



Centre for Free Expression Whistleblowing Initiatives: Assessment of Whistleblowing Provisions

Alberta Public Interest Disclosure (Whistleblower Protection) Act, SA 2012, c P-39.5

Overview

Alberta's PIDA came into force in 2012 and was amended in 2018. The stated purpose of the Act is stated in s. 2(2):

- to facilitate the disclosure and investigation of significant and serious matters in or relating to departments, public entities, offices or prescribed service providers, that an employee believes may be unlawful, dangerous to the public or injurious to the public interest,
- to protect employees who make those disclosures,
- to manage, investigate and make recommendations respecting disclosures of wrongdoings and reprisals,
- to provide for the determination of appropriate remedies concerning reprisals,
- to promote public confidence in the administration of or services provided by departments, public entities, offices and prescribed service providers, and
- any other purpose prescribed in the regulations.

Key Features

Alberta's PIDA applies to current or former employees of the Alberta public sector (departments and "public entities"), as well as "prescribed service providers", who make qualifying disclosures of wrongdoing to the appropriate authority. Qualifying disclosures of wrongdoing include contraventions of law and regulations, acts or omissions that create a "substantial and specific danger" to the life, health or safety of individuals or to the environment, gross mismanagement, "a problem in the culture of the organization relating to bullying, harassment or intimidation" and counselling or directing another person to take such action. Disclosures must be made in writing to a department/public entity's designated officer (DO) or to the Public Interest Commissioner to be protected. In order to obtain redress for reprisal, an employee may make a complaint to the Commissioner. If the Commissioner

investigates and finds that there has been a reprisal, they must refer it to the Alberta Labour Relations Board with recommendations for a remedy.

Assessment

The assessment of Alberta's PIDA was conducted using CFEWI's (2020) best practice criteria, which are based on the U.S. Government Accountability Project (GAP) best practices (2016), the European Directive 2019/1937 on whistleblowing legislation in member states (2019), and CFEWI experience with whistleblowers. GAP is an NGO with over 40 years of experience with whistleblowing regimes across the globe and the European Directive is the result of years of work developing best practices; both contain detailed analysis of all aspects of whistleblowing law. A detailed assessment of the Act can be found on page 5; major shortcomings that are considered "fatal flaws" are highlighted. The overall score on this assessment is 5/25 or 20%.

Freedom to blow the whistle

There are many loopholes in the Act, ranging from limited types of wrongdoing that can be disclosed, subjective terms in the definitions of wrongdoing (e.g. "substantial and specific danger", "reckless or wilful disregard"), overly restrictive avenues and processes for disclosure, broad opportunities to claim privilege to shield records from scrutiny, and almost limitless reasons to dismiss disclosures, including "any valid reason". This is exacerbated by the role of the Commissioner as a gatekeeper to the Labour Relations Board and the lack of a reverse onus of proof for whistleblowers seeking compensation for reprisal. The experience of the Government of Canada Office of the Public Sector Integrity Commissioner is illustrative: not only have few cases (7 out of 405 between 2007 and 2020) been referred to Public Servants Disclosure Protection Tribunal, the Office appears to have actively undermined whistleblower claims at the Tribunal and no one has prevailed before the Tribunal.

Preventing and providing redress for reprisals

With respect to protecting whistleblowers, the rights of implicated public entities and officials appear to be favoured over those of disclosers, who must meet strict criteria and maintain the onus of proving their case throughout the process. The department/public entity implicated has no duty to protect the whistleblower and the Commissioner has no powers to order a stop to reprisals on an interim basis while investigations are in progress. Thus, a whistleblower subject to reprisals may obtain no relief until all investigations have been completed. Further, while confidentiality of the whistleblower is theoretically protected, with anonymous disclosures possible, there are no sanctions for violations of confidentiality or "spillover" reprisals against suspected whistleblowers or anyone who supports their allegations. This might affect recipients of disclosures as well, as even a well-intentioned DO might be subject to reprisals if they investigate a wrongdoing which implicates senior management. These shortcomings make an already uneven playing field more hazardous, particularly as whistleblowers may be at the day-to-day mercy of the officials they have implicated in their disclosure.

Protection of the public

The corrective process for the wrongdoing disclosed is also not credible. First, investigations by DOs are susceptible to pressure from leadership of the department/public entity and DOs have weaker powers than the Commissioner to compel evidence. Second, whistleblowers do not have a right to participate or provide feedback during the course of an investigation. This is important, as implicated officials have a motive to minimize wrongdoing, distort facts, conceal evidence, and generally deflect investigations; whistleblowers are best placed to rebut such efforts. Third, reports arising from investigations may only make recommendations. Should the leadership of an implicated department/public entity decline to act on the recommendations, the matter may be escalated to the political level. However, experience in other jurisdictions suggests that this is unlikely except in circumstances arousing public outrage – with little personal accountability for senior leadership. Fourth, many records are shielded from investigation by solicitor-client, parliamentary, and cabinet privilege. Agencies have been known to shield documents using these exemptions, including under access to information/freedom of information laws. Thus, while Alberta's PIDA appears to give strong powers to investigate and compel evidence in theory, it needs an impartial mechanism to challenge claimed privilege.

Evidence of effectiveness

Finally, the Act does not require the production of meaningful evidence that it is effective. Public entities are mandated to provide information about the whistleblowing process, but there are no standards or training required for managers or employees. Both research and best practices suggest these are key elements in the success of any whistleblowing regime. There are also no meaningful indicators of success or periodic evaluations. The only mandated reporting processes are annual reports by the Commissioner and chief executives of public entities, leaving 5-year legislative reviews as the sole monitoring process. These cannot replace evaluations as they are controlled by the political party holding the majority and recommendations ignored – as with the review of the *Public Servants Disclosure Protection Act* (Parliament of Canada Standing Committee on Government Operations and Estimates, 2017).

Ratings

Category	Strengths	Weaknesses	Score (out of 5)
Freedom to blow the whistle	The right of an employee to decline to participate in a wrongdoing ; the possibility to make anonymous disclosures.	Reportable wrongdoings are limited, include subjective terms, and exclude violations of the <i>Code of Conduct and Ethics for the Alberta Public Service</i> ; restrictive reporting avenues; the omission of many categories of workers from protections (e.g. temp staff and many contractors); no ban on gag orders; a “good faith” requirement (reasonable belief should be all that is required); the absence of protections when a disclosure is made to a supervisor or in the course of duties.	1
Preventing reprisals	Significant potential fines for reprisal; service standards on time allowed for investigations; strong powers of Commissioner to compel evidence in the course of investigations.	A lack of standards for the competence of investigations; the absence of a duty to protect whistleblowers and the lack of protection against “spillover” reprisals against allies of the whistleblower; a lack of interim relief for whistleblowers complaining of reprisal; does not include unconventional reprisals (e.g. ostracizing and blacklisting); confidentiality provisions without penalties for violating.	1
Redress for reprisals	The possibility of “make whole remedies” ; reasonable time limits for investigations.	The absence of a reverse onus for proving reprisal; limited avenues of appeal with Commissioner acting as gatekeeper to Tribunal for complaints of reprisal.	1
Protection of the public	None.	The absence of a credible corrective process (e.g. no standards for investigations and Commissioner may only make recommendations); weak powers and a lack of independence for the department/public entity’s DO to investigate wrongdoing ; loopholes in Commissioner’s powers to compel evidence (e.g. respondents may claim various forms of privilege) ; the imbalance in rights to contribute or respond to investigations and recommendations, favoring the implicated department/public entity over the whistleblower; the absence of injunctive powers to stop the wrongdoing; the lack of authority for the Commissioner to initiate investigations without first receiving a disclosure; Act limited to public sector; appointment of the Commissioner is controlled by governing party (i.e. lacks independence); lack of protections for disclosure to public, even in emergencies or when DO and Commissioner decline to investigate.	0
Evidence of effectiveness	Act is reviewed every 5 years	Organizations only need to communicate rights to disclose internally (i.e. no standards or training); no outcomes or performance indicators; no periodic evaluation (except review of Act).	1

Summary

There is no component of Alberta's Public Interest Disclosure Act that is fit for purpose or comes close to meeting internationally accepted best practices. Overall, the Act places far more emphasis on managing disclosures and complaints than it does on correction of the wrongdoing and the protection of the whistleblower. Key weaknesses in law and implementation on whistleblower protection, remedies for reprisal, and correction of wrongdoing render the Act fatally flawed.

As a consequence, the Act will likely fail to meet its stated objectives as few potential whistleblowers will trust a mechanism perceived to be ineffective at correcting wrongdoing or protecting those who make disclosures.

A regime that is not trusted deters disclosure, leaves wrongdoing uncorrected, provides comfort to wrongdoers, and undermines public confidence. In other words, it is more than ineffective – it harms the public interest.

Sources

CFEWI. (2020). *Evaluation Criteria for Protection of Whistleblowers: A Guide for Legislation and Policy*. Ottawa, ON. Retrieved from [https://cfe.ryerson.ca/sites/default/files/Evaluation Criteria for Whistleblower Protection_0.pdf](https://cfe.ryerson.ca/sites/default/files/Evaluation%20Criteria%20for%20Whistleblower%20Protection_0.pdf)

GAP. (2016). International best practices for whistleblower policies. Retrieved from <https://whistleblower.org/international-best-practices-for-whistleblower-policies/>

European Union. (2019). Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law. Brussels. Retrieved from <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32019L1937>

Hutchison, C. (2020). *Whistleblowers Not Protected: How the Law Abandons Those Who Speak Up in the Public Interest in Alberta*. Edmonton. Retrieved from https://d3n8a8pro7vhmx.cloudfront.net/parklandinstitute/pages/1854/attachments/original/1606973671/Whistleblowers_not_protected.pdf?1606973671

Parliament of Canada Standing Committee on Government Operations and Estimates. (2017). *Strengthening the Protection of the Public Interest Within the Public Servants Disclosure Protection Act: Report of the Standing Committee on Government Operations and Estimates*. Ottawa. Retrieved from <http://www.ourcommons.ca/Content/Committee/421/OGGO/Reports/RP9055222/oggorp09/oggorp09-e.pdf>