

Personal work-related conduct

An amendment to the definition of disclosable conduct

Personal work-related conduct is not disclosable conduct unless an exception applies.

WHY WAS THE EXCLUSION INTRODUCED?

To ensure the PID Act better serves its purpose – investigating allegations of significant integrity wrongdoing such as fraud, serious misconduct, and corrupt conduct.

The exclusion also recognises that concerns about personal work-related conduct are generally more appropriately dealt with via other processes.

WHAT IS PERSONAL-WORK RELATED CONDUCT?

See the two-part definition in section 29A of the PID Act. Broadly speaking, personal work-related conduct is:

- » An action or omission taken in relation to a public official's engagement or appointment and/or employment (i.e. a work-related action)
- » That has, or would tend to have, personal implications for that public official (i.e. the action personally affects that person).

Personal work-related conduct includes:

- » Interpersonal conflict, including bullying or harassment.
- » Decisions about a person's employment, engagement, transfer, or promotion – including decisions to suspend, terminate, or discipline a person, or the terms and

conditions of a person's employment or engagement.

- » Conduct in relation to which the public official has or had review rights under section 33 of the *Public Service Act 1999* or comparable review processes.

Note that actions need not have personal implications for the discloser, for the exclusion to apply. This means that anonymous disclosures, as well as disclosures made about third parties, may still be excluded from investigation if the conduct is work-related and has personal implications. For example:

- » A discloser may raise concerns about a recruitment exercise that the discloser was not directly involved in. This would still be considered personal work-related conduct because the actions relate to a public official's engagement or appointment and/or employment and have, or tend to have, personal implications for that public official.
- » Similarly, in an open recruitment exercise where someone who is not a public official is aggrieved by what has occurred and seeks to be deemed a public official to make a PID, it remains likely that the exclusion would apply because the relevant actions are work-related – taken in relation to a public official's engagement or appointment – and had personal implications for that public official.

WHAT IS THE EXCEPTION?

Personal work-related conduct is disclosable conduct if it:

- » would constitute reprisal action or an offence under section 19; or
- » is so significant it would undermine public confidence in an agency or has other significant implications for an agency per section 29(2A).

WHAT KIND OF CONDUCT IS SO SIGNIFICANT THE EXCEPTION MAY APPLY?

While it will depend on the particular context, for conduct to be so significant it would have adverse consequences for the agency, the conduct would have to raise or tend to show serious misconduct, corruption, or other serious integrity issues. This could include, for example, personal work-related conduct that tends to show:

- » Systemic discriminatory employment practices, nepotism, or other conduct that seriously calls into question the impartiality and independence of the agency.
- » Serious criminal conduct, particularly if it relates to management of the agency.
- » Conduct that may substantially adversely affect the core functions of the agency.

SUGGESTED WORKFLOW FOR AUTHORISED OFFICERS

Before considering whether the information meets one of the specific definitions of disclosable conduct, we suggest authorised officers (AOs) consider whether the personal work-related exclusion may apply.

If it does, consider if an exception may apply and then whether the conduct subject to the exception meets one of the specific definitions of disclosable conduct. It will also be important to consider whether there are other matters in the disclosure that may meet the definition of a PID.

WHAT IF THE DISCLOSURE IS NOT SOLELY ABOUT PERSONAL WORK-RELATED CONDUCT?

The exclusion does not prevent information from being a PID only because the disclosure contains information that tends to show personal work-related conduct. See section 29A(2B).

Disclosures that contain both disclosable conduct and personal work-related conduct should be allocated as an internal disclosure under the PID Act, *unless* the conduct disclosed would be more appropriately investigated under another law or power.

EXAMPLES

Example A – A disclosure contains solely personal work-related conduct

A public official makes a disclosure to an authorised officer – the public official observed several incidents of bullying and harassment of a colleague following which the colleague was transferred to a different team. The public official alleges the conduct occurred because their team leader never liked the colleague.

For the purposes of allocation, the authorised officer must apply the test in s 26 and consider whether there is any reasonable basis on which the disclosure could be considered an internal disclosure. The authorised officer determines that the disclosure contains information that tends to show only personal work-related conduct (s 29A).

Applying s 29(2A), the authorised officer considers the information provided in the disclosure and forms the view that the personal work-related conduct does not tend to show:

- » reprisal action, or
- » conduct of such a significant nature that it would undermine public confidence in an agency or
- » conduct that has other significant implications for an agency.

This means the personal work-related conduct is not disclosable conduct.

As the disclosure does not contain any instances of disclosable conduct, the authorised officer must decide not to allocate it as a disclosure under the PID Act as they are satisfied on reasonable grounds that there is no reasonable basis on which the disclosure of that information could be considered a public interest disclosure.

As the disclosed conduct is not a public interest disclosure, the public official cannot make an external disclosure in relation to the conduct and does not receive the immunities under s 10 of the PID Act. While the discloser would not be entitled to immunities under the PID Act, the protections against reprisal action still apply.

The public official can pursue a complaint about the personal work-related conduct through an avenue other than the PID Act.

Example B – A disclosure contains both disclosable conduct and personal work-related conduct

A public official makes a disclosure to an authorised officer – the public official overheard a colleague discussing how their spouse’s company was tendering for a project that was being managed by the team. The colleague was keen to make sure their tender was considered favourably as it meant their spouse would get a bonus. The disclosure also included information about ongoing interpersonal conflict between the public official and their colleague.

For the purposes of allocation, the authorised officer must apply the test in s 26 and consider whether there is any reasonable basis on which the disclosure could be considered an internal disclosure. The authorised officer determines that the disclosure contains information that tends to show both disclosable conduct (s 29) and personal work-related conduct (s 29A).

Applying s 29(2A), the authorised officer considers the information provided in the disclosure and forms the view that the personal work-related conduct does not tend to show:

- » reprisal action, or
- » conduct of such a significant nature that it would undermine public confidence in an agency, or

- » conduct that has other significant implications for an agency.

This means the personal work-related conduct is not disclosable conduct. However, section 29(2B) underscores that a disclosure of information that tends to show disclosable conduct is not prevented from being a public interest disclosure only because it also tends to show personal work-related conduct.

As the disclosure includes information that tends to show at least one instance of disclosable conduct, the authorised officer finds that there is a reasonable basis that the disclosure could be considered an internal disclosure. The authorised officer must allocate it as a disclosure unless they are satisfied on reasonable grounds that the conduct would be more appropriately investigated under another law or power.

The public official will receive the protections under the PID Act for the whole of their disclosure – including the information that relates to personal work-related conduct.

Example C – A disclosure contains personal work-related conduct that is disclosable conduct

A public official makes a disclosure to an authorised officer – the public official observed several incidents of bullying and harassment of a colleague who was known to have made internal complaints (possibly including a public interest disclosure) about how their team was mismanaging a significant Government contract. The public official believed that this conduct was, at least partly, because their colleague was talking about making a public interest disclosure.

For the purposes of allocation, the authorised officer must consider whether there is any reasonable basis on which the disclosure could be considered an internal disclosure and apply the test in s 26. The authorised officer determines that the disclosure contains information that tends to show only personal work-related conduct (s29A).

Applying s 29(2A), the authorised officer considers the information provided in the disclosure and forms the view that the personal work-related conduct tends to show reprisal action against another person. This means the

personal work-related conduct is disclosable conduct (s29(2A)(a)).

As the disclosure of information contains at least one instance of disclosable conduct (including the conduct that would otherwise be personal work-related conduct), the authorised officer finds that there is a reasonable basis for the disclosure of that information to be considered an internal disclosure. The authorised officer must allocate it as a disclosure unless they are satisfied on reasonable grounds that the conduct would be more appropriately investigated under another law or power.

The public official receives the protections under the PID Act for the disclosure.

For further information about see
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