

# POLICY

## Investigations

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Policy Statement .....3

Investigation of an administrative action .....3

Investigation of Protected Disclosure Complaints .....5

Preparing for an investigation.....6

Investigation process .....6

Interviews .....7

Confidentiality .....9

Inspection of premises .....10

Procedural fairness .....10

Investigation outcomes .....10

Completion of an investigation .....11

Accountability of VO investigations.....12

Roles and Responsibilities .....12

Document Management.....13

    Compliance.....13

    Document approval .....13

    Document review .....13

    Document control.....13

**APPENDIX A: Related documents.....14**

## **POLICY STATEMENT**

The Ombudsman may investigate the administrative actions of an authority, which includes Victorian state government departments, agencies and local councils (and those acting on behalf of these bodies). The Ombudsman can also investigate improper conduct and detrimental action involving a protected disclosure entity on receipt of a protected disclosure complaint referred by the Independent Broad-based Anti-corruption Commission (IBAC).

Following an investigation, the Ombudsman can recommend that action be taken to remedy the error or improve public administration. We conduct investigations in an impartial manner, consistent with our statutory obligations and reasonable use of public resources.

## **INVESTIGATION OF AN ADMINISTRATIVE ACTION**

1. The purpose of VO conducting an investigation is to establish whether an administrative action taken by or in, a Victorian state government department, agency or local council (or those acting on behalf of these bodies), falls within one or more of the 'errors' set out in section 23(1) of the *Ombudsman Act 1973*. That is, an investigation examines whether the action was taken in error because it:
  - appears to have been taken contrary to law
  - was unreasonable, unjust, oppressive or improperly discriminatory
  - was in accordance with a rule of law or a provision of an enactment or practice that is or may be unreasonable, unjust, oppressive or improperly discriminatory
  - was taken in the exercise of a power or discretion, and was so taken for an improper purpose or on irrelevant grounds, or on the taking into account of irrelevant considerations
  - was a decision that was made in the exercise of a power or discretion and the reasons for the decision were not, but should have been, given
  - was based wholly or partly on a mistake of law or fact
  - was wrong.
2. We also investigate whether the action taken was incompatible with the *Charter of Human Rights and Responsibilities Act 2006* (see our 'Human Rights' policy).
3. VO's opinion on whether an error has been made is based on evidence collected during an investigation. When an error is identified, we may recommend that action be taken to remedy the error, or to improve public administration.

4. We can commence an investigation as a result of receiving:
  - a formal complaint (Ombudsman Act, section 15B)
  - a referral from another person or body, such as IBAC, the Health Services Commissioner or a local council (Ombudsman Act, sections 16C and 16D)
  - a referral from Parliament (Ombudsman Act, section 16), in which case we must commence an investigation.
  
5. We may also commence an own motion investigation (Ombudsman Act, section 16A) into any administrative action taken in or by an authority (see our 'Own Motion Enquiries and Investigations' policy).
  
6. VO has discretion in deciding when to conduct an investigation. Complaints or referrals received will not result in an investigation when:
  - we are not permitted to deal with a complaint or matter under our legislation
  - we are satisfied that an informal resolution can be reached without the need for an investigation (see our 'Enquiries' policy)
  - an investigation is not warranted.
  
7. An investigation is more likely to commence when it appears that the action:
  - extends beyond an individual's interests (that is, it impacts on groups of individuals or the wider population)
  - is known to have occurred on numerous occasions previously without remedy
  - is likely to arise again
  - is of a serious nature (this may be, for example, where it places a person's safety or welfare at risk, or is incompatible with a human right as set out in the *Charter of Human Rights and Responsibilities Act 2006*)
  - resulted in significant personal loss or detriment
  - could be redressed by VO making recommendations that lead to meaningful outcomes for a complainant (or affected party), or improvements to public administration.
  
8. Prior to commencing an investigation, VO may conduct enquiries (see our 'Enquiries' policy) to determine whether an investigation should be conducted.
  
9. Once a decision to commence an investigation has been made, VO must notify certain parties, including the responsible Minister (Ombudsman Act, section 17).

## **INVESTIGATION OF PROTECTED DISCLOSURE COMPLAINTS**

- 10.VO receives protected disclosure complaints that are referred from the Independent Broad-based Anti-Corruption Commission (IBAC), under section 73 of the *Independent Broad-based Anti-Corruption Commission Act 2011*.
- 11.Subject to certain discretions and exceptions, we must investigate protected disclosure complaints referred to us from IBAC.
- 12.We are able to make enquiries on a protected disclosure complaint referred by IBAC to determine whether an investigation should be carried out (Ombudsman Act, section 13A).
- 13.VO must refuse to investigate a protected disclosure complaint (Ombudsman Act, section 15D):
  - 13.1. where conducting an investigation would prejudice a criminal investigation or proceedings, or an investigation by the Victorian Inspectorate or IBAC (Ombudsman Act, section 13AB)
  - 13.2. unless the Ombudsman is reasonably satisfied that the complaint shows or tends to show improper conduct or detrimental action.
- 14.VO may refuse to investigate a protected disclosure complaint (Ombudsman Act, section 15E) where:
  - 14.1. the subject matter of the protected disclosure complaint is trivial
  - 14.2. the protected disclosure complaint is frivolous or vexatious
  - 14.3. the protected disclosure complaint lacks substance or credibility
  - 14.4. the conduct which is the subject of the protected disclosure complaint does not amount to improper conduct
  - 14.5. the subject matter has already been dealt with by an integrity body, or another body with coercive powers to obtain evidence
  - 14.6. the protected disclosure complaint was made more than 12 months after the person first became aware of the matter and the person does not provide a satisfactory reason for the delay in making the disclosure.
- 15.VO investigates improper conduct and detrimental action in much the same way that we investigate administrative actions. However, when conducting an investigation of a protected disclosure complaint we consider whether a public body or a public officer engaged in improper conduct or detrimental action.

16. We must not disclose information that would identify the discloser, unless there are exceptional circumstances (Protected Disclosure Act, section 54).

## **PREPARING FOR AN INVESTIGATION**

17. At the commencement of an investigation, the officers responsible for the investigation prepare an investigation plan. The investigation plan helps officers to remain focussed by setting out the matters or allegations under investigation; the information required to inform the investigation; how this information will be obtained; who is involved; and when each step in the process is intended to be taken.

18. An investigation plan helps officers to keep sight of the objectives of the investigation identified at the outset, however the plan may change as additional information becomes available.

## **INVESTIGATION PROCESS**

19. The Ombudsman Act allows for an investigation to proceed in whatever way is considered appropriate (Ombudsman Act, section 17). This means that the steps followed in conducting an investigation may vary depending on the subject matter, the persons or agencies involved and the seriousness of the issues under investigation. For example, an investigation may involve:

- conducting research
- requesting documents, material or information from other persons or bodies (most commonly, the agency, department or council to which the matters under investigation relate)
- seeking expert advice, opinion or analysis
- inviting public submissions
- interviews with persons we believe have information relevant to the investigation
- site visits
- an inspection of an authority's premises, including any files, systems or information at that premises
- meetings with relevant parties.

20. All VO investigations are conducted in private (Ombudsman Act, section 17(2)). This also means that:

- officers are not permitted to disclose information relating to an investigation, except in limited circumstances (Ombudsman Act, section 26A)

- investigations do not involve public hearings (Ombudsman Act, section 17(3))
- generally, the outcome of an investigation is not made public, unless tabled in Parliament.

21. When information is sought by VO from another person or body, we generally ask that it be provided voluntarily in the first instance. However, if deemed appropriate or necessary, we may use our coercive powers to obtain the information (that is by issuing the person a summons requiring that the information be provided).

22. In order to ensure that VO is able to gather information freely, section 22 of the Ombudsman Act provides that it is an offence to obstruct, hinder and/or mislead officers during an investigation.

23. We may, at any time during an investigation, discontinue the investigation after taking into account certain considerations (Ombudsman Act, section 17). If we decide to discontinue an investigation we must inform any person notified of the commencement of the investigation and provide the reasons for our decision to discontinue the investigation (Ombudsman Act, section 17(6D)).

## INTERVIEWS

24. VO commonly conducts interviews as part of an investigation to:

- 24.1. enable officers to ask questions of any person (a witness) whom we believe has information relevant to an investigation
- 24.2. provide the witness an opportunity to present their understanding or account of the matters under investigation.

25. Interviews usually take place at VO's offices, however an interview may also be held at another location.

26. VO can ask a witness to attend an interview voluntarily or compulsorily. A compulsory interview is conducted when:

- a witness is summonsed to appear (Ombudsman Act, section 18, and *Evidence (Miscellaneous Provisions) Act 1958*, (as in effect immediately before its repeal) section 17)
- the interview is conducted under oath or affirmation (*Evidence (Miscellaneous Provisions) Act*, (as in effect immediately before its repeal) section 18).

27. Before an interview takes place, we:

- 27.1. discuss with the witness a suitable time for the interview

27.2. must inform the witness of the nature of the matter on which they will be questioned (Ombudsman Act, sections 18 and 18D, subject to any applicable exceptions) including whether their actions are the subject of the investigation, unless doing so would prejudice the investigation

27.3. provide information about what to expect at the interview, including any intention to conduct the interview under oath or affirmation, applicable confidentiality requirements and whether the interview will be recorded

27.4. confirm details of an upcoming interview in writing (this may be by way of a summons or by email/letter where a summons is not issued).

28.If a witness provides information during an interview which raises concerns about their own conduct, the witness may become a subject of the investigation.

29.Interviews are conducted by at least two officers, and may be monitored remotely by other VO officers.

30.Interviews are usually audio recorded and may sometimes be video recorded. A transcript may be made of a recording after an interview has concluded.

31.A copy of the recording (and transcript, if created) is provided to the witness:

- following the conclusion of a compulsory interview, unless doing so would prejudice the investigation (Ombudsman Act, section 18F)
- if requested by the witness following the conclusion of a voluntary interview, under most circumstances.

32.A person attending an interview is able to seek legal advice and/or attend the interview with a legal representative or support person. In each case, the person attending the interview must inform VO of who they intend to bring to the interview beforehand.

33.Where VO believes that attendance of a particular support person may compromise the investigation, we will ask that arrangements be made for a different support person to attend.

34.Where VO believes that the involvement of a legal practitioner, engaged to provide advice to or represent a witness, may compromise an investigation, we can direct the witness not to seek advice or representation from the practitioner (Ombudsman Act, section 18C(3)) and provide three days for a different practitioner to be engaged.

## CONFIDENTIALITY

35.VO has the power to issue a 'confidentiality notice' (section 26C(1) Ombudsman Act,) to assist in preserving the standard of evidence obtained in the course of conducting an investigation. A confidentiality notice directs the recipient not to disclose information relating to specified matters. This can be issued when VO has reasonable grounds to believe that the disclosure of the information is likely to:

- 35.1. restrict or prejudice an investigation conducted by the Ombudsman, IBAC or Victorian Inspectorate
- 35.2. prejudice the safety or reputation of a person
- 35.3. prejudice the fair trial of a person.

36.A confidentiality notice issued by VO must be served on the person to whom it applies, sufficiently explain the consequences of the notice and include information specified in section 26C(2) of the Ombudsman Act.

37.VO will issue a notice cancelling the confidentiality notice when:

- 37.1. VO believes that the grounds on which the confidentiality notice was issued are no longer likely to have effect (Ombudsman Act, section 26C(5)) – that is, when the disclosure of information subject to a confidentiality notice is considered unlikely to prejudice an investigation by VO, IBAC or the Victorian Inspectorate, or a person's safety or reputation, or the fair trial of a person
- 37.2. VO wishes to alter the matter(s) subject to the confidentiality notice (Ombudsman Act, section 26C(3)) – that is, the existing confidentiality notice must be cancelled and a new confidentiality notice issued
- 37.3. concluding an investigation (Ombudsman Act, Section 26C(6)), except when VO has been granted an order to extend a confidentiality notice beyond the conclusion of an investigation, from the Supreme Court (Ombudsman Act, section 26D).

38.VO must provide the Victorian Inspectorate copies of each confidentiality notice; notice cancelling a confidentiality notice; and application for, and any Supreme Court order to, extend a confidentiality notice (Ombudsman Act, section 26E).

39.It is an offence to disclose matters specified in a confidentiality notice while the notice has effect (Ombudsman Act, section 26F).

## **INSPECTION OF PREMISES**

40. During an investigation, those authorised by the Ombudsman may enter and inspect the premises of an authority or protected disclosure entity (Ombudsman Act, section 21), for example to review files or systems held at the premises.

## **PROCEDURAL FAIRNESS**

41. Procedural fairness, or natural justice, enshrines the principle of fairness into the decision making process. In terms of our investigations, it is the opportunity for a person or body to consider and respond to material that may be adverse to them, or to correct errors or mistakes in a draft report. This practice ensures that the investigating body considers both sides to the matter, before a final decision is made.

42. To provide procedural fairness to any person or authority that VO intends to express an adverse opinion about in a report, or that may be adversely affected by a decision by VO, we provide that person or authority a reasonable opportunity to respond to any such material in the report (Ombudsman Act, section 25A). We interpret this provision broadly to ensure that any person who is subject of an opinion in a draft report that may be adverse to that person, is given a reasonable opportunity to respond.

43. Additionally, we consult with or seek comment from the principal officer of the authority concerned, or the responsible Minister or Mayor (if the investigation relates to a local council) in relation to our draft conclusions and any related draft recommendations.

44. The response received to such adverse material will be fairly set out in the final investigation report (Ombudsman Act, section 25A). This may mean that the report is altered, material is omitted or comments from the response are included.

## **INVESTIGATION OUTCOMES**

45. Based on the evidence collected in the course of an investigation, the Ombudsman:

- 45.1. forms an opinion about whether an error has been made under section 23(1) of the Ombudsman Act, when investigating administrative actions, or
- 45.2. makes a finding on the conduct of a public body or person, when the investigation is of a protected disclosure complaint.

46. The Ombudsman must be reasonably satisfied, on the balance of probabilities, that the conduct has occurred, or that an administrative error has been made. The High Court decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336 recognises that greater care is needed in considering evidence in some cases. The principle is best summed up in the decision as follows:

The seriousness of the allegation, the inherent unlikelihood of an occurrence of a given description, or the gravity of consequences flowing from a particular finding are considerations that must affect the answer to the question whether the issue has been proved ...

This case is particularly relevant to investigations of the conduct of a person.

47. When we form an opinion that there has been an error, or make a finding about conduct or detrimental action, we may recommend further action be taken to remedy the error or conduct, or to mitigate the risk of it occurring again (see our policy on 'Recommendations and proposals').

## COMPLETION OF AN INVESTIGATION

48. When we form the opinion that an error appears to have been made in by an agency, or on conclusion of an investigation of a protected disclosure complaint, the decision and underlying reasons are documented in a report. The report is provided to interested parties, including the authority and the responsible Minister (Ombudsman Act, section 23). We may also provide a copy to the Premier.

49. If we decide to discontinue an investigation on the basis that further investigation of the matter is not warranted, we still document the outcome of the investigation in a report, and provide a copy of the report to interested parties, including the authority and the responsible Minister (Ombudsman Act, section 23).

50. We will inform the complainant of the outcome of the investigation and result of any recommendations made as a consequence of the investigation findings.

51. Where we believe that it is in the public interest for the report to be made public, or where we have a legislative obligation to do so (Ombudsman Act, section 23A) the report will be tabled in Parliament and placed on the public record.

52. On completion of an investigation, we will continue to monitor an authority's progress on its implementation of recommendations (see our policy on 'Recommendations and proposals').

## ACCOUNTABILITY OF VO INVESTIGATIONS

53. The Victorian Inspectorate is responsible for the oversight and monitoring of our use of coercive powers, and for dealing with complaints about VO (*Victorian Inspectorate Act 2011*). See also our 'Complaints about the Ombudsman' policy).
54. We are also required to provide the Victorian Inspectorate copies of recordings of compulsory interviews and to report on our use of certain powers, such as a decision to issue a summons or give a formal direction.
2. The Accountability and Oversight Committee of the Victorian Parliament has responsibility for monitoring and reviewing the performance of the Ombudsman, and for examining reports tabled in Parliament (Ombudsman Act, section 26H).

## ROLES AND RESPONSIBILITIES

Role	Responsibility
<b>Assistant Ombudsman, Portfolios &amp; Administrative Improvement</b>	<i>Owner</i> – Accountable for ensuring the drafting, maintaining and seeking authorisation of the policy and standards from a suitable Senior Leadership Committee.
<b>Manager, Human Rights Portfolio</b>	<i>Charter compliance</i> – Responsible for checking compatibility of the policy with the human rights protected by the <i>Charter of Human Rights and Responsibilities 2006</i> .
<b>Governance Committee</b>	<i>Authorisation</i> – Authorises, leads, monitors and reports on information management activities.
<b>All staff, contractors and third parties</b>	<i>Implementation</i> – Responsible for acting in compliance with the policy, standards, procedures and associated documents.

## DOCUMENT MANAGEMENT

### Compliance

VO maintains a compliance management system. Compliance to this policy, including use of information and systems, is subject to regular monitoring and reporting to the Senior Leadership Committee (Governance Committee). For further details on compliance checks please refer to the compliance management system.

### Document approval

This document was approved by the Governance Committee on 17 December 2015.

### Document review

This document is due for review upon major changes or three years from the date of the last review.

### Document control

Version	Date	Section	Brief Description of Change
<b>0.1</b>	17/12/2015	All	Policy approved by Governance Committee
<b>0.2</b>	15/7/2016		Policy amended to incorporate July 2016 legislative amendments to Victoria's integrity scheme
<b>0.3</b>	21/12/2016	All	Revisions due to creation of policy on 'Recommendations and Proposals' endorsed by the Executive Committee
<b>0.4</b>	28/2/2017	All	Policy content transferred to new template

## APPENDIX A: Related documents

Title	Location
<i>Protected Disclosure Act 2012</i>	<a href="#"><u>Protected Disclosure Act 2012</u></a>
<i>Ombudsman Act 1973</i>	<a href="#"><u>Ombudsman Act 1973</u></a>