

Reference guide

Managing an internal investigation
into misconduct



Authorised and published by the Independent Broad-based
Anti-corruption Commission (IBAC) and the Victorian Ombudsman.

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This guide is adapted from the NSW Independent Commission
Against Corruption's 2012 publication *Fact finder - a guide
to conducting internal investigations*, and has been revised
to meet the jurisdictional requirements of IBAC and the
Victorian Ombudsman.

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\ Introduction \

This reference guide aims to be a practical resource for Public Interest Disclosure (PID) Coordinators and any public sector employees who have responsibility for conducting internal investigations into alleged misconduct within their agency.

The guide applies to handling allegations of misconduct, whether they are internally managed or outsourced to an independent organisation to undertake on behalf of a public sector agency. The ability to conduct an effective internal misconduct investigation is essential for the day-to-day operation of a public sector agency. There are many types of misconduct investigations an agency may be required to undertake, including those into improper conduct, complaints of poor service, discrimination or harassment, unsafe work practices, unfair personnel decisions or inefficient business practices.¹

Public sector agencies should have their own policy in place to guide the commencement and management of an internal misconduct investigation. Based on the perspective of two of Victoria's key integrity agencies, the Independent Broad-based Anti-corruption Commission (IBAC) and the Victorian Ombudsman, this reference guide highlights some of the key things to consider when an internal misconduct investigation may be required.

The information in this guide is not a comprehensive instruction manual and it is recommended that you seek your own legal advice and consult with your agency's internal unit responsible for integrity, governance and risk.

¹ The information provided in this reference guide may not be relevant in all organisational contexts or for all types of misconduct investigations. For example, some of the guidance may not be relevant when investigating disciplinary matters (eg bullying, inappropriate use of email or social media).

\ 1 \ Legislative compliance

There is a range of legislation that public sector agencies must comply with in their handling of employee misconduct. Some of the key pieces of legislation are outlined below. For more information, consult with your supervisor or your agency's internal unit responsible for integrity, governance and risk, to ensure your internal investigations are conducted in accordance with the below legislation and any relevant employment terms and conditions (eg enterprise agreement, *Fair Work Act 2009*) or agency policies and procedures.

\ 1.1 \ Public Administration Act 2004

Public sector bodies including state government departments and agencies are governed by the *Public Administration Act 2004*. The Public Administration Act defines misconduct as including:

- contravention of the Public Administration Act or *Code of Conduct for Victorian Public Sector Employees*
- improper conduct in an official capacity;
- contravention, without reasonable excuse, of a lawful direction given to an employee by a person authorised to give the direction
- an employee making improper use of their position for personal gain
- an employee making improper use of information they have gained because of their position. Improper use can be gaining financial benefits (or some other benefit) for themselves or someone else. It might be to cause detriment to the public sector.

\ 1.2 \ Local Government Act 2020

Local government is governed by the *Local Government Act 2020*. Council integrity measures covered in the Local Government Act include specific offences and penalties associated with misuse of position, conflicts of interest, gifts and benefits, and a councillor code of conduct. The Local Government Act provides for internal arbitration, determination by a Councillor Conduct Panel, and investigation by the Chief Municipal Inspector to manage allegations of misconduct and serious misconduct by a Councillor; corrupt conduct must be reported to IBAC.

\ 1.3 \ Public Interest Disclosures Act 2012

Before misconduct allegations are investigated, they may need to be reported to IBAC as a potential public interest disclosure (PID). The *Public Interest Disclosures Act 2012* (PID Act) ensures that people who report improper conduct and corruption in the Victorian public sector can do so in the knowledge that they will be protected. Protections include keeping the identity of the person reporting improper conduct confidential and protecting them from reprisals including bullying, harassment or legal action.

Most public sector agencies will have a PID Coordinator who is nominated to:

- receive potential PIDs
- ensure the welfare of disclosers
- work to make sure staff are aware of the PID legislation.

If you believe the conduct contained in a complaint could be a PID, you must refer the complainant to your PID Coordinator without delay. If you are uncertain as to where to refer the complainant you should refer them directly to IBAC.

More information on how to handle a potential PID, including guidelines for PID Coordinators, is available on the [IBAC website](#).

\ 1.4 \ Independent Broad-based Anti-corruption Act 2011 – Mandatory notification of suspected corrupt conduct

Under Section 57 of the *Independent Broad-based Anti-corruption Act 2011* (IBAC Act), relevant principal officers (including Department Secretaries and council CEOs) are required to notify IBAC of suspected corrupt conduct. IBAC has issued directions under section 57A that require notifications of suspected corrupt conduct to be made as soon as practicable after the relevant principal officer has formed a reasonable suspicion that corrupt conduct may have occurred or may be occurring.

The [IBAC Act](#) does not provide for any delays in notifying suspected corrupt conduct to IBAC. Providing timely notifications to IBAC is important to ensure due process and natural justice to all parties. Delays in notifying suspected corrupt conduct, and in assessing such notifications by IBAC, can result in lost investigative and preventive opportunities.

An assessment as to whether a matter must be notified to IBAC should be made based on the material available to the relevant principal officer. Where the available material is not sufficient to form a suspicion on reasonable grounds, a relevant principal officer may choose to gather further information. If doing so, the relevant principal officer should regularly re-assess the material and notify IBAC as soon as they form a suspicion on reasonable grounds that corrupt conduct has occurred or is occurring.

Where a notification of suspected corrupt conduct has been made to IBAC and further information becomes available or circumstances change and still give rise to a reasonable suspicion, the relevant principal officer must notify IBAC.

A mandatory notification form should be submitted to IBAC. This form and other resources are available on the [IBAC website](#).

\ 2 \ Notifying external agencies

As previously mentioned, you may need to notify external agencies if you become aware of a complaint. There are four key agencies you may need to notify in relation to suspected misconduct or corruption. Each agency has a distinct role and complementary functions, which are summarised below.

\ 2.1 \ IBAC

IBAC is Victoria's independent anti-corruption agency, responsible for preventing and exposing public sector corruption and police misconduct. The functions of IBAC are set out in the IBAC Act.

IBAC focusses on 'corrupt conduct' in the public sector as defined in the IBAC Act, and is required to prioritise for investigation serious or systemic matters. For example, complaints or notifications alleging bribery, misconduct in public office, serious fraud or theft, or misuse of public sector information. IBAC can also investigate suspected corruption without a complaint; this is called an 'own motion' investigation.

IBAC's jurisdiction encompasses state government bodies (including Victoria Police), local councils, the judiciary and parliament. When IBAC receives a complaint or a notification, it can investigate it, refer it to another agency to investigate (including the Victorian Ombudsman or the Local Government Inspectorate), refer it to the public sector body the matter relates to, or dismiss it.

Investigating misconduct before it has been reported to and assessed by IBAC can prejudice a decision or action by IBAC. Once a matter has been reported to IBAC, no further action should be taken until IBAC has assessed it. Exceptions apply where the action is:

- necessary to lessen or prevent a serious threat to the life, health, safety or welfare of an individual or to public health or safety
- taken to comply with another legal obligation, such as a duty to report the matter under other legislation
- reporting the matter to Victoria Police.



\ 2.2 \ Victorian Ombudsman

The Victorian Ombudsman is an independent officer of the Victorian Parliament who investigates complaints about state government bodies, most statutory authorities and local councils. The functions of the Ombudsman are set out in the Ombudsman Act 1973.

Anyone can complain to the Ombudsman about actions, decisions or conduct of staff of Victorian government bodies. The Ombudsman can deal with complaints about an action or decision of a state government agency or local council including in relation to services, infringements, poor communication or consultation, or breaches of human rights.

The Victorian Ombudsman has a different threshold for investigating misconduct or administrative matters compared to IBAC. IBAC often refers matters that do not meet the threshold of "corrupt conduct" to the Victorian Ombudsman for consideration. IBAC can also refer PID complaints to the Ombudsman for investigation. The Ombudsman can also start her own investigations into government bodies in the public interest, without a complaint.

\ 2.3 \ Local Government Inspectorate

The Local Government Inspectorate (LGI) is an independent agency that investigates complaints about council operations or the actions of councillors. The LGI also monitors governance and compliance against the Local Government Act including in relation to:

- misuse of position
- conflicts of interest
- disclosure of confidential information, and
- electoral offences.

\ 2.4 \ Victoria Police

Victoria Police is responsible for investigating criminal offences. Suspected criminal conduct (such as theft or assault) should be reported to Victoria Police.

It is recognised that under the PID Act, 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.

It may be necessary to report the criminal conduct to Victoria Police for immediate investigation, or take management action against an employee to prevent future conduct. In these cases, you can take immediate action while considering whether or not it is a disclosure that must be notified to IBAC. You can also take immediate action while awaiting IBAC's decision on a notified matter.

\ 3 \ Key considerations when undertaking investigations

\ 3.1 \ Procedural fairness and natural justice

In certain circumstances your agency may need to conduct an internal misconduct investigation.

Any investigation into misconduct should be procedurally fair. It is important to ensure that an investigation follows the natural justice process and is conducted in accordance with any relevant enterprise agreement or agency policies and procedures. Failure to do so could result in a Fair Work claim against your agency.

Effective management of conflicts of interest is a fundamental tenet of a fair investigation. Conflicts of interest should be avoided wherever possible in internal investigations and consideration should be given to actual, potential or perceived conflicts. Failure to identify, declare and manage a conflict of interest can risk mismanagement of internal investigations and undermine confidence in the integrity of the investigation. Generally, a person should not be appointed to investigate a matter if they have an actual conflict of interest, as it is difficult to sufficiently manage the conflict and safeguard the impartiality of an investigation. Proactive and transparent management and communication, including with the complainant, may address and manage the perceptions of a conflict.

When commencing the investigation, you need to consider what formal investigation powers you have at your disposal. Check with your agency's internal unit responsible for integrity, governance and risk for an accurate description of any powers you may have to gather information. Powers to conduct an investigation are usually found in:



any legislation and regulations relevant to your agency



employment agreements or awards



contracts



codes of conduct



employment law and the common law



workplace surveillance legislation.

More information about conflicts of interest and management practices is available on [IBAC's website](#).

\ 3.2 \ Preliminary inquiries and deciding whether to undertake an investigation

Regardless of how you become aware of an allegation of misconduct, you should closely analyse the information. This involves:

- obtaining a full account of the allegation from the complainant
- identifying what is fact and what is suspicion, opinion or possible exaggeration.

It is important to make sure that you do not disclose the complainant's identity to anyone, especially the person who has been accused of misconduct.

Sometimes an internal investigation is not the appropriate process. A matter may not require internal investigation or it might be better suited to mediation or even an external investigation.



Things to consider

Some questions to consider are whether the matter:

- has arisen from a dispute and if a mediation or a grievance procedure process may be the better option
- could impact the function or reputation of the organisation
- is too old or would not lend itself to a fair investigation due to lack of evidence or witnesses.

After initially assessing the matter, you may decide not to conduct the investigation. It is important that this is documented, including the process that was applied to reach that determination, any advice provided to the principal officer who made a final determination, and the reasons for choosing not to proceed.

The decision not to conduct an investigation should be confidentially communicated to the complainant who originally provided the information. If other parties need to be advised, be careful not to disclose any confidential information, such as the identity of the complainant.

Having taken into consideration any notification and reporting requirements to other agencies outlined above, you and your agency may determine that it is appropriate to conduct an internal misconduct investigation. The remainder of this reference guide summarises some of the key considerations when undertaking an internal investigation.

\ 3.3 \ Interviews

Should you decide to proceed with an investigation, it is important to be prepared for the first interview (preferably conducted face-to-face) by gathering as much information as possible. This will support good initial planning and decision-making.

If you decide you require additional information, you may follow up via a second interview. During the interview, you can update the complainant regarding the investigation, if appropriate, and you can discuss any matters needing clarification. Ongoing communication with the complainant will help you to understand their expectations and welfare needs.

If a face-to-face interview is not possible or appropriate, you could follow up via other confidential communication methods, such as a letter, asking for more specific and detailed information.



Interview questions

Useful questions to ask the complainant can include:

- How did they become aware of the information?
- Are there other people or evidence that might assist the investigation?
- Who else have they told about the matter?
- If the matter concerns suspected criminal conduct, have they reported it to Victoria Police?
- Do they consent to their identity being revealed if necessary at a later stage?
- Do they have any concerns for their welfare, or the welfare of another?
- What outcome would they like to see? (Asking this question is a useful way of identifying and managing their expectations).

\ 3.4 \ Record keeping

It is important to keep accurate written records of all conversations and interviews that are conducted with the person who has made the complaint.



Make clear and succinct notes

When noting the allegations, provide a clear and succinct description of:

- the exact nature of the conduct, including what functions and policies of the organisation are affected
- who is involved
- the time, date and location of any conduct described by the complainant.

In a fact-finding investigation you do not need the complainant to sign the record of interview; however, it is good practice to ask them to read the summary and check it to confirm it is accurate.

\ 3.5 \ Confidentiality

The information you collect during an investigation should be kept confidential. You have been entrusted to keep information to yourself and only use it for the purpose for which it was collected ie to assist with or inform the investigation.

Breaches of confidentiality could impact the safety or security of people involved and undermine the ability to conduct a robust investigation.



Ask people to keep it confidential

You should explain to the complainant at the initial interview that they should keep the allegations and interview confidential to help maintain the integrity of the investigations process, and that any breach of confidentiality could lead to disciplinary or other action. There may be some exceptions to confidentiality, for example, talking with a counsellor, doctor, or lawyer, or making a compensation claim for WorkCover.

Public Interest Disclosures (PID)

Under the [PID Act](#), there are two main restrictions on disclosing information:

- A person/body must not disclose content of a PID or information about its content. This restriction applies to a person or body that receives a disclosure or is provided information about the disclosure by an investigating entity assessing or investigating it.
- A person/body must not disclose any information that would be likely to lead to the identification of a person who has made a PID.

These restrictions do not apply to the discloser. However for all other persons or bodies, breaching either of these restrictions is an offence under the [PID Act](#).

\ 3.6 \ Welfare

The welfare of the people you interact with during any preliminary inquiries or investigation, including the complainant, witnesses and the person whom is the subject of the complaint, must be considered throughout the investigation.

Public sector agencies have legislative obligations to ensure the health and wellbeing of employees under the:

- [Occupational Health and Safety Act 2004](#)
- [Charter of Human Rights and Responsibilities Act 2006](#)
- [Public Administration Act.](#)

Public sector agencies also have other obligations under the:

- [Victorian Public Sector Code of Conduct](#)
- [Victorian Public Sector Code of Conduct for Special Bodies](#)
- [PID Act.](#)

Under section 45 of the [PID Act](#), public sector agencies are responsible for ensuring their workplace supports both the complainant and any witnesses, and protects them from direct and indirect detrimental action. This includes consideration of all applicable human rights under the [Charter of Human Rights and Responsibilities Act](#), such as the right to privacy for complainants.

Also under section 45 of the [PID Act](#), public sector agencies need to manage the welfare of those who are the subject of a PID. It is important that people are aware that they can seek the support of an Employee Assistance Program or other welfare service.



Welfare manager

You should consider if it is necessary to appoint a welfare manager to coordinate welfare support for a complainant or any witnesses. Further information is available in the [Guidelines for Public Interest Disclosure Welfare Management](#), available on the IBAC website.



\ 3.7 \ Reporting outcomes (including disciplinary matters, administrative issues)

It is important to be clear about the scope of the investigation. Your agency may have guidelines or procedures that outline the expectations when undertaking an investigation and reporting on the findings and recommendations. This could include the development of an investigation plan to outline the scope and purpose of any proposed investigation, the resources required, timelines, risk management and welfare considerations, and key tasks (eg relating to information/evidence gathering).

In most preliminary inquiries or internal investigations into misconduct the core issues will be:

- whether the evidence should be referred to a law enforcement or integrity agency for its consideration
- whether disciplinary action should be taken against an employee or employees
- whether administrative action should be taken with respect to an employee, employees or the organisation.

Document your findings

Upon completion of any preliminary inquiries or internal misconduct investigation, it is good practice to document your findings, for example via an investigation report. The precise format of your report is a matter for you in the context of your particular investigation and the expectations of your agency.

Aspects you may wish to cover in an investigation report include:

- executive summary
- introduction / background about the complaint and investigation
- outline of the evidence gathered and analysis of the evidence (eg in relation to documents analysed or person(s) interviewed)
- outline of the findings and recommendations.



\ 4 \ Further information

Further information about the content covered in this reference guide is available on the websites for the respective integrity agencies referenced or by contacting the agency to ask any questions:

- **IBAC:** www.ibac.vic.gov.au or 1300 735 135
- **Victorian Ombudsman:** www.ombudsman.vic.gov.au or (03) 9613 6222
- **Local Government Inspectorate:** www.lgi.vic.gov.au or (03) 7017 8212

The Victorian Ombudsman also conducts workshops on good complaint handling for public sector agencies.

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