

Public Interest Disclosures (Whistle-Blower) Procedure

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Effective From:	11 April 2018
Overarching Policies:	<i>Public Interest Disclosures Policy</i> <i>Employment Obligations – Department - Policy</i> <i>Employment Obligations – Worker Policy</i>
Replaces Doc. No:	Not applicable
Custodian and Review Responsibility:	Human Resources Management and Strategy
Contact:	Director Human Resources Management and Strategy
Applies to:	Department of Health Statewide This procedure also applies to former DHHS employees who have transferred to the Department of Communities Tasmania until otherwise advised.
Review Date:	31 October 2020
Keywords:	whistleblowing, disclosure, improper conduct, detrimental action
Routine Disclosure:	Yes

Approval

Prepared by		HR Consultant – Employment Policy		June 2014
Through		Executive Manager, Legislative Review and Legal Support		18 June 2014
Through		Deputy Secretary, Strategic Control Workforce and Regulation		20 June 2014
Approved by		A/Secretary		26 June 2014

Revision History

Revision No. 1	Procedure updated in line with Ombudsman guidelines and structure modified			
Revised by		Advisor - Workforce Development and HR Policy		July 2017
Through		Executive Manager, Legislative Review and Legal Support		Sep 2017
Through		A/Deputy Secretary, Corporate Policy and Regulatory Services		Sep 2017
Approved by		Secretary		Sep 2017

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Introduction

- This procedure supports the *Public Interest Disclosures (Whistle-Blower) Policy* and describes the requirements and processes associated with the implementation of the [Public Interest Disclosures Act 2002](#) (the Act) in the Department of Health (DoH).
- Officers and employees are encouraged to report known or suspected incidences of improper conduct or detrimental action under the Act, in accordance with this procedure.
- Officers and employees 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.
- This document contains:
 - an overview of the mandatory requirements for managing a public interest disclosure.
 - a summary of the procedures for managing a public interest disclosure.
 - Detailed procedures for managing a public interest disclosure based on the model procedures developed by the Ombudsman Tasmania.
- This procedure been prepared in accordance with Guidelines and Standards published by the Ombudsman under s38(1)(c) of the Act. These Guidelines and Standards can be seen on the Ombudsman's website at www.ombudsman.tas.gov.au.
- This procedure and related policy will be submitted to the Ombudsman for review at least once in each three year period to ensure they meet the objectives of the Act and accord with the Guidelines and Standards published by the Ombudsman. The date by which the procedures must be submitted to the Ombudsman for review is 11 April 2021.

Statement of Support

- The DoH is committed to the aims and objectives of the [Public Interest Disclosures Act 2002](#). 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.
- The DoH recognise the value of transparency and accountability in administrative and management practices, and support the making of disclosures that reveal the type of conduct to which the Act is directed.
- The DoH 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.

Purpose of this Procedure

- This procedure establishes a system for reporting disclosures of improper conduct or detrimental action by members, officers or employees of the Agency.
- This procedure is intended to assist DoH officers and employees to understand the way in which the Act operates and how it needs to be administered.
- This procedure provides for disclosures to be made to the Head of Agency (the Principal Officer) or to a delegated Public Interest Disclosure Officer. Disclosures may be made by people who are 'public officers' (any officer or employee) with the DoH, or by people who are or have been 'contractors' with the DoH for the supply of goods or services (see Attachment Two: Key Terms (p 19)).
- The procedure complements normal communication channels between managers and employees. Employees are encouraged to continue to raise appropriate matters at any time with their manager and to use existing grievance procedures within the DoH where appropriate.
- This procedure is related to:
 - *Grievance Management Procedure*- which describes how internal grievance are managed.
 - *Bullying, Harassment and Discrimination Resolution Procedure* which describes processes for resolving issues and complaints related to inappropriate workplace behaviours.
 - *Conflict of Interest and Improper Use of Power Procedure* which describes how conflicts of interest associated with an employee's employment are managed.
 - *Employment Direction No 5 (Code of Conduct) Management* – which describes how breaches and alleged breaches of the Code of Conduct are investigated and managed.
 - *Gifts, Benefits and Hospitality Procedure* which provides guidance on the declaration and acceptance of gifts, benefits and hospitality.
 - *Employee Files Procedure* – provides direction on how employee files should be managed, including confidential case management files.

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Key Definitions

- **‘contractor’**, is as described in the Act defined as a person who has entered into a contract with DoH to provide goods and services. The definition covers an employee of the contractor and subcontractor.
- **‘detrimental action’** means action taken against a person as reprisal for making or intending to make a protected disclosure, as defined in the Act
- **‘discloser’** means the person who had made a Public Interest Disclosure.
- **‘employee’** is a person as defined by the [State Service Act 2000](#).
- **‘improper conduct’** is as defined in the Act and includes conduct that is serious or significant as determined in accordance with guidelines issued by the Ombudsman and falls into one of these categories:
 - is corrupt or constitutes an illegal or unlawful activity
 - constitutes maladministration or professional misconduct
 - constitutes a waste of public resources
 - constitutes a danger to public health or safety or to the environment
 - breaches the code of conduct
 - constitutes detrimental action against a person who makes a public interest disclosure
- **‘member’** refers to a body or authority, whether incorporated or not, whose members or a majority of whose members are appointed by the Governor or a Minister
- **‘officer’** is a person as defined by the [State Service Act 2000](#).
- **‘Principal Officer’** is the DoH Secretary and is the person designated under the Act to appropriately administer the Act in the Agency.
- **‘protected disclosure’** means a disclosure which has been determined as meeting the criteria for protection described in the Act and therefore receives the appropriate protections
- **‘public body’** is as described in the Act. The DoH is a public body
- **‘Public Interest Disclosure Officer’** is the person appointed by the Principal Officer and provided with the delegation to exercise the statutory powers and functions of to the Principal Officer under the Act. The DoH delegates are Deputy Secretary – Corporate Services and Director - Human Resources Management and Strategy.
- **‘Public Officer’** is a person as defined in the Act. Officers, members and employees of the DoH are public officers
- **‘welfare manager’** is a person appointed by the Principal Officer or by the Public Interest Disclosure Officer and is responsible for protecting the general welfare of the discloser.

Also see Attachment Two: Key Terms (p19) for additional details and definitions.

Mandatory Requirements

- Activities (including the management of disclosures and investigations) associated with the Act must be undertaken in accordance with:
 - the Act
 - all applicable directions, standards and guidelines issued by the Ombudsman
 - this procedure and any other relevant legislation, directive or policy.

Disclosures

- A person may not make a disclosure under this Part about conduct that has occurred before 1 January 2001.
- Disclosures by DoH public officers relating to DoH public officers and contractors can be made to any of the following:
 - the Head of Agency or Public Interest Disclosure Officer
 - Integrity Commission
 - Ombudsman Tasmania (the Ombudsman)
- Disclosures relating to the Agency can only be made to the following:
 - Integrity Commission
 - Ombudsman Tasmania (the Ombudsman)
- Disclosures by DoH contractors or a member of the public relating to DoH or its public officers can only be made to the following:
 - Integrity Commission
 - Ombudsman Tasmania (the Ombudsman)
- Public Officer defined as being any member, officer or employee of the DoH
- Contractor defined as a person who has entered into a contract with DoH to provide goods and services. The definition covers an employee of the contractor and subcontractor,
- Disclosures that are determined to be public interest disclosures must be investigated by the Agency or referred to another party for investigation, unless the Principal Officer or delegate makes one of the following decisions and follows the notice requirements in the Act:
 - the disclosure:
 - is determined to be trivial, vexatious, misconceived or lacking in substance.
 - relates solely to the personal interests of the person making the disclosure.
 - is based on false or misleading information.
 - the subject matter of the disclosure has:
 - already been adequately dealt with.

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- has already been determined and the additional disclosure does not provide significant or substantial new information.
- the person making the disclosure:
 - has commenced proceeding in a commission court or tribunal which has power to order remedies similar to those available under this Act.
 - had knowledge for more than 12 months of the disclosed matter before making the disclosure and failed to give satisfactory explanation of the delay.
- or is otherwise covered by s64 of the Act being matters that do not have to be investigated.
- The Public Interest Disclosure Form is the preferred method of submitting a disclosure; however any form of written or verbal submission will be accepted.
- A discloser must not make a knowingly false disclosure.
- Anonymous disclosures will be accepted if the Public Interest Disclosure Officer (or other appropriate public body) receiving the disclosure is satisfied the disclosure is made by a public officer or contractor. Anonymous disclosures must be given equal consideration.

Protection and Welfare of the Discloser

- A person upon making or intending to make a disclosure under the Act is protected from reprisals under the Act, including but not limited to:
 - not being subjected to any civil or criminal liability for making the protected disclosure.
 - not being subjected to any detrimental action.
 - other protections as described in the Act and summarised in Attachment Five: Protections (p31).
- Officers and employees must be properly advised in writing that it is an offence for a person to take detrimental action against a discloser in reprisal for a protected disclosure.
- If a discloser reports an incident of detrimental action allegedly taken in reprisal for the making of the 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, with reference to Attachment Eight: Managing Welfare (p38).
- The discloser's general welfare must be protected at all times, including protection from any reprisals that may arise out of the disclosure.
- A discloser implicated in the detrimental action or improper conduct must be treated in accordance with the procedure.
- Investigators must take all reasonable steps to protect the identity of the discloser, and warn the discloser where disclosure of their identity cannot be avoided.

Persons who may be subject to adverse findings

- An employee or officer against whom a disclosure is made must be supported during the handling and investigation of disclosures and all reasonable steps taken to ensure the confidentiality of the person during the assessment and investigation process.
- An employee or officer against whom a disclosure is made must be provided with full support where the allegations contained in a disclosure are clearly wrong or unsubstantiated.
- Any person who is potentially subject to an adverse finding or comment must be told, before any final conclusions are formed, of:
 - the allegations made against them, or which have arisen against them as a result of the investigation; and
 - 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 potential findings in view, and their possible consequences.
- The investigation report must not include any comment adverse to any person unless that person has been given reasonable opportunity to be heard in the matter and their defence is fairly set out in the report.

Investigations

- The DoH must investigate every disclosure when:
 - the Principal Officer had determined that it should be investigated, with reference to Attachment Six: Investigations (p32); or
 - it has been referred to the Agency by the Ombudsman for investigation.
- Any investigation must be completed within six months. If the timeframe is not practicable, the DoH must apply to the Ombudsman for an extension of time.
- The principles of natural justice must be carefully observed in the course of the investigation, with respect to all parties involved. These principles must be demonstrated in the final report, with reference to Attachment Six: Investigations (p32).
- The DoH must ensure that procedural fairness is accorded to all parties involved including ensuring that no one is involved in the investigation who:
 - is known to be biased against any person who is potentially subject to an adverse finding,
 - is known to hold any biases which are relevant to the subject-matter of the investigation, or
 - in respect of whom there is reasonable ground for apprehending or suspecting bias.
- Investigation reports must not disclose particulars likely to lead to the identification of the discloser.
- 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.
- Reasonable information concerning the investigation must be provided to the Ombudsman on request, within 28 days of the request.

- The discloser may request reasonable information concerning the investigation. Information must be provided within 28 days of the request unless:
 - the information requested has already been provided to the discloser.
 - the giving of the information requested would endanger the safety of any person.
 - the giving of the information requested would prejudice the conduct of the investigation.
- Investigations should take into consideration the guidance provided in the Australian Public Service Commission's [Handling misconduct: A human resource manager's guide](#) (June 2015) and the *Employment Direction No 5 (Code of Conduct) Management Procedure*

Confidentiality

- Reasonable care must be taken to protect the identity of a discloser and protect the privacy of witnesses and of the person against whom the disclosure has been made.
- The identity of the discloser must not be revealed to the subject of the disclosure unless necessary and then only with the discloser's knowledge.
- Any person who receives information due to the handling or investigation of a protected disclosure, must not disclose that information (refer to Attachment Nine: Offences (p 41)) except in certain limited circumstances including:
 - where exercising their functions or the functions of the Agency under the Act.
 - when making a report or recommendation under the Act.
 - when publishing statistics in the annual report.
 - in proceedings for certain offences in the Act.
- Any report or recommendation must not include details that are likely to lead to the identification of the discloser.
- The information provided in the annual report must not include details that are likely to lead to the identification of the discloser or identify the person who is the subject of the disclosure.
- Information may be disclosed in certain circumstances. The discloser must be informed of the circumstance and the information which will be disclosed, including 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, or
 - the investigating body believes that the disclosure of the identifying information is necessary for the matter to be effectively investigated.
- All relevant files, whether paper or electronic, must be kept securely, in accordance with the *Employee Files Procedure* and can only be accessed by authorised persons including:
 - Principal Officer
 - Public Interest Disclosure Officer
 - investigator

- HR Consultant assigned as case manager to assist and advise the Principal Officer or Public Interest Disclosure Officer
- welfare manager (in relation to welfare matters only)
- Care must be taken to ensure that all relevant phone calls and meetings are conducted in private.
- Documents containing information regarding a disclosure, the identity of the discloser, or the identity of the subject of a disclosure are exempt (to the extent of the information) from release under the [Right to Information Act 2009](#).

Referral

- The Principal Officer or Public Interest Disclosure Officer may refer a protected disclosure to the Ombudsman if it believes that it is not able to complete the investigation satisfactorily. They may encourage the discloser to make their disclosure directly to the Ombudsman.
- The Principal Officer or Public Interest Disclosure Officer may refer a protected disclosure to the Integrity Commission where it considers that the disclosure relates to misconduct as defined in s4(1) of the [Integrity Commission Act 2009](#).
- If facts are uncovered before or during an investigation that reveal the possibility of a criminal offence, the Principal Officer or Public Interest Disclosure Officer will suspend the investigation and consult with the Ombudsman. The Ombudsman may refer a disclosed matter to the Commissioner of Police for investigation.
- The Principal Officer or Public Interest Disclosure Officer must notify the discloser (unless the discloser is anonymous) within a reasonable timeframe of any referral that has been made.

Publishing Statistics

The following statistics must be published in the DoH annual report:

- the number and types of disclosures made to the DoH during the year, and the number of disclosures determined to be a public interest disclosure; and
- the number of disclosures determined by the DoH to be public interest disclosures that were investigated during the year; and
- the number and types of disclosed matters referred to the DoH by the Ombudsman for investigation; and
- the number and types of disclosures referred by the DoH to the Ombudsman for investigation; and
- the number and types of investigations taken over from the DoH by the Ombudsman; and
- the number and types of disclosed matters that the DoH has declined to investigate; and
- 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 DoH.

Procedures

The following internal DoH procedures are described below:

1. Making a Public Interest Disclosure
2. Receiving a Public Interest Disclosure
3. Assessing and Managing a Public Interest Disclosure
4. Investigating a Public Interest Disclosure
5. Managing Reports of Detrimental Action against a Discloser

Making a Public Interest Disclosure

1. A DoH public officer is able to make a disclosure under the Act, upon identifying that they have knowledge of improper conduct which should be disclosed.
2. A contractor or member of the public is able to make a disclosure to the Integrity Commission or the Ombudsman.
3. The discloser reviews the options for disclosure and identifies a method of disclosure and the public body that it is appropriate to make the disclosure to by referring to the DoH fact sheet [Public Interest Disclosures: Reporting](#).
4. The discloser submits their disclosure (verbally or in writing) to:
 - 4.1. The DoH Principal Officer or Public Interest Disclosure Officer and the procedure below for 'Receiving a Public Interest Disclosure' is followed: or
 - 4.2. A DoH officer or employee who is not the Principal Officer or the Public Interest Disclosure Officer, in which case the disclosure is immediately referred to the Principal Officer or Public Interest Disclosure Officer and the procedure below for 'Receiving a Disclosure' Procedure is followed; or
 - 4.3. the Ombudsman; or
 - 4.4. the Integrity Commission.

Receiving a Public Interest Disclosure

1. The Principal Officer or Public Interest Disclosure Officer receives a disclosure from a DoH public officer.
 - 1.1. If the disclosure is provided verbally, or it is identified as part of a Grievance or other complaint process, the recipient provides the discloser with a copy of the Public Interest Disclosure Form and requests that the discloser put the disclosure in writing as soon as possible. The receiver immediately makes a file note which records:
 - 1.1.1. the time the disclosure was made; and
 - 1.1.2. the circumstances in which the disclosure was made; and
 - 1.1.3. the exact words used by the discloser (as far as possible).

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- 1.2. If the disclosure is regarding the conduct and/or action of the Principal Officer, the Public Interest Disclosure Officer immediately refers the disclosure to the Ombudsman and the process continues as appropriate to the circumstance and the directions provided by the Ombudsman.
- 1.3. If the disclosure is from a contractor, the Public Interest Disclosure Officer immediately refers the person who makes the disclosure to the Ombudsman or Integrity Commission.
2. The Public Interest Disclosure Officer (if they are the recipient) immediately informs the Principal Officer and provides a copy of the disclosure and any other records.
3. The Public Interest Disclosure Officer advises Human Resources Management and Safety (HRMS) and requests the allocation of a HR Consultant to assist and advise on the management of the disclosure.
4. The HR Consultant arranges for a Confidential File to be created, according to the requirements of the *Employee Files Procedure*.
5. The Principal Officer or Public Interest Disclosure Officer assesses the disclosure within 45 days to determine if it is a protected disclosure under the Act, with reference to Attachment Four: Receipt, Assessment and Referral (p 27):
 - 5.1. If the disclosure is assessed as a protected disclosure, the process continues
 - 5.2. If the disclosure is assessed as not a protected disclosure under the Act:
 - 5.2.1. the discloser is advised in writing and appropriate follow-up actions are taken, applicable to the nature of the disclosure, including:
 - 5.2.1.1 referring the discloser to another appropriate body (with reference to Attachment Three: The Reporting System (p 24)); or
 - 5.2.1.2 advising the discloser of alternative processes that may be more appropriate e.g. Grievance Procedure; or
 - 5.2.1.3 identifying alternative actions that should be taken in response to the disclosed information.
 - 5.2.2. If applicable, the Public Interest Disclosure Officer advises the HR Consultant that the Confidential File should be closed
6. If the Principal Officer believes that the disclosure would be preferably investigated by the Ombudsman or the Integrity Commission, or may need to be referred to the Police, refer to Attachment Four: Receipt, Assessment and Referral (p 27) and obtain advice if required.
7. The Principal Officer or Public Interest Disclosure Officer informs the discloser of the protections available to them, provides a copy of the DoH fact sheet Public Interest Disclosures: Protections and the disclosure is managed as a protected disclosure in accordance with the Act.

Assessing and Managing a Public Interest Disclosure

1. The disclosure has been assessed as a protected disclosure.
2. The Principal Officer or Public Interest Disclosure Officer reviews the disclosure to determine that it is a public interest disclosure under s33 of the Act, with reference to Attachment Four: Receipt, Assessment and Referral (p 27):

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- 2.1. If the disclosure is determined to not be a public interest disclosure, refer to Attachment Four: Receipt, Assessment and Referral (p 27) to determine how to proceed.
3. The Principal Officer or Public Interest Disclosure Officer considers whether the disclosed matter should be investigated, with reference to Attachment Six: Investigations (p 32):
 - 3.1. If the determination is that the matter does not need to be investigated, refer to Attachment Six: Investigations (p 32) to determine how to proceed.
 - 3.2. If the determination is that the matter should be investigated by another body (Ombudsman or Integrity Commission) with reference to Attachment Four: Receipt, Assessment and Referral (p 27), takes the appropriate actions to make the referral.
 - 3.3. If it is possible that there has been a criminal offence, consults with the Ombudsman before proceeding.
 - 3.4. If the investigation is to proceed, follows the procedure below for 'Investigating a Public Interest Disclosure.

Investigating a Public Interest Disclosure

1. A Public Interest Disclosure has been assessed and it has been determined that it should be investigated, or it has been referred to the DoH by the Ombudsman for investigation.
2. The Principal Officer or Public Interest Disclosure Officer proceeds with investigation of the disclosure and:
 - 2.1. appoints an independent investigator (who must be appointed by the Principal Officer); and
 - 2.2. appoints a welfare manager (who can be the Public Interest Disclosure Officer) to protect the welfare of the discloser; and
 - 2.3. prepares Terms of Reference for the investigator to follow.
3. The investigator prepares an investigation plan and submits it to the Public Interest Disclosure Officer for approval prior to commencing the investigation.
4. The investigation is undertaken having regard to all information available to the investigator, including information sourced from the subject of the disclosure and discloser (if applicable).
5. On completion of the investigation, the investigator supplies a written investigation report and all original evidence to the Principal Officer or Public Interest Disclosure Officer for review (with reference to Attachment Seven: Action taken after an Investigation (p 36)).
6. The Principal Officer or Public Interest Disclosure Officer considers the findings/recommendations of the investigation report and:
 - 6.1. if the conduct or action is found to be improper conduct and/or detrimental action:
 - 6.1.1. determines how the conduct and/or action is to be rectified in this instance, including remedy of any harm or loss (with reference to Attachment Seven: Action taken after an Investigation(p 36)); and
 - 6.1.2. determines how the conduct and/or action is to be prevented in the future; and
 - 6.1.3. determines the action to follow in the event of other findings/recommendations.

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- 6.2. If the conduct or action is found not to be improper conduct and/or detrimental action:
 - 6.2.1. the findings are reported to the Ombudsman and the discloser; and
 - 6.2.2. the person against whom the disclosure was made is advised, and appropriate actions taken with reference to Attachment Eight: Welfare (p 38); and
7. The Ombudsman, the relevant Minister and the discloser are notified of the findings of the investigation.
8. The subject of the disclosure is formally notified of the outcome of the investigation.
9. When identified actions have been implemented, or at the appropriate time, the Public Interest Disclosure Officer advises the HR Consultant to close the confidential file, according to the requirements of the *Employee Files Procedure*.

Managing Reports of Detrimental Action against a Discloser

1. A discloser believes that they are being subjected to detrimental action and reports it to the welfare manager.
2. The welfare manager records details of the incident, advises the discloser of their rights under the Act and informs the Principal Officer.
3. The Principal Officer or Public Interest Disclosure Officer assess the report as a new disclosure under the Act, and follows the above procedure for Receiving a Public Interest Disclosure.

Roles and Responsibilities

- The **Principal Officer** is responsible for:
 - supporting, endorsing and enforcing this procedure
 - supporting a culture which encourages the disclosure of improper conduct and detrimental action
 - ensuring that all workers have adequate access to information and training
 - upholding the responsibilities of the Principal Officer as described below.
- The Principal Officer has primary responsibility for ensuring that the provisions of the Act are implemented. The Principal Officer may delegate any or all of his or her functions to the Public Interest Disclosure Officer. S62A 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.
- A **Public Interest Disclosure Officer** is appointed by the Principal Officer under s62A(2) of the Act, and holds a delegation from the Principal Officer which enables him or her to exercise all the statutory powers and functions given to the Principal Officer by the Act.
- **Delegates** are appointed as described in the *DoH Delegations and Administrative Authorities – Human Resources Management Delegations and Administrative Authorities*, to:
 - The responsibilities of the Public Interest Disclosure Officer 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 s33 of the Act whether a disclosure is a 'public interest disclosure', and

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- 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.
- **Officers and employees** are responsible for:
 - reporting known or suspected incidences of improper conduct or detrimental action under the Act, in accordance with this procedure.
 - supporting those who have made a legitimate disclosure.
 - refraining from any activity that is, or could be perceived to be, victimisation or harassment of a person who makes a disclosure.
 - protecting and maintaining the confidentiality of a person they know or suspect to have made a disclosure.
- **Investigators:** where the Agency has determined that a disclosure is a public interest disclosure, or where the Ombudsman has referred a disclosed matter to the Agency 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 DoH or a consultant engaged for that purpose.
- **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. A welfare manager may be a person from within the DoH or a consultant engaged for that purpose. The welfare manager is responsible for:
 - examining the immediate welfare and protection needs of a person who has made a disclosure, and seeking to foster a supportive work environment;
 - advising the discloser of the legislative and administrative protections available to him or her;
 - listening and responding 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, protecting the identity of the discloser in the course of carrying out these responsibilities.
- **HR Teams** are responsible for:
 - supporting and advising the Principal Office and Public Interest Disclosure Officer as required;
 - taking on the role of welfare manager or investigator where required
 - arranging for the creation of confidential files and ensuring that files are managed according to the requirements of the *Employee Files Procedure*
- **Legislative Review and Legal Support** are responsible for providing legal support in relation to the implementation of this procedure, and liaising with Crown Law as needed.

Attachments

1. The Purpose of the Act and How it Works
2. Key Terms
3. The Reporting System
4. Receipt, Assessment and Referral
5. Protection under the Act
6. Investigations
7. Action taken after an investigation
8. Managing Welfare
9. Offences
10. Flowcharts

Related Legislation/Documents

- [Public Interest Disclosures Act 2002](#)
- *Public Interest Disclosures (Whistle-Blower) Policy*
- *Grievance Management Procedure*
- *Bullying, Harassment and Discrimination Resolution Procedure*
- *Conflict of Interest and Improper Use of Power Procedure*
- *Employment Direction No 5 (Code of Conduct) Management Procedure*
- *Gifts, Benefits and Hospitality Procedure*
- *Employee Files Procedure*
- *Fraud Prevention Policy*
- Public Interest Disclosure Form
- Fact Sheet: How to make a Protected Disclosure
- Fact Sheet: Protections under the *Public Interest Disclosures Act*

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Attachment One

The purpose of the Act and how it works

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.

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 s6).¹
- It provides certain statutory protections for protected disclosures (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 preliminary determination as to whether the protected disclosure is a ‘public interest disclosure’ (ss 30 and 33). In other words a disclosure which, in the case of decision-making by the Ombudsman, meets the requirements of s30(2), or, in the case of decision-making by the public body, meets the requirements of s33(2).
- 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 (ss39 and 63).
- It requires such investigation to be conducted as soon as practicable (ss 39A and 77A).
- It controls the manner in which a disclosure is investigated, and provides powers in this respect.

¹ Note that s7A of the Act permits a person to whom a disclosure may be made under Part 2 of the Act to treat a person who is not a public officer or contractor as a contractor for the purposes of the Act, if they consider that it would be in the public interest to do so.

- In the case of investigation by the Ombudsman, it gives the Ombudsman the power to recommend that action be taken in light of the investigation (s56.)
- 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).
- The flow chart (Attachment 10 (p 42)) depicts the way in which a public body should deal with a disclosure made to it under the Act. It is important to note that a person does not have to expressly reference the Act when making a disclosure in order to be eligible for protection, if all the requirements in the Act are otherwise met.

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;² - 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.

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.

² The Act concerns ‘improper conduct’, which embraces ‘corrupt conduct’. The IC Act concerns ‘misconduct’. The definitions of the expressions thus used in the two Acts do not align.

Attachment Two

Key Terms

The right to make a disclosure

The right to make a disclosure under the Act is given by s6 of the Act. That states:

6. Disclosures about improper conduct or detrimental action

- (1) A public officer who believes that another public officer or a public body –
 - (a) has engaged, is engaging or proposes to engage in improper conduct in their capacity as a public officer or public body; or
 - (b) has taken, is taking or proposes to take detrimental action in contravention of section 19 – may disclose that improper conduct or detrimental action in accordance with this Part.
- (2) A contractor who believes that the public body with which the contractor has entered into a contract –
 - (a) has engaged, is engaging or proposes to engage in improper conduct in its capacity as a public body; or
 - (b) has taken, is taking or proposes to take detrimental action in contravention of section 19 – may disclose that improper conduct or detrimental action in accordance with this Part.

As can be seen from the emphasis given to certain expressions in this version of s6, a number of expressions are key to its operation. These are:

- ‘public officer’
- ‘public body’
- ‘contractor’
- ‘improper conduct’
- ‘detrimental action’

Because of the way that the expression ‘improper conduct’ is defined in s3 of the Act, a further expression is also very important. This is the expression ‘corrupt conduct’.

‘Public officer’ and ‘public body’

These terms are defined in ss3 and 4 of the Act, in this way:

3. Interpretation

public body means a public body referred to in section 4;

public officer means a public officer referred to in section 4;

4. Public bodies and officers

- (1) Subject to subsection (3), the following bodies and authorities are public bodies for the purposes of this Act:
 - (a) the Parliament of Tasmania;
 - (b) a State Service Agency;
 - (c) the Police Service;
 - (d) a council;
 - (e) a Government Business Enterprise;
 - (f) a State-owned Company;
 - (g) a council-owned company;
 - (h) a body or authority, whether incorporated or not, whose members or a majority of whose members are appointed by the Governor or a Minister;
 - (i) any other prescribed body or authority, whether incorporated or not –
 - (i) to which any money is paid by way of appropriation from the Public Account; or
 - (ii) over which the Government or a Minister exercises control.
- (2) Subject to subsection (3), the following persons are public officers for the purposes of this Act:
 - (a) a Member of Parliament;
 - (b) a councillor;
 - (c) a member, officer or employee of a public body;
 - (d) a member of the governing body of a public body;
 - (e) an employee of a council;
 - (f) any person performing functions under the Parliamentary Privilege Act 1898;
 - (g) a person employed in an office of a Minister, Parliamentary Secretary or other Member of Parliament whether in accordance with the State Service Act 2000, Parliamentary Privilege Act 1898 or otherwise;
 - (h) any person performing functions under the Governor of Tasmania Act 1982;
 - (i) a person appointed to an office by the Governor or a Minister under an Act
- (3) The following bodies are not public bodies for the purposes of this Act:
 - (a) a court;
 - (b) a tribunal;
 - (c) the Tasmanian Industrial Commission;
 - (d) the Integrity Commission;
 - (e) any other prescribed body.

- (4) The following persons are not public officers for the purposes of this Act:
- (a) the Governor of Tasmania;
 - (b) a judge of the Supreme Court;
 - (c) the Associate Judge of the Supreme Court;
 - (d) a magistrate of the Magistrates Court;
 - (e) the Director of Public Prosecutions;
 - (f) any other prescribed person.

The DoH is a public body, as so defined.

Further, any member, officer or employee of the DoH is a public officer, as so defined.

Note that the right which s6 of the Act gives to a public officer to make a disclosure must be exercised whilst the person is still a public officer. It is not a requirement that a public officer refer to the Act, or even have knowledge that the Act exists, to make a disclosure which may be protected under the Act.

‘Contractor’

This term is defined in s3 of the Act, in this way:

‘contractor’ means –

- (a) a person who at any time has entered into a contract with a public body for the supply of goods or services to, or on behalf of, the public body; or
- (b) an employee of the contractor; or
- (c) a subcontractor engaged by the contractor to fulfil all or part of a contract with a public body for the supply of goods or services to, or on behalf of, the public body;’

This definition has the effect that a person may exercise the right given to a contractor by s6 of the Act even though the contract which they held with the public body is now over. Note that contractors cannot make a protected disclosure to a public body and should be referred to the Ombudsman or Integrity Commission.

‘Improper conduct’ and ‘corrupt conduct’

These terms are also defined in s3 of the Act, in this way:

‘improper conduct’ means –

- (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;

Note that paragraph (b) leads to another definition in s3, being that of ‘corrupt conduct’ –

‘corrupt conduct’ means –

- (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 his or her 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);’

Note that, for the right of disclosure under s6 to apply, the improper conduct (including corrupt conduct) must be serious or significant as determined in accordance with guidelines issued by the Ombudsman. The guidelines can be accessed at www.ombudsman.tas.gov.au.

Examples of ‘corrupt conduct’

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

Examples of other types of ‘improper conduct’

- A public officer tolerates poor practices, giving rise to a risk to public health or safety.
- A public officer wastes public resources for example using DoH credit card for personal use.

‘Detrimental action’

This term is defined in s3 of the Act, in this way:

‘detrimental action’ includes –

- (a) action causing injury, loss or damage; and
- (b) Intimidation or harassment; and

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- (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;'

Note that the right to make a disclosure in relation to detrimental action under s6 relates to detrimental action taken in contravention of s19 of the Act. Section 19 is in these terms:

19. Protection from reprisal

- (1) A person must not take detrimental action against a person in reprisal for a protected disclosure.

Penalty: Fine not exceeding 240 penalty units or imprisonment for a term not exceeding 2 years, or both.

- (2) A person takes detrimental action in reprisal for a protected disclosure if –
 - (a) the person takes or threatens to take the action because –
 - (i) a person has made, or intends to make, a protected disclosure; or
 - (ii) the person believes that a person has made or intends to make the protected disclosure; or
 - (b) the person incites or permits another person to take or threaten to take the action for either of those reasons.
- (3) In determining whether a person takes detrimental action in reprisal, it is irrelevant whether or not a reason referred to in subsection (2) is the only or dominant reason as long as it is a substantial reason.'

The effect of s19 is that reprisal must have been a substantial reason behind the detrimental action taken.

Examples of detrimental action are:

- 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, his or her family or friends ; and
- discrimination against the discloser or his or her family and associates in applications for jobs or services.

Attachment Three

The Reporting System

To whom a disclosure may be made – general principles

For the protections in the Act to apply, a disclosure must be made to the right person or body. Section 7 of the Act deals with this subject, and the following table summarises its effect:

Officer or public body to which the disclosure relates	Person to whom the disclosure may be made
a member, officer or employee of the DoH or other State Service Agency	<ul style="list-style-type: none"> • The Secretary or Public Interest Disclosure Officer of the DoH or Principal Officer of the other Agency as the case may be (see below) • the Integrity Commission • the Ombudsman
a member, officer or employee of a public body other than the Police Service, the DoH or other State Service Agency	<ul style="list-style-type: none"> • that public body; • the Integrity Commission • the Ombudsman
the principal officer of a public body or State Service Agency	<ul style="list-style-type: none"> • the Ombudsman • the Integrity Commission
a member of the Police Service, other than the Commissioner of Police	<ul style="list-style-type: none"> • the Commissioner of Police
the Commissioner of Police	<ul style="list-style-type: none"> • the Ombudsman
a member of the Legislative Council	<ul style="list-style-type: none"> • the President of the Legislative Council
a member of the House of Assembly	<ul style="list-style-type: none"> • the Speaker of the House
a councillor, within the meaning of the Local Government Act 1993	<ul style="list-style-type: none"> • the Ombudsman
a person employed under the provisions of the Parliamentary Privilege Act 1898	<ul style="list-style-type: none"> • the Ombudsman • the Integrity Commission
the Auditor-General	<ul style="list-style-type: none"> • the chairman of the Public Accounts Committee
the Ombudsman	<ul style="list-style-type: none"> • the Joint Standing Committee on Integrity
a person employed in an office of a Minister, Parliamentary Secretary or other Member of Parliament	<ul style="list-style-type: none"> • the Ombudsman

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Officer or public body to which the disclosure relates	Person to whom the disclosure may be made
in any other case, including if the disclosure is about a public body as opposed to an individual public officer	<ul style="list-style-type: none"> • the Ombudsman • the Integrity Commission

Hence, disclosures which relate to improper conduct or detrimental action by a member, officer or employee of the Agency must be made as explained below.

Disclosure to persons within the DoH

Disclosures of improper conduct or detrimental action by a member, officer or employee of the DoH may be made to the following officers:

- The Head of Agency – who is the ‘Principal Officer’ of the public body, within the terms of the Act.
- A Public Interest Disclosure Officer as described in the *DoH Delegations and Administrative Authorities – Human Resources Management Delegations and Administrative Authorities*.

Public Interest Disclosure Officers hold a delegation which enables them to receive public interest disclosures under the Act, as well as a delegation for all other powers and functions of the Principal Officer under the Act.

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.

It is not a requirement that the person contemplating making a disclosure refers to the Act, or is aware of the Act, to make a valid disclosure.

A disclosure about the Principal Officer should be immediately referred to the Ombudsman or the Integrity Commission.

Disclosure to the Ombudsman

A disclosure about improper conduct or detrimental action by the DoH 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

NAB House, Level 6, 86 Collins Street
HOBART TAS 7000

Internet: www.ombudsman.tas.gov.au

Email: ombudsman@ombudsman.tas.gov.au

Phone: 1800 001 170 (Charges from mobile phones apply)

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Disclosure to the Integrity Commission

A disclosure about improper conduct or detrimental action by the DoH or any of its members, officers or employees may also be made directly to the Integrity Commission. The contact details for the Integrity Commission are:

Tasmanian Integrity Commission
GPO Box 822
HOBART TAS 7001

or at

Level 2, Surrey House
199 Macquarie Street
HOBART TAS 7000

Internet: www.integrity.tas.gov.au

Email: integritycommission@integrity.tas.gov.au

Phone: 1300 720 289

To which entity should a disclosure be made?

Any person considering making a disclosure should refer to the table and consider appropriate options.

In some situations there may be only a single appropriate option.

Where there is a choice of entities to whom a disclosure may be made both the Ombudsman and the Integrity Commission will be able to give advice on the most suitable entity to receive the disclosure, but the Ombudsman has overall responsibility for the administration of the Act.

The considerations which might sensibly bear on the choice of entity to which the disclosure is made include:

- the nature of the normal functions (and therefore the skills and experience) of the different entities which might be chosen;
- the desirability of independent investigation of the disclosure – which might, for instance, lead away from making the disclosure to the public body to which it relates; and
- the seriousness or otherwise of the disclosure.

Note that if the disclosure is about the DoH it can only be made to the Ombudsman or the Integrity Commission. Given the normal functions of the Integrity Commission focus on individual misconduct it is recommended that the Ombudsman be contacted in the first instance.

Attachment Four

Receipt, Assessment and Referral

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, which records the time when 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 also ask the discloser to put 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 of any accompanying documents.

If the disclosure is about the Principal Officer, it should be immediately referred to the Ombudsman.

A confidential file should be created for the disclosure, marked clearly as being a *Public Interest Disclosures Act* matter as described in the *Employee Files Procedure*.

Assessing the disclosure – is it a protected disclosure?

The protections provided by the Act to disclosers (contained in Part 3 of the Act) only apply where the disclosure made is a 'protected disclosure'. This means a disclosure made in accordance with Part 2 of the Act: s14.

As soon as practicable after the receipt of a disclosure, the disclosure should therefore be assessed by the Principal Officer or a Public Interest Disclosure Officer to determine whether it has been made in accordance with Part 2 of the Act. The following questions need to be asked in carrying out this assessment:

- Has the disclosure been made by a public officer or contractor? Refer to Attachment Two: Key Terms (p19).
- Does the disclosure concern improper conduct or detrimental action? Refer to Attachment Two: Key Terms (p19).
- Did the alleged conduct or action occur more than 3 years before the commencement of the Act – i.e. on or after 1 January 2001? (see s10 of the Act).
- Has the disclosure been made to the appropriate person? Refer to the table in Attachment Three: The Reporting System (p24).

As required by s6 of the Act, one of the preconditions to a disclosure being a protected disclosure, and therefore attracting the protections in Part 3 of the Act, is that it is made by a public officer or a contractor. Note that disclosure by contractors must be made to the Ombudsman or Integrity Commission.

Note that 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. If the person is satisfied that an anonymous disclosure is from a contractor it should be referred to the Ombudsman.

The person who carries out the assessment should inform the discloser as soon as practicable of their conclusion as to whether the disclosure is a protected disclosure, and of their reasons for coming to that conclusion. This should be done in writing. If the disclosure has been assessed as being a protected disclosure, the discloser should be given a copy of the DoH fact sheet *Public Interest Disclosures: Protections* which details the protections which the Act provides. These protections should be explained to the discloser if necessary. The discloser should also be informed of the process which will now be followed with respect to the disclosure.

A copy of the assessment should also be given to the Principal Officer without delay, where the person who carried out the assessment is not the Principal Officer.

If the disclosure is considered to be a protected disclosure, the Principal Officer or a Public Interest Disclosure Officer should 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 – refer to Attachment Eight: *Managing Welfare* (p38).

Section 7A of the Act provides that a person to whom a disclosure may be made under Part 2 of the Act may, if the person considers that it would be in the public interest to do so, treat any other person who is not a public officer or a contractor as a contractor for the purposes of the Act. Only the Ombudsman or the Integrity Commission can accept disclosures from contractors, so the person will need to be advised to contact either of those bodies. If the Public Interest Disclosure Officer considers this is applicable, they should seek advice from the Ombudsman.

Should the disclosure be referred to another body?

Referral to the Ombudsman

The Agency may refer a protected disclosure to the Ombudsman if it believes that it is not able to complete the investigation satisfactorily: s68.

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.

Referral to the Integrity Commission

The Agency may refer a protected disclosure to the Integrity Commission where it considers that the disclosure relates to misconduct as defined in s4(1) of the [Integrity Commission Act 2009](#).

The Agency must notify the discloser of the referral within a reasonable time (unless the disclosure was made anonymously): s29D.

The Integrity Commission may deal with the disclosure under the [Integrity Commission Act](#), or it may refer the disclosure to the Ombudsman or a public body, as the case may require, for action by the Ombudsman or public body in accordance with the [Public Interest Disclosures Act](#).

Matters which would bear on a decision as to whether a protected disclosure should be referred to the Integrity Commission are:

- the relevance of the disclosure to the normal functions of the Commission;
- the desirability of independent investigation by the Commission of the subject matter of the disclosure; and

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- the views of the discloser as to whether referral should occur.

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 DoH will not commence and will suspend the investigation to consult with the Ombudsman as to the future of the matter. Under s41 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 Tasmania Police, the DoH should consider whether the disclosure should be referred to the Ombudsman under s68 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 s23 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 Agency. 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.

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 s33 of the Act as to whether the disclosure is a public interest disclosure. This assessment must be made within 45 days of the receipt of the disclosure.

For a disclosure to be a public interest disclosure, the public body 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. A disclosure must include an indication of the existence of evidence that if substantiated would show or tend to show that the alleged conduct occurred.

Where the Principal Officer or Public Interest Disclosure Officer concludes 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 14 days of the decision;
- notify the person making the disclosure within 14 days of the decision (unless it is an anonymous disclosure), and
- proceed to investigate the disclosed matter – refer to Attachment Six: Investigations (p32) - see s34.

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

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- advise the Principal Officer (if not the person receiving the disclosure)
- notify the Ombudsman within 14 days of the decision, and
- notify the person making the disclosure within 14 days of the decision (unless it is an anonymous disclosure) – see s35.

The Ombudsman must then review this decision: s35(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 the disclosure is not a public interest disclosure, but could be a complaint under the Ombudsman's Act 1978 the Ombudsman must notify the discloser of his or her right to have the disclosure dealt with as a complaint under the Ombudsman Act 1978 if he or she wishes.

If the Ombudsman determines that the disclosure is in fact a public interest disclosure, the matter may be referred back to the public body under s42 for investigation under the Act or the Ombudsman will deal with the disclosed matter.

Attachment Five

Protection

When does protection commence?

Where the DoH receives a disclosure made in accordance with 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, as found in s6, is that the discloser honestly believes that the alleged improper conduct or detrimental action in fact occurred).

The protection also extends to a person who intends to make a disclosure.

Note that, as provided in s9, a disclosure can still be made where the discloser cannot identify the person or body to whom or to which the disclosure relates.

What protection does the Act provide?

Part 3 of the Act gives various types of protection to a person who makes a protected disclosure. This part of these procedures only provides a summary of some elements of that Part of the Act.

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 (s16);
- 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 (s17(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 (s17(1)(b)).

These last two protections do not apply, however, to a disclosure of information to a person other than the person to whom the protected disclosure was originally made, unless that further disclosure was made in accordance with the Act: s17(2).

Part 3 also contains various provisions which are intended to protect a discloser from detrimental action by way of reprisal for a protected disclosure. By s19, the Act makes it an offence to take such detrimental action. By s20, it creates a liability to pay damages for such detrimental action. And by s21, it gives a person who believes that detrimental action has been taken against him or her 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.

Attachment Six

Investigations

Introduction

The DoH must investigate every disclosure referred to it for investigation by the Ombudsman: s63(b).

Unless the matters set out below apply, or the matter is referred to the Ombudsman, the Agency will investigate every disclosure that it receives and determines is a public interest disclosure under s33 of the Act: s63(a)

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 that purpose.

The objectives of an investigation are:

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

Matters that do not have to be investigated

Before embarking on the investigation of a public interest disclosure, the Principal Officer or Public Interest Disclosure Officer must first consider whether the disclosed matter deserves to be investigated. Section 64 specifies certain circumstances under which a public body may legitimately decide not to investigate. Those circumstances are if:

- in the opinion of the public body the disclosure is trivial, vexatious, misconceived or lacking in substance; or
- the subject matter of the disclosure has already been adequately dealt with by the Ombudsman or a public body, statutory authority, Commonwealth statutory authority, commission, court or tribunal; or
- the person making the disclosure has commenced proceedings in a commission, court or tribunal in relation to the same matter, and that commission, court or tribunal has power to order remedies similar to those available under this Act; or
- the person making the disclosure had knowledge for more than 12 months of the disclosed matter before making the disclosure and failed to give a satisfactory explanation for the delay in making the disclosure; or
- the disclosure relates solely to the personal interests of the person making the disclosure; or
- the disclosure is based on false or misleading information, or
- the matter which is the subject of the disclosure has already been determined and the additional disclosure does not provide significant or substantial new information.

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Any decision not to proceed with an investigation on a ground specified in s64 must be made by the Principal Officer.

If the Principal Officer determines that the disclosed matter is not to be investigated, notice of this fact must be given within 14 days to both the Ombudsman and (except in the case of an anonymous disclosure) the person who made the disclosure. Reasons for the decision must accompany the notice.

The Ombudsman is required by s65(2) to review such a decision. Following the review, the Ombudsman must notify the Agency of his or her decision within a reasonable time. If the Ombudsman on review determines that the disclosure should not be investigated, 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 decide how the matter should be dealt with.

If the Ombudsman determines that the disclosure should be investigated, and the matter is not referred to the Ombudsman for a reason specified in 68, the Agency must proceed with the investigation.

Appointment of investigator and framing of terms of reference

The Principal Officer will determine who is to carry out the investigation. This responsibility cannot be delegated to a Public Interest Disclosure Officer. This may be an officer or employee within the Agency 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; 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 6 months from the date of the determination that the disclosure is a public interest disclosure: s77A(1). If at any stage before or during the investigation it appears that the investigation cannot be completed within six months, the Agency may apply to the Ombudsman for an extension of up to 6 months in which to complete the investigation: s77A(2).

The terms of reference should require the investigator to make regular reports to the Principal Officer.

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 plan should be updated as necessary during the course of the investigation.

Natural justice

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

The principles are a set of procedural standards which need to be met if the right of a person to a fair hearing can be accepted as having been satisfied.

The Agency will ensure 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, or
- is known to hold any biases which are relevant to the subject-matter of the investigation, or
- in respect of whom there is reasonable ground for apprehending or suspecting bias.³

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.

Any person who is potentially subject to an adverse finding or comment must be told before any final conclusions are drawn by the investigator) of:

- the allegations made against them, or which have arisen against them as a result of the investigation;
- 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 potential findings in view, and their possible consequences.

Each such person must be given a reasonable time to respond to the material which is provided to them and the investigator must maintain an open mind, and must fairly take into account all representations which such a person may make.

Note that 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. Note also that the name of the person making the disclosure or any particulars which might identify that person must not be revealed unless necessary, and with the discloser's knowledge.

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

Conduct of the investigation

A useful reference in planning and executing the investigation is the publication by the Australian Public Service Commission (albeit produced for a different purpose) *Handling misconduct: A human resource manager's guide* (Second Edition, 2015).

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. Where disclosure of the identity of the person cannot be avoided, due to the nature of the allegations, the investigator should warn the discloser and his or her welfare manager of this.

³ For apprehended bias, the test 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 he or she is required to decide.

Referral of an investigation to the Ombudsman

Under s68 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 Attachment Four: Receipt, Assessment and Referral (p27) 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.

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 s74(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.

Attachment Seven

Action taken after an investigation

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 – refer to 'natural justice' in Attachment Six: Investigations (32).

With a view to potential action by the public body under s75 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 Agency to prevent the conduct from continuing or occurring in the future; and
- any action that should be taken by the Agency 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: s23(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: s75(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:
s75(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 the Minister for Health 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 s77 of the Act, the Principal Officer will also inform the discloser of the findings of the investigation, and of any steps taken under s75 as a result of the findings made.

Attachment Eight

Managing Welfare

Commitment to protecting disclosers

The Agency 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.

The welfare manager must 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.

See Attachment Two: Key Terms (p19) for further details as to what constitutes detrimental action.

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 Agency, they may report the matter to the Ombudsman. A report of detrimental action may qualify as a protected disclosure under the Act.

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 Agency to address any improper conduct that has been found to have occurred. The discloser must be given reasons for all decisions made by the Agency in relation to a disclosure. All communication with the discloser must be in plain English.

Occurrence of detrimental action

If a discloser reports an incident of detrimental action allegedly taken in reprisal for the making of the 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 in accordance with these procedures.

Discloser implicated in improper conduct

Where a person who makes a disclosure is implicated in misconduct, the Agency 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 Agency 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. However, in some circumstances, 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.

Management of the person against whom a disclosure has been made

The Agency recognises that employees against whom disclosures are made must also be supported during the handling and investigation of disclosures. The Agency 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 the Agency is accorded natural justice in accordance with Attachment Six: Investigations (p32).

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.

The Agency 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 the Agency will consider any request by that person to issue a statement of support setting out that the allegations were clearly wrong or unsubstantiated.

Attachment Nine

Offences

The Agency 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.

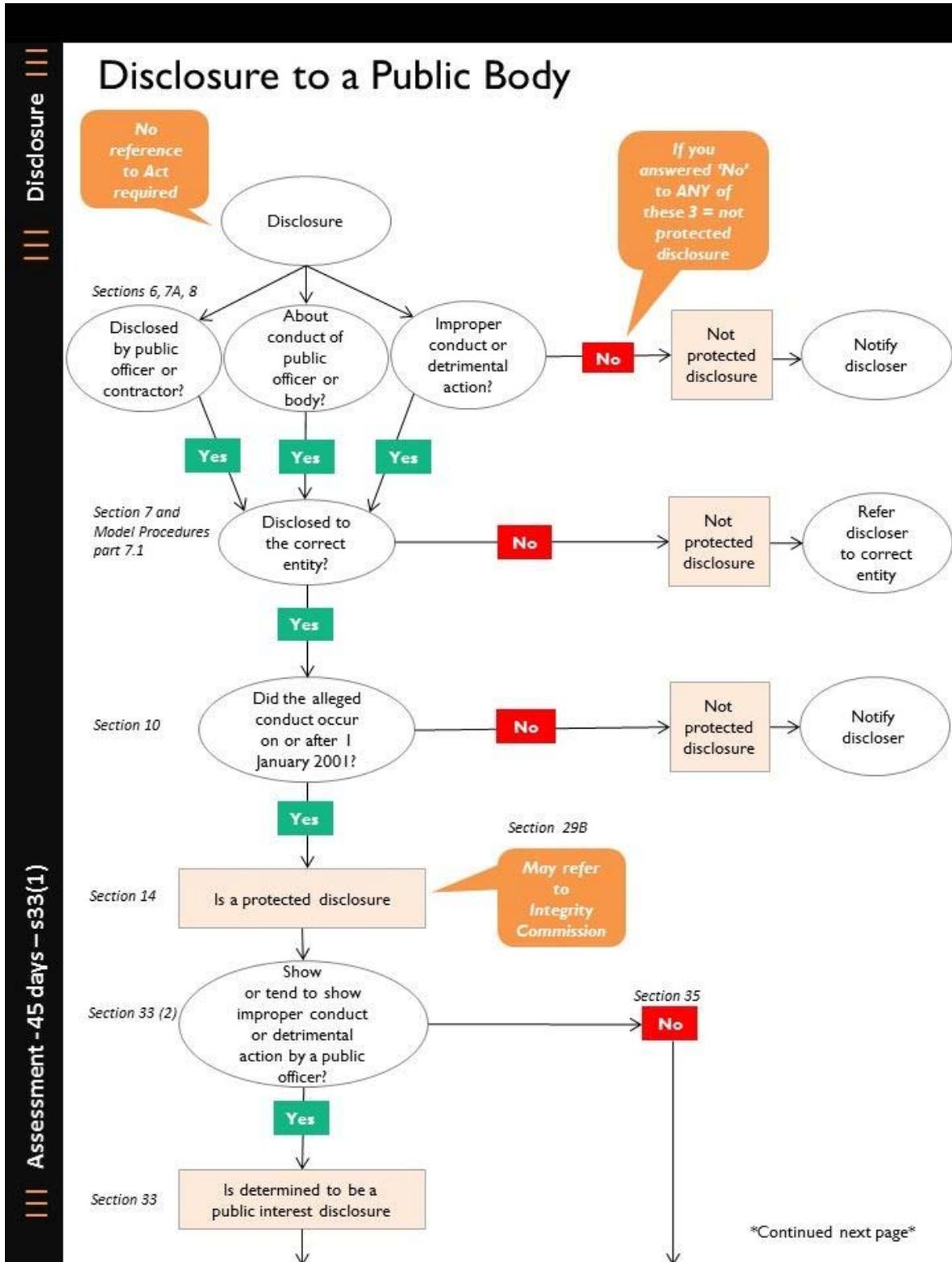
Section 87(2): This section makes it an offence for a person to knowingly provide false information to a person conducting an investigation under the Act. The provision provides for a maximum penalty of 240 penalty units or two years imprisonment, or both. The value of a penalty unit varies from time to time in accordance with movements in the Consumer Price Index.

For more information, see the Department of Justice website.

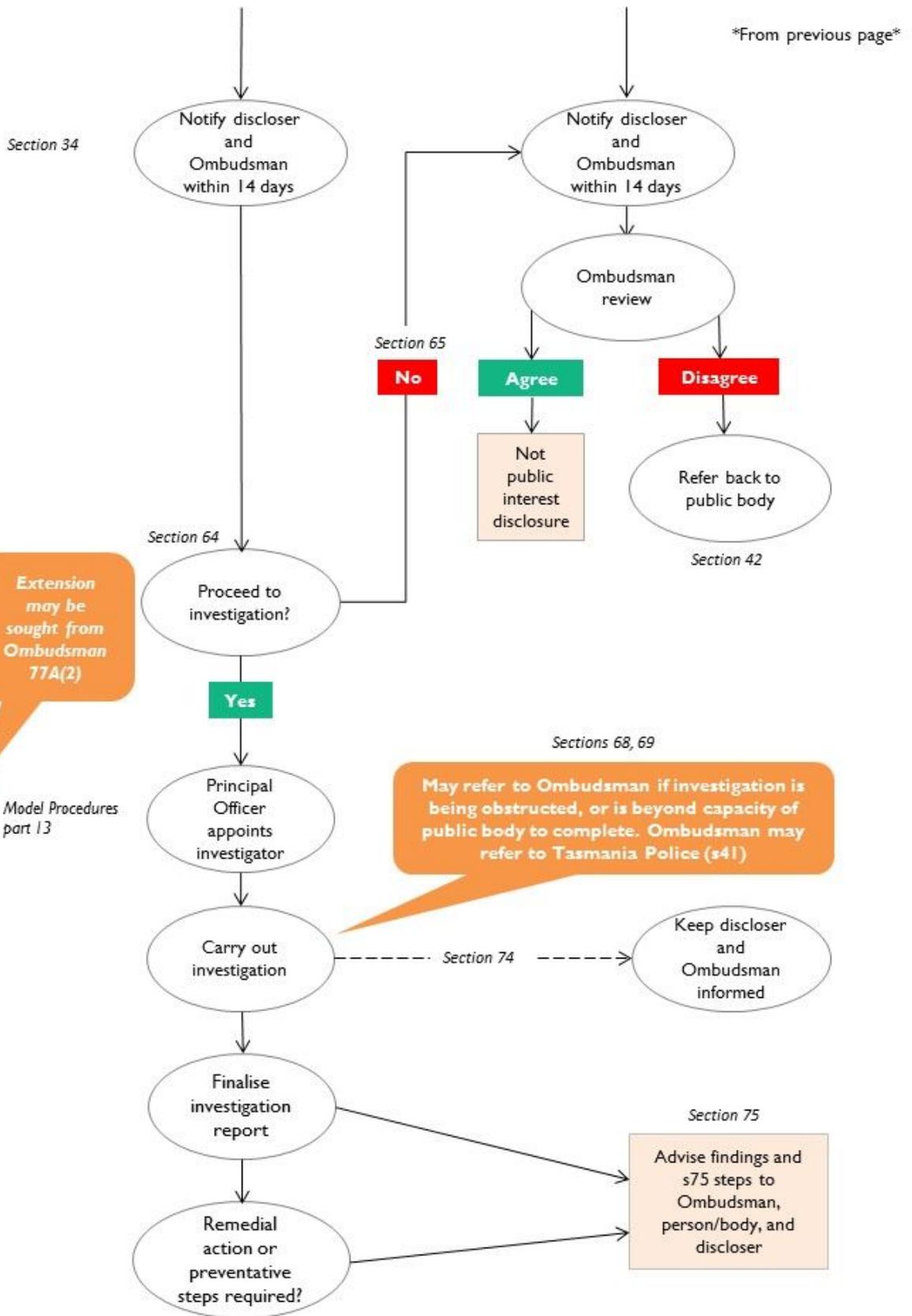
http://www.justice.tas.gov.au/legislationreview/value_of_indexed_units_in_legislation

Attachment Ten

Flowchart



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