



MOUNT ALEXANDER SHIRE

PROTECTED

DISCLOSURE PROCEDURES

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1. About these Procedures

Mount Alexander Shire Council (Council) is required to establish and publish procedures under s 58 of the *Protected Disclosure Act 2012* (Act) and in accordance with the Guidelines of the Independent Broad-based Anti-corruption Commissioner (IBAC) published under s 57 of the Act.¹ Council is required to ensure these procedures are readily available to members of the public as well as internally to all Councillors, contractors, and staff of Council.

These procedures are a resource for disclosers and potential disclosers, whether an internal Councillor, contractor or staff or an external member of the public; essentially, any individual who wants to find out how to make a disclosure, receive the protections available under the Act, and how the discloser and their disclosure may be managed and handled by Council.

These procedures cover:

- how disclosures may be made to Council;
- how Council manages the receipt of disclosures;
- how Council assesses disclosures it is able to receive under the Act;
- notifications Council is required to make about disclosures, to both disclosers and to the IBAC;
- how Council protects certain people, including from detrimental action being taken against them in reprisal for making a protected disclosure, namely:
 - protected disclosers,
 - persons who are the subject of protected disclosures and protected disclosure complaints, and
 - other persons connected to protected disclosures, such as witnesses or persons cooperating with an investigation.

These procedures form an essential part of Council's commitment to the aims and objectives of the Act. Council does not tolerate improper conduct by the organisation, its Councillors, contractors, staff nor the taking of reprisals against those who come forward to disclose such conduct.

Council recognises the value of transparency and accountability in its administrative and management practices, and supports the making of disclosures that reveal improper conduct or the taking of detrimental action in reprisal against persons who come forward to report such improper conduct.

Council 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 or body who is the subject of the disclosure.

¹ The IBAC has published 2 Guidelines under s 57 of the Act as at 1 October 2016. Further information about those Guidelines, including links to the full Guidelines, may be found at: <http://www.ibac.vic.gov.au/publications-and-resources#Guideline> (last accessed 28 November 2017).

2. About the Act

The Act commenced operation on 10 February 2013.

The purpose of the Act is to encourage and facilitate the making of disclosures of improper conduct and detrimental action by public officers and public bodies. It does so by providing certain protections for people who make a disclosure, or those who may suffer detrimental action in reprisal for making a disclosure. An essential component of this protection is to ensure that information connected to a protected disclosure, including the identity of a discloser and the contents of that disclosure, are kept strictly confidential.

Protected disclosures may be made about any of the public officers or bodies as defined in s 3 of the Act and s 6 of the *Independent Broad-based Anti-corruption Act 2011* (IBAC Act). They include:

- government departments;
- statutory authorities;
- Councils established under the Local Government Act 1989;
- the Electoral Boundaries Commission;
- government-appointed boards and committees;
- government-owned companies;
- universities and TAFEs;
- public hospitals;
- a body performing a public function on behalf of the State, a public body or a public officer;
- state-funded residential care services;
- employees, staff and members of public bodies including those set out above;
- police and protected service officers;
- teachers;
- public servants;
- Councillors;
- Members of Parliament, including Ministers;
- Judicial officers, including coroners, members of the Victorian Civil and Administrative Tribunal, associate judges and judicial officers;
- IBAC officers;
- statutory office holders, including the Auditor-General, the Ombudsman and the Director of Public Prosecutions; and
- the Governor, Lieutenant-Governor or Administrator of the State.

However, a protected disclosure cannot be made about:

- a Public Interest Monitor;
- the Victorian Inspectorate (VI) or officers of the VI; nor
- the conduct or actions of a Court.

Council's Internal Reporting Structures

Council supports a workplace culture where the making of protected disclosures is valued by the organisation and the right of any individual to make a protected disclosure taken seriously.

Council will:

- ensure these procedures, including detailed information about how disclosures may be made and to whom, are accessible on its website and available internally and externally to Councillors, contractors, staff and any individual in the broader community;
- ensure that appropriate training is provided at all levels of the organisation to raise awareness of how a protected disclosure may be made, and to take all reasonable steps to ensure Councillors, contractors and staff are familiar with Council's protected disclosure policies, procedures and any relevant codes of conduct;
- ensure its reporting system is centralised and accessible only by appropriately authorised officers, allowing the flow of information to be tightly controlled to enhance confidentiality and minimising risks of reprisals being taken against disclosers;
- ensure the reporting system protects the confidentiality of information received or obtained in connection with a protected disclosure in accordance with the Act;
- ensure the reporting system protects the identity of persons connected with a protected disclosure in accordance with the Act;
- not tolerate the taking of detrimental action in reprisal against any person for making a protected disclosure, including to take any reasonable steps to protect such persons from such action being taken against them;
- afford natural justice and treat fairly those who are the subject of allegations contained in disclosures;
- take the appropriate disciplinary and other action against any Councillors, contractors or staff engaged in the taking of detrimental action;
- ensure any staff involved with handling protected disclosures are trained to receive and manage protected disclosures appropriately;
- ensure that Council as a whole handles protected disclosures consistently and appropriately in accordance with its obligations under the Act, the *Protected Disclosure Regulations 2013* (Regulations), the IBAC's Guidelines and these procedures; and
- be visible, approachable, openly communicative and lead by example in establishing a workplace that supports the making of protected disclosures.

Councillors, contractors and staff

Councillors, contractors and staff are encouraged to raise matters of concern in relation to Council, including about any employee, staff or Councillors. In particular, Councillors, contractors and staff are encouraged to report known or suspected incidences of improper conduct or detrimental action in accordance with these

procedures, whether such conduct or action has taken place, is suspected will take place, or is still occurring.

All Councillors, contractors and staff of Council have an important role to play in supporting those who have made a legitimate disclosure in accordance with the Act. All persons must refrain from any activity that is, or could be perceived to be, victimisation or harassment of a person who makes a disclosure. Furthermore, they should protect and maintain the confidentiality of a person they know or suspect to have made a disclosure.

Direct and indirect supervisors and managers

Employees of Council who wish to make a protected disclosure may make that disclosure to their direct or indirect supervisor or manager.

If a person wishes to make a protected disclosure about an employee of Council, that person may make the disclosure to that employee's direct or indirect supervisor or manager.

The supervisor or manager receiving the disclosure will:

- immediately bring the matter to the attention of the Protected Disclosure Coordinator for further action in accordance with the Act;
- commit to writing down any disclosures made orally;
- take all necessary steps to ensure the information disclosed, including the identity of the discloser and any persons involved, is secured, remains private and confidential; and
- offer to remain a support person for the discloser in dealing with the Protected Disclosure Coordinator.

Protected Disclosure Officers

Council has appointed 2 protected disclosure officers to receive disclosures and be a contact point for general advice about the operation of the Act for any person wishing to make a disclosure. Protected Disclosure Officers are available to receive disclosures made internally within Council or from external sources. For Councillors, contractors, and staff of Council, they provide a confidential avenue of advice about the Act where Councillors, contractors, and staff of Council wish to raise a concern about their line managers, colleagues or supervisors.

Protected Disclosure Officers will:

- make arrangements for a disclosure to be made privately and discreetly and, if necessary, away from the workplace;
- receive any disclosure made orally or in writing from internal or external sources;
- commit to writing any disclosure made orally;
- forward all disclosures and supporting evidence to the Protected Disclosure Coordinator for further action in accordance with the Act;

- take all necessary steps to ensure the information disclosed, including the identity of the discloser and any persons involved, is secured, remains private and confidential; and
- offer to remain a support person for the discloser in dealing with the Protected Disclosure Coordinator.

The Protected Disclosure Officer appointed by Council and his contact details are:

John Taylor
 Principal Governance Officer
 Ph. 5471 1706
 Email: john.taylor@mountalexander.vic.gov.au

From time to time, it may be necessary to appoint other or additional Protected Disclosure Officers. Council will take all reasonable steps to publicise the contact details of those persons as widely as possible.

Protected Disclosure Coordinator

Council's Protected Disclosure Coordinator has a central role in the internal reporting system, and maintains oversight over the system.

The Protected Disclosure Coordinator is:

- contactable by external and internal persons making disclosures and has the authority to make enquiries of officers within the organisation;
- to receive all disclosures forwarded from Council's Protected Disclosure Officers;
- the contact point for general advice about the operation of the Act and for integrity agencies such as the IBAC;
- responsible for ensuring that Council carries out its responsibilities under the Act, any regulations made pursuant to the Act and any guidelines issued by the IBAC;
- Council's chief liaison with the IBAC in regard to the Act;
- responsible for coordinating Council's reporting system;
- to take all necessary steps to ensure information received or obtained in connection with a disclosure, including the identities of the discloser and the person(s) to whom the disclosure relate, are kept secured, private and confidential at all times;
- required to consider each disclosure impartially to determine whether it should be notified to the IBAC for assessment under the Act;
- responsible for arranging any necessary and appropriate welfare support for the discloser, including appointing a Welfare Manager to support the discloser and to protect him or her from any reprisals;
- to advise the discloser, appropriately and in accordance with the Act, the stage at which the disclosure is at (whether it has been notified to the IBAC for assessment, etc);
- to establish and manage a confidential filing system;

- to collate statistics on disclosures made; and
- to liaise with the Chief Executive Officer (CEO) of Council.

The Protected Disclosure Coordinator appointed by Council is:

John Taylor
Principal Governance Officer
Ph. 5471 1706
Email: john.taylor@mountalexander.vic.gov.au

The CEO of Council is:

Darren Fuzzard
Ph. 5471 1705
Email: d.fuzzard@mountalexander.vic.gov.au

3. Making a Disclosure

What is a disclosure and who can make a disclosure?

A disclosure may be made about 2 things under the Act:

- a) improper conduct of public bodies or public officers; and
- b) detrimental action taken by public bodies or public officers in reprisal against a person for the making of a protected disclosure.

The term disclosure is interpreted under the Act in the ordinary sense of the word, for example, as a “revelation” to the person receiving it. The IBAC considers that a complaint or allegation that is already in the public domain will not normally be a protected disclosure. Such material would, for example, include matters which have already been subject to media or other public commentary.

The conduct or action being disclosed about may be one which has taken place, is still occurring, or is believed is intended to be taken or engaged in. Disclosures may also be made about conduct that occurred prior to the commencement of the Act on 10 February 2013.

A disclosure may:

- only be made by a natural person (or a group of individuals making joint disclosures),² disclosures cannot be made by a company or an organisation;
- be made anonymously;³

² It should be noted that some of the protections set out in the Act protecting a protected discloser are available only to the person who makes a disclosure. The IBAC has pointed out that the consequence of this is, if a person makes a disclosure by ‘notifying’ the agency on behalf of another individual, then it is the ‘notifier’ who may receive those protections, and not the person on whose behalf they have made the disclosure. The person on whose behalf the disclosure has been made will only be entitled to protections against detrimental taken against them in reprisal for the disclosure made by the notifier.

³ Although this may create difficulties in Council being able to communicate with the discloser, and some of the notification requirements imposed on Council in relation to disclosures will not apply in relation to an anonymously made disclosure. In addition, it may impede the Council’s ability to

- be made even where the discloser is unable to identify precisely the individual or the organisation to which the disclosure relates; and
- also be a complaint, notification or disclosure (however described) made under another law.

The following are *not* protected disclosures under the Act:

- a disclosure that has not been made in accordance with all of the procedural requirements of Part 2 of the Act and the prescribed procedures in the Regulations (also see section 4 of these procedures below);
- a disclosure made by a discloser who expressly states in writing, at the time of making the disclosure, that the disclosure is not a disclosure under the Act;
- a disclosure made by an officer or employee of an investigative entity in the course of carrying out his or her duties or functions under the relevant legislation, unless the person expressly states in writing that the disclosure **is a disclosure** and the disclosure is otherwise made in accordance with Part 2 of the Act.
- If Council receives any disclosures which do not meet all of the requirements of Part 2 of the Act or the prescribed procedures in the Regulations, Council will not be required to consider whether it is a protected disclosure under the Act. However, Council will always consider whether it would be appropriate to inform the discloser how to make the disclosure in a way that would comply with the requirements of the Act and the Regulations in order to ensure that persons are properly afforded the opportunity to receive any appropriate protections available to them under the Act.
- In addition, Council is required to consider whether a disclosure that does not meet the requirements of the Act and the Regulations should be treated as a complaint, notification or referral to Council in accordance with any other laws or internal policies and procedures.

properly assess whether the complaint or allegation is a protected disclosure for the purposes of the Act.

How can a disclosure be made?

A disclosure must be made in accordance with Part 2 of the Act

A disclosure must be made in accordance with Part 2 of the Act.

Part 2 of the Act permits disclosures to be made anonymously, orally or in writing, and need not necessarily identify the person or organisation complained about.

Generally:

- a verbal disclosure may be made:
 - in person;
 - by telephone;
 - by leaving a voicemail message on a particular telephone answering machine; or
 - by any other form of non-written electronic communication.

- A written disclosure to the IBAC and the Ombudsman can be made via an online form available at each of their respective websites:
 - <https://www.ibac.vic.gov.au/reporting-corruption/report/complaints-form>: (last accessed 11 July 2018);
 - <https://www.ombudsman.vic.gov.au/Complaints/Make-a-Complaint/Complaint-Form> : (generic complaint form as at 11 July 2018).

Disclosures cannot be made by fax.

A disclosure made by email from an address from which the identity of the discloser cannot be ascertained will be treated as an anonymous disclosure.

An oral disclosure **must** be made in private. For a verbal disclosure, this means the discloser must reasonably believe that only the following people are present or able to listen to the conversation:

- the discloser him or herself (including any other individuals making a joint disclosure at the same time);
- any lawyer representing the discloser; and
- one or more people to whom a disclosure is permitted to be made under the Act or the Regulations.

The disclosure must be made to a body authorised to receive it

One of the requirements in Part 2 of the Act is that the disclosure has been made to a body authorised under the Act to receive the disclosure.

Council can only deal with disclosures which concern Council, its Councillors, contractors or staff.

Disclosures about improper conduct or detrimental action by Council's Councillors **must** be made to the IBAC or to the Ombudsman. Those disclosures may not be made to the Council.

Disclosures about improper conduct or detrimental action by Council or its Councillors, contractors and staff may be made to Council or one of 4 external authorities:

- the IBAC;
- the Ombudsman in relation to limited types of disclosures;
- the VI in relation to limited types of disclosures; or
- The Chief Commissioner of Police in relation to limited types of disclosures.

Although the Act states that disclosures may be made to one of the above 4 external authorities, it is the IBAC's view that, as at October 2016, no situations would arise where the VI or the Chief Commissioner of Police would be authorised under another Act to investigate such a protected disclosure. Therefore, in most circumstances, disclosures about Council, its Councillors, contractors or staff should be made to Council or to the IBAC.

Different procedures apply to the receiving body as detailed below.

If the disclosure concerns another public body or employees, members, officers or staff of that other public body, it has not been made in accordance with Part 2 of the Act and cannot be treated as a protected disclosure under the Act. However, if such a disclosure is made to Council, Council will take reasonable steps to direct the discloser to the (or an) other body which is able to receive a disclosure about that person or body under the Act (also see the table below). This may not be possible if, for example, the allegation received is made from an anonymous source and the source has not provided any contact details to Council. Where in doubt, a discloser should make their disclosure to the IBAC.

If a person does not wish their allegation or complaint to be treated as a disclosure made under Part 2 of the Act, the person must, at the time of making the disclosure, expressly state in writing that the disclosure is not a disclosure for the purposes of the Act.

Unless such an express statement has been made, upon receiving a disclosure (whether directly or indirectly), Council's Protected Disclosure Coordinator will determine whether the disclosure has been made in accordance with Part 2 of the Act. Part 2 of the Act and the Regulations set out how disclosures must be made in order to be a protected disclosure under the Act.

How to make a disclosure to Council

Oral disclosures

An oral disclosure to Council **must** be made in private and **may** be made:

- in person;
- by telephone to one of the persons authorised to receive disclosures set out below, including by leaving a voicemail message on that telephone number; or
- by some other form of non-written electronic communication.

The oral disclosure **must** be made to one of the following persons:

- the CEO of Council;
- one of the Protected Disclosure Officers identified in section 3 of these procedures;
- the Protected Disclosure Coordinator identified in section 3 of these procedures;
- to the direct or indirect manager of the discloser, if the discloser is an employee of Council; or
- to the direct or indirect manager of the person to whom the disclosure relates, if that person is an employee of Council.

For the telephone numbers of the Protected Disclosure Officers, the CEO and the Protected Disclosure Coordinator, please see section 3 of these procedures.

If the disclosure is made orally, the person receiving the disclosure will make notes at the time recording the disclosure. Recording of the conversation will only be done with the disclosure's permission or by giving prior warning that the conversation will be recorded.

Written disclosures

A written disclosure to Council must be:

- delivered personally to the office of Council at 25 Lyttleton Street, Castlemaine VIC 3450; or
- sent by post addressed to the office of Council at PO Box 185, Castlemaine VIC 3450; or
- sent by email to the office of Council at john.taylor@mountalexander.vic.gov.au; or
- sent by email to the official email address of:
 - the direct or indirect supervisor or manager of the discloser, if the discloser is an employee of the Council;
 - the direct or indirect supervisor or manager of the person to whom the disclosure relates, where that person is an employee of Council;
 - the Protected Disclosure Coordinator specified in section 3 of these procedures.

For the official email address of the Protected Disclosure Officers, the CEO and the Protected Disclosure Coordinator, please see sections 3 of these procedures.

Council recommends that the discloser ensures, where a written disclosure is being provided personally or by post to the official office location or address of Council, that the disclosure be sealed in an envelope which is clearly marked with one or more of the following:

- "Re: Protected disclosure";
- "To the personal attention of the CEO";
- "To the personal attention of the Protected Disclosure Coordinator"; or
- "To the personal attention of the Protected Disclosure Officer".

In relation to a disclosure being emailed to the official email address of Council, rather than to the official email address of one of the individuals specified above,

Council recommends that the discloser insert in the email subject line one of the labels set out above applicable to personally delivered or posted items.

Any employees of Council who receive disclosures except in the circumstances outlined above **must** direct the discloser to make their disclosure to one of the appropriate officers identified above.

How to make a disclosure to the IBAC

Oral disclosures

An oral disclosure to the IBAC **must** be made in private and **may** be made:

- in person;
- by telephone, to 1300 735 135;
- by leaving a voicemail message on the telephone number of one of the specified individuals below to whom an oral disclosure may be made; or
- by some other form of non-written electronic communication.

The oral disclosure **must** be made to one of the following persons:

- the Commissioner of the IBAC;
- the Deputy Commissioner of the IBAC;
- the CEO of the IBAC;
- an employee referred to in s 35(1) of the IBAC Act; or
- any staff referred to in s 35(2) of the IBAC Act.

Written disclosures

A written disclosure to the IBAC **must** be:

- delivered personally to the office of the IBAC, at Level 1, North Tower, 459 Collins Street, Melbourne, VIC 3001; or
- sent by post addressed to the office of the IBAC, at GPO Box 24234, Melbourne, VIC 3000; or
- sent by email to the official email address of a person specified above to whom an oral disclosure may be made (i.e., the Commissioner, the Deputy Commissioner, the CEO, or employee or staff referred to in s 35 of the IBAC Act); or
- submitted by an online form available from <https://www.ibac.vic.gov.au/reporting-corruption/report/complaints-form>: (last accessed 11 July 2018)

How to make a disclosure to the Ombudsman

Oral disclosures

An oral disclosure to the Ombudsman **must** be made in private and **may** be made:

- in person;
- by telephone, to 9613 6222 or toll free to 1800 806 314;
- by leaving a voicemail message on the telephone number of any Ombudsman officer; or

- by some other form of non-written electronic communication.

The oral disclosure may be made to an Ombudsman officer.

Written disclosures

A written disclosure to the Ombudsman **must** be:

- delivered personally to the office of the Ombudsman, at Level 2, 570 Bourke Street, Melbourne, VIC 3000; or
- sent by post addressed to the office of the Ombudsman, as above; or
- sent by email to the office of the Ombudsman at: ombudvic@ombudsman.vic.gov.au; or
- sent by email to the official email address of any Ombudsman officer; or
- submitted by an online form (if any) identified in the procedures established by the Ombudsman under s 58(1) of the Act.

Disclosures about other public bodies or public officers

Disclosures relating to improper conduct or detrimental action involving other public bodies or officers who are not Councillors, contractors or staff of Council may be made to the various bodies as shown below (although the table does not comprise an exhaustive list):

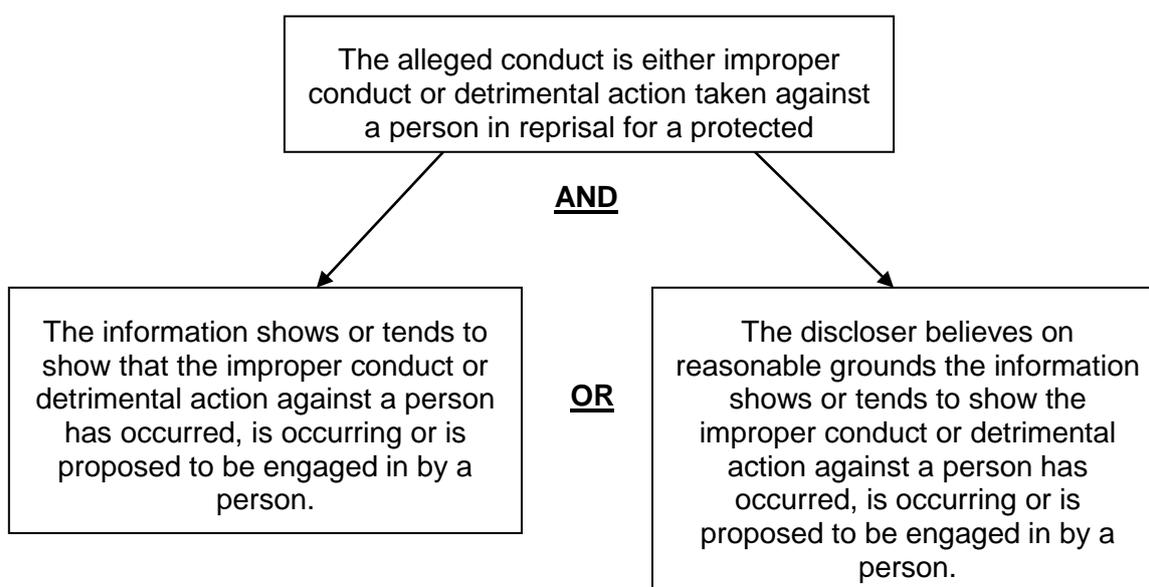
Person or body who is the subject of the disclosure	Person or body to whom the disclosure must be made	Relevant provisions in the Act and the Regulations where applicable
Employee, agent, deputy or delegate of or a public body, including a public service body and other Councils (unless the body is one of those set out below, in which case the below takes precedence)	That public body or the IBAC in most instances, and possibly also the Ombudsman, Chief Commissioner of Police and the VI in limited specified circumstances	Section 13 of the Act; r 6 in relation to disclosures made to the IBAC, r 7 in relation to disclosures made to the Ombudsman, r 8 in relation to disclosures made to the VI, r 9 in relation to disclosures made to a public service body, r 10 in relation to disclosures made to Councils.
The Chief Commissioner of Police, the Director of Public Prosecutions, the Chief Crown Prosecutor, the Solicitor-General, the Governor, the Lieutenant Governor, the Director of Police Integrity, the Electoral Commissioner, a judicial officer, a member of the VCAT who is not a judicial officer; Ministerial officers; Parliamentary advisers, electoral officers	The IBAC	Section 14 of the Act, r 6 of the Regulations
An officer of the Ombudsman officer or the Victorian Auditor-General's Office	The IBAC or the VI	Section 15 of the Act, r 6 in relation to disclosures made to the IBAC, r 8 in relation to disclosures made to the VI

Councillors, the FOI Commissioner, the Commissioner for Privacy and Data Protection, the Health Complaints Commissioner	The IBAC or the Ombudsman	Section 16 of the Act, r 6 in relation to disclosures made to the IBAC, r 7 in relation to disclosures made to the Ombudsman
The IBAC or an officer of the IBAC	The VI	Section 17 of the Act, r 8 of the Regulations
A member of Victoria police personnel, other than the Chief Commissioner of Police	A prescribed member of Victoria police personnel or the IBAC	Section 18 of the Act, r 6 in relation to disclosures made to the IBAC, r 11 in relation to disclosures made to a prescribed member of police personnel
A member of Parliament or Minister in the Legislative Assembly	The Speaker of the Legislative Assembly	Section 19 of the Act, r 12 of the Regulations
A member of Parliament or Minister in the Legislative Council	The President of the Legislative Council	Section 19 of the Act, r 12 of the Regulations

For further information, also see pages 13-15 of the Guidelines for Making and Handling Protected Disclosures (http://www.ibac.vic.gov.au/docs/default-source/guidelines/guidelines-for-making-and-handling-protected-disclosures-2016.pdf?sfvrsn=eb8b6875_12, last accessed 11 July 2018).

What can a disclosure be made about?

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



In assessing whether there is improper conduct or detrimental action, Council will look critically at all available information about the alleged conduct and about the discloser. Preliminary questions Council may seek answers to, or consider, include:

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

Improper conduct

A disclosure may be made about improper conduct by a public body or public official in the performance of their functions as a public body or public officer.

Central to the notion of improper conduct is the notion of the “public trust”.

“Public trust” is a concept that provides the basis *‘for obligations of honesty and fidelity in public officers that exist to serve, protect and advance the interests of the public’*.⁴

A person acting in their official capacity is exercising ‘public power’ that is derived from their public office holding and may be controlled or influenced by legislative provisions, administrative directions, or constitutional principles or conventions. There is an expectation that members of the community may rely on and trust their public bodies and officials to act honestly. The expectation is that public officers will not use their positions for personal advantage, or use the influence of their public office for improper purposes where there is a duty to act objectively and impartially.

Disclosers or Council will need to identify that there is a link between the alleged improper conduct of a person or an organisation and their function as a public officer or a public body.

Improper conduct is defined in the Act to mean either corrupt conduct or specified conduct (both terms are also defined by the Act and the IBAC Act).

Corrupt conduct

Corrupt conduct means any one of the following:

- conduct of any person that adversely affects the honest performance by a public officer or public body of his or her or its functions as a public officer or public body;
- conduct of a public officer or public body that constitutes or involves the dishonest performance of his or her or its functions as a public officer or public body;

⁴ *R v Bembridge* (1783) 99 ER 679.

- conduct of a public officer or public body that constitutes or involves knowingly or recklessly breaching public trust;
- conduct of a public officer or a public body that involves the misuse of information or material acquired in the course of the performance of his or her or its functions as a public officer or public body, whether or not for the benefit of the public officer or public body or any other person;
- conduct of a person intended to adversely affect the effective performance or exercise of functions or powers by a public officer or public body and result in that person (or their associate⁵) obtaining a gain, benefit or entitlement⁶ they would not have otherwise obtained, irrespective of whether the public officer or public body engages in any corrupt conduct or other misconduct;
- conduct that could constitute a conspiracy or an attempt to engage in any of the conduct referred to above; **and**

if that conduct could be proved beyond reasonable doubt at a trial, amounts to:

- an indictable offence; *or*
- one of the following 4 types of common law offences committed in Victoria:
 - perverting the course of justice
 - attempting to pervert the course of justice
 - bribery of an official
 - misconduct in public office.

Specified conduct

Specified conduct is any one of the above types of conduct, **or** conduct that involves substantial mismanagement of public resources, risk to public health or safety, or risk to the environment, which **would not** constitute “corrupt conduct” but would nevertheless, if proved, constitute either:

- a criminal offence; *or*
- reasonable grounds for dismissing or terminating the employment of the officer who engaged or is engaging in that conduct.

It should be noted the risk in relation to mismanagement or public health and safety or the environment must be “substantial”, requiring significant or considerable mismanagement, or significant or considerable risks to public health, safety or the environment.

⁵ Defined in s 4(2B) of the IBAC Act.

⁶ See s 4(1)(da)(i) – (iv) of the IBAC Act.

Detrimental action

It is an offence under the Act for a public officer or body to take detrimental action against a discloser in reprisal for a making protected disclosure. There are two essential components here: whether there is in fact “detrimental action”, as defined by the Act, and whether that action is being taken in reprisal against a person for making or being connected with a protected disclosure.

Detrimental action

Detrimental action as defined by the Act includes:

- 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.

In addition, a person can have taken detrimental action without having taken the action itself, but just by threatening to take such action. Further, the detrimental action need not necessarily have been taken (or threatened to be taken) against a person making a protected disclosure, but against any person connected with a protected disclosure.

Examples of detrimental action prohibited by the Act include:

- threats to a person’s personal safety or property, including intimidating, harassing a discloser or the discloser’s family or friends, otherwise causing personal injury or prejudice to the safety or damaging property of a discloser or the discloser’s family or friends;
- the demotion, transfer, isolation or change in duties of a discloser due to him or her having made a disclosure;
- discriminating or disadvantaging a person in their career, profession, employment, trade or business; or
- discriminating against the discloser or the discloser’s family and associates in subsequent applications for promotions, jobs, permits or tenders resulting in financial loss or reputational damage.

Taken in reprisal for a protected disclosure

The person (or the person incited to take detrimental action) must take or threaten the detrimental 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 reason for the person taking detrimental action in reprisal must be a ‘substantial’ reason for taking that action, or it will not be considered to be detrimental action.

4. Handling Disclosures

Receiving a disclosure

When Council receives a complaint, report or allegation of improper conduct or detrimental action, the first step will be to ascertain whether it has been made in accordance with Part 2 of the Act.

If the disclosure satisfies Part 2 of the Act, the discloser is entitled to receive protections under Part 6 of the Act (see section 7 of these procedures).

Assessing a disclosure

If the disclosure satisfies the requirements of Part 2 of the Act, Council is required to determine whether the disclosure may be a protected disclosure by going through the 2 step assessment process recommended by the IBAC as follows.

This will be the case even if the discloser does not refer to the Act or require the protections of the Act. The initial assessment is made on the nature of the information disclosed or on the belief that the discloser has about the nature of the information, and not the discloser's intention.

First step

The first question Council must answer is whether the information disclosed shows, or tends to show, that there is improper conduct or detrimental action taken in reprisal for the making of a protected disclosure.

This requires Council to ascertain whether the information satisfies the 'elements' of improper conduct or detrimental action, as defined in the Act and whether any of the relevant exceptions apply.

This may require Council to:

- seek further information;
- conduct a discreet initial enquiry;
- seek (further) evidence from the discloser;
- ascertain whether there is sufficient supporting material to demonstrate that the conduct or actions covered by the Act have occurred, are occurring or are likely to occur.

If it is not clear that the information disclosed does show or tend to show that there is improper conduct or detrimental action, then Council will go on to the second step below.

Second step

This requires Council to ask whether the discloser believes on reasonable grounds that the information shows or tends to show there is improper conduct or detrimental action. That is, does the person actually believe that the information shows, or tends to show, there is improper conduct or detrimental action? A reasonable belief requires the belief to be based on facts that would be sufficient to

make a reasonable person believe there was improper conduct or detrimental action.

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

According to the IBAC, simply stating that improper conduct or detrimental action is occurring, without providing any supporting information, would not be a sufficient basis for having a reasonable belief. In the IBAC's view, a belief cannot be based on a mere allegation or conclusion unsupported by any further facts or circumstances.

Other matters that the IBAC suggests Council can consider are:

- the reliability of the information provided by the discloser, even if it is second- or third-hand. For example, how would the discloser have obtained the information?
- the amount of detail that has been provided in the information disclosed; and
- the credibility of the discloser, or of those people who have provided the discloser with information.

Where urgent action is required while an assessment is still being made

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

Examples of this provided by the IBAC include where the disclosure may be about:

- a child protection worker allegedly sexually assaulting children in care;
- a council worker allegedly lighting bush fires; or
- a person threatening to poison the water supply.

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

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

The Act allows Council to disclose the content of the disclosure by a person or body "to the extent necessary for the purpose of taking lawful action in relation to the conduct that is the subject of an assessable disclosure including disciplinary process or action". However, the IBAC notes that this does not allow the identity of the discloser to be revealed. Reporting the alleged conduct to the Victoria Police as criminal conduct, or taking legitimate management action against the subject of the disclosure in order to prevent future conduct, may be appropriate courses of action in these circumstances.

Assessment decisions

At the conclusion of the assessment, Council must decide whether it considers the disclosure to be a protected disclosure. If Council decides it may be a protected disclosure, it **must** notify IBAC of the disclosure. If Council does not consider it to be a protected disclosure, then it may be a matter that Council otherwise deals with through any other relevant internal complaint or grievance management processes.

Notifications

If Council does not consider the disclosure to be a protected disclosure

If Council determines the disclosure is not a protected disclosure, and the discloser has indicated to Council (or it otherwise appears to Council) that the discloser wishes to receive the protections that apply to a protected disclosure under the Act, the discloser will be notified in writing, within 28 days of Council receiving the disclosure, that:

- Council considers the disclosure is not a protected disclosure;
- the disclosure has not been notified to the IBAC for assessment under the Act; and
- regardless of whether the disclosure is notified to the IBAC for assessment under the Act, the protections under Part 6 of the Act apply.

Notifications to a discloser do not need to be provided by Council in response to an anonymously made disclosure.

If Council considers the disclosure may be a protected disclosure

If Council considers the disclosure may be a protected disclosure under the Act, Council will, within 28 days of receiving the disclosure:

- notify the IBAC that:
 - Council considers the disclosure may be a protected disclosure; and
 - Council is notifying the disclosure to the IBAC for assessment under s 21 of the Act; **and**
- notify the discloser that:
 - the disclosure has been notified to the IBAC for assessment under the Act; and
 - it is an offence under s 74 of the Act to disclose that the disclosure has been notified to the IBAC for assessment under the Act.

In addition, at the time of notifying the IBAC under s 21 of the Act or at any later time, Council may also provide the IBAC with any information obtained by Council regarding the disclosure in the course of its enquiries leading up to its notification of the disclosure to the IBAC.

Protections for public officers

A public officer is given specific protections under the Act to provide information to other public officers or to the IBAC in dealing with a disclosure they have received. When a public officer acts in good faith and in accordance with the Act, Regulations and the IBAC's Guidelines, the public officer does not commit an offence under laws imposing a duty to maintain confidentiality or restricting the disclosure of information.

5. Assessment by the IBAC

Once a disclosure has been notified to the IBAC, the IBAC must determine whether it is a protected disclosure complaint. Such a determination must be made within a reasonable time after the disclosure is notified to the IBAC.

The IBAC must inform Council of its determination as to whether or not the disclosure is a protected disclosure complaint:

- in writing; and
- within a reasonable time after making the determination.

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

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

If the IBAC determines the disclosure is not a protected disclosure complaint

If the IBAC determines the disclosure is not a protected disclosure complaint, the IBAC must advise the discloser in writing and within a reasonable time after the determination is made, that:

- the IBAC has determined that the disclosure is not a protected disclosure complaint; and
- as a consequence of that determination:
 - the disclosure will not be investigated as a protected disclosure complaint; and
 - the confidentiality provisions under Part 7 of the Act no longer apply in relation to the disclosure; and
- regardless of whether the IBAC has determined that the disclosure is a protected disclosure complaint, the protections under Part 6 apply to a protected disclosure.

In addition, if the IBAC is of the view that the disclosure, although not a protected disclosure complaint, may be able to be dealt with by another entity, the IBAC may advise the discloser that:

- the matter which is the subject of the disclosure may be able to be dealt with by that entity other than as a protected disclosure complaint; and
- if the discloser wishes to pursue the matter, to make a complaint directly to that entity.

If this is the case, the IBAC will also advise the relevant notifying entity that the discloser has been given this advice.

The IBAC is also able to consider whether it wishes to treat the assessable disclosure as a notification made to the IBAC under the IBAC Act.

If the IBAC determines the disclosure is a protected disclosure complaint

Notification to the discloser

If the IBAC determines the disclosure is a protected disclosure complaint, the IBAC must advise the discloser in writing and within a reasonable time after the determination is made, that:

- the IBAC has determined that the disclosure is a protected disclosure complaint;
- regardless of the determination, the protections available to a discloser of a protected disclosure under Part 6 of the Act apply;
- the discloser has rights, protections and obligations under the Act as contained in ss 72, 74 and Parts 6 and 7 of the Act, including an explanation of the effect of those sections and Parts of the Act; and
- it is an offence under s 74 of the Act to disclose that the IBAC has determined that the disclosure is a protected disclosure complaint.

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

Once the IBAC has determined that a disclosure is a protected disclosure complaint, the discloser cannot withdraw that disclosure. However, under the IBAC Act, the IBAC can decide not to investigate a protected disclosure complaint if the discloser requests that it not be investigated.

Further actions the IBAC may take⁷

Under the IBAC Act, the IBAC may dismiss, investigate, or refer a protected disclosure complaint. The IBAC may also conduct preliminary inquiries in accordance with Division 3A of Part 3 of the IBAC Act before determining whether to dismiss, investigate or refer a protected disclosure complaint.

⁷ This section of the procedures comprises a summary of points drawn from pp 24 to 26 of the IBAC's Guidelines for Making and Handling Protected Disclosures (http://www.ibac.vic.gov.au/docs/default-source/guidelines/guidelines-for-making-and-handling-protected-disclosures-2016.pdf?sfvrsn=eb8b6875_12, last accessed 11 July 2018). For further information, please refer to those Guidelines.

If the IBAC dismisses a protected disclosure complaint, then it must do so on one of the grounds specifically set out in the IBAC Act. In particular, the IBAC **must** dismiss a protected disclosure complaint if the matter disclosed is a matter that neither the IBAC nor an investigating entity may investigate.

The IBAC may choose to investigate the alleged conduct if it suspects on reasonable grounds that it constitutes “corrupt conduct”.

The IBAC may also choose to refer the protected disclosure complaint to other appropriate and relevant investigative entities.

Depending on the action decided to be taken by the IBAC, the IBAC must also provide certain other information to the discloser. That information is set out at the chart on p 25 of the IBAC’s Guidelines for Making and Handling Protected Disclosures.⁸

Other information about investigative entities’ investigations of a protected disclosure complaint⁹

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

Council or person will be able to disclose information about the protected disclosure complaint to the investigative entity without breaching the confidentiality requirements of the Act.

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

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

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

The investigative entity may provide written information about the commencement, conduct or result of an investigation, including any actions taken and any recommendation made that any action or further action be taken to the relevant

⁸ Available at http://www.ibac.vic.gov.au/docs/default-source/guidelines/guidelines-for-making-and-handling-protected-disclosures-2016.pdf?sfvrsn=eb8b6875_12, last accessed 11 July 2018.

⁹ See footnote 7 above.

principal officer. However, the investigative entity must not provide any information that is likely to lead to the identification of a discloser.

The investigative entity does not have to provide this information to either the discloser or the relevant principal officer in specified circumstances set out in the IBAC Act or the Ombudsman Act 1973.

6. Welfare Management

Council is committed to the protection of genuine disclosers against detrimental action taken in reprisal for the making of protected disclosures.

The protection of persons making genuine protected disclosures about improper conduct or detrimental action is essential for the effective implementation of the Act. In addition, the Act extends the need for welfare management to people who have cooperated or intend to cooperate with an investigation of a protected disclosure complaint (cooperators). Persons who are the subject of allegations will also have their welfare looked after.

Council must ensure disclosers and cooperators are protected from direct and indirect detrimental action being taken against them in reprisal for the protected disclosure. Council will ensure its workplace culture supports disclosers and cooperators. Such support will extend to the relevant persons regardless of whether they are internal to the organisation (e.g., Councillors, contractors, other staff) or external members of the public. However, different legislative responsibilities (including those external to the Act) apply to persons internal to the organisation, and to persons who may be clients or users of Council's services. Those derive from various legislative and administrative obligations to:

- ensure the health and wellbeing of employees of a public sector body under laws including those relating to Occupational Health and Safety, the Charter of Human Rights and Responsibilities Act 2006, the Public Administration Act 2004, and various Victorian Public Sector Codes of Conduct (as relevant); and
- comply with various relevant laws, policies and practices when making administrative and other decisions or taking particular actions affecting a customer, client or user of the public body's services.¹⁰

Generally, for internal persons, Council will ensure a supportive work environment and respond appropriately to any reports of intimidation or harassment against these persons. For external persons, Council will take reasonable steps to provide appropriate support. Council will discuss reasonable expectations with all persons receiving welfare management in connection with a protected disclosure.

Support available to disclosers and cooperators¹¹

¹⁰ Page 8, Guidelines for protected disclosure welfare management, <http://www.ibac.vic.gov.au/docs/default-source/guidelines/guidelines-for-protected-disclosure-welfare-management-2016.pdf?sfvrsn=12> (last accessed 11 July 2018).

Council will support disclosers and cooperators by:

- keeping them informed, by providing:
 - confirmation that the disclosure has been received;
 - the legislative or administrative protections available to the person;
 - a description of any action proposed to be taken;
 - if action has been taken by Council, details about results of the action known to Council;
- providing active support by:
 - acknowledging the person for having come forward
 - assuring the discloser or cooperator that they have done the right thing, and Council appreciates it;
 - making a clear offer of support;
 - assuring them that all reasonable steps will be taken to protect them;
 - giving them an undertaking to keep them informed as far as Council is reasonably able to;
- managing their expectations by undertaking an early discussion with them about:
 - what outcome they seek;
 - whether their expectations are realistic;
 - what Council will be able to deliver;
- maintaining confidentiality by:
 - ensuring as far as is possible that other people cannot infer the identity of the discloser or cooperator;
 - reminding the discloser or cooperator not to reveal themselves or to reveal any information that would enable others to identify them as a discloser or cooperator;
 - ensuring that hardcopy and electronic files relating to the disclosure are accessible only to those who are involved in managing disclosures in Council;
- proactively assessing the risk of detrimental action being taken in reprisal (rather than reactively waiting for a problem to arise and a complaint made by the discloser or cooperator), that is, actively monitor the workplace, anticipating problems and dealing with them before they develop as far as is possible;
- protecting the discloser or cooperator by:
 - examining the immediate welfare and protection needs of the person and seeking to foster a supportive work environment;
 - listening and responding to any concerns the person may have about harassment, intimidation or victimisation in reprisal for their actions;
 - assessing whether the concerns the person may have about harassment, intimidation or victimisation might be due to other causes other than those related to the protected disclosure;

¹¹ This section is adapted from resources of the Queensland Government as cited and drawn from p 10 of the IBAC's Guidelines for protected disclosure welfare management, *ibid*.

- preventing the spread of gossip and rumours about any investigation into the protected disclosure; and
- keeping contemporaneous records of all aspects of the case management of the person, including all contact and follow-up action.

Appointment of a Welfare Manager

In appropriate circumstances, Council will appoint a suitable welfare manager to protect a discloser or a cooperator. The following matters will be taken into consideration by Council when deciding whether to appoint a welfare manager in a particular case:

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

If the answer to the first question is 'yes' then the IBAC recommends the appointment of a dedicated welfare officer. If the answer to the first question is 'no' and Council can meet the needs set out in the remainder of the questions, the IBAC suggests there may be no need for a dedicated welfare officer to be appointed for that particular case.

In most circumstances, a welfare officer will only be required where a protected disclosure complaint proceeds to investigation, but each protected disclosure received by Council will to be assessed on its own merits. In particular, a Welfare Manager will be appointed where the Council believes that one is required to ensure that the appropriate support as set above can be provided to the discloser or cooperator.

If appointed, the Welfare Manager will, in addition to providing the general support set out above:

- advise the discloser or cooperator of the legislative and administrative protections available to him or her, including providing practical advice;
- listen and respond to any concerns of harassment, intimidation or victimisation in reprisal for making a disclosure;
- not divulge any details relating to the protected disclosure to any person other than the Protected Disclosure Coordinator or the CEO;
- ensure all meetings between the Welfare Manager and the discloser or cooperator are conducted discreetly to protect the person from being identified as being involved in the protected disclosure;

- advise the discloser or cooperator of Council's Employee Assistance Program (EAP); and
- ensure the expectations of the discloser are realistic and reasonable, and that the discloser or cooperator understands the limits of the support Council is able to reasonably provide in the particular circumstances. This is particularly the case where a Welfare Manager has been appointed in relation to an external discloser or cooperator.

Welfare management of persons who are the subject of protected disclosures

Council will also meet the welfare needs of a person who is the subject of a protected disclosure. It is important to remember that until a protected disclosure complaint is resolved, the information about the person is only an allegation.

Council will make a decision about whether or when the subject of a disclosure will be informed about a protected disclosure involving an allegation made against him or her. 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 if a decision is made to dismiss the disclosure.

The 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 Act. Council may give information about the disclosure to the subject of the disclosure if it is directed or authorised to do so by the investigative entity investigating the protected disclosure complaint, or for the purpose of taking action with respect to the conduct alleged, including disciplinary action.

Investigative entities may also inform the subject of the protected disclosure complaint 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 the subject of a disclosure who is made aware of their status as such may have a welfare manager appointed by Council, or be referred to Council's EAP program for welfare assistance. Alternatively, the Protected Disclosure Coordinator will provide support and advice to a person the subject of a disclosure, particularly in relation to their rights and obligations under the Act, Council's internal reporting system, these procedures, and any other relevant law or code of conduct. Council will consider each matter on a case by case basis, taking into account the particular circumstances of the person and the protected disclosure complaint.

Confidentiality

Consistently with Council's confidentiality obligations under the Act as outlined in these procedures, the fact that a disclosure has been made, whether it has been notified to the IBAC for assessment, any information received from the IBAC or another investigative entity and the identities of persons involved will not be divulged.

Council will take all reasonable steps to ensure the confidentiality of the subject of a disclosure during any assessment and any ensuing investigation. Where the disclosure is dismissed or investigations do not substantiate the allegations made against the person, the fact that the investigation was undertaken, its results, and the identity of the person subject of the disclosure will still be kept confidential.

Natural justice

Council will afford natural justice to the subject of a disclosure prior to any decision being made about the allegations. If the matter has been investigated by an investigative entity, then the investigative entity will be responsible for ensuring consultations with the subject include the provision of natural justice to him or her. The IBAC has noted that affording a subject of a disclosure natural justice in this context 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; and
- have his or her defence set out fairly in any report.

If the allegations are wrong or unsubstantiated

Council will give its full support to a person who is the subject of a disclosure where the allegations contained in a disclosure are wrong or unsubstantiated. In those circumstances, Council and any investigative entity involved will ensure that there are no adverse consequences for this person arising out of the disclosure or its investigation. This is particularly crucial in a situation where there has been publicly disclosed information identifying the subject, but also where such information has become well-known across Council and the subject is an employee, Councillor or staff of Council.

Further, if the matter has been publicly disclosed by Council, the CEO will consider any request by that person to issue a statement of support setting out that the allegations were clearly wrong or unsubstantiated.

If detrimental action is reported

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 Act.

A person takes detrimental action against another person in reprisal for a protected disclosure if:

- the person takes, or threatens to take, detrimental action against the other person because, or in the belief that:

- the other person or anyone else has made, or intends to make, the disclosure; or
- the other person or anyone else has cooperated, or intends to cooperate, with an investigation of the disclosure; or
- for either of the reasons above, the person incites or permits someone else to take or threaten to take detrimental action against the other person.

All persons are reminded it is a criminal offence to take detrimental action against another person in reprisal for a protected disclosure under the Act. The penalty for committing such an offence in contravention of the Act is a maximum fine of 240 penalty units, (\$37,310.40 from 1 July 2016, usually increasing 1 July every year in accordance with arrangements made under the Monetary Units Act 2004), two years imprisonment or both.

In such circumstances, Council will be careful about making preliminary enquiries or gathering information concerning such an allegation of detrimental action so that, to the extent it is reasonably able to, it protects the integrity of any evidence that might be later relied upon in a criminal prosecution.

In addition, 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 will then be assessed by Council it as a new disclosure under Part 2 of the Act. Where the detrimental action is of a serious nature likely to amount to a criminal offence, Council will also consider reporting the matter to the police or the IBAC (if the matter was not already the subject of a disclosure notified to the IBAC).

A discloser of a protected disclosure may also:

- take civil action against the person who took detrimental action against the discloser and seek damages;
- take civil action against Council jointly and severally to seek damages if the person who took detrimental action against the discloser took that action in the course of employment with, or while acting as an agent of Council; and
- apply for an order or an injunction from the Supreme Court.

Protections for persons making a protected disclosure

Part 6 protections available to disclosers

Part 6 of the Act sets out the protections provided to persons who make a disclosure that is a 'protected disclosure', i.e., one that is made in accordance with Part 2 of the Act. In summary, they are as follows:

- the discloser is not subject to any civil or criminal liability for making the protected disclosure;
- the discloser is not subject to any administrative action (including disciplinary action) for making the protected disclosure;
- by making the protected disclosure, the discloser is not committing an offence against the Constitution Act 1975 or any other law that imposes

obligations of confidentiality or otherwise restricts the disclosure of information;

- by making the protected disclosure, the discloser is not breaching any other obligation (made by oath, rule of law or practice) requiring him or her to maintain confidentiality; and
- the discloser cannot be held liable for defamation in relation to information included in a protected disclosure made by him or her.

The protections in Part 6 apply from the time at which the disclosure is made by the discloser. They apply even if Council receiving the disclosure does not notify the disclosure to the IBAC, and even if the IBAC has determined that the protected disclosure is not a protected disclosure complaint.

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

- the entity to which the protected disclosure was made;
- the IBAC; or
- any investigative entity investigating the protected disclosure.

Sections 52 and 53 of the Act refer specifically to confidentiality obligations of persons receiving information connected with an assessable disclosure, or leading to the identification of a discloser. Those confidentiality obligations do not apply to disclosers.

Actions of the discloser constituting offences and leading to protections being lost

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

- 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 (maximum penalty: a fine of 120 penalty units (\$19,028.40 from 1 July 2017, usually increasing 1 July every year in accordance with arrangements made under the *Monetary Units Act* 2004), 12 months imprisonment, or both);
- claim that a matter is the subject of a protected disclosure knowing the claim to be false (maximum penalty: a fine of 120 penalty units, 12 months imprisonment, or both);
- falsely claim that a matter is the subject of a disclosure that the IBAC has determined to be a protected disclosure complaint (maximum penalty: a fine of 120 penalty units, 12 months imprisonment, or both).

Similar provisions set out in the IBAC Act, such as in s 184, also makes it a criminal offence to disclose certain information received from the IBAC. The penalties for such offences are a fine of 60 penalty units, 6 months imprisonment, or both.

Other limitations on protections afforded to disclosers

A discloser is not protected against legitimate management action being taken by Council in accordance with the Act.

In addition, although the discloser of a protected disclosure is not subject to criminal or civil liability for making the disclosure, the 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 Act. Therefore, the discloser will still be held liable for their own conduct that they disclose as part of making a protected disclosure.

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

Where a discloser is implicated in improper conduct, Council will handle the disclosure and protect the discloser from reprisals in accordance with the Act, the IBAC's guidelines and these procedures. Council acknowledges that the act of disclosing should not shield disclosers from the reasonable consequences flowing from any involvement in improper conduct. However, in some circumstances, an admission may be a mitigating factor when considering disciplinary or other action.

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.

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. The CEO will make the final decision on the advice of the Protected Disclosure Coordinator as to whether disciplinary or other action will be taken against a discloser. Where disciplinary or other action relates to conduct that is the subject of the disclosure, the disciplinary or other action will only be taken after the disclosed matter has been appropriately dealt with. In all cases where disciplinary or other action is being contemplated, any such action will not be taken without Council's CEO ensuring that:

- the fact that a person has made a protected disclosure is not a substantial reason for Council taking 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.

Council will take all reasonable steps to thoroughly document its decision-making process, including recording the reasons why the disciplinary or other action is being taken, and the reasons why the action is not being taken in retribution against the discloser for making the disclosure, so that it will be able to clearly demonstrate that the disciplinary or other action was taken for the appropriate and permitted reasons under the Act.

The discloser will be clearly informed of any action proposed to be taken, be afforded natural justice, and inform and be informed of any mitigating factors that have been taken into account. Such communications with the discloser will be

made in plain English and reasonable steps to provide appropriate support will be offered where appropriate.

7. Confidentiality

General obligation of confidentiality on Council and all individuals

Council will take all reasonable steps to protect the identity of the discloser and the matters disclosed by a discloser. Maintaining confidentiality in relation to protected disclosure matters is crucial, among other things, in ensuring reprisals are not made against a discloser.

Disclosers may consider whether it is in their best interests not to discuss any related matters other than with authorised persons within Council, officers of the IBAC, or other persons authorised by law.

Steps taken by Council to ensure confidentiality

Information management

Council will ensure all files, whether paper or electronic, are kept securely. Those files will be accessible only by the CEO and Protected Disclosure Coordinator. Where necessary, a Welfare Manager may be able to gain access (where appropriate) to related welfare matters.

The Welfare Manager will not divulge any details relating to the disclosed matter to any person other than the Protected Disclosure Coordinator or an investigator appropriately authorised under the Act or the IBAC Act. All meetings between any relevant persons, including the Welfare Manager and disclosers will be conducted discreetly to protect the confidentiality of the person making a protected disclosure. All printed material will be kept in files that are clearly marked as Protected Disclosure Act matters, and warn of the criminal penalties that apply to any unauthorised access, use or divulging of information concerning a protected disclosure.

All electronic files will be produced and stored in a secure directory of Council's electronic document management system which can only be accessed by the CEO and Protected Disclosure Coordinator. Access to this directory is automatically recorded and can be audited. All other materials in connection with a protected disclosure will also be stored securely with the protected disclosure file.

Council will not use unsecured email to transmit documents in connection with a disclosure and will ensure all telephone calls and meetings in connection to disclosures are conducted privately and in the strictest of confidence. Hard copy documents will not be delivered by internal mail to a generally accessible area and, where possible, will be delivered in person by authorised officers where possible.

Exemption from the Freedom of Information Act 1982 (FOI Act)

The FOI Act provides a general right of access for any person to seek documents in the possession of Council.

However, the Act provides that certain information related to protected disclosures as contained in documents in the possession of Council will be exempt from the application of the FOI Act.

Such information excluded from the operation of the FOI Act includes:

- any information relating to a disclosure made in accordance with the Act;
- any information relating to a disclosure notified to the IBAC by Council under s 21 of the Act for assessment; and
- any information that is likely to lead to the identification of a discloser.

Council is required to contact the IBAC prior to providing any document originating from the IBAC or relating to a protected disclosure, if that document is sought under the FOI Act.

Training for all staff

Council will:

- ensure that Councillors, contractors and staff have access to a copy of these procedures in hard or soft copy;
- incorporate into its induction procedures training about Council's general obligations under the Act and the rights and obligations of all Councillors, contractors and staff;
- introduce periodic refresher courses for existing Councillors, contractors and staff about their rights and obligations under the Act;
- provide additional training and assistance to:
 - any members of Council with specific responsibilities and functions to handle and manage protected disclosures under the Act, including the Protected Disclosure Coordinator and people involved in welfare management;
 - its complaint handling staff to ensure that any complaints received will be dealt with consistently and in accordance with the Act as required;
 - any staff with functions and duties under the FOI Act or with responsibilities for information management, to ensure that no prohibited information is disclosed under the Act and to ensure there is appropriate liaising with the staff of the IBAC or other investigative agencies where required in response to a request for access under the FOI Act; and
 - all staff and employees dealing with customers to ensure any potential disclosures received from external sources can be handled appropriately in accordance with the Act and these procedures.

Limited exceptions permitted by the Act

The Act makes it a crime to disclose information connected with a disclosure made in accordance with the Act. Limited exceptions to the prohibition on disclosure are specified by the Act, include circumstances such as:

- where disclosure is required by Council (or one of its officers) in the exercise of functions of Council under the Act;
- where necessary for the purpose of the exercise of functions under the Act;
- by an investigating entity for the purpose of exercising that entity's functions under the IBAC Act;
- in accordance with a direction or authorisation given by the investigating entity that is investigating the disclosure;
- to the extent necessary for the purpose of taking lawful action in relation to the conduct that is the subject of an assessable disclosure including a disciplinary process or action;
- where the IBAC or the VI has determined that the assessable disclosure is not a protected disclosure and the discloser or Council subsequently discloses the information;
- when an investigative entity had published a report to Parliament, in accordance with its confidentiality obligations;
- for the purpose of obtaining legal advice in relation to matters specified in the Act;
- in order to enable compliance with the Act:
 - where a person does not have a sufficient knowledge of the English language, to obtain a translation from an interpreter;
 - where a person is under 18 years of age, to a parent or guardian of a discloser;
 - where a person is suffering a disability and is not able to understand, to an independent person;
- in disciplinary actions or legal proceedings for certain offences in the Act or other specified Acts.

The Act prohibits the inclusion of any details, in any report or recommendation, that is likely to lead to the identification of a discloser. The Act also prohibits the identification of the person who is the subject of the disclosure in any particulars included in an annual report or any reports to Parliament.

Penalties apply for unauthorised disclosure of information

The Act contains a number of offence provisions relating to unauthorised disclosure of information by either disclosers or persons who have received disclosures. The relevant penalties include imprisonment, financial payments or both.

The criminal offences set out in the Act relating to confidentiality include:

1. divulging information obtained in connection or as a result of the handling or investigation of a protected disclosure without legislative authority. Maximum

penalty: 60 penalty units (\$9,514.20 from 1 July 2017), six months imprisonment, or both.

2. Disclosing that a disclosure has been notified to the IBAC for assessment under the Act. Maximum penalty: 60 penalty units, six months imprisonment, or both.
3. Disclosing that a disclosure has been assessed by the IBAC or the VI to be a protected disclosure complaint under the Act. Maximum penalty: 60 penalty units, six months imprisonment, or both.

8. Collating and publishing statistics

Council is required to publish certain statistics about the Act in its annual reports. That information relates mainly to how these procedures may be accessed and the number of disclosures notified to the IBAC for assessment under s 21 of the Act during the financial year.

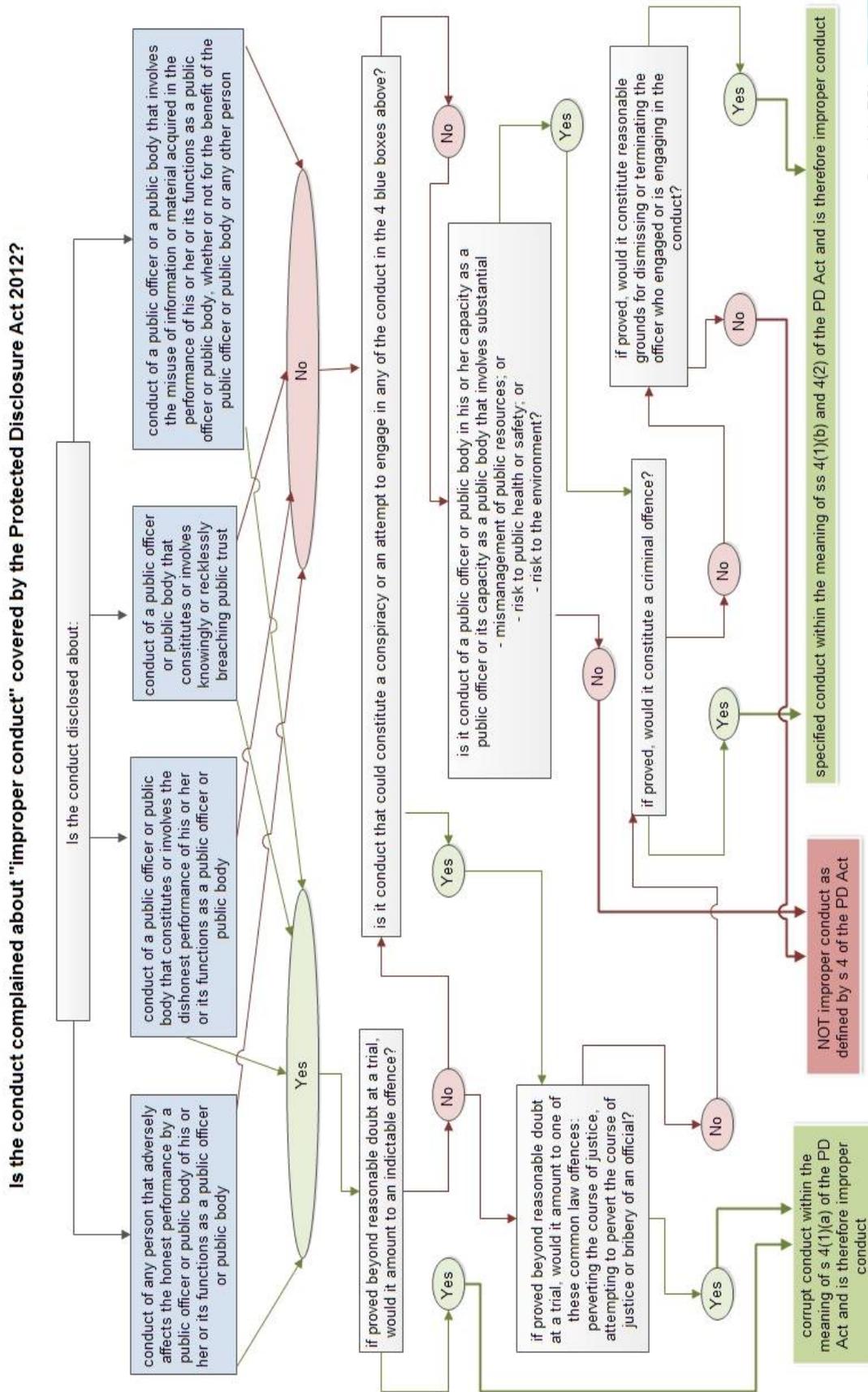
The Protected Disclosure Coordinator will establish a secure register to record such information, and to generally keep account of the status of disclosures made under the Act.

9. Review

These procedures will be reviewed every four years or upon significant change to the Act, the Regulations or the IBAC's guidelines to ensure they comply with the requirements of the Act, the Regulations and the IBAC's guidelines.

Appendix A

Chart 1



Copyright FOI SOLUTIONS
Solutions 2013

Chart 2

Protected disclosures about Councils and Councillors

