

## POLICY NO LG30 PUBLIC INTEREST DISCLOSURE POLICY

<b>DEPARTMENT:</b>	Corporate Services
<b>RESPONSIBLE OFFICER:</b>	Manager Corporate Services
<b>LINK TO STRATEGIC PLAN:</b>	Continuously strive for quality, responsive customer service and enhancement of image of Council.
<b>STATUTORY AUTHORITY:</b>	Public Interest Disclosures Act 2002
<b>OBJECTIVE:</b>	The <i>Public Interest Disclosures Act 2002</i> commenced operation on 1 January 2004. The purpose of the Act is to encourage and facilitate the making of disclosures of improper conduct by public officers and public bodies. The Act provides protection to persons who make disclosures in accordance with the Act, and establishes a system for the matters disclosed to be investigated and rectifying action to be taken while providing all parties involved with natural justice.
<b>POLICY INFORMATION:</b>	Adopted 19 March 2012 – Minute No 03/12.15.4.069 Amended 17 March 2014 – Minute No 03/14.11.15.060 Amended 21 August 2014 – Minute No 08/14.11.8.233 Amended 19 April 2017 – Minute No 04/17.12.6.90 Amended 18 September 2017 – Minute No 09/17.12.7.210 Amended 17 May 2021 – Minute No 05/21.13.4.110

## POLICY

### 1 STATEMENT OF SUPPORT

Break O'Day Council is committed to the aims and objectives of the *Public Interest Disclosures Act 2002* (the Act). It does not tolerate improper conduct by its employees, officers or members, or the taking of detrimental action against those who come forward to disclose such conduct.

Break O'Day Council recognises the value of transparency and accountability in its administrative and management practices, it supports and encourages the making of disclosures that reveal the type of conduct at which the Act is directed.

Break O'Day Council will take all reasonable steps to protect people who make such a disclosure from any detrimental action in reprisal for making the disclosure, and to protect their welfare. It will also afford natural justice to all parties involved in the investigation of a disclosure and provide for matters disclosed to be properly investigated and dealt with.

### 2 PURPOSE OF THESE PROCEDURES

These procedures set out how:

- public officers and contractors can make disclosures about improper conduct or reprisal action;
- disclosures are assessed;
- public interest disclosures are investigated; and
- Break O'Day Council protects disclosers and affords procedural fairness to those being investigated.

These 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, and to use existing grievance procedures within the organisation where appropriate. (see LG25 Grievance Policy, LG03 Councillors Code of Conduct Policy, LG35 Staff Code of Conduct Policy)

The procedures have been prepared in accordance with Guidelines and Standards published by the Ombudsman under s 38(1)(c) of the Act. These Guidelines and Standards can be seen on the Ombudsman's website at [www.ombudsman.tas.gov.au](http://www.ombudsman.tas.gov.au).

### **3 THE PURPOSE OF THE ACT**

The Act commenced operation on 1 January 2004. It was substantially amended by the *Public Interest Disclosures Amendment Act 2009*, following a major review of the Act, and these procedures reflect those amendments. The amendments took effect on 1 October 2010.

The purposes of the Act are contained in its long title. These are:

- to encourage and facilitate disclosures of improper conduct by public officers and public bodies;
- to protect persons making those disclosures, and others, from detrimental action;
- to provide for the matters disclosed to be properly investigated and dealt with; and
- to provide all parties involved in the disclosures with natural justice.

The public interest is served by providing an avenue for persons to report improper conduct and be protected for doing so.

### **4 HOW THE ACT WORKS**

Briefly, the Act works in this way:

- it gives certain people – “public officers” and “contractors” – the right to make a disclosure about “improper conduct” or “detrimental action” to certain integrity agencies, other persons and bodies (Part 2 of the Act, particularly s 6);
- it provides certain statutory protections for *protected disclosures*, even if the discloser does not reference the Act (Part 3);
- it dictates how the recipient of the disclosure is to deal with it (Parts 4 to 8);
- it treats the Ombudsman as the oversight agency in relation to the operation of the Act, including the default investigator, monitor of investigations by public bodies, and setter of standards under the Act;

- where the disclosure is handled by the Ombudsman or a public body, it requires a determination as to whether the protected disclosure is a *public interest disclosure* (ss 30 and 33);
- subject to exceptions, it requires investigation by the Ombudsman or public body of any protected disclosure which is found to be a public interest disclosure (ss 39 and 63);
- it requires such investigation to be conducted as soon as practicable, but if it is being conducted by a public body, not more than six months from the date of the determination that the disclosure is a public interest disclosure (ss 39A and 77A);
- it controls the manner in which a disclosure is investigated, and provides powers in this respect;
- in the case of an investigation by a public body which results in a finding that the alleged conduct occurred, it obliges the public body to take action to prevent that conduct from continuing or recurring, and to take action to remedy any harm or loss which may have arisen (s 75).

A flow chart, which depicts the way in which a public body should deal with a disclosure made to it under the Act, is at Attachment 4 to this document.

## 5 COMPARISON WITH THE INTEGRITY COMMISSION ACT

The Act and the *Integrity Commission Act 2009* (IC Act) work very differently.

Perhaps the most important difference is that the IC Act does not contain any provisions which protect a person who makes a complaint under that Act from detrimental action by way of reprisal. The provision of such protection is a key feature of the Act.

Other important differences are:

- the fact that anyone can make a complaint under the IC Act, whereas the right to make a disclosure under the Act is given only to a current public officer and a contractor;
- in the types of conduct to which the Act applies;<sup>1</sup> - the fact that a disclosure may be made under the Act about proposed conduct, whereas the IC Act only concerns past conduct;
- the fact that a disclosure under the Act may be oral, whereas a complaint under the IC Act must be in writing; and
- the different processes which each Act applies to a matter brought forward under it.

A person who is trying to decide which Act to proceed under should consider seeking legal advice on what is the best course for them to take.

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<sup>1</sup> The Act concerns “improper conduct”, which embraces “corrupt conduct”. The IC Act concerns “misconduct” only and it is unclear as to the extent to which corrupt conduct would be able to be investigated. The definitions of these expressions used in the two Acts do not align.

It is possible for a disclosure which is made under the Act to be dealt with under the IC Act – see Part 4A of the Act.

## **6 ROLES AND RESPONSIBILITIES**

This part explains the roles and responsibilities of individuals within Break O'Day Council under the Act.

### **6.1 Members, officers and employees**

Members, officers and employees of Break O'Day Council are encouraged to report known or suspected incidences of improper conduct or detrimental action under the Act, in accordance with these procedures.

All members, officers and employees of the Break O'Day Council have an important role to play in supporting those who have made a legitimate disclosure. They must refrain from any activity that is, or could be perceived to be, victimisation or harassment of a person who makes a disclosure. Furthermore, they should protect and maintain the confidentiality of a person they know or suspect to have made a disclosure.

### **6.2 Principal Officer**

The Principal Officer has primary responsibility for ensuring that the provisions of the Act are implemented by the public body. Section 62A of the Act provides that the Principal Officer has responsibility for:

- preparing procedures for approval by the Ombudsman;
- receiving public interest disclosures and ensuring they are dealt with in accordance with the Act;
- ensuring the protection of witnesses;
- ensuring the application of natural justice in the public body's procedures;
- ensuring the promotion of the importance of public interest disclosures and general education about the Act to all staff, and ensuring easy access to information about the Act and the public body's procedures, and
- providing access to confidential employee assistance programs and appropriately trained internal support staff for those involved in the process.

The Principal Officer may delegate many of his or her functions to a Public Interest Disclosure Officer.

### **6.3 Public Interest Disclosure Officer**

A Public Interest Disclosure Officer is appointed by the Principal Officer under s 62A(2) of the Act, and holds a delegation from the Principal Officer which enables him or her to exercise the statutory powers and functions given to the Principal Officer by the Act which are listed in their instrument of delegation.

These procedures frequently give responsibilities or functions to a Public Interest Disclosure Officer. Not all of these are referable to specific statutory powers or functions bestowed on

the Principal Officer by the Act, and so some of them represent things which the Public Interest Disclosure Officer is expected to do on a purely administrative basis.

Subject to the terms of their delegation, the responsibilities of a Public Interest Disclosure Officer generally include:

- acting as a contact point for general advice about the operation of the Act for any person wishing to make a disclosure about improper conduct or detrimental action;
- making arrangements for a disclosure to be made privately and discreetly and, if necessary, away from the workplace;
- receiving any disclosure made orally or in writing (from internal and external disclosers);
- recording in writing the details of any disclosure which is made orally;
- impartially assessing the allegation and determining whether it is a disclosure made in accordance with Part 2 of the Act (that is, “a protected disclosure”);
- impartially assessing under s 33 of the Act whether a disclosure is a “public interest disclosure”; and
- taking all necessary steps to ensure that the identity of the discloser and the identity of the person who is the subject of the disclosure are kept confidential.

#### **6.4 Investigator**

Where the Break O'Day Council has determined that a disclosure is a public interest disclosure, or where the Ombudsman has referred a disclosed matter to Break O'Day Council for investigation, the Principal Officer will appoint an investigator to investigate the matter in accordance with the Act. An investigator may be a person from within the public body or a consultant engaged for that purpose.

#### **6.5 Welfare manager**

The welfare manager will be appointed by the Principal Officer or by a Public Interest Disclosure Officer, and is responsible for looking after the general welfare of the discloser. The welfare manager will:

- examine the immediate welfare and protection needs of a person who has made a disclosure, and seek to foster a supportive work environment;
- advise the discloser of the legislative and administrative protections available to him or her;<sup>2</sup>
- listen and respond to any concerns of harassment, intimidation, victimisation or other detrimental action which may be occurring in reprisal for making the disclosure; and
- so far as is practicable, protect the identity of the discloser in the course of carrying out these responsibilities.

A welfare manager may be a person from within the public body or a consultant engaged for that purpose

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<sup>2</sup> See part 12 below for details of the legislative protections.

## **7 WHO CAN MAKE A DISCLOSURE?**

### **7.1 Public officers**

Any current public officer can make a disclosure to Break O'Day Council under the Act. This includes:

*'all employees and councillors of Break O'Day Council. Council volunteers are not considered public officers, but could make a disclosure to the Ombudsman or Integrity Commission about a public body as a member of the public.'*

### **7.2 Contractors**

Current or past contractors and sub-contractors can make disclosures about public bodies, not public officers, but they can only make a disclosure to the Ombudsman or the Integrity Commission not to Break O'Day Council. Public Interest Disclosure officers should refer any contractors wanting to make a disclosure to either of these bodies.

### **7.3 Members of the public**

Members of the public can make a disclosure about a public body, and may be treated in the same way as a contractor if it is in the public interest to do so, but they can only make the disclosure to the Ombudsman or Integrity Commission. The Ombudsman or Integrity Commission determines whether it is in the public interest to treat the discloser as a contractor, not the discloser. Public interest disclosure officers should refer any members of the public wanting to make a disclosure to either of these bodies.

### **7.4 Anonymous persons**

An anonymous disclosure may be accepted if the person receiving it is satisfied that the disclosure is being made by a public officer or contractor (see s 8 of the Act). If the person is satisfied that an anonymous disclosure is from a contractor it should be referred to the Ombudsman.

## **8 WHAT CAN A DISCLOSURE BE MADE ABOUT?**

A disclosure can be made about one or more public officers or a public body itself. If a disclosure relates to Break O'Day Council as a whole or the Principal Officer of Break O'Day Council, it should be referred to the Ombudsman or Integrity Commission as internal investigation would not be appropriate.

### **8.1 Improper conduct**

Disclosures about public officers need to relate to improper conduct by that officer, in the past, present or future (proposed action). Section 3 of the Act defines improper conduct as:

- (a) *conduct that constitutes an illegal or unlawful activity; or*

- (b) *corrupt conduct; or*
- (c) *conduct that constitutes maladministration; or*
- (d) *conduct that constitutes professional misconduct; or*
- (e) *conduct that constitutes a waste of public resources; or*
- (f) *conduct that constitutes a danger to public health or safety or to both public health and safety; or*
- (g) *conduct that constitutes a danger to the environment; or*
- (h) *misconduct, including breaches of applicable codes of conduct; or*
- (i) *conduct that constitutes detrimental action against a person who makes a public interest disclosure under this Act –*

*that is serious or significant as determined in accordance with guidelines issued by the Ombudsman;*

*Examples of improper conduct include:*

- to avoid closure of a town's only industry, an environmental health officer ignores or conceals evidence of illegal dumping of waste;
- an agricultural officer delays or declines imposing quarantine to allow a financially distressed farmer to sell diseased stock; and
- a building inspector tolerates poor practices and structural defects in the work of a leading local builder, giving rise to a risk to public health or safety.

## **8.2 Corrupt conduct**

Corrupt conduct is further defined in s3 of the Act as:

- a. conduct of a person (whether or not a public officer) that adversely affects, or could adversely affect, either directly or indirectly, the honest performance of a public officer's or public body's functions; or
- b. conduct of a public officer that amounts to the performance of any of their functions as a public officer dishonestly or with inappropriate partiality; or
- c. conduct of a public officer, a former public officer or a public body that amounts to a breach of public trust; or
- d. conduct of a public officer, a former public officer or a public body that amounts to the misuse of information or material acquired in the course of the performance of their functions as such (whether for the benefit of that person or body or otherwise); or
- e. a conspiracy or attempt to engage in conduct referred to in paragraph (a), (b), (c) or (d).

Examples of corrupt conduct include:

- a public officer takes a bribe in exchange for the discharge of a public duty;
- a public officer favours unmeritorious applications for jobs or permits by friends and relatives; and
- a public officer sells confidential information.



### 8.3 Detrimental action

Detrimental action, or reprisal action, against a discloser can be a form of improper conduct. It is defined in s 3 of the Act, as including:

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

Examples of detrimental action include:

- refusal of a deserved promotion;
- demotion, transfer, isolation in the workplace or changing a person's duties to their disadvantage;
- threats, abuse or other forms of harassment directly or indirectly against the discloser, their family or friends; and
- discrimination against the discloser or their family and associates in applications for jobs, permits or tenders.

## 9 WHERE TO MAKE A DISCLOSURE

For the protections in the Act to apply, a disclosure must be made to the right person or body. The following table sets this out, in accordance with s 7 of the Act.

Officer or public body to which the disclosure relates	Person to whom the disclosure may be made
a member, officer or employee of Break O'Day Council	that public body; or the Integrity Commission; or the Ombudsman
a councillor, within the meaning of the <i>Local Government Act 1993</i>	the Ombudsman
the Ombudsman	the Joint Standing Committee on Integrity
if the disclosure is about a public body as opposed to an individual public officer	the Ombudsman; or the Integrity Commission

A contractor, or a member of the public under s7A of the Act, can only make a disclosure about a public body, so they must make it to the Ombudsman or the Integrity Commission.



## 10 HOW TO MAKE A DISCLOSURE

Public officers can make a disclosure about other public officers of Break O'Day Council orally or in writing to the following officers:

- The General Manager – who is the Principal Officer of the public body, for the purposes of the Act; and
- a Public Interest Disclosure Officer.
- It is preferable that a disclosure be made in writing. It should be addressed to the public body, marked for the attention of the Principal Officer or Public Interest Disclosure Officer. A disclosure can be sent, delivered or left at 32-34 Georges Bay Esplanade, St Helens or emailed to [admin@bodc.tas.gov.au](mailto:admin@bodc.tas.gov.au).
- A public officer can also make an oral disclosure over the phone or in person to a Public Interest Disclosure officer. An oral disclosure should be made in private. If a public officer is concerned about making a disclosure in person in the workplace, they can call or email the Public Interest Disclosure Officer to request a meeting in a location away from the workplace.
- It is not a requirement that the person contemplating making a disclosure refers to the Act, or is aware of the Act.

### 10.1 Disclosure to persons within Break O'Day Council

Disclosures of improper conduct or detrimental action by a member, officer or employee of Break O'Day Council may be made to the following officers:

- the General Manager – who is the “Principal Officer” of the public body, within the terms of the Act; and
- a Public Interest Disclosure Officer.

Each person who holds or acts in any of the following positions within Break O'Day Council has been appointed by the Principal Officer to act as a Public Interest Disclosure Officer, and holds a delegation which enables them to receive public interest disclosures under the Act.

Manager Corporate Services - Public Interest Disclosure Officer  
Manager Human Resources - Public Interest Disclosure Officer

Where a person is contemplating making a disclosure and is concerned about approaching the Principal Officer or a Public Interest Disclosure Officer in the workplace, he or she can call the relevant officer and request a meeting in a discreet location away from the workplace.

A disclosure about the Principal Officer or Break O'Day Council should be immediately referred to the Ombudsman or the Integrity Commission.

### 10.2 Disclosure to the Ombudsman

A disclosure about improper conduct or detrimental action by Break O'Day Council or any of its members, officers or employees may also be made directly to the Ombudsman. The contact details for the Ombudsman are:



The Ombudsman  
GPO Box 960  
HOBART TAS 7001

or at

Level 6, 86 Collins Street  
HOBART TAS 7000

Website: [www.ombudsman.tas.gov.au](http://www.ombudsman.tas.gov.au)

Email: [ombudsman@ombudsman.tas.gov.au](mailto:ombudsman@ombudsman.tas.gov.au)

Phone: 1800 001 170 (free call, though charges for mobile phones may apply)

### **10.3 Disclosure to the Integrity Commission**

A disclosure may also be made directly to the Integrity Commission. The Commission can deal with a protected disclosure about individuals under the *Integrity Commission Act 2009* or refer it to a public body or the Ombudsman. A protected disclosure about a public body would be referred to the Ombudsman. The contact details for the Integrity Commission are:

Integrity Commission  
GPO Box 822  
HOBART TAS 7001

or at

Surrey House  
199 Macquarie Street  
HOBART TAS 7000

Website: [www.integrity.tas.gov.au](http://www.integrity.tas.gov.au)

Email: [contact@integrity.tas.gov.au](mailto:contact@integrity.tas.gov.au)

Phone: 1300 720 289

## **11 CONFIDENTIALITY**

Break O'Day Council will take all reasonable steps to protect the identity of a discloser. Maintaining confidentiality is crucial to ensure that detrimental action is not taken against the discloser in reprisal for making the disclosure.

All reasonable care should also be taken to protect the privacy of witnesses and of the person against whom the disclosure has been made.

Section 23 of the Act requires any person who receives information in the course of or as a result of a protected disclosure or its investigation, not to disclose that information except in certain limited circumstances. Disclosure of information in breach of this section constitutes an offence that is punishable by a maximum fine of 60 penalty units or six months imprisonment, or both.

The circumstances in which a person may disclose information obtained about a protected disclosure include:

- where exercising their functions or 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; and
- in proceedings for certain offences under the Act.

The Act, however, prohibits the inclusion of particulars in any report or recommendation that is likely to lead to the identification of the discloser. The Act also prohibits the identification of the person who is the subject of the disclosure in any particulars included in an annual report made in accordance with Part 9 of the Act.

It may be necessary to consider disclosing information where:

- it is essential, having regard to the principles of natural justice, that the identifying information be disclosed to the person who is the subject of the disclosure;
- the investigating body believes that the disclosure of the identifying information is necessary for the matter to be effectively investigated; or
- the identity of the discloser is likely to be guessed from the circumstances of the disclosure and the risks for the discloser are better managed if their identity is known and specific warnings or risk management actions can be taken.

In these circumstances, the person who made the disclosure should first be consulted before any action is taken. Consider obtaining permission in writing from the discloser prior to identifying them.

The Break O'Day Council will ensure that all relevant files, whether paper or electronic, are kept securely and can only be accessed by the Principal Officer, Public Interest Disclosure Officer/s, the investigator, and (in relation to welfare matters only) the Welfare Manager.

All printed and electronic material will be kept in files that are clearly marked as confidential, and all materials relevant to an investigation, such as interview recordings, will also be stored securely with the files. Electronic files should have access restricted to the relevant officers.

Care should also be taken to ensure that all relevant phone calls and meetings are conducted in private.

Section 90 exempts documents from release under the *Right to Information Act 2009* to the extent that:

- they contain information regarding a disclosure; or
- information that is likely to lead to the identification of the person who:
  - ~ made the disclosure; or
  - ~ the person who is the subject of the disclosure.

## **12 ASSESSING THE DISCLOSURE**

The Act requires the taking of two distinct steps when assessing a disclosure. It first needs to be determined whether or not it qualifies as a protected disclosure, and thus attracts the protections contained in the Act. In order to do so it must satisfy the following prerequisites:

- has it been made to the correct person or body; and
- if it has been correctly made to Break O'Day Council
  - ~ has it been made by a public officer (or, if the disclosure is anonymous, is the person receiving it satisfied that it is being made by a public officer);
  - ~ is it about the conduct of a public officer;
  - ~ does the discloser believe the public officer has, is or is proposing to engage in improper conduct;
  - ~ is it about conduct that could objectively fall within the definition of improper conduct; and
  - ~ does it concern conduct that occurred on or after 1 January 2001?

The next step is to determine if it is a public interest disclosure. This requires an assessment of the evidence provided by the discloser to determine if it shows or tends to show a public officer has, is or is proposing to engage in improper conduct.

### **12.1 What should the recipient of the disclosure do upon receipt of the disclosure?**

If the disclosure is oral, the recipient should make a file note as soon as possible. The note should record the time the disclosure was made, the circumstances under which it was made and, so far as is possible, the exact words used by the discloser. The recipient should ask the discloser to consider putting the disclosure in writing as soon as possible.

Unless the recipient is the Principal Officer (or the disclosure is about the Principal Officer), the recipient should immediately inform the Principal Officer of the disclosure, and should provide the Principal Officer with a copy of the disclosure, or record of the disclosure, and any accompanying documents. If the disclosure is about the Principal Officer, contact the Ombudsman for advice.

If the disclosure is from a contractor, a member of the public or about the Principal Officer or Break O'Day Council, it should be immediately referred to the Ombudsman or the Integrity Commission.

A file should be created for the disclosure, marked clearly as being a *Public Interest Disclosures Act 2002* matter

### **12.2 Is it a protected disclosure?**

The protections for disclosers, provided in Part 3 of the Act, only apply where the disclosure is a *protected disclosure* made in accordance with Part 2 of the Act.

The Principal Officer or a Public Interest Disclosure Officer should assess whether a disclosure has been made in accordance with Part 2 as soon as possible after it has been received. The assessment of disclosure form at Attachment 1 should be completed as part of this process. It contains a series of questions going to the essential elements of a protected disclosure, raised at Assessing the disclosure, and what is needed to be established before a disclosure can be a protected disclosure. A separate assessment of disclosure form will usually need to be completed for each disclosure. This means, for example, that if a discloser is complaining about three different public officers, this constitutes three disclosures and three assessments should be completed.

If it is determined that it is a protected disclosure, the discloser should be given information about the protections in the Act (such as a copy of Part 3 of the Act). These protections should be explained to the discloser if necessary. The discloser should also be informed of the process which will be followed with respect to the disclosure.

The Principal Officer or a Public Interest Disclosure Officer should also immediately appoint a Welfare Manager to protect the interests of the discloser and ensure that the discloser is advised of the name and contact details of that person. A risk assessment should also be completed.

### **12.3 Mixed content disclosures**

Many disclosures will also contain personal grievances. When conducting assessments of complaints or grievances the assessor needs to be alert to identifying those aspects that could constitute a protected disclosure.

It is not a requirement that a discloser specify they are making a disclosure, the onus rests on Break O'Day Council to identify whether or not the Act applies. Consider discussing with the person whether they wish to make a public interest disclosure if it appears their concerns would meet the threshold.

Those matters that can be dealt with under a grievance process and those that are more appropriately dealt with under these procedures should be dealt with separately where possible.

### **12.4 Risk Assessment**

A risk assessment should occur as soon as possible after the disclosure has been assessed as being a protected disclosure under the Act. The risk assessment template at Attachment 2 should be completed by the Principal Officer or Public Interest Disclosure Officer and any appropriate risk mitigation action required be implemented. A single assessment can be made of all relevant risks, or you may prefer to undertake separate assessments of the different risks relating to a particular disclosure, such as the risks to the discloser, the subject of the disclosure, any witnesses, or Break O'Day Council. The discloser is usually the most able to identify potential reprisal risks, so input should be sought from the discloser and the Welfare Manager in completing the risk assessment. All reasonable steps to reduce risks of reprisal to the discloser should be taken.

### **12.5 Referral of the protected disclosure to the Ombudsman**

The Break O'Day Council may refer a public interest disclosure to the Ombudsman if it believes that it is not able to complete the investigation satisfactorily (see s 68 of the Act).

The Act does not provide for other relevant circumstances in which a public body may refer a protected disclosure to the Ombudsman before commencing an investigation, but an alternative way of achieving the same result would for the public body to encourage the discloser to make their disclosure direct to the Ombudsman, such that there is no need for the public body to continue to investigate the matter.

## **12.6 Referral of a protected disclosure to the Integrity Commission**

The Break O'Day Council may refer a protected disclosure, as distinct from a public interest disclosure, to the Integrity Commission where it considers that the disclosure relates to misconduct as defined in s 4(1) of the *Integrity Commission Act 2009*. Consideration should also be given to:

- whether independent investigation of the subject matter of the disclosure by the Integrity Commission is preferable; and
- the views of the discloser and the Integrity Commission about whether the matter should be referred.

Break O'Day Council must notify the discloser of the referral under s 29D of the Act within a reasonable time (unless the disclosure was made anonymously).

The Integrity Commission may deal with the disclosure under its legislation, or it may refer the disclosure to the Ombudsman or a public body, as the case may require, for action in accordance with the Act.

## **12.7 Referral of criminal conduct to the Police**

It is possible that, before or during an investigation, facts are uncovered that reveal the possibility of a criminal offence. If this happens, the Break O'Day Council will not commence, or will suspend, the investigation and will consult with the Ombudsman as to the future of the matter. Under section 41 of the Act, the Ombudsman has the power to refer a disclosed matter to the Commissioner of Police for investigation.

If the Ombudsman is satisfied that the disclosed matter should be referred to the Commissioner, the Break O'Day Council should consider whether the disclosure should be referred to the Ombudsman under s 68 of the Act.

Early referral of the matter may avoid interference with the evidentiary trail. Referral to the police through the Ombudsman will also avoid any question of a breach of confidentiality under s 23 of the Act. Once a disclosure is referred to the Commissioner of Police through the Ombudsman, the investigation under the Act ceases. However, there may still be administrative or operational issues which have been identified during the disclosure process or investigation that should be dealt with under other internal processes of the Break O'Day Council. The Principal Officer, or the Public Interest Disclosure Officer acting in consultation with the Principal Officer, will decide how the matter should be dealt with.

## **12.8 Further assessment - Is the disclosure a public interest disclosure?**

Where the Principal Officer or Public Interest Disclosure Officer has received a disclosure that has been assessed to be a protected disclosure, the Principal Officer or Public Interest Disclosure Officer must make a determination under s 33 of the Act as to whether the disclosure is a public interest disclosure. This assessment must be made within forty five (45) days of the receipt of the disclosure. (Use the Assessment of disclosure form at Attachment 1)

For a disclosure to be a public interest disclosure, the Principal Officer, or their delegated Public Interest Disclosure Officer, must be satisfied that the disclosure shows or tends to show that the public officer to whom the disclosure relates:

- has engaged, is engaging or proposes to engage in improper conduct in his or her capacity as a public officer, or
- has taken, is taking or proposes to take detrimental action in reprisal for the making of the protected disclosure.

A disclosure must be more than a mere allegation without substantiation to meet this threshold. A disclosure must include an indication of the existence of evidence that, if substantiated, would show or tend to show that the alleged improper conduct occurred.

Where the Principal Officer or Public Interest Disclosure Officer determines that the disclosure amounts to a public interest disclosure, he or she must: -

- advise the Principal Officer (if not the person receiving the disclosure);
- notify the Ombudsman within fourteen (14) days of the decision using the notification template at Attachment 3;
- notify the person making the disclosure within fourteen (14) days of the decision (unless it is an anonymous disclosure and uncontactable); and
- proceed to investigate the disclosed matter under s 34 of the Act.

If the Principal Officer or Public Interest Disclosure Officer determines that the disclosure is not a public interest disclosure, he or she must: -

- advise the Principal Officer (if not the person receiving the disclosure);
- notify the Ombudsman within fourteen (14) days of the decision using the notification template at attachment 3; and
- notify the person making the disclosure within fourteen (14) days of the decision (unless it is an anonymous disclosure and uncontactable) – see s 35.

The Ombudsman must then review this decision under s 35(2).

If, on review of the matter, the Ombudsman decides that the disclosure is not a public interest disclosure, the matter does not need to be dealt with under the Act. The Principal Officer, or the Public Interest Disclosure Officer in consultation with the Principal Officer, will then decide how the disclosure should be dealt with.

If the Ombudsman determines on review that the disclosure is a public interest disclosure, it may be referred back to the public body under s 42 for investigation under the Act or the Ombudsman will deal with the disclosed matter.

## **13 PROTECTION**

### **13.1 When does protection commence?**

Where Break O'Day Council receives a disclosure which complies with the requirements of Part 2 of the Act, the disclosure immediately attracts the protections set out in Part 3 of the Act. This is so whether or not the disclosure is factually correct (although one of the requirements of Part 2 is that the discloser genuinely believes that the alleged improper conduct or detrimental action in fact occurred).



The protection can also extend to a person who intends to make a disclosure - see s19 of the Act.

### **13.2 What protection does the Act provide?**

Part 3 of the Act gives various types of protection to a person who makes a protected disclosure. Below is a summary of some elements of Part 3.

A person who makes a protected disclosure:

- is not subject to any civil or criminal liability, or to any liability arising by way of administrative process, for making the protected disclosure (s 16);
- does not by doing so commit an offence under a provision of any other Act that imposes a duty to maintain confidentiality, or which imposes any other restriction on the disclosure of information (s 17(1)(a)); and
- does not by doing so breach an obligation by way of oath, or rule of law or practice, or under an agreement, which requires the discloser to maintain confidentiality or otherwise restricts the disclosure of information (s 17(1)(b)).

If a disclosure is not made to the correct entity, the protections may not apply. For example, a discloser will not be protected if otherwise confidential information is disclosed to the media.

Part 3 also contains various provisions which are intended to protect a discloser from detrimental action by way of reprisal for a protected disclosure. These are:

- section 19, which makes it an offence to take such detrimental action;
- section 20, which creates a liability to pay damages for such detrimental action; and
- section 21, which gives a person who believes that detrimental action has been taken against them the right to apply to the Supreme Court for an order requiring the person who has taken the detrimental action to remedy that action, or for an injunction.

## **14 14 INVESTIGATION**

### **14.1 Introduction**

Any disclosure Break O'Day Council determines to be a public interest disclosure under s 33 must be investigated under the Act, unless there is a good reason not to do so pursuant to s 64.

Break O'Day Council must investigate every disclosure referred to it for investigation by the Ombudsman under s 63(b).

The Principal Officer will appoint an investigator to carry out the investigation. The investigator may be a person from within an organisation or a consultant engaged for the purpose.

The objectives of an investigation are to:

- collate information relating to the allegation as quickly as possible, which may involve taking steps to protect or preserve documents, materials and equipment;
- consider the information collected and to draw conclusions objectively and impartially; and
- maintain procedural fairness in the treatment of witnesses and generally to all parties involved in the disclosure.

#### **14.2 Matters that do not have to be investigated**

Before starting an investigation, the Principal Officer or Public Interest Disclosure Officer must first consider whether the disclosed matter needs to be investigated. Section 64 specifies certain circumstances under which a public body may legitimately decide not to investigate. Use the disclosure assessment template at Attachment 1 to assist in assessing whether any of the grounds in s64 apply.

Any decision not to proceed with an investigation on a ground specified in s 64 must be made by the Principal Officer.

If it is decided that the disclosed matter is not to be investigated, written notice must be given within 14 days of this decision to both the Ombudsman and (except in the case of an uncontactable anonymous discloser) the person who made the disclosure. Reasons for the decision must accompany the notice. Use the notification template at Attachment 3 to provide notice to the Ombudsman.

The Ombudsman will review the decision. If the Ombudsman agrees that the disclosure should not be investigated, the matter does not need to be dealt with under the Act. Importantly, the discloser still retains the protections. The Principal Officer, or the Public Interest Disclosure Officer in consultation with the Principal Officer, will decide how the matter should be dealt with.

If the Ombudsman determines that the disclosure should be investigated, they will advise the Principal Officer.

Section 64 may be reconsidered at a later time during the investigation.

#### **14.3 Appointment of investigator and framing of terms of reference**

The Principal Officer – not a Public Interest Disclosure Officer - will determine who is to carry out the investigation. As earlier indicated, this may be an officer within the Break O'Day Council or an external consultant.

The investigator will be given formal terms of reference, signed by the Principal Officer.

The terms of reference will specify:

- the matters to be investigated;
- the date by which the investigation is to be concluded;
- the requirement for regular reports to be made to the Principal Officer, including details of compliance with any measures identified in the risk assessment; and
- the resources available to the investigator for the purposes of the investigation.

The completion date should be as soon as practicable but, in any event, not more than six (6) months from the date of the determination that the disclosure is a public interest disclosure under s 77A(1). If at any stage before or during the investigation it appears that the investigation cannot be completed within six (6) months, Break O'Day Council may apply to the Ombudsman for an extension of up to a further six (6) months

#### **14.4 Investigation plan**

The investigator should prepare an investigation plan for approval by the Principal Officer. The plan should list the issues which are to be investigated and describe the steps which the investigator intends to take in investigating each of those issues.

The risk assessment should be considered as part of the investigation planning and appropriate steps taken to reduce identified risks during the investigation. The plan should be updated as necessary during the course of the investigation.

#### **14.5 Procedural Fairness**

The principles of procedural fairness must be carefully observed in the course of the investigation, with respect to all parties involved. These principles are sometimes referred to as natural justice under the Act

The principles are a set of procedural standards which need to be met in order to satisfy a person's right to a fair hearing. If natural justice is not provided, the investigation findings may be questionable and could be challenged.

The Break O'Day Council will comply with the following requirements in ensuring that procedural fairness is accorded to all parties involved.

No one is to be involved in the investigation:

- who is known to be biased against any person who is potentially subject to an adverse finding;
- who is known to hold any biases which are relevant to the subject matter of the investigation; or
- against whom there is reasonable ground for apprehending or suspecting bias.<sup>3</sup>

If the investigator is aware of any reason why they may be susceptible to an allegation of bias on the basis of these principles, they should immediately inform the Principal Officer. It is best to err on the side of caution and to consider an external investigator if there might be a perception of bias over the investigation.

Any person who is potentially subject to an adverse finding or comment must be told of:

- the allegations made against them, or which have arisen against them as a result of the investigation;

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<sup>3</sup>The test for establishing the existence of apprehended bias is whether a fair minded lay observer, taking into account all relevant circumstances, might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the questions that they are required to decide.

- all of the information which is adverse to their interests and which is, on an objective basis, credible, relevant and significant to the investigation; and
- the proposed adverse findings and their possible consequences.

This must be done before any final conclusions are formed by the investigator. The person subject to the potential adverse finding must be given a reasonable time to respond.

Despite the above, there is no requirement to inform the person who is subject to the disclosure as soon as it is received, or as soon as the investigation has commenced.

The final investigation report should be drafted in a way that demonstrates that procedural fairness has been afforded. For instance, it should record and deal with all submissions and evidence which a person has put in their defence.

#### **14.6 Conduct of the investigation**

The Integrity Commission's Guide to Managing Misconduct in the Tasmanian Public Sector is a useful guide on the conduct of a public interest disclosure investigation.

The investigator should make contemporaneous notes of all discussions and phone calls, and consideration should be given to the desirability of audiotaping significant interviews with witnesses

All information gathered in the course of the investigation must be securely stored.

Interviews should be conducted in private, and the investigator should take all reasonable steps to protect the identity of the discloser. The name of the discloser or any particulars which might identify that person must not be revealed unless necessary, and then only with the discloser's knowledge.

#### **14.7 Referral of an investigation to the Ombudsman**

Under s 68 of the Act, a public body may refer the investigation of a disclosed matter to the Ombudsman where the public body considers that its own investigation is being obstructed or that it is otherwise not within the capacity of the public body to complete the investigation.

Any decision as to whether the investigation should be referred to the Ombudsman will be taken by the Principal Officer.

See also part 11.3.3, concerning referral of an investigation to the Ombudsman, with a view to referral by the Ombudsman to the Commissioner of Police of suspected criminal conduct.

#### **14.8 Provision of information about the investigation**

The Principal Officer or the Public Interest Disclosure Officer must ensure that the discloser is kept regularly informed concerning the handling of a protected disclosure and an investigation.

The Principal Officer must report to the Ombudsman about the progress of an investigation.

Section 74 of the Act requires a public body, at the request of the Ombudsman or the person who made the disclosure, to give the Ombudsman or that person reasonable information about the investigation. The information must be given within 28 days of the request.

However, as provided in s 74(3), such information does not have to be given to the discloser if:

- it has already been given to the person; or
- the giving of the information would endanger the safety of another or may prejudice the conduct of the investigation.

## **15 ACTION TAKEN AFTER AN INVESTIGATION**

### **15.1 Investigator's final report**

At the conclusion of the investigation, the investigator must submit a written report of his or her findings to the Principal Officer. The report should contain:

- the allegation/s;
- a description of the manner in which the investigation was conducted, with sufficient detail to demonstrate that procedural fairness was observed;
- an account of all relevant information received;
- details of the evidence and submissions supplied by any person against whom an adverse finding is made, and the evaluation of that material by the investigator; and
- the findings made and conclusions reached, and the basis for them.

Note in particular that the report should not include any comment adverse to any person unless that person has been given an opportunity to be heard in the matter and their defence is fairly set out in the report (see part 13.5 of these procedures).

With a view to potential action by the public body under s 75 of the Act, if the investigator has found that conduct disclosed by the discloser has occurred, the investigator may wish to include recommendations as to:

- any steps that need to be taken by the Break O'Day Council to prevent the conduct from continuing or occurring in the future; and
- any action that should be taken by the Break O'Day Council to remedy any harm or loss arising from that conduct.

The steps to be taken may include bringing disciplinary proceedings against the person responsible for the conduct, and referring the matter to an appropriate authority for further consideration. For example, if the investigation has revealed conduct that may constitute a criminal offence, consideration should be given to whether the matter should be referred to Tasmania Police, unless this has previously occurred.

The report must be accompanied by:

- the transcript or other record of any oral evidence taken, including tape recordings; and

- all documents, statements or other exhibits received by the officer and accepted as evidence during the course of the investigation.

The report must not disclose particulars likely to lead to the identification of the discloser under s 23(2).

## **15.2 Action to be taken**

If the Principal Officer is satisfied that the conduct which was the subject of the investigation has occurred, he or she must consider the recommendations in the investigator's report and decide upon the steps which are to be taken to prevent the conduct from continuing or occurring in the future under s 75(1)(a). Again taking into consideration any recommendations in the investigator's report, the Principal Officer must also consider whether any action should be taken to remedy any harm or loss arising from the conduct under s 75(1)(b).

Where the Public Interest Disclosure Officer is responsible for the progress of the investigation and is satisfied that the disclosed conduct has occurred, he or she will recommend to the Principal Officer the action that must be taken.

The Principal Officer will provide a written report to either the Minister for Local Government or Break O'Day Council and the Ombudsman, setting out the findings of the investigation and any remedial steps taken.

Where the investigation concludes that the disclosed conduct did not occur, the Principal Officer will report these findings to the Ombudsman and to the discloser.

As required by s 77 of the Act, the Principal Officer will also inform the discloser of the findings of the investigation, and of any steps taken under s 75 as a result of the findings made.

## **16 MANAGING THE WELFARE OF THE DISCLOSER**

### **16.1 Commitment to protecting disclosers**

The Break O'Day Council is committed to the protection of genuine disclosers against detrimental action taken in reprisal for the making of protected disclosures. The Principal Officer is responsible for ensuring that disclosers and witnesses are protected from detrimental action, and that the culture of the workplace is supportive of protected disclosures being made.

The Principal Officer or the Public Interest Disclosure Officer must appoint a Welfare Manager to support all persons who have made a protected disclosure. This must occur within five (5) working days of the protected disclosure being received.

The Welfare Manager must contact the discloser as soon as possible and not more than five (5) working days after being appointed. The Welfare Office will also provide advice about what the discloser should do if they believe that a colleague/s or a relative/s is being subjected to detrimental action. The advice will include what level of information it is necessary for them to provide.

All employees will be advised that it is an offence for a person to take detrimental action in reprisal for a protected disclosure (s 19). The maximum penalty is a fine of 240 penalty units

or two years imprisonment, or both. The taking of detrimental action in breach of this provision can also be grounds for making a disclosure under the Act and can result in an investigation.

A discloser who believes that they are being subjected to detrimental action should report it to the Principal Officer or a Public Interest Disclosure Officer. If they believe that the reprisal is not being effectively dealt with by the Break O'Day Council, they may report the matter to the Ombudsman. A report of detrimental action may qualify as a protected disclosure under the Act.

## **16.2 Keeping the discloser informed**

The Principal Officer or the Public Interest Disclosure Officer must ensure that the discloser is kept informed of action taken in relation to his or her disclosure, and the time frames that apply. The discloser must be informed of the objectives of any investigation that takes place, the findings of the investigation, and the steps taken by the Break O'Day Council to address any improper conduct that has been found to have occurred.

The discloser must be given reasons for all decisions made by the Break O'Day Council in relation to a disclosure. All communication with the discloser must be in plain English.

## **16.3 Occurrence of detrimental action**

If a discloser reports an incident of detrimental action allegedly taken in reprisal for the making of a disclosure, the Welfare Manager must:

- record details of the incident;
- advise the discloser of his or her rights under the Act; and
- advise the Principal Officer of the detrimental action.

The taking of detrimental action in reprisal for the making of 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 Public Interest Disclosure Officer or the Principal Officer will assess the report as a new disclosure under the Act, and it will be dealt with accordingly.

## **16.4 Discloser implicated in improper conduct**

Where a person who makes a disclosure is implicated in misconduct, the Break O'Day Council will handle the disclosure and protect the discloser from reprisals in accordance with the Act, the Ombudsman's guidelines and these procedures. At the same time the Break O'Day Council acknowledges that the act of disclosing should not shield disclosers from the reasonable consequences flowing from any involvement in improper conduct. Section 18 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. In some circumstances, however, an admission may be a mitigating factor when considering disciplinary or other action.

The Principal Officer will make the final decision as to whether disciplinary or other action will be taken against a discloser. Where disciplinary or other action relates to conduct that is the subject of the person's disclosure, the disciplinary or other action will only be taken after the disclosed matter has been appropriately dealt with.

In all cases where disciplinary or other action is being contemplated, the Principal Officer must be satisfied that it has been clearly demonstrated that:



- the intention to proceed with disciplinary action is not causally connected to the making of the disclosure (as opposed to the content of the disclosure or other available information);
- there are good and sufficient grounds that would fully justify action against any non-discloser in the same circumstances; and
- there are good and sufficient grounds that justify exercising any discretion to institute disciplinary or other action.

The Public Interest Disclosure Officer or Principal Officer will 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 the making of the disclosure. The Public Interest Disclosure Officer or Principal Officer will clearly advise the discloser of the proposed action to be taken, and of any mitigating factors that have been taken into account.

They should advise the discloser that they can raise any concerns about the action taken being a potential reprisal with the Ombudsman.

## **17 MANAGEMENT OF THE PERSON AGAINST WHOM A DISCLOSURE HAS BEEN MADE**

Break O'Day Council recognises that employees against whom disclosures are made must also be supported during the handling and investigation of disclosures. When a person who is the subject of the disclosure is made aware of the allegations or of an investigation, they should be provided with an appropriate contact person to whom to direct queries. Information about employee assistance programs or other supports should also be provided, if appropriate.

Break O'Day Council will take all reasonable steps to ensure the confidentiality of the person who is the subject of the disclosure during the assessment and investigation process. Where an investigation does not substantiate a disclosure, the fact that the investigation has been carried out, the results of the investigation, and the identity of the person who is the subject of the disclosure will remain confidential.

The Public Interest Disclosure Officer or Principal Officer will ensure that the person who is the subject of any disclosure investigated by or on behalf of Break O'Day Council is afforded procedural fairness in accordance with these procedures.

Where the allegations in a disclosure have been investigated, and the person who is the subject of the disclosure is aware of the allegations or of the investigation, the Public Interest Disclosure Officer or Principal Officer will formally advise the person who is the subject of the disclosure of the outcome of the investigation.

Break O'Day Council will give its full support to a person who is the subject of a disclosure where the allegations contained in a disclosure are clearly wrong or unsubstantiated. If the matter has been publicly disclosed, the Principal Officer of Break O'Day Council will consider any request by that person to issue a statement of support setting out that the allegations were wrong or unsubstantiated.

## **18 OFFENCES**

The Break O'Day Council will ensure officers appointed to handle protected disclosures and all other employees are aware of the following offences created by the Act:

- **Section 19(1)**  
This provision makes it an offence for a person to take detrimental action against a person in reprisal for a protected disclosure being made. The section provides for a maximum penalty of a fine of 240 penalty units or two years imprisonment, or both.
- **Section 23(1)**  
This provision makes it an offence for a person to disclose, except under specified circumstances, information which they have obtained or received in the course of or as a result of a protected disclosure or the investigation of a disclosed matter under the Act. The section provides for a maximum penalty of 60 penalty units or six months imprisonment, or both.
- **Section 54**  
This section creates various offences relating to obstructing the work of the Ombudsman under the Act, including offences relating to misleading the Ombudsman. The section provides for a maximum penalty of 240 penalty units or two years imprisonment, or both.
- **Section 87(1)**  
This provision makes it an offence for a person to knowingly provide false information under the Act to certain officers (including the Ombudsman) with the intention that it be acted on as a disclosed matter. The provision provides for a maximum penalty of 240 penalty units or two years imprisonment, or both.
- **Section 87(2)**  
This section makes it an offence for a person to knowingly provide false information to a person conducting an investigation under the Act. The provision provides for a maximum penalty of 240 penalty units or two years imprisonment, or both.

The value of a penalty unit varies from time to time in accordance with movements in the Consumer Price Index. For more information, see the Department of Justice website.

## **19 APPROVAL AND REVIEW OF THESE PROCEDURES**

These procedures were approved by the Ombudsman under s 60(3) of the Act on 29 March 2021.

The procedures will be submitted to the Ombudsman for review at least once in each three (3) year period to ensure they meet the objectives of the Act and accord with the Guidelines and Standards published by the Ombudsman under s 38(1)(c) of the Act.

The date by which the procedures must be submitted to the Ombudsman for review is 29 March 2024.

## Assessment of disclosure form (Attachment 1)

*Public Interest Disclosures Act 2002*

**File number:**

**Date of assessment:**

**Name of assessing officer:**

### **Summary of disclosure:**

Include details of how the disclosure was received, the subject of the disclosure and details of the allegations.

An assessment of disclosure form will usually need to be completed for each disclosure. This means, for example, that if a discloser is complaining about three different public officers, this constitutes three disclosures and three assessments may be required.

## Part I: Is the disclosure a protected disclosure?

### **Question 1: Is the discloser a public officer?**

*The discloser needs to be a current public officer. See s4(2) and s4(4) of the Act for the definition of a public officer. If the discloser is anonymous, it is enough to be satisfied that the discloser is a public officer.*

*If the discloser is a contractor, member of the public or no longer a public officer at the time the disclosure is made, refer them to the Ombudsman or Integrity Commission.*

☐ Yes ☐ No

Please provide details if relevant:

### **Question 2: Is the disclosure about a public officer?**

*A disclosure can be made even if the discloser cannot identify the public officer – see s9 of the Act. If a disclosure is about the principal officer or the public body itself, refer the discloser to the Ombudsman or Integrity Commission.*

☐ Yes ☐ No

### **Question 3: Has the disclosure been made to the right person or body?**

*See s7 of the Act and reg 8 of the Public Interest Disclosures Regulations 2013.*

☐ Yes ☐ No

Please provide details:

**Question 4: Does the discloser believe that a public officer has, is or proposes to engage in improper conduct?**

☐ Yes ☐ No

If no, provide details:

**Question 5: Does the disclosure relate to improper conduct?**

Is the disclosure about conduct that could objectively fall within one of the categories of improper conduct, i.e:

- conduct that constitutes an illegal or unlawful activity; or
- corrupt conduct; or
- conduct that constitutes maladministration; or
- conduct that constitutes professional misconduct; or
- conduct that constitutes a waste of public resources; or
- conduct that constitutes a danger to public health or safety or to both public health and safety; or
- conduct that constitutes a danger to the environment; or
- misconduct, including breaches of applicable codes of conduct; or
- conduct that constitutes detrimental action against a person who makes a public interest disclosure under this Act –

that is serious or significant as determined in accordance with guidelines issued by the Ombudsman?

*For example, a discloser may believe that taking a non-confidential work file home is serious or significant improper conduct but it may not objectively fall within that definition.*

☐ Yes ☐ No

Please provide details:

**Question 6: Does the disclosure concern conduct that occurred on or after 1 January 2001?**

*This is the only time limitation that is relevant when assessing if a disclosure is a protected disclosure. Delays in making a disclosure any time on or after 1 January 2001 can be relevant when deciding whether to investigate a public interest disclosure under s64 of the Act.*

☐ Yes ☐ No

- **Assessment of Answers to Part 1 Questions**

If **ALL** the answers to the above are yes, the disclosure is a protected disclosure.

The discloser should be notified as soon as possible, if the disclosure is a protected disclosure and the assessment of whether it is a public interest disclosure has not been undertaken simultaneously.

If **ANY** of the answers to the above are no, the disclosure is not protected and the Act does not apply. Refer the discloser to the appropriate body and/or handle the matter under complaint or grievance policies.

In either case, the discloser should be given reasons in writing. A copy of the assessment should be given to the Principal Officer without delay, where the person who carried out the assessment is not the Principal Officer.

## Part 2: Should the protected disclosure be referred to the Integrity Commission?

Does the disclosure relate to misconduct, as defined in the *Integrity Commission Act 2009*?

☐ Yes ☐ No

If yes, should the disclosure be referred to the Integrity Commission under section 29B of the Act?

☐ Yes ☐ No

If yes, please provide details

*If the disclosure is referred, the assessment process is complete after the discloser is notified of the referral.*

## Part 3: Is the protected disclosure a public interest disclosure?

Are you satisfied that the protected disclosure shows, or tends to show, that the public officer to whom the disclosure relates –

- a) has engaged, is engaged or proposes to engage in improper conduct in his or her capacity as a public officer; or
- b) has taken, is taking or proposes to take detrimental action in contravention of s 19 of the Act?

*A mere allegation without substantiation is not sufficient – the disclosure must contain evidence or point to its existence (name documents, refer to potential witnesses etc) that shows or tends to show that the public officer is, has, or is proposing to engage in improper conduct.*

*This determination under s33 of the Act must be made within 45 days of the disclosure being received.*

☐ Yes ☐ No

Provide reasons for your decision and attach evidence if available

- **Next steps**

Notify the discloser and the Ombudsman of the assessment determination. Use the notification template attached to the public interest disclosure procedures when notifying the Ombudsman.

If the answer is no, the assessment is complete and Part 4 does not need to be completed. The Ombudsman will review the determination.

If the answer is yes, the public interest disclosure must be investigated unless a ground exists not to under s64 of the Act.

## Part 4 - Is there a ground under s64 not to investigate the public interest disclosure?

**Question 1: Is the public interest disclosure trivial, vexatious, misconceived or lacking in substance?**

☐ Yes ☐ No

If yes, provide details. Compelling reasons will be required to justify not investigating on this ground:

**Question 2: Has the subject matter of the public interest disclosure already been adequately dealt with by the Ombudsman or a public body, statutory authority, Commonwealth statutory authority, commission, court or tribunal?**

☐ Yes ☐ No

If yes, please provide details

**Question 3: Has the discloser commenced proceedings in a commission, court or tribunal in relation to the same matter, and does that commission, court or tribunal have power to order remedies similar to those available under this Act?**

☐ Yes ☐ No

If yes, please provide details

**Question 4: Did the discloser:**

- have knowledge for more than 12 months of the public interest disclosure matter before making the disclosure; and
- fail to give a satisfactory explanation for the delay in making the disclosure?

☐ Yes      ☐ No

If yes, provide details of this issue being put to the discloser and analysis concerning why any explanation provided was not satisfactory:

**Question 5: Does the public interest disclosure relate solely to the personal interests of the discloser?**

☐ Yes      ☐ No

*Most disclosures will contain some element of personal interest. This should only be used as a basis to not investigate in clear circumstances.*

If yes, please provide details:

**Question 6: Is the public interest disclosure based on false or misleading information?**

☐ Yes      ☐ No

If yes, please provide details and consider whether an offence may have been committed under s87 of the Act.

**Question 7: Has the matter the subject of the public interest disclosure already been determined AND this additional disclosure fails to provide significant or substantial new information?**

☐ Yes      ☐ No

If yes, please provide details



- **Assessment of Answers to Part 4 Questions**

If the answers to **ALL** the questions in Part 4 are no, the disclosure **must** be investigated in accordance with the public interest disclosure procedures. Referral to the Ombudsman can occur if internal investigation is not possible or appropriate.

If the answer is yes to **one or more of the above questions**, will the public interest disclosure be investigated?

*Although the public interest disclosure may not need to be investigated if an answer to any of the Part 4 questions is yes, it may still be appropriate to investigate in some circumstances.*

☐ Yes      ☐ No

Provide reasons for your decision:

Notify the discloser and the Ombudsman if it is decided not to investigate. The Ombudsman will review the decision. Use the notification template attached to the public interest disclosure procedures when notifying the Ombudsman.

## Summary

Part	Question	Answer
Part 1	Is the disclosure a protected disclosure?	
Part 2	Should the protected disclosure be referred to the Integrity Commission?	
Part 3	Is the protected disclosure a public interest disclosure?	
Part 4	Should the public interest disclosure be investigated?	

## Approval

**Approved by:**

Name of Public Interest Disclosure Officer or Principal Officer:

**Date of approval:**

## Risk assessment template (Attachment 2)

*Public Interest Disclosures Act 2002*

**File number:**

**Date of assessment:**

**Name of assessing officer:**

### Risk assessed to:

**Please select all relevant options**

- |  |  |
|--|--|
| <input type="checkbox"/> Discloser                     | <input type="checkbox"/> Other employees including potential witnesses         |
| <input type="checkbox"/> Your public body              | <input type="checkbox"/> Other (e.g. Tasmanian Government, the general public) |
| <input type="checkbox"/> The subject of the disclosure |  |

### Type of risk / possible harm

Such as:

- Adverse employment action
- Workplace injury
- Physical violence
- Verbal abuse
- Stress
- Untenable work environment
- Withdrawal of cooperation due to fear of reprisal/lack of support
- Reputational damage
- Risk to public safety
- Misuse of public funds
- Disruption to functioning of public body

**Please provide details:**

### Likelihood risk/s will occur

- ☐ Unlikely
- ☐ Possible
- ☐ Likely

- **Considerations:**

- Can confidentiality be maintained?
- Is the discloser (or others) concerned about reprisals?
- How many public officers are involved in the alleged improper conduct?
- What is their level of seniority?
- What is the seriousness of the alleged conduct?
- Is there a history of conflict in the workplace?

**Please provide your reasons:**

## Seriousness of consequences if risk/s occurs

- ☐ Minor
- ☐ Moderate
- ☐ Major

- **Considerations:**

- What is the potential impact if the risk occurs?
- Will the impact be limited, with the person able to readily deal with it?
- Will the impact have consequences which will affect the person's work or their personal and home life?
- Will the consequences be short-term, medium-term or long-term?

**Please provide your reasons:**

## Evaluation of level of risk

Risk occurrence	Minor consequence	Moderate consequence	Major consequence
Unlikely	Low	Low	Medium
Possible	Low	Medium	High
Likely	Medium	High	High

**Determine your level of risk:**

## Steps needed to mitigate risk

Consult with discloser and other parties as required. Possible strategies include:

- maintaining confidentiality as much as possible
- ensuring all parties are aware of their obligations
- when the identity of the discloser will be known or guessed by the subject of the disclosure and/or associates, proactively identifying the discloser (with their written permission) and advising relevant parties of the consequences of taking reprisal action and that their actions are being monitored
- altering reporting structures
- increasing monitoring of the work environment
- standing down the subject of the disclosure
- temporarily relocating the subject of the disclosure or the discloser to a different location/ role
- independently verifying the work performance of the discloser
- providing access to specialist support services if required
- making a statement to all staff or the media to address concerns

**Please provide details:**

## Action to be taken

- **Considerations:**

- risk rating
- ease or difficulty of mitigating risk
- financial cost of taking action
- consequences of not taking action should risk occur

**Please provide details of your risk action plan:**

## Approval

**Approved by:**

Public Interest Disclosure Officer or Principal Officer – Type Name

**Date of approval**

## Risk assessment review

Risk assessment to be reviewed on (date) or when (event) occurs.

**Name of reviewing officer:**

**Date of assessment:**

- **Notes on changes to risk since last assessment**

- **Review outcome**

☐ No change to action plan

☐ Further action required

**Please provide details:**

## Ombudsman notification template (Attachment 3)

*Public Interest Disclosures Act 2002*

**Public body name:**

**Date of disclosure:**

**Contact person:** *(include telephone and email contact details)*

**Date of s 33 determination:** *(to be made within 45 days of date of disclosure)*

**Date of notification:**

### Notification type

- ☐ Section 34 – Determination that disclosure is a public interest disclosure  
*Notification to be made within 14 days of decision*
- ☐ Section 35 – Determination that disclosure is not a public interest disclosure  
*Notification to be made within 14 days of decision*
- ☐ Section 65 – Decision not to investigate public interest disclosure under s 64  
*Notification to be made within 14 days of decision*
- ☐ Section 76 – Findings of investigation and steps taken under s 75  
*Investigation to be completed within 6 months unless Ombudsman extension granted*

### Evidence attached

- ☐ Copy of original disclosure or record of oral disclosure
- ☐ Disclosure assessment
- ☐ Risk assessment/s
- ☐ Investigation report including:
  - the transcript or other record of any oral evidence taken, including audio or video recordings; and
  - all documents, statements or other exhibits received by the investigator and accepted as evidence during the course of the investigation.
- ☐ Any other material used to make determination (list):

# Disclosure to a Public Body (Attachment 4 to Model Procedures)





