internal or external discloser or cooperator cannot be expected to go beyond what is reasonable for a public body in providing support to them. The welfare manager should discuss the issue of reasonable expectations with the discloser or cooperator.

For internal disclosers, public bodies may also wish to make use of their Employee Assistance Program (EAP) to provide welfare support¹.

¹ EAP may not extend to cover contract staff

Providing welfare services

Whether or not a welfare manager is appointed to look after a discloser or cooperator, various welfare support should be provided by the organisation for the discloser or cooperator on an ongoing basis.

Inform	<p>At a minimum, provide:</p> <ul style="list-style-type: none"> • confirmation that the disclosure has been received • the legislative or administrative protections available to the person • a description of the action proposed to be taken • if action has been taken, details about results of the action
Provide active support	<ul style="list-style-type: none"> • acknowledge the person for having come forward • provide the person with assurance that they have done the right thing, and the organisation appreciates it • make a clear offer of support • assure them that all reasonable steps will be taken to protect them • give them an undertaking to keep them informed
Manage expectations	<p>Have an early discussion with them:</p> <ul style="list-style-type: none"> • what outcome do they want? • are their expectations realistic? • what will the organisation be able to deliver?
Maintain confidentiality	<p>The identity of the discloser and the subject matter of their disclosure need to be kept confidential:</p> <ul style="list-style-type: none"> • make sure that other staff cannot infer the identity of the discloser or a person cooperating with the investigation from any information they receive • remind the discloser not to reveal themselves or give out information that would enable others to identify them as a discloser • make sure that hardcopy and electronic files relating to the disclosure are accessible only to those who are involved in managing disclosures and persons affected by them in your organisation
Assess the risks of detrimental action being taken in reprisal	<ul style="list-style-type: none"> • be proactive and do not wait for a complaint of victimisation, but actively monitor the workplace, anticipate problems and deal with them before they develop
Protect the discloser/cooperator	<ul style="list-style-type: none"> • examine the immediate welfare and protection needs of the person and seek to foster a supportive work environment • listen and respond to any concerns the person may have about harassment, intimidation or victimisation in reprisal for their actions • assess whether the concerns the person may have about harassment, intimidation or victimisation might be due to other causes other than those related to a protected disclosure
Manage the impact of any investigation	<ul style="list-style-type: none"> • prevent the spread of gossip and rumours about an investigation into the disclosure
Keep records	<ul style="list-style-type: none"> • keep contemporaneous records of all aspects of the case management of the person, including all contact and follow-up action

Adapted from *Handling a public interest disclosure*, Queensland Government 2011, pp21-27

A welfare manager must not divulge any details relating to the disclosed matter to any person other than the protected disclosure coordinator, or the principal officer of the public body. All meetings between the welfare manager and the person must be conducted discreetly to protect the person from being identified as being involved in the disclosure.

Protection against 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 the nature of the detrimental action, and 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.

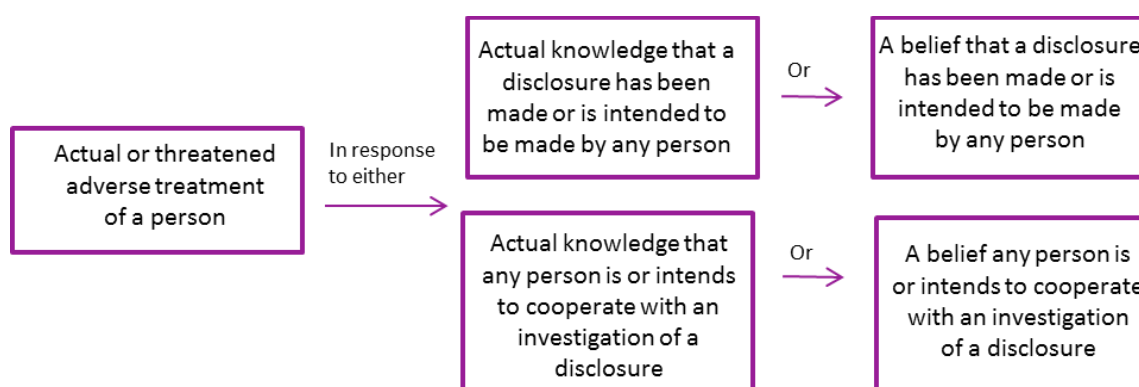
The detrimental action need not be taken against a discloser, but against any person.

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.

Dealing with detrimental action

If any person reports an incident of harassment, discrimination or adverse treatment that may amount to detrimental action apparently taken in reprisal for a disclosure the welfare manager or protected disclosure coordinator must record details of the incident and advise the person of their rights under the PD Act.

Where a public body that cannot receive disclosures has such a report made to it, the receiving officer should record details of the incident and advise the person of their rights under the PD Act to make a disclosure to IBAC.

Where the detrimental action is of a serious nature likely to amount to a criminal offence, consideration should be given to reporting the matter to the police or IBAC. If a person commits a criminal offence against subsection 45(1) of the PD Act that offence carries a penalty of 240 penalty units or two years imprisonment or both.

In such circumstances, a public body must be careful about making preliminary enquiries or gathering information concerning such an allegation of serious detrimental action so it does not compromise the integrity of any evidence that might be later relied upon in a criminal prosecution.

The taking of detrimental action in reprisal for making a disclosure can be grounds for a person to make a further disclosure with respect to that conduct. The disclosure of this allegation must be assessed by the entity receiving it as a new disclosure under Part 2 of the PD Act.

Transfer of employees

An employee of a public body who has made a disclosure and who believes on reasonable grounds that detrimental action is being taken against their in reprisal for a disclosure may request a transfer of employment (section 51 of the PD Act).

After making a disclosure an employee can be transferred internally to another part of a public service body, 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 head of the public body has reasonable grounds to suspect detrimental action will be, is being, or has been taken against the employee
- the head of the public body 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 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.

If the person making the disclosure is implicated in the improper conduct or detrimental action that is subject of the disclosure

The discloser is not subject to criminal or civil liability for making the disclosure under section 39 of the PD Act. However section 42 of the PD Act specifically provides that a person's liability for his or her own conduct is not affected by the person's disclosure of that conduct under the PD Act.

The management of the welfare of a discloser may become complicated when that person is implicated in misconduct, whether or not that misconduct is related to the disclosure. The general obligations of a public service or other body that can receive disclosures in relation to handling a disclosure and protecting the discloser still apply. A discloser is not protected from the reasonable consequences flowing from their involvement in any improper conduct, as section 42 of the PD Act sets out.

Care should be taken to thoroughly document the process of any action taken against a discloser 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 discloser should be clearly advised of the proposed action to be taken and of any mitigating factors that have been taken into account.

Welfare management of persons who are the subject of protected disclosures

An organisation also needs to meet the welfare needs of a person who is the subject of a protected disclosure. Until a protected disclosure complaint is resolved - either by dismissing, or investigating it, and an outcome is reached - the information about the person is only an allegation. This person is also likely to need support once they become aware that they are the subject of a disclosure.

Informing the subject of a disclosure

A decision has to be made as to whether or when a person who is the subject of a disclosure should be informed about the allegation made against him or her by a discloser. It is possible that the subject of the disclosure may never be told about the disclosure if it is not determined to be a protected disclosure complaint, or a decision is made to dismiss the disclosure.

The PD Act limits the disclosure of information about the content of an assessable disclosure and the identity of the discloser to certain specified circumstances set out in Part 7 of the PD Act. An assessable disclosure is one which must be notified to IBAC if the public service or other body receiving the disclosure considers it may be a protected disclosure or is made directly to IBAC. A public body may give information about the disclosure to the subject of the disclosure if it is directed or authorised to do so by the entity investigating the disclosure or for the purpose of taking action with respect to the conduct alleged, including disciplinary action.

Investigating entities may also inform the subject of the disclosure in the course of their investigation for the purposes of conducting that investigation, or any actions that they propose to take as a result of the investigation.

Welfare services

A person who is subject of a disclosure who is made aware of their status may have a welfare manager appointed by the organisation, or be referred to the organisation's EAP program for welfare assistance. It is necessary to consider each matter on a case by case basis, taking into account the particular circumstances of the person.

Confidentiality

The employer of the person about whom the protected disclosure has been made should take all reasonable steps to ensure the confidentiality of this person during the assessment and any ensuing investigation. Where the disclosure is dismissed or investigations do not substantiate the allegations made against the person, the fact of the investigation, its results, and the identity of the person subject of the disclosure should still be kept confidential.

Natural justice

The person must be afforded natural justice prior to a decision being made about their conduct. If the matter has been investigated by an investigating entity such as IBAC, Victorian Inspectorate, Victoria Police or the Ombudsman, then the carrying out of this consultation process is the responsibility of each of these organisations. Natural justice 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

- have his/her defence set out fairly in any report.

If allegations are wrong or unsubstantiated

If a person has been the subject of allegations that are wrong or unsubstantiated, then it is necessary for the employer and the investigating entity to ensure that there are no adverse consequences for this person arising out of the disclosure or its investigation. This is particularly crucial where information has been publicly disclosed that has identified the person, but also where such information has become well-known across the organisation where the person works.



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