Review of the

Public Interest Disclosure (Whistleblower Protection) Act

Submission of

Alberta's Public Interest Commissioner

to the

Standing Committee on Resource Stewardship

PUBLIC INTEREST COMMISSIONER

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Contents

Executive Summary

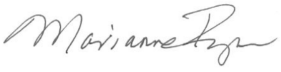
The *Public Interest Disclosure (Whistleblower Protection) Act* (the Act) is the statutory mechanism used to detect and remedy serious and significant wrongdoing in Alberta's public institutions that is unlawful, dangerous to the public or injurious to the public interest. Through the investigation of alleged wrongdoing and the implementation of appropriate corrective measures, the Act serves to promote public confidence in the administration of the public service. The Act is a powerful tool to ensure the proper stewardship of public funds and the delivery of public services, and is also a shield for those willing to report wrongdoing in the public interest.

The *Public Interest Disclosure (Whistleblower Protection) Act* (the Act) initially came into force in June 2013, and was reviewed in 2016 with amendments that came into effect in March 2018. The Act currently applies to government of Alberta departments, offices of the legislature, members of the Legislative Assembly and their offices, ministers and their offices, the Premier and the Premier's office, the education sector, the health sector, and provincial corporations.

Between June 2013 and October 2020, my office has managed over 1500 cases including over 400 complaints. This experience, combined with the feedback we receive from persons served by our office, and the perspectives generated through collaborative relationships with public entities, has given my office a strong sense of the effectiveness of the Act is and where improvements could be made.

This submission provides a summary of our experiences with the Act and provides recommendations in three areas – enhancing the scope of the Act, strengthening protections for whistleblowers and witnesses, and improving the functionality of the Act. These improvements would, in my view, make Alberta's legislation nonpareil in public interest disclosure law in Canada.

My office and I remain available to assist the Committee, in whatever manner required, as it completes its review of the Act. We appreciate the opportunity to participate in this process.



Marianne Ryan
Public Interest Commissioner

Referenced Legislation

Alberta – *Public Interest Disclosure (Whistleblower Protection) Act*	"The Act"
Alberta – *Public Interest Disclosure (Whistleblower Protection) Regulation*	"The Regulation"
British Columbia – *Public Interest Disclosure Act*	"BC Act"
Saskatchewan – *Public Interest Disclosure Act*	"Saskatchewan Act"
Manitoba – *The Public Interest Disclosure (Whistleblower Protection) Act*	"Manitoba Act"
Ontario – *Public Service of Ontario Act*	"Ontario Act"
New Brunswick – *Public Interest Disclosure Act*	"New Brunswick Act"
Nova Scotia – *Public Interest Disclosure of Wrongdoing Act*	"Nova Scotia Act"
Newfoundland and Labrador – *Public Interest Disclosure Whistleblower Protection Act*	"Newfoundland Act"
Yukon – *Public Interest Disclosure of Wrongdoing Act*	"Yukon Act"
Nunavut – *Consolidation of Public Service Act*	"Nunavut Act"
Quebec – *Act to Facilitate the Disclosure of Wrongdoing Relating to Public Bodies*	"Quebec Act"
Canada – *Public Servants Disclosure Protection Act*	"Federal Act"
New South Wales – *Public Interest Disclosures Act*	"New South Wales Act"
Australia – *Public Interest Disclosures Act*	"Australia Act"
United Kingdom – *Public Interest Disclosure Act 1998*	"UK Act"

Summary of recommendations

Enhancing the scope of the Act:

1. A prescribed service provider regulation be made, in accordance with section 4.2 of the Act.
2. The Act give the Minister of Municipal Affairs the ability to refer a matter of potential wrongdoing, relating to a municipal authority or council, to the Public Interest Commissioner for investigation in accordance with the Act.
3. The Act apply to public agencies as defined in the *Public Agencies Governance Act.*
4. The Act apply to publicly funded private post-secondary institutions as defined in the *Post-Secondary Learning Act*.
5. The Act include all subsidiary health corporations.

Strengthening protections for whistleblowers and witnesses:

6. The Act include protection from civil liability for persons who make disclosures of wrongdoing or complaints of reprisal.
7. The Act include requirements for the Commissioner, designated officers and any other person to keep confidential the identity of a person who made a disclosure, is the subject of a disclosure, or participated in an investigation, unless required by law or necessary to carry out the purposes of the Act.
8. The Act restrict the Commissioner, designated officers and any other person from disclosing information that may reveal the identity of a person who made a disclosure, is the subject of a disclosure, or participated in an investigation, unless required by law or necessary to carry out the purposes of the Act.
9. The Act restrict the disclosure of information that could reveal the identity of a person who made a disclosure during a civil court proceeding or a proceeding before an administrative tribunal.
10. The Act include a provision, similar to the Australia Act, making the disclosure of the identity of a person who made a disclosure of wrongdoing, participated in an investigation or is the subject of a disclosure of wrongdoing, an offence, except under certain circumstances.
11. The Act protect persons, other than employees, from reprisal when they make a disclosure of wrongdoing, or seek advice in accordance with the Act.
12. Expand the definition of reprisal to include “any detriment” to a person.
13. The Act protect persons who are suspected of making a disclosure of wrongdoing.

Improving the functionality of the Act:

14. Section 19 of the Act include a provision giving the Commissioner discretion to decline investigating matters currently being investigated by a law enforcement agency, that are the subject of court proceedings, or that relate to a decision rendered by a court.
15. The Act provide the Commissioner the ability to obtain information from any person under oath.

16. The Act include protection against self-incrimination.
17. The term "good faith" is removed from the Act.
18. The Act require that procedures established under section 5 by departments, offices[1] and public entities, be separate from any other procedure.
19. The Act adopt language similar to the Manitoba Act with respect to designated officer authority to access records and information, and requiring a person to be interviewed for the purpose of the Act.
20. It is stipulated that the Act prevail over any requirement placed on employees through any internal policy, procedure or code of conduct.
21. The Act permits the Commissioner to make any recommendations considered appropriate in regard to a disclosure of wrongdoing.
22. The legislation allow the Public Interest Commissioner to require that jurisdictional entities provide an annual reporting on their activities under the Act, in a manner determined by the Commissioner.

[1] "Offices" include offices of the Legislature, Members of the Legislative Assembly and their offices, Ministers and their offices, and the Premier and the Premier's office.

Part 1: Enhancing the scope of the Act

Prescribed Service Providers

Recommendation #1

A prescribed service provider regulation be made, in accordance with section 4.2 of the Act, describing a prescribed service provider as persons, organizations or bodies who are a party to a contract or agreement with a department, office or public entity, to provide goods or services; and

The Act apply to prescribed service providers to the extent of the contract or agreement with the department, office or public entity; and

The regulation require prescribed service providers adopt the existing whistleblower procedures, established under section 5 of the Act, through the contract or agreement with the department, office or public entity.

Current Provision

Amendments in 2018 expanded the application of the Act to include "prescribed service providers":

Definitions

1 *In this Act,*

(j.1) *"prescribed service provider" means any individual or any part or all of an organization, body or other person that is determined under the regulations made under section 4.2 to be a prescribed service provider;*

Application and purposes of the Act

2(1) *Subject to the regulations, this Act applies to the following:*

(a) departments;

(b) offices;

(c) public entities;

(d) prescribed service providers.

Under section 4.2 of Act, the Lieutenant Governor in Council may make regulations for the purpose of determining prescribed service providers to which the Act applies. To date, regulations have not been made.

Rationale for recommendation

One of the stated purposes in the Act is to promote public confidence in the administration of government. The current Act applies only to departments, offices, and public entities, and provides protections for those employees. However, the Act does not protect employees who, through contract or agreement, are in a business relationship with government and want to come forward to report the misuse of public funds, gross-mismanagement, or other unlawful acts committed within their organizations.

The role of government is to ensure contracted services are delivered in compliance with its requirements. The public perception is that entities receiving significant government funding and entities funded by the public by way of an additional levy for a service, are the responsibility of government. Further, during periods of economic downturn and fiscal restraint, it is important to ensure public funds expended for contracted services are managed appropriately and for their intended purpose.

The below chart highlights a 5-year average of government spending on procurement for goods, services and constructions:

Average government spending on procurement[2]

Category	Average spend	Authority and accountability
Goods	$575 Million	Service Alberta (low value goods delegated to ministries)
Services	$1.685 Billion	Ministries are responsible for their own service requirements
Construction	$2.502 Billion	Infrastructure and Transportation

Further, the Alberta Government reports its current level of spending on physicians is $5.4 billion, accounting for 10% of total government spending.[3] The recommended definition of prescribed service provider would include physicians in private practice and clinics.[4]

[2] Government of Alberta, Contract opportunities with the Government of Alberta, (https://www.alberta.ca/contract-opportunities-with-the-government-of-alberta.aspx)
[3] Government of Alberta, Physician Funding Framework (https://www.alberta.ca/physician-funding-framework.aspx)
[4] The Act currently applies to physicians and health practitioners who have hospital privileges granted by Alberta Health Services, Covenant Health or the Lamont Health Care Centre. (See s. 1(2) Regulation)

Naming persons, organizations or bodies as prescribed service providers based on limiting criteria (i.e., value of contract or industry sector) would be problematic due to the continuous change in business relationships industries and service providers have with Government. Further, it would lessen the effectiveness of this provision. The objective of whistleblower protection legislation is best achieved through a broad application and ought to include all contractors paid through public dollars to provide products or services.

The other most notable entities not governed by the Act are providers of continuing care services for seniors, management bodies of housing accommodations, and childcare service providers in the province. These facilities are private; however, they receive public funds to provide services to the most vulnerable Albertans.

The Act currently does not include all Early Childhood Service Providers (ECS). An ECS operator is only included in the Act if they are part of a private school. Private schools are currently jurisdictional under the Act if they are registered under the *Education Act* and receive funding under the *Education Grants Regulation* (See Regulation Schedule 1, s. 1). ECS providers receive funding under the *School Grants Regulation*. This funding distinction resulted in ECS operators being excluded from the Act.

There are three settings in which continuing care services are provided: home care services, designated supportive living, and long-term care.[5] Long-term care facilities include auxiliary hospitals and nursing homes. All long-term Care facilities are operated by, or contracted through, Alberta Health Services. Home care services are provided within a private home or in a seniors lodge by individuals employed by AHS or contracted by AHS. Designated Supportive Living Accommodations are licensed under the *Supportive Living Accommodation Licensing Act* (SA 2009, Chapter S-23.5) and are contracted by Alberta Health Services. Contracted supported living accommodations, long-term care facilities and home care service providers are not currently jurisdictional under the Act.

Designated Supportive Living Accommodations also includes privately run senior's lodges. Senior's lodges are not a contracted service and not all senior's lodges receive public funding. The Minister responsible may provide financial assistance under the *Lodge Assistance Program Regulation* (AR 406/94) to management bodies providing lodge accommodation.

A prescribed service provider regulation, as defined in the recommendation, would include:

1) Nursing Homes under contract with a regional health authority[6];
2) Home care service providers contracted through a regional health authority;
3) Seniors lodge accommodations licensed under the *Supportive Living Accommodation Licensing Act* and receiving funding under the *Lodge Assistance Program Regulation* (AR 406/94);

[5] Alberta Health Services, *What is continuing care?* https://www.albertahealthservices.ca/cc/Page15502.aspx
[6] Nursing Homes may be contracted through a regional health authority per Section 2(1) *Nursing Homes Act*

4) The management body of a housing corporation receiving funding under the *Alberta Housing Act;*
5) A child care service provider licensed under the *Child Care Licensing Act* that receives accreditation funding under the *Alberta Human Services Grant Regulation;* and
6) An Early Childhood Services Operator approved under the *School Act* that receives a grant under the *School Grants Regulation.*

Between March 2018 and October 2018, the Public Interest Commissioner's office received 27 complaints or inquiries regarding organizations that would have potentially been captured under a prescribed service provider regulation. The PIC office declined to investigate these matters due to a lack of jurisdiction.

Other jurisdictions

The recommendation follows a similar scheme to the Australia Act and New South Wales Act. Under these statutes, contractors providing goods or services under a contract, either for, or on behalf of a government agency may make disclosures. Disclosures are limited to conduct in relation to entering into, or giving effect to, the contract. Further, there is no role for a contracted service provider to deal with a disclosure under the legislation. Disclosures are made either to the government agency who engaged the contracted services provider or, in the case of the New South Wales Act, to an investigating authority. This includes the Ombudsman who oversees the Act. (See s. 30, 69 Australia Act, and s. 4A(1)(b), 4A(1)(c), 4A(3), 8(1), and 11 New South Wales Act.)

The Manitoba Act and the Federal Act provide protection from reprisal for employees of contracted service providers. (See s. 32 of the Manitoba Act and s. 42.2 of the Federal Act).

The Manitoba Act also includes licensed childcare facilities, licensed childcare centres, licensed residential care facilities, and subsidized rental units for low-income families. (See s. 2(b))

The Quebec Act includes childcare centres, day care centres benefiting from subsidized childcare spaces and home childcare coordinating offices. The Quebec Act also includes certain societies scheduled in the Act, and public and private institutions defined within Quebec's *Act Respecting Health Services and Social Services,* who are providing services under agreement with government. (See sec. 2(3), 2(4), 2(7) and 2(9))

The UK Act applies to both public and private sectors.

Additional considerations

The implementation of a prescribed service provider regulation would result in an increase in the scope of the Public Interest Commissioner's office and would require a supplement of human resources to accommodate the additional workload. However, the expectation is a

prescribed service providers regulation would result in an overall reduction of cost to the Government of Alberta through identifying and remedying the mismanagement of public funds by contracted service providers.

Municipal Authorities

Recommendation #2

The Act give the Minister of Municipal Affairs the ability to refer a matter of potential wrongdoing relating to a municipal authority or council, to the Public Interest Commissioner for investigation in accordance with the Act.

Current provision

The current Act does not apply to municipal authorities.

Municipal authorities and councils are established under the *Municipal Government Act.* Part 18 of the *Municipal Government Act* defines municipal authority and council as follows:

> ***1(1)***
> *(e) "council" means*
> *(i) the council of a city, town, village, summer village, municipal district or specialized municipality,*
> *(ii) repealed 1995 c24 s2,*
> *(iii) the council of a town under the Parks Towns Act, or*
> *(iv) the council of a municipality incorporated by a special Act;*
>
> *(p) "municipal authority" means a municipality, improvement district and special area and, if the context requires, in the case of an improvement district and special area,*
> *(i) the geographical area of the improvement district or special area, or*
> *ii) the Minister, where the improvement district or special area is authorized or required to act;*

Rationale for recommendation

Substantial public funds are allocated through provincial funding for municipal supports. Municipal supports accounted for 32% of the 2020 Government of Alberta Budget Plan.[7] The Government of Alberta 2020-2023 Fiscal Plan earmarks $5.6 billion for direct municipal support.[8]

[7] Government of Alberta 2020 Municipal Budget Plan, p.5
[8] Government of Alberta 2020-2023 Fiscal Plan, p.15

There is no legislative complaint mechanism within the *Municipal Government Act,* or any other statute, to address wrongdoing within municipal authorities. However, the cities of Edmonton and Calgary have well-established whistleblower offices, which oversee their respective administrations. Some municipalities have whistleblower policies in place to address and remedy wrongdoing. However, many smaller municipalities do not have policies in place to address and remedy wrongdoing.

Including municipal authorities and councils in the Act is not recommended. This inclusion would require an immense increase in resources to the Public Interest Commissioner's office where existing mechanisms to address wrongdoing within local governments may already exist. It is, however, recommended that a mechanism be in place giving the Minister of Municipal Affairs the discretion to request the Public Interest Commissioner investigate any matter involving a municipal authority or council that relates to potential wrongdoing, as defined in the Act. The protection provisions of the Act would subsequently apply. This would give the Minister the ability to request the assistance and resources of an independent legislative office to investigate the most serious circumstances of potential wrongdoing within municipal authorities (i.e., matters involving municipal council or administrative heads).

The current Act includes a similar provision giving a committee of the Legislative Assembly or the Lieutenant Governor in Council the ability to refer to the Commissioner, for investigation, a matter that may relate to wrongdoing within the Act:

> ***Reports at request of committee or the Lieutenant Governor in Council***
>
> ***34(1)*** *A committee of the Legislative Assembly may, at any time, refer to the Commissioner for investigation and report any petition or matter that is before the committee for consideration that may relate to a wrongdoing to which this Act applies.*
>
> ***(3)*** *The Lieutenant Governor in Council may, at any time, refer to the Commissioner for investigation and report any matter that is within the scope of the Commissioner's responsibilities pursuant to this Act.*

The *Alberta Ombudsman Act* applies to municipal authorities. The *Alberta Ombudsman Act* also contains a provision that would permit the Minister of Municipal Affairs to refer a matter for investigation:

> ***Functions and duties***
>
> ***12(5)*** *Without limiting subsection (1), a Minister may at any time by order refer any matter to the Ombudsman for investigation and report by the Ombudsman and, in that case, the Ombudsman may*
>
> *(a) subject to any special directions of the Minister, investigate the matter so referred to the Ombudsman so far as it is within the Ombudsman's jurisdiction, and*

(b) make any report to the Minister that the Ombudsman thinks fit,

Between March 2018 and October 2020, the Commissioner's office has received 10 complaints and 10 inquiries regarding municipalities. The Commissioner's office declined to investigate these matters due to a lack of jurisdiction.

Other jurisdictions

The Manitoba Act (See s. 2) prescribes certain municipalities and local government districts within a regulation.

The Quebec Act also applies to municipal bodies. However, the Quebec Public Protector does not have jurisdiction to investigate complaints of wrongdoing. The Quebec Act applies only to the extent of whistleblower protection. If a municipal employee wishes to make a disclosure concerning a municipal body, the employee may contact the minister responsible for municipal affairs to make the disclosure. Either the Public Protector or the Minister at the complainant's choice may address a complaint of reprisal. (See s. 2(9.1))

The New South Wales Act protects public officials (employees) who make disclosures relating to local government under the provisions of the *Local Government Act*. Local government includes local government authorities, a councillor, a member of county council, a member of staff of a local government authority, and a representative on the board of a joint organization involving local government. (See s. 12B)

Public Agencies

Recommendation #3

The Act apply to public agencies as defined in the *Public Agencies Governance Act*

Current provision

The Act defines "public entity" to which the Act applies as:

Definitions
1 *In this Act,*

(k) *"public entity" means any agency, board, commission, Crown corporation or other entity designated as a public entity in the regulations.*

Under the Regulation, the following are designated as public entities to which the Act applies:

Designation of public entities and chief officers

2(1) *For the purposes of section 2(1) of the Act, the following are designated as public entities to which the Act applies:*

(a) *a Provincial corporation as defined in section 1(1)(r)(i) or (ii) of the Financial Administration Act;*

…

Rationale for recommendation

The definition of public entity is limited to provincial corporations. This does not include public agencies as defined in the *Public Agencies Governance Act*. Currently, any unincorporated board, commission, council or other body that is not a department or part of a department, is not jurisdictional under the Act. These agencies, however, are financed through public funds and are accountable under the *Public Agencies Governance Act.* There are currently 71 public agencies not included under the Act. For example, the Act currently does not apply to the Alberta Motor Vehicle Industry Council or the Local Authorities Pension Plan Corporation.

Private post-secondary institutions

Recommendation #4

The Act apply to publicly funded private post-secondary institutions as defined in the *Post-Secondary Learning Act*.

Current provision

The Act defines "public entity" to which the Act applies as:

Definitions

2 *In this Act,*

(k) *"public entity" means any agency, board, commission, Crown corporation or other entity designated as a public entity in the regulations.*

Under the Regulation, the following are designated as public entities to which the Act applies:

Designation of public entities and chief officers

2(1) *For the purposes of section 2(1) of the Act, the following are designated as public entities to which the Act applies:*

(a) *a Provincial corporation as defined in section 1(1)(r)(i) or (ii) of the Financial Administration Act;*

Rationale for recommendation

Based on the definition of a public entity, the Act applies to all post-secondary institutions except Concordia University, King's College and Banff Centre. These organizations are not provincial corporations. They are publically funded private post-secondary institutions that receive funding under the *Post-Secondary Learning Act.*

Subsidiary Health Corporations

Recommendation #5
The Act include all subsidiary health corporations

Current provision

The Regulation schedules subsidiary health corporations to which the Act applies, however, does not include all current subsidiary health corporations in Alberta.

> ***Schedule 1 [Section 2(1)(b)]***
>
> ***Health sector***
>
> ***2*** *The following are designated as public entities in the health sector to which the Act applies:*
>
> ***(b)*** *The following subsidiary health corporations under the Regional Health Authorities Act:*
>
> *(i) Calgary Laboratory Services Ltd.;*
>
> *(ii) CapitalCare Group Inc.;*
>
> *(iii) Carewest;*

Rationale for recommendation

Calgary Laboratory Services Ltd. is a former subsidiary of Alberta Health Services. It was succeeded by Alberta Public Laboratory Services and most recently by Alberta Precision Laboratory Services.

As Alberta Precision Laboratory Services is not specifically scheduled in the Regulation, it is not jurisdictional under the Act, even though the Regulation intended for its predecessor to be.

Similarly, Covenant Care is a subsidiary corporation to Covenant Health, a public entity to which the Act applies. However, Covenant Care is not prescribed in the Regulation. Covenant Care was established in 2013, following the proclamation of the Act.

Including all subsidiary corporations under the Act would ensure the subsidiary corporation's employees have the same protections as those of the regional health authority, and would be consistent with the spirit and intent of Act. Amending the Regulation to state that all subsidiary health corporations apply as opposed to individually naming them, prevents future lapses in applicability of the Act when the name of a subsidiary corporation changes or new subsidiary corporations are established.

Part 2: Strengthening protections for whistleblowers and witnesses

Protection from civil liability

Recommendation #6

The Act include protection from civil liability for persons who make disclosures of wrongdoing or complaints of reprisal

Current provision

The Act states:

> ***Protection of Commissioner and others***
>
> ***51(2)*** *Subject to subsection (3), no person is liable to prosecution for an offence against any Act, and no action lies or may be commenced or maintained against a person, by reason of the person's* ***compliance*** *with any requirement of this Act.* [Emphasis added]

Rationale for recommendation

The Act only provides protection against civil liability for whistleblowers when they comply with a requirement of the Act. The language of the provision does not extend to the action of persons who come forward, on their own initiative, to report wrongdoing or a reprisal.

Employees considering reporting wrongdoing have brought concerns over civil liability to the Public Interest Commissioner's office. Specifically, employees are concerned that reporting wrongdoing under the Act after signing a severance agreement may constitute a breach of the agreement and expose them to civil liability. In one particular case, an employer withheld an employee's severance payment because of a complaint to the Commissioner's office. In another case, an employee ultimately declined to make a disclosure of wrongdoing after seeking independent legal advice. It was believed their employer would seek to recover the severance payment through civil action if a disclosure was made.

Civil agreements between employers and employees that specifically prohibit employees from reporting wrongdoing in the public service, under the Act, undermines the spirit and intent of the Act. Such agreements conflate public and private interest matters. Public entities that use severance agreements to prohibit whistleblowing may be viewed as attempting to "buy" their way out of their responsibilities under the Act using public funds. Further, the threat of potential civil action is a significant deterrent for employees who are considering reporting wrongdoing.

If protection from civil liability includes a person making a disclosure of wrongdoing, a concern for employers may be the lack of an ability to obtain civil remedy when an employee makes a malicious complaint. It is the Commissioner's position that persons who knowingly make a complaint using false or misleading information are not making a disclosure of wrongdoing, as defined in the Act, and are not subject to any protection provisions of the Act, including protection from civil liability. Further, in such scenarios the offence provisions of the Act could apply.[9]

Other Jurisdictions:

The Quebec Act (s. 32.1) states:

> *Any person who, in good faith, makes a disclosure or cooperates in an audit or investigation conducted on the basis of a disclosure incurs no civil liability for doing so.*

The BC Act provides protection from liability for persons who give information, voluntarily or otherwise, for the purposes of an investigation. The protections do not apply where a person is acting in bad faith, the giving of information is part of contempt proceedings, or the disclosure provides information that is unauthorized by the Act. (See s. 42)

The Saskatchewan Act provides immunity to persons acting pursuant to the authority of the Act, in good faith. (See s. 42)

The New South Wales Act also provides immunity for persons making a public interest disclosure despite any duty of secrecy or confidentiality. (See s. 21)

The Australia Act provides civil, criminal and administrative immunity to individuals who make a public interest disclosure, and further restricts against the exercise of all contractual rights or remedies. The Australia Act further grants individuals who makes disclosures absolute privilege in proceedings for defamation in respect of the public interest disclosure. (See s. 10)

[9] It is an offence under section 46 of the Act for a person to make a false or misleading statement, orally or in writing, when making a disclosure of wrongdoing to the Commissioner or to a designated officer.

Expanding confidentiality provisions

Recommendation #7

The Act include requirements for the Commissioner, designated officers and any other person to keep confidential the identity of a person who made a disclosure, is the subject of a disclosure, or participated in an investigation, unless required by law or necessary to carry out the purposes of the Act.

Recommendation #8

The Act restrict the Commissioner, designated officers and any other person from disclosing information that may reveal the identity of a person who made a disclosure, is the subject of a disclosure, or participated in an investigation, unless required by law or necessary to carry out the purposes of the Act.

Recommendation #9

The Act restrict the disclosure of information that could reveal the identity of a person who made a disclosure during a civil court proceeding or a proceeding before an administrative tribunal.

Recommendation #10

The Act include a provision, similar to the Australia Act, making the disclosure of the identity of a person who made a disclosure of wrongdoing, participated in an investigation or is the subject of a disclosure of wrongdoing, an offence, except under certain circumstances.

Current provisions

Confidentiality is inferred in the Act and is not explicit. The Commissioner and individuals employed by the Commissioner must take an oath not to disclose any information received under the Act except as provided in the Act. However, conditions under which the disclosure of information may be made are not stated.

> ***Oath***
> ***43(1)*** *The Commissioner must, before beginning the duties and functions of office, take an oath to faithfully and impartially perform the duties and functions of the office and not to disclosure any information received by the Office of the Public Interest Commissioner under this Act except as provided in this Act.*
>
> ***Office of the Public Interest Commissioner***
>
> ***44(7)*** *Every individual employed or engaged under subsection (1) or (2) must, before*

beginning to perform duties or functions under this Act, take an oath, to be administered by the Commissioner, not to disclose any information received by that individual under this Act except as provided in this Act.

Under section 5(1) of the Act, public entities are required to create procedures consistent with the Act respecting the confidentiality of information collected. The Act is silent on the Commissioner's obligation.

Rationale for recommendation

Ensuring confidentiality is the single most important aspect of whistleblower protection. Persons need confidence that their identity will not be disclosed when they report wrongdoing or participate in an investigation as a witness. The absence of those assurances is a deterrent to disclosing wrongdoing or providing unfiltered information as part of an investigation.

Although the Act protects employees against reprisal, revealing the identity of an employee who made the disclosure could have a significant negative impact on the employee in ways that would not constitute reprisal. For example, employees may be shunned by colleagues, anonymously harassed, targeted outside their workplace in-person or online, or contacted by the media. The Commissioner has become aware of circumstances where employers have attempted to determine the identity of a whistleblower.

It is equally important to protect the identity of persons who are accused of wrongdoing. A person accused of wrongdoing can suffer irreparable harm if their identity and the nature of the allegation becomes generally known – even if ultimately an investigation does not support the allegation. This was evident in a recent case involving an allegation against an executive within a public entity. Ultimately, the investigation did not support the allegation. However, the allegation was of such an egregious nature that if it had become known to others, the damage to this individual's reputation would have been insurmountable.

It is the Commissioner's position that a person employed by a public entity who intentionally reveals the identity of a person who is reporting wrongdoing for the public interest, is committing a serious breach of public trust. Revealing the identity of a person accused of wrongdoing is an equal abuse of the Act.

Other jurisdictions

The Australia Act makes it an offence to disclose information that is likely to reveal the identity of a person who made a public interest disclosure. The exceptions to the offence provision include the disclosure or use of information for the purpose of the Act, in connection with the performance of (the parliamentary officer), where required by law, where consented to by the

person making the disclosure, or where the information has previously been lawfully published. (See s. 20)

The Nova Scotia Act prohibits any person from the disclosure of information that may reveal the identity of a person who made a disclosure, a person alleged to have committed a wrongdoing, or a person who provides information related to a disclosure. (See s. 11)

The Newfoundland & Labrador Act requires the identity of an employee making a disclosure be kept confidential to the extent permitted by law and consistent with the need to conduct a proper investigation. (See s. 7.2)

The Nunavut Act requires the Ethics Office to protect the identity of the employee who made the disclosure, any person who is the subject of the disclosure, and any witness. (See s. 43(4)(c))

The Manitoba Act restricts the disclosure of information that could reveal the identity of a whistleblower during a civil court proceeding or a proceeding before an administrative tribunal. (See s.32.1(1))

The Quebec Act requires the Public Protector to ensure that the identity of the person who makes a disclosure or cooperates in an investigation remains confidential. (See s. 10(4))

The Quebec Act further binds confidentiality to designated officers, requiring that they take measures necessary to ensure that the identity of the person who made the disclosure remains confidential. (See s. 21)

The New Brunswick Act requires information that comes to the knowledge of the Ombud to be kept confidential, unless required to disclose it by law or in furtherance of the Ombud's mandate under the Act. (See s. 26)

The Federal Act prohibits the Commissioner from disclosing any information that comes to their knowledge, unless required by law or permitted by the Act. (See s. 44)

Expanding protections to all persons

Recommendation #11

The Act protect persons, other than employees, from reprisal when they make a disclosure of wrongdoing, or seek advice in accordance with the Act.

Recommendation #12

Expand the definition of reprisal to include "any detriment" to a person

Current provision

The Act limits protection from reprisal to an "employee", and limits what constitutes a reprisal to adverse employment action within the workplace:

Definitions

1(g) *"employee" means, as the context requires,*

(i) *an individual employed by a department, a public entity, an office or a prescribed service providers,*

(ii) *an individual who has suffered a reprisal and is no longer employed by a department, a public entity, an office or a prescribed service provider, or*

an individual or person or an individual or person within a class of individuals or persons, prescribed in the regulations as an individual or person to be treated as an employee for the purpose of this Act or a provision of this Act;

Reprisal

24(1) *This section applies to an employee or a prescribed service provider…"*

(2) *No person shall take or direct, or counsel or direct a person to take or direct, any of the following measures against an employee of a department, a public entity, an office of the Legislature, the Office of the Premier, an office of a minister or a prescribed service provider for the reason that the employee took an action referred to in subsection (1):*

(a) a dismissal, layoff, suspension, demotion or transfer, discontinuation or elimination of a job, change of job location, reduction in wages, change in hours of work or reprimand;

(b) any measure, other than one mentioned in clause (a), that adversely affects the employee's employment or working conditions;

(c) a threat to take any of the measures mentioned in clause (a) or (b).

Rationale for recommendation

The definition of employee is limited to a person currently employed by, or an individual who has suffered a reprisal and is no longer employed by, a department, public entity or office. The definition of employee does not include an individual who was employed at the time the alleged wrongdoing occurred, but is no longer an employee. Individuals who leave employment within the public service may have more confidence to report wrongdoing when they are no longer in

that environment. However, the protection provisions of the Act would not apply in that scenario.

Simply put, the reprisal protections of the Act cease once an individual leaves their employment within the public service, and do not apply to members of the public. Further, the definition of reprisal is limited to adverse employment action within the current work environment. However, an individual can be the victim of a reprisal even if they are not employed in the public service. For example, they may be blacklisted from future employment opportunities, given poor references, publically criticized, ridiculed, discredited or become the subject of civil action.

This scenario occurred in a recent case when the examination of communications during an investigation found that executives stated an intent to harm a former employee who had moved to the private sector because they believed the former employee was the whistleblower.

Other jurisdictions

The Australia Act protects all persons from any detriment when they make a disclosure of wrongdoing. (See s. 13)

The Saskatchewan Act protects public servants and former public servants from reprisal. (See s. 36)

The Nova Scotia Act definition of "employee" includes a former employee. (See s. 3(d))

The Quebec Act does not refer to employees, but rather protects "persons" from reprisal. (See s. 30)

The Newfoundland & Labrador Act permits an employee or former employee to file a written complaint of reprisal. (See s. 22)

However, similar to the Alberta Act, the Nova Scotia Act and Newfoundland Act prescribe reprisals as adverse actions relating to current employment or working conditions.

Expanding protections to include persons believed to be whistleblowers

Recommendation #13
The Act protect persons who are suspected of making a disclosure of wrongdoing

Current provision

The Act protects employees when they undertake a protected activity described in section 24(1):

Reprisal
24(1) *This section applies to an employee or a prescribed service provider who has, in good faith,*

- ***(a)*** *Requested advice about making a disclosure as described in Section 8…*
- ***(b)*** *Made a disclosure under this Act,*
- ***(c)*** *Co-operated in an investigation under this Act,*
- ***(d)*** *Declined to participate in a wrongdoing, or*
- ***(e)*** *Done anything in accordance with this Act.*

Rationale for recommendation

The Act does not protect persons suspected of making a disclosure. The Act only protects employees when they undertake a protected activity described in section 24.

The Public Interest Commissioner has encountered circumstances were employers have sought to identify whistleblowers, and have made false assumptions. The employer indicated an intention to harm this employee. The employee was not, in fact, the whistleblower. Had the employer taken reprisal action against the employee on the false belief they were the whistleblower, the protection provisions of the Act would not have applied. This is a significant deficiency in the Act.

Other jurisdictions

No Canadian jurisdictions have an applicable provision.

The Australia Act addresses this issue by making it a reprisal when a person causes detriment to another person because they believe or suspect that a person made a public interest disclosure. (See s.13)

Part 3: Improving the functionality of the Act

Matters before a court or under investigation by law enforcement agency

Recommendation #14
Section 19 of the Act include a provision giving the Commissioner discretion to decline investigating matters currently being investigated by a law enforcement agency, that are the subject of court proceedings, or that relate to a decision rendered by a court.

Current provisions

Section 19 of the Act prescribes circumstances where the Commissioner is not required to investigate a disclosure of wrongdoing. An explicit provision does not exist for when a matter is before a court or under investigation by a law enforcement agency.

Rationale for recommendation

Complaints have been received by the Public Interest Commissioner's office on matters that are currently before the courts or with a law enforcement agency. The Commissioner should not become involved in such matters and has declined jurisdiction under a discretionary provision of section 19:

> ***When investigation not required***
> ***19(1)*** *The Commissioner is not required to investigate a disclosure or, if an investigation has been initiated, may cease the investigation if, in the opinion of the Commissioner,*
>
> ***(g)*** *There is another valid reason for not investigating the disclosure.*

Declining to investigate a disclosure of a matter before a court or law enforcement agency is a valid reason, as investigations under the Act should not interfere or conflict with the courts or law enforcement. However, the absence of a specific provision in this regard creates ambiguity and causes persons who report wrongdoing to presume a decision for this reason is made arbitrarily.

There are, however, circumstances where a complaint in its entirety is not before the courts or under investigation by law enforcement. In those circumstances, certain elements of the complaint may remain under the Commissioner's jurisdiction (i.e., allegations of reprisal).

Other jurisdictions

The Quebec Act requires the Public Protector to put an end to the processing of a disclosure if the alleged wrongdoing is the subject of court proceedings or relates to a decision rendered by a court. (See s. 12)

The Nunavut Act gives the Ethics Officer the discretion to decide whether or not to investigate a disclosure if the matter is being investigated by a law enforcement agency. (See s. 42(1)(a))

The Ontario Act (sec. 117), authorizes the Integrity Commissioner to refuse to deal with a disclosure if the matter is being dealt with by law enforcement.

Obtaining evidence under oath

Recommendation #15

The Act provide the Commissioner the ability to obtain information from any person under oath.

Current provision

The Act does not provide for the Commissioner to obtain information under oath.

Rationale for provision

It is recognized that it is an offence under section 46 of the Act for a person to make a false or misleading statement during an investigation. However, investigations by the Commissioner have become increasingly complex and serious. The ability to examine witnesses under oath lends solemnity to the Commissioner's investigative process, and creates the potential offence of perjury for those who would be less than honest during an investigation.

Other jurisdictions

The Ontario Act gives the Integrity Commissioner the authority to summon any public servant or former public servant who, in the Commissioner's opinion, is able to give evidence about any matter that may be relevant to the investigation and may examine him or her, on oath or affirmation (See s. 126(2)). However, in addition to conducting public interest investigations under the Ontario Act, the Integrity Commissioner also conducts investigations under the *Members' Integrity Act, and Lobbyists Registration Act.*

No other jurisdictions contain provisions for information to be obtained under oath.

Protection against self-incrimination

Recommendation #16

The Act include protection against self-incrimination

Current provision

Section 3 of the Act defines wrongdoing, in part, as a contravention of an Act, a regulation made pursuant to an Act, an Act of the Parliament of Canada or a regulation made pursuant to an Act of the Parliament of Canada. The *Criminal Code of Canada* applies.

The Act does not include a provision protecting persons participating in an investigation from self-incrimination – an immunity granted by the *Charter of Rights & Freedoms.*

Rationale for recommendation

If, during an investigation, the Commissioner finds reason to believe an offence has occurred, the Commissioner must suspend the investigation and report the offence to a law enforcement agency and to the Minister of Justice and Solicitor General. (See s. 30(1))

The Commissioner's office has received complaints of wrongdoing which, if substantiated, constitute a contravention of the criminal code. The Commissioner has the authority under the Act to compel statements and information for the purpose of the investigation. However, the information provided could be self-incriminating. In this regard, individuals would have the right to refuse to participate in an investigation.

This was noted in recent case of an alleged contravention of the criminal code. The investigation precluded an interview of the alleged wrongdoer in order to avoid potential self-incrimination. However, this practice limits the Commissioner's ability to fulfill her mandate and conduct a full and complete investigation of the alleged wrongdoing, and make recommendations for corrective measures.

Providing immunity from self-incrimination would permit the Commissioner to fully conduct an investigation into the alleged wrongdoing. Where the investigation finds reason to believe an offence occurred, the Commissioner remains obligated to report the matter to law enforcement and to the Minister of Justice and Solicitor General. An independent criminal investigation may subsequently ensue.

Other jurisdictions

The Federal Act includes protections against self-incrimination and states:

> ***Self-incrimination***
> ***32*** *No public servant shall be excused from cooperating with the Commissioner, or with a person conducting an investigation, on the grounds that any information given by the public servant may tend to incriminate the public servant or subject him or her to any proceeding or penalty, but the information, or any evidence derived from it, may not be used or received to incriminate the public servant in any criminal proceeding against him or her, other than a prosecution under section 132 or 136 of the Criminal Code.*

The use of "Good Faith" terminology

Recommendation #17

The term "good faith" is removed from the Act

Current provision

The Act requires a disclosure of wrongdoing to be made in "good faith":

> ***Definitions***
> ***1*** *In this Act,*
>
> ***(f)*** *"disclosure", except where the context requires otherwise, means a disclosure of wrongdoing made* ***in good faith*** *by an employee in accordance with this Act;*
>
> ***When investigation not required***
> ***19(1)*** *The Commissioner is not required to investigate a disclosure or, if an investigation has been initiated, may cease the investigation if, in the opinion of the Commissioner,*
>
> ***(d)*** *the disclosure is frivolous or vexatious, has not been made* ***in good faith*** *or does not deal with wrongdoing,*

The Act further requires an employee act in good faith in order to receive protection from reprisal:

> ***Reprisal***
> ***24(1)*** *This section applies to an employee or a prescribed service provider who has,* ***in good faith****,*
>
> *(a) requested advice about making a disclosure as described in section 8 or, in the case of an employee of a prescribed service provider, the regulations made under Part 1.2, whether or not the employee made a disclosure,*
>
> *(b) made a disclosure under this Act,*
>
> *(c) co-operated in an investigation under this Act,*
>
> *(d) declined to participate in a wrongdoing, or*
>
> *(e) done anything in accordance with this Act*

Rationale for recommendation

The concept of good faith is challenging to define, as it has no technical or statutory meaning. There is no case law establishing a context of good faith within public interest disclosures.

The Commissioner's office has noted circumstances where employers are interpreting what constitutes good faith arbitrarily, and view the absence of good faith as negating the protection provisions of the Act. The Act provides no license to employers to penalize the complainant behind a bad faith disclosure. Doing so runs the risk of violating the reprisal provision of the Act and generating an investigation by the office of the Public Interest Commissioner. While it cannot punish bad faith allegations under the Act, an organization is also under no obligation to expend time and resources investigating them.

Further, a disclosure involving a legitimate wrongdoing can be made in bad faith. As an example, an employee with a personal grievance may not be acting in good faith when reporting wrongdoing committed by an adversary (i.e., having an intent to harm the other employee). However, the wrongdoing may have in fact occurred. The Commissioner's office examines and determines the merit of a complaint on the basis of fact, and the motivation of an employee is not the sole determining factor of whether an investigation ought to be conducted.

As an example, in a case brought to our office, a public entity had conducted an investigation under the Act following a series of disclosures made by an employee. The public entity asserted the complaints were not being made in good faith. However, ultimately the public entity substantiated one of the allegations.

In the normal course of reviewing and investigating disclosers, the Commissioner's office presumes good faith in the absence of clear evidence of malice. If a person makes a disclosure by providing knowingly false or misleading information, he or she will be subject to the penalties set out in Part 7 of the Act for making a false statement. Since its inception, the Commissioner's office has not declined to investigate a disclosure based on the absence of good faith.

Other Jurisdictions

The New South Wales Act presumes good faith in the absence of information otherwise:

> ***9A Presumptions about beliefs on which disclosures are based***
>
> *(1) For the purposes of determining whether a disclosure by a public official is protected by this Act, an assertion by the public official as to what the public official believes in connection with the disclosure is, in the absence of evidence to the contrary, evidence of the belief asserted and that the belief is an honest belief.*
>
> *(2) Such an assertion need not be express and can be inferred from the nature or content of the disclosure.*

Saskatchewan, Ontario, Nova Scotia, Quebec and Yukon have similar "good faith" provisions; however, New Brunswick, Newfoundland and Nunavut's legislation contain provisions which permit disciplinary action for frivolous, vexatious or bad faith disclosures.

Exclusivity of procedures established under section 5

Recommendation #18

The Act require that procedures established under section 5 by departments, offices and public entities, be separate from any other procedure

Current provision

The Act requires that every chief officer establish and maintain written procedures for managing and investigating disclosures by employees for whom the chief officer is responsible. (See s. 5)

Rationale for recommendation

The Commissioner's office has observed organizations attempt to combine existing procedures with the procedures required to be established under the Act. This has resulted in organizations implementing convoluted procedures and including provisions that are *ultra vires.* As an example, an organization may attempt to include a code of conduct violation as a type of wrongdoing where the Act makes no such consideration.

Authority of designated officers to access information

Recommendation #19

The Act adopt language similar to the Manitoba Act with respect to designated officer authority to access records and information, and requiring a person to be interviewed for the purpose of the Act

Current provisions

Section 18.1 of the Act specifies the Commissioner's authority to access records including electronic data processing equipment, owned or leased by a department, public entity or office. Subsection 6 provides greater clarity on the Commissioner's authority to compel records and information from any individual for the purposes of an investigation. However, the Act is silent on the authority of the designated officer to obtain records and information for the purpose of an investigation under the Act.

Rationale for recommendation

The Commissioner and designated officer share a common purpose of investigating disclosures of wrongdoing under the Act. Although the Act grants authority for designated officers to conduct investigations, they may be challenged when attempting to access records and obtain witness evidence during investigations.

This provision is particularly important should the prescribed service provider regulation be made as recommended. Designated officers would require access to records and information held by private entities and require the authority to obtain statements from employees of the entities during investigations.

Other jurisdictions

The Manitoba Act is explicit in giving designated officers the ability to obtain records:

> ***Records and information***
> ***22(5)*** *A designated officer may require an employee*
>
> > ***(a)*** *to produce to the designated officer any records in his or her possession or under his or her control that may be relevant to an investigation; and*
> >
> > ***(b)*** *to be interviewed for the purpose of the investigation.*

Clarification the Act prevails to extent of inconsistencies with policies or codes of conduct

Recommendation #20

It is stipulated that the Act prevails over any requirement placed on employees through any internal policy, procedure or code of conduct

Current provision

The Act does not explicitly state that notwithstanding any requirements placed on employees through internal policies, procedures of codes of conduct, the Act prevails.

Rationale for recommendation

Although it is a generally recognized legal principle that a statute supersedes policy, the absence of this clarification in the Act creates ambiguity. Further, although section 5 requires that every chief officer establish and maintain written procedures for managing and investigating

disclosures by employees, how these procedures intersect with other existing procedures may not be clear for organizations.

The Commissioner's office has become aware of organizations requiring employees to first utilize the code of conduct to report wrongdoing or be subject to disciplinary action. The Act does not protect employees who make reports of wrongdoing under the provisions of a code of conduct or any other internal policy. In these cases, the organizations are restricting their employees' right to report wrongdoing to the Commissioner and receive the protections under the Act.

In one particular case, a designated officer for a public entity informed the Commissioner that employees within the entity were not reporting wrongdoing under whistleblower procedures out of fear that doing so would not conform to the code of conduct. The designated officer also advised that one witness refused to participate in an investigation for that reason.

Expanding authority to provide recommendations

Recommendation #21

The Act permit the Commissioner to make any recommendations considered appropriate in regard to a disclosure of wrongdoing

Current provision

The Commissioner may make recommendations for corrective measures when an investigation finds wrongdoing:

Commissioner's report re investigation

22(1) *On completing an investigation, the Commissioner must prepare a report that sets out*

(a) the Commissioner's findings and reasons for those findings, and

(b) any recommendations the Commissioner considers appropriate respecting the disclosure and the wrongdoing.

Rationale for recommendation

The Act limits the Commissioner's ability to make recommendations only in circumstances where wrongdoing is found. There have been cases where investigations by the Commissioner's office did not find wrongdoing, however, significant deficiencies in operational processes, policies, procedures, or matters of conduct were found. As an example, an investigation into a

recent matter did not find wrongdoing, however, found deficiencies in procurement processes used by the public entity.

The purpose of the Act, in part, is to promote public confidence in the administration of departments, offices and public entities. The Commissioner's office expends significant time reviewing and investigating complaints, and often discovers issues that ought to be addressed for the betterment of the public entity. Allowing the Commissioner to make recommendations, including on matters where wrongdoing is not found but corrective measures are still required, is conducive with the purpose of the Act.

Other jurisdictions

The BC Act and Quebec Act provides the legislative officers the ability to make any recommendations considered appropriate. (See s. 27 BC Act, and s. 15 Quebec Act)

The Saskatchewan Act, Manitoba Act, Yukon Act, New Brunswick Act, Newfoundland & Labrador Act, and Nova Scotia Act adopts language similar to the Alberta Act.

Annual reporting of activities to the Commissioner

Recommendation #22

The legislation allow the Public Interest Commissioner to require that jurisdictional entities provide an annual reporting on their activities under the Act, in a manner determined by the Commissioner

Current provision

The Act requires that all Chief Officers prepare a report annually on all disclosures made or referred to the designated officer, and provide specific information relating to how the disclosures were managed and the recommendations made. (See s. 32)

The report must be included in the annual report of the respective organization, or otherwise be made available to the public on request. Although the information is publicly available, there is no requirement for jurisdictional entities to provide an annual report on their activities to the Commissioner.

Rationale for recommendation

The applicability and usefulness of data within chief officers' annual reports has not been fully recognized, as it is not being analyzed or interpreted in any meaningful manner. The Commissioner's office does not have the capacity to manually review annual reports, and collate

and analyze reporting data from all jurisdictional public entities. However, this information would be highly useful to assist the Commissioner in identifying systemic issues, recognizing deficiencies, measuring the effectiveness of the Act, and observing the performance of public entities in applying the Act.

It is therefore suggested that rather than prescribing a process in legislation, the Commissioner be given the ability to require chief officers provide information within their annual reports, and also be given the flexibility to develop a processes to efficiently obtain this information without creating an administrative burden for organizations.

Other jurisdictions

The Yukon Act requires that a copy of the annual report of the Chief Executive be provided to the Public Interest Disclosure Commissioner (See s. 42). All other jurisdictions have similar reporting requirements to the Alberta Act, except the Newfoundland & Labrador Act which does not require annual reporting from public entities.