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| Public interest disclosures policy and procedure |

# Purpose

This document sets out the Victorian Disability Worker Commission’s (the Commission's) and the Disability Worker Registration Board of Victoria's (the Board's) policy and procedure on public interest disclosures under the *Public Interest Disclosures Act 2012* (PID Act).

The Commission and the Board:

* are committed to the aims and objectives of the PID Act, and will not tolerate conduct that is contrary to the PID Act
* will take all reasonable steps to protect people who make disclosures under the PID Act from 'detrimental action', and will take appropriate action against employees who have taken detrimental action (including disciplinary action)
* will afford procedural fairness to anyone who is the subject of allegations in a disclosure
* recognise the value of transparency and accountability in administrative and management practices and support disclosures that reveal improper conduct or detrimental action
* will manage the welfare of persons connected with public interest disclosures consistently with the obligations arising under the PID Act
* will be visible, approachable, communicative and lead by example in establishing a workplace that supports public interest disclosures.

These procedures deal with:

* how the Commission and the Board support compliance with the public interest disclosure regime
* how to make a disclosure
* how the Commission and the Board support the welfare of staff and members.

The Commission and the Board have adopted this joint policy and procedure in recognition of their connected functions under the *Disability Service Safeguards Act 2018* and their shared commitment to the objectives of the PID Act.

These procedures are in addition to other legal obligations, including ensuring the health and wellbeing of employees of a public sector body under occupational health and safety laws, the *Charter of Human Rights and Responsibilities Act 2006*, the *Public Administration Act 2004*, and Victorian Public Sector Codes of Conduct. These procedures supplement guidelines produced by the Independent Broad-based Anti-corruption Commission (IBAC), such as the *Guidelines for handling public interest disclosures* (available [here](https://www.ibac.vic.gov.au/docs/default-source/guidelines/guidelines-for-handling-public-interest-disclosures.pdf?sfvrsn=eb8b6875_14)) and *Guidelines for public interest disclosure welfare management* (available [here](https://www.ibac.vic.gov.au/docs/default-source/guidelines/guidelines-for-public-interest-disclosure-welfare-management.pdf?sfvrsn=288e6875_16)).

# Application

This policy applies to all staff at the Commission, including the Victorian Disability Worker Commissioner (the Commissioner), the Board and its members.

# Definitions

## Terms used in this policy

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| Cooperator | Someone who cooperates or intends to cooperate with an investigation of a disclosure |
| Detrimental action | Action against a person in reprisal for them having made a public interest disclosure |
| Improper conduct | See explanation in policy |
| Investigative entity | A body authorised to investigate a public interest complaint |
| Disclosure | A disclosure about improper conduct in the public sector under the PID Act |
| Discloser | Someone who makes a public interest disclosure |
| Public interest disclosure | See explanation in policy |
| Public interest complaint | A disclosure determined by IBAC to be a public interest complaint |

## What is a public interest disclosure?

A public interest disclosure is a disclosure by a natural person that: shows, tends to show; or includes information that the person reasonably believes shows or tends to show, that:

* 'improper conduct' has, is, or is proposed to occur or
* 'detrimental action' has, is, or is proposed to be taken in reprisal for a public interest disclosure.

A public interest disclosure was previously called a 'protected disclosure'.

The Commission and the Board cannot receive public interest disclosures, so any disclosures must be made to IBAC.

After a public interest disclosure is made, IBAC will assess the disclosure and determine whether the disclosure is a public interest complaint. IBAC will determine that the disclosure is a public interest complaint if it considers that it shows that a person, public officer or public body has engaged in 'improper conduct' or 'detrimental action'. This includes if someone is still engaging in the conduct or proposes to. A determination that a disclosure is a public interest complaint may lead to an investigation by IBAC (or the relevant investigative entity such as the Victorian Inspectorate), or other further action to address the complaint.

## Improper conduct

Improper conduct includes corrupt conduct, criminal offences and other conduct specified in the PID Act.

Corrupt conduct (as defined in the *Independent Broad-Based Anti-Corruption Commission Act 2011* (IBAC Act)) means conduct:

* of any person that adversely affects the honest performance by a public officer or public body of his or her or its functions as a public officer or public body; or
* of a public officer or public body that constitutes or involves the dishonest performance of his or her or its functions as a public officer or public body; or
* of a public officer or public body that constitutes or involves knowingly or recklessly breaching public trust; or
* of a public officer or a public body that involves the misuse of information or material acquired in the course of the performance of his or her or its functions as a public officer or public body, whether or not for the benefit of the public officer or public body or any other person; or
* of a person (the first person) intended to adversely affect the effective performance or exercise by a public officer or public body of the functions or powers of the public officer or public body and result in the first person or an associate of the first person obtaining
  + a licence, permit, approval, authority or other entitlement under any Act or subordinate instrument; or
  + an appointment to a statutory office or as a member of the board of any public body under any Act or subordinate instrument; or
  + a financial benefit or real or personal property; or
  + any other direct or indirect monetary or proprietary gain - that they would not have otherwise obtained; or
* that could constitute a conspiracy or an attempt to engage in any conduct referred to in (a)-(e) being conduct that would constitute a relevant offence. A relevant office means an indictable offence against an Act or common law offences of perverting or attempting to pervert the course of justice, bribery of a public official and misconduct in public office.

Improper conduct also includes conduct of a public officer or public body, in their capacity as a public officer or a public body, that constitutes:

* a criminal offence
* serious professional misconduct - not defined in the PID Act, [IBAC guidance](https://www.ibac.vic.gov.au/docs/default-source/education-resources/information-sheet-key-changes-for-pid-integrity-and-accountability-legislation-amendment.pdf?sfvrsn=9939ec2_8) provides that this is conduct which constitutes a serious breach of an established professional code of conduct and/or other serious departures from the person’s professional responsibilities
* dishonest performance of public functions
* intentional or reckless breach of public trust
* intentional or reckless misuse of information
* substantial mismanagement of public resources
* substantial risk to health or safety of a person
* substantial risk to the environment.

Improper conduct also includes:

* conduct of any person that adversely affects a public officer's honest performance of their functions
* conduct of any person that adversely affects or is intended to adversely affect a public officer's effective performance of their functions, which results in a benefit to that person and
* a conspiracy or attempt to engage in any of the above conduct.

Commission employees and Board members are public officers.

Trivial conduct is not improper conduct. The PID Act does not define trivial conduct. IBAC will determine whether conduct is trivial conduct.

## Detrimental action

A person takes detrimental action against a person in reprisal for a public interest disclosure if:

* the person takes or threatens detrimental action against the other person because, or in the belief that:
  + the other person or anyone else has made, or intends to make, the disclosure or
  + the other person or anyone else has cooperated, or intends to cooperate, with an investigation of the disclosure or
* for either of those reasons, the person incites or permits someone else to take or threaten detrimental action against the other person.

Detrimental action is defined in the PID Act. Some examples of detrimental action include:

* threatening safety or property of a discloser or a discloser's family or friends
* demoting, transferring, isolating or changing in duties of a discloser due to their having made a disclosure
* discriminating or disadvantaging a discloser in their career, profession, employment, trade or business
* discriminating against the discloser, their family, or associates, in applications for promotions, jobs, permits or tenders
* taking other actions causing injury, loss or damage.

Taking management action against a person who has made a disclosure is not detrimental action so long as the reason for the action is not the making of the disclosure.

It is an offence, punishable by fine or imprisonment, to take detrimental action against another person in reprisal for a public interest disclosure. Detrimental action in reprisal for a disclosure can be grounds for a further public interest disclosure. Where the detrimental action is of a serious nature likely to amount to a criminal offence, the matter will be reported to the police or IBAC.

A discloser may:

* take civil action for damages against someone who takes detrimental action against them (including the Commission or Board, if the person was acting in the course of their employment or engagement with the Commission or Board, or as the Commission or Board's agent)
* seek relief from a court to prevent detrimental action from being taken.

# Protections for making a public interest disclosure

## Protections for a discloser

The PID Act provides the following protections for disclosers:

* immunity from civil or criminal liability for making disclosure (including in proceedings for defamation) or any liability arising by way of administrative process (such as disciplinary action)
* someone who makes a public interest disclosure does not, by making a disclosure, breach any other confidentiality obligations that might otherwise be thought to apply.

A disclosure that is made to a person or body who cannot receive disclosures under the PID Act (for example, a journalist or politician) will not attract the protections under the PID Act. There are some exceptions, in the limited circumstances specified in the PID Act, if a public interest disclosure has not been adequately acted on – called external disclosures. More information about external disclosures can be found on the IBAC website.

The protections under the PID Act apply from the time of the disclosure, even if IBAC determines that the disclosure is not a public interest complaint. The protections also apply to further information provided to IBAC (or other relevant investigative entity).

It is also an offence to disclose the content of a disclosure, or the identity of a person who has made a disclosure as confidentiality obligations under the PID Act apply (more at Maintaining confidentiality below).

A discloser is **not** protected under the PID Act if they provide false or misleading information relating to a disclosure, falsely claim that a matter is the subject of a public interest disclosure, or falsely claim that a matter is the subject of a disclosure that IBAC has determined to be a public interest complaint. A discloser is also not protected from legitimate management action, or the consequences of their own conduct (even if this was disclosed as part of the public interest disclosure).

Under the PID Act, a person's liability for their own conduct is not affected by having disclosed that conduct under the Act: therefore, a discloser is not protected from reasonable consequences flowing from their involvement in improper conduct. In some cases, admission to conduct may be a mitigating factor when considering disciplinary or other action.

## Maintaining confidentiality

The PID Act prohibits including any details in any report or recommendation that is likely to lead to identifying a discloser, and also prohibits identifying the person the subject of a disclosure in an annual report or any reports to Parliament.

Confidentiality requirements have three elements:

* An investigative entity investigating a public interest complaint may disclose information where this is necessary to perform its investigative functions.
* Disclosers may always seek advice and support from specified categories of persons without seeking permission. This enables a discloser to provide information about an assessable disclosure (content or information about the content) to a trade union, employee assistance program, the Victorian WorkCover Authority or for the purposes of an application to the Fair Work Commission.
* A person who receives a confidentiality notices may disclose restricted matters to certain categories of persons, unless the issuing agency directs otherwise.

## Exceptions to maintaining confidentiality

It is an offence to disclose information connected with a public interest disclosure. Exceptions are:

* where disclosure is required in order for the Commission, the Board, an investigating entity, or other relevant entity to exercise its functions under the PID Act
* where disclosure is in accordance with an investigative entity's direction or authorisation
* where disclosure is necessary to take lawful action in response to the conduct the subject of the disclosure (such as disciplinary process or action)
* where IBAC or the Victorian Inspectorate has determined that the disclosure is not a public interest disclosure
* when an investigative entity has published a report to Parliament in accordance with its confidentiality obligations
* for the purpose of obtaining legal advice about matters specified in the PID Act
* to enable compliance with the PID Act:
  + where a person does not have a sufficient knowledge of the English language, to an interpreter
  + where a person is a minor, to a parent or guardian
  + where a person is suffering a disability and is not able to understand, to an independent person
  + in disciplinary actions or legal proceedings for certain offences in the PID Act or other specified Acts.

## Steps the Commission and Board will take to protect confidentiality

Consistent with these requirements, the Commission and the Board will take the following steps to protect confidentiality:

* Staff and board member training: provide all staff and board members with these procedures, and training on these procedures. Staff with specific responsibilities under the PID Act and staff with information management responsibilities will receive additional training.
* Information management: all files regarding public interest disclosures are secure and only accessible by the Public Interest Disclosure Coordinator , investigating entity or welfare manager. This includes:
  + electronic files will be produced and stored separately and given password protection, with backup files stored in a secure manner such as on an encrypted external hard drive or USB
  + printed material will be kept in files clearly identified as containing public interest disclosure material and display a warning of the criminal penalties that apply to unauthorised access or disclosure of information relating to the disclosure
  + the welfare manager will not divulge information relating to the disclosed matter except to the Public Interest Disclosure Coordinator or investigating entity
  + the Commission and the Board will not email documents relevant to a public interest disclosure matter, and ensure that all telephone calls and meetings between relevant persons are in private.

# How to make a disclosure

**Disclosures about the Commission, Board or the Commissioner should be made to IBAC: phone 1300 735 135, email info@ibac.vic.gov.au**

A disclosure may be made orally or in writing, and may be made anonymously. Written disclosures to IBAC can be made via its online form available on the IBAC website: <https://www.ibac.vic.gov.au/reporting-corruption/report/complaints-form>

After a disclosure is notified to IBAC, IBAC will determine whether it is a public interest disclosure. A disclosure will not be treated as a public interest disclosure if, within 28 days of the disclosure, the discloser gives a written statement to the entity that received the disclosure, stating that the disclosure is not a public interest disclosure.

## If IBAC determines the disclosure is a public interest complaint

If IBAC determines the disclosure is a public interest complaint , it will advise the discloser in writing that the discloser has rights, protections and obligations under the PID Act that apply to a discloser.

Once IBAC has determined that a disclosure is a public interest complaint, the discloser cannot withdraw that disclosure.

## If IBAC determines the disclosure is not a public interest complaint

If IBAC determines that a disclosure is not a public interest complaint, it will advise the discloser in writing. The rights, protections and obligations of a person who has made a public interest disclosure under the PID Act will still apply. IBAC will also inform the discloser if it thinks that the disclosure could be dealt with by another entity.

## Information about the investigation

If IBAC (or another investigative entity) is investigating a public interest disclosure, it may contact the Commission, the Board or the person who is the subject of the disclosure to seek information.

Disclosing information to IBAC (or other relevant investigative entity) does not breach the confidentiality requirements under the PID Act. Where the Commission or Board is advised of the discloser's identity, it will support the welfare of that person, including by protecting them from detrimental action.

An investigative entity generally informs the discloser of the outcome of its investigation, including any action it has taken and recommendations it has made, but will not provide any information that is likely to lead to the discloser being identified. The investigative entity may provide to the Commission or Board written information about the commencement, conduct or result of an investigation, including any actions taken and any recommendation made that any action or further action be taken.

# Supporting staff and Board member welfare

The Commission and Board are committed to protecting persons who make public interest disclosures from detrimental action taken in reprisal for such disclosures. The Commission and the Board are also committed to protecting the welfare of people who have cooperated or intend to cooperate with an investigation of a public interest disclosure complaint, and persons who are the subject of allegations in a disclosure.

Because the Commission and Board cannot receive disclosures then neither entity may not know that a person has made a disclosure. Because of confidentiality obligations, a person who has made a public interest disclosure must not discuss the matter with anyone else except IBAC (or another investigative entity to which IBAC has referred the disclosure). Therefore, the Commission and Board will only know that a person should be protected under the PID Act if it is informed of the disclosure by IBAC (or other relevant investigative entity) or where information has been disclosed to the Commission or Board under one of the exceptions to non-disclosure. These exceptions are contained in the Section 4.2 of IBAC's *Guidelines for handling public interest disclosures* and contained in sections 53(2) or 54 of the PID Act.

The Commission, in line with the *Code of Conduct for Victorian Public Sector employees* and the Victorian public sector values (<<https://vpsc.vic.gov.au/ethics-behaviours-culture/promoting-integrity/vps-values-and-employment-principles/>>) and the Board, in line with the *Code of Conduct for Directors of Victorian Public Entities* (< <https://vpsc.vic.gov.au/html-resources/code-of-conduct-for-directors-of-public-entities/>>) will provide an inclusive work environment and respond appropriately to any reports of intimidation or harassment.

## Welfare services

The Public Interest Disclosure Coordinator has a key role in how to ensure that the welfare of any persons connected with a public interest disclosure complaint is properly managed. The Public Interest Disclosure Coordinator:

* provides general advice about the PID Act and about integrity agencies including IBAC
* ensures that we carry out our responsibilities under the PID Act and associated regulations and guidelines
* is our chief liaison with IBAC about the PID Act
* will take all necessary steps to ensure information received or obtained in connection with a disclosure is confidential, including the identities of the discloser or other persons connected with the disclosure
* arranges necessary and appropriate welfare support for the discloser, including by appointing a welfare manager to support the discloser and to protect them from reprisals
* collates statistics that the Commission and the Board are required to report under the PID Act.

The Commission's and the Board’s Public Interest Disclosure Coordinator is General Counsel, Prue Elletson, phone 0409 801 364 or email: [prue.elletson@vdwc.vic.gov.au](mailto:prue.elletson@vdwc.vic.gov.au)

The Public Interest Disclosure Coordinator may appoint a welfare manager to the subject of a disclosure or be referred to the Commission’s employee assistance program. Alternatively, the Public Interest Disclosure Coordinator will provide support and advice to the subject of a disclosure, particularly in relation to their rights and obligations under the PID Act and other related matters. The Commission and the Board will consider each matter on a case-by-case basis, taking into account the information it has been provided by the investigative entity and the person’s particular circumstances.

## Support for disclosers and cooperators

The Commission and the Board will support disclosers and cooperators by:

* keeping them informed of an action that is proposed to be taken in relation to the disclosure, and the outcome of any action
* providing the legal protections available to the person
* managing expectations through early discussion about the outcomes sought, whether their expectations are realistic, and what the Commission or the Board can do
* protecting confidentiality by
  + protecting the identity of the discloser or cooperator;
  + reminding the discloser or cooperator not to reveal information that would allow them to be identified
  + ensuring that files relating to the disclosure are accessible only to those who are involved in managing disclosures
* proactively assessing the risk of detrimental action being taken in reprisal (rather than reactively waiting for a problem to arise and a complaint to be made by the discloser or cooperator), that is, actively monitoring the workplace, anticipating problems and dealing with them before they develop as far as is possible
* protecting the discloser or cooperator by:
  + examining the immediate welfare and protection needs of the person and seeking to foster a supportive work environment
  + listening and responding to any concerns the person may have about harassment, intimidation or victimisation in reprisal for making a public interest disclosure complaint
  + assessing whether the concerns the person may have about harassment, intimidation or victimisation might be due to other causes (i.e. other than disclosure under the PID Act)
* preventing the spread of gossip and rumours about any investigation into a complaint (where the Commission is aware of the investigation)
* keeping contemporaneous records of all aspects of the case management of the person, including all contact and follow-up action.

## Appointment of welfare manager

The Commission or the Board, as the case requires, will consider appointment of a welfare manager consistent with IBAC's *Guidelines for public interest disclosure welfare management*.

Usually, a welfare manager will only be needed where a disclosure proceeds to investigation, but each case will be assessed on its own merits.

A welfare manager must not divulge any details relating to a disclosed matter to any person other than the Public Interest Disclosure Coordinator or the principal officer. However, information relating to a public interest disclosure (or the identity of the person who made the disclosure) may be disclosed to a health practitioner, trade union or an employee assistance program in order to assist the person who made the disclosure to seek advice or support.

Usually, the welfare manager will, in addition to providing general support:

* Advise the person of their rights under the PID Act
* Listen and respond to any concerns the person may have about harassment, intimidation or victimisation in reprisal for their actions
* Ensure that all meetings between the welfare manager and the person are conducted discreetly to protect the person from being identified as being involved in the disclosure and that the person knows that they can access the Commission's Employee Assistance Program
* Discuss the issue of reasonable expectations with the discloser or cooperator.

## Welfare of subjects of a disclosure

Until a public interest disclosure complaint is resolved (either by dismissing or investigating it) the information about the person is only an allegation. Therefore, the Commission and the Board will also meet the welfare needs of a person who is the subject of a disclosure.

The PID Act limits the disclosure of information about the content of disclosures or which would be likely to identify a discloser. However, the Commission or the Board may give information about the disclosure to the subject of the disclosure:

* if it is directed or authorised to do so by the investigative entity investigating the public interest disclosure complaint
* for the purpose of taking action with respect to the conduct alleged, including disciplinary action.

Investigative entities may also inform the subject of the disclosure for the purposes of conducting their investigation, or taking action as a result of their investigation.

The Commission or the Board will take all reasonable steps to ensure the confidentiality of a person who is the subject of a public interest disclosure complaint. Where the disclosure is dismissed or investigations do not substantiate the allegations, confidentiality will be maintained in relation to the subject's identity, as well as the fact of the investigation and any results.

## Confidentiality

## Procedural fairness

The subject of an allegation has a right to be accorded procedural fairness before a decision is made about their conduct, this includes the right to:

* be informed about the substance of the allegations against them
* have the opportunity to answer the allegations before a final decision is made
* be informed about the substance of any adverse comment that may be included in any report arising from an investigation
* have their defence set out fairly in any report.

If the matter has been investigated, the investigating entity is responsible for carrying out this consultation.

## If the allegations are wrong or unsubstantiated

If someone has been the subject of wrong or unsubstantiated allegations, the Commission or the Board and the investigating entity will ensure there are no adverse consequences for the person arising out of the disclosure or its investigation, particularly where information has been publicly disclosed that has identified the person or such information has become well known within the Commission or among the Board.

## If detrimental action is reported

If any person reports potential detrimental action taken in reprisal for a disclosure, the welfare manager or Public Interest Disclosure Coordinator must record details of the incident and advise the person of their rights under the PID Act.

## Transfer of employees

An employee who has made a public interest disclosure, and who reasonably believes that detrimental action is being, will be, or has been taken against them, can request a transfer of employment. The transfer may be permanent or temporary, and post-transfer service will be treated as continuous with pre-transfer service.

Transfer of employees under this policy is not applicable to Board members.

The Commissioner may transfer the employee on terms and conditions of employment that are no less favourable overall, provided:

* the employee requests/consents to the transfer
* the Commissioner reasonably suspects that detrimental action will be, is being, or has been taken against that employee
* the Commissioner considers that the transfer will avoid, reduce or eliminate the risk of detrimental action against the employee
* the Head of the public service body or entity to which the employee will be transferred consents to the transfer.

## If the discloser is implicated in the relevant improper conduct or detrimental action

Where a discloser is implicated in the improper conduct disclosed and an investigative entity has provided the necessary information to the Commission or Board, then the Commission and Board will protect the discloser from detrimental action in accordance with the PID Act.

The Commissioner will make a decision, after consulting with the Public Interest Disclosure Coordinator and welfare manager, about whether disciplinary or other action will be taken against a discloser who is an employee.

Where disciplinary or other action relates to conduct that is the subject of the disclosure, the disciplinary or other action will only be taken after the disclosure has been appropriately dealt with. In all cases where disciplinary or other action is being considered, any such action will not be taken without the Commission ensuring that:

* the fact that a person has made a public interest disclosure is not a reason for the Commission taking the action against the employee
* there are good and sufficient grounds that would fully justify action against any other person in the same circumstances
* there are good and sufficient grounds that justify exercising any discretion to institute disciplinary or other action.

The Commission will document the process if any action is taken against the discloser, including why any disciplinary or other action is taken, and explain why the action does not constitute reprisal against the discloser. The discloser will be afforded procedural fairness, including being informed of any such proposed action and any mitigating factors that have been taken into account. For further information, contact the Public Interest Disclosure coordinator.

The *Disability Service Safeguards Act 2018*  applies to the tenure of Board members (see sections 10 and 12).

# References/related documents

## Policies and guidelines

List of related policies and guidelines:

* Informal release of information policy
* Privacy policy

## Compliance

This policy complies with all relevant legislation and VPS policies, in particular:

* *Public Interest Disclosures Act 2012*
* *Independent Broad-based Anti-corruption Commission Act 2011*
* *Freedom of Information Act 1982*
* Code of Conduct for Victorian Public Sector Employees
* Code of Conduct for Directors of Victorian Public Entities

# Policy review and currency

This policy will be reviewed annually from the last approved date, or within six months of any significant legislative change or VPS wide policy change that affects the policy.

### Version history

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| Release notice | | | | |
| Version | Date of effect | Amendment details | Amended by | |
| 1.0 | 02/03/2021 | Initial release |  | |
| 2.0 | 24/06/2021 | Amended to incorporate Board amendments | Legal team | |
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