

Designing a pilot for the Discloser Support Scheme

Discussion paper
October 2018

Contents

Introduction	3
The proposed Discloser Support Scheme	4
Assistance available under the scheme	4
Applying for assistance	5
Determining applications for assistance	6
Providing assistance	9
Review and reconsideration of applications	9
Reporting on the scheme's operation	9
Next steps	10
Appendix A – Costing information	11
Appendix B – Discloser Support Scheme process flowchart	13

Introduction

As part of its broad review of the Victorian integrity and accountability system, the Victorian Government is developing a scheme to provide assistance to people who make protected disclosure complaints. The objective of the scheme is to ensure that, so far as possible, a person is no worse off for making a protected disclosure complaint.

The proposed Discloser Support Scheme will help disclosers access subsidised legal services to support them while their disclosure is being investigated. The scheme will also offer financial assistance to help with the legal, welfare and career-transition costs of making a protected disclosure complaint.

The Government plans to initially launch a two-year pilot scheme. If the pilot is successful, the scheme may be extended or expanded.

Why is the Government developing the Discloser Support Scheme?

Protecting people who report improper conduct in the public sector is a critical part of Victoria's integrity and accountability system. To uphold the highest standards of public sector conduct, it is essential that people feel safe to speak up when they see something wrong.

In Victoria, the *Protected Disclosure Act 2012* provides important protections to people who report improper conduct – including confidentiality and immunity from legal penalties. However, in reality, making a protected disclosure can be emotionally and financially challenging. The personal costs of making a protected disclosure may include negative impacts on mental health, career prospects and finances.¹ The Government wants to ensure that disclosers can access legal, welfare and career-transition services that they may need as a result of reporting improper conduct.

Why is the Government consulting on the scheme?

To ensure that the pilot model of the Discloser Support Scheme is fit for purpose and will genuinely help to support people who make protected disclosure complaints, we are seeking the community's views on the protected disclosure system and on the proposed scheme. For example, we would welcome your views on:

- how well the current system supports people who make protected disclosure complaints;
- if you have made a protected disclosure – whether you found yourself out of pocket;
- what kinds of assistance would help to support you if you made a protected disclosure complaint in the future; and
- how the scheme should be designed to best support disclosers.

¹ Independent Broad-based Anti-corruption Committee, Parliament of Victoria, *Improving Victoria's whistleblowing regime: a review of the Protected Disclosure Act 2012* (Vic) (2017), page 142.

The proposed Discloser Support Scheme

This paper outlines the proposed pilot model for the scheme for discussion purposes. Details of the model may be adjusted in light of the information we receive through consultation.

Assistance available under the scheme

What types of assistance are available?

The Discloser Support Scheme provides eligible persons with:

- subsidised legal assistance;
- full or partial reimbursement of reasonable legal costs incurred in making a protected disclosure complaint; and/or
- financial assistance towards welfare costs (such as access to counsellors and psychologists) and career-transition costs (if the person needs to change careers as a result of detrimental action taken in reprisal for their disclosure).

Legal assistance

The scheme offers two complementary types of legal assistance – access to subsidised legal services, and reimbursement of reasonable legal costs incurred. This is to ensure that a discloser can seek assistance in the way that best suits them. For example:

- accessing subsidised legal assistance may be preferable to disclosers who do not want to be temporarily out of pocket while waiting for costs to be reimbursed, or who are not sure where to seek legal advice; and
- seeking reimbursement for costs incurred may be preferable for disclosers who would prefer to seek advice from their usual solicitor.

The options are not mutually exclusive. For example, a discloser may seek reimbursement of reasonable legal expenses incurred before they made their disclosure (e.g. advice about how to make the disclosure) and then opt for subsidised legal assistance for the remainder of the process.

To ensure that the scheme does not have the unintended consequences of encouraging disclosers to seek more legal advice than is necessary, the scheme will only cover *reasonable* legal expenses. Assessment under the scheme will include whether the legal expenses incurred were reasonable in all the circumstances. This may include consideration of internal policies indicating what costs are reasonable at each stage of the protected disclosure process. Any such policies will be published online and available to applicants.

The Disclosure Support Scheme is intended to be a safety net for disclosers. This means that a discloser will only receive financial assistance to cover legal expenses they have actually incurred. If a discloser has received legal assistance on a pro bono or 'no win no fee' basis, they will only be eligible for funding under the Discloser Support Scheme to cover any reasonable expenses they were actually required to pay.

Career transition and welfare assistance

Eligible disclosers will be provided with financial assistance prospectively, to help with the difficulties that can be incurred in changing careers and the emotional impact of making a protected disclosure. Disclosers will be able to choose whether to use the assistance to access career transition or welfare services, or a combination of both.

What are the limits?

Under the Discloser Support Scheme, a discloser may be eligible for financial assistance up to the following amounts:

Type of assistance	Inclusions	Amount
Legal costs (subsidised assistance and/or reimbursement of costs)	Cost of seeking advice from a solicitor in relation to making a protected disclosure, participating in an investigation and any detrimental action proceedings	Up to \$24,000 (total)
Career transition costs and welfare costs	Advice, assistance and coaching from a recruitment or human resources firm; re-skilling costs; counselling from a counsellor, psychologist or psychiatrist	Up to \$2,000 (total)

In exceptional circumstances, a discloser may be awarded assistance above the maximum amount listed above. However, this is expected to happen only rarely, as the caps should be sufficient to cover the reasonable expenses of most disclosers.

Appendix A sets out how the cap for each category was calculated.

Applying for assistance

Who can apply?

A person will be informed that they may wish to apply for assistance under the Discloser Support Scheme if they have made a disclosure that has been determined to be a protected disclosure complaint under the *Protected Disclosure Act 2012*; and either:

- they made their disclosure other than in accordance with a statutory obligation and an investigating entity has decided to investigate the complaint; or
- they made their disclosure in line with a statutory obligation and IBAC (in particular) has decided to investigate the protected disclosure complaint.

Disclosures made in accordance with a statutory obligation may include, for example:

- mandatory misconduct complaints that police officers and protective service officers are required to make under section 167(3) of the *Victoria Police Act 2013*, which are deemed to be protected disclosures; and
- mandatory corrupt conduct notifications that public sector body heads are required to make under section 57 of the *Independent Broad-based Anti-corruption Commission Act 2011*.

People making disclosures in accordance with these provisions are only eligible for assistance if, ultimately, IBAC decides to investigate the complaint.

Further information is provided under ‘What are the eligibility criteria?’ below.

When can someone apply?

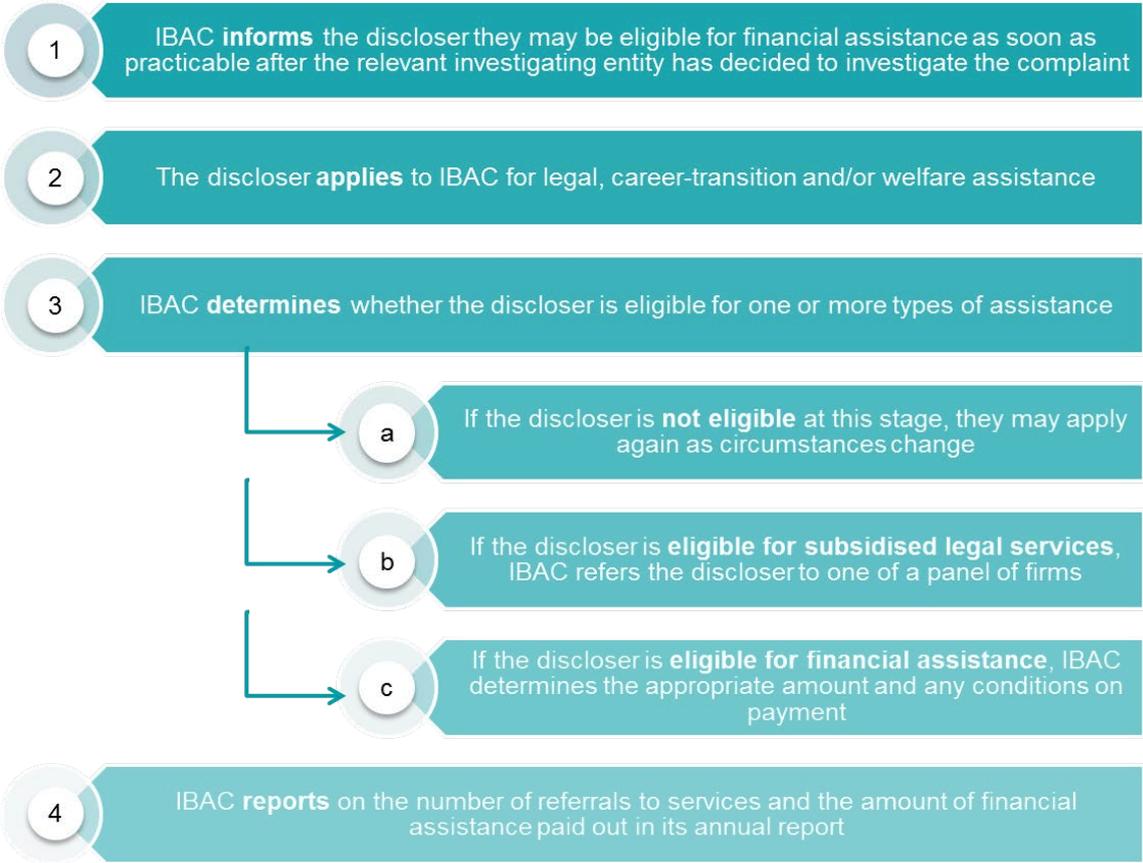
A person can apply for assistance at any time while their protected disclosure complaint is being investigated or after the investigation is complete. A person can apply for more than one type of assistance in a single application.

Multiple applications may be submitted throughout the life of an investigation into a protected disclosure complaint. For example, a person may apply for welfare assistance immediately after learning that their disclosure has been assessed to be a protected disclosure complaint, and apply later for legal assistance as the investigation progresses.

Determining applications for assistance

What is the determination process?

The chart below shows the process for determining an application for assistance when IBAC is the assessing entity. The same process would apply where the Victorian Inspectorate was the assessing entity.



Appendix B sets out the determination process in a more detailed flow chart.

Who will determine applications for assistance?

At this stage, it is proposed that IBAC will determine applications for assistance where the protected disclosure complaint is being investigated by the Ombudsman or Victoria Police, and the Victorian Inspectorate will determine applications for assistance where IBAC is investigating.

In this paper, the entity responsible for determining an application for assistance is called the **assessing entity**.

What are the eligibility criteria?

An applicant will be eligible for assistance if:

- the applicant has made a protected disclosure complaint; and
- either:
 - the applicant made their disclosure other than in accordance with a statutory obligation² and an investigating entity has decided to investigate the complaint; or
 - the applicant made their disclosure in line with a statutory obligation and IBAC (in particular) has decided to investigate the protected disclosure complaint; and
- the applicant has incurred, or is likely to incur, costs relating to legal, welfare and/or career-transition services as the result of making the protected disclosure complaint; and
- it does not appear that the applicant is eligible for financial assistance or compensation that would cover those costs under a comparable scheme.

The eligibility criteria have been designed to ensure that the pilot of the scheme prioritises assisting disclosers who:

- may be deterred from making a protected disclosure complaint because of the financial implications (i.e. those who are under no obligation to make a protected disclosure);
- are involved in the most complex and serious protected disclosure investigations, and are therefore most likely to be worse off for having made a protected disclosure complaint (i.e. those investigated by IBAC); and
- would otherwise be left out of pocket as a result of making a protected disclosure complaint (i.e. those who are not entitled to assistance under existing schemes).

How is information gathered?

On receiving a request for assistance, the assessing entity will request certain information directly from the investigating entity (e.g. whether the entity has decided to investigate the protected disclosure complaint or not). This is because confidentiality obligations under the *Protected Disclosure Act 2012* or other legislation may prevent the applicant from providing such information themselves.

When applying for assistance, the applicant is required to provide information about:

- the costs that they have incurred or are likely to incur in relation to their protected disclosure complaint; and

- any eligibility for assistance under an existing program, and why this is not sufficient to cover their reasonable costs.

Applicants should provide any evidence they have to support their applications. However, applicants will need to be aware of confidentiality obligations that may apply (e.g. if the investigating entity has issued a confidentiality notice). Applicants may wish to seek authorisation from the relevant investigating entity to share confidential information with the assessing entity.

The assessing entity may then ask the applicant and/or the relevant investigating entity (with the applicant's consent) for further information to help it determine an application for assistance.

How is procedural fairness provided?

Each application will be determined on its merits. Applicants will be treated equitably, and decisions will be made impartially. Applicants will be given the opportunity to fully state their case in writing.

If an application for assistance is refused, the assessing entity will provide written reasons for its decision, unless doing so would compromise the integrity of an ongoing investigation, or a person's safety or reputation.

How is confidentiality protected?

The assessing entity will treat applications for assistance as strictly confidential. The assessing entity will only share identifying information about the applicant with another person or body with the applicant's written consent.

The assessing entity will also comply with any confidentiality obligations that may apply under the *Protected Disclosure Act 2012*, the *Privacy and Data Protection Act 2014*, and any other legislation.

How is the amount of financial assistance determined?

In applications for financial assistance, the assessing entity will determine an amount of assistance that is fair and reasonable in the circumstances. This will include consideration of any evidence provided in support of the application, such as invoices or receipts. It may also include consideration of internal policies indicating what costs are considered reasonable at each stage of the protected disclosure process. These policies will be published online.

The overarching objective will be to ensure that, so far as possible, a person is no worse off for having made a protected disclosure complaint. However, the amount of financial assistance provided must be reasonable, and will also be subject to the maximum caps set out above, unless exceptional circumstances apply.

What information is provided to applicants?

The applicant will be provided with written reasons for the decision made in respect of their application, except to the extent that doing so would compromise the integrity of an ongoing investigation, or a person's safety or reputation.

The applicant will also be provided with information about any available internal review processes, and how to make a complaint about the way an application was handled.

Providing assistance

How is assistance provided in practice?

When an applicant is eligible for subsidised legal assistance, the assessing entity will refer the applicant to one of a panel of legal firms who have been engaged to provide disclosers with legal advice. The discloser's consent is required before the assessing entity provides any identifying information to the legal services provider. The discloser will receive subsidised legal assistance for the duration of the investigation into their protected disclosure complaint and, if necessary, any proceedings relating to detrimental action that follow. The discloser may also wish to seek financial assistance to reimburse them for legal costs incurred before they were referred to the subsidised legal provider.

Where an applicant is eligible for financial assistance, the assessing entity determines the appropriate amount of assistance to be provided and any conditions that may attach to payment. For example, it may be a condition of payment that, if the discloser is ultimately convicted of a criminal offence relating to the conduct that is the subject of the disclosure, they must repay some or all of the financial assistance received.

Once any conditions are accepted, funds will be transferred to the discloser.

Review and reconsideration of applications

Can an application be reviewed or reconsidered?

The assessing entity may reconsider an application at the discloser's request where this is warranted – for example, where circumstances have changed, or where new information is available.

Who can receive complaints about the way an application was dealt with?

Where IBAC is the assessing entity, the applicant can make a complaint to the Victorian Inspectorate. The Victorian Inspectorate handles complaints about the conduct of IBAC and IBAC personnel.

Where the Victorian Inspectorate is the assessing entity, the applicant can make a complaint to the IBAC Committee of Parliament, which oversees the operation of the Victorian Inspectorate.

Reporting on the scheme's operation

How is the scheme's operation reported?

In their annual reports, the assessing entities will report on the number of referrals to subsidised legal services and the amount of financial assistance paid out in each category each year. The reports will not identify individuals who received assistance.

How will the government decide whether to extend the pilot scheme?

Following two years of the pilot scheme's operation, the government will evaluate the scheme's performance. The evaluation will consider the efficiency and effectiveness of the pilot scheme and any lessons learned, including demand for the scheme, its estimated impact on disclosers, the amount of assistance sought and provided, and any feedback or complaints about the scheme that have been received.

The government may decide to extend or discontinue the scheme following this evaluation.

Next steps

The Government is seeking feedback on the proposed model for the Discloser Support Scheme. All feedback will be carefully considered, and may be used to make changes to the model to ensure it will operate effectively.

How can I provide feedback on the proposed scheme?

If you would like to provide feedback on the proposed Discloser Support Scheme, please visit Engage Victoria (www.enagage.vic.gov.au) and make a submission. Submissions can be made anonymously and confidentially.

Please **do not** include any confidential information about a protected disclosure made by you or any other person in your submission. If you have made a protected disclosure, you may wish to seek legal advice about confidentiality obligations under the *Protected Disclosure Act 2012* or other legislation.

How can I make a protected disclosure?

If you want to make a protected disclosure, please visit IBAC's website for further information: <http://www.ibac.vic.gov.au/reporting-corruption/what-is-a-protected-disclosure>.

The Engage Victoria portal is not the correct channel to make a protected disclosure.

Appendix A – Costing information

To calculate the costs that the Discloser Support Scheme should cover, DPC sought expert advice on the reasonable legal and career transition costs that a discloser is likely to incur as a result of making a protected disclosure complaint.

Due to the confidential nature of protected disclosure investigations, this advice was by necessity based on a set of assumptions about the experience of people who make disclosures. DPC hopes to test these assumptions through this consultation process, to ensure that the capped amounts of assistance are appropriate.

Proposed caps on assistance

Under the Discloser Support Scheme, a discloser may be eligible for assistance up to the following amounts:

Type of assistance	Inclusions	Amount
Legal costs	Cost of seeking advice from a solicitor in relation to making a protected disclosure, participating in an investigation and any detrimental action proceedings	Up to \$24,000
Career transition costs and welfare costs	Advice, assistance and coaching from a recruitment or human resources firm; re-skilling costs; counselling from a counsellor, psychologist or psychiatrist	Up to \$2,000 (total)

Legal costs

The proposed legal costs cap of \$24,000 per person is based on expert advice about the types of legal advice that a discloser is likely to require as the result of making a protected disclosure complaint.

The cap is above the average estimated solicitor's costs that a discloser will incur in seeking legal advice at each of the following stages:

- before making a protected disclosure;
- in deciding how and where to make their protected disclosure; and
- during an investigation into the protected disclosure complaint.

The cost of advice at each stage was estimated in accordance with the Victorian Supreme Court Scale of Costs for general civil procedures, as a reasonable benchmark for costs charged by legal practitioners. This means that legal costs were estimated at the rate of \$393/hr excluding GST.

The cap includes a contribution towards solicitors' costs that may be incurred if a person wishes to commence proceedings in relation to detrimental action taken in reprisal for their protected disclosure complaint (e.g. under section 47 of the *Protected Disclosure Act 2012*).

However, it is difficult to estimate the costs of detrimental action proceedings or the demand for this assistance, as such proceedings have not frequently been commenced.³

The cap for legal costs does not cover the costs of engaging a barrister, or costs that may be incurred through related unfair dismissal or adverse action proceedings.

Career transition and welfare costs

The proposed combined cap of \$2,000 per person for career transition and welfare costs is based on:

- expert advice about the type of assistance a discloser may require if they are required to change jobs or careers as a result of making a protected disclosure complaint; and
- the average amount paid out by the Victims of Crime Assistance Tribunal (VOCAT) in compensation for counselling costs incurred by victims of crime.

The cap covers the average costs that a discloser is likely to incur in:

- engaging a recruitment or human resources firm to provide coaching and assist with job searching;
- taking short courses to upgrade or update professional skills; and
- attending counselling sessions with counsellors, psychologists or psychiatrists in relation to their protected disclosure complaint.

The cap does not cover the cost of higher education such as university courses.

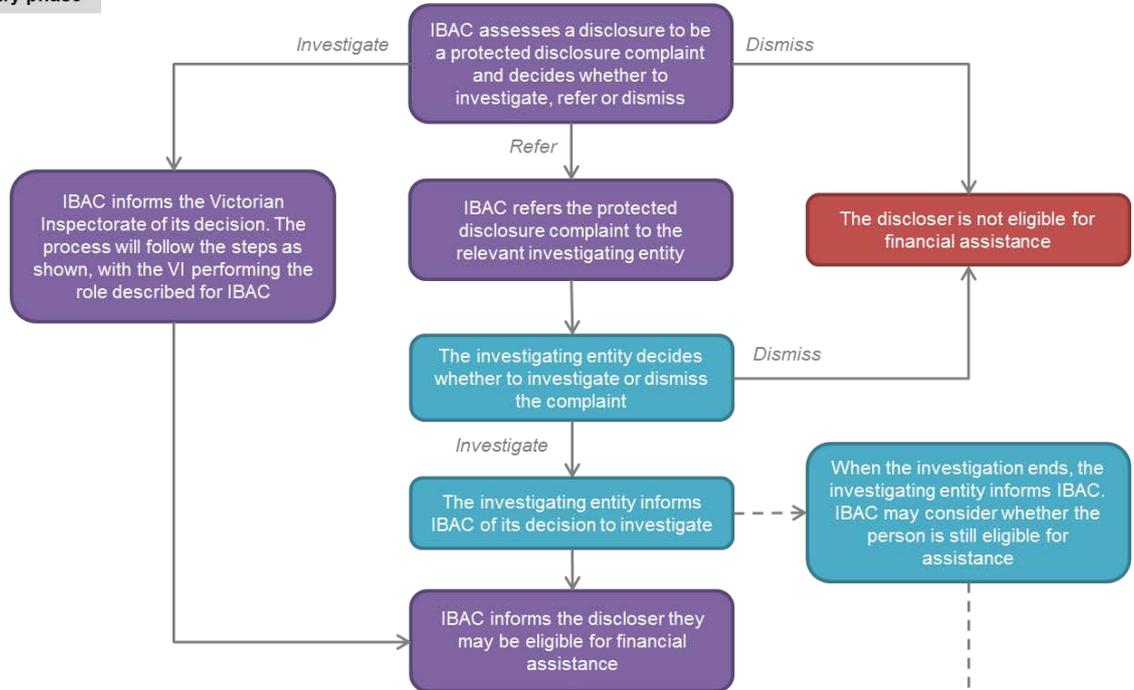
The combined cap for career transition and welfare costs reflects the fact that disclosers are likely to have differing needs and should have the flexibility to access the types of services that will benefit them most.

Assistance provided by the Discloser Support Scheme is intended to complement existing remedies for disclosers who are required to change careers as a result of making a protected disclosure (e.g. section 51 of the *Protected Disclosure Act 2012*, which allows a public sector employee who has made a protected disclosure to request a transfer of employment where they believe that detrimental action has been or will be taken against them).

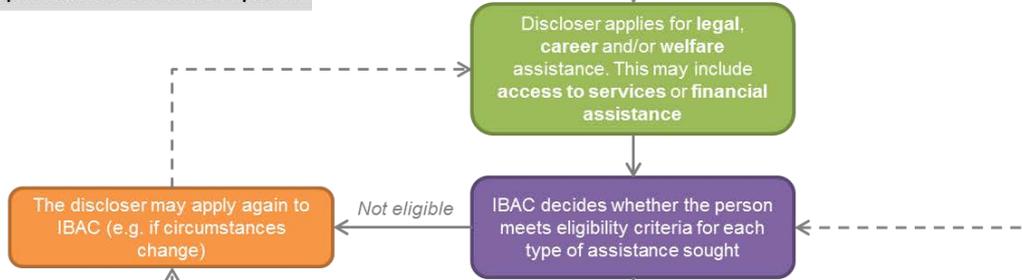
³ Independent Broad-based Anti-corruption Committee, Parliament of Victoria, *Improving Victoria's whistleblowing regime: a review of the Protected Disclosure Act 2012* (Vic) (2017), page 146.

Appendix B – Discloser Support Scheme process flowchart

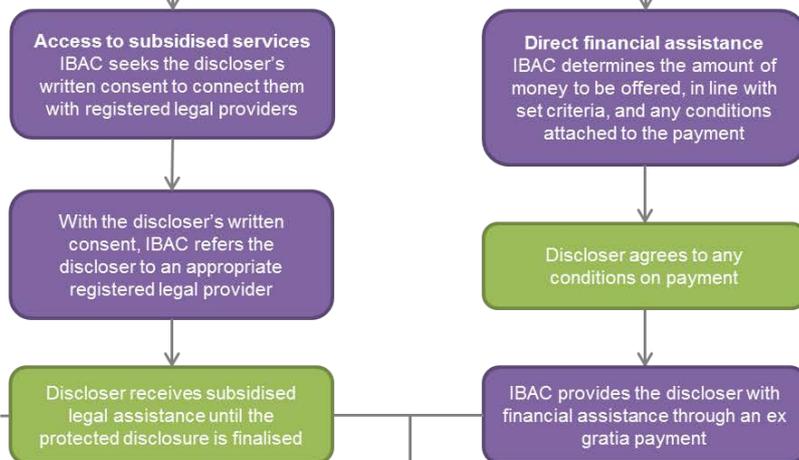
1. Preliminary phase



2. Application and assessment phase



3. Assistance phase



4. Reporting phase

