

# POLICY

## Investigations

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<b>Responsible officer</b>	Assistant Ombudsman, Executive Office



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## POLICY STATEMENT

The Ombudsman may investigate the administrative actions of an authority, which includes Victorian state government departments, statutory authorities, local councils and public organisations. The Ombudsman can also investigate allegations of improper conduct and detrimental action involving an authority or public interest disclosure entity on receipt of a public interest complaint referred by the Independent Broad-based Anti-corruption Commission (IBAC).

Following an investigation, the Ombudsman can recommend that action be taken to remedy the error or improve public administration. We conduct investigations in an impartial manner, consistent with our statutory obligations, policies and reasonable use of public resources.

## INVESTIGATION OF AN ADMINISTRATIVE ACTION

1. The purpose of VO conducting an investigation is to establish whether an administrative action taken by or in a Victorian government organisation falls within one or more of the 'errors' set out in section 23(1) of the *Ombudsman Act 1973* (Vic). That is, an investigation examines whether the action was taken in error because it:
  - appears to have been taken contrary to law
  - was unreasonable, unjust, oppressive or improperly discriminatory
  - was in accordance with a rule of law or a provision of an enactment or practice that is or may be unreasonable, unjust, oppressive or improperly discriminatory
  - was taken in the exercise of a power or discretion, and was so taken for an improper purpose or on irrelevant grounds, or on the taking into account of irrelevant considerations
  - was a decision that was made in the exercise of a power or discretion and the reasons for the decision were not, but should have been, given
  - was based wholly or partly on a mistake of law or fact
  - was wrong.
2. We also investigate whether the action taken was incompatible with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Ombudsman Act, section 13(2) and see our 'Human Rights' policy).
3. VO's opinion on whether an error has been made is based on evidence collected during an investigation. When an error is identified, we may recommend that action be taken to remedy the error, or to improve public administration.

4. We can commence an investigation as a result of receiving:
  - a complaint (Ombudsman Act, section 15B)
  - a referral from another person or body, such as IBAC, the Health Complaints Commissioner or a local council (Ombudsman Act, sections 16C and 16D)
  - a referral from Parliament (Ombudsman Act, section 16), in which case we must commence an investigation.
5. We may also commence an own motion investigation (Ombudsman Act, section 16A) into any administrative action taken in or by an authority (see our 'Own Motion Enquiries and Investigations' policy).
6. VO has discretion in deciding when to conduct an investigation. Complaints or referrals received will not result in an investigation when:
  - we are not permitted to deal with a complaint or matter under our legislation
  - we are satisfied that an informal resolution can be reached without the need for an investigation (see our 'Enquiries' policy and 'Alternative dispute resolution' policy)
  - an investigation is not warranted (Ombudsman Act, section 15A).
7. An investigation is more likely to commence when it appears that the action:
  - extends beyond an individual's interests (that is, it impacts on groups of individuals or the wider population)
  - is known to have occurred on numerous occasions previously without remedy
  - is likely to arise again
  - is of a serious nature (this may be, for example, where it places a person's safety or welfare at risk, or is incompatible with a human right as set out in the Charter of Human Rights and Responsibilities Act)
  - resulted in significant personal loss or detriment
  - could be redressed by VO making recommendations that lead to meaningful outcomes for a complainant (or affected party), or improvements to public administration.
8. Prior to commencing an investigation, VO may conduct enquiries (see our 'Enquiries' policy) to determine whether an investigation should be conducted.
9. Once a decision to commence an investigation has been made, the Ombudsman must notify certain parties, including the complainant, principal officer and responsible Minister (Ombudsman Act, section 17).

## INVESTIGATION OF PUBLIC INTEREST COMPLAINTS

- 10.VO receives public interest complaints that are referred from IBAC, under section 73 of the *Independent Broad-based Anti-Corruption Commission Act 2011* (Vic).
- 11.Subject to certain discretions and exceptions, we must investigate public interest complaints referred to us from IBAC.
- 12.We are able to make enquiries on a public interest complaint referred by IBAC to determine whether an investigation should be carried out (Ombudsman Act, section 13A).
- 13.VO must refuse to investigate a public interest complaint (Ombudsman Act, section 15D):
- where conducting an investigation would prejudice a criminal investigation or proceedings, or an investigation by the Victorian Inspectorate or IBAC (Ombudsman Act, section 13AB)
  - unless the Ombudsman is reasonably satisfied that the complaint shows or tends to show improper conduct or detrimental action.
- 14.VO may refuse to investigate a public interest complaint (Ombudsman Act, section 15E) where:
- the subject matter of the public interest complaint is trivial
  - the public interest complaint is frivolous or vexatious
  - the public interest complaint lacks substance or credibility
  - the conduct which is the subject of the public interest complaint does not amount to improper conduct or detrimental action
  - the subject matter has already been dealt with by an integrity body, or another body with coercive powers to obtain evidence
  - the public interest complaint was made more than 12 months after the person first became aware of the matter and the person does not provide a satisfactory reason for the delay in making the disclosure.
- 15.VO investigates improper conduct and detrimental action in much the same way that we investigate administrative actions. However, when conducting an investigation of a public interest complaint we consider whether a public body or a public officer engaged in improper conduct or detrimental action.
- 16.We must not disclose information that would identify the discloser, unless there are exceptional circumstances (*Public Interest Disclosures Act 2012* (Vic), section 54).

## **SUSPENDING INVESTIGATIVE ACTIVITY AND DECISIONS TO INVESTIGATE**

17. VO may suspend activity on an investigation or postpone a decision to commence an investigation in accordance with principles of proportionality and the public interest.
18. Suspending investigative activity may be appropriate where an authority is already investigating or has agreed to investigate the same matter, and VO considers the authority is best placed to do so in the first instance. For example, VO may await the outcome of an authority's investigation where the conduct or subject matter under consideration is less serious, and the matter could be appropriately dealt with by the authority without the need for coercive powers, such as in accordance with established procedures for managing misconduct or alleged misconduct of an employee.
19. Where VO suspends its activity to allow an authority to conduct its own investigation, VO maintains oversight of that investigation and may recommence its activity at any time. VO assesses an authority's progress and outcomes to determine how to deal with the matter in accordance with the Ombudsman Act. VO may treat an authority's investigation as evidence to inform its own investigation.
20. Suspending investigative activity is supported by VO's ability to regulate the procedures on an investigation in such manner as the Ombudsman thinks fit (Ombudsman Act, section 17(1)). Similarly, postponing the decision to commence an investigation pending the outcome of an authority's investigation is compatible with the purpose of an 'enquiry' to determine whether an investigation under this Act should be conducted (Ombudsman Act, section 13A(1)(a)).
21. For the avoidance of doubt, where VO administratively suspends activity on a public interest complaint, the rights and protections of the discloser continue to apply.

## **PREPARING FOR AN INVESTIGATION**

22. At the commencement of an investigation, the officers responsible for the investigation prepare an investigation plan. The investigation plan helps officers to remain focussed by setting out the matters or allegations under investigation; the information required to inform the investigation; how this information will be obtained; who is involved; and when each step in the process is intended to be taken.

23. An investigation plan helps officers to keep sight of the objectives of the investigation identified at the outset, however the plan may change as additional information becomes available.

## INVESTIGATION PROCESS

24. The Ombudsman Act allows for an investigation to proceed in whatever way is considered appropriate (Ombudsman Act, section 17). This means that the steps followed in conducting an investigation may vary depending on the subject matter, the persons or agencies involved and the seriousness of the issues under investigation. For example, an investigation may involve:

- conducting research
- gathering information and intelligence through open source searches
- requesting documents, material or information from other persons or bodies (most commonly, the agency, department or council to which the matters under investigation relate)
- seeking expert advice, opinion or analysis
- inviting public submissions (Ombudsman Act, section 26FC(1))
- interviews with persons we believe have information relevant to the investigation
- site visits
- an inspection of an authority's premises, including any files, systems or information at that premises
- meetings with relevant parties.

25. All VO investigations are conducted in private (Ombudsman Act, section 17(2)). This also means that:

- officers are not permitted to disclose information relating to an investigation, except in limited circumstances (Ombudsman Act, section 26A)
- investigations do not involve public hearings (Ombudsman Act, section 17(3))
- generally, the outcome of an investigation is not made public, unless tabled in Parliament.

26. When information is sought by VO from another person or body, we generally ask that it be provided voluntarily in the first instance. However, if deemed appropriate or necessary, we may use our coercive powers to obtain the information (that is by issuing the person or body corporate a summons requiring that the information be provided).



27. In order to ensure that VO is able to gather information freely, section 22 of the Ombudsman Act provides that it is an offence to obstruct, hinder and/or mislead officers during an investigation.

28. We may, at any time during an investigation, discontinue the investigation after taking into account certain considerations (Ombudsman Act, section 17). If we decide to discontinue an investigation we must inform any person notified of the commencement of the investigation and provide the reasons for our decision to discontinue the investigation (Ombudsman Act, section 17(6D)).

## INTERVIEWS

29. VO commonly conducts interviews as part of an investigation to:

- enable officers to ask questions of any person (a witness) whom we believe has information relevant to an investigation
- provide the witness an opportunity to present their understanding or account of the matters under investigation.

30. Interviews usually take place at VO's office, however an interview may also be held at another location or online.

31. VO can ask a witness to attend an interview voluntarily or compulsorily.

- at a compulsory interview, the witness is required to appear in response to a witness summons (Ombudsman Act, section 18) and must answer any question and remain at the interview until it is concluded
- at a voluntary interview, the witness appears voluntarily and can decide not to answer questions and/or leave the interview at any time.

32. VO may ask a witness to take an oath or affirmation at a compulsory or voluntary interview. By taking an oath or affirmation, the witness promises to tell the truth when giving evidence.

33. Before an interview takes place, we:

- discuss with the witness a suitable time for the interview
- must inform the witness of the nature of the matter on which they will be questioned (Ombudsman Act, sections 18(2)(b) and 18N(1), subject to any applicable exceptions) including whether their actions are under investigation
- provide information about what to expect at the interview, including any intention to conduct the interview under oath or affirmation, applicable confidentiality requirements, rights and obligations, and whether the interview will be recorded

- confirm details of an upcoming interview in writing (this may be by way of a summons or by email/letter where a summons is not issued).

34.If a witness provides information during an interview which raises concerns about their own conduct, actions or decisions, we may investigate those concerns.

35.Interviews are conducted by at least two officers and may be monitored remotely by other VO officers.

36.Interviews are usually audio and video recorded. A transcript may be made of a recording after an interview has concluded.

37.A copy of the audio recording (and transcript, if created) is provided to the witness:

- following the conclusion of a compulsory interview, unless doing so would prejudice the investigation (Ombudsman Act, section 18Q)
- if requested by the witness following the conclusion of a voluntary interview, under most circumstances.

38.A person attending an interview is able to seek legal advice and/or attend the interview with a legal representative (Ombudsman Act, section 18M) or support person (Ombudsman Act, section 18P(9)). In each case, the person attending the interview is asked to inform VO of who they intend to bring to the interview beforehand.

39.Where VO believes that attendance of a particular support person may compromise the investigation, we will ask that arrangements be made for a different support person to attend.

40.Where VO believes that the involvement of a legal practitioner, engaged to provide advice to or represent a witness, may compromise an investigation, we can direct the witness not to seek advice or representation from the practitioner (Ombudsman Act, section 18 M(3)) and must provide three days for a different practitioner to be engaged (Ombudsman Act, section 18M(3)).

## CONFIDENTIALITY

41.VO has the power to issue a 'confidentiality notice' (Ombudsman Act section, 26C(1)) to assist in preserving the standard of evidence obtained in the course of conducting an investigation. A confidentiality notice directs the recipient not to disclose information relating to specified 'restricted matters'. This can be issued when VO has reasonable grounds to believe that the disclosure of the information is likely to:

- prejudice an investigation conducted by the Ombudsman, IBAC or Victorian Inspectorate
- prejudice the safety or reputation of a person
- prejudice the fair trial of a person.

42.A confidentiality notice issued by VO must be in the prescribed form and must be served on the person to whom it applies (Ombudsman Act, section 26C(8)). It explains the consequences of the notice and include information specified in section 26C(2) of the Ombudsman Act.

43.VO will issue a notice cancelling the confidentiality notice when:

- VO believes that the grounds on which the confidentiality notice was issued are no longer likely to have effect (Ombudsman Act, section 26C(5)) – that is, when the disclosure of information subject to a confidentiality notice is considered unlikely to prejudice an investigation by VO, IBAC or the Victorian Inspectorate, or a person's safety or reputation, or the fair trial of a person
- VO wishes to alter the matter(s) subject to the confidentiality notice (Ombudsman Act, section 26C(3)) – that is, the existing confidentiality notice must be cancelled and a new confidentiality notice issued
- concluding an investigation (Ombudsman Act, Section 26C(6)), except when VO has been granted an order to extend a confidentiality notice beyond the conclusion of an investigation, from the Supreme Court (Ombudsman Act, section 26D).

44.VO must provide the Victorian Inspectorate copies of each confidentiality notice; notice cancelling a confidentiality notice; and application for, and any Supreme Court order to, extend a confidentiality notice (Ombudsman Act, section 26E).

45.It is an offence to disclose matters specified in a confidentiality notice while the notice has effect (Ombudsman Act, section 26F).

## INSPECTION OF PREMISES

46. During an investigation, those authorised by the Ombudsman may enter and inspect the premises of an authority or public interest disclosure entity (Ombudsman Act, section 21), for example to review files or systems held at the premises.

## PROCEDURAL FAIRNESS

47. Procedural fairness, or natural justice, enshrines the principle of fairness into the decision making process. In terms of our investigations, it is the opportunity for a person or body to consider and respond to material that may be adverse to them, or to correct errors or mistakes in a draft report. This practice ensures that the investigating body considers both sides to the matter before a final decision is made.

48. To provide procedural fairness to any person or authority that VO intends to express an adverse opinion about in a report, or that may be adversely affected by a decision by VO, we provide that person or authority a reasonable opportunity to respond to any such material in the report (Ombudsman Act, section 25A). We interpret this provision broadly to ensure that any person who is subject of an opinion in a draft report that may be adverse to that person, is given a reasonable opportunity to respond.

49. Additionally, we consult with or seek comment from the principal officer of the authority concerned, or the responsible Minister or Mayor (if the investigation relates to a local council) in relation to our draft conclusions and any related draft recommendations.

50. The response received to adverse material must be fairly set out in the final investigation report (Ombudsman Act, section 25A). This may mean that the report is altered, material is omitted or comments from the response are included.

## INVESTIGATION OUTCOMES

51. Based on the evidence collected in the course of an investigation, the Ombudsman:

- forms an opinion about whether an error has been made under section 23(1) of the Ombudsman Act, when investigating administrative actions, or
- makes a finding under section 23(2A) of the Ombudsman Act on the conduct of a public officer or public body, when the investigation is of a public interest complaint.

52. The Ombudsman is guided by the civil standard of proof, the balance of probabilities, when determining the facts of an investigation – that is, establishing whether an act, decision or conduct, and any relevant associated circumstances under investigation, occurred. From these facts, the Ombudsman may form an opinion about an administrative error or make a finding about conduct.
53. In determining whether this standard has been met, the Ombudsman takes into consideration the nature and seriousness of the matters or conduct under investigation, and the gravity of the consequences that may result from any adverse opinion formed.
54. When we form an opinion that there has been an error, or make a finding about conduct or detrimental action, we may recommend further action be taken to remedy the error or conduct, or to mitigate the risk of it occurring again (see our policy on 'Recommendations and proposals').

## COMPLETION OF AN INVESTIGATION

55. When we form the opinion that an error appears to have been made by or in an authority, or on conclusion of an investigation of a public interest complaint, the decision and underlying reasons are documented in a report. The report is provided to certain parties, including the authority and the responsible Minister (Ombudsman Act, section 23). We may also provide a copy to the Premier.
56. If we decide to discontinue an investigation on the basis that further investigation of the matter is not warranted, we still document the outcome of the investigation in a report and provide a copy of the report to certain parties, including the authority and the responsible Minister (Ombudsman Act, section 23).
57. We will inform the complainant of the outcome of the investigation and result of any recommendations made as a consequence of the investigation.
58. Where we believe that it is in the public interest for the report to be made public, or where we have a legislative obligation to do so (Ombudsman Act, section 23A) the report will be tabled in Parliament and placed on the public record.
59. On completion of an investigation, we will continue to monitor an authority's progress on its implementation of recommendations (see our policy on 'Recommendations and proposals').

## ACCOUNTABILITY OF VO INVESTIGATIONS

60. The Victorian Inspectorate is responsible for the oversight, monitoring and investigation of our use of coercive powers, and for dealing with complaints about

VO (*Victorian Inspectorate Act 2011* (Vic). See also our 'Complaints about and Oversight of the Ombudsman' policy).

61. We are also required to provide the Victorian Inspectorate copies of recordings of compulsory interviews and to report on our use of certain powers, such as a decision to issue a summons, give a formal direction or issue a confidentiality notice.
62. The Integrity and Oversight Committee of the Victorian Parliament has responsibility for monitoring and reviewing the performance of the Ombudsman, and for examining reports tabled in Parliament (Ombudsman Act, section 26H).

## ROLES AND RESPONSIBILITIES

Role	Responsibility
<b>Assistant Ombudsman, Executive Office</b>	<i>Owner</i> – Accountable for maintaining policy drafting, reviews and authorisation from the Executive.
<b>Principal Legal Adviser</b>	<i>Legal compliance</i> – Responsible for ensuring compatibility with the <i>Charter of Human Rights and Responsibilities 2006</i> (Vic) and compliance with other legislation under which VO operates.
<b>Executive Committee</b>	<i>Authorisation</i> – Authorises policies and significant amendments.
<b>All staff, contractors and third parties</b>	<i>Implementation</i> – Responsible for acting in compliance with the policy, standards, procedures and associated documents.

## **DOCUMENT MANAGEMENT**

### **Compliance**

VO maintains a compliance management system. Compliance to this policy, including use of information and systems, is subject to regular monitoring and reporting to the Executive Committee. For further details on compliance checks please refer to the compliance management system.

### **Document approval**

This document was approved by the Governance Committee on 17 December 2015.

### **Document review**

This document is due for review upon major changes or three years from the date of the last review.



## APPENDIX A: Related documents

Title	Location
<i>Public Interest Disclosures Act 2012</i>	Available at <a href="http://www.legislation.vic.gov.au/">http://www.legislation.vic.gov.au/</a>
<i>Ombudsman Act 1973</i>	
<i>Charter of Human Rights and Responsibilities 2006</i>	
<i>Victorian Inspectorate Act 2011</i>	