

Select Special Ethics and Accountability Committee

Final Report

Twenty-Ninth Legislature
Second Session

September 2016





SELECT SPECIAL ETHICS AND ACCOUNTABILITY COMMITTEE

September 2016

**To the Honourable Robert Wanner
Speaker of the Legislative Assembly
of the Province of Alberta**

As Chair of the Select Special Ethics and Accountability Committee I have the honour of submitting its final report upon completion of its one year mandate.

Sincerely,

[original signed by]

Jessica Littlewood, MLA
Chair, Select Special Ethics and Accountability Committee

c. Mr. Robert Reynolds, Q.C.
Clerk of the Legislative Assembly

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COMMITTEE MANDATE

On June 25, 2015, the Legislative Assembly passed Government Motion 12, which appointed the Select Special Ethics and Accountability Committee, an all-party committee made up of 17 Members, to review the *Election Act*, the *Election Finances and Contributions Disclosure Act*, the *Conflicts of Interest Act*, and the *Public Interest Disclosure (Whistleblower Protection) Act*. On November 2, 2015, Bill 203, *Election (Restrictions on Government Advertising) Amendment Act, 2015*, was also referred to the Committee.

The Committee met on the following dates in order to review this legislation and Bill 203: September 29, October 22, and December 18, 2015, and January 27, February 11, April 15, May 10, May 19, May 27, June 17, July 6, July 26, July 27, August 10, August 15, August 16, September 8, September 9, September 12, September 19 and September 23, 2016.

PART I:
THE PUBLIC INTEREST DISCLOSURE
(WHISTLEBLOWER PROTECTION) ACT

**MEMBERS OF THE SELECT SPECIAL ETHICS AND ACCOUNTABILITY COMMITTEE
29th Legislature**

Jessica Littlewood, MLA^{*}
Chair
Fort Saskatchewan-Vegreville (ND)

David Shepherd, MLA[†]
Acting Chair
Edmonton-Centre (ND)

Hon. Christina Gray, MLA[‡]
Chair
Edmonton-Mill Woods (ND)

Barb Miller, MLA[§]
Deputy Chair
Red Deer-South (ND)

Hon. Brandy Payne, MLA^{**}
Deputy Chair
Calgary-Acadia (ND)

Wayne Anderson, MLA
Highwood (W)

Hon. Ricardo Miranda, MLA^{***}
Calgary-Cross (ND)

Greg Clark, MLA
Calgary-Elbow (AP)

Chris Nielsen, MLA
Edmonton-Decore (ND)

Michael Connolly, MLA^{††}
Calgary-Hawkwood (ND)

Jason Nixon, MLA
Rimbey-Rocky Mountain House-Sundre (W)

Estefania Cortes-Vargas, MLA
Strathcona-Sherwood Park (ND)

Marie Renaud, MLA
St. Albert (ND)

Scott Cyr, MLA
Bonnyville-Cold Lake (W)

Dr. Richard Starke, MLA
Vermillion-Lloydminster (PC)

Deborah Drever, MLA^{††}
Calgary-Bow (ND)

Graham D. Sucha, MLA^{†††}
Calgary-Shaw (ND)

Sandra Jansen, MLA
Calgary-North West (PC)

Dr. David Swann, MLA
Calgary-Mountain View (AL)

Rod Loyola, MLA
Edmonton-Ellerslie (ND)

Glenn van Dijken, MLA
Barrhead-Morinville-Westlock (W)

Hon. Stephanie McLean, MLA^{§§}
Calgary-Varsity (ND)

^{*} Chair from March 9, 2016

[†] Substitution for Christina Gray on February 11, 2016

[‡] Chair to March 9, 2016

[§] Committee Member from June 25, 2015, and Deputy Chair from March 9, 2016

^{**} Deputy Chair to March 9, 2016

^{††} Committee Member from March 9, 2016

^{††} Committee Member from March 9, 2016

^{§§} Committee Member to March 9, 2016

^{***} Committee Member to March 9, 2016

^{†††} Committee Member from March 9, 2016

Substitutions Pursuant to Standing Order 56(2.1-2.4):

Donald MacIntyre, MLA*
Innisfail-Sylvan Lake (W)

Grant R. Hunter, MLA†
Cardston-Taber-Warner (W)

Brian Malkinson‡
Calgary-Currie (ND)

Michael Connolly, MLA§
Calgary-Hawkwood (ND)

David Hanson, MLA**
Lac La Biche-St. Paul-Two Hills (W)

Leela Sharon Aheer, MLA††
Chestermere-Rocky View (W)

Erin Babcock, MLA‡‡
Stony Plain (ND)

Lorne Dach, MLA§§
Edmonton-McClung (ND)

Deborah Drever, MLA***
Calgary-Bow (ND)

Trevor Horne, MLA†††
Spruce Grove-St. Albert (ND)

Jonathon Carson, MLA‡‡‡
Edmonton-Meadowlark (ND)

Nathan Cooper, MLA§§§
Olds-Didsbury-Three Hills (W)

Dr. Robert Turner, MLA****
Edmonton-Whitemud (ND)

David Shepherd, MLA††††
Edmonton-Centre (ND)

Annie McKittrick, MLA‡‡‡‡
Sherwood Park (ND)

Heather Sweet, MLA§§§§
Edmonton-Manning (ND)

Craig Coolahan, MLA*****
Calgary-Klein

Members also in Attendance:

Tany Yao, MLA†††††
Fort McMurray-Wood Buffalo (W)

* Substitution for Scott Cyr on September 29, 2015

† Substitution for Scott Cyr on December 18, 2015, and for Glenn van Dijken on July 26, 2016

‡ Substitution for Stephanie McLean on December 18, 2015, and for Michael Connolly on May 10, 2016

§ Substitution for Stephanie McLean on January 27, 2016

** Substitution for Glenn van Dijken on January 27, 2016, and for Jason Nixon on September 12, 2016

†† Substitution for Jason Nixon on February 11, 2016, and for Glenn van Dijken on May 10, 2016

‡‡ Substitution for Brandy Payne on February 11, 2016

§§ Substitution for Ricardo Miranda on February 11, 2016, for Estefania Cortes-Vargas on July 26, 2016, and for Marie Renaud on September 12, 2016

*** Substitution for Stephanie McLean on February 11, 2016

††† Substitution for Chris Nielsen on February 11, 2016

‡‡‡ Substitution for Marie Renaud on April 15, 2016, for Chris Nielsen on May 27, 2016, and for Michael Connolly on July 26, 2016

§§§ Substitution for Jason Nixon on April 15, 2016

**** Substitution for Michael Connolly on May 19, 2016, for Deborah Drever on July 26, 2016, and for Barb Miller on September 12, 2016

†††† Substitution for Deborah Drever on June 17, 2016

‡‡‡‡ Substitution for Rod Loyola on July 6, 2016

§§§§ Substitution for Marie Renaud on July 6, 2016

***** Substitution for Marie Renaud on July 26, 2016

††††† May 27 and July 6, 2016

1.0 EXECUTIVE SUMMARY

The Select Special Ethics and Accountability Committee makes the following recommendations, including suggested amendments, to the *Public Interest Disclosure (Whistleblower Protection) Act*, S.A. 2012, c. P-39.5 (the “Act”) and the *Public Interest Disclosure (Whistleblower Protection) Regulation*, Alta. Reg. 71/2013, where necessary, to implement the recommendations.

Application and Purposes of Act

1. That the Act be amended to expand the Commissioner’s jurisdiction to include contracted and delegated service providers and that the Act be amended to extend protection to those contractors and other delegated service providers who have a business relationship with the Government.
2. That the Act be amended to clarify that its scope applies to ministers and Members of the Legislative Assembly.
3. That any physician included in an alternative relationship plan is covered by the Act.
4. That no changes be made to the Act to expand its scope to the private sector.

Wrongdoings

5. That gross mismanagement be defined as an act or omission that is deliberate and shows a reckless or wilful disregard for the management of government resources.
6. That the Act be amended so that the gross mismanagement provision in regard to the public sector parallels the current Ontario or federal legislation.

Procedures for Disclosures

7. That the Act be amended to permit individuals who make disclosures of wrongdoing to report directly to the Public Interest Commissioner.
8. That the Act be amended to allow employees to make protected disclosures to a supervisor or other person of authority within their organization and extend the protections within section 24 to employees in these situations.
9. That the Act be amended to clarify a chief or designated officer’s obligation to report illegal conduct to law enforcement or to the Department of Justice and Solicitor General in cases where there is a reasonable belief that an offence has been committed.
10. That the Act be amended to include stronger provisions protecting the confidentiality of individuals who make internal disclosures and to exempt the names of whistleblowers in the event that an access to information request is made under the *Freedom of Information and Protection of Privacy Act*.

Investigations by the Commissioner

11. That the Act be amended to extend the timeline required to determine whether or not an investigation is required to 20 business days.
12. That the Act be amended to strengthen the Public Interest Commissioner’s right to information and create an obligation for the entity to provide the requested information in a timely fashion.

13. That the Act be amended to compel the Public Interest Commissioner to notify any individuals whose identifying health information has been disclosed to the Public Interest Commissioner as part of an investigation.
14. That the Act be amended to clarify who has an obligation to act and report on recommendations made in situations where the chief or designated officer is involved in the matter.

Reprisals

15. That the Act be enhanced to ensure that whistleblowers that suffer reprisals receive appropriate restitution where wrongdoing has been established.
16. That the Act be amended to allow for the use of the Labour Relations Board to conduct hearings on reprisals and be empowered to call for remedies.

General Matters

17. That the Act be enhanced to ensure more detailed annual reporting, including the types of proven wrongdoing in the disclosures received by the Public Interest Commissioner, summary findings of the Commissioner in cases where wrongdoing or acts of reprisal are found to have been committed, the specific recommendations made to public entities or offices of the Legislature and the entities' responses to such recommendations, and any offences committed or penalties given under the Act.
18. That the Act be amended to add a provision that provides protection from waiver of solicitor-client privilege in the event that a disclosure is made to the Public Interest Commissioner as part of an investigation.

Office of the Public Interest Commissioner

19. That the Act be amended to allow the Public Interest Commissioner power to delegate authority in the event of normal absences, similar to the provision found in section 61 of the *Freedom of Information and Protection of Privacy Act*.

Other Recommendations

20. That the Act be amended to provide for an exemption for the Commissioner and staff from giving evidence in any other proceedings of a judicial nature and, further, that all information gathered in the course of an investigation be protected by privilege.
21. That the Act be amended to ensure records management be consistent with that of other legislative offices.

2.0 COMMITTEE MANDATE WITH RESPECT TO *THE PUBLIC INTEREST DISCLOSURE (WHISTLEBLOWER PROTECTION) ACT*

The scope of the Committee's review with respect to the *Public Interest Disclosure (Whistleblower Protection) Act* is mandated by section 37 of the Act:

Within 2 years after this Act comes into force and every 5 years after that, a special committee established by the Legislative Assembly must begin a comprehensive review of this Act and must submit to the Legislative Assembly, within one year after beginning the review, a report that includes any amendments recommended by the committee.

The Committee began its review of the Act on September 29, 2015.

3.0 INTRODUCTION

The *Public Interest Disclosure (Whistleblower Protection) Act* facilitates the disclosure and investigation of wrongdoing and protects employees who make those disclosures from reprisal. The Act applies to departments, offices of the Legislature, and the public entities prescribed in the regulations.

The *Public Interest Disclosure (Whistleblower Protection) Act* was enacted in 2012, and all parts were proclaimed in force by June 1, 2013.

This report is the result of the Select Special Ethics and Accountability Committee's review of the Act, which started in September 2015. It contains the 21 recommendations that were agreed to during the Committee's deliberations. For a complete record of the Committee's deliberations please consult the transcripts of the Committee's meetings, which are posted online at assembly.ab.ca.

4.0 ACKNOWLEDGEMENTS

The Committee wishes to acknowledge the useful contributions of the individuals and organizations who provided written submissions and/or appeared before the Committee.

The Committee also wishes to acknowledge the valuable assistance of the technical support staff and Legislative Assembly Office support staff.

Technical Support Staff

Office of the Public Interest Commissioner

Mr. Peter Hourihan, Public Interest Commissioner

Ms Sandy Hermiston, General Counsel

Mr. Ted Miles, Director

Legislative Assembly Office Support Staff

Mr. Robert H. Reynolds, QC, Clerk of the Assembly (in his former capacity as Law Clerk and Director of Interparliamentary Relations)

Ms Shannon Dean, Law Clerk and Director of House Services

Dr. Philip Massolin, Manager of Research and Committee Services

Mr. Trafton Koenig, Parliamentary Counsel

Dr. Sarah Amato, Research Officer

Ms Nancy Robert, Research Officer

Ms Jody Rempel, Committee Clerk

Mrs. Karen Sawchuk, Committee Clerk

Mr. Duncan Leung, Committee Services Co-ordinator

Ms Leah Kirtio, Committee Services Assistant

Ms Rhonda Sorensen, Manager of Corporate Communications and Broadcast Services

Ms Jeanette Dotimas, Communications Consultant

Hansard staff

Security staff

5.0 CONSULTATION AND REVIEW PROCESS

The Committee's review of the *Public Interest Disclosure (Whistleblower Protection) Act* involved a series of meetings that were open to the public and streamed live on the Legislative Assembly website. These meetings took place on September 29, October 22, and December 18, 2015, and January 27, February 11, April 15, May 10, May 19, May 27, June 17, July 6, July 26, and September 12, 2016.

As part of the review process the Committee received a background briefing on the *Public Interest Disclosure (Whistleblower Protection) Act* from officials from the Office of the Public Interest Commissioner on October 22, 2015.

The Committee invited written submissions from a number of identified stakeholders and advertised for written submissions from the public through radio and newspapers, on its website, and through social media and other web-based initiatives. Stakeholders included Government of Alberta ministries, agencies, boards and commissions, postsecondary institutions and their faculty associations, school boards, and labour unions.

The Committee received 20 written submissions from identified stakeholders and 12 written submissions from members of the public. On January 27, 2016, the Committee heard an oral presentation from the Office of the Public Interest Commissioner, on February 11, 2016, from the Alberta Federation of Labour, Alberta Justice and Solicitor General (on behalf of Government of Alberta ministries), and the Office of the Auditor General of Alberta, and on May 19, 2016, from an invited presenter. Appendices A and B contain a list of the individuals and organizations that provided written submissions and oral presentations to the Committee.

The Committee met on May 27, June 17, July 6, and July 26, 2016, to deliberate on the issues and proposals arising from the written submissions and oral presentations. Representatives from the Office of the Public Interest Commissioner attended the meetings and supported the Committee by providing technical expertise.

This report is the result of the Committee's deliberations and contains its 21 recommendations in relation to the Act.

6.0 COMMITTEE RECOMMENDATIONS ON THE PUBLIC INTEREST DISCLOSURE (WHISTLEBLOWER PROTECTION) ACT

6.1 Application and Purposes of the Act

Contractors and Other Delegated Service Providers

Currently the *Public Interest Disclosure (Whistleblower Protection) Act* gives no consideration to services which are contracted to or delegated by Government. Six submissions, from the Public Interest Commissioner, Auditor General of Alberta, Alberta Federation of Labour, Alberta Union of Provincial Employees, NorQuest College, and one member of the public, suggested that the scope of the Act be expanded to extend protection to contractors and other delegated service providers who have a business relationship with Government.

For example, in his submission the Auditor General of Alberta questioned the rationale for excluding from the Act contractors and other delegated service providers who are fully funded by Government given that “the objectives of whistleblower protection policies and legislation are best achieved through broad coverage.” Similarly, the Alberta Federation of Labour considered it problematic that “all contracted employees are currently excluded [from the Act], meaning that workers who contract individually 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.”

The Committee considered that delegated service providers and contractors in a business relationship with Government are in much the same position as other employees in so far as they may face retaliation when reporting a wrongdoing. The Committee noted that the Department of Human Services has contracts with more than 2,200 service providers, many of which are small businesses. The concern was raised that smaller service providers might find compliance with the Act administratively burdensome, especially if they are expected to develop the internal disclosure procedures outlined in section 5. Direct disclosure to the Public Interest Commissioner was discussed as a solution to this potential problem.

Therefore, the Committee recommends:

- 1. That the Act be amended to expand the Commissioner’s jurisdiction to include contracted and delegated service providers and that the Act be amended to extend protection to those contractors and other delegated service providers who have a business relationship with the Government.**

Application to Ministers and Members of the Legislative Assembly

Currently section 2(1) of the Act provides the application of the Act as follows:

This Act applies to departments, offices of the Legislature and public entities prescribed in the regulations.

In their written submissions to the Committee the Office of the Public Interest Commissioner and Service Alberta suggested that the Act be clarified to specify whether it applies to ministers and Members of the Legislative Assembly. The Office of the Public Interest Commissioner explained that there is some confusion about whether ministers, as heads of departments, and Members of the Legislative Assembly are subject to the Act.

The Committee agreed that clarification was required. In addition, it was concluded that if Members were included in the Act, then their staff would be able to make a protected disclosure under the Act.

Therefore, the Committee recommends:

- 2. That the Act be amended to clarify that its scope applies to ministers and Members of the Legislative Assembly.**

Physicians Included in an Alternative Relationship Plan

Currently, section 1 of the *Public Interest Disclosure (Whistleblower Protection) Regulation* (the “Regulation”) provides the following definitions for “medical staff” and “professional staff”:

- (c) “medical staff” means a physician appointed by a public entity designated in section 2 of Schedule 1 to admit, attend or treat, or who utilizes the resources of the public entity in respect of, patients;
- (d) “professional staff” means a health practitioner, other than a physician, who is regulated under a health profession statute and has been appointed by a public entity designated in section 2 of Schedule 1 to admit, attend or treat, or who utilizes the resources of the public entity in respect of, patients.

Section 2 of Schedule 1 to the Regulation states:

The following are designated as public entities in the health sector to which the Act applies:

- (a) for greater clarity, a regional health authority under the *Regional Health Authorities Act*;
- (b) the following subsidiary health corporations under the *Regional Health Authorities Act*:
 - (i) Calgary Laboratory Services Ltd.;
 - (ii) CapitalCare Group Inc.;
 - (iii) Carewest;
- (c) Covenant Health;
- (d) Lamont Health Care Centre.

In its submission to the Committee the Alberta Medical Association requested clarification of the definition of “employees,” suggesting that the Regulation should clearly encompass independent contractors, members of alternative relationship plans, residents, and medical students.

In its discussion of the issue the Committee wanted physicians who are members of alternative relationship plans to be included in the Act. The Committee therefore recommends:

- 3. That any physician included in an alternative relationship plan be covered by the Act.**

Private Sector

Private-sector organizations are not currently included in Alberta’s Act or in any other public interest disclosure statute in Canada.

The Committee received six submissions, from the Non-Academic Staff Association at the University of Alberta, Calgary & District Labour Council, Public Interest Alberta, United Food and Commercial Workers Canada Union Local No. 401, and Bow Valley College Faculty Association, proposing to extend the scope of the Act to wrongdoing in the private sector. The Committee expressed the view that this

proposal was too far reaching and goes beyond the intended scope of the Act. Therefore, the Committee recommends:

- 4. That no changes be made to the Act to expand its scope to the private sector.**

6.2 Wrongdoings

Defining “Gross Mismanagement”

An action is considered a wrongdoing if it meets the definition set out in the Act. Section 3(1)(c) of the Act provides one form of wrongdoing as “gross mismanagement of public funds or a public asset.”

Three submissions, from the Auditor General of Alberta, Alberta Health Services, and the Alberta Medical Association, proposed that the Act should be amended to define “gross mismanagement.”

In its discussion of gross mismanagement the Committee suggested that a definition of the term might bring more clarity to the Act. The Public Interest Commissioner explained that in practice his office determines whether a situation constitutes gross mismanagement by considering whether “the acts or omissions are deliberate and exhibit a reckless or wilful disregard for the efficient management of government resources.” The Committee noted that Nova Scotia is the only other jurisdiction where the term is defined and that Nova Scotia’s definition is similar to the approach taken by the Office of the Public Interest Commissioner in Alberta.

The Committee sought to bring more clarity to the Act by defining “gross mismanagement.” Therefore, the Committee recommends:

- 5. That gross mismanagement be defined as an act or omission that is deliberate and shows a reckless or wilful disregard for the management of government resources.**

Gross Mismanagement of the Public Sector

In his submission the Public Interest Commissioner suggested expanding gross mismanagement in section 3(1)(c) to include managing people (in the public sector). The Commissioner explained that his office receives many phone calls from employees who have encountered significant bullying and harassment. Some employees have been dissatisfied with internal investigations conducted by their departments into these matters and have approached the Public Interest Commissioner for a review of the situation. The Office of the Public Interest Commissioner has been unable to investigate these complaints because they fall outside the jurisdiction of the Act. The current provision on “gross mismanagement” does not include gross mismanagement of the public sector.

The Committee discussed the merits of extending the Commissioner’s authority to cover situations where a human resource investigation has not been dealt with satisfactorily and sought information on how other jurisdictions handle this issue. The Committee heard that there is a more open-ended definition in Ontario’s legislation while the federal legislation references “gross mismanagement in the public sector.”

Section 8 of the federal *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46, states:

This Act applies in respect of the following wrongdoings in or relating to the public sector:

- ...
- (b) a misuse of public funds or a public asset;
- (c) a gross mismanagement of the public sector;
- ...

Section 108(1) of Ontario's *Public Service of Ontario Act*, 2006, S.O. 2006, c. 35, Sch., states:

In this Part,

"wrongdoing" means,

...

(c) gross mismanagement by a public servant, a minister or parliamentary assistant in the work of the public service of Ontario,

...

The Committee examined the wording of the legislation in these jurisdictions and suggested that Alberta emulate the federal government or Ontario in this matter.

Therefore, the Committee recommends:

- 6. That the Act be amended so that the gross mismanagement provision in regard to the public sector parallels the current Ontario or federal legislation.**

6.3 Procedures for Disclosure

Direct Disclosure to the Commissioner

The Act currently provides that an employee must first make a disclosure of wrongdoing internally to the chief officer or designated officer of their department, entity, or office of the Legislature except in certain circumstances. In the circumstances provided in section 10(1) of the Act an employee may make a disclosure directly to Alberta's Public Interest Commissioner.

Eight submissions, from the Public Interest Commissioner, Auditor General of Alberta, Public Interest Alberta, Alberta Union of Provincial Employees, Alberta Federation of Labour, Bow Valley College Faculty Association, and two members of the public, suggested amending the Act to permit individuals to make disclosures of wrongdoing directly to the Public Interest Commissioner.

The Committee agreed that while it may be preferable for employees to begin the disclosure process internally, employees may also benefit from the option of making disclosures of wrongdoing directly to the Public Interest Commissioner in situations where the culture of the department makes disclosure more difficult. It was further noted that direct disclosure offers a way for whistleblowers to more immediately access the expertise of the Office of the Public Interest Commissioner. Employees of small organizations in a contractual relationship with Government may particularly benefit from direct access to the Office of the Public Interest Commissioner since they may not have the resources to develop their own internal disclosure procedures.

The Committee also agreed that the opportunity to make a direct disclosure may enhance confidence in the disclosure process overall. The Committee therefore recommends:

- 7. That the Act be amended to permit individuals who make disclosures of wrongdoing to report directly to the Public Interest Commissioner.**

Disclosure to a Supervisor or Person of Authority

As discussed above, the Act currently provides that an employee must first make a disclosure of wrongdoing internally to the chief officer or designated officer of their department, entity, or office of the Legislature except in the circumstances set out in section 10(1), whereby an employee may make a disclosure directly to the Public Interest Commissioner.

Three submissions, from the Public Interest Commissioner, the Auditor General of Alberta, and Service Alberta, suggested amending the Act to permit internal disclosures to supervisors in addition to chief officers and designated officers.

The Committee considered it likely that an employee may raise a concern related to wrongdoing with their supervisor, but this disclosure would not be protected since it was not made to the authorities currently specified by the Act: the designated officer, chief officer, or the Public Interest Commissioner. If the employee subsequently suffers a reprisal because of the disclosure, the Office of the Public Interest Commissioner would have no authority to investigate the matter. The Committee heard that the Office of the Public Interest Commissioner would like to have the jurisdiction to investigate “if someone goes forward internally and tries to make a disclosure internally and then suffers a reprisal.”

The Committee also considered the possibility that an employee may make a disclosure to a person with greater authority than their immediate supervisor and wanted to protect disclosures made to persons “up the chain of command” within the organization.

The Committee therefore recommends:

- 8. That the Act be amended to allow employees to make protected disclosures to a supervisor or other person of authority within their organization and extend the protections within section 24 to employees in these situations.**

Reporting Alleged Illegal Conduct to Law Enforcement

Section 5(2)(f) of the Act provides that procedures to manage and investigate disclosures by a designated officer must include:

procedures for reporting an alleged offence if, during an investigation of a disclosure, the designated officer has reason to believe that an offence has been committed under an Act or regulation or under an Act or regulation of the Parliament of Canada.

Section 20(2) provides that

If, during an investigation, the Commissioner has reason to believe that an offence has been committed under an Act or regulation or under an Act or regulation of the Parliament of Canada, the Commissioner must, as soon as reasonably practicable, report the alleged offence to a law enforcement agency and to the Minister of Justice and Solicitor General, and the Commissioner’s investigation under this Act is suspended.

In his submission to the Committee the Auditor General of Alberta suggested that the Act be amended to clarify a chief or designated officer’s obligation to report alleged illegal conduct to law enforcement or to the Department of Justice and Solicitor General in cases where there is a reasonable belief that an offence has been committed.

The Committee considered the need for consistency between sections 5(2)(f) and 20(2) and preferred more clarity with respect to a chief or designated officer’s obligation to report alleged illegal conduct in cases where there is a reasonable belief that an offence has been committed.

The Committee therefore recommends:

- 9. That the Act be amended to clarify a chief or designated officer’s obligation to report illegal conduct to law enforcement or to the Department of Justice and Solicitor General in cases where there is a reasonable belief that an offence has been committed.**

Protecting Confidentiality

The Committee received submissions from the University of Alberta, Alberta Health Services, Calgary & District Labour Council, and Alberta Federation of Labour proposing that the Act should be amended to include stronger provisions protecting the confidentiality of individuals who make internal disclosures and that the names of whistleblowers be exempted in the event that an access to information request is made under the *Freedom of Information and Protection of Privacy Act* (FOIPPA).

In its consideration of the issue the Committee heard that designated officers who work within public entities and are charged with investigating internal whistleblower complaints are concerned that someone would be able to make an access to information request and obtain information regarding an internal investigation which would identify the whistleblower. The submission of the University of Alberta, for example, noted that for internal disclosures “there is less legislative protection for exempting the names of ‘whistleblowers’ should an access to information request be made [under the FOIPPA], despite confidentiality requirements outlined in section 5(2)(g) of [the Act].” Moreover, according to the submission, the same records held by a public body do not enjoy the same protection as those held by the Office of the Public Interest Commissioner, which is exempt from a request made under FOIPPA. The Committee agreed that stronger provisions protecting confidentiality are necessary for internal disclosures.

Therefore, the Committee recommends:

- 10. That the Act be amended to include stronger provisions protecting the confidentiality of individuals who make internal disclosures and to exempt the names of whistleblowers in the event that an access to information request is made under the *Freedom of Information and Protection of Privacy Act*.**

6.4 Investigations by the Commissioner

Timelines for the Commissioner to Determine to Investigate

The Act currently sets a timeline of 10 business days for the Office of the Public Interest Commissioner to acknowledge receipt of a disclosure of wrongdoing or complaint of reprisal, decide whether to investigate, and notify the employee of that decision. The Commissioner may extend this time limit as appropriate in the interests of a fair and efficient outcome. Three submissions, from the Public Interest Commissioner, Service Alberta, and Alberta Health Services, suggested that the Act be amended to extend this timeline. In requesting this change, the Public Interest Commissioner noted that the timeline currently set out in the Act is “difficult to meet insofar as 10 days is not sufficient time to determine whether to investigate. Information received from a complainant is often not complete and requires significant analysis to determine if the matter is jurisdictional and warrants an investigation.”

The Committee discussed a reasonable and expeditious timeline for the Office of the Public Interest Commissioner to determine whether to investigate. Twenty business days was considered a more appropriate time frame to decide whether an investigation is warranted.

The Committee therefore recommends:

- 11. That the Act be amended to extend the timeline required to determine whether or not an investigation is required to 20 business days.**

Right to information

Section 18(5) of the Act currently says that the “Commissioner may in the course of an investigation require” information. The Committee heard from the Public Interest Commissioner that this provision has

been interpreted as an optional rather than a mandatory opportunity to provide requested material. The inability of the Office of the Public Interest Commissioner to acquire information has, in turn, “resulted in prolonged investigations and [has] had a negative impact on timelines.”

In his submission to the Committee, the Commissioner suggested that the Act be amended to strengthen the Commissioner’s right to information and create an obligation for the entity to provide the requested information in a timely fashion.

In its discussion of the issue, the Committee agreed that the Commissioner should have the right to compel information needed for an investigation under the Act.

The Committee therefore recommends:

- 12. That the Act be amended to strengthen the Public Interest Commissioner’s right to information and create an obligation for the entity to provide the requested information in a timely fashion.**

Notification Regarding the Disclosure of Health Information

Two submissions from the Alberta Medical Association and Bow Valley College Faculty Association suggested that the Act should be amended to clarify a potential conflict between the power of the Public Interest Commissioner to compel information and documents, including those pertaining to individually identifying health information, and the obligation of a custodian of health information to limit disclosure to the least amount necessary to achieve the purpose.

The Committee discussed the disclosure of individually identifying health information to the Commissioner during an investigation. During the discussion, the Commissioner clarified that his office would notify the individual when his or her individual health information is needed for the purposes of an investigation. This notification is not currently required by the Act.

The Committee expressed the need to protect the identifying health information of Albertans by ensuring that Albertans are notified if their information has been shared with an office outside of the health care system. Therefore, the Committee recommends:

- 13. That the Act be amended to compel the Public Interest Commissioner to notify any individuals whose identifying health information has been disclosed to the Public Interest Commissioner as part of an investigation.**

Obligation to Act on Recommendations Involving the Chief or Designated Officer

Section 23 of the Act currently provides that if an investigation involves the chief or designated officer, the Commissioner must provide a copy of the report

- (a) in the case of a department, to the chief officer of Executive Council,
- (b) in the case of a public entity, to the minister responsible, if any, and to the board of directors or the person designated to act as the head of the public entity, if any,
- (c) in the case of an office of the Legislature, to the Speaker of the Legislative Assembly, or
- (d) in the case of a minister’s office or the chief officer of Executive Council, to the Speaker of the Legislative Assembly.

The Act is silent with respect to the obligations of these individuals to act on the Commissioner's recommendations in situations where the subject matter of an investigation involves the chief officer or designated officer.

The submission of the Public Interest Commissioner suggested that the Act be amended to clarify who has an obligation to act and report on recommendations made in situations where the chief or designated officer is involved in the matter. During the Committee's deliberations the Commissioner further explained that the chief officer of Executive Council, the minister, or the Speaker, for example, could be obligated to notify the Commissioner of the steps taken to give effect to the Commissioner's recommendations in these situations.

The Committee agreed with this proposal and therefore recommended:

- 14. That the Act be amended to clarify who has an obligation to act and report on recommendations made in situations where the chief or designated officer is involved in the matter.**

6.5 Reprisals

Remedies for Whistleblowers that Suffer Reprisals

Currently the Act gives no compensation to whistleblowers who suffer a reprisal.

Eight submissions, from Service Alberta, the Auditor General of Alberta, the Alberta Union of Provincial Employees, United Food and Commercial Workers Canada Union Local No. 401, Public Interest Alberta, Calgary & District Labour Council, Non-Academic Staff Association at the University of Alberta, and Alberta Federation of Labour, all proposed that the Act be amended to provide remedies for employees who suffer reprisals as a consequence of disclosure.

These submissions expressed similar views. Public Interest Alberta, for example, suggested that "Albertans' livelihoods should not be at stake when they make a disclosure that protects the public interest" and proposed that the Public Interest Commissioner "have the power to compel the employer to reinstate the employee." Other submissions suggested that the law should protect employment and the employee's ability to seek compensation if the employee has suffered a reprisal.

The Committee discussed the range of emotional and financial costs employees might incur as a consequence of their whistleblowing and agreed with the need to provide compensation for reprisals. It was considered important to grant employees the knowledge that a remedy might be awarded if a reprisal were to occur.

The Public Interest Commissioner expressed the view that should this recommendation be carried, his office "would not want the power to order" and would "prefer [only] the power to recommend" compensation. The Committee was amenable to this suggestion and therefore recommends:

- 15. That the Act be enhanced to ensure that whistleblowers that suffer reprisals receive appropriate restitution where wrongdoing has been established.**

The Labour Relations Board

The Committee considered proposals from the Alberta Federation of Labour and Calgary & District Labour Council to amend the Act to provide that a tribunal conduct hearings on reprisals and is empowered to award damages and remedies.

The Public Interest Commissioner suggested that the Labour Relations Board would be the appropriate forum to make an assessment of potential remedies. The Committee in turn decided to request information from the Labour Relations Board about its capacity to do this work. The Labour Relations Board responded with a letter stating that “this addition to the Board’s jurisdiction would not require the creation of a new administrative structure.” Moreover, the “Board would support a recommendation where the Commissioner would receive, investigate and issue reports concerning complaints of reprisal and, if not resolved, the complaint would be referred to the Board for a hearing to determine whether the reprisal occurred and, if so, to award an appropriate remedy.” The Committee expressed satisfaction with this response and therefore recommended:

- 16. That the Act be amended to allow for the use of the Labour Relations Board to conduct hearings on reprisals and be empowered to call for remedies.**

6.6 General Matters

The Commissioner’s Annual Report

Section 33(1) of the Act provides that the Public Interest Commissioner “must report annually to the Legislative Assembly on the exercise and performance of the Commissioner’s functions and duties” under the Act. The contents of the annual report must include the number of general inquiries made, disclosures received, and investigations commenced by the Commissioner.

Four submissions, from the Auditor General of Alberta, Alberta Union of Provincial Employees, and two members of the public, proposed amending the Act to require the Public Interest Commissioner to include in his or annual report substantive information on the types of wrongdoing alleged in disclosures, a summary of the Commissioner’s findings in cases where a wrongdoing or act of reprisal was committed, and the specific recommendation made by the Commissioner to public entities or Offices of the Legislature.

While discussing this recommendation, the Committee suggested that the inclusion of additional information in the Commissioner’s annual report might promote learning opportunities for all employees and entities covered by the Act. It would also encourage the development of a culture in which employees feel comfortable coming forward to disclose wrongdoing. At the same time, the Committee considered the implications of providing information on alleged wrongdoings and unfounded complaints in the Commissioner’s annual report. It was agreed that the annual reports should only discuss proven wrongdoings. The Committee therefore recommends:

- 17. That the Act be enhanced to ensure more detailed annual reporting, including the types of proven wrongdoing in the disclosures received by the Public Interest Commissioner, summary findings of the Commissioner in cases where wrongdoing or acts of reprisal are found to have been committed, the specific recommendations made to public entities or offices of the Legislature and the entities’ responses to such recommendations, and any offences committed or penalties given under the Act.**

Solicitor-Client Privilege

A proposal from the Auditor General of Alberta suggested that the Act be amended to grant the Commissioner access to information that is protected by solicitor-client privilege if the Act affords the same privileges to designated officers for internal investigations.

In its discussion of the proposal the Committee sought the position of the Public Interest Commissioner on the matter. The Commissioner indicated that his preference would be to provide assurance in the legislation that disclosure of solicitor-client privileged information to the Commissioner does not constitute

a waiver of solicitor-client privilege elsewhere. This would assure individuals and departments that choosing to provide information to the Commissioner would not compromise that information for other proceedings.

The Committee agreed with this rationale and therefore recommends:

- 18. That the Act be amended to add a provision that provides protection from waiver of solicitor-client privilege in the event that a disclosure is made to the Public Interest Commissioner as part of an investigation.**

6.7 Office of the Public Interest Commissioner

Commissioner's Power to Delegate Authority in the Event of Normal Absences

The Public Interest Commissioner suggested that a provision be added to the Act to permit the Commissioner to delegate authority in the event of short, temporary, and normal absences.

During the deliberations of the Committee the Commissioner explained that the Act provides no way for him to delegate authority if he is absent for short periods of time due to illnesses, holidays, or conferences. In contrast, section 27 of the *Ombudsman Act* and section 61 of the *Freedom of Information and Protection of Privacy Act* grant this ability to the Ombudsman and the Information and Privacy Commissioner, respectively. The Committee agreed that the Commissioner's proposal was reasonable.

Therefore, the Committee recommends:

- 19. That the Act be amended to allow the Public Interest Commissioner power to delegate authority in the event of normal absences, similar to the provision found in section 61 of the *Freedom of Information and Protection of Privacy Act*.**

6.8 Other Recommendations

Privilege and Protection from Giving Evidence

In his submission to the Committee the Public Interest Commissioner proposed that a provision be added to the Act which exempts the Commissioner and staff from giving evidence in any other proceedings of a judicial nature and that all information gathered in the course of an investigation is protected by privilege.

In making this recommendation, the Commissioner explained that he is concerned about his investigators getting subpoenaed in other proceedings and that this in turn might jeopardize investigations. Moreover, the Commissioner noted that similar provisions are included in the *Ombudsman Act* and in most legislation in other jurisdictions.

The Committee agreed that the Commissioner and his staff should be exempted from giving evidence in other proceedings of a judicial nature and that the information gathered in the course of an investigation should be privileged.

Therefore, the Committee recommends:

- 20. That the Act be amended to provide for an exemption for the Commissioner and staff from giving evidence in any other proceedings of a judicial nature and, further, that all information gathered in the course of an investigation be protected by privilege.**

Records Management

Three submissions, from the Public Interest Commissioner, Service Alberta, and the Alberta Medical Association, suggested that the Act be amended to include a provision dealing with records management. The Committee requested from the Public Interest Commissioner an explanation regarding his office's current approach to destroying, digitizing, and retaining documents. The Commissioner explained that all other legislative offices in Alberta "are required, under their legislation, to obtain approval for records retention and disposition schedules by the Standing Committee on Legislative Offices." Since there are currently no provisions in the Act granting the Public Interest Commissioner authority on records management, the current practice of the Commissioner's office is to keep all information in perpetuity and to hold these records on-site.

The Committee expressed the need for a proper retention schedule and consistency between legislative offices. The Committee therefore recommends:

- 21. That the Act be amended to ensure records management be consistent with that of other legislative offices.**

APPENDICES

Appendix A: Written Submissions to the Committee

Name	Organization
Jim Ellis	Alberta Energy Regulator
Jon Reay	Alberta Investment Management Corporation
Peter Woloshyn	Natural Resources Conservation Board
Mary Persson	University of Alberta
Guy Smith	Alberta Union of Provincial Employees
Noela Inions	Alberta Health Services
David C. Linder	Alberta Securities Commission
Nancy Furlong	Non-Academic Staff Association at the University of Alberta
Carl W. Nohr	Alberta Medical Association
Katrina Piechotta	United Food and Commercial Workers
Nicole Estabrooks	Bow Valley College Faculty Association
Gil McGowan and Gwen Feeny	Alberta Federation of Labour
Kevin Nagel	Keyano College
Tim Grant	Service Alberta
Alexander Shevalier	Calgary & District Labour Council
Merwan Saher	Office of the Auditor General of Alberta
Joel French	Public Interest Alberta
Stephen Lougheed	Alberta Innovates
Laurel D. Evans	NorQuest College
Scott McCormack	Alberta School Boards Association
Kenn Bur	Private Citizen
Brad Jones	Private Citizen
Catherine Schnell	Private Citizen
Rose Zuk	Private Citizen
Mark Fox	Private Citizen
Jeanette Jamieson	Private Citizen
Les Aberle	Private Citizen
Rene Millward	Private Citizen
Paul Buhler	Private Citizen
Bette Gray	Private Citizen
Jeannette Hall	Private Citizen
Antonietta Fiacco and Bev Grimolfson	Private Citizens

Appendix B: Oral Presentations to the Committee

Name	Organization
Peter Hourihan	Office of the Public Interest Commissioner
Merwan Saher and Kerry Langford	Office of the Auditor General of Alberta
Gil McGowan and Gwen Feeny	Alberta Federation of Labour
Philip Bryden and Joan Neatby	Ministry of Justice and Solicitor General (on behalf of Government of Alberta ministries)
Invited Presenter	

PART II: FURTHER RECOMMENDATION TO THE ASSEMBLY

At its September 23, 2016 meeting, the Select Special Ethics and Accountability Committee agreed to the following motion:

that the Assembly appoint a select special committee during the fall 2016 sitting for the purposes of reviewing the *Election Finances and Contributions Disclosure Act*, *Election Act* and the *Conflicts of Interest Act*, that these reviews be completed by March 31, 2017, and that this committee comprise membership similar to the Select Special Ethics and Accountability Committee and have complete access to and use of the submissions, research documents, and other information collected by the Select Special Ethics and Accountability Committee.