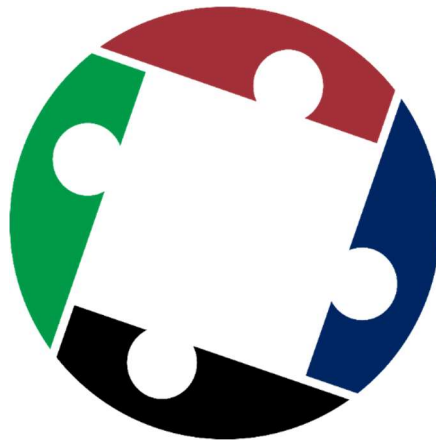




Ombudsman Tasmania

Public Interest Disclosures Act 2002

Public Interest Disclosure

Guideline One

Serious or significant improper conduct

Issued: 25 November 2020

Introduction

The purpose of the *Public Interest Disclosures Act 2002* (the Act) is to:

- encourage and facilitate disclosures of improper conduct by Tasmanian public officers and public bodies;
- protect persons making those disclosures and others from reprisals;
- provide for the matters disclosed to be properly investigated and dealt with; and
- provide all parties involved in those disclosures with procedural fairness (referred to in the Act as natural justice).

I have a number of functions under the Act, including:

- receiving disclosures from public officers, contractors (including members of the public if it is in the public interest) and determining if the disclosures are public interest disclosures;
- investigating public interest disclosures;
- receiving notifications about public interest disclosures made internally to public bodies;
- reviewing certain decisions by public bodies under the Act;
- monitoring the progress of public bodies' investigations;
- preparing and publishing guidelines and standards;
- reviewing and approving large public bodies' procedures every three years; and
- providing advice to public bodies.

Purpose of this guideline

The Act provides that public officers, contractors and, in limited circumstances, members of the public can make disclosures about the improper conduct of public officers or public bodies. The discloser needs to believe the public officer or public body is, has been or proposes to engage in serious or significant improper conduct.

The purpose of this guideline is to assist users of the Act to determine whether the alleged conduct or misconduct is 'serious or significant'.

I have published this guideline under s 38(1)(f) of the Act.

Improper conduct

Section 3 of the Act defines improper conduct as:

- (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;

Corrupt conduct is defined in section 3 of the Act as:

- (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 her or his 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).

Determining seriousness or significance

Determining whether the alleged conduct or misconduct is serious or significant in nature involves judgement. Different people might reasonably have different views about whether conduct in a given situation meets this threshold.

To ensure the determination is reasonable, 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 the relevant conduct 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.

You should also consider whether the conduct is such that the disclosure deserves to be dealt with under the Act, having regard to the protections which the Act provides to protected disclosures and the special processes which apply to them.

Factors which may be relevant when considering whether the alleged conduct or misconduct is serious or significant include:

- (a) whether the conduct or misconduct involves a crime or an offence which carries a significant penalty;
- (b) whether the conduct or misconduct might merit serious disciplinary or other consequences, if proven;
- (c) the level of trust, confidence or responsibility to which the public officer who is subject to the allegation has;
- (d) the amount or potential amount of money involved;
- (e) any apparent premeditation;
- (f) any apparent consciousness of wrongdoing in the public officer who is subject to the allegation;
- (g) whether the public officer who is subject to the allegation should have appreciated that the conduct or misconduct was wrong;
- (h) what the public officer who is subject to the allegation ought properly to have done;
- (i) the level of risk posed to others or to the State;
- (j) the harm or potential harm associated with the conduct or misconduct;
- (k) the degree to which the public officer who is subject to the allegation was acting in concert with others, and the nature of their complicity or involvement;

- (l) the benefit or potential benefit derived from the conduct or misconduct, by the public officer who is subject to the allegation or by others;
- (m) how the conduct of the public officer who is subject to the allegation might reasonably be viewed by their professional peers; and
- (n) the content of any applicable policies.

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

Richard Connock
OMBUDSMAN