

Whistleblowers Protection Act 2001
Ombudsman's Guidelines

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WHISTLEBLOWERS PROTECTION ACT 2001 OMBUDSMAN'S GUIDELINES

Objects of the Act

The main objective of the *Whistleblowers Protection Act 2001* (the Act) is to encourage and facilitate the making of disclosures of improper conduct by public officers and public bodies and establish a system for matters to be investigated. The Act provides protection to a person who makes a disclosure and remedies for the person where detrimental action has been taken against them.

Who is subject to the Act?

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

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

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

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

Public officers include:

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

Public officers excluded from the Act are magistrates and judges of a court or members of a tribunal, the Director of Public Prosecutions, the Auditor-General, the Ombudsman, the Director Police Integrity, the Special Investigations Monitor, the Electoral Commissioner, and parliamentary and judicial staff.

The role of the Ombudsman

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

- preparing and publishing guidelines to assist public bodies in interpreting and complying with the Act
- reviewing written procedures established by public bodies and making recommendations in relation to those procedures
- determining whether a disclosure warrants investigation
- investigating disclosures
- monitoring investigations where they have been referred to public bodies
- monitoring the action taken by public bodies where the findings of an investigation reveal that improper conduct has occurred
- reporting to Parliament where public bodies fail to implement recommendations made by the Ombudsman at the conclusion of an investigation
- collating and publishing statistics about disclosures handled by the Ombudsman
- educating and training public bodies.

Establishing written procedures

In addition to being the potential subject of a disclosure, each public body is required by section 68 of the Act to establish written procedures for handling disclosures. The procedures must facilitate the making of disclosures, the investigation of disclosures, and the protection of whistleblowers from reprisals by the public body or any officer, member or employee of the public body. The procedures must be in accordance with the Act and these guidelines.

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

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

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

Contents of whistleblower protection procedures

1. Statement of support for whistleblowers
2. Purpose of the procedures
3. Objects of the Act
4. Definitions of key terms
5. The reporting system
6. Roles and responsibilities
7. Confidentiality
8. Collating and publishing statistics
9. Receiving and assessing disclosures
10. Investigations
11. Action taken after investigations
12. Managing the welfare of the whistleblower
13. Management of the person against whom the disclosure is made
14. Criminal offences

Establishing a reporting system

A public body must establish a reporting system for the receipt, assessment and investigation of whistleblower disclosures.

The chief requirements of any reporting system are:

- ensuring senior executive staff are involved and retain oversight
- ensuring confidentiality of the information and the identity of the whistleblower are maintained throughout the process
- keeping the roles of assessment and investigation of a disclosure distinct from welfare management of the whistleblower
- identifying clear contact points for reporting whistleblower disclosures, including all relevant mail, phone calls and emails
- ensuring a disclosure about the chief executive officer of a public body is immediately referred to the Ombudsman.

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

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

What reporting structure to adopt

The reporting system should be centralised. A centralised system of handling disclosures could involve a small number of officers who report direct to the principal officer of an organisation. There are a number of benefits of a centralised system including:

- Fewer people handling disclosures enhances confidentiality and thereby reduces the likelihood of reprisals being taken against whistleblowers.
- Direct involvement of senior management in the reporting system appropriately reflects the seriousness of whistleblower matters.
- As the occurrence of improper conduct is often a result of poor supervision within an organisation, senior management should take overall responsibility for the investigation of these matters.
- It avoids conflicts of interest by excluding line managers from the assessment and investigation of any disclosure.

Roles and responsibilities of those involved in the internal reporting system

There are a number of ways a public body can set up a reporting system. The number of officers and their respective roles will depend on the size of the body and its structure in terms of regions or organisational units. An internal reporting policy should identify the officers who will be involved in the internal reporting system and clearly describe their individual roles.

The Protected Disclosure Coordinator

Every public body must have a nominated protected disclosure coordinator.

The protected disclosure coordinator has a central role in the internal reporting system. He or she will:

- impartially assess each disclosure to determine whether it is a public interest disclosure
- coordinate the reporting system used by the organisation
- be a contact point for general advice about the operation of the Act
- be responsible for ensuring that the public body carries out its responsibilities under the Act and the Guidelines
- liaise with the Ombudsman in regard to the Act
- be responsible for carrying out, or appointing an investigator to carry out, an investigation referred to the public body by the Ombudsman
- be responsible for overseeing and coordinating an investigation where an investigator has been appointed
- where necessary, appoint a welfare manager to support the whistleblower

- advise the whistleblower of the progress of an investigation into the disclosed matter
- establish and manage a confidential filing system
- collate and publish statistics on disclosures made
- take all necessary steps to ensure the identity of the whistleblower and the identity of the person who is the subject of the disclosure are kept confidential
- liaise with the chief executive officer of the public body.

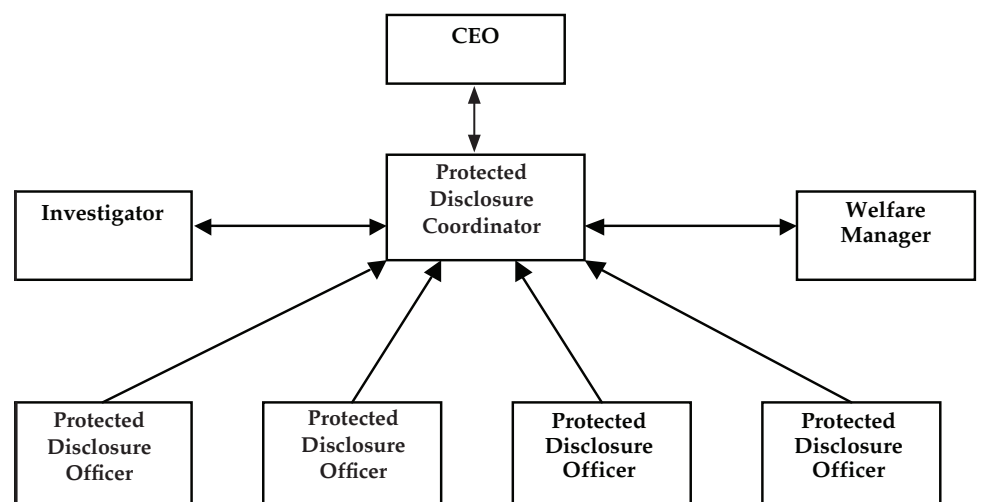
In a smaller public body the Principal Officer may decide to take on the role of protected disclosure coordinator. The protected disclosure coordinator must be contactable by external and internal whistleblowers and have the authority to make enquiries of officers within the organisation.

A large organisation, or an organisation with a number of geographic locations may wish to appoint a number of protected disclosure officers to assist the protected disclosure coordinator with the receipt of disclosures. However, I recommend that some central oversight be maintained by the protected disclosure coordinator to ensure accurate reporting on outcomes.

Model reporting system for a large organisation

There are a number of possible reporting systems a large organisation or public body can establish. It may involve a number of different officers. For example, one reporting structure could be represented as follows:

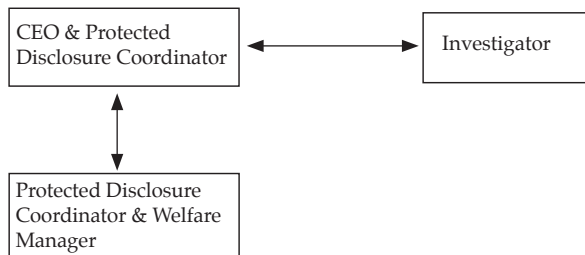
Figure 1: Model reporting system for a large organisation



Model reporting system for a small organisation

In a smaller organisation, a possible internal reporting structure is represented below:

Figure 2: Model reporting system for a small organisation



Ensuring confidentiality

Policies and procedures need to take into account the obligation to ensure non-disclosures of confidential information except in accordance with the Act.

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

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

However, the Act prohibits:

- the inclusion of particulars in any report or recommendation that is likely to lead to the identification of the whistleblower
- the disclosure of particulars in an annual report and other reports to Parliament that might lead to the identification of a person against whom a protected disclosure is made.¹

A breach of section 22 constitutes a criminal offence.

¹ Under section 22A the Ombudsman may disclose the identity of a person against whom a protected disclosure is made if it is in the public interest.

Protecting the whistleblower from reprisals

Section 68 of the Act also requires public bodies to establish procedures for the protection of a whistleblower from reprisal by personnel for making a protected disclosure. Keeping the whistleblower's identity confidential will assist in minimising the risk of reprisals.

Procedures should include ensuring whistleblowers are advised that it is in their own interests to keep disclosures confidential by only discussing related matters with authorised persons within the public body or officers of the Ombudsman's office or other persons as authorised by law.

Also see page 15 for information about detrimental action that amounts to a reprisal and page 21 on managing the welfare of the whistleblower.

Establishing a confidential electronic and paper filing system

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

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

Education and training to ensure knowledge by personnel

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

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

- correspondence, including faxes
- phone calls

- emails
- in person approaches by staff or members of the public.

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

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

Receiving a disclosure

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

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

For the protections of Part 3 of the Act to apply, a disclosure must be made in accordance with Part 2 of the Act. Disclosures made under Part 2 of the Act are called protected disclosures.

How can a protected disclosure be made?

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

- orally
- in writing
- electronically
- anonymously.

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

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

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

To whom must a protected disclosure be made?

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

Therefore, public bodies can only receive disclosures that relate to the conduct of their own members, officers or employees. If a public body receives a disclosure about an employee, officer or member of another public body, the disclosure has not been made in accordance with Part 2 of the Act. The public body should advise the person making the disclosure of the correct person or body to whom the disclosure must be made. In such circumstances they should be advised to make their disclosure to the Ombudsman.

Table 1: Requirements for receiving a disclosure

Person who is the subject of the disclosure	Person/body to whom the disclosure must be made
Employee of a public body	That public body or the Ombudsman
Member of Parliament (Legislative Assembly)	Speaker of the Legislative Assembly
Member of Parliament (Legislative Council)	President of the Legislative Council
Councillor	The Ombudsman
Chief Commissioner of Police	The Ombudsman or the Director, Police Integrity
Member of the police force	The Ombudsman, the Director, Police Integrity or Chief Commissioner of Police

Mechanisms for the receipt of disclosures

The public body is responsible for any decisions or actions taken under the Act, the Guidelines or the Regulations. Any correspondence and communication between the Ombudsman and the public body will not be through an agent but generally will be between the chief executive officer of the public body or, in some cases, its protected disclosure coordinator. It is generally not appropriate for an agency to use a lawyer or an agent to communicate with my office.

The prescribed procedures are set out in the regulations. Regulation 8 applies to disclosures to public bodies. It states that oral disclosures must be made to a member, officer or employee of the public body and written disclosures must be addressed and sent or delivered to the office of the public body. Hence, an agent cannot offer a separate telephone line, post office box, mail bag or other method to receive disclosures as this may have the effect of invalidating the disclosure.

In assessing and considering whether the information provided is a protected disclosure or a public interest disclosure, an agent may be involved for the purpose of taking statements and collating information. The agent can then provide advice to the public body; however, it is the public body that must decide if the information amounts to a protected disclosure or a public interest disclosure, not the agent.

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

Assessing a disclosure

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

Protected disclosures

A protected disclosure is a disclosure that satisfies Part 2 of the Act. The person making a disclosure that satisfies Part 2 receives the protections outlined in Part 3 of the Act. To be assessed as a protected disclosure it must meet the following criteria:

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

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

Improper conduct

A disclosure may be made about improper conduct by a public body or public official. Improper conduct is defined in section 3 of the Act to mean conduct that is:

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

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

Examples of improper conduct

To avoid closure of a town's only industry, an environmental health officer ignores or conceals evidence of illegal dumping of harmful waste.

An agricultural officer delays or declines imposing quarantine to allow a financially distressed farmer to sell diseased stock.

A building inspector tolerates poor practices and structural defects in the work of a leading local builder.

Corrupt conduct

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

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

The definition of 'corrupt conduct' contemplates dishonesty, or at the least the foregoing of public interest for a private benefit. The *Shorter Oxford English Dictionary* defines corruption as: to induce a person to act dishonestly or unfaithfully; to make venal; to bribe. Hence, it is an offence of dishonesty. Dishonesty involves a lack of probity; a disposition to deceive, defraud or steal.

The commonly understood meaning of corruption is further qualified in the Act by the requirement for the conduct in question to be a criminal offence or grounds for dismissal. This indicates that the conduct will only fall within the meaning of the Act where it is dishonesty of a serious nature.

Similar legislation in NSW, entitled the *Protected Disclosures Act 1994*, adopts a definition of corrupt conduct that includes conduct of a specific type such as:

- bribery
- blackmail
- obtaining or offering secret commissions
- fraud
- theft
- perverting the course of justice
- embezzlement
- election offences
- tax and revenue evasions
- forgery.

The list is obviously not exhaustive and, when in doubt, those with the responsibility for making a decision as to whether the conduct shows or tends to show that there was corrupt conduct, should contact the office of the Ombudsman for guidance.

Examples of corrupt conduct

A public officer receives a bribe or receives a payment other than his or her wages or salary in exchange for the discharge of a public duty.

A public officer sells confidential information.

Substantial mismanagement of public resources

The use of the word 'substantial' has the effect of confining the definition to a situation in which the mismanagement is of a significant or considerable degree.

Mismanagement should not be confused with 'misuse'. Mismanagement is to manage badly or wrongly, whilst misuse is wrong or improper use. For example, to use a government car for personal gain is a misuse rather than mismanagement.

Substantial risk to public health, safety or the environment

The use of 'substantial' has the effect of confining the definition to conduct that puts public health, safety or the environment at considerable or great risk.

The risk is limited to public health or safety. This means the risk is not just to an individual but relates to conduct which affects, or has the potential to affect, a large class or group of the wider community.

Detrimental action

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

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

Examples of detrimental action

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

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

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

Reasonable grounds for belief

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

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

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

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

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

Notification of the decision

Where a public body determines that a person has failed to make a disclosure under Part 2 of the Act, the public body must advise the individual of its assessment. The public body should indicate on what grounds it has made its assessment and should advise the person of their right of appeal to the Ombudsman about the public body's determination. It may also be appropriate to advise the person of alternative avenues of redress.

This should include advising the person that their concerns may be made through the public body's general complaints mechanisms.

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

Section 28 of the Act requires a public body to reach its conclusion on a disclosure within 45 days of receiving it.

A reassessment of the disclosure can be made if the person provides additional information to support the allegations made.

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

Public interest disclosures

Once an allegation has been assessed as a protected disclosure, section 28(1) of the Act requires an assessment to be made of whether or not it is a public interest disclosure. Division 2 of Part 4 (sections 28 to 32) of the Act sets out the process that applies to the determination made by a public body.

The threshold test for a protected disclosure to be a public interest disclosure is established in section 28(2), as follows:

In reaching a conclusion under sub-section (1) the public body must consider whether the disclosure shows or tends to show that a public officer to whom the disclosure relates–

(a) has engaged, is engaging or proposes to engage in improper conduct in their capacity as a public officer; or

(b) has taken, is taking or proposes to take detrimental action in contravention of section 18.

To show or tend to show improper conduct or detrimental action

Legal interpretation of the phrase ‘shows or tends to show’ generally indicates that the disclosure must reveal or make known the conduct. Hence, the focus now shifts away from the reasonable grounds for the belief of the whistleblower. In making this determination the public body may seek further information or conduct a discreet initial enquiry prior to finalising an assessment.

To assess whether a disclosure shows or tends to show that a public officer has engaged in improper conduct, a public body must be satisfied that there is sufficient supporting material to demonstrate that the conduct has actually occurred. A mere allegation with no supporting evidence is not sufficient.

It may be necessary to question the whistleblower about his or her information and the evidence he or she has or can point to as supporting his or her allegations.

In order to reach a conclusion about whether a disclosure is a public interest disclosure, a public body may conduct discreet enquiries to obtain information that the whistleblower was unable to provide. Those enquiries may reveal information that supports the disclosure made by the whistleblower and lead the public body to conclude the disclosure is a public interest disclosure.

Determination of a public interest disclosure

Where the public body concludes that the disclosure amounts to a public interest disclosure, section 29 of the Act requires the public body to within 14 days:

1. Notify the person who made the disclosure of that conclusion, and
2. Refer the disclosure to the Ombudsman for a determination as to whether it is a public interest disclosure.

Determination that the disclosure is not a public interest disclosure

Where the public body concludes that the disclosure is not a public interest disclosure, section 30 of the Act requires the public body to:

1. Notify the person who made the disclosure within 14 days of that conclusion, and
2. Advise that person that he or she may request the public body to refer the disclosure to the Ombudsman for a formal determination as to whether the disclosure is a public interest disclosure, and that this request must be made within 28 days of the notification.

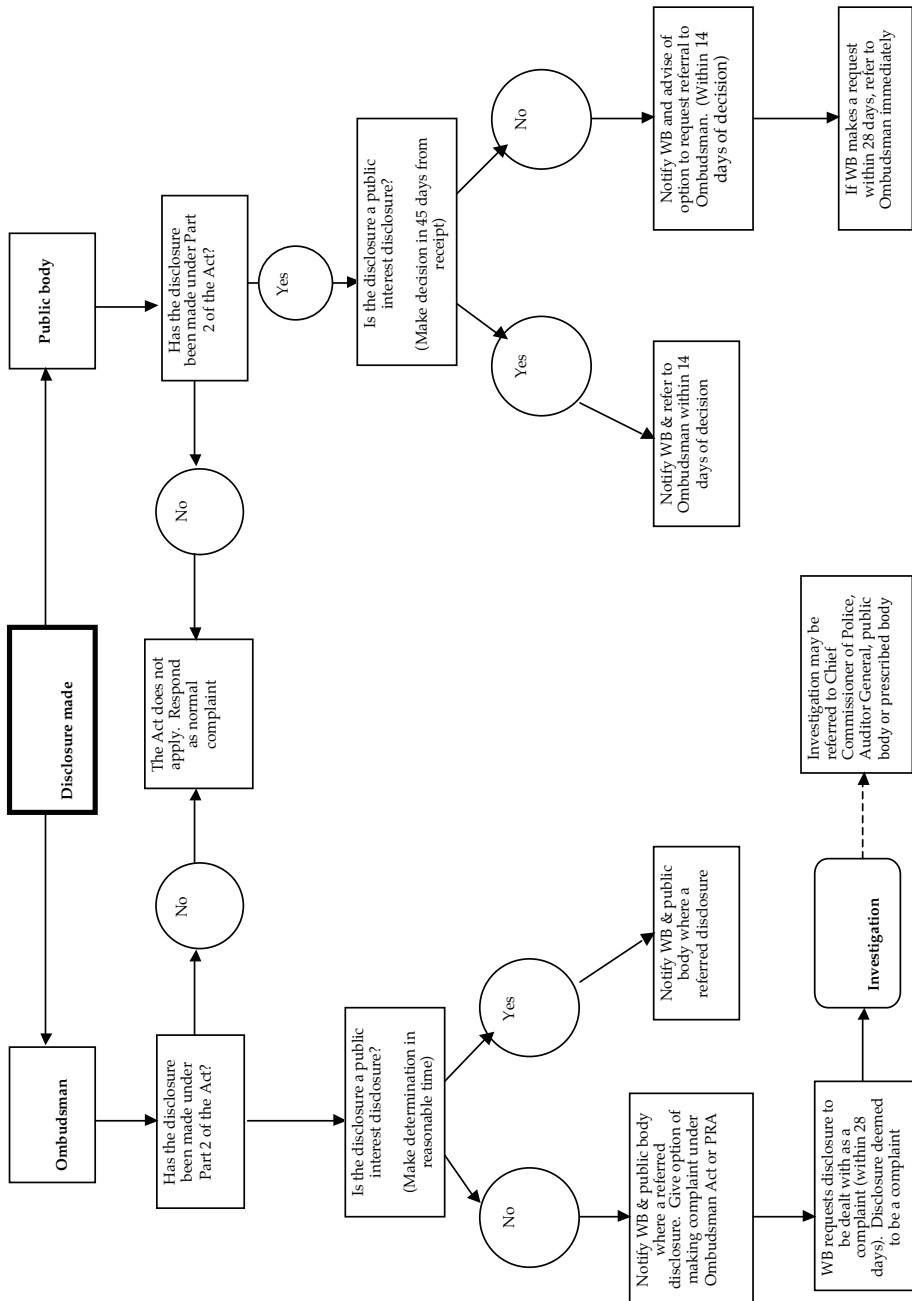
Notification to the whistleblower is not necessary where the disclosure has been made anonymously.

It is highlighted that if a determination is made that the disclosure is not a public interest disclosure, it does not alter the decision that it is a protected disclosure. The protections of Part 3 of the Act continue to apply in this situation.

Flowchart

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

Figure 3: Flowchart of assessment and referral process



Possible criminal charges, legal action and disciplinary proceeding

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

Criminal offences

Detrimental action

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

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

Maximum penalty: a fine of 240 penalty units or two years imprisonment or both: section 18.

Breach of confidentiality

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

Maximum penalty: a fine of 60 penalty units or six months imprisonment or both: section 22.

Obstruction of the Ombudsman

It is an offence for a person to obstruct the Ombudsman in performing his responsibilities under the Act.

Maximum penalty: a fine of 240 penalty units or two years imprisonment or both: section 60.

Provision of false information

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

Maximum penalty: a fine of 240 penalty units or two years imprisonment or both: section 106.

Civil action

A whistleblower may take civil action against any person when they believe that detrimental action has been or may be taken against them in reprisal for the disclosure by applying to the Supreme Court for:

- an order that the person who took the detrimental action remedies it
- an injunction in any terms the Court considers appropriate: sections 20 and 21.

A person who takes detrimental action against a person in reprisal for a protected disclosure is liable in damages to that person: section 19.

Disciplinary proceedings can be brought against a person responsible for established conduct that was subject of the investigation: section 81.

Managing the welfare of the whistleblower

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

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

Internal and external whistleblowers

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

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

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

Appointing a welfare manager

The senior management of a public body must take responsibility for the welfare of a whistleblower. The protected disclosure coordinator should appoint a welfare manager to monitor the needs of the whistleblower and to provide advice and support. Public bodies may wish to make use of an Employee Assistance Program for this purpose. In most circumstances, a welfare manager will only be required where a disclosed matter proceeds to investigation. However, public bodies are obliged to protect all persons who make a protected disclosure, regardless of whether that disclosure is determined to be a public interest disclosure that warrants investigation.

The role of the welfare manager is to:

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

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

Reporting back

Whistleblowers should be advised, in general terms, of the progress in investigating or otherwise dealing with their disclosures and the timeframes that apply. An individual should be nominated by the public body to be the point of contact for the whistleblower for the purposes of keeping him or her informed of this information. The officer responsible would normally be the protected disclosure coordinator, or the welfare manager. It should be a person who is readily accessible to the whistleblower and informed of the overall handling of the disclosed matter.

Section 83 of the Act requires the public body to advise the whistleblower of the findings of any investigation and any action taken by a public body as a result.

Managing expectations

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

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

Occurrence of detrimental action

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

- record details of the incident
- advise the whistleblower of his or her rights under the Act.

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

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

Consequences for whistleblowers implicated in improper conduct, or disciplinary matters

The management of the welfare of an internal or external whistleblower may become complicated when the whistleblower is implicated in misconduct, whether that misconduct is related to the disclosure made or not. The general obligations of a public body in relation to handling and investigating a disclosure and protecting the whistleblower still apply. A whistleblower is not protected from the reasonable consequences flowing from any involvement in improper conduct. Section 17 of the Act specifically provides that a person's liability for his or her own conduct is not affected by the person's disclosure of that conduct under the Act. However, in some circumstances, an admission may be a mitigating factor when considering disciplinary or other action.

Disciplinary or other action against a whistleblower invariably creates the perception that it is being taken in retaliation for the disclosure. In all cases where disciplinary or other action is being contemplated, the chief executive officer or other responsible public officer must be able to clearly demonstrate that:

- his or her intention to proceed with disciplinary action is not causally connected to the making of the disclosure
- there are good and sufficient grounds that would fully justify action against any non-whistleblower in the same circumstances
- there are good and sufficient grounds that justify exercising any discretion to institute disciplinary or other action.

If a public body cannot demonstrate that the above preconditions have been met, it leaves itself open to allegations of taking detrimental action against a whistleblower in reprisal for making the disclosure. A public body may wish to obtain legal advice prior to taking any action against the whistleblower.

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

Errors to be avoided

The Queensland Criminal Justice Commission (CJC) compiled the following list of errors to be avoided in managing whistleblowers. It can be found on page 29 of the CJC's publication *Exposing Corruption – A CJC guide to whistleblowing in Queensland*, published in October 1996.

The following organisational errors in the management of whistleblower disclosures occur more often than many may think and can have serious consequences. The actions have the potential to effectively contaminate the relationship between the whistleblower and the investigating authority and prejudice the integrity of any investigation:

1. Fail to observe the confidentiality of a disclosure by having information pass through a series of hands with few checks as to who has, or who should view the material.
2. Tell anyone who asks about the details and investigations of the disclosure.

3. Report to the workgroup who the whistleblower is, what the allegations are, and whom they are about.
4. Interpret natural justice to mean a person has an immediate right to know when a disclosure has been made about them and who made it.
5. Always as a first step, ask the person who is the subject of the disclosure about the allegation.
6. Forward the disclosure and action on it through the chain of command so as many people know about the matter as possible.
7. Forewarn the person who is the subject of an allegation in plenty of time about the allegations and provide them with investigation details.
8. Allow personal biases about the personality of the whistleblower to influence the assessment of a disclosure.
9. Do not take seriously the concerns expressed by a whistleblower about the possibility of reprisal.
10. Ignore potential conflicts of interest when deciding who should assess or investigate the disclosure.
11. Allow political considerations to influence the assessment of a disclosure or the findings of an investigation.
12. Delay the investigation for as long as possible so any evidence of wrongdoing can be altered or destroyed.

Investigations

The Act requires the Ombudsman to determine the appropriate way to investigate a public interest disclosure. The Ombudsman will notify public bodies and whistleblowers of the determination made and whether an investigation will take place. Once a public body has referred a disclosure to the Ombudsman to determine if it is a public interest disclosure, the public body must not commence an investigation until instructed by the Ombudsman.

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

Who can carry out the investigation?

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

- Chief Commissioner of Police
- Auditor-General
- Director, Police Integrity
- other bodies prescribed in Regulation 9 in the regulations
- a public body, where the matter relates to an employee, officer or member of that body.

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

Investigation by a public body

Where the Ombudsman has referred an investigation to a public body, the public body must carry out the investigation in compliance with Part 6 of the Act, these guidelines and the established procedures of that public body.

The objectives of an investigation should be to:

- collate information relating to the allegation as quickly as possible. This may involve taking steps to protect or preserve documents, materials and equipment
- consider the information collected and draw conclusions objectively and impartially
- maintain procedural fairness in the treatment of witnesses and the person who is the subject of the disclosure
- make recommendations arising from the conclusions drawn concerning remedial or other appropriate action.

It is prudent to maintain regular contact with the whistleblower so he or she is kept informed of the progress of the investigation. Regular communication is an important way to reassure whistleblowers that their disclosures are being taken seriously.

Terms of reference and authorisation

Before commencing an investigation, a public body should draw up terms of reference and obtain authorisation for those terms by the chief executive officer or protected disclosure coordinator. The setting of terms of reference is crucial to the successful conduct of enquiries as they establish a focus and set limits for an investigation. Terms of reference oblige a public body to clarify the key issues to which the disclosure gives rise.

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

The terms of reference should provide for the adequate monitoring of the investigation by the protected disclosure coordinator or the chief executive officer of the public body. Monitoring should ensure the investigation maintains its relevance to the allegations and is being carried out effectively and efficiently.

Preparation of investigation plan

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

- What is being alleged?
- What are the possible findings or offences?
- What are the facts in issue?
- How is the enquiry to be conducted?
- What resources are required?

Investigating officers should obtain all documents relevant to the allegation prior to conducting interviews. This familiarises the investigator with the issues of the case and allows witnesses, including the whistleblower, to identify and explain documents during the interview process.

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

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

The investigator needs to be sensitive to the whistleblower's possible fear of reprisals, and to be aware of the statutory protections provided to the whistleblower.

The investigator

The investigator will be responsible for carrying out an investigation into a disclosure where the Ombudsman has referred a matter to the public body. An investigator may be a person from within an organisation, or a consultant engaged for that purpose. The public agency must ensure that any investigator is aware of the provisions of the Act, including the criminal penalties that apply for breaches of the Act. A public agency should ensure a contracted investigator signs a form confirming their understanding of the Act prior to the commencement of an investigation.

Monitoring by the Ombudsman

Part 6 of the Act requires the Ombudsman to monitor investigations conducted by public bodies. The public body must provide information about the progress of its investigation to the Ombudsman or to the whistleblower at their request. The information must be provided within 28 days of the request. A public body is not obliged to provide information to the whistleblower where that information has already been given to the whistleblower, or where giving the information would endanger the safety of any person or prejudice the outcome of the investigation.

If the Ombudsman is not satisfied with an investigation by a public body, the Ombudsman may take it over. If the whistleblower has reasonable grounds to be dissatisfied with the investigation, they may request the Ombudsman to conduct the investigation.

The public body should also provide the Ombudsman with a copy of its terms of reference and investigation plan at the commencement of the investigation. This information should be provided to the Ombudsman within one month of the

referral of the investigation to the public body. The public body should also keep the Ombudsman regularly informed of the progress of the investigation. The public body should advise the Ombudsman of any difficulties or problems encountered in its investigation.

Natural justice

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

Public bodies should have regard to the following issues in ensuring procedural fairness:

The person who is the subject of the disclosure is entitled to know the allegations made against him or her and must be given the right to respond. (This does not mean the person must be advised of the allegation as soon as the disclosure is received or the investigation has commenced.)

If the investigator is contemplating making a report adverse to the interests of any person, that person must be given the opportunity to respond to the criticisms and to put forward further material that may influence the outcome of the report and that person's defence should be fairly set out in the report.

All relevant parties to a matter should be heard and all submissions should be considered.

A decision should not be made until all reasonable enquiries have been made.

The investigator or any decision-maker should not have a personal or direct interest in the matter being investigated.

All proceedings must be carried out fairly and without bias. Care should be taken to exclude perceived bias from the process.

The investigator must be impartial in assessing the credibility of the whistleblowers and any witnesses. Where appropriate, conclusions as to credibility should be included in the investigation report.

Recording information

It is important that contemporaneous notes are made of all discussions, phone calls and interviews. It is recommended that all interviews with witnesses be recorded to enable an accurate record of the interview to be kept. The investigator should ask the witness to identify him/herself at the commencement of the interview for the purposes of the taped record.

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

Confidentiality requirements

Confidentiality requirements demand that strict security should surround the conduct of an investigation into a public interest disclosure. Disclosures should be assessed and investigated discreetly, with a strong emphasis on maintaining confidentiality of both the whistleblower and the person who is the subject of the disclosure.

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

Witnesses should be advised that information about the matter is confidential, and that they may be in breach of the Act if they divulge the information to a third party.

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

However, there will be cases where it will be impossible to protect the identity of the whistleblower. For example, a case may arise where it is well known within an organisation that only the whistleblower could have access to the information in the disclosure. In these circumstances, the whistleblower must be made aware that to investigate a matter, his or her identity will probably be revealed. While confidentiality may not be able to be maintained, the whistleblower is still afforded the protections in the Act and should have a welfare manager appointed. The Principal Officer of a public body remains responsible for ensuring that no detrimental action is taken against the whistleblower.

Management of the person against whom a disclosure is made

A public body must also manage the person who is the subject of a protected disclosure. This person will always be an employee, member or officer of the public body. Procedures should be established to avoid unnecessary harm to that person, particularly as an investigation might exonerate the officer from any wrongdoing. Public bodies may appoint an internal contact or make use of an Employee Assistance Program to ensure persons who are the subject of disclosures are given the appropriate support.

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

Powers with respect to witnesses

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

Investigators should carry out interviews with employees, officials or members in a professional manner.

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

Legal representation and other support to witnesses

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

Immunity from disciplinary action

A situation may arise where a witness or the whistleblower seeks immunity from disciplinary action for providing information about improper conduct in which they are implicated. In some circumstances, it may be appropriate for the public body to exercise discretion in relation to disciplinary action where an employee comes forward with a disclosure. This will depend on the nature and seriousness of the witness's misconduct. Any decision concerning immunity from disciplinary action must always be made by those officers with the power to take disciplinary action. This should be either the chief executive officer or the protected disclosure coordinator, and not the investigator.

Criminal conduct

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

Problems with an investigation conducted by a public body

Section 73 of the Act requires that if a public body considers its own investigation is being obstructed, it must refer the investigation to the Ombudsman. Obstruction may include a refusal to attend an interview or to provide documents.

The Ombudsman has powers to summon a person to attend a hearing to answer questions or to produce documents. Non-compliance with such a summons is an offence. Section 60 also establishes an offence if a person obstructs an investigation being conducted by the Ombudsman.

The Ombudsman may take over the investigation

There are three circumstances in which the Ombudsman may take over an investigation by a public body:

1. A public body considers its own investigation is being obstructed. If the public body refers an investigation back to the Ombudsman, it must where possible notify the person who made the disclosure of the referral.

2. The person who made the disclosure may request the Ombudsman to investigate the disclosed matter if:

- the public body fails to carry out the investigation
- the person is dissatisfied with the manner in which the public body is carrying out the investigation
- the person is dissatisfied with the steps taken by the public body after the investigation of the matter
- the public body has failed to comply with the reporting and remedial action requirements set out in section 81 of the Act.

3. The Ombudsman is not satisfied with the investigation by the public body. Where the Ombudsman takes over an investigation, the Ombudsman must give notice to the person who made the disclosure, unless it was made anonymously.

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

- commence a new investigation
- complete the investigation
- refer the investigation back to the public body with recommendations
- refer the matter to another public body to investigate.

Action on completion of investigation

Sections 81 to 83 of the Act set out the requirements of a public body at the conclusion of an investigation. The public body must report its findings to the Ombudsman whether the allegations are substantiated or not.

If any of the allegations are substantiated, or the public body takes any action, it must report its findings to the relevant Minister, or the relevant council in the case of council employees.

The Act also requires the public body to inform the whistleblower of the findings of the investigation and any steps taken as a result. This does not mean that the public agency must provide the whistleblower with the complete investigation report as in many circumstances it is not appropriate to do so. If the public body is unaware of the identity of the whistleblower and it is known by the Ombudsman, the Ombudsman will inform the whistleblower of the findings and action taken.

The Act requires the public body to take all reasonable steps to prevent the conduct from continuing or reoccurring, and may take action to remedy any harm or loss arising from the conduct. Action may include disciplinary proceedings.

Where the allegations in a disclosure have been investigated, and the person who is the subject of the disclosure is aware of the allegations or the fact of the investigation, he or she should be formally advised of the outcome of the investigation.

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

Collating and publishing statistics

Section 104 of the Act requires that all public bodies that publish an annual report or report of operations must include in that report its current whistleblower procedures, and a range of details about protected disclosures in the reporting year. These details include:

- the number and types of disclosures made to the public body during the year
- the number of disclosures referred to the Ombudsman for determination as to whether they are public interest disclosures
- the number and types of disclosed matters referred to the public body by the Ombudsman for investigation
- the number and types of disclosed matters referred by the public body to the Ombudsman for investigation
- the number and types of investigations taken over from the public body by the Ombudsman
- the number of requests made by a whistleblower to the Ombudsman to take over an investigation by the public body
- the number and types of disclosed matters that the public body has declined to investigate
- the number and types of disclosed matters that were substantiated upon investigation and the action taken on completion of the investigation
- any recommendation made by the Ombudsman under the Act that relates to the public body.

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

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

General information

The role of the Ombudsman

The role of the Ombudsman under the Act is to:

- determine whether disclosures are public interest disclosures
- investigate matters disclosed in public interest disclosures
- prepare and publish guidelines for the procedures to be followed by public bodies in relation to the Act
- monitor investigations by public bodies
- monitor investigations by the Chief Commissioner of Police
- review the procedures and implementation of public bodies in relation to the Act
- report findings of an investigation to Parliament as required under the Act.

Freedom of Information

It is highlighted that section 109 of the Act excludes the application of the *Freedom of Information Act 1982* to any document that relates to a disclosure made under the Act. Public agencies should ensure that any of its officers handling freedom of information requests are aware of this section. A public agency should contact the Ombudsman prior to providing any document originating from the Ombudsman under the Freedom of Information Act.

Contact details

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