

PROTECTED DISCLOSURE ACT 2012

PROCEDURES

VERSION 1.3

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For further information or clarification please contact Council's Protected Disclosure Coordinator, Melinda Viksne, at Darebin Municipal Offices – telephone 8470 8301.

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1. Statement of Support for Persons making Protected Disclosures

Darebin City Council (**Council**) is committed to the aims and objectives of the *Protected Disclosure Act 2012* (**the Act**). Council does not accept improper conduct by its members, officers or employees, nor reprisals against those who come forward to disclose such conduct.

Council recognises the value of transparency and accountability in its administrative and management practices, and supports the making of disclosures that reveal corrupt conduct, conduct involving a substantial mismanagement of public resources or conduct involving a substantial risk to public health and safety or the environment.

Council will take all reasonable steps to protect people who make such disclosures from any detrimental action in reprisal for making the disclosure.

2. Purpose of these Procedures

These Procedures establish a system for reporting disclosures of improper conduct or detrimental action by Council or its members, officers or employees. They are intended to facilitate the handling and management of disclosures, including notifications to the Independent Broad-based Anti-corruption Commission (**IBAC**), as well as establish procedures for protecting people against detrimental action. These Procedures have been adopted to ensure that Council complies with the requirements of the Act.

In addition to these Procedures, Council is committed to processes which provide:

- (a) secure information management systems for the receipt, storage, assessment and notification of protected disclosures, including:
 - (i) an internal reporting structure; and
 - (ii) identification of the roles and responsibilities of those in the reporting structure;
- (b) a secure process for receiving verbal or written disclosures;
- (c) the appointment of Melinda Viksne as the Protected Disclosure Coordinator (PDC), who receives and assesses disclosures;
- (d) a secure means of notifying IBAC of protected disclosures;
- (e) education and training for selected staff in the receipt, handling, assessment and notification of disclosures and welfare management of persons associated with a protected disclosure; and
- (f) the collection and collation of statistics on protected disclosures for inclusion in Council's Annual Report.

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.

3. Objects of the Act

The Act commenced operation on 10 February 2013. It replaces the *Whistleblowers Protection Act 2001* and amends the *Ombudsman Act 1973*. The purpose of the Act is to encourage and facilitate the making of disclosures of improper conduct by public officers and public bodies and establish a system for matters to be investigated. The Act provides protection from detrimental action to persons who make a disclosure or who cooperate or intend to cooperate with an investigation of a protected disclosure.

4. Definitions of key terms

Three key concepts in the reporting system are improper conduct, corrupt conduct and detrimental action. Definitions of these terms are set out below.

4.1 *Improper conduct*

A disclosure may be made about improper conduct by a public body or public official. Improper conduct is defined by section 4 of the Act as follows:

- (1) For the purposes of this Act, improper conduct means –
 - (a) corrupt conduct; or
 - (b) conduct specified in subsection (2) that is not corrupt conduct but that, if proved, would constitute –
 - (i) a criminal offence; or
 - (ii) reasonable grounds for dismissing or dispensing with, or otherwise terminating the services of the officer who was, or is, engaged in that conduct.
- (2) For the purposes of subsection (1)(b), **specified conduct** is conduct–
 - (a) of any person that adversely affects the honest performance by a public officer or public body of his or her or its functions as a public officer or public body; or
 - (b) of a public officer or public body that constitutes or involves the dishonest performance of his or her or its functions as a public officer or public body; or
 - (c) of a public officer or public body that constitutes or involves knowingly or recklessly breaching the public trust; or
 - (d) of a public officer or public body that involves the misuse of information or material acquired in the course of the performance of his or her or its functions as a public officer or public body, whether or not for the benefit of the public officer or public body or any other person; or
 - (e) that could constitute conspiracy or an attempt to engage in any conduct referred to in paragraph (a), (b), (c) or (d); or
 - (f) of a public officer or public body in his or her capacity as a public officer or its capacity as a public body that –
 - (i) involves substantial mismanagement of public resources; or
 - (ii) involves substantial risk to health or safety; or
 - (iii) involves substantial risk to the environment.

Specified conduct must be serious enough to constitute, if proved, a criminal offence or reasonable grounds for dismissal.

Examples

To avoid closure of local industry, an environmental health officer ignores or conceals evidence of illegal dumping of waste.

A building inspector tolerates poor practices and structural defects in the work of a local builder.

4.2 *Corrupt conduct*

Corrupt conduct is defined by section 4 of the *Independent Broad-based Anti-corruption Commission Act 2011* (which definition is adopted by section 3 of the Act) as follows:

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- (1) For the purposes of this Act, **corrupt conduct** means conduct—
- (a) of any person that adversely affects the honest performance by a public officer or public body of his or her or its functions as a public officer or public body; or
 - (b) of a public officer or public body that constitutes or involves the dishonest performance of his or her or its functions as a public officer or public body; or
 - (c) of a public officer or public body that constitutes or involves knowingly or recklessly breaching public trust; or
 - (d) of a public officer or a public body that involves the misuse of information or material acquired in the course of the performance of his or her or its functions as a public officer or public body, whether or not for the benefit of the public officer or public body or any other person; or
 - (da) of a person (the first person) intended to adversely affect the effective performance or exercise by a public officer or public body of the functions or powers of the public officer or public body and result in the first person or an associate of the first person obtaining—
 - (i) a licence, permit, approval, authority or other entitlement under any Act or subordinate instrument; or
 - (ii) an appointment to a statutory office or as a member of the board of any public body under any Act or subordinate instrument; or
 - (iii) a financial benefit or real or personal property; or
 - (iv) any other direct or indirect monetary or proprietary gain—
that they would not have otherwise obtained; or
 - (e) that could constitute a conspiracy or an attempt to engage in any conduct referred to in paragraph (a), (b), (c), (d) or (da)—
being conduct that would constitute a relevant offence.
- (1A) For the purposes of this Act, in determining whether conduct would constitute a relevant offence, the IBAC may assume that the required state of mind to commit the relevant offence can be proven.
- (2) Conduct may be **corrupt conduct** for the purposes of this Act if—
- (a) all or any part of the conduct occurs outside Victoria, including outside Australia; and
 - (b) the conduct would be corrupt conduct if it occurred in Victoria.
- (2A) For the purposes of section 4(1)(da), the effective performance or exercise by a public officer or public body of the functions or powers of the public officer or public body may be adversely affected notwithstanding that the public officer or public body does not engage in any corrupt conduct or other misconduct in performing or exercising those functions or powers.
- (2B) For the purposes of section 4(1)(da), an associate of a first person is—
- (a) a person or entity who has an agreement, arrangement or understanding with the first person or holds any relevant financial interest in any business of the first person;
 - (b) if the first person is a natural person, a person who is a relative of the first person;
 - (c) if the first person is a body corporate—
 - (i) an entity of whom the first person is an associate within the meaning of section 11 of the Corporations Act; or
 - (ii) an employee or officer of a related body corporate within the meaning of the Corporations Act to the first person.
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(2C) For the purposes of subsection (2B)—

relative means—

- (a) the spouse or domestic partner of the first person;
- (b) a parent, son, daughter, brother, sister, aunt, uncle, grandparent, cousin, nephew or niece of the first person;
- (c) a step-father, step-mother, legal guardian, step-son, step-daughter, step-brother, step-sister, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law or sister-in-law of the first person;
- (d) a parent, son, daughter, brother, sister, aunt, uncle, grandparent, cousin, nephew or niece of the spouse or domestic partner of the first person;
- (e) a step-father, step-mother, legal guardian, step-son, step-daughter, step-brother, step-sister, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law or sister-in-law of the spouse or domestic partner of the first person;

relevant financial interest includes any share in the capital of a business of the first person or any entitlement to receive any income or payment from a business of the first person.

- (3) This Act does not apply to any conduct of any person that can be considered by the Court of Disputed Returns in proceedings in relation to a petition under Part 8 of the **Electoral Act 2002**.

The conduct must be serious enough to constitute, if proved, a criminal offence, being an indictable offence, an attempt to pervert the course of justice, bribery of a public official or perverting the course of justice.

Examples

A public officer takes a bribe or receives a payment other than his or her wages or salary in exchange for the discharge of a public duty.

A public officer favours unmeritorious applications for jobs or permits by friends and relatives. A public officer sells confidential information.

4.3 Detrimental action

The Act makes it an offence for a person to take detrimental action against a person in reprisal for making a disclosure. Detrimental action is defined by section 3 of the Act as including:

- (a) action causing injury, loss or damage;
- (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.

Examples

A public body refuses a deserved promotion of a person who makes a disclosure.

A public body demotes, transfers, isolates in the workplace or changes the duties of a person who has made a protected disclosure.

A person threatens, abuses or carries out other forms of harassment directly or indirectly against a person who has made a protected disclosure, his or her family or friends.

A public body discriminates against a person who has made a protected disclosure or his or her family and associates in subsequent applications for jobs, permits or tenders.

5. The Reporting System

5.1 Contact persons within the Darebin City Council

Council's Chief Executive Officer (CEO) has established the following structure for implementation of the protected disclosure legislation at Council.



Melinda Viksne, Manager Governance and Performance, is the delegated PDC. Melinda can be contacted on:

Telephone: (03) 8470 8301 or 0403 448 674
Email: melinda.viksne@darebin.vic.gov.au

Disclosures of improper conduct or detrimental action by Council or its employees, may be made to the PDC or the CEO or can be made directly to the IBAC or the Ombudsman.

A disclosure that relates to a Councillor **must** be made to the IBAC or the Ombudsman.

All correspondence, telephone calls and emails from internal or external persons making a disclosure to someone other than the PDC will be referred, at first instance, to the PDC.

Where a person is contemplating making a disclosure and is concerned about approaching the PDC in the workplace, he or she can call the PDC and request a meeting in a discreet location away from the workplace.

Copies of Council's *Protected Disclosure Act 2012 - Disclosure Form and Guidelines* are available at Council's Customer Service Centres.

5.2 Alternative Contact Persons

A disclosure about improper conduct or detrimental action by Council or its members, officers or employees may be made directly to IBAC:

Address: Level 1, North Tower, 459 Collins Street
Melbourne, Victoria 3000

GPO Box 24234
Melbourne, Victoria, 3000

Toll Free: 1300 735 135
Fax: (03) 8365 6444
Internet: www.ibac.vic.gov.au

Or to the Ombudsman:

Address: Level 2, 570 Bourke Street
Melbourne Victoria 3000
(DX 210174)

Tel: (03) 9613 6222
Toll Free: 1800 806 314
Internet: www.ombudsman.vic.gov.au
Email: ombudvic@ombudsman.vic.gov.au

6. Roles and Responsibilities

6.1 Employees

Employees are encouraged to report known or suspected incidences of improper conduct or detrimental action in accordance with these Procedures.

All Council employees have an important role to play in supporting those who have made a legitimate disclosure. They must refrain from any activity that is, or could be perceived to be, victimisation or harassment of a person who makes a disclosure. Furthermore, they should protect and maintain the confidentiality of a person they know or suspect to have made a disclosure.

6.2 Protected Disclosure Coordinator

The PDC will:

- (a) receive all phone calls, emails and letters from members of the public or Council employees seeking to make a disclosure;
- (b) receive any disclosure made orally or in writing (from internal and external persons who have made protected disclosures);
- (c) commit to writing any disclosure made orally;
- (d) make arrangements for a disclosure to be made privately and discreetly and, if necessary, away from the workplace;
- (e) impartially assess each disclosure (in conjunction with the CEO) to determine whether it is a disclosure made in accordance with Part 2 of the Act (i.e. a protected disclosure);
- (f) within 28 days of receipt, notify a disclosure that the PDC thinks is a protected disclosure to IBAC for assessment;
- (g) take all necessary steps to ensure the identity of the person who has made the protected disclosure and the identity of the person who is the subject of the protected disclosure are kept confidential;
- (h) be a contact point for general advice about the operation of the Act and for integrity agencies such as IBAC;
- (i) appoint (in consultation with the CEO) a Welfare Manager to support the person who has made the protected disclosure and to protect him or her from any reprisals;
- (j) be responsible for ensuring that Council carries out its responsibilities under the Act and any guidelines published by IBAC;
- (k) liaise with IBAC in regard to the Act;
- (l) coordinate the reporting system used by the organisation;
- (m) establish and manage a confidential filing system;

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- (n) collate and publish statistics on disclosures made; and
 - (o) liaise with the CEO.

If the need arises the CEO may appoint Protected Disclosure Officers to assist the PDC.

6.3 Welfare Manager

The Welfare Manager is responsible for looking after the general welfare of the person who has made the protected disclosure. The Welfare Manager will:

- (a) examine the immediate welfare and protection needs of a person who has made a protected disclosure and, where that person is an employee, seek to foster a supportive work environment;
- (b) advise the person who has made the protected disclosure of the legislative and administrative protections available to him or her;
- (c) listen and respond to any concerns of harassment, intimidation or victimisation in reprisal for making the disclosure;
- (d) ensure the confidentiality of the identity of the discloser and the content of the disclosure in accordance with the Act;
- (e) keep a contemporaneous record of all aspects of the case management of the person who made the protected disclosure including all contact and follow-up action; and
- (f) ensure the expectations of the person who made the protected disclosure are realistic.

7. Confidentiality

Council will take all reasonable steps to protect the identity of a person who has made a protected disclosure. Maintaining confidentiality is crucial in ensuring reprisals are not made against a person who has made a protected disclosure.

It should be noted that a person making a disclosure is not bound by the confidentiality requirements of sections 52 and 53 of the PD Act, however it is an offence for a person to disclose that a matter has been referred to IBAC, pursuant to section 184 of the *IBAC Act*. There are also other obligations on a person making a protected disclosure which are outlined under section 9.7 of these Procedures.

Section 52 of the Act requires any person who receives information through the handling of a protected disclosure, not to disclose that information, except if:

- (a) the person or body discloses the content, or information about the content, of the assessable disclosure—
 - (i) in accordance with section 54; or
 - (ii) in accordance with a direction or authorisation given by the investigating entity that is investigating the disclosure; or
 - (iii) to the extent necessary for the purpose of taking lawful action in relation to the conduct that is the subject of the assessable disclosure including a disciplinary process or action; or
- (b) the IBAC or the Victorian Inspectorate has determined that the assessable disclosure is not a protected disclosure complaint and the person or body discloses the content, or information about the content, of the assessable disclosure after that determination; or
- (c) an investigating entity has—

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- (i) published in a report to Parliament under this or any other Act, or otherwise made public, the content, or information about the content, of the assessable disclosure; and
 - (ii) in doing so, acted consistently with the obligations relating to confidentiality that apply to the investigating entity under this Act—

and the person or body discloses the content, or information about the content, of the assessable disclosure after that publication.

Further, section 53 of the Act requires that the identity of the person making the disclosure must not be disclosed, except in certain limited circumstances.

According to section 54 of the Act, this includes circumstances where:

- (a) the discloser has given their consent, in writing, to the disclosure of their identity;
- (b) IBAC has determined that the assessable disclosure is not a protected disclosure complaint (then the confidentiality provisions cease to apply);
- (c) it is necessary for the purpose of the exercise of Council's functions under the Act;
- (d) it is necessary for the purpose of obtaining legal advice or legal representation;
- (e) it is necessary to use an interpreter for persons who require such assistance;
- (f) the information is disclosed to a parent or guardian of a person who is under 18 years of age; or
- (g) the information is disclosed to an independent person, for the purposes of enabling a person who is suffering a disability to understand an obligation under the Act.

Disclosure of information in breach of either section 52 or section 53 of the Act constitutes an offence that is punishable, in the case of a natural person, by a maximum fine of 120 penalty units (\$19,342.80*) or twelve months imprisonment or both and, in the case of a body corporate, a maximum fine of 600 penalty units (\$96,714.00*).

Council will ensure that all files, whether paper or electronic, are kept securely and can only be accessed by the PDC or the Welfare Manager (in relation to welfare matters). All printed material will be kept in files that are clearly marked as a 'Protected Disclosure Act Matter', and warn of the criminal penalties that apply to any unauthorised divulging of information concerning a protected disclosure. All electronic files will be produced and stored on a stand-alone computer or be given password protection. Backup files will be kept on a disk/USB stick. All materials relevant to an investigation, such as tapes from interviews, will also be stored securely with the protected disclosure files.

*(*As at 1 July 2018 the value of one penalty unit is \$161.19. This figure is subject to change and is generally adjusted on 1 July each year by the Department of Treasury and Finance.)*

The Council will not email documents relevant to a person who has made a protected disclosure matter and will ensure all telephone calls and meetings are conducted in private.

8. Collating and Publishing Statistics

The PDC will establish a secure register to record the information required to be published in its Annual Report, and to generally keep account of the status of persons who have made protected disclosures. The register will be confidential and will not record any information that may identify the person who has made the protected disclosure.

Section 70 of the Act requires that Council include in its Annual Report information about how to access Council's Protected Disclosure Procedures under Part 9 of the Act as well as the number of disclosures assessed by Council to be protected disclosures and notified to IBAC for assessment during the year.

While Council is required to include this information about protected disclosures in its Annual Report, the Act prohibits the inclusion of any particulars of any report or recommendation that are likely to lead to the identification of the discloser or the person the subject of the disclosure.

9. Receiving and Assessing Disclosures

A disclosure is a report made by a person about improper conduct of Council, or a member, officer or employee of Council, to any of the organisations specified in Part 2 of the Act. A disclosure can also be made about detrimental action against a person by Council or a member, officer or employee of Council in reprisal for the making of a protected disclosure by any person. The disclosure can relate to improper conduct or detrimental action against a person that may already have taken place, may be occurring now, or that Council, or a member, officer or employee of Council, may be going to undertake in the future. Disclosures can be made about conduct that occurred prior to the commencement of the Act on 10 February 2013.

A complaint or allegation that is already in the public domain will not normally be a protected disclosure (e.g. if the matter has already been subject to media or other public commentary). The term 'disclosure' is interpreted under the Act in the ordinary sense of the word as a 'revelation' to the person receiving it.

Where a disclosure has been received by the PDC, he or she will assess whether the disclosure meets the criteria of Part 2 of the Act and is, therefore, a protected disclosure.

Pursuant to section 40 of the Act, a person making a protected disclosure does not commit an offence under section 95 of the *Constitution Act 1975* or a provision of any other Act that imposes a duty to maintain confidentiality with respect to a matter or any other restriction on the disclosure of information; or breach an obligation by way of oath or rule of law or practice or under an agreement requiring him or her to maintain confidentiality or otherwise restricting the disclosure of information with respect to a matter (e.g. an employment contract), unless they have contravened section 72(1) or (2) in relation to the information disclosed. (See Section 12 of these Procedures for further information in relation to Offences).

9.1 How can a disclosure be made?

A person may make a disclosure:

- (a) orally;
- (b) in writing; or
- (c) electronically; and
- (d) anonymously.

Any person can submit an allegation or complaint. The Act does not require the individual to be an employee of the public body they are complaining about, or a public sector employee. The complaint must be made by an individual and not by a company, organisation or group of people.

9.1.1 Oral disclosure

A person can make an oral disclosure:

- (a) in person;
- (b) by telephone;
- (c) by leaving a voice mail message; or
- (d) by any other form of electronic communication that does not require writing (note that an email is considered to be a written disclosure).

The disclosure must be made in private, meaning that the person making the disclosure must reasonably believe that only the following people are present or able to listen to the conversation:

- (a) the person making the disclosure;
- (b) a lawyer representing the person (if any); or
- (c) one or more people to whom a disclosure can be made under the Act or the *Protected Disclosure Regulations 2013 (Regulations)*.

This does not preclude a group of individuals from making of a joint disclosure at the one time.

If the disclosure is made orally, Council will ensure that the person receiving the disclosure makes notes at the time recording the disclosure. This person could also record the conversation, but should only do so with the discloser's permission or by giving prior warning that the conversation will be recorded.

9.1.2 Written disclosure

A written disclosure can only be provided to Council by:

- (a) personal delivery to the Darebin Civic Centre;
- (b) mail addressed to Council; or
- (c) email to Council's email address, or to the email address of the PDC.

IBAC and the Ombudsman can also accept a written disclosure via an online form. Disclosures cannot be made by facsimile.

9.1.3 Anonymous disclosure

A discloser need not identify themselves to Council to make a disclosure.

An anonymous disclosure can be made by using an unverifiable email address, through anonymous telephone calls or in a face-to-face conversation or meeting where the person refuses to identify themselves (provided that meeting or conversation takes place 'in private' in accordance with the Regulations).

If the disclosure comes from an email address where the identity of the person making the disclosure cannot be determined, the disclosure will be treated as an anonymous disclosure.

9.2 *Has the disclosure been made to the appropriate person?*

For the disclosure to be responded to by Council, it must concern Council or a member, officer or employee of Council. A disclosure can be made to:

- (a) the CE;
- (b) the PDC;
- (c) if the person making the disclosure is an employee or officer of Council, to an employee who directly or indirectly supervises or manages that person; or
- (d) if the disclosure relates to an employee or officer of Council, to an employee who directly or indirectly supervises or manages that person.

If the disclosure concerns a member, officer or employee of another public body, Council will endeavour to advise the person making the disclosure of the correct person or body to whom or to which the disclosure should be directed. (If the misdirected disclosure has been made anonymously, it will be referred to IBAC).

Disclosures relating to Councillors **must** be made directly to IBAC or the Ombudsman.

9.3 Does the disclosure contain the essential elements of a protected disclosure?

To be a protected disclosure, a disclosure must satisfy the following criteria:

- (a) Did a natural person (that is, an individual person rather than a corporation) make the disclosure?
- (b) Does the disclosure relate to conduct of a member, officer or employee of Council acting in their official capacity?
- (c) Is the alleged conduct either improper conduct or detrimental action taken against a person in reprisal for making a protected disclosure?

If one or more of the above elements is not satisfied, the person has not made a disclosure under Part 2 of the Act.

If Council receives a disclosure that does not meet these requirements, it is not required under the Act to consider whether it is a protected disclosure. However, to ensure that disclosers are not deprived of the opportunity to receive protection, if Council receives what appears to be a disclosure about improper conduct or detrimental action which has not met all the requirements of the Act, it will consider whether to tell the person about the correct way to make a disclosure, so that they have an opportunity to meet the legislative requirements.

9.4 How will a disclosure be assessed?

In assessing whether there is improper conduct or detrimental action, the PDC will consider all information about the alleged conduct and about the discloser, in particular:

- (a) the discloser's connection to the alleged conduct (whether they are a victim, witness or participant);
- (b) how they came to know about the conduct (whether they were directly involved, observed it happening to another person or heard it from someone else);
- (c) how detailed the information provided is (whether there is sufficient information to enable the PDC to consider whether there is improper conduct or detrimental action); and
- (d) how reliable the information is (whether it is supported by other information).

The PDC will apply one of two tests (set out in section 9(1) of the Act) for determining whether there is a disclosure of improper conduct or detrimental action (the alleged conduct) that falls under Part 2 of the Act.

Test 1 – Does the information show or tend to show there is improper conduct or detrimental action?

The information needs to be assessed as to whether it satisfies the 'elements' of either improper conduct or detrimental action as defined by the Act and whether any of the exceptions apply.

If it is not clear that the information disclosed shows or tends to show that there is improper conduct or detrimental action, then the second test can be applied.

Test 2 – Does the discloser believe on reasonable grounds that the information shows or tends to show there is improper conduct or detrimental action?

This means that the person must actually believe that the information shows or tends to show there is improper conduct or detrimental action and his or her belief must be 'reasonable'.

This means that the person's belief is based on facts that would be sufficient to make a reasonable person believe there was improper conduct or detrimental action.

This reasonable belief does not have to be based on actual proof that the improper conduct or detrimental action in fact occurred, is occurring, or will occur, but there must be some information supporting this belief. The grounds for the reasonable belief can leave something to surmise or to conjecture, but it must be more than just a reasonable suspicion, and the belief must be probable.

Simply stating that improper conduct or detrimental action is occurring, without providing any supporting information, would not be a sufficient basis for having a reasonable belief. A belief cannot be based on a mere allegation or conclusion unsupported by any further facts or circumstances. For example, it would not be sufficient for a person's disclosure to consist just of a one sentence statement 'I know X is corrupt'.

Other matters that can be considered in determining whether there are reasonable grounds for the discloser's belief is the reliability of the information they have provided, even if it is second or third hand. The PDC can consider:

- (a) how the person would have obtained the information and the amount of detail that has been provided; and
- (b) the credibility of the discloser, or of those people who have provided the discloser with information.

At the conclusion of this assessment, the PDC will be in a position to decide what to do with the disclosure. If it is considered to be a protected disclosure, IBAC will be notified.

9.5 What is the effect of the PDC's determination of a disclosure?

Where the PDC determines that a disclosure is a protected disclosure, he or she will notify the protected disclosure to the IBAC. That notification must be made within 28 days of receiving the disclosure and the person making the disclosure must also be notified of it.

Where a disclosure is assessed not to be a protected disclosure, Council must notify the person making the disclosure of that decision and the matter does not need to be dealt with under the Act. The PDC will decide how the matter should be responded to in consultation with the CE, and the person making the disclosure will be advised of alternative complaint mechanisms available for addressing the allegations comprising the original disclosure.

9.6 Protection of a person who has made a protected disclosure

If a disclosure is assessed as a protected disclosure under the Act then:

- (a) it is an offence for any person to take any reprisals or actions that are detrimental to the person who has made the protected disclosure;
- (b) a person who has made a protected disclosure has a defence to any defamation proceedings that arise from a disclosure;
- (c) the disclosure is confidential and it is an offence for the information to be disclosed (unless in the exercise of functions under the Act);
- (d) a person who has made a protected disclosure can take Supreme Court action in respect of any detrimental action or reprisals taking place against him/her; and
- (e) a person who has made a protected disclosure cannot be subject to any administrative law, civil or criminal liability for making the disclosure.

If a disclosure is not assessed as a protected disclosure then:

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- (a) the person making the disclosure will not receive the protections listed above and set out in the Act;
 - (b) the confidentiality provisions under Part 7 of the Act will no longer apply to the disclosure; and

the disclosure will not be notified to IBAC for assessment under the Act.

9.7 Obligations of a person making or who has made a Protected Disclosure

Whilst there are a range of protections afforded to a person making or who has made a protected disclosure, that person also has a number of obligations.

A person must not:

- provide information under the Act that the person knows is false or misleading in a material particular with the intention that the information be acted on as a protected disclosure (section 72(1) of the Act);
- provide further information relating to a protected disclosure made by the person, that the person knows is false or misleading in a material particular (section 72(2) of the Act);
- claim that a matter is a protected disclosure knowing that claim to be false (section 73(1));
- claim that a matter is the subject of a disclosure that the IBAC or the Victorian Inspectorate has determined to be a protected disclosure complaint knowing that claim to be false (section 73(2)); or
- disclose certain advice received from certain entities or IBAC except in circumstances provided for in section 74(5) of the Act (section 74(1)-(4)).

Breaches of the Act could result in a fine(s), imprisonment, or both. Further information in relation to Offences can be found under Section 12 of these Procedures.

9.8 Assessment by the IBAC

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

The IBAC must inform Darebin City Council of its determination as to whether or not the disclosure is a protected disclosure complaint:

- in writing; and
- within a reasonable time after making the determination.

In making its assessment, the IBAC may seek additional information from the Council or from the discloser if the IBAC considers there is insufficient information to make a decision.

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

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

- the IBAC has determined that the disclosure is not a protected disclosure complaint; and
- as a consequence of that determination:

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

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

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

If this is the case, the IBAC will also advise the relevant notifying entity that the discloser has been given this advice.

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

9.8.1 Protected Disclosure Complaint

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

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

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

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

9.8.2 Further actions the IBAC may take

Under the *IBAC Act*, the IBAC may dismiss, investigate, or refer a protected disclosure complaint.

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

The IBAC may choose to investigate the alleged conduct if it is reasonably satisfied that it is “serious corrupt conduct”.

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

Depending on the action decided to be taken by the IBAC, the IBAC must also provide certain other information to the discloser. That information is set out at the chart on page 24 of the IBAC's Guidelines for Making and Handling Protected Disclosures.

9.8.3 Other information about investigative entities' investigations of a protected disclosure complaint

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

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

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

If the Council or public officer is advised of the identity of the discloser, then they will be required to look after the welfare of the discloser and provide protection against possible detrimental action.

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

The investigative entity may provide written information about the commencement, conduct or result of an investigation, including any actions taken and any recommendation made that any action or further action be taken to the relevant principal officer. However, the investigative entity must not provide any information that is likely to lead to the identification of a discloser. The investigative entity does not have to provide this information to either the discloser or the relevant principal officer in specified circumstances set out in the *IBAC Act* or the *Ombudsman Act 1973*.

9.9 What if urgent action is required?

In some circumstances, a disclosure may relate to improper conduct that poses an immediate threat to the health and safety of individuals, preservation of property, or may consist of serious criminal conduct.

Examples could include a child protection worker allegedly sexually assaulting children in care, a Council worker allegedly lighting fires or a person threatening to poison the water supply.

In these cases, Council can take immediate action while considering whether the disclosure is a protected disclosure that must be notified to IBAC or awaiting IBAC's decision on a notified matter.

It may be necessary to report criminal conduct to Victoria Police for immediate investigation, or take management action against an employee to prevent future conduct.

Section 52(3)(a)(iii) of the Act allows disclosure of the content of the disclosure by a person or body 'to the extent necessary for the purpose of taking lawful action in relation to the conduct that is the subject of an assessable disclosure including disciplinary process or action'.

However, this does not allow the identity of the discloser to be revealed. Reporting the alleged conduct to the Victoria Police as criminal conduct, or taking legitimate management action against the subject of the disclosure in order to prevent future conduct, may be appropriate courses of action in these circumstances.

10. Managing the Welfare of a Person who has made a Protected Disclosure

10.1 Commitment to protecting a person who has made a protected disclosure

Council is committed to the protection of a person who has made a protected disclosure against detrimental action taken in reprisal for the making of protected disclosures. The PDC is responsible for ensuring a person who has made a protected disclosure is protected from direct and indirect detrimental action, and that the culture of the workplace is supportive of protected disclosures being made.

The PDC will appoint a Welfare Manager to all persons who have made a protected disclosure. The Welfare Manager will undertake the responsibilities set out in subparagraph 6.3 above in respect of a discloser to whom they are appointed.

Employees will be advised that it is an offence for a person to take detrimental action in reprisal for making a protected disclosure. Pursuant to section 45 of the Act, the maximum penalty is a fine of 240 penalty units (\$38,685.60*) or two years imprisonment or both. The taking of detrimental action in breach of this provision can also be grounds for making a disclosure under the Act and can result in an investigation.

The Welfare Manager must not divulge any details relating to the disclosed matter to any person other than the PDC. All meetings between the Welfare Manager and the discloser must be conducted discreetly to protect the confidentiality of the disclosure and the discloser.

Other statutory protections (contained in the Act) applicable to a person who makes a protected disclosure include:

- (a) immunity from civil and criminal liability and disciplinary action for the making of the disclosure (section 39);
- (b) immunity from liability for breaching a confidentiality provision (section 40);
- (c) protection from actions in defamation (section 41);
- (d) provision of a statutory right to sue for damages for reprisals made (section 45);
- (e) provision of a statutory right to apply for reinstatement where detrimental action involves termination or variation of employment (section 46); and
- (f) provision of a statutory right to apply to the Supreme Court for an injunction or order requiring detrimental action to be remedied (section 49).

Importantly, if a person has another person make a disclosure on their behalf, or takes part in a 'joint disclosure', the protections provided by sections 39, 40 and 41 of the Act are only provided to the person who makes the disclosure (i.e. the 'notifier' of the disclosure), not the person on whose behalf the disclosure is made.

The person on whose behalf the disclosure is made will only be entitled to protection against detrimental action taken against them in reprisal for a disclosure made by the 'notifier'.

10.2 Keeping the person who has made a protected disclosure informed

The PDC will ensure that the person who has made the protected disclosure is kept informed of action taken in relation to his or her disclosure, and the time frames that apply. To the extent possible, the person who has made a protected disclosure will be informed of the conduct of an investigation (if any), the findings of an investigation, and the steps taken by Council to address any improper conduct that has been found to have occurred. All communication with the person who has made a protected disclosure will be in plain English.

10.3 Occurrence of detrimental action

If a person who has made a protected disclosure reports an incident of harassment, discrimination or adverse treatment that would amount to detrimental action taken in reprisal for the making of the disclosure, the Welfare Manager will:

- (a) record details of the incident;
- (b) advise the person who has made the protected disclosure of his or her rights under the Act; and
- (c) advise the PDC or CEO of the detrimental action.

The taking of detrimental action in reprisal for the making of a disclosure can be an offence against the Act as well as grounds for making a further disclosure. Where such detrimental action is reported, the PDC will assess the report as a new disclosure under the Act. Where the PDC (in consultation with the CE) is satisfied that the new disclosure is a protected disclosure, he or she will notify it to IBAC for assessment and, if IBAC sees fit, action.

10.4 Person who has made a protected disclosure implicated in improper conduct

Where a person who makes a disclosure is implicated in misconduct, Council will handle the disclosure and protect the person who has made the disclosure from reprisals in accordance with the Act, any guidelines published by IBAC and these Procedures. Council acknowledges that the act of making a protected disclosure should not shield the person who has made the protected disclosure from the reasonable consequences flowing from any involvement in improper conduct.

Section 42 of the Act specifically provides that a person's liability for his or her own conduct is not affected by their disclosure of that conduct under the Act. However, in some circumstances, an admission may be a mitigating factor when considering disciplinary or other action.

The CEO will make the final decision, in consultation with the PDC, as to whether disciplinary or other action will be taken against a person who has made a protected disclosure. Where disciplinary or other action relates to conduct that is the subject of the relevant 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 CEO must be satisfied that it has been clearly demonstrated that:

- (a) the intention to proceed with disciplinary action is not causally connected to the making of the disclosure (as opposed to the content of the disclosure or other available information);
- (b) there are good and sufficient grounds that would fully justify action against any person who has made a protected disclosure in the same circumstances; and
- (c) there are good and sufficient grounds that justify exercising any discretion to institute disciplinary or other action.

The PDC 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 PDC will clearly advise the person who has made a protected disclosure of the proposed action to be taken, and of any mitigating factors that have been taken into account.

11. Management of the Person against whom a Protected Disclosure has been made

Council recognises that employees against whom disclosures are made must also be supported during the handling of disclosures. Council will take all reasonable steps to ensure the confidentiality of the person who is the subject of the disclosure.

Council 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 CEO will consider any request by that person to issue a statement of support setting out that the allegations were clearly wrong or unsubstantiated.

12. Criminal offences

There are a number of offences created by the PD Act including, but not limited to, the following:

- It is an offence under section 45 of the Act for a person to take detrimental action against a person in reprisal for a protected disclosure being made. The Act provides a maximum penalty of a fine of 240 penalty units (\$38,685.60*) or two years imprisonment or both.
- It is an offence under section 52(2) of the Act for a person to divulge information obtained as a result of the handling or investigation of a protected disclosure without legislative authority. The Act provides, in the case of a natural person, a maximum penalty of 120 penalty units (\$19,342.80*) or twelve months imprisonment or both and, in the case of a body corporate, a maximum penalty of 600 penalty units (\$96,714*).
- It is an offence under sections 72(1) and 72(2) of the PD Act for a person to provide false information with the intention that it be acted on as a protected disclosure or to provide further information relating to a protected disclosure knowing that information is false or misleading. The Act provides a maximum penalty of 240 penalty units (\$38,685.60*) or two years imprisonment or both.
- It is an offence under section 73(1) and 73(2) of the PD Act to falsely claim a disclosure is a protected disclosure or is a protected disclosure complaint. The Act provides a maximum penalty of 120 penalty units (\$19,342.80*) or 12 months imprisonment or both.
- It is an offence under section 74(1)-(6) of the PD Act to disclose certain advice. The Act provides a maximum penalty of 120 penalty units (\$19,342.80*) or 12 months imprisonment or both.
- It is an offence for a person to obstruct IBAC officers in the performance of their responsibilities under section 180 of the Independent broad-based Anti-corruption Commission Act 2011 (IBAC Act). The IBAC Act provides a maximum penalty of 120 penalty units (\$19,342.80*) or 12 months imprisonment or both.
- It is an offence to under section 184 of the Independent broad-based Anti-corruption Commission Act 2011 to disclose certain information received from IBAC. The IBAC Act provides a maximum penalty of 60 penalty units (\$9,671.40*) or 6 months imprisonment or both.

*(*As at 1 July 2018 the value of one penalty unit is \$161.19. This figure is subject to change and generally adjusted on 1 July each year by the Department of Treasury and Finance.)*

13. Review

This is Version 1.2 of the *Darebin City Council Protected Disclosure Act 2012 – Procedures*.

These Procedures are supported by the *Protected Disclosure Act 2012 – Protected Disclosure Form*.

These Procedures will be reviewed as required to ensure they continue to meet the objectives of the Act and accord with any guidelines published by IBAC.

Rasiah Dev
Chief Executive Officer
August 2016