Ombudsman Tasmania

Public Interest Disclosures Act 2002

Public Interest Disclosure Guideline Two

Procedures for public bodies

Issued: 25 November 2020

Introduction

Tasmania's whistleblowing legislation, the *Public Interest Disclosures Act 2002* (the Act), aims to reduce corruption, misuse of public positions and other forms of improper conduct in public bodies.[1] Research indicates that internal reporting is the primary way in which improper conduct is identified and addressed.[2] Public bodies should encourage and facilitate disclosures through robust procedures, fostering a positive and safe reporting culture and taking strong action when improper conduct is found.

All public bodies are required under section 60 to develop and publish procedures to handle public interest disclosures which comply with my guidelines and standards. This guideline sets out the key requirements for public bodies in relation to public interest disclosure procedures. It provides the minimum standard for what must be included in those procedures. I also include model procedures which contain all the required elements and are able to be individualised and adopted by public bodies.

Large public bodies must submit their procedures for my approval on establishment and then at least every three years.

This Guideline replaces previous Guidelines and Standards published by the Ombudsman under section 38(1)(c) of the Act in November 2003, March 2011 and March 2019.

Key requirements

Any procedures developed by a public body for the purpose of section 60 of the Act must address the following topics:

Procedures to be followed in relation to disclosures under Part 2

Including:

- to whom a disclosure should be made, including details of the name/s and duties of the public body's Public Interest Disclosure Officer/s;
- that the discloser does not have to know or say that they are making a disclosure under the Act;

[1] As defined in section 4 of the Act.
[2] Whistling While They Work 2: Key results and findings, Griffith University, August 2019, available at https://www.whistlingwhiletheywork.edu.au/.

- a risk assessment relating to potential harm to the discloser, the subject of the disclosure and/or the public body – how this is to be done and who is to do it;
- an assessment under section 33 as to whether the disclosure is a public interest disclosure – how this is to be done and who is to do it; and
- an assessment under section 64 as to whether a public interest disclosure may not have to be investigated – how this is to be done and who is to do it.

Procedures to be followed in relation to investigations under Part 7

Including:

- the appointment of the investigator;
- terms of reference, and who is to issue them;
- the need for an investigation plan, and what it should address;
- how the investigation should be conducted;
- referral to the Ombudsman and Tasmania Police, when this may be necessary, and who should decide;
- the maintenance of contact with the discloser and the Ombudsman; and
- the action to be taken after the investigation under Part 7, Division 4 – who is to do what.

Protection from reprisal

Including:

- steps that must be taken to support, and protect the welfare of, the discloser and witnesses, including developing a support plan and who has responsibility for these; and
- to whom reports of detrimental action should be made, and what should be done on receipt of such a report.

Procedural fairness

As a minimum:

- an explanation of the principles of procedural fairness (referred to in the Act as natural justice); and
- the procedures to be followed to make sure that the principles are observed.

Other

- Steps to be taken to protect the welfare of the person against whom the disclosure is made, and who has responsibility for these; and

- Public bodies covered by the *Corporations Act 2001* should address the intersection between the Commonwealth and Tasmania's public interest disclosure schemes.[3]

Model Procedures

A public body may choose to adopt the Model Procedures in Attachment A, after tailoring them to suit its individual needs and requirements.

Richard Connock
OMBUDSMAN

[3] There is currently the potential for conflict between these legislative schemes and public bodies may need to obtain legal advice to ensure they are compliant.

Ombudsman Tasmania

Public Interest Disclosures Act 2002

Public Interest Disclosure Model Procedures

Model procedures to be followed by public bodies

Issued: 25 November 2020

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1. Statement of Support

[*Public bodies should provide a statement here outlining their commitment to the purposes of the Public Interest Disclosures Act 2002 (the Act), which are primarily:*

- *to encourage and facilitate disclosures of improper conduct by public officers;*
- *to protect persons making those disclosures and others from reprisals;*
- *to provide for the matters disclosed to be properly investigated and dealt with; and*
- *to provide all parties involved with those disclosures with procedural fairness (referred to as natural justice in the Act).*

A statement of support should recognise the value of internal reporting as one of the main ways in which improper conduct is uncovered. It should be aimed at ensuring employees feel safe to report improper conduct and confident that it will be appropriately dealt with. The statement should demonstrate a public body's commitment to transparency and accountability and how it does that.]

2. Purpose of these procedures

These procedures set out how:

- public officers and contractors can make disclosures about improper conduct or reprisal action;
- disclosures are assessed;
- public interest disclosures are investigated; and
- [NAME OF PUBLIC BODY] protects disclosers and affords procedural fairness[1] to those being investigated.

These procedures are designed to complement normal communication channels between supervisors and employees. 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.

[1] Referred to as natural justice in the Act.

[It would be useful to include cross references to other relevant policies and procedures in your public body dealing with investigation of complaints etc at this point. This would include your public body's code of conduct and any other grievance or complaint handling policy.]

The procedures have 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.

3. How the Act works

Briefly, the Act works in this way:

- it gives certain people – *public officers* and *contractors* – the right to make disclosures about *improper conduct* or *detrimental action* to certain integrity agencies, other persons and bodies (Part 2 of the Act, particularly s 6);[2]

- it provides certain statutory protections for *protected disclosures*, even if the discloser does not reference the Act (Part 3);

- it dictates how the recipient of the disclosure is to deal with it (Parts 4 to 8);

- 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;

- where the disclosure is handled by the Ombudsman or a public body, it requires a determination as to whether the protected disclosure is a *public interest disclosure* (ss 30 and 33);

- subject to exceptions, it requires investigation by the Ombudsman or public body of any public interest disclosure (ss 39 and 63);

- 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 (ss 39A and 77A);

- it controls the manner in which a disclosure is investigated, and provides investigative powers; and

- in the case of an investigation by a public body which results in a finding that the alleged conduct occurred, it requires the public body to take action to prevent that conduct

[2] Members of the public may also make disclosures in limited circumstances, when the Ombudsman or Integrity Commission deems this in the public interest under s 7A.

from continuing or recurring, and to take action to remedy any harm or loss which may have arisen (s 75).

A flow chart, which depicts the way in which a public body should deal with a disclosure, is Attachment 4 to this document.

4. Roles and responsibilities

This part explains the roles and responsibilities under the Act of individuals within [NAME OF PUBLIC BODY].

4.1. Members, officers and employees

Members, officers and employees (public officers) of [NAME OF PUBLIC BODY] are encouraged to report known or suspected incidences of improper conduct or detrimental action in accordance with these procedures.

All public officers of [NAME OF PUBLIC BODY] have an important role to play in supporting those who have made disclosures. They must refrain from any activity that is, or could be perceived to be, victimisation or harassment of a person who makes a disclosure. They should protect and maintain the confidentiality of a person they know or suspect to have made a disclosure.

4.2. Principal Officer

The Principal Officer has primary responsibility for ensuring that the provisions of the Act are implemented by [NAME OF PUBLIC BODY]. Section 62A of the Act provides that the Principal Officer has responsibility for:

- preparing procedures for approval by the Ombudsman;
- receiving public interest disclosures and ensuring they are dealt with in accordance with the Act;
- ensuring the protection of witnesses;
- ensuring the application of procedural fairness in [NAME OF PUBLIC BODY]'s procedures;
- 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 the procedures, and
- providing access to confidential employee assistance programs and appropriately trained internal support staff for those involved in the process.

The Principal Officer may delegate all of these functions and powers to a Public Interest Disclosure Officer.

4.3. Public Interest Disclosure Officer

A Public Interest Disclosure Officer is appointed by the Principal Officer under s 62A(2) of the Act. They hold a delegation from the Principal Officer which enables them to [*list statutory powers and functions which are set out in their instrument of delegation. You may want to include some of the following responsibilities which are either administrative or delegated:*

- *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;*
- *making arrangements for a disclosure to be made privately and discreetly and, if necessary, away from the workplace;*
- *receiving any disclosure from a public officer made orally or in writing;*
- *recording in writing the details of any disclosure which is made orally;*
- *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");*
- *impartially assessing under s 33 of the Act whether a disclosure is a "public interest disclosure";*
- *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; and*
- *administrative functions to support the role under the Act, as required.]*

See the cover page for a list of [NAME OF PUBLIC BODY]'s Public Interest Disclosure officers.

4.4. Investigator

Where it is determined that a disclosure is a public interest disclosure, or where the Ombudsman has referred a public interest disclosure to [NAME OF PUBLIC BODY] for investigation, the Principal Officer will appoint an investigator to investigate the matter in accordance with the Act. An investigator may be a person from within [NAME OF PUBLIC BODY] or a consultant engaged for that purpose.

4.5. Welfare Manager

The Welfare Manager will be appointed by the Principal Officer or by a Public Interest Disclosure Officer, and is responsible for looking after the general welfare of the discloser. The Welfare Manager will:

- examine the immediate welfare and protection needs of a person who has made a disclosure, and develop a support plan for them;

- advise the discloser of the legislative and administrative protections available to them;[3]
- 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
- 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 employed by [NAME OF PUBLIC BODY] 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[4] can make a disclosure to [NAME OF PUBLIC BODY] under the Act. This includes [*insert information specific to your public body, e.g. for a local council*

> *'all employees and councillors of [NAME OF PUBLIC BODY]. Council volunteers are not considered public officers, but could make a disclosure to the Ombudsman or Integrity Commission about a public body as a member of the public.'*

Whether a volunteer is a public officer or not will depend on the circumstances. A volunteer who is a member of a public body, such as a volunteer firefighter under the Fire Service Act 1979, is a public officer but if there is no legislative instrument relating to the appointment of a volunteer, such as through a council run community program, it is likely they are not a public officer. Volunteers who are not public officers can still make disclosures though as a member of the public and should be referred to the Ombudsman or Integrity Commission]

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 [NAME OF PUBLIC BODY]. Public Interest Disclosure officers should refer any contractors wanting to make a disclosure to either of these bodies.

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[3] See Protection below for details of the legislative protections.

[4] This can include a public officer from another public body

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. Public interest disclosure officers 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 s 8 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 [NAME OF PUBLIC BODY] as a whole or the Principal Officer of [NAME OF PUBLIC BODY], it should be referred to the Ombudsman or Integrity Commission as internal investigation would not be appropriate.

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.[5]

Examples of improper conduct include:

- to avoid closure of a town's only industry, an environmental health officer ignores or conceals evidence of illegal dumping of waste;
- an agricultural officer delays or declines imposing quarantine to allow a financially distressed farmer to sell diseased stock; and
- a principal officer spends $15,000 of public money on a staff Christmas party.

[*Note: You may wish to replace with or include an example/s of relevance to your public body.*]

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 public officer takes a bribe in exchange for the discharge of a public duty;
- a public officer favours unmeritorious applications for jobs or permits by friends and relatives; and

[5] See Public Interest Disclosure Guideline Two: Serious or Significant Improper Conduct, available at www.ombudsman.tas.gov.au

- a police officer accesses and discloses criminal record information at the request of a friend, without any legitimate reason.

[*Note: You may wish to replace with or include an example/s of relevance to your public body.*]

6.3. Detrimental action

Detrimental action, or reprisal action, against a discloser can be a form of improper conduct. It is defined in s 3 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:

- refusal of a deserved promotion;
- demotion, transfer, isolation in the workplace or changing a person's duties to their disadvantage;
- threats, abuse or other forms of harassment directly or indirectly against the discloser, their family or friends; and
- discrimination against the discloser or their family and associates in applications for jobs, permits or tenders.

[*Note: You may wish to replace with or include an example/s of relevance to your public body.*]

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 s 7 of the Act:

Officer or public body to which the disclosure relates	Where the disclosure may be made
A member, officer or employee of a public body other than the Police Service or a State Service Agency	that public body; or the Integrity Commission; or the Ombudsman
A member, officer or employee of a public body that is a State Service Agency	that State Service Agency; or the Integrity Commission; or the Ombudsman
The principal officer of a public body or State Service Agency	the Ombudsman; or the Integrity Commission
A member of the Police Service, other than the Commissioner of Police	the Commissioner of Police
The Commissioner of Police	the Ombudsman
A member of the Legislative Council	the President of the Legislative Council
A member of the House of Assembly	the Speaker of the House
A councilor, within the meaning of the *Local Government Act 1993*	the Ombudsman
A person employed under the provisions of the *Parliamentary Privilege Act 1898*	the Ombudsman; or the Integrity Commission
The Auditor-General	the chairman of the Public Accounts Committee.
The Ombudsman	the Joint Standing Committee on Integrity
A person employed in an office of a Minister, Parliamentary Secretary or other Member of Parliament	the Ombudsman
In any other case, including if the disclosure is about a public body as opposed to an individual public officer	the Ombudsman; or the Integrity Commission

[*The above table may be summarised or made specific to your public body, if preferred, such as in the following example for a state government department:*

Officer or public body to which the disclosure relates	Where the disclosure may be made
A member, officer or employee of [NAME OF PUBLIC BODY]	[NAME OF PUBLIC BODY]; or the Integrity Commission; or the Ombudsman
The Principal Officer of [NAME OF PUBLIC BODY] or [NAME OF PUBLIC BODY] as a whole	the Ombudsman; or the Integrity Commission
The relevant minister for [NAME OF PUBLIC BODY], a member of the House of Assembly	the Speaker of the House
A person employed in an office of a Minister, Parliamentary Secretary or other Member of Parliament	the Ombudsman

]

8. How to make a disclosure

Public officers can make a disclosure about other public officers of [NAME OF PUBLIC BODY] orally or in writing to the following officers:

- the [*title of principal officer of public body*] – who is the Principal Officer of the public body, for the purposes of the Act; and
- a Public Interest Disclosure Officer.

8.1. Public Interest Disclosure Officers

The following staff are public interest disclosure officers and can receive disclosures:

[*set out list – when appointing Public Interest Disclosure Officers consider which positions, in the course of their duties, would likely come across matters that may satisfy the requirements of a disclosure. Public Interest Disclosure Officers should have appropriate skills and knowledge, for example, consider roles that might have particular expertise in investigating and dealing with confidential matters impartially and have direct reporting lines to the principal officer. This may include, for example:*

- *HR Managers who deal with complaints from public officers about other staff or supervise code of conduct investigations;*

- *in-house legal counsel who would advise on issues to do with corruption or staff conduct; and*
- *internal audit staff.]*

If someone wants to make a disclosure about the Principal Officer or [NAME OF PUBLIC BODY], 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. It should be addressed to the public body, marked for the attention of the Principal Officer or Public Interest Disclosure Officer. A disclosure can be sent, delivered or left at [*insert address and email*].

A public officer can also make an oral disclosure over the phone or in person to a Public Interest Disclosure officer. An oral disclosure should be made in private. If a public officer is concerned about making a disclosure in person in the workplace, they can call or email the Public Interest Disclosure Officer to request a meeting in a location away from the workplace.

It is not a requirement that the 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
Email: 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
Email: contact@integrity.tas.gov.au
Phone: 1300 720 289

9. Confidentiality

[NAME OF PUBLIC BODY] 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:

- where exercising their functions or the functions of the public body under the Act;
- when making a report or recommendation under the Act;
- when publishing statistics in the annual report of a public body; and
- 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:

- 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;

- the investigating body believes that the disclosure of the identifying information is necessary for the matter to be effectively investigated; or

- 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.

The [NAME OF PUBLIC BODY] will ensure that all relevant files, whether paper or electronic, are kept securely and can only be accessed by the Principal Officer, Public Interest Disclosure Officer/s, 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:

- they contain information regarding a disclosure; or

- 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 do so it must satisfy the following prerequisites:

- has it been made to the correct person or body; and

- if it has been correctly made to [NAME OF PUBLIC BODY],

    - has it 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);

    - is it about the conduct of a public officer;

    - does the discloser believe the public officer has, is or is proposing to engage in improper conduct;

- is it about conduct that could objectively fall within the definition of improper conduct; and
- does it concern conduct that occurred on or after 1 January 2001?

The next step is to determine if it is 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 the Principal Officer (or the disclosure is about the Principal Officer), the recipient should immediately inform the Principal Officer of the disclosure, and should provide the Principal Officer with a copy of the disclosure, or record of the disclosure, and any accompanying documents.[6] If the disclosure is about the Principal Officer, contact the Ombudsman 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.

The Principal Officer or a Public Interest Disclosure Officer should 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 at Attachment 1 should be completed as part of this process. It contains a series of questions going to the essential elements of a protected disclosure, raised at Assessing the disclosure, and what is needed 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

[6] Contractors or members of the public who wish to make a disclosure should be advised to contact the Ombudsman or Integrity Commission, as per Who can make a disclosure?

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 Principal Officer or a Public Interest Disclosure Officer 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 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 [NAME OF PUBLIC BODY] 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.

[*state government departments may wish to consider inserting the following - If the assessor considers that the complaint or grievance may warrant an Employment Direction 5 investigation then the matter should also potentially be assessed under these public interest disclosure procedures.*]

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 template at Attachment 3 should be completed by the Principal Officer or Public Interest Disclosure Officer 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 [NAME OF PUBLIC BODY]. 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

[NAME OF PUBLIC BODY] 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 s 4(1) of the *Integrity Commission Act 2009*. Consideration should also be given to:

- whether independent investigation of the subject matter of the disclosure by the Integrity Commission is preferable; and

- the views of the discloser and the Integrity Commission about whether the matter should be referred.

[NAME OF PUBLIC BODY] must notify the discloser of the referral under s 29D 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 Principal Officer or Public Interest Disclosure Officer must make this determination under s 33 of the Act within 45 days of the receipt of the disclosure. Use the Assessment of disclosure form at Attachment 1 to ensure you consider all the necessary requirements.

For a disclosure to be a public interest disclosure, the Principal Officer, or their delegated Public Interest Disclosure Officer, must be satisfied that the disclosure shows or tends to show that the public officer to whom the disclosure relates has:

- engaged, is engaging or proposes to engage in improper conduct in their capacity as a public officer, or
- 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 Principal Officer or Public Interest Disclosure Officer determines that the disclosure amounts to a public interest disclosure, they must:

- advise the Principal Officer (if not the person assessing the disclosure);

- notify the Ombudsman within 14 days of the decision using the notification template at Attachment 3;

- notify the person making the disclosure within 14 days of the decision (unless they are anonymous and uncontactable); and

- proceed to investigate the disclosed matter under s 34 of the Act.

If the Principal Officer or Public Interest Disclosure Officer determines that the disclosure is not a public interest disclosure, they must:

- advise the Principal Officer (if not the person assessing the disclosure);
- notify the Ombudsman within 14 days of the decision using the notification template at Attachment 3; and
- notify the person making the disclosure within 14 days of the decision (unless they are anonymous and uncontactable) – see s 35.

The Ombudsman must then review this decision under s 35(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 Principal Officer, or the Public Interest Disclosure Officer in consultation with the Principal 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 s 42 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, [NAME OF PUBLIC BODY] will not commence, or will suspend, the investigation and will consult with the Ombudsman as to the future conduct of the matter. Under s 41 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, [NAME OF PUBLIC BODY] should consider whether the disclosure should be referred to the Ombudsman under s 68 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 s 23 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 [NAME OF PUBLIC BODY]. The Principal Officer, or the Public Interest Disclosure Officer acting in consultation with the Principal Officer, will decide how the matter should be dealt with.

11. Protection

11.1. When does protection commence?

Where [NAME OF PUBLIC BODY] 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 - see 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:

- is not subject to any civil or criminal liability, or to any liability arising by way of administrative process, for making the protected disclosure (s 16);
- 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 (s 17(1)(a)); and
- 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 (s 17(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:

- section 19, which makes it an offence to take such detrimental action;
- section 20, which creates a liability to pay damages for such detrimental action; and
- 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

12.1. Introduction

Any disclosure [NAME OF PUBLIC BODY] determines to be a public interest disclosure under s 33 must be investigated under the Act, unless there is a good reason not to do so pursuant to s 64.

[NAME OF PUBLIC BODY] must investigate every disclosure referred to it for investigation by the Ombudsman under s 63(b).

The Principal 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:

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

12.2. Matters that do not have to be investigated

Before starting an investigation, the Principal Officer or Public Interest Disclosure Officer 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 disclosure assessment template at Attachment 1 to assist in assessing 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 Principal 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. Use the notification template at Attachment 3 to provide notice to 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 Principal Officer, or the Public Interest Disclosure Officer in consultation with the Principal Officer, will decide how the matter should be dealt with.

If the Ombudsman determines that the disclosure should be investigated, they will advise the Principal Officer.

Section 64 may be reconsidered at a later time during the investigation.

12.3. Employment Direction 5 investigations

[*Only relevant for public bodies covered by this direction*]

If a public body 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). It is not a relevant consideration, however, when determining whether or not to investigate a public interest disclosure that the matter may be, or is being, investigated under Employment Direction 5 (ED5) or another internal process.

ED5 investigations and the process under the Act for assessing and investigating disclosures are separate processes and the investigations should 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 an ED5 investigation given the confidentiality requirements of s23. As a minimum, however, if a public officer has raised an allegation about another public officer that may need to be investigated under ED5, then it should also be considered under these public interest disclosure procedures.

The two processes have a different focus. An ED5 investigation is aimed at investigating potential breaches of the State Service Code of Conduct by an employee and ensuring they are afforded procedural fairness, including informing them of the substance of the alleged breach and the intention to investigate. In contrast, a protected disclosure, whilst it can also be about a breach of the code, 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 an ED5 investigation concludes prior to the conclusion of a public interest disclosure investigation and the Principal Officer considers that the subject matter of the disclosure has been adequately dealt with through the ED5 process, they may decide not to further investigate the matter pursuant to s64(b). The notification process outlined above will need to be followed.

Consider seeking legal advice or contacting the Ombudsman for more information.

12.4. Appointment of investigator and framing of terms of reference

The Principal Officer – not a Public Interest Disclosure Officer - will determine who is to carry out the investigation.

The investigator will be given formal terms of reference, signed by the Principal Officer.

The terms of reference will specify:

- the matters to be investigated;
- the date by which the investigation is to be concluded;
- the requirement for regular reports to be made to the Principal Officer, including details of compliance with any measures identified in the risk assessment; and

- 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 s 77A(1). If at any stage before or during the investigation it appears that the investigation cannot be completed within six months, [NAME OF PUBLIC BODY] may apply to the Ombudsman for an extension of up to a further six months.

12.5. Investigation plan

The investigator should prepare an investigation plan for approval by the Principal 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.

12.6. 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.

[NAME OF PUBLIC BODY] 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:

- who is known to be biased against any person who is potentially subject to an adverse finding;
- who is known to hold any biases which are relevant to the subject matter of the investigation; or
- against whom there are reasonable grounds for apprehending or suspecting bias.[7]

[7] 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.

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 Principal 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:

- the allegations made against them, or which have arisen against them as a result of the investigation;
- 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
- 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.

12.7. Conduct of the investigation

The Integrity Commission's Guide to Managing Misconduct in the Tasmanian Public Sector[8] 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.

12.8. Referral of an investigation to the Ombudsman

Under s 68 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

[8] Accessible at https://www.integrity.tas.gov.au/publications/prevention-resources/guides.

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 (see Referral of criminal conduct to the Commissioner of Police above for more detail).

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

12.9. Provision of information about the investigation

The Principal Officer or the Public Interest Disclosure Officer 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 s 74(3), however, such information does not have to be given to the discloser if:

- it has already been given to the person; or
- 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 Principal Officer. The report should contain:

- the allegation/s;
- a description of the manner in which the investigation was conducted, with sufficient detail to demonstrate that natural justice was observed;
- an account of all relevant information received;
- 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
- 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 s 75 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:

- any steps that need to be taken by the [NAME OF PUBLIC BODY] to prevent the conduct from continuing or occurring in the future; and

- any action that should be taken by the [NAME OF PUBLIC BODY] 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:

- the transcript or other record of any oral evidence taken, including audio or video recordings; and

- 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, [NAME OF PUBLIC BODY] 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 Principal Officer should take into consideration any recommendations in the investigator's report, but can take different or broader action if appropriate.

The Principal Officer will provide a written report to [*name of 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. See the notification template at Attachment 3.

As required by s 77 of the Act, the Principal Officer will also inform the discloser of the findings of the investigation, and of any steps taken under s 75 as a result of those findings having been made.

Where the investigation concludes that the disclosed conduct did not occur, the Principal Officer will report that finding to the Ombudsman, in accordance with the notification template at Attachment 3, and to the discloser.

14. Managing the welfare of the discloser

14.1. Support for the discloser

The Principal Officer or the Public Interest Disclosure Officer 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 Principal Officer or a Public Interest Disclosure Officer, as this can be a potential further protected disclosure. If they believe that the reprisal is not being effectively dealt with by [NAME OF PUBLIC BODY], they may report the matter to the Ombudsman.

14.2. Keeping the discloser informed

The Principal Officer or the Public Interest Disclosure Officer 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 [NAME OF PUBLIC BODY] to address any improper conduct that has been found to have occurred. The discloser must be given reasons for all decisions made by [NAME OF PUBLIC BODY] 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:

- record details of the incident;
- advise the discloser of their rights under the Act; and
- assist the discloser to advise a Public Interest Disclosure Officer or the Principal 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 Public Interest Disclosure Officer or the Principal 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, [NAME OF PUBLIC BODY] 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 [NAME OF PUBLIC BODY] 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 Principal 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 Principal Officer must be satisfied that it has been clearly demonstrated that:

- 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);
- there are good and sufficient grounds that would fully justify action against any non-discloser in the same circumstances; and
- there are good and sufficient grounds that justify exercising any discretion to institute disciplinary or other action.

The Public Interest Disclosure Officer or Principal 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 Public Interest Disclosure Officer or Principal 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

[NAME OF PUBLIC BODY] 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.

[NAME OF PUBLIC BODY] 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 Public Interest Disclosure Officer or Principal Officer will ensure that the person who is the subject of any disclosure investigated by or on behalf of [NAME OF PUBLIC BODY] 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 Public Interest Disclosure Officer or Principal Officer will formally advise the person who is the subject of the disclosure of the outcome of the investigation.

[NAME OF PUBLIC BODY] 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 Principal Officer of [NAME OF PUBLIC BODY] will consider any request by that person to issue a statement of support setting out that the allegations were wrong or unsubstantiated.

16. Approval and review of these procedures

[*This is only relevant for a 'large public body', as defined in s60(4) of the Act. All other public bodies may amend this section to reflect their internal review process.*]

These procedures were approved by the Ombudsman under s 60(3) of the Act on [*date of approval*].

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 s 38(1)(c).

The date by which the procedures must be submitted to the Ombudsman for review is [*date*].

Assessment of disclosure form (Attachment 1)

Public Interest Disclosures Act 2002

File number: **Date of assessment:**

Name of assessing officer:

Summary of disclosure:
Include details of how the disclosure was received, the subject of the disclosure and details of the allegations.

An 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 may be required.

Part 1: Is the disclosure a protected disclosure?

Question 1: Is the discloser a public officer?

The discloser needs to be a current public officer. See s4(2) and s4(4) of the Act for the definition of a public officer. If the discloser is anonymous, it is enough to be satisfied that the discloser is a public officer.

If the discloser is a contractor, member of the public or no longer a public officer at the time the disclosure is made, refer them to the Ombudsman or Integrity Commission.

☐ Yes ☐ No

Please provide details if relevant:

Question 2: Is the disclosure about a public officer?

A disclosure can be made even if the discloser cannot identity the public officer – see s9 of the Act. If a disclosure is about the principal officer or the public body itself, refer the discloser to the Ombudsman or Integrity Commission.

☐ Yes ☐ No

Question 3: Has the disclosure been made to the right person or body?

See s7 of the Act and reg 8 of the Public Interest Disclosures Regulations 2013.

☐ Yes ☐ No

Please provide details:

Question 4: Does the discloser believe that a public officer has, is or proposes to engage in improper conduct?

☐ Yes ☐ No

If no, provide details:

Question 5: Does the disclosure relate to improper conduct?

Is the disclosure about conduct that could objectively fall within one of the categories of improper conduct, i.e:

- conduct that constitutes an illegal or unlawful activity; or
- corrupt conduct; or
- conduct that constitutes maladministration; or
- conduct that constitutes professional misconduct; or
- conduct that constitutes a waste of public resources; or
- conduct that constitutes a danger to public health or safety or to both public health and safety; or
- conduct that constitutes a danger to the environment; or
- misconduct, including breaches of applicable codes of conduct; or
- 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?

For example, a discloser may believe that taking a non-confidential work file home is serious or significant improper conduct but it may not objectively fall within that definition.

☐ Yes ☐ No

Please provide details:

Question 6: Does the disclosure concern conduct that occurred on or after 1 January 2001?

This is the only time limitation that is relevant when assessing if a disclosure is a protected disclosure. Delays in making a disclosure any time on or after 1 January 2001 can be relevant when deciding whether to investigate a public interest disclosure under s64 of the Act.

☐ Yes ☐ No

Assessment of Answers to Part 1 Questions

If **ALL** the answers to the above are yes, the disclosure is a protected disclosure.

The discloser should be notified as soon as possible, if the disclosure is a protected disclosure and the assessment of whether it is a public interest disclosure has not been undertaken simultaneously.

If **ANY** of the answers to the above are no, the disclosure is not protected and the Act does not apply. Refer the discloser to the appropriate body and/or handle the matter under complaint or grievance policies.

In either case, the discloser should be given reasons in writing. A copy of the assessment should be given to the Principal Officer without delay, where the person who carried out the assessment is not the Principal Officer.

Part 2: Should the protected disclosure be referred to the Integrity Commission?

Does the disclosure relate to misconduct, as defined in the *Integrity Commission Act 2009*?

☐ Yes ☐ No

If yes, should the disclosure be referred to the Integrity Commission under section 29B of the Act?

☐ Yes ☐ No

If yes, please provide details

If the disclosure is referred, the assessment process is complete after the discloser is notified of the referral.

Part 3: Is the protected disclosure a public interest disclosure?

Are you satisfied that the protected disclosure shows, or tends to show, that the public officer to whom the disclosure relates –

a) has engaged, is engaged or proposes to engage in improper conduct in his or her capacity as a public officer; or
b) has taken, is taking or proposes to take detrimental action in contravention of s 19 of the Act?

A mere allegation without substantiation is not sufficient – the disclosure must contain evidence or point to its existence (name documents, refer to potential witnesses etc) that shows or tends to show that the public officer is, has, or is proposing to engage in improper conduct.

This determination under s33 of the Act must be made within 45 days of the disclosure being received.

☐ Yes ☐ No

Provide reasons for your decision and attach evidence if available

Next steps

Notify the discloser and the Ombudsman of the assessment determination. Use the notification template attached to the public interest disclosure procedures when notifying the Ombudsman.

If the answer is no, the assessment is complete and Part 4 does not need to be completed. The Ombudsman will review the determination.

If the answer is yes, the public interest disclosure must be investigated unless a ground exists not to under s64 of the Act.

Part 4 - Is there a ground under s64 not to investigate the public interest disclosure?

Question 1: Is the public interest disclosure trivial, vexatious, misconceived or lacking in substance?

☐ Yes ☐ No

If yes, provide details. Compelling reasons will be required to justify not investigating on this ground:

Question 2: Has the subject matter of the public interest disclosure already been adequately dealt with by the Ombudsman or a public body, statutory authority, Commonwealth statutory authority, commission, court or tribunal?

☐ Yes ☐ No

If yes, please provide details

Question 3: Has the discloser commenced proceedings in a commission, court or tribunal in relation to the same matter, and does that commission, court or tribunal have power to order remedies similar to those available under this Act?

☐ Yes ☐ No

If yes, please provide details

Question 4: Did the discloser:

- **have knowledge for more than 12 months of the public interest disclosure matter before making the disclosure; and**
- **fail to give a satisfactory explanation for the delay in making the disclosure?**

☐ Yes ☐ No

If yes, provide details of this issue being put to the discloser and analysis concerning why any explanation provided was not satisfactory:

Question 5: Does the public interest disclosure relate solely to the personal interests of the discloser?

☐ Yes ☐ No

Most disclosures will contain some element of personal interest. This should only be used as a basis to not investigate in clear circumstances.

If yes, please provide details:

Question 6: Is the public interest disclosure based on false or misleading information?

☐ Yes ☐ No

If yes, please provide details and consider whether an offence may have been committed under s87 of the Act.

Question 7: Has the matter the subject of the public interest disclosure already been determined AND this additional disclosure fails to provide significant or substantial new information?

☐ Yes ☐ No

If yes, please provide details

Assessment of Answers to Part 4 Questions

If the answers to **ALL** the questions in Part 4 are no, the disclosure **must** be investigated in accordance with the public interest disclosure procedures. Referral to the Ombudsman can occur if internal investigation is not possible or appropriate.

If the answer is yes to **one or more of the above questions**, will the public interest disclosure be investigated?

Although the public interest disclosure may not need to be investigated if an answer to any of the Part 4 questions is yes, it may still be appropriate to investigate in some circumstances.

☐ Yes ☐ No

Provide reasons for your decision:

Notify the discloser and the Ombudsman if it is decided not to investigate. The Ombudsman will review the decision. Use the notification template attached to the public interest disclosure procedures when notifying the Ombudsman.

Summary

Part	Question	Answer
Part 1	Is the disclosure a protected disclosure?	
Part 2	Should the protected disclosure be referred to the Integrity Commission?	
Part 3	Is the protected disclosure a public interest disclosure?	
Part 4	Should the public interest disclosure be investigated?	

Approval

Approved by:
Name of Public Interest Disclosure Officer or Principal Officer:

Date of approval:

Risk assessment template (Attachment 2)

Public Interest Disclosures Act 2002

File number: **Date of assessment:** **Name of assessing officer:**

Risk assessed to:

Please select all relevant options

☐ Discloser

☐ Other employees including potential witnesses

☐ Your public body

☐ Other (e.g. Tasmanian Government, the general public)

☐ The subject of the disclosure

Type of risk / possible harm

Such as:

- Adverse employment action
- Workplace injury
- Physical violence
- Verbal abuse
- Stress
- Untenable work environment
- Withdrawal of cooperation due to fear of reprisal/lack of support
- Reputational damage
- Risk to public safety
- Misuse of public funds
- Disruption to functioning of public body

Please provide details:

Likelihood risk/s will occur

☐ Unlikely

☐ Possible

☐ Likely

Considerations:

- Can confidentiality be maintained?
- Is the discloser (or others) concerned about reprisals?
- How many public officers are involved in the alleged improper conduct?
- What is their level of seniority?

- What is the seriousness of the alleged conduct?
- Is there a history of conflict in the workplace?

Please provide your reasons:

Seriousness of consequences if risk/s occurs

☐ Minor

☐ Moderate

☐ Major

Considerations:

- What is the potential impact if the risk occurs?
- Will the impact be limited, with the person able to readily deal with it?
- Will the impact have consequences which will affect the person's work or their personal and home life?
- Will the consequences be short-term, medium-term or long-term?

Please provide your reasons:

Evaluation of level of risk

Risk occurrence	Minor consequence	Moderate consequence	Major consequence
Unlikely	Low	Low	Medium
Possible	Low	Medium	High
Likely	Medium	High	High

Determine your level of risk:

Steps needed to mitigate risk

Consult with discloser and other parties as required. Possible strategies include:

- maintaining confidentiality as much as possible
- ensuring all parties are aware of their obligations
- when the identity of the discloser will be known or guessed by the subject of the disclosure and/or associates, proactively identifying the discloser (with their written permission) and advising relevant parties of the consequences of taking reprisal action and that their actions are being monitored
- altering reporting structures
- increasing monitoring of the work environment
- standing down the subject of the disclosure
- temporarily relocating the subject of the disclosure or the discloser to a different location/ role
- independently verifying the work performance of the discloser
- providing access to specialist support services if required
- making a statement to all staff or the media to address concerns

Please provide details:

Action to be taken

Considerations:

- risk rating
- ease or difficulty of mitigating risk
- financial cost of taking action
- consequences of not taking action should risk occur

Please provide details of your risk action plan:

Approval

Approved by: **Date of approval**

Public Interest Disclosure Officer or Principal Officer – Type Name

Risk assessment review

Risk assessment to be reviewed on (date) or when (event) occurs.

Name of reviewing officer: **Date of assessment:**

Notes on changes to risk since last assessment

Review outcome

☐ No change to action plan

☐ Further action required

Please provide details:

Thank you to the Queensland Ombudsman for the use of some of its risk assessment materials in this template.

Ombudsman notification template (Attachment 3)

Public Interest Disclosures Act 2002

Public body name: **Date of disclosure:**

Contact person: *(include telephone and email contact details)*

Date of s 33 determination: *(to be made within 45 days of date of disclosure)* **Date of notification:**

Notification type

☐ Section 34 – Determination that disclosure is a public interest disclosure
Notification to be made within 14 days of decision

☐ Section 35 – Determination that disclosure is not a public interest disclosure
Notification to be made within 14 days of decision

☐ Section 65 – Decision not to investigate public interest disclosure under s 64
Notification to be made within 14 days of decision

☐ Section 76 – Findings of investigation and steps taken under s 75
Investigation to be completed within 6 months unless Ombudsman extension granted

Evidence attached

☐ Copy of original disclosure or record of oral disclosure

☐ Disclosure assessment

☐ Risk assessment/s

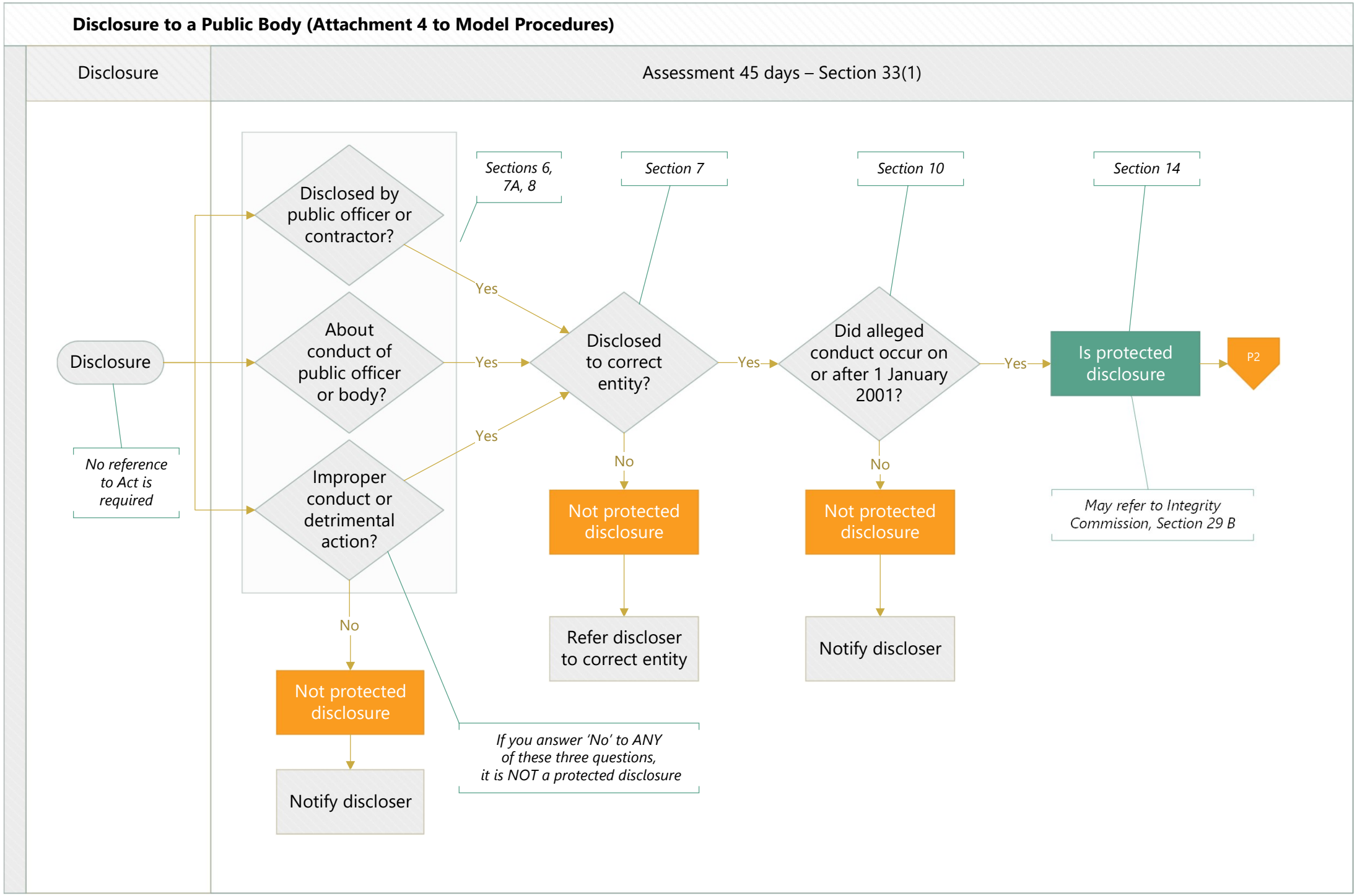
☐ Investigation report including:

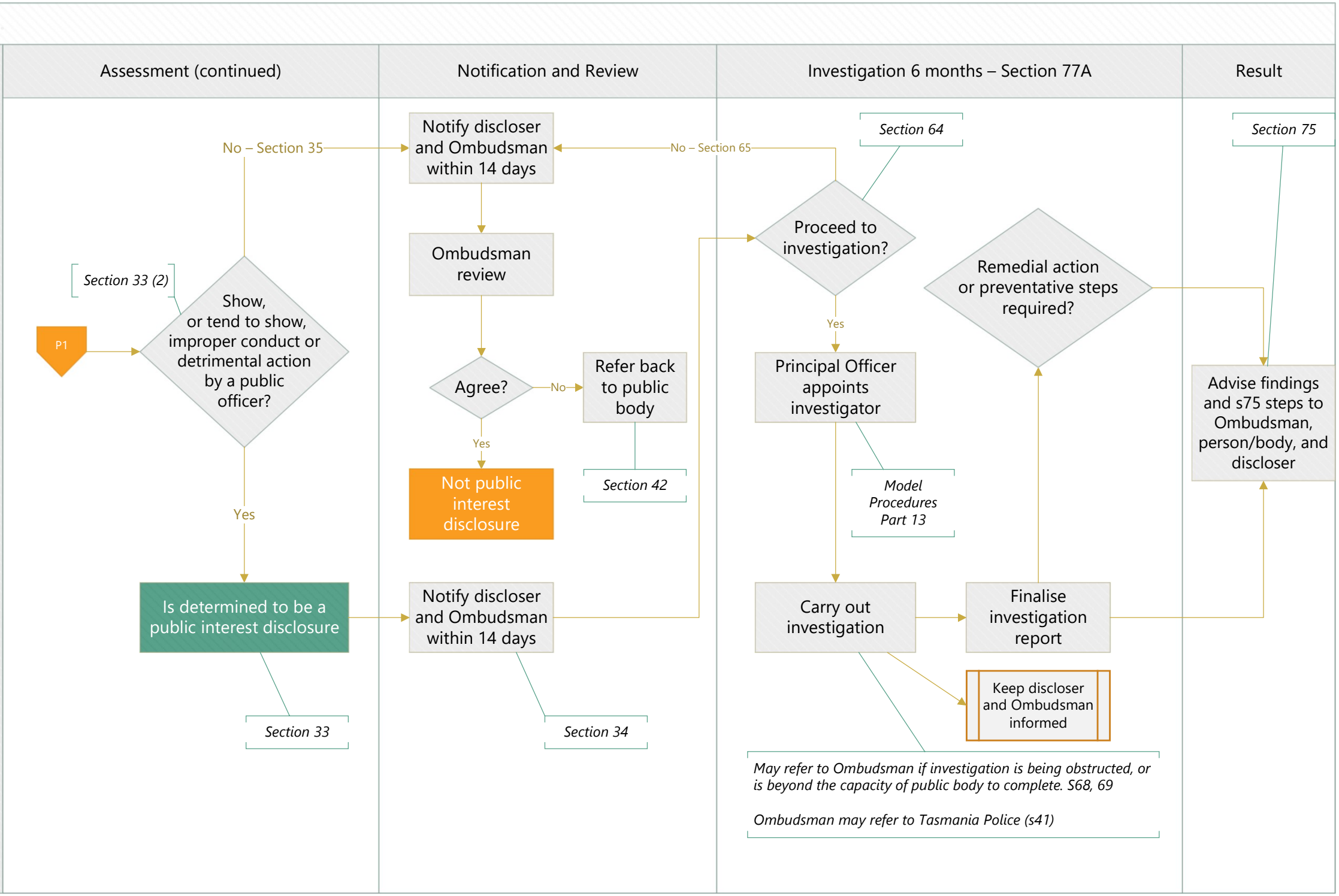
- the transcript or other record of any oral evidence taken, including audio or video recordings; and
- all documents, statements or other exhibits received by the investigator and accepted as evidence during the course of the investigation.

☐ Any other material used to make determination (list):

-
-
-

Disclosure to a Public Body (Attachment 4 to Model Procedures)




Assessment (continued)
Notification and Review
Investigation 6 months – Section 77A
Result
P1
Section 33 (2)
Show, or tend to show, improper conduct or detrimental action by a public officer?
No – Section 35
Yes
Is determined to be a public interest disclosure
Section 33
Notify discloser and Ombudsman within 14 days
Ombudsman review
Agree?
No
Refer back to public body
Section 42
Yes
Not public interest disclosure
Notify discloser and Ombudsman within 14 days
Section 34
No – Section 65
Section 64
Proceed to investigation?
Yes
Principal Officer appoints investigator
Model Procedures Part 13
Carry out investigation
Finalise investigation report
Keep discloser and Ombudsman informed
Remedial action or preventative steps required?
May refer to Ombudsman if investigation is being obstructed, or is beyond the capacity of public body to complete. S68, 69
Ombudsman may refer to Tasmania Police (s41)
Section 75
Advise findings and s75 steps to Ombudsman, person/body, and discloser