



# Protection for people making disclosures of improper conduct

July 2013

## Background

The purpose of the *Protected Disclosure Act 2012* (the Act) is to encourage and facilitate the making of disclosures of improper conduct within public bodies, and establish a system for matters to be investigated. The Act provides protection from detrimental action to any person affected by the protected disclosure whether it is the person making the disclosure, a witness or a person who is the subject of an investigation. The Act also provides for confidentiality regarding the content of disclosures and the persons making the disclosures. OPA will take all reasonable steps to protect such people from any detrimental action and discipline action will be taken against any employee who is found to be involved in the taking of detrimental action.

This procedure has been developed in compliance with section 58(5) of the Act and establishes a system for the protection of people making of disclosures of improper conduct by OPA or its employees under the Act.

## Acceptable conduct

The way in which we are expected to behave is articulated in our Values, the Code of Conduct for the Victorian public sector, public sector values and public sector employment principles.

### **OPA Values**

OPA strives to demonstrate the following in all activities and relationships:

- **Respect** - treat everyone equally and with dignity and justice, accept each person's individuality, acknowledge diversity and promote self determination
- **Compassion** - accept people as they are and understand, acknowledge and have empathy for their circumstances
- **Inclusiveness** - strive to empower all people to contribute and participate
- **Ethical behaviour** - act at all times in a principled and informed manner, treat people fairly, accept accountability and uphold justice
- **Independence** - be free-thinking, unbiased and impartial, and challenge the status quo.

### **Public sector values**

Section 7 of part 2 of the *Public Administration Act 2004* contains the public sector values:

**Responsiveness** - public officials should demonstrate responsiveness by:

- providing frank, impartial and timely advice to the Government, and
- providing high quality services to the Victorian community, and
- identifying and promoting best practice.

**Integrity** – public officials should demonstrate integrity by:

- being honest, open and transparent in their dealings, and

- using powers responsibly, and
- reporting improper conduct, and
- avoiding any real or apparent conflicts of interest, and
- striving to earn and sustain public trust of a high level.

**Impartiality** - public officials should demonstrate impartiality by

- making decisions and providing advice on merit and without bias, caprice, favouritism or self-interest, and
- acting fairly by objectively considering all relevant facts and fair criteria, and
- implementing Government policies and programs equitably.

**Accountability** - public officials should demonstrate accountability by:

- working to clear objectives in a transparent manner, and
- accepting responsibility for their decisions and actions, and
- seeking to achieve best use of resources, and
- submitting themselves to appropriate scrutiny.

**Respect** - public officials should demonstrate respect for colleagues, other public officials and members of the Victorian community by:

- treating them fairly and objectively, and
- ensuring freedom from discrimination, harassment and bullying, and
- using their views to improve outcomes on an ongoing basis.

**Leadership** - public officials should demonstrate leadership by actively implementing, promoting and supporting these values.

### ***Public sector employment principles***

Section 8 of the Public Administration Act 2004 contains the public sector employment principles. Department heads must establish employment processes that will ensure that:

- employment decisions are based on merit, and
- public sector employees are treated fairly and reasonably, and
- equal employment opportunity is provided, and
- public sector employees have a reasonable avenue of redress against unfair or unreasonable treatment, and
- in the case of public service bodies, the development of a career public service is fostered.

### **Protected disclosures**

Under section 9 of the Act, a natural person may make a disclosure of information that shows or tends to show, or the person believes on reasonable grounds shows, that a person, public officer or public body:

- has engaged, is engaging or proposes to engage in improper conduct or
- has taken, is taking or proposes to take detrimental action against a person in contravention of section 45 (protection from reprisals).

To be a protected disclosure, a disclosure must satisfy all of the following criteria:

- the disclosure is made by a natural person

- the disclosure relates to the conduct of a public body or public officer
- the alleged conduct constitutes either improper conduct (which has been engaged in, is currently being engaged in or is proposed to be engaged in) or detrimental action (which has been taken, is currently being taken or is proposed to be taken) in reprisal for making a protected disclosure.

A disclosure may:

- be about conduct that occurred before the commencement of the Act
- be made even if the person making the disclosure cannot identify the person or body to whom or to which the disclosure relates
- be a disclosure made in accordance with Part 2 of the Act even if it is a complaint, notification or disclosure (however described), made under another Act.

### **Making a protected disclosure**

OPA is not able to receive disclosures under the Act and persons including employees, office holders or members of the public should contact IBAC direct when making a protected disclosure complaint. If a person approaches OPA to make a disclosure, they will be directed to IBAC.

### **Protection from detrimental action**

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

The Act makes it an offence for a person to take detrimental action against another person in reprisal for someone making a protected disclosure. Section 3 of the Act defines detrimental action as including:

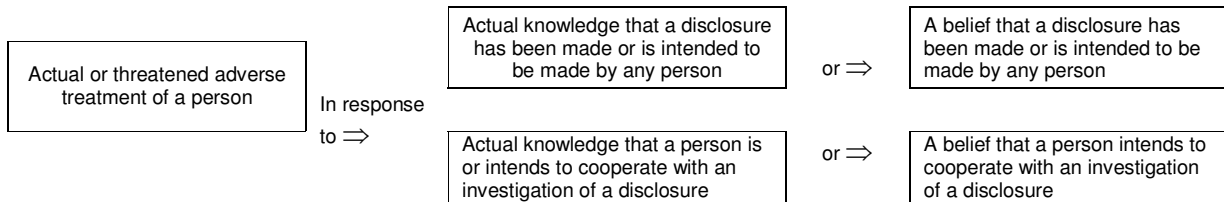
- action causing injury, loss or damage
- intimidation or harassment, and
- discrimination, disadvantage or adverse treatment in relation to a person's employment, including the taking of disciplinary action.

A person need not have taken the action, but threatened to do so or incited someone else to do so.

#### ***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



Examples of detrimental action might include instances where:

- a public body demotes, transfers, isolates in the workplace or changes the duties of a person making a disclosure due to the making of that disclosure
- a person threatens, abuses or carries out other forms of harassment directly or indirectly against the person making a disclosure, his or her family or friends

- a public body discriminates against the person making a disclosure or his or her family and associates in subsequent applications for jobs, permits or tenders.

### ***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, a welfare manager<sup>1</sup> (if appointed) must record details of the incident and advise the persons of their rights under the Act.

Where the detrimental action is of a serious nature and may amount to a criminal offence the matter should be reported to the police and IBAC. When making preliminary enquiries or gathering information concerning such allegations, the person making those enquiries must be mindful not to compromise the integrity of any evidence that might be later relied upon in a criminal prosecution.

### **Welfare management**

OPA has an obligation in regard to the welfare of persons making protected disclosures to IBAC whether that person is an employee, a volunteer, a client or member of the public. OPA will treat all persons involved in a protected disclosure complaint fairly, regardless of whether they are a discloser, a witness or a person subject to an investigation. OPA has obligations:

- under section 21 of the *Occupational Health and Safety Act 2004*, OPA, OPA must so far as is reasonably practicable, provide and maintain for employees a working environment that is safe and without risks to health and this includes providing adequate facilities for the welfare of employees
- under section 7(1)(e) of the *Public Administration Act 2006* and the *Public Sector Code of Conduct for the Victorian Public Sector*, employees can expect to be treated fairly and objectively and not be subjected to discrimination, harassment or bullying.
- under section 38 (1) of the *Charter of Human Rights and Responsibilities Act 2006* it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

### ***Welfare manager***

In cases where there are real risks of detrimental action being taken against a discloser/cooperator, a welfare manager will be appointed. The welfare manager will:

- take the person seriously and respond swiftly and fairly to any allegation of detrimental action
- provide practical support and advice
- treat the person with respect
- ensure the person is given effective support
- keep the person informed as far as practicable (given matters concerning OPA are referred to IBAC for assessment/investigation).

Meetings between the welfare manager and the discloser/cooperator must be conducted discretely to protect the person from being identified as being involved in a disclosure.

It is noted that the welfare manager is not expected to go beyond what is reasonable for a public body in providing support and should discuss with the discloser/co-operator reasonable expectations.

If the person cooperating with the protected disclosure complaint is an employee or volunteer they will be offered the services of the Employee Assistance Program (EAP), which provides

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<sup>1</sup> A welfare officer would be appointed for each case.

confidential counselling services, 24 hours per day, seven days per week. ppc worldwide can be contacted on 1300 361 008.

A welfare manager must not divulge details of any disclosed matter to any person other than the Public Advocate.

**Welfare services**

Regardless of whether a welfare manager is appointed OPA will provide ongoing welfare support to disclosers/cooperators and will:

<b>Inform</b>	<ul style="list-style-type: none"> <li>confirm that the disclosure has been received</li> <li>advise of legislative and administrative protections available</li> <li>advise of the action to be taken</li> <li>if action has already been taken, advise of the results of that action</li> </ul>
<b>Active support</b>	<ul style="list-style-type: none"> <li>acknowledge the person for coming forward</li> <li>provide assurance that the person has done the right thing and the organisation appreciates it</li> <li>make clear offers of support</li> <li>assure the person you will take reasonable steps to protect them</li> <li>give them an undertaking to keep them informed</li> </ul>
<b>Expectations</b>	<p>Discuss:</p> <ul style="list-style-type: none"> <li>the outcome they want</li> <li>whether their expectations are realistic</li> <li>what the organisation will be able to deliver</li> </ul>
<b>Confidentiality</b>	<p>The identity of the discloser and the subject matter need to be kept confidential.</p> <ul style="list-style-type: none"> <li>make sure that other staff cannot infer the identity of the discloser or a person cooperating with the investigation from any information they receive</li> <li>remind the discloser not to reveal themselves or give out information that would enable others to identify them as a discloser</li> <li>make sure that hard copy and electronic files relating to the disclosure are accessible only to those involved in the management of disclosures (Protected Disclosure Coordinator and the Public Advocate) and persons affected by them</li> </ul>
<b>Risks</b>	<ul style="list-style-type: none"> <li>OPA will be proactive and not wait for a complaint of victimisation and will actively monitor the workplace, anticipate problems and deal with them before they develop</li> </ul>
<b>Protection</b>	<ul style="list-style-type: none"> <li>examine the immediate welfare and protection needs of the seek to foster a supportive work environment</li> <li>listen and respond to any concerns the person may have about harassment, intimidation or victimisation in reprisal for their actions</li> <li>assess whether the concerns about harassment, intimidation or victimisation might be due to causes other than those related to the disclosure.</li> </ul>
<b>Impact</b>	<ul style="list-style-type: none"> <li>prevent the spread of gossip and rumours about an investigation into a disclosure</li> </ul>
<b>Records</b>	<ul style="list-style-type: none"> <li>maintain contemporaneous case management records including contact and follow up action</li> </ul>

**Transfer of an employee**

If an employee, having made a disclosure believes on reasonable grounds that detrimental action is being taken against them in reprisal, they may request a transfer of employment. This can only happen with the consent of the person and if the Public Advocate:

- has reasonable grounds to suspect detrimental action will be, is being or has been taken against the person
- considers the transfer will avoid, reduce or eliminate the risk of detrimental action.

A transfer to another department may be proposed if that department consents to the transfer.

A transfer may be temporary or permanent and service in the new department would be regarded as continuous service.

**Where a discloser is implicated in improper conduct or detrimental action**

The management of a discloser may become complicated if that person is implicated in misconduct (whether or not related to the disclosure), however the general obligations for protecting the discloser still apply. A discloser is not protected from reasonable consequences flowing from their involvement in any improper conduct.

### ***Welfare Management of a person against whom the disclosure is made***

A person who is subject of a disclosure and has been made aware of their status, may have a welfare manager appointed or be referred to the EAP.

Where a disclosure is dismissed or investigations do not substantiate the allegations, OPA will maintain confidentiality of the investigation, its results and the identity of the subject person. OPA will ensure that there are no adverse consequences arising out of the disclosure or its investigation.

### ***Procedural fairness for a person against whom the disclosure is made***

The person subject to a protected disclosure complaint is entitled to natural justice and this means that if a decision is to be made about a person's conduct, that person is entitled to be:

- informed about the substance of the allegations against them
- given the opportunity to answer the allegations before the final decision is made
- informed about the substance of any adverse comment that may be included in any report arising from an investigation
- have his or her defence fairly set out in any report

### **Confidentiality**

While OPA is not able to receive disclosures under the Act, it may be provided with information from IBAC or another investigative authority when assessing a protected disclosure complaint. Having been made aware of the identity of a disclosure, and/or the contents of a disclosure, OPA will take all reasonable steps to ensure confidentiality during any assessment or investigation (undertaken by IBAC). OPA will only advise the person who is subject to a disclosure if it is directed to do so by IBAC or an investigating authority.

### **Criminal offences**

The Act establishes a number of offences regarding a disclosure, once it has been determined to be a protected disclosure including offences related to:

- detrimental action
- breach of confidentiality
- providing false information.

### **Making a disclosure about OPA or a public officer employed by OPA**

All protected disclosures concerning OPA or a public officer employed by OPA should be made to IBAC. IBAC has a central role in handling disclosures of improper conduct made under the Act. The role of IBAC includes receiving disclosures directly or by notification, determining whether a disclosure is a protected disclosure and assessing and investigating disclosures.

IBAC will also monitor the action taken by public bodies where the findings of an investigation reveal that improper conduct has occurred.

Procedures to be followed by all staff:

- if approached about corrupt or improper conduct, refer the person to the Protected Disclosure Coordinator or IBAC
- if you are making a protected disclosure or are cooperating with an investigation conducted by IBAC or another investigating body, you can expect the support of OPA

through the OPA Protected Disclosure Coordinator and/or a welfare officer if one is appointed in your case.

- if you become aware that a protected disclosure has been made, do not take detrimental action against a person because of it.

A person wishing to make a disclosure concerning OPA or its employees may make that disclosure to IBAC:

- orally (free call 1300 735 135 )
- in writing (GPO Box 24234, Melbourne, VIC 3001 or fax (03) 8635 6444 )
- electronically (submit@ibac.vic.gov.au )
- anonymously.

If you have any concerns, you may seek confidential advice from:

Protected Disclosure Coordinator:  
Mr Phil Grano  
[phil.grano@justice.vic.gov.au](mailto:phil.grano@justice.vic.gov.au)  
9603 9524