

The Alberta Federation of Labour thanks the Select Special Ethics and Accountability Committee for this opportunity to provide our thoughts on the review of the *Public Interest Disclosure (Whistleblower Protection) Act* (the “Act” or “PIDA”). As the organization representing more than 170,000 unionized employees and advocating for all workers in the province, we know the importance of robust whistleblower legislation as a part of a strong employment and labour statutory regime to protect and respect the rights of workers.

PIDA was introduced in late 2012 in response to a number of scandals and it came into force on June 1, 2013. Pursuant to the Act, it is now up for its first review by a committee of the Legislature. As such, the Select Special Ethics and Accountability Committee has sought the advice of affected organizations and will be reporting its findings back to the Legislature by September 2016 for possible legislative amendments.

Canadian jurisdictions have lagged behind best practices established elsewhere, notably in the United States, Australia and United Kingdom, when it comes to whistleblower protection legislation. Several provinces brought in their own legislation similar to PIDA around the same time as Alberta, but significant room for improvement remains in Alberta and across Canada.

Whistleblowing protects not just the workplace where the disclosure is made, but the public interest as a whole. Well crafted whistleblower legislation will encourage disclosure making by creating safe, accessible and simple procedures for reporting and by safeguarding the rights and protections of those who do report. It will also discourage the silencing or suppression of reporting by providing remedies and compensation to whistleblowers who are the victims of reprisal, while ensuring a fair and transparent reporting and investigation system that creates public confidence in the whistleblowing regime. Then, employees who are faced with the difficult decision to report will feel capable and supported in doing so and the public will feel assured that reports are appropriately investigated and managed to ensure the effectiveness of disclosure.

The AFL has called for enhanced protections for whistleblowers before and since the introduction of PIDA and we see this legislative review as an excellent opportunity to address some of the law’s shortcomings. Strong whistleblower legislation protects workers, but it also serves an important function in improving workplace health and safety and employment standards for all workers as well as corporate compliance with obligations under financial, environmental and tax regimes.

Effective whistleblower protection is particularly important in a province like Alberta with a resource-based economy, where many employees work in potentially dangerous or risky workplaces and where undisclosed wrongdoings present the potential for widespread economic or environmental damage. The fact that there have been only two investigative reports throughout the course of PIDA’s existence suggests that the legislation can be significantly strengthened in order to ensure that it is meeting the objective of encouraging disclosure of wrongdoing and the protection of employees who do so.

A. Expanding Protected Employees

Defining Employees

Alberta's various pieces of labour and employment legislation do not have standard, comprehensive definitions that apply across all statutes. For clarity and simplicity and to ensure that the greatest number of workers in employment relationships is protected under each piece of legislation -- eliminating "loophole" gaps in certain areas -- definitions should be common and sufficiently broad and flexible to reflect modern, ever-changing workplaces.

Many workers today are employed in non-traditional employer-employee relationships, but are equally vulnerable to reprisal in the form of cuts to hours, delegation of undesirable, unrewarding or less lucrative tasks, job loss or other employer (or co-worker) actions designed to silence or intimidate. The definition of employee must therefore be capable of including new classes of workers who need employment-related protections such as whistleblower support.

Contracted Employees

Furthermore, many employees are excluded from the protections of PIDA because they are not direct employees of the provincial government or designated health and education sector bodies. All contracted employees are currently excluded, meaning that workers who contract individually or through agencies for the provision of services on behalf of the government have no protection, though they are also public sector employees in the sense that they are paid through public dollars to provide public services. This gap means that doctors, child and youth protection workers, disability support workers and employees who provide financial advice to Alberta's public sector pension plans are not covered under whistleblower protection.

It is even more difficult for wrongdoing to be discovered in cases of contracted-out government work, where typical corporate and financial disclosure and transparency requirements are non-existent or less stringent than in direct government work. Needless to say, the public interest in maintaining integrity and the highest quality of service is just as important in contracted-out government services and these contracted-out workers should be equally protected.

The Act and the regulations should be amended to ensure a minimum standard that all those providing government contracted services are covered by the PIDA regime. For example, in Manitoba, over 600 "government bodies" are currently covered by their whistleblower legislation which includes agencies, authorities and other organizations that receive more than 50 per cent of their funding from government. Currently, Alberta's Public Interest Commissioner only tracks 377 entities in a relatively larger province. In the United States, Congress enacted best practice rights for government contractor employees in 2013.

Private Sector

An even simpler solution is to expand whistleblower protection in legislation to all employees in both private and public sectors. While other transparency and privacy considerations exist for private sector bodies, there remains a public interest in the ability of employees to disclose serious

wrongdoing which could harm society at large beyond the company itself. One of the strongest examples in recent memory of the potentially devastating effects for the public from private wrongdoing is the 2008 financial crisis, where actions of private banks had ripple effects across the global economy.

Other jurisdictions have more comprehensive coverage for private sector employees, though there is opportunity for Alberta to be a leader in North America. In the United States, because of their similar federal structure, coverage of private sector employees varies by state. However, there are federal anti-fraud statutes that do contain some protection for private sector whistleblowing. For example, the *Sarbanes-Oxley Act* gives whistleblower protection for corporate employees while mandating that companies establish procedures to permit anonymous reporting by employees. Similarly, two Australian states provide private sector whistleblower protection, though private sector protections are more limited at the federal level.

The United Kingdom's *Public Interest Disclosure Act* is the best example of comprehensive whistleblower legislation that provides protection to both public and private sector. It was introduced in 1998 and provides private sector employees with the same rights, protections and remedies as public sector employees.

B. Expanding Procedural Protections

Allowing External Reporting

Currently, PIDA does contain procedures that appropriately reflect principles of administrative law with regard to procedural fairness or best practices for whistleblower process.

Unlike other provinces, Albertans must only disclose wrongdoing to a designated officer within their workplace, which is often not their direct supervisor or even a person with whom they interact occasionally. Albertans are not entitled to make disclosures to whomever they feel most comfortable doing so in the given situation. Except in rare circumstances, they may not make disclosure directly to the Public Interest Commissioner or an external third party.

The Act could be improved by broadening the circumstances where an employee may make disclosures to external bodies as opposed to being required to make internal disclosures as a first step in almost all cases. Reporting internally can be difficult for employees who fear retaliation from managers or supervisors or the perceived loss of trust of co-workers, and it may also not be appropriate in smaller workplaces or those organized more horizontally, where anonymity or the protections of hierarchical and confidential reporting relationships might not exist.

Data from a review of Manitoba's legislation last year showed that civil servants are more likely to report to the Ombudsman than to officials in their own departments. In the first five years of its whistleblower statute being in force, only three internal disclosures were received whereas the Ombudsman received 57.¹

Research from other jurisdictions also suggests that allowing reports to be made externally strengthens whistleblower legislation. A professor at the University of Brandon recommends that all disclosures be made solely to external agencies in order to avoid the potential stifling of reports to

¹ http://www.manitoba.ca/csc/whistle/doc/Whistleblower_Report.pdf

supervisors or managers or intentional or unintentional mishandling of internal disclosures.² Meanwhile, a survey by the Auditor General in Manitoba found that 58 per cent of respondents would report initially to their supervisor, 21 per cent to their designated officer and 21 per cent to the Ombudsman.³

Therefore, Alberta's legislation should build some flexible options for employees in order to ensure that the reporting procedures are responsive to the specific characteristics and relationships of each employee's workplace. Whistleblowers who report wrongdoings to their MLAs or the media must also be protected under the law as they currently report at their own risk.

As the Ontario Integrity Commissioner writes, "the existence of a neutral third party to receive and deal with disclosures of wrongdoing is an essential component of a well-functioning disclosure of wrongdoing framework."⁴

Improving Transparency of Investigations and Removing Discretionary Exemptions

Currently, PIDA delegates an unusual amount of discretion to the Public Interest Commissioner, which reduces the transparency around the Act and its processes. Public confidence in the whistleblower regime and employee willingness to risk whistleblowing depends on an easily understood, transparent process. As the Ontario Integrity Commissioner states, "...increased awareness about the use of the disclosure system will create confidence in the system itself."⁵ Furthermore, reducing this discretion also reduces the possibility of inconsistent application of the Act, which can also undermine public confidence in the system.

For example, the Public Interest Commissioner currently has unlimited discretion to conduct or not conduct investigations into alleged wrongdoings with no requirements in the legislation for alternative procedures or enumerated grounds for declining to investigate a disclosure. The legislation should curb this discretion to ensure transparency and consistency in decision making by the Commissioner.

A related problem is that, currently, cases where wrongdoing is not found or complaints are dismissed outright without investigation, the information leading to the complaint will remain confidential. This is opposed to the general obligation, subject to FOIPP requirements, that all complaints will be disclosed publicly. Because the discretion to disclose information about these complaints and the discretion to decide whether to investigate both reside with the Public Interest Commissioner, there is a potential that information about wrongdoings will remain confidential to the public.

Improving public transparency around investigations and findings also provides better protection to employees who take the risk of whistleblowing because their disclosures cannot be buried under secretive procedures.

² *Ibid.*

³ *Ibid.*

⁴ <http://www.oico.on.ca/docs/default-source/dow/integrity-commissioner-recommendations-review-of-part-vi-of-the-psoa-2013-03-27.pdf?sfvrsn=0>

⁵ *Ibid.*

Improving Protections against Reprisals

In many ways, Alberta's procedure for reporting and investigating reprisals, which is similar to Saskatchewan's, is an improvement upon those in other provinces, where reporting to the Labour Board is a necessary, but cumbersome and time consuming, step.

However, Alberta does not provide any remedy of compensation to the whistleblower for reprisals in PIDA. David Hutton, an expert on Canadian whistleblower protections, recommends that a mechanism be included to help whistleblowers in obtaining some compensation or other remedy when they have suffered career-related or monetary losses due to reprisals.⁶ Manitoba's legislation allows the Labour Board to make orders for financial or other compensation. In the United Kingdom, whistleblowers have a right to seek a remedy before an employment tribunal for reprisals and about 20 per cent of whistleblowers succeed in obtaining compensation at the tribunal.⁷

Furthermore, PIDA does not currently provide any powers to the Public Interest Commissioner, Ombudsman or Auditor General to make interim orders to protect whistleblowers who are facing potential reprisals. Expanding the powers of the appropriate officer to make orders to prevent ongoing or further reprisals will better protect employees and reduce barriers to reporting of wrongdoing.

C. Improving Training and Education

As with many similar employee-rights legislation, whistleblower protection statutes are only strong and effective if workers are aware of their rights, what is covered by the Act, how to report wrongdoing and how to access supports, advice and assistance throughout the process. In this regard, the government should commit to increasing awareness of PIDA and the availability of easy-to-understand information and training materials within workplaces across the province.

For example, in its review of whistleblower protections in the public service, the Government of Ontario found that 59 per cent of public servants surveyed were not aware of the disclosure of wrongdoing provisions in their statute and 91 per cent were not aware of how to file a disclosure of wrongdoing.⁸

Furthermore, since the Act as currently structured relies a great deal on internal procedures, it is all the more important that employees who will be responsible for receiving disclosures and handling them properly are well trained and educated on the Act, developing, implementing and reviewing internal policies and procedures, the role of the Public Interest Commissioner and best practices for reporting and investigations.

D. Conclusion

The Alberta Federation of Labour is hopeful that this review of PIDA will lead to improvements in the law to better encourage and protect whistleblowers. We, again, thank the Select Special Ethics and Accountability Committee for this opportunity to present our recommendations for

⁶ <http://s3-us-west-2.amazonaws.com/parkland-research-pdfs/shootingthemessenger.pdf>

⁷ *Ibid.*

⁸ <http://www.oico.on.ca/docs/default-source/dow/ministers-report-disclosure-of-wrongdoing-legislation.pdf?sfvrsn=2>

improvements to PIDA in order to create a stronger whistleblower protection regime in Alberta, thereby protecting the public interest and respecting employee rights.