

PROTECTED DISCLOSURE MANAGEMENT

Quick reference guide to protected disclosures

<p>Who can make a disclosure?</p>	<p>Any individual or group of individuals.</p> <p>A disclosure cannot be made by a business or company.</p> <p>(refer to Part 2 of these procedures for more information)</p>
<p>How do I make a disclosure?</p>	<p>Verbally or in writing (but not by fax) in accordance with specific procedures.</p> <p>(refer to Part 3 of these procedures for more information)</p>
<p>What can I make a disclosure about?</p>	<p>Improper conduct engaged in, and/or detrimental action taken by, public bodies or public officers performing public functions.</p> <p>This includes the Office of Public Prosecutions (“OPP”) and its employees and/or officers, the Solicitor for Public Prosecutions, a Crown Prosecutor, the Chief Crown Prosecutor, an Associate Crown Prosecutor and the Director of Public Prosecutions.</p> <p>(refer to Part 4 of these procedures for more information)</p>
<p>Who can I make a disclosure to?</p>	<p>If you wish to make a protected disclosure about the OPP or any of its employees and/or officers, the Solicitor for Public Prosecutions, an Associate Crown Prosecutor or a Crown Prosecutor, you may contact:</p> <ul style="list-style-type: none"> • The Independent Broad-based Anti-corruption Commission (IBAC) <p style="padding-left: 40px;">Assessment and Review Unit GPO Box 24234 Melbourne VIC 3001 Telephone: 1300 735 135 Email: submit@ibac.vic.gov.au Website: www.ibac.vic.gov.au</p> <p>If you wish to make a protected disclosure about the Director of Public Prosecutions or the Chief Crown Prosecutor, you must contact IBAC.</p> <p>(refer to Part 5 of these procedures for more information)</p>

1. Background and purpose

- 1.1 The OPP, its employees or officers, the Solicitor for Public Prosecutions, the Director of Public Prosecutions, the Chief Crown Prosecutor, Associate Crown Prosecutors and Crown Prosecutors encourage employees and members of the public to report known or suspected incidences of corrupt or improper conduct.
- 1.2 The purpose of this document is to establish procedures for how a person (whether an employee or member of the public) can make a disclosure about the OPP and its employees or officers and the above listed entities; how the OPP will protect disclosers against detrimental action for making a disclosure; and addressing welfare management arrangements for disclosers.
- 1.3 These procedures have been prepared in accordance with the *Protected Disclosure Act 2012 (the Act)* and the guidelines of the Independent Broad-based Anti-corruption Commission (**IBAC**) which are available on the IBAC website (www.ibac.vic.gov.au).

2. Who can make a protected disclosure?

- 2.1 Any person can make a protected disclosure about improper conduct engaged in, or detrimental action taken by, the OPP or one of its employees or officers, the Solicitor for Public Prosecutions, the Director of Public Prosecutions, the Chief Crown Prosecutor, an Associate Crown Prosecutor and a Crown Prosecutor.
- 2.2 You can make a protected disclosure if you are a member of the public, an employee or officer of the OPP, or an employee, officer or member of a department or public body.
- 2.3 You can make a disclosure as an individual or together with a group of individuals.
- 2.4 A company or business cannot make a protected disclosure.
- 2.5 You can ask someone else to make a disclosure on your behalf. However, if you ask someone else to make a disclosure on your behalf, only that person will receive the full protection of the Act in relation to that disclosure. Your protection will be limited to confidentiality and protection against detrimental action taken against you in reprisal for the disclosure that has been made.
- 2.6 You do not have to specifically refer to the Act or the protections in the Act for your disclosure to be a 'protected disclosure'. You may also advise that you do not want your disclosure to be treated as a 'protected disclosure'.

3. How do I make a protected disclosure?

- 3.1 You may make a protected disclosure:
 - (a) in person
 - (b) by phone
 - (c) by leaving a voicemail message
 - (d) in writing by post, personal delivery or email
 - (e) by any other form of electronic communication, and/or

(f) anonymously.

3.2 You may **not** make a protected disclosure by fax.

3.3 A protected disclosure must be made in private so it is important that only the person who/entity that you are making the disclosure to can hear or receive your disclosure. For example, if you make your disclosure by email, your disclosure should be sent to the email address of the person who/entity that you are making the disclosure to, rather than a group email. You are not precluded from making a joint disclosure with a group of individuals at the same time.

3.4 If you are making your disclosure verbally, the person receiving your disclosure may take notes of your discussion. The person receiving your disclosure may also want to record the conversation, but will only do so with your permission.

3.5 You do not have to identify yourself when making a disclosure. However, if your disclosure is anonymous, this may affect how the disclosure is investigated and you will not be notified of the outcome of any investigation.

3.6 If you cannot be identified from the disclosure, the disclosure will be treated as an anonymous disclosure.

4. What can I make a protected disclosure about?

4.1 You may make a protected disclosure about information that shows or tends to show, or that you believe on *reasonable grounds* shows or tends to show, that:

- (a) a person, public officer or public body
- (b) is engaging in, or proposing to engage in
- (c) *'improper conduct'* and/or *'detrimental action'*.

Public officer and public body

4.2 The conduct you are disclosing must be in the performance of a person or body's function as a public officer or public body. In other words, there must be a link between the alleged improper conduct and/or detrimental action and the person or body's functions as a public officer or public body.

4.3 Public bodies or public officers include the entities referred to in paragraph 2.1.

Improper conduct and detrimental action

- 4.4 The conduct you are disclosing must be improper conduct and/or detrimental action.
- 4.5 The definitions of improper conduct and detrimental action are explained in the diagram below.

**'Improper conduct' is defined as:
'CORRUPT CONDUCT' or 'SPECIFIED CONDUCT'**

Corrupt conduct is:

Conduct that:

- adversely affects the honest performance of functions by a public officer or public body
- involves the dishonest performance of functions by a public officer or public body
- involves a breach of public trust
- involves a misuse of information acquired in the performance of functions as a public officer or public body, or
- involves a conspiracy or an attempt to engage in any of the above conduct

AND

- would constitute:
 - an indictable offence
 - an attempt to pervert the course of justice
 - bribery of a public official or
 - perverting the course of justice.

Specified conduct is:

Corrupt conduct that would not constitute an indictable offence, but would constitute either a criminal offence or reasonable grounds for dismissing or terminating the services of the officer engaged in the conduct

OR

Conduct that:

- involves a substantial mismanagement of public resources
- involves a substantial risk to public health and safety, or
- involves a substantial risk to the environment

AND

- would constitute a criminal offence, or reasonable grounds for dismissing or terminating the services of the officer engaged in the conduct, an attempt to pervert the course of justice, bribery of a public official or perverting the course of justice.

'Detrimental action' is defined as:

Action taken against a person who has made a protected disclosure which:

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

Detrimental action is not:

- legitimate management action where there are good and sufficient grounds that would justify the action against any other person in the same circumstances.

Examples of improper conduct

1. An OPP employee accepts a bribe to disclose confidential information about an individual's criminal history.
2. An OPP employee sells confidential information.
3. An OPP employee favours unmeritorious applications for jobs by friends and relatives.
4. An OPP employee falsifies documents in order to gain a favourable outcome in a criminal trial.

Examples of detrimental action

1. A public body demotes, transfers, isolates in the workplace or changes the duties of a person who has made a disclosure due to the making of a disclosure.
2. A person threatens, abuses or carries out other forms of harassment directly or indirectly against the person who makes a disclosure and his or her family or friends.
3. A public body discriminates against the person who makes a disclosure or his or her family and associates in subsequent applications for jobs.

'Reasonable grounds'

- 4.6 Your belief that improper conduct or detrimental action has occurred, is occurring, or will occur does not have to be based on actual proof. It is enough if you *believe* (as opposed to *know*) that improper conduct or detrimental action has occurred, is occurring or will occur. However, you must have *reasonable grounds* for your belief.
- 4.7 A mere suspicion, allegation or conclusion that is unsupported by further information, facts or circumstances will not be protected by the Act. For example, it is not enough to say 'I know X is corrupt'. You must have information that would lead a reasonable person to believe that the information shows, or tends to show, improper conduct or detrimental action.

5. Who do I make my protected disclosure to?

- 5.1 Who you can make your protected disclosure to depends on the person or body your disclosure is about as only certain persons and entities can receive protected disclosures.
- 5.2 If your disclosure is made to a person or entity that cannot receive your disclosure, your disclosure will **not** be a protected disclosure and you will **not** be protected under the Act. It is therefore important that you check that you are providing your disclosure to the right person or body. If in doubt, disclosures should be made directly to IBAC, **unless** the disclosure is about IBAC or one of its officers.

Making a disclosure about the OPP and/or its employees and officers

5.3 If you wish to make a protected disclosure about the OPP or any of its employees and/or officers, at this timeⁱ you may make your disclosure to:

- (a) IBAC
- Assessment and Review Unit
GPO Box 24234
Melbourne VIC 3001
Telephone: 1300 735 135
Email: submit@ibac.vic.gov.au
Website: www.ibac.vic.gov.au

Making a disclosure about the Director of Public Prosecutions or the Chief Crown Prosecutor

5.4 If you wish to make a protected disclosure about the Director of Public Prosecutions or the Chief Crown Prosecutor you must make your disclosure to IBAC.

Making a disclosure about the Solicitor for Public Prosecutions, an Associate Crown Prosecutor or a Crown Prosecutor

5.5 If you wish to make a protected disclosure about the Solicitor for Public Prosecutions, an Associate Crown Prosecutor or a Crown Prosecutor, at this timeⁱⁱ you may make your disclosure to IBAC.

6. What will happen after I make a disclosure?

6.1 Disclosures made to IBAC will be handled in accordance with IBAC's guidelines and processes. Please refer to those for further information.

Assessment by IBAC

6.2 IBAC is responsible for identifying, investigating, exposing and preventing serious corrupt conduct across the whole of the Victorian public sector.

6.3 If IBAC determines that your disclosure is a protected disclosure, it must decide to either:

- (a) dismiss your disclosure
- (b) investigate your disclosure or
- (c) refer your disclosure to another body for investigation, such as Victoria Police, the Ombudsman or the Victorian WorkCover Authority.

6.4 Regardless of whether IBAC determines your disclosure is a protected disclosure or not, you will still receive the protections under the Act. This includes protection from detrimental action taken in reprisal for you making the disclosure.

6.5 However, if IBAC determines that your disclosure is not a protected disclosure, the confidentiality requirements set out in Part 11 of these procedures no longer apply in relation to your disclosure.

7. What protections will I receive?

- 7.1 The Act sets out the protections provided to persons who make a disclosure in accordance with the Act. These include:
- (a) immunity from civil or criminal liability as well as administrative action (including disciplinary action) for making the disclosure
 - (b) immunity from committing an offence under the *Constitution Act 1975* or any other Act that imposes obligations of confidentiality or otherwise restricts the disclosure of information
 - (c) immunity from breaching any other obligation (made by oath or rule of law or practice) requiring the maintenance of confidentiality or otherwise restricting the disclosure of information, and
 - (d) protection from an action for defamation.
- 7.2 These protections apply to a disclosure from the time you make the disclosure and continue to apply even if IBAC determines that the disclosure is not a 'protected disclosure'.
- 7.3 The protections in the Act do not apply if you provide false or misleading information or claim that a matter is the subject of a protected disclosure knowing that claim to be false.
- 7.4 The protections will apply to further information relating to a protected disclosure that you provide to:
- (a) IBAC, or
 - (b) an investigating entity.
- 7.5 In addition to these protections, the OPP recognises that the welfare and protection from detrimental action of persons making genuine protected disclosures is essential for the effective implementation of the Act and is relevant to the OPP's obligation to create a safe working environment under the *Occupational Health and Safety Act 2004*, the *Charter of Human Rights and Responsibilities Act 2006*, the *Public Administration Act 2004 (Vic)* and the common law.

8. Welfare Management

- 8.1 The OPP will provide welfare support to a discloser or a witness in an investigation as the circumstances require and when advised of the identity of the discloser by IBAC
- 8.2 The OPP will also consider appointing a welfare manager when a person has made a protected disclosure or is cooperating, or intending to cooperate, with an investigation of a protected disclosure.
- 8.3 A welfare manager is responsible for:
- (a) examining the discloser and/or witness' immediate welfare and protection needs and, where that person is an employee, fostering a supportive work environment
 - (b) providing practical advice and support

- (c) advising the discloser and/or witness of the protections available under the Act
- (d) responding to any disclosures made to IBAC of detrimental action in reprisal for making the disclosure (e.g. harassment, intimidation or victimisation)
- (e) ensuring that the discloser and/or witness' expectations of the process and outcomes are realistic
- (f) maintaining confidentiality, and
- (g) operating discreetly to protect the discloser and/or witness from being identified as being involved in a protected disclosure.

8.4 In determining whether to appoint a welfare manager in any particular case, the OPP will consider:

- (a) whether there are any real risks of detrimental action against the persons involved, taking into account their particular circumstances
- (b) whether the OPP can provide effective support to the persons involved, including keeping them informed of the progress of the disclosure, and
- (c) whether it is within the OPP's power to protect the person/s involved from suffering repercussions.

8.5 The OPP may appoint an internal person as welfare manager or engage a contractor to provide welfare services. The OPP will also consider referring an employee to its Employee Assistance Program.

8.6 If a welfare manager is appointed to look after a discloser or witness, the welfare manager will only be required to provide reasonable support and should discuss the reasonable expectations with the person(s) they are supporting.

9. Protection from detrimental action

9.1 The OPP will take precautions to prevent its employees and agents from taking detrimental action in reprisal for a protected disclosure. This includes identifying, assessing, controlling and monitoring risks of reprisals faced by disclosers and witnesses.

9.2 The precautions taken by the OPP will depend on individual circumstances and the disclosers and witnesses will, where possible, be consulted about any action that is taken.

9.3 A disclosure of detrimental action is itself a protected disclosure and will be assessed by IBAC as a new disclosure in accordance with these procedures.

9.4 Where the detrimental action is of a serious nature that is likely to amount to a criminal offence, IBAC may consider reporting the matter to the police.

9.5 If you are an employee who has made a protected disclosure and you believe on reasonable grounds that detrimental action will be, is being, or has been taken against you, you may request a transfer of employment to another government agency on terms and conditions that are no less favourable overall to you. Note that all requests of this nature will be considered, but a number of conditions must be satisfied before they are granted, including:

- (a) the Solicitor for Public Prosecutions must be satisfied there are reasonable grounds to suspect detrimental action will be, is being, or has been taken against you
- (b) the Solicitor for Public Prosecutions must consider that the transfer will avoid, reduce or eliminate the risk of detrimental action, and
- (c) the head of the 'receiving' government agency consents to the transfer.

9.6 If you have sustained injury, loss or damage as a result of detrimental action taken against you in reprisal for making a disclosure, the Act sets out remedies that are available to you. You may wish to obtain legal advice about this.

9.7 Whilst there are these protections, there are also responsibilities. You must not take detrimental action against another person in reprisal for a protected disclosure and, if you have been involved in the improper conduct or detrimental action which is the subject of your disclosure, you will still be held liable for your own involvement. Making a disclosure does not provide you with immunity for your own wrongdoing.

10. What happens if a protected disclosure is made against me?

10.1 The OPP recognises that employees against whom disclosures are made must also be supported during the handling and investigation of disclosures and will provide welfare support to you during the handling and investigation of a disclosure as the circumstances require.

10.2 The OPP will only disclose information about the subject of a disclosure in accordance with the law, including this Act (and as explained in these procedures).

10.3 Where investigations do not substantiate disclosures, the fact that the investigation has been carried out, the results of the investigation and the identity of the person who is the subject of the disclosure will remain confidential.

11. Confidentiality

11.1 You must not tell anyone else about your protected disclosure except in the circumstances set out in these procedures or as permitted by the Act.

11.2 If you repeat your disclosure to someone other than as provided by these procedures or permitted by the Act, you may lose the protections provided for in the Act. For example, if a disclosure is repeated to the media and the media reports on it, you may not be protected from defamation action. If you are considering disclosing information about your disclosure, you may wish to obtain legal advice first.

11.3 The OPP will only disclose information about you or your disclosure in accordance with the law, including the Act.

11.4 IBAC or the relevant investigating entity may disclose your identity and the content of your disclosure if it is necessary for the purposes of their investigative action. In that case, the public body or public officer to whom the information has been disclosed is bound by confidentiality requirements that prohibit a person from:

- (a) Disclosing the content, or information about the content of an assessable disclosure, or

- (b) Information likely to lead to the identification of a person who has made an assessable disclosure.

11.5 The circumstances in which a person may disclose the information referred to in paragraph 11.4 (and depending on the type of information in question) include:

- (a) in accordance with a direction or authorisation given by the investigating entity that is investigating the disclosure
- (b) to the extent necessary for the purpose of taking lawful action in relation to the conduct that is the subject of the disclosure including disciplinary process or action
- (c) where the IBAC has determined that the disclosure is not a protected disclosure
- (d) where necessary for the purpose of the exercise of functions under the Act
- (e) by an investigating body where necessary for the purpose of the exercise of functions under the *Independent Broad-based Anti-corruption Commission Act 2011*
- (f) for the purpose of a proceeding for an offence under a relevant Act or provision
- (g) for the purpose of disciplinary process or action in respect of conduct that would constitute an offence
- (h) for the purpose of obtaining legal advice or representation
- (i) to an interpreter, parent, guardian or independent person for the purpose of understanding the confidentiality obligations under the Act, and
- (j) an investigating body has published a report to Parliament or otherwise made public the content of the disclosure consistent with the confidentiality requirements of the Act.

12. Criminal offences

12.1 There are a number of offences set out in the Act relating to breaches of the requirements of the Act. The key offences to be aware of are:

- (a) it is an offence to take detrimental action against another person in reprisal for a protected disclosure
- (b) it is an offence to disclose information which is likely to lead to the identification of the person who made that disclosure unless permitted to by the Act
- (c) it is an offence for any person to:
 - (i) 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
 - (ii) claim that a matter is the subject of a protected disclosure knowing the claim to be false, and

- (iii) falsely claim that a matter is the subject of a disclosure that IBAC has determined to be a protected disclosure complaint, and
- (d) it is an offence for any person to:
 - (i) disclose that a disclosure has been determined to be a protected disclosure complaint unless permitted to do so by the Act.

13. Alternatives to making a 'protected disclosure'

- 13.1 These procedures are designed to complement usual methods of submitting complaints to the OPP about its employees or officers; the Solicitor for Public Prosecutions; the Director of Public Prosecutions; the Chief Crown Prosecutor; an Associate Crown Prosecutor or a Crown Prosecutor.
- 13.2 Members of the public are encouraged to use the OPP's feedback process to communicate complaints or concerns with the services provided by the OPP and the entities listed above. More information is available on the OPP's website at FAQs (www.opp.vic.gov.au).
- 13.3 Employees are encouraged to raise matters with their supervisors and managers at any time.

14. Review

- 14.1 These procedures are reviewed regularly to ensure they meet the objectives of the Act and accord with IBAC's guidelines.

Schedule 1 - Welfare services that should be provided by the OPP

<p>Inform</p>	<p>At a minimum:</p> <ul style="list-style-type: none"> • make information about the legislative or administrative protections available to the person • describe the action proposed to be taken • if action has been taken, provide details about results of the action
<p>Provide active support</p>	<ul style="list-style-type: none"> • Acknowledge the discloser for having come forward. • Provide the person with assurance that they have done the right thing and the OPP appreciates it • Make a clear offer of support • Assure the discloser that all reasonable steps will be taken to protect them • Give them an undertaking to keep them informed
<p>Manage expectations</p>	<p>Have an early discussion with the discloser about:</p> <ul style="list-style-type: none"> • what outcome they want • whether their expectations are realistic • what the OPP is able to deliver
<p>Maintain confidentiality</p>	<p>The identity of the discloser and the subject matter of their disclosure must 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 stored separately and securely and are accessible only to those who are involved in dealing with the disclosure

Assess the risks of detrimental action taken in reprisal	<ul style="list-style-type: none"> • Be proactive • Do not wait for a complaint of victimisation • Actively monitor the workplace, anticipate problems and deal with them before they develop
Protect the discloser/witness	<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 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 • Keep the records in secure storage facilities

The content in this table is adapted from Queensland Ombudsman, *Handling a public interest disclosure: A guide for public sector managers and supervisors*, 2011, pp21-27.

ⁱ Sections 13(3)(c), 13(4) and 13(5) of the Act create the possibility for as yet to be prescribed public bodies and public officers to also directly receive protected disclosures that relate to their employees, officers etc. At this time, no public bodies or public officers have been prescribed for the purposes of these sections.

ⁱⁱ As above.