



## Frequently asked questions

# *The Integrity and Accountability Legislation Amendment (Public Interest Disclosures, Oversight and Independence) Act 2019*

[www.ibac.vic.gov.au](http://www.ibac.vic.gov.au)

## Key changes commence on 1 January 2020

### *Protected Disclosure Act 2012 becomes the Public Interest Disclosures Act 2012*

#### What terminology is changing?

- Under the new legislation, the terms 'protected disclosure' and 'protected disclosure complaint' have been replaced with:
  - public interest disclosure (PID): disclosure by a natural person of information that shows / tends to show or information that the person reasonably believes shows / tends to show improper conduct or detrimental action (previously a protected disclosure) and
  - public interest complaint (PIC): a public interest disclosure that has been determined by IBAC, the Victorian Inspectorate or the Integrity and Oversight Committee (IOC) to be a public interest complaint (previously a protected disclosure complaint).
- Where a matter is determined to be a PIC, additional rules apply as to how it must be handled. These include a restricted list of bodies which can be referred the matter for investigation, what notifications must be given to the discloser and a restriction on withdrawing the complaint.

#### Why is the legislation changing?

- The changes are intended to make it easier to make a disclosure. The changes allow a broader range of disclosures to be made, provide for more independent expert bodies to investigate disclosures and introduce a flexible 'no wrong door' approach to ensure disclosures aren't excluded because of non-compliance with complex procedures.
- The changes also introduce new flexibility for IBAC to determine, with the discloser's consent, that a matter would be better dealt with outside of the public interest disclosure system. The new provisions allow disclosers to give details about their disclosure to additional specified bodies (such as health practitioners or WorkCover where necessary for support or a claim) or more broadly where a public interest complaint has not been adequately addressed within a specified amount of time.

### Improper conduct

#### How has the definition of improper conduct changed?

- Disclosures can be made under the public interest disclosure regime where they relate to improper conduct or detrimental action.
- Previously, improper conduct consisted of corrupt conduct and certain types of specified conduct *where they constituted a criminal offence or reasonable grounds for dismissal or termination*.
- Under the new legislation, the definition of improper conduct has been broadened and simplified to encourage disclosures about certain types of public sector wrongdoing. A new category of 'serious professional misconduct' has also been introduced to allow for a broader range of disclosures about wrongdoing in an official capacity.
- Improper conduct now includes:
  - corrupt conduct and/or
  - any of the following conduct by a public officer or public body in their capacity as a public officer or public body:
    - a criminal offence
    - serious professional misconduct
    - dishonest performance of public functions
    - an intentional breach or reckless breach of public trust
    - an intentional or reckless misuse of information or material acquired in the course of the performance of public functions
    - a substantial mismanagement of public resources
    - a substantial risk to the health or safety of one or more persons
    - a substantial risk to the environment.

- conduct by a third party that adversely affects the honest performance of a public officer or public body or is intended to adversely affect effective performance of a public officer or public body while obtaining an advantage for the third party, and/or
  - conduct by a third party that could constitute a conspiracy or attempt to engage in any of the above.
- Less serious or trivial complaints are excluded from the definition of improper conduct.

### What is serious professional misconduct?

- The *Public Interest Disclosures Act 2012* (PID Act) doesn't define serious professional misconduct.
- In accordance with the intention to broaden the types of disclosures that receive protection under the scheme, this may include conduct that constitutes a serious breach of an established professional code of conduct and/or other serious departures from the person's professional responsibilities. This may include a serious failure to exhibit the skills and experience required to perform the functions of the office, as well as non-compliance with professional codes of conduct or the policies, procedures and laws that govern behaviour in the public sector and the workplace.
- With the benefit of this new threshold coming into operation in January 2020, IBAC may issue further guidance on its application in future.

### What is an example of conduct that adversely affects the honest performance by a public officer of their functions?

- A common example of this would be attempting to bribe a public officer.

## Bodies that can receive PIDs

### PIDs can be made to public service bodies and local councils

- Public service bodies can receive disclosures where they relate to the conduct of that body or where the disclosure is made by that body's employees, members or officers.
- The term 'public service body' is defined in the *Public Administration Act 2004* to mean departments, administrative offices and the Victorian Public Sector Commission.
- A list of these bodies can be found in the IBAC information sheet *Key Changes - The Integrity and Accountability Legislation Amendment (Public Interest Disclosures, Oversight and Independence) Act 2019*, or at [www.ibac.vic.gov.au/reporting-corruption/what-is-a-protected-disclosure/Information-for-Protected-Disclosure-Coordination](http://www.ibac.vic.gov.au/reporting-corruption/what-is-a-protected-disclosure/Information-for-Protected-Disclosure-Coordination).

- The Victorian Public Sector Commission also maintains a list of the departments and administrative offices as currently established at [vpsc.vic.gov.au/about-public-sector/machinery-of-government/](http://vpsc.vic.gov.au/about-public-sector/machinery-of-government/).
- Under the the PID Act, local councils can also receive public interest disclosures that relate to that council, but disclosures relating to particular councillors must be made to IBAC or the Victorian Ombudsman.
- Bodies that receive PIDs will continue to need to refer PIDs to IBAC to determine whether protections under the legislation apply.

### What if a PID is made to a body that cannot receive PIDs?

- Although certain amendments have been made to accept misdirected disclosures (explained further below), where a PID is made to a body that *cannot* receive a PID in any event, it will not fall into that new scheme.
- If a PID is made to a body that cannot receive PIDs, information should be given to the discloser that no protections or confidentiality obligations for that disclosure currently apply and that their disclosure should be redirected to the appropriate entity if they want it to be assessed or protected under the public interest disclosure regime.

### What are the new bodies that can receive PIDs?

- The Integrity and Oversight Committee (IOC) is a new joint committee of the Victorian Parliament established under the *Parliamentary Committees Act 2003*. The IOC can receive PIDs regarding the Victorian Inspectorate.

## Bodies that can investigate PICs

### What are the new bodies that can investigate PICs?

Under the current scheme the following bodies can investigate PICs:

- IBAC
- Victorian Ombudsman
- Victorian Inspectorate
- Chief Commissioner of Police
- Judicial Commission of Victoria.

Under the new scheme, the following bodies have been added:

- Chief Municipal Inspector
- the Information Commissioner
- the Racing Integrity Commissioner.

## Misdirected disclosures

### What is a misdirected disclosure?

- The new 'misdirected disclosure' scheme provides that where a disclosure is made to an entity which ordinarily can receive PIDs and which the discloser believed to be the correct place for the disclosure but it is not the correct place for that particular disclosure, the disclosure can still be notified to IBAC for assessment as a PIC and will receive the protections of the public interest disclosure regime. This is what is being referred to as the 'no wrong door' amendment.
- The misdirected disclosure scheme does not apply to disclosures that relate to members of Parliament. Those disclosures need to be made directly to the Speaker of the Legislative Assembly or the President of the Legislative Council.
- When a body receives a misdirected disclosure it should:
  - consider if the disclosure may be one which shows a public officer or public body has engaged in or proposes to engage in improper conduct or detrimental action
  - notify those disclosures to the appropriate entity within 28 days.
- The appropriate entity to which misdirected disclosures should be notified are:
  - the Integrity and Oversight Committee if the disclosure relates to the Victorian Inspectorate or a Victorian Inspectorate officer
  - the Victorian Inspectorate if the disclosure relates to IBAC, an IBAC officer or a Public Interest Monitor
  - IBAC if the disclosure relates to any other person or body.
- Beyond this notification, the body that receives a misdirected disclosure is prohibited from disclosing the content of that misdirected disclosure and from disclosing information likely to reveal the identity of the person who made it.

### What is an example of a misdirected disclosure?

- A misdirected disclosure can be redirected to the correct entity for assessment. For example, if the Victorian Ombudsman receives a misdirected disclosure about Victoria Police it can redirect the disclosure to IBAC for assessment.
- Another example might be where a department receives a PID about an agency that is not within its portfolio. The department could then redirect the PID to the correct entity for assessment.

## External disclosures

### If a person who has made a PIC is not satisfied with the way it is being handled, can they contact a journalist?

- A new mechanism has been introduced to allow relief for people who have made a public interest disclosure and are subject to confidentiality restrictions relating to that disclosure, in situations where the disclosure has not been adequately addressed.
- This mechanism allows for people who have made a public interest disclosure to make a further disclosure of substantially the same subject matter to external parties (i.e. those not authorised to receive public interest disclosures, such as journalists or politicians) if:
  - the original disclosure was not made anonymously
  - the original disclosure was determined to be a public interest complaint and the discloser was notified of that determination, and
  - one of the following situations applies:
    - the discloser has not been notified of any action taken in relation to the disclosure within six months of determination as a public interest complaint and has not received a response 30 days after requesting an update on progress
    - an investigation has not been completed 12 months after determination as a public interest complaint and the discloser has not received a response 30 days after requesting an update on progress
    - an investigation has not been completed 12 months after determination as a public interest complaint and, although the discloser received a response within 30 days after requesting an update on progress, the discloser received no further update advising the investigation had been completed six months after that response.
- The protections provided to public interest disclosures under the Part 6 of the PID Act will also apply to these external disclosures.
- Any external disclosure must not contain information that may prejudice a criminal investigation, criminal proceeding or other legal proceeding of which the person making the external disclosure is aware and must not contain information that is likely to disclose investigative methods used by IBAC or Victoria Police.

## Confidentiality obligations

### What information can be provided by an investigating entity to other agencies in relation to a PID/PIC?

- In general, until a matter has been determined not to be a PIC, confidentiality obligations apply that preclude a body that has received information about a disclosure from revealing the content of that disclosure or the identity of the discloser.
- However, an investigating entity is empowered to disclose certain information where:
  - It is necessary for the purposes of investigating a PIC as part of performing its legislated functions (section 54(2)(b) of the PID Act).
  - It is relevant to certain other bodies' functions and it is appropriate that the information be passed on. The bodies that investigating agencies may pass this information to are IBAC, the Victorian Inspectorate, the Victorian Ombudsman, the Victorian Auditor-General, Victoria Police, the Office of Public Prosecutions, the Commission for Children and Young People, the Australian Federal Police, the police force of another state or territory or a further person or body if so prescribed.
- This permission to pass on information, however, does not allow the investigating entities to disclose information that would likely identify the discloser where that information would be given to a body that is the subject of a disclosure unless:
  - the discloser has given their written consent
  - IBAC or the VI has determined the matter is not a PIC
  - an investigating entity has published a report or already made public that information in a manner consistent with its confidentiality obligations.

## Who can a discloser share information about their PID/PIC with?

- A discloser is restricted from sharing information they receive from IBAC about whether their PID has been dismissed, referred or investigated and from disclosing any information they receive about the results of any investigation.
- After an investigation is initiated, IBAC and some other investigating bodies may determine that disclosure of further types of information (such as any evidence or information given to IBAC or the fact that a disclosure has been notified for assessment under the PID Act) is likely to prejudice the inquiry or investigation, the safety or reputation of a person or the fair trial of a person. In those circumstances, an investigating body is empowered to issue a confidentiality notice on a person which will further restrict what information that person can share.
- However, even where a confidentiality notice is in place, exceptions apply to allow information to be shared where necessary to, among other things, seek legal advice, get the support of a health practitioner or trade union or make a compensation claim to WorkCover, unless there is a direction that those standard exceptions do not apply.
- A discloser is not restricted from disclosing the subject matter of a PID to another person if they are not under a confidentiality notice, however the protections will not apply to protect the discloser if that additional disclosure results in retribution or detrimental action.

## Detrimental action

### Is detrimental action the same under the new legislated arrangements?

- From 1 January 2020, there is a lower threshold for proving that detrimental action has taken place. Prior to 1 January 2020, a discloser would have to prove that detrimental action was a 'substantial reason' for their employer (manager) taking action against them following their disclosure, but from 1 January 2020 'substantial' has been removed from section 45.
- In practical terms this means that if the fact an employee has made a disclosure forms *any part* of the reason for which management action is taken against that employee, it will constitute detrimental action and be reportable as a public interest disclosure under the scheme as well as being a criminal offence.

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- investigating serious corruption and police misconduct
- informing the public sector, police and the community about the risks and impacts of corruption and police misconduct, and ways in which it can be prevented.

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