7. Whistleblower Protection

The Case for Whistleblower Protection

Ontario health care workers need whistleblower protection to ensure that public health risks are reported promptly to public health authorities without fear of consequences. Without this protection, fear of workplace consequences might discourage the timely disclosure of public health risk. Front line health care workers made enormous sacrifices during SARS. They are entitled to be protected when they raise an alarm to protect public health.

As one nurse told the Commission:

> I want to have the freedom to speak out, so that I'm not worried I might lose my job.

Nurses and other health care workers should be able to alert public health authorities to infection control and disease outbreak problems within hospitals, nursing homes, and the like. If instruments are not being properly sterilized, if a hospital is not actively investigating reports of a possible infectious outbreak, health care workers should be able to report it to public health officials without fear of personal consequences. Workers who disclose information vital to protecting the public's health should be assured that they are protected legally against any form of employer reprisal or workplace consequence.

This chapter will focus on the need to add public health whistleblower protection to the *Health Promotion and Protection Act*. As for other whistleblower issues, there are already whistleblower provisions in the *Occupational Health and Safety Act*,[209] and the larger question of general whistleblower protection for public employees is beyond the scope of this Commission.

209. R.S.O. 1990, c. O-1.

Subsection 95(4) of the *Health Protection and Promotion Act* does allow that "no action or other proceeding shall be instituted against a person for making a report in good faith in respect of a communicable disease or a reportable disease in accordance with Part IV." However, it is of limited protection. As noted in a submission to the Commission:

> The *Health Protection and Promotion Act* should be amended to provide reprisal protection for employees who, in good faith, raise concerns about how a public health risk is being addressed. The Act does provide that "No action or other proceeding shall be instituted against a person for making a report in good faith in respect of a communicable disease or a reportable disease in accordance with Part IV," *(Health Protection and Promotion Act,* R.S.O. 1990, c. H.7, s. 95 (4)), but that protection only deals with reporting specific occurrences, and not with raising concerns about how such an occurrence is being addressed by the public health system. This lack of real "whistleblowing protection" for public health workers is a gap in Ontario's health protection system.

Fear of reprisal is very real. Many nurses and other health care workers expressed fear of workplace consequences if it became known that they were being interviewed confidentially by the Commision. In some cases health care workers agreed to be interviewed on a confidential basis only after they understood that their disclosures to the Commission were protected by the whistleblower protection in Ontario's *Public Inquiries Act*,[210] which governs this Commission: Section 9.1 provides

1. No adverse employment action shall be taken against any employee or any person because the employee, acting in good faith, has made representations as a party or has disclosed information either in evidence or otherwise to a commission under this Act or to the staff of a commission.

2. Any person who contrary to subsection (1) takes adverse employment action against an employee is guilty of an offence and on conviction is liable to a fine of not more than $5,000.

210. R.S.O. 1990, c. P-41.

3. This section applies despite any other Act and the oath of office of a Crown employee is not breached where information is disclosed as described in subsection (1).[211]

Even with this protection under the *Public Inquiries Act* some witnesses were initiitally reluctant to speak to the Commission. Their fear of workplace retaliation was more immediate to them than the seemingly remote protection provided by the statute.

The measure of the concern was expressed by one reluctant witness, a health care worker, who was "afraid of losing my job." Even after being briefed on the confidential nature of the Commission process, and the whistleblower protection in the *Public Inquiries Act,* the witness said:

> There are lots of other reasons for firing people.

The initial reluctance of some health care workers to speak confidentially to the Commission, even after the *Public Inquiries Act* whistleblower protection was explained, underlines their feelings of vulnerability even when given a measure of legal protection. Those feelings of vulnerability are necessarily greater when there is no legal protection at all in respect of a disclosure of a public health danger. Other than the protection when reporting a reportable or communicable disease as required by s. 95(4)[212] of the *Health Protection and Promotion Act*, health care workers who disclose a public health hazard have no protection at all from workplace reprisal.

Health care work can be tough and demanding. The demanding work may strain relationships between workers and supervisors. The atmosphere and pressures on the hospital floor may be less conducive to appropriate disclosure than the higher-ups may think. The fear of retaliation exists and is very real in the minds of those who might have information highly relevant to the protection of the public against an outbreak of infectious disease. These fears have the potential to impede the reporting of information that is vital to the protection of other health care workers and the public, particularly in the case of an infectious disease, where timely reporting and action is critical.

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211. These amendments received Royal Assent on June 23, 2003, following submissions from OPSEU calling for whistle-blower protection in the Walkerton Inquiry.

212 .Subsection 95(4) provides:

> No action or other proceeding shall be instituted against a person for making a report in good faith in respect of a communicable disease or a reportable disease in accordance with Part IV.

Barb Wahl, the then President of the Ontario Nurses' Association (ONA),[213] in a statement at the SARS Commission public hearings: emphasized the need for whistleblower protection:

> Nurses need whistle-blower protection so that they can go elsewhere with the information they have. They need respect and recognition as professionals and essential members of the health care team. Nurses are tired of being shunted aside and disregarded. It's another reason they're leaving the profession. They see they're not included in the decisions and, as a result, they feel they and their patients are not safe.[214]

Adeline Falk-Rafael, President of the Registered Nurses Association of Ontario (RNAO)[215] noted its long standing advocacy of whistleblower protection for health care workers as an important safety valve in the health care system:

> Immediately introduce whistleblower legislation to ensure that nurses and other health care workers can express their concerns without fear of reprisal from their employer. RNAO first requested this legislation from the Premier of Ontario in March of 1998. Failure to implement this legislation has meant that an important safety valve is missing from our health care system.[216]

Whistleblower protection is advocated by the unions that represent Ontario health care workers.

The Canadian Union of Public Employees (CUPE),[217] in a written recommendation to the Commission, stated "Whistleblower legislation is necessary for any employees who feel an employer is putting themselves or the public at risk."

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213. The Ontario Nurses' Association (ONA) is the trade union that represents 50,000 registered nurses and allied health professionals working in hospitals, long-term care facilities, public health, community agencies and industry throughout Ontario (Source: ONA website). On January 1, 2004, Linda Haslam Stroud succeeded Wahl as ONA President.
214. SARS Commission, Public Hearings, September 29, 2003.
215. The Registered Nurses Association of Ontario (RNAO) is the professional association representing over 20,000 registered nurses in Ontario.
216. SARS Commission, Public Hearings, September 29, 2003.
217. CUPE is Canada's largest union. With more than half a million members across Canada, CUPE represents workers in health care, education, municipalities, libraries, universities, social services, public utilities, transportation, emergency services and airlines. (Source: CUPE website).

The Ontario Public Service Employees' Union (OPSEU),[218] in recommending whistleblower protection for health care workers, made the following submission to the Commission:

> Any person with public health responsibilities should be able to bring their good faith concerns about public health risks to the attention of an independent public authority, and, if necessary, the public, without facing reprisal or retaliation from vested interests. The leading Canadian study makes the following observation concerning federal public servants:
>
> > An effective regime for the identification, disclosure and correction of wrongdoing . . . provides public servants with the tools and support they need to reveal and correct instances where conduct and decision-making fall short of the high standards expected in public institutions. In addition, a trusted disclosure regime can make a significant contribution to public service morale and conduct, and to public confidence in government. (Government of Canada, Report of the Working Group on Disclosure of Wrongdoing, 2003, Executive Summary: on Treasury Board website.)
>
> These comments apply equally to persons employed in public sector health functions.

OPSEU made the following recommendation to the Commission:

> Amend the *Health Protection and Promotion Act* to add a provision similar to the *Environmental Bill of Rights*, Section 105, but broadened to include protection against reprisals: where the employee is employed by an enforcement agency, for bringing the matter to public attention after the matter was first brought to the attention of the employer of that person.

Those concerned about the need for whistleblower protection will experience a shock of recognition in the findings made by Associate Chief Judge Murray Sinclair, in the

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218. OPSEU is the third largest union in Ontario, with approximately 100,000 full- and part-time members, nearly 500 locals, and 20 offices across Ontario. OPSEU represents Ontario public service employees, education workers, health workers, social services workers, justice workers and some municipal employees.

Report of the Manitoba Paediatric Cardiac Surgery Inquest. The inquiry looked at the deaths of 12 infants at a Winnipeg Hospital and concluded that five were preventable, three "were still surrounded by more questions than answers," and only one had been acceptably explained. Judge Sinclair found:

> The evidence suggests that because nursing occupied a subservient position within the HSC structure, issues raised by nurses were not always treated appropriately.[219]

He wrote:

> Historically, the role of nurses has been subordinate to that of doctors in our health-care system. While they are no long[er] explicitly told to see and be silent, it is clear that legitimate warnings and concerns raised by nurses were not always treated with the same respect or seriousness as those raised by doctors. There are many reasons for this, but the attempted silencing of members of the nursing profession, and the failure to accept the legitimacy of the concerns, meant that serious problems in the paediatric cardiac surgery programme were not recognized or addressed in a timely manner. As a result, patient care was compromised.[220]

Judge Sinclair said:

> It is necessary to put in place structures that ensure that all staff can make their concerns known without fear or reprisal. It is also important to ensure that the structure of the HSC be adjusted to ensure that the position of nursing does not continue to be a subservient one.

To this end, he recommended that:

> The Province of Manitoba consider passing 'whistle blowing' legislation to protect nurses and other professionals from reprisals stemming from their disclosure of information arising from a legitimately and reasonably held concern over the medical treatment of patients.

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219. Mr. Justice Murray Sinclair, The Report of the Manitoba Paediaric Cardiac Surgery Inquest, "An Inquiry Into Twelve Deaths at the Winnipeg Health Sciences Centre in 1994," November 27, 2000, Chapter 10, p. 1 (electronic version), (subsequently referred to as the Sinclair Report).
220. The Sinclair Report, Chapter 10, p. 1 (electronic version).

Everything said in that report about the barriers to disclosure, and the need for whistleblower protection, applies to the concerns expressed by Ontario health care workers. All Ontario workers now enjoy a limited protection in respect of the disclosure of workplace health and safety hazards. The Ontario *Occupational Health and Safety Act*[221] whistleblower provision provides:

> (50) No employer or person acting on behalf of an employer shall,
>
> (a) dismiss or threaten to dismiss a worker;
>
> (b) discipline or suspend or threaten to discipline or suspend a worker;
>
> (c) impose any penalty upon a worker; or
>
> (d) intimidate or coerce a worker,
>
> because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the *Coroners Act*.

The Ontario workplace safety disclosure provisions require that the worker seek compliance with the statute, as opposed to simply disclosing a concern about a hazard, before the worker attracts whistleblower protection. The focus of this legislation is not on public health but rather on workplace safety, a matter to be dealt with in the final report.

It is important to distinguish between occupational health and safety whistleblower protection and public health whistleblower protection directed to health care workers who make a disclosure to a medical officer of health in respect of a public health risk. Obvious examples include disclosure of a dangerous infection control practice in a hospital, or a cluster of cases that warrants investigation for evidence of an infectious disease outbreak.

A number of statutes, both provincial and federal, provide whistleblower protection. For example, in addition to the *Occupational Health and Safety Act*, Ontario's

221. R.S.O. 1990, c. O-1.

Environmental Bill of Rights makes it an offence for any employer to take reprisals against an employee where the latter has, in good faith, complained, provided information for an investigation or review or participated in a process under the Act.[222] Similarly, the Ontario *Labour Relations Act, 1995,* makes it an offence for either the employer or the Union to take employment action against a person who has made a complaint under the Act.[223]

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222. R.S.O. 1993, s. 105(1) provides:

> Any person may file a written complaint with the Board alleging that an employer has taken reprisals against an employee on a prohibited ground.
>
> Reprisals mean:
>
> (2) For the purposes of this Part, an employer has taken reprisals against an employee if the employer has dismissed, disciplined, penalized, coerced, intimidated or harassed, or attempted to coerce, intimidate or harass, the employee.
>
> Subsection (3) sets out the prohibited grounds:
>
> (3) For the purposes of this Part, an employer has taken reprisals on a prohibited ground if the employer has taken reprisals because the employee in good faith did or may do any of the following:
>
> > 1. Participate in decision-making about a ministry statement of environmental values, a policy, an Act, a regulation or an instrument as provided in Part II.
> >
> > 2. Apply for a review under Part IV.
> >
> > 3. Apply for an investigation under Part V.
> >
> > 4. Comply with or seek the enforcement of a prescribed Act, regulation or instrument.
> >
> > 5. Give information to an appropriate authority for the purposes of an investigation, review or hearing related to a prescribed policy, Act, regulation or instrument.
> >
> > 6. Give evidence in a proceeding under this Act or under a prescribed Act.

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223. S.O., 1995, c. 1, Sched. A, s. 87(1) provides:

> (1) No employer, employers' organization or person acting on behalf of an employer or employers' organization shall,
>
> > (a) refuse to employ or continue to employ a person;
> >
> > (b) threaten dismissal or otherwise threaten a person;
> >
> > (c) discriminate against a person in regard to employment or a term or condition of employment; or

There are somewhat similar whistleblower provisions in federal legislation such as the *Canadian Environmental Protection Act, 1999*.[224]

(d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that the person may testify in a proceeding under this Act or because the person has made or is about to make a disclosure that may be required in a proceeding under this Act or because the person has made an application or filed a complaint under this Act or has participated in or is about to participate in a proceeding under this Act.

Same

(2) No trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions shall,

(a) discriminate against a person in regard to employment or a term or condition of employment; or

(b) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that the person may testify in a proceeding under this Act or because the person has made or is about to make a disclosure that may be required in a proceeding under this Act or because the person has made an application or filed a complaint under this Act or has participated in or is about to participate in a proceeding under this Act.

224. R.S.C. 1999, c. 33, s. 16. provides:

(1) Where a person has knowledge of the commission or reasonable likelihood of the commission of an offence under this Act, but is not required to report the matter under this Act, the person may report any information relating to the offence or likely offence to an enforcement officer or any person to whom a report may be made under this Act.

(2) The person making the report may request that their identity, and any information that could reasonably be expected to reveal their identity, not be disclosed.

(3) No person shall disclose or cause to be disclosed the identity of a person who makes a request under subsection (2) or any information that could reasonably be expected to reveal their identity unless the person authorizes the disclosure in writing.

(4) Despite any other Act of Parliament, no employer shall dismiss, suspend, demote, discipline, harass or otherwise disadvantage an employee, or deny an employee a benefit of employment, by reason that

(*a*) the employee has made a report under subsection (1);

(*b*) the employee, acting in good faith and on the basis of reasonable belief, has refused or stated an intention of refusing to do anything that is an offence under this Act; or

(*c*) the employee, acting in good faith and on the basis of reasonable belief, has done or stated an intention of doing anything that is required to be done by or under this Act.

Whistleblower protection of a more general nature has been advocated in Ontario from time to time. A complicated series of 1993 amendments to the *Public Service Act*,[225] passed by the Legislative Assembly, would have provided general protection for Ontario government employees against retaliation for disclosing allegations of serious government wrongdoing and would also have provided a means for making those allegations public. The legislation proposed an elaborate structure of advice, disclosure, review, reports, notices, reviews, exemptions, submissions, consents, referrals, complaints, arbitrations, settlements, and appeals involving an independent counsel as an officer of the Legislative Assembly. Since its enactment 11 years ago no government has ever proclaimed it in force. The Act applies primarily to government employees and even if proclaimed would withhold protection from most health care workers who are not employed by a government institution.

A more recent Ontario initiative was the introduction into the Legislative Assembly on May 23, 2002, by Shelley Martel M.P.P., of Bill 27, *"An Act to promote patients' rights and to increase accountability in Ontario's health care system."* This private members' public bill called for the appointment of a Health Care Standards Commissioner, whose function would include, among other things the administration of a system of whistleblower protection.[226] The Act was never

225. R.S.O. 1990, c. P-47.

226. The proposed whistleblower section provides:

> 4(1) The purposes of this section are,
>
> to protect employees of providers of health care services from adverse employment action for disclosing allegations of noncompliance with the Patients' Bill of Rights or a health care standard; and
>
> to provide the means for making those allegations public.
>
> 4(2) An employee of health care service provider may disclose to the Commissioner information that is obtained in the course of his or her employment and that the employee is otherwise required to keep confidential, for either or both of the following purposes:
>
> To seek advice about the employee's rights and obligations;
>
> To allow the information to be made public, if the employee believes that it may be in the public interest to do so.
>
> Subsection 4(5) provides:
>
> No provider of health care services or person acting on behalf of such a provider shall take adverse employment action against an employee because the employee has, acting in good faith, disclosed information under subsection (2).

passed.[227] The focus of that proposal was on patients' rights and health care standards generally, not on public health risk in particular. It involved a complex system of reporting, including a separate agency to receive and invesigate complaints.

More recently, two pieces of federal legislation one enacted and one pending, provided whistleblower protection in the federal domain.

The first, Bill C-12, repealed and replaced the former *Quarantine Act*, with *"An Act to prevent the introduction and spread of communicable diseases."* This new *Quarantine Act* was passed on February 10, 2005. It contains a section which provides:

> 54. (1) A person who, in good faith, reports to a screening officer, a quarantine officer or an environmental health officer a contravention of this Act by another person, or the reasonable likelihood of such a contravention, may request that their identity, and any information that could reasonably reveal their identity, not be disclosed to their employer or the other person.
>
> (2) Subject to any other Act of Parliament, no person shall disclose or permit the disclosure of that identity or information unless authorized in writing by the person who made the request.
>
> (3) Despite any other Act of Parliament, no person shall dismiss, suspend, demote, discipline, deny a benefit of employment to, harass or otherwise disadvantage a person for having
>
> a) made a report under subsection (1);
>
> b) refused or stated an intention of refusing to do anything that they believed on reasonable grounds was or would be a contravention under this Act; or

227. Bill 22 was first introduced as private members in Bill 50, 1998, in the 2nd Session of the 36th Parliament by Marion Boyd. Bill 22 remains essentially the same as drafted under Ms. Boyd's direction with two additions noted by Ms. Martel in 2002, in the 3rd Session 33rd Parliament, in debate and second reading. It has been referred to the Committee of the Whole House once under Ms. Boyd and once under Ms. Martel but was never debated and died.

> c) done or stated an intention to do anything that they believed on reasonable grounds was required under this Act.

The other recent piece of federal legislation is Bill C-11, titled *"An Act to establish a procedure for the disclosure of wrongdoings in the public sector, including the protection of persons who disclose the wrongdoings."*[228] It mandates the establishment of a process by which public sector employees can report wrongdoings in the public sector. Section 19 prohibits reprisals against public servants who make disclosures in accordance with the Act. The protection, however, is limited to federal public sector employees.

Recently, the Justice Policy Committee, examining emergency management law in Ontario, made the following recommendation in respect of whistleblower protection:

> Preventing the spread of communicable diseases such as SARS, and ensuring a proper response by the public health system requires open communication between those on the front line, hospital administrators, and government representatives. Sec. 95(4) of the *Health Protection and Promotion Act* protects employees who report occurrences of communicable or reportable diseases, but does not protect, for example, individuals who raise concerns about how disease is being addressed by the public health system.
>
> 14. The Committee recommends that government protect employees who, in good faith, raise concerns about public health and other emergency risks by codifying whistleblower protection.[229]

Principles of Whistleblower Protection

Enough has been said to demonstrate the wide range of current whistleblower provisions and proposals which exist federally and in Ontario. A similarly wide range of legislation exists in other countries.[230] The form of protection depends on its purpose. Some whistleblower statutes have as their purpose the public exposure and prosecu-

228. Bill C-11 received first reading on October 8, 2004.
229. Legislative Assembly, Standing Committee on Justice Policy, "Report on the Review of Emergency Management Law in Ontario," November 2004, p. 7.
230. Three Whistleblower Protection Models: A Comparative Analysis of Whistleblower Legislation in Australia, the United States and the United Kingdom, Sheryl Groeneweg, Research Directorate, Public Service Commission of Canada, October 2001.

tion of the employer. These statutes focus on wrongdoing and punishment. However, the object of public health whistleblower protection is not to punish but to protect the public's health by ensuring timely investigation of a public health risk.

The structure of public health whistleblower protection would be necessarily different from the provincial workplace safety provision and the federal environmental provisions. The latter statutes deal largely with disclosure for the purpose of enforcement or prosecution, while public health disclosure is encouraged for the purpose of investigation and correction.

Another unique feature of health care worker whistleblowing is the private and confidential health information about individual patients that might necessarily be involved in the disclosure to a medical officer of health of a public health danger.

It is beyond the Commission's mandate to debate the question of whether there should be some form of general whistleblower protection throughout the health care system, or indeed the government in general. The Commission's mandate is limited to the public health issues raised by SARS.

The Commission proposes a strong and simple form of protection based on the need to protect employees and encourage the speedy investigation and resolution of public health risks without focusing on wrongdoing or prosecution. The Commission's proposal consists of a clear prohibition against whistleblower retaliation and requires no administrative machinery.

SARS demonstrated that an infection control problem in one hospital can quickly become a problem for the entire province. It must be ensured that any problem in any health care facility that creates a public health hazard is brought to the attention of the medical officer of health or Chief Medical Officer of Health. Otherwise such problems can simmer within a health care institution, uninvestigated and unknown to the authorities, and then break out into the community suddenly and without warning.

The elements of the proposed protection are:

- It applies to every health care worker in Ontario and to everyone in Ontario who employs or engages the services of a health care worker;

- It enables disclosure to a medical officer of health (including the Chief Medical Officer of Health);

- It includes disclosure to the medical officer of health (including the Chief Medical Officer of Health) of confidential personal health information;

- It applies to the risk of spread of an infectious disease and to failures to conform to the *Health Protection and Promotion Act*;

- It prohibits any form of reprisal, retaliation or adverse employment consequences direct or indirect;[231]

- It requires only good faith on the part of the employee; and

- There is both a punitive and a remedial penalty attached to the protection.

The protection should apply to a broad category of people, from nurses, to doctors, to porters, clerks and cleaning staff. It should apply to anyone who employs or engages the services of a health care worker, whether they be permanent staff, contract staff, full-time staff, or part-time casual staff. Each and every health care worker in the province must be assured an equal level of protection, regardless of location of employment or their employment status.

The Commission recommends that the whistleblowing be permitted to the local medical officer of health or the Chief Medical Officer of Health. Some have recommended to the Commission that the whistleblower provisions must include the power to allow a health care worker to whistleblow publicly. For example, OPSEU, in their submission to the Commission, stated:

> Indeed, we suggest that this protection be augmented. The *Environmental Bill of Rights* provision does not include protection for providing information to the public. This shortcoming is of particular importance in circumstances where the employee of an enforcement agency is raising a concern that the enforcement agency itself is not performing its duties appropriately. In those circumstances, the only practical alternative for

231. Although specific types of reprisal could be listed, as in Ontario's workplace legislation, the listing of specific examples can shift the focus from the strong general prohibition to any gaps in the examples that can be found by an ingenious lawyer or administrator. It is therefore recommended that the prohibition remain general.

> that employee may be to provide the information to the public or to the political process for review. There should be protection for doing so.

The extension of whistleblower protection into the political and media arena would add an entirely new layer to the proposed system of disclosure to the Chief Medical Officer of Health or the medical officer of health. Such extension would require a separate system of safeguards to guarantee that disclosure could not bring confidential personal health information directly or indirectly to the public domain.

It is not clear at this time that anything is required beyond confidential disclosure to the Chief Medical Officer of Health or a medical officer of health who are protected from political interference and armed with the fullest independent authority to investigate and to intervene and speak out publicly[232] without fear of employment consequences. The proposed system of protected disclosure to the Chief Medical Officer of Health or a medical officer of health should be given a chance to work before building an extra layer on the speculation that the proposed system will not work. Until the proposed system has been given a chance to work, the proposal for media and public disclosure is not ripe for enactment.

The Commission recommends that this whistleblower protection described above, be included in the *Health Protection and Promotion Act* and that it extend to all disclosures made in relation to the risk of spread of infectious disease and/or violations of the *Health Protection and Promotion Act*. It would thus become an integral part of the public health protection system administered by the medical officer of health and the Chief Medical Officer of Health.

For three reasons, the Commission recommends that the disclosure be tied directly to the risk of the spread of infectious disease and/or violations of the *Health Protection and Promotion Act*.

The first reason is that other health system problems, such as patient treatment generally, patient safety, occupational health and safety and other general health issues, are outside the direct responsibility of the Chief Medical Officer of Health and the medical officer of health. They cannot, with their enormous range of duties and limited resources, be expected to solve all the problems of the health care system. As one expert commented to the Commission:

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232. As noted above, the government has increased the independence of the Chief Medical Officer of Health. This report recommends further measures of independence for the Chief Medical Officer of Health and local medical officers of health.

> … the push will come that it … needs to be universal. If I see a patient maltreated, I want to be able to report; I do not care if it is a public health issue or not … The worst-case scenario is it gets broadened, broadened, broadened and the medical officers of health become the arbiters of every problem in the health system.

The second reason is that to encourage health care workers to report to the medical officers of health problems unrelated to their own duties and resources is to create unrealistic expectations on the part of the public as to the limited role of the medical officers of health and their inability to solve all problems. As another health expert cautioned:

> Keep in mind too, the medical officers of health are constrained by the Act itself. Their powers are set out in the Act, their ability to respond to whistle blowing is limited by the Act. So if they are getting a whole bunch of reports outside their mandate, it is true that they are not under any obligation to act. But it is going to create a fairly negative impression from members of the public if they are being asked to do things that are clearly outside their authority to do under the Act and they are going to get such pressure if there is no limit put on what sort of complaints can be brought forward to the medical officer of health as part of whistle-blower protection.

To encourage workers to report a problem to an official who has no mandate or ability to deal with the problem is to mislead both the worker and the public.

The third reason is that other forms of disclosure relating to matters such as worker health and safety are already covered by existing legislation and governed by the machinery of other statutes such as the *Occupational Health and Safety Act*. Workplace health and safety issues arising from SARS are strongly on the Commission's agenda and will be dealt with in the final report. This interim report deals only with the public health aspects of whistleblower disclosure where health care workers have no protection at all. Whatever issues may be identified in the current legislation or in the role that the Ministry of Labour played during the SARS outbreak, the solution does not lie in forcing the medical officer of health to intervene in relation to issues outside their mandate, resources and legal powers.

The good faith requirement proposed by this Commission excludes from protection only those disclosures that are made for some bad faith purpose, such as personal malice. Some whistleblower legislation, by requiring "reasonable and probable

grounds" instead of mere good faith, diminishes the protection afforded to the worker.

To require that the worker have "reasonable and probable grounds" to believe that the apprehended problem actually does exist in fact is a high hurdle for the health care worker, akin to the criminal requirement that a police officer, before laying a criminal charge, must have objective reasonable and probable grounds to believe that a criminal offence has been committed. There are lower thresholds such as "reasonable suspicion" and "reason to believe." A requirement of "reasonable and probable grounds" or even "reasonable suspicion" attracts the criminal standard and it could lead to endless arguments in court about the degree of proof required before a health care worker can disclose a problem. This criminal law baggage is an unecessary burden for the health care worker who sees a potential infection control problem or a cluster of uninvestigated suspicious infections and simply wants to make sure that someone looks into it.

It is important to ensure that the whistleblower protection does not put the threshold too high for effective health care worker protection. The Commission recommends that the worker be protected so long as the disclosure is made in good faith. In recommending the good faith requirement the Commission rejects the "reasonable and probable grounds"[233] requirement that would afford too little protection to the worker.

Finally, the protection must come with penalties for violation, both punitive and remedial. For example, paragraph 70(1)(a) of the *Personal Health Information Protection Act*, makes it an offence for anyone to dismiss, suspend, demote, discipline, harass or otherwise disadvantage a person who has made a report or complaint to the Commissioner under the Act.[234] Such a violation is punishable by a fine of up to

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233. The *Public Interest Disclosure Act*, 1998 (U.K.), 43B(2) of the United Kingdom:

> to qualify for protection, requires that the worker making the disclosure must be acting in good faith throughout and must have reasonable grounds for believing that the information disclosed indicates the existence of one of the defined problems.

234. Subsection 70(1) provides:

> No one shall dismiss, suspend, demote, discipline, harass or otherwise disadvantage a person by reason that,
>
> (a) the person, acting in good faith and on the basis of reasonable belief, has disclosed to the Commissioner that any other person has contravened or is about to contravene a provision of this Act or its regulations;

$50,000.00 where the offender is a natural person and $250,000.00 where the offender is not a natural person.[235]

While these deterrent penalties are essential, remedial protection is equally important. It is not enough to punish the employer if the employee is left without any remedy. It is of little assistance to the health care worker if the violating employer is fined but the worker is left without a job. Other statutes, such as the *Environmental Bill of Rights*[236]

Subsection 72(1) provides:

A person is guilty of an offence if the person,

(j) contravenes section 70.

235. Subsection 72(2) provides:

A person who is guilty of an offence under subsection (1) is liable, on conviction,

(a) if the person is a natural person, to a fine of not more than $50,000; and

(b) if the person is not a natural person, to a fine of not more than $250,000.

236. Subsection 105(1) provides:

Any person may file a written complaint with the Board alleging that an employer has taken reprisals against an employee on a prohibited ground.

Reprisals

(2) For the purposes of this Part, an employer has taken reprisals against an employee if the employer has dismissed, disciplined, penalized, coerced, intimidated or harassed, or attempted to coerce, intimidate or harass, the employee.

Prohibited grounds

(3) For the purposes of this Part, an employer has taken reprisals on a prohibited ground if the employer has taken reprisals because the employee in good faith did or may do any of the following:

1. Participate in decision-making about a ministry statement of environmental values, a policy, an Act, a regulation or an instrument as provided in Part II.

2. Apply for a review under Part IV.

3. Apply for an investigation under Part V.

4. Comply with or seek the enforcement of a prescribed Act, regulation or instrument.

and the *Occupational Health and Safety Act,*[237] have attempted to address this issue by establishing procedures for review by the Ontario Labour Relations Board, in cases of

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5. Give information to an appropriate authority for the purposes of an investigation, review or hearing related to a prescribed policy, Act, regulation or instrument.

6. Give evidence in a proceeding under this Act or under a prescribed Act.

Labour relations officer, authorization

106. The Board may authorize a labour relations officer to inquire into a complaint.

Labour relations officer, inquiry into complaint

107. A labour relations officer authorized to inquire into a complaint shall make the inquiry as soon as reasonably possible, shall endeavour to effect a settlement of the matter complained of and shall report the results of the inquiry and endeavours to the Board.

Inquiry by the Board

108. If a labour relations officer is unable to effect a settlement of the matter complained of, or if the Board in its discretion dispenses with an inquiry by a labour relations officer, the Board may inquire into the complaint.

Burden of proof

109. In an inquiry under section 108, the onus is on the employer to prove that the employer did not take reprisals on a prohibited ground.

Determination by the Board

110. If the Board, after inquiring into the complaint, is satisfied that the employer has taken reprisals on a prohibited ground, the Board shall determine what, if anything, the employer shall do or refrain from doing about the reprisals.

Same

(2) A determination under subsection (1) may include, but is not limited to, one or more of,

(a) an order directing the employer to cease doing the Act or acts complained of;

(b) an order directing the employer to rectify the Act or acts complained of; or

(c) an order directing the employer to reinstate in employment or hire the employee, with or without compensation, or to compensate instead of hiring or reinstatement for loss of earnings or other employment benefits in an amount assessed by the Board against the employer.

237. Subsection 50(1) provides:

No employer or person acting on behalf of an employer shall,

(a) dismiss or threaten to dismiss a worker;

(b) discipline or suspend or threaten to discipline or suspend a worker;

(c) impose any penalty upon a worker; or

(d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the *Coroners Act*.

Arbitration

> (2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Board in which case any rules governing the practice and procedure of the Board apply with all necessary modifications to the complaint.

Inquiry by Board

> (3) The Board may inquire into any complaint filed under subsection (2) and section 96 of the *Labour Relations Act, 1995*, except subsection (5), applies with all necessary modifications as if such section, except subsection (5), is enacted in and forms part of this Act.

Same

> (4) On an inquiry by the Board into a complaint filed under subsection (2), sections 110, 111, 114 and 116 of the *Labour Relations Act, 1995* apply with all necessary modifications.

Onus of proof

> (5) On an inquiry by the Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

Jurisdiction when complaint by Crown employee

> (6) The Board shall exercise jurisdiction under this section on a complaint by a Crown employee that the Crown has contravened subsection (1).

Board may substitute penalty

> (7) Where on an inquiry by the Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

dismissal or workplace reprisals against a whistleblowing employee. In both statutes the burden of proof is on the employer to establish that it did not take repraisals on the prohibited ground. Health care workers who whistleblow for the protection of the public's health require protection equal to that afforded by the *Environmental Protection Act* and the *Occupational Health and Safety Act*.

The Commission therefore recommends that an employer who breaches the whistleblower protection is liable to a fine of up to $50,000.00 where the offender is a natural person and $250,000.00 where the offender is not a natural person, and that remedial machinery be enacted to restore a whistleblower to the position he or she held before the unlawful reprisal.[238]

Conclusion

Any health care worker should be free to alert public health authorities to a situation that involves the risk of spreading an infectious disease, or a failure to comply with the *Health Protection and Promotion Act*. Public health officials do not have the resources to be present in every health care facility at every moment. While one would expect that a facility administrator, infection control specialist, or practitioner would report to public health officials situations or cases that might risk the public's health, the cost of nonreporting or inaction is too high. In the event of such a failure to report, regardless of its cause, it is not enough to hope that public health officials will stumble across the problem eventually. SARS and other diseases[239]clearly demonstrate the importance of timely reporting of a risk to public health. Health care workers can be the eyes and ears of public health and the front line protectors of the public's health. They must be free to communicate with public health officials without fear of employment consequences or reprisals.

238. The liability and penalty should be the same as that in the *Personal Health Information Protection Act*, including liability of officers and other employees as set out in s. 72(3). It provides:

    72(3) If a corporation commits an offence under this Act, every officer, member, employee or other agent of the corporation who authorized the offence, or who had the authority to prevent the offence from being committed but knowingly refrained from doing so, is a party to and guilty of the offence and is liable, on conviction, to the penalty for the offence, whether or not the corporation has been prosecuted or convicted.

    It should also include liability of directors.

239. For example, Tuberculosis. Consider the case of the delayed reporting of a homeless man with tuberculosis, which is discussed earlier in the "Reporting Requirements" chapter.

Recommendation

The Commission therefore recommends that:

- **The *Health Protection and Promotion Act* be amended to provide health care workers whistleblower protection in accordance with the following principles:**

    - **It applies to every health care worker in Ontario and to everyone in Ontario who employs or engages the services of a health care worker;**

    - **It enables disclosure to a medical officer of health (including the Chief Medical Officer of Health);**

    - **It includes disclosure to the medical officer of health (including the Chief Medical Officer of Health) of confidential personal health information;**

    - **It applies to the risk of spread of an infectious disease and to failures to conform to the *Health Protection and Promotion Act*;**

    - **It prohibits any form of reprisal, retaliation or adverse employment consequences direct or indirect;[240]**

    - **It requires only good faith on the part of the employee; and**

    - **It not only punishes the violating employer but also provides a remedy for the employee.[241]**

240. Although specific types of reprisal could be listed, as in Ontario's workplace legislation, the listing of specific examples can shift the focus from the strong general prohibition to any gaps in the examples that can be found by an ingenious lawyer or administrator. It is therefore recommended that the prohibition remain general.
241. As noted above, the punishment recommended for an employer who violates the protection is a fine of up to $50,000.00 where the employer is a natural person and $250,000.00 where the employer is not a natural person.