INTEGRITY COMMISSIONER RECOMMENDATIONS: REVIEW OF THE DISCLOSING AND INVESTIGATING WRONGDOING PART OF THE *PUBLIC SERVICE OF ONTARIO ACT, 2006*

Office of the Integrity Commissioner
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INTRODUCTION

Part VI of the *Public Service of Ontario Act, 2006* (the "Act") establishes a framework for public servants to make disclosures of wrongdoing observed in their workplace. The framework has been in effect since August 2007.

Public servants can make disclosures of wrongdoing internally to their ethics executive or, if they do not believe the internal route is appropriate, to the Integrity Commissioner. The existence of a neutral third party to receive and deal with disclosures of wrongdoing is an essential component of a well-functioning disclosure of wrongdoing framework.

In fulfilling the duties in the Act, the Commissioner has observed that the system is working and that the disclosures that have been received, referred and investigated have been worthy of review and in some instances resulted in important corrective actions. As with most new systems, the Commissioner has also observed that there is room for improvement.

As part of a required statutory review, the Integrity Commissioner was consulted by the Minister of Government Services in the summer of 2012. In response, several recommendations were made, which are outlined below.

RECOMMENDATIONS

1. ABILITY FOR THE COMMISSIONER TO INVESTIGATE DIRECTLY, WITHOUT REFERRAL

> **Amend Part VI to provide the Integrity Commissioner with the authority to investigate directly if, in the opinion of the Commissioner, it is more appropriate than referring the matter to any of the officials designated in section 118(3). It is suggested that this discretion be exercised when the Commissioner determines that any of the circumstances in section 119 are present.**

If the Integrity Commissioner has jurisdiction over a matter, a referral must first be made to an appropriate senior official within a ministry or public body. Ontario is the only Canadian jurisdiction with a "referral-first mechanism." The Commissioner supports the referral-first mechanism but requires greater discretion to move directly to a Commissioner-initiated investigation in appropriate circumstances.

The status quo relies on the good faith of the receiving senior official to declare a conflict or to refer back for other reasons (section 119). However, in some cases, the referral alone will reveal information that ought not to be disclosed to protect the integrity and strategy of the Integrity Commissioner's investigation.

Further, the "referral-first mechanism" gives rise to skepticism on the part of some public servants who wish to make a disclosure. Public servants who contact the Commissioner have often decided that their ethics executive is not suitable to receive and deal with their allegations. Indeed, it is difficult to explain to a public servant that the Commissioner must first refer the matter back to the same deputy minister with whom they had initiated an internal process, and felt that it was not handled appropriately.

Providing the Commissioner with this type of discretion would ensure the integrity of investigations and in some cases improve the confidence of public servants who wish to make disclosures, particularly when a senior official has a conflict.

2. INITIAL ASSESSMENT OR PRELIMINARY INQUIRY

> **Amend Part VI to expressly provide the Integrity Commissioner with the authority to require information and records from a ministry or public body to assist the Commissioner with completing the jurisdictional assessment of a possible disclosure without having to reveal the subject matter of the disclosure to the government.**

Upon receipt of a disclosure of wrongdoing, the Integrity Commissioner must determine whether there is jurisdiction to receive and deal with the matter. First, the Commissioner considers whether the subject matter is in the nature of wrongdoing (i.e. one of the four types of wrongdoing set out in the Act). Second, the Commissioner considers whether any of the circumstances in section 117 of the Act are present. Section 117 enumerates a list of subject matters which the Commissioner is restricted from dealing with. This process is referred to as the Commissioner's "jurisdictional assessment" in this document.

The Commissioner requires more authority to make reasonable requests of government offices to provide information without having to first disclose the nature of the alleged wrongdoing.

The Commissioner is not provided with any powers or authority to carry out any inquiries for purposes of the jurisdictional assessment. At present, the Commissioner carries out the jurisdictional assessment strictly on the basis of the information provided by the discloser and other publicly-available information. On two occasions the Commissioner has requested information from government officials to assist with the review.

All Canadian counterparts are better positioned to perform initial or jurisdictional assessments because they are not bound by the referral-first mechanism and can move directly to a preliminary investigation.

Providing the Commissioner with authority to carry out initial inquiries will improve the ability of the Commissioner to carry out the jurisdictional assessment in as fair a manner as possible. It would allow for information to be considered that is not necessarily in the possession of public servants making disclosures but is relevant to understanding the context of an allegation. This type of information could avoid referrals in cases where there is misinformation or, in some cases, could support referrals when the discloser was not in a position to have access to the best information to evidence wrongdoing.

The Commissioner also made specific recommendations to obtain additional clarity about the jurisdictional exclusions set out in section 117.

3. WORKING WITH OTHER LEGISLATIVE OFFICERS

Amend Part VI to acknowledge that, at any stage in the process, the Integrity Commissioner may seek and rely on advice sought from other Officers of the Legislative Assembly and that personal information about the discloser shared by the Commissioner for these purposes remains confidential.

To assist with the jurisdictional assessment, the Integrity Commissioner has sought confidential advice from other Officers of the Legislative Assembly when a matter touched on their respective areas of expertise. This has proven useful and is an efficient use of existing resources. In each circumstance protocols were established to protect the confidentiality of information provided.

The Commissioner would like to be able to consult with other Officers in a more transparent manner, including the ability to report on the seeking of advice to the discloser or the public, as the case may be. In addition, the Commissioner would like statutory confirmation that the information shared about the discloser for these purposes must remain confidential in the hands of the other Officer.

4. CONFLICT OF INTEREST COMMISSIONER

Amend section 118(3) to include the Conflict of Interest Commissioner as a possible senior official to whom the Integrity Commissioner can refer a matter.

About one third of the cases referred to date included allegations of conflict of interest. The Conflict of Interest Commissioner is an internal authority on application of the *Conflict of Interest Rules*. Further, the Conflict of Interest Commissioner operates at arm's length and has existing jurisdiction to make inquiries and determinations about information received that gives rise to issues under the *Conflict of Interest Rules*.

5. ANNUAL EDUCATION

Require deputy ministers and chairs to ensure that public servants are informed annually about DOW mechanisms.

It is the role of the ethics executive to inform public servants of the existence of the mechanism. It is our view that a formal program to raise awareness should take place annually.

The Integrity Commissioner is optimistic that an increased focus on the duty to inform public servants about the disclosure of wrongdoing framework will provide opportunities for deputy ministers and chairs to develop trust among their staff, encouraging resort to the internal process.

6. PUBLIC REPORTING OF INTERNAL DISCLOSURE OF WRONGDOING ACTIVITY

Amend Act to require government to publicly report internal disclosures

Information about internal activity for disclosures of wrongdoing is an important part of the overall picture of the functioning of the disclosure procedures. It is the Integrity Commissioner's view that increased awareness about the use of the disclosure system will create confidence in the system itself. It

is useful for public servants (and the public) to know that the mechanism is being used and that it is working. The Commissioner sees no principled basis for ministries and public bodies not to proactively disclose this kind of information. Further, all other provinces and the federal government require public reporting of internal activities.

7. LEVEL OF INFORMATION PROVIDED TO DISCLOSERS AND THE PUBLIC

Amend the Act to clarify that public reporting by the Integrity Commissioner (and the government) about activity under the disclosure of wrongdoing framework is in the public interest and that this factor can be weighed against privacy interests.

There is a high public interest in transparency about the activities of the Integrity Commissioner (and the government) in relation to disclosures of wrongdoing. This must be balanced against other interests such as the right to privacy.

When the Commissioner reports to a discloser, publicly or in a limited public forum, the Commissioner is required to consider the provisions of the *Freedom of Information and Protection of Privacy Act*. There are shortcomings with this system, including that the *FIPPA* provisions are designed to deal with pre-existing records subject to access requests not reports of activity or outcomes of investigations. The Commissioner's principle activity is reporting on the activity of the office.

There are also positive features of the status quo. At present, the Commissioner is required to exercise discretion and to consult with the information and privacy head prior to making a decision about how much information to provide to a discloser and to the public. The Commissioner is in favour of maintaining this discretion and the consultation mechanism.

However, the Commissioner would be assisted in exercising her discretion if there was a codification of the principle that the public interest is served by transparent reporting of activity under the disclosure of wrongdoing framework. If there is a concern about broader distribution of the information in the hands of the discloser, there can be statutory restrictions placed on the discloser receiving the information.

8. PRIVILEGED INFORMATION

Amend the Act to eliminate the restriction against providing privileged information to the Integrity Commissioner.

Section 127 states that the Integrity Commissioner cannot require privileged information. This is a significant limitation on the Commissioner's ability to carry out an investigation. It can be contrasted with the Auditor General's much more broad authority in section 10 of the *Auditor General Act*.

The Commissioner seeks a broader ability to compel information even if it is privileged. The *Auditor General Act* and the federal public disclosure legislation each contain provisions clarifying that disclosure alone to the legislative officer does not constitute a waiver of privilege. This seems to be a sensible framework that is as appropriate to the Commissioner's work under Part VI of the *PSOA* as the Auditor's work.

9. LEGAL FUNDING

Amend regulation regarding legal fees (O.Reg 385/07).

The Integrity Commissioner made detailed recommendations to the Minister of Government Services regarding the legal funding regulation in February 2009. In summary, the Commissioner raised concerns about the potential restriction of legal funding to only disclosures that have been "received" by the Integrity Commissioner and the requirement that the Commissioner consider the ability of the public servant to pay.

In February 2009, the Commissioner sought the following amendments to the legal funding regulation:

1. Amend section 1 of the Regulation to clarify that the Integrity Commissioner may arrange or pay for the provision of legal services for public servants or former public servants *considering* filing a disclosure of wrongdoing under section 116 of the PSOA.

2. Amend section 3 of the Regulation to eliminate ability to pay as a mandatory factor.

3. Amend section 1 of the Regulation to allow for the Integrity Commissioner to arrange or pay for the provision of legal services for public servants or former public servants who file an internal disclosure of wrongdoing with their ethics executive under section 114 of the PSOA or address this gap internally in another way.

4. Amend the Regulation to require a future review with recommendations from the Integrity Commissioner in a specified time period to ensure the amount remains reasonable.

10. FUTURE STATUTORY REVIEW

Amend the Act to include a future statutory review in five years.

Public interest disclosure of wrongdoing legislation is new in Canada. Although there have been many lessons learned in the five years that the disclosure of wrongdoing framework has been in place, there will certainly be new lessons learned in the future. The Commissioner suggests that a future review in five years would be beneficial to ensure that the legislation is current and responsive to emerging best practices.

11. ROLE OF PROFESSIONALS

Consider whether another statutory or internal mechanism ought to be established to resolve disputes between regulated professional public servants and non-regulated-professional decision-makers receiving the advice.

The Integrity Commissioner has observed that within the public service there is sometimes a strained relationship between regulated professionals providing advice and non-regulated-professional management. Members of a regulated profession can have a valid concern that their opinions are not being understood or are ignored by senior decision makers who do not have similar professional

credentials. Of course, decision makers are not bound to make decisions solely informed by professional advice.

The role of regulated professions in government decision making gives rise to some unique issues. For example, a professional engineer must reconcile his or her duty as a regulated professional to take certain positive actions to prevent any situation involving engineering that might cause harm to the public, with the engineer's duties as a public servant.

In the cases dealt with to date, the Commissioner has observed that there is some misunderstanding on both sides about a public servant's duty as a regulated professional. The Commissioner recommends that more be done to raise awareness and understanding about the intersection of the duties of professionals as part of a regulated profession with their duties as a public servant.

12. CONTRACTORS

Consider whether contractors (and their sub-contractors) be able to disclose.

The Integrity Commissioner receives requests to make a disclosure about the conduct of public servants observed by contractors carrying out work. There does not seem to be any reasonable basis to disqualify these individuals from making disclosures, particularly because they have the same vantage point as public servants.

13. LOWER LEVEL ENTRY POINT FOR INTERNAL DISCLOSURES

Consider whether a person at a lower level than a deputy minister should be appointed within the ministries to deal with allegations of wrongdoing.

Federal and provincial counterparts have more elaborate systems for internal reporting whereby middle-level managers are assigned the duty to receive and deal with disclosures of wrongdoing. It may be that this type of model encourages more reporting because a public servant is not required to reach out to the highest position in the organization to make the report.

The Integrity Commissioner encourages the government to explore this issue to determine whether it is a way to encourage broader institutional buy-in to the disclosure process in general.

14. WORKPLACE DISRUPTION

Consider whether workplace disruption caused by DOW investigations can be addressed.

The Integrity Commissioner has observed that significant workplace disruption can occur after a disclosure of wrongdoing. We encourage the government to explore means by which this disruption can be minimized.

15. SUMMONS POWERS

Amend the Act to enhance the ability of the Integrity Commissioner to enforce summons issued pursuant to section 126(3).

At present, the Integrity Commissioner has authority to issue a summons to compel evidence. However, the Act is silent about the remedies available to the Commissioner to enforce a summons so issued. A motion within an application before a superior court for interpretation of the statute appears to be the only remedy open to the Commissioner.

The Integrity Commissioner seeks specific provision in the Act to provide for the steps to be taken to enforce a summons in the face of contempt.

16. SUMMONS POWER – SCOPE

Amend the Act to broaden the scope of the investigation powers to authorize the Commissioner to compel information and evidence under oath from individuals with information relevant to the investigation.

At present, the Integrity Commissioner has authority to compel information and evidence under oath from public servants or former public servants. Our experience is that individuals other than public servants can have information relevant to investigations of wrongdoing. The Integrity Commissioner seeks authority equivalent to the Ombudsman's authority to compel information and evidence from any "person who, in the Ombudsman's opinion, is able to give any information" relating to a matter under investigation (s. 19 of the Ombudsman Act).

17. DUTY TO COOPERATE WITH INVESTIGATIONS

Amend the Act to clarify that there is a positive obligation on the part of public servants and individuals appointed pursuant to orders-in-council (but who are not public servants) to cooperate with investigations.

It is an offence to obstruct the Integrity Commissioner in her work. At best, the Act contains an implied duty on public servants to cooperate with investigations and no duty on the part of individuals appointed pursuant to an order-in-council (who are not public servants) to cooperate with investigations. The Commissioner seeks an express recognition in the Act that there is a positive obligation on the part of public servants and other publicly appointed individuals to cooperate with investigations.