

<b>Procedure Title: Public Disclosure Procedure</b>	
<b>Department:</b> Human Resources	
<b>Approved By:</b> Chief Executive Officer	
<b>Applicable Corporate Policies;</b> 8	
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## **1 STATEMENT OF SUPPORT**

The Metro Tasmania Pty Ltd is committed to the aims and objectives of the *Public Interest Disclosures Act 2002* (the Act). It does not tolerate improper conduct by its employees, officers or members, or the taking of detrimental action against those who come forward to disclose such conduct.

Metro Tasmania Pty Ltd recognises the value of transparency and accountability in its administrative and management practices, and supports the making of disclosures that reveal the type of conduct to which the Act is directed.

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

## **2 PURPOSE OF THESE PROCEDURES**

These procedures establish a system for reporting disclosures of improper conduct or detrimental action by Metro Tasmania Pty Ltd or its employees. They are also intended to assist members, officers and employees of Metro Tasmania Pty Ltd to understand the way in which the Act operates and needs to be administered.

The system created by these procedures provides for such disclosures to be made to the Chief Executive Officer (the Principal Officer) or to a delegated Public Interest Disclosure Officer. Disclosures may be made by people who are “public officers” with Metro Tasmania Pty Ltd, or by people who are or have been “contractors” with Metro Tasmania Pty Ltd the supply of goods or services. These expressions are explained later in this document.

These procedures are designed to complement normal communication channels between supervisors and employees. Employees are encouraged to continue to raise appropriate matters at any time with their supervisors, and to use existing grievance procedures within the organisation where appropriate.

The procedures have been prepared in accordance with Guidelines and Standards published by the Ombudsman under s 38(1)(c) of the Act. These Guidelines and Standards can be seen on the Ombudsman’s website at [www.ombudsman.tas.gov.au](http://www.ombudsman.tas.gov.au).

## **3 THE PURPOSE OF THE ACT**

The Act commenced operation on 1 January 2004. It was substantially amended by the *Public Interest Disclosures Amendment Act 2009*, following a major review of the Act, and these procedures reflect those amendments. The amendments took effect on 1 October 2010. The purposes of the Act are contained in its long title. These are –

- to encourage and facilitate disclosures of improper conduct by public officers and public bodies
- to protect persons making those disclosures, and others, from reprisals
- to provide for the matters disclosed to be properly investigated and dealt with, and
- to provide all parties involved in the disclosures with natural justice.

In colloquial terms, the Act is about “whistle-blowing” in the Tasmanian public sector. The Act is based on the precepts that it is in the public interest for whistle-blowing to occur, and that this will be encouraged and facilitated by providing due protection for whistle-blowers, and by ensuring that disclosures which they make are properly investigated and dealt with.

## **4 HOW THE ACT WORKS**

Briefly, the Act works in this way –

- It gives certain people – “public officers” and “contractors” – the right to make a disclosure about “improper conduct” or “detrimental action” to certain integrity agencies, other persons and bodies (Part 2 of the Act, particularly s 6). 3 4. A disclosure which is made in the exercise of this right is called a “protected disclosure”.
- It provides certain statutory protections for such protected disclosures (Part 3).
- It dictates how the recipient of the disclosure is to deal with it (Parts 4 to 8).
- It treats the Ombudsman as the oversight agency in relation to the operation of the Act, including the default investigator, monitor of investigations by public bodies, and setter of standards under the Act.
- Where the disclosure is handled by the Ombudsman or a public body, it requires a preliminary determination as to whether the protected disclosure is a “public interest disclosure” (ss 30 and 33). This is a disclosure which, in the case of decision-making by the Ombudsman, meets the requirements of s 30(2), or, in the case of decision-making by the public body, meets the requirements of s 33(2).
- Subject to exceptions, it requires investigation by the Ombudsman or public body of any protected disclosure which is found to be a public interest disclosure (ss 39 and 63).
- It requires such investigation to be conducted as soon as practicable (ss 39A and 77A)
- It controls the manner in which a disclosure is investigated, and provides powers in this respect.
- In the case of investigation by the Ombudsman, it gives the Ombudsman the power to recommend that action be taken in light of the investigation (s 56)
- In the case of an investigation by a public body which results in a finding that the alleged conduct occurred, it obliges the public body to take action to prevent that conduct from continuing or recurring, and to take action to remedy any harm or loss which may have arisen (s 75).

## 5 KEY TERMS

### 5.1 *The right to make a disclosure*

The right to make a disclosure under the Act is given by s 6 of the Act. That states –

#### **Section 6. Disclosures about improper conduct or detrimental action**

(1) A *public officer* who believes that another *public officer* or a *public body* –

- (a) has engaged, is engaging or proposes to engage in *improper conduct* in their capacity as a *public officer* or *public body*; or
- (b) has taken, is taking or proposes to take *detrimental action* in contravention of section 19 – may disclose that *improper conduct* or *detrimental action* in accordance with this Part.

(2) A *contractor* who believes that the *public body* with which the *contractor* has entered into a contract –

- (a) has engaged, is engaging or proposes to engage in *improper conduct* in its capacity as a *public body*; or
- (b) has taken, is taking or proposes to take *detrimental action* in contravention of section 19 – may disclose that *improper conduct* or *detrimental action* in accordance with this Part.

As can be seen from the emphasis given to certain expressions in this version of s 6, a number of expressions are key to its operation. These are -

- · “public officer”
- · “public body”
- · “contractor:
- · “improper conduct”
- · “detrimental action”

Because of the way that the expression “improper conduct” is defined in s 3 of the Act, a further expression is also very important. This is the expression “corrupt conduct”. Each of these expressions is now explained.

## **5.2 “public officer” and “public body”**

These expressions are defined in ss 3 and 4 of the Act, in this way –

### **Section 3. Interpretation**

**“public body”** means a public body referred to in section 4;

**“public officer”** means a public officer referred to in section 4;

### **Section 4. Public bodies and officers**

(1) Subject to subsection (3), the following bodies and authorities are *public bodies* for the purposes of this Act:

- (a) the Parliament of Tasmania;
- (b) a State Service Agency;
- (c) the Police Service;
- (d) a council;
- (e) a Government Business Enterprise;
- (f) a State-owned Company;
- (g) a council-owned company;
- (h) a body or authority, whether incorporated or not, whose members or a majority of whose members are appointed by the Governor or a Minister;
- (i) any other prescribed body or authority, whether incorporated or not –
  - (i) to which any money is paid by way of appropriation from the Public Account; or
  - (ii) over which the Government or a Minister exercises control.

(2) Subject to subsection (3), the following persons are *public officers* for the purposes of this Act:

- (a) a Member of Parliament;
- (b) a councillor;
- (c) a member, officer or employee of a public body;
- (d) a member of the governing body of a public body;
- (e) an employee of a council;
- (f) any person performing functions under the Parliamentary Privilege Act 1898;
- (g) a person employed in an office of a Minister, Parliamentary Secretary or other Member of Parliament whether in accordance with the State Service Act 2000, Parliamentary Privilege Act 1898 or otherwise;
- (h) any person performing functions under the Governor of Tasmania Act 1982;
- (i) a person appointed to an office by the Governor or a Minister under an Act

(3) The following bodies are not *public bodies* for the purposes of this Act:

- (a) a court;
- (b) a tribunal;
- (c) the Tasmanian Industrial Commission;
- (d) the Integrity Commission;
- (e) any other prescribed body.

(4) The following persons are not *public officers* for the purposes of this Act:

- (a) the Governor of Tasmania;
- (b) a judge of the Supreme Court;
- (c) the Associate Judge of the Supreme Court;
- (d) a magistrate of the Magistrates Court;
- (e) the Director of Public Prosecutions;
- (f) any other prescribed person.

Metro Tasmania Pty Ltd is a “public body”, as so defined. Further, any member, officer or employee of Metro Tasmania Pty Ltd is a “public officer”, as so defined.

### **5.3 “contractor”**

This expression is defined in s 3 of the Act, in this way – *Meaning of “contractor”*

#### **Section 3. Interpretation “contractor” means –**

- (a) a person who at any time has entered into a contract with a public body for the supply of goods or services to, or on behalf of, the public body; or
- (b) an employee of the contractor; or
- (c) a subcontractor engaged by the contractor to fulfil all or part of a contract with a public body for the supply of goods or services to, or on behalf of, the public body;

This definition has the effect that a person may exercise the right given to a contractor by s 6 of the Act even though the contract which they held with the public body is now over.

### **5.4 “Improper conduct” and “corrupt conduct”**

These expressions are defined in s 3 of the Act, in this way – *Meaning of “improper conduct”*

#### **Section 3. Interpretation “improper conduct” means –**

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

Note that paragraph (b) leads to another definition in s 3, being that of “corrupt conduct” – “corrupt conduct” means –

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

As can be seen, the expression “improper conduct” covers a wide range of inappropriate conduct, covering conduct which constitutes -

- o · an illegal or unlawful activity
- o · “corrupt conduct”, as defined
- o · maladministration
- o · professional misconduct
- o · a waste of public resources
- o a danger to public health or safety or to both public health and safety
- o a danger to the environment

- misconduct, including breaches of applicable codes of conduct · detrimental action against a person who makes a public interest disclosure.

The reference to “corrupt conduct” covers –

- conduct of any person (whether or not a public official) that adversely affects the honest performance of a public officer’s or public body’s functions;
- the performance of a public officer’s functions dishonestly or with inappropriate partiality
- conduct of a public officer, former public officer or a public body that amounts to a breach of public trust
- conduct of a public officer, former public officer or a public body that amounts to the misuse of information or material acquired in the course of the performance of their official functions; or
- a conspiracy or attempt to engage in conduct of any of these types.

### **5.5 Detrimental action**

This expression is defined in s 3 of the Act, in this way –*Meaning of “detrimental action”*

**Section 3. Interpretation “detrimental action”** includes –

- (a) action causing injury, loss or damage; and
- (b) intimidation or harassment; and
- (c) discrimination, disadvantage or adverse treatment in relation to a person’s employment, career, profession, trade or business, including the taking of disciplinary action; and
- (d) threats of detrimental action;

### **Section 19. Protection from reprisal**

(1) A person must not take detrimental action against a person in reprisal for a protected disclosure.

Penalty: Fine not exceeding 240 penalty units or imprisonment for a term not exceeding 2 years, or both.

(2) A person takes detrimental action in reprisal for a protected disclosure if –

- (a) the person takes or threatens to take the action because –
  - (i) a person has made, or intends to make, a protected disclosure; or
  - (ii) the person believes that a person has made or intends to make the protected disclosure; or
- (b) the person incites or permits another person to take or threaten to take the action for either of those reasons.

(3) In determining whether a person takes detrimental action in reprisal, it is irrelevant whether or not a reason referred to in subsection (2) is the only or dominant reason as long as it is a substantial reason.

The effect of s 19 is that reprisal must have been a substantial reason behind the detrimental action taken.

## **6 THE REPORTING SYSTEM**

### **6.1 To whom a disclosure may be made – general principles**

For the protections in the Act to apply, a disclosure must be made to the right person or body. Section 7 of the Act deals with this subject

#### **Officer or public body to which the disclosure relates**

A member, officer or employee of a public body that is a State Service Agency;

- that State Service Agency; or
- the Integrity Commission; or
- the Ombudsman; or
- the State Service Commissioner

Hence, disclosures which relate to improper conduct or detrimental action by a member, officer or employee of Metro Tasmania Pty Ltd must be made as explained in the following two sections.

### **6.2 Disclosure to persons within Metro Tasmania Pty Ltd**

Disclosures of improper conduct or detrimental action by a member, officer or employee of Metro Tasmania Pty Ltd may be made to the following officers:

- Principal Officer - The Chief Executive Officer – who is the “Principal Officer” of the public body, within the terms of the Act.
- Public Interest Disclosure Officer - Manager Human Resources

Where a person is contemplating making a disclosure and is concerned about approaching the Principal Officer or a Public Interest Disclosure Officer in the workplace, he or she can call the relevant officer and request a meeting in a discreet location away from the workplace. A disclosure about the Principal Officer should be immediately referred to the Ombudsman.

### **6.3 Disclosure to the Ombudsman**

A disclosure about improper conduct or detrimental action by Metro Tasmania Pty Ltd or any of its members, officers or employees may also be made directly to the Ombudsman. The contact details for the Ombudsman are: -

The Ombudsman  
GPO Box 960  
Hobart Tasmania 7001

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

### **6.4 Disclosure to the Integrity Commission**

A disclosure about improper conduct or detrimental action Metro Tasmania Pty Ltd or any of its members, officers or employees may also be made directly to the Integrity Commission. The contact details for the Integrity Commission are –

Tasmanian Integrity Commission  
GPO Box 822, Hobart Tasmania 7001

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

## **7 ROLES AND RESPONSIBILITIES**

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

### **7.1 Employees**

Employees are encouraged to report known or suspected incidences of improper conduct or detrimental action in accordance with these procedures. All employees of the Metro Tasmania Pty Ltd 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.

### **7.2 Principal Officer**

The Principal Officer has primary responsibility for ensuring that the provisions of the Act are implemented in the Agency. Section 62A of the Act provides that the Principal Officer has responsibility for:

- preparing procedures for approval by the Ombudsman
- receiving public interest disclosures and ensuring they are dealt with in accordance with the Act
- ensuring the protection of witnesses
- ensuring the application of natural justice in the public body's procedures
- ensuring the promotion of the importance of public interest disclosures and general education about the Act to all staff, and ensuring easy access to information about the Act and the public body's procedures, and
- providing access to confidential employee assistance programs and appropriately trained internal support staff for those involved in the process.

The Principal Officer may delegate any or all of his or her functions to a Public Interest Disclosure Officer.

### **7.3 Public Interest Disclosure Officers**

Public Interest Disclosure Officers are appointed by the Principal Officer under s 62A(2) of the Act, and hold delegations from the Principal Officer which enable them to carry out the functions listed in their instrument of delegation. Subject to the terms of the delegation, the responsibilities of the Officer include:

- acting as a contact point for general advice about the operation of the Act for any person wishing to make a disclosure about improper conduct or detrimental action
- making arrangements for a disclosure to be made privately and discreetly and, if necessary, away from the workplace
- receiving any disclosure made orally or in writing (from internal and external disclosers)
- recording in writing the details of any disclosure which is made orally
- impartially assessing the allegation and determining whether it is a disclosure made in accordance with Part 2 of the Act (that is, "a protected disclosure")
- impartially assessing under s 33 of the Act whether a disclosure is a "public interest disclosure", and
- taking all necessary steps to ensure that the identity of the discloser and the identity of the person who is the subject of the disclosure are kept confidential.

### **7.4 Investigator**

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

### **7.5 Welfare manager**

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

- examine the immediate welfare and protection needs of a person who has made a disclosure, and seek to foster a supportive work environment
- advise the discloser of the legislative and administrative protections available to him or her
- listen and respond to any concerns of harassment, intimidation, victimisation or other detrimental action which may be occurring in reprisal for making disclosure, and
- ensure that the expectations of the discloser are realistic.

A welfare manager may be a person from within the agency or a consultant engaged for that purpose.

## **8 CONFIDENTIALITY**

Metro Tasmania Pty Ltd will take all reasonable steps to protect the identity of a discloser. Maintaining confidentiality is crucial in ensuring reprisals are not made against the discloser.

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

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

- where exercising their functions or the functions of the public body under the Act
- when making a report or recommendation under the Act
- when publishing statistics in the annual report of a public body, and
- in criminal proceedings for certain offences in the Act.

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

It may be necessary to consider disclosing information where:

- it is essential, having regard to the principles of natural justice, that the identifying information be disclosed to the person who is the subject of the disclosure, or
- the investigating body believes that the disclosure of the identifying information is necessary for the matter to be effectively investigated.

In both circumstances, the person who made the disclosure should be informed as to this step.

Metro Tasmania Pty Ltd will ensure that all relevant files, whether paper or electronic, are kept securely and can only be accessed by the Principal Officer, Public Interest Disclosure Officer/s, the investigator, and (in relation to welfare matters only) the welfare manager. All printed material will be kept in files that are clearly marked as a *Public Interest Disclosures Act* matter, and warn of the criminal penalties that apply to any unauthorised divulging of information concerning a protected disclosure. All materials relevant to an investigation, such as tapes from interviews, will also be stored securely with the files.

Metro Tasmania Pty Ltd will not email documents relevant to a disclosed matter and will ensure that all phone calls and meetings are conducted in private.

Section 90 exempts documents from release under the *Right to Information Act 2009* to the extent that they contain information regarding a disclosure, or information that is likely to lead to the identification of the person who made the disclosure or the person who is the subject of the disclosure.

## **9 COLLATING AND PUBLISHING STATISTICS**

The Principal Officer 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 discloser.

The annual reporting requirements are set out in s.86 of the Act.

The register will contain the following information:

- the number and types of disclosures made to the [ name of public body] during the year, and the number of disclosures determined to be a public interest disclosure
- the number of disclosures determined by Metro Tasmania Pty Ltd to be public interest disclosures that it investigated during the year
- the number and types of disclosed matters referred to Metro Tasmania Pty Ltd by the Ombudsman for investigation
- the number and types of disclosures referred by Metro Tasmania Pty Ltd to the Ombudsman for investigation
- the number and types of investigations taken over from Metro Tasmania Pty Ltd by the Ombudsman
- the number and types of disclosed matters that Metro Tasmania Pty Ltd has declined to investigate
- the number and types of disclosed matters that were substantiated upon investigation and the action taken on completion of the investigation, and
- any recommendations made by the Ombudsman that relate to Metro Tasmania Pty Ltd.

## **10 PRELIMINARY ISSUES**

### ***10.1 What should the recipient of the disclosure do upon receipt of the disclosure?***

If the disclosure is oral, the recipient should immediately reduce it to writing. If possible, the written record of the disclosure should be signed and dated by the discloser.

Unless the recipient is the Principal Officer, the recipient should immediately inform the Principal Officer of the disclosure, and should provide the Principal Officer with a copy of the disclosure, or record of the disclosure, and of any accompanying documents.

A file should be created for the disclosure, marked clearly as being a *Public Interest Disclosures Act* matter – see section 8 (Confidentiality).

### ***10.2 Assessing the disclosure – is it a protected disclosure?***

The protections provided by the Act to disclosers (as to which see Part 4 of the Act) only apply where the disclosure made is a “protected disclosure”. This means a disclosure made in accordance with Part 2 of the Act: s 14.

As soon as practicable after the receipt of a disclosure, the disclosure should therefore be assessed by the Principal Officer or a Public Interest Disclosure Officer to determine whether it has been made in accordance with Part 2 of the Act. The following questions need to be asked in carrying out this assessment:

- Has the disclosure been made by a public officer or contractor? (See sections 5.2 and 5.3 above.)
- Does the disclosure concern improper conduct or detrimental action? (see sections 5.4 and 5.5 above.)
- Did the alleged conduct or action occur more than 3 years before the commencement of the Act – i.e. on or after 1 January 2001? (the Act, s 10)
- Has the disclosure been made to the appropriate person? (See section 6.1 above.)

As required by s 6 of the Act (see section 5.1 above), one of the preconditions to a disclosure being a protected disclosure, and therefore attracting the protections in Part 3 of the Act, is that must it is made by a public officer or a contractor.

Note that an anonymous disclosure may be accepted if the person receiving it is satisfied that the disclosure is being made by a public officer or contractor: s 8.

The person who carries out the assessment should inform the discloser as soon as practicable of their conclusion as to whether the disclosure is a protected disclosure, and of their reasons for coming to that conclusion. This should be done in writing. If the disclosure has been assessed as being a protected disclosure, the discloser should be given a copy of Part 3 of the Act, which details the protections which the Act provides. These protections should be explained to the discloser if necessary. The discloser should also be informed of the process which will now be followed with respect to the disclosure.

A copy of the assessment should also be given to the Principal Officer without delay, where the person who carried out the assessment is not the Principal Officer.

If the disclosure is considered to be a protected disclosure, the Principal Officer or a Public Interest Disclosure Officer should immediately appoint a welfare manager to protect the interests of the discloser, and ensure that the discloser is advised of the name and contact details of that person – see sections 7.5 and 12.1.

Note that s 7A of the Act provides that a person to whom a disclosure may be made under Part 2 of the Act may, if the person considers that it would be in the public interest to do so, treat any other person who is not a public officer or a contractor as a contractor for the purposes of this Act. If this is under consideration, the matter should first be discussed with the Principal Officer, and consideration should also be given to seeking advice from the Ombudsman as to whether this step is appropriate.

### **10.3 Should the disclosure be referred to another body?**

#### **10.3.1 Referral to the State Service Commissioner**

Metro Tasmania Pty Ltd may refer a protected disclosure to the State Service Commissioner if it considers that the disclosure relates to an alleged breach by a State Service officer or State Service employee of the State Service Code of Conduct under the *State Service Act 2000*.

Metro Tasmania Pty Ltd must notify the discloser of the referral within a reasonable time (unless the disclosure was made anonymously): s 29. The Commissioner may deal with the disclosure under the *State Service Act*, or may refer it to the Ombudsman or public body as the case requires (s.28), to deal with it as a public interest disclosure.

#### **10.3.2 Referral to the Integrity Commission**

Metro Tasmania Pty Ltd may refer a protected disclosure to the Integrity Commission where it considers that the disclosure relates to misconduct as defined in s 4(1) of the *Integrity Commission Act 2009*.

Metro Tasmania Pty Ltd must notify the discloser of the referral within a reasonable time (unless the disclosure was made anonymously): s 29D

Matters which would bear on a decision as to whether a protected disclosure should be referred to the to the State Services Commissioner or it may refer the disclosure to the Ombudsman or a public body, as the case may require, for action by the Ombudsman or public body in accordance with the Public Interest Disclosures Act.

#### **10.3.3 Referral of criminal conduct to the Police**

It is possible that, before or during an investigation, facts are uncovered that reveal the possibility of a criminal offence. If this happens, Metro Tasmania Pty Ltd will not commence, or will suspend, the investigation and will consult with the Ombudsman as to the future of the matter. Under section 41 of the Act, the Ombudsman has the power to refer a disclosed matter to the Commissioner of Police for investigation.

If the Ombudsman is satisfied that the disclosed matter should be referred to Tasmania Police, Metro Tasmania Pty Ltd should consider whether the disclosure should be referred to the Ombudsman under s 68 of the Act.

Early referral of the matter may avoid interference with the evidentiary trail. Referral to the police through the Ombudsman will also avoid any question of a breach of confidentiality under s 23 of the Act. Once a disclosure is referred to the Commissioner of Police through the Ombudsman, the investigation under the Act process ceases. However, there may still be administrative or operational issues which have been identified during the disclosure process or investigation that should be dealt with under other internal processes of Metro Tasmania Pty Ltd. The Principal Officer, or the Public Interest Disclosure Officer acting in consultation with the Principal Officer, will decide how the matter should be dealt with.

#### **10.3.4 Further assessment - Is the disclosure a public interest disclosure?**

Where the Principal Officer or Public Interest Disclosure Officer has received a disclosure that has been assessed to be a protected disclosure, the Principal Officer or Public Interest Disclosure Officer must make a determination under s 33 of the Act as to whether the disclosure is a public interest disclosure. This assessment must be made within 45 days of the receipt of the disclosure.

For a disclosure to be a public interest disclosure, the public body must be satisfied that the disclosure shows or tends to show that the public officer to whom the disclosure relates –

- o has engaged, is engaging or proposes to engage in improper conduct in his or her capacity as a public officer, or
- o has taken, is taking or proposes to take detrimental action in reprisal for the making of the protected disclosure.

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

Where the Principal Officer or Public Interest Disclosure Officer concludes that the disclosure amounts to a public interest disclosure, he or she must –

- o advise the Principal Officer (if not the person receiving the disclosure)
- o notify the Ombudsman within 14 days of the decision;
- o notify the person making the disclosure within 14 days of the decision (unless it is an anonymous disclosure), and
- o proceed to investigate the disclosed matter - see section 12 (Investigations) below - see s 34.

If the Principal Officer or Public Interest Disclosure Officer concludes that the disclosure is not a public interest disclosure, he or she must –

- o advise the Principal Officer (if not the person receiving the disclosure)
- o notify the Ombudsman within 14 days of the decision, and
- o notify the person making the disclosure within 14 days of the decision (unless it is an anonymous disclosure) – see s 35.

The Ombudsman must then review this decision: s 35(2).

If, on review of the matter, the Ombudsman decides that the disclosure is not a public interest disclosure, the matter does not need to be dealt with under the Act. The Principal Officer, or the Public Interest Disclosure Officer in consultation with the Principal Officer, will then decide how the disclosure should be dealt with.

## **11 PROTECTION**

### ***11.1 When does protection commence?***

Where Metro Tasmania Pty Ltd receives a disclosure which complies with the requirements of Part 2 of the Act, the disclosure immediately attracts the protections set out in Part 3 of the Act. This is so whether or not the disclosure is factually correct (although one of the requirements of Part 2, as found in s 6, is that the discloser honestly believes that the alleged improper conduct or detrimental action in fact occurred).

Note that, as provided in s 9, a disclosure can still be made where the discloser cannot identify the person or body to whom or to which the disclosure relates.

### ***11.2 What protection does the Act provide?***

Part 3 of the Act gives various types of protection to a person who makes a protected disclosure. This section only provides a summary of some elements of that Part of the Act.

A person who makes a protected disclosure –

- is not subject to any civil or criminal liability, or to any liability arising by way of administrative process, for making the protected disclosure (s 16)
- does not by doing so commit an offence under a provision of any other Act that imposes a duty to maintain confidentiality, or which imposes any other restriction on the disclosure of information (s 17(1)(a)), and
- does not by doing so breach an obligation by way of oath, or rule of law or practice, or under an agreement, which requires the discloser to maintain confidentiality or otherwise restricts the disclosure of information (s 17(1)(b))

However these last two protections do not apply to a disclosure of information to a person other than the person to whom the protected disclosure was originally made, unless that further disclosure was made in accordance with the Act: s 17(2).

Part 3 also contains various provisions which are intended to protect a discloser from detrimental action by way of reprisal for a protected disclosure. By s 19, the Act makes it an offence to take such detrimental action. By s 20, it creates a liability to pay damages for such detrimental action. And by s 21, it gives a person who believes that detrimental action has been taken against him or her the right to apply to the Supreme Court for an order requiring the person who has taken the detrimental action to remedy that action, or for an injunction.

## **12 INVESTIGATIONS**

### ***12.1 Introduction***

Metro Tasmania Pty Ltd will investigate every disclosure referred to it for investigation by the Ombudsman: s 63(b).

Unless the matters set out in 11.2 below apply, or the matter is referred to the Ombudsman, Metro Tasmania Pty Ltd will investigate every disclosure that it receives and determines is a public interest disclosure under s 33 of the Act: s 63(a).

The Principal Officer will appoint an investigator to carry out the investigation. The investigator may be a person from within an organisation or a consultant engaged for that purpose.

The objectives of an investigation will be:

- to collate information relating to the allegation as quickly as possible. This may involve taking steps to protect or preserve documents, materials and equipment
- to consider the information collected and to draw conclusions objectively and impartially
- to maintain procedural fairness in the treatment of witnesses and generally to all parties involved in the disclosure
- to make recommendations concerning remedial or other appropriate action, based on the findings of the investigation.

### **12.2 Matters that do not have to be investigated**

Before embarking on the investigation of a public interest disclosure, the Principal Officer or Public Interest Disclosure Officer must first consider in light of the provisions of s 64 of the Act whether the disclosed matter deserves to be investigated. Section 64 specifies certain circumstances under which a public body may legitimately decide not to investigate. Those circumstances are –

- if in the opinion of the public body the disclosure is trivial, vexatious, misconceived or lacking in substance
- if the subject matter of the disclosure has already been adequately dealt with by the Ombudsman or a public body, statutory authority, Commonwealth statutory authority, commission, court or tribunal
- if the person making the disclosure has commenced proceedings in a commission, court or tribunal in relation to the same matter, and that commission, court or tribunal has power to order remedies similar to those available under this Act
- if the person making the disclosure had knowledge for more than 12 months of the disclosed matter before making the disclosure and failed to give a satisfactory explanation for the delay in making the disclosure
- if the disclosure relates solely to the personal interests of the person making the disclosure
- if the disclosure is based on false or misleading information, or
- if the matter which is the subject of the disclosure has already been determined and the additional disclosure does not provide significant or substantial new information.

Any decision not to proceed with an investigation on a ground specified in s 64 must be made by the Principal Officer.

If the Principal Officer determines that the disclosed matter is not to be investigated on a ground specified in s 64, notice of this fact must be given within 14 days to both the Ombudsman and (except in the case of an anonymous disclosure) the person who made the disclosure. Reasons for the decision must accompany the notice.

The Ombudsman is required by s 65(2) to review such a decision. Following the review, the Ombudsman must notify Metro Tasmania Pty Ltd of his or her decision within a reasonable time. If the Ombudsman on review determines that the disclosure should not be investigated, the matter does not need to be dealt with under the Act. The Principal Officer, or the Public Interest Disclosure Officer in consultation with the Principal Officer, will decide how the matter should be dealt with.

If the Ombudsman determines that the disclosure should be investigated, and the matter is not referred to the Ombudsman for a reason specified in s 68, Metro Tasmania Pty Ltd must proceed with the investigation.

### **12.3 Appointment of investigator and framing of terms of reference**

The Principal Officer will determine who is to carry out the investigation. As earlier indicated, this may be an officer within Metro Tasmania Pty Ltd or an external consultant.

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

The terms of reference will set a date by which the investigation report is to be concluded, and will describe the resources available to the investigator to complete the investigation within the time set. The completion date should be as soon as practicable but, in any event, not more than 6 months from the date of the determination that the disclosure is a public interest disclosure: s 77A(1). If at any stage before or during the investigation it appears that the investigation cannot be completed within 6 months, Metro Tasmania Pty Ltd may apply to the Ombudsman for an extension of up to 6 months in which to complete the investigation: s 77A(2).

The terms of reference will require the investigator to make regular reports to the Principal Officer.

### **12.4 Investigation plan**

The investigator must prepare an investigation plan for approval by the Principal Officer. The plan must list the specific issues which are to be investigated and describe the steps which the investigator intends to take in investigating each of those issues.

The plan must also ensure that the following questions are properly addressed in the course of the investigation:

- What is being alleged?
- What are the facts in issue?
- How is the inquiry to be conducted?
- What are the possible findings or offences?
- What resources are required for the efficient conduct of the investigation?
- What action should be taken by the public body if the disclosed matter is found proven?  
(See particularly s 75 of the Act.)

The plan will be updated as necessary during the course of the investigation.

At the commencement of the investigation, the discloser should be:

- notified by the investigator that he or she has been appointed to conduct the investigation
- asked to clarify any matters which may need clarification at that early stage, and
- asked to provide any additional material he or she might have which might assist the investigation.

Any further information provided by the discloser or any other witness relating to the disclosure may also be a protected disclosure and must be dealt with confidentially and in accordance with the provisions of the Act. The investigator must remain sensitive to the discloser's possible fear of reprisals and must be aware of the statutory protections provided to the discloser.

### **12.5 Natural justice**

The principles of natural justice must be carefully observed in the course of the investigation, with respect to all parties involved in the investigation. These principles are also known as "procedural fairness".

The principles are a set of procedural standards which need to be met if the right of a person to a fair hearing can be accepted as having been satisfied. Metro Tasmania Pty Ltd will comply

with the following requirements in ensuring that procedural fairness is accorded to all parties involved:

- No one is to be involved in the investigation who;
  - *is known to be biased against any person who is potentially subject to an adverse finding, or*
  - *is known to hold any biases which are relevant to the subject matter of the investigation, or*
  - *in respect of whom there is reasonable ground for apprehending or suspecting bias.*
  
- Any person who is potentially subject to an adverse finding or comment must be told of –
  - *the allegations made against them, or which have arisen against them as a result of the investigation*
  - *all of the information which is adverse to their interests and which is, on an objective basis, credible, relevant and significant to the investigation*
  - *the potential findings in view, and their possible consequences*
  
- This must be done before any final decisions in the investigation are effectively made.
- Each such person must be given a reasonable time to respond to the material which is provided to them
- The investigator must maintain an open mind, and must fairly take into account all representations which such a person may make.

Note that there is no requirement to inform the person who is subject to the disclosure as soon as it is received, or as soon as the investigation has commenced. Note also that the name of the person making the disclosure or any particulars which might identify that person must not be revealed unless necessary, and with the discloser's knowledge.

The final investigation report should be drafted in a way that demonstrates that procedural fairness has been accorded. For instance, it should record and deal with all submissions and evidence which a person has put in their defence.

### **12.6 Conduct of the investigation**

The investigator must make contemporaneous notes of all discussions and phone calls, and all interviews with witnesses must be taped. All information gathered in an investigation must be stored securely. Interviews must be conducted in private and the investigator must take all reasonable steps to protect the identity of the discloser. Where disclosure of the identity of the person cannot be avoided, due to the nature of the allegations, the investigator must warn the discloser and his or her welfare manager of this probability.

### **12.7 Referral of an investigation to the Ombudsman**

Under s 68 of the Act, a public body may refer the investigation of a disclosed matter to the Ombudsman where the public body considers that its own investigation is being obstructed or that it is otherwise not within the capacity of the public body to complete the investigation.

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

See also section 10.3.3, concerning referral of an investigation to the Ombudsman, with a view to referral by the Ombudsman to the Commissioner of Police of suspected criminal conduct.

### **12.8 Provision of information about the investigation**

The Principal Officer or the Public Interest Disclosure Officer must ensure that the discloser is kept regularly informed concerning the handling of a protected disclosure and an investigation.

The Principal Officer must report to the Ombudsman about the progress of an investigation.

Section 74 of the Act requires a public body, at the request of the Ombudsman or the person who made the disclosure, to give the Ombudsman or that person reasonable information about the investigation. The information must be given within 28 days of the request. However, as provided in s 74(3), such information does not have to be given to the discloser if:

- it has already been given to the person, or
- the giving of the information would endanger the safety of another or may prejudice the conduct of the investigation.

## **13 ACTION TAKEN AFTER AN INVESTIGATION**

### ***13.1 Investigator's final report***

At the conclusion of the investigation, the investigator must submit a written report of his or her findings to the Principal Officer. The report must contain:

- the allegation/s
- a description of the manner in which the investigation was conducted, with sufficient detail to demonstrate that procedural fairness was observed
- an account of all relevant information received
- details of the evidence and submissions supplied by any person against whom an adverse finding is made, and the evaluation of that material by the investigator
- the findings made and conclusions reached, and the basis for them
- any recommendations arising from these findings and conclusions.
- Note in particular that such a report should not include any comment adverse to any person unless that person has been given an opportunity to be heard in the matter and their defence is fairly set out in the report – see section 12.5.

With a view to potential action by the public body under s 75 of the Act, if the investigator has found that conduct disclosed by the discloser has occurred, the recommendations made by the investigator must address:

- any steps that need to be taken by the [name of public body] to prevent the conduct from continuing or occurring in the future, and
- any action that should be taken by Metro Tasmania Pty Ltd to remedy any harm or loss arising from that conduct.

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

The report must be accompanied by:

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

The report must not disclose particulars likely to lead to the identification of the discloser: s 23(2).

### ***13.2 Action to be taken***

If the Principal Officer is satisfied that the conduct which was the subject of the investigation has occurred, he or she must consider the recommendations in the investigator's report and decide

upon the steps which are to be taken to prevent the conduct from continuing or occurring in the future: s 75(1)(a). Again taking into consideration any recommendations in the investigator's report, the Principal Officer must also consider whether any action should be taken to remedy any harm or loss arising from the conduct: s 75(1)(b).

Where the Public Interest Disclosure Officer is responsible for the progress of the investigation and is satisfied that the disclosed conduct has occurred, he or she will recommend to the Principal Officer the action that must be taken.

The Principal Officer will provide a written report to the Minister for Sustainable Transport, the Ombudsman and the discloser, setting out the findings of the investigation and any remedial steps taken.

Where the investigation concludes that the disclosed conduct did not occur, the Principal Officer will report these findings to the Ombudsman and to the discloser.

## **14 MANAGING THE WELFARE OF THE DISCLOSER**

### ***14.1 Commitment to protecting disclosers***

Metro Tasmania Pty Ltd is committed to the protection of genuine disclosers against detrimental action taken in reprisal for the making of protected disclosures. The Principal Officer is responsible for ensuring that disclosers and witnesses are protected from detrimental action, and that the culture of the workplace is supportive of protected disclosures being made.

The Principal Officer or the Public Interest Disclosure Officer must appoint a welfare manager to support all persons who have made a protected disclosure. See section 7.5 for the responsibilities of a welfare manager.

Where it is assessed that there is a high likelihood that the discloser will be subject to reprisal, the welfare manager must make an assessment of the discloser's organisational position/work performance at the point in time of their reporting. This will provide a benchmark against which alleged reprisals can be measured.

The welfare manager must also provide advice about what the discloser should do if they believe that a colleague/s or a relative/s is being subjected to detrimental action. The advice will include what level of information it is necessary for them to provide.

All employees will be advised that it is an offence for a person to take detrimental action in reprisal for a protected disclosure (s 19). The maximum penalty is a fine of 240 penalty units 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.

See section 5.5 for further details as to what constitutes detrimental action. A discloser who believes that they are being subjected to detrimental action should report it to the Principal Officer or a Public Interest Disclosure Officer. If they believe that the reprisal is not being effectively dealt with by Metro Tasmania Pty Ltd, they may report the matter to the Ombudsman. A report of detrimental action may qualify as a protected disclosure under the Act.

### ***14.2 Keeping the discloser informed***

The Principal Officer or the Protected Interest Disclosure Officer must ensure that the discloser is kept informed of action taken in relation to his or her disclosure, and the time frames that apply. The discloser must be informed of the objectives of any investigation that takes place, the findings of the investigation, and the steps taken by Metro Tasmania Pty Ltd to address any improper conduct that has been found to have occurred. The discloser must be given reasons for all decisions made by Metro Tasmania Pty Ltd in relation to a disclosure. All communication with the discloser must be in plain English.

### **14.3 Occurrence of detrimental action**

If a discloser reports an incident of detrimental action allegedly taken in reprisal for the making of the disclosure, the welfare manager must:

- record details of the incident
- advise the discloser of his or her rights under the Act, and
- advise the Public Interest Disclosure Officer or the Principal Officer of the detrimental action.

The taking of detrimental action in reprisal for the making of a disclosure can be an offence against the Act as well as grounds for making a further disclosure. Where such detrimental action is reported, the Public Interest Disclosure Officer or the Principal Officer will assess the report as a new disclosure under the Act, and it will be dealt with accordingly in accordance with these procedures.

### **14.4 Discloser implicated in improper conduct**

Where a person who makes a disclosure is implicated in misconduct, Metro Tasmania Pty Ltd will handle the disclosure and protect the discloser from reprisals in accordance with the Act, the Ombudsman's guidelines and these procedures. At the same time Metro Tasmania Pty Ltd acknowledges that the act of disclosing should not shield disclosers from the reasonable consequences flowing from any involvement in improper conduct. Section 18 of the Act specifically provides that a person's liability for his or her own conduct is not affected by the person's 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 Principal Officer will make the final decision as to whether disciplinary or other action will be taken against a discloser. Where disciplinary or other action relates to conduct that is the subject of the person's disclosure, the disciplinary or other action will only be taken after the disclosed matter has been appropriately dealt with.

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

- the intention to proceed with disciplinary action is not causally connected to the making of the disclosure (as opposed to the content of the disclosure or other available information)
- there are good and sufficient grounds that would fully justify action against any non-discloser in the same circumstances, and
- there are good and sufficient grounds that justify exercising any discretion to institute disciplinary or other action.

The Public Interest Disclosure Officer or Principal Officer will thoroughly document the process, including recording the reasons why the disciplinary or other action is being taken, and the reasons why the action is not in retribution for the making of the disclosure. The Public Interest Disclosure Officer or Principal Officer will clearly advise the discloser of the proposed action to be taken, and of any mitigating factors that have been taken into account.

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

Metro Tasmania Pty Ltd recognises that employees against whom disclosures are made must also be supported during the handling and investigation of disclosures. Metro Tasmania Pty Ltd will take all reasonable steps to ensure the confidentiality of the person who is the subject of the disclosure during the assessment and investigation process. Where an investigation does not substantiate a disclosure, the fact that the investigation has been carried out, the results of the

investigation, and the identity of the person who is the subject of the disclosure will remain confidential.

The Public Interest Disclosure Officer or Principal Officer will ensure that the person who is the subject of any disclosure investigated by or on behalf of Metro Tasmania Pty Ltd is accorded natural justice in accordance with section 12.5 of these procedures.

Where the allegations in a disclosure have been investigated, and the person who is the subject of the disclosure is aware of the allegations or of the investigation, the Public Interest Disclosure Officer or Principal Officer will formally advise the person who is the subject of the disclosure of the outcome of the investigation.

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

## **16 CRIMINAL OFFENCES**

Metro Tasmania Pty Ltd will ensure officers appointed to handle protected disclosures and all other employees are aware of the following offences created by the Act:

- **Section 19(1)** - This provision makes it an offence for a person to take detrimental action against a person in reprisal for a protected disclosure being made. The section provides for a maximum penalty of a fine of 240 penalty units or two years imprisonment, or both.
- **Section 23(1)** - This provision makes it an offence for a person to disclose, except under specified circumstances, information which they have obtained or received in the course of or as a result of a protected disclosure or the investigation of a disclosed matter under the Act. The section provides for a maximum penalty of 60 penalty units or six months imprisonment, or both.
- **Section 54** - This section creates various offences relating to obstructing the work of the Ombudsman under the Act, including offences relating to misleading the Ombudsman. The section provides for a maximum penalty of 240 penalty units or two years imprisonment, or both.
- **Section 87(1)** - This provision makes it an offence for a person to knowingly provide false information under the Act to certain officers (including the Ombudsman) with the intention that it be acted on as a disclosed matter. The provision provides for a maximum penalty of 240 penalty units or two years imprisonment, or both.
- **Section 87(2)** - This section makes it an offence for a person to knowingly provide false information to a person conducting an investigation under the Act. The provision provides for a maximum penalty of 240 penalty units or two years imprisonment, or both.

## **17 APPROVAL AND REVIEW OF THESE PROCEDURES**

These procedures were approved by the Ombudsman under s 60(3) of the Act on 28 June 2011.

The procedures will be submitted to the Ombudsman for review at least once in each 3 year period to ensure they meet the objectives of the Act and accord with the Guidelines and Standards published by the Ombudsman under s 38(1)(c) of the Act.

The date by which the procedures must be submitted to the Ombudsman for review is 28 June 2014.