

# Dealing with voluntary protected communications

## DIRECTIONS AND GUIDELINES

Section 96 *Independent Commissioner Against Corruption Act 2017* (ICAC Act)

January 2024

Office of the  
Independent  
Commissioner  
Against  
Corruption NT



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## Foreword

This document is targeted toward individuals who can receive voluntary protected communications.

I have prepared this document in accordance with section 96 of the ICAC Act. It supersedes previous directions and guidelines made in accordance with section 96. It is essential reading for any person who can receive a voluntary protected communication. This document contains both directions (which are mandatory) and guidelines (which are recommendations).

Compliance with these directions and guidelines will be monitored by my office.

Logic dictates that integrity in public administration is safeguarded by the willingness of its agents to speak up and call out impropriety. Where that willingness is hampered by a fear of personal repercussion for speaking out, or a sense that there is no point in speaking out, trust in public administration is diminished.

The Northern Territory (NT) Parliament has, through the ICAC Act, recognised the importance of having in place a robust process for the provision of information about improper conduct and other matters, and for the protection of those persons who provide that information.

At the front line of that process are those who are empowered to receive information by way of voluntary protected communications. The manner in which such recipients deal with the information, and the individual who has provided it, is a critical element in supporting people who come forward and protecting them from harm for doing so.

Recipients of a voluntary protected communication bear a heavy burden. There are a number of statutory obligations imposed upon the recipient, who is obliged to exercise sound judgement when considering, in a fair and objective manner, the information provided. At the same time, the recipient must engage with, and manage the expectations of, the discloser. That is not always a straightforward task.

I trust that this document will be a useful source of information and guidance to recipients of voluntary protected communications.

Before reading this document, the reader should already have a good understanding of Part 6 of the ICAC Act. These directions and guidelines assume that the reader already understands the whistleblower scheme in the ICAC Act and the key processes involved. Information about the whistleblower framework, including video explanations, can be accessed from the ICAC website.

I express my appreciation to Anna Collins of my office whose work has been pivotal to the development of these directions and guidelines.



Michael Riches  
**Independent Commissioner Against Corruption**

January 2024

## Summary of directions

### **DIRECTION 1**

In accordance with section 93(3) of the ICAC Act the recipient of a voluntary protected communication must receive and address the communication, whether it be received in writing or verbally and whether or not the identity of the discloser is known.

### **DIRECTION 2**

A recipient must not receive, or purport to receive, a voluntary protected communication unless and until the recipient has satisfied themselves that they are entitled to do so under the ICAC Act.

### **DIRECTION 3**

On the rare occasion where the recipient forms the belief that the person making the communication has provided information that that person knows or believes is misleading information, that belief must be reported to an appropriate person or entity. The recipient is to consider internal reporting processes and the reporting directions issued by the ICAC.

### **DIRECTION 4**

Upon receipt of a voluntary protected communication, the recipient is to conduct an assessment of the information to determine whether:

- the information gives rise to a suspicion of corrupt conduct, anti-democratic conduct, misconduct or unsatisfactory conduct as defined in the ICAC Act
- the information gives rise to some other issue relating to public administration about which further action should be taken
- the protected person, or any other person, is at risk of retaliation
- the information gives rise to a concern that a person, or persons, may be at risk of imminent physical harm.

The assessment must be documented and include the opinion of the recipient as to the above matters.

### **DIRECTION 5**

Where the recipient of a voluntary protected communication decides that no further action need be taken in respect of the content of the communication, the recipient must:

- make a written record of that decision, including why that decision has been made
- advise the maker of the communication, as soon as reasonably practicable, that no further action will be taken and the reason(s) why that decision has been made.

### **DIRECTION 6**

Where the recipient of a voluntary protected communication decides that it is necessary, for the purposes of an investigation, to disclose information about the identity of a protected person, the recipient must:

- inform the receiver of the information that that information relates to the identity of a protected person
- advise the maker of the voluntary protected communication that information about their identity has been disclosed and to whom
- keep a written record of when, to whom, and for what purpose, identifying information has been provided.

The recipient of a voluntary protected communication must have regard to section 146A of the ICAC Act when determining whether to disclose information about the identity of a protected person.

#### **DIRECTION 7**

Where the recipient of a voluntary protected communication decides to address the information contained within the communication by way of an informal resolution process, the recipient must satisfy themselves that:

- the communication does not give rise to a suspicion of corrupt conduct or anti-democratic conduct
- the matter is appropriate to be addressed by way of an informal resolution process
- the recipient is authorised to resolve, or attempt to resolve, matters raised in the protected communication by way of an informal resolution process.

#### **DIRECTION 8**

Where the recipient of a voluntary protected communication decides to address the information contained within the communication by way of an informal resolution process, the recipient must:

- advise the protected person of that decision and why that decision was made
- keep a written record of that decision and why that decision was made
- only disclose information about the identity of a protected person as permitted by section 146A(3) and, in particular, the defence set out on page 16 of this document.

#### **DIRECTION 9**

Where the recipient of a voluntary protected communication decides that the information contained within the communication should be referred to another person or entity for action, the recipient must satisfy themselves that the person or body to whom the referral is to be made is the most appropriate person or body to deal with the referral.

#### **DIRECTION 10**

Where the recipient of a voluntary protected communication refers information contained within a protected communication to another person or entity, the recipient must:

- advise the protected person, as soon as practicable after the referral has been made:
  - that the matter has been referred
  - to whom it was referred
  - the means by which the protected person can contact the person or entity to which the referral was made
  - whether information about the identity of the protected person was disclosed with the referral
- advise the person or entity to which the referral was made that the information referred was provided by way of a protected communication
- if the recipient discloses information about the identity of the protected person (having regard to section 146A of the ICAC Act) as part of a referral, inform the receiver of the referral of that fact.

## **DIRECTION 11**

Where the recipient of a voluntary protected communication refers information contained with the communication to another person or entity, the recipient must keep a written record of that fact, including:

- the date of the referral
- to whom the referral was made
- the information provided by way of the referral
- whether the referral included information about the identity of a protected person
- when and how the protected person was advised of the referral
- what, if any, information was provided to the recipient by the person or entity to whom the referral was made.

## **DIRECTION 12**

Recipients of voluntary protected communications must have regard to the communication requirements in section 98 and Schedule 2 of the ICAC Act.

## **DIRECTION 13**

Where the recipient of a voluntary protected communication is of the opinion that the protected person is at risk, or is experiencing, retaliation, the recipient must:

- comply with any internal policy or procedure in respect of addressing retaliation risks and alleged retaliation<sup>1</sup>
- report actual incidents of suspected retaliation to the ICAC
- advise the protected person of the action taken in respect of the risks or suspected incidence of retaliation
- keep detailed records of the steps taken to address any identified risk, or incidence, of retaliation.

## **DIRECTION 14**

The recipient of a voluntary protected communication must keep records created or received in respect of a voluntary protected communications in a safe and secure manner.

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<sup>1</sup> 'Guidelines for the minimisation of retaliation against protected persons', and in particular Guidelines 5 and 6.

# Summary of guidelines

## GUIDELINE 1

All public bodies should have in place a suite of policies, procedures and other guidance material that support the making of, and dealing with, a voluntary protected communication.

A public body's framework should include information for staff about:

- how, and to whom, to make a voluntary protected communication
- the information that should be included in the communication, including:
  - when and where the alleged conduct occurred
  - if the alleged conduct is ongoing
  - the people involved, including alleged perpetrators, witnesses and victims
  - evidence relating to the conduct and where that evidence can be located
  - the consequences of the conduct
  - risks to individuals, work groups, the organisation or the public interest arising as a result of the conduct or the making of a protected communication
- the information that the person making the communication will be provided and when that information will be provided.
- support services available to the person making the communication.

## GUIDELINE 2

The fact that a voluntary protected communication can be made anonymously should be stated in a public body's relevant policies and procedures.

## GUIDELINE 3

Recipients of voluntary protected communications should take steps to disseminate their contact information within their public body. Contact information should include:

- a means for communicating electronically, for example by way of a dedicated email address
- how an appointment can be made to speak to the recipient in person, or over the phone, to make a voluntary protected communication verbally
- how in person and telephone communications will be conducted to ensure confidentiality.

## GUIDELINE 4

The recipient may wish to ask, at the time a communication is being made, whether the maker intends that the communication be treated as a protected communication.

## **GUIDELINE 5**

While there is no obligation to determine that a communication **is** a protected communication, the recipient ought to consider whether such a determination should be made when the communication:

- contains information of a kind that would meet the criteria in section 93(2) of the ICAC Act
- does not raise, in the mind of the recipient, a belief that it contains misleading information and that the maker knew, or believed, that the information was misleading
- was made without an indication of the kind contemplated in section 93(4A)(a)
- has been made and, on further contact or inquiry, the maker of the communication asks that the communication be treated as a protected communication.

## **GUIDELINE 6**

Unless the recipient of a communication forms the belief, supported by reliable evidence, that the person making the communication has provided information that that person knows or believes is misleading information, the communication should be treated as a protected communication and, therefore, the maker should be treated as a protected person.

The recipient should carefully assess the evidence upon which such a belief is formed.

## **GUIDELINE 7**

Those persons and entities that can receive a voluntary protected communication should prepare a template with tailored information consistent with that specified in section 98(1) and Schedule 2, in order that such information can be provided to the maker of a protected communication without undue delay.

## **GUIDELINE 8**

To aid in the assessment required by Direction 4, the recipient should have regard to the 'Guidelines for the minimisation of retaliation against protected persons' and, in particular, the retaliation risk assessment process outlined in that document.

## **GUIDELINE 9**

Where the recipient of a voluntary protected communication decides to conduct inquiries to support a more fulsome assessment, the recipient must consider how those inquiries can be conducted without disclosing information about the identity of the protected person.

## **GUIDELINE 10**

Recipients of voluntary protected communications should endeavour to provide as much information to a protected person as is reasonably appropriate, to ensure the protected person understands what, if any, action has been taken in respect of the communication and the outcome of that action.

The nature and extent of information provided will depend upon the nature and extent of the action taken, and any legislative, regulatory other legal considerations relevant to the provision of that information.



# Introduction

## What is this document?

Section 96(1) of the ICAC Act requires the ICAC to issue directions and guidelines governing how a recipient of a voluntary protected communication is to deal with the communication. This document serves that purpose.

Directions in this document are to be regarded as mandatory. Guidelines are recommendations that, while not mandatory, are nevertheless strongly encouraged.

## Who should read this document?

While all public officers will benefit from reading this document, it is primarily targeted towards individuals who can receive voluntary protected communications. Such individuals include the heads of public bodies, nominated recipients in public bodies, certain statutory office holders and their staff, and, in certain circumstances, other individuals and entities.

## Other relevant documents

These directions and guidelines should be read together with the 'Guidelines for the minimisation of retaliation against protected persons', and Part 6 of the ICAC Act, all of which can be accessed on the ICAC website.

## Document structure

These directions and guidelines are structured to provide useful background and introductory information for recipients of voluntary protected communications. The responsibilities imposed upon recipients are outlined in this document by reference to 3 main themes:

- Receiving a protected communication
- Actioning a protected communication
- Protecting a protected person

A **DIRECTION** will be displayed in a box with green background.

A **GUIDELINE** will be displayed in a box with a blue background.

## Guiding principles

These directions and guidelines have been drafted consistently with the whistleblower protection principles, which can be found in section 91 of the ICAC Act.

Those principles are as follows:

- (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.

## Key terms

The following is a summary of key terms used in this document. For a complete description of terms please 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.

**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.

**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.

**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.

**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:

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

A **mandatory report** is a report made to the ICAC in accordance with the directions issued under section 22 of the ICAC Act. Mandatory reports are a form of protected communication if they are provided in accordance with the ICAC reporting directions and the ICAC Act.

**Protected action** is defined in section 92 of the ICAC Act. A protected action includes the act of making a protected communication.

A **protected action** is also an act done to comply with the ICAC Act or to cooperate with people carrying out functions under the ICAC Act. Giving information to the ICAC or an ICAC staff member when it has been requested may amount to a protected action.

**Protected person** is defined in section 4 of the ICAC Act and is a person who has taken, or is taking, a protected action. A protected person may also be a person who is the victim of retaliation.

**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.

**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.

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

- (a) with the intention of discouraging the victim or another person from taking a protected action; or
- (b) with the intention of discouraging the victim or another person from supporting a protected person; or
- (c) because the victim has taken, or is suspected to have taken, a protected action; or
- (d) because the victim is, or is suspected to be, supporting a protected person.

**Voluntary protected communication** is a form of protected communication that is made in accordance with section 93 of the ICAC Act. A voluntary protected communication can only be made to a person or entity listed in that section (see the definition of recipient) and must satisfy certain criteria.

See the ICAC website for more information.

## The term ‘purported’

In November 2023, changes to the ICAC Act came into effect. Those changes included the introduction of the terms ‘purported protected person’ and ‘purported protected communication’.

The word ‘purported’ has been included for practical reasons. To be a voluntary protected communication, the person making the communication has to believe on reasonable grounds that the information being provided meets certain criteria.

Moreover, a communication will not be a protected action if the action involves the provision or communication of information that the communicator knows or believes is misleading information.

The recipient of the communication will rarely be in a position to verify the state of mind of the communicator, including whether the communicator held the requisite belief on reasonable grounds and was not knowingly providing misleading information.

Such a verification might not occur for some time after further analysis.

For those reasons, the ICAC Act no longer requires the recipient to positively state that a communication is a protected communication. Rather, the communication is regarded as a purported protected communication and the communicator is advised the communication is, or may be, a protected communication. In turn, the communicator is regarded as a purported protected person.

A person’s status as a purported protected person is to be treated in the same way as a person who is regarded as a protected person.

## Nominated recipients

A nominated recipient is an eligible person nominated by the head of a public body to be a nominated recipient in accordance with section 97 of the ICAC Act. A nominated recipient can receive voluntary protected communications relating to officers or employees of their public body, and can fulfil the responsibilities of the head of a public body in accordance with section 98 of that Act.

All staff of a public body should have access to information about the identity and contact information for persons who can receive a voluntary protected communication, including the nominated recipient.

### Why have a nominated recipient?

Should a public officer wish to make a voluntary protected communication to a recipient within their public body, they can make that communication to the head of the public body or a nominated recipient.

A public body that does not have a nominated recipient might create challenges for staff. There may be nervousness or fear about going directly to the head of the public body. There may also be geographical or structural barriers to doing so.

A nominated recipient provides public officers within a public body with an alternative means of making a voluntary protected communication.

However, it must be understood that making a voluntary protected communication to a nominated recipient does not relieve the communicator of the requirement to comply with other reporting obligations, including compliance with reporting directions issued by the ICAC.

### Who can be a nominated recipient?

Section 97 of the ICAC Act says that a person is eligible for nomination as a nominated recipient if:

- (a) the person is a public officer; and
- (b) the person responsible for the management or control of a public body is satisfied the person has suitable skills and training to be the nominated recipient.

## Training, knowledge and experience

When considering whether to nominate a person as a nominated recipient, heads of public bodies ought to consider whether the candidate has:

- broad knowledge of the organisation and its operating context to readily identify:
  - the seriousness of the information communicated
  - available pathways to address the information
  - the risks to individuals and the organisation, including risks of retaliation
- sufficient seniority and autonomy to reliably deal with protected communications without managerial oversight
- access to, or can be provided with access to, secure and confidential means to record and store physical and electronic items
- demonstrated capacity to conduct themselves with the highest level of integrity, including maintaining strict confidentiality and approaching matters in an impartial, objective and fair manner
- a willingness to have their contact details made available to all staff of the public body
- a willingness to participate in ongoing training forums delivered by the ICAC.

## Advising the ICAC of new nominations, expiry of nominations and revocation of nominations

Heads of public bodies have a statutory obligation to advise the ICAC, as soon as practicable after the:

- nomination of a nominated recipient
- expiry of a nomination or
- revocation of a nomination.<sup>2</sup>

Notice to the ICAC of a nomination must be in writing and include the name and contact details of the nominated recipient, and the period of the nomination.<sup>3</sup>

## Supporting nominated recipients

The capacity of a nominated recipient to receive and deal with voluntary protected communications is contingent upon their own knowledge, training and experience, together with the resources available to them through the public body.

Of particular importance is access to secure means to store confidential records relating to voluntary protected communications. It is incumbent upon public bodies to facilitate access to such secure storage facilities.

Importantly, the process of making voluntary protected communications can be emotionally challenging for both the communicator and the recipient. To that end, nominated recipients should have access to suitable support services.

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<sup>2</sup> ICAC Act, section 97(5).

<sup>3</sup> Ibid, section 97(6).

## Preliminary considerations

### Frameworks for receiving and dealing with voluntary protected communications

To enable recipients to receive and action voluntary protected communications, public bodies should have in place a framework that supports the making of such communications, and the pathways for action on those communications. A public body's processes to guard against risks of retaliation will be an important step in improving the willingness of public officers to speak up.

#### GUIDELINE 1

All public bodies should have in place a suite of policies, procedures and other guidance material that support the making of, and dealing with, a voluntary protected communication.

A public body's framework should include information for staff about:

- how, and to whom, to make a voluntary protected communication
- the information that should be included in the communication, including:
  - when and where the alleged conduct occurred
  - if the alleged conduct is ongoing
  - the people involved, including alleged perpetrators, witnesses and victims
  - evidence relating to the conduct and where that evidence can be located
  - the consequences of the conduct
  - risks to individuals, work groups, the organisation or the public interest arising as a result of the conduct or the making of a protected communication
- the information that the person making the communication will be provided and when that information will be provided.
- support services available to the person making the communication.

More information can be found in the 'Guidelines for the minimisation of retaliation against protected persons', available on the ICAC website.

## Anonymous communications and the method of communication

Section 93(3) of the ICAC Act provides that a protected communication can be made orally or in writing, and that it can be made anonymously. Neither a public body, nor the recipient of a voluntary protected communication, can decline to receive and address a voluntary protected communication on the grounds that it has been made anonymously or has not been made in a particular form.

### DIRECTION 1

In accordance with section 93(3) of the ICAC Act the recipient of a voluntary protected communication must receive and address the communication, whether it be received in writing or verbally and whether or not the identity of the discloser is known.

### GUIDELINE 2

The fact that a voluntary protected communication can be made anonymously should be stated in a public body's relevant policies and procedures.

## Recipients that include 'the office' or are an entity

While most recipients of voluntary protected communications listed in section 93 of the ICAC Act are individuals, reference is also made to offices and entities. For example, recipients include the Auditor-General or the Auditor-General's office, the Ombudsman or the Ombudsman's Office, or the Environmental Protection Authority.

In those circumstances, it is important that the heads of those offices ensure that its members and staff, or relevant members and staff, understand and adhere to the requirements in Part 6 of the ICAC Act and these directions and guidelines.

## Confidentiality

Fundamental to the willingness of individuals to speak out about impropriety in public administration is the extent to which the individual has confidence that their identity, and the information they provide, will be treated confidentially.

The NT Parliament has recognised the importance of protecting the identity of a protected person with provisions under section 146A of the ICAC Act.

- 1) A person commits an offence if:
  - (a) the person obtains information about the identity of a protected person; and
  - (b) the person intentionally engages in conduct; and
  - (c) the conduct results in the disclosure of the information and the person is reckless in relation to that result.

A breach of section 146A carries a penalty of a fine or imprisonment for 2 years.



There are a number of circumstances where the disclosure of information about the identity of a protected person will not amount to a criminal offence. Those circumstances include for the administration of the ICAC Act, or in cases of sudden emergency.

Disclosure is also permissible 'only to the extent necessary to ensure the matters about which the information relates are properly investigated'.<sup>4</sup>

Independent entities<sup>5</sup> can disclose in other circumstances.

In addition, the ICAC Act enables the ICAC to issue guidelines that permit the disclosure of a protected person's identity.<sup>6</sup>

In accordance with section 146A(3)(f) of the ICAC Act, the following additional circumstances will be a defence against a prosecution for an offence against section 146A(1):

- (a) where the person believes on reasonable grounds that the disclosure of information about the identity of a protected person is necessary in order to comply with obligations imposed upon that person under Division 3, Part 2.1 of the *Care and Protection of Children Act 2007*; or
- (b) where the person believes on reasonable grounds that the disclosure of information about the identity of a protected person is necessary in order to address a serious and imminent risk of retaliation<sup>7</sup> against a protected person, or to address an actual incident of retaliation against a protected person; or
- (c) where the person believes on reasonable grounds that the disclosure is necessary to support the informal resolution of matters raised in a protected communication, but only where:
  - (i) the information in the protected communication does not relate to potential corrupt conduct or anti-democratic conduct; or
  - (ii) the matter raises an issue other than corrupt conduct or anti-democratic conduct and the person is authorised to address that issue and the protected person has given written consent for the disclosure of information about their identity; or
- (d) Where the person is the recipient of a protected communication and, in the opinion of the recipient:
  - (i) it is necessary to disclose the identity of the protected person to another person or entity in order for that other person or entity to take appropriate action (if any) in relation to the protected communication; and
  - (ii) the person has sought and considered the views of the protected person as to the disclosure.

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<sup>4</sup> ICAC Act, 146A(3) and *Criminal Code*, section 43BE.

<sup>5</sup> ICAC Act, section 4.

<sup>6</sup> *Ibid*, section 146A(3)(f).

<sup>7</sup> *Ibid* section 95.

## Ensuring security and confidentiality

Recipients and their organisations should have in place the systems and resources to allow recipients of protected communications to receive and store information relating to the communications safely and securely.

See guidelines 9 and 10 of the 'Guidelines for the minimisation of retaliation against protected persons'.

## Receiving a voluntary protected communication

Recipients of voluntary protected communications have a number of statutory obligations, which are supplemented by the directions and guidelines below.

### Entitlement to receive a voluntary protected communication

Only persons and entities listed in section 93(1)(b) of the ICAC Act are entitled to receive a voluntary protected communication.

#### **DIRECTION 2**

A recipient must not receive, or purport to receive, a voluntary protected communication unless and until the recipient has satisfied themselves that they are entitled to do so under the ICAC Act.

### Form of voluntary protected communications

A person is entitled to make a voluntary protected communication in writing or verbally.<sup>8</sup>

#### **GUIDELINE 3**

Recipients of voluntary protected communications should take steps to disseminate their contact information within their public body. Contact information should include:

- a means for communicating electronically, for example by way of a dedicated email address
- how an appointment can be made to speak to the recipient in person, or over the phone, to make a voluntary protected communication verbally
- how in person and telephone communications will be conducted to ensure confidentiality.

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<sup>8</sup> Refer to Direction 1 in this document.

## The requirement to indicate the making of a protected communication

The maker of a protected communication must indicate to the recipient that they are making the communication as a protected communication.<sup>9</sup> If the recipient is a nominated recipient, the maker of the communication must indicate to the nominated recipient that the communication is made to the recipient in their capacity as a nominated recipient.<sup>10</sup>

### GUIDELINE 4

The recipient may wish to ask, at the time a communication is being made, whether the maker intends that the communication be treated as a protected communication.

## Circumstances where an indication is not given

Section 93(4A) of the ICAC Act says that a communication is not a protected communication unless an indication of the kind mentioned above is given.

However, even if no indication is given, the recipient has the discretion to determine that the information is a protected communication.<sup>11</sup>

### GUIDELINE 5

While there is no obligation to determine that a communication **is** a protected communication, the recipient ought to consider whether such a determination should be made when the communication:

- contains information of a kind that would meet the criteria in section 93(2) of the ICAC Act
- does not raise, in the mind of the recipient, a belief that it contains misleading information and that the maker knew, or believed, that the information was misleading
- was made without an indication of the kind contemplated in section 93(4A)(a)
- has been made and, on further contact or inquiry, the maker of the communication asks that the communication be treated as a protected communication.

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<sup>9</sup> ICAC Act, section 93(4A)(a)(i).

<sup>10</sup> Ibid, section 93(4A)(a)(ii).

<sup>11</sup> Ibid, section 93(4A)(b).

## Misleading information

The act of making a protected communication is a protected action. However:

... 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.<sup>12</sup>

In other words, a person who makes a communication knowing or believing that the information being provided is misleading may not have the protections available to protected persons under the ICAC Act.

### GUIDELINE 6

Unless the recipient of a communication forms the belief, supported by reliable evidence, that the person making the communication has provided information that that person knows or believes is misleading information, the communication should be treated as a protected communication and, therefore, the maker should be treated as a protected person.

The recipient should carefully assess the evidence upon which such a belief is formed.

### DIRECTION 3

On the rare occasion where the recipient forms the belief that the person making the communication has provided information that that person knows or believes is misleading information, that belief must be reported to an appropriate person or entity. The recipient is to consider internal reporting processes and the reporting directions issued by the ICAC.

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<sup>12</sup> ICAC Act, section 92(2).

## Communication with a protected person

Effective, timely and ongoing communication with a protected person is critical. Ensuring the protected person is informed, from the outset, as to when, how and by whom they will receive communications and updates, is an important step in managing the person's expectations.

The recipient of a protected communication, including a voluntary protected communication, must comply with section 98 of the ICAC Act.

Section 98(1) provides that a recipient must:

[a]s soon as practicable after receiving a purported protected communication, ... give the person who made the communication a written notice setting out:

- (a) a statement that the communication has been received; and
- (b) the date of receipt; and
- (c) an indication of the content of the communication; and
- (d) a statement that the communication is or may be a protected communication; and
- (e) information about the ICAC's role and contact details for the ICAC's office.

If the recipient has taken reasonable efforts to contact the person but has been unsuccessful, the obligation above does not apply.

Aside from the information to be provided in accordance with section 98(1), 'the recipient must make reasonable efforts to inform the person who made a protected communication of the matters specified in Schedule 2.'<sup>13</sup>

### GUIDELINE 7

Those persons and entities that can receive a voluntary protected communication should prepare a template with tailored information consistent with that specified in section 98(1) and Schedule 2, in order that such information can be provided to the maker of a protected communication without undue delay.

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<sup>13</sup> ICAC Act, section 98(3).

## Actioning a protected communication

Nothing in this section, or the directions and guidelines more generally, amend or displace the obligation upon a public officer to comply with the reporting directions issued by the ICAC in accordance with section 22 of the ICAC Act.

When a voluntary protected communication has been received the recipient must act to ensure that the information is properly assessed and dealt with.

### Assessing the information

To appropriately assess the information, the recipient should have a thorough understanding of the forms of improper conduct prescribed in the ICAC Act, together with relevant legislation, regulations, rules, codes of conduct, policies and procedures that may bear upon the matters raised in the information.

The recipient must also be familiar with the concept of retaliation, and how risks of retaliation are to be assessed.

#### **DIRECTION 4**

Upon receipt of a voluntary protected communication, the recipient is to conduct an assessment of the information to determine whether:

- the information gives rise to a suspicion of corrupt conduct, anti-democratic conduct, misconduct or unsatisfactory conduct as defined in the ICAC Act
- the information gives rise to some other issue relating to public administration about which further action should be taken
- the protected person, or any other person, is at risk of retaliation
- the information gives rise to a concern that a person, or persons, may be at risk of imminent physical harm.

The assessment must be documented and include the opinion of the recipient as to the above matters.

#### **GUIDELINE 8**

To aid in the assessment required by Direction 4, the recipient should have regard to the 'Guidelines for the minimisation of retaliation against protected persons' and, in particular, the retaliation risk assessment process outlined in that document.

## Determining the action pathway

Having assessed the communication, the recipient must consider what, if any, action is required. Action might include investigating alleged improper conduct, taking informal action to resolve less serious matters, or referring the information to another person or entity. It may be that no action need be taken after the information is assessed or following initial inquiries.

Determining what action to take may depend on:

- the nature and quality of the information provided
- whether the protected person has advised that the information has been disclosed to another person or entity (for example, the Ombudsman, the NT Police or the ICAC).
- the assessed seriousness of any alleged improper conduct
- the seniority of persons the subject of allegations in the communication
- the availability of evidence and witnesses to the alleged improper conduct
- whether previous action has already been taken and whether that action was satisfactory
- whether action, including legal proceedings, are currently being undertaken by another person or entity.

### No further action

Where the recipient of a voluntary protected communication determines that no further action is required, that decision must be documented and the maker of the communication must be advised.

#### **DIRECTION 5**

Where the recipient of a voluntary protected communication decides that no further action need be taken in respect of the content of the communication, the recipient must:

- make a written record of that decision, including why that decision has been made
- advise the maker of the communication, as soon as reasonably practicable, that no further action will be taken and the reason(s) why that decision has been made.

### Further inquiry

In many cases further inquiry will be required in respect of matters raised in a voluntary protected communication. Whether or not those inquiries can be made by the recipient, or whether the matter must be referred to another person or entity, will depend upon the recipient's role and position.

Further inquiry may involve seeking additional information to enable a more fulsome assessment to be made. In such cases care must be taken to preserve confidentiality.

#### **GUIDELINE 9**

Where the recipient of a voluntary protected communication decides to conduct inquiries to support a more fulsome assessment, the recipient must consider how those inquiries can be conducted without disclosing information about the identity of the protected person.

## Investigation

Information contained within a voluntary protected communication may warrant an investigation.

Investigations may require the engagement of other public officers, including human resource professionals, internal or external investigators, and legal practitioners.

Where an investigation is conducted, or supported, by persons other than the recipient of the protected communication, the recipient must consider whether information about the identity of a protected person needs to be disclosed.

Section 146A(3)(e) of the ICAC Act permits disclosure of information about the identity of a protected person 'only to the extent necessary to ensure matters to which the information relates are properly investigated'.

Careful consideration must be given to what information is required to enable an investigation to be undertaken. It is not always necessary for the identity of a protected person to be disclosed, and legal advice should be obtained where there is doubt.

If the recipient of a voluntary protected communication decides that it is necessary to disclose information about the identity of a protected person, certain steps are to be undertaken.

### **DIRECTION 6**

Where the recipient of a voluntary protected communication decides that it is necessary, for the purposes of an investigation, to disclose information about the identity of a protected person, the recipient must:

- inform the receiver of the information that that information relates to the identity of a protected person
- advise the maker of the voluntary protected communication that information about their identity has been disclosed and to whom
- keep a written record of when, to whom, and for what purpose, identifying information has been provided.

The recipient of a voluntary protected communication must have regard to section 146A of the ICAC Act when determining whether to disclose information about the identity of a protected person.



## Informal resolution

In some cases the information contained within a protected communication is best addressed through an informal resolution process. The nature of that process will depend upon the legislation, regulations, delegations, policies and procedures relevant to the recipient and the recipient's public body.

Before deciding to address a protected communication by way of informal resolution, a number of matters are to be considered.

### **DIRECTION 7**

Where the recipient of a voluntary protected communication decides to address the information contained within the communication by way of an informal resolution process, the recipient must satisfy themselves that:

- the communication does not give rise to a suspicion of corrupt conduct or anti-democratic conduct
- the matter is appropriate to be addressed by way of an informal resolution process
- the recipient is authorised to resolve, or attempt to resolve, matters raised in the protected communication by way of an informal resolution process.

### **DIRECTION 8**

Where the recipient of a voluntary protected communication decides to address the information contained within the communication by way of an informal resolution process, the recipient must:

- advise the protected person of that decision and why that decision was made
- keep a written record of that decision and why that decision was made
- only disclose information about the identity of a protected person as permitted by section 146A(3) and, in particular, the defence set out on page 16 of this document.

## Referral to another person or entity

In many cases, the recipient of a voluntary protected communication will decide to refer the matter to another person or entity for action.

### **DIRECTION 9**

Where the recipient of a voluntary protected communication decides that the information contained within the communication should be referred to another person or entity for action, the recipient must satisfy themselves that the person or body to whom the referral is to be made is the most appropriate person or body to deal with the referral.

### **DIRECTION 10**

Where the recipient of a voluntary protected communication refers information contained within a protected communication to another person or entity, the recipient must:

- advise the protected person, as soon as practicable after the referral has been made:
  - that the matter has been referred
  - to whom it was referred
  - the means by which the protected person can contact the person or entity to which the referral was made
  - whether information about the identity of the protected person was disclosed with the referral
- advise the person or entity to which the referral was made that the information referred was provided by way of a protected communication
- if the recipient discloses information about the identity of the protected person (having regard to section 146A of the ICAC Act) as part of a referral, inform the receiver of the referral of that fact.

### **DIRECTION 11**

Where the recipient of a voluntary protected communication refers information contained within the communication to another person or entity, the recipient must keep a written record of that fact, including:

- the date of the referral
- to whom the referral was made
- the information provided by way of the referral
- whether the referral included information about the identity of a protected person
- when and how the protected person was advised of the referral
- what, if any, information was provided to the recipient by the person or entity to whom the referral was made.

## Keeping a protected person informed

The directions and guidelines already outline the requirements for recipients of voluntary protected communications to provide information to a protected person. The provision of information should continue until the recipient no longer has any involvement with the matter. That might occur at the point of referral to another person or entity, or at the conclusion of any informal resolution process or investigation.

### **GUIDELINE 10**

Recipients of voluntary protected communications should endeavour to provide as much information to a protected person as is reasonably appropriate, to ensure the protected person understands what, if any, action has been taken in respect of the communication and the outcome of that action.

The nature and extent of information provided will depend upon the nature and extent of the action taken, and any legislative, regulatory other legal considerations relevant to the provision of that information.

### **DIRECTION 12**

Recipients of voluntary protected communications must have regard to the communication requirements in section 98 and Schedule 2 of the ICAC Act.

## Protecting a protected person

A protected person has certain protections available to them under the ICAC Act. An important step in protecting a protected person is to prevent or reduce the risk of that person becoming the subject of retaliation.

Detailed information about retaliation can be found in the 'Guidelines for the minimisation of retaliation against protected persons', which is available on the ICAC website.

Recipients of voluntary protected communications have an important role to play in identifying risks of retaliation and taking action to prevent or minimise the likelihood of those risks materialising. Of course, the extent to which the recipient of a voluntary protected communication can identify and take steps to address risks of retaliation will depend upon a number of factors, including the:

- role of the recipient, and in particular, whether the recipient has an understanding or connection with the operating environment in which the protected person works
- extent to which the protected person has provided information about risks, or perceived risks, of retaliation.

As set out in Schedule 2 of the ICAC Act, a protected person 'is responsible for seeking assistance at an early opportunity if they experience or fear retaliation'.<sup>14</sup> In other words, protected persons themselves have a responsibility to identify and raise fears of, or instances of, retaliation.

Where such matters are raised, it is important that they are addressed.

To assist in preventing or minimising the risks of retaliation, regard is to be had to **DIRECTION 4** and **GUIDELINE 8**. The following additional direction is given.

### DIRECTION 13

Where the recipient of a voluntary protected communication is of the opinion that the protected person is at risk, or is experiencing, retaliation, the recipient must:

- comply with any internal policy or procedure in respect of addressing retaliation risks and alleged retaliation<sup>15</sup>
- report actual incidents of suspected retaliation to the ICAC
- advise the protected person of the action taken in respect of the risks or suspected incidence of retaliation
- keep detailed records of the steps taken to address any identified risk, or incidence, of retaliation.

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<sup>14</sup> ICAC Act, schedule 2, clause 1(d).

<sup>15</sup> 'Guidelines for the minimisation of retaliation against protected persons', and in particular Guidelines 5 and 6.

## Enduring protection

A person's status as a protected person under the ICAC Act is ever lasting. But the protections afforded to the protected person only relate to the protected action taken (such as the making of a voluntary protected communication). The taking of other action, such as disclosing information other than by way of a protected action, will not be protected under the ICAC Act.

Retaliation risks may not arise, or materialise, until some time after the making of a voluntary protected communication. There may be particular points in time where the risk of retaliation increases, such as when inquiries require contacting witnesses, or when allegations are put to an accused person. For more information, consult the 'Guidelines for the minimisation of retaliation against protected persons'.

## Record keeping

As is clear from these directions and guidelines, maintaining detailed and accurate records relating to voluntary protected communications, and actions taken as a consequence of those communications, are essential.

Such records include:

- handwritten or typed notes
- emails and email attachments
- memoranda, in hardcopy or electronic form
- documents or other things collected for the purposes of the receipt of a voluntary protected communication, its assessment and the taking of subsequent action.

Recipients should check and ensure that systems are in place to audit access to such records, whether they be in hardcopy or electronic form.

### **DIRECTION 14**

The recipient of a voluntary protected communication must keep records created or received in respect of a voluntary protected communications in a safe and secure manner.

## Further information

Further information, including fact sheets, flow charts and answers to frequently asked questions, will be published on the ICAC website.

Legal advice on the application of the ICAC Act and these directions and guidelines should be obtained from a suitably qualified legal practitioner.



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