

PROTECTED DISCLOSURE POLICY

Human Resources

1 Parent Policy

Conduct and Compliance Policy

2 Preamble

The Victorian Electoral Commission (VEC) is committed to the aims and objectives of the [Protected Disclosure Act 2012](#) (PD Act). The PD Act replaces the former *Whistleblowers Protection Act 2001* and amends the *Ombudsman Act 1973*.

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.

Under the PD Act, protection from detrimental action, such as discrimination or disadvantage, is available to the person making the disclosure as well as witnesses and persons who are the subject of an investigation.

The VEC does not tolerate improper conduct by its employees, appointees or members, nor the taking of reprisals against those who come forward to disclose such conduct.

The VEC recognises the value of transparency and accountability in its administrative and management practices, and supports the making of disclosures that reveal corrupt conduct, conduct involving a substantial mismanagement of public resources, or conduct involving a substantial risk to public health and safety or the environment.

The VEC will take all reasonable steps to protect people who make such disclosures from any detrimental action in reprisal for making the disclosure. It will also afford natural justice to the person who is the subject of the disclosure.

The PD Act outlines the procedure for reporting disclosures of improper conduct or detrimental action by the VEC or its employees. Disclosures may be made by employees or by members of the public.

These procedures are designed to complement normal communication channels between supervisors and employees. Employees are encouraged to continue to raise appropriate matters at any time with their supervisors. As an alternative, employees may make a disclosure of improper conduct or detrimental action under the PD Act in accordance with this policy.

3 Definitions

| Word/Term | Definition |
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| Detrimental Action | <p>The PD Act makes it an offence for a person to take detrimental action against a person in reprisal for a protected disclosure. Detrimental action includes:</p> <ul style="list-style-type: none"> • action causing injury, loss or damage; • intimidation or harassment; and • discrimination, disadvantage or adverse treatment in relation to a person's employment, career, profession, trade or business, including the taking of disciplinary action. |

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| IBAC | Independent Broad-based Anti-corruption Commission (IBAC) |
| Improper conduct : Corrupt or Specified Conduct | <p>Improper conduct is defined in section 4 of the PD Act to mean:</p> <ul style="list-style-type: none"> • corrupt conduct (as defined in the IBAC Act), or • specified conduct. <p>The conduct must be serious enough to constitute, if proved, a criminal offence or reasonable grounds for dismissal.</p> <p>Corrupt or specified conduct includes (for public officers or entities):</p> <ul style="list-style-type: none"> • 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; or • conduct that implies: <ul style="list-style-type: none"> - a substantial mismanagement of public resources - a substantial risk to public health or safety - a substantial risk to the environment. <p>Corrupt or specified conduct includes (for members of the public or any person):</p> <ul style="list-style-type: none"> • conduct adversely affecting the honest performance of a public officer or public official of their performance. |
| Protected disclosure | <p>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.</p> <p>The information disclosed must show, or tend to show, that the improper conduct or detrimental action against a person:</p> <ul style="list-style-type: none"> • has occurred; • is occurring; or • proposes to engage in.? |
| Public interest disclosure | <p>A protected disclosure that IBAC or the Ombudsman is satisfied shows, or tends to show, that the VEC or an employee:</p> <ul style="list-style-type: none"> • has engaged, is engaging or proposes to engage in improper conduct in their capacity as a public officer or public body; or • has taken, is taking or proposes to take detrimental action against a person in reprisal for a protected disclosure. |
| Discloser | <p>Any person - internal or external to the VEC - who makes a disclosure of alleged improper conduct or detrimental action by the VEC, or an employee, under the Protected Disclosure Act 2012.</p> |
| Disclosure made “ in private” | <p>A disclosure is made in private if the person making the disclosure reasonably believes that the only persons who are present or able to listen to the disclosure at the time the disclosure is made are:</p> <ol style="list-style-type: none"> (a) the person making the disclosure; (b) one or more persons to whom the disclosure can be made in accordance with the PD Act and the Protected Disclosure Regulations 2013; or (c) an Australian legal practitioner (if any) representing the person making the disclosure. |

4 Scope

This procedure applies to all VEC employees, appointees and contractors.

5 Considerations when making a disclosure

Things to consider before making a disclosure under the *Protected Disclosure Act 2012*:

1. That the proposed disclosure will advance the public interest and is not for personal or political gain or revenge.
2. That you have reasonable grounds for believing that the alleged conduct has actually occurred.
3. That you have thought about the outcomes you want to achieve by making a disclosure and having the matter investigated, and that these outcomes are realistic and achievable.

Possible outcomes include:

- making people responsible for their wrongdoing;
 - preventing the wrongdoing from continuing; or
 - creating an opportunity to put better work practices into practice which seek to prevent future wrongdoing.
4. That you are prepared for possible disapproval of your actions from fellow workers, friends and family.
 5. That you have identified sources of support from within and outside the workplace that you can rely on during the process.

6 How to make a disclosure

A disclosure can be made by any person in relation to improper conduct and detrimental action by public bodies and public officers. All disclosures must be made to IBAC. A disclosure may be made:

- orally;
- electronically;
- in writing or anonymously, but not by fax.

A disclosure must be made by an individual (for example, not by a company), and if made verbally, must be made in private.

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. The alleged conduct must be either improper conduct or detrimental action taken against a person in reprisal for a protected disclosure.

The information disclosed must show or tend to show that the improper conduct or detrimental action against a person:

- has occurred;
- is occurring; or
- proposes to engage in.

Or the discloser must believe on reasonable grounds that the information shows or tends to show the improper conduct or detrimental action against a person:

- has occurred;
- is occurring; or
- proposes to engage in.

Improper conduct includes corrupt conduct and conduct that is not corrupt conduct but which, if proved, would constitute a criminal offence or reasonable grounds for dismissal.

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

7 Who to make a disclosure to

Disclosures about public bodies or public officers must only be made to IBAC. A disclosure may be made:

- orally in person;
- electronically; or
- in writing or anonymously, but not by fax.

For the purposes of section 12(1) of the Act, an oral disclosure to the IBAC must be made in private, either in person or by telephone or some form of electronic communication not involving writing, to;

- (a) the Commissioner appointed under section 14(1) of the *Independent Broad-based Anti-corruption Commission Act 2011*
- (b) a Deputy Commissioner appointed under section 17(1) of the *Independent Broad-based Anti-corruption Commission Act 2011*
- (c) the Chief Executive Officer appointed under section 27(1) of the *Independent Broad-based Anti-corruption Commission Act 2011*
- (d) an employee referred to in section 29(1) of the *Independent Broad-based Anti-corruption Commission Act 2011*
- (e) any staff referred to in section 29(2) of the *Independent Broad-based Anti-corruption Commission Act 2011*.

For the purposes of section 12(1) of the PD Act, a written disclosure to the IBAC must be;

- (a) delivered personally to the office of the IBAC

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

- (b) sent by post addressed to the office of the IBAC

GPO Box 24234, Melbourne, VIC 3001

- (c) sent by email to the email address of the office of the IBAC
- (d) submitted by the IBAC [online complaints form](#).

The VEC is not an authorised entity and is not able to receive disclosures.

8 What disclosures are protected?

The decision to make a disclosure of a public body is not an easy one. Often people do not feel able to discuss the matter with anyone for fear of not being believed, thinking that their situation is not serious enough or because they fear reprisals. Ultimately, each person has to decide what is best for them, based on their particular circumstances.

Does the disclosure contain the essential elements of a protected disclosure?

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

- Did a natural person (that is, an individual person rather than a corporation) make the disclosure?
- Does the disclosure relate to conduct of a public body or public officer acting in their official capacity?
- Is the alleged conduct either corrupt or specified conduct or detrimental action taken against a person in reprisal for making a protected disclosure?
- Does the person making a disclosure have reasonable grounds for believing the alleged conduct has occurred?

9 Assessing the Disclosure

IBAC will assess whether there is improper conduct or detrimental action, by looking critically at all information about the alleged conduct and about the discloser.

They will consider a number of points.

- (a) What is the discloser's connection to the alleged conduct? Are they a victim, a witness, or a participant?
- (b) 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?
- (c) How detailed is the information provided? Is there sufficient information to enable you to consider whether there is improper conduct or detrimental action?
- (d) How reliable is the information? Is it supported by other information?

In making its assessment, IBAC may seek additional information 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.

10 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 the 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 and must provide reasons for doing so.

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.

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.

11 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. This may be in the form of 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.

12 Investigation outcome notification to discloser

Once IBAC has made a determination in respect of an assessable disclosure notified to it, then IBAC has a responsibility 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.

13 Protections for persons making 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.

The discloser:

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

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

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.

14 Offences for making an unauthorised disclosure or taking adverse action

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. This offence carries 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. 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.

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.

15 Procedure Endorsement

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| Date approved: | | Date Policy will take effect: | October 2013 | Date of Next Review: | October 2014 |
| Approved by: | VEC Management Team | | | TRIM # | D13/6206 |
| Custodian title: | Human Resources Manager | | | | |
| Author: | Human Resources | | | | |
| Responsible branch | Human Resources | | | | |
| Supporting documents, procedures & forms of this policy: | Conduct and Compliance Policies. | | | | |
| References & Legislation: | Protected Disclosure Act 2012 Protected Disclosure Regulations 2013 Guidelines for making and handling protected disclosures Guidelines for Protected Disclosure Welfare Management IBAC Protected Disclosure information Independent Broad-based Anti-corruption Commission Act 2011 | | | | |
| Audience: | VEC employees, appointees and contractors. | | | | |

16 Version control and change history

| Version Control | Date Effective | Approved By | Amendment |
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