



***WHISTLEBLOWERS PROTECTION ACT 2001***

**GUIDELINES**

**November 2001**

p\Whistleblower\Guidelines\_Mk2

## TABLE OF CONTENTS

### PART A – COMPLIANCE REQUIREMENTS FOR PUBLIC BODIES

<b>1. OBJECTS OF THE ACT .....</b>	<b>6</b>
<b>2. THE ROLE OF THE OMBUDSMAN .....</b>	<b>6</b>
<b>3. KEY TERMS AND CONCEPTS .....</b>	<b>6</b>
3.1 Who is subject to the Act?: public bodies and public officers .....	6
3.2 Improper conduct .....	8
3.2.1 Corrupt conduct .....	8
3.3 Detrimental action .....	8
<b>4. HOW DO PUBLIC BODIES COMPLY WITH THE ACT? .....</b>	<b>8</b>
4.1 Establishing written procedures.....	8
4.2 Establishing a reporting system.....	9
4.2.1 Introduction .....	9
4.2.2 Roles and responsibilities of those involved in the internal reporting system..	10
<b>5. ENSURING CONFIDENTIALITY .....</b>	<b>10</b>
5.1 Statutory requirements.....	10
5.2 Maintaining confidentiality to avoid reprisals .....	11
5.3 Establishing a confidential electronic and paper filing system .....	11
<b>6. COLLATING AND PUBLISHING STATISTICS .....</b>	<b>11</b>
6.1 Statutory requirements.....	11
6.2 Establishing a register .....	12
<b>7. RECEIVING AND ASSESSING DISCLOSURES .....</b>	<b>12</b>
7.1 Introduction.....	12
7.2 Has the disclosure been made in accordance with Part 2 of the Act? .....	13
7.2.1 How can a protected disclosure be made?.....	14
7.2.2 To whom must a protected disclosure be made? .....	14
7.2.3 Main elements of a protected disclosure .....	14
7.3 Is the disclosure a public interest disclosure? .....	15
7.3.1 Statutory requirements.....	15
7.3.2 To show or tend to show improper conduct or detrimental action .....	15
7.3.3 The disclosure should be in writing.....	16
7.4 Action following assessment of public interest disclosure .....	16
7.5 Flowchart.....	16
<b>8. INVESTIGATIONS .....</b>	<b>18</b>
8.1 Introduction.....	18
8.2 Who can carry out the investigation? .....	18
8.3 Investigation by a public body.....	18

8.4	Terms of reference and authorisation.....	19
8.5	Preparation of investigation plan .....	19
8.6	Natural justice.....	20
8.7	Recording information.....	21
8.8	Confidentiality requirements.....	21
8.9	Powers with respect to witnesses .....	22
8.10	Legal representation and other support to witnesses .....	22
8.11	Immunity from disciplinary action.....	22
8.12	Criminal conduct .....	23
8.13	The Ombudsman may take over the investigation .....	23
8.14	Reporting requirements.....	24
<b>9.</b>	<b>ACTION TAKEN AFTER AN INVESTIGATION.....</b>	<b>24</b>
9.1	Investigator’s report of findings .....	24
9.2	Action to be taken by the public body after an investigation.....	25
<b>10.</b>	<b>MANAGING THE WELFARE OF THE WHISTLEBLOWER.....</b>	<b>26</b>
10.1	Introduction.....	26
10.2	Internal and external whistleblowers .....	26
10.3	Statutory protections .....	27
10.4	Administrative protections .....	27
	10.4.1 <i>Appointing a welfare manager</i> .....	27
	10.4.2 <i>Reporting back</i> .....	28
	10.4.3 <i>Ensuring confidentiality</i> .....	28
10.5	Managing expectations.....	28
10.6	Occurrence of detrimental action .....	29
10.7	Consequences for whistleblowers implicated in improper conduct .....	29
<b>11.</b>	<b>MANAGEMENT OF THE PERSON AGAINST WHOM A DISCLOSURE IS MADE .....</b>	<b>30</b>
11.1	Confidentiality.....	30
11.2	Natural justice.....	30
11.3	Information as to rights and obligations .....	30
11.4	Notification of findings of any investigation .....	31
11.5	Unsubstantiated allegations .....	31
<b>12.</b>	<b>CRIMINAL OFFENCES .....</b>	<b>31</b>
<b>1.</b>	<b>CONTACT DETAILS.....</b>	<b>31</b>
<b>14.</b>	<b>COMMON QUESTIONS.....</b>	<b>32</b>
14.1	What is the purpose of the Whistleblowers Protection Act 2001?.....	32
14.2	When does the Act come into force? .....	32
14.3	Who is a whistleblower?.....	32

14.4	What is a disclosure? .....	32
14.5	What disclosures are protected under the Act? .....	32
14.6	What disclosures are investigated under the Act?.....	33
14.7	To whom can a disclosure be made?.....	33
14.8	How can a disclosure be made?.....	33
14.9	When can a disclosure be made?.....	33
14.10	Is it mandatory to make a disclosure? .....	34
14.11	Can the whistleblower appeal a decision not to investigate a disclosure? .....	34
14.12	How is a whistleblower protected from reprisals? .....	34
14.13	Is a person entitled to protection before the Ombudsman makes a determination that a disclosure is a public interest disclosure? .....	35
14.14	For how long is a whistleblower protected? .....	35
14.15	Is the identity of the person making the disclosure confidential?.....	35
14.16	Who will carry out the investigation?.....	36
14.17	Does information given by a witness during an investigation become a protected disclosure? .....	36
14.18	Will vexatious or frivolous disclosures be investigated? .....	36
14.19	What must public bodies do to comply with the Act?.....	36
14.20	When must public bodies have procedures in place? .....	37
14.21	What notification do whistleblowers receive about action taken in relation to a disclosure made? .....	37
14.22	Where further information is sought by a public body from a person who makes a disclosure, is that information protected? .....	37

## **Annexure A – MODEL PROCEDURES**

## Acknowledgment

These Guidelines have been based on Guidelines published in November 2001 by the Ombudsman. Dr Barry Perry. The Guidelines have been adapted to suit particular requirements at the City of Yarra. The Ombudsman's Guidelines are available in full on the Ombudsman's website - [ombudsman.vic.gov.au](http://ombudsman.vic.gov.au)

In releasing his Guidelines, Dr Perry said:

“The Victorian Ombudsman, Dr Barry Perry, acknowledges and appreciates the assistance provided by the NSW Ombudsman, Mr Bruce Barbour, in making the *Protected Disclosure Guidelines* published under the NSW *Protected Disclosure Act 1994* (reprint October 2000) available as a model for the development of these guidelines. The Queensland Criminal Justice Commission is also acknowledged for allowing these guidelines to include an excerpt from its publication *Exposing Corruption – A CJC guide to whistleblowing in Queensland*, published in October 1996”.

# Part A – COMPLIANCE REQUIREMENTS FOR PUBLIC BODIES

## 1. Objects of the Act

The main objective of the *Whistleblowers Protection Act 2001* (“the Act”) is to encourage and facilitate the making of disclosures of improper conduct or detrimental action by public officers and public bodies. The Act provides protection to whistleblowers who make disclosures in accordance with the Act, and establishes a system for the matters disclosed to be investigated and for rectifying action to be taken.

## 2. The role of the Ombudsman

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

- preparing and publishing guidelines to assist public bodies in interpreting and complying with the Act;
- reviewing written procedures established by public bodies and making recommendations in relation to those procedures;
- determining whether a disclosure warrants investigation;
- investigating disclosures;
- 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;
- reporting to Parliament where public bodies fail to implement recommendations made by the Ombudsman at the conclusion of an investigation;
- collating and publishing statistics about disclosures handled by the Ombudsman; and
- educating and training public bodies.

## 3. Key terms and concepts

### 3.1 *Who is subject to the Act?: public bodies and public officers*

A whistleblower may make a disclosure about improper conduct by public bodies and public officers. The Act defines public bodies and public officers broadly.

Public bodies include:

- all government departments and administrative offices;
- statutory authorities;
- municipal councils:
- government-appointed boards and committees;
- government-owned companies;
- universities;
- TAFE colleges;
- public hospitals;
- state-funded residential care services;
- health services contractors; and
- correctional services contractors.

Public bodies excluded from the Act are courts, boards, tribunals, commissions and other bodies presided over by a judge, magistrate or legal practitioner appointed by virtue of a statutory requirement.

Public officers include:

- members of parliament;
- councillors;
- council employees;
- public servants;
- university employees
- police officers;
- protective services officers;
- administrative staff of the Chief Commissioner of Police;
- teachers; and
- officer holders appointed by Governor in Council or a Minister.

The public officers excluded from the Act are members of the judiciary, the Director of Public Prosecutions, Auditor-General, Ombudsman, Electoral Commissioner, and parliamentary and judicial staff.

The role of public bodies includes:

- promoting the policy of the Act to staff members;
- establishing and publishing written procedures;
- receiving and assessing disclosures of improper conduct;
- referring disclosures to the Ombudsman;
- carrying out investigations referred by the Ombudsman;
- taking action in response to findings that improper conduct has occurred;
- protecting whistleblowers from reprisals; and
- collating and publishing statistics about disclosures received.

### **3.2 *Improper conduct***

A disclosure may be made about improper conduct by a public body or public official. Improper conduct is defined in section 3 of the Act to mean conduct that is corrupt, a substantial mismanagement of public resources, or conduct involving substantial risk to public health or safety or to the environment. The conduct must be serious enough to constitute, if proved, a criminal offence or reasonable grounds for dismissal.

#### **3.2.1 Corrupt conduct**

Corrupt conduct is defined by section 3 of the Act to mean:

- conduct of any person (whether or not a public official) that adversely affects the honest performance of a public officer's or public body's functions;
- the performance of a public officer's functions dishonestly or with inappropriate partiality;
- conduct of a public officer, former public officer or a public body that amounts to a breach of public trust;
- conduct by a public officer, 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 official functions; or
- a conspiracy or attempt to engage in the above conduct.

### **3.3 *Detrimental action***

The Act creates an offence for a person to take detrimental action against a person in reprisal for a protected disclosure. Section 3 of the Act defines detrimental action to include:

- 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.

## **4. How do public bodies comply with the Act?**

### **4.1 *Establishing written procedures***

The City of Yarra has established written procedures for handling disclosures made under the Act. Those procedures are contained in these Guidelines and accompanying Annexure. These procedures will be in place as soon as it is practicable after the commencement of the Act on 1 January 2002. The procedures facilitate the making of disclosures, the investigation of disclosures, and the protection of whistleblowers from reprisals by the Council or any officer, member or

employee of the Council. The written procedures are in accordance with the Act and these guidelines.

The Council has made a copy of its written procedures available to each of its councillors and staff, and a copy is available for inspection by members of the public during normal office hours free of charge.

The following list of matters is included in Council's procedures 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. Yarra's detailed reporting procedure is set out in annexure A.

#### **Contents of whistleblower protection procedures**

1. Statement of support for whistleblowers
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. Investigations
11. Action taken after investigations
12. Managing the welfare of the whistleblower
13. Management of the person against whom the disclosure is made
14. Criminal offences

## **4.2 Establishing a reporting system**

### 4.2.1 Introduction

The City of Yarra has established a system for the reporting, assessment and investigation of whistleblower disclosures. This system is centralised because a centralised system of handling disclosures involves a small number of officers who report directly to the Chief Executive Officer.

The benefits of a centralised system include:

- fewer people handling disclosures enhances confidentiality and thereby reduces the likelihood of reprisals being taken against whistleblowers;
- direct involvement of senior management in the reporting system appropriately reflects the seriousness of whistleblower 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;
- whistleblower allegations sometimes concern the whistleblower's supervisor. A devolved model of reporting may therefore create a conflict of interest by

- involving that supervisor in the assessment and investigation of any disclosure;  
and
- a centralised system requires the training of fewer staff.

This internal reporting system will:

- encourage staff to raise matters of concern internally rather than making disclosures directly to the Ombudsman;
- provide a reporting channel for disclosures that may otherwise never be reported;
- ensure disclosures by whistleblowers are properly and appropriately assessed and acted upon; and
- ensure the protection of the Act is fully available to all internal and external whistleblowers.

#### 4.2.2 Roles and responsibilities of those involved in the internal reporting system

Yarra's internal reporting policy identifies the officers who will be involved in the internal reporting system and describes their individual roles.

There are five chief requirements of Yarra's reporting system:

- ensuring senior executive staff are involved and retain oversight;
- keeping the roles of assessment and investigation of a disclosure distinct from welfare management of the whistleblower;
- identifying clear contact points for reporting whistleblower disclosures, including all relevant mail, phone calls and emails;
- providing an alternative contact for the making of a disclosure where the nominated protected disclosure officer is unavailable or implicated in the allegation; and
- ensuring a disclosure about the chief executive officer of a public body is immediately referred to the Ombudsman.

At Yarra, the Manager Governance, Tim Brown (9205 5110) has been appointed to carry out the requisite functions under the Act.

The general criteria for this appointment was:

- direct access to the CEO;
- sufficient seniority and status;
- training on requirements of the Act and these guidelines; and
- skills and experience.

## 5. Ensuring confidentiality

### 5.1 *Statutory requirements*

Section 22 of the Act requires any person who receives information due to the handling or investigation of a protected disclosure, not to disclose that information except in certain limited circumstances. Disclosure of information in breach of

section 22 constitutes an offence punishable by a maximum fine of 60 penalty units (\$6000) or six months imprisonment or both.

The circumstances in which a person may disclose information obtained about a protected disclosure 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; and
- 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 whistleblower. The Act also prohibits the identification of the person who is the subject of the disclosure in any particulars included in an annual report.

As a further assurance of confidentiality, a person cannot obtain information about a protected disclosure by application under the *Freedom of Information Act 1982*.

## **5.2 Maintaining confidentiality to avoid reprisals**

Council will protect whistleblowers from reprisals for making a protected disclosure. Maintaining the confidentiality of the identity of the whistleblower is the best way of preventing reprisals being made. Whistleblowers are advised that it is in their own interests to keep disclosures confidential.

See section 10 for more information about protection of the whistleblower.

## **5.3 Establishing a confidential electronic and paper filing system**

Council will ensure that all files, whether paper or electronic, are secure and can only be accessed by authorised officers. All printed material will be kept in files that are clearly marked as a Whistleblower Protection Act matter and warn of the criminal penalties that apply to any unauthorised divulging of information concerning a protected disclosure.

# **6. Collating and publishing statistics**

## **6.1 Statutory requirements**

In accordance with the Act, Yarra's future annual report will include the written procedures established for whistleblower matters, and a range of details about protected disclosures that have been made to that body in the reporting year. These details include:

- the number and types of disclosures made during the year;
- the number of disclosures referred to the Ombudsman for determination as to whether they are public interest disclosures;
- the number and types of disclosed matters referred to the Council by the Ombudsman for investigation;

- the number and types of disclosed matters referred by the Council to the Ombudsman for investigation;
- the number and types of investigations taken over from the Council by the Ombudsman;
- the number of requests made by a whistleblower to the Ombudsman to take over an investigation by the Council;
- the number and types of disclosed matters that the Council has declined to investigate;
- the number and types of disclosed matters that were substantiated upon investigation and the action taken on completion of the investigation; and
- any recommendations made by the Ombudsman that relate to the Council.

## **6.2 Establishing a register**

Council has established a secure register to record the information required to be published in an annual report, and to generally keep account of the status of whistleblower disclosures. The register is the responsibility of the Manager Governance and is confidential. The register does not record information that may identify the whistleblower.

# **Part B – HANDLING A PROTECTED DISCLOSURE**

## **7. Receiving and assessing disclosures**

### **7.1 Introduction**

This section deals with the Council's responsibilities when it receives a disclosure about improper conduct.

Council may receive a range of complaints and grievances from staff and members of the public. Only some of these matters will qualify for protection and investigation under the Act. The task for the Council is to ensure the appropriate policy and procedure are applied to the particular circumstances of the case. *Table 1* sets out the alternative mechanisms available at Yarra for dealing with possible complaints or allegations.

<b>Problem</b>	<b>Initial contact</b>	<b>Other options</b>	<b>Workplace policy</b>
Workplace conflicts or grievances	Supervisor or manager	Grievance registrar	Grievance policy or dispute handling policy
Equal opportunity concerns	Supervisor or manager	EO Officer or EO Commission	Equal opportunity policy
Occupational health and safety	Supervisor or manager	OH&S representative	OH&S policy
Ethical or other misconduct concerns	Supervisor or manager	Office of Public Employment	VPS Code of Conduct
Improper conduct or detrimental action*	Protected disclosure officer	The Ombudsman	Whistleblower Protection Act procedures
Complaints re administrative action by government bodies	The public body concerned	The Ombudsman	<i>Ombudsman Act 1973</i>

**Table 1**

\* *Corrupt conduct, substantial mismanagement of public resources, conduct involving substantial risk to public safety or health or to the environment, or detrimental action taken in reprisal for the making of a disclosure about the above matters.*

Due to the confidentiality requirements for whistleblower disclosures, Council has established a reporting system that enables a possible whistleblower disclosure to be identified as early as possible. Early identification of disclosures will enable them to be referred directly to a protected disclosure officer or the protected disclosure coordinator for assessment. The source of possible whistleblower disclosures include:

- correspondence;
- phone calls;
- emails; and
- in person approaches by staff or members of the public.

Mail centres, front desk staff, online services units and all employees need to be aware of the general nature of whistleblower disclosures and the established reporting channels.

## **7.2 Has the disclosure been made in accordance with Part 2 of the Act?**

When Council receives a complaint or report or allegation of improper conduct or detrimental action, the first step is to determine whether the matter falls under the Act. Disclosures that come under the Act must be made in accordance with Part 2 of the Act. Disclosures made under Part 2 of the Act are called protected disclosures.

There will be situations where Council receives an allegation of improper conduct or detrimental action, but the person making the allegation has not referred to the Act.

In these cases, the Manager Governance will advise that person that he or she may wish to make a disclosure under the Act due to the protections it provides to genuine whistleblowers. Guidance in how to make the disclosure in accordance with the Act will be provided.

### 7.2.1 How can a protected disclosure be made?

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

- orally;
- in writing; or
- anonymously.

A disclosure may be made about conduct that has occurred before the commencement of the Act on 1 January 2002, and where the person cannot identify the person or body to whom the disclosure relates.

### 7.2.2 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 the employs the person who is the subject of the disclosure, or to the Ombudsman.

Therefore, Council can only receive disclosures that relate to the conduct of its own councillors or staff. If Council 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. If this occurs, the Manager Governance will advise the person making the disclosure of the correct person or body to whom the disclosure must be made. Where the disclosure has been made anonymously, it will be referred to the Ombudsman.

*Table 2* sets out the requirements for directing a disclosure.

<b>Person who is the subject of the disclosure</b>	<b>Person/body to whom the disclosure must be made</b>
A Council staff member	That Chief Executive Officer.
Councillor	The Ombudsman

*Table 2*

### 7.2.3 Main elements of a protected disclosure

Where Council receives information relating to the conduct of a councillor or staff member, it must assess whether the disclosure meets 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 the Council 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 ?

See 3.2–3.4 for a definition of improper conduct and detrimental action.

If one or more of the above elements are not satisfied, the person has failed to make a disclosure under the Part 2 of the Act; for example:

- where there was an allegation of corrupt conduct by the public officer, but not in his or her official capacity as a public officer;
- where the person cannot provide evidence to demonstrate that he or she had reasonable grounds for believing the conduct has occurred; or
- where the alleged conduct does not constitute improper conduct or detrimental action taken against a person in reprisal for making a protected disclosure.

Where a person has failed to make a disclosure under Part 2 of the Act, no further action need be taken under the Act. The alleged conduct may, however, still warrant examination by the Council. Alternatively, it may be appropriate to advise the complainant of alternative avenues of redress. Please refer to *Table 2*.

Where the Council 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. The next step requires the Council to assess whether the protected disclosure is a public interest disclosure.

### **7.3 Is the disclosure a public interest disclosure?**

#### **7.3.1 Statutory requirements**

Where the Council has received a disclosure that has been made in accordance with Part 2 of the Act (a protected disclosure), it must assess whether the disclosure amounts to a public interest disclosure. This assessment must be made within 45 days of the receipt of the disclosure.

In reaching a conclusion as to whether a protected disclosure is a public interest disclosure, the Council must consider whether 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.

#### **7.3.2 To show or tend to show improper conduct or detrimental action**

Uncertainty about whether an allegation amounts to a public interest disclosure may arise in relation to demonstrating that improper conduct or detrimental action has taken place. To assess whether a disclosure shows or tends to show that a public

officer has engaged in improper conduct, the Council must be satisfied that there is sufficient supporting material to demonstrate that the conduct has actually occurred. A mere allegation with no supporting evidence is not sufficient.

7.3.3 The disclosure should be in writing

#### **7.4 Action following assessment of public interest disclosure**

Where the Council concludes that the disclosure amounts to a public interest disclosure, it must:

- notify the person who made the disclosure of that conclusion; and
- refer the disclosure to the Ombudsman for formal determination as to whether it is indeed a public interest disclosure.

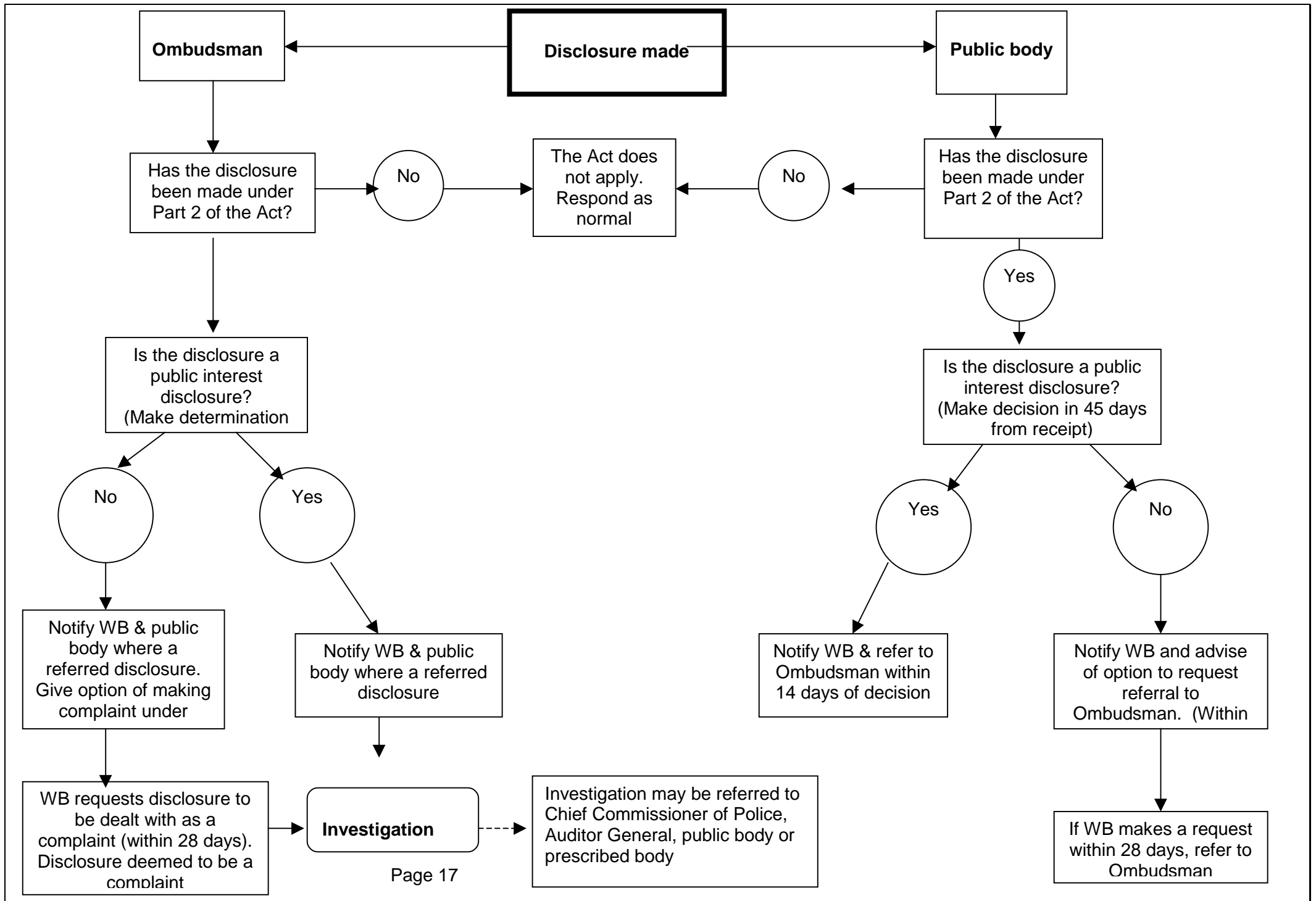
Where the Council concludes that the disclosure is not a public interest disclosure, it must:

- notify the person who made the disclosure of that conclusion; and
- advise that person that he or she may request the Council to refer the disclosure to the Ombudsman for a formal determination as to whether the disclosure is a public interest disclosure, and that this request must be made within 28 days of the notification.

In either case, the Council must make the notification and the referral within 14 days of reaching its conclusion.

#### **7.5 Flowchart**

The flowchart below represents the assessment and referral process. WB stands for the whistleblower (or person who makes the disclosure).



## **8. Investigations**

### **8.1 Introduction**

Where the Ombudsman determines a protected disclosure to be a public interest disclosure, the matter will proceed to investigation. The Ombudsman makes this determination for disclosures that are referred by public bodies and disclosures made directly to the Ombudsman. Therefore, it is the Ombudsman who always determines whether an investigation will take place.

The Ombudsman will notify the Council and whistleblowers of the determination made and whether an investigation will take place. Where the Ombudsman has determined a matter not to be a public interest disclosure, he will advise the person who made the disclosure of the option of having the matter dealt with as a complaint under the *Ombudsman Act 1973* or the *Police Regulation Act 1958*. A person must request that the matter be dealt with as a complaint under either Act within 28 days of being given notice. Allegations or complaints that are determined not to be a public interest disclosure may still warrant investigation and a response by a public body under its normal complaints handling mechanisms.

### **8.2 Who can carry out the investigation?**

The Ombudsman will either investigate a public interest disclosure or refer the investigation to the following officers and bodies, where it is appropriate to do so:

- the Chief Commissioner of Police;
- the Auditor-General;
- the Deputy Ombudsman;
- other bodies prescribed in the regulations; or
- a public body, where the matter relates to an employee, officer or member of that body.

Where the Ombudsman refers an investigation, the Ombudsman must notify the person who made the disclosure of the referral.

### **8.3 Investigation by a public body**

Where the Ombudsman has referred an investigation to a public body, the public body must carry out the investigation in compliance with the Act, these guidelines and the established procedures of that public body.

The objectives of an investigation should be to:

- collate information relating to the allegation as quickly as possible. This may involve taking steps to protect or preserve documents, materials and equipment;
- consider the information collected and draw conclusions objectively and impartially;
- maintain procedural fairness in the treatment of witnesses and the person who is the subject of the disclosure; and

- make recommendations arising from the conclusions drawn concerning remedial or other appropriate action.

#### **8.4 Terms of reference and authorisation**

Before commencing an investigation, the Manager Governance will draw up terms of reference and obtain authorisation for those terms by the Chief Executive Officer. The setting of terms of reference is crucial to the successful conduct of inquiries as they establish a focus and set limits for an investigation. The setting of terms of reference obliges the Council to clarify the key issues to which the disclosure gives rise.

The terms of reference will set a date by which the investigation report is concluded. They should take into account the practicalities of the investigation and ensure sufficient resources are available to the investigator to complete the investigation within the time set. A mechanism should be established to enable the extension of time where reasonable circumstances exist. Such extensions of time should only be approved by the CEO.

The terms of reference should provide for the adequate monitoring of the investigation by the CEO. Monitoring should ensure the investigation maintains its relevance to the allegations and is being carried out effectively and efficiently. If the Ombudsman is not satisfied with an investigation by a public body, the Ombudsman may take it over (see 8.10).

#### **8.5 Preparation of investigation plan**

The investigator should prepare an investigation plan. The plan will require the elements of the allegation to be clarified. It should list the issues to be substantiated and describe the avenue of inquiry. A plan should address the following issues:

- what is being alleged?
- what are the possible findings or offences?
- what are the facts in issue?
- how is the inquiry to be conducted?
- what resources are required?

The Manager Governance will obtain all documents relevant to the allegation prior to conducting interviews. This familiarises the investigator with the issues of the case and allows witnesses (including the whistleblower) to identify and explain documents during the interview process.

At the commencement of the investigation, the whistleblower should be:

- notified by the investigator that he or she has been appointed to conduct the investigation;
- asked to clarify any matters; and
- asked to provide any additional material he or she might have.

See section 10 for more information about managing the welfare of the whistleblower.

## 8.6 *Natural justice*

The principles of natural justice should be followed in any investigation of a public interest disclosure. The principles of natural justice concern procedural fairness and aim to ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals, and enhances public confidence in the process.

The Council will have regard to the following issues in ensuring procedural fairness:

- the person who is the subject of the disclosure is entitled to know the allegations made against him or her and must be given the right to respond. (This does not mean the person must be advised of the allegation as soon as the disclosure is received or the investigation has commenced);
- if the investigator is contemplating making a report adverse to the interests of any person, that person should be given the opportunity to put forward further material that may influence the outcome of the report and that person's defence should be fairly set out in the report;
- all relevant parties to a matter should be heard and all submissions should be considered;
- a decision should not be made until all reasonable inquiries have been made;
- the investigator or any decision maker should not have a personal or direct interest in the matter being investigated;
- all proceedings must be carried out fairly and without bias. Care should be taken to exclude perceived bias from the process; and
- the investigator must be impartial in assessing the credibility of the whistleblowers and any witnesses. Where appropriate, conclusions as to credibility should be included in the investigation report.

## **8.7 Recording information**

The Council may accept written statements from a witness. The statement should include the witness's name, address and occupation, and each page should be signed. The last page should be signed below the final paragraph.

## **8.8 Confidentiality requirements**

Confidentiality requirements demand that strict security should surround the conduct of an investigation into a public interest disclosure. All interviews should be conducted in private, and care should be taken to avoid any unauthorised divulging of information about the disclosed matter during the investigation process. All information obtained should be placed on a confidential file that is stored securely in a location only accessible by authorised officers. Any tapes or other relevant materials should also be kept in this secure location.

Whistleblowers will often be anxious about the prospect of information about their disclosures being revealed. The investigator should assure the whistleblower that his or her identity will be protected as much as possible at all times. The whistleblower should be advised of the protection afforded by the Act and of the procedures that are in place to ensure confidentiality will be maintained. Any interviews with the whistleblower should be arranged discreetly and, possibly, away from the workplace to avoid the whistleblower being identified. It may assist the investigation if witnesses are informed in general terms of the reason for the investigation. The whistleblowers should be advised by the investigator of the need to disclose the reason for the investigation to any witness.

However, there will be cases where it will be impossible to protect the identity of the whistleblower. For example, a case may arise where it is well known within an organisation that only the whistleblower could have access to the information in the disclosure. In these circumstances, the whistleblower must be made aware that to investigate a matter, his or her identity will probably be revealed. While confidentiality may not be able to be maintained, the whistleblower is still afforded the various protections in the Act and should have a welfare manager appointed to his or her case. See section 10 for more information about whistleblower protections.

## **8.9 Powers with respect to witnesses**

The Act does not specifically provide public bodies with the power to compel witnesses to attend interviews, to answer questions or to produce documents. However, the Chief Executive Officer and her delegates have the power to give a lawful instruction to an employee to attend a meeting at a particular time and to produce official documents. The Chief Executive Officer and her delegates are entitled to ask an employee any relevant question concerning his or her employment. An employee may decline to answer any question if the answer would tend to incriminate him or her in relation to a criminal or disciplinary offence.

If an investigator wishes to interview a person employed by another public body or a member of the public, the investigator may only carry out the interview where this person has provided consent. Minors may only be interviewed with the permission of, and in the presence of, a parent or guardian whose particulars should be documented in the notes of the interview.

Where an investigation cannot proceed due to the lack of cooperation by key witnesses, the Council will refer the matter to the Ombudsman for investigation. The Ombudsman has powers to summon a person to attend a hearing to answer questions or to produce documents. Non-compliance with such a summons is an offence. See 8.13 for further information about the Ombudsman taking over investigations.

## **8.10 Legal representation and other support to witnesses**

It is in the discretion of the investigator to determine whether it is appropriate for a witness to have legal representation or any other person present during an interview. If a witness has a special need for another person to be with them, permission should be granted. Where legal representation or another support person is present, their role is to advise or support the witness, not to answer questions for the witness.

## **8.11 Immunity from disciplinary action**

A situation may arise where a witness or the whistleblower seeks immunity from disciplinary action for providing information about improper conduct in which they are implicated. In some circumstances, it may be appropriate for the Council to exercise discretion in relation to disciplinary action where an employee comes forward with a disclosure. This will depend on the nature and seriousness of the witness's misconduct. Any decision concerning immunity from disciplinary action must always be made by those officers with the power to take disciplinary action. This will be the Chief Executive Officer and not the investigator. See 10.7 for further information about compromised whistleblowers.

If a person considering making a disclosure wishes to discuss possible immunity for any improper conduct he or she may be implicated in, he or she should approach a protected disclosure officer or the protected disclosure coordinator to discuss the issue.

### **8.12 Criminal conduct**

The Ombudsman will not refer disclosures alleging serious criminal offences to a public body for investigation. Such disclosures will usually be referred to the Chief Commissioner of Police. However, it is possible during an investigation by a public body that facts are uncovered that reveal possible criminal offences. It is important in these circumstances for the public body to suspend the investigation and to seek the advice of the Ombudsman as to the future of the matter. The Ombudsman will take over the investigation of any serious criminal matter or refer the investigation to the Chief Commissioner of Police.

### **8.13 The Ombudsman may take over the investigation**

There are three circumstances in which the Ombudsman may take over an investigation by the Council:

- the Council considers its own investigation is being obstructed. Non-compliance by key witnesses is an example of such obstruction. The Chief Executive Officer will make a decision about referral of the investigation on the advice of the Manager Governance. If the Council refers an investigation back to the Ombudsman, it must notify the person who made the disclosure of the referral,
- the person who made the disclosure may request the Ombudsman to investigate the disclosed matter if:
  - the Council fails to carry out the investigation; or
  - the person is dissatisfied with the manner in which the Council is carrying out the investigation; or
  - the person is dissatisfied with the steps taken by the Council after the investigation of the matter; or
  - the Council has failed to comply with the reporting and remedial action requirements set out in section 81 of the Act;
- the Ombudsman is not satisfied with the investigation by the Council. Where the Ombudsman takes over an investigation, the Ombudsman must give notice to the person who made the disclosure, unless it was made anonymously.

Where the Ombudsman takes over an investigation, the Council must give to the Ombudsman in writing any information that it has and any findings, preliminary or otherwise, that it has made in respect to the matter. The Ombudsman may:

- commence a new investigation;
- complete the investigation;
- refer the investigation back to the Council with recommendations; or
- refer the matter to the Council to investigate.

Where the Ombudsman takes over an investigation due to a request by the whistleblower, or where the Ombudsman is dissatisfied with the investigation, the Ombudsman may inquire into the conduct of the investigation by the Council.

#### **8.14 Reporting requirements**

There is a statutory obligation for a public body conducting an investigation to provide information about the progress of the investigation to the Ombudsman or to the whistleblower at their request. The information must be provided within 28 days of the request. A public body is not obliged to provide information to the whistleblower where that information has already been given to the whistleblower, or where giving the information would endanger the safety of any person or prejudice the outcome of the investigation.

See section 10 for more information about managing the welfare of the whistleblower.

### **9. Action taken after an investigation**

#### **9.1 Investigator's report of findings**

After completing an investigation, a report must be prepared. The investigation is complete when the investigator is satisfied that he or she has obtained all necessary information to reach a conclusion, or all relevant information that is practical to obtain. The report will be forwarded to the Chief Executive Officer and will be for the Council's records. It should contain:

- the allegation/s;
- an account of all relevant information received and, if the investigator has rejected evidence as being unreliable, the reasons for this opinion being formed;
- the conclusions reached and the basis for them; and
- any recommendations arising from the conclusions.

In formulating a conclusion on the evidence collected, an investigator must be satisfied on the balance of probabilities that the alleged conduct has occurred. Where the investigator has found the conduct disclosed by the whistleblower has occurred, recommendations made by the investigator should include:

- the steps that need to be taken by the Council to prevent the conduct from continuing or occurring in the future; and

- any action that should be taken to remedy any harm or loss arising from the conduct. This action may include bringing disciplinary proceedings against the person responsible for the conduct, and referring the matter to an appropriate authority for further consideration.

The report should 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.

In drafting the report, it is important to bear in mind the requirements of procedural fairness (see 8.6). If an adverse comment is to be made against any person, that person must be given the opportunity to respond and his or her defence must be fairly included in the report.

The report must not disclose particulars likely to lead to the identification of the whistleblower (see section 5).

## **9.2 Action to be taken by the public body after an investigation**

If the findings of an investigation conclude that the disclosed conduct has occurred, the Council:

- must take all reasonable steps to prevent the conduct from continuing or occurring in the future;
- may take action to remedy any harm or loss arising from the conduct. This action may include bringing disciplinary proceedings against the person responsible for the conduct, and referring the matter to an appropriate authority for further investigation; and
- must report the findings of the investigation and any remedial steps taken to the Minister responsible for the Council. Where the disclosure concerns a staff member, the report must be made to that council.

At the conclusion of every investigation, the Council must:

- give written notification to the Ombudsman of the findings of the investigation and any remedial steps taken; and
- inform the whistleblower of the findings of the investigation and any remedial steps taken within a reasonable time after the completion of the investigation.

## **10. Managing the welfare of the whistleblower**

### ***10.1 Introduction***

The protection of genuine whistleblowers against detrimental action is essential for the effective implementation of the Act. Council will ensure whistleblowers 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 whistleblowers from reprisals. The procedures must comply with the Act and with these guidelines. Recommended administrative procedures for the protection of whistleblowers are discussed in 10.4.

The Act also provides the whistleblower with a number of statutory protections. These are listed in 10.3.

### ***10.2 Internal and external whistleblowers***

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 whistleblowers from detrimental action taken in reprisal for the making of the disclosure. The management of both types of whistleblower will, however, be different.

The main issue of difference is that internal whistleblowers 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 (see 4.2.2 and 10.4). (At Yarra, the Manager Organisation Development has been appointed to this role in relation to internal whistleblowers).

There may, however, be opportunities for reprisals to be taken against external whistleblowers. The Council may also a welfare manager for an external whistleblower. A welfare manager of an internal or external whistleblower cannot be expected to go beyond what is reasonable for the Council in providing support to a whistleblower. The welfare manager should discuss the issue of reasonable expectations with the whistleblower.

### **10.3 Statutory protections**

The Act creates an offence for a person to take detrimental action in reprisal for a protected disclosure. The maximum penalty is a fine of 240 penalty units (\$24,000) 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.

Detrimental action includes:

- 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).

Other statutory protections include:

- immunity from civil and criminal liability and disciplinary action for the making of the disclosure (section 14);
- immunity from liability for breaching a confidentiality provision (section 15);
- protection from actions in defamation (section 16);
- provision of a statutory right to sue for damages for reprisals made (section 19);
- provision of a statutory right to apply to the Supreme Court for an injunction or order requiring detrimental action to be remedied (sections 20 & 21);
- creation of an offence to reveal information obtained as a result of a disclosure or investigation, except in limited circumstances (section 22); and
- prohibition on revealing the identity of the whistleblower in any report or recommendation made under the Act (section 22).

The above protections attach to the making of the disclosure. A person who makes a disclosure is not immune from liability for his or her own conduct. See 10.7 for more information about where whistleblowers are implicated in the improper conduct.

More detailed discussion of the above statutory protections can be found in part C of these guidelines.

### **10.4 Administrative protections**

#### **10.4.1 Appointing a welfare manager**

The senior management of the Council will take responsibility for the welfare of a whistleblower. As indicated, the Chief Executive Officer has appointed the Manager Organisational Development as the welfare manager to monitor the needs of the whistleblower and to provide advice and support.

As described in 4.2.2, the role of the welfare manager is to:

- examine the immediate welfare and protection needs of a whistleblower who has made a disclosure and seek to foster a supportive work environment;

- advise the whistleblower 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 disclosure;
- keep a contemporaneous record of all aspects of the case management of the whistleblower including all contact and follow-up action; and
- ensure the expectations of the whistleblower are realistic.

#### 10.4.2 Reporting back

Whistleblowers should be advised, in general terms, of the progress in investigating or otherwise dealing with their disclosures and the timeframes that apply. The Manager Governance is the point of contact for the whistleblower for the purposes of keeping him or her informed of this information..

The whistleblower must be advised of the findings of any investigation and any steps taken by a public body to address improper conduct that has been found to have occurred. See 9.2.

#### 10.4.3 Ensuring confidentiality

The Council is obliged to protect the identity of the whistleblower. Confidentiality in respect of all records kept, details of matters disclosed, and the identity of persons involved in the disclosure must be maintained at all times.

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 whistleblower must be conducted discreetly to protect the confidentiality of the whistleblower.

The welfare manager should advise the whistleblower not to divulge any details of the disclosure other than to the appropriate officers within the public body or to the Ombudsman.

See section 5 for further information on ensuring confidentiality.

### **10.5 Managing expectations**

It is important to ensure the whistleblower's expectations are realistic. If a whistleblower develops unrealistically high expectations, dissatisfaction invariably results with either the way in which the public body has dealt with the disclosure, or the outcome of the investigation.

The whistleblower's expectations in relation to the handling of the disclosure should be discussed at the outset of the making of the disclosure. This can be done by the protected disclosure officer, the welfare manager or both. The whistleblower should be informed of the objective of any investigation, what action the public body proposes to take in relation to the disclosure, and the reasons why this decision has been made. All information provided to the whistleblower should be in plain English.

## **10.6 Occurrence of detrimental action**

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

- record details of the incident;
- advise the whistleblower of his or her rights under the Act; and
- advise the Chief Executive Officer of the detrimental action.

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 Chief Executive Officer should assess it as a new disclosure under the Act. If the Ombudsman subsequently determines the matter to be a public interest disclosure, the Ombudsman may refer it to the Chief Commissioner of Police for investigation.

## **10.7 Consequences for whistleblowers implicated in improper conduct**

The management of the welfare of an internal or external whistleblower becomes complicated when the whistleblower is implicated in misconduct, whether that misconduct be related to the disclosure made or not. This type of whistleblower is referred to as a compromised whistleblower. The general obligations of a public body in relation to handling and investigating a disclosure and protecting the whistleblower still apply. The act of whistleblowing should not shield whistleblowers from the reasonable consequences flowing from any involvement in improper conduct.

Section 17 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.

Disciplinary or other action against a whistleblower 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 (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-whistleblower in the same circumstances; and
- there are good and sufficient grounds that justify exercising any discretion to institute disciplinary or other action.

Where disciplinary or other action relates to conduct that is the subject of the whistleblower's disclosure, it is desirable that it can be shown that disciplinary or other action was only commenced after the disclosed matter had been appropriately dealt with and consideration given the issues listed above.

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

## **11. Management of the person against whom a disclosure is made**

The Council must also manage the person who is the subject of a protected disclosure. This person will always be a councillor or staff member. The Council may appoint an internal contact or make use of an Employee Assistance Program to ensure persons who are the subjects of disclosures are given the appropriate support.

### **11.1 Confidentiality**

Disclosures should be assessed and investigated discreetly, with a strong emphasis on maintaining confidentiality of both the whistleblower and the person who is the subject of the disclosure. The Act creates an offence to disclose information obtained in the course of handling or investigating a protected disclosure, except in certain limited circumstances.

Where investigations do not substantiate disclosures, 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 should remain confidential.

See section 5 for more information about confidentiality.

### **11.2 Natural justice**

The subject of any disclosure that is investigated by or on behalf of the Council has the right to:

- be informed as to the substance of the allegations;
- be given the opportunity to answer the allegations before a final decision is made;
- be informed as to the substance of any adverse comment that may be included in any report arising from the investigation; and
- have his or her defence set out fairly in any report.

See 8.6 for more information on natural justice.

### **11.3 Information as to rights and obligations**

All staff, and in particular the person who is the subject of the disclosure, will be given adequate information as to their rights and obligations under the Act, the Council's internal reporting system, and any other relevant law or code of conduct.

#### **11.4 Notification of findings of any investigation**

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 the fact of the investigation, he or she will be formally advised of the outcome of the investigation.

#### **11.5 Unsubstantiated allegations**

Where the allegations contained in a disclosure are clearly wrong or unsubstantiated, the person who is the subject of the disclosure is entitled to the support of the public Council and its senior management. If the matter has been publicly disclosed, it may be appropriate for the Council to issue a letter of support setting out that the allegations were clearly wrong or unsubstantiated, where the person who is the subject of the disclosure has so requested.

### **12. Criminal offences**

All staff should be aware of the four offences created by the Act:

- it is an offence for a person to take detrimental action against a person in reprisal for a protected disclosure being made. The Act provides a maximum penalty of a fine of 240 penalty units (\$24,000) or two years imprisonment or both;
- 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. The Act provides a maximum penalty of 60 penalty units (\$6,000) or six months imprisonment or both;
- it is an offence for a person to obstruct the Ombudsman in performing his responsibilities under the Act. The Act provides a maximum penalty of 240 penalty units (\$24,000) or two years imprisonment or both; and
- 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 disclosed matter. The Act provides a maximum penalty of 240 penalty units (\$24,000) or two years imprisonment or both.

### **13. Contact details**

Dr Barry Perry  
The Ombudsman Victoria  
Level 22, 459 Collins St  
Melbourne 3000  
(DX 210174)  
Tel: 9613 6222  
Toll Free 1800 806 314

**OR**

Mr Tim Brown  
Manager Governance  
City of Yarra  
333 Bridge Rd  
Richmond 3121  
Tel: 9205 5110

## **Part C – LEGAL INTERPRETATION OF THE WHISTLEBLOWERS PROTECTION ACT 2001**

### **14. Common questions**

#### **14.1 *What is the purpose of the Whistleblowers Protection Act 2001?***

The main purpose of the Act is to ensure transparency and accountability in the workings of the public sector by:

- encouraging and facilitating disclosures of improper conduct by public officers and public bodies;
- providing protection for persons who make those disclosures and for persons who may suffer reprisals in relation to those disclosures; and
- providing for the matters disclosed to be properly investigated and dealt with.

#### **14.2 *When does the Act come into force?***

The Act will become law in Victoria on 1 January 2002.

#### **14.3 *Who is a whistleblower?***

The term *whistleblower* is used to describe a person who makes a disclosure about improper conduct by a public body or public official. Under the Act, a disclosure can only be made by a natural person and not by corporations or other artificial persons.

#### **14.4 *What is a disclosure?***

The term *disclosure* is used to describe the allegation or report of improper conduct made by the whistleblower.

#### **14.5 *What disclosures are protected under the Act?***

A disclosure is a protected disclosure, and therefore protected under the Act, when it is made in accordance with Part 2 of the Act. Part 2 requires a disclosure to satisfy the criteria set out in the following questions:

- 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?

The disclosure must also be made to the appropriate person. This depends on who is the subject of the disclosure.

Person who is the subject of the disclosure	Person/body to whom the disclosure must be made
A Council employee	The Chief Executive Officer.
Councillor	The Ombudsman.

Part 2 of the Act otherwise provides that a person may make a disclosure orally, in writing or anonymously. It may be made about conduct that has occurred before the commencement of the Act on 1 January 2002, and where the person cannot identify the person or body to whom the disclosure relates.

#### **14.6 What disclosures are investigated under the Act?**

Disclosures determined by the Ombudsman to be a public interest disclosure are investigated under the Act. In making a determination, the Ombudsman must be satisfied that the disclosure shows or tends to show that the public officer or public body 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.

#### **14.7 To whom can a disclosure be made?**

A person must make a disclosure to the appropriate person or body set out in the table in 14.5, depending on who is the subject of the disclosure.

#### **14.8 How can a disclosure be made?**

A disclosure can be made orally, in writing or anonymously.

#### **14.9 When can a disclosure be made?**

A disclosure can only be made after the commencement of the Act on 1 January 2002. It can, however, be made about a matter that occurred prior to the commencement of the Act.

#### **14.10 Is it mandatory to make a disclosure?**

While it is ethical for a public servant to report any improper conduct, the Act does not mandate the making of a disclosure by an employee, officer or member of a public body or a member of the public.

#### **14.11 Can the whistleblower appeal a decision not to investigate a disclosure?**

If a whistleblower makes a disclosure to a public body at the first instance, a determination of whether the disclosure is a public interest disclosure is initially made by that public body. If the disclosure is found to be a public interest disclosure, it is then referred to the Ombudsman for a final determination. If the disclosure is found not to be a public interest disclosure, the whistleblower is advised of this decision and given the opportunity to have the matter referred to the Ombudsman for reconsideration. The whistleblower must request that the matter be referred to the Ombudsman within 28 days of the notification.

Where a disclosure is made directly to the Ombudsman or referred to the Ombudsman by a public body, the Ombudsman must determine whether it is a public interest disclosure and therefore warrants investigation. There is no appeal from this decision. However, a person may elect to have the complaint dealt with under the Ombudsman Act or the Police Regulation Act as appropriate. This must be done within 28 days of receiving notice of the determination. Allegations or complaints that are determined not to be a public interest disclosure may still warrant investigation and response by a public body under its normal complaints handling mechanisms.

#### **14.12 How is a whistleblower protected from reprisals?**

The Act provides a number of protections to whistleblowers who make a protected disclosure:

- Section 14 provides that a person who makes a protected disclosure is not subject to any civil or criminal liability or any liability arising by way of administrative process (including disciplinary action) for making the protected disclosure;
- Section 15 provides that a person making a protected disclosure does not commit an offence under any Act or breach an obligation in any oath, rule of law, practice or under any agreement that imposes a duty to maintain confidentiality about a matter or restricts disclosure of information in respect of a matter;
- Section 16 provides that a person has a defence of absolute privilege in proceedings for defamation in respect of making a protected disclosure;
- Section 18 creates an offence for a person to take detrimental action against a person in reprisal for a protected disclosure;
- Section 19 provides that a person who takes detrimental action against a person in reprisal for a protected disclosure is liable in damages to that person; and

- Section 20 creates a statutory right for a person who believes that detrimental action has been taken against him or her in reprisal for making protected disclosure to apply to the Supreme Court for an order remedying that action or for an injunction. Section 21 provides that the Supreme Court may make such an order or injunction where it is satisfied that a person has taken or intends to take detrimental action in reprisal for a protected disclosure.

**14.13 *Is a person entitled to protection before the Ombudsman makes a determination that a disclosure is a public interest disclosure?***

Where a whistleblower makes a disclosure in accordance with Part 2 of the Act, he or she is entitled to the protection of the Act in relation to the making of that disclosure. The Ombudsman's determination of whether that disclosure is a public interest disclosure does not alter the standing of the disclosure in relation to protection under the Act. See 14.14 in relation to the provision of further information.

**14.14 *For how long is a whistleblower protected?***

The protections provided to a person who makes a protected disclosure under the Act do not cease. However, where a person makes a protected disclosure, and that disclosure is determined not to be a public interest disclosure, any further information provided by that person in relation to the subject matter of the disclosure will not attract the protections listed in 14.12. The information that formed part of the original protected disclosure will continue to be protected, unless the whistleblower has repeated the allegations to persons not authorised by the Act to receive that disclosure; for example, the media.

**14.15 *Is the identity of the person making the disclosure confidential?***

The Act seeks to ensure the confidentiality of the whistleblower by creating an offence for the unauthorised release of any information concerning the whistleblower. Section 22 of the Act requires any person who receives information due to the handling or investigation of a protected disclosure not to disclose that information except in certain limited circumstances. Disclosure of information in breach of section 22 constitutes an offence that is punishable by a maximum fine of 60 penalty units (\$6000) or six months imprisonment or both. The circumstances in which a person may disclose information obtained about a protected disclosure 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; and
- in criminal proceedings for certain offences in the Act.

The Act prohibits, however, the inclusion of particulars in any report or recommendation that is likely to lead to the identification of the whistleblower.

#### **14.16 Who will carry out the investigation?**

The Ombudsman will carry out an investigation of a disclosed matter or the Ombudsman will refer the investigation to:

- the Chief Commissioner of Police;
- the Auditor-General;
- the Deputy Ombudsman;
- other bodies prescribed in the regulations; or
- a public body, where the matter relates to an employee, officer or member of that body.

Where the Ombudsman carries out the investigation, the Ombudsman may request the Chief Commissioner of Police or a public body that is prescribed in the regulations to make available members of the police force or staff to assist in the investigation.

Where the Ombudsman refers an investigation to a public body to investigate, the Ombudsman will monitor that investigation and may take it over if dissatisfied with its progress.

#### **14.17 Does information given by a witness during an investigation become a protected disclosure?**

If information provided by a witness satisfies the criteria set out in Part 2 of the Act, it will become a protected disclosure. See 7.2 above. All information provided in an interview must be kept confidential. Unauthorised disclosure of such information is an offence under section 22 of the Act.

#### **14.18 Will vexatious or frivolous disclosures be investigated?**

If the Ombudsman determines a protected disclosure to be a public interest disclosure, section 40 of the Act provides that the Ombudsman may decline to investigate the matter if satisfied that the disclosure is trivial, frivolous or vexatious.

#### **14.19 What must public bodies do to comply with the Act?**

Section 68 of the Act requires public bodies to establish procedures to facilitate the making of disclosures, for investigations of disclosed matters, and for the protection of persons from reprisals for making the disclosure. The procedures must comply with the Act and with these guidelines. A public body must make a copy of the procedures available to every employee, member or officer of that public body, and members of the public must be able to inspect a copy of the procedures during normal office hours free of charge.

Public bodies must receive and assess disclosures about improper conduct in accordance with the Act, investigate disclosed matters when referred from the Ombudsman, and take appropriate action when improper conduct has been found to have occurred. Public bodies must protect whistleblowers from reprisals. The Act also imposes a number of notification and reporting requirements, including the

publication of statistics relating to disclosures dealt with in the public body's annual report.

**14.20 *When must public bodies have procedures in place?***

Public bodies must have procedures in place as soon as practicable after the commencement of the Act on 1 January 2002. Where a public body is established after 1 January 2002, it must have procedures in place as soon as practicable after it has been established.

**14.21 *What notification do whistleblowers receive about action taken in relation to a disclosure made?***

The whistleblower must be notified of whether the information provided amounts to a public interest disclosure, the findings of any investigation, and of action taken where improper conduct has been found to have occurred.

**14.22 *Where further information is sought by a public body from a person who makes a disclosure, is that information protected?***

That information will be protected as forming part of the original disclosure, or where an entirely different allegation is being made, by constituting a new disclosure.

\*\*\*\*\*