

Guidelines for public interest disclosure welfare management

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IBAC is required to issue and publish guidelines under Part 9 of the *Public Interest Disclosures Act 2012* (Vic) (the PID Act). These guidelines are issued pursuant to section 57 of the PID Act.

These guidelines are not a substitute for reading the PID Act and Public Interest Disclosures 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.

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About these guidelines

It takes courage to speak up and make a disclosure about improper conduct by a public official or public body.

For the *Public Interest Disclosures Act 2012* (PID Act) to be effective, those who shine a spotlight on wrongdoing in public life need to be confident they will be protected from reprisals.

So too do those who cooperate as witnesses during investigations. When someone discloses wrongdoing in the workplace or by a public officer or public body, organisations need to respond quickly and appropriately.

These guidelines cover managing the welfare of:

- a person who makes a public interest disclosure
- a person who is a witness in an investigation of a public interest complaint
- a person who is the subject of such an investigation.

These guidelines cover the welfare management of anyone who makes a public interest disclosure.

ABOUT THE PID ACT

The PID Act aims to:

- encourage and assist people to report improper conduct and detrimental action taken in reprisal for a public interest 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.

Who should use these guidelines?

These guidelines are a resource for:

- Public Interest 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
- investigating entities (except the Victorian Inspectorate and the Integrity and Oversight Committee).

These guidelines should be read in conjunction with IBAC's 'Guidelines for handling public interest disclosures', which explains what a public interest disclosure is, what an organisation should do when it receives a disclosure and the protections provided under the PID Act. The guidelines are available at www.ibac.vic.gov.au

1 Workplace procedures

When someone discloses wrongdoing in the workplace, organisations need to respond quickly and appropriately.

1.1 Creating the right workplace culture

Public bodies that can receive disclosures should create and support a workplace culture where the making of public interest disclosures is valued and taken seriously.

Organisations can encourage staff to disclose by:

- being clear about what conduct is unacceptable raising awareness of responsibilities to disclose and how to do this
- advising staff of their right to disclose to their own organisation and other appropriate authorities
- making sure there is information readily available on how to make a disclosure, and ensuring staff members are familiar with the organisation's public interest disclosure policies, procedures and codes of conduct
- letting staff know they can seek advice confidentially and anonymously from the Public Interest Disclosure Coordinator or from the head of the organisation
- reassuring staff that detrimental action will not be tolerated and they will be protected
- initiating disciplinary action against staff who take (or are involved with) detrimental action
- ensuring the Public Interest Disclosure Coordinator knows how to receive and manage a public interest disclosure and what to do with it
- ensuring the organisation handles public interest disclosures consistently and appropriately
- being visible and approachable, openly communicating, and leading by example.

It is also important for management to treat fairly those who are the subject of a disclosure.

1.2 Developing internal procedures

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

If you (the entity) can receive public interest disclosures, you must also have effective procedures to facilitate the making of disclosures, and to receive and manage disclosures (including notifications to IBAC, the Victorian Inspectorate or the Integrity and Oversight Committee). Read the 'Guidelines for handling public interest disclosures' for more information about establishing procedures.

1.3 Appointing a welfare manager

You should consider if it is necessary to appoint a welfare manager to coordinate welfare support for a discloser or cooperator (someone who cooperates or intends to cooperate with an investigation of a disclosure). The following questions should be considered in deciding if a welfare manager needs to be appointed:

- Are there any real risks of detrimental action against the person, taking into account their particular circumstances?
- Can you ensure that you will take the person seriously and treat them with respect?
- Can you ensure that you will give the person effective support? (This includes keeping them informed of the status of their disclosure.)
- Can you protect the person from suffering repercussions by dealing with the matter discreetly and confidentially?
- Can you respond swiftly and fairly to any allegations the person has, in fact, suffered retribution?

If the answer to the first question is 'yes' then the appointment of a dedicated welfare manager is probably appropriate.

If the answer to the first question is 'no' and you can meet the needs set out in the remainder of the questions, there may be no need for a welfare manager

What are the limits of this role?

A welfare manager's role is to monitor the specific needs of the discloser or cooperator and provide them with practical advice and support.

In most circumstances, a welfare manager will only be required where a public interest complaint proceeds to investigation. However, each case needs to be assessed on its own merits.

A welfare manager (if appointed) cannot be expected to go beyond what is reasonable for a public body in providing support to the discloser or cooperator. The welfare manager should discuss the issue of reasonable expectations with the discloser or cooperator.

For internal disclosers, public bodies may also wish to make use of their Employee Assistance Program to provide welfare support.

A welfare manager must not divulge any details relating to the disclosed matter to any person other than the Public Interest Disclosure Coordinator, or the principal officer of the public body. All meetings between the welfare manager and the person must be conducted discreetly to protect the person from being identified as being involved in the disclosure.

2 Welfare management

The PID Act provides a number of protections for anyone who makes a public interest disclosure, including protections against detrimental action. Some of those protections are extended to those who cooperate or intend to cooperate with an investigation into a public interest complaint (referred to here as cooperators).

Public bodies are responsible for ensuring their workplace supports both those who make disclosures (referred to as disclosers) and cooperators, and protects them from direct and indirect detrimental action. Public bodies also need to manage the welfare of those who are the subject of a public interest disclosure.

2.1 Public bodies have an obligation to protect disclosers and cooperators

A person making a public interest disclosure – or cooperating with an investigation – may be a public sector employee or a member of the public.

Public bodies have obligations to protect all disclosers and cooperators from detrimental action taken in reprisal for a public interest disclosure. This also applies to organisations that cannot receive a disclosure, but can be the subject of a disclosure made to IBAC or other specified organisations.

Ensuring confidentiality is one of the ways that disclosers and other people involved in public interest disclosure investigations are protected. The PID Act restricts the disclosure of information about the content of disclosures or which could identify the discloser. Where an organisation obtains this information, it must be kept confidential. This includes where an investigating entity provides the information to an organisation when making investigative enquiries or to assist a person to access welfare support.

If IBAC determines that a disclosure is a public interest complaint, these public bodies must protect the identity of the discloser and the content of the person's disclosure to ensure confidentiality.

While the obligation to protect extends to both employees and members of the public, the welfare management of each may be different. For example, public bodies have legislative and administrative obligations to ensure the health and wellbeing of employees under occupational health and safety legislation, the *Charter of Human Rights and Responsibilities Act 2006*, the Public Administration Act, the Victorian Public Sector Code of Conduct and the Victorian Public Sector Code of Conduct for Special Bodies.

These may not apply to members of the public who are disclosers or cooperators, even when they are clients or users of the organisation's services.

2.2 Providing welfare services

Welfare support should be provided by the organisation for the discloser or cooperator on an ongoing basis, even if a welfare manager has not been appointed.

TABLE 1: WELFARE SUPPORT

Inform	<p>At a minimum:</p> <ul style="list-style-type: none"> • Confirm the disclosure has been received. • Outline the legislative or administrative protections available. • Describe the action you propose be taken. • If action has been taken, provide details about the results.
Provide active support	<p>Acknowledge the person for having come forward.</p> <ul style="list-style-type: none"> • Provide the person with assurance they have done the right thing and the organisation appreciates it. • Make a clear offer of support. • Assure them that all reasonable steps will be taken to protect them. • Give them an undertaking to keep them informed.
Manage expectations	<p>Have an early discussion with them:</p> <ul style="list-style-type: none"> • What outcome do they want? • Are their expectations realistic? • What will the organisation be able to deliver?
Maintain confidentiality	<p>The identity of the discloser and the subject matter of their disclosure need to be kept confidential:</p> <ul style="list-style-type: none"> • Make sure other staff cannot infer the identity of the discloser or a person cooperating with the investigation from any information they receive. • Remind the discloser not to reveal themselves or give out information that would enable others to identify them as a discloser. • Make sure that hard-copy and electronic files relating to the disclosure are accessible only to those who are involved in managing disclosures in your organisation.
Assess the risks of detrimental action being taken in reprisal	<p>Be proactive and do not wait for a complaint of victimisation.</p> <ul style="list-style-type: none"> • Actively monitor the workplace, anticipate problems and deal with them before they develop.
Protect the discloser/cooperator	<p>Examine the immediate welfare and protection needs of the person and foster a supportive work environment.</p> <ul style="list-style-type: none"> • Listen and respond to any concerns the person may have about harassment, intimidation or victimisation in reprisal for their actions. • Assess whether the concerns the person may have about harassment, intimidation or victimisation might be due to causes other than those related to a public interest disclosure.
Manage the impact of any investigation	<p>Prevent the spread of gossip and rumours about an investigation into the disclosure.</p>
Keep records	<p>Keep contemporaneous records of all aspects of the case management of the person, including all contact and follow-up action.</p>

Adapted from Handling a public interest disclosure, Queensland Government 2011, pp 21–27

2.3 Protecting against detrimental action

Under the PID Act, it is an offence for a person to take detrimental action against another person in reprisal for a public interest disclosure.

What is detrimental action?

Some examples of detrimental action could be intimidation or harassment, causing personal injury, threatening or prejudicing someone's safety, or damaging a person's property.

It can also be detrimental action if a public body discriminates or disadvantages a person in their career, profession, employment, trade or business.

A manager may take management action in relation to an employee who has made a public interest disclosure, provided the making of the disclosure is not a reason for the management action.

Detrimental action must be taken in reprisal for a public interest disclosure

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

Recording details and advising of rights

If anyone reports an incident of harassment, discrimination or adverse treatment that may amount to detrimental action, the welfare manager or Public Interest Disclosure Coordinator must record details of the incident and advise the person of their rights under the PID Act.

Where a public body that cannot receive disclosures receives such a report, the receiving officer should record details of the incident and advise the person of their rights under the PID Act to make a disclosure (this will normally be to IBAC).

A person can make a public interest disclosure about detrimental action taken against them in reprisal for making an earlier disclosure. If this occurs, it must be treated as a new disclosure under Part 2 of the PID Act.

Transfer of employees

An employee of a public service body or public entity who has made a public interest 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.

Employees can be transferred internally or to certain other public bodies on similar terms and conditions of employment. This can only happen if they request, or consent to, a transfer and the following conditions apply:

- The head of the public service body or public entity has reasonable grounds to suspect detrimental action will be, is being, or has been taken against the employee.
- The head of the public service body or public entity considers that the transfer will avoid, reduce or eliminate the risk of detrimental action.
- If transfer to another public body is proposed, the head of that public body consents to the transfer.

The transfer can be temporary or permanent. If the employee is moved to another public body, the employee's service in the new body is regarded as continuous with their pre-transfer service.

Referring serious instances of detrimental action

Where the detrimental action is of a serious nature likely to amount to a criminal offence, you should consider reporting the matter to Victoria Police or IBAC.

If you report the matter to Victoria Police or IBAC, be careful about making preliminary enquiries or gathering information about the allegation. Doing so may compromise the integrity of any evidence that might be later relied on in a criminal prosecution.

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

The discloser is not subject to criminal or civil liability for making the disclosure (section 39 of the PID Act). However, section 42 of the PID Act specifically provides that a person's liability for their own conduct is not affected by having disclosed that conduct under the PID Act. In other words, a discloser is not protected from the reasonable consequences flowing from their involvement in any improper conduct.

The management of the welfare of a discloser may therefore become complicated when that person is implicated in misconduct, whether or not that misconduct is related to the disclosure. The general obligations of a public service or other body that can receive disclosures in relation to handling a disclosure and protecting the discloser still apply.

Care should be taken to thoroughly document the process of any action taken against a discloser. This includes recording why the disciplinary or other action is being taken, and the reasons why the action is not in retribution for making the disclosure.

The discloser should be clearly advised of the proposed action to be taken and of any mitigating factors that have been taken into account.

2.4 Meeting the welfare needs of the subject of a public interest disclosure

Until a public interest complaint is resolved (either by dismissing or investigating it) the information about the person who is the subject of the disclosure is only an allegation.

An organisation therefore needs to meet the welfare needs of the subject of the disclosure as they may need support once they become aware an allegation has been made against them.

Consider each matter on a case-by-case basis, taking into account the particular circumstances of the person. A referral to your organisation's Employee Assistance Program may be appropriate.

Informing the subject of a disclosure

Whether the person who is the subject of a disclosure is informed about the allegation made against them depends on the circumstances. It is possible the subject may never be told about the disclosure if it is not determined to be a public interest complaint, or a decision is made to dismiss the matter.

The PID Act restricts the release of information about the content of disclosures or which would be likely to identify a discloser. This generally means a public body cannot reveal this information to the person who is the subject of a disclosure.

However, a public body may give information to the subject of the disclosure about the allegation made against them in some circumstances, such as:

- if it is directed or authorised to do so by the entity investigating the disclosure
- for the purpose of taking action with respect to the alleged conduct, including disciplinary action.

These exceptions do not allow a public body to reveal information that would be likely to identify the discloser.

Investigating entities may also inform the subject of the disclosure for the purposes of conducting their investigation or taking action as a result of the investigation.

Confidentiality

The employer of a person who is the subject of a public interest disclosure should take all reasonable steps to ensure the person's confidentiality during the assessment and any ensuing investigation.

Where the disclosure is dismissed or investigations do not substantiate the allegations, confidentiality should be maintained in relation to the subject's identity, as well as the fact of the investigation and any results.

Natural justice

The subject of an allegation must be afforded natural justice before a decision is made about their conduct.

Natural justice means the 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
- have his/her defence set out fairly in any report.

If the matter has been investigated, the investigating entity (eg, IBAC) is responsible for carrying out this consultation.

If allegations are wrong or unsubstantiated

If someone has been the subject of allegations that are wrong or unsubstantiated, then the employer and the investigating entity need to ensure there are no adverse consequences for the person arising out of the disclosure or its investigation.

This is particularly crucial where information has been publicly disclosed that has identified the person, but also where such information has become well known across the organisation where the person works.

