

Public Interest Disclosures Act 2002

***GUIDELINES AND STANDARDS FOR THE PURPOSE OF
DETERMINING WHETHER IMPROPER CONDUCT
IS SERIOUS OR SIGNIFICANT***

This Guideline is published by the Ombudsman under s 38(1)(f) of the *Public Interest Disclosures Act 2002* (the Act).

The purpose of the Guideline is to assist users of the Act to determine whether improper conduct is serious or significant.

1. Introduction

1.1 As indicated by the long title to the Act, its principal purposes are -

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

1.2 Section 6 of the Act creates rights which are central to the operation of the Act. Section 6(1) gives 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 s 19 of the Act (being detrimental action against a person in reprisal for a protected disclosure) –

the right to disclose that improper action or detrimental action in accordance with Part 2 of the Act.

1.3 Section 6(2) gives a comparable right to contractors

- 1.4 To properly understand ss 6(1) and (2), it is necessary to have recourse to the definitions of various expressions, to be found in s 3 of the Act. These are the expressions “contractor”, “detrimental action”, “improper conduct”, “public body”, and “public officer”.
- 1.5 A disclosure which is made in accordance with Part 2 of the Act (in which s 6 falls) is a “protected disclosure” and attracts the various protections which are given by Part 3 of the Act.
- 1.6 Further, where a disclosure is made in accordance with Part 2, this must in due course be dealt with in accordance with Part 5. That Part requires that the Ombudsman or public body determine, within a reasonable time, whether the disclosure is a public interest disclosure – see ss 30(1) and 33(1). This bears upon whether the disclosure is investigated under the Act – see ss 39 and 63(a). For a disclosure to be a public interest disclosure, the Ombudsman or public body must be satisfied that the disclosure shows or tends to show that a public officer or public body –
- (a) has engaged, is engaging or proposes to engage in improper conduct in their capacity as a public officer, or
 - (b) has taken is taking or proposes to take detrimental action in contravention of s 19.
- 1.7 Thus, the term “improper conduct” is central to the rights created by s 6, and to the issue of whether a disclosure can be found to be a public interest disclosure under either s 30 or s 33. Hence it is central to the question of whether a disclosure which is made under Part 2 is investigated under the Act.
- 1.8 The term “improper conduct” is defined in terms which require that the relevant conduct or misconduct be “serious or significant”. The definition of this term in s 3 is as follows –
- “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” [Emphasis added.]

- 1.9` Note that the term “corrupt conduct” in paragraph (b) of this definition is also itself defined in s 3 –

““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)”

- 1.10 To repeat, therefore, the purpose of this Guideline is to give guidance on whether conduct or misconduct which falls within the definition of “improper conduct” in the Act is “serious or significant”.

2. Determining seriousness or significance

- 2.1 Determining whether conduct or misconduct is serious or significant in nature involves judgement. Minds might reasonably differ on whether conduct or misconduct in a given situation is of such a nature that one or both of these descriptions might reasonably be applied to it.

- 2.2 In deciding whether conduct or misconduct is serious or significant, it is necessary to consider all of the relevant circumstances. For instance, an isolated incident of misconduct might not merit such a description, but an incident which is one of a number of repeated incidents or which

is part of a course of misconduct might qualify. Similarly, the seriousness or significance of conduct or misconduct may depend on the nature of the role of the public officer against whom the disclosure is being made. For example, the expectations of a public officer who has charge of children differ from those of a public officer who manages public monies.

2.3 It will also assist to consider whether the conduct or misconduct is such that the disclosure of the conduct or misconduct deserves to be dealt with under the Act, having regard to the protections which the Act provides to protected disclosures, and having regard to the special processes which apply to them.

2.4 Factors which may bear upon the judgement as to whether particular conduct or misconduct is serious or significant include –

- whether the conduct or misconduct involves a crime or an offence which carries a significant penalty
- whether the conduct or misconduct might merit serious disciplinary or other consequences, if proven.
- the level of trust, confidence or responsibility to which the public officer who is subject to the allegation is subject
- the amount or potential amount of money involved
- any apparent premeditation
- any apparent consciousness of wrongdoing in the public officer who is subject to the allegation
- whether the public officer who is subject to the allegation should have appreciated that the conduct or misconduct was wrong
- what the public officer who is subject to the allegation ought properly to have done
- the level of risk posed to others or to the State
- the harm or potential harm associated with the conduct or misconduct
- the degree to which the public officer who is subject to the allegation was acting in concert with others, and the nature of his or her complicity or involvement
- the benefit or potential benefit derived from the conduct or misconduct, by the public officer who is subject to the allegation or by others

- how the conduct of the public officer who is subject to the allegation might reasonably be viewed by his or her professional peers
- the content of any applicable codes of conduct or policies.

2.5 This list is not exhaustive, and is provided as a guide to the types of consideration that may bear upon the decision.

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