

# **2023 Review of The Public Interest Disclosure (Whistleblower Protection) Act**

C. Lynn Romeo

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Available in alternate formats, on request: please contact 204-945-2332 or by email at PSCSIB@gov.mb.ca.

## Table of Contents

Executive Summary .....	1
Chapter 1 Introduction.....	4
1. Mandate.....	4
2. A few definitions .....	5
3. 2018 Amendments.....	6
4. General Process .....	7
Chapter 2 How Are The 2018 Amendments Functioning .....	9
1. How disclosures and reprisal complaints are assessed and investigated .....	9
2. Reprisal complaints now investigated by the Ombudsman .....	11
Chapter 3 “Municipal Opt In” Provisions.....	14
Chapter 4 Review of Disclosures and Whether The Pandemic Affected Disclosures .....	17
1. Number of disclosures and reprisal complaints made since 2018 .....	19
2. Type of disclosures made since 2018 .....	20
3. Effect of the pandemic on number of disclosures made .....	23
4. Effect of the pandemic on type of disclosures made .....	24
Chapter 5 Improving the Functionality of PIDA .....	26
1. Raising awareness, education and training .....	26
2. Reporting and Monitoring.....	30
3. Gaps in PIDA .....	35
(a) Complaints about senior officials .....	35
(b) Section 13 - facilitating resolution of reprisal complaints .....	38
(c) Reprisal protection for designated officers and others.....	38
4. Supporting whistleblowers.....	40
(a) Good faith test .....	40
(b) Non-disclosure agreements .....	42
5. Strengthen reprisal protection .....	43
(a) Reverse onus .....	43
6. Centralizing investigations of disclosures made to government departments.....	44
Chapter 6 Summary of Recommendations .....	47

## Executive Summary

Significant amendments were made to The Public Interest Disclosure Act (Whistleblower Protection) Act (“PIDA”) in 2018. Amendments included a requirement to review PIDA every 5 years. I was retained to conduct the first 5-year review.

My review of PIDA focused mainly on how the 2018 amendments have been functioning. It did not extend to an examination of broad policy issues such as expanding the definition of what constitutes wrongdoing or extending the application of PIDA to the private sector.

Based on my consultations, overall, it appears that the 2018 PIDA amendments were positive and made significant improvements to the legislation, particularly with respect to:

- strengthening the powers of the Ombudsman and designated officers to conduct investigations
- enhancing the powers of the Ombudsman to receive and investigate reprisal complaints and to make recommendations to address acts or threats of reprisal
- extending protections under PIDA to school divisions, school districts and their employees and authorizing government to designate municipalities, including the City of Winnipeg, and local government districts and their employees to be covered by PIDA
- strengthening whistleblower protection by requiring investigators to take steps to protect the identity and procedural rights of all people involved in an investigation and by prohibiting the disclosure of a whistleblower’s identity in a civil court proceeding or a proceeding of an administrative tribunal.

In addition to extensive consultations, I reviewed whistleblower legislation, reports and recommendations for legislative amendments in other jurisdictions; the Centre for Free Expression reports on whistleblower legislation in Manitoba and a number of other Canadian jurisdictions; and reports and articles from other advocacy groups and experts. Through this process gaps, areas of concern and opportunities for improvement were identified.

This report includes a number of recommendations which I believe will support and improve the effective functioning of PIDA. These recommendations fall within the following major areas:

## 1. Raising awareness, education and training

A series of recommendations focus on development of a centralized program of PIDA specific education and related supports to ensure that all public bodies covered by PIDA and their employees have access to information and resources about PIDA. Specific elements of this education program include educating designated officers, who are responsible for managing internal disclosures, and supervisors, who are authorized to receive internal disclosures, to ensure that they are appropriately trained to fulfill their duties.

A series of recommendations focus specifically on raising awareness about PIDA at the municipal and local government level.

## 2. Reporting and Monitoring

Two recommendations which are based on recommendations made in a 2014 PIDA report by Diana Scarth are included, namely:

- creation of a centralized process to track and publish information about internal disclosures made under section 29.1 of PIDA on an annual basis, and
- creation of a central monitoring process to ensure that public bodies are meeting the requirements of PIDA, with the authority to require that specific steps be taken to address any perceived shortcomings.

Additional recommendations focus on enhancing compliance with PIDA requirements including, for example, authorizing the Ombudsman to undertake investigations on their own initiative respecting matters arising under PIDA.

## 3. Gaps in PIDA

A series of recommendations focus on addressing identified gaps in PIDA such as extending reprisal protection to employees who are required to perform duties under PIDA.

## 4. Supporting whistleblowers

A series of recommendations focus on strengthening supports for whistleblowers, for example, removing the “good faith” language from PIDA and replacing it with “reasonable belief” and ensuring that non-disclosure agreements are not used to prevent an employee from making a disclosure of wrongdoing or a reprisal complaint under PIDA.

## 5. Strengthening reprisal protection

A recommendation has been made to include a reverse onus provision respecting reprisal cases in PIDA so that if an employee alleges that a reprisal has taken place, the burden of proving that the action was **not** a reprisal falls to the employer. Advocates argue that introduction of a reverse onus provision will strengthen reprisal protection for whistleblowers.

## Chapter 1 Introduction

### 1. Mandate

I was retained in July, 2023 to conduct a review of The Public Interest Disclosure (Whistleblower Protection) Act (“PIDA”) as required by subsection 37.1(1).<sup>1</sup> The main purpose of the review is to examine how the 2018 amendments have been functioning. The review must also include:

- consulting with the Manitoba Ombudsman, the Office of the Auditor General, the Manitoba Labour Board and Manitoba’s Crown Corporations as well as such other organizations falling under PIDA as I deem appropriate;
- consulting with the Department of Municipal Relations (now the Department of Municipal and Northern Relations) and the Association of Manitoba Municipalities specific to the “opt-in provisions” contained in the 2018 amendments;
- examining the number and type of disclosures made since 2018;
- examining whether the pandemic affected the number and types of disclosures being made.

I was also asked to consider the Centre for Free Expression’s April 11, 2023 assessment of PIDA<sup>2</sup> and the results of the EngageMB survey conducted between July 1, 2023 and August 23, 2023 (“the EngageMB survey”).<sup>3</sup>

On the basis of information obtained through consultations, research and reviews, I have made recommendations for legislative amendments and policy and procedure changes that I believe will support and improve the effective functioning of PIDA.

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<sup>1</sup> The Public Interest Disclosure (Whistleblower Protection) Act S.M. 2018, c.4  
<https://web2.gov.mb.ca/laws/statutes/2018/c00418e.php#>

<sup>2</sup> <https://cfe.torontomu.ca/publications/assessment-manitobas-whistleblower-protection-legislation>

<sup>3</sup> This online survey was administered via the Manitoba government’s central public engagement portal in order to gather perspectives on PIDA. The survey received 129 contributions from respondents, including employees protected under PIDA and the general public.

My mandate did not extend to an examination of broad policy issues such as expanding the definition of what constitutes a wrongdoing or extending the application of PIDA to the private sector. Therefore, these and similar issues were not considered.

## 2. A few definitions

It will be helpful to set out the definitions of several terms that are used throughout this report. PIDA defines “department”, “government body”, “office”, “public bodies”, as well as “chief executive” and “designated officer”. In summary, departments, government bodies and offices are the 3 components that make up public bodies. Chief executives and designated officers perform the primary administrative functions. The definitions are:

**“chief executive”** means

- (a) in relation to a department, the deputy minister of the department;
- (b) in relation to an office, the officer of the Legislative Assembly in charge of the office;
- (c) in relation to a school division or a school district, the superintendent of the division or district or, if there is no superintendent, the secretary-treasurer of the division or district;
- (d) in relation to a municipality, the chief administrative officer of the municipality;
- (e) in relation to a local government district, the resident administrator of the district; and
- (f) in relation to any other government body, the chief executive officer of the body.

**“department”** means a department of the government.

**“designated officer”** means the senior official designated under section 6 to receive and deal with disclosures under this Act.

**“government body”** means

- (a) a government agency as defined in The Financial Administration Act;
- (b) a health authority as defined in The Health System Governance and Accountability Act;
- (c) a child and family services agency incorporated under The Child and Family Services Act;
- (d) a Child and Family Services Authority established under The Child and Family Services Authorities Act;
- (e) a school division or a school district;
- (f) a municipality that is designated in the regulations as a government body for the purposes of this Act;
- (g) a local government district that is designated in the regulations as a

- government body for the purposes of this Act; and
- (h) any other body designated as a government body in the regulations.

**"office"** means

- (a) the office of the Auditor General;
- (b) the office of the Chief Electoral Officer;
- (b.1) the office of the registrar appointed under The Lobbyists Registration Act;
- (c) the office of the Advocate for Children and Youth;
- (c.1) the office of the Information and Privacy Adjudicator; and
- (d) the office of the Ombudsman.

**"public body"** means

- (a) a department;
- (b) a government body; and
- (c) an office.<sup>4</sup>

### **Information about government bodies**

When reviewing this report, it is also important to know that there are over 600 organizations that fall within the definition of a “government body”. These organizations range from large, traditional public sector organizations such as health authorities, universities, school divisions and the cities of Winnipeg and Brandon, to many small organizations often led by volunteer boards that would not typically be seen as public sector organizations.

### **3. 2018 Amendments**

When PIDA came into effect in 2007, Manitoba was the first province to enact stand-alone whistleblower protection legislation. Many provinces followed suit and there was a significant evolution in Canadian whistleblower legislation over the next number of years. In 2013 Diana Scarth was retained to review and evaluate PIDA and make recommendations to improve its functioning. The report “Review of The Public Interest Disclosure (Whistleblower Protection) Act” dated April 24, 2014<sup>5</sup> formed the basis for the 2018 amendments. Key 2018 amendments were:

1. Protections under PIDA were extended to school divisions, school districts and their employees. Authority was given to government to designate, by regulation, municipalities, including The City of Winnipeg, and local government districts to be covered by PIDA.

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<sup>4</sup> The Public Interest Disclosure (Whistleblower Protection) Act S.M. 2018, c.4  
<https://web2.gov.mb.ca/laws/statutes/2018/c00418e.php#>

<sup>5</sup> [https://www.gov.mb.ca/csc/whistle/pdf/pida-scarth\\_report.pdf](https://www.gov.mb.ca/csc/whistle/pdf/pida-scarth_report.pdf)



2. The roles of designated officers and the Ombudsman were clarified and the investigatory powers of a designated officer were strengthened.
3. The amendments authorized the Ombudsman to request, review, and provide recommendations concerning the disclosure procedures of a public body.
4. The amendments specified that an investigator must take steps to protect the identity and procedural rights of all people involved in the investigation.
5. Designated officers were empowered to require employees to produce documents and to be interviewed for the purpose of an investigation.
6. The powers of the Ombudsman were enhanced to receive and investigate reprisal complaints and to make recommendations to address acts or threats of reprisal. Reprisal complaints must be made to the Ombudsman. The employee may file a further complaint about the alleged reprisal with the Manitoba Labour Board if they are not satisfied with the outcome of the Ombudsman's process.
7. Whistleblower protection was strengthened by prohibiting the disclosure of the whistleblower's identity in a civil court proceeding or a proceeding of an administrative tribunal.
8. Requirement to review PIDA every five years was added.<sup>6</sup>

#### 4. General Process

In addition to the specific consultations set out in my mandate, I spoke with a number of designated officers and other senior officials within government departments and government bodies. I reviewed: whistleblower legislation, reports and recommendations for legislative amendments in other jurisdictions; the Centre for Free Expression reports on whistleblower legislation in Manitoba and a number of other Canadian jurisdictions; and reports and articles by a number of other organizations, including Transparency International, Government Accountability Project and Federal Accountability Initiative for Reform.

The major issues considered in my discussions with designated officers, senior officials and others were:

- Are the designated officers, supervisors and chief executives of public bodies aware of their responsibilities under PIDA and knowledgeable about the procedures to be followed in managing disclosures? How might their

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<sup>6</sup> The Public Interest Disclosure (Whistleblower Protection) Act S.M. 2018, c.4  
<https://web2.gov.mb.ca/laws/statutes/2018/c00418e.php#>

awareness and knowledge be improved?

- Are the employees of public bodies aware of PIDA and knowledgeable about their rights and obligations under it? How might their awareness and knowledge be improved?
- How are public bodies communicating with employees about PIDA and how might communications be improved?
- What types of disclosures are public bodies receiving?
- Did the pandemic affect the number and types of disclosures being made?
- How are public bodies reporting disclosure information? Is there sufficient information being made available in public reports to build confidence in the system?
- Are the enhanced powers of the Ombudsman and designated officers under the 2018 amendments functioning effectively and are they adequate? Are there any gaps?
- Are there procedures and developments in other jurisdictions which could inform best practices?
- Are there concerns expressed by advocacy groups which could inform best practices?

While overall, consultations indicated that the 2018 amendments were positive and made significant improvements to the legislation, gaps and areas of concern were identified. Consideration of comments by advocacy groups, including the Centre for Free Expression and developments in other Canadian jurisdictions also identified areas for improvement.

## Chapter 2 How Are The 2018 Amendments Functioning

### 1. How disclosures and reprisal complaints are assessed and investigated

Many advocates in multiple jurisdictions are critical of the fact that so few disclosures of wrongdoing are investigated, and even fewer findings of wrongdoing are made. Their conclusion is often that the process for assessing and investigating disclosures is flawed. I explored this issue at length with the Ombudsman and a number of designated officers in government departments and government bodies.

The 2021/22 Ombudsman annual report describes how disclosures of wrongdoing are assessed<sup>7</sup>. Each disclosure of wrongdoing is carefully assessed to determine if an allegation meets the PIDA definition of wrongdoing, if there is enough information to support the allegation at face value and if PIDA is the most appropriate process to have the matter investigated. In the vast majority of cases, a decision to decline investigating a disclosure was made on the basis of one or more of the following reasons:

- the matter could be more appropriately dealt with according to a procedure provided for under another Act;
- the disclosure does not deal with a sufficiently serious matter;
- the disclosure does not provide adequate particulars about the wrongdoing alleged;
- the disclosure relates to a matter that could more appropriately be dealt with according to procedures under a collective agreement or employment agreement.

The reasons for declining to investigate a disclosure of wrongdoing are documented and the person making the disclosure is informed in writing of the decision and the reason(s) for making that decision.

In our discussions officials confirmed that the process for assessing a disclosure to determine whether or not to conduct an investigation is rigorous.

The 2019 Ombudsman annual report provides the reasons for some of the decisions made to decline to investigate reprisal complaints.<sup>8</sup> This information coupled with

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<sup>7</sup> <https://www.ombudsman.mb.ca/uploads/document/files/2021-22-annual-report-FINAL-JAN-2023-edition2-revised-with-corrections.pdf> (at page 43)

<sup>8</sup> <https://www.ombudsman.mb.ca/uploads/document/files/2019-annual-report-en-en.pdf>

information from my discussions with officials confirmed that the process for assessing a complaint of reprisal to determine whether or not to conduct an investigation is also rigorous. According to the report, reasons for decisions not to investigate include:

- there was no evidence of the complainant's involvement in a matter under PIDA;
- the measure (termination or disciplinary action) was taken against the employee prior to any involvement under PIDA or for other documented reasons;
- the complainant was not in an employer/employee relationship with the public body.

In our discussions, Ombudsman staff also described a fulsome investigative process in which there are numerous opportunities for employees to provide information and respond to allegations and information provided by others. The advantages of such a process include it being confidential, accessible and non-adversarial (written evidence is not required and formal hearings are not held).

The Ombudsman's investigative process also includes taking certain actions even in cases where no investigation is conducted or where an investigation is conducted and no wrongdoing is confirmed. I noted 3 examples of such actions in case summaries included in the Ombudsman's 2020 and 2021/22 annual reports. In the first example, an investigation found inconsistencies in a department's processes which could lead to misuse of government assets. The Ombudsman made recommendations for administrative improvements which the department agreed to implement.<sup>9</sup> In the second example, an investigation by the Ombudsman identified concerns regarding how a government body handled the disclosure. As a result, the Ombudsman started an investigation under The Ombudsman Act to review the organization's administrative policies, processes and compliance with PIDA requirements.<sup>10</sup> In the third example, although there was insufficient information available to support an investigation of the disclosure, the Ombudsman forwarded

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<sup>9</sup> <https://www.ombudsman.mb.ca/uploads/document/files/2020-annual-report-web-en-en.pdf>

(at page 38)

<sup>10</sup> <https://www.ombudsman.mb.ca/uploads/document/files/2021-22-annual-report-FINAL-JAN-2023-edition2-revised-with-corrections.pdf>

(at page 45)

the allegations to the organization's senior management and board thus providing the organization with the opportunity to review its administrative processes.<sup>11</sup>

The Ombudsman advises that such actions are taken in the interests of improving transparency and good governance. These actions also create opportunities to focus on educating and supporting public bodies.

Designated officers in several government bodies also described robust investigative processes during our consultations, however most of those in departments spoke of lack of experience and training in conducting investigations. I expect that the same is true for designated officers in a majority of government bodies. I have therefore made a number of recommendations respecting training of designated officers in Chapter 5 of this report to ensure that the investigative processes in government bodies and departments are robust.

Based on my broad consultations and information provided, I believe the 2018 amendments respecting roles of designated officers and the Ombudsman, the improved investigatory powers of designated officers, the clarification around consultations by designated officers, the requirement that investigators take steps to protect the identity and procedural rights of all people involved in an investigation have been positive and have significantly improved PIDA. I also note that the Centre for Free Expression commented at page 9 of its assessment that "significant improvements were introduced in 2018."<sup>12</sup> Other jurisdictions, including Alberta and Canada have recommended incorporating a number of the 2018 amendments into their whistleblower legislation.

## **2. Reprisal complaints now investigated by the Ombudsman**

The 2018 amendments to PIDA enhanced the powers of the Ombudsman to receive and investigate reprisal complaints and to make recommendations to address acts or threats of reprisal. This amendment was intended to provide a process for investigating allegations which was more accessible, less adversarial and did not involve the same risk of public identification as proceedings before the Manitoba

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<sup>11</sup> <https://www.ombudsman.mb.ca/uploads/document/files/2021-22-annual-report-FINAL-JAN-2023-edition2-revised-with-corrections.pdf>  
(at page 45)

<sup>12</sup> <https://cfe.torontomu.ca/publications/assessment-manitobas-whistleblower-protection-legislation>

Labour Board. Section 28 provides the employee with the option of filing a further complaint about the alleged reprisal with the Board if the employee is not satisfied with the outcome of the Ombudsman's process.

The EngageMB survey included a question about the enhanced powers of the Ombudsman with respect to reprisal protection. An overwhelming number of participants agreed the enhanced powers protect people against reprisal complaints (46% strongly agreed, 38.9% agreed and 13.5% somewhat agreed). One respondent indicated the current process of making a reprisal complaint to the Ombudsman "is a much better option (less adversarial) than going directly to the Labour Board" and another noted that enhancing the Ombudsman's powers to investigate reprisal "is a natural fit". These responses are consistent with many of the comments I heard during my consultations.

Extending the Ombudsman's jurisdiction in this manner is consistent with the approach taken in a number of other Canadian jurisdictions, including Prince Edward Island, Saskatchewan and Alberta. Their legislation also provides that reprisal complaints are made to the Commissioner and investigated in the same manner as disclosures. PIDA also provides the option of making a further complaint to the Labour Board. Advocates consider the existence of this right of access to the Labour Board (which can order a full range of remedies and offers avenues of appeal) one of the most significant strengths of PIDA.<sup>13</sup>

Overall, the 2018 amendments which enhanced the powers of the Ombudsman with respect to reprisal protection and provide the option of making a further complaint to the Labour Board are functioning well.

Many advocates and experts see mediation processes an effective way to resolve allegations of reprisal. One of the suggestions I heard during my consultations was that the role of the Labour Board should be expanded to give complainants the option of making reprisal complaints to the Ombudsman or the Labour Board in the first instance. The complainant would then be in a position to choose the option that offered the most effective remedies for their particular circumstances. Factors cited to me in support of this approach included: the Labour Board has the authority to grant interim relief, which is an important remedy in terms of reprisal protection, Board officers are trained in mediation processes and the Board's success rate in mediation

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<sup>13</sup> <https://cfe.torontomu.ca/publications/assessment-manitobas-whistleblower-protection-legislation>

cases is quite high.

While I agree that providing whistleblowers with options is desirable, a complainant does have recourse to the Labour Board under PIDA following the Ombudsman's review. By all accounts, this 2018 amendment appears to have been working well and I therefore believe that amendments to PIDA are not required.

## Chapter 3 “Municipal Opt In” Provisions

The 2018 amendments extended protections under PIDA to school divisions, school districts and their employees. The amendments also provided that the government could, by regulation, designate municipalities, including the City of Winnipeg, and local government districts to be covered by the PIDA. The designation by regulation provisions have been described as “municipal opt in” provisions, suggesting that a municipality or local government district would only be designated if it so requested. While this may be the general understanding, it is important to note that the legislation contains no such limitation on the government’s authority to designate a municipality or local government district as a government body under PIDA.

The Cities of Winnipeg and Brandon were designated by regulation as government bodies for the purposes of PIDA when the 2018 amendments came into effect. In February, 2023 the City of Flin Flon resolved to “opt in” and thus begin the process to be bound by PIDA. To my knowledge, following consultations described below, no other municipalities or local government districts have expressed an interest in opting in and being bound by PIDA.

When the 2018 amendments were introduced, the Association of Manitoba Municipalities (AMM) provided a written submission to the Standing Committee of Human Resources which was considered at its hearings on May 8, 2018. The submission stated in part, “In light of the provincial government’s commitment to ensure municipalities have a “fair say”, the AMM welcomes the option by regulation for local governments to opt-in to the PIDA framework”.<sup>14</sup> The AMM also stated that flexibility is important, particularly for smaller municipalities and called on the government to provide training and resource materials to all interested municipalities.

During consideration of the amendments by the Standing Committee on Human Resources on May 8, 2018, concerns were expressed that PIDA did not cover all municipalities and the government was urged to include municipalities and local government districts at every opportunity.<sup>15</sup> Similar views were expressed by a number of participants in the EngageMB survey conducted in the summer of 2023. In particular they stated that the application of PIDA to all municipalities and local government districts should be mandatory.

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<sup>14</sup> [https://www.gov.mb.ca/legislature/hansard/41st\\_3rd/hr\\_01/hr\\_01.html](https://www.gov.mb.ca/legislature/hansard/41st_3rd/hr_01/hr_01.html) (at page 97)

<sup>15</sup> [https://www.gov.mb.ca/legislature/hansard/41st\\_3rd/hr\\_01/hr\\_01.html](https://www.gov.mb.ca/legislature/hansard/41st_3rd/hr_01/hr_01.html)



Based on my consultations with senior officials in the AMM, the Manitoba Municipal Administrators' Association (MMAA) and the Department of Municipal and Northern Relations, I believe that extending PIDA to all municipalities and local governments would be premature at this time. Information provided during consultations that informed this conclusion include:

- At the time 2018 amendments were introduced, municipalities and local government districts appear to have been informed that PIDA would apply only to those that specifically opted in and requested that they be designated as a government body under the regulations. This appears to have been a significant factor in AMM's decision to support the extension of PIDA.
- Since enactment of the 2018 amendments there has been significant turnover in municipal councils with approximately 45% of officials being newly elected. Many chief administrative officers are also new to their roles. During this period there has been no sustained outreach or information about PIDA. Together, these factors have resulted in a widespread lack of awareness about PIDA and the "opt in" provisions at the municipal level.
- Most municipalities and local government districts are small organizations with very few employees. I am informed that many are experiencing vacancies in the chief administrative officer role. In these circumstances, mandating applicability of PIDA without building awareness and enhancing capacity would be highly problematic. In this regard, I also note the concerns expressed by the AMM in its submission to the Standing Committee on Human Resources that appointing a chief administrative officer as designated officer in smaller municipalities would not be practical.<sup>16</sup>

### **Recommendation 1**

While I am not prepared to recommend a mandatory extension of PIDA to all municipalities and local government districts at this time, I do recommend that steps be taken to better equip municipalities and local government district to be designated and to ensure they have better support when they are designated; whether the designation is by opt in or is mandated. Significant efforts should be undertaken to raise awareness about PIDA in municipalities and local government districts and at a minimum:

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<sup>16</sup> [https://www.gov.mb.ca/legislature/hansard/41st\\_3rd/hr\\_01/hr\\_01.html](https://www.gov.mb.ca/legislature/hansard/41st_3rd/hr_01/hr_01.html) (at page 97)

- (a) The Public Service Commission (PSC) develop an informational package respecting PIDA designed for municipalities and local government districts, with a view to encouraging them to opt in;
- (b) The Deputy Minister responsible for the Department of Municipal and Northern Relations be reminded annually to ensure information respecting PIDA is sent to all municipalities and local government districts that have not yet been designated; and
- (c) The PSC and the Department of Municipal and Government Relations develop a strategy for raising awareness about PIDA as well as building capacity at the municipal level utilizing the well-developed relationships and processes in place within the department for consulting and working with these organizations. The strategy should ideally include input from the Ombudsman.

## Chapter 4 Review of Disclosures and Whether The Pandemic Affected Disclosures

My mandate included reviewing the number and type of disclosures made since PIDA was amended in 2018 and exploring whether the pandemic affected the number and type of disclosures being made.

The amendments came into effect December, 2018. This report therefore focuses on disclosures made during fiscal years 2018/19 to 2022/23 (calendar years 2019-2022 for entities reporting on a calendar year basis), (the “review period”). I note that not all reports for fiscal year 2022/23 were available at the time of writing this report.

PIDA provides that employees who reasonably believe they have evidence that a wrongdoing has been committed, or is about to be committed; may make a disclosure to their supervisor or their organization’s designated officer or the Ombudsman.<sup>17</sup> If a disclosure is made to the supervisor, the supervisor must promptly refer the matter to the designated officer. Disclosures made to a supervisor or designated officer are sometimes referred to as internal disclosures and those made to the Ombudsman are sometimes referred to as external disclosures.

PIDA requires that each chief executive report annually on all disclosures of wrongdoing received by the designated officer. The report must include:

- (a) the number of disclosures received, and the number acted on and not acted on;
- (b) the number of investigations commenced as a result of a disclosure; and
- (c) if there is finding of wrongdoing, a description of the wrongdoing and any recommendations or corrective actions taken or the reasons why no corrective action was taken.<sup>18</sup>

The Ombudsman must report annually on the exercise and performance of its functions and duties under PIDA:

- (a) the number of general inquiries relating to this Act;
- (b) the number of disclosures received, and the number acted on and not acted on;
- (c) the number of investigations commenced under this Act;

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<sup>17</sup> <https://web2.gov.mb.ca/laws/statutes/ccsm/p217.php?lang=en>

<sup>18</sup> <https://web2.gov.mb.ca/laws/statutes/ccsm/p217.php?lang=en>  
(see s 29.1(1)-(3))

- (d) the number of recommendations the Ombudsman has made and whether the public body has complied with the recommendations;
- (e) whether, in the opinion of the Ombudsman, there are any systemic problems that give rise to wrongdoings; and
- (f) any recommendations for improvement that the Ombudsman considers appropriate.<sup>19</sup>

As noted earlier, there are more than 600 hundred public bodies covered by PIDA. Because there is no centralized process in place to track and publish information regarding internal disclosures made under PIDA annually, my review of disclosures was necessarily limited. In conducting the review, I examined publicly available information for 21 public bodies and many of these organizations provided me with additional information during our consultations. In summary:

- All departments of government (treated as 1 organization for this purpose). Reports about disclosures required by PIDA are included in each department's annual report. A summary of the disclosure reports is compiled annually by the Public Service Commission and posted to its website.<sup>20</sup>
- 16 government bodies. Of these, 8 reported disclosures and 8 had no disclosures to report.<sup>21</sup>
- 3 independent offices of the Legislative Assembly. These offices had no disclosures to report.
- Office of the Ombudsman with respect to external disclosures. The Ombudsman's annual report for 2022/23 was not complete at the time of conducting this review therefore only disclosures for 2019, 2020 and 2021/22 are included.

I also searched the websites of many other government bodies and noted that information about PIDA varied widely. In many instances there was no reference whatsoever to PIDA while some websites contained extensive information, including the body's PIDA policies and procedures. In many cases annual reports were not available. The annual reports of many government bodies, including several of the 16 examined did not make any reference to PIDA or any disclosures made under PIDA.

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<sup>19</sup> <https://web2.gov.mb.ca/laws/statutes/ccsm/p217.php?lang=en> (see s 29.2(1))

<sup>20</sup> [https://www.gov.mb.ca/csc/whistle/pdf/pida-disclosure\\_stats.pdf](https://www.gov.mb.ca/csc/whistle/pdf/pida-disclosure_stats.pdf)

<sup>21</sup> The 16 government bodies include crown corporations and several government bodies in each of the health and education related sectors.

A number of government bodies did not respond to requests for information about their PIDA policies, procedures and disclosures.

## 1. Number of disclosures and reprisal complaints made since 2018

### Disclosures (internal and external)

Total number of disclosures considered:	<b>146<sup>22</sup></b>
Disclosures investigated; no wrongdoing found:	<b>35<sup>23</sup></b>
Disclosures investigated; wrongdoing confirmed:	<b>8</b>
Disclosure reviews in process:	<b>2<sup>24</sup></b>

### Reprisal complaints

Following enactment of the 2018 amendments, reprisal complaints are made to the Ombudsman in the 1<sup>st</sup> instance. The complainant has an option to make a further complaint to the Manitoba Labour Board in certain circumstances.<sup>25</sup>

The Ombudsman annual reports indicate that there were 13 reprisal complaints made between 2019 and 2021/22.<sup>26</sup> The 2019 annual report notes that 9 reprisal complaints were received in that calendar year, 1 complaint was investigated and the complaint of reprisal was not substantiated. Of the 4 complaints made in 2020 and 2021/22, 1 was investigated and the investigation was discontinued when the complaint was withdrawn.

The Manitoba Labour Board confirmed that 2 reprisal matters were received in 2019

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<sup>22</sup> The Ombudsman's annual report for 2022/23 was not complete at the time of conducting this review; only disclosures for 2019, 2020 and 2021/22 are included.

<sup>23</sup> Of these disclosures, 1 investigation included 2 disclosures about same matter and 2 investigations were discontinued. The Ombudsman's annual report for 2022/23 was not complete at the time of conducting this review; only disclosures for 2019, 2020 and 2021/22 are included.

<sup>24</sup> The Ombudsman advises that 1 of these is informed by 3 disclosures.

<sup>25</sup> <https://web2.gov.mb.ca/laws/statutes/ccsm/p217.php?lang=en>

(see s 27.1 and s 28)

<sup>26</sup> The Ombudsman's annual report for 2022/23 was not complete at the time of conducting this review.

and 1 in 2020. My research confirmed that one of the 2019 matters was a request by a complainant to review a decision made by the Board in 2018; the other was a complaint of reprisal made to the Board under section 28(1) of PIDA following dismissal of the complaint by the Ombudsman. The 2020 matter was a request by the complainant to review the Board's 2019 decision. Both the 2019 and 2020 reviews were dismissed.

The Board confirmed that as of March 31, 2023, no other reprisal complaints had been made under subsection 28(1) of PIDA.

## 2. Type of disclosures made since 2018

The PIDA reporting requirements for internal disclosures clearly provide that the requirement to include a description of the matter disclosed applies **only** if an investigation results in a finding of wrongdoing. Given that few disclosures have resulted in a finding of wrongdoing, there is very little publicly available information about the type of internal disclosures made. I note that the disclosure reports of a few government bodies I examined provide some very general information about other disclosures received even though they are not required to do so.

PIDA does not require the Ombudsman to provide any descriptions of disclosures received even where wrongdoing is confirmed. I note however, that annual reports for fiscal years 2020/2021 and 2021/2022 include case examples of disclosures that were assessed and a decision made not to investigate. The reports also include case examples of disclosures which were investigated but no findings of wrongdoing were made. The Ombudsman advises that these case examples are included to educate and promote transparency while respecting the confidentiality requirements under PIDA. The case examples help illustrate the decision-making process followed by the Ombudsman when disclosures are received.

Given the lack of publicly available information, I inquired about the type of disclosures being made during my consultations with designated officers and the Ombudsman. All of them expressed the importance of respecting the confidentiality requirements of PIDA. Many designated officers advised that information about disclosures received prior to their appointment as designated officers was not available to them. In cases where information was available, disclosures were discussed globally and in very generic terms so that individuals and public bodies could be assured that confidentiality was not compromised.

In our discussions, there was agreement that the most common types of disclosures are:

- human resource and employment related issues that are personal in nature; and

- matters which are perceived to be “wrong” but are relatively minor in nature and do not rise to the level of wrongdoing under PIDA.

This information is consistent with the experience in other jurisdictions.

Publicly available information about the types of wrongdoing confirmed included: employees committing offences, employees misusing employer resources for their own benefit, employees directing others to commit a wrongdoing, data breaches, financial mismanagement and conflict of interest. Some cases included findings of several different types of wrongdoing.

Information disclosed by some government bodies did not appear to be PIDA compliant, referencing only the number of disclosures received, with no reference to whether the disclosures were acted on or not. While some government bodies include “nil” reports in their annual reports, many make no reference to PIDA. The reasonable conclusion might be that all government bodies that do not include disclosure information are aware of their reporting obligations and had no disclosures to report. However, the lack of any references to PIDA on the websites of many government bodies I searched and the lack of awareness of PIDA in many smaller government bodies reported by the Ombudsman leads to concerns about whether it is reasonable to conclude that all of these government bodies had no disclosures. This reinforces the need for:

- a centralized process to track and publish information regarding internal disclosures made under PIDA;
- a central monitoring process to ensure that government bodies are complying with the requirements of PIDA; and
- enhanced awareness of and improved education about PIDA  
all of which are discussed in a broader context in Chapter 5 of this report.

Because my mandate specifically required a review of the type of disclosures made since the 2018 amendments, I also explored the issue of whether amending PIDA to require general information about the nature of the wrongdoing being alleged in **all** disclosures received might be beneficial. A longstanding criticism of whistleblower legislation in Canada is the lack of transparency in public reporting. Advocates and critics argue that greater transparency in reporting helps build confidence in the system.

During my consultations concerns were expressed that even general information can be used to identify a whistleblower or the alleged wrongdoer, particularly in smaller departments and government bodies. A number of people interviewed were also of the view that providing general information about the type of disclosures made would not have the effect of increasing confidence in the system or knowledge within the public body because the information would of necessity be so limited.

In its 2014 report called Manitoba's Framework for an Ethical Environment, the Auditor General recommended that the Civil Service Commission (now the PSC) and departments track investigations of ethical violations by type. The Auditor General noted that not maintaining the investigations by category or type is a lost opportunity to identify trends or systemic issues that may exist. The report also stated that this information could assist in making changes to policies and procedures and developing training to address issues.<sup>27</sup>

The PSC annual reports now contain a summary of annual investigations broken down into 3 broad categories: sexual harassment, Respectful Workplace (includes harassment and bullying) and other misconduct (includes attempted fraud, conflict of interest or other inappropriate conduct).<sup>28</sup> Similarly, the Office of the Auditor General advised it tracks concerns received from its citizen concern line by the nature of the allegation. The categories developed are quite broad. Examples include conflict of interest matters; misuse of funds/mismanagement of assets; procurement/tendering matters and human resource matters.

The concerns I heard around the risks to maintaining confidentiality and the fact that the PIDA reporting requirements are consistent with those of other Canadian jurisdictions lead me to conclude that I should not recommend amending PIDA to include a description of the nature of the wrongdoing alleged in all disclosures made. If a policy decision is made that such information would be of value and amendments are contemplated, the processes followed by the PSC and the Office of the Auditor General in tracking investigations and allegations by type or category provide models which could be considered to enhance public reporting of disclosure information.

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<sup>27</sup> <https://www.oag.mb.ca/wp-content/uploads/2019/09/Chapter-7-MB-Framework-for-an-Ethical-Environment-Web.pdf> See pages 328-329

<sup>28</sup> [https://www.gov.mb.ca/csc/publications/annrpt/pdf/2022-23\\_annualrpt\\_en-fr.pdf](https://www.gov.mb.ca/csc/publications/annrpt/pdf/2022-23_annualrpt_en-fr.pdf) (see page 63)



### 3. Effect of the pandemic on number of disclosures made

I reviewed the disclosures referenced above for the period April 1, 2020, which was the effective date of the first lockdown to March 31, 2022, which was the date on which the last restrictions were phased out (the “pandemic period”).

Departmental disclosures remained relatively constant during the pandemic period, with 3 disclosures in fiscal year 2020/21 (same as the previous year) and 2 in fiscal year 2021/22. Disclosures fell to 1 in fiscal year 2022/23.

There was a slight decline in disclosures in the crown corporations during the pandemic period with 5 in 2020/21 (down from 7 in 2019/20) and 3 in 2021/22. Disclosures increased to 4 in 2022/23.

Disclosures in the health-related entities were low during the pandemic period with no disclosures in 2020/21 and 2 in 2021/22; however, these entities also reported no disclosures in 2018/19 and 3 in 2019/20. There were 5 disclosures in 2022/23.

Disclosures to the Ombudsman remained consistent with previous years in calendar year 2020 (the first year of the pandemic) and declined somewhat in the 15-month period from January 2021 to March 31, 2022. While information about disclosures in fiscal year 2022/23 was not available at the time this review was conducted, the Ombudsman advises that disclosures remained relatively consistent with the previous year. The number of disclosures to the Ombudsman over the pandemic period were:

Calendar year 2019 - 35;

Calendar year 2020 - 33;

January 2021 to March 31, 2022 (15-months) - 25;

Fiscal year 2022/23 - not available.

In light of the relatively small number of disclosures each year in departments and many of the government bodies examined and the inconsistent patterns observed, I cannot draw any conclusions as to whether the pandemic affected the number of disclosures made under PIDA. Simply put, there is just not enough information available to draw any informed conclusions.

#### 4. Effect of the pandemic on type of disclosures made

For the reasons noted earlier in this report, a review of publicly available information has not been very helpful to my consideration of whether the pandemic affected the type of disclosures made. A few public bodies provide very general information about all disclosures received. A review of that information indicated that the nature of the disclosures made during the pandemic years did not differ from those made in the other years. The Ombudsman's 2021/22 annual report referred to a disclosure about a public body's Covid-19 vaccination policy. The employee was advised that this concern was best addressed by their union or human resources department.<sup>29</sup>

In discussions with designated officers a majority indicated that they saw no discernable difference in the types of disclosures made in the pandemic years. One designated officer commented that general inquiries and complaints to their hotline and to managers and union representatives increased during the pandemic years. These were not PIDA disclosures. They mentioned that many of these complaints/questions related to requirements to share personal health information about testing and vaccine status. This designated officer also reported that while general inquiries and complaints about safety issues are common, during the pandemic period these inquiries and complaints (again, not PIDA disclosures) often focused on pandemic related matters such as whether the workplace was enforcing requirements in the context of screening, quarantining and masking.

Senior officials in the Office of the Auditor General had no comments respecting the effect of the pandemic on PIDA disclosures. They did note however that calls to their citizens concern hotline during the pandemic period included many pandemic related concerns, most frequently about vaccine and masking requirements.

The Manitoba Labour Board confirmed that there were no new reprisal complaints under section 28 of PIDA during the pandemic period. As noted earlier, the matter they received in 2020 was an application for review of a decision about a reprisal complaint made in 2019. Consistent with the other comments I received, the Board noted that there was an increase in the number of labour grievances filed at the Board during the pandemic period. Grievances based on pandemic related matters such as vaccine status and testing and masking requirements were the main source of the increase.

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<sup>29</sup> <https://www.ombudsman.mb.ca/uploads/document/files/2021-22-annual-report-FINAL-JAN-2023-edition2-revised-with-corrections.pdf>

In our consultations, the Ombudsman staff confirmed receiving many questions respecting health orders, mandates and the government's authority to make and enforce them. There were a few disclosures under PIDA alleging wrongdoing most frequently based on individuals being asked about their vaccine status or concerns about the safety of the workplace. Investigations were declined on the basis that these matters:

- did not constitute wrongdoing under PIDA;
- were more appropriately dealt with according to procedures under a collective agreement or employment agreement; and/or
- were more appropriately dealt with according to a procedure under another act (for example, The Workplace Safety and Health Act). Inquiries and disclosures relating to requiring information about vaccine status and other Covid health related issues were dealt with under The Freedom of Information and Protection of Privacy Act.

Based on the information available to me from public sources and through consultations, it appears that the pandemic may have affected the type of disclosures made during the pandemic period in that there were some disclosures made about health orders such as vaccine mandates, masking requirements and workplace practices arising from health orders, such as enforcement of quarantining, testing and masking requirements.

To summarize, I explored the issue of whether the pandemic affected the number and type of disclosures being made as requested. I have concluded that there was simply not sufficient information available to determine if the number of disclosures was affected. While it appears that the pandemic may have affected the type of disclosures being made, because the available information was very limited and often anecdotal, I could not determine the extent to which the type of disclosures may have been affected. I also concluded that amendments to PIDA requiring a description of the wrongdoing alleged in all disclosures are not required.

## Chapter 5 Improving the Functionality of PIDA

### 1. Raising awareness, education and training

Reports on whistleblower legislation in Canada and other jurisdictions often reference the general lack awareness of employees about this legislation. Advocates have long suggested that this lack of awareness is one of the reasons why there are so few disclosures.

For the most part, designated officers I spoke with agreed that employees in their organization were not generally aware of or knowledgeable about PIDA. Although the EngageMB survey response pool was small (129 responses to the question “how would you rate your current knowledge of PIDA procedures?”), 45.2% responded that they had either no knowledge or minimum knowledge. This result certainly supports the information received in consultations.

One of the concerns I heard most frequently in consultations was the lack of education and training opportunities for employees about PIDA. This lack of education and training extended to most designated officers, some of whom reported that they felt unprepared to carry out their duties. This comment was more commonly expressed by designated officers in government departments who noted that there are very few opportunities to develop expertise and knowledge given the small number of internal disclosures received. Based on my consultations, I would add that this concern is also reflective of the fact that many designated officers in government departments had been in the role for less than a year. Designated officers within government bodies who were lawyers or who had previous experience conducting investigations reported feeling better prepared to meet their obligations.

As noted earlier in this report, PIDA applies to more than 600 government bodies. Many of these organizations are small, often led by volunteer boards and not typically viewed as public sector bodies. It is challenging for these organizations to fulfil their disclosure management and reporting obligations under PIDA and to provide education and training to their employees.

Diana Scarth reported hearing concerns respecting lack of education about PIDA in the 2014 review.<sup>30</sup> One of the resulting amendments to PIDA is section 8 that

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<sup>30</sup>[https://www.gov.mb.ca/csc/whistle/pdf/pida-scarth\\_report.pdf](https://www.gov.mb.ca/csc/whistle/pdf/pida-scarth_report.pdf)

requires the chief executive to ensure that information about PIDA and the disclosure procedures are widely communicated annually to the employees of the public body for which the chief executive is responsible.<sup>31</sup> This is the only provision in PIDA that imposes any obligations with respect to training and education. Compliance with this requirement by the public bodies I engaged with was inconsistent.

In our discussions, the PSC advised that there were a number of outreach and training initiatives undertaken in the lead up to the introduction of the 2018 amendments. Indeed, there is a significant amount of useful information about PIDA available on the PSC and Ombudsman websites. Experienced designated officers reported being aware of these resources and many indicated they were comfortable reaching out for advice and support if needed. The PSC, Ombudsman and experienced designated officers noted that prior to the pandemic these resources were augmented by additional supports such as designated officer meetings (hosted by the Ombudsman), in person orientation and training programs delivered on request, and ad hoc advice respecting investigations and procedures for managing disclosures.

Recognizing both the significant turn over in the public service since 2018 and the need to re-engage with public bodies after the pandemic, the PSC is developing a series of online training modules for release in early 2024. The first series is primarily intended for designated officers and supervisors. Another series is expected to follow later in 2024 that will focus on education and support for employees and the general public. Senior officials advise that these training modules will be made available to all public bodies covered by PIDA. This education initiative is a very positive development.

In our discussions, both the Ombudsman and PSC acknowledged the important role that education plays in the proper functioning of PIDA. Both entities have participated in past initiatives to this end. However, there is no clear mandate or centralized system in place to ensure that:

- the necessary education and related supports are available when needed,
- employees and public bodies know how to access the supports, and
- there is a process in place to ensure that supports are current and reflective of the needs of public bodies and their employees.

I believe that a centralized educational program should be developed to ensure that employees and employers across the broad range of public bodies covered by PIDA

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<sup>31</sup> <https://web2.gov.mb.ca/laws/statutes/ccsm/p217.php?lang=en>

have access to education and related supports.

Given the PSC's broad role and duties with respect to the public service as set out in The Public Service Act<sup>32</sup>, and its expertise in developing, providing and coordinating education and training across government, the PSC is well positioned to be responsible for a PIDA specific educational program of the nature contemplated. I heard many thoughtful suggestions about educational and related supports that would be particularly useful and have included these in the recommendations and related discussions that follow.

As noted earlier, there are many newly appointed designated officers and inevitably, changes in designated officers will continue to occur. Responsibility to ensure employees, the PSC and the Ombudsman's office are kept informed about who has been appointed as the designated officer for each public body is not assigned. Based on my consultations and online research, I believe that assigning responsibility for this could improve the functionality of PIDA. Examples of benefits include:

- Communication with employees about the appointment of a new designated officer provides an opportunity to raise awareness about PIDA and the role of the designated officer in the public body and provides critically important information to an employee who is considering making a disclosure.
- Communication by the PSC with hundreds of public bodies about significant PIDA matters appears to depend on vague and often outdated contact information resulting in communications that do not reach the appropriate persons. The opportunity to contact the designated officer directly in some circumstances would enable the PSC to engage more effectively with public bodies and to gain a greater understanding of their education needs and to better support designated officers.
- There are many points of contact between the Ombudsman and designated officers, especially following a disclosure. Seamless contact with designated officers provides the Ombudsman with the opportunity to build effective working relationships and build capacity within public bodies to manage disclosures, particularly investigations.

## **Recommendation 2**

The PSC develop a centralized program of PIDA specific educational and

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<sup>32</sup> <https://web2.gov.mb.ca/laws/statutes/ccsm/p271.php?lang=en>

related supports to ensure that all public bodies covered by PIDA and their employees have access to information and resources about PIDA. The overarching purposes would include such matters as:

- (a) Informing public bodies and their employees about PIDA thereby raising awareness about the legislation.
- (b) Educating employees about their rights and obligations under PIDA.
- (c) Educating designated officers and supervisors about managing disclosures, conducting investigations, reporting on disclosures as well as communicating with employees about PIDA.
- (d) Developing a process to ensure that supports are current and reflective of the needs of public bodies and their employees.
- (e) Developing a process to ensure that information about the appointment of a designated officer is communicated and readily available to employees of the public body, the PSC and the Ombudsman.

### **Recommendation 3**

At a minimum the PSC should include the development and release, as soon as practicable, of the 2 series of online training modules described above (accessible to all public bodies covered by PIDA) together with a robust communication plan to effectively engage with public bodies about PIDA and to ensure that employees and designated officers within government and in all public bodies are aware of the online training courses and have access to them.

### **Recommendation 4**

The PSC, in consultation with the Ombudsman develop a process for identifying gaps in knowledge to inform education and related supports beyond those referenced in Recommendation 3. Gaps specifically identified to me during consultations related to:

- the need for specific training on conducting investigations,
- assisting public bodies in ensuring the uniqueness of PIDA disclosures is recognized in their other complaint mechanisms to ensure that it is understood that reprisal protection only applies to PIDA complaints;
- providing guidance to public bodies on factors to consider when appointing designated officers.<sup>33</sup>

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<sup>33</sup> <https://ombudsman.sk.ca/app/uploads/2022/04/PIDC-AR-2021.pdf> See comments of Saskatchewan Ombudsman at page 7

## **Recommendation 5**

The PSC consider developing additional supports for public bodies and their employees. During my consultations, many individuals spoke about the need for a “PIDA toolbox”. The most common components mentioned were:

- guides, checklists and FAQs;
- process to assist public bodies in complying with the annual communication requirements of section 8 of PIDA, including sample memos;
- sample onboarding processes and supporting documents about PIDA for employees and for designated officers; and
- guidance to public bodies to improve intranet sites to facilitate easy access to resources.

## **2. Reporting and Monitoring**

### **Reporting**

The challenges posed by the current PIDA annual reporting requirements were clearly evident in the disclosure review described in Chapter 4 of this report. Because there is no central process to track and publish information regarding internal disclosures made under PIDA, reliable information about the number of internal disclosures received by government bodies, investigations undertaken and outcomes of those investigations is not available in any meaningful way.

Experts and advocates have been very critical of the lack of transparency in Canadian whistleblower processes and the limited accessibility to information about internal disclosures. Centralized reporting and monitoring systems would make the information more accessible and would create more transparency in the processes; which experts argue would lead to increased confidence.

In the 2014 review of PIDA Dianna Scarth stated, “Such information would be helpful to identify trends and systemic issues and would also provide statistics to assist in assessing whether PIDA is functioning effectively.”<sup>34</sup> This statement accurately describes a significant barrier to assessing whether PIDA is functioning effectively overall, that is, an inability to effectively access reliable statistical information.

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<sup>34</sup> [https://www.gov.mb.ca/csc/whistle/pdf/pida-scarth\\_report.pdf](https://www.gov.mb.ca/csc/whistle/pdf/pida-scarth_report.pdf)

(at page 18)



Ms. Scarth's recommendation that a centralized process should be created to track and publish information respecting internal disclosures made under PIDA on an annual basis<sup>35</sup> was not addressed in the 2018 amendments. In response to the recommendation, the PSC publishes an annual summary of departmental PIDA reports.<sup>36</sup> While helpful in the context of disclosures in government departments, this approach will not translate effectively to summarizing the information of hundreds of government bodies.

In our discussions, the Ombudsman reiterated the advantages of a centralized reporting process and pointed to Prince Edward Island's recently proclaimed Public Interest Disclosure and Whistleblower Protection Act.<sup>37</sup> The legislation imposes a duty on each deputy head to report disclosures received to the Commissioner (except those that are otherwise referred to the Commissioner) within the time required by the Commissioner. The report must include the **nature** of the disclosure and whether the deputy head intends to investigate the matter (see subsection 11(2)). The deputy head is also required to report the results of any investigation, any recommendations made with respect to the disclosure/wrongdoing and any steps that have been taken by the public body to respond to the deputy head. This report must be made within the time period required by the Commissioner (see section 12).

Yukon's Public Interest Disclosure of Wrongdoing Act requires that the chief executive of each public entity must provide a copy of its annual report required under section 42 to the Commissioner (see subsection 42(3)).<sup>38</sup>

While receiving information from public bodies as contemplated by the Prince Edward Island and Yukon legislation would assist the Ombudsman in carrying out their duties under PIDA, their legislation imposes reporting requirements on the Commissioners that would be onerous and ineffective given the number of public bodies covered by PIDA. As Alberta's Commissioner commented in their 2020 review of the Alberta legislation (at page 32) on this issue,

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<sup>35</sup> [https://www.gov.mb.ca/csc/whistle/pdf/pida-scarth\\_report.pdf](https://www.gov.mb.ca/csc/whistle/pdf/pida-scarth_report.pdf)

<sup>36</sup> [https://www.gov.mb.ca/csc/whistle/pdf/pida-disclosure\\_stats.pdf](https://www.gov.mb.ca/csc/whistle/pdf/pida-disclosure_stats.pdf)

<sup>37</sup> <https://www.canlii.org/en/pe/laws/stat/rspei-1988-c-p-31.01/latest/rspei-1988-c-p-31.01.html>

<sup>38</sup> <https://laws.yukon.ca/cms/images/LEGISLATION/PRINCIPAL/2014/2014-0019/2014-0019.pdf>

“The applicability and usefulness of data within chief officer’s 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.”<sup>39</sup>

Alberta’s Commissioner went on to recommend amendments to the legislation allowing the Commissioner to require jurisdictional entities to provide annual reporting on their activities under the Act, in a manner determined by the Commissioner. They noted that this flexibility to develop processes to obtain the information without creating an administrative burden for organizations would be preferable to prescribing a process in the legislation.<sup>40</sup>

Receiving information from public bodies would assist the Ombudsman in performing their duties under PIDA. For example:

- As noted in Chapter 4, information about the number of disclosures being made and how the disclosures are being managed within public bodies would provide the opportunity to identify trends and systemic issues within public bodies and recommend proactive measures to address. It would also be an effective tool in assisting the Ombudsman in investigating reprisal complaints.
- There are concerns about the accuracy and consistency of the statistical information currently available. In addition to the concerns raised in Chapter 4, the Ombudsman believes public bodies have different interpretations of the requirements of section 29(1)-(3) of PIDA leading to inconsistent reporting. For example, if a public body refers a disclosure to the Ombudsman under PIDA (or vice versa), the disclosure is likely being reported by both the public body and the Ombudsman. The authority to require public bodies to provide information in the manner determined by the Ombudsman, would allow the Ombudsman to develop policies to improve consistency in interpretation, tracking and reporting.

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<sup>39</sup> <https://yourvoiceprotected.ca/wp-content/uploads/2021/02/Submission-of-Public-Interest-Commissioner-on-the-review-of-PIDA-November-2020-003.pdf>

<sup>40</sup> <https://yourvoiceprotected.ca/wp-content/uploads/2021/02/Submission-of-Public-Interest-Commissioner-on-the-review-of-PIDA-November-2020-003.pdf>

- The concern expressed in Chapter 4 as to whether some government bodies were aware of their obligations under PIDA was shared by the Ombudsman who confirmed that the office is experiencing more disclosures and inquiries from employees of smaller government bodies. Many of these organizations, which are not typically seen as public sector organizations, do not have procedures to manage disclosures; some are not even aware that PIDA applies to them. The Ombudsman noted that if all public bodies were required to submit annual information, the Ombudsman would be aware of and could contact government bodies that did not submit annual reports to make inquiries. This would enable the Ombudsman to create awareness of PIDA and reinforce the reporting and other requirements of PIDA. The Ombudsman's ability to effectively determine if public bodies are accurately submitting annual report information would also be enhanced by amendments to the annual reporting provisions of PIDA requiring each chief executive to file a "nil" report if no disclosures of wrongdoing have been received by the designated officer in a particular year.

## Monitoring

In the 2014 report Ms. Scarth also raised concerns about the absence of a centralized monitoring process to ensure public bodies are complying with their obligations under PIDA and recommended that:

A central monitoring *process* should be created to ensure that organizations, departments and government bodies have created adequate procedures to meet the requirements of PIDA, with the authority to require that specific steps be taken to address any perceived shortcomings, following the model in the Alberta legislation.<sup>41</sup>

Ms. Scarth's concerns centered around ensuring that bodies create adequate internal disclosure procedures. As recommended, the 2018 PIDA amendments enhanced the authority of the Ombudsman to require public bodies to (a) provide copies of their disclosure procedures on request (subsection 5(3)); and (b) take steps to address any shortcomings identified by the Ombudsman (subsection 5(4)).<sup>42</sup> As noted in Chapter 4, compliance issues extend beyond the existence of procedures.

In our discussions, the Ombudsman confirmed that gaps in compliance remain problematic, particularly in terms of conducting PIDA investigations. The Ombudsman's authority should be enhanced to effectively address these gaps in

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<sup>41</sup> [https://www.gov.mb.ca/csc/whistle/pdf/pida-scarth\\_report.pdf](https://www.gov.mb.ca/csc/whistle/pdf/pida-scarth_report.pdf)

<sup>42</sup> <https://web2.gov.mb.ca/laws/statutes/ccsm/p217.php?lang=en>

compliance as well as processes under PIDA. The Ombudsman pointed to the authority of the office to conduct “own authority investigations” under section 15 of The Ombudsman Act<sup>43</sup> and noted that extending the Ombudsman’s authority to specifically conduct “own authority investigations” under PIDA would strengthen PIDA in the longer term.

Creating centralized processes to (a) make information reported under whistleblower legislation readily accessible; and (b) effectively monitor compliance with that legislation appears to be a work in progress in all Canadian jurisdictions. While I have reiterated Ms. Scarth’s recommendations on these issues (see Recommendations 6 and 7), I have also recommended legislative and process actions intended to improve the functioning PIDA, even in absence of centralized processes.

### **Recommendation 6**

A centralized process should be created to track and publish information regarding internal disclosures made under section 29.1 of PIDA on an annual basis.

### **Recommendation 7**

A central monitoring process should be created to ensure that public bodies are meeting the requirements of PIDA, with the authority to require that specific steps be taken to address any perceived shortcomings.

### **Recommendation 8**

Amend the PIDA reporting provisions to require a “nil” report be prepared and included in the annual report or otherwise be made available to the public on request for any year in which no disclosures were received by the designated officer of the public body.

### **Recommendation 9**

Amend PIDA to require that a chief executive officer must provide a copy of the annual report about disclosures under PIDA (as currently required by section 29.1 of PIDA) to the Ombudsman. For clarity and to avoid duplication, the summary of departmental PIDA reports prepared and published by the PSC would be provided to the Ombudsman for this purpose. The amendment should extend authority to the Ombudsman to develop policies to ensure

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<sup>43</sup> <https://web2.gov.mb.ca/laws/statutes/ccsm/p217.php?lang=en>

consistency in reporting under PIDA.

### **Recommendation 10**

Amend PIDA to authorize the Ombudsman to undertake investigations on their own initiative respecting matters arising under PIDA following the model set out in the investigation provisions of section 15 of The Ombudsman Act.

## **3. Gaps in PIDA**

### **(a) Complaints about senior officials**

In our consultations about the functionality of the 2018 amendments, the Ombudsman raised a number of gaps in PIDA. One of the gaps identified relates to disclosures received by the Ombudsman or designated officers which include allegations of wrongdoing involving senior officials or the chief executive of a public body. In particular, there are a number of requirements in PIDA, Regulation 64/2007 made under PIDA, the procedures used by public bodies to manage disclosures under PIDA and The Ombudsman Act which, when applied to cases involving such allegations, raise significant concerns about the integrity and independence of the resulting investigations.

The relevant provisions are:

- (a) PIDA requires that a copy of the report prepared by the designated officer or Ombudsman on completion of an investigation (subsection 24(1)) must be provided to the responsible chief executive (subsection 24(2)).<sup>44</sup>
- (b) Subsection 24(3) of PIDA provides that where the matter being investigated involves the chief executive, the Ombudsman must also give a copy of the report to the person or head of the board or other governing body of the public body (for example, in the case of a department, to the minister responsible).<sup>45</sup>
- (c) When conducting an investigation under PIDA, the Ombudsman and persons employed under the Ombudsman have the powers and protections provided for in The Ombudsman Act (subsection 22(6) PIDA).<sup>46</sup> The Ombudsman

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<sup>44</sup> <https://web2.gov.mb.ca/laws/statutes/ccsm/p217.php?lang=en>

<sup>45</sup> <https://web2.gov.mb.ca/laws/statutes/ccsm/p217.php?lang=en>

<sup>46</sup> <https://web2.gov.mb.ca/laws/statutes/ccsm/p217.php?lang=en>

notifies the chief executive of a public body prior to initiating an investigation.<sup>47</sup>

- (d) The standard form procedures used by many public bodies to manage disclosures under PIDA<sup>48</sup> require the designated officer to notify the chief executive prior to initiating an investigation into a disclosure of wrongdoing.
- (e) Section 3 of Regulation 64/2007 made under PIDA<sup>49</sup> requires that the procedures used by public bodies to manage disclosures provide that the designated officer has the authority to refer a disclosure to the Ombudsman if it would be inappropriate for the designated officer to deal with it, either because of the nature of the wrongdoing or because of the persons involved in the disclosures.
- (f) The procedures referred to in paragraph (d) above, also provide that a designated officer may refer a disclosure of wrongdoing to an alternate authority, including the Ombudsman, if the matter pertains to an individual that supersedes the hierarchal position of the designated officer.

These provisions effectively require the Ombudsman and designated officers to give notice of an investigation into a disclosure of wrongdoing and a copy of the report upon completion of the investigation to the chief executive even in circumstances where the chief executive is a person who is alleged to be involved in the matter being investigated and reported on; an outcome that is not consistent with the fundamental protections provided for whistleblowers under PIDA.

While the Regulation and standard procedures provide that a designated officer **may** refer a disclosure of wrongdoing to the Ombudsman in certain circumstances, such as the involvement of the chief executive or another senior officer in the allegation, there is no requirement to do so. The absence of a requirement in these circumstances also raises significant concerns about the integrity and independence of internal investigations and could put the designated officer in a very difficult position with their superiors.

Several comments made by respondents in the EngageMB survey reflected a lack of confidence in the internal investigation process including statements that: they would not trust that the review of information could be neutral and unbiased; and they would not feel safe reporting internally.

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<sup>47</sup> <https://web2.gov.mb.ca/laws/statutes/ccsm/o045.php?lang=en>

<sup>48</sup> <https://www.gov.mb.ca/csc/whistle/pdf/pida-procedures.pdf>

<sup>49</sup> <https://web2.gov.mb.ca/laws/regs/current/064-2007.php?lang=en>

I agree with the Ombudsman that the described legislative and procedural gaps respecting handling of disclosures which include allegations involving senior officials or the chief executive of a public body are clearly not consistent with the purposes of PIDA and should be addressed. The Ombudsman pointed to Prince Edward Island's recently proclaimed Public Interest Disclosure and Whistleblower Protection Act and particularly, Section 16 which provides that where the deputy head of the public entity to which a disclosure relates is the subject of an allegation of wrongdoing in the disclosure, the disclosure: (i) must be made to the Public Interest Disclosure Commissioner; (ii) subject to section 14 (discretion not to investigate), the Commissioner shall investigate the disclosure; and (iii) any notice or report required to be given to or by a deputy head shall be given to or by the head of the public entity.<sup>50</sup>

The Ombudsman supports amendments to PIDA, Regulation 64/2007 and the procedures based on the Prince Edward Island model.

The Prince Edward Island legislation does not address circumstances in which a disclosure received by a designated officer includes allegations of wrongdoing by an individual who supersedes the hierarchal position of the designated officer. Based on the foregoing discussion, the Ombudsman also supports amending PIDA, Regulation 64/2007 and the procedures to address such circumstances as well.

### **Recommendation 11**

Amend PIDA to provide that:

- (a) A disclosure must be made or referred to the Ombudsman if (i) the chief executive of the public body is the subject of an allegation of wrongdoing in the disclosure; or (ii) an individual who supersedes the hierarchal position of the designated officer of the public body to which the disclosure relates is the subject of an allegation of wrongdoing in the disclosure; and
- (b) Subject to section 21 (decision not to investigate), the Ombudsman must investigate the disclosure.

### **Recommendation 12**

Amend subsections 24(2) and (3) of PIDA to ensure that any notice or report that is required to be given to or by a chief executive or a designated officer in the circumstances set out in Recommendation 11 is given to or by the appropriate

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<sup>50</sup> <https://www.canlii.org/en/pe/laws/stat/rspei-1988-c-p-31.01/latest/rspei-1988-c-p-31.01.html>

entity/person to whom the chief executive reports. Subsection 16(c) of the Prince Edward Island legislation is illustrative in this regard.<sup>51</sup>

### **Recommendation 13**

Amend Regulation 64/2007 and the procedures established by a public body to manage disclosures by the employees of the public body to reflect the legislative amendments.

#### **(b) Section 13 - facilitating resolution of reprisal complaints**

During our consultations, the Ombudsman noted section 13 of PIDA<sup>52</sup> which provides that when an employee makes a disclosure to the Ombudsman, the Ombudsman make take any steps considered appropriate to help resolve the matter within the public body. While this authority has proven to be very helpful over the years, it is limited to disclosures of wrongdoing and does not apply to complaints of reprisal. Addressing this gap in the legislation by extending the Ombudsman's powers under section 13 to reprisal complaints will provide the Ombudsman with additional tools to address allegations of reprisal more effectively. The Ombudsman supports amending the legislation and believes that there is an opportunity for the office to facilitate resolution and work toward restoring relationships in cases where allegations of reprisal are made.

### **Recommendation 14**

Amend PIDA to expand the authority of the Ombudsman under section 13 to take any steps considered appropriate to help resolve reprisal complaints as well as disclosures within the public body.

#### **(c) Reprisal protection for designated officers and others**

In our consultations the Ombudsman advised that individuals have expressed concerns that the reprisal protections contained in PIDA do not extend to employees who are required to perform duties under PIDA.

The definition of reprisal states in part: ""reprisal" means any of the following measures taken against an employee because the employee has, in good faith,

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<sup>51</sup> <https://www.canlii.org/en/pe/laws/stat/rspei-1988-c-p-31.01/latest/rspei-1988-c-p-31.01.html>

<sup>52</sup> <https://web2.gov.mb.ca/laws/statutes/ccsm/p217.php?lang=en>



sought advice about making a disclosure, made a disclosure, or co-operated in an investigation under this Act...” and section 27 of PIDA provides:

### **Protection of employee from reprisal**

- 27** No person shall take a reprisal against an employee or direct that one be taken against an employee because the employee has, in good faith,
- (a) sought advice about making a disclosure from his or her supervisor, designated officer or chief executive, or the Ombudsman;
  - (b) made a disclosure; or
  - (c) co-operated in an investigation under this Act.<sup>53</sup>

While it is clear that witnesses are protected under section 27, it is not at all clear that clause (c) protects the supervisors, designated officers and chief executives who perform important duties under PIDA.

In response to the EngageMB survey question “Who would you speak with if you had a concern about a wrongdoing in your workplace? Select all that apply”, the vast majority selected their supervisor, followed by the Ombudsman, human resource representative and union shop steward. This list includes additional employees who are likely to be called upon to perform important duties and who may not be protected from reprisal under PIDA. The Ombudsman suggested that this is a gap in PIDA which should be addressed to ensure that all key individuals in the PIDA framework are protected. I agree with this assessment and confirm that the Alberta legislation includes an additional category of protection to persons who have “done anything in accordance with this Act”.<sup>54</sup> I am therefore recommending amendments to PIDA to address this gap.

In reviewing reprisal protection in other Canadian jurisdictions, I note that both the Alberta and Saskatchewan acts include protection for those who declined to participate in a wrongdoing.<sup>55</sup> The Centre for Free Expression recommends

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<sup>53</sup> <https://web2.gov.mb.ca/laws/statutes/ccsm/p217.php?lang=en>

<sup>54</sup> <https://www.canlii.org/en/ab/laws/stat/sa-2012-c-p-39.5/latest/sa-2012-c-p-39.5.html>

<sup>55</sup> <https://www.canlii.org/en/ab/laws/stat/sa-2012-c-p-39.5/latest/sa-2012-c-p-39.5.html> and <https://www.canlii.org/en/sk/laws/stat/ss-2011-c-p-38.1/latest/ss-2011-c-p-38.1.html>

inclusion of such a provision to strengthen whistleblower protection.<sup>56</sup> The Saskatchewan and Prince Edward Island acts also include protection for those who are suspected of doing any of the protected actions.<sup>57</sup> Alberta’s Commissioner has recommended amendments to its legislation to protect those suspected of doing any of the protected actions.<sup>58</sup> I am recommending that Manitoba consider similar amendments.

### **Recommendation 15**

Amend the definition of reprisal and section 27 of PIDA to protect individuals performing duties under the PIDA from reprisal, following the Alberta and Saskatchewan models.

### **Recommendation 16**

Consider additional amendments to the definition of reprisal and section 27 of PIDA to protect those who decline to participate in a wrongdoing and those are suspected of doing any of the protected actions from reprisal following the Saskatchewan and Prince Edward Island models.

## **4. Supporting whistleblowers**

### **(a) Good faith test**

PIDA imposes a “good faith” test on disclosure and reprisal complainants (see definitions of disclosure and reprisal; s. 21(1)(b); ss 27; s. 31(1)(a); s. 32 and s. 35(b)).<sup>59</sup>

The “good faith” test is found in the whistleblower legislation of a number of Canadian jurisdictions. Its inclusion has been subject to considerable criticism by advocates in

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<sup>56</sup> <https://cfe.torontomu.ca/publications/assessment-manitobas-whistleblower-protection-legislation>

<sup>57</sup> <https://www.canlii.org/en/sk/laws/stat/ss-2011-c-p-38.1/latest/ss-2011-c-p-38.1.html> and <https://www.canlii.org/en/pe/laws/stat/rspei-1988-c-p-31.01/latest/rspei-1988-c-p-31.01.html>

<sup>58</sup> <https://yourvoiceprotected.ca/wp-content/uploads/2021/02/Submission-of-Public-Interest-Commissioner-on-the-review-of-PIDA-November-2020-003.pdf>

<sup>59</sup> <https://web2.gov.mb.ca/laws/statutes/ccsm/p217.php?lang=en>

recent years, including by the Centre for Free Expression.<sup>60</sup>

In consultations with the Ombudsman, the Chair of the Manitoba Labour Board and a number of designated officers, it appears that in the normal course of assessing and investigating disclosures and complaints, good faith is assumed in the absence of clear evidence of malice.

Use of the term good faith however, arguably introduces motive as a qualifier therefore potentially requiring an individual to prove that they reasonably believe the information they submit **and** that they have submitted the information in good faith. Advocates argue that the individual's motive in bringing forward information or allegations is not relevant; rather, what is relevant is whether a wrongdoing or reprisal has been committed. Such an assessment should be made on the basis of facts and evidence, not on the basis of the individual's motivation. Reasonable belief is therefore recommended as the appropriate test for PIDA.

Whistleblower legislation in Ontario and British Columbia<sup>61</sup> references reasonable belief and both the Federal and Alberta Commissioners have recommended removing the good faith requirement from their legislation.<sup>62</sup> A number of senior officials I interviewed supported removing this language with the Chair of the Labour Board noting that reasonable belief was the preferred standard. While some individuals interviewed had no opinion on this issue when asked, none expressed any reservations about its removal.

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<sup>60</sup> <https://cfe.torontomu.ca/publications/assessment-manitobas-whistleblower-protection-legislation>

<sup>61</sup> [https://www.canlii.org/en/bc/laws/stat/sbc-2018-c-22/latest/sbc-2018-c-22.html#:~:text=10%20\(1\)%20For%20the%20purposes,the%20chief%20executive%20is%20responsible](https://www.canlii.org/en/bc/laws/stat/sbc-2018-c-22/latest/sbc-2018-c-22.html#:~:text=10%20(1)%20For%20the%20purposes,the%20chief%20executive%20is%20responsible). And <https://www.canlii.org/en/on/laws/stat/so-2006-c-35-sch-a/latest/so-2006-c-35-sch-a.html>

<sup>62</sup> <https://yourvoiceprotected.ca/wp-content/uploads/2021/02/Submission-of-Public-Interest-Commissioner-on-the-review-of-PIDA-November-2020-003.pdf> and [https://psic-ispcc.gc.ca/sites/default/files/2019-03/legislative\\_review\\_recommendations.pdf](https://psic-ispcc.gc.ca/sites/default/files/2019-03/legislative_review_recommendations.pdf)

## **Recommendation 17**

Remove the “good faith” language from PIDA and replace it with “reasonable belief” language.

### **(b) Non-disclosure agreements**

Advocates are very critical of the use of non-disclosure or confidentiality agreements (sometimes referred to as “gag orders”) to silence whistleblowers. In this context, non-disclosure agreements are often used in circumstances where an employee is dismissed or otherwise disciplined following a complaint about wrongdoing, discrimination or harassment in the workplace. The employer may pay compensation subject to the employee agreeing not to discuss or otherwise disclose any information about the events complained of. Advocates argue that robust whistleblower protection legislation should restrict use of non-disclosure agreements in such cases.

In February, 2023 the Canadian Bar Association passed a resolution<sup>63</sup> that it:

1. promote the fair and proper use of NDAs as a method to protect intellectual property and discourage their use to silence victims and whistleblowers who report experiences of abuse, discrimination and harassment in Canada;
2. advocate and lobby the federal, provincial and territorial governments to enact changes to legislation and policies to ensure NDAs are not misused for the purpose of silencing victims and whistleblowers

The Canadian Bar Association referenced The Non-Disclosure Agreements Act enacted by Prince Edward Island in 2022 that restricts use of these agreements in certain cases. They noted that similar legislation is under consideration in other Canadian jurisdictions and that 16 American states have legislated to restrict use of these agreements.

The Ombudsman raised the use of non-disclosure agreements in the context of disclosures of wrongdoing or complaints of reprisal under PIDA in our consultations. The Ombudsman noted that generally, an individual making a disclosure or complaint under PIDA would be contractually obliged to retract the disclosure or complaint following the signing of a non-disclosure agreement. We agreed that the use of non-disclosure agreements in these circumstances does not promote a culture of transparency and accountability necessary for the proper functioning of whistleblower legislation and is inconsistent with the intent of PIDA. I therefore recommend legislative action as noted below.

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<sup>63</sup> <https://www.cba.org/Our-Work/Resolutions/Resolutions/2023/Principles-to-Prevent-Misuse-of-Non-Disclosure-Agr>

## Recommendation 18

Legislative action should be taken to ensure that provisions in non-disclosure agreements which are used to prevent an employee from making a disclosure of wrongdoing or a reprisal complaint under PIDA are not enforceable. Such action should not interfere with the fair and proper uses of non-disclosure agreements and may be accomplished by way of broadly based stand-alone legislation (the Prince Edward Island approach) or by way of targeted amendments to PIDA.

### 5. Strengthen reprisal protection

#### (a) Reverse onus

Advocates (including the Centre for Free Expression<sup>64</sup>) and experts note that very few findings of reprisal are made in Canada and point to the standard of proof in reprisal cases as a major contributing factor. In many jurisdictions, including Manitoba, the employee must prove that an alleged action (such as demotion or disciplinary action) constitutes reprisal. Advocates recommend that whistleblower legislation should include a reverse onus provision in respect of reprisal cases. The effect of such a provision in this context is to reverse the onus so that if an employee alleges that a reprisal has taken place, the burden of proving that the action was **not** a reprisal falls to the employer. The rationale for this recommendation is that information respecting why an employer took certain action against an employee resides with the employer, thus making it very difficult for the employee to make their case. If the onus is reversed, the employer does not encounter the same difficulties currently faced by the employee. The introduction of a reverse onus provision is viewed as levelling the playing field and strengthening reprisal protection for whistleblowers.

Reverse onus provisions are found in whistleblower legislation in Ontario and British Columbia. Both Canada and Alberta are considering legislative amendments to this effect.

In our discussions, the Chair of the Manitoba Labour Board pointed to reverse onus provisions in both The Labour Relations Act<sup>65</sup> and The Workplace Safety and Health Act<sup>66</sup> and commented on its appropriateness in reprisal complaints. I also note that

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<sup>64</sup> <https://cfe.torontomu.ca/publications/assessment-manitobas-whistleblower-protection-legislation>

<sup>65</sup> <https://web2.gov.mb.ca/laws/statutes/ccsm/l010.php?lang=en>

<sup>66</sup> <https://web2.gov.mb.ca/laws/statutes/ccsm/w210.php?lang=en>

in a review of refusal of access under The Freedom of Information and Protection of Privacy Act (see subsection 66.7(1))<sup>67</sup>, the public body must prove the applicant has no right of access.

Many other senior officials I consulted with believed a reverse onus provision would be more appropriate. None of the officials consulted expressed any serious concerns about such an amendment.

### **Recommendation 19**

Amend PIDA to provide that a complaint of reprisal under the act is considered substantiated unless sufficient evidence to the contrary is provided as part of an investigation under the act.

## **6. Centralizing investigations of disclosures made to government departments**

My mandate did not include a review of broad policy issues, however during my consultations I heard very strongly that it would be more efficient and effective if all internal government disclosures were managed by a central department such as the PSC. I have therefore included a discussion of this matter for consideration.

As discussed earlier in this Chapter, a number of designated officers in government departments commented that the small number of internal disclosures received over the years has limited their ability to develop expertise and knowledge in managing and investigating disclosures. I also heard that the lack of internal disclosures in many departments may be a disincentive to investing in education and awareness building efforts.

There are certainly advantages to centralizing the management of internal disclosures. The PSC's role with respect to the public service was discussed earlier in this Chapter. Its role and duties under The Public Service Act<sup>68</sup> are even broader with respect to departments of government, and include review and investigative functions. PSC has well developed relationships within departments. Centralizing the management of all internal government disclosures within the PSC would thus ensure expertise and experience in conducting investigations as well as a consistent approach to reviewing and assessing disclosures within the public service ethical framework.

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<sup>67</sup> <https://web2.gov.mb.ca/laws/statutes/ccsm/f175.php?lang=en>

<sup>68</sup> <https://web2.gov.mb.ca/laws/statutes/ccsm/p271.php?lang=en>

There are however a number of other factors to consider when analyzing this proposed model, including:

- A centralized approach is not consistent with the fundamental structure of PIDA. A government department is specifically defined as a public body. Each public body has a chief executive (in the case of a department, the deputy minister) who must establish procedures to manage disclosures received from the public body's employees (subsection 5(1)) and must appoint a senior official to act as the designated officer (section 6). In the absence of an appointment, the chief executive is the designated officer. The obligation to communicate information annually to the public body's employees resides with the chief executive (section 8). Employees may make a disclosure to their supervisor, designated officer or the Ombudsman pursuant to subsection 10(1). The designated officer is responsible for investigating disclosures made to the employee's supervisor or to the designated officer (subsection 19.1(1)). Under subsection 29.1(1) each public body must report annually on disclosures received by the designated officer.<sup>69</sup> Moving to a centralized model for the management of disclosures within government represents a significant change to this fundamental structure and underlying policy of PIDA.
- Inclusion of the supervisor as a person to whom an employee may make a disclosure is another strong indication of the underlying policy and legislative intention that the management of disclosures should be at the departmental level within government. Respondents to the EngageMB survey overwhelmingly chose their supervisor as one of the persons they would speak with if they had a concern about a wrongdoing in their workplace, suggesting that this aspect of the departmental model is well entrenched in practice.
- The approach to departments of government described above is consistent with the approach of whistleblower legislation in other Canadian jurisdictions.
- Many of the government bodies covered by PIDA are small organizations with volunteer boards. These organizations are required to have procedures in place to manage disclosures by their employees and must comply with the same provisions as individual government departments. Considering amendments to PIDA in respect of government departments for the reasons outlined above raises policy questions as to whether amendments should also extend to other government bodies and if so, what

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<sup>69</sup> <https://web2.gov.mb.ca/laws/statutes/ccsm/p217.php?lang=en>

alternatives to centralization would be available to appropriately address their circumstances.

A similar concern respecting management of internal disclosures in government was raised in the Saskatchewan Commissioner's 2021 Annual Report. The Commissioner made a number of recommendations for improvements to Saskatchewan's legislation, including that the legislation be amended "to expand the definition of who can perform the role of designated officer ..."<sup>70</sup>. I note that the analysis preceding the recommendation and the recommendation itself were not limited to government departments.<sup>71</sup> I have referenced the Saskatchewan Commissioner's 2021 Annual Report because the analysis and recommendation raise some of the broader policy issues to be considered in addressing the question of how internal government disclosures are managed.

In summary, I believe that an in-depth analysis is required if consideration is being given to centralizing the management of disclosures received by government departments.

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<sup>70</sup> <https://ombudsman.sk.ca/app/uploads/2022/04/PIDC-AR-2021.pdf> at page 7

<sup>71</sup> <https://ombudsman.sk.ca/app/uploads/2022/04/PIDC-AR-2021.pdf>  
at pages 6 and 7



## Chapter 6 Summary of Recommendations

The following is a summary of the recommendations contained in this report:

### **Recommendation 1**

While I am not prepared to recommend a mandatory extension of PIDA to all municipalities and local government districts at this time, I do recommend that steps be taken to better equip municipalities and local government district to be designated and to ensure they have better support when they are designated; whether the designation is by opt in or is mandated. Significant efforts should be undertaken to raise awareness about PIDA in municipalities and local government districts and at a minimum:

- (a) The Public Service Commission (PSC) develop an informational package respecting PIDA designed for municipalities and local government districts, with a view to encouraging them to opt in;
- (b) The Deputy Minister responsible for the Department of Municipal and Northern Relations be reminded annually to ensure information respecting PIDA is sent to all municipalities and local government districts that have not yet been designated; and
- (c) The PSC and the Department of Municipal and Government Relations develop a strategy for raising awareness about PIDA as well as building capacity at the municipal level utilizing the well-developed relationships and processes in place within the department for consulting and working with these organizations. The strategy should ideally include input from the Ombudsman.

### **Recommendation 2**

The PSC develop a centralized program of PIDA specific educational and related supports to ensure that all public bodies covered by PIDA and their employees have access to information and resources about PIDA. The overarching purposes would include such matters as:

- (a) Informing public bodies and their employees about PIDA thereby raising awareness about the legislation.
- (b) Educating employees about their rights and obligations under PIDA.
- (c) Educating designated officers and supervisors about managing disclosures, conducting investigations, reporting on disclosures as well as communicating with employees about PIDA.
- (d) Developing a process to ensure that supports are current and reflective of

- the needs of public bodies and their employees.
- (e) Developing a process to ensure that information about the appointment of a designated officer is communicated and readily available to employees of the public body, the PSC and the Ombudsman.

### **Recommendation 3**

At a minimum the PSC should include the development and release, as soon as practicable, of the 2 series of online training modules described above (accessible to all public bodies covered by PIDA) together with a robust communication plan to effectively engage with public bodies about PIDA and to ensure that employees and designated officers within government and in all public bodies are aware of the online training courses and have access to them.

### **Recommendation 4**

The PSC, in consultation with the Ombudsman develop a process for identifying gaps in knowledge to inform education and related supports beyond those referenced in Recommendation 3. Gaps specifically identified to me during consultations related to:

- the need for specific training on conducting investigations,
- assisting public bodies in ensuring the uniqueness of PIDA disclosures is recognized in their other complaint mechanisms to ensure that it is understood that reprisal protection only applies to PIDA complaints;
- providing guidance to public bodies on factors to consider when appointing designated officers.<sup>72</sup>

### **Recommendation 5**

The PSC consider developing additional supports for public bodies and their employees. During my consultations, many individuals spoke about the need for a “PIDA toolbox”. The most common components mentioned were:

- guides, checklists and FAQs;
- process to assist public bodies in complying with the annual communication requirements of section 8 of PIDA, including sample memos;
- sample onboarding processes and supporting documents about

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<sup>72</sup> <https://ombudsman.sk.ca/app/uploads/2022/04/PIDC-AR-2021.pdf> See comments of Saskatchewan Ombudsman at page 7

PIDA for employees and for designated officers; and

- guidance to public bodies to improve intranet sites to facilitate easy access to resources.

### **Recommendation 6**

A centralized process should be created to track and publish information regarding internal disclosures made under section 29.1 of PIDA on an annual basis.

### **Recommendation 7**

A central monitoring process should be created to ensure that public bodies are meeting the requirements of PIDA, with the authority to require that specific steps be taken to address any perceived shortcomings.

### **Recommendation 8**

Amend the PIDA reporting provisions to require a “nil” report be prepared and included in the annual report or otherwise be made available to the public on request for any year in which no disclosures were received by the designated officer of the public body.

### **Recommendation 9**

Amend PIDA to require that a chief executive officer must provide a copy of the annual report about disclosures under PIDA (as currently required by section 29.1 of PIDA) to the Ombudsman. For clarity and to avoid duplication, the summary of departmental PIDA reports prepared and published by the PSC would be provided to the Ombudsman for this purpose. The amendment should extend authority to the Ombudsman to develop policies to ensure consistency in reporting under PIDA.

### **Recommendation 10**

Amend PIDA to authorize the Ombudsman to undertake investigations on their own initiative respecting matters arising under PIDA following the model set out in the investigation provisions of section 15 of The Ombudsman Act.

### **Recommendation 11**

Amend PIDA to provide that:

- (a) A disclosure must be made or referred to the Ombudsman if (i) the chief executive of the public body is the subject of an allegation of wrongdoing

- in the disclosure; or (ii) an individual who supersedes the hierarchal position of the designated officer of the public body to which the disclosure relates is the subject of an allegation of wrongdoing in the disclosure; and
- (b) Subject to section 21 (decision not to investigate), the Ombudsman must investigate the disclosure.

### **Recommendation 12**

Amend subsections 24(2) and (3) of PIDA to ensure that any notice or report that is required to be given to or by a chief executive or a designated officer in the circumstances set out in Recommendation 11 is given to or by the appropriate entity/person to whom the chief executive reports. Subsection 16(c) of the Prince Edward Island legislation is illustrative in this regard.<sup>73</sup>

### **Recommendation 13**

Amend Regulation 64/2007 and the procedures established by a public body to manage disclosures by the employees of the public body to reflect the legislative amendments.

### **Recommendation 14**

Amend PIDA to expand the authority of the Ombudsman under section 13 to take any steps considered appropriate to help resolve reprisal complaints as well as disclosures within the public body.

### **Recommendation 15**

Amend the definition of reprisal and section 27 of PIDA to protect individuals performing duties under the PIDA from reprisal, following the Alberta and Saskatchewan models.

### **Recommendation 16**

Consider additional amendments to the definition of reprisal and section 27 of PIDA to protect those who decline to participate in a wrongdoing and those are suspected of doing any of the protected actions from reprisal following the Saskatchewan and Prince Edward Island models.

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<sup>73</sup> <https://www.canlii.org/en/pe/laws/stat/rspei-1988-c-p-31.01/latest/rspei-1988-c-p-31.01.html>

**Recommendation 17**

Remove the “good faith” language from PIDA and replace it with “reasonable belief” language.

**Recommendation 18**

Legislative action should be taken to ensure that provisions in non-disclosure agreements which are used to prevent an employee from making a disclosure of wrongdoing or a reprisal complaint under PIDA are not enforceable. Such action should not interfere with the fair and proper uses of non-disclosure agreements and may be accomplished by way of broadly based stand-alone legislation (the Prince Edward Island approach) or by way of targeted amendments to PIDA.

**Recommendation 19**

Amend PIDA to provide that a complaint of reprisal under the act is considered substantiated unless sufficient evidence to the contrary is provided as part of an investigation under the act.