

Protected Disclosures Procedure

Department Organisational Governance
Section Corporate Services
Approved by Corporate Performance & Operations



1. PURPOSE

Maryborough District Health Service (“**MDHS**”) is required to establish and publish procedures under s 58 of the *Protected Disclosure Act 2012* (“**Act**”) and in accordance with the Guidelines of the Independent Broad-based Anti-corruption Commission (“**IBAC**”) published under s 57 of the Act.¹ MDHS is required to ensure these procedures are readily available to members of the public as well as internally to all employees, staff and Board members (“**staff**”) of MDHS.

These procedures form an essential part of MDHS’s commitment to the aims and objectives of the Act.

The Act commenced operation on 10 February 2013.

The purpose of the Act is to encourage and facilitate the making of disclosures of improper conduct and detrimental action by public officers and public bodies. It does so by providing certain protections for people who make a disclosure, or those who may suffer detrimental action in reprisal for making a disclosure. An essential component of this protection is to ensure that information connected to a protected disclosure, including the identity of a discloser and the contents of that disclosure, are kept strictly confidential.

Protected disclosures may be made about any of the public officers or bodies as defined in s 3 of the Act and s 6 of the IBAC Act. They include:

- government departments;
- statutory authorities;
- Councils established under the *Local Government Act 1989*;
- the Electoral Boundaries Commission;
- government-appointed boards and committees;
- government-owned companies;
- universities and TAFEs;
- public hospitals;
- a body performing a public function on behalf of the State, a public body or a public officer;
- state-funded residential care services;
- employees, staff and members of public bodies including those set out above;
- police and protected service officers;
- teachers;
- public servants;
- Councillors;
- Members of Parliament, including Ministers;
- Judicial officers, including coroners, members of the Victorian Civil and Administrative Tribunal, associate judges and judicial officers;
- IBAC officers;
- statutory office holders, including the Auditor-General, the Ombudsman and the Director of Public Prosecutions; and
- the Governor, Lieutenant-Governor or Administrator of the State.

According to the IBAC, not all agencies may receive disclosures under the Act. In the IBAC’s view, MDHS is **not** a body that may receive protected disclosures. Therefore, if you wish to make a disclosure about

¹ The IBAC has published 2 Guidelines under s 57 of the Act as at 1 October 2016. Further information about those Guidelines, including links to the full Guidelines, may be found at: <http://www.ibac.vic.gov.au/publications-and-resources> (last accessed 25 January 2017).

Protected Disclosures Procedure

Department *Organisational Governance*
Section *Corporate Services*
Approved by *Corporate Performance & Operations*



MDHS, or one of our staff, you should make that disclosure to the IBAC in accordance with its procedures and Guidelines.

A protected disclosure cannot be made about:

- a Public Interest Monitor;
- the VI or officers of the VI; nor
- the conduct or actions of a Court.

MDHS does not tolerate improper conduct by MDHS nor its staff; nor does it tolerate the taking of reprisals against those who come forward to disclose such conduct.

MDHS recognises the value of transparency and accountability in its administrative and management practices, and supports the making of disclosures that reveal improper conduct or the taking of detrimental action in reprisal against persons who come forward to report such improper conduct.

MDHS will take all reasonable steps to protect people who make such disclosures from any detrimental action in reprisal for making the disclosures. It will also afford natural justice to the person or body who is the subject of the disclosures.

2. TARGET AUDIENCE

These procedures are a resource for disclosers and potential disclosers, whether a member of staff or an external member of the public; essentially, any individual who wants to find out how MDHS will manage their welfare if they make a disclosure. In addition, these procedures cover how MDHS will protect other people connected to a protected disclosure complaint from detrimental action being taken against them in reprisal for a discloser making a protected disclosure. Such persons can include individuals who are the subject of protected disclosures and protected disclosure complaints; and others who are connected to protected disclosures, such as witnesses or persons cooperating with an investigation into a protected disclosure complaint.

3. DEFINITIONS, ABBREVIATIONS AND KEY TERMS

The following abbreviations and key terms are used in these procedures:

Act:	<i>Protected Disclosure Act 2012</i>
discloser:	A person who (purports to) make(s) a complaint, allegation or disclosure (however described) under the Act
disclosure:	Any complaint, concern, matter, allegation or disclosure (however described) purported to be made in accordance with Part 2 of the Act
Guidelines:	The Guidelines published by the IBAC under s 57 of the Act as at October 2016, copies of which may be downloaded from http://www.ibac.vic.gov.au/publications-and-resources/article/guidelines-for-making-and-handling-protected-disclosures (last accessed on 25 January 2017)
IBAC:	Independent Broad-based Anti-corruption Commission
IBAC Act:	<i>Independent Broad-based Anti-corruption Commission Act 2011</i>

Protected Disclosures Procedure

Department Organisational Governance
Section Corporate Services
Approved by Corporate Performance & Operations



investigative entity:	Any one of the four bodies authorised to investigate a protected disclosure complaint, being the IBAC, the Victorian Ombudsman, the Chief Commissioner of Police and the VI.
MDHS:	Maryborough District Health Service
procedures:	This version of the procedures of MDHS, as established under s 58 of the Act
protected discloser:	A person who makes a disclosure of improper conduct or detrimental action in accordance with the requirements of Part 2 of the Act
protected disclosure:	Any complaint, concern, matter, allegation or disclosure (however described) made in accordance with Part 2 of the Act
protected disclosure complaint:	A protected disclosure which has been determined and assessed by the IBAC to be a protected disclosure complaint under s 26 of the Act
Regulations:	<i>Protected Disclosure Regulations 2013</i>
staff:	Any MDHS employee, Board member, person or body performing a public function on behalf of MDHS (whether under contract or not)
VI:	Victorian Inspectorate

4. MDHS'S INTERNAL ARRANGEMENTS FOR HANDLING WELFARE MANAGEMENT

MDHS supports a workplace culture where the making of protected disclosures is valued by the organisation and the right of any individual to make a protected disclosure taken seriously.

MDHS will:

- ensure these procedures are accessible on its website and available internally and externally to staff and any individual in the broader community;
- not tolerate the taking of detrimental action in reprisal against any person for making a protected disclosure, including to take any reasonable steps to protect such persons from such action being taken against them;
- afford natural justice and treat fairly those who are the subject of allegations contained in disclosures;
- take the appropriate disciplinary and other action against any staff engaged in the taking of detrimental action;
- ensure that MDHS as a whole handles the welfare management of persons connected with protected disclosures matters consistently and appropriately in accordance with its obligations under the Act, the Regulations, the IBAC's Guidelines and these procedures; and
- be visible, approachable, openly communicative and lead by example in establishing a workplace that supports the making of protected disclosures.

Protected Disclosures Procedure

Department *Organisational Governance*
Section *Corporate Services*
Approved by *Corporate Performance & Operations*



4.1 Staff

Staff members are encouraged to raise matters of concern in relation to MDHS, including about any other staff. In particular, staff members are encouraged to report known or suspected incidences of improper conduct or detrimental action in accordance with these procedures, whether such conduct or action has taken place, is suspected will take place, or is still occurring.

All staff have an important role to play in supporting those who have made a legitimate disclosure in accordance with the Act. All persons 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.

4.2 Protected Disclosure Coordinator

MDHS's Protected Disclosure Coordinator has a central role in the way the organisation deals with all protected disclosure matters, and in particular for ensuring that the welfare of any persons connected with a protected disclosure is properly managed.

The Protected Disclosure Coordinator is:

- the contact point for general advice about the operation of the Act and for integrity agencies such as the IBAC;
- responsible for ensuring that MDHS carries out its responsibilities under the Act, any regulations made pursuant to the Act and any guidelines issued by the IBAC;
- the MDHS's chief liaison with the IBAC in regard to the Act;
- to take all necessary steps to ensure information received or obtained in connection with a disclosure, including the identities of the discloser and the person(s) to whom the disclosure relate, are kept secured, private and confidential at all times;
- responsible for arranging any necessary and appropriate welfare support for the discloser, including appointing a Welfare Manager to support a person entitled to be protected and to protect him or her from any reprisals; and
- to collate statistics required to be reported by MDHS in its annual reports under the Act.

The Protected Disclosure Coordinator appointed by MDHS is:

The Chief Executive Officer ("**CEO**")
Maryborough District Health Service
Clarendon Street
MARYBOROUGH VIC 3465
Ph: 5461 0333
Email: mdhs@mdhs.vic.gov.au

Disclosures involving or relating to the Protected Disclosure Coordinator will be handled by the President of the Board.

5. MAKING A DISCLOSURE

5.1 What is a disclosure and who can make a disclosure?

Protected Disclosures Procedure

Department Organisational Governance
Section Corporate Services
Approved by Corporate Performance & Operations



A disclosure may be made about 2 things under the Act:

- (i) improper conduct of public bodies or public officers; and
- (ii) detrimental action taken by public bodies or public officers in reprisal against a person for the making of a protected disclosure.

The term disclosure is interpreted under the Act in the ordinary sense of the word, for example, as a “revelation” to the person receiving it. The IBAC considers that a complaint or allegation that is already in the public domain will not normally be a protected disclosure. Such material would, for example, include matters which have already been subject to media or other public commentary.

The conduct or action being disclosed about may be one which has taken place, is still occurring, or is believed is intended to be taken or engaged in. Disclosures may also be made about conduct that occurred prior to the commencement of the Act on 10 February 2013.

A disclosure may:

- only be made by a natural person (or a group of individuals making joint disclosures).² Disclosures cannot be made by a company or an organisation;
- be made anonymously;
- be made even where the discloser is unable to identify precisely the individual or the organisation to which the disclosure relates; and
- also be a complaint, notification or disclosure (however described) made under another law.

The following are *not* protected disclosures under the Act:

- a disclosure that has not been made in accordance with all of the procedural requirements of Part 2 of the Act and the prescribed procedures in the Regulations;
- a disclosure made by a discloser who expressly states in writing, at the time of making the disclosure, that the disclosure is **not** a disclosure under the Act;
- a disclosure made by an officer or employee of an investigative entity in the course of carrying out his or her duties or functions under the relevant legislation, unless the person expressly states in writing that the disclosure **is** a disclosure and the disclosure is otherwise made in accordance with Part 2 of the Act.

5.2 How can a disclosure be made?

A disclosure must be made in accordance with Part 2 of the Act.

Part 2 of the Act permits disclosures to be made anonymously, orally or in writing, and need not necessarily identify the person or organisation complained about.

Oral disclosures must be made in private.

² It should be noted that some of the protections set out in the Act protecting a protected discloser are available only to the person who makes a disclosure. The IBAC has pointed out that the consequence of this is that if a person makes a disclosure by ‘notifying’ the agency on behalf of another individual, then it is the ‘notifier’ who may receive those protections, and not the person on whose behalf they have made the disclosure. The person on whose behalf the disclosure has been made will only be entitled to protections against detrimental taken against them in reprisal for the disclosure made by the notifier.

Protected Disclosures Procedure

Department Organisational Governance
Section Corporate Services
Approved by Corporate Performance & Operations



Generally:

- a verbal disclosure may be made:
 - in person;
 - by telephone;
 - by leaving a voicemail message on a particular telephone answering machine; or
 - by any other form of non-written electronic communication.
- The IBAC recommends that written disclosures to the IBAC be made via its online form available from <https://www.ibac.vic.gov.au/report-corruption-or-misconduct/online-form> (last accessed 25 January 2017).

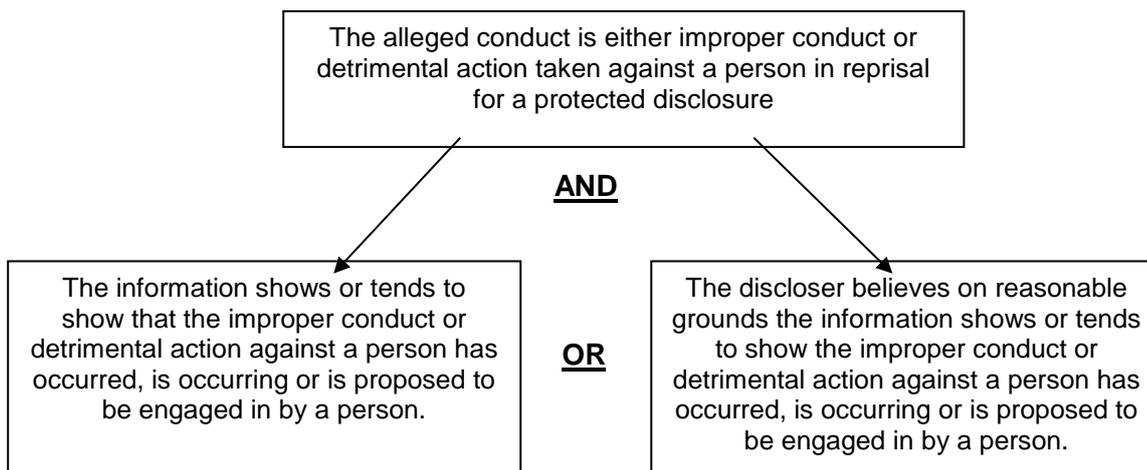
Disclosures cannot be made by fax.

A disclosure made by email from an address from which the identity of the discloser cannot be ascertained will be treated as an anonymous disclosure.

According to the IBAC, a disclosure attempted or purported to be made to MDHS will not be a disclosure made in accordance with Part 2 of the Act, because in the IBAC's view Part 2 of the Act does not permit MDHS to receive disclosures.³ If you wish to make a disclosure, please make that disclosure directly to the IBAC. For further information about how to make a disclosure to the IBAC, see pp 11 – 16 of the IBAC's Guidelines for Making and Handling Protected Disclosures.

5.3 What can a disclosure be made about?

A disclosure must be about the conduct of a person, public officer or public body in their capacity as a public body or public officer as outlined in the following diagram:



5.3.1 Improper conduct

A disclosure may be made about improper conduct by a public body or public official in the performance of their functions as a public body or public officer.

Central to the notion of improper conduct is the notion of the "public trust".

³ For more information on this point, please see pp 12 – 13 of the Guidelines for Making and Handling Protected Disclosures (<http://www.ibac.vic.gov.au/docs/default-source/guidelines/guidelines-for-making-and-handling-protected-disclosures-2016.pdf?sfvrsn=10>, last accessed 25 January 2017).

Protected Disclosures Procedure

Department Organisational Governance
Section Corporate Services
Approved by Corporate Performance & Operations



“Public trust” is a concept that provides the basis *‘for obligations of honesty and fidelity in public officers that exist to serve, protect and advance the interests of the public’*.⁴

A person acting in their official capacity is exercising ‘public power’ that is derived from their public office holding and may be controlled or influenced by legislative provisions, administrative directions, or constitutional principles or conventions. There is an expectation that members of the community may rely on and trust their public bodies and officials to act honestly. The expectation is that public officers will not use their positions for personal advantage, or use the influence of their public office for improper purposes where there is a duty to act objectively and impartially.

Disclosers will need to identify that there is a link between the alleged improper conduct of a person or an organisation and their function as a public officer or a public body.

Improper conduct is defined in the Act to mean either corrupt conduct or specified conduct (both terms are also defined by the Act and the IBAC Act).

Corrupt conduct

Corrupt conduct means any one of the following:

- conduct of any person that adversely affects the honest performance by a public officer or public body of his or her or its functions as a public officer or public body;
- conduct of a public officer or public body that constitutes or involves the dishonest performance of his or her or its functions as a public officer or public body;
- conduct of a public officer or public body that constitutes or involves knowingly or recklessly breaching public trust;
- conduct of a public officer or a public body that involves the misuse of information or material acquired in the course of the performance of his or her or its functions as a public officer or public body, whether or not for the benefit of the public officer or public body or any other person;
- conduct of a person intended to adversely affect the effective performance or exercise of functions or powers by a public officer or public body and result in that person (or their associate⁵) obtaining a gain, benefit or entitlement⁶ they would not have otherwise obtained, irrespective of whether the public officer or public body engages in any corrupt conduct or other misconduct; *or*
- conduct that could constitute a conspiracy or an attempt to engage in any of the conduct referred to above; **and**

if that conduct could be proved beyond reasonable doubt at a trial, amounts to:

- an indictable offence; *or*
- one of the following 4 types of common law offences committed in Victoria:
 - perverting the course of justice
 - attempting to pervert the course of justice
 - bribery of an official
 - misconduct in public office.

⁴ *R v Bembridge* (1783) 99 ER 679.

⁵ Defined in s 4(2B) of the IBAC Act.

⁶ See s 4(1)(da)(i) – (iv) of the IBAC Act.

Protected Disclosures Procedure

Department *Organisational Governance*
Section *Corporate Services*
Approved by *Corporate Performance & Operations*



Specified conduct

Specified conduct is any one of the above types of conduct, **or** conduct that involves substantial mismanagement of public resources, risk to public health or safety, or risk to the environment, which **would not** constitute “corrupt conduct” but would nevertheless, if proved, constitute either:

- a criminal offence; or
- reasonable grounds for dismissing or terminating the employment of the officer who engaged or is engaging in that conduct.

It should be noted the risk in relation to mismanagement or public health and safety or the environment must be “substantial”, requiring significant or considerable mismanagement, or significant or considerable risks to public health, safety or the environment.

5.3.2 *Detrimental action*

It is an offence under the Act for a public officer or body to take detrimental action against a discloser in reprisal for making a protected disclosure. There are two essential components here: whether there is in fact “detrimental action”, as defined by the Act, and whether that action is being taken in reprisal against a person for making or being connected with a protected disclosure.

Detrimental action

Detrimental action as defined by the Act includes:

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

In addition, a person can have taken detrimental action without having taken the action itself, but just by threatening to take such action. Further, the detrimental action need not necessarily have been taken (or threatened to be taken) against a person making a protected disclosure, but against any person connected with a protected disclosure.

Examples of detrimental action prohibited by the Act include:

- threats to a person’s personal safety or property, including intimidating or harassing a discloser or the discloser’s family or friends or otherwise causing personal injury or prejudice to the safety or damaging property of a discloser or the discloser’s family or friends;
- the demotion, transfer, isolation or change in duties of a discloser due to his or her having made a disclosure;
- discriminating or disadvantaging a person in their career, profession, employment, trade or business; or
- discriminating against the discloser or the discloser’s family and associates in subsequent applications for promotions, jobs, permits or tenders resulting in financial loss or reputational damage.

Protected Disclosures Procedure

Department *Organisational Governance*
Section *Corporate Services*
Approved by *Corporate Performance & Operations*



Taken in reprisal for a protected disclosure

The person (or the person incited to take detrimental action) must take or threaten the detrimental action, because, or in the belief that the:

- other person or anyone else has made, or intends to make the disclosure;
- other person or anyone else has cooperated, or intends to cooperate with an investigation of the disclosure.

This belief must be a 'substantial' reason for taking that action, or it will not be considered to be detrimental action.

6. ASSESSMENT OF A DISCLOSURE

Disclosures about MDHS and its staff should only be made to the IBAC. According to the IBAC, MDHS is a public body that cannot receive disclosures. If MDHS receives a complaint, report, or allegation of improper conduct or detrimental action that it views to be a protected disclosure, it will advise the discloser to make their disclosure to the IBAC.

Once a disclosure has been notified to the IBAC, the IBAC must determine whether it is a protected disclosure complaint. Such a determination must be made within a reasonable time after the disclosure is notified to the IBAC.

If the IBAC is of the view that the assessable disclosure is not a protected disclosure, then it is not a 'protected disclosure complaint'. If the IBAC is of the view that the assessable disclosure is a protected disclosure, then it must determine that the protected disclosure is a "protected disclosure complaint".

6.1. If the IBAC determines the disclosure is not a protected disclosure complaint

If the IBAC determines the disclosure is not a protected disclosure complaint, the IBAC must advise the discloser in writing and within a reasonable time after the determination is made, that:

- the IBAC has determined that the disclosure is not a protected disclosure complaint; and
- as a consequence of that determination:
 - the disclosure will not be investigated as a protected disclosure complaint; and
 - the confidentiality provisions under Part 7 of the Act no longer apply in relation to the disclosure; and
- regardless of whether the IBAC has determined that the disclosure is a protected disclosure complaint, the protections under Part 6 apply to a protected disclosure.

In addition, if the IBAC is of the view that the disclosure, although not a protected disclosure complaint, may be able to be dealt with by another entity, the IBAC may advise the discloser that:

- the matter which is the subject of the disclosure may be able to be dealt with by that entity other than as a protected disclosure complaint; and
- if the discloser wishes to pursue the matter, make a complaint directly to that entity.

The IBAC is also able to consider whether it wishes to treat the assessable disclosure as a notification made to the IBAC under the IBAC Act.

Protected Disclosures Procedure

Department *Organisational Governance*
Section *Corporate Services*
Approved by *Corporate Performance & Operations*



6.2 If the IBAC determines the disclosure is a protected disclosure complaint

6.2.1 Notification to the discloser

If the IBAC determines the disclosure is a protected disclosure complaint, the IBAC must advise the discloser in writing and within a reasonable time after the determination is made, that:

- the IBAC has determined that the disclosure is a protected disclosure complaint;
- regardless of the determination, the protections available to a discloser of a protected disclosure under Part 6 of the Act apply;
- the discloser has rights, protections and obligations under the Act as contained in ss 72, 74 and Parts 6 and 7 of the Act, including an explanation of the effect of those sections and Parts of the Act; and
- it is an offence under s 74 of the Act to disclose that the IBAC has determined that the disclosure is a protected disclosure complaint.

Whether or not IBAC determines the disclosure to be a protected disclosure complaint, the protections under Part 6 of the Act apply to the discloser.

Once the IBAC has determined that a disclosure is a protected disclosure complaint, the discloser cannot withdraw that disclosure. However, under the IBAC Act, the IBAC can decide not to investigate a protected disclosure complaint if the discloser requests that it not be investigated.

6.2.2 Further actions the IBAC may take⁷

Under the IBAC Act, the IBAC may dismiss, investigate, or refer a protected disclosure complaint. The IBAC may also conduct preliminary inquiries in accordance with Division 3A of Part 3 of the IBAC Act before determining whether to dismiss, investigate or refer a protected disclosure complaint.

If the IBAC dismisses a protected disclosure complaint, then it must do so on one of the grounds specifically set out in the IBAC Act. In particular, the IBAC must dismiss a protected disclosure complaint if the matter disclosed is a matter that neither the IBAC nor an investigating entity may investigate.

The IBAC may choose to investigate the alleged conduct if it suspects on reasonable grounds that it constitutes “corrupt conduct”.

The IBAC may also choose to refer the protected disclosure complaint to other appropriate and relevant investigative entities.

Depending on the action the IBAC decides to take, the IBAC must also provide certain other information to the discloser. That information is set out at the chart on p 25 of the IBAC’s Guidelines for Making and Handling Protected Disclosures.⁸

⁷ This section of the procedures comprises a summary of points drawn from pp 24 to 26 of the IBAC’s Guidelines for Making and Handling Protected Disclosures (<http://www.ibac.vic.gov.au/docs/default-source/guidelines/guidelines-for-making-and-handling-protected-disclosures-2016.pdf?sfvrsn=10>, last accessed 25 January 2017). For further information, please refer to those Guidelines.

⁸ Available at <http://www.ibac.vic.gov.au/docs/default-source/guidelines/guidelines-for-making-and-handling-protected-disclosures-2016.pdf?sfvrsn=10>, last accessed 25 January 2017.

Protected Disclosures Procedure

Department Organisational Governance
Section Corporate Services
Approved by Corporate Performance & Operations



6.2.3 Other information about investigative entities' investigations of a protected disclosure complaint⁹

If the IBAC or another investigative entity is conducting an investigation of a protected disclosure complaint, it may be in contact with MDHS or a person about which the disclosure has been made. This will be for the purpose of conducting investigative enquiries.

MDHS or that person will be able to disclose information about the protected disclosure complaint to the investigative entity without breaching the confidentiality requirements of the Act.

The relevant investigative entity may also disclose the identity of the discloser and the content of the disclosure if necessary to do so for the purposes of their investigative action. If this is the case, then MDHS or person to whom the information has been disclosed, is bound by the confidentiality requirements of Part 7 of the Act.

In addition, if MDHS is advised of the identity of the discloser, then it will be required to look after the welfare of the discloser and provide protection against possible detrimental action.

At the conclusion of its investigation, the relevant investigative entity must generally provide the discloser with information about the results of its investigation, including any action taken by the investigative entity and any recommendation by the investigative agency that action or further action be taken.

The investigative entity may provide written information about the commencement, conduct or result of an investigation, including any actions taken and any recommendation made that any action or further action be taken to the relevant principal officer. However, the investigative entity must not provide any information that is likely to lead to the identification of a discloser.

The investigative entity does not have to provide this information to either the discloser or the relevant principal officer in specified circumstances set out in the IBAC Act or the *Ombudsman Act 1973*.

7. WELFARE MANAGEMENT

MDHS is committed to the protection of genuine disclosers against detrimental action taken in reprisal for the making of protected disclosures.

The protection of persons making genuine protected disclosures about improper conduct or detrimental action is essential for the effective implementation of the Act. In addition, the Act extends the need for welfare management to people who have cooperated or intend to cooperate with an investigation of a protected disclosure complaint ("**cooperators**"). Persons who are the subject of allegations will also have their welfare looked after.

It is the view of the IBAC that MDHS cannot receive disclosures, and therefore may not know that a person has made a protected disclosure. Confidentiality obligations require a person who has made a protected disclosure not to discuss the matter with any other person except with the IBAC (or another investigative entity to which the IBAC may have referred the disclosure). Therefore, MDHS will only be made aware that a person requires protection under the Act if that information has been provided to MDHS by the IBAC or the VI (when assessing whether a disclosure is a protected disclosure complaint), or by the investigative entity investigating a protected disclosure complaint.

⁹ See footnote 7 above.

Protected Disclosures Procedure

Department	Organisational Governance
Section	Corporate Services
Approved by	Corporate Performance & Operations



Once MDHS has been made aware of the identity of a discloser, and any other relevant information about the protected disclosure, MDHS will keep all information it receives confidential, and will manage the welfare of any relevant persons in accordance with its obligations under the Act.

MDHS must, where it is aware of or has been provided the identities of disclosers and cooperators, ensure they are protected from direct and indirect detrimental action being taken against them in reprisal for the protected disclosure.¹⁰ MDHS will ensure its workplace culture supports disclosers and cooperators. Such support will extend to the relevant persons regardless of whether they are internal to the organisation (e.g., staff) or external members of the public. However, different legislative responsibilities (including those external to the Act) apply to persons internal to the organisation, and to persons who may be clients or users of MDHS's services. These responsibilities derive from various legislative and administrative obligations to:

- ensure the health and wellbeing of employees of a public sector body under laws including those relating to Occupational Health and Safety, the *Charter of Human Rights and Responsibilities Act 2006*, the *Public Administration Act 2004*, and various Victorian Public Sector Codes of Conduct (as relevant); and
- comply with various relevant laws, policies and practices when making administrative and other decisions or taking particular actions affecting a customer, client or user of the public body's services.¹¹

Generally, for internal persons, MDHS will ensure a supportive work environment and respond appropriately to any reports of intimidation or harassment against these persons. For external persons, MDHS will take reasonable steps to provide appropriate support. MDHS will discuss reasonable expectations with all persons receiving welfare management in connection with a protected disclosure.

7.1 Support available to disclosers and cooperators¹²

MDHS will support disclosers and cooperators by:

- keeping them informed, by providing:
 - confirmation that the disclosure has been received, if the relevant investigative agency has provided this information to the MDHS;
 - the legislative or administrative protections available to the person;
 - a description of any action proposed to be taken;
 - if action has been taken by MDHS, details about results of the action known to the MDHS;
- providing active support by:
 - acknowledging the person for having come forward;
 - assuring the discloser or cooperator that they have done the right thing, and MDHS appreciates it;
 - making a clear offer of support;
 - assuring them that all reasonable steps will be taken to protect them;

¹⁰ The balance of this section of these procedures assume that MDHS has been provided with the relevant information from one of the investigative entities such that it is aware of the identity of the persons requiring protection and is therefore able to comply with its requirements to manage the welfare of those persons.

¹¹ Pages 8, Guidelines for protected disclosure welfare management, <http://www.ibac.vic.gov.au/docs/default-source/guidelines/guidelines-for-protected-disclosure-welfare-management-2016.pdf?sfvrsn=12> (last accessed 25 January 2017).

¹² This section is adapted from resources of the Queensland Government as cited and drawn from p 10 of the IBAC's Guidelines for protected disclosure welfare management, *ibid*.

Protected Disclosures Procedure

Department	Organisational Governance
Section	Corporate Services
Approved by	Corporate Performance & Operations



- giving them an undertaking to keep them informed as far as MDHS is reasonably able to;
- managing their expectations by undertaking an early discussion with them about:
 - what outcome they seek;
 - whether their expectations are realistic;
 - what MDHS will be able to deliver;
- maintaining confidentiality by:
 - ensuring as far as is possible that other people cannot infer the identity of the discloser or cooperator;
 - reminding the discloser or cooperator not to reveal themselves or to reveal any information that would enable others to identify them as a discloser or cooperator;
 - ensuring that hardcopy and electronic files relating to the disclosure are accessible only to those who are involved in managing disclosures in the MDHS;
- proactively assessing the risk of detrimental action being taken in reprisal (rather than reactively waiting for a problem to arise and a complaint to be made by the discloser or cooperator), that is, actively monitor the workplace, anticipating problems and dealing with them before they develop as far as is possible;
- protecting the discloser or cooperator by:
 - examining the immediate welfare and protection needs of the person and seeking to foster a supportive work environment;
 - listening and responding to any concerns the person may have about harassment, intimidation or victimisation in reprisal for their actions;
 - assessing whether the concerns the person may have about harassment, intimidation or victimisation might be due to other causes other than those related to the protected disclosure;
- preventing the spread of gossip and rumours about any investigation into the protected disclosure where MDHS is aware of any investigation being undertaken or about to be undertaken; and
- keeping contemporaneous records of all aspects of the case management of the person, including all contact and follow-up action.

7.1.1 Appointment of a Welfare Manager

In appropriate circumstances, MDHS will appoint a suitable welfare manager to protect a discloser or a cooperator. The following matters will be taken into consideration by MDHS when deciding whether to appoint a welfare manager in a particular case:

- are there any real risks of detrimental action against the discloser or cooperator, taking into account their particular circumstances?
- whether MDHS can or will take the discloser or cooperator seriously and treat them with respect?
- whether MDHS will give the discloser or cooperator effective support, including keeping the discloser informed of the status of the disclosure (as far as MDHS has been provided with such information by a relevant investigative entity)?
- can MDHS protect the person from suffering repercussions, by dealing with the matter discreetly and confidentially, and responding swiftly and fairly to any allegations that the discloser or cooperator has in fact suffered retribution?

Protected Disclosures Procedure

Department *Organisational Governance*
Section *Corporate Services*
Approved by *Corporate Performance & Operations*



If the answer to the first question is 'yes' then the IBAC recommends the appointment of a dedicated welfare officer. If the answer to the first question is 'no' and MDHS can meet the needs set out in the remainder of the questions, the IBAC suggests there may be no need for a dedicated welfare officer to be appointed for that particular case.

In most circumstances, a welfare officer will only be required where a protected disclosure complaint proceeds to investigation, but each protected disclosure received by MDHS will be assessed on its own merits. In particular, a Welfare Manager will be appointed where MDHS believes that one is required to ensure that the appropriate support as set out in section 7.1 above can be provided to the discloser or cooperator.

If appointed, the Welfare Manager will, in addition to providing the general support set out above at section 7.1:

- advise the discloser or cooperator of the legislative and administrative protections available to him or her, including providing practical advice;
- listen and respond to any concerns of harassment, intimidation or victimisation in reprisal for making a disclosure;
- not divulge any details relating to the protected disclosure to any person other than the Protected Disclosure Coordinator;
- ensure all meetings between the Welfare Manager and the discloser or cooperator are conducted discreetly to protect the person from being identified as being involved in the protected disclosure;
- offer referral to Employee Assistance Program, as an additional support for internal disclosers and cooperators; and
- ensure the expectations of the discloser are realistic and reasonable, and that the discloser or cooperator understands the limits of the support MDHS is able to reasonably provide in the particular circumstances. This is particularly the case where a Welfare Manager has been appointed in relation to an external discloser or cooperator.

7.2 Welfare management of persons who are the subject of protected disclosures

MDHS will also meet the welfare needs of a person who is the subject of a protected disclosure. It is important to remember that until a protected disclosure complaint is resolved, the information about the person is only an allegation.

MDHS will make a decision about whether or when the subject of a disclosure will be informed about a protected disclosure involving an allegation made against him or her. It is possible that the subject of the disclosure may never be told about the disclosure if it is not determined to be a protected disclosure complaint, or if a decision is made to dismiss the disclosure. This may also depend on the stage at which the relevant investigative entity actually informs MDHS of the identity of the subject of a disclosure.

The Act limits the disclosure of information about the content of an assessable disclosure and the identity of the discloser to certain specified circumstances set out in Part 7 of the Act. MDHS may give information about the disclosure to the subject of the disclosure if it is directed or authorised to do so by the investigative entity investigating the protected disclosure complaint, or for the purpose of taking action with respect to the conduct alleged, including disciplinary action.

Investigative entities may also inform the subject of the protected disclosure complaint in the course of their investigation for the purposes of conducting that investigation, or any actions that they propose to take as a result of the investigation.

Protected Disclosures Procedure

Department *Organisational Governance*
Section *Corporate Services*
Approved by *Corporate Performance & Operations*



7.2.1 *Welfare services*

A person the subject of a disclosure who is made aware of their status as such may have a welfare manager appointed by MDHS, or be referred to MDHS's EAP program for welfare assistance. Alternatively, the Protected Disclosure Coordinator will provide support and advice to a person the subject of a disclosure, particularly in relation to their rights and obligations under the Act, these procedures, and any other relevant law or code of conduct. MDHS will consider each matter on a case by case basis, taking into account the information it has been provided by the investigative entity and the person's particular circumstances.

7.2.2 *Confidentiality*

Consistently with MDHS's confidentiality obligations under the Act as outlined in these procedures, the fact that a disclosure has been made, any information received from the IBAC or another investigative entity and the identities of persons involved will not be divulged.

MDHS will take all reasonable steps to ensure the confidentiality of the subject of a disclosure at all times. Where the disclosure is dismissed or investigations do not substantiate the allegations made against the person, the fact that the investigation was undertaken, its results, and the identity of the person subject of the disclosure (to the extent that MDHS has been provided that information by an investigative entity) will still be kept confidential by the MDHS.

7.2.3 *Natural justice*

MDHS will afford natural justice to the subject of a disclosure prior to any decision being made about the allegations. If the matter has been investigated by an investigative entity, then the investigative entity will be responsible for ensuring consultations with the subject include the provision of natural justice to him or her. The IBAC has noted that affording a subject of a disclosure natural justice in this context means that if a decision is to be made about their conduct this person has the right to:

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

7.2.4 *If the allegations are wrong or unsubstantiated*

MDHS will give its full support to a person who is the subject of a disclosure where the allegations contained in a disclosure are wrong or unsubstantiated. In those circumstances, MDHS and any investigative entity involved will ensure that there are no adverse consequences for this person arising out of the disclosure or its investigation. This is particularly crucial in a situation where there has been publicly disclosed information identifying the subject, but also where such information has become well-known across MDHS and the subject is staff member of the MDHS.

Further, if the matter has been publicly disclosed by the MDHS, the CEO will consider any request by that person to issue a statement of support setting out that the allegations were clearly wrong or unsubstantiated.

Protected Disclosures Procedure

Department Organisational Governance
Section Corporate Services
Approved by Corporate Performance & Operations



7.3 If detrimental action is reported

If any person reports an incident of harassment, discrimination or adverse treatment that may amount to detrimental action apparently taken in reprisal for a disclosure, the Welfare Manager or Protected Disclosure Coordinator must record details of the incident and advise the person of their rights under the Act to make a disclosure to the IBAC.

A person takes detrimental action against another person in reprisal for a protected disclosure if:

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

All persons are reminded it is a criminal offence to take detrimental action against another person in reprisal for a protected disclosure under the Act. The penalty for committing such an offence in contravention of the Act is a maximum fine of 240 penalty units, (\$37,310.40 from 1 July 2016, usually increasing 1 July every year in accordance with arrangements made under the *Monetary Units Act 2004*), two years imprisonment or both.

In addition, the taking of detrimental action in reprisal for making a disclosure can be grounds for a person to make a further disclosure with respect to that conduct. The disclosure of this allegation should be made to the IBAC as a new disclosure under Part 2 of the Act. Where the detrimental action is of a serious nature likely to amount to a criminal offence, and MDHS will also consider reporting the matter to the police or the IBAC.

A discloser of a protected disclosure may also:

- take civil action against the person who took detrimental action against the discloser and seek damages;
- take civil action against MDHS jointly and severally to seek damages if the person who took detrimental action against the discloser took that action in the course of employment with, or while acting as an agent of the MDHS; and
- apply for an order or an injunction from the Supreme Court.

7.4 Protections for persons making a protected disclosure

7.4.1 Part 6 protections available to disclosers

Part 6 of the Act sets out the protections provided to persons who make a disclosure that is a 'protected disclosure', i.e., one that is made in accordance with Part 2 of the Act. In summary, they are as follows:

- the discloser is not subject to any civil or criminal liability for making the protected disclosure;
- the discloser is not subject to any administrative action (including disciplinary action) for making the protected disclosure;
- by making the protected disclosure, the discloser is not committing an offence against the *Constitution Act 1975* or any other law that imposes obligations of confidentiality or otherwise restricts the disclosure of information;
- by making the protected disclosure, the discloser is not breaching any other obligation (made by oath, rule of law or practice) requiring him or her to maintain confidentiality; and

Protected Disclosures Procedure

Department	Organisational Governance
Section	Corporate Services
Approved by	Corporate Performance & Operations



- the discloser cannot be held liable for defamation in relation to information included in a protected disclosure made by him or her.

The protections in Part 6 apply from the time at which the disclosure is made by the discloser. They apply even if the IBAC has determined that the protected disclosure is not a protected disclosure complaint.

The protections also apply to further information relating to a protected disclosure made by the original discloser, if the further information has been provided, verbally or in writing, to:

- the IBAC; or
- any other investigative entity investigating the protected disclosure.

Sections 52 and 53 of the Act refer specifically to confidentiality obligations of persons receiving information connected with an assessable disclosure, or leading to the identification of a discloser. Those confidentiality obligations do not apply to disclosers.

Transfer of employees

An employee of MDHS who has made a protected disclosure and believes on reasonable grounds that detrimental action will be, is being, or has been taken against them may request a transfer of employment.

After making a disclosure an employee can be transferred internally to another part of the MDHS, or to another public service body or public entity on similar terms and conditions of employment.¹³ This can only happen if they request, or consent to, a transfer and the following other conditions apply:

- the head of MDHS has reasonable grounds to suspect detrimental action will be, is being, or has been taken against the employee;
- the head of MDHS considers that the transfer will avoid, reduce or eliminate the risk of detrimental action; and
- if transfer to another public body is proposed, the head of that other public body consents to the transfer.

The transfer can be temporary or permanent, and if the employee is moved to another public body, the employee's service in the new body is regarded as continuous with their pre-transfer service.

7.4.2 Actions of the discloser constituting offences and leading to protections being lost

However, a discloser is not protected if they commit an offence under s 72 or s 73 of the Act, as follows:

- 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 (maximum penalty: a fine of 120 penalty units (\$18,655.20 from 1 July 2016), usually increasing 1 July every year in accordance with arrangements made under the *Monetary Units Act 2004*, 12 months imprisonment, or both);
- claim that a matter is the subject of a protected disclosure knowing the claim to be false (maximum penalty: a fine of 120 penalty units, 12 months imprisonment, or both);
- falsely claim that a matter is the subject of a disclosure that the IBAC has determined to be a protected disclosure complaint (maximum penalty: a fine of 120 penalty units, 12 months imprisonment, or both).

¹³ The terms "public service body" and "public entity" are as defined in ss 4(1) and 5 respectively of the *Public Administration Act 2004*. MDHS is a public entity as defined by s 5 of the *Public Administration Act 2004*.

Protected Disclosures Procedure

Department *Organisational Governance*
Section *Corporate Services*
Approved by *Corporate Performance & Operations*



Similar provisions set out in the IBAC Act, such as in s 184, also make it a criminal offence to disclose certain information received from the IBAC. The penalties for such offences are a fine of 60 penalty units, 6 months' imprisonment, or both.

7.4.3 *Other limitations on protections afforded to disclosers*

A discloser is not protected against legitimate management action being taken by MDHS in accordance with the Act.

In addition, although the discloser of a protected disclosure is not subject to criminal or civil liability for making the disclosure, the Act specifically provides that a person remains liable for their own conduct even though the person has made a disclosure of that conduct under the Act. Therefore, the discloser will still be held liable for their own conduct that they disclose as part of making a protected disclosure.

If the person making the disclosure is implicated in the improper conduct or detrimental action that is the subject of the disclosure

Where a discloser is implicated in improper conduct, and an investigative entity has provided the necessary information to the MDHS, MDHS will protect the discloser from reprisals in accordance with the Act, the IBAC's guidelines and these procedures. MDHS acknowledges that the act of disclosing should not shield disclosers from the reasonable consequences flowing from any involvement in improper conduct. However, in some circumstances, an admission may be a mitigating factor when considering disciplinary or other action.

The management of the welfare of a discloser may become complicated when that person is implicated in misconduct, whether or not that misconduct is related to the disclosure.

Taking disciplinary or other action against a person who has made a protected disclosure invariably creates the perception that it is being taken in reprisal for the disclosure. The CEO will make the final decision on the advice of the Protected Disclosure Coordinator or Welfare Manager 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 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, any such action will not be taken without MDHS ensuring that:

- the fact that a person has made a protected disclosure is not a substantial reason for MDHS taking the action against the staff;
- there are good and sufficient grounds that would fully justify action against any other person in the same circumstances;
- there are good and sufficient grounds that justify exercising any discretion to institute disciplinary or other action.

MDHS will take all reasonable steps to thoroughly document its decision-making process, including recording the reasons why the disciplinary or other action is being taken, and the reasons why the action is not being taken in retribution against the discloser for making the disclosure, so that it will be able to clearly demonstrate that the disciplinary or other action was taken for the appropriate and permitted reasons under the Act.

The discloser will be clearly informed of any action proposed to be taken, be afforded natural justice, and inform and be informed of any mitigating factors that have been taken into account. Such communications with the discloser will be made in plain English and reasonable steps to provide appropriate support will be offered where appropriate.

Protected Disclosures Procedure

Department Organisational Governance
Section Corporate Services
Approved by Corporate Performance & Operations



8. CONFIDENTIALITY

8.1 General obligation of confidentiality on MDHS and all individuals

MDHS will take all reasonable steps to protect the identity of the discloser and the matters disclosed by a discloser. Maintaining confidentiality in relation to protected disclosure matters is crucial, among other things, in ensuring detrimental actions are not taken in reprisal against a discloser.

Disclosers may consider whether it is in their best interests not to discuss any related matters other than with officers of the IBAC, another investigative entity, or other persons authorised by law.

8.2 Steps taken by MDHS to ensure confidentiality

8.2.1 Information management

MDHS will ensure all files, whether paper or electronic, are kept securely. Those files will be accessible only by the Protected Disclosure Coordinator or a Welfare Manager where one has been appointed. The Welfare Manager will not divulge any details relating to the disclosed matter to any person other than the Protected Disclosure Coordinator or an investigator appropriately authorised under the Act or the IBAC Act. All meetings between any relevant persons will be conducted discreetly to protect the confidentiality of the person making a protected disclosure.

8.2.2 Exemption from the Freedom of Information Act 1982 (“FOI Act”)

The FOI Act provides a general right of access for any person to seek documents in the possession of the MDHS.

However, the Act provides that certain information related to protected disclosures as contained in documents in the possession of MDHS will be exempt from the application of the FOI Act.

Such information excluded from the operation of the FOI Act includes:

- any information relating to a disclosure made in accordance with the Act; and
- any information that is likely to lead to the identification of a discloser.

MDHS is required to contact the IBAC prior to providing any document originating from the IBAC or relating to a protected disclosure, if that document is sought under the FOI Act.

8.2.3 Training for all staff

MDHS will:

- ensure that staff have access to a copy of these procedures in hard or soft copy;
- incorporate into its induction procedures training about MDHS’s general obligations under the Act and the rights and obligations of all staff;
- introduce periodic refresher courses for existing staff about their rights and obligations under the Act;
- provide additional training and assistance to:
 - any staff with specific responsibilities and functions to handle and manage protected disclosures under the Act, including the Protected Disclosure Coordinator and people involved in welfare management; and
 - any staff with functions and duties under the FOI Act or with responsibilities for information management, to ensure that no prohibited information is disclosed under the Act and to

Protected Disclosures Procedure

Department *Organisational Governance*
Section *Corporate Services*
Approved by *Corporate Performance & Operations*



ensure there is appropriate liaising with the staff of the IBAC or other investigative agencies where required in response to a request for access under the FOI Act.

8.3 Limited exceptions permitted by the Act

The Act makes it a crime to disclose information connected with a disclosure made in accordance with the Act. Limited exceptions to the prohibition on disclosure are specified by the Act, include circumstances such as:

- where disclosure is required by MDHS (or one of its staff) in the exercise of functions of MDHS under the Act;
- where necessary for the purpose of the exercise of functions under the Act;
- by an investigative entity for the purpose of exercising that entity's functions under the IBAC Act;
- in accordance with a direction or authorisation given by the investigative entity that is investigating the disclosure;
- to the extent necessary for the purpose of taking lawful action in relation to the conduct that is the subject of an assessable disclosure including a disciplinary process or action;
- where the IBAC or the VI has determined that the assessable disclosure is not a protected disclosure and the discloser or MDHS subsequently discloses the information;
- when an investigative entity had published a report to Parliament, in accordance with its confidentiality obligations;
- for the purpose of obtaining legal advice in relation to matters specified in the Act;
- in order to enable compliance with the Act:
 - where a person does not have a sufficient knowledge of the English language, to obtain a translation from an interpreter;
 - where a person is under 18 years of age, to a parent or guardian;
 - where a person is suffering a disability and is not able to understand, to an independent person;
- in disciplinary actions or legal proceedings for certain offences in the Act or other specified Acts.

The Act prohibits the inclusion of any details, in any report or recommendation, that is likely to lead to the identification of a 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 or any reports to Parliament.

8.4 Penalties apply for unauthorised disclosure of information

The Act contains a number of offence provisions relating to unauthorised disclosure of information by either disclosers or persons who have received disclosures. The relevant penalties include imprisonment, financial payments or both.

The criminal offences set out in the Act relating to confidentiality include:

- 1) divulging information obtained in connection or as a result of the handling or investigation of a protected disclosure without legislative authority. Maximum penalty: 60 penalty units (\$9,327.60 from 1 July 2016), six months imprisonment, or both.
- 2) Disclosing that a disclosure has been notified to the IBAC for assessment under the Act. Maximum penalty: 60 penalty units, six months imprisonment, or both.
- 3) Disclosing that a disclosure has been assessed by the IBAC or the VI to be a protected disclosure complaint under the Act. Maximum penalty: 60 penalty units, six months imprisonment, or both.

Protected Disclosures Procedure

Department Organisational Governance
Section Corporate Services
Approved by Corporate Performance & Operations



9. COLLATING AND PUBLISHING STATISTICS

MDHS is required to publish information about how these procedures may be accessed in its annual reports.

10. REVIEW

These procedures will be reviewed annually or upon significant change to the Act, the Regulations or the IBAC's Guidelines to ensure they comply with the requirements of the Act, the Regulations and the IBAC's Guidelines.

Key Aligned Documents

Protected Disclosures Policy

Key Legislation, Acts & Standards

Protected Disclosure Act 2012

References

Nil

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Keywords

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