

Mandatory notifications - Frequently asked questions

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Summary of questions

1. Why do relevant principal officers now need to notify IBAC of suspected corrupt conduct?
2. What are the benefits of notifying instances of suspected corrupt conduct?
3. What is a relevant principal officer?
4. What kinds of corrupt conduct must relevant principal officers notify IBAC of?
5. What does 'suspects on reasonable grounds' mean?
6. The directions provide some advice on 'misconduct in public office', can IBAC provide any further advice to help determine if conduct constitutes this kind of misconduct?
7. Under what circumstances should relevant principal officers notify Victoria Police of suspected corrupt conduct or criminal activity?
8. Some public bodies also have obligations to report misconduct or other suspect activity under other legislation. Does a relevant principal officer need to notify IBAC in these instances as well?
9. How will IBAC ensure information made in a relevant principal officers notification remains confidential?
10. How does a public body's obligation under the *Protected Disclosure Act 2012* interact with a relevant principal officer's obligation to notify IBAC of suspected corrupt conduct?
11. If an agency of a relevant principal officer has reported a complaint directly to IBAC which now has Protected Disclosure status, does a relevant principal officer need to notify IBAC of that complaint if they have just become aware of it? What would the impact be on Protected Disclosure status?
12. How does the public body's obligations under the Standing Directions of the Minister for Finance 2016 (SD 4.5.4) to report theft and loss interact with the relevant principal officer's obligation to notify IBAC of suspect corrupt conduct?
13. What happens after a relevant principal officer submits a notification to IBAC?
14. What can a relevant principal officer do if urgent action is required to deal with an issue immediately, and cannot wait until completion of IBAC's assessment?
15. What can a relevant principal officer do if they have submitted a notification form to IBAC of suspected corrupt conduct, but the issue has escalated and now needs urgent action?
16. What can organisations do if they become aware of a potential issue, but are not yet sure if it needs to be notified to IBAC. Can relevant principal officers make preliminary investigations to ascertain if an issue merits notification?
17. What should relevant principal officers (Chief Executive Officers) of local councils do if it appears that a local council issue falls within the jurisdictions of both IBAC and the Local Government Investigations and Compliance Inspectorate?
18. Do relevant principal officers need to notify IBAC of suspected corrupt conduct that occurred, or they were aware of, before 1 December 2016?
19. If suspect conduct is detected during a regular review process (eg an internal audit, service review or routine quality assurance review), should relevant principal officers halt that process while IBAC makes an assessment?
20. Does IBAC have an obligation to notify a relevant principal officer of a complaint relating to their organisation if that complaint has been made to IBAC by a member of the public or a public sector employee?
21. Will an on-line mandatory notification form be available?
22. What will IBAC do to monitor implementation of this new obligation?
23. What should a relevant principal officer do if the directions don't seem to address or provide guidance on the particular circumstance they are encountering?
24. What happens if IBAC and a relevant principal officer have a difference of opinion on the application of the directions eg whether something is a reportable issue?
25. What happens if a relevant principal officer breaches the obligations under the legislation, for example, by not notifying IBAC?

1. Why do relevant principal officers now need to notify IBAC of suspected corrupt conduct?

Victoria's Parliament introduced changes to Victoria's integrity system legislation in 2016 to implement a stronger system of integrity and accountability in the Victorian public sector. Changes were made to a number of Acts including the *Independent Broad-based Anti-corruption Commission Act 2011*. As part of these changes, from 1 December 2016, all relevant principal officers of a public body must notify IBAC of any matter they suspect on reasonable grounds involves corrupt conduct.

2. What are the benefits of notifying instances of suspected corrupt conduct?

Mandatory notifications provide an opportunity for relevant principal officers to gain an understanding of the nature of complaints and allegations arising in relation to their organisation and can help identify ways in which systems, control and organisation culture can be strengthened to help prevent corruption and improve integrity in the Victorian public sector.

The information can likewise provide an opportunity for IBAC and the Victorian Public Sector to build an accurate picture of corrupt conduct and corruption risks, and respond accordingly in working to prevent corrupt conduct from occurring. IBAC will use the information to improve its understanding of the nature and scope of corrupt conduct and corruption risks in the public sector. In addition, the information will help IBAC identify practices and activities that public sector bodies can implement to prevent corruption occurring.

3. What is a relevant principal officer?

Section 3 of the *Independent Broad-based Anti-corruption Commission Act 2011* defines relevant principal officers to include:

- the public sector body Head (as set out in the *Public Administration Act 2004*)
- the Chief Executive Officer of a council
- the Chief Executive Officer of Court Services Victoria.

Public sector bodies include all government departments and administrative offices, certain statutory authorities and corporations, and 'special bodies' as defined in section 6 of the *Public Administration Act 2004*.

Practically, this means that heads of state government departments and many government agencies, as well as local council Chief Executive Officers, are relevant principal officers. It is sometimes not clear-cut whether an organisation is a public sector body, or whether the head of an organisation comes under the Act's definition of relevant principal officer – independent legal advice should be sought in these instances.

4. What kinds of corrupt conduct must relevant principal officers notify IBAC of?

All instances of matters suspected by relevant principal officers, on reasonable grounds to involve corrupt conduct must be notified to IBAC. Section 4 of the *Independent Broad-based Anti-corruption Commission Act 2011* defines corrupt conduct as conduct, or an attempt or conspiracy to engage in conduct (whether it takes place inside or outside of Victoria), that:

1. adversely affects the honest performance of the functions of a public officer or public body;
2. constitutes or involves the dishonest performance of the functions of a public officer or public body;
3. constitutes or involves knowingly or recklessly breaching public trust by a public officer or public body;
4. involves the misuse of information or material acquired in the course of the performance of the functions of a public officer or public body; and
5. is intended to adversely affect the effective performance of the functions or powers of a public officer or public body and results in the person or their associate obtaining a specified benefit.

In order for conduct to be corrupt conduct, it must also be the case that the conduct would constitute a 'relevant offence'. Relevant offence is defined in the IBAC Act to mean an indictable offence against any Act, or the common law offences of attempt to pervert the course of justice, perverting the course of justice, bribery of a public official, and misconduct in public office.

Corrupt conduct is generally deliberate or intentional and not a result of a mistake or negligence.

Examples of corrupt conduct could include:

- a public officer that recommends and enables a contract between a public body and a company that the public officer has an undeclared interest in
- a public officer who uses a corporate credit card to make personal transactions
- a public officer or public body that accepts bribes to do something or refrain from doing something in their capacity as a public officer.

What is conduct that “is intended to adversely affect the effective performance or exercise of the functions or powers of a public officer or public body and results in the person or an associate obtaining a specified benefit”?

The definition of corrupt conduct in the IBAC Act was expanded in July 2016 to include this type of conduct (see section 4(1)(da)). This type of corrupt conduct is only made out where the conduct results in the person or an associate obtaining a specified benefit that they would not otherwise have obtained. The benefits which are specified in section 4(1)(da) of the IBAC Act are:

- a licence, permit, approval, authority or other entitlement under any Act or subordinate instrument; or
- an appointment to a statutory office or as a member of the board of any public body under any Act or subordinate instrument; or
- a financial benefit or real or personal property; or
- any other direct or indirect monetary or proprietary gain.

Any person can engage in this type of conduct. It is not limited to public officers and public bodies. Further, in addition to a natural person, a ‘person’ includes a body politic, body corporate, unincorporated association, firm, and partnership.

Whether a person is an ‘associate’ of the person who engaged in the conduct will depend on the relationship between the parties. The term ‘associate’ is defined in s 4(2B) of the IBAC Act and includes relatives, as well as a person or entity that has an agreement or understanding with the first person or holds a ‘relevant financial interest’ in a business of the first person.

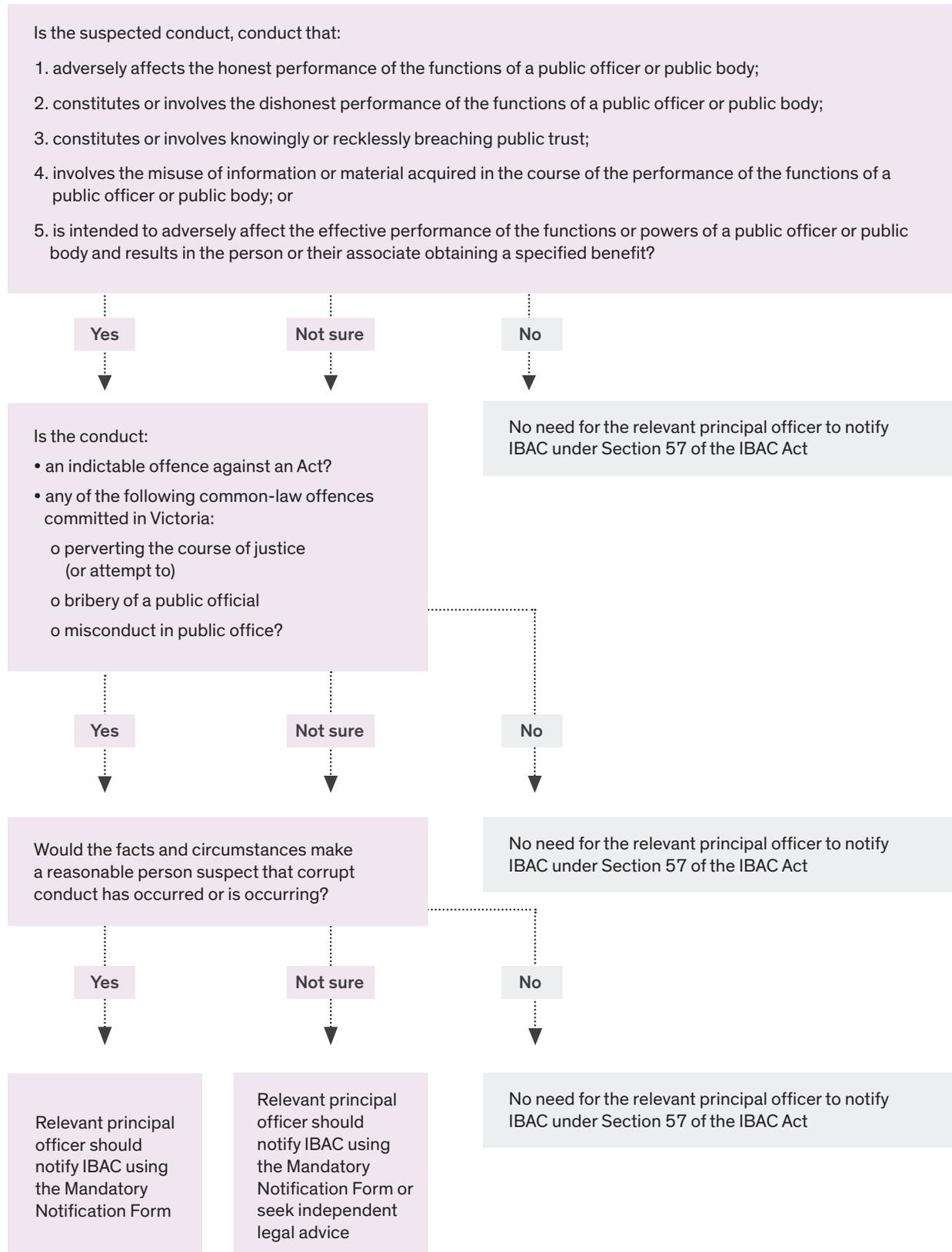
For this type of conduct to be made out, it should be noted that:

<p>1. The person must intend that the effective performance or exercise of an official function or power will be adversely affected.</p>	<p>This does not include conduct which is accidental or unintentional.</p>
<p>2. The person or associate must obtain a benefit that they would not have otherwise obtained.</p>	<p>The conduct of the person must result in the person or an associate obtaining one of the specified benefits. It must also be the case that the benefit would not have been obtained if the person hadn’t engaged in the conduct.</p> <p>‘Associate’ is defined in the IBAC Act as:</p> <ol style="list-style-type: none"> a person or entity that has an agreement or understanding with the first person or holds a ‘relevant financial interest’ in a business of the first person a person who is a ‘relative’ of the first person, and where the first person is a body corporate, certain associated persons and bodies, such as a director or employee of a subsidiary company.
<p>3. The conduct must constitute a relevant offence.</p>	<p>Includes:</p> <ul style="list-style-type: none"> • Any indictable offence against an Act; and • The common law offences of: <ul style="list-style-type: none"> o perverting the course of justice (or attempt to); o bribery of a public official; or o misconduct in public office.

Examples of such conduct could include:

- lying to a public officer about meeting the criteria for a government grant, resulting in the grant being awarded
- providing false information to a public body to avoid paying tax
- submitting a fabricated quote so that a family member wins a contract awarded by a public body
- including false information on a resume to obtain employment in a public body.

Flow chart – Determining whether conduct should be notified to IBAC as suspected corrupt conduct



Judgement may sometimes be required in determining if something is or is not corrupt conduct or a relevant offence, as it may not be clear-cut. It will always depend on the particular facts and circumstances of a case. Seek independent legal advice if needed. If in doubt, submit a notification to IBAC for assessment.

5. What does 'suspects on reasonable grounds' mean?

The words 'suspects on reasonable grounds' mean there is a real possibility that corrupt conduct is, or may be, involved. It requires a relevant principal officer to hold a suspicion of corrupt conduct, and that the suspicion is based on reasonable grounds. 'Suspicion' is something less than belief, but requires more than idle speculation.

The requirement that a person suspects on 'reasonable grounds' means that the suspicion must be based on facts and circumstances that would be sufficient to make a reasonable person suspect that corrupt conduct had occurred or was occurring. However, proof is not necessary, nor is it required that an individual or individuals be identified.

The question to ask is would the facts and circumstances make a reasonable person suspect that corrupt conduct has occurred or is occurring?

For example, if during the audit of a public officer's corporate credit card, a financial transaction with an unknown purpose comes to light - that on its own will not be enough to warrant suspicion on reasonable grounds that corrupt conduct has occurred. However, if repeated unauthorised purchases are made on the same credit card without any connection to the public officer's employment, that may give rise to suspicion on reasonable grounds.

Every case is unique and what will constitute suspicion on reasonable grounds will depend on the particular facts and circumstances of each case. If you are unsure if suspicion on reasonable grounds has been met, seek independent legal advice.

6. The directions provide some advice on 'misconduct in public office', can IBAC provide any further advice to help determine if conduct constitutes this kind of misconduct?

Misconduct in public office is a 'catch-all' offence and can include misconduct by act or omission. The misconduct may be intentional or reckless, but it must be serious enough to warrant criminal punishment, in light of the public officer's role and responsibilities.

The elements of the offence were described by the Victorian Court of Appeal in *R v Quach* (2010) 27 VR 310 (**Quach**) as follows:

Elements of misconduct in public office	
1. A public official	A person who is a 'public officer' under the IBAC Act will ordinarily meet this requirement.
2. In the course of or connected with his/her public office	In Quach , this element was described at [38] as: "The official's conduct will be linked to their office when in doing the impugned act, the official did something he or she was duty bound to refrain from doing, according to the responsibilities of the office."
3. Willfully misconducts him/herself; by act or omission, for example by willfully neglecting or failing to perform his/her duty	This is the mental element of the offence. The conduct must be willful rather than accidental, in the sense that it is deliberate and considered. The offence also extends to circumstances where the public officer is reckless as to whether their conduct is wrong or not.
4. Without reasonable excuse or justification	This will involve an assessment on the material and information available to the relevant principal officer once they become aware of the corrupt conduct.
5. Where such conduct is serious and meriting criminal punishment, having regard to the responsibilities of the office of the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those responsibilities	This element was defined in Quach at [47] as conduct that is "so far below acceptable standards as to amount to an abuse of the public's trust in the office holder" and "sufficient to attract criminal punishment."

Conduct must satisfy all the above elements for it to be considered misconduct in public office. Examples of conduct that may constitute misconduct in public office are highlighted in the directions and include:

- deliberately falsifying accounts to conceal or obtain a benefit
- entering into a secret commission or profit sharing arrangement with another person while acting in an official capacity
- colluding with other public offers to share profits with tender recipients and conceals the overvaluation of tenders
- using public office to deceive a member of the public to gain a financial advantage
- misusing power to harm, oppress or disadvantage a person.

More specific examples of where instances of misconduct in public office have been found, include:

- a police officer engaging in sexual activity with a person who the police officer met in the course of his duties and who the police officer knew had mental health issues
- a uniformed, on-duty police officer witnessing a fatal assault outside a nightclub and failing to take any steps to intervene
- a Minister using influence to encourage a council to approve a change to the conditions on a planning permit.

Whether conduct is sufficient to constitute misconduct in public office will always depend on the facts and circumstances of a matter. If you are unsure, seek independent legal advice.

7. Under what circumstances should relevant principal officers notify Victoria Police of suspected corrupt conduct or criminal activity?

The requirement to notify IBAC about suspected corrupt conduct does not prevent a relevant principal officer reporting potential criminal activity to Victoria Police. Relevant principal officers should use their discretion to decide whether suspected corrupt conduct should also be reported to police.

8. Some public bodies also have obligations to report misconduct or other suspect activity under other legislation. Does a relevant principal officer need to notify IBAC in these instances as well?

Some public bodies may also have obligations to report some types of conduct or misconduct under other legislation or agreements. If the conduct constitutes corrupt conduct and the relevant principal officer forms a suspicion on reasonable grounds that it has occurred or is occurring, then it also needs to be notified to IBAC as soon as possible. Notifying IBAC of suspect corrupt conduct does not negate the need to comply with other legislated obligations to report.

9. How will IBAC ensure information made in a relevant principal officer's notification remains confidential?

IBAC keeps the source of all allegations and complaints confidential. In some circumstances, IBAC may disclose certain information to other persons or bodies. This may occur, for example, if it is more appropriate for another body to investigate the matter or if information must be disclosed in order to take action on a notification.

Additional confidentiality restrictions apply to certain disclosures made under the *Protected Disclosure Act 2012*. All notifications made to IBAC will be assessed as to whether they are protected disclosures. For further information about the confidentiality of disclosures, please refer to IBAC's *Guidelines for making and handling protected disclosures*.

10. How does a public body's obligation under the *Protected Disclosure Act 2012* interact with a relevant principal officer's obligation to notify IBAC of suspected corrupt conduct?

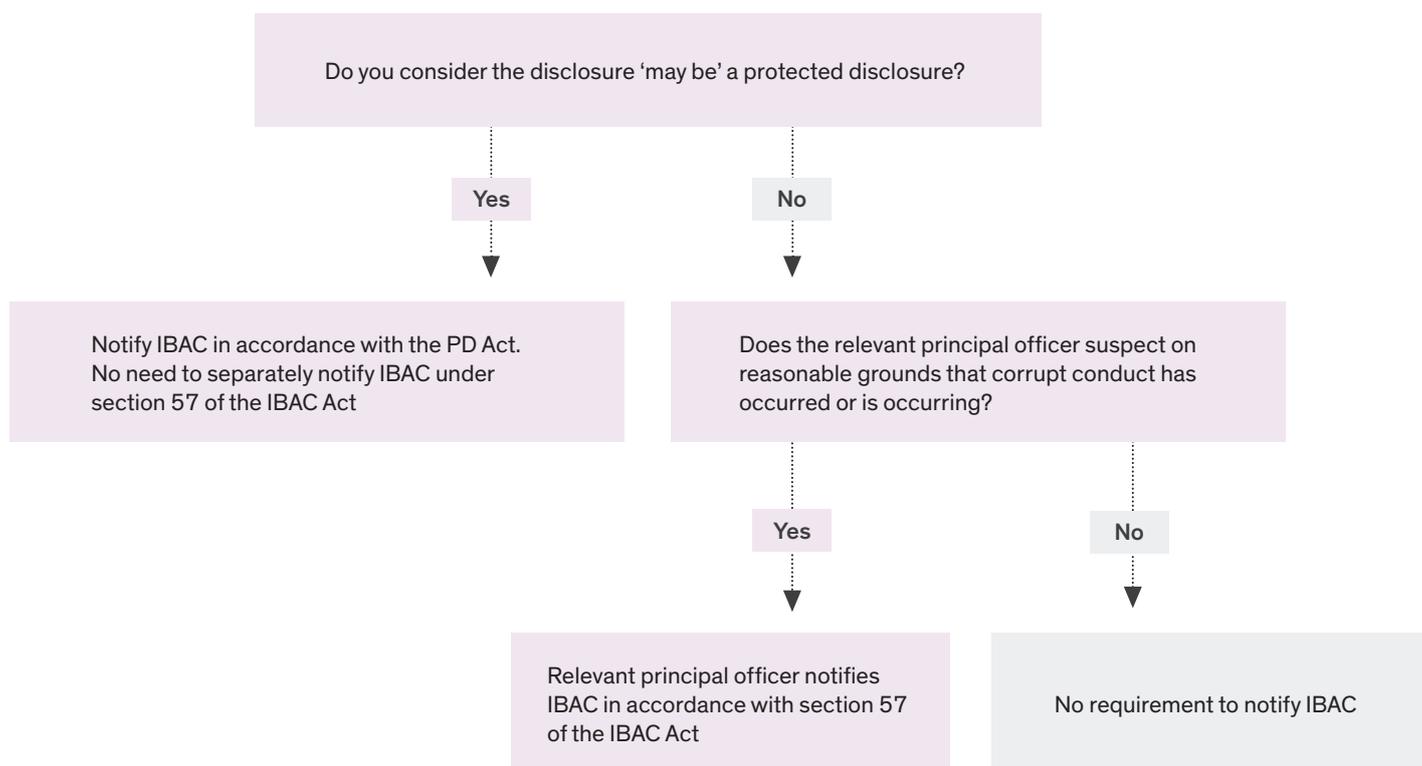
The *Protected Disclosure Act 2012* (PD Act) is designed to encourage people to come forward and make complaints by offering legal protection. The PD Act provides protection for people who make disclosures and provides for the confidentiality of the content of the disclosures and the identity of persons who make those disclosures.

All complaints and notifications received by IBAC are assessed for whether they attract the protections offered under the PD Act and can be therefore classified as protected disclosures. This includes all notifications made mandatorily by relevant principal officers.

Some public bodies can receive disclosures under the PD Act. For those public bodies that can receive disclosures, there may be overlapping obligations under the PD Act and the obligation on the relevant principal officer to make mandatory notifications. If such a body receives a potential disclosure, it should first deal with the matter in accordance with the PD Act. If the matter is not notified to IBAC in accordance with the PD Act, the organisation should consider whether the relevant principal officer may need to make a notification of suspected corrupt conduct to IBAC.

All notifications and complaints to IBAC are assessed as potential protected disclosures under the PD Act. Where suspected corrupt conduct is notified to IBAC, it will similarly be assessed. Where suspected corrupt conduct has been notified to IBAC specifically as a potential protected disclosure, IBAC will also treat it as a suspected corrupt conduct notification and there is no need to further notify IBAC under section 57 of the IBAC Act.

The following flow-chart demonstrates the decision-making process for matters that could be a disclosure under the PD Act:



11. If an agency of a relevant principal officer has notified a potential disclosure to IBAC and it has been determined a protected disclosure complaint, does a relevant principal officer need to notify IBAC of the same matter if they have just become aware of it? What would the impact be on the status of the protected disclosure?

In many cases, a potential disclosure will be notified to IBAC by an agency's Protected Disclosure Coordinator and the relevant principal officer will have no knowledge of the matter. In these cases, the relevant principal officer may separately become aware of the conduct and should notify IBAC if they have a reasonable suspicion that corrupt conduct has occurred or is occurring. A notification in these circumstances will not alter the status of the protected disclosure.

12. How does the public body's obligations under the Standing Directions of the Minister for Finance 2016 (SD 3.5.3) to report theft and loss interact with the relevant principal officer's obligation to notify IBAC of suspect corrupt conduct?

The obligation under section 57(1) of the IBAC Act does not affect or alter the obligation under Standing Direction 3.5.3 to notify the Minister for Finance and the Auditor-General of suspected or actual theft, arson, irregularity or fraud. If a notification is made under Standing Direction 3.5.3 and the criterion of section 57(1) are satisfied, it will also be necessary to also notify IBAC of the conduct. Notifying the Minister for Finance and the Auditor-General under Standing Direction 3.5.3 does not negate the need to notify IBAC under section 57(1) or vice-versa.

13. What happens after a relevant principal officer submits a notification to IBAC?

IBAC assesses all notifications of suspected corrupt conduct. Section 58 of the Act requires that IBAC dismiss, investigate or refer notifications.

IBAC may **dismiss** a notification if there is insufficient information provided or because it has already been investigated or dealt with by another agency and there was no new or further evidence.

IBAC may **refer** the notification to another person or body, or may refer back to the relevant principal officer to investigate and ask that they report back to IBAC on the action taken.

In a small number of notifications, IBAC will decide to **investigate** a matter. Consistent with its legislative remit, IBAC will prioritise serious and/or systemic corrupt conduct.

In considering a notification, IBAC may choose to make preliminary inquiries, prior to a decision to either refer, investigate or dismiss. Most notifications will result in a referral back to the relevant principal officer for investigation. IBAC may then choose to further consider and/or review the response of the agency.

IBAC works to assess and finalise notifications within 45 days of receipt. Most notifications are finalised earlier. Relevant principal officers should contact IBAC if urgent action is required before or during the assessment as IBAC can prioritise the assessment of these matters if needed. At the completion of the assessment, IBAC will then write to the relevant principal officer outlining the result of the assessment and next steps.

14. What can a relevant principal officer do if urgent action is required to deal with an issue immediately, and cannot wait until completion of IBAC's assessment?

Certain actions – in particular any investigation – that a relevant principal officer or organisation may make when suspected corrupt conduct comes to light can prejudice a future investigation or action by IBAC. No action should be taken by the relevant principal officer until IBAC has assessed the matter and informed the relevant principal officer of its decision.

However, IBAC understands that urgent action has to be taken in some circumstances. Organisations can take action on a matter where that action is:

- necessary to lessen or prevent a threat to the life, health, safety or welfare of an individual or to public health or safety
- taken to comply with another legal obligation, such as a duty to report the matter under other legislation or to take immediate action
- reporting the matter to Victoria Police.

If such action is necessary, the relevant principal officer should notify IBAC about the actions taken.

There may be many other circumstances where a relevant principal officer considers that urgent action is required. If that's the case, the relevant principal officer should consult with IBAC immediately via the phone number 1300 735 135 or email info@ibac.vic.gov.au. IBAC staff can discuss the situation and provide guidance on next steps.

IBAC understands that relevant principal officers will need to use their judgement in such situations with urgency and it will not always be possible to consult IBAC prior to action being taken.

15. What can a relevant principal officer do if they have submitted a notification form to IBAC of suspected corrupt conduct, but the issue has escalated and now needs urgent action?

Again, IBAC understands that sometimes urgent action has to be taken, including if issues escalate or something changes after a notification is made that now warrants urgent action. If that's the case, the relevant principal officer should consult with IBAC immediately via the phone number 1300 735 135 or email info@ibac.vic.gov.au. IBAC staff can discuss the situation and provide guidance on next steps. IBAC will prioritise more serious and urgent matters.

16. What can organisations do if they become aware of a potential issue, but are not yet sure if it needs to be notified to IBAC. Can relevant principal officers make preliminary investigations to ascertain if an issue merits notification?

Relevant principal officers or officers on their behalf can conduct some level of preliminary inquiry to establish what conduct has occurred and to establish reasonable grounds for suspicion. However, once a relevant principal officer suspects on reasonable grounds that corrupt conduct has occurred or is occurring, then any investigative action should cease immediately.

It is important that any preliminary inquiries do not compromise any future assessment or investigation that IBAC may undertake. Therefore, any such inquiries must involve sensitivity and discretion. If a relevant principal officer is unsure as to how to conduct any preliminary inquiries, they should seek independent legal advice.

17. What should relevant principal officers (Chief Executive Officers) of local councils do if it appears that a local council issue falls within the jurisdictions of both IBAC and the Local Government Investigations and Compliance Inspectorate?

There may be occasions when an issue or allegation appears to be both a breach of the *Local Government Act 1989* and constitute corrupt conduct. In such situations, relevant principal officers are obliged to notify both the Local Government Investigations and Compliance Inspectorate (LGICI) and IBAC. When notifying either the LGICI or IBAC of such conduct, relevant principal officer should inform both bodies that they are notifying both the LGICI and IBAC for the same conduct.

18. Do relevant principal officers need to notify IBAC of suspected corrupt conduct that occurred, or they were aware of, before 1 December 2016?

Relevant principal officers should notify IBAC of suspected corrupt conduct that:

- they became aware of on or after 1 December 2016; or
- was under investigation, or being dealt with in some way by the organisation, on 1 December 2016.

For any other conduct of which the relevant principal officer was aware prior to 1 December 2016, the relevant principal officer can exercise judgement on whether or not to notify IBAC.

When notifying IBAC of conduct that was under investigation, or being dealt with in some way by the organisation on 1 December 2016, the relevant principal officer is not required to cease any action in response to the corrupt conduct, unless directed by IBAC. It is important that any action is disclosed to IBAC.

19. If suspect conduct is detected during a regular review process (eg an internal audit, service review or routine quality assurance review), should relevant principal officers halt that process while IBAC makes an assessment?

Action associated with the specific matter should cease pending the outcome of IBAC's assessment of a notification, while other audit/review actions can continue. If the relevant principal officer is of the view that action associated with the specific matter should continue, they should contact IBAC for guidance.

20. Does IBAC have an obligation to notify a relevant principal officer of a complaint relating to their organisation if that complaint has been made to IBAC by a member of the public or a public sector employee?

No, IBAC does not have an obligation to notify relevant principal officers of complaints relating to their organisation. IBAC will notify a relevant principal officer of a complaint if:

- IBAC requires information to assist in an investigation or preliminary investigation; or
- IBAC is referring the complaint to the relevant principal officer to investigate; or
- IBAC has investigated the complaint and is notifying the relevant principal officer of the outcome, and recommendations arising, if any.

21. Will an on-line mandatory notification form be available?

Currently, a mandatory notification form is available for relevant principal officers to notify IBAC, which can be sent by email or in hardcopy form by mail to IBAC by the relevant principal officer. Address details are contained in the directions for making mandatory notifications of suspected corruption. This form is available to download at www.ibac.vic.gov.au/notifications

An on-line form may be developed and made available in future.

22. What will IBAC do to monitor implementation of this new obligation?

IBAC will monitor closely how the new obligation is being adhered to and impact on organisations.

It will take some time for both organisations and IBAC to get used to the new obligations, see how it is working and to become familiar with the types of notifications coming through.

IBAC will follow-up with some organisations to iron out arising challenges, identify any possible need for protocols for high-volume notifications and seek feedback on notification processes and guidance materials and refine where needed.

There may be types of specific conduct that IBAC can mutually agree with relevant principal officers that do not need to be notified to IBAC.

23. What should a relevant principal officer do if the directions don't seem to address or provide guidance on the particular circumstance they are encountering?

The directions and support material released by IBAC to assist relevant principal officers to meet their obligations are not meant to cover every circumstance.

There will sometimes be grey areas that will require the relevant principal officer's best judgement at the time. If in doubt, seek independent legal advice.

24. What happens if IBAC and a relevant principal officer have a difference of opinion on the application of the directions eg whether something is a reportable issue?

IBAC is committed to working with relevant principal officers to successfully implement this new notification obligation and will seek to discuss issues openly and collaboratively to resolve differences of opinions.

25. What happens if a relevant principal officer fails to comply with the obligations under the legislation, for example, by not notifying IBAC?

Section 57 of the *Independent Broad-based Anti-corruption Commission Act 2011*, from 1 December 2016, sets out the obligation of relevant principal officers to make mandatory notifications to IBAC. The legislation does not identify any specific sanctions for relevant principal officers for non-compliance with the obligation.

IBAC will work with public bodies to successfully implement this new obligation and address any challenges and problems.

IBAC may choose to review application of this obligation, including adherence by relevant principal officers, at some point in the future and results of that review may be released in public reports.

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IBAC is Victoria's anti-corruption agency responsible for preventing and exposing public sector corruption and police misconduct. We do this by:

- investigating corruption and police misconduct
- informing the public sector, police and the community about the risks and impacts of corruption and police misconduct, and ways in which it can be prevented.

To report corruption phone 1300 735 135 or visit www.ibac.vic.gov.au