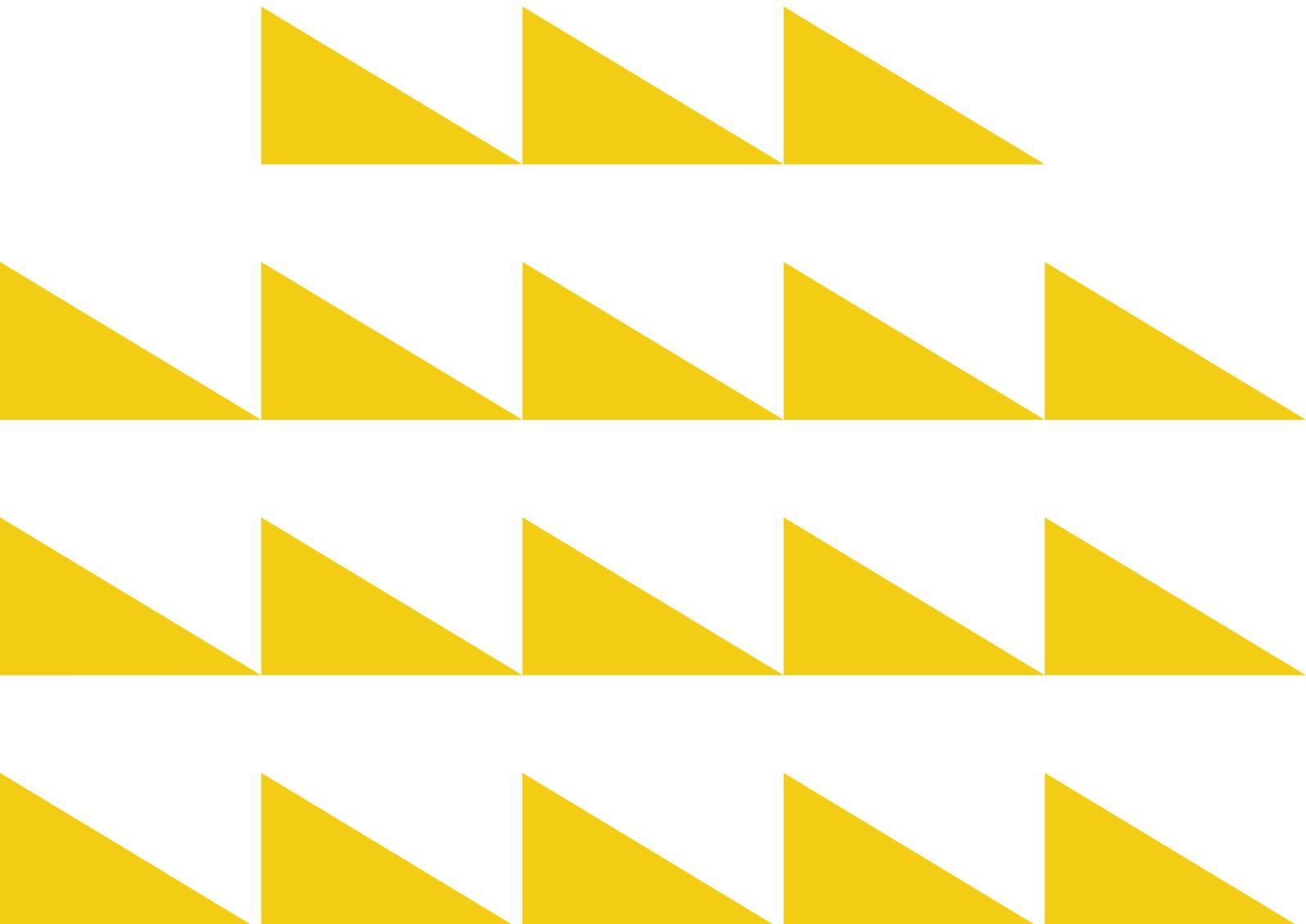


Guidelines for making and handling protected disclosures

October 2016



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IBAC is required to issue and publish guidelines under Part 9 of the *Protected Disclosure Act 2012 (Vic)* (the PD Act). These guidelines are issued pursuant to section 57 of the PD Act.

These guidelines are not a substitute for reading the PD Act and Protected Disclosure Regulations 2013. It may be necessary to seek your own legal advice or advice from IBAC when determining how to handle disclosures or manage welfare for disclosers and others.

If you would like to receive this publication in an accessible format, such as large print or audio, please phone IBAC's Communication team on 1300 735 135, using the National Relay Service 13 36 77 if required, or email communications@ibac.vic.gov.au

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Definitions

Assessable disclosure: A disclosure that is made directly, or which must be notified, to IBAC or the Victorian Inspectorate, including a police complaint disclosure. In the case of a disclosure notified to IBAC, it is a disclosure that the notifier considers may be a protected disclosure.

Discloser: A person who makes a disclosure that may be a protected disclosure.

Entity that can receive disclosure: An investigating entity, a public service body within the meaning of section 4(1) of the *Public Administration Act 2004* (Public Administration Act), a council (established under the *Local Government Act 1989*), or a public body or public officer prescribed for the purposes of section 13 of the *Protected Disclosure Act 2012* (PD Act).

Investigating entity: IBAC, the Victorian Ombudsman, Victoria Police and the Victorian Inspectorate. Only these entities can investigate a protected disclosure complaint.

Police complaint disclosure: A complaint made by a police officer or protective services officer about another police officer or protective services officer to the Chief Commissioner of Police, IBAC, or an officer of more senior rank who refers the complaint to the Chief Commissioner under section 168 of the *Victoria Police Act 2013* (Victoria Police Act).

Presiding Officer: The Speaker of the Legislative Assembly or the President of the Legislative Council.

Protected disclosure: A disclosure made in accordance with Part 2 of the PD Act; or a complaint made in accordance with section 167(3) of the *Victoria Police Act*.

Protected disclosure complaint: A disclosure that has been determined by IBAC under section 26 of the PD Act to be a protected disclosure complaint.

Public body: A public body within the meaning of section 6 of the *Independent Broad-based Anti-corruption Act 2011* (IBAC Act), IBAC, or any other body or entity prescribed for the purposes of this definition.

Public officer: A public officer within the meaning of section 6 of the IBAC Act, an IBAC officer, or any other person prescribed for the purposes of this definition.

Public sector: The sector comprising all public bodies and public officers.

Public service body: A department, an administrative office, or the Victorian Public Sector Commission.

About these guidelines

Members of the community must be able to rely on those in public office to conduct themselves properly and to use any powers they have in the service of the public.

Where there is a suggestion that public officials are, for example, breaching the trust invested in them, misusing information or mismanaging public resources, it is vital that those who observe or suspect such behaviour speak up and report the alleged misconduct.

The *Protected Disclosure Act 2012* (Vic) (PD Act) encourages people to come forward and make complaints by offering legal protection. In some circumstances, a complaint will be a **protected disclosure** because it involves 'improper conduct' or 'detrimental action' (explained further in section 1). These disclosures were previously known as 'whistleblower' complaints.

These guidelines answer the following questions:

- What is a protected disclosure? (Section 1)
- What procedures do I need to have in place? (Section 2)
- Who can make a disclosure – and to whom? (Section 3)
- What do I do if I receive a disclosure? (Section 4)
- How is a protected disclosure determined and investigated? (Section 5)
- What protections does the PD Act provide? (Section 6)

These guidelines do not cover disclosures about IBAC and its officers, or disclosures about members of Parliament. Disclosures about IBAC should be made to the Victorian Inspectorate. Disclosures about members of the Legislative Assembly must be made to the Speaker of the Legislative Assembly and disclosures about members of the Legislative Council must be made to the President of the Legislative Council.

Who should use these guidelines?

These guidelines are a resource for:

- Protected Disclosure Coordinators
- entities that can receive disclosures (including public service bodies and local councils)
- Victorian public sector organisations that cannot receive disclosures but may be the subject of a disclosure
- anyone who wants to make a disclosure about improper conduct or detrimental action
- investigating entities (except the Victorian Inspectorate).

These guidelines should be read in conjunction with IBAC's 'Guidelines for protected disclosure welfare management', available at www.ibac.vic.gov.au

About IBAC

IBAC is Victoria's anti-corruption agency responsible for preventing and exposing public sector corruption and police misconduct. We do this by:

- investigating corruption and police misconduct
- informing the public sector, police and the community about the risks and impacts of corruption and police misconduct, and ways in which it can be prevented.

About the PD Act

The PD Act aims to:

- encourage and assist people to report improper conduct and detrimental action taken in reprisal for a protected disclosure
 - provide certain protections for people who make a disclosure or those who may suffer detrimental action in reprisal for a disclosure
 - ensure that certain information about a disclosure is kept confidential – the identity of the person making the disclosure and the content of that disclosure.
-

1 What is a disclosure?

1 What is a disclosure?

A disclosure is a report about the **improper conduct** of public bodies or public officers that a person makes to any of the organisations specified in Part 2 of the PD Act.

A disclosure can also be made about **detrimental action** that a public officer or public body takes against a person in reprisal for them (or another person) having made a protected disclosure or cooperated with the investigation of a protected disclosure.

The disclosure can relate to conduct or action that:

- may have already taken place (including conduct that occurred before 10 February 2013 when the PD Act came into effect)
- may be occurring now, or
- may happen in the future.

A complaint or allegation that is already in the public domain will not normally be a protected disclosure – for example, if the matter has already been subject to media or other public commentary.

Disclosures by police officers and protective services officers about other officers

A complaint made under section 167(3) of the Victoria Police Act is defined as a 'protected disclosure' by the PD Act.

These complaints must be made by a police officer or protective services officer about the conduct of another police officer or protective services officer if they have reason to believe the other officer is guilty of misconduct.

A 'police complaint disclosure' is considered to be a disclosure for the purposes of the PD Act. This is a complaint made by a police officer or protective services officer to one of the following:

- the Chief Commissioner of Police
- IBAC
- another police officer or protective services officer of more senior rank who refers the complaint to the Chief Commissioner of Police under section 168 of the Victoria Police Act.

A 'police officer' includes the Chief Commissioner of Police, a Deputy Commissioner, an Assistant Commissioner as well as other police officers. This includes those on probation, police reservists and special constables. A 'police officer' does not include police recruits or Victoria Police employees employed by Victoria Police under Part 3 of the Public Administration Act.

A 'protective services officer' is a person appointed under Division 7 of Part 3 of the Victoria Police Act, including an officer on probation.

1.1 What is improper conduct?

Improper conduct must, at its lowest threshold level, be either criminal conduct or conduct serious enough to result in a person's dismissal.

Improper conduct is defined in section 4 of the PD Act to mean:

- corrupt conduct (as defined in the IBAC Act)
- specified conduct.

Corrupt conduct

Under the IBAC Act, **corrupt conduct** is conduct of a certain type that would constitute a relevant offence. Relevant offences are:

- indictable offences against an Act
- the common law offences of attempting to pervert the course of justice, perverting the course of justice, bribery of a public official or misconduct in public office.

Offences punishable by imprisonment for five years or more are presumed to be indictable offences.

The types of conduct that can be **corrupt conduct** are:

- conduct of any person that adversely affects the honest performance by a public officer or public body of their official functions
- conduct of a public officer or public body that:
 - constitutes or involves a dishonest performance of their official functions
 - constitutes or involves knowingly or recklessly breaching public trust
 - involves misuse of information or material that was obtained in their official capacity
- conduct that could constitute a conspiracy or attempt to engage in any of the above conduct
- conduct intended to adversely affect the effective performance of a public officer or public body which leads to a benefit as described in the Act.

Specified conduct

By contrast, **specified conduct** under the PD Act covers a broader range of conduct where that conduct would, if proved, constitute a criminal offence or reasonable grounds for dismissal.

The types of conduct that can be specified conduct are:

- all types of corrupt conduct, and
- conduct of a public officer or public body in their official capacity that:
 - involves substantial mismanagement of public resources
 - involves substantial risk to public health or safety, or
 - involves substantial risk to the environment.

1 What is a disclosure?

1.2 What is detrimental action?

The PD Act creates an offence for a person to take detrimental action against another person in reprisal for a protected disclosure.

Detrimental action can be taken by any person. However, a disclosure under the PD Act can only be made about detrimental action by a public officer or public body.

Section 3 of the PD Act defines detrimental action by a person as including:

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

The person need not have actually taken the action, but can just have threatened to do so.

The person need not have taken or threatened to take the action against the person themselves, but can have incited or permitted someone else to do so.

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

Detrimental action must be taken in reprisal for a protected disclosure

You will need to consider both the nature of the detrimental action and whether it is being **taken in reprisal for a protected disclosure**.

The person must take or threaten the action (or incite or permit another person to take or threaten the action) because, or in the belief that:

- the other person (or anyone else) has made, or intends to make, the disclosure
- the other person (or anyone else) has cooperated, or intends to cooperate, with an investigation of the disclosure.

The reason for the person taking action in reprisal must be a 'substantial' reason, or it is not considered to be detrimental action (section 43(3) of the PD Act).

2 Developing internal procedures

2 Developing internal procedures

All public bodies must have procedures to protect people against detrimental action taken in reprisal for a protected disclosure.

If you (the entity) can receive protected disclosures, you must also have effective procedures to facilitate the making of disclosures, and to receive and manage disclosures (including notifications to IBAC).

Procedures for entities that can receive disclosures

Bodies that can receive disclosures should have:

- secure information management systems for the receipt, storage, assessment and notification of protected disclosures. These systems will include an internal reporting structure and will identify the roles and responsibilities of those in that reporting structure
 - a secure process for receiving disclosures
 - a means of identifying a person (or persons) who can receive disclosures (known as a Protected Disclosure Coordinator)
 - a secure means of notifying IBAC of assessable disclosures
 - education for selected staff in the receipt, handling, assessment and notification of disclosures
 - education and training for selected staff in the welfare management of those associated with a protected disclosure
 - a way to collect and collate statistics on protected disclosures for annual reporting.
-

Procedures must be consistent with the PD Act, the Protected Disclosure Regulations 2013 and guidelines issued by IBAC (collectively referred to as the PD scheme). Except for the procedures of the Victorian Inspectorate and the Victorian Ombudsman, IBAC can review procedures at any time to ensure they are consistent with the PD scheme.

3 Making a disclosure

3 Making a disclosure

3.1 Who can make a disclosure?

Anyone can make a disclosure about improper conduct or detrimental action – both members of the public and employees of a public body.

You can make a disclosure as an individual or together with a group of individuals.

A company or business cannot itself make a protected disclosure, but its officers or employees can.

You do not have to specifically refer to the PD Act or the protections in the PD Act for your disclosure to be a protected disclosure. You may also advise that you do not want your disclosure to be treated as a protected disclosure under the PD Act by stating so in writing at the time you make the disclosure (this does not apply to disclosures made by police officers or protective services officers under section 167(3) of the Victoria Police Act).

You can make an anonymous disclosure. However, this creates potential difficulties in assessing whether a complaint fits the definition of a disclosure.

You can also make a disclosure in circumstances where you cannot identify the person or the organisation to which the disclosure relates.

3.2 Who can a disclosure be made to?

Most disclosures can be made to IBAC. Disclosures can also generally be made to the other investigating entities (Victoria Police, the Victorian Ombudsman and the Victorian Inspectorate) where the entity could investigate the disclosure if it was a protected disclosure complaint.

Public service bodies and councils may only receive disclosures that relate to the conduct of themselves, or their own members, officers or employees. Such disclosures may also be made to IBAC, or to the Victorian Ombudsman (if it is within the Ombudsman's jurisdiction).

If an entity receives a disclosure about an employee, officer or member of **another public body**, the disclosure has not been made in accordance with Part 2 of the PD Act. In this case, the entity should advise the person or body about where to go to make the disclosure (in most cases this will be IBAC).

Example

The Department of Health and Human Services receives a disclosure from a person about the conduct of a hospital employee working at a Victorian public hospital.

This is not a disclosure about the department, but about a public health provider.

The disclosure cannot be made to the public hospital. The discloser should be advised to make a disclosure to IBAC.

Disclosures about some public bodies or public officers must only be made to particular entities.

Table 1: Where to report disclosures

| Subject of the disclosure | | Report to: |
|---|---|---|
| Chief Commissioner of Police | ➤ | IBAC |
| Director of Public Prosecutions | | |
| Chief Crown Prosecutor | | |
| Solicitor General | | |
| Governor | | |
| Lieutenant Governor or Administrator | | |
| Director, Police Integrity | | |
| Electoral Commissioner | | |
| Commissioner appointed under the <i>Inquiries Act 2014</i> | | |
| A member of a Board or Inquiry | | |
| A judicial officer | | |
| A member of VCAT who is not a judicial officer | | |
| A judicial employee | | |
| A Ministerial officer | | |
| A Parliamentary adviser | | |
| An electorate officer | | |
| A Parliamentary officer | | |
| Minister of the Crown who is not a member of Parliament | | |
| A Councillor | ➤ | IBAC or the Victorian Ombudsman |
| Freedom of Information Commissioner | | |
| Commissioner for Privacy and Data Protection | | |
| Health Services Commissioner | ➤ | IBAC or the Victorian Inspectorate |
| The Chief Examiner or an Examiner appointed under section 21 of the <i>Major Crimes (Investigative Powers) Act 2004</i> | | |
| A Victorian Ombudsman officer | | |
| A Victorian Auditor-General's Office officer | ➤ | IBAC or a prescribed member of police personnel |
| A member of police personnel (other than the Chief Commissioner) | | |
| Member of Parliament (Legislative Council) | ➤ | President of the Legislative Council |
| Member of Parliament (Legislative Assembly) | ➤ | Speaker of the Legislative Assembly |
| IBAC, including its officers | ➤ | Victorian Inspectorate |

3 Making a disclosure

3.3 How can a disclosure be made?

Private verbal disclosure

You can make a verbal disclosure in person, by phone or by leaving a voice mail message.

You must make your verbal disclosure **in private**. This means the person making the disclosure must reasonably believe that only the following people (other than themselves) are present or able to listen to the conversation:

- a lawyer representing the person making the disclosure (if any)
- one or more people to whom a disclosure can be made under the PD Act or PD Regulations.

This does not preclude a group of individuals from making a joint disclosure at one time.

If the disclosure is made verbally, the organisation receiving the information should ensure the person receiving the disclosure makes notes at the time. This person could also record the conversation, but should only do so if the discloser gives permission or by giving prior warning the conversation will be recorded.

Written disclosure

A written disclosure can only be provided to the relevant organisation by:

- delivering it in person to the office of the organisation
- mail addressed to the office of the organisation
- email to the email address of the office of the organisation, or to the official email address of a person nominated in the organisation's procedures or in the PD Regulations to receive a disclosure
- online form (to IBAC and the Victorian Ombudsman only).

Anonymous disclosure

A person doesn't need to identify themselves to make a disclosure under the PD Act.

An anonymous disclosure can be made by using unverifiable email addresses, through anonymous phone calls, or in a face-to-face conversation or meeting where the person refuses to identify themselves (provided the meeting or conversation takes place in private in accordance with the PD Regulations).

If the disclosure comes from an email address where the identity of the person making the disclosure cannot be determined, the disclosure should be treated as an anonymous disclosure.

Within a given entity, only certain people can receive the disclosure.

Table 2: People who can receive disclosures

| Organisation | Officers who can receive disclosures |
|------------------------|--|
| IBAC | The Commissioner |
| | A Deputy Commissioner |
| | The Chief Executive Officer |
| | An IBAC employee |
| | An IBAC staff member assigned from another public body |
| Victorian Ombudsman | A Victorian Ombudsman officer |
| Victorian Inspectorate | The Victorian Inspector |
| | A Victorian Inspectorate employee |
| | A Victorian Inspectorate staff member assigned from another public body |
| Victoria Police | A police member with a rank, including acting rank, of sergeant or above |
| Public sector body | Head of the relevant public sector body |
| | A person defined in the public service body's procedures as a person who can receive a disclosure about that body, eg Protected Disclosure Coordinator |
| | Manager or supervisor of the discloser |
| | Manager or supervisor of the person who is the subject of the disclosure |
| Council | Chief Executive Officer |
| | A person identified in the council's procedures as a person who can receive a disclosure about that council, eg Protected Disclosure Coordinator |
| | Manager or supervisor of the discloser |
| | Manager or supervisor of the person who is the subject of the disclosure |

3 Making a disclosure

3.4 Who can a disclosure be about?

Disclosures can only be made about public bodies or public officers, or about conduct of a person that adversely affects the honest performance of an official function by a public body or public officer, or intends to adversely affect their effective performance. This means that a disclosure must involve a public body or public officer.

Public bodies include:

- public sector bodies (including public entities and special bodies)
- incorporated or unincorporated bodies established under an Act for a public purpose, including universities
- Electoral Boundaries Commission
- a council (established under the *Local Government Act 1989*)
- a body performing a public function on behalf of the State or a public body or public officer.

Public officers include:

- public servants, including IBAC officers
- local government Councillors and council employees
- university employees and teachers
- Victoria Police personnel
- Members of Parliament, including Ministers
- ministerial officers, parliamentary advisers and officers, electorate officers
- judicial officers, including coroners, members of Victorian Civil and Administrative Tribunal (VCAT), associate judges, judicial registrars
- statutory office holders, including the Auditor-General and the Victorian Ombudsman, and the Director of Public Prosecutions
- the Governor, Lieutenant-Governor or Administrator of the State.

Further information about the types of public bodies and public officers about whom disclosures can be made is in the Public Administration Act, and the IBAC Act.

Information can also be found on the Victorian Public Sector Commission website at vpsc.vic.gov.au

4 Handling disclosures

4 Handling disclosures

4.1 Is this a protected disclosure?

If you (the entity) receive a disclosure relating to the conduct of an employee, member or officer, you **must** assess whether the disclosure may be a protected disclosure.

The same applies to a disclosure received by the Victorian Ombudsman, the Chief Commissioner of Police or a prescribed member of Victoria Police personnel.

A disclosure will not be a protected disclosure under Part 2 of the PD Act if:

- the discloser has made a disclosure to an entity that cannot receive the disclosure
- the disclosure was made about a Public Interest Monitor, the Victorian Inspectorate, a Victorian Inspectorate officer, or a court
- the discloser expressly states in writing at the time the disclosure is made that it is **not** a disclosure for the purposes of the PD Act
- the disclosure is made by an officer or employee of an investigating entity in the course of his/her duties or functions **unless** this person expressly states in writing at the time the disclosure is made that it is a disclosure and the disclosure is otherwise made in accordance with the PD Act
- the disclosure does not meet all the requirements under Part 2 of the PD Act and the prescribed procedures in the PD Regulations.

The reference to an 'entity' in this section is a public body or officer that can receive disclosures.

Public bodies that cannot receive disclosures should also read this section since they will need to identify whether complaints, reports or allegations made to them might be protected disclosures. If so, they should advise the discloser how they can make a disclosure.

If it appears that a person wishes to make a disclosure but they have not met the requirements of Part 2, you should tell the person about the correct way to make a disclosure so they have an opportunity to meet the legislative requirements.

If a disclosure does not meet the requirements of Part 2 of the PD Act, you should consider whether it could be dealt with in accordance with your organisation's normal complaint process.

Disclosures by police officers and protective services officers about other officers

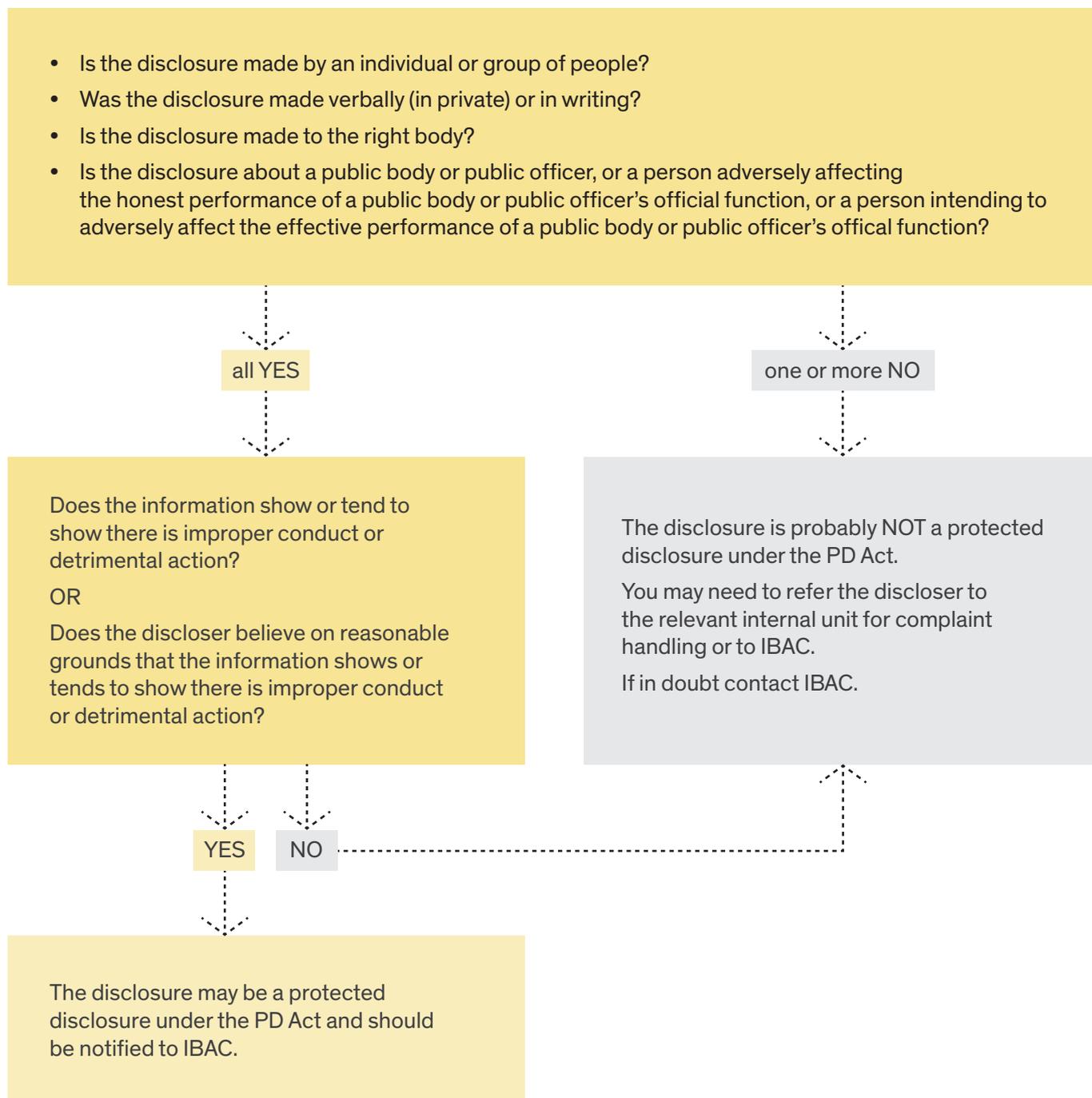
Complaints made by police officers and protective services officers in accordance with section 167(3) of the Victoria Police Act are deemed to be protected disclosures and do not need to meet the requirements of Part 2 of the PD Act.

Does the discloser need to specifically request the protections of the PD Act?

No. In fact, the discloser does not need to refer to the PD Act at all. Your 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.

Protections under Part 6 of the PD Act apply to a protected disclosure from the time the disclosure is made.

Figure 1: Is this a protected disclosure?



4 Handling disclosures

4.2 Assessing disclosures

To determine whether the conduct in question is improper conduct or detrimental action you need to consider the **seriousness of the conduct in terms of consequences** – not just whether the conduct constitutes or involves a particular type of conduct.

When assessing allegations of improper conduct, you need to identify that there is a link between the conduct and the official function of a public officer or public body.

Useful preliminary questions to ask

In assessing whether there is improper conduct or detrimental action, look critically at all the information about the alleged conduct and about the discloser.

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

Tests for improper conduct or detrimental action

For a disclosure to be made under Part 2 of the PD Act it must satisfy one of two 'tests'.

Test 1

Does the information show or tend to show there is improper conduct or detrimental action?

The information needs to be assessed as to whether it satisfies the 'elements' of either improper conduct or detrimental action, as defined in the PD Act, and whether any of the exceptions apply.

If it is not clear that the information disclosed does show or tend to show that there is improper conduct or detrimental action, then the second test can be applied.

Test 2

Does the discloser believe on reasonable grounds that the information shows or tends to show there is improper conduct or detrimental action?

This means the person must actually believe that the information shows or tends to show there is improper conduct or detrimental action, and his or her belief must be 'reasonable'. That is, the person's belief is based on facts that would be sufficient to make a reasonable person believe there was improper conduct or detrimental action.

Reasonable belief?

Reasonable belief does not have to be based on actual proof of improper conduct or detrimental action – but there must be some information supporting the belief. That is, the belief **must be probable**.

The grounds for the reasonable belief can leave something to surmise or conjecture, but the belief must be more than just a reasonable suspicion.

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. A belief cannot be based on a mere allegation or conclusion unsupported by any further facts or circumstances. For example, it would not be sufficient for a person's disclosure to consist simply of a one sentence statement like 'I know X is corrupt'.

Other matters that can be considered in determining whether there are reasonable grounds for the discloser's belief is the **reliability** of the information they have provided, even if it is second or third hand. You can consider how the person would have obtained the information and the amount of detail that has been provided.

You can also consider the **credibility** of the discloser, or of those people who have provided the discloser with information.

What if urgent action is required while an assessment is still being made?

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

Examples could include a child protection worker allegedly assaulting children in care, a council worker allegedly lighting bush fires, or a person threatening to poison the water supply.

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

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

While the PD Act limits the release of information about disclosures, it allows you to disclose the content of the disclosure 'to the extent necessary for the purpose of taking lawful action' in relation to conduct that is the subject of an assessable disclosure, including disciplinary process or action (section 52(3)(a)(iii)). However, this does not allow you to reveal the identity of the discloser.

4 Handling disclosures

4.3 Who needs to be notified of the assessment?

If you consider the disclosure may be a protected disclosure

If you (the entity) consider the disclosure may be a protected disclosure, you are required to:

- notify IBAC in writing within 28 days after the disclosure was made that:
 - you consider the disclosure may be a protected disclosure
 - you are notifying the disclosure to IBAC for assessment.

You may also provide IBAC with any information you have obtained regarding the disclosure in the course of your inquiries leading up to the notification. This information can be provided at the time of notification or at any later time

- notify the discloser in writing within 28 days after the disclosure was made that:
 - the disclosure has been notified to IBAC for assessment
 - it is an offence under section 74 of the PD Act to disclose that the disclosure has been notified to IBAC for assessment under the PD Act.

If you do not consider the disclosure to be a protected disclosure

If you (the entity) do not consider the disclosure to be a protected disclosure, you must advise the discloser in writing within 28 days after the disclosure was made that:

- you do not consider the disclosure to be a protected disclosure
- the disclosure has not been notified to IBAC for assessment
- the protections under Part 6 of the PD Act apply to a protected disclosure, regardless of whether the disclosure is notified to IBAC for assessment.

However, you do not have to provide the discloser with this information unless the discloser has indicated, or it otherwise appears to you, that they wish to receive the protections that apply to a protected disclosure under the PD Act.

4.4 Protection for public officers

A public officer is given specific protections under the PD Act that allow them to provide information to other public officers or IBAC in dealing with a disclosure.

When a public officer acts in good faith and in accordance with the PD scheme, they do not commit an offence under section 95 of the *Constitution Act 1975* or any other Act that imposes a duty to maintain confidentiality, and do not breach confidentiality obligations or information disclosure restrictions.

5 Determination and investigation of disclosures

5 Determination and investigation of disclosures

5.1 IBAC's assessment: is this a protected disclosure complaint?

Once a notification is made to IBAC, IBAC must assess whether, in its view, the assessable disclosure is a protected disclosure.

If the answer is 'yes', then IBAC must determine the protected disclosure is a 'protected disclosure complaint'.

In making its assessment, IBAC may seek additional information from the notifying entity or from the discloser.

5.2 IBAC must dismiss, investigate or refer a protected disclosure complaint

If IBAC determines a disclosure is a protected disclosure complaint, it must then refer, investigate, or dismiss the matter.

- *Referring the matter*

IBAC may refer a protected disclosure complaint to the relevant investigating entity. In the case of disclosures about the conduct of a member of Victoria Police personnel, this will be to the Chief Commissioner of Police. In the case of other disclosures, this will be to the Victorian Ombudsman.

Any disclosures received by IBAC about the conduct of IBAC or IBAC officers must be referred to the Victorian Inspectorate. Disclosures about the conduct of the Victorian Ombudsman or the Auditor-General – or their officers – may be referred to the Victorian Inspectorate.

- *Investigating the matter*

IBAC may choose to investigate the alleged conduct if it meets the criteria for investigation by IBAC.

- *Dismissing the matter*

If IBAC dismisses a protected disclosure complaint, then it must do so on one of the grounds set out in section 68 of the IBAC Act. In particular, IBAC must dismiss a protected disclosure complaint if the matter disclosed is a matter that neither IBAC nor another investigating entity may investigate.

Notifying entities and the discloser of the determination

Once IBAC has made a determination on whether a disclosure is a protected disclosure complaint, it:

- advises the relevant notifying entity of its determination
- advises the discloser of the determination and the action it intends to take (this applies to disclosers who have made their disclosures directly to IBAC and those who have had their disclosures notified to IBAC).

If IBAC determines 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 which they have made the disclosure. In this case, IBAC will also advise the relevant notifying entity that the discloser has been given this advice.

Figure 2 shows the information that IBAC will provide to a discloser following its determination.

Figure 2: IBAC's obligations

| If it is a protected disclosure complaint: | If it is not a protected disclosure complaint: |
|---|---|
| <p>IBAC must advise the discloser of this determination and the action proposed to be taken. This includes advising the discloser of whether IBAC has decided to dismiss, investigate or refer the protected disclosure complaint.</p> <p>This is to be done in writing and within a reasonable time.</p> <p>Depending on the action IBAC has decided to take, IBAC has to provide certain information to a discloser:</p> <ul style="list-style-type: none">• If IBAC decides to dismiss the protected disclosure complaint it must give reasons for its decision.• If IBAC decides to investigate or refer the protected disclosure complaint it must provide a written statement advising the discloser that it is an offence under section 184 of the IBAC Act to disclose IBAC's action. <p>IBAC may decide not to notify the discloser or the entity that has notified the disclosure if it considers that notifying would have one of the adverse consequences set out in subsection 59(4) of the IBAC Act. These adverse consequences include putting a person's safety at risk, or prejudicing an investigation under the IBAC Act.</p> | <p>Where the disclosure is not determined to be a protected disclosure complaint, IBAC must advise the discloser in writing within a reasonable time, that:</p> <ul style="list-style-type: none">• IBAC has determined their disclosure is not a protected disclosure complaint• the disclosure will not be investigated as a protected disclosure complaint• the confidentiality provisions under Part 7 of the PD Act no longer apply in relation to the disclosure. <p>In this case, IBAC may also advise the discloser that:</p> <ul style="list-style-type: none">• the entity to whom they made their disclosure may be able to deal with their disclosure• if the person wants to pursue the matter, the person should make a complaint directly to that entity. <p>IBAC will advise the notifying entity of its determination.</p> <p>IBAC may also consider whether to treat the assessable disclosure as a notification to IBAC under the IBAC Act.</p> |

5.3 Conducting investigations: confidentiality and welfare issues

During their investigation of a protected disclosure complaint, IBAC or another investigating entity may need to contact the public body about which the disclosure has been made.

If so, the public body or public officer will be able to disclose information about the protected disclosure complaint without breaching the confidentiality requirements of the PD Act.

IBAC or the relevant investigating entity may also disclose the identity of the discloser and the content of the disclosure if necessary. If so, the public body or public officer to whom the information has been disclosed is bound by the confidentiality requirements of Part 7 of the PD Act (see section 6 for further information about confidentiality).

In addition, if the public body 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.

5 Determination and investigation of disclosures

5.4 Providing information at the conclusion of an investigation

IBAC's obligations to inform

IBAC must provide the discloser with information about the results of its investigation. This will include any action taken by IBAC and any recommendation by IBAC that action or further action be taken.

IBAC may provide written information to the relevant principal officer about the commencement, conduct or result of an investigation. This includes any actions taken and any recommendations for action or further action. However, IBAC must not provide any information that is likely to lead to a discloser being identified.

IBAC does not have to provide this information to either the discloser or the relevant principal officer if it considers the disclosure might result in any of the possible adverse outcomes specified in section 163(4) of the IBAC Act.

The Victorian Ombudsman's obligations to inform

Where a protected disclosure complaint is referred to the Victorian Ombudsman for investigation, the Ombudsman must inform the discloser of the result of the investigation or other action taken, the recommendations made and comments on them (in certain specified circumstances). The Ombudsman may also disclose any additional information they consider proper to disclose.

The Victorian Ombudsman must not provide this information to the discloser if they consider that the disclosure might result in any of the possible adverse outcomes specified in section 24(3) of the *Ombudsman Act 1973*.

Chief Commissioner of Victoria Police's obligations to inform

The Chief Commissioner of Victoria Police must inform the discloser of the outcome of the investigation unless they consider that to do so might result in any of the possible adverse outcomes specified in section 182 of the Victoria Police Act.

The Freedom of Information Act

Documents are not subject to the *Freedom of Information Act 1982* if they disclose information that:

- relates to a protected disclosure
- relates to an assessable disclosure
- is likely to identify a person who has made a protected disclosure (section 78(1) of the PD Act).

Public bodies should ensure that any officers handling freedom of information requests are aware of this section.

A public body should contact IBAC before providing any document originating from IBAC or relating to a protected disclosure, if requested under the Freedom of Information Act.

6 Protections and offences

6 Protections and offences

Part 6 of the PD Act sets out the protections provided to those who make a protected disclosure.

These protections apply to a disclosure made in accordance with Part 2 of the PD Act or section 167(3) of the Victoria Police Act. They apply from the time that the disclosure is made.

They apply even if the public body receiving the disclosure does not notify the disclosure to IBAC.

They also apply whether IBAC has determined that it is a protected disclosure complaint.

The protections apply when further information about the disclosure is provided by the discloser, verbally or in writing, to any of the following:

- the entity to which the protected disclosure was made
- IBAC
- an investigating entity investigating the protected disclosure.

An employee may request a transfer of employment

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.

Limitations on protections

A number of the protections in Part 6 of the PD Act do not apply if a discloser:

- provides information intending that it be acted on as a protected disclosure, or further information that relates to a protected disclosure, knowing it to be false or misleading
- claims that a matter is the subject of a protected disclosure knowing the claim to be false
- falsely claims that a matter is the subject of a disclosure that IBAC has determined to be a protected disclosure complaint.

The PD Act also 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.

A person who makes a disclosure is not protected against legitimate management action being taken in relation to them.

Protections provided under Part 6 of the PD Act

Part 6 includes a number of protections for a discloser:

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

Taking disciplinary action against a person who has made a protected 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 taking 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.

If a public body cannot demonstrate the above conditions have been met, it leaves itself open to allegations of taking detrimental action against a person for having made a disclosure. A public body may therefore wish to obtain legal advice before taking any action against the person making a protected disclosure.

Care should be taken to thoroughly document the process. This includes 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.

If you would like information on how to manage the welfare of disclosers, witnesses and any person who is the subject of a protected disclosure investigation refer to the 'Guidelines for protected disclosure welfare management' available at www.ibac.vic.gov.au

6 Protections and offences

6.1 Confidentiality of disclosures

Ensuring confidentiality is one of the ways that disclosers and other people involved in protected disclosure investigations are protected.

Part 7 of the PD Act contains two main restrictions on disclosing information. Breaching either of these restrictions is an offence.

Content of assessable disclosure must not be disclosed

The PD Act prohibits the disclosure of the content, or information about the content, of an assessable disclosure.

This restriction applies if the information was received in particular circumstances, including where a person or body receives a disclosure or is provided information about the disclosure by an investigating entity assessing or investigating it. The restriction does not apply to the discloser.

A number of exceptions to the restriction apply, including where the information is revealed:

- to exercise functions under the PD Act
- to obtain legal advice or representation
- after IBAC or the Victorian Inspectorate has determined the assessable disclosure is not a protected disclosure complaint
- in accordance with a direction or authorisation from the investigating entity that is investigating the disclosure
- because it is necessary for taking lawful action in relation to the conduct that is the subject of the assessable disclosure.

Identity of person making an assessable disclosure must not be disclosed

The PD Act also prohibits the disclosure of information that would be likely to lead to the identification of a person who has made an assessable disclosure.

This restriction applies to any person or body, except the discloser.

Exceptions to the restriction apply, including where the information is revealed:

- to exercise functions under the PD Act
- to obtain legal advice or representation
- after IBAC or the Victorian Inspectorate has determined the assessable disclosure is not a protected disclosure complaint
- by an investigating entity after and in accordance with the consent of the discloser.

Other offences for unauthorised disclosure

Part 11 of the PD Act also restricts the disclosure of certain information about what has happened with a disclosure once it has been made.

A person will commit an offence if they disclose that:

- a disclosure has been notified to IBAC for assessment, subject to specific exceptions
- IBAC or the Victorian Inspectorate has determined a disclosure is a protected disclosure complaint, subject to specific exceptions.

These restrictions apply to disclosers and other people who receive the information in certain circumstances (including where the information is received from the discloser).

Table 3: Civil and criminal penalties under the PD Act

| Specific offences | Penalties |
|--|--|
| Detrimental action | |
| <p><i>Liability of an individual</i> It is an offence for a person to take or threaten action in reprisal when:</p> <ul style="list-style-type: none"> • another person has made or intends to make a protected disclosure • the person believes another person has made or intends to make a protected disclosure • another person has cooperated or intends to cooperate with the investigation of a protected disclosure • the person believes another person has cooperated or intends to cooperate with the investigation of a protected disclosure | <ul style="list-style-type: none"> • Criminal penalty: 240 penalty units or two years' imprisonment or both <p>AND (if person is convicted or found guilty of an offence)</p> <ul style="list-style-type: none"> • Civil penalty: Order of court for offender to pay appropriate level of damages to compensate for injury, loss or damage |
| <p><i>Vicarious liability of their employer</i> An employer may also be held to be liable for the detrimental action of their employee or agent</p> | <ul style="list-style-type: none"> • Criminal penalty: 240 penalty units or two years' imprisonment or both <p>AND (if person is convicted or found guilty of an offence)</p> <ul style="list-style-type: none"> • Civil penalty: Order of court for offender to pay appropriate level of damages to compensate for injury, loss or damage |
| Disclosure of content of assessable disclosure | |
| <p>A person/body must not disclose content of assessable disclosure or information about its content</p> | <ul style="list-style-type: none"> • 120 penalty units or 12 months' imprisonment or both (person) • 600 penalty units (body corporate) |
| Disclosure of identity of person making assessable disclosure | |
| <p>A person/body must not disclose information likely to lead to the identification of a person who has made an assessable disclosure</p> | <ul style="list-style-type: none"> • 120 penalty units or 12 months' imprisonment or both (person) • 600 penalty units (body corporate) |
| Disclosure of certain advice | |
| <p>A person must not disclose that a disclosure has been notified to IBAC or determined to be a protected disclosure complaint</p> | <p>60 penalty units or six months' imprisonment or both</p> |

Criminal offences

6 Protections and offences

| | Specific offences | Penalties |
|-------------------|---|--|
| | Making false disclosure or providing false further information | |
| Criminal offences | A person must not provide information intending it be acted on as a protected disclosure, or further information that relates to a protected disclosure, knowing it to be false or misleading | 120 penalty units or 12 months' imprisonment or both |
| | Falsely claiming disclosure is a protected disclosure or protected disclosure complaint | |
| | A person must not falsely claim a matter is the subject of a protected disclosure or the subject of a disclosure determined to be a protected disclosure complaint | 120 penalty units or 12 months' imprisonment or both |
| | Detrimental action | |
| Civil action | A person who takes detrimental action may be subject to proceedings in tort in any court of competent jurisdiction Injunction or interim injunction can be granted by the Supreme Court if the Court is satisfied that a person has taken or intends to take detrimental action against another person in reprisal for a protected disclosure | Civil penalty: Court order for damages for any injury, loss or damage, including exemplary damages |

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