



PUBLIC INTEREST DISCLOSURES PROCEDURE

**Public Interest Disclosures Act 2012(Vic) – Procedures**  
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## **1. INTERPRETATION / DEFINITIONS**

Terms and definitions are provided at Appendix A.

## **2. PURPOSE OF THIS PROCEDURE**

*The Public Interest Disclosure Act 2012 (Vic) (Act)* commenced operation on 10 February 2013 and amended by the *Integrity and Accountability Legislation Amendment (Public Interest Disclosures, Oversight and Independence) Act 2019*

The purpose of the Act is to encourage and facilitate the making of disclosures of improper conduct by public officers and public bodies and to establish a system for matters the subject of a disclosure to be investigated by IBAC. The Act provides protection from detrimental action to any person affected by a Public Interest Disclosure whether it is a person who makes a disclosure, a witness, or a person who is subject of an investigation.

## **3. OBLIGATIONS OF ESSSUPER**

ESSSuper is a Public Body, as defined under the Acts and is therefore an entity that may receive disclosures under the Acts. It is therefore subject to the following obligations:

### **3.1 Establish Procedure**

A Public Interest Disclosure procedure (“Procedure”) has been established:

- to facilitate persons making disclosures;
- to allow those disclosures to be handled by ESSSuper appropriately;
- to require notification to IBAC (if required);
- to protect persons making a disclosure from detrimental action;
- to provide a system for reporting disclosures of improper conduct or detrimental action by ESSSuper or its employees to IBAC (if required), or to the Coordinator.

### **3.2 Who can make disclosure**

The officers, employees and agents of ESSSuper are Public Officers and are able to make disclosures or to be the subject of a disclosure. The term Public Officer is not confined to employees but can extend to consultants or service providers to the ESSSuper who performs a public function on its behalf (with or without a contract). ESSSuper must ensure that it’s Public Officers who are subject to the Policy and these procedures are aware of their rights and obligations.

Appropriate training will be provided on this Procedure and on an ongoing basis to ensure that all officers, employees and agents of ESSSuper are aware of these procedures, their rights, obligations and potential liability under the Public Interest Disclosure Legislation.

Any other person outside of ESSSuper (e.g. general public, a member) can make a disclosure concerning ESSSuper and its officers, employees and agents.

### **3.3 Publish Procedure**

ESSSuper must ensure this Procedure is readily available to the public, members, officers and employees. Consequently a current version of these Procedures will be available on the ESSSuper website. .

### **3.4 Annual report of ESSSuper to include additional information**

The annual report of ESSSuper must include:

- a) information about how to access this Procedure; and
- b) the number of disclosures notified to IBAC during the financial year.

The information included in the report must not include information that is likely to lead to identification of a person who has made a disclosure. The exceptions to this are:

- where the person making the disclosure has consented in writing;
- IBAC has determined the disclosure is not a Public Interest disclosure; or IBAC has made the information public

The Coordinator will establish a secure register to record the information required to be published in the annual report, and to generally keep account of the status of Public Interest Disclosures. The register will be confidential and will not record any information that may identify the person making a Public Interest Disclosure.

### **3.5 Review Procedure**

This Procedure is to be reviewed on a biennial basis. The next Review is due in January 2022

The Procedure will be reviewed and approved by the Executive Team. It will be published on the intranet and staff training will be provided via the Compliance Net Module.

IBAC may at any time review this Procedure and the implementation of the Procedure, to ensure they are consistent with the Acts and its regulations and the Guidelines.

IBAC may make recommendations to ESSSuper concerning this Procedure or its implementation. If ESSSuper fails to take sufficient steps within a reasonable time of receiving a recommendation, IBAC may send a copy of its recommendation to the relevant Minister.

### **3.6 Report Public Interest Disclosures to IBAC**

If ESSSuper receives a disclosure and from a preliminary review, assess that it may be a Public Interest Disclosure under the Act, it must no later than 28 days after the disclosure is made, notify the disclosure to IBAC for assessment. ESSSuper may when reporting to IBAC, or at any later time, provide any information it has obtained in the course of reviewing if the disclosure is a disclosure that must be reported to IBAC.

If the disclosure is reported to IBAC, ESSSuper must also advise the person who made the disclosure that this has occurred.

### **3.7 Disclosures that are not reportable to IBAC**

If, from a preliminary review, ESSSuper assess that the disclosure is not reportable to IBAC, and the person making the disclosure has indicated to it, or it otherwise appears to ESSSuper, that the person wishes to receive the protection applicable to a Public Interest Disclosure under the Act<sup>1</sup>, it must advise the person who has made the disclosure that:

- (a) it considers the disclosure is not a Public Interest Disclosure;
- (b) the disclosure has not been notified to IBAC for assessment under the Act; and
- (c) although not reported to IBAC the person is still entitled to the protections that apply to Public Interest disclosures.

The above advice must be in writing and be given no later than 28 days after the disclosure is made to ESSSuper.

### **3.8 Report suspected corrupt conduct to IBAC<sup>2</sup>**

The CEO will notify IBAC of any matter that ESSSuper suspect on reasonable grounds involve corrupt conduct occurring or having occurred as soon as practicable. Prior to reporting to IBAC, Management must ensure that a reasonable suspicion is formed.

## **4. INTERACTION WITH EXISTING REPORTING PROCEDURES**

These Procedures are designed to complement existing procedures already in place that facilitate the normal communication channels between managers and employees within ESSSuper. Employees are encouraged to continue to raise appropriate matters at any time with their managers via these existing procedures. As an alternative, employees may make a disclosure of Improper Conduct or Detrimental Action in accordance with this Procedure.

## **5. DISCLOSURES OF IMPROPER CONDUCT**

### **5.1 What is a disclosure?**

A disclosure is the disclosure of information by a person in relation to improper conduct by, or detrimental action of, a person, Public Officer or Public Body which has, is or may occur in contravention of the Act. The person making the disclosure must believe on reasonable grounds that the information they are disclosing shows or tends to show, that the contravention has, is or may occur.

A disclosure may be made even if the person making the disclosure cannot identify the person, or the body that the disclosure relates to.

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<sup>1</sup> Sub-section 24(6) of the Act

<sup>2</sup> Section 57 of the IBAC Act

A complaint, disclosure or notification that is made pursuant to other legislation may also be a disclosure.

Therefore a complaint made to ESSSuper under its internal complaint procedure, or to VCAT, which involved Improper Conduct by an employee may also be a disclosure and be subject to these Procedures. The Complaints Officer of ESSSuper must on determining the existence of such a disclosure refer the matter to Manager Risk & Compliance or in his absence General Manager Trustee Services as well as processing the complaint according to the internal complaints handling procedure.

## 5.2 Types of Disclosure

ESSSuper can only receive disclosures relating to the conduct of its own members, officers, agents or employees. If it receives a disclosure about an employee, officer or member of another public body, that disclosure will not be considered to have been made in accordance with the Act (Part 2). In those circumstances, the person making the disclosure should be advised of the correct person or body the disclosure should be made to if possible but generally they should be referred to IBAC.

## 5.3 Improper conduct

### ***Examples of Improper Conduct include:***

- a) A person who offers a bribe to an employee of ESSSuper to vary records or otherwise facilitate payment of a higher benefit to that person or their associate.
- b) An employee of the ESSSuper becomes aware that manager or supervisor has established member accounts for members who do not exist for the purpose of committing a fraud against ESSSuper.
- c) An employee of ESSSuper becomes aware of a conspiracy to sell the confidential information of members of ESSSuper to third parties for profit in order to use that information for identity theft to commit a fraud against the members.

## 5.4 Detrimental Action

### **(a) When is it an offence to take Detrimental Action?**

It is an offence for a person to take Detrimental Action against a person in reprisal for a Public Interest Disclosure. Detrimental Action is defined in section 1 above. A person takes detrimental action against another person in reprisal for a disclosure if:

- (i) they take or threaten to take detrimental action against the other person because, or in the belief that, the other person or anyone else has:
  - made, or intends to make, the disclosure; or
  - cooperated, or intends to cooperate, with an investigation of the disclosure; or
- (ii) for either of the above reasons, the person incites or permits someone else to take or threaten to take detrimental action against the other person.

## **(b) Circumstances where reprisal does not constitute detrimental action**

- (i) Information is false and misleading in a material particular

No detrimental action will occur against another person in reprisal for a disclosure where the person making the disclosure has contravened the Act (sections 72(1) and (2)) in relation to the information disclosed.

- (ii) Detrimental action not relevant to the Public Interest Disclosure

There are penalties for reprisals being made as a result of Public Interest Disclosure. Exceptions apply where the Detrimental Action does not relate to the Public Interest Disclosure, see Section 45 of the Act.

- (iii) Management Action

A manager may take management action in relation to an employee who has made a Public Interest Disclosure, only if the Public Interest Disclosure is not the reason for the taking the action.

### ***Examples***

*A Public Body demotes, transfers, isolates in the workplace or changes the duties of a person making a disclosure due to the making of a disclosure.*

*A person threatens, abuses or carries out other forms of harassment directly or indirectly against the person making the disclosure, his or her family or friends.*

*A Public Body discriminates against the person making a disclosure or his or her family and associates in subsequent applications for jobs, permits or tenders.*

## **5.5 Manner of Disclosure**

A disclosure for the purposes of this Procedure may be made verbally or in writing, and may also be made anonymously. If made anonymously, the provisions of the Act requiring ESSSuper to notify, advise or otherwise communicate with the person making the disclosure does not apply.

## **6. STATEMENT OF SUPPORT TO PUBLIC INTEREST DISCLOSURES**

ESSSuper is committed to the aims and objectives of the Act. ESSSuper does not tolerate improper conduct by its employees, officers or members, nor the taking of reprisals against those who come forward to disclose such conduct.

ESSSuper 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 the substantial mismanagement of public resources, or conduct involving a substantial risk to public health and safety or the environment.

ESSSuper will take all reasonable steps to protect people who make such disclosures from any detrimental action in reprisal for making the disclosure. It will also ensure the person who is the subject of the disclosure receives natural justice.

## **7. THE REPORTING SYSTEM**

ESSSuper has established a reporting system that covers receipt, assessment and investigation of disclosures to determine if they are Public Interest Disclosures reportable to IBAC. This reporting system ensures senior staff are involved and retain oversight of this process. This reporting system includes:

- (a) procedures to protect the confidentiality of information and identity of persons making disclosures;
- (b) ensuring those assessing whether a disclosure is a Public Interest Disclosure are independent of those who are responsible for the welfare management of the person making the disclosure;
- (c) establishing clear contact points for reporting disclosures whether made in person or by mail, phone or emails;

### **7.1 Purpose of reporting system**

The purpose of this reporting system is to benefit ESSSuper by:

- (a) encouraging staff to raise matters of concern internally;
- (b) providing a reporting channel for disclosures that may otherwise never be reported and therefore not come to the notice of the Board of ESSSuper;
- (c) ensuring that if a disclosure is made it is properly and appropriately assessed and acted upon; and
- (d) ensuring persons making a disclosure, whether from an internal or external source have the full protection provided by the Act.

### **7.2 Contact persons within ESSSuper**

Any disclosures of Improper Conduct or Detrimental Action concerning ESSSuper or its officers, employees, members or agents may be made to the Coordinator for ESSSuper. The Coordinator is:

Manager, Risk and Compliance  
Level 16, 140 William Street  
MELBOURNE VIC 3000

Telephone: (03) 8684 4547  
Email: Allan.Ogilvie@esssuper.com.au

In the Manager, Risk and Compliance's absence, disclosures may be made to:

General Manager, Trustee Services  
Level 16, 140 William Street  
MELBOURNE VIC 3000

Telephone: (03) 8684 4604



Email: [Ian.Lancaster@esssuper.com.au](mailto:Ian.Lancaster@esssuper.com.au)

All correspondence, phone calls and e-mails from internal or external persons making a disclosure will be referred to the Coordinator.

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

### **7.3 Alternative contact persons**

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

IBAC  
GPO Box 24234  
Melbourne Victoria 3001

Internet: [www.ibac.vic.gov.au](http://www.ibac.vic.gov.au)  
Tel: 1300 735 135

## **8. PROTECTING CONFIDENTIALITY OF INFORMATION & PERSONS MAKING DISCLOSURES**

ESSSuper will take all reasonable steps to protect the identity of the person making a disclosure and any confidential information they disclose. Maintaining confidentiality is crucial in ensuring persons will make disclosures so that they can be confident that if they come forward they will be protected from reprisals.

### **8.1 Protecting Identity of Discloser**

The protection of a person making a disclosure applies regardless of whether the disclosure has been determined to be a Public Interest disclosure. The protection extends to verbal and written disclosures.

A person or body who discloses information likely to identify a person who has made an assessable disclosure (i.e. awaiting IBAC determination) is subject to a penalty of 120 penalty units (\$19,826.40) or 12 months imprisonment or both. A body corporate will incur 600 penalty units (\$ 99,132).

#### **(a) Immunity from liability**

A person making a disclosure is protected from:

- civil or criminal liability or any liability arising by administrative process (e.g. disciplinary action) as a consequence of making a disclosure;
- any offence under the Constitution Act 1975 (for example the requirement is that officers within the public service must not comment on the administration of a Victorian State Department) or any other Statute

imposing a duty to maintain confidentiality or other restriction on the disclosure of information; and

- breach of an obligation by way of oath or rule of law or practice or under an agreement requiring him or her to maintain confidentiality or restricts disclosure of information.

However, this immunity does not apply if the person has contravened the Act by providing information that is false or misleading.

### **(b) Protection from Defamation**

A person making a disclosure is also protected in any proceeding for defamation by a defence of absolute privilege concerning making a disclosure. However, this protection does not apply where person makes a false disclosure or provides false information.

### **(c) Liability for own conduct**

Despite the above a person making a disclosure remains liable for their own conduct.

### **(d) Penalties**

A person must not take detrimental action against another person in reprisal for a disclosure. There is a monetary penalty of 240 penalty units or 2 years imprisonment or both. One penalty unit imposed by Victorian Legislation is equal to \$165.22 (applies from 1/7/19 - 30/6/20.-

#### *Defences*

It is a defence, if a person can show that the substantial reason for taking Detrimental Action was not because the other party intended to make a disclosure or cooperate with an investigation of the disclosure.

It is also a defence if IBAC has determined the disclosure is not a Public Interest Disclosure complaint and when the person took the detrimental action they knew of that determination.

### **(e) Orders for damages or reinstatement of employment**

In addition to the monetary penalty and imprisonment referred to above, a person who takes detrimental action against another person in reprisal for a disclosure may also, if convicted of an offence be required to pay damages.

These damages can be imposed in addition to the monetary penalty. The Court may order the offender to pay to the person who has suffered the detrimental action, an amount in damages the court considers appropriate to compensate that person for any injury, loss or damage.

### *Vicarious liability*

If the employer of a person or someone acting as an agent of the employer, is found guilty of an offence for detrimental action against that person, the Court may in addition to imposing a penalty and any damages ordered as referred to above, order the employer to reinstate or re-employ the person in his or her former position, or if such position is not available, a similar position.

#### **(f) Person suffering Detrimental Action has legal standing to sue for recovery of damages**

A person who has suffered Detrimental Action can issue legal proceedings to recover damages for any injury, loss or damage they have incurred as a consequence. This does not impact on any other right or remedy available to that person as a consequence of the detrimental action.

#### **(g) ESSSuper responsible for actions of employees/agents**

If an employee or agent of ESSSuper takes Detrimental Action against another person in reprisal for a disclosure:

- ESSSuper will be jointly and severally civilly liable with its employee or agent for that action; and
- proceedings for damages can be taken against either or both of them.

### *Defence*

It is a defence for a Public Body if it can prove on the balance of probabilities that it took reasonable precautions to prevent the employee or agent from taking detrimental action against the other person in reprisal for the disclosure.

Ensuring all employees and agents are aware of these Procedures will assist ESSSuper establishing this defence.

#### **(h) Transfer of employee**

If an employee of ESSSuper has made a disclosure and believes on reasonable grounds that Detrimental Action will be, is being or has been taken against him or her which contravenes the Act, they may request a transfer of employment.

## **8.2 Protecting confidential information**

The Act requires any person who receives information due to the handling or investigation of a disclosure being assessed by ESSSuper to determine if it is a Public Interest Disclosure, not to disclose that information except in certain limited circumstances. If that information is disclosed in breach of this requirement, this will be an offence punishable by a maximum fine of 120 penalty units (being \$165.22 x 120 = \$19,826.40 or twelve months imprisonment or both. In the case of a body corporate, which includes ESSSuper, the fine is 600 penalty units (being \$165.22 x 600 = \$99,132).

### *Exceptions*

Disclosing the content, or information about the content, or information likely to lead to the identification of a person who has made a disclosure, is permissible in the following circumstances:

- a) where necessary for the purpose of exercising the functions of ESSSuper under the Act;
- b) for the purpose of a proceeding for an offence under the Act;
- c) for the purpose of a disciplinary process or action instituted in respect of conduct that could constitute an offence under the Act;
- d) for the purpose of obtaining legal advice or representation in relation to:
  - (i) a witness summons, confidentiality notice or notice cancelling such notice, or an order extending a confidentiality notice; and
  - (ii) the person's rights, liabilities, obligations and privileges under the Act.
- e) by a solicitor to whom the disclosure or information has been disclosed in the circumstances under d) above to comply with a legal duty of disclosure or a professional relationship with his or her client;
- f) to an interpreter to enable a person who does not speak English to comply with the Confidentiality requirements of the Act;
- g) to a parent or guardian or independent person to a person under 18 years to comply with Part 7 of the Act; and
- h) to an independent person, to enable an illiterate person or person with a mental or physical impairment to comply with the Act.

## **9. ESTABLISHING CONFIDENTIAL ELECTRONIC & PAPER FILING SYSTEM**

ESSSuper has established a secure electronic and paper filing system to ensure that:

- a) all paper and electronic files are secure and only accessible by authorised officers;
- b) all printed material are kept in files clearly marked as a Public Interest Disclosure matter with a prominent warning on the front that criminal penalties apply to any unauthorised divulging of information concerning a disclosure;
- c) electronic files saved are password protected or have limitations on access rights;
- d) any other material, such as tapes from interviews, are stored securely and are accessible only by authorised officers; and
- e) the security of communications between nominated officers and/or contracted officers (i.e. sensitive information or documents) are not emailed or faxed to a machine that has general access. Personal delivery of documents where practicable should be adopted to ensure confidentiality.

To meet the above requirements under the Guidelines all files, whether paper or electronic, are kept in a secure room and can only be accessed by the Coordinator, the Investigator or the Welfare Officer (in relation to welfare matters only).

All electronic files will be produced and be given password protection. Backup files will be kept on suitable removable media. All materials relevant to an investigation, such as

tapes from interviews, will also be stored securely with the Public Interest disclosure files.

ESSSuper will not email or fax documents relevant to a Public Interest disclosure matter and will ensure all phone calls and meetings are conducted in private.

## **10. ROLES & RESPONSIBILITIES**

### **10.1 Employees**

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

All employees of ESSSuper 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.

All employees are to be provided with all the relevant information and given appropriate training to ensure they are familiar with the policy, procedure, the relevant part of the legislation, particularly their confidentiality obligations and resulting consequences of a breach of the Act.

### **10.2 Role of the Coordinator**

The Coordinator has a central clearing-house role in the internal reporting system. The Coordinator reports directly to the General Manager, Trustee Services and will:

- a) receiving all disclosures, including phone calls ,emails and letters from members of the public or staff;
- b) impartially perform a preliminary review and assess each disclosure whether it appears to be a Public Interest Disclosure and refer to IBAC for determination;
- c) coordinate the reporting system used by ESSSuper;
- d) be a contact point for general advice about the operation of the Act and for IBAC;
- e) be responsible for ensuring ESSSuper carries out its responsibilities under the Public Interest Disclosure Legislation;
- f) liaise with IBAC in regard to the Act;
- g) where necessary, arrange for appropriate welfare support for the person making a public interest Disclosure;
- h) advise the person making a Public Interest Disclosure of the progress of an investigation into the disclosed matter;
- i) establish and manage a confidential filing system;
- j) collate and publish statistics on disclosures made;
- k) take all necessary steps to ensure the identity of the person making a Public Interest Disclosure and the identity of the person who is the subject of the disclosure are kept confidential;

l) liaise with the Chief Executive Officer (CEO) of ESSSuper.

The Coordinator has the authority to make enquiries of all officers, employees or agents of ESSSuper in relation to a disclosure.

### **10.3 Welfare Officer**

The Coordinator is responsible for the appointment of a Welfare Officer to monitor the needs of the person making a disclosure and to provide the necessary advice and support to those persons. Generally, the Welfare Officer will only be required when the disclosure has proceeded to the assessment stage. The Welfare Officer must be a senior manager within ESSSuper.

The Welfare Officer is the General Manager, Corporate Services unless otherwise determined. In his/her absence, the Welfare Officer will be a person acting in the position of General Manager, Corporate Services.

The role of the Welfare Officer is to ensure persons making a disclosure are protected against direct and indirect detrimental action, and that the culture of the workplace is supportive of these disclosures being made. This includes protecting those who make disclosures from within ESSSuper and externally from reprisals.

One of the primary functions of the Welfare Officer is to promote a supportive work environment and respond promptly and effectively to any reports of intimidation or harassment and to bring those incidents to the attention of the Coordinator.

The role of the Welfare Officer is as follows:

- a) to examine the immediate welfare and protection needs of a person who has made a disclosure, and seek to foster a supportive work environment;
- b) to advise the person making a disclosure of the legislative and administrative protections available to him or her;
- c) to listen and responding to any concerns of harassment, intimidation or victimisation in reprisal for making disclosure;
- d) to keep a contemporaneous record of all aspects of the case management of the person making a disclosure including all contact and follow-up action; and
- e) to ensure the expectations of the person making a disclosure are realistic.

The Welfare Officer must not divulge any details concerning the disclosure to any person other than the Coordinator, any person authorised by the Coordinator to investigate the disclosure or the CEO of ESSSuper.

Meetings between the Welfare Officer and the person making the disclosure will be conducted discreetly to protect the confidentiality of the person making a disclosure.

## 11. REVIEWING & ASSESSING DISCLOSURES

### 11.1 Has the disclosure been made in accordance with the requirements of the Act?

Where a disclosure has been submitted to the Coordinator, he or she will perform a preliminary review and assess whether the disclosure has been made in accordance with of the Act as outlined by these Procedures (as per paragraph 11.4) and is, therefore, a Public Interest Disclosure reportable to IBAC.

A disclosure must be accepted even if not made in accordance with this Procedure or if it does not specifically refer to the Act. A disclosure may be made to any member, officer or employee of ESSSuper. Any officer, employee or agent of ESSSuper who receives any allegation that may come within the Act must immediately refer it to the Coordinator so that it can be dealt with under these Procedures.

### 11.2 Has the disclosure been made to the appropriate forum?

For the disclosure to be responded to by ESSSuper, it must concern ESSSuper or an employee, member or officer of ESSSuper. If the disclosure concerns an employee, officer or member of another public body, the person who has made the disclosure must be advised of the correct person or body to whom the disclosure should be directed based on the following table:

<b>Person who is the subject of the Disclosure.</b>	<b>Person/body to whom the disclosure must be made.</b>
Employee of a public body	That Public Body or IBAC
Member of Parliament (Legislative Assembly)	Speaker of the Legislative Assembly
Member of Parliament (Legislative Council)	President of the Legislative Council
Councillor	IBAC
Chief Commissioner of Police	IBAC
Member of the police force	IBAC or Chief Commissioner of Police

If made anonymously, the provisions of the Act requiring ESSSuper to notify, advise or otherwise communicate with the person making the disclosure under the Act does not apply. However, the disclosure must still be assessed to determine if it should be referred to IBAC as a Public Interest disclosure.

### 11.3 Does the disclosure contain the essential elements of a Public Interest disclosure?

To be a Public Interest Disclosure, a disclosure must satisfy the following criteria:

- a) Did a natural person (that is, a person rather than a corporation) make the disclosure?
- b) Does the disclosure relate to conduct of a Public Body or Public Officer 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 Public Interest Disclosure?
- d) Does the person making a disclosure have reasonable grounds for believing the alleged conduct (refer further clarification outlined below) has occurred?

If one or more of the above are not satisfied, the person will not have made a disclosure for the purposes of the Act.

#### *Reasonable grounds for belief*

There must be reasonable grounds for believing alleged conduct has occurred rather than a reasonable suspicion. There must be supporting facts and circumstances. In determining whether such a belief exists the Coordinator will consider whether a reasonable person should have formed that belief based on all the circumstances of the matter.

A mere allegation or conclusion unsupported by any facts or circumstances will not be considered to be reasonable grounds. To be reasonable the belief must be supported by evidence showing the reasonable grounds are probable. The Guidelines provide an example where a person bases disclosure on a statement like "I know X is accepting bribes to grant planning permits to Y developer". This is a mere allegation without supporting facts and circumstances and will not meet the above criteria. By comparison the person does not have to make a prima facie case when making a disclosure. It just needs to be reasonable.

Hearsay or second-hand information may be used to show reasonable grounds but the information and its source must appear credible. This will depend on how the person obtained the information and the detail it contains.

The credibility of the person making a disclosure or who provided the information may also be considered.

### **11.4 Assessment of the disclosure**

The Coordinator will assess the disclosure and determine whether it is a Potential Public Interest disclosure.

#### **a) Disclosure is a Public Interest Disclosure**

Where the Coordinator performs a preliminary review and assesses the disclosure to be a Potential Public Interest Disclosure, he or she will notify IBAC no later than **twenty eight (28)** days after the disclosure is made. IBAC will then make its assessment of the Public Interest Disclosure under the Act. (See paragraph 3.6 of these Procedures for more information.)

#### **b) Disclosure is not a Public Interest Disclosure**

Where the Coordinator performs a preliminary review and assesses that the disclosure is not to a Potential Public Interest Disclosure and therefore will not be referred to IBAC, he or she will advise the person who made the disclosure



of its assessment twenty-eight (28) days after the disclosure was made. (See paragraph 3.7 of these Procedures for more information.)

## **11.5 Investigation plan**

The Investigator will prepare an investigation plan for approval by the Public Interest Disclosure Coordinator. The plan will list the issues to be substantiated and describe the avenue of inquiry. It will address the following issues:

1. What is being alleged?
2. What are the possible findings or offences?
3. What are the facts and issues?
4. How is the inquiry to be conducted?
5. What resources are required?

At the commencement of the investigation, the person making the disclosure should be:

- a) Notified by the Investigator that he or she has been appointed to conduct the investigation;
- b) Asked to clarify any matters; and
- c) Provide any additional material he or she might have.

The Investigator will be sensitive to the person making the Public Interest Disclosure possible fear of reprisals and will be aware of the statutory protections available.

## **11.6 Keeping the person making the Public Interest Disclosure informed**

The Coordinator will ensure the person who makes a disclosure is kept informed of action taken in relation to his or her disclosure, and the time frames that apply.

## **11.7 Occurrence of detrimental action**

If a person making Public Interest Disclosures 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 Officer or Coordinator must:

- record details of the incident; and
- advise the person making the disclosures of his or her rights under the Act.

If the Detrimental Action is of a serious nature and likely to amount to a criminal offence, consideration will be given to reporting the matter to the police or IBAC as appropriate. In these circumstances, the Coordinator will immediately inform the CEO.

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 Coordinator will assess the report as a new disclosure under the Act.

**Note:** The Guidelines state that any Public Body must be extremely cautious about conducting enquiries or gathering information concerning an allegation or Detrimental Action, as a criminal offence may have been committed and informal investigations may compromise the integrity of evidence.

### **11.8 Person making Public Interest Disclosures implicated in improper conduct, or disciplinary matters**

Where a person who makes a disclosure under this procedure is implicated in misconduct, ESSSuper will handle the disclosure and protect the discloser from reprisals in accordance with the Public Interest Disclosure Legislation and this Procedure. ESSSuper acknowledges that the person making a disclosure is not protected from the reasonable consequences flowing from any personal involvement that person may have had in the improper conduct.

The CEO will make the final decision on the advice of the Coordinator as to whether disciplinary or other action will be taken against a person who has made disclosures. Where disciplinary or other action relates to conduct that is the subject of the disclosure, the disciplinary or other action will only be taken after the disclosed matter has been appropriately dealt with under this Procedure.

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 (i.e. the making of the disclosure has not caused the disciplinary action);
- b) there are good and sufficient grounds that would fully justify action against any other person in the same circumstances; and
- c) there are good and sufficient grounds that justify exercising any discretion to institute disciplinary or other action.

The Coordinator 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 Coordinator will clearly advise the person making the disclosure of the proposed action to be taken, and of any mitigating factors that have been taken into account.

Legal advice should be sought before taking any action against a person making a disclosure.

Note: The Guidelines recommend seeking legal advice before taking any action against a person making a disclosure.

## **12. MANAGEMENT OF THE PERSON AGAINST WHOM A DISCLOSURE HAS BEEN MADE**

ESSSuper recognises that employees against whom disclosures are made must also be supported during the handling and investigation of disclosures.

ESSSuper will take all reasonable steps to ensure the confidentiality of the person who is the subject of the disclosure during the assessment process and any

subsequent assessment by IBAC before a final determination is made as to whether it is a Public Interest Disclosure.

Where the Coordinator determines the disclosure is not a Public Interest Disclosure, the fact that the disclosure has been made and, the results of the assessment, and the identity of the person who is the subject of the disclosure will remain confidential.

The Coordinator will ensure the person who is the subject of any disclosure is:

- a) informed as to the substance of the allegations;
- b) given the opportunity to answer the allegations before a final decision is made;
- c) informed as to the substance of any adverse comment that may be included in any report arising from the investigation; and
- d) given the opportunity to have his or her defence set out fairly in any report. 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 the fact of the investigation, the Public Interest Disclosure Coordinator will formally advise the person who is the subject of the disclosure of the outcome of the investigation.

### 13. CRIMINAL OFFENCES

ESSSuper will ensure officers appointed to handle Public Interest Disclosures and all other employees and agents are aware of the following offences created by the Act in addition to those referred to above:

Section of the Act	Offence (Part 11 of the Act)	Penalty (Where 1 penalty unit is worth \$165.22 (2019 – 2020). Body Corporate penalty will be 5 times that of an individual which is shown below)
45(1)	Person must not take Detrimental Action	240 penalty units or 2 years imprisonment or both
52(2)	Disclosure of confidential information	120 penalty units or 12 months imprisonment or both (Note: for a body corporate the penalty is higher – 600 penalty units)
53(1)	Person or body must not disclose information likely to lead to the identification of a person who has made an assessable disclosure	For individuals 120 penalty units and 2 years imprisonment  For body corporate 600 penalty units.

72	Providing information under the Act a person knows is false or misleading in a material particular, intending that the information be acted on as a Public Interest Disclosure	120 penalty units or 12 months imprisonment or both
73	Person must not claim a matter is the subject of a Public Interest Disclosure knowing that claim to be false	120 penalty units or 12 months imprisonment or both

#### **14. PROTECTION OF PUBLIC OFFICERS**

Employees of ESSSuper are Public Officers as that term is defined in the Act and therefore entitled to protection under the Act where they disclose information to another employee of ESSSuper in the course of:

- a) handling a disclosure; or
- b) notifying a disclosure to IBAC; or
- c) providing information to IBAC,

and the disclosure of the information is made in good faith and in accordance with the Public Interest Disclosure Legislation and this Procedure.

In these circumstances, the Public Officer is not taken to have breached any agreement requiring him or her to maintain confidentiality or otherwise restricting disclosure of information, and is not subject to any civil or criminal liability or disciplinary action for disclosing the information.

#### **15. EXEMPTION FROM FREEDOM OF INFORMATION ACT 1982 (FOI)**

FOI does not apply to a document in the possession of any person or body to the extent that it discloses information relating to a disclosure or is likely to lead to the identification of a person who made that disclosure.

IBAC should be contacted before the release of any document originating from IBAC or relating to a Public Interest Disclosure if requested under the FOI.

#### **16. WHISTLEBLOWERS OBLIGATIONS UNDER SIS**

ESSSuper is an exempt public sector superannuation scheme under SIS. It is therefore exempt from the SIS requirements. However, ESSSuper is subject to the Heads of Government Agreement (HOGA) between the Victorian Government and the Federal Government. Under the terms of HOGA, ESSSuper will comply with the spirit of SIS and specified core principles.

Subject to the requirements under the Act, ESSSuper has determined that the requirements under SIS applicable to whistleblowers should be adopted by this Procedure. For the purposes of this Procedure, we have substituted references to APRA with the Department of Treasury & Finance as the ESSSuper regulator and IBAC. Those requirements are as follows:

**(a) No constraints on providing information**

A person must not be constrained or impeded (whether by confidentiality clauses or other means) from:

- a) disclosing information to the Department of Treasury & Finance or IBAC;
- b) discussing issues with the Department of Treasury & Finance or IBAC relevant to management and prudential supervision of ESSSuper;
- c) providing documents under their control to the Department of Treasury & Finance or IBAC relevant in the context of management or prudential supervision of ESSSuper; and
- d) Providing information to auditors, actuaries and others who have responsibilities concerning ESSSuper.

Policies or contractual arrangement established or entered into by ESSSuper must not explicitly or implicitly restrict or discourage auditors or other parties from communicating with the Department of Treasury & Finance or IBAC.<sup>3</sup>

**(b) Adoption of Part 29A of SIS**

For the purposes of this Procedure, ESSSuper adopts the procedures in Part 29A of SIS relating to whistleblowing and the relevant parts of Superannuation Prudential Standard SPS 510 Governance & SPS 520 Fit & Proper as they relate to whistleblowing. This is subject to applying these requirements within the context of HOGA and adapting them to ensure that they are consistent with the State legislation pursuant to which ESSSuper operates and which it administers.

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<sup>3</sup> Superannuation Prudential Standard SPS 510 Governance paragraphs 69 and 70 and SPS 520 Fit & Proper paragraphs 37 to 42.

## Appendix A: Terms and Definitions

The following terms relating to the Policy are defined below:

<p><b>Coordinator</b> means the Public Interest Disclosure coordinator appointed pursuant to paragraph 5.8 of the Public Interest Disclosure Policy (“Policy”).</p>
<p><b>Corrupt Conduct</b> <sup>4</sup>means conduct:</p> <ul style="list-style-type: none"><li>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</li><li>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</li><li>c) of a public officer or public body that constitutes or involves knowingly or recklessly breaching public trust; or</li><li>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</li><li>e) 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:<ul style="list-style-type: none"><li>o a licence, permit, approval, authority or other entitlement under any Act or subordinate instrument; or</li><li>o an appointment to a statutory office or as a member of the board of any public body under any Act or subordinate instrument; or</li><li>o a financial benefit or real or personal property; or</li><li>o any other direct or indirect monetary or proprietary gain—</li></ul>that they would not have otherwise obtained; or</li><li>f) that could constitute a conspiracy or an attempt to engage in any conduct referred to in paragraph (a), (b), (c), (d) or (e) above, being conduct that would constitute a relevant offence.</li></ul>
<p><b>Detrimental Action</b> includes:</p> <ul style="list-style-type: none"><li>a) action causing injury, loss or damage;</li><li>b) intimidation or harassment;</li><li>c) discrimination, disadvantage or adverse treatment concerning a person’s employment, career, profession, trade or business, including the taking of disciplinary action.</li></ul>
<p><b>IBAC</b> means Independent Broad-based Anti-corruption Commission of Victoria</p>
<p><b>IBAC Act</b> means <i>Independent Broad-based Anti-corruption Commission Act 2011(Vic)</i>.</p>

<sup>4</sup> Section 4 of the Independent Broad-based Anti-corruption Commission Act 2011

**Improper Conduct** means conduct that is:

- a) *Corrupt Conduct*; or
- b) conduct of a Public Officer or Public Body engaged in by the Public Officer or Public Body in their capacity as a Public Officer or a Public Body that constitutes:
  - a criminal offence; or
  - serious professional misconduct; or
  - dishonest performance of public functions; or
  - an intentional or reckless breach of public trust; or
  - an intentional or reckless misuse of information or material acquired in the course of the performance of the functions of the Public Officer or Public Body; or
  - a substantial mismanagement of public resources; or
  - a substantial risk to the health or safety of one or more persons; or
  - a substantial risk to the environment; or
- c) conduct of any person that—
  - adversely affects the honest performance by a Public Officer or Public Body of their functions as a Public Officer or Public Body; or
  - is 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 results in the person, or an associate of the person, obtaining:
    - a licence, permit, approval, authority or other entitlement under any Act or subordinate instrument; or
    - an appointment to a statutory office or as a member of the board of any public body under any Act or subordinate instrument; or
    - a financial benefit or real or personal property; or
    - any other direct or indirect monetary or proprietary gain

that the person or associate would not have otherwise obtained; or

- conduct of any person that could constitute a conspiracy or attempt to engage in any of the conduct referred to in the bullet points above.

Less serious or trivial conduct is excluded from the definition of Improper Conduct.

'Public Interest Disclosure' is a disclosure by a natural person of:

- a) information that shows or tends to show:
  - o a person, Public Officer or Public Body has engaged, is engaging or proposes to engage in Improper Conduct; or
  - o a Public Officer or Public Body has taken, is taking or proposed to take Detrimental Action against a person in reprisal for making a Public Interest Disclosure; or
- b) information that the person reasonably believes shows or tends to show:
  - o a person, Public Officer or Public Body has engaged, is engaging or proposes to engage in Improper Conduct; or
  - o a Public Officer or Public Body has taken, is taking or proposes to take detrimental action against a person in reprisal for making a Public Interest Disclosure.

Public Interest Disclosure does not include a disclosure regarding the conduct of, or actions taken by, the following;

- c) the Office of the Special Investigations Monitor;
- d) the Special Investigations Monitor;
- e) a court;
- f) an investigating panel;
- g) a member of an investigating panel.

**Public Interest Complaint** for the purposes of these procedures means a disclosure that has been determined under the Act to be a Public Interest Disclosure complaint;

**Public Interest Disclosures Legislation** means the Acts, regulations made to the Acts and the Guidelines.

**Public Body** means

a *public body* (within the meaning of the IBAC Act) whether corporate or unincorporated, established by or under an Act for a public purpose which includes;

- a) government departments and agencies;
- b) statutory authorities;
- c) officers of municipal councils;
- d) government-appointed boards and committees;
- e) government-owned companies;
- f) universities;
- g) TAFE colleges;
- h) Public hospitals;
- i) State-funded residential care services;
- j) the Victorian Inspectorate;
- k) the IBAC; or
- l) any other body or entity prescribed for the purposes of this definition.



**Public Officers** means

a public officer as defined in section 3C of the IBAC Act 2011(Vic) which for the purposes of these procedures includes:

- a) Public Officer within the meaning of the Section 6 of the IBAC Act including but not limited to:
  - o a person employed in any capacity or holding any office in the public sector within the meaning of Section 4(1) of the Public Administration Act 2004 (e.g. public sector employee, the holder of a statutory office and a director of a public entity);
  - o an ongoing employee or temporary employee in the teaching service;
  - o a member of police personnel; and
  - o a judge, a magistrate, a coroner or a member of VCAT
- b) an IBAC Officer;
- c) a Victorian Inspectorate Officer;
- d) a Public Interest Monitor

**Reasonable Suspicion** means<sup>5</sup>

Something less than belief, but requires more than idle speculation. It must be based on facts and circumstances that would be sufficient to make a reasonable person suspect corrupt conduct had occurred or was occurring.

**Regulations mean the Public Interest Disclosure Regulations 2013 (Vic)**

**SIS means the Superannuation Industry (Supervision) Act 1993 (Cth)**

**Welfare Officer** means the person appointed to protect the welfare of persons who have made a disclosure (pursuant to paragraph 5.12 of the Policy)

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<sup>5</sup> Section 57 of the IBAC Act