

INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION

“WHISTLEBLOWERS PROTECTION” PROCEDURES AND GUIDELINES

Purpose of these guidelines

Moreland City Council is committed to the aims and objectives of the *Protected Disclosure Act 2012* (the Act), which replaced the *Whistleblowers Protection Act 2001* in February 2013. Moreland Council does not tolerate improper conduct by its elected representatives or employees, nor the taking of reprisals against those who come forward to disclose such conduct.

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

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

These guidelines and procedures establish a system for reporting disclosures of improper conduct or detrimental action by Moreland City Council councillors or its employees. The system enables such disclosures to be made to the protected disclosure coordinator. Disclosures may be made by employees or by members of the public.

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

The Independent Broad-Based Anti-Corruption Commission (IBAC) has issued guidelines as it is required to do under Part 9 of the *Protected Disclosure Act 2012* (the Act). Section 57 of the Act sets out that the guidelines are to be used by entities in establishing procedures consistent with the guidelines:

- to facilitate the making of disclosures
- for the handling of disclosures and, where appropriate, for notification to IBAC
- for the protection of persons making disclosures from detrimental actions under section 45 of the Act.

The Moreland City Council guidelines below are closely modelled on the IBAC Guidelines.

Objects of the Protected Disclosures Act 2012 (the Act)

The main objective of the *Protected Disclosures Act 2012* is to encourage and facilitate the making of disclosures of improper conduct by public officers and public bodies and establish a system for matters to be investigated. The Act provides protection from detrimental action to any person affected by a protected disclosure whether it is a person who makes a disclosure, a witness, or a person who is the subject of an investigation.

Who may make a disclosure and who may it be made about?

Any person may make a disclosure about improper conduct by public bodies and public officers. Improper Conduct, public body and public officer are defined in section 3 of the Act.

The types of bodies about which a person may make a disclosure include:

- government departments and agencies and statutory authorities
- officers of municipal councils
- government-appointed boards and committees
- government-owned companies
- universities and TAFE colleges
- public hospitals
- state-funded residential care services

Public officers include:

- Members of Parliament
- Judicial officers
- Councillors
- council employees
- public servants
- university employees
- police officers and protective services officers
- administrative staff of the Chief Commissioner of Police
- teachers
- office holders appointed by Governor-in-Council or a Minister.

Who can a disclosure be made to under the Act?

Disclosures may be made to IBAC and to other investigating entities such as the Chief Commissioner of Police, the Ombudsman and the Victorian Inspectorate. In addition, complaints may be made directly to a public officer or public body where the disclosure relates to the public officer or public body or a member, officer or employee of the public body, or a person acting on behalf of a public officer under section 13 of the Act. That is, disclosures **relating to a Council officer** can be made direct to the Council.

The Act sets out a number of disclosures which must be made direct to IBAC in section 14.

Disclosures **relating to a Councillor** must be made to IBAC or the Ombudsman.

If an entity considers a disclosure to be a protected disclosure and the disclosure was made to a body other than IBAC, it may be notified to IBAC for assessment.

The role of IBAC

IBAC aims to strengthen the integrity of the Victorian public sector, and to promote community confidence in public sector accountability. It is Victoria's first anti-corruption body with responsibility for identifying and preventing serious corrupt conduct across the whole public sector, including members of Parliament, the judiciary and state and local government. IBAC also has a broad oversight role in relation to police personnel misconduct.

IBAC has an important function to facilitate the education of the public sector and the community about the detrimental effects of corrupt conduct and police personal misconduct, and to assist public sector agencies to improve their systems and processes to prevent corruption.

IBAC has a central role in handling disclosures of improper conduct made under the Act. The role of IBAC involves:

- receiving disclosures directly or by notification
- determining whether a disclosure is a protected disclosure
- assessing and investigating disclosures
- preparing and publishing guidelines to facilitate making disclosures, for the handling of disclosures and for the protection of persons from detrimental actions
- reviewing written procedures established by public bodies and making recommendations in relation to those procedures
- monitoring investigations where they have been referred to public bodies
- monitoring the action taken by public bodies where the findings of an investigation reveal that improper conduct has occurred
- researching, collecting and analysing data and statistics relating to the protected disclosure scheme
- reporting to Parliament on IBAC's research and education functions
- providing education and information about the protected disclosure scheme.

Establishing written procedures

In addition to being the potential subject of a disclosure, each public body is required to establish written procedures for handling disclosures by section 58 of the Act. The procedures must facilitate the making of disclosures, the investigation of disclosures, and the protection of persons making disclosures from detrimental actions by the public body or any officer, member or employee of the public body. The procedures must be in accordance with the Act and these guidelines. These Moreland City Council Guidelines fulfil Council's responsibilities under section 58 of the Act.

IBAC may review the written procedures of a public body and their implementation. IBAC may make recommendations to a public body as a result of such a review. It is the responsibility of the public body to ensure that its policies and procedures reflect the current Act, Regulations and Guidelines. Each public body should review its policies and procedures if amendments are made to the Act, Regulations or IBAC's Guidelines.

A public body must make a copy of its written procedures available to each of its members, employees or officers, and must have a copy available for inspection by members of the public during normal office hours free of charge. The procedures should also be located or linked on any website maintained by the public body.

The following list of matters should be included in the written procedures of a public body to establish an effective internal reporting system for the Act. Further information about each matter listed can be found in the following sections of these guidelines.

Contents of protected disclosure procedures

1. Statement of support for persons making protected disclosures
2. Purpose of the procedures
3. Objects of the Act
4. Definitions of key terms
5. The reporting system
6. Roles and responsibilities
7. Confidentiality
8. Collating and publishing statistics
9. Receiving and assessing disclosures
10. Preventing detrimental actions
11. Management of the person against whom the disclosure is made
12. Criminal offences

Establishing a reporting system

Moreland City Council is required under the Act to establish a reporting system for the receipt, assessment and investigation of protected disclosures.

The chief requirements of any reporting system are:

- ensuring senior executive staff are involved and retain oversight
- ensuring confidentiality of the information and the identity of the persons making protected disclosures are maintained throughout the process
- keeping the roles of assessment and investigation of a disclosure distinct from welfare management of the person making a disclosure
- identifying clear contact points for reporting protected disclosures, including all relevant disclosures made in person or by mail, phone calls and emails
- ensuring a disclosure about the Chief Executive Officer of the Council is immediately notified to IBAC.

A clear internal reporting system will benefit a public body by:

- encouraging staff to raise matters of concern internally
- providing a reporting channel for disclosures that may otherwise never be reported
- ensuring disclosures by such persons are properly and appropriately assessed and acted upon
- ensuring the protection of the Act is fully available to all internal and external persons making protected disclosures.

What reporting structure to adopt

Moreland City Council has a centralised reporting system. The centralised system of handling disclosures involves one officer who reports direct to the principal officer of an organisation.

There are a number of benefits of a centralised system including:

- Fewer people handling disclosures enhances confidentiality and thereby reduces the likelihood of reprisals being taken against persons making protected disclosures.
- Direct involvement of senior management in the reporting system appropriately reflects the seriousness of protected disclosure matters.
- As the occurrence of improper conduct is often a result of poor supervision within an organisation, senior management should take overall responsibility for the investigation of these matters.
- It avoids conflicts of interest by excluding line managers from the assessment and investigation of any disclosure.
- Liaison with IBAC and other investigative agencies is clearly defined and information flows are able to be managed

Roles and responsibilities of those involved in the internal reporting system

This internal reporting policy identifies the officers who will be involved in the internal reporting system and clearly describes their individual roles.

Coordinator

The protected disclosure coordinator (the Moreland City Council Internal Auditor) is the central role in the internal reporting system. He or she will:

- impartially assess each disclosure to determine whether it appears to be a protected disclosure
- coordinate the reporting system used by the organisation
- be a contact point for general advice about the operation of the Act and for integrity agencies such as IBAC
- be responsible for ensuring that the public body carries out its responsibilities under the Act and the Guidelines
- liaise with IBAC in regard to the Act

- where necessary, arrange for appropriate welfare support for the person making a protected disclosure
- advise the person making a protected disclosure of the progress of an investigation into the disclosed matter
- establish and manage a confidential filing system
- collate statistics on disclosures made
- take all necessary steps to ensure the identity of the person making a protected disclosure and the identity of the person who is the subject of the disclosure are kept confidential
- liaise with the Chief Executive Officer of the Council.

The protected disclosure coordinator is contactable by external and internal persons making disclosures and has the authority to make enquiries of officers within the organisation. The contact details for the Moreland City Council Internal Auditor are described in the final page of these guidelines.

Ensuring confidentiality

There are specific requirements of confidentiality under the Act relating to assessable disclosures and the identity of the person making the disclosure. These Guidelines, policies and procedures take these obligations into account to ensure non-disclosures of confidential information except in accordance with the Act. There are criminal penalties attached to unlawful disclosures under sections 52 and 53 of the Act which are summarised later in these guidelines. A breach of section 52 constitutes a criminal offence.

Section 52 of the Act requires any person who receives information due to the handling or investigation of an assessable disclosure, not to disclose that information except in certain limited circumstances. These include:

- where exercising the functions of the public body under the Act
- when making a report or recommendation under the Act
- when publishing statistics in the annual report of a public body
- in criminal proceedings for certain offences in the Act.

However, the Act prohibits:

- the inclusion of particulars in any report or recommendation that is likely to lead to the identification of the person making a protected disclosure
- the disclosure of particulars in an annual report and other reports to Parliament that might lead to the identification of a person against whom a protected disclosure is made.

There are particular circumstances where information may be disclosed. They are listed in Sections 52, 53 and 54 of the Act and include:

- where the disclosure is made in accordance with the consent of the disclosing person to the disclosure of their identity
- where IBAC or the Victorian Inspectorate has determined that the assessable disclosure is not a protected disclosure and the person or body subsequently discloses the information

- where necessary for the purpose of the exercise of functions under this Act or the **Independent Broad-Based Anti-Corruption Commission Act 2011**
- an investigating entity publishes a report to Parliament, made in accordance with its confidentiality requirements
- for the purposes of a proceeding for an offence against the relevant Act
- for the purpose of obtaining legal advice
- to an interpreter
- to a parent or guardian of a person who under 18 years of age
- to an independent person, for the purposes of enabling a person who is suffering a disability to understand an obligation under this Act

Protection from reprisals

Section 58 of the Act also requires Moreland City Council to establish procedures for the protection of a person making a disclosure from reprisal by personnel for making a protected disclosure. Preserving the confidentiality of their identity will assist in minimising the risk of reprisals. Procedures should include ensuring that persons making such disclosures are advised that it is in their own interests to keep disclosures confidential by only discussing related matters with authorised persons within the public body or officers of IBAC's office or other persons as authorised by law.

There is further material later in these guidelines providing information about:

- ⊙ detrimental action that amounts to a reprisal; and
- ⊙ managing the welfare of the person making the protected disclosure.

Establishing a confidential electronic and paper filing system

To prevent breaches of the confidentiality requirements and to minimise the possibility of detrimental action, public bodies must necessarily establish a secure electronic and paper filing system. Moreland City Council will ensure that:

- all paper and electronic files are secure and can only be accessed by authorised officers
- all printed material is kept in files that are clearly marked as a protected disclosure matter and include a prominent warning on the front of the file that criminal penalties apply to any unauthorised divulging of information concerning a protected disclosure
- any electronic files saved are password protected or have limitations on access rights
- any other material, such as tapes from interviews, are stored securely with access only to authorised officers
- the security of communications between nominated officers and/or contracted officers, i.e. sensitive information or documents, are not emailed or faxed to a machine to which staff have general access; personal delivery of documents is the best way to ensure confidentiality.

Education and training to ensure knowledge by personnel

All personnel should be provided with all relevant information and given appropriate training to ensure they are familiar with policies, procedures, the relevant parts of the legislation, particularly their confidentiality obligations and resulting consequences of a breach of the Act.

Owing to the confidentiality requirements for protected disclosures, public bodies must establish a reporting system that enables a possible disclosure under the Act to be identified as early as possible. The sources of possible disclosures include:

- correspondence, including faxes
- phone calls
- emails
- in person approaches by staff or members of the public.

If a public body has a separate complaints system, then those officers who deal with the receipt and assessment of complaints must be made aware of the Act, and what matters may fall under the Act.

Similarly mail centres, front desk staff, online services units and other employees must be made aware of the general nature of protected disclosures and the established reporting channels so that identified disclosures are dealt with appropriately.

Receiving a disclosure

When Moreland City Council receives a complaint, report or allegation of improper conduct or detrimental action, the first step is to determine whether the disclosure has been made to the right person or body and then whether the matter falls under the Act.

There will be situations where a public body receives an allegation of improper conduct or detrimental action, but the person making the allegation has not referred to the Act. If an allegation raises issues that may fall within the provisions of the Act, the public body should assess the allegations in terms of the Act. The protections of the Act may apply to a disclosure regardless of whether or not the individual making the disclosure specifically requests the protections of the Act. The assessment is made on the nature of the disclosure and not the intention of the individual making it.

For the protections of Part 6 of the Act to apply, a disclosure must be made in accordance with Part 2 of the Act. Disclosures made under Part 2 of the Act are called protected disclosures.

How can a protected disclosure be made?

Part 2 of the Act provides that a person may make a disclosure:

- orally
- in writing
- electronically

- anonymously.

This means that disclosures may be received from anonymous sources, including unverified email addresses, phone calls, by facsimile, in a conversation or meeting. If the disclosure is made orally, the public body should ensure that contemporaneous notes are made of the disclosure.

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

Any person can submit an allegation or complaint. The Act does not require the individual to be an employee of the public body they are complaining about, or a public sector employee. The complaint must be made by an individual and not by a company, organisation or group of people.

To whom must a protected disclosure be made?

Part 2 of the Act provides that a person must make a disclosure to the appropriate person or body for it to be a protected disclosure under the Act. As a general rule, a disclosure must be made to the public body that the complaint relates to, or to IBAC.

Therefore, public bodies can only receive disclosures that relate to the conduct of their own members, officers or employees. If a public body 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 Act. The public body should advise the person making the disclosure of the correct person or body to whom the disclosure must be made. In such circumstances they should generally be advised to make their disclosure to IBAC.

Table 1: Requirements for receiving a disclosure

Person who is the subject of the disclosure	Person/body to whom the disclosure must be made
Employee of a public body (Moreland City Council)	That public body (Moreland City Council) or IBAC
Moreland City Councillor	IBAC

Mechanisms for the receipt of disclosures

Moreland City Council is responsible for any decisions or actions taken under the Act, the Guidelines or the Regulations. Any formal notification of a disclosure or other correspondence and communication between IBAC and the public body will generally will be between the Chief Executive Officer of the Council or, in some cases, its protected disclosure coordinator. It is

generally not appropriate for an agency to use a lawyer or an agent to communicate with IBAC, although separately obtaining legal advice may be appropriate in some circumstances.

The Act only requires that an individual make the disclosure to the public body. The reporting procedures must be available to advise potential disclosing persons of the most effective way to raise their concerns. However, the disclosure does not have to be made in accordance with the public body's preferred procedure. A disclosure may be made to any member, officer or employee of the public body. It is the responsibility of the public body to ensure that any allegation made that may fall under the Act is referred to the protected disclosure coordinator to assess the information.

Assessing a disclosure

Where a public body receives information relating to the conduct of an employee, member or officer of that public body, it must assess whether the disclosure meets the criteria of Part 2 of the Act to be a protected disclosure. If Part 2 of the Act is satisfied, the agency must determine if the information also satisfies Part 4 of the Act to be a public interest disclosure. Section 28 requires the public agency to reach its conclusion about the disclosure within 45 days of receiving it.

Protected disclosures

A protected disclosure is a disclosure that satisfies Part 2 of the Act. A protected disclosure receives the protections outlined in Part 6 of the Act. To be assessed as a protected disclosure it must meet the following criteria:

- Did a natural person (that is, an individual person rather than a corporation) make the disclosure?
- Does the disclosure relate to conduct of a public body or public officer acting in their official capacity?
- Is the alleged conduct either improper conduct or detrimental action taken against a person in reprisal for making a protected disclosure?
- Does the person making a disclosure have reasonable grounds for believing the alleged conduct has occurred?
- If one or more of the above elements are not satisfied, the person has not made a disclosure under Part 2 of the Act.

Improper conduct

A disclosure may be made about improper conduct by a public body or public official. Improper Conduct is defined in section 4 of the Act to mean:

- Corrupt Conduct (as defined in the **Independent Broad-Based Anti-Corruption Commission Act 2011**), or
- specified conduct that is not Corrupt Conduct including:

- a substantial mismanagement of public resources, or
- a substantial risk to public health or safety, or
- a substantial risk to the environment.

The conduct must be serious enough that if proven would constitute a criminal offence or reasonable grounds for dismissal.

Further, specified conduct includes:

- conduct of any person that adversely affects the honest performance of a public officer’s or public body’s functions
- conduct of a public officer or public body that constitutes or involves the dishonest performance of a public officer’s or public body’s functions
- conduct of a public officer, former public officer or a public body that amounts to knowingly or recklessly breaching public trust
- conduct by a public officer or a public body that amounts to the misuse of information or material acquired in the course of the performance of their official functions, or
- a conspiracy or attempt to engage in any of the above conduct
- conduct of a public officer or public body that involves:
 - a substantial mismanagement of public resources, or
 - a substantial risk to public health or safety, or
 - a substantial risk to the environment.

These elements of improper conduct are qualified by the requirement that they would be a criminal offence or grounds for dismissal if proven. This indicates that the conduct will only fall within the meaning of the Act where it is dishonesty of a serious nature. The list is not exhaustive and, when in doubt, those with the responsibility for making a decision as to whether the conduct shows or tends to show that there was improper conduct, should contact IBAC for guidance.

Ⓢ **Substantial mismanagement of public resources**

The use of the word ‘substantial’ has the effect of confining the definition to a situation in which the mismanagement is of a significant or considerable degree. Mismanagement should not be confused with ‘misuse’. Mismanagement is to manage badly or wrongly, whilst misuse is wrong or improper use. For example, to use a government car for personal gain is a misuse rather than mismanagement.

Ⓢ **Substantial risk to public health, safety or the environment**

The use of ‘substantial’ has the effect of confining the definition to conduct that puts public health, safety or the environment at considerable or great risk. The risk is limited to public health or safety. This means the risk is not just to an individual but relates to conduct which affects, or has the potential to affect, a large class or group of the wider community.

Detrimental action

The Act creates an offence for a person to take detrimental action against a person who has made a protected disclosure. Section 3 of the Act defines detrimental action as including:

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

© Examples of detrimental action

A public body demotes, transfers, isolates in the workplace or changes the duties of a person making a disclosure due to the making of a disclosure.

A person threatens, abuses or carries out other forms of harassment directly or indirectly against the person making a disclosure, his or her family or friends.

A public body discriminates against the person making a disclosure or his or her family and associates in subsequent applications for jobs, permits or tenders.

Reasonable grounds for belief

The phrase ‘reasonable grounds for belief’ requires more than a suspicion and the belief must have supporting facts and circumstances. For reasonable grounds of belief, the usual test applied is whether a reasonable person would have formed that belief, having regard to all the circumstances. This test is an objective one, that is, whether a reasonable person, possessed of the same information that the person making the disclosure holds, would believe that the improper conduct had occurred. Reasonable grounds for a belief are also taken to require something more than a reasonable suspicion.

Nor can a belief be held to be based on reasonable grounds, where it is based on a mere allegation, or conclusion, which is unsupported by any facts or circumstances. The existence of evidence is required to show that the reasonable grounds are probable. For example, it is not sufficient for a person to base a disclosure on the statement ‘I know X is accepting bribes to grant planning permits to Y developer’. This is a mere allegation unsupported by any further facts and circumstances.

However, the requirement for facts and circumstances to be present to support a belief does not mean that it is necessary that the person have a prima facie case, merely that the belief be reasonably based.

In some circumstances, hearsay or second-hand information may be used to establish reasonable grounds for the belief, provided that the information and its source appears credible. This may depend on how the person obtained the information, and the detail of the information.

The credibility of the person making a disclosure or individuals who have provided them with information may also be considered in determining if the individual has reasonable grounds for the belief.

Notification of the decision

Where IBAC determines that a person has failed to make a disclosure under Part 2 of the Act, the public body must advise the individual of its assessment. IBAC should indicate on what grounds it has made its assessment. This should include advising the person that their concerns may be made through the public body's general complaints mechanisms.

If the reason for the determination is based upon the failure of the person to support reasonable grounds for the belief that improper conduct has occurred, the public body should ensure the person has had sufficient opportunity to support the allegations or to present additional information prior to completing its determination. A reassessment of the disclosure can be made if the person provides additional information to support the allegations made.

Where a public body determines that a person has made a disclosure in accordance with Part 2 of the Act, this disclosure is now referred to as a protected disclosure and must be dealt with in accordance with the Act.

Possible criminal charges, legal action and disciplinary proceeding

The Act establishes a number of offences regarding a disclosure once it has been determined to be a protected disclosure. Public bodies must ensure all nominated officers and staff are aware of the criminal offences created by the Act and other legal action that may be taken against them for any breach by them.

Criminal offences

Detrimental action

It is an offence for a person to take or threaten action in reprisal when:

- a protected disclosure has been made
- a person believes a protected disclosure has been made
- a person believes that another person intends to make a protected disclosure.

Breach of confidentiality

It is an offence for a person to divulge information obtained as a result of the handling or investigation of a protected disclosure without legislative authority.

Provision of false information

It is an offence for a person to knowingly provide false information under the Act with the intention that it be acted on as a protected disclosure.

Civil action

A person who takes detrimental action against a person in reprisal for a protected disclosure may be found liable in damages to that person. The public body may also be found to be vicariously liable.

Managing the welfare of the person making the protected disclosure

The protection of genuine persons making protected disclosures against detrimental action is essential for the effective implementation of the Act. Management of a public body must be responsible for ensuring persons making a protected disclosure are protected from direct and indirect detrimental action, and that the culture of their workplace is supportive of protected disclosures being made.

It is a requirement of the Act that public bodies establish procedures for the protection of persons making protected disclosures from reprisals. The procedures must comply with the Act and with these guidelines.

Internal and external sources

A person making a protected disclosure may be employed by a public body or may be a member of the public. Public bodies are obliged to protect both internal and external persons making protected disclosures from detrimental action taken in reprisal for the making of the disclosure. The management of both types of persons making protected disclosures will, however, be different.

The main issue of difference is that internal persons making protected disclosures are at risk of suffering reprisals in the workplace. A welfare manager must foster a supportive work environment and respond to any reports of intimidation or harassment.

Reprisals may also be taken against external persons making protected disclosures. Public bodies may also appoint a welfare manager for an external person making a protected disclosure. A welfare manager of an internal or external person making a protected disclosure cannot be expected to go beyond what is reasonable for a public body in providing support to them. The welfare manager should discuss the issue of reasonable expectations with the person making a protected disclosure.

Appointing a welfare manager

The senior management of a public body should take responsibility for the welfare of a person making a protected disclosure. The protected disclosure coordinator should appoint a welfare manager to monitor the needs of the person making a protected disclosure and to provide advice and support. Public bodies may wish to make use of an Employee Assistance Program for this purpose. In most circumstances, a welfare manager will only be required where a protected disclosure proceeds to investigation.

The role of the welfare manager is to:

- examine the immediate welfare and protection needs of a person making a protected disclosure who has made a disclosure and seek to foster a supportive work environment
- advise the person making a protected disclosure of the legislative and administrative protections available to him or her
- listen and respond to any concerns of harassment, intimidation or victimisation in reprisal for making a disclosure
- keep a contemporaneous record of all aspects of the case management of the person making the protected disclosure, including all contact and follow-up action
- endeavour to ensure that the expectations of the person making a protected disclosure are realistic.

The welfare manager must not divulge any details relating to the disclosed matter to any person other than the protected disclosure coordinator, the investigator or the chief executive officer. All meetings between the welfare manager and the person making a protected disclosure must be conducted discreetly to protect the confidentiality of the person making a protected disclosure.

Occurrence of detrimental action

If a person making a protected disclosure reports an incident of harassment, discrimination or adverse treatment that would amount to detrimental action apparently taken in reprisal for the making of the disclosure, the welfare manager or protected disclosure coordinator must:

- record details of the incident
- advise the person making a protected disclosure of his or her rights under the Act.

Where the detrimental action is of a serious nature likely to amount to a criminal offence, consideration should be given to reporting the matter to the police or IBAC.

The taking of detrimental action in reprisal for making a disclosure can be an offence against the Act, as well as grounds for making a further disclosure. Where such detrimental action is reported, the allegation must be assessed as a new disclosure under the Act. A public body must be extremely cautious about conducting enquiries or gathering information concerning an allegation of detrimental action, as a criminal offence may have been committed and any informal investigation may compromise the integrity of evidence.

Consequences for persons making disclosures implicated in improper conduct, or disciplinary matters

The person making a protected disclosure is not subject to criminal or civil liability for making the disclosure under section 39 of the Act. Section 42 of the Act specifically provides that a person's liability for his or her own conduct is not affected by the person's disclosure of that conduct under the Act. However, in some circumstances, an admission may be a mitigating factor when considering disciplinary or other action.

However, the management of the welfare of an internal or external person making a protected disclosure may become complicated when the person making a protected disclosure is implicated in misconduct, whether that misconduct is related to the disclosure made or not. The general obligations of a public body in relation to handling and investigating a disclosure and protecting the person making a protected disclosure still apply. A person making a protected disclosure is not protected from the reasonable consequences flowing from any involvement in improper conduct, as section 42 sets out.

Disciplinary or other action against a person making a protected disclosure invariably creates the perception that it is being taken in retaliation 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 that:

- his or her intention to proceed with disciplinary action is not causally connected to the making of the disclosure
- 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 that the above preconditions have been met, it leaves itself open to allegations of taking detrimental action against a person making a protected disclosure in reprisal for making the disclosure. A public body may wish to obtain legal advice prior to taking any action against the person making a protected disclosure.

Great care should be taken to thoroughly document the process including recording the reasons why the disciplinary or other action is being taken, and the reasons why the action is not in retribution for making the disclosure. The person making a protected disclosure should be clearly advised of the proposed action to be taken and of any mitigating factors that have been taken into account.

Collating and publishing statistics

Section 67 of the Act requires that IBAC include in IBAC's annual report or report of operations must include in that report information about accessing issued guidelines and procedures under part 9 of the Act, and a range of details about protected disclosures in the reporting year. These details include:

- the number and types of assessable disclosures made directly to IBAC

- the number and types of disclosures notified to IBAC
- the number and types of assessments made by IBAC to determine if it is a protected disclosure
- the number and types of protected disclosures investigated, referred or dismissed by IBAC
- any recommendation made by IBAC under the Act.

Describing the type of disclosure requires a statement about the nature of the disclosure; for example, an allegation of bribery or fraudulent use of public funds.

It is the responsibility of the protected disclosure coordinator to ensure that confidential records are kept to enable accurate reporting as required by the Act.

Freedom of Information

It is highlighted that section 78 of the Act excludes the application of the *Freedom of Information Act 1982* to any document that relates to a disclosure made under the Act. Public agencies should ensure that any of its officers handling freedom of information requests are aware of this section. A public agency should contact IBAC prior to providing any document originating from IBAC or relating to a protected disclosure, if requested under the Freedom of Information Act.

Contact details

Independent Broad-Based Anti-Corruption Commission

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