



**Public Interest Disclosures
Act 2002**

**Procedures to be
followed by the
House of Assembly**

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Attachment I : Flowcharts

I Statement of Support

The House of Assembly 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 or officers, or the taking of detrimental action against those who come forward to disclose such conduct.

The House of Assembly 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.

The House of Assembly 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 the House of Assembly or, officers or employees of the House of Assembly, or Members of the House of Assembly. The procedures are also intended to assist officers and employees to understand the way in which the Act operates and needs to be administered.

The system created by these procedures provides for such disclosures about an employee or officer of the House to be made to the Ombudsman or the Integrity Commission, and for disclosures about a Member of the House of Assembly to be made to the Speaker of the House. Disclosures may be made by people who are “public officers” with the House of Assembly, or by people who are or have been “contractors” with House of Assembly for 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.

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 detrimental action
- 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.

The public interest is served by providing an avenue for persons to report improper conduct and be protected for doing so.

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).¹
- It provides certain statutory protections for 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). In other words 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).

¹ Note that s 7A of the Act permits a person to whom a disclosure may be made under Part 2 of the Act to treat a person who is not a public officer or contractor as a contractor for the purposes of the Act, if they consider that it would be in the public interest to do so.

- 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).

Two flow charts which depict the way in which the Act works are attached, in Attachment I. Table 1, which is for general information, depicts how the Ombudsman deals with a disclosure made to the Ombudsman. Table 2 depicts how disclosures may be made to the Speaker of the House of Assembly.

5 Comparison with the Integrity Commission Act

The PID Act and the *Integrity Commission Act 2009* (IC Act) work very differently.

Perhaps the most important difference is that the IC Act does not contain any provisions which protect a person who makes a complaint under that Act from detrimental action by way of reprisal. The provision of such protection is a key feature of the PID Act.

Other important differences are:

- the fact that anyone can make a complaint under the IC Act, whereas the right to make a disclosure under the PID Act is given only to a current public officer and a contractor;
- in the types of conduct to which the Act applies;² - the fact that a disclosure may be made under the PID Act about proposed conduct, whereas the IC Act only concerns past conduct;

² The PID Act concerns “improper conduct”, which embraces “corrupt conduct”. The IC Act concerns “misconduct”. The definitions of the expressions thus used in the two Acts do not align.

- the fact that a disclosure under the PID Act may be oral, whereas a complaint under the IC Act must be in writing; and
- the different processes which each Act applies to a matter brought forward under it.

A person who is trying to decide which Act to proceed under should consider seeking legal advice on what is the best course for them to take.

It is possible for a disclosure which is made under the PID Act to be dealt with under the IC Act – see Part 4A of the PID Act.

6 Key terms

6.1 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:

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.

6.2 “Public officer” and “public body”

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

3. *Interpretation*

"public body" means a public body referred to in section 4;

"public officer" means a public officer referred to in section 4;

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.”*

The Parliament of Tasmania is a “public body”, as so defined, and the House of Assembly is one part of the Parliament of Tasmania.

Further, any officer or employee of House of Assembly is a “public officer”, as so defined.

Any Member of the House of Assembly is a “public officer,” as so defined.

Note that the right which s 6 of the Act gives to a public officer to make a disclosure must be exercised whilst the person is still a public officer.

6.3 “Contractor”

This expression is defined in s 3 of the Act, in this way:

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.

6.4 “Improper conduct” and “corrupt conduct”

These expressions are also defined in s 3 of the Act, in this way:

“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);”*

Note that, for the right of disclosure under s 6 to apply, the improper conduct (including corrupt conduct) must be serious or significant as determined in accordance with guidelines issued by the Ombudsman – as to which see Guideline 1/2010 under the “Publications” tab at www.ombudsman.tas.gov.au.

Examples of “corrupt conduct”

- A public officer takes a bribe in exchange for the discharge of a public duty.
- A public officer favours unmeritorious applications for jobs or permits by friends and relatives.
- A public officer sells confidential information.

Examples of other types of “improper conduct”

- To avoid closure of a town’s only industry, an environmental health officer ignores or conceals evidence of illegal dumping of waste.
- An agricultural officer delays or declines imposing quarantine to allow a financially distressed farmer to sell diseased stock.
- A building inspector tolerates poor practices and structural defects in the work of a leading local builder, giving rise to a risk to public health or safety.

6.5 Detrimental action

This expression is defined in s 3 of the Act, in this way:

"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;”*

Note that the right to make a disclosure in relation to detrimental action under s 6 relates to detrimental action taken in contravention of s 19 of the Act. Section 19 is in these terms:

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.

Examples of detrimental action are:

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

7 The reporting system

7.1 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, and the following table summarises its effect:

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

Hence, disclosures which relate to improper conduct or detrimental action by an officer or employee of the House of Assembly must be made as explained in part 7.2, and disclosures which relate to improper conduct or detrimental action by a Member of the House of Assembly must be made as explained in part 7.3.

7.2 Disclosure about an employee or officer of the House of Assembly

Disclosures of improper conduct or detrimental action by an officer or employee of the House of Assembly (in all cases being a person employed under the Parliamentary Privilege Act 1898) must be made to the Ombudsman or the Integrity Commission.

The contact details for the Ombudsman are:

The Ombudsman
GPO Box 960
HOBART TAS 7001

or at

Level 6, 86 Collins Street
HOBART TAS 7000

Internet: www.ombudsman.tas.gov.au
Email: ombudsman@ombudsman.tas.gov.au
Phone: 1800 001 170 (Charges from mobile phones apply)

The contact details for the Integrity Commission are:

Tasmanian Integrity Commission
GPO Box 822
HOBART TAS 7001

or at

Level 2
Surrey House
199 Macquarie Street
HOBART TAS 7000

Internet: www.integrity.tas.gov.au
Email: integritycommission@integrity.tas.gov.au
Phone: 1300 720 289

7.3 Disclosure about a Member of the House of Assembly

Disclosures of improper conduct or detrimental action by a Member of the House of Assembly are to be made to the Speaker of the House.

7.4 To which entity should a disclosure be made?

As can be seen from part 7.1, there are some situations in which a disclosure may only be made to a single entity. For instance, if the disclosure is about a councillor in a local council, it must be made to the Ombudsman.

Where there is a choice of entities, those choices will include the Ombudsman and the Integrity Commission. Either of those entities will be able to give advice on the most suitable entity to receive the disclosure, but the Ombudsman has overall responsibility for the administration of the Act.

The considerations which might sensibly bear on the choice of entity to which the disclosure is made include:

- the nature of the normal functions (and therefore the skills and experience) of the different entities which might be chosen;
- the desirability of independent investigation of the disclosure – which might, for instance, lead away from making the disclosure to the public body to which it relates; and
- the seriousness or otherwise of the disclosure.

Where the disclosure is against a public body, not against a public officer, it is recommended that the disclosure be made to the Ombudsman.

8 Disclosure about a Member of the House of Assembly

This part explains the process for making a disclosure against a Member of the House of Assembly.

As indicated above in Part 7, disclosures about Members of the House of Assembly are to be made to the Speaker of the House.

A disclosure may be made orally or in writing and is to be made in accordance with prescribed procedure.³

An oral disclosure under the Act to the Speaker is to be made by telephone, or in person, in private to the Speaker.⁴

³ Public Interest Disclosures Act 2002, s7(6)

⁴ Public Interest Disclosures Regulations 2013, s6

A written disclosure under the Act to the Speaker of the House of Assembly is to be made by addressing the disclosure to the Speaker and sending or delivering the disclosure to, or leaving the disclosure at, the office of the Speaker.⁵

The Speaker may refer a disclosure to the Ombudsman for investigation.⁶

9 Disclosure about an officer or employee of the House of Assembly

This part explains the process for making a disclosure against an officer or employee of the House of Assembly.

As indicated above in Part 7, disclosures about officers or employees of the House of Assembly are to be made to the Ombudsman or the Integrity Commission.

Although it is likely that in most cases the Ombudsman would investigate the disclosure, in some instances the Ombudsman may refer a matter back to the House of Assembly for investigation.

9.1 Roles and responsibilities

This part explains the roles and responsibilities of individuals within the House of Assembly under the Act.

9.1.1 Officers and employees

Officers and employees of the House of Assembly are encouraged to report known or suspected incidences of improper conduct or detrimental action under the Act, in accordance with these procedures.

All officers and employees of the House of Assembly 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.

9.1.2 Principal Officer

The Principal Officer, the Clerk of the House, has primary responsibility for ensuring that the provisions of the Act are implemented by the public body. Section 62A of the Act provides that the Principal Officer has responsibility for:

⁵ Public Interest Disclosures Regulations 2013, s6

⁶ Public Interest Disclosures Act 2012, s78

- preparing procedures for approval by the Ombudsman;
- receiving public interest disclosures and ensuring they are dealt with in accordance with the Act (however in the case of the House of Assembly, the Clerk of the House as Principal Officer cannot receive a disclosure under the Act as any disclosure about an officer or employee of the House of Assembly must be made to the Ombudsman or Integrity Commission);
- 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.

9.1.3 Public Interest Disclosure Officer

A Public Interest Disclosure Officer is appointed by the Principal Officer under s 62A(2) of the Act, and holds a delegation from the Principal Officer which enables him or her to exercise the statutory powers and functions given to the Principal Officer by the Act which are listed in their instrument of delegation.

Each person who holds or acts in any of the following positions within House of Assembly has been appointed by the Principal Officer to act as a Public Interest Disclosure Officer, and holds a delegation which enables them to receive public interest disclosures under the Act.

Deputy Clerk.

These procedures frequently give responsibilities or functions to a Public Interest Disclosure Officer. Not all of these are referable to specific statutory powers or functions bestowed on the Principal Officer by the Act, and so some of them represent things which the Public Interest Disclosure Officer is expected to do on a purely administrative basis.

Subject to the terms of their delegation, the responsibilities of a Public Interest Disclosure Officer generally 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.

9.1.4 Investigator

Where the Ombudsman has referred a disclosed matter to the House of Assembly 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 public body or a consultant engaged for that purpose.

9.1.5 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;⁷
- listen and respond to any concerns of harassment, intimidation, victimisation or other detrimental action which may be occurring in reprisal for making the disclosure; and
- so far as is practicable, protect the identity of the discloser in the course of carrying out these responsibilities.

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

9.2 Confidentiality

The House of Assembly 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.

All reasonable care should also be taken to protect the privacy of witnesses and of the person against whom the disclosure has been made.

Section 23 of the Act requires any person who receives information 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 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.

The House of Assembly 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 confidential, and all materials relevant to an investigation, such as tapes from interviews, will also be stored securely with the files.

Care should also be taken to ensure that all relevant phone calls and meetings are conducted in private.

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

9.3 Publishing statistics

Section 86 of the Act requires the House of Assembly to include in its annual report:

- the number and types of disclosures made to the House of Assembly during the year, and the number of disclosures determined to be a public interest disclosure;
- the number of disclosures determined by the House of Assembly to be public interest disclosures that it investigated during the year;
- the number and types of disclosed matters referred to the House of Assembly by the Ombudsman for investigation;
- the number and types of disclosures referred by the House of Assembly to the Ombudsman for investigation;
- the number and types of investigations taken over from the House of Assembly by the Ombudsman;
- the number and types of disclosed matters that the House of Assembly 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 the House of Assembly.

9.4 Protection

9.4.1 *When does protection commence?*

Where a disclosure is received 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).

The protection also extends to a person who intends to make a disclosure.

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.

9.4.2 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 part of these procedures 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)).

These last two protections do not apply, however, 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.

9.5 Investigations

9.5.1 Introduction

The House of Assembly must investigate every disclosure referred to it for investigation by the Ombudsman: s 63(b).

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

The objectives of an investigation are:

- 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

9.5.2 Appointment of investigator and framing of terms of reference

The Principal Officer – not a Public Interest Disclosure Officer - will determine who is to carry out the investigation. As earlier indicated, this may be an officer within the House of Assembly or an external consultant.

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

The terms of reference will specify –

- the matters to be investigated;
- the date by which the investigation is to be concluded; and
- the resources available to the investigator for the purposes of the investigation.

The completion date should be as soon as practicable but, in any event, not more than 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, the House of Assembly 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 should require the investigator to make regular reports to the Principal Officer.

9.5.3 Investigation plan

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

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

9.5.4 Natural justice

The principles of natural justice must be carefully observed in the course of the investigation, with respect to all parties involved. These principles are sometimes referred to 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.

The House of Assembly 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.⁸

If the investigator is aware of any reason why they may be susceptible to an allegation of bias on the basis of these principles, they should immediately inform the Principal Officer.

- Any person who is potentially subject to an adverse finding or comment must be told of:
 - the allegations made against them, or which have arisen against them as a result of the investigation;
 - all of the information which is adverse to their interests and which is, on an objective basis, credible, relevant and significant to the investigation; and
 - the potential findings in view, and their possible consequences.
- This must be done before any final conclusions are formed by the investigator.
- 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.

⁸ For apprehended bias, the test is whether a fair minded lay observer, taking into account all relevant circumstances, might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the questions that he or she is required to decide.

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.

9.5.5 Conduct of the investigation

A useful reference in planning and executing the investigation is the publication by the Australian Public Service Commission (albeit produced for a different purpose), *Handling misconduct: A human resource practitioner's guide to the reporting and handling of suspected and determined breaches of the APS Code of Conduct* (February, 2007).

The investigator should make contemporaneous notes of all discussions and phone calls, and consideration should be given to the desirability of audiotaping significant interviews with witnesses

All information gathered in the course of the investigation must be securely stored.

Interviews should be conducted in private, and the investigator should take all reasonable steps to protect the identity of the discloser. Where disclosure of the identity of the person cannot be avoided, due to the nature of the allegations, the investigator should warn the discloser and his or her welfare manager of this.

9.5.6 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.

9.6 Action taken after an investigation

9.6.1 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 should 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; and
- the findings made and conclusions reached, and the basis for them.

Note in particular that the report should not include any comment adverse to any person unless that person has been given an opportunity to be heard in the matter and their defence is fairly set out in the report – see part 9.5.4.

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 investigator may wish to include recommendations as to:

- any steps that need to be taken by the House of Assembly to prevent the conduct from continuing or occurring in the future; and
- any action that should be taken by the House of Assembly 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, unless this has previously occurred.

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).

9.6.2 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 Speaker of the House and the Ombudsman, 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.

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

9.7 Managing the welfare of the discloser

9.7.1 *Commitment to protecting disclosers*

The House of Assembly 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 9.1.5 for the responsibilities of a welfare manager.

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 part 6.5 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 the House of Assembly, they may report the matter to the Ombudsman. A report of detrimental action may qualify as a protected disclosure under the Act.

9.7.2 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 the House of Assembly to address any improper conduct that has been found to have occurred. The discloser must be given reasons for all decisions made by the House of Assembly in relation to a disclosure. All communication with the discloser must be in plain English.

9.7.3 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 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.

9.7.4 Discloser implicated in improper conduct

Where a person who makes a disclosure is implicated in misconduct, the House of Assembly 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 the House of Assembly 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.

9.8 Management of the person against whom a disclosure has been made

The House of Assembly recognises that employees against whom disclosures are made must also be supported during the handling and investigation of disclosures. The House of Assembly 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 the House of Assembly is accorded natural justice in accordance with part 9.5.4 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.

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

9.9 Offences

The House of Assembly 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.

At the present time, the value of a penalty unit is \$130. The value of a penalty unit varies from time to time in accordance with movements in the Consumer Price Index. For more information, see the Department of Justice website at –

http://www.justice.tas.gov.au/legislationreview/value_of_indexed_units_in_legislation

10 Review of these procedures

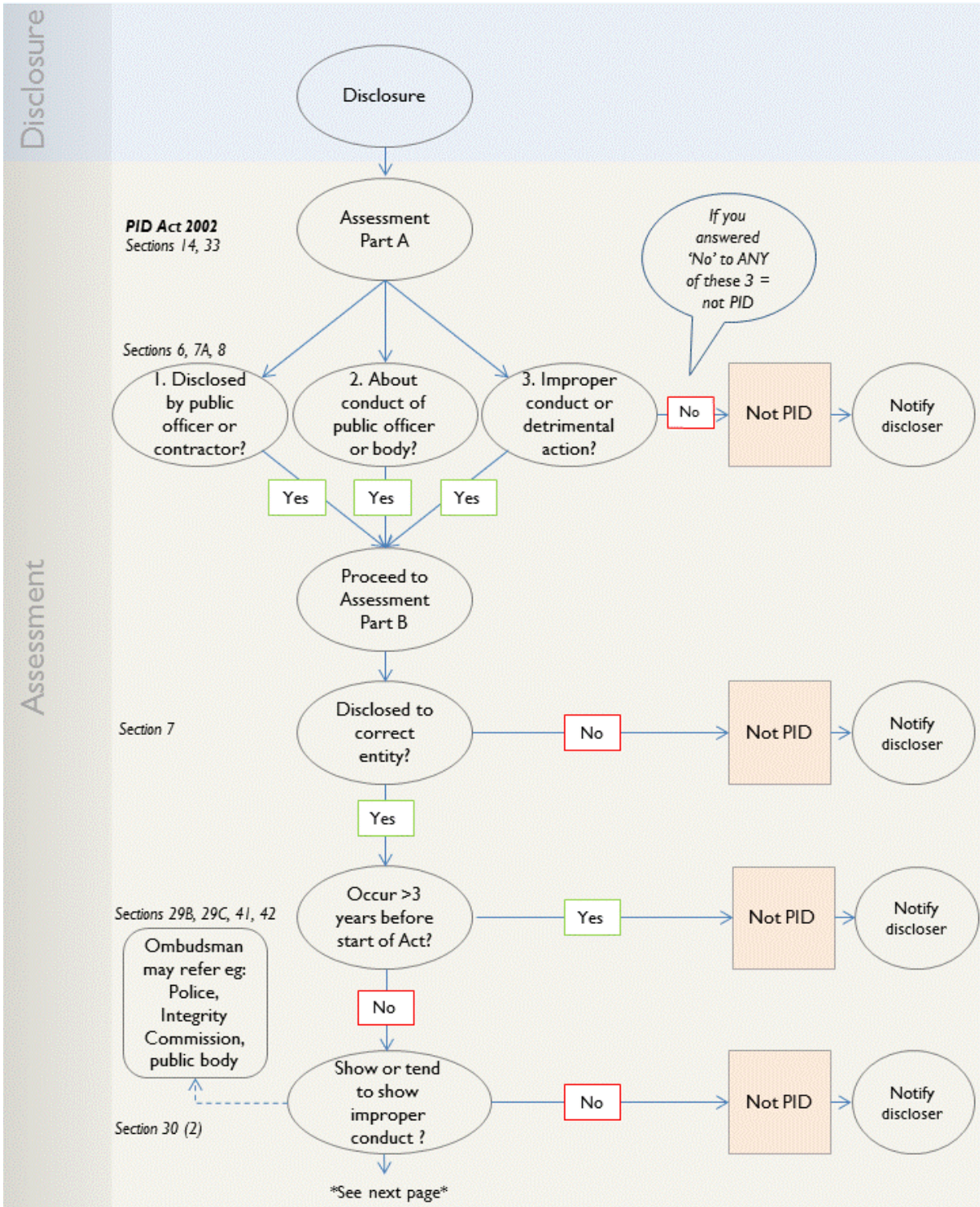
These procedures were reviewed by the Ombudsman on 21 March 2016

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 should be submitted to the Ombudsman for review is 21 March 2019.

Attachment I: Flowcharts

Table I: Disclosures made to the Ombudsman



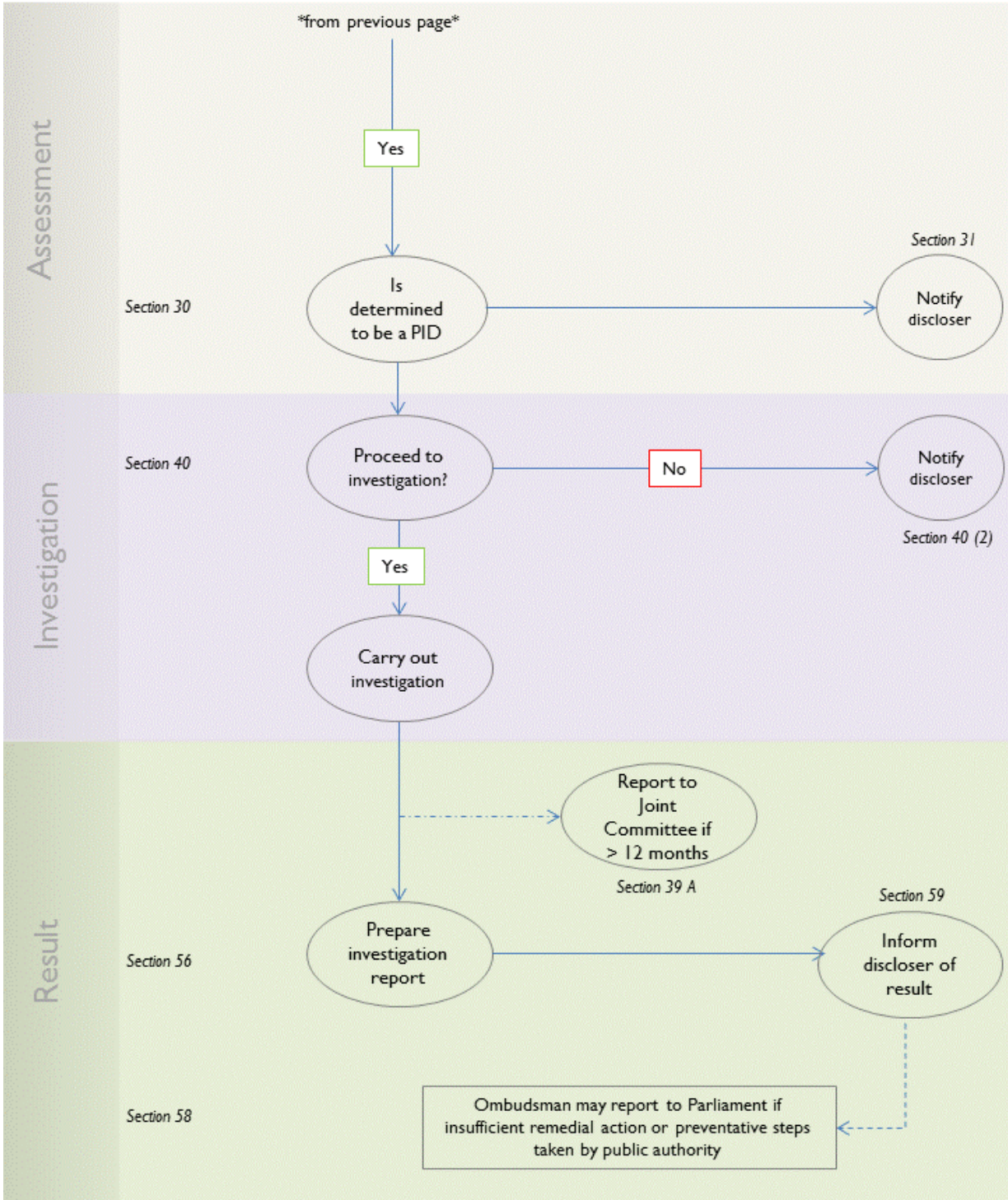


Table 2: Disclosures made to the Speaker of the House of Assembly

