

Guidelines for the minimisation of retaliation against protected persons

Section 106 *Independent Commissioner Against Corruption Act 2017* (ICAC Act)

January 2024

Office of the
Independent
Commissioner
Against
Corruption NT



Table of contents

Table of contents	1
Foreword	2
Summary of guidelines	3
Introduction	6
Whistleblower protection principles.....	6
Purpose.....	6
The regulatory framework.....	7
Key terms	9
Mandatory requirements	11
What is retaliation?	11
Recognising retaliation	11
Sources of retaliation.....	12
A retaliation minimisation framework – the key elements	13
1. Setting the culture	13
2. Establishing retaliation policies and procedures	14
3. Clearly defined roles and responsibilities.....	15
4. A process to assess the risks of retaliation	18
5. Developing a retaliation minimisation action plan	20
6. A process for responding to alleged retaliation	21
7. Record keeping	24
8. Confidentiality and protecting identity	25
9. Training and education	25
10. Supporting protected persons	26
Other matters	26
Addressing false or misleading allegations	26
How can the ICAC assist?.....	27
Where to from here?	28

Foreword

Imagine what it would be like to observe someone else doing the wrong thing in public administration, reporting it, and then yourself being the subject of retaliation for doing so. While it might seem absurd that a person who does the right thing by calling out bad behaviour would themselves be penalised for doing so, retaliation does occur in public administration.

In fact, fear of personal repercussion is known to be one of the primary reasons that people do not come forward and report wrongdoing.

Where a person, in good faith, reports alleged wrongdoing in public administration, such individuals ought to be commended, not punished.

Just as there is no place for improper conduct in public administration, there is no place for retaliation against a person who has reported such improper conduct.

I have prepared these guidelines to assist public bodies to develop frameworks and practices for minimising risks of retaliation. They have been developed in line with section 106 of the ICAC Act. They supersede previous guidelines issued under section 106. While the document is entitled 'guidelines', there are some mandatory requirements imposed by legislation. Those mandatory requirements will be clearly identified in this document.

Otherwise, public officers and public bodies should use this document to guide the development of a tailored retaliation minimisation framework for their organisation. There is no template, or checklist provided, because every organisation is different. Accordingly, every agency must think carefully about their own retaliation risks in order to develop an appropriate framework. There is no 'one size fits all'.

I urge all public officers to read these guidelines.

Section 110 of the ICAC Act permits me to evaluate or review adherence, by public bodies, to these guidelines. Such evaluations will commence 6 months after these guidelines have been published.

I express my appreciation to Anna Collins of my office, who has been the driving force behind the development of these guidelines.



Michael Riches
Independent Commissioner Against Corruption

Summary of guidelines

GUIDELINE 1

Executives and managers should strive to create and support, through their own actions, a positive workplace culture that promotes integrity, respect and excellence.

GUIDELINE 2

A public body should have in place documented policies, procedures or other guidance material addressing:

- the Executive's commitment to the protection of protected persons
- how a voluntary protected communication can be made, including the identity and contact details for recipients and nominated recipients
- grievance and complaint handling
- how a voluntary protected communication is dealt with, including details of potential referral pathways, statutory reporting obligations and how a protected person will be kept reasonably informed
- strategies for the prevention and minimisation of retaliation
- how retaliation can be reported and to whom
- inappropriate workplace behaviour and the way it will be dealt with by the agency
- how allegations of retaliation are to be dealt with
- support services for protected persons
- confidentiality and the protection of identity of a protected person
- record keeping and auditing.

GUIDELINE 3

A public body's suite of policies and procedures relating to the prevention and minimisation of retaliation should include a clear, detailed description of the responsibilities relating to preventing, assessing and addressing retaliation given to:

- the head of the public body
- other executives
- managers
- staff.

GUIDELINE 4

Every public body should have a documented process for assessing the risks of retaliation, taking into account the role and operating context of the public body.

GUIDELINE 5

Where a risk of relation has been identified, a public body should have in place a process for establishing and implementing a retaliation minimisation action plan.

GUIDELINE 6

As a part of a public body's suite of policies and procedures, a documented process for the receipt and assessment of allegations of retaliation should be included.

GUIDELINE 7

An assessment of a report of retaliation ought to be conducted by a person who can bring a fair, independent and objective mind to the task. A person whose interests have been, or might be, affected by the actions of the protected person ought not conduct the assessment.

GUIDELINE 8

Where retaliation is assessed as having occurred, or presently occurring, there should be a positive obligation to take immediate action. Action to be taken should include:

- If the retaliation involves the conduct of a public officer, a report should be made to the ICAC in accordance with existing reporting directions.
- In consultation with the victim, taking all reasonable steps to ensure a safe working environment is provided, including reasonable steps to prevent the opportunity for further retaliation to occur.
- Offering support for the victim, including access to specialised support and counselling.
- Establishing a process for ongoing communication with the victim and monitoring of retaliation risks.
- Keeping detailed records of the action taken by the public body.

GUIDELINE 9

All public bodies should have, as a part of their retaliation minimisation framework, a requirement to document matters relating to suspected, reported and actual incidents of retaliation, including:

- communication with the protected person
- reports or allegations of retaliation
- the retaliation risk assessment
- the retaliation minimisation action plan
- the assessment process conducted in respect of reports or allegations of retaliation
- the steps taken to address incidents of retaliation.

GUIDELINE 10

All public bodies should have, as a part of their retaliation minimisation framework, how documents of the kind mentioned in Guideline #9 will be stored and accessed, in order to maintain the confidentiality of that information. The process should contemplate how:

- physical security of hard copy documents will be maintained
- electronic documents will be stored securely
- access to documents will be authorised, and by whom
- access to documents will be audited.

GUIDELINE 11

A public body's retaliation minimisation framework should emphasise the importance of maintaining the confidentiality of information about the identity of a protected person and highlight the offence found in section 146A of the ICAC Act. The framework should set out the processes that the public body will take to maintain such confidentiality.

GUIDELINE 12

A public body should establish a training and education program to equip staff to understand:

- the concept of retaliation and how to recognise it
- the right to be protected from retaliation
- the policies, procedures and processes in place to address risks and allegations of retaliation
- how reports of retaliation, or the fear of retaliation, can be reported, and to whom
- how confidentiality will be maintained
- support services available
- outside reporting pathways (that is, ICAC, NT Police).

Training for supervisors and managers should also include education about identifying and addressing improper conduct in the workplace, and how to identify and respond to potential retaliation.

Training should be repeated at such intervals as to ensure that all staff remain cognisant of the public body's policies and procedures, and each staff member's responsibilities.

Introduction

Whistleblower protection principles

Part 6 of the ICAC Act is dedicated to the protection of whistleblowers. That Part applies to all protected communications, protected actions and protected persons.

Within Part 6 are the whistleblower protection principles.¹ Those principles are:

- (a) public bodies have the primary responsibility for providing protected persons with protection and support;
- (b) the ICAC's role is to provide guidance as to how public bodies can fulfil this responsibility and to take action if the ICAC considers a public body is not fulfilling its responsibility;
- (c) wherever possible, the identity of a protected person should be kept confidential, as anonymity is the best protection of a person from retaliation;
- (d) the principle that public bodies of the Territory are, and are to act as, model litigants in proceedings, including disciplinary proceedings.

As the principles explain, the primary responsibility for providing protection and support to protected persons rests with public bodies. That obligation is consistent with an organisation's responsibility to provide a safe workplace. In this way, protecting and supporting protected persons is an extension of already existing workplace obligations, including work health and safety obligations as well as existing requirements to appropriately manage complaints, inappropriate workplace behaviours, and confidential information.

The ICAC's role is to provide guidance to public bodies on how to fulfil their responsibilities. In accordance with section 106 of the ICAC Act the ICAC must issue guidelines and directions to public bodies for minimising retaliation risks.

Purpose

This document provides guidance to public bodies and public officers on how to prevent, identify and respond to retaliation and how to address retaliation risks.

By using these guidelines to develop tailored frameworks and practices a public body should be better placed to discourage retaliation, to respond effectively and efficiently to allegations of retaliation, and to support a speak up/listen up culture within their organisation.

This document should be read in conjunction with the Dealing with voluntary protected communications - Guidelines and directions.

These guidelines contain two statutory requirements. Those requirements are set out on page 11.

¹ ICAC Act, section 91(1).

The regulatory framework

Public bodies and public officers have various responsibilities in respect of improper conduct, providing a safe workplace, supporting protected persons and complying with various governmental obligations. The following list just some of those responsibilities.

The ICAC Act

Mandatory Reporting

All public officers have an obligation to report to the ICAC suspected corrupt conduct and anti-democratic conduct. Corrupt conduct can include retaliation.

Prescribed public officers must also report to the ICAC suspected misconduct and unsatisfactory conduct. More information about reporting obligations is available on the ICAC website.

Protecting and supporting protected persons

Public bodies are primarily responsible for the protection and support of protected persons. To do so, the public body must have effective frameworks and processes in place to provide that protection and support.

A central feature of such protection and support is the existence of effective processes for receiving and dealing with protected communications. Public officers who are recipients of protected communications must know, understand and apply the directions and guidelines issued by the ICAC in accordance with section 96 of the ICAC Act.

Acknowledging and providing information

Recipients of protected communications are responsible for acknowledging and providing information to persons making a protected communication. If the recipient is the head of a public body, they may direct a nominated recipient for that public body to acknowledge and provide the information required by section 98 and Schedule 2 of the ICAC Act.

Vicarious liability of public bodies

Public bodies have a responsibility to take reasonable steps to prevent retaliation. If a public officer engages in retaliation in the course of employment, and the public body has not taken reasonable steps to prevent the public officer from engaging in the act of retaliation, the public body may be liable for the compensation of the victim.²

Reasonable steps may include establishing and enforcing policies, and providing education and training aimed at preventing and decreasing retaliation.

Treasurer's Directions

Agencies that are required to comply with the Treasurer's Directions issued under the *Financial Management Act 1995* must ensure they comply with the reporting obligations set out in Treasurer's Directions – Fraud Control.

Where that reporting obligation has arisen as a consequence of a protected communication, consideration must be given to the whistleblower protection principles³ and section 146A of the ICAC Act. In short, careful consideration should be given to the need to disclose the identity of the protected person when making a report and whether such disclosure is permitted by section 146A.

² ICAC Act, section 105.

³ Ibid, section 91(1).

Work Health and Safety (National Uniform Legislation) Act 2011

Work health and safety legislation already imposes responsibilities on public officers in respect of safe working environments. Providing a safe workplace includes ensuring that retaliation and retaliation risks are identified and minimised. Retaliation minimisation frameworks that are documented, promoted and enforced may assist in demonstrating compliance with work health and safety obligations.

Information Act 2002

Public bodies that are required to adhere to the *Information Act 2002* must consider section 146A of the ICAC Act when considering and deciding the information to be disclosed as a part of a freedom of information request.

It is recommended that public bodies seek legal advice if they are considering providing information that might identify a protected person.

Key terms

Protected person is defined in section 4 of the ICAC Act and generally means a person who has taken a protected action. A protected person is also a person who someone engaging in retaliation believes or suspects is taking, or has taken, protected action.

Protected action is defined in section 92 of the ICAC Act and includes making a protected communication or taking other action for the purposes of complying with the ICAC Act, or cooperating with a person or body performing a function under the ICAC Act.

Protected communication is defined in section 93 of the ICAC Act and includes mandatory reports made in accordance with section 22 of that ICAC Act and voluntary protected communications made in accordance with section 93. A protected communication may include an allegation of retaliation.

A protected communication must generally:

- include a statement from the person providing the information that it is intended to be a protected communication; or
- include a statement that the person providing the information is doing so to a nominated recipient in their capacity as a nominated recipient; and
- not be false or misleading; and
- be provided to an entity listed in section 93(1)(b) of the ICAC Act; and
- satisfy the criteria in section 93(2) of the ICAC Act.

Recipient is an entity defined in section 93 of the ICAC Act who can receive voluntary protected communications. Recipients include nominated recipients nominated in accordance with section 97 of the ICAC Act.

Recipients of voluntary protected communications must have regard to the document 'Dealing with voluntary protected communications – Directions and guidelines', issued by the ICAC.

Retaliation is defined by reference to section 95 of the ICAC Act and includes causing or intending to cause harm to a victim.

Harm is defined in section 4 of the ICAC Act.

Identifying information is defined in section 4 of the ICAC Act and includes information that identifies or tends to identify a protected person.

Identifying information may include names, job titles, specific office or working locations of a person and characteristics and physical attributes of a person.

Public body is defined in section 16(1) of the ICAC Act and includes:

- agencies of the Northern Territory (NT) Government
- the police force of the NT
- local governments
- bodies where members are appointed by the Administrator or a minister
- boards, commissions, tribunals or other bodies established under an Act that has judicial or quasi-judicial functions in the performance of its deliberative functions
- bodies established under an Act

- universities
- government owned corporations.

To find out more about entities that are public bodies refer to the ICAC Act.

Public officer is defined in section 16(2) of the ICAC Act and includes:

- employees and members of, and persons engaged under contract to perform official functions of, a public body
- ministers and members of the Legislative Assembly
- persons in statutory appointed positions
- judicial officers.

To find out more about entities that are public bodies refer to the ICAC Act.

Executive refers to the top level of management within a public body. It generally includes staff who report to and directly support the head of the body to meet statutory and organisational responsibilities.

Managers refers to staff who lead and supervise others in the workplace. This may include team leaders, managers and shift supervisors.

Head of a public body means the person with authority and control of a public body. This could be the Chief Executive Officer of a NT Government agency or local council, the chairperson of a statutory board, or the holder of a statutory office to which others report.

Mandatory requirements

Section 106(3) of the ICAC Act requires these guidelines to contain certain mandatory requirements.

The following comprises the requirements imposed by the ICAC Act.

A public body or public officer who receives a protected communication is required to keep the person who made the communication reasonably informed:

- (a) in relation to the steps taken to deal with the protected communication; and
- (b) as to whether the matter has been reported to the ICAC.

What is retaliation?

Retaliation is the act of causing, or threatening to cause, harm to a victim because that person:

- is trying to discourage the victim or another person from taking a protected action; or
- is trying to discourage the victim or another person from supporting a protected person; or
- believes the victim has taken a protected action; or
- believes the victim is supporting a protected person.⁴

Harm is defined in section 4 of the ICAC Act and includes injury, loss, damage, intimidation or harassment. It also includes discrimination, disadvantage, or adverse treatment in relation to employment, career, profession, trade or business.

Retaliation is a criminal offence, punishable by a fine or imprisonment for 2 years.

A person who engages in retaliation may be ordered to pay compensation to the victim, and a public body may be vicariously liable for the retaliation and may also be ordered to pay compensation.

Recognising retaliation

Retaliation can sometimes be difficult to recognise. However, there are telltale signs. The most common sign is a noticeable difference in the way a protected person is treated in the workplace following the taking of a protected action.

Retaliation need not involve aggression, anger or threats, although it can. Retaliation can be subtle. It can involve conduct that isolates or intimidates victims by removing or limiting their access to peer support, management support, information, training and other ordinary workplace opportunities. Direct intimidation, by way of threats relating to ongoing employment, future job opportunities and promotional prospects may also occur.

⁴ ICAC Act, section 95.

Retaliation may also include:

- undermining and intentionally acting to discredit the work or conduct of the protected person, including undue scrutiny or criticism of work performed
- humiliating or 'calling out' a person with the intent of causing embarrassment
- acting in a manner that attempts to elicit an emotional response from the protected person
- exclusion from meetings and social events
- restriction of information or resources required to complete official duties.
- taking disciplinary action, or conducting a disciplinary investigation, as a form of punishment against the protected person
- unreasonably withholding or delaying entitlements or refusing leave applications
- withholding or withdrawing promotions or opportunities to perform higher duties soon after a protected action
- prematurely terminating a contract or employment or denying contract renewal when no such action had been raised or contemplated prior to a protected action being taken.

In serious cases of retaliation, a person may be physically assaulted or placed in an unsafe situation in a workplace that leads to, or could lead to, physical harm.

Sources of retaliation

Retaliation can be engaged in by any person. Most commonly, those who engage in retaliation are the subjects of a protected communication, and those whose reputation might be adversely affected by the making of a protected communication.

For example, peers, managers, supervisors and senior executives in a public body might face scrutiny as a consequence of information provided in a protected communication, even if the protected communication does not relate directly to them. In such circumstances, ill-will may be harboured against the protected person because of exposure to that scrutiny, perceived disloyalty to the team, organisation or its leaders, or the 'burden' of having to properly address the information in that communication.

Of course, such behaviour is entirely inappropriate, and has no place in public administration.

Occasionally, retaliation might come from close family members of persons alleged to have engaged in wrongdoing, or contractors, suppliers or other persons who have benefitted from the improper conduct alleged in the protected communication.

A retaliation minimisation framework – the key elements

Retaliation, in any form, is inappropriate. In order to prevent and minimise the risk of retaliation, every public body should have a retaliation minimisation framework in place. That framework should have a number of elements. The nature of the framework, and its content, will depend upon the nature of the public body, its size, structure, functions and working environment.

The following are key elements of a retaliation minimisation framework.

1. Setting the culture

Organisational culture is the way people in an organisation, or part of an organisation, behave.⁵ While culture is often informed by an organisation's values, expectations and practices, it is demonstrated by how members of the organisation, or part of it, conduct themselves in respect of their duties and their interactions with others. Those behaviours become the customs and practices that create its culture. Organisational culture may not always align with organisation's values or expectation.

An organisational culture (or corporate culture) that embraces integrity and ethical behaviour is an important safeguard against improper conduct, including retaliation.

Such is its importance that the ICAC Act provides that the ICAC may make findings about the conduct of a public body if:

- the conduct occurs and a corporate culture exists in the public body that directs, encourages, tolerates or leads to it occurring; or
- the conduct occurs and the public body has failed to create and maintain a corporate culture to deter or prevent it occurring.⁶

Both executives and managers are influencers of organisational culture and must role model the behaviours expected from staff. Whether they are elected, appointed or employed it is incumbent on executives and managers to know and understand their responsibilities and to lead with the highest level of integrity and accountability.

GUIDELINE 1

Executives and managers should strive to create and support, through their own actions, a positive workplace culture that promotes integrity, respect and excellence.

Speak up/listen up

Strong cultures will have, as an entrenched attribute, a speak up/listen up approach. A speak up/listen up approach promotes two-way communication where individuals are confident to raise concerns about suspected improper conduct and are encouraged to do so by executives and managers.⁷ The approach embraces the willingness of executives and managers to listen to staff who raise such matters and a commitment to take positive action where necessary.

⁵ Office of the Commissioner for Public Employment (NT), Monitoring Organisational Health, January 2023.

⁶ ICAC Act, section 8(2)(c) and (d).

⁷ Standards Australia, ASO ISO 37002:2023 'Whistleblowing management systems – Guidelines', 17 February 2023.

Establishing a speak up/listen up approach

The starting point for establishing a speak up/listen up approach is an executive commitment to receive, assess, respond and resolve reports of improper conduct and to take a zero tolerance approach to retaliation.

A speak up/listen up approach can be supported through the development of frameworks and processes of a kind explored in this document. Actively enforcing policies, procedures and practices designed to identify and respond to inappropriate workplace behaviours is critical to the speak up/listen up approach.

2. Establishing retaliation policies and procedures

The purpose of a retaliation minimisation and management framework is to:

- demonstrate the executive's commitment to a speak up/listen up approach, support for calling out impropriety and the protection of protected persons
- educate staff on how to recognise and report retaliation or other suspected improper conduct, the benefits of reporting impropriety and how the public body will take steps to minimise the risk of retaliation
- promote a zero tolerance approach to adverse consequences for a person who has spoken out about improper conduct in good faith
- document impartial pathways for action that include management of conflicts of interest, appointment of impartial and suitably qualified staff to investigate alleged wrongdoing, and ongoing communication and support for the reporter
- define, in unambiguous terms, the roles and responsibilities imposed on staff, managers, and executives, in respect of positively addressing allegations of improper conduct and minimising the risks of retaliation
- train and provide resources to staff who have a role in receiving, assessing and addressing voluntary protected communications and supporting protected persons
- explain how recipients in the public body will receive voluntary protected communications, how they will be assessed, and what action may be taken
- promote contact details of those who can receive voluntary protected communications within the public body
- define the process for raising actual or feared retaliation and how that information will be dealt with
- demonstrate that reasonable steps have been taken by the organisation to prevent retaliation from occurring and decrease its impact on individuals and the organisation
- promote and reinforce accountability of executives and managers to treat allegations of impropriety seriously and address those allegations properly
- commit to the regular review of frameworks and practices, including through staff feedback.

GUIDELINE 2

A public body should have in place documented policies, procedures or other guidance material addressing:

- the Executive's commitment to the protection of protected persons
- how a voluntary protected communication can be made, including the identity and contact details for recipients and nominated recipients
- grievance and complaint handling
- how a voluntary protected communication is dealt with, including details of potential referral pathways, statutory reporting obligations and how a protected person will be kept reasonably informed
- strategies for the prevention and minimisation of retaliation
- how retaliation can be reported and to whom
- inappropriate workplace behaviour and the way it will be dealt with by the agency
- how allegations of retaliation are to be dealt with
- support services for protected persons
- confidentiality and the protection of identity of a protected person
- record keeping and auditing.

Public bodies may leverage shared corporate and support services for retaliation minimisation. However, easily accessible links, copies, or direct access to these documents, along with clear references within the retaliation minimisation framework specific to the public body, are essential.

3. Clearly defined roles and responsibilities

Preventing, minimising and responding to retaliation is a shared responsibility. While much of that responsibility rests with the heads of public bodies, they must be supported by executives, managers and staff who act consistently with and are accountable to, that organisation's leader.

Roles and responsibilities must be clear to avoid ambiguity, or misunderstanding as to where responsibilities rest. Individuals to whom responsibilities are given must be accountable for discharging those responsibilities with due attention.

The role of the head of the public body

The head of a public body is responsible for ensuring that:

- a suitable suite of policies and procedures exists to prevent or minimise the risks of retaliation
- individuals within the public body have a clear understanding of their roles and responsibilities in respect of addressing improper conduct and identifying, preventing and addressing retaliation
- a clear message is disseminated throughout the public body that retaliation will not be tolerated
- the public body meets its various statutory and regulatory obligations
- improper conduct is addressed if and when it is detected.

The role of other executives

Other executives must support the head of the public body by:

- supporting and applying a speak up/listen up approach
- endorsing and supporting a zero tolerance approach to retaliation
- ensuring adequate training is in place for staff to understand how, and to whom, a report of improper conduct can be made within the public body and the public body's position in respect of retaliation
- ensuring policies and procedures relevant to reporting and retaliation are easily accessible to all staff
- ensuring that allegations of improper conduct, including allegations of retaliation, are taken seriously and properly addressed
- supporting and building an organisational culture that embraces a speak/up listen up approach, and has attributes of integrity, respect and excellence as its hallmarks.

The role of managers

Managers at all levels are the front line in terms of establishing and maintaining organisational culture and in identifying and dealing with improper conduct, including retaliation. While it is true that organisational tone comes from the top, managers have the capacity to best influence organisational culture at the ground level.

To that end, the important role played by managers and supervisors, both in terms of dealing with improper conduct and addressing risks of retaliation, must be clearly understood by those individuals. Managers should be responsible for:

- promoting and applying a speak up/listen up approach within work units and through staff performance reviews
- early intervention and de-escalation of staff disputes and grievances
- escalation of serious issues
- proactively identifying circumstances where a staff member is being subjected to adverse behaviour, and promptly addressing such behaviour
- ensuring a safe workplace and addressing or reporting hazards and risks, including suspected retaliation.

The role of recipients and nominated recipients

Individuals who can receive voluntary protected communications have a number of statutory responsibilities. Those responsibilities are explained in the document 'Dealing with voluntary protected communications – Directions and guidelines', issued in accordance with section 96 of the ICAC Act.

GUIDELINE 3

A public body's suite of policies and procedures relating to the prevention and minimisation of retaliation should include a clear, detailed description of the responsibilities relating to preventing, assessing and addressing retaliation given to:

- the head of the public body
- other executives
- managers
- staff.

The role of the ICAC and the ICAC's office

While the primary responsibility for the protection of protected persons rests with public bodies, the ICAC has a specific role.

The ICAC's role includes:

- ensuring that improper conduct is dealt with by an appropriate entity
- issuing directions and guidelines for dealing with protected communications and guidelines for the minimisation of retaliation (this document) in accordance with sections 96 and 106 of the ICAC Act
- considering applications for a declaration of a protected communication in accordance with section 94 of the ICAC Act, and giving specific directions in respect of certain occasions of alleged retaliation (sections 107 and 112 of that Act).

More information about the ICAC's role can be found in the ICAC Act and on the ICAC website.

4. A process to assess the risks of retaliation

The recipient of a protected communication, an individual to whom information is provided about the identity of a protected person, or a person who is alerted to the potential for a protected person to be at risk of retaliation, ought to conduct a retaliation risk assessment. The extent to which that risk assessment is conducted will depend upon what information is known to the assessor, including in respect of the protected person and the environment in which the protected person works.

Of course, any such risk assessment should involve consultation with the protected person.

GUIDELINE 4

Every public body should have a documented process for assessing the risks of retaliation, taking into account the role and operating context of the public body.

The following risk factors and considerations is a useful guide to conducting a risk assessment. Each public body should formulate its own risk assessment process, incorporating any unique risks that might arise in light of the public body's varied working environments.

Risk factor	Considerations
Confidentiality is not or may not be maintained	<ul style="list-style-type: none"> • Has the protected action been taken anonymously or by a named person? • Who knows a protected person's identity? For example, who may have seen the protected communication or had access to records of the communication? • Has the protected person told other people or entities about their report or provided the same information to another entity? • Is the protected person in a small work unit? • Will action taken in respect of the protected communication result in the protected person being identified? • Will acting on the protected communication require engaging with witnesses? • Could the nature or content of the information lead to a protected person being identified? For example, could the information have come from a different source, or is it likely that the protected person would be identifiable as the source?
Past conduct	<ul style="list-style-type: none"> • Does the subject(s) of the protected communication have a demonstrated history of inappropriate conduct, making threats or causing harm to others in the workplace? • Is there a history of conflict between the protected person and the subject(s)? • Is there a history of retaliation, conflict or poor workplace culture in the work unit or organisation? • Have specific threats been made against the protected person?

Risk factor	Considerations
Vulnerability	<ul style="list-style-type: none"> • Does the protected communication involve a number of people or subjects of alleged improper conduct? • Are the protected person and the subject(s) involved in activities together outside of the workplace? • Do the protected person and the subject(s) work together or in close proximity? • Is the protected person in the same reporting line or answerable to the subject(s) of allegations? • Is the information about the alleged conduct of a minister, executive or senior officer? • Is the protected person employed on a contract, temporary or casual basis? • Is the protected person a supplier, tenderer, consultant or other service provider to the organisation? • Is the protected person located in a remote, regional or otherwise isolated office? • Has an investigation, disciplinary proceeding or other administrative action been commenced against the protected person since the protected action was taken? • What is the risk profile of the protected person's workplace? For example, does the person routinely engage in high-risk work or work in a high-risk workplace?
Seriousness of protected communication	<ul style="list-style-type: none"> • Does the protected communication involve an allegation of improper conduct? • Does the protected communication tend to show that serious improper conduct² has occurred? • Is the alleged conduct ongoing or imminent? • Does the protected communication implicate a number of people? • Does the protected communication allege improper conduct by, or prompt scrutiny of, a minister, executive or senior staff member?

1. Adapted from Commonwealth Ombudsman, 'Assessing and managing the risk of reprisal'
2. Serious improper conduct may include corrupt or anti-democratic conduct, conduct resulting in a significant loss or detriment to an individual or organisation (financial or otherwise), potential criminal conduct or conduct that has impacted, or has the potential to impact, many people or entities.

A risk assessment will assist in determining the extent, and nature, of retaliation risks. An action plan can then be developed to minimise those identified risks.

5. Developing a retaliation minimisation action plan

The content of a retaliation minimisation action plan will very much depend upon the extent and nature of identified risks. The action plan should be developed in consultation with the protected person, documented and a copy provided to the protected person.

Examples of what might be incorporated into an action plan:

- Directing a staff member not to contact specific individuals or engage in open discussions concerning the matter, in order to preserve confidentiality and the integrity of action being taken, and the identity of a protected person.
- Limiting staff access to sensitive data, files, electronic systems, or applications.
- Restricting direct or unsupervised interactions between the protected person and the subject(s) of allegations.
- Removing staff from supervisory responsibilities.
- Temporary reassignment or alternative duties for the subject of the allegations or the protected person(s).
- Customised protection plans for serious retaliation and safety risks.

Where there has been an assessment of serious risks of retaliation that might involve physical safety risks, such circumstances ought to be brought to the attention of the ICAC. Where there is an imminent risk of physical safety, contact should be made with NT Police.

Notwithstanding any action taken in accordance with an action plan, the protected person should always be reminded that he or she is responsible for 'seeking assistance at an early opportunity if they experience or fear retaliation'.⁸

GUIDELINE 5

Where a risk of relation has been identified, a public body should have in place a process for establishing and implementing a retaliation minimisation action plan.

⁸ ICAC Act, Schedule 2 clause 1(d).

6. A process for responding to alleged retaliation

Every report of alleged retaliation must be taken seriously and dealt with in a timely, consistent and appropriate manner. Failure to respond quickly and appropriately may reduce confidence that the organisation takes retaliation seriously.

GUIDELINE 6

As a part of a public body's suite of policies and procedures, a documented process for the receipt and assessment of allegations of retaliation should be included.

The process ought to include:

- Timeframes for responding
It is reasonable to expect that a report of retaliation will be acknowledged within 5 working days of it being made, and that action (if required) will be commenced within working 10 days.
- Communication requirements
The alleged victim of retaliation has a responsibility to provide fulsome information and the recipient of that information has a responsibility to ensure it is properly assessed. The process should also include how, and how often, the alleged victim will be updated in respect of the matter.
- Alternative reporting options
The process should include information on how the alleged victim of retaliation may also report the matter to the ICAC or, where there is a fear of physical retaliation, NT Police.
- Access to support services
There should be clear pathways for a person to seek confidential support from appropriately specialised services.

Assessing a report of retaliation

Assessing reports of alleged retaliation can be challenging. On occasion, a person may perceive behaviour towards them as retaliation but, when assessed objectively, there is no evidence to support that assertion.

It is important that recipients of reports of suspected retaliation ensure that reporters are adequately supported and referred to wellbeing services if necessary. Perceptions of adverse treatment may be influenced by stress, feeling isolated and fear arising from taking a protected action.

Above all, the need for objectivity is paramount.

GUIDELINE 7

An assessment of a report of retaliation ought to be conducted by a person who can bring a fair, independent and objective mind to the task. A person whose interests have been, or might be, affected by the actions of the protected person ought not conduct the assessment.

When assessing a report of alleged retaliation, the assessor should consider the following questions:

- What retaliatory action has the person reported?
- What is the adverse consequence that has resulted from the alleged retaliation?
- Who is alleged to have engaged in retaliation?
- Has the alleged retaliation only occurred since the person took a protected action?
- Is there an alternative explanation? For example, is the alleged retaliation part of reasonable management action, ongoing performance management or disciplinary process, or related to conduct the reporter has allegedly engaged in that is not related to the protected action?
- Are there witnesses to the alleged retaliation?
- Is there evidence or supporting information that has been or could be provided by the reporter?
- Does the report constitute grounds for making a mandatory report to the ICAC?
- Is action required to address an immediate or potential risk to the reporter or another person?
- Is additional information required to enable an informed, consistent, and objective assessment, and where can this information can be found?

In making an assessment, it is important to understand the views and expectations of the reporter. However, the assessment must be based upon an objective assessment of the information available, and not purely upon the expectations of the reporter.

Taking action

The most critical aspect of responding to retaliation is the taking of action to address it. The failure to take timely action can have significant consequences for the victim, the perpetrator and the public body.

GUIDELINE 8

Where retaliation is assessed as having occurred, or presently occurring, there should be a positive obligation to take immediate action. Action to be taken should include:

- If the retaliation involves the conduct of a public officer, a report should be made to the ICAC in accordance with existing reporting directions.
- In consultation with the victim, taking all reasonable steps to ensure a safe working environment is provided, including reasonable steps to prevent the opportunity for further retaliation to occur.
- Offering support for the victim, including access to specialised support and counselling.
- Establishing a process for ongoing communication with the victim and monitoring of retaliation risks.
- Keeping detailed records of the action taken by the public body.

To avoid doubt, where a public officer suspects that retaliation has occurred, or is occurring, a report should be made to the ICAC, irrespective of other action taken by the public body. Where the matter has been reported to the ICAC, the protected person must be informed of that fact.⁹

⁹ ICAC Act, section 106(3)(b).

7. Record keeping

In light of the serious consequences that can arise from retaliation, activities relating to the identification, assessment and response to allegations of retaliation must be well documented.

GUIDELINE 9

All public bodies should have, as a part of their retaliation minimisation framework, a requirement to document matters relating to suspected, reported and actual incidents of retaliation, including:

- communication with the protected person
- reports or allegations of retaliation
- the retaliation risk assessment
- the retaliation minimisation action plan
- the assessment process conducted in respect of reports or allegations of retaliation
- the steps taken to address incidents of retaliation.

Care must be taken to ensure the confidentiality of such documents.

GUIDELINE 10

All public bodies should have, as a part of their retaliation minimisation framework, how documents of the kind mentioned in Guideline #9 will be stored and accessed, in order to maintain the confidentiality of that information. The process should contemplate how:

- physical security of hard copy documents will be maintained
- electronic documents will be stored securely
- access to documents will be authorised, and by whom
- access to documents will be audited.

8. Confidentiality and protecting identity

Protecting the identity of a protected person is the best protection from retaliation.¹⁰

It follows that confidentiality should figure prominently in a public body's retaliation minimisation framework.

Section 146A of the ICAC Act creates an offence for disclosing information about the identity of a protected person except for specific reasons.

GUIDELINE 11

A public body's retaliation minimisation framework should emphasise the importance of maintaining the confidentiality of information about the identity of a protected person and highlight the offence found in section 146A of the ICAC Act. The framework should set out the processes that the public body will take to maintain such confidentiality.

9. Training and education

Ensuring staff are aware of and understand the public body's policies, procedures and processes is essential to their success. To that end, training and education is critical.

GUIDELINE 12

A public body should establish a training and education program to equip staff to understand:

- the concept of retaliation and how to recognise it
- the right to be protected from retaliation
- the policies, procedures and processes in place to address risks and allegations of retaliation
- how reports of retaliation, or the fear of retaliation, can be reported, and to whom
- how confidentiality will be maintained
- support services available
- outside reporting pathways (that is, ICAC, NT Police).

Training for supervisors and managers should also include education about identifying and addressing improper conduct in the workplace, and how to identify and respond to potential retaliation.

Training should be repeated at such intervals as to ensure that all staff remain cognisant of the public body's policies and procedures, and each staff member's responsibilities.

¹⁰ ICAC Act, section 91(1)(c).

10. Supporting protected persons

For many people, speaking up about wrongdoing can be stressful and induce fear. Such stress and fear can be ameliorated by:

- an organisational culture that embraces a speak up/listen up approach
- tone from the top that supports people coming forward to report impropriety, together with a zero tolerance to retaliation
- having in place a suite of policies and procedures that provide for a consistent, timely and transparent approach to addressing reports of impropriety, assessing risks of retaliation and responding to incidents of retaliation
- providing appropriate support pathways for those who come forward, and those who support them.

Supporting a protected person also means maintaining communication and providing information and updates, so the protected person knows that the information they have provided is being treated appropriately. Where action is not taken, a protected person ought to be told why that is the case.

The extent of information provided to a protected person will vary, depending upon the nature of the allegation, the role of the protected person, and any statutory or other legal restrictions.

Nothing in these guidelines should be taken to suggest that a protected person must be provided with all information relevant to the matter about which they have come forward. There may be proper reasons why certain information, including in respect of action taken, may not be appropriate to provide to the protected person. Setting and managing the expectations of a protected person about what information will be provided to them, and when, is important.

Where there is doubt as to what information can or should be provided to a protected person, legal advice should be obtained.

Other matters

Addressing false or misleading allegations

In rare cases, a person may purport to make a protected communication, or allege retaliation, in circumstances where the allegation is knowingly false or misleading.

Section 92(2) of the ICAC Act says that 'an action is not protected action to the extent the action involves the provision or communication of information the person taking the action knows or believes is misleading information.'

In such circumstances, the protections provided under the ICAC Act will not be available to the individual for that action. Of course, the obligation to maintain a safe workplace remains, and care must be taken to ensure all staff members, including a staff member who is suspected of providing false or misleading information, have a safe working environment.

Care should be taken when forming the view that a person has made a false or misleading allegation. Such a view should not be formed lightly, and must be supported by solid evidence. Where there is doubt, it should be assumed the person is a protected person and dealt with accordingly.

Where, after careful consideration of the evidence, a view is taken that a false or misleading allegation has been made, this should be addressed as a matter of potential improper conduct itself. The seriousness of the conduct will determine whether it is a matter to be immediately reported to the ICAC, or reported by a prescribed public officer within one month of the issue being identified.¹¹

How can the ICAC assist?

The ICAC will assess all reports of retaliation, in the same way it assesses any allegation of improper conduct. The ICAC, or the ICAC's delegate, will determine the most appropriate course of action to be taken.

The ICAC has a number of additional powers relating to risks, or incidences, of retaliation.

Section 107 of the ICAC Act empowers the ICAC to give a written direction to a public officer or public body to act for the protection of a protected person.

This direction may include requiring a public officer or public body to:

- make an arrangement for a public officer to be offered an opportunity to relocate to a suitable role in a different work unit or location
- manage any retaliation risks to a particular person, or persons, or particular group
- take any other action
- refrain from taking any action.¹²

It is an offence to contravene such a direction.

In serious cases, if the ICAC considers that a person is at risk of intimidation, harm, or harassment because of that person's status as a protected person, the ICAC may take any action the ICAC considers necessary or desirable for the protection of that person, including giving directions to the Commissioner of Police in relation to such protection.¹³

Where a public officer, or public body, thinks the exercise of such powers is necessary, contact should be made with the ICAC's office.

More generally, the ICAC and ICAC staff can provide support by way of training and education sessions, and (albeit limited) assistance on the development of policies and procedures.

¹¹ See Mandatory Reporting Directions and Guidelines for Public Officers, ICAC NT.

¹² ICAC Act, section 106.

¹³ Ibid Act, section 112.

Where to from here?

The starting point for every public body should be a documented commitment from the head of the public body to develop a retaliation minimisation framework in line with this document.

The head of the public body, together with executive staff, should develop and promulgate a road map and timeline for the development of policies, practices and procedures that will give effect to the key elements outlined in this document.

That roadmap will be a central tool for tracking progress to deliver a comprehensive, detailed and tailored framework for the minimisation of retaliation in the public body.

The following might be considered in the design of a roadmap:

1. Review existing policies and frameworks that might already address some or all of the matters identified in this document, with a view to benchmarking existing policies and procedures against the guidelines in this document to identify gaps or weaknesses.
2. Having conducted a review, identify and assign resources to implement any identified changes.
3. Conduct a review of existing organisational culture, and the extent to which a speak up/listen up approach exists. The review may include surveys and staff interviews.
4. Develop a plan to implement a speak up/listen up approach.
5. Implement a program of education and training for all staff to ensure consistent knowledge and understanding of the policies, procedures, processes and expectations relevant to retaliation risks and occurrences.
6. Set a review cycle for continuous improvement of the public body's retaliation minimisation framework.



Contact the ICAC

Freecall 1800 250 918

Level 7, 9-11 Cavenagh Street
Darwin NT 0801
GPO Box 3750 Darwin NT 0801

icac.nt.gov.au

Office of the
Independent
Commissioner
Against
Corruption NT

