

Public Interest Disclosure Policy & Procedure

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1. STATEMENT OF SUPPORT

The Tasmanian Ports Corporation Pty Ltd (**TasPorts**) 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.

TasPorts 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.

TasPorts 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 members, officers or employees of TasPorts. The procedures are also intended to assist TasPorts' members, 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 to be made to Anthony Donald the Chief Executive Officer (the **Principal Officer**) or to a delegated Public Interest Disclosure Officer (Adam Mucci the Chief Financial Officer or Angie Somann-Crawford the General Counsel). Disclosures may be made by people who are "public officers" with TasPorts, or by people who are or have been "contractors" with TasPorts 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. Employees may wish to refer to TasPorts':

- Fraud and Corruption Control Policy;
- Whistleblower Policy;
- Code of Conduct; and
- TasPorts Values,

which are available on DocUControl and contain information regarding appropriate conduct and investigation of complaints. TasPorts also has a Right to Information Policy and the process for making a Right to Information request is set out in the Right to Information Form also available on DocUControl.

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

3. THE PURPOSE OF THE ACT

The purposes of the Act are primarily–

- 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.

The Act operates separately and differently from the Commonwealth whistle-blowing legislation contained within the *Corporations Act 2001* (Cth) and the *Tax Act 1953* (Cth), but may overlap. For example, the Commonwealth legislation recognises a broader category of discloser, the eligible recipients for a disclosure are different and the scope of disclosable matters is determined by different legislation. As such, if a disclosure does not meet the requirements of the Act the receiver of the disclosure should consider whether the disclosure would be protected under the Commonwealth legislation. Where a disclosure is protected under both the Tasmanian and Commonwealth regime, TasPorts will determine the most appropriate regime to apply.

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
- 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); and
- 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).

¹ Members of the public may also make disclosures in limited circumstances, when the Ombudsman or Integrity Commission deems this in the public interest under s7A.

A flow chart, which depicts the way in which a public body should deal with a disclosure made to it under the Act, is at Attachment 4 to this document. It is important to note that a person does not have to expressly reference the Act when making a disclosure in order to be eligible for protection, if all the requirements in the Act are otherwise met.

5. COMPARISON WITH THE INTEGRITY COMMISSION ACT

The 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 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 Act is given only to a current public officer and a contractor;
- differences in the types of conduct to which the Act applies. The Act concerns “improper conduct”, which embraces “corrupt conduct”. The IC Act concerns “misconduct”. The definitions of the expressions thus used in the two statutes do not align;
- in the types of conduct to which the Act applies: the fact that a disclosure may be made under the Act about *proposed* conduct, whereas the IC Act only concerns *past* conduct;
- the fact that a disclosure under the Act may be oral, whereas a complaint under the IC Act must be in writing; and
- the different processes which each statute 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 Act to be dealt with under the IC Act – see Part 4A of the 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 which states:

- (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. Each of these expressions are defined in either ss 3 and/or 4 and are now explained.

6.2. “public officer” and “public body”

TasPorts is a “public body” according to the Act.

Any member, officer or employee of TasPorts is a “public officer”.

A public officer can include a public officer from another public body.

The right for a public officer to make a disclosure must be exercised whilst the person is still a public officer.

It is **not a requirement** that a public officer refer to the Act, or even have knowledge that the Act exists, to make a disclosure which may be protected under the Act.

6.3. “contractor”

Current or past contractors and sub-contractors can make disclosures about public bodies, not public officers, but they can only make a disclosure to the Ombudsman or Integrity Commission. Public Interest Disclosure officers should refer any contractors wanting to make a disclosure to either of these bodies.

6.4. “improper conduct” and “corrupt conduct”

“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 (see Public Interest Disclosure Guideline Two: Serious or Significant Improper Conduct, available at www.ombudsman.tas.gov.au).

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).

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, to include:

- (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:

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

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.

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 is its effect with regard to TasPorts specifically:

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 (<i>other than</i> the Police Service or a State Service Agency)	that public body (TasPorts); or the Integrity Commission; or the Ombudsman

Hence, disclosures which relate to improper conduct or detrimental action by a member, officer or employee of TasPorts must be made to TasPorts (refer Section 7.2 below), the Integrity Commission or the Ombudsman as explained in parts 7.2 to 7.5. A contractor, or a member of the public under s7A of the Act, can only make a disclosure about a public body, so they must make it to the Ombudsman or the Integrity Commission.

7.2. Disclosure to persons within TasPorts

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

- The Chief Executive Officer – who is the “Principal Officer” of the public body, within the terms of the Act.
- The Chief Financial Officer or General Counsel – who are “Public Interest Disclosure Officers” appointed by the Principal Officer and hold a delegation which enables them to receive public interest disclosures under the Act.

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 a Public Interest Disclosure Officer (Chief Financial Officer or General Counsel) should be referred to the Principal Officer (Chief Executive Officer).

A disclosure about the Principal Officer, TasPorts or the Board should be immediately referred to the Ombudsman or the Integrity Commission.

7.3. Disclosure to the Ombudsman

A disclosure may also be made directly to the Ombudsman. The contact details for the Ombudsman are:

Ombudsman Tasmania
GPO Box 960
HOBART, TASMANIA 7001

or at

Level 6, 86 Collins Street
HOBART, TASMANIA 7000

Internet: www.ombudsman.tas.gov.au

Email: ombudsman@ombudsman.tas.gov.au

Phone: 1800 001 170 (Freecall, though charges for mobile phones may apply)

7.4. Disclosure to the Integrity Commission

A disclosure may also be made directly to the Integrity Commission. The Commission can deal with a protected disclosure about individuals under the *Integrity Commission Act 2009* or refer it to a public body or the Ombudsman. A protected disclosure about a public body would be referred to the Ombudsman. The contact details for the Integrity Commission are:

Integrity Commission
GPO Box 822
HOBART, TASMANIA 7001

or at

Level 2
Surrey House
199 Macquarie Street
HOBART, TASMANIA 7000

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

7.5. To which entity should a disclosure be made?

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.

Note that if the disclosure is about TasPorts it can only be made to the Ombudsman or the Integrity Commission. Given that the normal functions of the Integrity Commission focus on individual misconduct it is recommended that the Ombudsman be contacted in the first instance.

8. ROLES AND RESPONSIBILITIES

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

8.1. Members, officers and employees

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

All members, officers and employees of TasPorts 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.

8.2. Principal Officer

The Principal Officer has primary responsibility for ensuring that the provisions of the Act are implemented in the public body. 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 (Chief Executive Officer) may delegate any or all of their functions to a Public Interest Disclosure Officer. This delegation within TasPorts has been made to the Chief Financial Officer and General Counsel.

8.3. 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 them to exercise the statutory powers and functions given to the Principal Officer by the Act which are listed in their instrument of delegation.

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”;
- 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; and
- administrative functions to support the role under the Act, as required.

8.4. Investigator

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

8.5. 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 develop a support plan for them;
- advise the discloser of the legislative and administrative protections available to them;²
- listen and respond to any concerns of harassment, intimidation, victimisation or other detrimental action which may be occurring in reprisal for making disclosure; and
- so far as is practicable, protect the identity of the discloser in the course of carrying out these responsibilities.

The Senior Advisor Health and Safety has been appointed as the Welfare Manager. The Welfare Manager must not be responsible for assessing or investigating the disclosure.

9. CONFIDENTIALITY

TasPorts 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;

² See Part 12 below for details of the legislative protections

- 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; or
- the identity of the discloser is likely to be guessed from the circumstances of the disclosure and the risks for the discloser are better managed if their identity is known and specific warnings or risk management actions can be taken.

In these circumstances, the person who made the disclosure should first be consulted before any action is taken. Consider obtaining permission in writing from the discloser prior to identifying them.

TasPorts 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 and electronic material will be kept in files that are clearly marked as 'confidential', and all materials relevant to an investigation, such as interview recordings, will also be stored securely with the files. Electronic files should have access restricted to the relevant officers.

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.

10. PUBLISHING STATISTICS

Section 86 of the Act requires TasPorts to include in its annual report -

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

11. ASSESSING THE DISCLOSURE

The Act requires the taking of two distinct steps when assessing a disclosure. It first needs to be determined whether or not it qualifies as a protected disclosure, and thus attracts the protections contained in the Act. In order to do so it must satisfy the following prerequisites:

- has it been made to the correct person or body; and
- if it has been correctly made to TasPorts,
 - has it been made by a public officer (or, if the disclosure is anonymous, is the person receiving it satisfied that it is being made by a public officer);
 - is it about the conduct of a public officer;
 - does the discloser believe the public officer has, is or is proposing to engage in improper conduct;
 - is it about conduct that could objectively fall within the definition of improper conduct; and
 - does it concern conduct that occurred on or after 1 January 2001?

The next step is to determine if it is a public interest disclosure. This requires an assessment of the evidence provided by the discloser to determine if it shows or tends to show a public officer has, is or is proposing to engage in improper conduct.

11.1. What should the recipient of the disclosure do upon receipt of the disclosure?

If the disclosure is oral, the recipient should make a file note as soon as possible, which records the time when the disclosure was made, the circumstances under which it was made and, so far as is possible, the exact words used by the discloser. The recipient should also ask the discloser to put the disclosure in writing as soon as possible.

Unless the recipient is the Principal Officer (or the disclosure is about 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.

If the disclosure is:

- from a contractor or a member of the public; or
- about the Principal Officer,

it should be immediately referred to the Ombudsman or the Integrity Commission.

A file should be created for the disclosure, marked clearly as being a *Public Interest Disclosures Act 2002* matter – see part 9 of these procedures (Confidentiality).

11.2. Is it a protected disclosure?

The protections for disclosers, provided in Part 3 of the Act only apply where the disclosure is a “protected disclosure”. This means a disclosure made in accordance with Part 2 of the Act, s 14.

The Principal Officer or a Public Interest Disclosure Officer should assess whether a disclosure has been made in accordance with Part 2 as soon as possible after it has been received. The

assessment of disclosure form at Attachment 1 should be completed as part of this process. It contains a series of questions going to the essential elements of a protected disclosure, raised at Assessing the disclosure, and what is needed to be established before a disclosure can be a protected disclosure. A separate assessment of disclosure form will usually need to be completed for each disclosure. This means, for example, that if a discloser is complaining about three different public officers, this constitutes three disclosures and three assessments should be completed.

If it is determined that it is a protected disclosure, the discloser should be given information about the protections in the Act (such as a copy of Part 3 of the Act). These protections should be explained to the discloser if necessary. The discloser should also be informed of the process which will be followed with respect to the 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 parts 8.5 and 15.1. A risk assessment should also be completed.

11.3. Mixed content disclosures

Many disclosures will also contain personal grievances. When conducting assessments of complaints or grievances the assessor needs to be alert to identifying those aspects that could constitute a protected disclosure.

It is not a requirement that a discloser specify they are making a disclosure, the onus rests on TasPorts to identify whether or not the Act applies. Consider discussing with the person whether they wish to make a public interest disclosure if it appears their concerns would meet the threshold.

Those matters that can be dealt with under a grievance process and those that are more appropriately dealt with under these procedures should be dealt with separately where possible.

11.4. Risk Assessment

A risk assessment should occur as soon as possible after the disclosure has been assessed as being a protected disclosure under the Act. The risk assessment template at Attachment 3 should be completed by the Principal Officer or Public Interest Disclosure Officer and any appropriate risk mitigation action required be implemented. A single assessment can be made of all relevant risks, or you may prefer to undertake separate assessments of the different risks relating to a particular disclosure, such as the risks to the discloser, the subject of the disclosure, any witnesses, or TasPorts. The discloser is usually the most able to identify potential reprisal risks, so input should be sought from the discloser and the Welfare Manager in completing the risk assessment. All reasonable steps to reduce risks of reprisal to the discloser should be taken.

11.5. Should the disclosure be referred to another body?

11.5.1. Referral to the Ombudsman

TasPorts may refer a protected disclosure to the Ombudsman if it believes that it is not able to complete the investigation satisfactorily: s 68. The Act does not provide for other relevant circumstances in which a public body may refer a protected disclosure to the Ombudsman before commencing an investigation, but an alternative way of achieving the same result would be for the public body to encourage the discloser to make their disclosure direct to the Ombudsman, such that there is no need for the public body to continue to investigate the matter.

11.5.2. Referral to the Integrity Commission

TasPorts may refer a protected disclosure (as distinct from a public interest disclosure) to the Integrity Commission where it considers that the disclosure relates to misconduct as defined in s 4(1) of the IC Act. Consideration should also be given to:

- whether independent investigation of the subject matter of the disclosure by the Integrity Commission is preferable; and
- the views of the discloser and the Integrity Commission about whether the matter should be referred.

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

The Integrity Commission may deal with the disclosure under the IC Act, 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.

11.5.3. Referral of criminal conduct to the Commissioner of Police

It is possible that, before or during an investigation, facts are uncovered that indicate the possibility that a criminal offence might have been committed. If this happens, TasPorts will not commence, or will suspend, the investigation and will consult with the Ombudsman as to the future conduct of the matter. Under section 41 of the Act, the Ombudsman has the power to refer a public interest disclosure to the Commissioner of Police for investigation.

If the Ombudsman is satisfied that the disclosed matter should be referred to the Commissioner, TasPorts 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 and so should be done at the first possible opportunity. Referral to the Commissioner 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 through the Ombudsman, the investigation under the Act ceases. There may still be administrative or operational issues which have been identified during the disclosure process or investigation, however, these should be dealt with under other internal processes of TasPorts. 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.

11.5.4. Is the disclosure a public interest disclosure?

Once a disclosure has been assessed as being a protected disclosure, a further determination must be made as to whether or not it is a public interest disclosure. The Principal Officer or Public Interest Disclosure Officer must make this determination under s 33 of the Act within 45 days of the receipt of the disclosure. Use the Assessment of disclosure form at Attachment 1 to ensure you consider all the necessary requirements.

For a disclosure to be a public interest disclosure, the Principal Officer or their delegated Public Interest Disclosure Officer must be satisfied that the disclosure shows or tends to show that the public officer to whom the disclosure relates has:

- engaged, is engaging or proposes to engage in improper conduct in their capacity as a public officer; or
- 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, they must -

- advise the Principal Officer (if not the person assessing the disclosure);
- notify the Ombudsman within 14 days of the decision using the notification template at Attachment 3;
- notify the person making the disclosure within 14 days of the decision (unless they are an anonymous and uncontactable); and
- proceed to investigate the disclosed matter - see part 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, they must -

- advise the Principal Officer (if not the person assessing the disclosure);
- notify the Ombudsman within 14 days of the decision using the notification template at Attachment 3; and
- notify the person making the disclosure within 14 days of the decision (unless they are anonymous and uncontactable) – 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.

If the Ombudsman determines that the disclosure is a public interest disclosure, the matter may be referred back to TasPorts under s 42 for investigation under the Act or the Ombudsman will deal with the disclosed matter.

12. PROTECTION

12.1. When does protection commence?

Where TasPorts 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).

The protection also extends to a person who intends to make a disclosure – see s 19 of the Act.

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.

12.2. What protection does the Act provide?

Part 3 of the Act gives various types of protection to a person who makes a protected disclosure. Below is a summary of some elements of Part 3.

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)).

If a disclosure is not made to the correct entity, the protections may not apply. For example, a discloser will not be protected if otherwise confidential information is disclosed to the media.

Part 3 also contains various provisions which are intended to protect a discloser from detrimental action by way of reprisal for a protected disclosure. These are:

- s 19, which makes it an offence to take such detrimental action;
- s 20, which creates a liability to pay damages for such detrimental action; and
- s 21, which gives a person who believes that detrimental action has been taken against them 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.

13. INVESTIGATIONS

13.1. Introduction

TasPorts will investigate every disclosure referred to it for investigation by the Ombudsman: s 63(b).

Unless the matters set out in 13.2 below apply, or the matter is referred to the Ombudsman, TasPorts 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 TasPorts or a consultant engaged for that purpose.

The objectives of an investigation are to:

- collate information relating to the allegation as quickly as possible, which may involve taking steps to protect or preserve documents, materials and equipment;
- consider the information collected and to draw conclusions objectively and impartially; and
- maintain procedural fairness in the treatment of witnesses and generally to all parties involved in the disclosure.

13.2. Matters that do not have to be investigated

Before starting an the investigation, the Principal Officer or Public Interest Disclosure Officer must first consider whether the disclosed needs to be investigated. Section 64 specifies certain circumstances under which a public body may legitimately decide not to investigate. Use the disclosure assessment template at Attachment 1 to assist in assessing whether any of the grounds in s 64 apply.

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

If it is decided that the disclosed matter is not to be investigated, written notice must be given within 14 days of this decision to both the Ombudsman and (except in the case of an uncontactable anonymous disclosure) the person who made the disclosure. Reasons for the decision must accompany the notice. Use the notification template at Attachment 3 to provide notice to the Ombudsman.

The Ombudsman will review the decision. If the Ombudsman agrees that the disclosure should not be investigated, the matter does not need to be dealt with under the Act. Importantly, the discloser still retains the protections. 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, they will advise the Principal Officer.

S 64 may be reconsidered at a later time during the investigation.

13.3. 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.

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;
- the requirement for regular reports to be made to the Principal Officer, including details of compliance with any measures identified in the risk assessment; 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, TasPorts may apply to the Ombudsman for an extension of up to a further 6 months in which to complete the investigation: s 77A(2).

13.4. 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 risk assessment should be

considered as part of the investigation planning and appropriate steps taken to reduce identified risks during the investigation.

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

13.5. Procedural fairness

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

The principles are a set of procedural standards which need to be met in order to satisfy a person's right to a fair hearing. If natural justice is not provided, the investigations findings may be questionable and could be challenged.

TasPorts 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.³

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. It is best to err on the side of caution and to consider an external investigator if there might be a perception of bias over the investigation.

- 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 proposed adverse findings, 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.

Despite the above, 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.

³ 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 they are required to decide. Further discussion of this principle can be found in the Tasmania Supreme Court decision of *R v West Coast Council; Ex Parte Strahan Motor Inn (A Firm)* [1995] TASSC 47

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.

13.6. Conduct of the investigation

The Integrity Commission's Guide to Managing Misconduct in the Tasmanian Public Sector⁴ is a useful guide on the conduct of a public interest disclosure investigation.

The investigator should make contemporaneous notes of all discussions and phone calls, and audio recordings of significant interviews with witnesses where possible.

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. The name of the discloser or any particulars which might identify that person must not be revealed unless necessary, and then only with the discloser's knowledge.

13.7. Referral of an investigation to the Ombudsman

Under s 68 of the Act, TasPorts may refer the investigation of a disclosed matter to the Ombudsman where TasPorts considers that its own investigation is being obstructed or that it is otherwise not within the capacity of TasPorts to complete the investigation. An investigation can also be referred to the Ombudsman if evidence of possible criminal conduct is found, to enable the Ombudsman to refer the matter to Tasmania Police for investigation (see Referral of criminal conduct to the Commissioner of Police above for more detail).

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

13.8. 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 any 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.

14. ACTION TAKEN AFTER AN INVESTIGATION

14.1. Investigator's final report

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

⁴ Accessible at <https://www.integrity.tas.gov.au/publications/prevention-resources/guides>.

- the allegation/s;
- a description of the manner in which the investigation was conducted, with sufficient detail to demonstrate that natural justice 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 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 part 13.5. A public body must take action, under s 75 of the Act, to redress any improper conduct found and try to prevent its recurrence. Accordingly, if the investigator has found that the alleged improper conduct has occurred, the investigator may wish to include recommendations as to:

- any steps that need to be taken by TasPorts to prevent the conduct from continuing or occurring in the future; and
- any action that should be taken by TasPorts 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 internal investigation report must be accompanied by:

- the transcript or other record of any oral evidence taken, including audio or video recordings; and
- all documents, statements or other exhibits received by the investigator 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).

14.2. Action to be taken

If the investigation makes a finding that a public officer has engaged, is engaging or proposes to engage in improper conduct, TasPorts must, take all reasonable steps to prevent the conduct from continuing or occurring in the future and may take action to remedy any loss or harm arising from the conduct (s 75). The Principal Officer should take into consideration any recommendations in the investigator's report, but can take different or broader action if appropriate.

The Principal Officer will provide a written report to the Minister for Infrastructure and the Ombudsman, setting out the findings of the investigation and any remedial steps taken. The report must not disclose particularly likely to lead to the identification of the discloser. The Ombudsman will also be provided with the full internal investigation report and accompanying evidence. See the notification template at Attachment 3.

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.

Where the investigation concludes that the disclosed conduct did not occur, the Principal Officer will report these findings to the Ombudsman (in accordance with the notification template at Attachment 3) and to the discloser.

15. MANAGING THE WELFARE OF THE DISCLOSER

15.1. Commitment to protecting disclosers

TasPorts 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. This must occur within 5 working days of the protected disclosure being received. See part 8.5 for the responsibilities of a Welfare Manager.

The Welfare Manager must contact the discloser as soon as possible and not more than 5 working days after being appointed.

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 in reprisal for having made a disclosure should report it to the Principal Officer or a Public Interest Disclosure Officer, as this can be a potential further protected disclosure. If they believe that the reprisal is not being effectively dealt with by TasPorts, they may report the matter to the Ombudsman.

15.2. Keeping the discloser informed

The Principal Officer or the Public Interest Disclosure Officer must ensure that the discloser is kept informed of action taken in relation to their 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 TasPorts to address any improper conduct that has been found to have occurred. The discloser must be given reasons for all decisions made by TasPorts in relation to a disclosure. All communication with the discloser must be in plain English.

15.3. 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 should:

- record details of the incident;
- advise the discloser of their rights under the Act, and
- assist the discloser to advise a 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.

15.4. Discloser implicated in improper conduct

Where a person who makes a disclosure is implicated in improper conduct, TasPorts 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 TasPorts 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 their 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 because of 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. They should advise the discloser that they can raise any concerns about the action taken being a potential reprisal with the Ombudsman.

16. MANAGEMENT OF THE PERSON AGAINST WHOM A DISCLOSURE HAS BEEN MADE

TasPorts recognises that employees against whom disclosures are made must also be supported during the handling and investigation of disclosures. When a person who is the subject of the disclosure is made aware of the allegations or of an investigation, they should be provided with an appropriate contact person to whom to direct queries. Information about employee assistance programs or other supports should also be provided, if appropriate.

TasPorts 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 TasPorts is afforded procedural fairness in accordance with part 13.5 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.

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

17. OFFENCES

TasPorts 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 date of these procedure the value of a penalty unit is \$172. 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:

https://www.justice.tas.gov.au/about/legislation/value_of_indexed_units_in_legislation

18. APPROVAL AND REVIEW OF THESE PROCEDURES

These procedures were approved by the Ombudsman under s 60(3) of the Act on [date of approval to be inserted].

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 [insert date to be resubmitted for approval].

ATTACHMENTS:

- Attachment 1 – Assessment of Disclosure Form
- Attachment 2 – Risk Assessment Template
- Attachment 3 – Ombudsman Notification Template
- Attachment 4 - Flowchart