

Making and Handling Protected Disclosures

Procedures

August 2013

Quick reference guide to protected disclosures

<p>Who can make a disclosure?</p>	<p>Any individual or group of individuals.</p> <p>A disclosure cannot be made by a business or company.</p> <p>(refer to Part 2 of these procedures for more information)</p>
<p>How do I make a disclosure?</p>	<p>Verbally or in writing (but not by fax) in accordance with specific procedures.</p> <p>(refer to Part 3 of these procedures for more information)</p>
<p>What can I make a disclosure about?</p>	<p>Improper conduct engaged in, and/or detrimental action taken by, public bodies or public officers performing public functions.</p> <p>This includes the government departments and agencies as well as their employees / officers.</p> <p>(refer to Part 4 of these procedures for more information)</p>
<p>Who can I make a disclosure to?</p>	<p>If you wish to make a protected disclosure about VicRoads or any of its employees and/or officers, you may contact:</p> <ul style="list-style-type: none"> • The Independent Broad-based Anti-corruption Commission (IBAC) <p style="margin-left: 40px;">Level 1, North Tower 459 Collins Street Melbourne Vic 3000 GPO Box 24234, Melbourne, VIC 3001 Telephone: 1300 735 135 Website: www.ibac.vic.gov.au</p> <p>If you wish to make a protected disclosure about a Councillor, the Freedom of Information Commissioner or the Privacy Commissioner you must make your disclosure to:</p> <ul style="list-style-type: none"> • IBAC; or • The Victorian Ombudsman <p style="margin-left: 40px;">Level 9, North Tower 459 Collins Street Melbourne Vic 3000 Telephone: (03) 9613 6222 / 1800 806 314 Website: www.ombudsman.vic.gov.au</p> <p>If you wish to make a disclosure about a member of police personnel (other than the Chief Commissioner of Police), you must make your disclosure to IBAC or prescribed members of police personnel.</p> <p>If you wish to make a disclosure about a statutory entity or office, you should make your disclosure to IBAC.</p> <p>(refer to Part 5 of these procedures for more information)</p>

Who can provide me with information or assistance?

If you wish to obtain information about the operation of the protected disclosure regime within VicRoads or would like obtain welfare support you should contact:

Franca Chick, Manager FOI & Privacy
60 Denmark Street Kew, 3101
Ph: 9854 2331
Email: franca.chick@roads.vic.gov.au

1. Background and purpose

- 1.1 VicRoads is committed to the aims and objectives of the *Protected Disclosure Act 2012*. VicRoads encourages employees and members of the public to report known or suspected instances of corrupt or improper conduct.
- 1.2 The purpose of this document is to establish procedures for receiving and handling disclosures of improper conduct engaged in and/or detrimental action taken by VicRoads and/or its employees and officers.
- 1.3 These procedures have been prepared in accordance with the *Protected Disclosure Act 2012* (the Act) and the guidelines of the Independent Broad-based Anti-corruption Commission (IBAC) which are available on the IBAC website (www.ibac.vic.gov.au).

2. Who can make a protected disclosure?

- 2.1 Any person can make a protected disclosure about improper conduct engaged in, or detrimental action taken by, VicRoads or employees and/or officers.
- 2.2 You can make a protected disclosure if you are a member of the public, an employee of VicRoads, or an employee or member of another department or public body.
- 2.3 You can make a disclosure as an individual or together with a group of individuals.
- 2.4 A company or business cannot make a protected disclosure.
- 2.5 You can ask someone else to make a disclosure on your behalf. However, if you ask someone else to make a disclosure on your behalf, only that person will receive the full protection of the Act in relation to that disclosure. Your protection will be limited to confidentiality and protection against any detrimental action taken against you in reprisal for the disclosure that has been made.
- 2.6 You do not have to specifically refer to the Act or the protections in the Act for your disclosure to be a 'protected disclosure'. You may also advise that you do not want your disclosure to be treated as a 'protected disclosure'.

3. How do I make a protected disclosure?

- 3.1 You may make a protected disclosure:
 - (a) in person
 - (b) by phone
 - (c) by leaving a voicemail message
 - (d) in writing by post, personal delivery or email
 - (e) by any other form of electronic communication, and/or
 - (f) anonymously.

- 3.2 You may **not** make a protected disclosure by fax.
- 3.3 A protected disclosure must be made in private so it is important that only the person to whom you are making the disclosure to can hear or receive your disclosure. For example, if you make your disclosure by email, your disclosure should be sent to the email address of the person to whom you are making the disclosure to, rather than a group email. You are not precluded from making a joint disclosure with a group of individuals at the same time.
- 3.4 If you are making your disclosure verbally, the person receiving your disclosure may take notes of your discussion. The person receiving your disclosure may also want to record the conversation, but will only do so with your permission.
- 3.5 You do not have to identify yourself when making a disclosure. However, if your disclosure is anonymous, this may affect how the disclosure is investigated and you will not be notified of the outcome of any investigation.
- 3.6 If you cannot be identified from the disclosure, the disclosure will be treated as an anonymous disclosure.

4. What can I make a protected disclosure about?

- 4.1 You may make a protected disclosure about information that shows or tends to show, or that you believe on *reasonable grounds* shows or tends to show, that:
- (a) a person, public officer or public body
 - (b) is engaging in, or proposing to engage in,
 - (c) *'improper conduct'* and/or *'detrimental action'*.

Public officer and public body

- 4.2 The conduct you are disclosing must be in the performance of a person or body's function as a public officer or public body. In other words, there must be a link between the alleged improper conduct and/or detrimental action and the person or body's functions as a public officer or public body.
- 4.3 Public bodies or public officers include the departments, government agencies and statutory authorities such as VicRoads.
- 4.4 For a full definition of 'public body' and 'public officer' see Schedule 1 of these procedures.

Improper conduct and detrimental action

- 4.5 The conduct you are disclosing must be improper conduct and/or detrimental action.
- 4.6 The definitions of improper conduct and detrimental action are explained in the diagram below.

'Improper conduct' is defined as:

'CORRUPT CONDUCT' or 'SPECIFIED CONDUCT'

Corrupt conduct is:

Conduct that:

- adversely affects the honest performance of functions by a public officer or public body;
- involves the dishonest performance of functions by a public officer or public body;
- involves a breach of public trust;
- involves a misuse of information acquired in the performance of functions as a public officer or public body; or
- involves a conspiracy or an attempt to engage in any of the above conduct

AND

- would constitute:
 - an indictable offence;
 - an attempt to pervert the course of justice;
 - bribery of a public official; or
 - perverting the course of justice.

Specified conduct is:

Corrupt conduct that would not constitute an indictable offence, but would constitute either a criminal offence or reasonable grounds for dismissing or terminating the services of the officer engaged in the conduct

OR

Conduct that:

- involves a substantial mismanagement of public resources;
- involves a substantial risk to public health and safety; or
- involves a substantial risk to the environment

AND

- would constitute a criminal offence, or reasonable grounds for dismissing or terminating the services of the officer engaged in the conduct, an attempt to pervert the course of justice, bribery of a public official or perverting the course of justice.

'Detrimental conduct' is defined as:

Action taken against a person who has made a protected disclosure which:

- causes injury, loss or damage;
- is intimidation or harassment; or
- is discrimination, disadvantage or adverse treatment in relation to a person's employment, career, profession, trade or business (including disciplinary action).

Detrimental action is not:

- legitimate management action where there are good and sufficient grounds that would justify the action against any other person in the same circumstances.

Examples of improper conduct

1. An employee of a public body takes a bribe or receives a payment other than his or her wages in exchange for the discharge of a public duty.
2. An employee of a public body sells or dishonestly exploits confidential information.
3. A public officer favours unmeritorious applications for jobs or permits by friends and relatives.

Examples of detrimental action

1. A public body demotes, transfers, isolates in the workplace or changes the duties of a person who has made a disclosure due to the making of a disclosure.
2. A person threatens, abuses or carries out other forms of harassment directly or indirectly against the person who makes a disclosure and his or her family or friends.
3. A public body discriminates against the person who makes a disclosure or his or her family and associates in subsequent applications for jobs, permits or tenders.

'Reasonable grounds'

- 4.7 Your belief that improper conduct or detrimental action has occurred, is occurring, or will occur does not have to be based on actual proof. It is enough if you *believe* (as opposed to *know*) that improper conduct or detrimental action has occurred, is occurring or will occur. However, you must have *reasonable grounds* for your belief.
- 4.8 A mere suspicion, allegation or conclusion that is unsupported by further information, facts or circumstances will not be protected by the Act. For example, it is not enough to say 'I know X is corrupt'. You must have information that would lead a reasonable person to believe that the information shows, or tends to show, improper conduct or detrimental action.

5. Who do I make my protected disclosure to?

- 5.1 Who you can make your protected disclosure to depends on the person or body your disclosure is about as only certain persons and entities can receive protected disclosures.
- 5.2 If your disclosure is made to a person or entity that cannot receive your disclosure, your disclosure will **not** be a protected disclosure and you will **not** be protected under the Act. It is therefore important that you check that you are providing your disclosure to the right person or body. If in doubt, disclosures should be made directly to IBAC, **unless** the disclosure is about IBAC or one of its officers.

Making a disclosure about VicRoads and/or its employees and officers

- 5.3 If you wish to make a protected disclosure about improper conduct engaged in, or detrimental action taken by VicRoads or its employees and /or officers, you may make your disclosure to:

IBAC

Level 1, North Tower
459 Collins Street
Melbourne Vic 3000
GPO Box 24234, Melbourne, VIC 3001
Telephone: 1300 735 135
Website: www.ibac.vic.gov.au

A disclosure of improper conduct or detrimental action made to a VicRoads employee will not be a protected disclosure and you will not be protected under the Act.

If you would like information about the protected disclosure regime in VicRoads you may contact:

Franca Chick, Manager FOI & Privacy
60 Denmark Street Kew, 3101
Ph: 9854 2331
Email: franca.chick@roads.vic.gov.au

Making a disclosure about a Councillor, the Freedom of Information Commissioner or the Privacy Commissioner

- 5.4 If you wish to make a protected disclosure about a Councillor, the Freedom of Information Commissioner or the Privacy Commissioner, you must make your disclosure to:

(a) IBAC

OR

(b) The Victorian Ombudsman

Level 9, North Tower
459 Collins Street
Melbourne Vic 3000
Telephone: (03) 9613 6222 / 1800 806 314
Email: ombudvic@ombudsman.vic.gov.au
Website: www.ombudsman.vic.gov.au

Making a disclosure about members of Victoria Police

- 5.5 If you wish to make a disclosure about a member of police personnel (other than the Chief Commissioner of Police), you must make your disclosure to IBAC or prescribed members of police personnel.

Making a disclosure about independent public officers, public bodies and ministerial advisers

- 5.6 If you wish to make a disclosure about any other public body or public officer you must make your disclosure to IBAC.

6. What will happen after I make a disclosure?

Assessment by IBAC

- 6.1 IBAC is responsible for identifying, investigating, exposing and preventing serious corrupt conduct across the whole of the Victorian public sector.
- 6.2 Once the IBAC receives a disclosure, IBAC must assess within a reasonable time whether (in its view) your disclosure is a protected disclosure. It may seek additional information from you to make its decision.
- 6.3 If IBAC determines that your disclosure is a protected disclosure, it must decide to either:
- (a) dismiss your disclosure
 - (b) investigate your disclosure, or
 - (c) refer your disclosure to another body for investigation, such as Victoria Police, the Ombudsman or the Victorian WorkCover Authority.
- 6.4 Regardless of whether IBAC determines your disclosure is a protected disclosure or not, you will still receive the protections under the Act. This includes protection from detrimental action taken in reprisal for you making the disclosure.
- 6.5 However, if IBAC determines that your disclosure is not a protected disclosure, the confidentiality requirements set out in Part 11 of these procedures will no longer apply in relation to your disclosure.

7. What protections will I receive?

- 7.1 The Act sets out the protections provided to persons who make a disclosure in accordance with the Act. These include:
- (a) immunity from civil or criminal liability as well as administrative action (including disciplinary action) for making the disclosure
 - (b) immunity from committing an offence under the *Constitution Act 1975* or any other Act that imposes obligations of confidentiality or otherwise restricts the disclosure of information
 - (c) immunity from breaching any other obligation (made by oath or rule of law or practice) requiring the maintenance of confidentiality or otherwise restricting the disclosure of information, and
 - (d) protection from an action for defamation.
- 7.2 These protections apply to a disclosure from the time you make the disclosure and continue to apply even if the IBAC determines that the disclosure is not a 'protected disclosure'.
- 7.3 The protections in the Act do not apply if you provide false or misleading information or claim that a matter is the subject of a protected disclosure knowing that claim to be false.
- 7.4 The protections will apply to further information relating to a protected disclosure that you provide to:

- (a) IBAC, or
- (b) an investigating entity.

7.5 In addition to these protections, VicRoads recognises that the welfare and protection from detrimental action of persons making genuine protected disclosures is essential for the effective implementation of the Act and is relevant to VicRoads' obligation to create a safe working environment under the *Occupational Health and Safety Act 2004*, the *Charter of Human Rights and Responsibilities Act 2006*, the *Public Administration Act 2004 (Vic)* and the common law.

8. Welfare Management

- 8.1 VicRoads will offer welfare support to a discloser or a witness in an investigation as the circumstances require and where discloser or witness identifies himself/herself to VicRoads.
- 8.2 VicRoads will also consider appointing a welfare manager when a person has made a protected disclosure or is cooperating, or intending to cooperate, with an investigation of a protected disclosure.
- 8.3 A welfare manager is responsible for:
- (a) examining the discloser and/or witness' immediate welfare and protection needs and, where that person is an employee, fostering a supportive work environment
 - (b) providing practical advice and support
 - (c) advising the discloser and/or witness of the protections available under the Act
 - (d) if the discloser seeks to make a disclosure of detrimental action in reprisal for making a disclosure (e.g. harassment, intimidation or victimisation), to advise the discloser that the disclosure must be made to IBAC if the discloser wants the disclosure to be a protected disclosure
 - (e) ensuring that the discloser and/or witness' expectations of the process and outcomes are realistic
 - (f) maintaining confidentiality, and
 - (g) operating discreetly to protect the discloser and/or witness from being identified as being involved in a protected disclosure.
- 8.4 In determining whether to appoint a welfare manager in any particular case, VicRoads will consider:
- (a) whether the disclosure has proceeded, or is likely to proceed, to an investigation
 - (b) whether there are any real risks of detrimental action against the persons involved, taking into account their particular circumstances
 - (c) whether VicRoads can provide effective support to the persons involved, including keeping them informed of the progress of the disclosure, and

- (d) whether it is within VicRoads' power to protect the person/s involved from suffering repercussions.

- 8.5 VicRoads may appoint an internal person as welfare manager or engage a contractor to provide welfare services. VicRoads will also consider referring an employee to its Employee Assistance Program.
- 8.6 If a welfare manager is appointed to look after a discloser or witness, the welfare manager will only be required to provide reasonable support and should discuss the reasonable expectations with the person(s) they are supporting.

9. Protection from detrimental action

- 9.1 VicRoads will take precautions to prevent its employees and agents from taking detrimental action in reprisal for a protected disclosure. This includes identifying, assessing, controlling and monitoring risks of reprisals faced by disclosers and witnesses.
- 9.2 The precautions taken by VicRoads will depend on individual circumstances and the disclosers and witnesses will, where possible, be consulted about any action that is taken.
- 9.3 If a person experiences treatment that the person considers may amount to detrimental action, the person may make a disclosure to IBAC. IBAC will determine whether the disclosure is a disclosure of detrimental action.
- 9.4 A disclosure of detrimental action that is made to IBAC is itself a protected disclosure and will be assessed by IBAC as a new disclosure.
- 9.5 A disclosure of detrimental action that is made to a VicRoads employee will not be a protected disclosure and the discloser will not be protected under the Act. Where the detrimental action is of a serious nature and may constitute a criminal offence, it will be necessary to consider reporting the matter to the police.
- 9.6 If you are an employee who has made a protected disclosure and you believe on reasonable grounds that detrimental action will be, is being, or has been taken against you, you may request a transfer of employment to another government agency or to another position within VicRoads on terms and conditions that are no less favourable overall to you. Such a request does not require you to provide details of the disclosure. Note that all requests of this nature will be considered, but a number of conditions must be satisfied before they are granted, including:
 - (a) the Chief Executive must be satisfied there are reasonable grounds to suspect detrimental action will be, is being, or has been taken against you
 - (b) the Chief Executive must consider that the transfer will avoid, reduce or eliminate the risk of detrimental action, and
 - (c) where the transfer is to another government agency, the head of the 'receiving' government agency consents to the transfer.
- 9.7 If you have sustained injury, loss or damage as a result of detrimental action taken against you in reprisal for making a disclosure, the Act sets out remedies that are available to you. You may wish to obtain legal advice about this.
- 9.8 Whilst there are these protections, there are also responsibilities. You must not take detrimental action against another person in reprisal for a protected disclosure and, if you have been involved in the improper conduct or detrimental action which is the

subject of your disclosure, you will still be held liable for your own involvement. Making a disclosure does not provide you with immunity for your own wrongdoing.

- 9.9 You must not disclose the information which is likely to lead to the identification of the person who made that disclosure unless permitted to by the Act. See Part 11 of these procedures for further information.

10. What happens if a protected disclosure is made against me?

- 10.1 VicRoads recognises that employees against whom disclosures are made must also be supported during the handling and investigation of disclosures, and will provide welfare support to you during the handling and investigation of a disclosure as the circumstances require.
- 10.2 VicRoads will only disclose information about the subject of a disclosure in accordance with the law, including this Act (and as explained in these procedures and its 'Protected Disclosure Management' procedures).
- 10.3 Where investigations do not substantiate disclosures, 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.

11. Confidentiality

- 11.1 There are a number of confidentiality obligations which arise under the Act and other laws relating to the receipt and investigation of protected disclosures.
- 11.2 If you repeat your disclosure to someone other than as provided for in these procedures or permitted by the Act, you may lose the protections provided for in the Act. For example, if a disclosure is repeated to the media and the media reports on it, you may not be protected from defamation action. You may also breach your confidentiality obligations.
- 11.3 If you are considering disclosing information about your disclosure, you may wish to speak to the Director Legal Services, your welfare manager and/or obtain legal advice first.
- 11.4 VicRoads will only disclose information about you or your disclosure in accordance with the law, including the Act.
- 11.5 The circumstances in which a person may disclose information about a protected disclosure or information which is likely to lead to the identification of the person who made that disclosure include:
- (a) in accordance with a direction or authorisation given by the investigating entity that is investigating the disclosure
 - (b) to the extent necessary for the purpose of taking lawful action in relation to the conduct that is the subject of the disclosure including disciplinary process or action
 - (c) the IBAC or the Victorian Inspectorate has determined that the disclosure is not a protected disclosure
 - (d) where necessary for the purpose of the exercise of functions under the Act

- (e) by an investigating body where necessary for the purpose of the exercise of functions under the *Independent Broad-based Anti-corruption Commission Act 2011*
- (f) for the purpose of a proceeding for an offence under a relevant Act
- (g) for the purpose of disciplinary process or action in respect of conduct that would constitute an offence
- (h) for the purpose of obtaining legal advice or representation
- (i) to an interpreter, parent, guardian or independent person for the purpose of understanding the confidentiality obligations under the Act, and
- (j) an investigating body has published a report to Parliament or otherwise made public the content of the disclosure consistent with the confidentiality requirements of the Act.

11.6 The Act also prohibits disclosing information that is likely to lead to your identification unless permitted to do so in accordance with the Act.

11.7 IBAC or the relevant investigating entity may disclose your identity and the content of your disclosure if it is necessary for the purposes of their investigative action. In that case, the public body or public officer to whom the information has been disclosed is bound by the same confidentiality requirements.

12. Criminal offences

12.1 There are a number of offences set out in the Act relating to breaches of the requirements of the Act. The key offences to be aware of are:

- (a) it is an offence to take detrimental action against another person in reprisal for a protected disclosure
- (b) it is an offence to disclose the content, or information about the content, of a disclosure that has been notified to IBAC or information which is likely to lead to the identification of the person who made that disclosure unless permitted to by the Act
- (c) it is an offence for any person to:
 - (i) provide false or misleading information, or further information that relates to a protected disclosure, that the person knows to be false or misleading in a material particular, intending that the information be acted on as a protected disclosure
 - (ii) claim that a matter is the subject of a protected disclosure knowing the claim to be false, and
 - (iii) falsely claim that a matter is the subject of a disclosure that IBAC has determined to be a protected disclosure complaint, and
- (d) it is an offence for any person to:
 - (i) disclose that a disclosure has been notified to IBAC for assessment unless permitted to do so by the Act, and

- (ii) disclose that a disclosure has been determined to be a protected disclosure complaint unless permitted to do so by the Act.

13. Alternatives to making a 'protected disclosure'

- 13.1 These procedures are designed to complement usual methods of submitting complaints to the VicRoads.
- 13.2 Members of the public are encouraged to use the VicRoads' feedback processes to communicate complaints or concerns with the services provided by VicRoads
- 13.3 Employees are encouraged to raise matters with their supervisors and managers at any time.

14. Review

- 14.1 These procedures are reviewed regularly to ensure they meet the objectives of the Act and accord with IBAC's guidelines.

Schedule 1 - What is a public body and what is a public officer?

A public body is:

- (a) a public sector body within the meaning of s 4(1) of the *Public Administration Act 2004*
- (b) a body, whether corporate or unincorporated, established by or under an Act for a public purpose, including a university
- (c) the Electoral Boundaries Commission constituted under the *Electoral Boundaries Commission Act 1982*
- (d) a Council
- (e) a body that is performing a public function on behalf of the State or a public body or public officer (whether under contract or otherwise), and
- (f) any other body or entity prescribed for the purposes of this definition.

A public officer is:

- (a) a person employed in any capacity or holding any office in the public sector within the meaning of section 4(1) of the *Public Administration Act 2004*
- (b) a person to whom a provision of the *Public Administration Act 2004* applies as a result of the application of Part 7 of that Act
- (c) an ongoing employee or temporary employee in the teaching service under the *Education and Training Reform Act 2006*
- (d) a judicial employee employed under Division 3 of Part 6 of the *Public Administration Act 2004*
- (e) a Ministerial officer employed under Division 1 of Part 6 of the *Public Administration Act 2004*
- (f) an electorate officer within the meaning of the *Parliamentary Administration Act 2005*
- (g) a Parliamentary adviser employed under Division 2 of Part 6 of the *Public Administration Act 2004*
- (h) a Parliamentary officer within the meaning of the *Parliamentary Administration Act 2005*
- (i) a member of police personnel
- (j) a responsible Minister of the Crown
- (k) a member of the Legislative Assembly or the Legislative Council
- (l) a Councillor within the meaning of section 3(1) of the *Local Government Act 1989*
- (m) a member of Council staff employed under the *Local Government Act 1989*
- (n) a judge, a magistrate, a coroner or a member of VCAT
- (o) an associate judge or a judicial registrar
- (p) a Crown Prosecutor
- (q) the Chief Crown Prosecutor

- (r) the Director of Public Prosecutions
- (s) the Governor, the Lieutenant-Governor or the Administrator of the State
- (t) the Auditor-General
- (u) the Ombudsman
- (v) the Electoral Commissioner
- (w) the holder of any other statutory office or any other prerogative office
- (x) any other person in the service of the Crown or a public body
- (y) a person that is performing a public function on behalf of the State or a public officer or public body (whether under contract or otherwise)
- (z) a person who holds, or a person who is a member of a class of persons who hold, an office prescribed to be a public office for the purposes of this definition, and
- (aa) an employee of, or any person otherwise engaged by, or acting on behalf of, or acting as a deputy or delegate of, a public body or a public officer.