



Yukon
Public Interest
Disclosure
Commissioner

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Section 1

Public Interest Disclosure Commissioner (PIDC) PIDWA Review Recommendations

April 14, 2023

A Revise PIDC Powers

General Statement

The current PIDC powers are imported from the Ombudsman Act. Since the PIDC can be appointed in their own right, we recommend that all references to the 'Ombudsman' in PIDWA be changed to the PIDC (or dropped where no longer relevant). In addition, we propose additional powers.

Provision	Comments
6	Revise 6(1) to require that the chief executive must providing in writing whether they accept any recommendations made by the PIDC and if not, the reasons they are not accepting and including the recommendation as part of their disclosure procedures. This is similar to other enactments, including the <i>Ombudsman Act</i> (23-25) and ATIPPA (11).
New after 28	Add a new provision to state that if, during an investigation of a reprisal complaint, the PIDC has reason to believe that another reprisal measure has been taken against an employee, the PIDC may investigate that



		reprisal measure in accordance with this Part (4). This would be similar to 21 that allows the PIDC to investigate other wrongdoings that may be discovered as part of an investigation.
New after 43(4)		Add a new provision to allow the PIDC to make public comments that the PIDC considers to be in the public interest concerning matters relating generally to the exercise of the PIDC's duties -- or where there's an urgent matter that the PIDC reasonably believes to amount to an imminent risk of a substantial and specific danger to the life, health or safety of persons or to the environment. As the PIDC has recommendation only power (similar to the Ombudsman model), it is important the PIDC has the clear authority to comment publicly where appropriate.
2, 45, 46		Delete 'Ombudsman' – see General Statement above.
46		Add a new provision in 46 or under PART 8 Miscellaneous to allow the PIDC to determine (within the confines of PIDWA) the PIDC's procedures in exercising the powers conferred and performing the duties imposed by PIDWA. For example, it could state that the PIDC can establish and implement practices and procedures for the office of the PIDC in order to ensure its efficient and timely compliance with this Act.
46		Add a new provision in 46 and reference it in 5 to allow the PIDC to have 'own-motion' power to audit compliance with PIDWA as was recently introduced under ATIPPA [111(1)(b)].
B Establish Mandatory Disclosure Procedures		
General Statement		
<p>PIDWA should require a chief executive of any public entity to establish disclosure procedures, subject to regulations.</p> <p>We acknowledge, however, that not all public entities are the same. Some may require a slightly different approach based on their uniqueness, something that would first have to be identified and categorized (perhaps as a 'class' of public entity). Although the disclosure procedures in their case would have to accord with section 5, the proposed regulation could allow for some reasonable differences based on different classes of public entities.</p>		
Provision	Comments	
Before 5(2)(a)	Add a new provision to require a designated officer to assess the risks, in the context of a request for advice or a disclosure, that reprisals may be taken against a discloser.	

New after 5(2)(f)	Add new provision to make sure that any personal information collected or used is limited to the personal information required for investigations and the process for advice requests/disclosures.
New after 5(2)(f)	Add new provision to protect, subject to any other enactment, the identity of a discloser in requesting advice or making a disclosure.
New after 5(2)(f)	Add new provision to allow a designated officer to refer disclosure subject-matter to another appropriate entity if that entity has the necessary jurisdiction to address it. The designated officer must notify the PIDC of the entity the disclosure was referred to.
New after 5(2)(f)	Add new provision to require designated officers, on receiving, reviewing and investigating disclosures, to carry out those activities as informally, fairly and efficiently as possible in the circumstances. This is similar the requirement of the PIDC under 46(4).
New after 5(2)(f)	Add new provision to allow a designated officer to investigate other wrongdoings that may arise during a disclosure investigation.
New after 5(2)(f)	Add new provision to require designated officers to provide disclosers with an appropriate summary of the investigation.
New after 5(2)(f)	Add new provision to require designated officers to give their public entity an opportunity to make representations prior to finalizing an investigation report.
New after 5(2)(f)	Revise provision [formerly 5(2)(a)] to require a chief executive to designate a senior officer to receive requests for advice and receive/investigate disclosures for which the chief executive is responsible. The designated officer should not create a conflict of interest or be involved in any competing process to ensure procedural fairness. PIDWA must always be considered before any other process is contemplated.
New after 5(2)(f)	Add new provision to state that a designated officer is responsible for investigating disclosures received under 9(1)(b) or a referral from another public entity or the PIDC. The designated officer must investigate disclosures as per their disclosure procedures or alternatively may refer the disclosure to the PIDC. If the designated refers the disclosure to the PIDC -- they must notify the discloser.
New after 5(2)(f)	Add new provision to echo 20 but replace 'PIDC' with 'designated officer'.

C Revise Definitions and Terms	
General Statement	
We recommend that certain definitions be added and certain terms be revised to make PIDWA more responsive to the public interests set out in purposes 1(a) and 1 (c) – and clearer to administer.	
Provision	Comments
2	'Advice' should be added to mean advice that may be requested in respect of making a disclosure or a complaint about a reprisal (under PIDWA).
2	'Chief executive officer' should be revised to mean the deputy minister of a department, the head of the public entity, and the relevant officer of the Legislative Assembly.
2	'Commissioner' means the Public Interest Disclosure Commissioner. As such, all references in PIDWA about the PIDC can be shortened to 'Commissioner'.
2	'Department' should be added to mean a department of the Yukon Government, as set out in the Schedule.
2	'Discloser' should be added to mean a person who seeks advice about making a disclosure or makes a disclosure. This would allow any person, whether an employee or not, to seek advice about making a disclosure or make a disclosure. The term should include an anonymous discloser.
2	'Employees' should be revised to mean an employee of a department, public entity or office.
2	'Ombudsman' should be deleted as the PIDC can be appointed in its own right.
2	'Personal information' should be added to mean the same as personal information in the <i>Access to Information and Protection of Privacy Act (ATIPPA)</i> .
2	'Record' should be added to mean the same as a record in the ATIPPA.
2	'Reprisal' should be revised to mean a measure referred to in revised 25.
2	'Supervisor' should be deleted throughout PIDWA because disclosures should only be made (in the interests of protecting a discloser's identity) to a designated officer or, where a designated officer is implicated, to a chief executive.

25		<p>This provision should be revised to incorporate the current 'reprisal' definition in 2 by stating the following [noting that 25(a-d) should be deleted]:</p> <p>A person shall not take any of the following measures of reprisal against an employee, or counsel or direct that any of the following measures of reprisal be taken against an employee, by reason that the employee has, in good faith, made a request for advice, a disclosure or a complaint about a reprisal or cooperated with an investigation under this Act:</p> <ul style="list-style-type: none"> (a) a disciplinary measure; (b) a demotion; (c) a termination of employment; (d) any measure that adversely affects the employee's employment or working conditions; (e) a threat to take any of the measures referred to in paragraphs (a) to (d). <p>This provision should also state that a person doesn't contravene the reprisal prohibition if they've took, counselled or directed a measure otherwise set out as a reprisal measure if they did so because they were managing or terminating an employment relationship -- and this wasn't done because the employee (in good faith) made a request for advice, a disclosure, a reprisal complaint or cooperated in a PIDWA investigation.</p>
D Revise Chief Executive PIDWA Awareness and Reporting Responsibilities		
<p>General Statement</p> <p>We recommend that a chief executive must broadly communicate PIDWA to their staff and provide training at least on an annual basis. They should also report annually to the PIDC on the results of their efforts.</p>		
Provision	Comments	
7	<p>Revise this key provision to state, not only must a chief executive 'widely communicate' PIDWA to their staff but also information about how to seek advice about making a disclosure or making one, and how to make a reprisal complaint, as well as conveying any information that may be prescribed. This communication requirement should occur at least on an annual basis.</p>	

		<p>This provision should also require each department, public entity and office to provide mandatory training to the chief executive and their employees on an annual basis and require employee (including a chief executive and newly onboarded employees) to 'sign-off' that they have taken such training in the annual timeframe.</p> <p>In addition, the chief executive should report annually to the PIDC on the results of meeting this communication/training provision.</p>
42		<p>Revise this provision to include the PIDC in the main text of 42(1).</p> <p>This provision should also be revised to require chief executives (or designated officers) to keep records of any disclosures made in 42(1)(a) and any reprisal complaints received in (b) -- and make them available for production to the PIDC on its request for purposes of audit.</p> <p>This provision should also be revised to require chief executives to report on the assessment/investigation timelines suggested as a new provision under Division 4 following current 17(c) -- including any backlogs.</p> <p>This provision should also be revised to require chief executives to report the substantive outcomes of their (disclosure procedure) investigations to the Minister responsible for PIDWA, public entities and additionally to the PIDC for purposes of audit. These reports should include summaries of investigations, inclusive of reasons, that did not result in a finding of wrongdoing or reprisal.</p>
E	Delete Arbitration Mechanism	
	<p>General Statement</p> <p>Public Interest Disclosure Commissioners typically follow the Ombudsman model where they are provided with the powers and authority to investigate a matter within their mandate and to make recommendations to resolve and/or mitigate the root cause. We recommend that the arbitration mechanism set out in Division 5 be deleted and the PIDC's involvement end at 34. The PIDC's role in PIDWA, in both a disclosure and reprisal context, is to inquire neutrally after the truth and then make</p>	



findings of fact/law and recommendations (if any). We have no further role as Division 5 would seem to suggest to the contrary. If a public entity takes issue with our investigative report, then they have the 32 avenues to respond.

However, we acknowledge that our report should be subject to judicial review brought by a public entity.

Provision	Comments
35-41	Delete.
New after 34(3)	<p>Delete OMB Act 28, as referred to in new provision after 34(3). In its place (and in place of Division 5 Arbitration) – add new provision to state:</p> <p>(1) The Commissioner or a person employed in the administration of PIDWA must not be compelled in civil proceedings</p> <p>(a) to give evidence in respect of matters that come to their knowledge in the course of their employment; or</p> <p>(b) to produce records that are in the possession of the PIDC because of the PIDC’s powers or duties under this Act.</p> <p>(2) Despite (1), a court may require the Commissioner to produce the record of the investigation report that is the subject of an application for judicial review.</p>



Section 2

Public Interest Disclosure Commissioner (PIDC) Responses to PSC PIDWA Review Discussion Paper

April 14, 2023

PSC 1.0		
	1.1	Q - Should the Act be more exhaustive in including other groups besides employees that can make a disclosure of wrongdoing or seek advice about a disclosure? If so, who?
	PIDC Comments	Yes – Volunteers, such as those in long-term care homes/hospitals as well as firefighter/EMS community volunteers should be included. This could be addressed by creating a ‘discloser’ definition. It would allow any person, including an anonymous discloser, to request advice or make a disclosure.
	1.2	Q - Should the Act be expanded to cover more organizations under the public entities Schedule?
	PIDC Comments	Yes – This could emulate the list of organizations set out in the <i>Access to Information and Protection of Privacy Act</i> . In addition, the Schedule should be moved into ‘regulation’ so that the Commissioner in Executive Council could add other organizations if necessary (e.g., municipalities). I would encourage municipalities with the Yukon to be included as a public entity. In addition, there should be the opportunity for First Nation governments to request the assistance of the PIDC to investigate allegations of wrongdoing within their government, similar to provisions within section 11(5) of the <i>Ombudsman Act</i> .
PSC 2.0	2.1	Q - Should the Act allow people to disclose wrongdoings or seek advice about making a disclosure anonymously?
	PIDC Comments	Yes – We recommend that a person should be able to request advice or make a disclosure anonymously – but only to the PIDC. This could be included in a definition of ‘discloser’. However,

		anonymous disclosers must provide minimal contact information (e.g., phone number/email) in case an investigator requires more information from them.
	2.2	Q - Should the Act give expanded reprisal protections?
	PIDC Comments	No – although we recognize that reprisals could have impacts beyond the discloser, it would become very difficult to operationalize this protection. To support an allegation of reprisal there must be an evidentiary nexus between the disclosure made (or advice sought), and the reprisal measure taken against the discloser. Where the discloser and the reprised are not the same individual, it would add many new challenges including the protection of personal privacy. Allowing extended reprisal protection would simply make PIDWA unwieldy in this context.
	2.3	Q - Should the Act expand time limits for reprisal protection?
	PIDC Comments	No –90 days [26(2)] is a reasonable period based on when the discloser knew or the PIDC deemed them to have known when the reprisal was taken against them. Any period longer than that risks the value and integrity of an investigation because material information or players may no longer be available. Moreover, the PIDC can extend this time frame, if necessary, as per 26(3).
PSC 3.0	3.1.1	Q - Should chief executives be required to communicate information about the Act on an annual basis?
	PIDC Comments	Yes – we recommend that this provision should require chief executives to communicate PIDWA information at least on an annual basis. However, the provision should not just state 'widely communicated' by each chief executive – but also specifically require the inclusion of information about how to seek advice or how to make a disclosure, and how to make a reprisal complaint, as well as conveying information that may be prescribed. In addition, the chief executive should report annually to the PIDC on the results of meeting this communication requirement.
	3.1.2	Q - Should mandatory training be required?
	PIDC Comments	Yes – This provision should also require each public entity to provide mandatory training to the chief executive and their employees at least on an annual basis and require employee (including a chief

		<p>executive and newly onboarded employees) to 'sign-off' that they have taken such training in the annual timeframe.</p> <p>In addition, the chief executive should report annually to the PIDC on the results of meeting this training requirement.</p>
PSC 4.0	4.1.1	Q - Should a common set of procedures for all Yukon government departments be established?
	PIDC Comments	Yes – It should be mandatory for a chief executive in any public entity to establish disclosure procedures, subject to regulations. Yukon should not be the only jurisdiction to make public entity disclosure procedures optional. Making them mandatory would provide chief executives with an active and primary responsibility to comply with the three PIDWA purposes and give them the ability to conduct PIDWA investigations and respond more completely to a disclosure.
	4.1.2	Q - Should a common set of procedures for all public entities be established?
	PIDC Comments	No --Common procedures may not be appropriate in all YG non-department cases, given the differences in various public entities. It may be reasonable and efficient for all YG departments, for example, to adopt a common set of disclosure procedures by using the PSC 'Guidelines to Disclosure Wrongdoing' as an aid to creating a regulation under 56(a). However, other types of public entities may require a slightly different approach based on their uniqueness, something that would first have to be identified and categorized (perhaps as a 'class' of public entity). Although the disclosure procedures in their case would have to accord with section 5 regulation could allow for some reasonable differences based on different classes of public entities.
	4.2	Q - Should timelines for assessing and investigating a disclosure be prescribed?
PIDC Comments	Yes – Assessment and investigation timelines for public entities should be set out. We recommend that the designated officer should acknowledge receipt of a respective disclosure within 10 business days after receiving it – and then notify the discloser within 20 days of receiving it of the decision to investigate or not. The designated officer must complete an investigation within 120 days of receiving	



	<p>the respective disclosure – noting that this timeline can be reasonably extended (with subsequent notice and reasons to the discloser).</p> <p>46(4) requires that the PIDC conduct an investigation as informally and expeditiously as possible. This provides appropriate flexibility to determine the nature and depth of an investigation required. This should be sufficient to ensure investigations by the PIDC are conducted in a timely manner.</p>
4.3.1	Q - Should the Act require additional reporting?
PIDC Comments	<p>Yes – Chief executives (or designated officers) should be required, in addition to their current reporting duties, to:</p> <ul style="list-style-type: none"> • keep records of any disclosures made in 42(1)(a) and any reprisal complaints received in (b) – and make them available for production to the PIDC on its request for purposes of audit; • report on the assessment/investigation timelines suggested 4.2 above – including any backlogs; and • report the substantive outcomes of their (disclosure procedure) investigations to the Minister responsible for PIDWA/heads of public entities and additionally to the PIDC for purposes of audit. These reports should include summaries of investigations, inclusive of reasons, that did not result in a finding of wrongdoing or reprisal.
4.3.2	Q - Should the Act require periodic evaluation and/or reviews?
PIDC Comments	<p>Yes – we recommend that PIDWA should be reviewed comprehensively at least every five years by a special committee of the Legislative Assembly, at the request of the PIDC. This special committee would then submit a report about the PIDWA review within one year of its appointment. The report would include any recommended amendments to PIDWA (and consequentially to other enactments).</p>

PSC 5.0	5.1	Q - Should the PIDC be able to review and approve public entities' internal procedures?
	PIDC Comments	Commenting on draft disclosure procedures or amendments is currently required under 6(1-2). We recommend that the public entity head must provide their response on whether to accept any recommendations provided by the PIDC and if not, their reasons for not accepting the recommendations. This is similar to other enactments, including the <i>Ombudsman Act</i> (23-25) and ATIPPA (11).
	5.2.1	Q - Should the Act contain separate and distinct authorities for the PIDC?
	PIDC Comments	Yes – We recommend that 46(1) should be revised to delete reference to the <i>Ombudsman Act</i> as it is no longer necessary to import this Act into PIDWA. The PIDC, as per current 45(3-4), can be appointed in their own right (as is currently the case). In addition, the respective paragraphs in 46(1) should be set out in their full text as PIDWA provisions (inclusive of suggested PIDC revisions), with no further need to cross-reference tediously to the <i>Ombudsman Act</i> .
	5.2.2	Q - What could separate and distinct authorities look like?
	PIDC Comments	We recommend the following: <ul style="list-style-type: none"> • The current (albeit renamed as PIDC authorities) should remain the same. • The PIDC can determine (within the confines of PIDWA) the PIDC's procedures in exercising the powers conferred and performing the duties imposed by PIDWA. For example, it could state that the PIDC can establish and implement practices and procedures for the office of the PIDC in order to ensure its efficient and timely compliance with this Act. • The PIDC should have the 'own-motion' power to audit compliance with PIDWA similar to the new powers under the ATIPP Act.