

# PUBLIC INTEREST DISCLOSURE PROCEDURE

## DOCUMENT CONTROL TABLE

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## 1 STATEMENT OF SUPPORT

Metro Tasmania (Metro) is committed to the aims and objectives of the *Public Interest Disclosure Act (2002) (Tas)* (the Act) which are to:

- a) Encourage and facilitate disclosures of improper conduct by public officers;
- b) Protect persons making those disclosures and others from reprisals;
- c) Provide for the matters disclosed to be properly investigated and dealt with; and
- d) Provide all parties involved with those disclosures with procedural fairness (referred to as natural justice in the act).

Metro does not tolerate improper conduct by its employees, officers or members, or the taking of detrimental action against those who come forward to disclose such conduct. It recognises the value of transparency and accountability in its administrative and management practices, and supports the making of disclosures that reveal the type of conduct to which the Act is directed.

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

This Procedure focuses exclusively on the arrangements which Metro has in place to meet its obligations under the Act. Separate to these obligations, because Metro is a proprietary limited company, it is also required to comply with whistleblowing provisions established under Commonwealth legislation. Metro has a Whistleblowing Policy in place to address whistleblowing requirements under Commonwealth Legislation and the Whistleblowing Policy should also be reviewed to determine whether the Commonwealth Legislation may apply to a particular disclosure or fact situation. If there is doubt about which legislative scheme applies in a particular case, legal advice should be obtained.

## 2 PURPOSE

This Procedure sets out how:

- a) Public officers and contractors can make disclosures about improper conduct or reprisal action;
- b) Disclosures are assessed;
- c) Public interest disclosures are investigated; and
- d) Metro protects disclosers and affords procedural fairness<sup>1</sup> to those being investigated.

The Procedure is designed to complement normal communication channels between supervisors and employees. It has been prepared in accordance with the Ombudsman's *Guideline One: Procedures for Public Bodies*. This Guideline can be accessed on the Ombudsman's website at [www.ombudsman.tas.gov.au](http://www.ombudsman.tas.gov.au).

Metro employees are encouraged to continue to raise appropriate matters at any time with their supervisors, and to use existing grievance procedures within the organisation where appropriate. Metro procedures that may be useful to employees seeking to resolve grievances or raise concerns include:

- Code of Conduct Procedure
- Dispute Settlement Procedure
- Grievance Handling Procedure

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<sup>1</sup> Referred to as natural justice in the Act.

- Issue Resolution Procedure
- Whistleblowing Policy
- Workplace Behaviour Procedure

### 3 HOW THE ACT WORKS

Briefly, the Act works in this way:

- a) It gives certain people – “public officers” and “contractors” – the right to make a disclosure about “improper conduct” or “detrimental action” to certain integrity agencies, other persons and bodies (Part 2 of the Act, particularly s6);<sup>2</sup>
- b) It provides certain statutory protections for protected disclosures (Part 3);
- c) It dictates how the recipient of the disclosure is to deal with it (Parts 4 to 8);
- d) It treats the Ombudsman as the oversight agency in relation to the operation of the Act, including the default investigator, monitor of investigations by public bodies, and setter of standards under the Act;
- e) Where the disclosure is handled by the Ombudsman or a public body, it requires a preliminary determination as to whether the protected disclosure is a “public interest disclosure” (ss30 and 33).
- f) Subject to exceptions, it requires investigation by the Ombudsman or public body of any public interest disclosure (ss39 and 63);
- g) It requires such investigation to be conducted as soon as practicable but if it is being conducted by a public body, not more than six months from the date of the determination that the disclosure is a public interest disclosure (ss39A and 77A);
- h) It controls the manner in which a disclosure is investigated, and provides investigative powers;
- i) In the case of an investigation by a public body which results in a finding that the alleged conduct occurred, it obliges the public body to take action to prevent that conduct from continuing or recurring, and to take action to remedy any harm or loss which may have arisen (s75).

A flow chart, which depicts the way in which a public body should deal with a disclosure, can be found in Attachment 1.

### 4 ROLES AND RESPONSIBILITIES

This section explains the roles and responsibilities under the Act of individuals within Metro.

#### 4.1 METRO DIRECTORS AND EMPLOYEES

Directors and employees of Metro are encouraged to report known or suspected incidences of improper conduct or detrimental action in accordance with these procedures. All directors and employees have an important role to play in supporting those who have made a legitimate disclosure.

They must refrain from any activity that is, or could be perceived to be, victimisation or harassment of a person who makes a disclosure. Furthermore, they should protect and maintain the confidentiality of a person they know or suspect to have made a disclosure.

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<sup>2</sup> Members of the public may also make disclosures in limited circumstances, when the Ombudsman or Integrity Commission deems this in the public interest under s7A.

## **4.2 PRINCIPAL OFFICER (METRO CHIEF EXECUTIVE OFFICER)**

The Principal Officer (in Metro, the Chief Executive Officer) has primary responsibility for ensuring that the provisions of the Act are implemented by Metro. Section 62A of the Act provides that Metro's Chief Executive Officer has responsibility for:

- a) Preparing procedures for approval by the Ombudsman;
- b) Receiving public interest disclosures and ensuring they are dealt with in accordance with the Act;
- c) Ensuring the protection of witnesses;
- d) Ensuring the application of procedural fairness in Metro's procedures;
- e) Ensuring the promotion of the importance of public interest disclosures and general education about the Act to all staff, and ensuring easy access to information about the Act and this procedure; and
- f) Providing access to confidential employee assistance programs and appropriately trained internal support staff for those involved in the process.

Metro's Chief Executive Officer may delegate any or all of these to the General Manager Corporate Services in their capacity as a Public Interest Disclosure Officer.

## **4.3 PUBLIC INTEREST DISCLOSURE OFFICER (GENERAL MANAGER CORPORATE SERVICES)**

Pursuant to s62A(2) of the Act, Metro's Chief Executive Officer has appointed the General Manager Corporate Services a Public Interest Disclosure Officer. By virtue of this appointment the General Manager Corporate Services is responsible for:

- a) Acting as a contact point for general advice about the operation of the Act for any person wishing to make a disclosure about improper conduct or detrimental action;
- b) Making arrangements for a disclosure to be made privately and discreetly and, if necessary, away from the workplace;
- c) Receiving any disclosure made orally or in writing (from internal and external disclosers);
- d) Recording in writing the details of any disclosure which is made orally;
- e) Impartially assessing the allegation and determining whether it is a disclosure made in accordance with Part 2 of the Act (that is, "a protected disclosure");
- f) Impartially assessing under s33 of the Act whether a disclosure is a "public interest disclosure"; and
- g) Taking all necessary steps to ensure that the identity of the discloser and the identity of the person who is the subject of the disclosure are kept confidential.

## **4.4 INVESTIGATOR**

Where Metro has determined that a disclosure is a public interest disclosure, or where the Ombudsman has referred a disclosed matter to Metro for investigation, the Chief Executive Officer will appoint an investigator to investigate the matter in accordance with the Act. An investigator may be a person from within Metro or a consultant engaged for that purpose.

## **4.5 WELFARE MANAGER**

The Welfare Manager will be appointed by the Chief Executive Officer or the General Manager Corporate Services, and is responsible for looking after the general welfare of the discloser.

The Welfare Manager will:

- a) Examine the immediate welfare and protection needs of a person who has made a disclosure, and implement support arrangements for them;
- b) Advise the discloser of the legislative and administrative protections available to them;<sup>3</sup>
- c) Listen and respond to any concerns of harassment, intimidation, victimisation or other detrimental action which may be occurring in reprisal for making the disclosure; and
- d) So far as is practicable, protect the identity of the discloser in the course of carrying out these responsibilities.

A Welfare Manager may be a person from within Metro or a consultant engaged for that purpose. They must not be responsible for assessing or investigating the disclosure.

## **5 WHO CAN MAKE A DISCLOSURE?**

### **5.1 PUBLIC OFFICERS**

Any current public officer<sup>4</sup> can make a disclosure to Metro under the Act. The term public officer includes any Director or Employee of Metro.

### **5.2 CONTRACTORS**

Current or past contractors and sub-contractors can make disclosures about public bodies, not public officers, but they can only make a disclosure to the Ombudsman or the Integrity Commission not to Metro. The General Manager Corporate Services should refer any contractor wanting to make a disclosure to either of these bodies.

### **5.3 MEMBERS OF THE PUBLIC**

Members of the public can make a disclosure about a public body, and may be treated in the same way as a contractor if it is in the public interest to do so, but they can only make the disclosure to the Ombudsman or Integrity Commission.

The Ombudsman or Integrity Commission determines whether it is in the public interest to treat the discloser as a contractor, not the discloser. The General Manager Corporate Services should refer any members of the public wanting to make a disclosure to either of these bodies.

### **5.4 ANONYMOUS PERSONS**

An anonymous disclosure may be accepted if the person receiving it is satisfied that the disclosure is being made by a public officer or contractor (see s8 of the Act). If the person is satisfied that an anonymous disclosure is from a contractor it should be referred to the Ombudsman.

## **6 WHAT CAN A DISCLOSURE BE MADE ABOUT?**

A disclosure can be made about one or more public officers or a public body itself. If a disclosure relates to Metro as a whole or Metro's Chief Executive Officer, it should be referred to the Ombudsman or Integrity Commission as internal investigation would not be appropriate.

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<sup>3</sup> See Part 12 below for details of the legislative protections

<sup>4</sup> This can include a public officer from another public body

## 6.1 IMPROPER CONDUCT

Disclosures about public officers need to relate to improper conduct by that officer, in the past, present or future (proposed action). Section 3 of the Act defines improper conduct as:

- a) Conduct that constitutes an illegal or unlawful activity; or
- b) Corrupt conduct; or
- c) Conduct that constitutes maladministration; or
- d) Conduct that constitutes professional misconduct; or
- e) Conduct that constitutes a waste of public resources; or
- f) Conduct that constitutes a danger to public health or safety or to both public health and safety; or
- g) Conduct that constitutes a danger to the environment; or
- h) Misconduct, including breaches of applicable codes of conduct; or
- i) Conduct that constitutes detrimental action against a person who makes a public interest disclosure under this act –that is serious or significant as determined in accordance with guidelines issued by the ombudsman<sup>5</sup>.

Examples of improper conduct include:

- a) To avoid closure of a town's only industry, an environmental health officer conceals evidence of illegal dumping of waste; and
- b) An agricultural officer delays imposing quarantine to allow a financially distressed farmer to sell diseased stock.

## 6.2 CORRUPT CONDUCT

Corrupt conduct is further defined in s3 of the Act as:

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

Examples of corrupt conduct include:

- a) An employee takes a bribe from a contractor to accept their work quotation without fairly considering the quotations of other contractors; and
- b) An employee favours an unmeritorious application for a job by a relative.

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<sup>5</sup> See Public Interest Disclosure Guideline Two: Serious or Significant Improper Conduct, available at [www.ombudsman.tas.gov.au](http://www.ombudsman.tas.gov.au)



### 6.3 DETRIMENTAL ACTION

Detrimental action, or reprisal action, against a discloser can be a form of improper conduct. It is defined in s3 of the Act, as including:

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

Examples of detrimental action include:

- a) Demotion, transfer, isolation in the workplace or changing a person's duties to their disadvantage; or
- b) Threats, abuse or other forms of harassment directly or indirectly against the discloser, their family or friends; or
- c) Discrimination against the discloser or their family and associates in applications for jobs, permits or tenders.

### 7 WHERE TO MAKE A DISCLOSURE

For the protections in the Act to apply, a disclosure needs to be made to the right person or body. The following table sets this out, in accordance with s7 of the Act:

| OFFICER OR PUBLIC BODY TO WHICH THE DISCLOSURE RELATES  | WHERE THE DISCLOSURE MAY BE MADE   |
|---|--|
| An Officer or Employee of Metro (other than Metro Officers or Employees listed below).  | Metro; or<br>The Integrity Commission; or<br>The Ombudsman.  |
| The Chief Executive of Metro; or<br>One or more Director(s) of Metro;<br>Metro as a whole.  | The Ombudsman; or<br>The Integrity Commission.   |
| A Minister who is responsible for Metro.  | If the relevant Minister is a Member of the House of Assembly: The Speaker of the House.<br><br>If the relevant Minister is a Member of the Legislative Council: The President of the Legislative Council. |
| A person employed in an office of a Minister, Parliamentary Secretary or other Member of Parliament.  | The Ombudsman  |
| A member of the Police Service, other than the Commissioner of Police (including a member of the Police Service who delivers policing services on the Metro network pursuant to the Tasmania Police and Metro Memorandum of Understanding). | The Commissioner of Police   |

## 8 HOW TO MAKE A DISCLOSURE

### 8.1 DISCLOSURE TO SPECIFIC METRO EMPLOYEES

A Director or Employee of Metro can make a disclosure about other Directors or Employees of Metro orally or in writing to the following Metro employees:

- The Chief Executive Officer (who is Metro's Principal Officer); or
- The General Manager Corporate Services (who is Metro's Public Interest Disclosure Officer).

If a Director or Employee of Metro wants to make a disclosure about Metro's Chief Executive Officer, one or more Directors of Metro or Metro as a whole, they should be referred to the Ombudsman or the Integrity Commission.

### 8.2 WRITTEN OR ORAL DISCLOSURE

It is preferable that a disclosure be made in writing. A written disclosure can:

- a) Be emailed to Chief Executive Officer or the General Manager Corporate Services; or
- b) Addressed to the Chief Executive Officer or General Manager Corporate Services. A written disclosure in this form can either be:
  - Physically left at Metro's Corporate Office, 212 Main Road, Moonah, TAS, 7009 (access via Metro Shop Opposite Stop A which is open Monday – Friday excluding public holidays between 7:00 am and 5:30 pm); or
  - Posted to Metro Tasmania, PO Box 61, Moonah, TAS, 7009.

An oral disclosure can be made either over the phone or in person to Chief Executive Officer or General Manager Corporate Services.

An oral disclosure should be made in private. If a member, officer or employee of Metro is concerned about making a disclosure in person in the workplace, they can call or email Chief Executive Officer or General Manager Corporate Services to request a meeting in a location away from the workplace.

It is not a requirement that a person contemplating making a disclosure refers to the Act, or is aware of the Act.

### 8.3 DISCLOSURE TO THE OMBUDSMAN

A disclosure may also be made directly to the Ombudsman. The contact details for the Ombudsman are:

Ombudsman Tasmania  
GPO Box 960  
Hobart, TAS, 7001

Or at

Level 6  
86 Collins Street  
Hobart, TAS, 7000

Website: [www.ombudsman.tas.gov.au](http://www.ombudsman.tas.gov.au)  
Email: [ombudsman@ombudsman.tas.gov.au](mailto:ombudsman@ombudsman.tas.gov.au)  
Phone: 1800 001 170

## 8.4 DISCLOSURE TO THE INTEGRITY COMMISSION

A disclosure may also be made directly to the Integrity Commission. The Commission can deal with a protected disclosure about individuals under the *Integrity Commission Act 2009* or refer it to a public body or the Ombudsman. A protected disclosure about a public body would be referred to the Ombudsman. The contact details for the Integrity Commission are:

Integrity Commission  
GPO Box 822  
Hobart, TAS, 7001

Or at

Level 2  
Surrey House  
199 Macquarie Street  
Hobart, TAS, 7000

Website: [www.integrity.tas.gov.au](http://www.integrity.tas.gov.au)  
Email: [contact@integrity.tas.gov.au](mailto:contact@integrity.tas.gov.au)  
Phone: 1300 720 289

## 9 CONFIDENTIALITY

Metro will take all reasonable steps to protect the identity of a discloser. Maintaining confidentiality is crucial to ensure that detrimental action is not taken against the discloser in reprisal for making the disclosure. All reasonable care should also be taken to protect the privacy of witnesses and of the person against whom the disclosure has been made.

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

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

- a) Where exercising their functions or the functions of the public body under the Act;
- b) When making a report or recommendation under the Act;
- c) When publishing statistics in the annual report of a public body; and
- d) In proceedings for certain offences under the Act.

The Act, however, prohibits the inclusion of particulars in any report or recommendation that is likely to lead to the identification of the discloser. The Act also prohibits the identification of the person who is the subject of the disclosure in any particulars included in an annual report made in accordance with Part 9 of the Act.

It may be necessary to consider disclosing information where:

- a) It is essential, having regard to the principles of natural justice, that the identifying information be disclosed to the person who is the subject of the disclosure;
- b) The investigating body believes that the disclosure of the identifying information is necessary for the matter to be effectively investigated; or

- c) The identity of the discloser is likely to be guessed from the circumstances of the disclosure and the risks for the discloser are better managed if their identity is known and specific warnings or risk management actions can be taken.

In these circumstances, the person who made the disclosure should first be consulted before any action is taken. Consider obtaining permission in writing from the discloser prior to identifying them. Metro will ensure that all relevant files, whether paper or electronic, are kept securely and can only be accessed by the Chief Executive Officer, General Manager Corporate Services, the investigator, and (in relation to welfare matters only) the Welfare Manager.

All printed and electronic material will be kept in files that are clearly marked as confidential, and all materials relevant to an investigation, such as interview recordings, will also be stored securely with the files. Electronic files should have access restricted to the relevant officers.

Care should also be taken to ensure that all relevant phone calls and meetings are conducted in private. Section 90 exempts documents from release under the *Right to Information Act 2009* to the extent that:

- a) They contain information regarding a disclosure; or  
b) Information that is likely to lead to the identification of the person who:
- Made the disclosure; or
  - The person who is the subject of the disclosure.

## 10 ASSESSING THE DISCLOSURE

The Act requires the taking of two distinct steps when assessing a disclosure. It first needs to be determined whether or not it qualifies as a protected disclosure, and thus attracts the protections contained in the Act.

In order to qualify as a protected disclosure, a disclosure must satisfy all of the following prerequisites:

- a) It has been made to the correct person or body; and  
b) Having been correctly made to Metro:
- It has been made by a public officer (or, if the disclosure is anonymous, is the person receiving it satisfied that it is being made by a public officer); and
  - It is about the conduct of a public officer; and
  - The discloser believes the public officer has, is or is proposing to engage in improper conduct; and
  - It is about conduct that could objectively fall within the definition of improper conduct; and
  - It concerns conduct that occurred on or after 1 January 2001.

The next step is to determine if a protected disclosure is also a public interest disclosure. This requires an assessment of the evidence provided by the discloser to determine if it shows or tends to show a public officer has, is or is proposing to engage in improper conduct.

### 10.1 WHAT SHOULD THE RECIPIENT OF THE DISCLOSURE DO UPON RECEIPT OF THE DISCLOSURE?

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

Unless the recipient is Metro's Chief Executive Officer (or the disclosure is about Metro's Chief Executive Officer), the recipient should immediately inform the Chief Executive Officer of the disclosure, and should provide the Chief Executive Officer with a copy of the disclosure, or record of the disclosure, and any accompanying documents<sup>6</sup>. If the disclosure is about the Chief Executive Officer, the Ombudsman should be contacted for advice.

## 10.2 IS IT A PROTECTED DISCLOSURE?

The protections for disclosers, provided in Part 3 of the Act, only apply where the disclosure is a *protected disclosure* made in accordance with Part 2 of the Act. Metro's Chief Executive Officer or General Manager Corporate Services will assess whether a disclosure has been made in accordance with Part 2 as soon as possible after it has been received.

[The Assessment of Disclosure Form](#) should be completed as part of this process. It contains a series of questions going to the essential elements of a protected disclosure and what needs to be established before a disclosure can be a protected disclosure. A separate [Assessment of Disclosure Form](#) will usually need to be completed for each disclosure. This means, for example, that if a discloser is complaining about three different public officers, this constitutes three disclosures and three assessments should be completed.

If it is determined that it is a protected disclosure, the discloser should be given information about the protections in the Act (such as a copy of Part 3 of the Act). These protections should be explained to the discloser if necessary. The discloser should also be informed of the process which will be followed with respect to the disclosure.

The Chief Executive Officer or General Manager Corporate Services should also immediately appoint a Welfare Manager to protect the interests of the discloser and ensure that the discloser is advised of the name and contact details of that person. A [Risk Assessment Form](#) should also be completed.

## 10.3 MIXED CONTENT DISCLOSURES

Many disclosures will also contain personal grievances. When conducting assessments of complaints or grievances the assessor needs to be alert to identifying those aspects that could constitute a protected disclosure.

It is not a requirement that a discloser specify they are making a disclosure, the onus rests on Metro to identify whether or not the Act applies. Consider discussing with the person whether they wish to make a public interest disclosure if it appears their concerns would meet the threshold.

Those matters that can be dealt with under a grievance process and those that are more appropriately dealt with under these procedures should be dealt with separately where possible.

## 10.4 RISK ASSESSMENT

A risk assessment should occur as soon as possible after the disclosure has been assessed as being a protected disclosure under the Act. The [Risk Assessment Form](#) should be completed by the Chief Executive Officer or General Manager Corporate Services and any appropriate risk mitigation action required be implemented. A single assessment can be made of all relevant risks, or you may prefer to undertake separate assessments of the different risks relating to a particular disclosure, such as the risks to the discloser, the subject of the disclosure, any witnesses, or Metro. The discloser is usually the most able to identify potential reprisal risks, so input should be sought from the discloser and the Welfare Manager in completing the risk assessment. All reasonable steps to reduce risks of reprisal to the discloser should be taken.

## 10.5 REFERRAL OF A PROTECTED DISCLOSURE TO THE INTEGRITY COMMISSION

Metro may refer a protected disclosure, as distinct from a public interest disclosure, to the Integrity Commission where it considers that the disclosure relates to misconduct as defined in s4(1) of the *Integrity Commission Act 2009*. Consideration should also be given to:

- a) Whether independent investigation of the subject matter of the disclosure by the Integrity Commission is preferable; and
- b) The views of the discloser and the Integrity Commission about whether the matter should be referred.

Metro must notify the discloser of the referral under s29D of the Act within a reasonable time (unless the disclosure was made anonymously). The Integrity Commission may deal with the disclosure under its legislation, or it may refer the disclosure to the Ombudsman or a public body, as the case may require, for action in accordance with the Act.

## 10.6 IS THE DISCLOSURE A PUBLIC INTEREST DISCLOSURE?

Once a disclosure has been assessed as being a protected disclosure, a further determination must be made as to whether or not it is a public interest disclosure. The Chief Executive Officer or General Manager Corporate Services must make this determination under s33 of the Act within 45 days of the receipt of the disclosure. The [Assessment of Disclosure Form](#) should be utilised to ensure all the necessary requirements are considered.

For a disclosure to be a public interest disclosure, the Chief Executive Officer, or the General Manager Corporate Services, must be satisfied that the disclosure shows or tends to show that the public officer to whom the disclosure relates has:

- a) Engaged, is engaging or proposes to engage in improper conduct in their capacity as a public officer, or
- b) Taken, is taking or proposes to take detrimental action in reprisal for the making of the protected disclosure.

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

Where the Chief Executive Officer or General Manager Corporate Services determines that the disclosure amounts to a public interest disclosure, they must:

- a) If the assessment is made by the General Manager Corporate Services, advise the Chief Executive Officer;
- b) Notify the Ombudsman within 14 days of the decision using the [Ombudsman Notification Form](#);
- c) Notify the person making the disclosure within 14 days of the decision (unless they are anonymous and uncontactable); and
- d) Proceed to investigate the disclosed matter under s34 of the Act.

If the Chief Executive Officer or General Manager Corporate Services:

- a) If the assessment is made by the General Manager Corporate Services, advise the Chief Executive Officer;
- b) Notify the Ombudsman within 14 days of the decision using the [Ombudsman Notification Form](#); and
- c) Notify the person making the disclosure within 14 days of the decision (unless they are anonymous and uncontactable) – see s35.

The Ombudsman must then review this decision under s35(2).

If, on review of the matter, the Ombudsman agrees that the disclosure is not a public interest disclosure, it does not need to be dealt with under the Act. The Chief Executive Officer, or the General Manager Corporate Services in consultation with the Chief Executive Officer, will then decide how the disclosure should be dealt with.

If the Ombudsman determines on review that the disclosure is a public interest disclosure, it may be referred back to the public body under s42 for investigation under the Act or the Ombudsman will deal with the disclosed matter.

## **10.7 REFERRAL OF CRIMINAL CONDUCT TO THE COMMISSIONER OF POLICE**

It is possible that, before or during the investigation of a public interest disclosure, facts are uncovered that indicate the possibility that a criminal offence might have been committed. If this happens, Metro will not commence, or will suspend, the investigation and will consult with the Ombudsman as to the future conduct of the matter. Under s41 of the Act, the Ombudsman has the power to refer a public interest disclosure to the Commissioner of Police for investigation.

If the Ombudsman is satisfied that the disclosed matter should be referred to the Commissioner, Metro should consider whether the disclosure should be referred to the Ombudsman under s68 of the Act. Early referral of the matter may avoid interference with the evidentiary trail and so should be done at the first possible opportunity. Referral to the Commissioner through the Ombudsman will also avoid any question of a breach of confidentiality under s23 of the Act. Once a disclosure is referred to the Commissioner through the Ombudsman, the investigation under the Act ceases.

There may still be administrative or operational issues which have been identified during the disclosure process or investigation, however, these should be dealt with under other internal processes of Metro. The Chief Executive Officer, or the General Manager Corporate Services acting in consultation with the Chief Executive Officer, will decide how the matter should be dealt with.

## **11 PROTECTION**

### **11.1 WHEN DOES PROTECTION COMMENCE?**

Where Metro receives a disclosure which complies with the requirements of Part 2 of the Act, the disclosure immediately attracts the protections set out in Part 3 of the Act. This is so whether or not the disclosure is factually correct (although one of the requirements of Part 2 is that the discloser genuinely believes that the alleged improper conduct or detrimental action in fact occurred). The protection can also extend to a person who intends to make a disclosure (refer s19 of the Act).

### **11.2 WHAT PROTECTION DOES THE ACT PROVIDE?**

Part 3 of the Act gives various types of protection to a person who makes a protected disclosure. Below is a summary of some elements of Part 3.

A person who makes a protected disclosure:

- a) Is not subject to any civil or criminal liability, or to any liability arising by way of administrative process, for making the protected disclosure (s16);
- b) Does not by doing so commit an offence under a provision of any other act that imposes a duty to maintain confidentiality, or which imposes any other restriction on the disclosure of information (s17(1)(a)); and

- c) Does not by doing so breach an obligation by way of oath, or rule of law or practice, or under an agreement, which requires the discloser to maintain confidentiality or otherwise restricts the disclosure of information (s17(1)(b)).

If a disclosure is not made to the correct entity, the protections may not apply. For example, a discloser will not be protected if otherwise confidential information is disclosed to the media.

Part 3 also contains various provisions which are intended to protect a discloser from detrimental action by way of reprisal for a protected disclosure. These are:

- a) Section 19, which makes it an offence to take such detrimental action;
- b) Section 20, which creates a liability to pay damages for such detrimental action; and
- c) Section 21, which gives a person who believes that detrimental action has been taken against them the right to apply to the Supreme Court for an order requiring the person who has taken the detrimental action to remedy that action, or for an injunction.

## 12 INVESTIGATION

Any disclosure Metro determines to be a public interest disclosure under s33 must be investigated under the Act, unless there is a good reason not to do so pursuant to s64.

Metro must investigate every disclosure referred to it for investigation by the Ombudsman under s63(b).

Metro's Chief Executive Officer will appoint an investigator to carry out the investigation. The investigator may be a person from within an organisation or a consultant engaged for the purpose.

The objectives of an investigation are to:

- a) Collate information relating to the allegation as quickly as possible, which may involve taking steps to protect or preserve documents, materials and equipment;
- b) Consider the information collected and to draw conclusions objectively and impartially; and
- c) Maintain procedural fairness in the treatment of witnesses and generally to all parties involved in the disclosure.

### 12.1 MATTERS THAT DO NOT HAVE TO BE INVESTIGATED

Before starting an investigation, the Chief Executive Officer or General Manager Corporate Services must first consider whether the disclosed matter needs to be investigated. Section 64 specifies certain circumstances under which a public body may legitimately decide not to investigate. Use the [Assessment of Disclosure Form](#) to determine whether any of the grounds in s64 apply.

Any decision not to proceed with an investigation on a ground specified in s 64 must be made by the Chief Executive Officer. If it is decided that the disclosed matter is not to be investigated, written notice must be given within 14 days of this decision to both the Ombudsman and (except in the case of an uncontactable anonymous discloser) the person who made the disclosure. Reasons for the decision must accompany the notice. The [Ombudsman Notification Form](#) should be used to advise the Ombudsman.

The Ombudsman will review the decision. If the Ombudsman agrees that the disclosure should not be investigated, the matter does not need to be dealt with under the Act. Importantly, the discloser still retains the protections. The Chief Executive Officer, or the General Manager Corporate Services in consultation with the Chief Executive Officer, will decide how the matter should be dealt with.

If the Ombudsman determines that the disclosure should be investigated, they will advise the Chief Executive Officer. Section 64 may be reconsidered at a later time during the investigation.



## 12.2 OTHER METRO INVESTIGATIONS

If Metro has already investigated the subject matter of a disclosure, it may not need to be investigated again under the Act, as provided by s64(b).

In determining whether the subject matter has already been investigated care needs to be taken to consider the different purposes of different types of investigations.

For example Metro's disciplinary investigation process to determine whether a breach of Metro's Code of Conduct has occurred and the process under the Act for assessing and investigating disclosures are different. Accordingly the investigations should generally be conducted separately.

The interaction between the two processes should be considered on a case-by-case basis, for example, whether evidence gathered during a public interest disclosure investigation can be used in a Code of Conduct investigation given the confidentiality requirements of s23.

As a minimum, however, if an employee or officer of Metro has raised an allegation about another employee or officer that may need to be investigated under Metro's disciplinary investigation process then it should also be considered under these public interest disclosure procedures.

The two processes have a different focus. A Metro Disciplinary Investigation is aimed at investigating potential breaches of Metro's Code of Conduct by an employee and ensuring they are afforded procedural fairness, including informing the Metro officer or employee of the substance of the alleged breach and the intention to investigate.

In contrast, a protected disclosure, whilst it can also be about a potential breach of Metro's Code of Conduct, provides protections to a discloser and imposes confidentiality requirements on the handling of the matter.

The purpose of the investigation of a public interest disclosure is to establish if improper conduct has occurred and to make recommendations, which may include taking disciplinary action.

Procedural fairness requirements still apply during a public interest disclosure investigation but the public officer may not be notified of the disclosure or the investigation at the outset, or at all, if the investigation finds it is unsubstantiated.

If a Metro disciplinary investigation concludes prior to the conclusion of a public interest disclosure investigation and the Chief Executive Officer considers that the subject matter of the disclosure has been adequately dealt with through the disciplinary investigation process, they may decide not to further investigate the matter pursuant to s64(b).

In any such case the notification process outlined above will still need to be followed and Metro should consider seeking legal advice or contacting the Ombudsman for more information.

## 12.3 APPOINTMENT OF INVESTIGATOR AND FRAMING OF TERMS OF REFERENCE

The Chief Executive Officer must personally determine who is to carry out the investigation (this is a non-delegable obligation). The investigator will be given formal terms of reference, signed by the Chief Executive Officer which will specify:

- a) The matters to be investigated;
- b) The date by which the investigation is to be concluded;
- c) The requirement for regular reports to be made to the chief executive officer, including details of compliance with any measures identified in the risk assessment; and
- d) The resources available to the investigator for the purposes of the investigation.

The completion date should be as soon as practicable but, in any event, not more than six months from the date of the determination that the disclosure is a public interest disclosure under s77A(1). If at any stage before or during the investigation it appears that the investigation cannot be completed within six months, Metro may apply to the Ombudsman for an extension of up to a further six months.

## 12.4 INVESTIGATION PLAN

The investigator should prepare an investigation plan for approval by the Chief Executive Officer. The plan should list the issues which are to be investigated and describe the steps which the investigator intends to take when investigating each of those issues. The risk assessment should be considered as part of the investigation planning and appropriate steps taken to reduce identified risks during the investigation. The plan should be updated as necessary during the course of the investigation.

## 12.5 PROCEDURAL FAIRNESS

The principles of procedural fairness must be carefully observed in the course of the investigation, with respect to all parties involved. These principles are referred to as natural justice in the Act. The principles are a set of procedural standards which need to be met in order to satisfy a person's right to a fair hearing. If natural justice is not provided, the investigation findings may be questionable and could be challenged. Metro will comply with the following requirements in ensuring that procedural fairness is accorded to all parties involved.

No one is to be involved in the investigation:

- a) Who is known to be biased against any person who is potentially subject to an adverse finding;
- b) Who is known to hold any biases which are relevant to the subject matter of the investigation; or
- c) Against whom there are reasonable grounds for apprehending or suspecting bias<sup>7</sup>.

If the investigator is aware of any reason why they may be susceptible to an allegation of bias on the basis of these principles, they should immediately inform the Chief Executive Officer. It is best to err on the side of caution and to consider an external investigator if there might be a perception of bias over the investigation.

Any person who is potentially subject to an adverse finding or comment must be told of:

- a) The allegations made against them, or which have arisen against them as a result of the investigation;
- b) All of the information which is adverse to their interests and which is, on an objective basis, credible, relevant and significant to the investigation; and
- c) The proposed adverse findings, and their possible consequences.

This must be done before any final conclusions are formed by the investigator. The person subject to the potential adverse finding must be given a reasonable time to respond.

Despite the above, there is no requirement to inform the person who is subject to the disclosure as soon as it is received, or as soon as the investigation has commenced. The final investigation report should be drafted in a way that demonstrates that procedural fairness has been afforded. For instance, it should record and deal with all submissions and evidence which a person has put in their defence.

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<sup>7</sup> The test for establishing the existence of apprehended bias is whether a fair minded lay observer, taking into account all relevant circumstances, might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the questions that they are required to decide.

## 12.6 CONDUCT OF THE INVESTIGATION

The Integrity Commission's [Guide to Managing Misconduct in the Tasmanian Public Sector](#)<sup>8</sup> is a useful guide on the conduct of a public interest disclosure investigation. The investigator should make contemporaneous notes of all discussions and phone calls, and audio recordings of significant interviews with witnesses should be made where possible. All information gathered in the course of the investigation must be securely stored.

Interviews should be conducted in private, and the investigator should take all reasonable steps to protect the identity of the discloser. The name of the discloser or any particulars which might identify that person must not be revealed unless necessary, and then only with the discloser's knowledge.

## 12.7 REFERRAL OF AN INVESTIGATION TO THE OMBUDSMAN

Under s68 of the Act, a public body may refer the investigation of a public interest disclosure to the Ombudsman where the public body considers that its own investigation is being obstructed or that it is otherwise not within the capacity of the public body to complete the investigation. An investigation can also be referred to the Ombudsman if evidence of possible criminal conduct is found, to enable the Ombudsman to refer the matter to Tasmania Police for investigation (refer Item **Error! Reference source not found.** for more detail).

Any decision as to whether the investigation should be referred to the Ombudsman will be made by the Chief Executive Officer.

## 12.8 PROVISION OF INFORMATION ABOUT THE INVESTIGATION

The Chief Executive Officer or the General Manager Corporate Services must ensure that the discloser is kept regularly informed concerning the handling of their protected disclosure and any investigation. Section 74 of the Act requires a public body, at the request of the Ombudsman or the person who made the disclosure, to give the Ombudsman or that person reasonable information about the investigation. The information must be given within 28 days of the request.

As provided by s74(3), however, such information does not have to be given to the discloser if:

- a) It has already been given to the person; or
- b) The giving of the information would endanger the safety of another or may prejudice the conduct of the investigation.

## 13 ACTION TAKEN AFTER AN INVESTIGATION

### 13.1 INVESTIGATOR'S FINAL REPORT

At the conclusion of the investigation, the investigator must submit a written report of their findings to the Chief Executive Officer. The report should contain:

- a) The allegation/s;
- b) A description of the manner in which the investigation was conducted, with sufficient detail to demonstrate that natural justice was observed;
- c) An account of all relevant information received;

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<sup>8</sup> Accessible at <https://www.integrity.tas.gov.au/publications/prevention-resources/guides>.

- d) Details of the evidence and submissions supplied by any person against whom an adverse finding is made, and the evaluation of that material by the investigator; and
- e) The findings made and conclusions reached, and the basis for them.

Note in particular that the report should not include any comment adverse to any person unless that person has been given an opportunity to be heard on the matter and their defence is fairly set out in the report. A public body must take action, under s75 of the Act, to redress any improper conduct found and try to prevent its recurrence. Accordingly, if the investigator has found that the alleged improper conduct has occurred, the investigator may wish to include recommendations as to:

- a) Any steps that need to be taken by the Metro to prevent the conduct from continuing or occurring in the future; and
- b) Any action that should be taken by the Metro to remedy any harm or loss arising from that conduct.

The steps to be taken may include bringing disciplinary proceedings against the person responsible for the conduct or referring the matter to an appropriate authority for further consideration. For example, if the investigation has revealed conduct that may constitute an unreported criminal offence, consideration should be given to whether the matter should be referred to Tasmania Police. The internal investigation report must be accompanied by:

- a) The transcript or other record of any oral evidence taken, including audio or video recordings; and
- b) All documents, statements or other exhibits received by the investigator and accepted as evidence during the course of the investigation.

## 13.2 ACTION TO BE TAKEN

If the investigation makes a finding that a public officer has engaged, is engaging or proposes to engage in improper conduct, Metro must, in accordance with s75, take all reasonable steps to prevent the conduct from continuing or occurring in the future and may take action to remedy any loss or harm arising from the conduct. The Chief Executive Officer should take into consideration any recommendations in the investigator's report, but can take different or broader action if appropriate.

The Chief Executive Officer will provide a written report to [*the minister responsible for the public body, or name of council where disclosure relates to employee of a council*] and the Ombudsman, setting out the findings of the investigation and any remedial steps taken. The report must not disclose particulars likely to lead to the identification of the discloser. The Ombudsman will also be provided with the full internal investigation report and accompanying evidence (use the [Ombudsman Notification Form](#) to provide this information).

As required by s77 of the Act, the Chief Executive Officer will also inform the discloser of the findings of the investigation, and of any steps taken under s75 as a result of those findings having been made. Where the investigation concludes that the disclosed conduct did not occur, the Chief Executive Officer will report that finding to the Ombudsman, (use the [Ombudsman Notification Form](#)).

## 14 MANAGING THE WELFARE OF THE DISCLOSER

### 14.1 SUPPORT FOR THE DISCLOSER

The Chief Executive Officer or the General Manager Corporate Services must appoint a Welfare Manager to support all persons who have made a protected disclosure. This must occur within five working days of the protected disclosure being received. The Welfare Manager must contact the discloser as soon as possible and not more than five working days after being appointed.

A discloser who believes that they are being subjected to detrimental action in reprisal for having made the disclosure should report it to the Chief Executive Officer or General Manager Corporate Services, as this can be a potential further protected disclosure. If they believe that the reprisal is not being effectively dealt with by Metro, they may report the matter to the Ombudsman.

## **14.2 KEEPING THE DISCLOSER INFORMED**

The Chief Executive Officer or the General Manager Corporate Services must ensure that the discloser is kept informed of action taken in relation to their disclosure, and the time frames that apply. The discloser must be informed of the objectives of any investigation that takes place, the findings of the investigation, and the steps taken by Metro to address any improper conduct that has been found to have occurred. The discloser must be given reasons for all decisions made by Metro in relation to a disclosure. All communication with the discloser must be in plain English.

## **14.3 OCCURRENCE OF DETRIMENTAL ACTION**

If a discloser reports an incident of detrimental action allegedly taken in reprisal for the making of a disclosure, the Welfare Manager should:

- a) Record details of the incident;
- b) Advise the discloser of their rights under the act; and
- c) Assist the discloser to advise General Manager Corporate Services or the Chief Executive Officer of the detrimental action.

The taking of detrimental action in reprisal for the making of a disclosure can be an offence under the Act as well as grounds for making a further disclosure. Where such detrimental action is reported, the General Manager Corporate Services or the Chief Executive Officer will assess the report as a new disclosure under the Act, and it will be dealt with accordingly.

## **14.4 DISCLOSER IMPLICATED IN IMPROPER CONDUCT**

Where a person who makes a disclosure is implicated in improper conduct, Metro will handle the disclosure and protect the discloser from reprisals in accordance with the Act, the Ombudsman's guidelines and these procedures.

At the same time Metro acknowledges that the act of disclosing should not shield disclosers from the reasonable consequences flowing from any involvement in improper conduct. Section 18 of the Act specifically provides that a person's liability for their own conduct is not affected by the person's disclosure of that conduct under the Act.

In some circumstances, however, an admission may be a mitigating factor when considering disciplinary or other action. The Chief Executive Officer will make the final decision as to whether disciplinary or other action will be taken against a discloser. Where disciplinary or other action relates to conduct that is the subject of the person's disclosure, the disciplinary or other action will only be taken after the disclosed matter has been appropriately dealt with.

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

- a) The intention to proceed with disciplinary action is not because of the making of the disclosure (as opposed to the content of the disclosure or other available information);
- b) There are good and sufficient grounds that would fully justify action against any non-discloser in the same circumstances; and

- c) There are good and sufficient grounds that justify exercising any discretion to institute disciplinary or other action.

The General Manager Corporate Services or Chief Executive Officer will thoroughly document the process, including recording the reasons why the disciplinary or other action is being taken, and the reasons why the action is not in retribution for the making of the disclosure. The General Manager Corporate Services or Chief Executive Officer will clearly advise the discloser of the proposed action to be taken, and of any mitigating factors that have been taken into account. They should advise the discloser that they can raise any concerns about the action taken being a potential reprisal with the Ombudsman.

## 15 MANAGEMENT OF THE PERSON AGAINST WHOM A DISCLOSURE HAS BEEN MADE

Metro recognises that employees against whom disclosures are made must also be supported during the handling and investigation of disclosures. When a person who is the subject of the disclosure is made aware of the allegations or of an investigation, they should be provided with an appropriate contact person to whom to direct queries. Information about employee assistance programs or other supports should also be provided, if appropriate.

Metro will take all reasonable steps to ensure the confidentiality of the person who is the subject of the disclosure during the assessment and investigation process.

Where an investigation does not substantiate a disclosure, the fact that the investigation has been carried out, the results of the investigation, and the identity of the person who is the subject of the disclosure will remain confidential.

The General Manager Corporate Services or Chief Executive Officer will ensure that the person who is the subject of any disclosure investigated by or on behalf of Metro is afforded [procedural fairness](#) in accordance with these procedures.

Where the allegations in a disclosure have been investigated, and the person who is the subject of the disclosure is aware of the allegations or of the investigation, the General Manager Corporate Services or Chief Executive Officer will formally advise the person who is the subject of the disclosure of the outcome of the investigation.

Metro will give its full support to a person who is the subject of a disclosure where the allegations contained in a disclosure are clearly wrong or unsubstantiated. If the matter has been publicly disclosed, the Chief Executive Officer of Metro will consider any request by that person to issue a statement of support setting out that the allegations were wrong or unsubstantiated.

## 16 OMBUDSMAN REVIEW AND APPROVAL OF THESE PROCEDURES

The procedures will be submitted to the Ombudsman for review at least once every three years to ensure they meet the objectives of the Act and accord with the Guidelines and Standards published by the Ombudsman under s38(1)(c).

The date by which the procedures must next be submitted to the Ombudsman for review is 26 February 2021.

Subject to endorsement by the Ombudsman the following statement may be made by Metro:

- These procedures were approved by the Ombudsman under s60(3) of the Act on 30 March 2021.

## 17 RECORDS MANAGEMENT

Metro must maintain all records relevant to administering this document in Metro's Electronic Document and Records Management System, *Content Manager*.

## 18 RELATED AND REFERENCED DOCUMENTS

### 18.1 LEGISLATION

*Ombudsman Act (1978) (Tas)*

*Integrity Commission Act (2009) (Tas)*

*Public Interest Disclosures Act (2002) (Tas)*

*Public Interest Disclosures Amendment Act (2009) (Tas)*

### 18.2 METRO

Code of Conduct Procedure

Discipline Procedure

Grievance Handling Procedure

Issue Resolution Procedure

Public Interest Disclosure – Ombudsman Notification Form

Public Interest Disclosure – Assessment of Disclosure Form

Public Interest Disclosure – Risk Assessment Form

Whistleblowing Policy (*Note: This policy relates to disclosures made pursuant to Commonwealth Legislation*)

## 19 VERSION CONTROL TABLE

| No: | Date     | Details  | Status     |
|-----|----------|--|------------|
| 1   | 20/02/19 | Redesigned for CM. Previous versions archived. No content change.  | Superseded |
| 2   | 01/12/20 | Content updated to reflect changes to the Ombudsman Model Procedures and approved by ELT on 19 January 2021. Submitted to Ombudsman and approved on 30 March 2021. | Current    |

**ATTACHMENT 1 – FLOW CHART SUMMARISING THE WAY IN WHICH METRO SHOULD DEAL WITH A DISCLOSURE MADE TO IT UNDER THE ACT**





