

Protected Disclosure Procedures

National Gallery of Victoria

Quick reference guide to protected disclosures

Who can make a disclosure?	<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>
How do I make a disclosure?	<p>Verbally or in writing (but not by fax) in accordance with specific procedures.</p> <p>(refer to Part 2 of these procedures for more information)</p>
What can I make a disclosure about?	<p>Improper conduct engaged in, and/or detrimental action taken by, public bodies or public officers performing public functions.</p> <p>This includes the NGV and/or its staff.</p> <p>(refer to Part 2 of these procedures for more information)</p>
Who can I make a disclosure to?	<p>Protected disclosures about the NGV or any of its staff may be made to:</p> <ul style="list-style-type: none"> • The Independent Broad-based Anti-corruption Commission (IBAC) <p>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>(refer to Part 1 of these procedures for more information).</p> <p>Disclosures made to IBAC will be handled in accordance with IBAC's guidelines and processes.</p>

1. Objectives

- 1.1 The Protected Disclosure Procedures for the National Gallery of Victoria (**Procedures**) are established for the protection of persons from detrimental action taken by the NGV¹ and its staff.²
- 1.2 The NGV cannot receive protected disclosures in relation to the improper conduct or detrimental action of public bodies or public officials, for example, public servants, or NGV staff. Any such protected disclosures should be directed to the Independent Broad-based Anti-corruption Commission (**IBAC**).
- 1.3 The Procedures are prepared in accordance with the *Protected Disclosure Act 2012* (**PD Act**) and the guidelines of the IBAC, available on (www.ibac.vic.gov.au).

2. Making a protected disclosure

Who can make a protected disclosure

- 2.1 Protected disclosures about improper conduct engaged in or detrimental action taken by the NGV or its staff can be made by an individual or by a group of individuals.
- 2.2 Protected disclosures can be made by a member of the public, an employee, officer or member of a department or one of its portfolio agencies, or an employee, officer or member of another department or public body.
- 2.3 A company or business is not authorised to make a protected disclosure.

Making a protected disclosure

- 2.4 A protected disclosure must be made in private; and may be made:
 - (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.
- 2.5 Protected disclosures cannot be made by fax.

¹ In these Procedures, references to NGV mean the Council of Trustees of the National Gallery of Victoria, as established by the *National Gallery of Victoria Act 1966*.

² In these Procedures, references to NGV staff mean employees, officers and members of the Council of Trustees of the National Gallery of Victoria.

What could a protected disclosure be about?

- 2.6 A protected disclosure could be about information that a person believes on *reasonable grounds*, demonstrates or tends to demonstrate that a person, public officer or public body is engaging in, or proposing to engage in '*improper conduct*' and/or '*detrimental action*'.
- 2.7 The conduct being disclosed must be in the performance of a person or body's function as a public officer or public body. Public bodies include the NGV. Public officers include NGV staff. For a full definition of 'public body' and 'public officer' see Schedule 1 of these procedures.
- 2.8 The conduct being disclosed must be *improper conduct* and/or *detrimental action*. The definitions of *improper conduct* and *detrimental action* are explained in the diagrams located in the following page.

'Reasonable grounds'

- 2.9 'Reasonable grounds' require belief that *improper conduct* or *detrimental action* has occurred, is occurring, or will occur. The belief 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. But, you must have *reasonable grounds* for your belief.
- 2.10 A mere suspicion, allegation or conclusion that is unsupported by further information, facts or circumstances will not be protected under the PD Act. 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*.

Offences under the PD Act

- 2.11 Under the PD Act, it is an offence:
- (a) To take detrimental action against another person in reprisal for a protected disclosure. Penalties of up to 240 penalty units³ and/or 2 years imprisonment apply (s 45(1), PD Act);
 - (b) To disclose the content, or information about the content, of a disclosure that has been notified to IBAC by the NGV or information which is likely to lead to the identification of the person who made that disclosure unless permitted to by the PD Act;
 - (c) 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;

³ Currently \$34,646.40. One penalty unit is currently \$144.36 - see <http://www.ocpc.vic.gov.au>.

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- (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) For any person to:
 - (i) Disclose that a disclosure has been notified to IBAC for assessment unless permitted to do so by the PD Act; and
 - (ii) Disclose that a disclosure has been determined to be a protected disclosure complaint unless permitted to do so by the PD Act.

**'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 action' is defined as:

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

- causes injury, loss or damage;
- intimidation or harassment; or
- 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. The NGV or its staff take a bribe or receives a payment in exchange for the discharge of a public duty.
2. The NGV or its staff sell confidential information.
3. An NGV staff member favours unmeritorious applications for jobs or engagement for goods and services by friends and relatives.

Examples of detrimental action

1. The NGV 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. The NGV discriminates against the person who makes a disclosure or his or her family and associates in subsequent applications for jobs, permits or tenders.

3. Dealing with detrimental action

- 3.1 The NGV together with the Protected Disclosure Coordinator will take precautions to prevent NGV staff from taking detrimental action in reprisal for a protected disclosure by identifying, assessing, controlling and monitoring risks of reprisals faced by disclosers and witnesses.
- 3.2 The Protected Disclosure Coordinator is Alison Lee, Manager, Governance, Policy and Planning (telephone: 8620 2374).
- 3.3 The Protected Disclosure Coordinator will assess the individual circumstances of each case and the disclosers and witnesses will, where possible, be consulted about any action that is taken.
- 3.4 A disclosure of detrimental action is itself a protected disclosure and should be made to IBAC. IBAC will assess it as a new disclosure according to its own guidelines and processes.

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- 3.5 Where the detrimental action is of a serious nature that is likely to amount to a criminal offence, the NGV may consider reporting the matter to the police.
- 3.6 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 Protected Disclosure Coordinator will record details of the incident and advise the person of their rights under the PD Act to make a disclosure to IBAC. The Protected Disclosure Coordinator will also advise the person of the protections that they will receive under the PD Act.
- 3.7 If the Protected Disclosure Coordinator receives a disclosure, the details of the incident should be recorded and the discloser must be advised of his/her rights under the PD Act to make a disclosure to IBAC.
- 3.8 If you have sustained injury, loss or damage as a result of detrimental action taken against you in reprisal for making a disclosure, the PD Act sets out remedies that are available to you. You may wish to obtain legal advice about this.
- 3.9 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.
- 3.10 You must not disclose the content, or information about the content, of a disclosure that has been notified to IBAC by the NGV or information which is likely to lead to the identification of the person who made that disclosure unless permitted to by the PD Act. See Part 5 of these procedures for further information.

Transfer of employees

- 3.11 An NGV staff member who has made a disclosure and believes on reasonable grounds that detrimental action is being taken against him or her may request a transfer of employment (s 51, PD Act).
- 3.12 An NGV staff member could be transferred internally to a different area of the NGV on similar terms and conditions of employment. This can only happen on request or by consent to a transfer. Alternatively, an NGV staff member could also be transferred to duties within a Department, an Administrative Office or the State Services Authority, again only on request from the employee or with the employee's consent. The following further conditions apply to employee transfers:
- (a) The President of the NGV must have reasonable grounds to suspect detrimental action will be, is being, or has been taken against the employee;
 - (b) The President of the NGV must consider that the transfer will avoid, reduce or eliminate the risk of detrimental action;
 - (c) If a transfer to a Department, Administrative Office or the State Services Authority is proposed, the head of the relevant Department, Administrative Office or the State Services Authority must consent to the transfer.

4. Welfare Services

- 4.1 The NGV recognises that the welfare and protection from detrimental action of persons making genuine protected disclosures is essential for the effective implementation of the PD Act and is relevant to the NGV's 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.
- 4.2 The NGV will provide welfare support to a discloser or a witness in an investigation, or persons who are the subject of the protected disclosure, or those who have cooperated or intend to cooperate with an investigation of a protected disclosure complaint, as the circumstances require.
- 4.3 The Protected Disclosure Coordinator 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; and managing the impact of any investigation;
 - (b) Providing practical advice and support; actively monitoring the workplace and anticipating problems and addressing them without waiting for complaint of victimisation;
 - (c) Advising the discloser and/or witness of the protections available under the PD Act;
 - (d) Keeping records of the case management of the person, including contact and follow up action;
 - (e) Referring any disclosures of detrimental action in reprisal for making the disclosure (eg harassment, intimidation or victimisation) to IBAC;
 - (f) Ensuring that the discloser and/or witness' expectations of the process and outcomes are realistic;
 - (g) Maintaining confidentiality:
 - (i) ensuring that staff cannot infer the identity of the discloser or a person cooperating with the investigation from any information they receive; and
 - (ii) ensuring that hardcopy and electronic files relating to the disclosure are accessible only to the persons involved in dealing with the disclosure.
- 4.4 The Protected Disclosure Coordinator will only be required to provide reasonable support and will discuss the reasonable expectations with the person(s) they are supporting on what the NGV is able to deliver; and whether their expectations are realistic.

5. Confidentiality

- 5.1 The NGV must keep certain information confidential, including the identity of the person making the disclosure. Ensuring that the person making the disclosure cannot be identified may help protect the discloser from detrimental action.
- 5.2 The NGV cannot receive protected disclosures under the PD Act. Any protected disclosures made to it will be referred to IBAC.
- 5.3 In circumstances where a disclosure about the NGV or an NGV staff member has been made directly to IBAC, the NGV may subsequently become aware of it by IBAC, who is assessing whether the disclosure is a protected disclosure complaint. Having been made aware of the identity of a discloser, and/or the contents of the disclosure, the PD Act provides that NGV must keep this information confidential. The NGV can only disclose such information in the limited circumstances provided for under the PD Act. These include disclosing this information:
- (a) With the discloser's consent;
 - (b) In accordance with a direction or authorisation given by the investigating entity that is investigating the disclosure (for example, IBAC);
 - (c) 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;
 - (d) Where the IBAC or the Victorian Inspectorate has already determined that the disclosure is not a protected disclosure;
 - (e) Where necessary for the purpose of the exercise of functions under the PD Act;
 - (f) For the purpose of a proceeding for an offence under a relevant Act or provision;
 - (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) Where an investigating body (for example, IBAC) has already published a report to Parliament or otherwise made public the content of the disclosure consistent with the confidentiality requirements of the Act.
- 5.4 IBAC or the relevant investigating entity may disclose the discloser's identity and the content of the 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 as the NGV.

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- 5.5 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 still remain confidential.
- 5.6 A person who makes a protected disclosure cannot tell anyone about it except as permitted by the PD Act. If a person who makes a protected disclosure repeats their disclosure other than as permitted by the PD Act, they may lose the protections provided for in the PD Act. For example, if a disclosure is repeated to the media and the media reports on it, the discloser may not be protected from defamation action.

6. Review

- 6.1 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:

- (g) 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*;
- (h) 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;
- (i) an ongoing employee or temporary employee in the teaching service under the *Education and Training Reform Act 2006*;
- (j) a judicial employee employed under Division 3 of Part 6 of the *Public Administration Act 2004*;
- (k) a Ministerial officer employed under Division 1 of Part 6 of the *Public Administration Act 2004*;
- (l) an electorate officer within the meaning of the *Parliamentary Administration Act 2005*;
- (m) a Parliamentary adviser employed under Division 2 of Part 6 of the *Public Administration Act 2004*;
- (n) a Parliamentary officer within the meaning of the *Parliamentary Administration Act 2005*;
- (o) a member of police personnel;
- (p) a responsible Minister of the Crown;
- (q) a member of the Legislative Assembly or the Legislative Council;
- (r) a Councillor within the meaning of section 3(1) of the *Local Government Act 1989*;
- (s) a member of Council staff employed under the *Local Government Act 1989*;
- (t) a judge, a magistrate, a coroner or a member of VCAT;

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- (u) an associate judge or a judicial registrar;
 - (v) a Crown Prosecutor;
 - (w) the Chief Crown Prosecutor;
 - (x) the Director of Public Prosecutions;
 - (y) the Governor, the Lieutenant-Governor or the Administrator of the State;
 - (z) the Auditor-General;
 - (aa) the Ombudsman;
 - (bb) the Electoral Commissioner;
 - (cc) the holder of any other statutory office or any other prerogative office;
 - (dd) any other person in the service of the Crown or a public body;
 - (ee) 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);
 - (ff) 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
 - (gg) 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.