



PUBLIC INTEREST DISCLOSURES ACT 2002

*Guidelines and Standards for procedures to be followed
by Public Bodies*

GUIDELINE No 1/2011

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1. INTRODUCTION

These Guidelines and Standards are published by the Ombudsman under s 38(1)(c) of the Public Interest Disclosures Act 2002 (the Act).

That provision requires the Ombudsman to prepare and publish guidelines and standards for the procedures to be followed by public bodies in relation to a number of matters –

- disclosures under Part 2 of the Act
- investigations under Part 7 of the Act
- the protection of persons from reprisal because of the making of a protected disclosure
- the application of natural justice to all parties involved in an investigation of a public interest disclosure.

Section 60 of the Act requires each public body, as defined in the Act, to establish procedures which comply with these Guidelines and Standards.

The procedures established by the public body must be submitted to the Ombudsman for approval before they are finally adopted. They must then be submitted to the Ombudsman for renewed approval at least once in every subsequent 3-year period, following the initial approval.

Model Procedures which comply with these Guidelines and Standards are attached, as Appendix B. A public body may wish to adopt these Model Procedures, with necessary modifications to suit its circumstances, submitting the modified document for approval.

If a public body does not wish to adopt the Model Procedures, the procedures which it develops must comply with these Guidelines and Standards.

2 REPLACEMENT OF FORMER GUIDELINES

These Guidelines and Standards replace the Guidelines published by the Ombudsman under the Act in November 2003.

These new Guidelines and Standards have been prepared in light of amendments to the Act made by the Public Interest Disclosures Amendment Act 2009, which commenced on 1 October 2010.

3 BACKGROUND

3.1 The purpose of this part

This part of these Guidelines and Standards contains material which explains the context within which the specific guidelines and standards which are set out in part 4, and the procedures set out in the Model Procedures in Appendix B, are intended to operate. Amongst other things, it explains –

- the purpose of the Act
- in a general way, how the Act works
- important terms in the Act – see also Appendix A
- what a “public body” is
- who may receive disclosures under the Act
- the obligations of a public body and its officers under the Act, and
- the procedures which a public body must follow under the Act.

3.2 The purpose of the Act

The purposes of the Act are contained in its long title. These are –

- to encourage and facilitate disclosures of improper conduct by public officers and public bodies
- to protect persons making those disclosures, and others, from reprisals
- to provide for the matters disclosed to be properly investigated and dealt with, and
- to provide all parties involved in the disclosures with natural justice.

3.3 How the Act works

This part of these Guidelines and Standards needs to be read with part 3.4.

Briefly, the Act works in this way –

- It gives certain people – “public officers” and “contractors” – the right to make a disclosure about “improper conduct” or “detrimental action” to certain integrity agencies, other persons and bodies (Part 2 of the Act, particularly s 6).^{1, 2}
- A disclosure which is made in the exercise of this right is called a “protected disclosure”.
- It provides certain statutory protections for such protected disclosures (Part 3).
- It dictates how the recipient of the disclosure is to deal with it (Parts 4 to 8).
- It treats the Ombudsman as the oversight agency in relation to the operation of the Act, including the default investigator, monitor of investigations by public bodies, and setter of standards under the Act.
- Where the disclosure is handled by the Ombudsman or a public body, it requires a preliminary determination as to whether the protected disclosure is a “public interest disclosure” (ss 30 and 33). This is a disclosure which, in the case of decision-making by the Ombudsman, meets the requirements of s 30(2), or, in the case of decision-making by the public body, meets the requirements of s 33(2).
- Subject to exceptions, it requires investigation by the Ombudsman or public body of any protected disclosure which is found to be a public interest disclosure (ss 39 and 63).
- It requires such investigation to be conducted as soon as practicable (ss 39A and 77A)
- It controls the manner in which a disclosure is investigated, and provides powers in this respect.
- In the case of investigation by the Ombudsman, it gives the Ombudsman the power to recommend that action be taken in light of the investigation (s 56)
- In the case of an investigation by a public body which results in a finding that the alleged conduct occurred, it obliges the public body to take action to prevent that conduct from continuing or recurring, and to take action to remedy any harm or loss which may have arisen (s 75).

¹ Note that s 7A of the Act permits a person to whom a disclosure may be made under Part 2 of the Act to treat a person who is not a public officer or contractor as a contractor for the purposes of the Act, if they consider that it would be in the public interest to do so.

² Note that a public officer can make a disclosure about actions by a public officer or a public body, whereas a contractor can only make a disclosure about actions by a public body with which the contractor has entered into a contract (s 6)

3.4 Important terms

To properly understand the reach of the Act and how it operates, it is necessary to understand a number of fundamental expressions which the Act uses. These are principally defined in ss 3 and 4.

The significance of these expressions can be seen most directly in ss 6, 30(2) and 33(2). The first of these sections creates the right to make a disclosure which is protected by the Act. The other two sections bear upon the obligation to investigate.

These expressions, in particular, must be understood –

- “public officer” (see s 3(1) and ss 4(2) and (4))
- “public body” (see s 3(1) and ss 4(1) and (3))
- “improper conduct”, which itself leads to the expression “corrupt conduct” (see s 3(1))
- “detrimental action” (s 3(1))
- “contractor” (s 3(1))
- “protected disclosure” (ss 3(1) and 14)
- “public interest disclosure” (ss 3(1), 30(1) and (2) and 33(1) and (2)).

For convenience, the definitions in the Act of these terms are set out in Appendix A.

Note –

- that the definition of “improper conduct” only covers conduct which “is serious or significant as determined in accordance with guidelines issued by the Ombudsman”. Guidelines on this subject have been published, and can be seen at www.ombudsman.tas.gov.au, under the “Publications” tab. They are to be found in Guideline 1/2010.
- that a “protected disclosure” is one which is made in accordance with Part 2 of the Act.
- that the expression “public interest disclosure” is not defined in s 3(1) of the Act, but finds its explanation in ss 30 and 33. The expression denotes a disclosure which has resulted in a determination by the Ombudsman under s 30, or by a public body under s 33, under which the Ombudsman or public body is satisfied that the disclosure –
shows or tends to show that a public officer or public body –
 - a) has engaged, is engaging or proposes to engage in improper conduct in their capacity as a public officer or public body; or*
 - b) has taken, is taking or proposes to take detrimental action in contravention of section 19.*

Although not defined in s 3(1) of the Act, the expression “public interest disclosure” is used throughout the Act, most importantly in ss 30, 32-35, 37-40, 42, 62A, 63, 77A, 79, and 81.

3.5 “Public body”

For the purposes of the Guidelines and Standards, which apply to public bodies, it is important to identify which bodies this expression covers.

As stated in s 4(1) of the Act, the expression includes –

- a) *the Parliament of Tasmania;*
- b) *a State Service Agency;*
- c) *the Police Service;*
- d) *a council;*
- e) *a Government Business Enterprise;*
- f) *a State-owned Company;*
- g) *a council-owned company;*
- h) *a body or authority, whether incorporated or not, whose members or a majority of whose members are appointed by the Governor or a Minister;*
- i) *any other prescribed body or authority, whether incorporated or not*
 -
 - i. *(i) to which any money is paid by way of appropriation from the Public Account; or*
 - ii. *(ii) over which the Government or a Minister exercises control.*

And, as stated in s 4(3), the expression does not include –

- a) *a court;*
- b) *a tribunal;*
- c) *the Tasmanian Industrial Commission;*
- d) *the Integrity Commission;*
- e) *any other prescribed body.*

3.6 “Public officer”

It is also highly important to understand who is and who is not a “public officer”.

Aside from a contractor, only a person who is currently public officer may make a disclosure under the Act. And a disclosure under the Act may only be

made under the Act in relation to conduct or detrimental action by a public officer or public body.

As stated in s 4(2) of the Act, the following persons are public officers for the purposes of the Act –

- (a) *a Member of Parliament;*
- (b) *a councillor;*
- (c) *a member, officer or employee of a public body;*
- (d) *a member of the governing body of a public body;*
- (e) *an employee of a council;*
- (f) *any person performing functions under the Parliamentary Privilege Act 1898;*
- (g) *a person employed in an office of a Minister, Parliamentary Secretary or other Member of Parliament whether in accordance with the State Service Act 2000, Parliamentary Privilege Act 1898 or otherwise;*
- (h) *any person performing functions under the Governor of Tasmania Act 1982;*
- (i) *a person appointed to an office by the Governor or a Minister under an Act*

And, as stated in s 4(4) of the Act, the following persons are not public officers for the purposes of the Act –

- (a) *the Governor of Tasmania;*
- (b) *a judge of the Supreme Court;*
- (c) *the Associate Judge of the Supreme Court;*
- (d) *a magistrate of the Magistrates Court;*
- (e) *the Director of Public Prosecutions;*
- (f) *any other prescribed person.*

No such person has been prescribed.

3.7 To whom a disclosure may be made

This is governed by s 7 of the Act, and is explained in the following table –

Officer or public body to which the disclosure relates	Person to whom the disclosure may be made
a member, officer or employee of a public body other than the Police Service or a State Service Agency	that public body; or the Integrity Commission; or the Ombudsman
a member, officer or employee of a public body that is a State Service Agency	that State Service Agency; or the Integrity Commission; or the Ombudsman; or the State Service Commissioner
a member of the Police Service, other than the Commissioner of Police	the Commissioner of Police
the Commissioner of Police	the Ombudsman
a member of the Legislative Council	the President of the Legislative Council
a member of the House of Assembly	the Speaker of the House
a councillor, within the meaning of the <i>Local Government Act 1993</i>	the Ombudsman
a person employed under the provisions of the <i>Parliamentary Privilege Act 1898</i>	the Ombudsman; or the Integrity Commission
the Auditor-General	the chairman of the Public Accounts Committee
the State Service Commissioner	the Joint Standing Committee on Integrity
the Ombudsman	the Joint Standing Committee on Integrity
a person employed in an office of a Minister, Parliamentary Secretary or other Member of Parliament	the Ombudsman
in any other case	the Ombudsman; or the Integrity Commission

Hence, a public body may under the Act be the recipient of a disclosure made to it under the Act by a member, officer or employee. It may also be the recipient of a disclosure referred to it by the Ombudsman, the Integrity

Commission or the State Service Commissioner, for investigation: ss 28, 29C, and 42.

3.8 Obligations of a public body and its officers

This part deals with the general obligations which the Act imposes on a public body, and in particular on its principal officer. The next part deals with the processes which a public body must follow when it receives a protected disclosure.

Section 60(1) of the Act requires a public body to establish procedures which comply with these Guidelines and Standards.

The procedures established by the public body must:

- include procedures for the protection and welfare of the person making the disclosure: s 60(2)
- be submitted to the Ombudsman for initial approval and then be submitted at least once in each three year period: s 60(3).

The public body must ensure that a copy of the procedures is available to each member, officer and employee of the public body: s 61(1). It must also make the procedures available to the public in such manner it thinks fit: s 61(2)

As provided in s 62A(1)(a), responsibility for preparing the procedures for approval by the Ombudsman falls with the principal officer.

As defined in s 3(1) of the Act, the expression “principal officer” refers to -

- a) *the Secretary of a State Service Agency; or*
- b) *the general manager of a council, but only in relation to the employees of that council; or*
- c) *the chief executive officer of a State-owned company or council-owned company; or*
- d) *the chief executive officer of a Government Business Enterprise; or*
- e) *the principal administrative officer of a public body; or*
- f) *such other person as may be prescribed;*

The principal officer also has responsibility for receiving public interest disclosures and making sure that they are dealt with in accordance with the Act. Like all of the principal officer’s responsibilities, these may be delegated to a public interest disclosure officer: s 62B. Indeed, the Act requires by s 62A(2) that the principal officer appoint one or more public interest disclosure officers. Before making such an appointment, the principal officer must ensure that the proposed appointee has the skills and knowledge needed to fulfil the role: s 62A(4).

The other obligations imposed on a principal officer by s 62A are –

- to ensure the protection of witnesses
- to ensure the application of the principles of natural justice in the public body's procedures
- to ensure the promotion of the importance of public interest disclosures, including general education of all staff about the legislation, and ensuring easy access to information about both the legislation and the public body's procedures
- to provide access, for persons making a disclosure and others involved in the process of investigation, to confidential employee assistance programs, and
- to provide access, for persons making a disclosure and others involved in the process of investigation, to appropriately trained internal support staff.

3.9 Procedures to be followed by a public body

A public body may receive disclosures in various ways.

A disclosure may be made directly to the public body under Part 2 of the Act. Alternatively, and as earlier indicated, a public body may receive a disclosure by way of referral from the Ombudsman under s 42, from the State Service Commissioner under s 26(b) or from the Integrity Commission under s 29A(b).

Subject to the terms of Division 2 of Part 7 of the Act (ss 63 to 72), and as provided for in s 63, a public body must investigate –

- every disclosure that it receives and determines is a public interest disclosure under s 33 – see part 3.9.1 below; and
- every disclosure that the Ombudsman has referred to the public body for investigation.

3.9.1 Determining whether the disclosure is a public interest disclosure

Where a public body has received a disclosure under Part 2 of the Act, it may choose to refer the disclosure to the State Service Commissioner (s 27) or to the Integrity Commission (s 29B). If it decides to refer in this way, and unless the disclosure was anonymously made, the public body must within a reasonable time notify the person who made the disclosure: ss 29 and 29A.

Otherwise – and this applies also to disclosures referred to it by the State Service Commissioner or the Integrity Commission – the public body must within 45 days of receiving the disclosure make a determination as to whether the disclosure is a public interest disclosure: s 33(1). As earlier indicated, and as arises from the terms of s 33(2) of the Act, the issue here is whether the public body is satisfied that the disclosure –

shows or tends to show that a public officer or public body –

- a) has engaged, is engaging or proposes to engage in improper conduct in their capacity as a public officer or public body; or*
- b) has taken, is taking or proposes to take detrimental action in contravention of section 19.*

See the definitions of “improper conduct” and “detrimental action” in Appendix A.

If the public body decides that the disclosure is a public interest disclosure, it must give notice of that determination to the person who made the disclosure (unless the disclosure was anonymous), and to the Ombudsman, doing so within 14 days of the making of the determination: s 34.

Similarly, if the public body decides that the disclosure is not a public interest disclosure, it must give notice of that determination to the person who made the disclosure (unless the disclosure was anonymous), and to the Ombudsman, within 14 days of the making of the determination: s 35. A determination to this effect must be reviewed by the Ombudsman: s 35(2).

3.9.2 Disclosures which do not need to be investigated

As provided for in s 64 of the Act, the public body is not obliged to investigate a disclosure which it has received and determined under s 33 to be a public interest disclosure if:

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

In the event that the public body decides not to investigate the disclosure on any of these grounds, the body is required by s 65 of the Act to notify both the Ombudsman and (except in the case of an anonymous disclosure) the person who made the disclosure within 14 days. Reasons for the decision must be given to the person making the disclosure, and should also sensibly be given to the Ombudsman. The Ombudsman is required by s 65(2) to review such a decision.

3.9.3 Public body may refer the investigation to the Ombudsman, or the Ombudsman may take over the investigation

A public body may refer the investigation of a disclosed matter to the Ombudsman if the public body considers that its own investigation is being obstructed, or that it is not otherwise within the capacity of the public body to complete the investigation: s 68. Where that happens, the public body must notify the person who made the disclosure, unless the disclosure was anonymously made: s 72(1).

The Ombudsman may also take over the investigation of a disclosed matter from a public body where the Ombudsman is not satisfied with the investigation: s 69.

If the Ombudsman commences or takes over an investigation of a disclosed matter that a public body was to investigate or has commenced investigating, the public body must give the Ombudsman in writing any information that it has, and any findings, preliminary or otherwise, that it has made, in respect of the matter: s 70.

Where the investigation of a disclosed matter has been referred to the Ombudsman, or the Ombudsman has taken over an investigation from a public body, one of the options available to the Ombudsman is to refer the matter back to the public body with recommendations about the future conduct of the investigation: s 71(1)(c).

If the investigation of a disclosed matter by a public body has been taken over by the Ombudsman, the Ombudsman may also enquire into the conduct of the investigation by the public body: s 71(2).

3.9.4 Investigation by the public body

Various provisions within the Act impose obligations upon a public body in connection with the investigation of a disclosed matter.

A public body must –

- conduct the investigation in accordance with procedures established by the public body in accordance with these Guidelines and Standards - see s 73, read with ss 38(1)(c)(ii) and 60(1)

- subject to the exceptions set out in s 74(3), and if so requested by the Ombudsman or the person who made the disclosure, give the Ombudsman or that person (as the case requires), reasonable information about the investigation, doing so within 28 days of receiving the request: s 74
- except where it decides not to investigate in accordance with s 64 (see part 3.9.2), complete the investigation as soon as practicable, but in any event not more than 6 months from the date of the determination that the disclosure is a public interest disclosure (subject to the possibility of an extension of time, as explained in the following paragraph): 77A(1)

The public body may apply to the Ombudsman for an extension of time of up to 6 months in which to complete the investigation: s 77A(2). The Ombudsman may grant an extension if he or she considers that reasonable progress has been made by the public body: s 77A(3).

If the investigation is not completed within the 6-month period provided for in s 77A(1), or any period of extension granted by the Ombudsman, the public body must refer the public interest disclosure to the Ombudsman within 14 days of the end of the period, together with all relevant information: s 77A(4).

3.9.5 Following the investigation

If, on completing the investigation of a disclosed matter, the public body finds that the conduct which was the subject of the investigation occurred, the public body must, in accordance with s 75(1) –

- take all reasonable steps to prevent the conduct from continuing or occurring in the future
- take action to remedy any harm or loss arising from the conduct.

As indicated in s 75(2), the steps to be taken may include:

- bringing disciplinary proceedings against the person responsible for the conduct; and
- referring the matter to the appropriate authority for investigation.

Referring the matter to the appropriate authority for investigation may include referring the matter to the police.

The public body must give written notice to the Ombudsman of the findings of the investigation and of any steps taken under s 75 - see s76(1). It must also give written notice to the “relevant person” of any steps taken under s 75 - the relevant person being the council, where the disclosed matter relates to an employee of a council, or otherwise the relevant Minister: ss 76(1)(b) and (2).

As required by s 77, the public body must also within a reasonable time of completing its investigation, and unless the disclosure was anonymous,

inform the person who made the disclosure of the findings of the investigation and of any steps taken under s 75.

4 GUIDELINES AND STANDARDS

This part of these Guidelines and Standards is best read in conjunction with the Model Procedures in Appendix B.

Any procedures developed by a public body for the purpose of s 60 of the Act must address the following topics –

4.1 *Procedures to be followed in relation to disclosures under Part 2*

- To whom a disclosure should be made
- How the disclosure is to be received and recorded
- Assessing under s 33 whether the disclosure is a public interest disclosure – how this is to be done and who is to do it
- Assessing whether the matter deserves to be investigated (s 64) – how this is to be done and who is to do it.
- What is to be done if the decision is made not to investigate (s 65), and who is to do it.
- When a matter is to be referred to the Ombudsman, and who is to do it (s 68)
- How referral to the police should occur.

4.2 *Procedures to be followed in relation to investigations under Part 7*

- The appointment of the investigator
- Terms of reference, and who is to issue them
- The need for an investigation plan, and what it should address
- How the investigation should be conducted
- Referral to the Ombudsman – when this may be necessary, and who should decide
- Maintenance of contact with the discloser and the Ombudsman
- Action to be taken after the investigation – who is to do what (Part 7, Division 4)

4.3 *Protection from reprisal*

- Steps that must be taken to support, and protect the welfare of, the discloser and witnesses, and who has responsibility for this
- To whom reports of detrimental action should be made, and what should be done on receipt of such a report

4.4 *Natural justice*

- An explanation of the principles of natural justice
- The procedures to be followed to make sure that the principles are observed

4.5 *Other*

- Steps to be taken to protect the welfare of the person against whom the disclosure is made, and who has responsibility for these.

5 MODEL PROCEDURES

As indicated, a public body may choose to adopt the Model Procedures in Appendix B, adapting these as may be necessary to match its internal administrative arrangements and systems.

6 SUBMITTING PROCEDURES TO THE OMBUDSMAN FOR APPROVAL

Each public body should as soon as practicable prepare procedures which comply with these Guidelines and Standards, and submit them to the Ombudsman for approval.

The procedures must include procedures for the protection of the welfare of a person making a disclosure: s 60(2).

If the procedures prepared by the public body depart in any respect from the Model Procedures in Appendix B, the procedures should be accompanied by a document which—

- explains why the public body has departed from the Model Procedures; and
- identifies each such departure.

The address of the Ombudsman is –

The Ombudsman
GPO Box 960
HOBART
TAS 7001

The public body must keep its procedures up to date, and submit them to the Ombudsman for further approval once in each 3-year period following initial approval: s 60(3).

Simon Allston
Ombudsman

Date of first issue of Guideline and Standards: 28 March 2011

APPENDIX A: FUNDAMENTAL EXPRESSIONS USED IN THE ACT

As indicated in part 3.4 of these Guidelines and Standards, there are a number of expressions which are critical to understanding how the Act operates. These are –

- “public officer” (see s 3(1) and ss 4(2) and (4))
- “public body” (see s 3(1) and ss 4(1) and (3))
- “improper conduct”, which itself leads to the expression “corrupt conduct” (see s 3(1))
- “detrimental action” (s 3(1))
- “contractor” (s 3(1))
- “protected disclosure” (ss 3(1) and 14)
- “public interest disclosure” (ss 3(1), 30(1) and (2) and 33(1) and (2)).

The first five of these expressions are to be found in s 6 of the Act, which is at the very centre of its operation.

Section 6 is therefore set out below, followed by the provisions which are essential to understanding these expressions.

6. Disclosures about improper conduct or detrimental action

(1) A *public officer* who believes that another *public officer* or a *public body* –

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

(b) has taken, is taking or proposes to take *detrimental action* in contravention of section 19 –

may disclose that *improper conduct* or *detrimental action* in accordance with this Part.

(2) A *contractor* who believes that the *public body* with which the *contractor* has entered into a contract –

(a) has engaged, is engaging or proposes to engage in *improper conduct* in its capacity as a *public body*; or

(b) has taken, is taking or proposes to take *detrimental action* in contravention of section 19 –

may disclose that *improper conduct* or *detrimental action* in accordance with this Part.

[Emphasis added.]

Meaning of “public officer” and “public body”

3. Interpretation

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

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

4. Public bodies and officers

(1) Subject to subsection (3), the following bodies and authorities are public bodies for the purposes of this Act:

- (a) the Parliament of Tasmania;
- (b) a State Service Agency;
- (c) the Police Service;
- (d) a council;
- (e) a Government Business Enterprise;
- (f) a State-owned Company;
- (g) a council-owned company;
- (h) a body or authority, whether incorporated or not, whose members or a majority of whose members are appointed by the Governor or a Minister;
- (i) any other prescribed body or authority, whether incorporated or not –
 - (i) to which any money is paid by way of appropriation from the Public Account; or
 - (ii) over which the Government or a Minister exercises control.

(2) Subject to subsection (3), the following persons are public officers for the purposes of this Act:

- (a) a Member of Parliament;
- (b) a councillor;
- (c) a member, officer or employee of a public body;
- (d) a member of the governing body of a public body;
- (e) an employee of a council;

- (f) any person performing functions under the Parliamentary Privilege Act 1898;
- (g) a person employed in an office of a Minister, Parliamentary Secretary or other Member of Parliament whether in accordance with the State Service Act 2000, Parliamentary Privilege Act 1898 or otherwise;
- (h) any person performing functions under the Governor of Tasmania Act 1982;
- (i) a person appointed to an office by the Governor or a Minister under an Act

(3) The following bodies are not public bodies for the purposes of this Act:

- (a) a court;
- (b) a tribunal;
- (c) the Tasmanian Industrial Commission;
- (d) the Integrity Commission;
- (e) any other prescribed body.

(4) The following persons are not public officers for the purposes of this Act:

- (a) the Governor of Tasmania;
- (b) a judge of the Supreme Court;
- (c) the Associate Judge of the Supreme Court;
- (d) a magistrate of the Magistrates Court;
- (e) the Director of Public Prosecutions;
- (f) any other prescribed person.

Meaning of "improper conduct"

3. Interpretation

"improper conduct" means –

- (a) conduct that constitutes an illegal or unlawful activity; or
- (b) corrupt conduct; or
- (c) conduct that constitutes maladministration; or
- (d) conduct that constitutes professional misconduct; or
- (e) conduct that constitutes a waste of public resources; or
- (f) conduct that constitutes a danger to public health or safety or to both public health and safety; or
- (g) conduct that constitutes a danger to the environment; or
- (h) misconduct, including breaches of applicable codes of conduct; or
- (i) conduct that constitutes detrimental action against a person who

makes a public interest disclosure under this Act –

that is serious or significant as determined in accordance with guidelines issued by the Ombudsman;

The Ombudsman has published Guidelines for the purpose of this provision. See Guideline 1/2010 under the “Publications” tab at www.ombudsman.tas.gov.au.

Note that paragraph (b) leads to another definition in s 3, being that of “corrupt conduct” –

"corrupt conduct" means –

- (a) conduct of a person (whether or not a public officer) that adversely affects, or could adversely affect, either directly or indirectly, the honest performance of a public officer's or public body's functions; or
- (b) conduct of a public officer that amounts to the performance of any of his or her functions as a public officer dishonestly or with inappropriate partiality; or
- (c) conduct of a public officer, a former public officer or a public body that amounts to a breach of public trust; or
- (d) conduct of a public officer, a former public officer or a public body that amounts to the misuse of information or material acquired in the course of the performance of their functions as such (whether for the benefit of that person or body or otherwise); or
- (e) a conspiracy or attempt to engage in conduct referred to in paragraph (a), (b), (c) or (d);

Meaning of “detrimental action”

3. Interpretation

"**detrimental action**" includes –

action causing injury, loss or damage; and

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; and

threats of detrimental action;

Meaning of “contractor”

3. Interpretation

“contractor” means –

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

Meaning of “protected disclosure”

3. Interpretation

“protected disclosure” has the meaning given to it by section 14.

14. Protected disclosure

A protected disclosure is a disclosure made in accordance with Part 2.

Part 2 of the Act comprises ss 6 to 12 of the Act. Section 6 has been set out above.

Meaning of “public interest disclosure”

This expression is not defined in s 3 of the Act, and the meaning of it is apparent from ss 30(1) and (2), relating to the Ombudsman, and ss 33(1) and

(2), relating to public bodies. Ss 30(2) and 33(2) state those things of which the Ombudsman or public body must be satisfied if a determination is to be made that the disclosure is a public interest disclosure.

Sections 30(1) and (2) and ss 33(1) and (2) are set out below.

30. Determination by Ombudsman of disclosure as public interest disclosure

(1) If a person makes a disclosure to the Ombudsman in accordance with Part 2, the Ombudsman must, within a reasonable time after receiving the disclosure, determine whether the disclosure is a public interest disclosure.

(2) In making a determination under subsection (1), the Ombudsman must be satisfied that the disclosure shows or tends to show that a public officer or public body –

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

(b) has taken, is taking or proposes to take detrimental action in contravention of section 19.

33. Determination by public body of disclosure as public interest disclosure

(1) If a person makes a disclosure to a public body in accordance with Part 2, the public body must, within 45 days after receiving the disclosure, determine whether the disclosure is a public interest disclosure.

(2) In making a determination under subsection (1), the public body must be satisfied that the disclosure shows or tends to show that the public officer to whom the disclosure relates –

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

(b) has taken, is taking or proposes to take detrimental action in contravention of section 19.

APPENDIX B: MODEL PROCEDURES

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1 STATEMENT OF SUPPORT

The [NAME OF PUBLIC BODY] is committed to the aims and objectives of the *Public Interest Disclosures Act 2002* (the Act). It does not tolerate improper conduct by its employees, officers or members, or the taking of detrimental action against those who come forward to disclose such conduct.

The [NAME OF PUBLIC BODY] recognises the value of transparency and accountability in its administrative and management practices, and supports the making of disclosures that reveal the type of conduct to which the Act is directed.

The [NAME OF PUBLIC BODY] will take all reasonable steps to protect people who make such a disclosure from any detrimental action in reprisal for making the disclosure, and to protect their welfare. It will also afford natural justice to all parties involved in the investigation of a disclosure.

2 PURPOSE OF THESE PROCEDURES

These procedures establish a system for reporting disclosures of improper conduct or detrimental action by [NAME OF PUBLIC BODY] or members, officers or employees of the public body. The procedures are also intended to assist its members, officers and employees to understand the way in which the Act operates and needs to be administered.

The system created by these procedures provides for such disclosures to be made to the [TITLE OF PRINCIPAL OFFICER OF THE PUBLIC BODY] (the Principal Officer) or to a delegated Public Interest Disclosure Officer. Disclosures may be made by people who are “public officers” with the [NAME OF PUBLIC BODY], or by people who are or have been “contractors” with [NAME OF PUBLIC BODY] for the supply of goods or services. These expressions are explained later in this document.

These procedures are designed to complement normal communication channels between supervisors and employees. Employees are encouraged to continue to raise appropriate matters at any time with their supervisors, and to use existing grievance procedures within the organisation where appropriate

[Note: It would be useful to include cross references to other relevant policies and procedures in your public body dealing with investigation of complaints etc at this point. This would include your public body’s code of conduct and any other grievance or complaint handling policy.]

The procedures have been prepared in accordance with Guidelines and Standards published by the Ombudsman under s 38(1)(c) of the Act. These Guidelines and Standards can be seen on the Ombudsman’s website at www.ombudsman.tas.gov.au.

3 THE PURPOSE OF THE ACT

The Act commenced operation on 1 January 2004. It was substantially amended by the *Public Interest Disclosures Amendment Act 2009*, following a major review of the Act, and these procedures reflect those amendments. The amendments took effect on 1 October 2010.

The purposes of the Act are contained in its long title. These are –

- to encourage and facilitate disclosures of improper conduct by public officers and public bodies
- to protect persons making those disclosures, and others, from reprisals
- to provide for the matters disclosed to be properly investigated and dealt with, and
- to provide all parties involved in the disclosures with natural justice.

In colloquial terms, the Act is about “whistle-blowing” in the Tasmanian public sector. The Act is based on the precepts that it is in the public interest for whistle-blowing to occur, and that this will be encouraged and facilitated by providing due protection for whistle-blowers, and by ensuring that disclosures which they make are properly investigated and dealt with.

4 HOW THE ACT WORKS

Briefly, the Act works in this way –

- It gives certain people – “public officers” and “contractors” – the right to make a disclosure about “improper conduct” or “detrimental action” to certain integrity agencies, other persons and bodies (Part 2 of the Act, particularly s 6).³⁴

A disclosure which is made in the exercise of this right is called a “protected disclosure”.

- It provides certain statutory protections for such protected disclosures (Part 3).
- It dictates how the recipient of the disclosure is to deal with it (Parts 4 to 8).
- It treats the Ombudsman as the oversight agency in relation to the operation of the Act, including the default investigator, monitor of investigations by public bodies, and setter of standards under the Act.
- Where the disclosure is handled by the Ombudsman or a public body, it requires a preliminary determination as to whether the protected disclosure is a “public interest disclosure” (ss 30 and 33). This is a disclosure which, in the case of decision-making by the Ombudsman, meets the requirements of s 30(2), or, in the case of decision-making by the public body, meets the requirements of s 33(2).
- Subject to exceptions, it requires investigation by the Ombudsman or public body of any protected disclosure which is found to be a public interest disclosure (ss 39 and 63).
- It requires such investigation to be conducted as soon as practicable (ss 39A and 77A)
- It controls the manner in which a disclosure is investigated, and provides powers in this respect.
- In the case of investigation by the Ombudsman, it gives the Ombudsman the power to recommend that action be taken in light of the investigation (s 56)
- In the case of an investigation by a public body which results in a finding that the alleged conduct occurred, it obliges the public body to take action to prevent that conduct from continuing or recurring, and to take action to remedy any harm or loss which may have arisen (s 75).

³ Note that s 7A of the Act permits a person to whom a disclosure may be made under Part 2 of the Act to treat a person who is not a public officer or contractor as a contractor for the purposes of the Act, if they consider that it would be in the public interest to do so.

⁴ Note that s 7A of the Act permits a person to whom a disclosure may be made under Part 2 of the Act to treat a person who is not a public officer or contractor as a contractor for the purposes of the Act, if they consider that it would be in the public interest to do so.

Two flow charts which depict the way in which the Act works are attached, in Attachment 1. Table 1, which is for general information, depicts how the Ombudsman deals with a disclosure made to the Ombudsman. Table 2 depicts how a public authority deals with a disclosure made to it.

5 COMPARISON WITH THE INTEGRITY COMMISSION ACT

The PID Act and the *Integrity Commission Act 2009* (IC Act) work very differently.

Perhaps the most important difference is that the IC Act does not contain any provisions which protect a person who makes a complaint under that Act from detrimental action by way of reprisal. The provision of such protection is a key feature of the PID Act.

Other important differences are -

- the fact that anyone can make a complaint under the IC Act, whereas the right to make a disclosure under the PID Act is given only to a current public officer and a contractor
- differences in the types of conduct to which the Act applies. The PID Act concerns “improper conduct”, which embraces “corrupt conduct”. The IC Act concerns “misconduct”. The definitions of the expressions thus used in the two Acts do not align.
- the fact that a disclosure may be made under the PID Act about proposed conduct, whereas the IC Act only concerns past conduct
- the fact that a disclosure under the PID Act may be oral, whereas a complaint under the IC Act must be in writing
- the different processes which each Act applies to a matter brought forward under it.

A person who is trying to decide which Act to proceed under should consider seeking legal advice on what is the best course for them to take.

It is possible for a disclosure which is made under the PID Act to be dealt with under the IC Act – see Part 4A of the PID Act.

6 KEY TERMS

6.1 *The right to make a disclosure*

The right to make a disclosure under the Act is given by s 6 of the Act. That states –

6. Disclosures about improper conduct or detrimental action

(1) A *public officer* who believes that another *public officer* or a *public body* –

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

(b) has taken, is taking or proposes to take *detrimental action* in contravention of section 19 –

may disclose that *improper conduct* or *detrimental action* in accordance with this Part.

(2) A *contractor* who believes that the *public body* with which the *contractor* has entered into a contract –

(a) has engaged, is engaging or proposes to engage in *improper conduct* in its capacity as a *public body*; or

(b) has taken, is taking or proposes to take *detrimental action* in contravention of section 19 –

may disclose that *improper conduct* or *detrimental action* in accordance with this Part.

[Emphasis added.]

As can be seen from the emphasis given to certain expressions in this version of s 6, a number of expressions are key to its operation. These are -

- “public officer”
- “public body”
- “contractor:
- “improper conduct”
- “detrimental action”

Because of the way that the expression “improper conduct” is defined in s 3 of the Act, a further expression is also very important. This is the expression “corrupt conduct”.

Each of these expressions is now explained.

6.2 “public officer” and “public body”

These expressions are defined in ss 3 and 4 of the Act, in this way –

3. Interpretation

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

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

4. Public bodies and officers

(1) Subject to subsection (3), the following bodies and authorities are *public bodies* for the purposes of this Act:

(a) the Parliament of Tasmania;

(b) a State Service Agency;

(c) the Police Service;

(d) a council;

(e) a Government Business Enterprise;

(f) a State-owned Company;

(g) a council-owned company;

(h) a body or authority, whether incorporated or not, whose members or a majority of whose members are appointed by the Governor or a Minister;

(i) any other prescribed body or authority, whether incorporated or not –

(i) to which any money is paid by way of appropriation from the Public Account; or

(ii) over which the Government or a Minister exercises control.

(2) Subject to subsection (3), the following persons are *public officers* for the purposes of this Act:

- (a) a Member of Parliament;
 - (b) a councillor;
 - (c) a member, officer or employee of a public body;
 - (d) a member of the governing body of a public body;
 - (e) an employee of a council;
 - (f) any person performing functions under the Parliamentary Privilege Act 1898;
 - (g) a person employed in an office of a Minister, Parliamentary Secretary or other Member of Parliament whether in accordance with the State Service Act 2000, Parliamentary Privilege Act 1898 or otherwise;
 - (h) any person performing functions under the Governor of Tasmania Act 1982;
 - (i) a person appointed to an office by the Governor or a Minister under an Act
- (3) The following bodies are not *public bodies* for the purposes of this Act:
- (a) a court;
 - (b) a tribunal;
 - (c) the Tasmanian Industrial Commission;
 - (d) the Integrity Commission;
 - (e) any other prescribed body.
- (4) The following persons are not *public officers* for the purposes of this Act:
- (a) the Governor of Tasmania;
 - (b) a judge of the Supreme Court;
 - (c) the Associate Judge of the Supreme Court;
 - (d) a magistrate of the Magistrates Court;
 - (e) the Director of Public Prosecutions;
 - (f) any other prescribed person.

The [NAME OF PUBLIC BODY] is a “public body”, as so defined.

Further, any member, officer or employee of [NAME OF PUBLIC BODY] is a “public officer”, as so defined.

Note that the right which s 6 of the Act gives to a public officer to make a disclosure must be exercised whilst the person is still a public officer.

6.3 “contractor”

This expression is defined in s 3 of the Act, in this way –

Meaning of “contractor”

3. Interpretation

“contractor” means –

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

This definition has the effect that a person may exercise the right given to a contractor by s 6 of the Act even though the contract which they held with the public body is now over.

6.4 “improper conduct” and “corrupt conduct”

These expressions are defined in s 3 of the Act, in this way –

Meaning of “improper conduct”

3. Interpretation

“improper conduct” means –

- (a) conduct that constitutes an illegal or unlawful activity; or
- (b) corrupt conduct; or
- (c) conduct that constitutes maladministration; or

- (d) conduct that constitutes professional misconduct; or
- (e) conduct that constitutes a waste of public resources; or
- (f) conduct that constitutes a danger to public health or safety or to both public health and safety; or
- (g) conduct that constitutes a danger to the environment; or
- (h) misconduct, including breaches of applicable codes of conduct; or
- (i) conduct that constitutes detrimental action against a person who makes a public interest disclosure under this Act –

that is serious or significant as determined in accordance with guidelines issued by the Ombudsman;

Note that paragraph (b) leads to another definition in s 3, being that of “corrupt conduct” –

"corrupt conduct" means –

- (a) conduct of a person (whether or not a public officer) that adversely affects, or could adversely affect, either directly or indirectly, the honest performance of a public officer's or public body's functions; or
- (b) conduct of a public officer that amounts to the performance of any of his or her functions as a public officer dishonestly or with inappropriate partiality; or
- (c) conduct of a public officer, a former public officer or a public body that amounts to a breach of public trust; or
- (d) conduct of a public officer, a former public officer or a public body that amounts to the misuse of information or material acquired in the course of the performance of their functions as such (whether for the benefit of that person or body or otherwise); or
- (e) a conspiracy or attempt to engage in conduct referred to in paragraph (a), (b), (c) or (d);

As can be seen, the expression “improper conduct” covers a wide range of inappropriate conduct, covering conduct which constitutes -

- an illegal or unlawful activity
- “corrupt conduct”, as defined
- maladministration

- professional misconduct
- a waste of public resources
- a danger to public health or safety or to both public health and safety
- a danger to the environment
- misconduct, including breaches of applicable codes of conduct
- detrimental action against a person who makes a public interest disclosure.

The reference to “corrupt conduct” covers –

- conduct of any person (whether or not a public official) that adversely affects the honest performance of a public officer’s or public body’s functions;
- the performance of a public officer’s functions dishonestly or with inappropriate partiality
- conduct of a public officer, former public officer or a public body that amounts to a breach of public trust
- conduct of 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 conduct of any of these types.

Note that, for the right of disclosure under s 6 to apply, the improper conduct (including corrupt conduct) must be serious or significant as determined in accordance with guidelines issued by the Ombudsman – as to which see Guideline 1/2010 under the “Publications” tab at www.ombudsman.tas.gov.au.

Examples of “corrupt conduct”

A public officer takes a bribe in exchange for the discharge of a public duty.

A public officer favours unmeritorious applications for jobs or permits by friends and relatives.

A public officer sells confidential information.

[Note: You may wish to replace with or include an example/s of relevance to your public body.]

Examples of other types of “improper conduct”

To avoid closure of a town’s only industry, an environmental health officer ignores or conceals evidence of illegal dumping of 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, giving rise to a risk to public health or safety..

[Note: You may wish to replace with or include an example/s of relevance to your public body.]

6.5 Detrimental action

This expression is defined in s 3 of the Act, in this way –

Meaning of “detrimental action”

3. Interpretation

"**detrimental action**" includes –

- (a) action causing injury, loss or damage; and
- (b) intimidation or harassment; and
- (c) discrimination, disadvantage or adverse treatment in relation to a person's employment, career, profession, trade or business, including the taking of disciplinary action; and
- (d) threats of detrimental action;

Note that the right to make a disclosure in relation to detrimental action under s 6 relates to detrimental action taken in contravention of s 19 of the Act. Section 19 is in these terms –

19. Protection from reprisal

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

Penalty:

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

(2) A person takes detrimental action in reprisal for a protected disclosure if –

(a) the person takes or threatens to take the action because –

- (i) a person has made, or intends to make, a protected disclosure; or
- (ii) the person believes that a person has made or intends to make the protected disclosure; or

(b) the person incites or permits another person to take or threaten to take the

action for either of those reasons.

(3) In determining whether a person takes detrimental action in reprisal, it is irrelevant whether or not a reason referred to in subsection (2) is the only or dominant reason as long as it is a substantial reason.

The effect of s 19 is that reprisal must have been a substantial reason behind the detrimental action taken.

Examples of detrimental action are -

Examples of “detrimental action”

Refusal of a deserved promotion

Demotion, transfer, isolation in the workplace or changing a person’s duties to their disadvantage.

Threats, abuse or other forms of harassment directly or indirectly against the discloser, his or her family or friends.

Discrimination against the discloser or his or her family and associates in applications for jobs, permits or tenders.

[Note: You may wish to replace with or include an example/s of relevance to your public body.]

7 THE REPORTING SYSTEM

7.1 To whom a disclosure may be made – general principles

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

Officer or public body to which the disclosure relates	Person to whom the disclosure may be made
a member, officer or employee of a public body other than the Police Service or a State Service Agency	that public body; or the Integrity Commission; or the Ombudsman
a member, officer or employee of a public body that is a State Service Agency	that State Service Agency; or the Integrity Commission; or the Ombudsman; or the State Service Commissioner
a member of the Police Service, other than the Commissioner of Police	the Commissioner of Police
the Commissioner of Police	the Ombudsman
a member of the Legislative Council	the President of the Legislative Council
a member of the House of Assembly	the Speaker of the House
a councillor, within the meaning of the Local Government Act 1993	the Ombudsman
a person employed under the provisions of the Parliamentary Privilege Act 1898	the Ombudsman; or the Integrity Commission
the Auditor-General	the chairman of the Public Accounts Committee
the State Service Commissioner	the Joint Standing Committee on Integrity
the Ombudsman	the Joint Standing Committee on Integrity
a person employed in an office of a Minister, Parliamentary Secretary or other Member of Parliament	the Ombudsman
in any other case	the Ombudsman; or the Integrity Commission

Hence, disclosures which relate to improper conduct or detrimental action by a member, officer or employee of [name of public body] must be made as explained in parts 7.2 to 7.6.

7.2 Disclosure to persons within the [NAME OF PUBLIC BODY]

Disclosures of improper conduct or detrimental action by a member, officer or employee of [NAME OF PUBLIC BODY] may be made to the following officers:

- The [title of principal officer of public body] – who is the “Principal Officer” of the public body, within the terms of the Act.
- a Public Interest Disclosure Officer

Each person who holds or acts in any of the following positions within [NAME OF PUBLIC BODY] has been appointed by the Principal Officer to act as a Public Interest Disclosure Officer, and holds a delegation which enables them to receive public interest disclosures under the Act.

[SET OUT LIST]

Where a person is contemplating making a disclosure and is concerned about approaching the Principal Officer or a Public Interest Disclosure Officer in the workplace, he or she can call the relevant officer and request a meeting in a discreet location away from the workplace.

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

7.3 Disclosure to the Ombudsman

A disclosure about improper conduct or detrimental action by [NAME OF PUBLIC BODY] or any of its members, officers or employees may also be made directly to the Ombudsman. The contact details for the Ombudsman are: -

The Ombudsman
GPO Box 960
HOBART
TASMANIA 7001

or at

99 Bathurst Street
HOBART
TASMANIA 7000

Internet: www.ombudsman.tas.gov.au
Email: ombudsman@ombudsman.tas.gov.au
Phone: 1800 001 170 (Charges from mobile phones apply)

7.4 Disclosure to the Integrity Commission

A disclosure about improper conduct or detrimental action by [name of public body] or any of its members, officers or employees may also be made directly to the Integrity Commission. The contact details for the Integrity Commission are -

Tasmanian Integrity Commission
GPO Box 822
HOBART
TASMANIA 7001

or at

Level 2
Surrey House
199 Macquarie Street
HOBART
TASMANIA 7000

Internet: www.integrity.tas.gov.au
Email: integritycommission@integrity.tas.gov.au

Phone: 1300 720 289

7.5 Disclosure to the State Service Commissioner

A disclosure about improper conduct or detrimental action by a member, officer or employee of a public body which is a State Service Agency may also be made directly to the State Service Commissioner. The contact details for the State Service Commissioner are: -

Office of the State Service Commissioner
PO Box 621
HOBART
TASMANIA 7001

or at

Level 2/144 Macquarie Street
HOBART
TASMANIA 7000

Internet: www.osscc.tas.gov.au
Email: osscc@dpac.tas.gov.au
Phone: (03) 6232 7007

7.6 To which entity should a disclosure be made?

As can be seen from part 7.1, there are some situations in which a disclosure may only be made to a single entity. For instance, if the disclosure is about a councillor in a local council, it must be made to the Ombudsman.

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

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

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

Where the disclosure is against a public body, not against a public officer, it is recommended that the disclosure be made to the Ombudsman.

8 ROLES AND RESPONSIBILITIES

This part explains the roles and responsibilities of individuals within [name of public body] under the Act.

8.1 *Members, officers and employees*

Members, officers and employees of [NAME OF PUBLIC BODY] are encouraged to report known or suspected incidences of improper conduct or detrimental action under the Act, in accordance with these procedures.

All members, officers and employees of the [NAME OF PUBLIC BODY] have an important role to play in supporting those who have made a legitimate disclosure. They must refrain from any activity that is, or could be perceived to be, victimisation or harassment of a person who makes a disclosure. Furthermore, they should protect and maintain the confidentiality of a person they know or suspect to have made a disclosure.

8.2 *Principal Officer*

The Principal Officer has primary responsibility for ensuring that the provisions of the Act are implemented in the public body. Section 62A of the Act provides that the Principal Officer has responsibility for:

- preparing procedures for approval by the Ombudsman
- receiving public interest disclosures and ensuring they are dealt with in accordance with the Act
- ensuring the protection of witnesses
- ensuring the application of natural justice in the public body's procedures
- ensuring the promotion of the importance of public interest disclosures and general education about the Act to all staff, and ensuring easy access to information about the Act and the public body's procedures, and
- providing access to confidential employee assistance programs and appropriately trained internal support staff for those involved in the process.

The Principal Officer may delegate any or all of his or her functions to a Public Interest Disclosure Officer.

8.3 *Public Interest Disclosure Officer*

A Public Interest Disclosure Officer is appointed by the Principal Officer under s 62A(2) of the Act, and holds a delegation from the Principal Officer which

enables them to exercise the statutory powers and functions given to the Principal Officer by the Act which are listed in their instrument of delegation.

These procedures frequently give responsibilities or functions to a Public Interest Disclosure Officer. Not all of these are referable to specific statutory powers or functions bestowed on the Principal Officer by the Act, and so some of them represent things which the Public Interest Disclosure Officer is expected to do on a purely administrative basis.

Subject to the terms of their delegation, the responsibilities of a Public Interest Disclosure Officer generally include:

- acting as a contact point for general advice about the operation of the Act for any person wishing to make a disclosure about improper conduct or detrimental action
- making arrangements for a disclosure to be made privately and discreetly and, if necessary, away from the workplace
- receiving any disclosure made orally or in writing (from internal and external disclosers)
- recording in writing the details of any disclosure which is made orally
- impartially assessing the allegation and determining whether it is a disclosure made in accordance with Part 2 of the Act (that is, “a protected disclosure”)
- impartially assessing under s 33 of the Act whether a disclosure is a “public interest disclosure”, and
- taking all necessary steps to ensure that the identity of the discloser and the identity of the person who is the subject of the disclosure are kept confidential.

8.4 Investigator

Where the [NAME OF PUBLIC BODY] has determined that a disclosure is a public interest disclosure, or where the Ombudsman has referred a disclosed matter to [NAME OF PUBLIC BODY] for investigation, the Principal Officer will appoint an investigator to investigate the matter in accordance with the Act. An investigator may be a person from within the public body or a consultant engaged for that purpose.

8.5 Welfare manager

The welfare manager will be appointed by the Principal Officer or by a Public Interest Disclosure Officer, and is responsible for looking after the general welfare of the discloser. The welfare manager will:

- examine the immediate welfare and protection needs of a person who has made a disclosure, and seek to foster a supportive work environment
- advise the discloser of the legislative and administrative protections available to him or her⁵
- listen and respond to any concerns of harassment, intimidation, victimisation or other detrimental action which may be occurring in reprisal for making disclosure
- so far as is practicable, protect the identity of the discloser in the course of carrying out these responsibilities.

A welfare manager may be a person from within the public body or a consultant engaged for that purpose.

⁵ See Part 12 below for details of the legislative protections.

9 CONFIDENTIALITY

The [NAME OF PUBLIC BODY] will take all reasonable steps to protect the identity of a discloser. Maintaining confidentiality is crucial in ensuring reprisals are not made against the discloser.

All reasonable care should also be taken to protect the privacy of witnesses and of the person against whom the disclosure has been made.

Section 23 of the Act requires any person who receives information due to the handling or investigation of a protected disclosure, not to disclose that information except in certain limited circumstances. Disclosure of information in breach of this section constitutes an offence that is punishable by a maximum fine of 60 penalty units or six months imprisonment, or both.

The circumstances in which a person may disclose information obtained about a protected disclosure include:

- where exercising their functions or the functions of the public body under the Act
- when making a report or recommendation under the Act
- when publishing statistics in the annual report of a public body, and
- in 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 discloser. The Act also prohibits the identification of the person who is the subject of the disclosure in any particulars included in an annual report made in accordance with Part 9 of the Act.

It may be necessary to consider disclosing information where:

- it is essential, having regard to the principles of natural justice, that the identifying information be disclosed to the person who is the subject of the disclosure, or
- the investigating body believes that the disclosure of the identifying information is necessary for the matter to be effectively investigated.

In both circumstances, the person who made the disclosure should be informed as to this step.

The [NAME OF PUBLIC BODY] will ensure that all relevant files, whether paper or electronic, are kept securely and can only be accessed by the Principal Officer, Public Interest Disclosure Officer/s, the investigator, and (in relation to welfare matters only) the welfare manager.

All printed material will be kept in files that are clearly marked as confidential, and all materials relevant to an investigation, such as tapes from interviews, will also be stored securely with the files.

Care should also be taken to ensure that all relevant phone calls and meetings are conducted in private.

Section 90 exempts documents from release under the *Right to Information Act 2009* to the extent that they contain information regarding a disclosure, or information that is likely to lead to the identification of the person who made the disclosure or the person who is the subject of the disclosure.

10 PUBLISHING STATISTICS

Section 86 of the Act requires [NAME OF PUBLIC BODY] to include in its annual report -

- the number and types of disclosures made to the [name of public body] during the year, and the number of disclosures determined to be a public interest disclosure
- the number of disclosures determined by the [name of public body] to be public interest disclosures that it investigated during the year
- the number and types of disclosed matters referred to the [name of public body] by the Ombudsman for investigation
- the number and types of disclosures referred by the [name of public body] to the Ombudsman for investigation
- the number and types of investigations taken over from the [name of public body] by the Ombudsman
- the number and types of disclosed matters that the [name of 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, and
- any recommendations made by the Ombudsman that relate to the [name of public body].

11 PRELIMINARY ISSUES

11.1 What should the recipient of the disclosure do upon receipt of the disclosure?

If the disclosure is oral, the recipient should make a file note as soon as possible, which records the time when the disclosure was made, the circumstances under which it was made and, so far as is possible, the exact words used by the discloser. The recipient should also ask the discloser to put the disclosure in writing as soon as possible.

Unless the recipient is the Principal Officer (or the disclosure is about the Principal Officer), the recipient should immediately inform the Principal Officer of the disclosure, and should provide the Principal Officer with a copy of the disclosure, or record of the disclosure, and of any accompanying documents.

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

A file should be created for the disclosure, marked clearly as being a *Public Interest Disclosures Act* matter – see part 9 of these procedures (Confidentiality).

11.2 Assessing the disclosure – is it a protected disclosure?

The protections provided by the Act to disclosers (as to which see Part 4 of the Act) only apply where the disclosure made is a “protected disclosure”. This means a disclosure made in accordance with Part 2 of the Act: s 14.

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

- Has the disclosure been made by a public officer or contractor? (See parts 6.2 and 6.3 above.)
- Does the disclosure concern improper conduct or detrimental action? (see parts 6.4 and 6.5 above.)
- Did the alleged conduct or action occur more than 3 years before the commencement of the Act – i.e. on or after 1 January 2001? (the Act, s 10)
- Has the disclosure been made to the appropriate person? (See part 7.1 above.)

As required by s 6 of the Act (see part 6.1 above), one of the preconditions to a disclosure being a protected disclosure, and therefore attracting the

protections in Part 3 of the Act, is that must it is made by a public officer or a contractor.

Note that an anonymous disclosure may be accepted if the person receiving it is satisfied that the disclosure is being made by a public officer or contractor: s 8.

The person who carries out the assessment should inform the discloser as soon as practicable of their conclusion as to whether the disclosure is a protected disclosure, and of their reasons for coming to that conclusion. This should be done in writing. If the disclosure has been assessed as being a protected disclosure, the discloser should be given a copy of Part 3 of the Act, which details the protections which the Act provides. These protections should be explained to the discloser if necessary. The discloser should also be informed of the process which will now be followed with respect to the disclosure.

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

If the disclosure is considered to be a protected disclosure, the Principal Officer or a Public Interest Disclosure Officer should immediately appoint a welfare manager to protect the interests of the discloser, and ensure that the discloser is advised of the name and contact details of that person – see parts 8.5 and 15.1.

Note that s 7A of the Act provides that a person to whom a disclosure may be made under Part 2 of the Act may, if the person considers that it would be in the public interest to do so, treat any other person who is not a public officer or a contractor as a contractor for the purposes of this Act. If this is under consideration, the matter should first be discussed with the Principal Officer, and consideration should also be given to seeking advice from the Ombudsman as to whether this step is appropriate.

11.3 Should the disclosure be referred to another body?

11.3.1 Referral to the Ombudsman

The [NAME OF PUBLIC BODY] may refer a protected disclosure to the Ombudsman if it believes that it is not able to complete the investigation satisfactorily: s 68. The Act does not provide for other relevant circumstances in which a public body may refer a protected disclosure to the Ombudsman before commencing an investigation, but an alternative way of achieving the same result would for the public body to encourage the discloser to make their disclosure direct to the Ombudsman, such that there is no need for the public body to continue to investigate the matter.

11.3.2 Referral to the State Service Commissioner

The [NAME OF PUBLIC BODY] may refer a protected disclosure to the State Service Commissioner if it considers that the disclosure relates to an alleged breach by a State Service officer or State Service employee of the State Service Code of Conduct under the *State Service Act 2000*.

The [NAME OF PUBLIC BODY] must notify the discloser of the referral within a reasonable time (unless the disclosure was made anonymously): s 29.

The Commissioner may deal with the disclosure under the *State Service Act*, or may refer it to the Ombudsman or public body as the case requires (s.28), to deal with it as a public interest disclosure.

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

- the relevance of the disclosure to the normal functions of the Commissioner
- the desirability of independent investigation by the Commissioner of the subject matter of the disclosure
- the views of the discloser as to whether referral should occur.

11.3.3 Referral to the Integrity Commission

The [NAME OF PUBLIC BODY] may refer a protected disclosure to the Integrity Commission where it considers that the disclosure relates to misconduct as defined in s 4(1) of the *Integrity Commission Act 2009*.

The [NAME OF PUBLIC BODY] must notify the discloser of the referral within a reasonable time (unless the disclosure was made anonymously): s 29D

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

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

- the relevance of the disclosure to the normal functions of the Commission
- the desirability of independent investigation by the Commission of the subject matter of the disclosure
- the views of the discloser as to whether referral should occur.

11.3.4 Referral of criminal conduct to the Police

It is possible that, before or during an investigation, facts are uncovered that reveal the possibility of a criminal offence. If this happens, the [NAME OF PUBLIC BODY] will not commence, or will suspend, the investigation and will consult with the Ombudsman as to the future of the matter. Under section 41 of the Act, the Ombudsman has the power to refer a disclosed matter to the Commissioner of Police for investigation.

If the Ombudsman is satisfied that the disclosed matter should be referred to Tasmania Police, the [NAME OF PUBLIC BODY] should consider whether the disclosure should be referred to the Ombudsman under s 68 of the Act.

Early referral of the matter may avoid interference with the evidentiary trail. Referral to the police through the Ombudsman will also avoid any question of a breach of confidentiality under s 23 of the Act. Once a disclosure is referred to the Commissioner of Police through the Ombudsman, the investigation under the Act process ceases. However, there may still be administrative or operational issues which have been identified during the disclosure process or investigation that should be dealt with under other internal processes of the [NAME OF PUBLIC BODY]. The Principal Officer, or the Public Interest Disclosure Officer acting in consultation with the Principal Officer, will decide how the matter should be dealt with.

11.3.5 Further assessment - Is the disclosure a public interest disclosure?

Where the Principal Officer or Public Interest Disclosure Officer has received a disclosure that has been assessed to be a protected disclosure, the Principal Officer or Public Interest Disclosure Officer must make a determination under s 33 of the Act as to whether the disclosure is a public interest disclosure. This assessment must be made within 45 days of the receipt of the disclosure.

For a disclosure to be a public interest disclosure, the public body must be satisfied that the disclosure shows or tends to show that the public officer or public body to whom the disclosure relates –

- has engaged, is engaging or proposes to engage in improper conduct in his or her capacity as a public officer, or
- has taken, is taking or proposes to take detrimental action in reprisal for the making of the protected disclosure.

A disclosure must be more than a mere allegation without substantiation. A disclosure must include an indication of the existence of evidence that if substantiated would show or tend to show that the alleged conduct occurred.

Where the Principal Officer or Public Interest Disclosure Officer concludes that the disclosure amounts to a public interest disclosure, he or she must -

- advise the Principal Officer (if not the person receiving the disclosure)
- notify the Ombudsman within 14 days of the decision;

- notify the person making the disclosure within 14 days of the decision (unless it is an anonymous disclosure), and
- proceed to investigate the disclosed matter - see part 12 (Investigations) below - see s 34.

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

- advise the Principal Officer (if not the person receiving the disclosure)
- notify the Ombudsman within 14 days of the decision, and
- notify the person making the disclosure within 14 days of the decision (unless it is an anonymous disclosure) – see s 35.

The Ombudsman must then review this decision: s 35(2).

If, on review of the matter, the Ombudsman decides that the disclosure is not a public interest disclosure, the matter does not need to be dealt with under the Act. The Principal Officer, or the Public Interest Disclosure Officer in consultation with the Principal Officer, will then decide how the disclosure should be dealt with.

12 PROTECTION

12.1 When does protection commence?

Where the [NAME OF PUBLIC BODY] receives a disclosure which complies with the requirements of Part 2 of the Act, the disclosure immediately attracts the protections set out in Part 3 of the Act. This is so whether or not the disclosure is factually correct (although one of the requirements of Part 2, as found in s 6, is that the discloser honestly believes that the alleged improper conduct or detrimental action in fact occurred).

Note that, as provided in s 9, a disclosure can still be made where the discloser cannot identify the person or body to whom or to which the disclosure relates.

12.2 What protection does the Act provide?

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

A person who makes a protected disclosure –

- is not subject to any civil or criminal liability, or to any liability arising by way of administrative process, for making the protected disclosure (s 16)
- does not by doing so commit an offence under a provision of any other Act that imposes a duty to maintain confidentiality, or which imposes any other restriction on the disclosure of information (s 17(1)(a)), and
- does not by doing so breach an obligation by way of oath, or rule of law or practice, or under an agreement, which requires the discloser to maintain confidentiality or otherwise restricts the disclosure of information (s 17(1)(b))

However these last two protections do not apply to a disclosure of information to a person other than the person to whom the protected disclosure was originally made, unless that further disclosure was made in accordance with the Act: s 17(2).

Part 3 also contains various provisions which are intended to protect a discloser from detrimental action by way of reprisal for a protected disclosure. By s 19, the Act makes it an offence to take such detrimental action. By s 20, it creates a liability to pay damages for such detrimental action. And by s 21, it gives a person who believes that detrimental action has been taken against him or her the right to apply to the Supreme Court for an order requiring the person who has taken the detrimental action to remedy that action, or for an injunction.

13 INVESTIGATIONS

13.1 Introduction

The [NAME OF PUBLIC BODY] will investigate every disclosure referred to it for investigation by the Ombudsman: s 63(b).

Unless the matters set out in 13.2 below apply, or the matter is referred to the Ombudsman, the [NAME OF PUBLIC BODY] will investigate every disclosure that it receives and determines is a public interest disclosure under s 33 of the Act: s 63(a).

The Principal Officer will appoint an investigator to carry out the investigation. The investigator may be a person from within an organisation or a consultant engaged for that purpose.

The objectives of an investigation will 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
- to consider the information collected and to draw conclusions objectively and impartially
- to maintain procedural fairness in the treatment of witnesses and generally to all parties involved in the disclosure

13.2 Matters that do not have to be investigated

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

- if in the opinion of the public body the disclosure is trivial, vexatious, misconceived or lacking in substance
- if the subject matter of the disclosure has already been adequately dealt with by the Ombudsman or a public body, statutory authority, Commonwealth statutory authority, commission, court or tribunal
- if the person making the disclosure has commenced proceedings in a commission, court or tribunal in relation to the same matter, and that commission, court or tribunal has power to order remedies similar to those available under this Act
- if the person making the disclosure had knowledge for more than 12 months of the disclosed matter before making the disclosure and failed to give a satisfactory explanation for the delay in making the disclosure

- if the disclosure relates solely to the personal interests of the person making the disclosure
- if the disclosure is based on false or misleading information, or
- if the matter which is the subject of the disclosure has already been determined and the additional disclosure does not provide significant or substantial new information.

Any decision not to proceed with an investigation on a ground specified in s 64 must be made by the Principal Officer.

If the Principal Officer determines that the disclosed matter is not to be investigated on a ground specified in s 64, notice of this fact must be given within 14 days to both the Ombudsman and (except in the case of an anonymous disclosure) the person who made the disclosure. Reasons for the decision must accompany the notice.

The Ombudsman is required by s 65(2) to review such a decision. Following the review, the Ombudsman must notify the [NAME OF PUBLIC BODY] of his or her decision within a reasonable time. If the Ombudsman on review determines that the disclosure should not be investigated, the matter does not need to be dealt with under the Act. The Principal Officer, or the Public Interest Disclosure Officer in consultation with the Principal Officer, will decide how the matter should be dealt with.

If the Ombudsman determines that the disclosure should be investigated, and the matter is not referred to the Ombudsman for a reason specified in s 68, the [NAME OF PUBLIC BODY] must proceed with the investigation.

13.3 Appointment of investigator and framing of terms of reference

The Principal Officer – not a Public Interest Disclosure Officer - will determine who is to carry out the investigation. As earlier indicated, this may be an officer within the [NAME OF PUBLIC BODY] or an external consultant.

The investigator will be given formal terms of reference, signed by the Principal Officer.

The terms of reference will specify –

- the matters to be investigated
- the date by which the investigation is to be concluded, and
- the resources available to the investigator for the purposes of the investigation.

The completion date should be as soon as practicable but, in any event, not more than 6 months from the date of the determination that the disclosure is a public interest disclosure: s 77A(1). If at any stage before or during the investigation it appears that the investigation cannot be completed within 6

months, the [NAME OF PUBLIC BODY] may apply to the Ombudsman for an extension of up to 6 months in which to complete the investigation: s 77A(2).

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

13.4 Investigation plan

The investigator should prepare an investigation plan for approval by the Principal Officer. The plan should list the issues which are to be investigated and describe the steps which the investigator intends to take in investigating each of those issues.

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

13.5 Natural justice

The principles of natural justice must be carefully observed in the course of the investigation, with respect to all parties involved in the investigation. These principles are also known as “procedural fairness”.

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

The [NAME OF PUBLIC BODY] will comply with the following requirements in ensuring that procedural fairness is accorded to all parties involved:

- No one is to be involved in the investigation who –
 - is known to be biased against any person who is potentially subject to an adverse finding, or
 - is known to hold any biases which are relevant to the subject-matter of the investigation, or
 - in respect of whom there is reasonable ground for apprehending or suspecting bias.⁶

If the investigator is aware of any reason why they may be susceptible to an allegation of bias on the basis of these principles, they should immediately inform the Principal Officer.

- Any person who is potentially subject to an adverse finding or comment must be told of –
 - the allegations made against them, or which have arisen against them as a result of the investigation

⁶ For apprehended bias, the test is whether a fair minded lay observer, taking into account all relevant circumstances, might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the questions that he or she is required to decide.

- all of the information which is adverse to their interests and which is, on an objective basis, credible, relevant and significant to the investigation
- the potential findings in view, and their possible consequences
- This must be done before any final conclusions are formed by the investigator.
- Each such person must be given a reasonable time to respond to the material which is provided to them
- The investigator must maintain an open mind, and must fairly take into account all representations which such a person may make.

Note that there is no requirement to inform the person who is subject to the disclosure as soon as it is received, or as soon as the investigation has commenced. Note also that the name of the person making the disclosure or any particulars which might identify that person must not be revealed unless necessary, and with the discloser's knowledge.

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

13.6 Conduct of the investigation

A useful reference in planning and executing the investigation is the publication by the Australian Public Service Commission (albeit produced for a different purpose), *Handling misconduct: A human resource practitioner's guide to the reporting and handling of suspected and determined breaches of the APS Code of Conduct* (February, 2007).

The investigator should make contemporaneous notes of all discussions and phone calls, and consideration should be given to the desirability of audiotaping significant interviews with witnesses

All information gathered in the course of the investigation must be securely stored.

Interviews should be conducted in private, and the investigator should take all reasonable steps to protect the identity of the discloser. Where disclosure of the identity of the person cannot be avoided, due to the nature of the allegations, the investigator should warn the discloser and his or her welfare manager of this.

13.7 Referral of an investigation to the Ombudsman

Under s 68 of the Act, a public body may refer the investigation of a disclosed matter to the Ombudsman where the public body considers that its own investigation is being obstructed or that it is otherwise not within the capacity of the public body to complete the investigation.

Any decision as to whether the investigation should be referred to the Ombudsman will be taken by the Principal Officer.

See also part 11.3.3, concerning referral of an investigation to the Ombudsman, with a view to referral by the Ombudsman to the Commissioner of Police of suspected criminal conduct.

13.8 Provision of information about the investigation

The Principal Officer or the Public Interest Disclosure Officer must ensure that the discloser is kept regularly informed concerning the handling of a protected disclosure and an investigation.

The Principal Officer must report to the Ombudsman about the progress of an investigation.

Section 74 of the Act requires a public body, at the request of the Ombudsman or the person who made the disclosure, to give the Ombudsman or that person reasonable information about the investigation. The information must be given within 28 days of the request.

However, as provided in s 74(3), such information does not have to be given to the discloser if:

- it has already been given to the person, or
- the giving of the information would endanger the safety of another or may prejudice the conduct of the investigation.

14 ACTION TAKEN AFTER AN INVESTIGATION

14.1 Investigator's final report

At the conclusion of the investigation, the investigator must submit a written report of his or her findings to the Principal Officer. The report should contain:

- the allegation/s
- a description of the manner in which the investigation was conducted, with sufficient detail to demonstrate that procedural fairness was observed
- an account of all relevant information received
- details of the evidence and submissions supplied by any person against whom an adverse finding is made, and the evaluation of that material by the investigator
- the findings made and conclusions reached, and the basis for them.

Note in particular that such a report should not include any comment adverse to any person unless that person has been given an opportunity to be heard in the matter and their defence is fairly set out in the report – see part 13.5.

With a view to potential action by the public body under s 75 of the Act, if the investigator has found that conduct disclosed by the discloser has occurred, the investigator may wish to include recommendations as to :

- any steps that need to be taken by the [name of public body] to prevent the conduct from continuing or occurring in the future, and
- any action that should be taken by the [name of public body] to remedy any harm or loss arising from that conduct.

The steps to be taken may include bringing disciplinary proceedings against the person responsible for the conduct, and referring the matter to an appropriate authority for further consideration. For example, if the investigation has revealed conduct that may constitute a criminal offence, consideration should be given to whether the matter should be referred to Tasmania Police, unless this has previously occurred.

The report must be accompanied by:

- the transcript or other record of any oral evidence taken, including tape recordings, and
- all documents, statements or other exhibits received by the officer and accepted as evidence during the course of the investigation.

The report must not disclose particulars likely to lead to the identification of the discloser: s 23(2).

14.2 Action to be taken

If the Principal Officer is satisfied that the conduct which was the subject of the investigation has occurred, he or she must consider the recommendations in the investigator's report and decide upon the steps which are to be taken to prevent the conduct from continuing or occurring in the future: s 75(1)(a). Again taking into consideration any recommendations in the investigator's report, the Principal Officer must also consider whether any action should be taken to remedy any harm or loss arising from the conduct: s 75(1)(b).

Where the Public Interest Disclosure Officer is responsible for the progress of the investigation and is satisfied that the disclosed conduct has occurred, he or she will recommend to the Principal Officer the action that must be taken.

The Principal Officer will provide a written report to [NAME OF THE MINISTER RESPONSIBLE FOR THE PUBLIC BODY, OR NAME OF COUNCIL WHERE DISCLOSURE RELATES TO EMPLOYEE OF A COUNCIL] and the Ombudsman, setting out the findings of the investigation and any remedial steps taken.

Where the investigation concludes that the disclosed conduct did not occur, the Principal Officer will report these findings to the Ombudsman and to the discloser.

As required by s 77 of the Act, the Principal Officer will also inform the discloser of the findings of the investigation, and of any steps taken under s 75 as a result of the findings made.

15 MANAGING THE WELFARE OF THE DISCLOSER

15.1 Commitment to protecting disclosers

The [NAME OF PUBLIC BODY] is committed to the protection of genuine disclosers against detrimental action taken in reprisal for the making of protected disclosures. The Principal Officer is responsible for ensuring that disclosers and witnesses are protected from detrimental action, and that the culture of the workplace is supportive of protected disclosures being made.

The Principal Officer or the Public Interest Disclosure Officer must appoint a welfare manager to support all persons who have made a protected disclosure. See part 8.5 for the responsibilities of a welfare manager.

The welfare manager must also provide advice about what the discloser should do if they believe that a colleague/s or a relative/s is being subjected to detrimental action. The advice will include what level of information it is necessary for them to provide.

All employees will be advised that it is an offence for a person to take detrimental action in reprisal for a protected disclosure (s 19). The maximum penalty is a fine of 240 penalty units or two years imprisonment, or both. The taking of detrimental action in breach of this provision can also be grounds for making a disclosure under the Act and can result in an investigation.

See part 6.5 for further details as to what constitutes detrimental action.

A discloser who believes that they are being subjected to detrimental action should report it to the Principal Officer or a Public Interest Disclosure Officer. If they believe that the reprisal is not being effectively dealt with by the [NAME OF PUBLIC BODY], they may report the matter to the Ombudsman. A report of detrimental action may qualify as a protected disclosure under the Act.

15.2 Keeping the discloser informed

The Principal Officer or the Protected Interest Disclosure Officer must ensure that the discloser is kept informed of action taken in relation to his or her disclosure, and the time frames that apply. The discloser must be informed of the objectives of any investigation that takes place, the findings of the investigation, and the steps taken by the [NAME OF PUBLIC BODY] to address any improper conduct that has been found to have occurred. The discloser must be given reasons for all decisions made by the [NAME OF PUBLIC BODY] in relation to a disclosure. All communication with the discloser must be in plain English.

15.3 Occurrence of detrimental action

If a discloser reports an incident of detrimental action allegedly taken in reprisal for the making of the disclosure, the welfare manager must:

- record details of the incident
- advise the discloser of his or her rights under the Act, and
- advise the Principal Officer of the detrimental action.

The taking of detrimental action in reprisal for the making of a disclosure can be an offence against the Act as well as grounds for making a further disclosure. Where such detrimental action is reported, the Public Interest Disclosure Officer or the Principal Officer will assess the report as a new disclosure under the Act, and it will be dealt with accordingly in accordance with these procedures.

15.4 Discloser implicated in improper conduct

Where a person who makes a disclosure is implicated in misconduct, the [NAME OF PUBLIC BODY] will handle the disclosure and protect the discloser from reprisals in accordance with the Act, the Ombudsman's guidelines and these procedures. At the same time the [NAME OF PUBLIC BODY] acknowledges that the act of disclosing should not shield disclosers from the reasonable consequences flowing from any involvement in improper conduct. Section 18 of the Act specifically provides that a person's liability for his or her own conduct is not affected by the person's disclosure of that conduct under the Act. However, in some circumstances, an admission may be a mitigating factor when considering disciplinary or other action.

The Principal Officer will make the final decision as to whether disciplinary or other action will be taken against a discloser. Where disciplinary or other action relates to conduct that is the subject of the person's disclosure, the disciplinary or other action will only be taken after the disclosed matter has been appropriately dealt with.

In all cases where disciplinary or other action is being contemplated, the Principal Officer must be satisfied that it has been clearly demonstrated that:

- the intention to proceed with disciplinary action is not causally connected to the making of the disclosure (as opposed to the content of the disclosure or other available information)
- there are good and sufficient grounds that would fully justify action against any non-discloser in the same circumstances, and
- there are good and sufficient grounds that justify exercising any discretion to institute disciplinary or other action.

The Public Interest Disclosure Officer or Principal Officer will thoroughly document the process, including recording the reasons why the disciplinary or other action is being taken, and the reasons why the action is not in retribution

for the making of the disclosure. The Public Interest Disclosure Officer or Principal Officer will clearly advise the discloser of the proposed action to be taken, and of any mitigating factors that have been taken into account.

16 MANAGEMENT OF THE PERSON AGAINST WHOM A DISCLOSURE HAS BEEN MADE

The [NAME OF PUBLIC BODY] recognises that employees against whom disclosures are made must also be supported during the handling and investigation of disclosures. The [NAME OF PUBLIC BODY] will take all reasonable steps to ensure the confidentiality of the person who is the subject of the disclosure during the assessment and investigation process. Where an investigation does not substantiate a disclosure, the fact that the investigation has been carried out, the results of the investigation, and the identity of the person who is the subject of the disclosure will remain confidential.

The Public Interest Disclosure Officer or Principal Officer will ensure that the person who is the subject of any disclosure investigated by or on behalf of the [NAME OF PUBLIC BODY] is accorded natural justice in accordance with part 13.5 of these procedures.

Where the allegations in a disclosure have been investigated, and the person who is the subject of the disclosure is aware of the allegations or of the investigation, the Public Interest Disclosure Officer or Principal Officer will formally advise the person who is the subject of the disclosure of the outcome of the investigation.

The [NAME OF PUBLIC BODY] will give its full support to a person who is the subject of a disclosure where the allegations contained in a disclosure are clearly wrong or unsubstantiated. If the matter has been publicly disclosed, the Principal Officer of the [NAME OF PUBLIC BODY] will consider any request by that person to issue a statement of support setting out that the allegations were clearly wrong or unsubstantiated.

17 CRIMINAL OFFENCES

The [NAME OF PUBLIC BODY] will ensure officers appointed to handle protected disclosures and all other employees are aware of the following offences created by the Act:

- Section 19(1)

This provision makes it an offence for a person to take detrimental action against a person in reprisal for a protected disclosure being made. The section provides for a maximum penalty of a fine of 240 penalty units or two years imprisonment, or both.
- Section 23(1)

This provision makes it an offence for a person to disclose, except under specified circumstances, information which they have obtained or received in the course of or as a result of a protected disclosure or the investigation of a disclosed matter under the Act. The section provides for a maximum penalty of 60 penalty units or six months imprisonment, or both.
- Section 54

This section creates various offences relating to obstructing the work of the Ombudsman under the Act, including offences relating to misleading the Ombudsman. The section provides for a maximum penalty of 240 penalty units or two years imprisonment, or both.
- Section 87(1)

This provision makes it an offence for a person to knowingly provide false information under the Act to certain officers (including the Ombudsman) with the intention that it be acted on as a disclosed matter. The provision provides for a maximum penalty of 240 penalty units or two years imprisonment, or both.
- Section 87(2)

This section makes it an offence for a person to knowingly provide false information to a person conducting an investigation under the Act. The provision provides for a maximum penalty of 240 penalty units or two years imprisonment, or both.

At the present time, the value of a penalty unit is \$130. The value of a penalty unit varies from time to time in accordance with movements in the Consumer Price Index. For more information, see the Department of Justice website at –

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

18 APPROVAL AND REVIEW OF THESE PROCEDURES

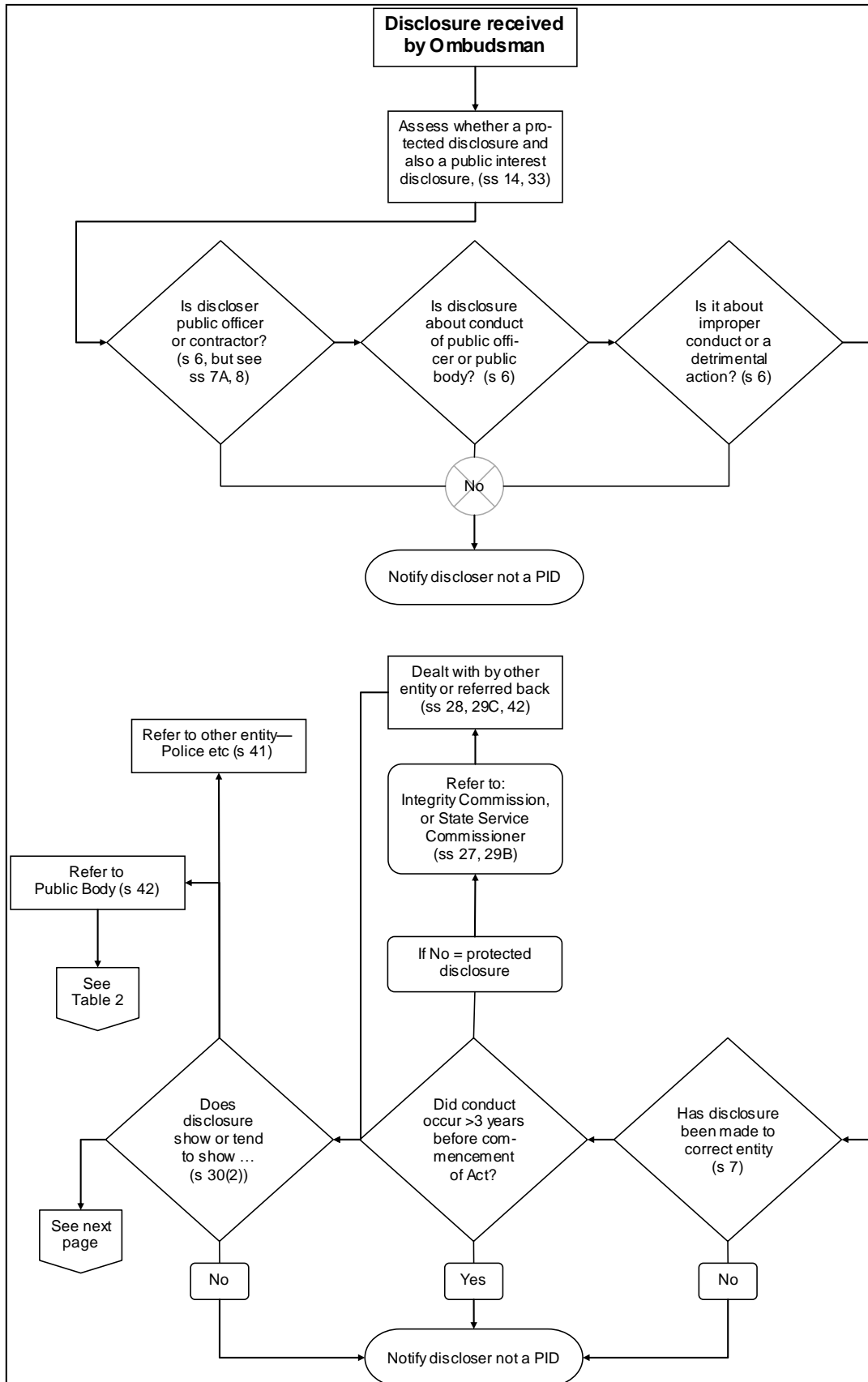
These procedures were approved by the Ombudsman under s 60(3) of the Act on [DATE OF INITIAL APPROVAL].

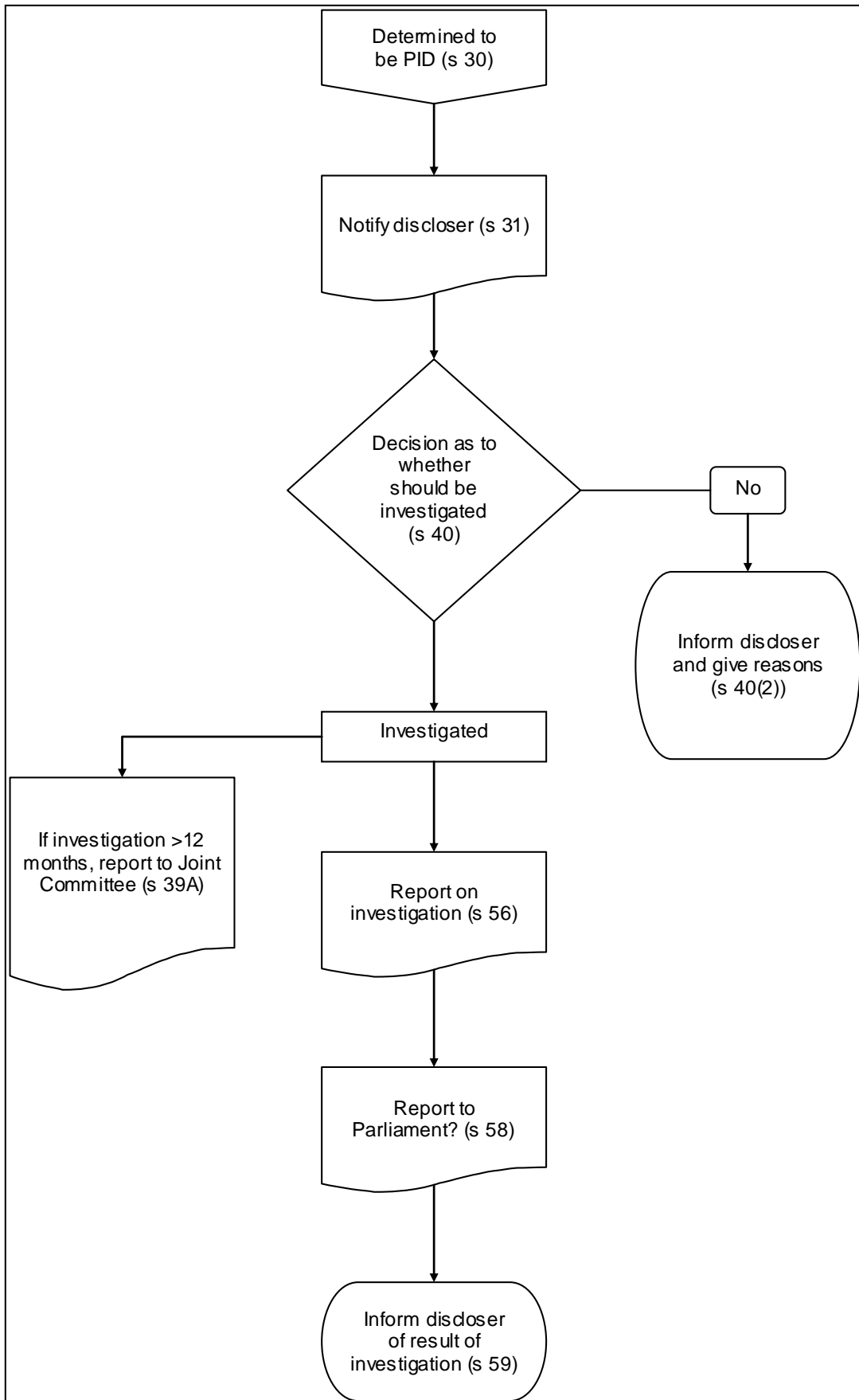
The procedures will be submitted to the Ombudsman for review at least once in each 3 year period to ensure they meet the objectives of the Act and accord with the Guidelines and Standards published by the Ombudsman under s 38(1)(c) of the Act.

The date by which the procedures must be submitted to the Ombudsman for review is [DATE].

ATTACHMENT 1: FLOWCHARTS

18.1 Table 1: Disclosure received by Ombudsman





18.2 Table 2: Disclosure to Public Body

