Treasury Board of Canada Secretariat
Secrétariat du Conseil du Trésor du Canada

Meeting the Expectations of Canadians

The *Financial Administration Act*: Responding to Non-compliance

REPORT TO PARLIAMENT

Canada

Catalogue No. BT22-99/2005
ISBN 0-662-69026-5

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Executive Summary

Managers in the federal Public Service serve in an institution created and governed by a complex array of statutes, regulations, policies, and directives. They operate in an environment of increasingly intense scrutiny and accelerated changes driven by technology, program reviews, and public and political expectations for service improvements. These factors, combined with the growing institutional complexity and risks and concerns expressed by the Auditor General of Canada, led to this review of mechanisms that operate in response to compliance with the *Financial Administration Act* (FAA) and the recovery of lost public funds.

The review's terms of reference were framed by the purpose and intent of the FAA, which finds its origins in the earlier days of the confederation. The FAA sets out the core legal framework within which public sector managers must manage.

This review has provided the government with a thorough and comprehensive look at the complex issues surrounding compliance and sanctions under the FAA and related policies. While public attention has focussed on recent instances of mismanagement, it is clear that the vast majority of those charged with public sector management responsibilities carry out their duties with integrity and honesty. Comparative research also confirms that Canada is on par with other jurisdictions in the areas of criminal sanctions, debt recovery, investigations, and discipline.

Furthermore, the review has provided a better understanding of opportunities to improve the integrated policies, and statutes that comprise the compliance framework for the FAA and set the context for managing in the Public Service.

A number of broad and important conclusions and understandings need to be emphasized:

- The principles behind the legislative and administrative frameworks are sound. The difficulty arises from the accumulation of rules and policies, etc. This complexity contributes to confusion and errors.
- "Mismanagement" includes a wide variety of behaviours ranging from a mistake or error up to and including criminal activity such as theft or fraud. Regardless of where mismanagement falls on the spectrum, appropriate tools and responses are generally available.
- Education and training at all levels of the Public Service are of paramount importance both to addressing mismanagement and to helping public service employees do their jobs properly.

- Consistency is crucial in addressing mismanagement. Sanctions must always be applied with the primary goal of restoring compliance.
- Managers must be held accountable for mismanagement that falls within their area of responsibility. Accountability must start from the top. Good examples must be set to encourage confidence and to reinforce the trust that underlies the relationship between the Government of Canada as employer and its employees.

Most importantly, any response, be it carrying out an investigation or taking remedial action, must be conducted rapidly and transparently. The results must be communicated effectively in order to enhance confidence in the government's compliance framework.

Recommendations from this review have been incorporated into the paper *Management in the Government of Canada: A Commitment to Continuous Improvement*.

Introduction

The Government of Canada has made a commitment to restoring trust and accountability in government. On December 12, 2003, the government announced a series of initiatives to attain these objectives. Since that time, the government has made strides in strengthening oversight, accountability, and management across the public sector.

On February 10, 2004, the government announced measures aimed at strengthening transparency and accountability across the public sector. These measures included improving oversight activities, principally at the Treasury Board of Canada Secretariat (the Secretariat), and the launch of three reviews directed at specific areas of public sector management, including one on the compliance and sanction regime under the *Financial Administration Act* (FAA).

This review's terms of reference covered three broad areas:

- review of the tools and mechanisms available to the government to prevent and deter instances of mismanagement or the disregard of related laws and directives;
- review of compliance and sanction regimes applicable to current employees of the Public Service, the broader public sector, as well as former employees; and
- review of investigative processes and approaches, including those used in seeking recovery of public funds, to determine if and how they can be enhanced.

On March 24, 2004, the government released the Action Plan for Strengthening Public Sector Management and reaffirmed its commitment to strengthen the rules governing compliance with management principles. The Action Plan included a full review of the government's measures for dealing with all aspects of mismanagement or rule breaking. The scope of the review includes prevention and deterrence tools and mechanisms as well as options available to the government, investigative processes and approaches, and recovery of public funds. The 2005 budget documents provided an update on these initiatives.

Most of the research and consultations for the review were conducted in 2004. This served as a basis for discussions and analysis that supported an important part of the management improvement agenda. This report sets out the context within which elements of the Action Plan related to compliance, investigation, and consequences may be considered.

A Word on Methodology

The work underlying this report was done through a series of modules conducted by members of a review team assembled from different areas within the government. Experts in the areas of labour relations, management, and financial management were brought in, along with lawyers with experience in criminal law, labour and employment law, and instrument choice.

The review team consulted subject matter specialists in areas including financial management, law enforcement, and labour relations using methods such as individual discussions and focus groups. Members from the executive cadre down to middle managers also participated in these consultations. A review of practices in other jurisdictions, within Canada and abroad, offered additional insights. The team also conducted both legal and academic research to gain a better understanding of the current state of the law with respect to these issues and of the issues themselves. A list of the organizations and persons consulted is found in Appendix A.

There is no comprehensive empirical evidence concerning the degree or number of cases of non-compliance or mismanagement in the federal government. The information on non-compliance and mismanagement used as part of this review was gleaned from reports prepared by the Office of the Auditor General of Canada and from anecdotal evidence and information obtained through internal consultation.

1. Overview of the *Financial Administration Act*

The Public Service of Canada is governed by a legislative framework that sets out the formal rules for the administration and management of the government. This section illustrates that framework in three key areas: financial administration and management of assets, human resources, and information management.

The *Financial Administration Act* (FAA) is the cornerstone of the legal framework for general financial management and accountability of public service organizations and Crown corporations. It sets out a series of fundamental principles on the manner in which government spending may be approved, expenditures can be made, revenues obtained, and funds borrowed.

The FAA also provides a procedure for the internal control of funds allocated to departments and agencies by Parliament and for the preparation of the Public Accounts that contain the government's annual statement of expenses and revenues. The financial statements are presented to the Auditor General of Canada, who provides an independent opinion on them to the House of Commons.

The Minister of Finance is given the management of the Consolidated Revenue Fund, into which all revenues must be paid and from which expenditures are paid with parliamentary approval.

The FAA also establishes the Treasury Board, a committee of Cabinet composed of at least six ministers, including its President and the Minister of Finance. The FAA allows the Treasury Board to adopt administrative policies for the Government of Canada and gives it specific authority to issue directions in various areas related to the management and control of funds. Thus, while the FAA does not encompass all of the rules and principles governing public management, it serves as the principal source of management authority for the Public Service. For this reason, it has led to the definition of the parameters for this review. The Treasury Board also carries out other related functions; notably, it acts as the employer of public service employees engaged in core public administration and plays a key role in real property matters. The Treasury Board may act by approving general or specific policies or directives or by issuing non-binding documents providing guidance and benchmarks.

For the most part, the Treasury Board uses the authorities granted (primarily) under the FAA to issue policies that are binding upon the administration. There are currently about 411 instruments issued by the Treasury Board, including policies, directives, and guidelines.

The FAA also authorizes the passing of regulations. While from the public service perspective the policies are no less binding than the regulations, the breach of regulations is liable to attract sanctions that would not be applicable to the breach of published directives or instruments. Regulations, like legislation, are official, published instruments and, in certain circumstances, they also affect third parties. There are currently 13 regulations of general application adopted pursuant to the provisions of the FAA.

Finally, the FAA also sets specific rules itself, most notably in the areas of collection, management, and spending of public funds.

The FAA imposes rights and duties on ministers and directly on deputy heads in relation to the institutions they manage. These include, notably, the obligation for a deputy head to establish procedures and maintain records respecting the control of financial commitments chargeable to public funds, the fact that only a minister or his or her delegate can request the issuance of a payment, and that before a payment is issued in return for work, goods, or services, the deputy of a minister (or another delegate) must certify that the work has been performed, the goods received, or the services rendered (sections 32, 33, 34).

Departments are primarily responsible and accountable for the following:

- the expenditure of funds and management of assets that they have been allocated;
- delivering the results that they commit to achieving with the resources they have been allocated; and
- meeting the management expectations according to performance indicators in the Management Accountability Framework (MAF) for performance reporting and accountability, which sets out a rigorous regime of managerial expectations.

Departments, as led by their deputy heads, are also responsible for implementing appropriate management processes, systems, and instruments to deliver their management duties and obligations, and monitor their performance.

An appropriation act is the vehicle through which Parliament provides spending authority to the government on an annual basis. It is how Parliament discharges its responsibility through section 26 of the FAA and section 53 of the *Constitution Act, 1867*. About 33 per cent of spending monies are acquired in this manner. Money is also acquired through statutory appropriation, which means that approval for funds is embedded in legislation and does not have to be sought annually.

A number of other statutes are instrumental to human resources management in the federal Public Service:

- the *Public Service Staff Relations Act* (PSSRA);
- the *Public Service Employment Act*;
- the *Public Service Modernization Act*;
- the *Canada Labour Code*;
- the *Canadian Human Rights Act*; and
- the *Employment Equity Act*.

The PSSRA establishes a framework for the certification of bargaining agents, a collective bargaining regime, and the provision of essential services in case of strikes. It also provides a right to grieve discipline and any action affecting terms and conditions of employment. Regulations under the PSSRA set out the grievance and adjudication processes. The PSSRA also articulates prohibited conduct that may constitute an unfair labour practice as well as a bargaining agent's duty to fairly represent its members.[1] Collective agreements concluded pursuant to provisions of the PSSRA are legally binding on the employer and its representatives, the bargaining agent, and the employees subject to it.

The *Public Service Employment Act* sets out the rules and principles governing the staffing of positions in the Public Service. Built on the merit principle, with a view to ensure and maintain the political neutrality of the Public Service, it strives to ensure fairness and equity in the manner in which positions are being staffed.

Both statutes and their underlying principles were reviewed as part of the Public Service Modernization Initiative. The *Public Service Modernization Act* reissues both of these acts.

Part II of the *Canada Labour Code* governs occupational health and safety in the workplace. It affects both public and private sector workers under federal jurisdiction. It further establishes fundamental employee safety rights and sets out the roles of health and safety committees and officers as well as procedures for determining whether a danger in the workplace exists.

The *Canadian Human Rights Act* prohibits discrimination and harassment based on a series of enumerated grounds. These include sex, age, disability, ethnic origin, and sexual orientation. The *Canadian Human Rights Act* mandates the Canadian Human Rights Commission to receive and inquire into complaints and, ultimately, refer them to the Canadian Human Rights Tribunal.

1. The PSSRA has been revised and retitled as part of the *Public Service Modernization Act* (PSMA). The relevant provisions of the PSMA have not yet come into force.

The *Employment Equity Act* was implemented to achieve equality in the workplace so that no person would be denied employment opportunities or benefits for reasons unrelated to his or her abilities. It also aims to correct the disadvantage in employment experienced by women, Aboriginal peoples, persons with disabilities, and members of visible minority groups by giving effect to the principle that employment equity means not only treating persons in the same way, but also requires special measures and the accommodation of differences. The *Employment Equity Act* applies to employers in the private and public sector and sets out the employers' obligations in support of employment equity.

Information management is governed by three main pieces of legislation: the *Privacy Act*, the *Access to Information Act*, and the *Library and Archives of Canada Act*.

The *Privacy Act* obliges managers to protect the privacy of employees and to retain information pertaining to them. Under the *Privacy Act*, the personal information of an employee can, upon request, be disclosed to that individual, subject to any applicable exemptions. The *Access to Information Act* requires safekeeping of most information created or obtained by the government (it creates a criminal offence for deliberately destroying information likely to be requested). Subject to some specific exemptions, the *Access to Information Act* requires officials to produce information upon request by members of the public. The *Library and Archives of Canada Act* dictates the rules governing retention periods for documents. Each of these statutes is accompanied by regulations. The Secretariat provides supplemental guidelines and policies to assist institutions with interpretation of the *Privacy Act* and the *Access to Information Act*.

2. Managing in the Public Service

"Good management" is not just the application of a series of rules and legal instruments, and "mismanagement" cannot be simply defined as a failure to apply management rules. There is no single instrument to guide public service managers: the rules and principles by which they must operate are scattered in a variety of statutes, regulations authorized by those statutes, and, as described above, numerous policies and directives applicable to the internal administration of government.

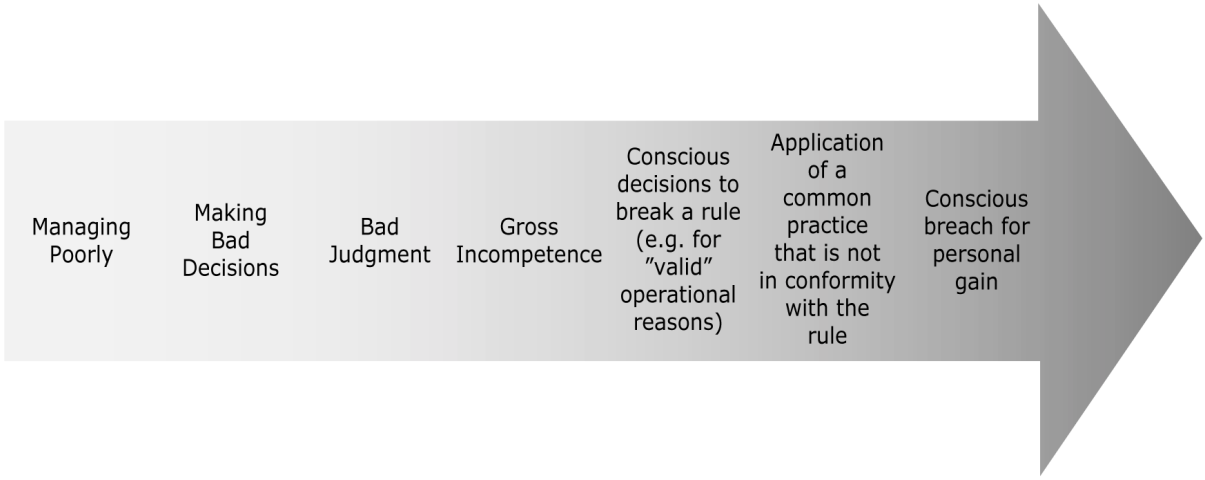
Good public sector management requires sound judgment that is well grounded in ethics, values, and principles and a desire to uphold the rule of law and pursue the public interest. Rules, whether regulations, policies, guidelines, or directives, should be understood and respected. Respect for the rules does not preclude changing them to enhance program delivery or creating new ones that respect fundamental values. The environment in which public service employees manage is in constant evolution. Drivers of change include a more complex policy environment, program review and its ensuing effects on specialist communities supporting managers, along with additional layers of rules dealing with specific issues. Public service employees, particularly at senior levels, are often caught in organizational paradoxes amplified by the nature of the institution: It is characterized by frequent change in policy directives and the need to constantly reconcile a broad range of interests and values. At the same time, technology has raised expectations for faster decision making and increased transparency, while access to information legislation has, in turn, fuelled a demand for more information, delivered faster.

This review was primarily conducted with financial management as a focus. Much of the analysis and many of the conclusions apply to the broader scope of management responsibilities, notably to those related to human resources and information, where the same high standard of ethical behaviour is expected to be applied.

2.1 What is mismanagement?

Dictionaries define "mismanagement" as doing something badly, improperly, wrongly, carelessly, incompetently, or inefficiently. Mismanagement could conceivably cover a range of actions from a simple mistake in performing an administrative task to a deliberate transgression of relevant laws and related policies. In some cases, it could involve criminal behaviour such as theft, fraud, breach of trust, and conspiracy. A continuum is illustrated below.

Figure 1. Range of Mismanagement Actions



Given the scope of the issues covered here, no single all-encompassing definition of "mismanagement" is adequate. For example, both the discussions on criminal sanctions and disciplinary regimes require more precise views. On the other hand, discussion of approaches to promote compliance can accommodate a broader definition. For these reasons, the review has not attempted to arrive at a precise definition. This review has adopted, as a working concept of mismanagement, those situations where a public service employee fails to follow the rules set by the framework of management instruments created by the FAA.

2.2 Better rule making: Overhaul of the management policy suite

It is intuitive that increased knowledge of management rules does, in turn, increase compliance. As noted at the outset, there are hundreds of Treasury Board instruments imposing specific responsibilities and accountabilities. Confusion arises because management policies lack coherence, speak to varying levels within government, or use slightly different language. They can at times present a "siloed" approach to problem resolution rather than a holistic one.

The Secretariat and the Public Service Human Resources Management Agency of Canada are working to streamline and simplify the Treasury Board management policy suite. This is also an objective of the *Public Service Modernization Act* directed, in part, at making the staffing process more efficient.

Managing in the government will never be simple. The Treasury Board's policy review effort is striving for a coherent view of the rules for managers. The goal is to make policies part of an overhauled global guidance system for public service employees—a system that will make management rules come to life for managers and practitioners—improving coherence and easing

compliance, while contributing to an environment where employees willingly and systematically pursue compliance.

2.3 The special duties and obligations of public service employees

Public service employees have special responsibilities. By virtue of holding a public service position, employees and office holders are entrusted with a series of special obligations that differ from those found in private sector employment relationships. This results in specific duties and commitments for these employees.

The constitutional conventions relating to the role of the Public Service within the cabinet-parliamentary system stress the value of a non-partisan, professional, and permanent public service appointed and operated on the basis of merit and competence. This public service is intended to provide intelligent and objective policy advice to ministers and deliver programs in an efficient and impartial manner.

In 1985, the Supreme Court of Canada noted that the fundamental task of the federal Public Service is to administer and implement policy, saying:

> In order to do this well, the public service must employ people with certain important characteristics. Knowledge is one, fairness another, integrity a third. […] The tradition [surrounding our public service] emphasizes the characteristics of impartiality, neutrality, fairness and integrity.[2]

The 1996 Tait report, *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*, set out some of the factors underlying the trust placed in public service employees:

> Every day, in myriad ways, public servants make decisions and take actions that affect the lives and interests of Canadians: they handle private and confidential information, provide help and service, manage and account for public funds, answer calls from people at risk. Because public servants hold such a significant public trust, ethical values must necessarily have a heightened importance for them.
>
> A public organization does not and cannot enjoy the "flexibilities" of private sector organizations. It will always have to meet higher standards of transparency and due process in order to allay any fears of favouritism, whether internal or external, in performing its duties under its position of trust and in its use of public funds.

2. Fraser v. Canada (Public Service Staff Relations Board) [1985] 2 S.C.R. 455 at paras. 40 and 43.

The expectations placed on public service employees are highlighted:

> […] wherever we find ourselves in the public service, and at whatever levels, we enjoy the deep privileges of public service—the opportunity to serve and help our country—and the obligations of leadership and initiative that go with them. We do not have to, and should not, wait for signals from others before undertaking the great tasks of public service leadership: exercising imagination, creativity and vigilance for the public good and caring for the people entrusted to our charge.[3]

The Supreme Court of Canada took a similar view in a 1996 decision:

> Protecting the integrity of government is crucial to the proper functioning of a democratic system. […] Preserving the appearance of integrity, and the fact that the government is fairly dispensing justice, are, in this context, as important as the fact that the government possesses actual integrity and dispenses actual justice. […] given the heavy trust and responsibility taken on by the holding of a public office or employ, it is appropriate that government officials are correspondingly held to codes of conduct which, for an ordinary person, would be quite severe.[4]

Clearly, in acting on behalf of their ministers, public service employees, and particularly those in the senior ranks of the Public Service, are burdened with a set of responsibilities that is unique and very different from those of their private sector counterparts. These responsibilities are accompanied by a set of rules, the breach of which would not necessarily attract any reaction in the private sector but may well constitute "mismanagement" in the public sector.

2.4 Public service culture and values

Historically, the Public Service of Canada has evolved into an organization grounded in solid ethical principles and sound values. The public service values, as set out in the Tait report, provide a strong framework to guide managers and employees. Furthermore, a number of current initiatives reinforce a values-based public service culture. For example, the government "whistle-blower" bill (protecting public service employees who disclose wrongdoings) introduced in 2004 highlights values and proposes a Charter of Values of Public Service.

In December 2003, the responsibility for public service values and ethics was given to the Public Service Human Resources Management Agency of Canada. Among the Agency's priorities was creating widespread awareness, understanding, and application of public service values and

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3. John C. Tait, Q.C., chaired a task force on **Values and Ethics**, the mandate of which was to examine the relationship between existing and evolving values in the Public Service and to consider ways to align values with current challenges. The resulting report can be found at the following site: http://www.myschool-monecole.gc.ca/Research/publications/html/tait_e.html#professional.
4. R. v. Hinchey [1996] 3 S.C.R. 1128 at paras. 15, 17, and 18, respectively (per L'Heureux-Dubé).

ethics, including obligations under the *Values and Ethics Code for the Public Service* as well as supporting departments and agencies in meeting their commitments by establishing performance indicators, providing a "roadmap" for assessing and improving values and ethics results, and implementing measurement and evaluation strategies, including surveys.

An evolving public service needs to maintain and reinforce a strong ethical compass, but balance is critical. A management approach exclusively based on values and principles would not only be impractical but also unfair to public service employees. The renewal of the management policy suite will provide a set of clear directions within which public service employees will be able to work, while being inspired and guided by their values and sense of ethics.

As noted by Peter Aucoin, a professional public service can articulate and communicate what its values are and can govern itself accordingly. This is not achieved only by getting the right legislative framework in place or by having the right attitudes:

> […] Rather, it is dependent, first and foremost, upon both the individual and collective willingness to exercise professional judgment, that is to take action when managers or staff do not behave in ways that accord with public service values and ethics and to reward those who do.[5]

2.5 Consequences and implications of non-compliance and mismanagement

In general, unresolved issues of non-compliance and mismanagement weaken the public's trust in government as a protector of the public interest. (Even when such cases are not made public, mismanagement that results in a loss or waste of resources reduces the government's capacity to do its job). Neither the various reports of the Auditor General of Canada nor anecdotal evidence of cases of mismanagement point to an insufficiency of rules. The evidence points instead to a periodic or occasional lack of compliance—by officials and departments—with some of the rules.

In extreme cases, non-compliance can erode the reputation of the Public Service. Canadians rightly expect managers and public service employees follow the rules. Their confidence when dealing with the Public Service may be adversely affected if non-compliance were ever to be seen as widespread. Even the government's reputation might suffer if it was perceived that widespread or serious non-compliance was left unchecked. In the last few years, in fact, there has been evidence of a growing public perception of declining ethics and professionalism in governments.

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5. Peter Aucoin is a political scientist who has written extensively on public service governance. From: "Comparative Perspectives on Canadian Public Service Reform in the 1990s," page 5, as part of a report of the Auditor General, *Public Service Management Reform Progress: Setbacks and Challenge*, February 2001.

In these extreme circumstances, instances of non-compliance can undermine the government's role as a lawmaker and regulator. Canadians who obey the law—the vast majority—do so because they view the legal authorities they deal with as having a *legitimate* right to set and enforce certain behaviours that are in the public interest. A governing institution that appears to be unable to put its own house in order may well run into issues of credibility.

2.6 Key conclusions of the review of non-compliance in the context of the FAA

Essentially the FAA itself does most of what is needed to set a legal framework for public sector management.

At the time this exercise was initiated, a number of critical issues had been identified for review:

- Whether the government has the right instruments to conduct investigations into questions of mismanagement. If not, this would hamper the government's ability to address these situations. The review also identified a number of enhancements to the current regime.
- Once mismanagement is established and disciplinary and administrative responses are warranted, whether the right sanctions existed and managers were able to use them, giving also specific attention to some employees in particular situations (executives, former employees, public office holders, Crown corporation office holders, employees of Crown corporations). The review concluded that the existing regime possesses the basics. For the most part, the government needs to build its capacity to use them as well as to better promote and recognize management excellence in the senior cadre of the Public Service.
- When the situations of mismanagement are serious, whether criminal sanctions are used and if not, why. The review confirmed that the FAA's criminal provisions have practically never been used but that similar offences found in the *Criminal Code* are used occasionally to prosecute public service employees for actions related to their functions, normally in relation to instances of theft, fraud, or corruption.
- Finally, where the mismanagement led to the loss of funds, whether the government's procedures for recovering those funds are adequate. The review found that the systems and processes in place were complete, albeit somewhat complex. It concluded that enhancements could be made to facilitate their application.

The review also examined related areas that were identified as important, including the creation of a compliance framework.

3. Investigations

The review examined options and ways to strengthen administrative investigative processes applied to instances of possible mismanagement. It examined those processes principally as they relate to the imposition of disciplinary sanctions. During the review, staff relations officers, consultants who have been involved in investigations on behalf of the government, managers, lawyers who have used investigation products, police forces and Crown prosecutors, and departmental investigators were consulted and bargaining agents were invited to participate in discussions on the subject.

Within the broader framework of addressing mismanagement of funds and non-compliance in the federal Public Service, the investigatory process is crucial. Investigations serve to substantiate allegations (or not, depending on the evidence) and to identify wrongdoers, by way of gathering evidence through interviews and document compilation. They also serve to determine causal or facilitating factors for the misconduct, thereby playing a role in preventing reoccurrence of the situation that may have led to the misconduct having been committed. Finally, a promptly and properly conducted investigation will raise employee confidence in the employer and morale in the workplace.

Treasury Board publications provide limited guidance in the area of investigations. In fact, other than the Treasury Board *Guidelines for Discipline,* there are no government-wide policies or procedures on administrative investigations. Over time, however, a variety of duties and obligations have been established for both the employer and the employee, through accepted practices, clauses in collective agreements, and decisions of administrative tribunals, principally the Public Service Labour Relations Board.

The employer’s duties and obligations encompass such things as promptly investigating in the event of an incident or a complaint. All avenues of information and evidence must be explored during the process. The employer must also give sufficient notice of the investigation to the employee. This notice must contain specific information on the allegations and indicate the consequences of an adverse decision. Employees have the duty to participate in meetings and to provide all relevant information pertaining to the employee’s possible defence; they also have the obligation not to cause undue delays.

Through the consultations and interviews held in the review process, a number of areas where improvement would be desirable were identified:

- Managers trained in the conduct of investigations or qualified investigators are not always available. This is particularly an issue outside of large urban areas or within smaller operations.
- Staff relations personnel and investigators called upon to perform administrative investigations do not always have sufficient training or uniform guidelines.
- It is not uncommon to have both criminal and administrative investigations occurring simultaneously or one occurring immediately after the other. This leads to confusion about the rights and responsibilities of managers in regard to the administrative investigation.
- Investigations are not always carried out in a timely manner, in part because of the other reasons outlined here.
- Investigators and managers do not always have access to or knowledge of the findings of other government entities examining the same events (internal audits, various ombudsmen, the Auditor General of Canada, security investigations, disclosure officers, etc.), nor are all the players equally knowledgeable about each other's role and methods.

Perhaps the biggest shortcoming in the area of administrative investigation is the unequal access to investigators trained in the conduct of administrative investigations and knowledgeable about the Public Service. Many departments rely on managers to conduct complex investigations. Others rely on investigators who have been trained as police officers and who are not familiar with the particular nature of administrative investigations.

4. Disciplinary and Administrative Sanctions

The review examined Treasury Board policies, guidelines, and the management framework governing discipline within the Public Service to determine if they could be strengthened. In seeking to assess the strength of the regime, consultations were carried out in a variety of organizations, with human resources professionals, and with management. Bargaining agents were also invited to participate in the review.

Disciplinary sanctions are primarily aimed at individuals. Imposing personal consequences can be achieved via disciplinary or administrative measures. This should not suggest that institutions are absolved from responsibility when mismanagement occurs. A strong institutional lens—including examination of systemic circumstances that contribute to individual mismanagement—is an important element of the government's Action Plan. In many cases, appropriate responses to non-compliance would be aimed, wholly or in part, at the institution.

A minister's accountability relates principally to the general direction of a department—to its policies and programs. It entails representing the department before Parliament, guiding legislation relating to the department's work through the legislative process, ensuring acceptance of departmental estimates of proposed expenditures, and explaining and defending the department's policies and practices. Ministers are also accountable for the overall quality of departmental management. The more administrative aspects of accountability involve management and the soundness of departmental finances. A further aspect of this control mechanism is, of course, the allocation of responsibility for maladministration, misconduct, or unexpected results of governance.

The employment sanction systems, both administrative and disciplinary, allow ministers to provide assurance to Parliament and the public that systems are in place to respond in a progressive and appropriate manner to instances of inappropriate conduct by public service employees. This includes seeking out the causes of the misconduct, taking appropriate corrective action, and neutralizing any contributing factors that come to light.

Many tend to view the role and functions of the Treasury Board in its role of public employer as similar to those of private sector employers. In fact, the two regimes were vastly different for most of the first 100 years of Confederation when public servants where occupying offices truly

at the pleasure of Her Majesty. Over time, the values, ethics, and policies governing behaviour—and accountability—for public service workers have evolved into a complex set of special duties and obligations, some of which were inspired by private sector practices but a large part of which still depend on the particularities of the public service environment. Similarly, disciplinary standards and practices have changed over time; the authority to impose discipline is now shared among deputy heads, heads of separate employers, and the Treasury Board.

4.1 What constitutes "discipline"?

Disciplinary actions are intended to motivate employees to accept those rules and standards of conduct that are desirable or necessary in achieving the goals and objectives of the organization. A disciplinary system also serves to punish the employee and is a mechanism of deterrence; that is, it is intended to prevent any other employee from engaging in the misconduct. At the extreme end of the spectrum, when circumstances warrant and the bond of trust has been irreparably severed, a disciplinary system will support termination of employment.

Disciplinary actions in the government

Managers have a number of responses at their disposal:

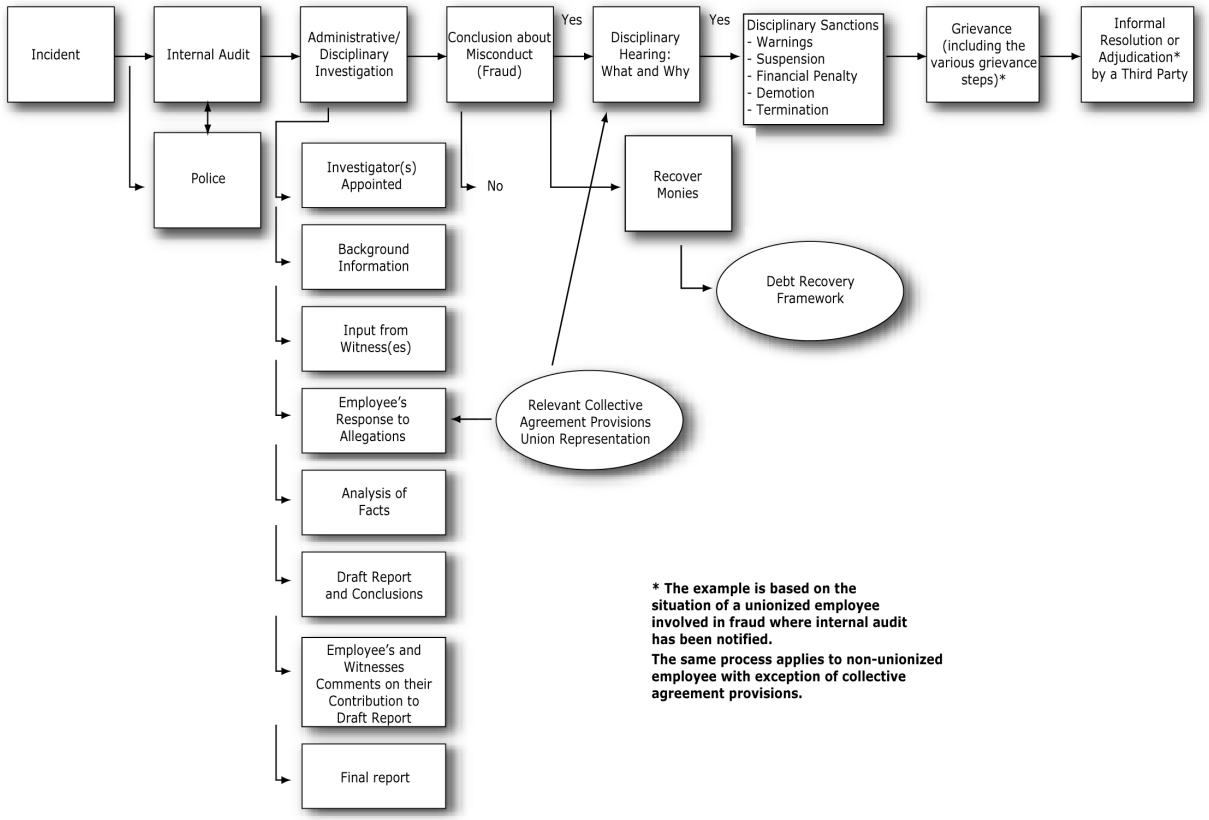
- oral reprimand
- written reprimand
- suspension without pay
- financial penalty
- demotion
- termination of employment

Discipline responds to fault, either willful wrongdoing or culpable negligence. It is not used to respond to instances of incompetence or incapacity, unless, of course, this is due to factors under the employee's control.

The FAA, the *Public Service Labour Relations Act*, and Treasury Board policies, along with case law and rules generally accepted in the field of staff relations, do provide a framework of rules and obligations in imposing discipline, from investigations and interviews to disciplinary hearing and documentation. They provide for steps in determining misconduct and disciplinary action and provide various redress procedures to those who are disciplined. Disciplinary action may be the subject of a grievance. A grievance complaining of discipline causing a financial penalty, suspension, or termination may also be referred to adjudication. Disciplinary action will be judged against the standard of cause. Cause requires an adjudicator to determine if misconduct or misbehaviour has occurred that justifies a disciplinary response and, if so, whether the misconduct in question warrants the particular action (or penalty) taken, considering all of the circumstances. If an adjudicator finds that the employee's conduct did not constitute misconduct or that the penalty was excessive, the adjudicator will normally rescind it.

Figure 2 illustrates the steps of the standard disciplinary process used in the government chronologically.

Figure 2. The Disciplinary Process in the Government of Canada



4.2 Standards of conduct

Employees are responsible at all times for conforming to established standards of conduct, implicit or explicit. There are several Treasury Board instruments that establish standards of conduct in specific areas: the *Values and Ethics Code for the Public Service*, the *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace*, and the *Policy on Losses of Money and Offenses and Other Illegal Acts Against the Crown*. These recognize and reflect the unique nature of public service employment and employees' special obligations related to impartiality, honesty, loyalty, and confidentiality. Moreover, the *Conflict of Interest and Post-employment Code for Public Office Holders* was created to enhance public confidence in the integrity of public office holders and the decision-making process in government. Other standards of conduct (that are not based on unique requirements of the Public Service but rather on good management practices) are established in such policies as the *Policy on the Prevention and Resolution of Harassment in the Workplace*.

Department-specific standards of conduct may also be set. For this exercise, deputy heads are cautioned by the Treasury Board against attempting to provide an exhaustive definition of what

constitutes misconduct in order to ensure that they retain sufficient flexibility to deal with any type of disciplinary matter that might arise.

Many other types of employment-related misconduct are implied, such as insubordination. Because certain conduct is implicit in the employment context (that is, fundamental conduct that is compatible with an employee's discharge of the duties and responsibilities of his or her employment), it is not necessary for it to have been spelled out expressly in a policy.

Violation of work-related policies may also constitute misconduct, for example, breach of the requirements of a policy on Internet use or a travel policy.

Before imposing discipline, the department must ensure that the employee has received advance notice of the expected standards of conduct or must reasonably establish that the employee ought to have known about the standards of conduct. Expectations concerning what the employee should be expected to know arise from the employee's position, training, and certification; position mandate and responsibilities; work experience; and efforts to cover up as well as common sense; objective reasonable person test in like circumstances; employer communications; and previous warnings.

4.3 Discipline as part of administrative responses to individual behaviour

The government disposes of a series of possible responses to individual behaviour, of which disciplinary action is only one. The course of action taken by departments is dependent on how the conduct is characterized, either as culpable misconduct or as incompetence.

The Government of Canada's disciplinary and administrative frameworks that exist today are sound and compare with those of other comparable Westminster-based jurisdictions. The range of sanctions and responses offered to managers is appropriate. The approaches adopted in the Public Service to date provide a good fundamental basis for the direct exercise of disciplinary authority by deputy heads conferred by the *Public Service Modernization Act*. Appendix B sets out an outline comparing the federal government's disciplinary and non-disciplinary authorities with those of provincial jurisdictions and some Commonwealth countries. The basic approach does differ. Some jurisdictions have one comprehensive piece of legislation providing a hierarchy of rules and systems governing the responsibilities of public service employees. Some impose specific duties on executives or provide for independent review of their performance. There is very little difference, however, in the types of sanctions available to discipline misconduct or mismanagement.

The onus to use the regime and to do so judiciously is placed directly on the management cadre in departments and agencies. This is especially so since the coming into force on April 1, 2005,

of the *Public Service Labour Relations Act*. Treasury Board guidelines had already placed the responsibility on managers to develop, maintain, and amend codes of discipline that reflect departmental organization and mandate. While most organizations, especially large ones, do have codes, they do not at present specifically target behaviours that may lead to mismanagement. The special obligations of public service employees were referred to earlier. These are not well integrated into the disciplinary process and thinking. A consensus needs to be built within the staff relations community and the management community in two key areas: the impact of the failure to follow management rules and what then constitutes misconduct subject to discipline.

Public sector managers operate in a complex environment. For example, a case study involving possible discipline for mismanagement identified 25 Treasury Board policies that may come into play, most of them not overtly linked with each other or cross-referenced in any way. Not surprisingly, knowledge and awareness of the policies and procedures is often insufficient or low. This is taken into account in the renewal of the Treasury Board policy suite.

Finally, there are some cases where mismanagement is more appropriately characterized as non-culpable—but poor—performance rather than as a disciplinary issue. There are reports that the abundance of redress mechanisms makes it difficult to address problems of poor performers.

In those situations, dealing with poor managers and poor performers becomes part of an appropriate response. The *Public Service Modernization Act* contains provisions that give some deference to a deputy head's opinion that an employees' performance is unsatisfactory when a decision to terminate or demote a poor performer is reviewed by an adjudicator.

The process that must be followed to respond to instances of non-culpable behaviour is not inordinately complex but requires a sustained effort. The available support of trained human resources specialists is probably the most important element in helping public service managers apply this process. Provisions of the *Public Service Modernization Act* also require that each deputy head implement informal conflict resolution mechanisms in his or her institution. This will provide a facilitating mechanism to deal with poor performance.

4.4 A look at disciplinary sanctions and administrative responses for specific groups of public service employees

The review also looked at accountability and sanction mechanisms applicable to members of the executive category, former employees, public office holders, and employees of Crown corporations. The purpose was to assess their appropriateness.

Executive group

As part of the public service senior cadre, members of the Executive group (EX) play a pivotal role in the establishment and maintenance of a culture that both frowns upon mismanagement and seeks to promote sound stewardship of government resources. Because of the leadership role they are expected to play and because they are also among the most mobile of public service employees, their collective attitudes, values, and conduct can greatly influence the entire Public Service. While the accountability of executives lies within the hierarchical structure of their own departments, a number of processes to collectively develop and manage the community are in place, particularly in the EX-04 and EX-05 (assistant deputy minister) ranks.

Some of the basic elements of good governance definitely include establishing clear accountabilities for senior members of the executive cadre as well as the mechanisms to hold them accountable. Certain jurisdictions have addressed some of these points in a very direct way. In some places, this has included specific provision dealing with the discipline of executives or the management of their performance. Some also provide for the discipline of executives by a party outside the executive's department.

In the Canadian public service, discipline of executives is frequently informal in nature, not formal. The concept of progressive discipline arose out of collective bargaining and is normally found in collective agreements. It lacks recognition in the common law context. Under common law, employees pass from warnings to termination for cause. As a result, the progressive discipline approach is not one that is necessarily expected to be applied in the same fashion, if at all, for members of management. In fact, just as the appropriate notice of termination period is calculated differently for executives and unionized employees, so too is the disciplinary approach. Indeed, a review of decisions reveals that conduct for which a unionized employee will be suspended may well constitute cause for termination of an executive.

As role models for the organization, executives are held to a higher standard. For career mobility, indeed for continued employment, a misconduct-free record is imperative. A relationship of trust is essential between senior management and departmental executives. The relatively few reported instances of misconduct or other difficulties speak to the culture of the relationship between executives and their supervisors and lead to informal sanctions involving executives being moved to another position. Since the remuneration of executives includes performance pay, those who have faced these difficulties in their management functions will see this reflected in the withholding of such pay. While formal disciplinary measures are usually eschewed, this is therefore most often in favour of a different, less formal approach, often involving a resignation.

This approach has the advantage of flexibility but leads to difficulties in ensuring a coherent approach to acts of mismanagement in the Public Service. It has also created the perception that executives are not held accountable, particularly for acts of mismanagement that occurred "on

their watch." Since mismanagement in general is not necessarily detected or systematically sanctioned, this may contribute to a perception that the government has been lax in dealing with these types of situations. At the same time, there are factors and circumstances that are unique to executives that must be considered when determining disciplinary responses. This is reflected in the distinct policies and approaches that have been adopted to deal with situations where the employment of executives is terminated, including, for example, the *Policy on Deployment of Executives* that provides that executives at the higher levels may be transferred from one position to another without their consent and as operational needs arise.

An effective compliance framework requires the government to formalize possible responses to acts of executive mismanagement. This should still allow for flexibility and for approaches unique to the executive category. Given that mismanagement does not necessarily come to light immediately, mechanisms that would enable executives to be called to account for transgressions even though some time may have passed or they have moved to another position may sometimes be called for.

The principles outlined here should hold to the top-most level of any department. The government's desire to reward good executive management is to be communicated through action and recognition. It is as important as the responses to instances of mismanagement.

It is not realistic to assume that those who are evaluating executives are always better managers themselves. The government's approach to the Performance Management Program must recognize this and give executives the necessary tools to effectively manage their subordinates. Some departments have done a lot to bring the Performance Management Program to life and to ensure that managers get the full benefits from it.

Executives, like other groups of public service employees involved in the management of public resources, may have suffered from the absence of programs providing solid training in core management functions (although some have benefited from the executive development programs). While the government's human resources planning initiatives have established the validity of developing the senior management category, primary focus has been on the "softer" leadership capacities. These skills are intrinsic to good management; however, the practice may have slowed investment in the development of complementary elements, such as knowledge and understanding of the principles and management rules by which executives must govern themselves in performing their duties.

The government's renewed emphasis on good management has manifested itself notably through the development of the MAF. The MAF will encourage a more systematic consideration of management capabilities and performance as part of the evaluation of executives. The Leadership Network and the Public Service Commission of Canada are completing their work in developing a new competency profile for executives. Management excellence is one of four key

leadership competencies, also including values and ethics that will be used in recruiting, assessing, and promoting executives in the Public Service. The leadership profile will also cover deputy ministers, heads of agencies, and managers in levels feeding the Executive group, facilitating the establishment of shared practices and values and the renewed culture in management.

Former public service employees

In a number of cases examined by the Auditor General of Canada, public service employees who appeared to have been implicated in acts of mismanagement were no longer employed by the time the reports were completed. This has prompted the consideration of the situation of former public service employees who may have committed acts of mismanagement while in office.

In the context of this review, these situations raised two issues:

- the impact of the employees' departure on the investigation; and
- the nature and relevance of the sanctions that may be imposed on these employees.

The reasons underlying these departures are not necessarily available. Some may have taken place as the result of a disciplinary process that culminated in an agreement to resign. Some public service employees may also have offered a resignation, unprompted, while an investigation was in progress.

Since the primary purpose of discipline is corrective, the imposition of a disciplinary action to a departing employee is unlikely to have the desired result. Furthermore, if the employee has already left, the employment relationship upon which rests the authority to impose disciplinary or administrative sanctions no longer exists.

At present, the government has some instruments at its disposal. Offences under the *Criminal Code* and the FAA do not make any distinctions based on the current employment status of the individual, and actual policies do require the disclosure of potential offences to the proper law enforcement agency. At the same time, monies owed by retired individuals can be set off from amounts owed to or by the Crown, including pension benefits. In fact, many departments and agencies will now withhold payment of termination benefits pending determination of outstanding claims where there is a risk that monies may be owed to the Crown.

The relative ease with which departments can contract directly or indirectly to obtain the services of public service employees raises an issue related to whether it is appropriate to retain the services of a person who was dismissed from the Public Service on grounds of mismanagement, short of having been found guilty of corruption. The same issue arises out of re-employment or employment by another public service employer or an agent Crown corporation. There is no general rule preventing a fired employee or an employee who resigns as part of the disciplinary process from being re-employed.

Public office holders

The review also looked at the situation of public office holders, principally Governor-in-Council appointees. At the time of writing, about 3,000 appointees held office, approximately 600 of whom were engaged on a full-time basis. From time to time, questions arise as to whether these appointees are obliged to comply with rules and are subject to the usual sanctions and enforcement regimes.

Governor-in-Council appointees are found in a variety of positions and organizations. They are appointed as heads and members of departments, agencies, boards, commissions, and Crown corporations. They include deputy ministers and deputy heads. For many of those, the MAF will stand as a statement of expectations.

The Privy Council Office has issued two documents to assist deputy ministers and heads of agencies: *Guidance for Deputy Ministers*[6] and *A Guide Book for Heads of Agencies: Operations, Structures and Responsibilities in the Federal Government*.[7] These publications help to define responsibilities and accountabilities, which translate into expectations. Taken together with the 2003 *Values and Ethics Code for the Public Service*, the *Conflict of Interest and Post-Employment Code for Public Office Holders* issued in 2004, and the MAF, it is apparent that there is a substantive body of written work to assist the majority of public office holders in understanding the culture and values of the government, as well as performance expectations. The existence of this body of written work is not enough in and of itself.

There is evidence to suggest that some of the situations of mismanagement related to public office holders arise not because of deliberate malfeasance but because of misunderstandings of the rules, culture, or values related to public administration.

Two factors seem to influence these occurrences. First, many of these organizations have mandates that require them to perform quasi-judicial functions or otherwise carry out their activities in a manner that is more independent from the executive branch of the government than departments. At times, this independence with respect to *mandate* may be misinterpreted as independence in *administration* (financial and human resources management). In some instances, it appears that some public office holders experience difficulties in balancing the independence of their mandate with the defined set of government administrative requirements and values.

6. The document may be found at the following Web site: http://www.pco-bcp.gc.ca/default.asp?Page=Publications&Language=E&doc=gdm-gsm/gdm-gsm_doc_e.htm.
7. The document may be found at the following Web site: http://www.pco-bcp.gc.ca/default.asp?Page=Publications&Language=E&doc=mog/cover_e.htm.

The fact that an organization has a mandate with a level of independence from the executive does not automatically translate into that same level of independence for the administration or management of the organization. There are a variety of examples of organizations that are independent in terms of how they carry out their mandate (for example, the Office of the Auditor General of Canada) but are still subject to the rubric of legislation, regulation, and policy that applies to financial management and the general administration of organizations that are scheduled under the FAA, whether those organizations are departments or tribunals.

The second factor is related to the first but occurs in organizations regardless of their level of independence. Some public office holders whose appointments are their first work experience with the federal government may bring with them a different set of cultural values. In some cases, they have not been successfully supported in developing the culture and instincts to adapt those practices to the public service environment. It is often the case that those different sets of values are nothing more than a manifestation of the difference between the rules in each environment. The majority of public office holders charged with management responsibilities are seen by observers as skilled and performing their jobs with integrity and competence. On some occasions, problems have occurred when public office holders appointed from outside of the Public Service legitimately believing that their non–Public Service experience was a factor leading to their appointment have not adapted past practices to their new public sector environment. Accordingly, they may have believed that managing in accordance with a set of cultural values and ethics garnered through their experience outside of government was both legitimate—and actually expected—by those responsible for their appointment. Occasionally, this approach has led to problems. Further measures could be developed to ensure that all appointees understand the differences in expectations, rules, and values within the public service environment.

Training and orientation programs, including orientation to public service culture and ethics, have been developed by the Secretariat, the Privy Council Office, and the Canada School of Public Service. These courses and programs provide public office holders with a sense of the public service culture and of the legislative and policy frameworks that govern their work. The learning mechanisms also serve to introduce new appointees to appropriate professional networks. At present, the public office holder determines whether he or she wishes to participate. In addition, the School is establishing the Senior Leaders Program with a curriculum focussed on core management accountabilities (finance, human resources, values and ethics, etc.).

Public office holders in Crown corporations

The directors of Crown corporations are usually part-time appointees and subject to the first part of the *Conflict of Interest and Post-Employment Code for Public Office Holders* (the Code). Chief executive officers (CEOs) are usually the only full-time public office holders and, as such, are subject to all parts of the Code. For Crown corporations, the Code represents a written set of

expectations around the values and principles influencing the decisions of the CEO and directors. Boards of directors adopt, through bylaws, codes of conduct and procedures for the declaration and management of conflicts of interest. These tend to be designed to meet the particular characteristics of a particular corporation but are based on similar principles.

The Privy Council Office, working with the Secretariat, has developed a course on corporate governance (including a component on the *Code of Values and Ethics for the Public Service*) for any chair, CEO, or director appointed to a Crown corporation. The course describes the principles of corporate governance and the roles and responsibilities of the director.

Employees of Crown corporations

Assessing the processes available to sanction mismanagement by employees of Crown corporations was considered. As outlined in the *Review of the Governance Framework for Canada's Crown Corporations,* these corporations manage their day-to-day operations autonomously. Neither the Treasury Board nor any other part of the executive would play an investigative or enforcement role in relation to the conduct of employees of Crown corporations.

The findings of the *Review of the Governance Framework for Canada's Crown Corporations* do not require that these conclusions be revisited. It would not be appropriate to expand the role that the government can play with respect to the discipline of employees of Crown corporations.

The government does have oversight mechanisms in place with respect to Crown corporations themselves. All Crown corporations are required to carry out annual audits. Currently, 41 of 46 parent Crown corporations are audited by the Auditor General of Canada. The majority are subject to a special examination (a type of performance audit). In the *Review of the Governance Framework for Canada's Crown Corporations*, the government committed to giving the Auditor General of Canada the discretion to audit all Crown corporations (except for the Bank of Canada and the Canada Pension Plan Investment Board) as well as to requiring all Crown corporations to undergo special examinations by the Auditor General of Canada. The *Budget Implementation Act, 2005,* tabled by the government in the House of Commons on February 23, 2005, delivers on this commitment.

The Treasury Board and the government would still benefit from having means to satisfy themselves that Crowns and their employees do comply with the relevant provision of the FAA and related policies. This would require that the relevant information be made available to the Treasury Board as part of regular reporting.

5. Criminal Sanctions

The FAA sets out criminal offences for office holders having engaged in certain behaviours connected with the collection or management of public funds.

Research on compliance has confirmed that criminal proceedings are not necessarily the most appropriate—or most useful—first response to instances of mismanagement. In addition to its shortcomings as a deterrent and a tool to modify behaviours, the use of the criminal justice system is costly and slow, and the intervention of many different factors makes the outcome somewhat unpredictable. That said, there are certainly situations where the laying of criminal charges by law enforcement officers stands as a clearly appropriate response.

5.1 The current criminal regime

Corrupt and inefficient practices, described as rampant within federal government departments from the mid-1800s, are likely what led to Parliament's 1867 decision to set out the criminal liability of certain officers for the custody and accounting of public funds in sections of the *Revenue Act*. The essence of these provisions was retained in successive consolidated revenue acts—including the *Consolidated Revenue and Audit Act* of 1931—that centralized the financial mechanisms for government spending, thereby allowing for greater executive control.[8]

Criminal offences are set out in sections 80 and 81 of the FAA. For the most part, they pertain to corruption of public officials and falsification of records. Section 80 contains one specific offence that is committed when a person who manages funds for the government fails to report to a superior officer, in writing, information about a contravention of the FAA or its regulations.

Despite the long-standing existence of these provisions, a review of reports of judicial decisions rendered in Canada has failed to yield any judgment indicating that they have been used in

8. Amendments were made in 1931 to create more centralization in an effort by R.B. Bennett to strengthen the government's capacity to manage public funds. At the time, the positions of financial officers accountable to the Minister of Finance were created. The 1931 House of Commons debates surrounding the Bill to amend the *Consolidated Revenue and Audit Act* did not reveal any discussions around the liability and offences sections, other than noting that a five-year term was a harsh penalty for failing to report a misdemeanour or fraud. It was thought that this was a good and useful deterrent. After these brief words, the liability and offences sections were carried.

prosecuting actual or former officials. The Attorney General's Federal Prosecution Service also advises that it has never been referred any charges for prosecution under the FAA by law enforcement officers.

This is not to say that actual or former employees have not been prosecuted. In fact, over the last two years, as reported in the media, there have been a number of occasions involving the laying of criminal charges related to employees' actions in the management of public funds. These charges were laid pursuant to provisions of the *Criminal Code*.[9]

Generally, the authority to prosecute offences under the *Criminal Code* is given to provincial attorneys general. Provincial Crown prosecutors work closely with law enforcement agencies operating in the same jurisdiction and will develop ongoing working relationships with police officers. Those working relationships, along with the familiarity of provincial prosecutors and police officers with the *Criminal Code* and its workings, are factors in establishing the preference to work with the *Criminal Code* rather than with the FAA (these prosecutions would normally be handled by federal Crown attorneys).

Under the *Policy on Losses of Money and Offenses and Other Illegal Acts Against the Crown*, all losses of money and suspected cases of fraud, defalcation, or any other offence or illegal act against the Crown must be reported to law enforcement authorities. Police forces normally use a prioritization system to allocate resources to the investigation of a file or a category of files. From our consultations, it appears that these systems do not result in a very high priority being given to files involving breaches of the FAA, except where they may disclose instances of corruption or represent important occurrences of theft or fraud.

The law enforcement officials consulted during the review expressed the opinion that the provisions of the *Criminal Code* do not leave any gap and are broad enough to allow prosecution in the situations of serious mismanagement that they have encountered. Prosecutors and police officers also expressed a strong preference for working with the *Criminal Code*, with which they are familiar, rather than with a financial administration statute.

9. The *Criminal Code* was first enacted by Parliament in 1878. In the debates leading to Confederation, there had not been any controversy over whether legislative power over criminal law should be given to the federal government. In parliamentary debates in 1865, Sir John A. MacDonald, then the Attorney General, referred to this as being a matter almost of necessity, where it was of great importance to have the same criminal law throughout the provinces, with the same protection of life and property operating equally in all of British North America. (This stood in contrast to the United States system, where each state could have a Criminal Code of its own.) Based on an excerpt from M.C. Friedlang, "Criminal Justice and the Division of Power in Canada," in *A Century of Criminal Justice* (1934).

Criminal offences contravene fundamental rules and involve clearly apparent harm.[10] It is evident that the *Criminal Code* is a very comprehensive and useful tool for addressing clearly criminal activities.

A comparison between the offences contained in the FAA and those set out in the *Criminal Code* confirms that all of the FAA offences, save one, are found in both statutes. The exception is the failure to report a breach, which was referred to above, for which there is no counterpart in the *Criminal Code*.

This raises three possible scenarios: creating offences targeting specifically the responsibilities attributed to public service managers; simply doing away with offences in the FAA, recognizing that they are not used; or creating a regulatory regime in lieu of a criminal regime for FAA-related offences.

5.2 Examining new directions

The scope of the FAA offences is very narrow. The types of conduct the FAA prohibits do not, for the most part, reflect the range of management duties and obligations. Section 126 of the *Criminal Code*, a provision that creates an offence for disobeying any federal statute, does fill this vacuum in part. This section is not very useful, however, in securing compliance with those particular provisions nor does it cover the breach of regulations.

The FAA sets out a number of positive obligations and duties, the breach of which could conceivably give rise to offences as follows:

- subsection 9(1): Failure to keep accounts in prescribed form
- subsections 9(2) and (3): Failure to provide information and any documents required by the Treasury Board
- subsection 17(1): Failure to deposit public money as required
- subsection 31(3): Failure to ensure an adequate system of internal control and audit
- sections 26 and 28: Making payments out of the Consolidated Revenue Fund, except as authorized
- subsections 24.1(1), (2), and 25(2): Forgiveness of debts or obligations in a way other than as provided
- section 160: Breaching regulations, prescribed policies, and procedures

10. Law Reform Commission of Canada. Working Paper 2, infra, note 41.

Figure 3 illustrates the offences that Australia, New Zealand, and South Africa have included in their government financial administration legislation and that pertain specifically to duties and obligations created by those statutes. They vary greatly, and the penalties imposed by these jurisdictions also range from the very mild to the very harsh. For example, New Zealand stipulates a maximum $2,000 fine on a summary conviction for anyone refusing or failing to produce information in his or her possession or control relating to financial or banking activities of any Crown asset or liability. For the equivalent offence, South Africa imposes a maximum of 15 years' imprisonment upon conviction. Canada has the equivalent prohibition in the FAA but does not specifically provide for an offence in the event of a lack of compliance.[11]

11. Section 126 of the *Criminal Code* then applies. It provides for a penalty of imprisonment for a term not exceeding two years.

Figure 3. Overview of Offences in Three Jurisdictions

Note: The UK does not have a general financial management statute.

Description of Offence	Australia[12]	New Zealand[13]	South Africa[14]
Public money paid into a non-official account	√	√	√
Receipt of public money by outsiders without the minister's authority	√		
Withdrawals from official accounts made without being authorized by the finance minister	√		
Misapplying or improperly disposing of or using public money	√		
Refusing or failing to provide information		√	√
Resisting or obstructing persons acting in the discharge of their duties		√	√
Making false statements or giving information knowing it to be false or misleading		√	
Committing acts for the purpose of procuring any improper payment of public money or improper use of any public financial resource		√	
Failure to keep records			√
Destroying or tampering with records			√
Failure to report suspicious or unusual transactions			√
Unauthorized disclosure			√
Misuse of information			√
Failure to formulate and implement internal rules			√
Failure to provide training or appoint a compliance officer			√
Unauthorized access to or modification of the contents of a computer system			√

Canada's system of criminal offences for mismanagement has been operating under a duplicated regime. It is not clear that this duplication serves any purpose:

12. *Financial Management and Accountability Act*, 1997.
13. *Public Finance Act*, 1989.
14. *Financial Intelligence Centre Act*, 2001.

- First, the systematic preference for the *Criminal Code* may have affected the deterrence value of the existing FAA offences.
- Second, short of creating, funding, and promoting a special investigative and prosecuting capacity with a specific mandate, the federal government does not have any influence over how the law enforcement community approaches breaches of the FAA.[15]

This leaves the government with limited tools to address serious—though not criminal in the traditional sense of the term—instances of failure to abide by management rules. It raises a question as to whether a criminal regime that only minimally takes into account the specific nature of the FAA remains an appropriate tool.

The discussion above also raises the question of whether it is appropriate to have two sets of offences that practically duplicate each other. Removing the criminal sanctions would recognize that a threat of stiffer punishment does not bring about behaviour change and is not always appropriate in all situations. If accompanied by new administrative or regulatory sanctions, it also creates distinctions between fundamentally criminal behaviour and immoral behaviour that is *not* criminal at root. Law enforcement officers are more familiar with the *Criminal Code* and can efficiently work with this regime.

15. Note that it is not being suggested that this should affect prosecutorial discretion and independence.

6. Recovering Lost Funds

The FAA sets out criminal offences for office holders having engaged in certain behaviours connected with the collection or management of public funds.

The review examined tools and mechanisms available for debt recovery in the federal government. Consultations took place with senior financial officers, with government lawyers involved in debt collections, with the Office of the Comptroller General, and with Me. André Gauthier, appointed as special counsel for civil recoveries upon release of the November 2003 report of the Auditor General of Canada. Comments were also received from the community of financial officers.

6.1 The government's approach to debt recovery

The Canadian system of parliamentary democracy requires that the government account to Parliament for its handling of the funds entrusted to it. As part of its stewardship of public funds, the government of the day is also responsible to citizens for how it manages public monies.

The foundations for financial administration in Canada were established at the time of Confederation when broad principles were set, including a single consolidated fund for receipts and disbursements (the Consolidated Revenue Fund); parliamentary authority for the approval of taxes, expenditures, and borrowing; internal control systems for the safeguarding of public assets; and standard accounting and reporting.

These principles remain in effect today, and they have been strengthened through ongoing reform initiatives, such as the enactment of the FAA in 1951, the decentralization of financial administration responsibilities, and the creation of a financial administration policy promulgating mandatory requirements for all departments.

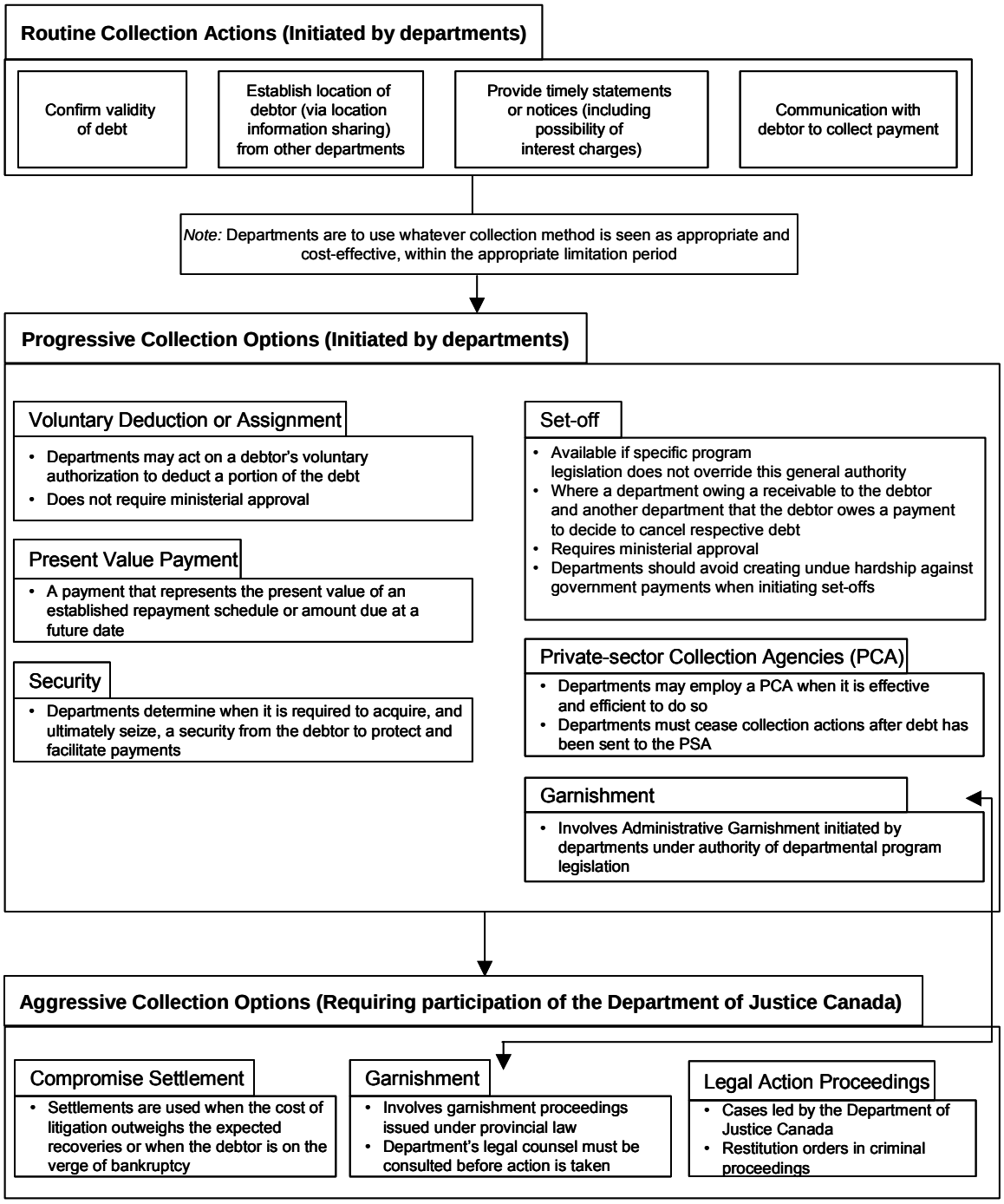
The government's recovery framework is extensive and includes a series of provisions in the FAA, three separate sets of regulations, and a number of policies. Those processes were the focus of a broad review led by the Secretariat in 2002 as part of an examination of the government's receivables management practices. The conclusion reached was that the legal framework was sound and that enhancements to the management process could be addressed through policy revisions. The new *Policy on Receivables Management* gives departments and

agencies corporate responsibility for the global management of receivables in addition to their own obligation to pursue recovery of debts receivable under their direct control. This improvement to efficiency and effectiveness of the overall government management of receivables capitalizes on the various facets of government activities. It encourages the identification of opportunities where information, information technology, collection facilities, or other resources can be shared. In 2003, the new policy was examined by an interdepartmental working committee as part of a first phase of the policy suite review. The group concluded that the current policy was comprehensive and did not require changes.

The financial recovery processes are mapped out in Figure 4.

The fact that the existence of a debt is due to mismanagement or the *type* of mismanagement leading to debt does not fundamentally affect the process for its recovery. In the context of this review, recoverable debts should be thought of as referring to debts ranging from unintentional overpayment of salary or pensions to entering into contracts for services where services are not rendered, as well as to circumstances when monies are intentionally diverted into the pockets of officials or employees as a result of fraud or theft. While the existence of mismanagement, especially where criminal behaviour is suspected, creates the need to ensure protection of the government's interest at an earlier stage, this is something that is already contemplated in the current framework. At the same time, in some instances it may be difficult to recover funds simply because public service employees have made legally binding "bad bargains." Obviously, responses in these cases rest primarily in the area of compliance, training, and sanctions.

Figure 4. Mapping of the Financial Recovery Processes



6.2 Debt recovery in other jurisdictions

A comparative review of both debt recovery mechanisms and the general approach to financial management in other jurisdictions, notably the U.S., South Africa, Australia, and the United Kingdom, revealed few differences in the tools used to recover debt (notice to debtors, use of set-off, use of collection agencies, garnishment, etc.). This information is summarized in Appendix C. The main difference lies in the degree of decentralization for this responsibility. For example, South Africa relies on the skills of the departmental accounting officer who has responsibility for budgetary control, reporting, and debt collection. In the United Kingdom, the Treasury has central responsibility for financial relations within government, while having also adopted the concept of accounting officer for certain purposes.

6.3 Facilitating debt recovery

Reporting losses of money

Public service employees are required to report losses of public funds, misappropriation, suspected frauds, and other illegal activities against the Government of Canada. The Treasury Board's *Policy on Losses of Money and Offenses and Other Illegal Acts Against the Crown* was adopted in response to the 1984 and 1987 reports of the Auditor General of Canada that found that procedures at that time were inadequate to ensure that the Treasury Board, the RCMP, the Deputy Attorney General, and Parliament received reliable reports of illegal activity against the Crown. It has not been reviewed since 1992. The Policy requires that losses be investigated and reported to Parliament through public accounts, that suspected offences be reported to law enforcement agencies, and that losses be recovered whenever possible. It also specifies factors to be taken into consideration when determining the amount of the government's claim. Departments are required to implement measures to prevent reoccurrences and to take appropriate disciplinary action. It specifies that managers who fail to take appropriate action or who directly or indirectly tolerate or condone improper activity be themselves held to account. Finally, it prompts departments to remind public service employees of their obligation to report contraventions of the FAA, any revenue law, or any fraud against Her Majesty.

The terms used in the Policy are ambiguous, however, and its purpose is not well understood. This leads to variation in its interpretations. Interviews conducted by the review team revealed that managers sometimes failed to report loss of funds or mismanagement leading to loss of funds, as required by the Policy. Different reporting practices with respect to losses of funds also exist.

Finally, it appears likely that numerous public service employees, including managers, are not aware of their reporting responsibilities under the FAA and Treasury Board policies. As a result, the reporting element of the Policy concerning breaches of the FAA and its regulations is not functioning as it should and does not have the deterrent effect that could have been expected.

While it was intended that the information described in the Policy be monitored through reports submitted by departments to the RCMP and the Secretariat, most reporting requirements were abolished as part of the Program Review in the late 1990s. Certain losses with serious impact, with government-wide implications, or that indicate a weakness in government policies or controls are still reportable. Of the approximately 12 losses reported to the Secretariat annually, however, very few meet those criteria.

Limitation period to recover debts

Another issue that surfaced during consultations is that of the *limitation period* applicable to collecting debt. The FAA does *not* specify a specific limitation period for collection of debt by deduction or set-off. Recent case law indicates that a court is likely to conclude that a six-year limitation period prescribed in the *Crown Liability and Proceedings Act* could be applicable. This would mean that any debt older than six years is unrecoverable. The difficulty of establishing the presence of instances of mismanagement, along with the complexity of establishing the nature of debts and individual responsibilities, would suggest that the establishment of a longer period during which the government could use set-offs would benefit the debt-recovery process overall.

Detecting losses of funds: The control framework

A number of existing mechanisms do serve to identify and report losses of public monies: the internal control framework, internal and external audit activities, and reporting systems, including the Public Accounts of Canada. Through work being done in the Secretariat and the Office of the Comptroller General, the government is already engaged in initiatives aimed at strengthening oversight of government funding and the internal audit function. It is also establishing a government-wide information system on government expenditures.

Early detection of mismanagement will enable the government to deal with these situations faster and more easily, enhancing both the value and the effect of the responses. Information on these projects is available on the Secretariat's Web site.

7. Fostering Better Compliance with Management Rules

Why do people fail to follow rules? What makes people decide to comply with rules? In assessing the quality of current investigative tools and methods and in evaluating the appropriateness of available sanctions, it also made sense to examine how these situations arise in the first place and then adopt a strategy to prevent instances of mismanagement. People choose to obey rules for a multitude of reasons and many variables contribute to non-compliance. No single response to possible breaches will be effective. The review assessed strategies and action plans aimed at improving adherence to the FAA, regulations, and related policies.

7.1 A compliance framework for the Government of Canada

The government has made one of its priorities the prevention of non-compliance with management rules. In assessing a compliance framework, the review looked at causes and factors underlying non-compliance and mechanisms that have proved effective in improving compliance. The review then examined a framework that is well adapted to the risks faced by government and studied an approach to develop strategies to address those risks. Key elements include the following:

- First, compliance needs to be restored where it is lacking. In situations where an individual responsible for wrongdoing is identified, systems must define personal responsibilities, seek acknowledgement of responsibility, and ensure that appropriate corrective action is taken. A focus on restoration of compliance, rather than an immediate move to a purely punishment-oriented approach, is generally more successful. The aim is to offer organizations and individuals the information and tools needed to make them able and willing to comply after problems have occurred.
- The use of soft controls (leadership, ethics, culture, teamwork, etc.) along with hard controls (segregation of authorities, sign-offs, etc.) will enhance prevention. Graduated sanctions will be implemented where restorative approaches fail.
- A range of strategies that would enhance compliance could be explored, including approaches such as the following:
  - process-based strategies (for example, ISO 9000);
  - performance-based strategies;

- internal compliance plans; and
- mandatory third-party verification.

- Compliance could be nurtured by building up expertise, information, and technological capacity. Research has established that the most successful compliance strategies employ a range of instruments, along with a graduated response to non-compliance.

An approach based on this framework could include mechanisms to ensure compliance through learning, facilitating compliance, and responses to non-compliance by individuals, departments, and agencies.

It must be noted that many of the other management reforms being put in place by the government (e.g. internal audit, financial management, reporting) will enhance compliance with the FAA.

7.2 Why? A study of factors underlying non-compliance

There are, of course, a multitude of factors that may result in situations of breaches of management rules. The sidebar illustrates key factors cited notably by the Auditor General of Canada as having resulted in *individual* non-compliance with the FAA and related policies in a number of recent cases. To be able to enhance compliance, factors that are likely to arise need to be identified, understood, and influenced.

In some instances, institutional or organizational behaviour becomes one of those factors. For example, the 2000 review of Human Resources Development Canada's grants and contributions by the Auditor General of Canada found that the department did not respect its own requirements for financial and

Why do employees and institutions fail to comply?

- lack of knowledge of the rules;
- public service employees do not know which rules are more important;
- ignorance of why the rules are in place;
- knowledge of the rules but the context facilitates breaking them;
- no sense of accountability or little concern for accountability;
- unclear role of central agencies (the Privy Council Office / the Secretariat / the Public Service Commission of Canada)—no clarity on when they should intervene, which agency should act, and the type of intervention that is required;
- lack of expected consequences for not complying;
- officials show no qualms about breaking rules that apply internally to government, with many believing there is no obligation to follow a policy;
- a sense of entitlement (officials seek benefits or restitution);
- a belief that government rules are inherently unnecessary and stifle innovation; and
- a sense of being (or of a situation being) above rules and their application.

Based on reports of the Office of the Auditor General of Canada and discussions with officers from central agencies.

activity monitoring and did not heed the advice of its own auditors who noted, “There is no doubt that a persistent situation of weak controls will increase the probability of mismanagement resulting from negligence, abuse and even fraud.” While individuals within the department were responsible for addressing some of the shortcomings, only the department as a whole could have appropriately remedied all of them, as it eventually did.

As part of their ongoing work, officials from the Secretariat have had occasion to discuss several types of weaknesses that could influence a department’s or agency’s ability to comply with the requirements of the FAA, regulations, and related policies. Areas where weaknesses create risks of *organizational* non-compliance include the following:

- capacity to perform project management;
- audit and evaluation capacity;
- succession planning;
- capacity to undertake large-scale procurement;
- IT/IM planning and management capacity;
- controls to manage grants and contributions as well as transfer payment programs;
- ability to meet performance expectations of risk management in contracts, financial management, and human resources;
- management control frameworks;
- sufficient attention paid to recruitment, competency building, and retention in financial management and contracting; and
- understanding of Treasury Board contracting policies and rules.

The government has much to lose from incidents of non-compliance in the Public Service. As was also noted earlier, there is no definitive picture of the scope of non-compliance occurring in government. The collective information from a number of different mechanisms is therefore critical—this includes dialogues between departments, agencies, and central agencies such as the Treasury Board of Canada Secretariat. Ongoing reviews, such as the important work done by the Auditor General of Canada and the results of internal audits, provide mechanisms to monitor the evolution of risky behaviour and weaknesses in the compliance regime of the FAA. These also serve to identify factors that influence compliance. Each factor on its own may not be cause for alarm, but the potential for the cumulative effects of these factors lays the groundwork for more serious situations of non-compliance and mismanagement.

Factors leading to non-compliance normally fall under one or more of three categories. Compliance strategies could be aimed at these areas:

- *Knowing and understanding the rules*: Officials need to be aware of the rules, understand them and why they are necessary—clarity and transparency are essential.
- *Willingness to comply with the rules*: Officials must be willing to comply—competing interests may be at work (i.e. respecting rules may undermine timeliness and efficiency).
- Ability to comply with the rules: Officials must be able to comply with the rules—systems should make applying the rules easy instead of the opposite.

Not understanding the rules

Requirements may simply be too complex to know and understand. There may be too many rules with varying levels of complexity for departments to administer. Our consultations revealed that officials may not understand or appreciate the reason for one or another of these rules. A lack of understanding or appreciation encourages non-compliance. Faced with non-compliance, the government may have had a tendency to make yet more rules or expand existing ones to close loopholes and address compliance problems. The cumulative effect of reacting this way is increased complexity, further reducing the ability to understand what compliance with the rules involves, and addition to the number of rules that must be followed.

Unwillingness to comply with the rules

Compliance may be perceived as too costly at the organizational level: Can departments always sustain appropriate levels of staff and investments in systems to comply with the requirements of the FAA and related policies? The cost of administering the sum of regulations inside the government is not known. A study of compliance costs of regulation inside the British government found that they are significant and described them as big business and a growth sector.[16] Internal audit units were heavily hit during program review downsizing, as was funding for training and many elements of corporate services. With limited resources, some departments may have been focussing on areas of program delivery and doing without appropriate levels of staffing, financial, and management processes to adequately comply with all of the requirements of the FAA and policies.

16. Hood, Christopher, Colin Scott, Oliver James, George Jones, and Tony Travers. *Regulation Inside Government*. New York: Oxford University Press Inc., 1999, pp. 20–43 at p. 26: "The notion of compliance costs is familiar in the business world […] but little attention has been paid to these costs in the public sector […] Estimating compliance costs is difficult because they raise complex counterfactual questions of what organizations would do in the absence of any regulation, and because regulatees have an incentive to overstate (and regulators to understate) such costs. […] compliance costs for our purposes is what it costs the regulatee to interact with the regulator, including the costs of dealing with requests for information, consulting the regulator, setting up and acting as guide on visits and inspections."

Reacting to command and control approaches: Command and control approaches make extensive use of laws and directives and are generally described as forms of direct intervention in the affairs of entities. These approaches are often associated with a legalistic application of rules and high levels of inspection and enforcement. The negative effects of an overly legalistic application of rules on compliance rates have been well established.[17] For example, when "regulatees" feel that regulators are being overly strict, they respond by scaling down their efforts to comply with the intent of the law. A series of studies of the effects of different inspection styles used in coal mine safety and nursing home and environmental regulation have shown that reliance on strict, coercive strategies to achieve compliance often breaks down the goodwill and motivation of the regulatees who were earlier willing to be socially responsible. An organized culture of resistance can result from policies that are perceived to be unreasonable, and over-deterrence can chill innovation that might have otherwise led to superior outcomes. When punishment rather than dialogue is in the foreground of regulatory encounters, people find this humiliating and resent and resist it in ways that include non-compliance.

Zero tolerance: Does it work?

Research on the effectiveness of zero-tolerance policies shows that they are a bad prescription. An overly tough enforcement regime risks producing rule-following automatons rather than officials thinking as team players about problem prevention. This appears to be particularly true in the case of a complex entity such as the Public Service. Experts have also expressed the view that a zero-tolerance policy raises the risk of scapegoats being penalized instead of actual wrongdoers.

Insufficient monitoring is the flip side of an overly legalistic application of rules. A rule that is on the books but not monitored is unlikely to elicit compliance. Monitoring and responding to non-compliance in a consistent manner is an effective means of ensuring compliance.

Monitoring that is not rigorous enough or not targeted at high-risk areas is also less likely to be effective. Monitoring or inspection approaches that are stigmatizing (i.e. that involve disrespect and humiliation, label persons as "bad" or "evil") cause significant reductions in compliance rates. Similarly, monitoring or inspection approaches that involve saying nice things at all times are almost equally ineffective because of the failure to express strong disapproval when standards are not met.[18]

17. Organisation for Economic Co-operation and Development. *Reducing The Risk of Policy Failure: Challenges for Regulatory Compliance*. Paris, 2000.
18. Braithwaite, John. "Restorative Justice and Corporate Regulation." In Weitekamp, Elmar and Hans-Jürgen Kerner, eds. *Restorative Justice in Context: International Practice and Directions*. Devon, UK, and Portland, Oregon: Willan Publishing, 2003, pp. 161–172.

Random inspections have the effect of making people and enterprises that are normally law-abiding constantly aware of the existence of enforcement activities and tend to reduce the likelihood of future non-compliance.

Rules at odds with practice: As discussed above, compliance with a law or policy is not necessarily an automatic occurrence. Often, practices and rules do not match up. **A sense of injustice or entitlement** may also lead persons who feel they are being treated unfairly to respond by refusing to comply with rules. Research demonstrates that when authorities implement policies, conceptions of fairness (particularly of fair treatment) are especially important, as these will have a bearing on how people respond to them.

Documented evidence indicates that, in some cases, officials will take advantage of benefits when they feel they are underpaid, overworked, and underappreciated. In other cases, officials with private sector experience come to the Public Service believing they are entitled to private sector type entitlements, thus leading to a mismatch between expectations and acceptable behaviour. One expert commented that creating a moral climate of support for a law would alter compliance more effectively than changing estimates of the certainty or severity of punishment. Moral appeals are four times as effective as threats of sanction in inducing people to pay taxes.[19]

Within government, individuals who feel they are not being dealt with fairly may not be as inclined to apply or follow rules rigorously. If moral appeals are more effective than threats of sanction, strengthening a government-wide culture of values and ethics is an appropriate response.

Inability to comply with the rules

Failures of administrative capacity: Achieving compliance also calls for resources to adequately implement internal government rules. The provision of information, professional development, and other support mechanisms is required to make it feasible for public service employees to comply with the rules.

Deterrence

Research shows that deterrence functions only if the following conditions are satisfied:

- target groups are fully informed and make decisions in their best interest;
- rules unambiguously define misbehaviour;
- the target group sees legal punishment as the primary incentive for compliance; and

19. Tyler, Tom R. *Why People Obey The Law*. New Haven, Connecticut: Yale University Press, 1990, p. 110. In a recent discussion, Prof. Tyler indicated that all of his later research confirms and reinforces the findings he sets out in *Why People Obey The Law*.

- enforcement bodies optimally detect and punish misbehaviour.

All of these conditions are rarely satisfied. It is well established that the deterrent effect of sanctions (including criminal sanctions) will depend on their certainty, severity, speed, and uniformity. Of these factors, certainty of detection has the most deterrent effect. That is, in order for the deterrence model to be effective, people have to believe there is a strong probability of being caught. This model is based on instilling in people a fear of being caught. While deterrence remains an integral component of a compliance strategy, a government relying solely on deterrence might not be able to sustain a strong relationship with its employees based on values and ethics. In addition, experience reveals that a much more complex and dynamic reality is typically in play. Rarely will a single measure attain policy objectives and influence the entire range of behaviour exhibited by groups targeted for compliance.

Perfect compliance?

Is 100 per cent compliance a valid objective? An effective compliance strategy for government must be reasonable and realistic. For example, achieving continuous and full compliance with all rules is not always possible, at least not at a cost that would be reasonable for the taxpayer. One need only point to the 840 pay rates and more than 70,000 rules governing pay and allowances administered by federal departments to demonstrate this. Few public service employees—even those with specific responsibilities in those areas—could hope to be fully knowledgeable about all of them at any given time. An understanding of human and organizational behaviour is required to match rules to desired behaviours.

Research undertaken by the Department of Justice Canada, the Conference Board of Canada, and the World Bank generally supports the view that a mix of instruments or compliance mechanisms is essential to achieve policy goals and enhance compliance. An effective compliance framework for government, therefore, must contain a mix of activities that function together.

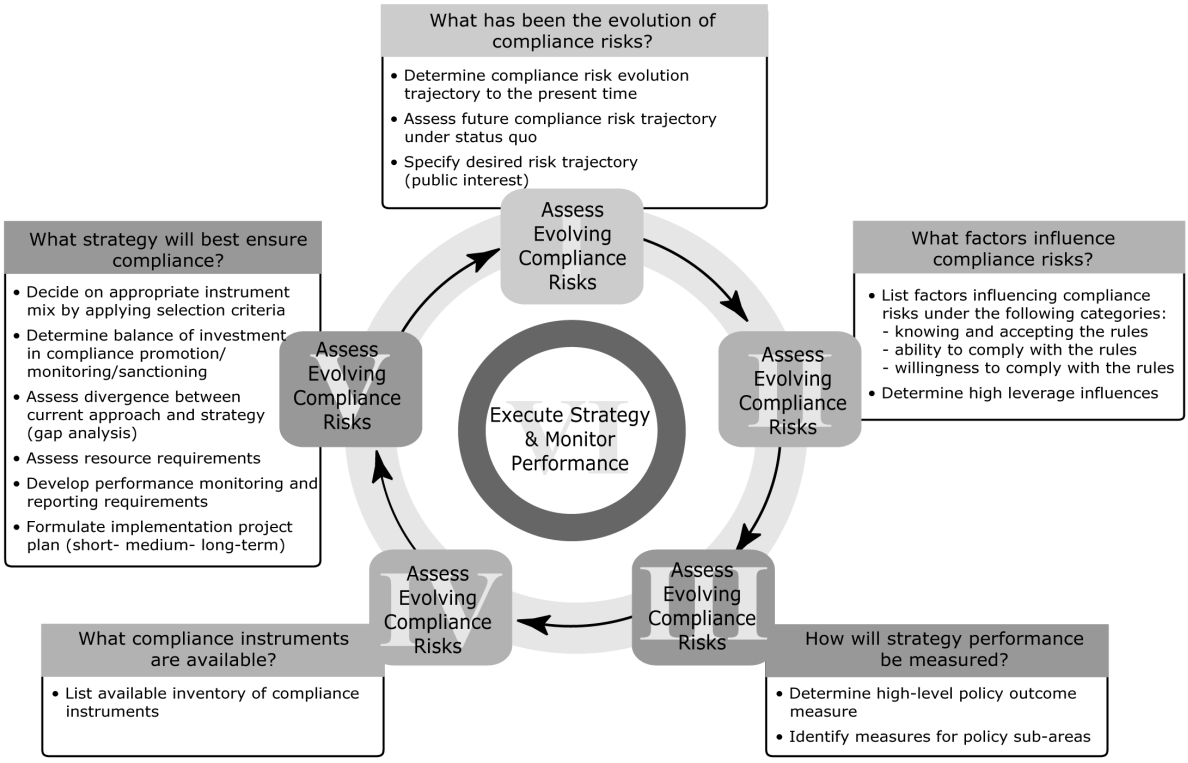
7.3 Basing compliance strategies on risks

Compliance issues are often complex. The issues surrounding non-compliant behaviour leading to mismanagement are varied. No single action or instrument is likely to be sufficiently effective in improving compliance to any significant degree.

The adoption of a compliance framework would correspond to the vision expressed by the House of Commons Standing Committee on Public Accounts in its ninth report on the November 2003 report of the Auditor General of Canada, released in April 2005.

In establishing a framework, the government would necessarily face trade-offs because it is not feasible to eliminate all risks. In reviewing its policy suite, the government is seeking to develop an accurate risk profile related to compliance, establishing a link between the behaviour it wants to influence and the means of intervention aimed at ensuring compliance with the FAA and related policies. The strategy is illustrated in Figure 5.

Figure 5. Elements of a Dynamic Risk Analysis



Using sanctions

Graduated responses would be used in situations of non-compliance: instead of using the most drastic strategies first, attempts could be made to trade on the goodwill of the individual. These are also the principles that have presided over the development of the disciplinary regime. Institutions and employees need to know that, unless matters improve, authorities will not hesitate to escalate up the pyramid. While assuming a commitment to action, the approach leaves sufficient flexibility to take specific circumstances into account.

Sanctions must be examined at both the individual and institutional level, since institutional compliance is also an essential element of the Framework.

Because the terms of reference of the review principally targeted individual conduct, much of the focus here is on the government's response to the conduct of individuals and not to organizational failings. These form part of the government's integrated strategy for dealing with non-compliance. The use of graduated responses to non-compliance by institutions is also a

necessary element in an integrated compliance framework. Figure 6 provides a sample application of a graduated method to institutional non-compliance.

Figure 6. Graduated Method to Institutional Non-compliance

HIGHEST

Reorganize department	Review and recovery of performance awards
Termination of employees	Recover funds
Request RCMP investigation	Appoint an external party to exercise departmental management responsibilities ("receivership")
Reassign deputy minister	Refuse to support rescheduling Crown corporation in FAA, which yields benefits to corporation
Remove delegated authorities	Send back to Cabinet **or** direct department to bring a matter forward for Cabinet discussion
Recommendations on reappointment, compensation, suspension or termination of Governor-in-Council appointments	Force deposit by Crown corporation of surplus funds in special purpose accounts in Consolidated Revenue Fund
Freeze allotments	Impose / manage follow-up by departments
Create special purpose allotments	Direct one entity to work with another and submit a report
Reduce delegations	Tie approval of funding for subject "x" to completion of specific action "y" (or conditional approval contingent on future events)
Impose conditions on sub-delegations	Direct department to undertake a specific action by a specified date
Impose conditions on approved corporate plan and budgets	Impose Major Crown project designation
Increase reporting requirements / impose progress reports	Impose actions and redress measures
Require (further) internal audit	Require external audit or review
Impose deadline for transmittal to the Secretariat of final audit/evaluations reports	Require / recommend audit by the Public Service Commission of Canada
Conduct Secretariat-led forensic audit	Require / Recommend Access to Information and Privacy commissioner review
Refer to the Auditor General of Canada	Impose training/counselling
Make observations in MAF assessment and monitor through annual work plan	Secretariat review of hospitality expenditures
Letters to senior financial officers reminding of responsibilities	Interim financing provided

	▸ Ensure department has an action plan, including potentially, internal audit and referral to the Office of the Auditor General of Canada	▸ Internal reorganization
	▸ Dispute resolution, mediation, group facilitation, workplace assessment	▸ Removal / reduction of internal delegation
	▸ Ensure department is using its internal compliance policy	▸ More formal follow-up by Secretariat senior management with counterparts (Secretary or Secretariat follow-up)
L	▸ Report in the President's annual report to Parliament on Crown corporations	▸ Revise Treasury Board policy
O	▸ Work collaboratively with department to modify behaviour	▸ More formal follow-up by President of the Treasury Board with appropriate minister
W	▸ Guide department in understanding Treasury Board policies and subsequent strengthening of controls and oversight	▸ Seek revisions / amendments to Corporate Plans
E	▸ Secretariat aid in developing departmental/agency expertise in areas such as human resources and finance	▸ Force reporting on issue in departmental performance report
S	▸ Review departmental expenditure and management performance (vertical, horizontal and program infrastructure)	▸ Informal working level follow-up by the Secretariat with department to ensure follow-up is being undertaken
T		

Factors that could be considered in moving through these measures are primarily based on judgment, taking into consideration the particular situation, the degree of management risk, and the nature of the intelligence on which intervention is being considered. There are areas where responsibility and authority would lie within departments or would be shared with central agencies. Central agencies and departments themselves have used most if not all of these responses. This approach, the use of graduated responses to situations of non-compliance, provides for a more systematic application of many existing practices.

8. Conclusion

This review has provided the government with a thorough and comprehensive look at the complex issues surrounding compliance and sanctions under the FAA and related policies. While public attention has focussed on recent instances of mismanagement, it is clear that the vast majority of those charged with public sector management responsibilities carry out their duties with integrity and honesty. Comparative research also confirms that Canada is on par with other jurisdictions in the areas of criminal sanctions, debt recovery, investigations, and discipline.

Furthermore, the review has provided a better understanding of opportunities to strengthen and improve the integrated legislation, policies, and statutes that comprise the compliance framework for the FAA and set the context for managing in the Public Service.

A number of broad and important conclusions and understandings need to be emphasized:

- The principles behind the legislative and administrative frameworks are sound. The difficulty arises from the accumulation of rules and policies, etc. This complexity contributes to confusion and errors.
- "Mismanagement" includes a wide variety of behaviours ranging from a mistake or error, up to and including criminal activity such as theft or fraud. Regardless of where mismanagement falls on the spectrum, appropriate tools and responses are generally available.
- Education and training at all levels of the Public Service is of paramount importance both to addressing mismanagement and to helping public service employees do their jobs properly.
- Consistency is crucial in addressing mismanagement. Sanctions must always be applied with the primary goal of restoring compliance.
- Managers must be held accountable for mismanagement that falls within their area of responsibility. Accountability must start from the top. This is how a shift in culture and values takes place. Good examples must be set to encourage confidence and to reinforce the trust that underlies the relationship between the Government of Canada as employer and its employees.

Recommendations flowing from this review have been incorporated in the paper entitled *Management in the Government of Canada: A Commitment to Continuous Improvement*. Most importantly, any response, be it carrying out investigations or taking remedial measures, should

be conducted rapidly and transparently. The results must be communicated effectively in order to enhance confidence in the government's compliance framework.

The Government of Canada is changing the way it works, the way it accounts to Canadians, and the way it serves them. These changes are forging a culture of management improvement rooted in accountability, responsiveness, and innovation.

These same values are what Canadians deserve and expect from their government. This report is one of the key initiatives contributing to the government's strategy to meet those expectations and become a world-class public service.

Appendix A: List of Subject Matter Specialists Consulted

During their work, members of the review team consulted with subject matter specialists in a variety of areas. These included persons from the following organizations. Their valued insight and input helped shape the review's major findings; they were not asked to endorse how the government has set out the issues and measures in this report.

Canada Revenue Agency

Financial Administration Directorate
Revenue Accounting and Reporting
Security Directorate
Labour Relations
Tax Operations Division, Investigations Directorate

Department of Justice Canada (Headquarters and Departmental Legal Services Units)

Business and Regulatory Law Portfolio
Canadian Security Intelligence Service Legal Services Unit
Civil Litigation Section
Commercial Law (Recoveries) Practice Group
Constitutional and Administrative Law Section
Corporate Services
Criminal Law Policy Section
Dispute Resolution Services
Employment Law Practice Group
Federal Prosecution Service
Human Rights Law Section
Legislative Services Branch
Litigation Practice Management Centre
Public Law Group
Public Service Commission of Canada Legal Services Unit
Royal Canadian Mounted Police Legal Services Unit
Strategic Prosecution Policy Section
Tax Law Services Section
Treasury Board Legal Services Unit

Public Service Human Resources Management Agency of Canada

Capacity, Learning, and Cultural Change
Executive Management Policies
Labour Relations Modernization
Policy and Learning
Public Service Values and Ethics
Office of Staffing, Staffing Recourse and Human Resources Systems
Strategic Policy Team
The Leadership Network

Public Works and Government Services Canada

Fraud Investigations and Internal Disclosures Directorate
Inquiry Liaison Office
Labour Relations
Payments Standards Division

Treasury Board of Canada Secretariat

Compensation Planning Division, Human Resources Management Office—
Executive Director's Office
Office of the Comptroller General of Canada
Expenditure and Management Strategies Sector
Government Operations Sector
Labour Relations and Compensation Operations
Social and Cultural Sector

Other Federal Departments and Agencies

Agriculture and Agri-Food Canada
Canada School of Public Service
Canadian Grain Commission
Canadian Heritage
Citizenship and Immigration Canada
Correctional Service Canada
Ethics Commissioner
Fisheries and Oceans Canada
Health Canada
Indian and Northern Affairs Canada
Industry Canada
Natural Resources Canada

Office of the Commissioner for Federal Judicial Affairs
Office of the Superintendent of Financial Institutions
Privy Council Office (Commissions of Inquiry and Task Forces, Senior Personnel)
Public Safety and Emergency Preparedness Canada
Public Service Commission of Canada
Royal Canadian Mounted Police
Social Development Canada
Statistics Canada
Transport Canada
Transportation Safety Board of Canada
Veterans Affairs Canada

Individuals Outside the Federal Government Consulted on Specific Issues

Michael Callaghan, Criminal Law Division, Ontario Attorney General's Office

Lesley Clarke, Civil Service Pensions, Policy Branch, the Government of the United Kingdom

Linda Dashwood, Director, Office of Human Resources, Management Services (Branch), Government of New Brunswick

Brenda Dermody, Human Resources Consultant, Human Resources, Saskatchewan Labour

Len Doust, Special Prosecutor, McCarthy Tétrault, Vancouver

André Gauthier, Lawyer, Hull, Quebec (Special Counsel for Civil Recoveries)

Alison Khan, Employment Policy and Practice Division, Cabinet Office, The Mall, London, England

Bruce MacFarlance, Q.C., Deputy Minister of Justice, Manitoba

Eric A. Milligan, President, Delsys Research, Ottawa, Ontario

Marc Mowbray d'Arbela, Branch Manager, Legislative Review Branch, Financial Framework Division, Financial Management Group, Department of Finance and Administration, Australian Government

Adrian Reid, Deputy Director of Public Prosecutions, Office of the Attorney General in Nova Scotia.

Milan Rupic, Director of Special Prosecutions, Criminal Law Division, Ontario Attorney General's Office

Andrew Thompson, Labour Relations Consultant, Classification and Labour Relations, Public Service Commission, Government of P.E.I.

Susan Zerr, Senior Labour Relations Consultant, Saskatchewan Public Service Commission

Groups/Organizations/Offices

National Joint Council

Association of Professional Executives of the Public Service of Canada

The Professional Institute of the Public Service of Canada

Delsys Research Group, Ottawa

Appendix B: Disciplinary and Non-disciplinary Authorities

1. Provincial Comparison of Disciplinary and Non-disciplinary Authorities (2004)

Jurisdiction: Federal

Legislation and Regulations

Financial Administration Act

- The Treasury Board may establish standards of discipline in the Public Service and prescribe the financial and other penalties, including termination of employment and suspension, that may be applied for breaches of discipline or misconduct (paragraph 11(2)(f))
- The Treasury Board may provide for the termination of employment or the demotion to a position at a lower maximum rate of pay, for reasons other than breaches of discipline or misconduct (paragraph 11(2)(f))
- Disciplinary action, termination or demotion must be for cause (subsection 11(4))

Policies, Guidelines, Manuals, etc.

Guidelines for Discipline

Values and Ethics Code for the Public Service

Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace

Policy on Losses of Money and Offenses and Other Illegal Acts Against the Crown

Policy on Prevention and Resolution of Harassment in the Workplace

[list not exhaustive]

Jurisdiction: Alberta

Legislation and Regulations

Public Service Act

- Provides that an employee may be dismissed, suspended, or subjected to other disciplinary action by the employee's department head if:
  - (a) the employee is unable to satisfactorily perform the employee's duties; or
  - (b) for misconduct, improper conduct, or negligence (subsection 25(1))

- Provides that a code of conduct and ethics could be established and a system of disclosure for financial information
- No related regulations

Policies, Guidelines, Manuals, etc.

Code of Conduct and Ethics for the Public Service of Alberta

Human Resources Directives

Includes a directive on the authority to discipline, harassment, performance management, etc.

Comments

- Note that discipline is not just for misconduct, it is for "improper conduct or negligence" and could be imposed on someone who "is unable to satisfactorily perform" his or her job
- Merges the concepts of disciplinary action for misconduct, improper conduct, and negligence and non-disciplinary action for an employee who is unable to perform his or her duties

Jurisdiction: British Columbia

Legislation and Regulations

Public Service Act

- The agency head, a deputy minister or an employee authorized by a deputy minister may suspend an employee for just cause from the performance of his or her duties (s.22(1))
- The agency head, a deputy minister or an individual delegated authority under section 6(c) may dismiss an employee for just cause (s.22(2))
- Regulations may be made on all matters respecting discipline, suspension and dismissal of employees (s.25(1))
- No related regulations

Jurisdiction: Manitoba

Legislation and Regulations

The Civil Service Act

- The commission shall, by regulation, establish standards of conduct for members of the civil service for the purpose of maintaining discipline within the civil service (s.24(1))
- The commission shall, by regulation, establish penalties to be imposed by the commission or employing authorities for breach of discipline by a member of the civil service (s.24(2))

Conditions of Employment Regulation

- If someone with supervisory authority determines that disciplinary action is necessary, the supervisory authority may reprimand the employee, refer the matter to a higher authority, or

recommend the dismissal or termination, suspension or other action to the employing authority (s.18(1))

Policies, Guidelines, Manuals, etc.

Principles and Policies for Managing Human Resources

- Includes a section on criminal charges

Also see Saskatchewan HR Manual

- Includes a section on conflict of interest

Conflict of Interest Policy

Jurisdiction: New Brunswick

Legislation and Regulations

Financial Administration Act

- Provides that the Board may establish standards of competence and discipline in the public service and prescribe the financial and other penalties, including suspension and discharge, that may be applied for incompetence, incapacity, or for breaches of discipline or misconduct (s.6)
- No related regulations

Policies, Guidelines, Manuals, etc.

Conflict of Interest Policy

Harassment in the Workplace Policy

Comments

- Merges the concepts of disciplinary actions for misconduct and non-disciplinary actions for incompetence or incapacity
- Only jurisdiction, other than federal jurisdiction, that provides the authority for financial and human resources management in the FAA

Jurisdiction: Newfoundland and Labrador

Legislation and Regulations

Public Employees Act

- The Lieutenant-Governor in Council may dismiss a public employee or suspend him or her from duty or take other measures of disciplinary action against him or her for inefficiency, insobriety, insubordination, misconduct, dishonesty, or other just cause (s.6(1))

Comments

- Discipline may be imposed for inefficiency, insobriety, insubordination, misconduct, dishonesty, or other just cause

Jurisdiction: Northwest Territories

Legislation and Regulations

Public Service Act

- Provides that a deputy head may suspend an employee for up to 30 days, reduce the employee's pay, or demote an employee where the deputy head is of the opinion that the employee is guilty of misconduct or incompetence (s.29(1))
- An employee may appeal the suspension, reduction of pay, or demotion to the Minister (s.29(2))
- A demotion under this section "may be for a fixed period" (s.29(5))
- In any case where it is alleged the employee is guilty of misconduct or incompetence, and the Minister wants to investigate the matter, the Minister may suspend an employee up to 30 days (s.30(1)) and investigate the matter
- The Minister may extend the period of suspension of an employee but each extension must not exceed 30 days (s.30(2))
- The maximum suspension time is 60 days (s.30(3))
- On completion of the investigation, if the Minister is satisfied that the employee is guilty of misconduct or incompetence, the Minister shall dismiss or demote the employee, suspend the employee, or take other action the Minister considers appropriate (s.32(1))
- Where the Minister dismisses an employee, the Minister shall give notice in writing and reasons for it (s.33)

Public Service Regulations

Policies, Guidelines, Manuals, etc.

Human Resources Manual

Includes a section on employee discipline (including disciplinary suspension or demotion, and dismissal)

Includes a section on suspension pending investigation

Includes a section on ethics

Comments

- Merges the concepts of discipline for misconduct and non-disciplinary action for incompetence
- Provides that an employee's pay may be reduced and also provides for disciplinary demotion or the demotion may be for a fixed period; confirmed
- Suspension during investigation cannot exceed 30 days unless extended by the minister

Jurisdiction: Nova Scotia

Legislation and Regulations

Civil Service Act

- Provides that a deputy head may suspend an employee (s.26)
- Provides that a deputy head may dismiss an employee in accordance with regulations or the terms of a collective agreement (s.27)
- No related regulations

Jurisdiction: Nunavut

Legislation and Regulations

Public Service Act (Nunavut)

- Exactly the same as the Northwest Territories' Public Service Act

Jurisdiction: Ontario

Legislation and Regulations

Public Service Act

- Provides for suspension during investigation (s.22(1))
- A deputy minister may for cause remove from employment without salary any public servant in his or her ministry for a period not exceeding one month or such lesser period as the regulations prescribe (s.22(2))
- A deputy minister may for cause dismiss from employment in accordance with the regulations any public servant in his or her ministry (s.22(3))
- Includes a section on political activity rights and whistle-blower protection

Regulation: Rules of Conduct for Public Servants

- Lists prohibited conduct such as not using a position to benefit oneself, one's spouse, same-sex partner, or children; not allowing the prospect of one's future employment to detrimentally affect the performance of duties; not disclosing confidential information except in accordance with the law; no hiring or entering into contracts with one's spouse, same-sex partner, child, parent, or sibling, etc.

Comments

- Deputy minister may suspend an employee from employment during an investigation (and may withhold salary)
- Deputy minister may for cause remove an employee from employment without pay pending investigation for a period not exceeding one month

Jurisdiction: Prince Edward Island

Legislation and Regulations

Civil Service Act

- A deputy head or authorized official may, for cause, reprimand or suspend an employee in his or her department or agency (s.32(3))
- A department head or a deputy head may, for cause, demote or dismiss an employee in his or her department or agency (s.32(4))

Civil Service Act Regulations

- An employee who fails to maintain proper standards of conduct or commits a disciplinary offence, shall be subject to disciplinary action (s.30)
- The following is a general listing of disciplinary offences, which should not be taken as complete:
- attendance, including lateness, incorrect time reporting, abuse of leave, leaving without leave, leaving work without authorization;
- work performance, including negligence, unsatisfactory work performance;
- personal behaviour at work, including breach of the employer's rules or policies, inattention to duties or carelessness, falsifying records or expense claims, harassment, use of obscene language, unruly behaviour, fighting, or assault, use of alcohol or drugs, insubordination, theft or gambling, smoking in forbidden areas, indictable offence, or summary conviction offence, misuse of government property or services including the use of such property or services for purposes other than for government business;
- personal behaviour away from work including any act that would bring the civil service into disrepute, or indictable offence.
- Disciplinary action should be used only after other corrective measures have been considered (s.32(1))
- When it is necessary for the deputy head to remove an employee from a place of employment to investigate the employee's conduct because of a suspected disciplinary offence, the deputy head may, subject to the approval of the Department, suspend the employee for a period of up to 30 days. (s.32(3))
- The deputy head may extend the period of suspension for an additional 30 days (s.32(4))
- The following is the scale of disciplinary actions: oral reprimand, written reprimand, suspension, dismissal or demotion (s.33(1))
- An employee demoted for disciplinary reasons shall not be eligible for a salary increment for six months from the date of the demotion (s.35) reporting, abuse of leave, leaving without leave, leaving work without authorization;

- work performance, including negligence, unsatisfactory work performance;
- personal behaviour at work, including breach of the employer's rules or policies, inattention to duties or carelessness, falsifying records or expense claims, harassment, use of obscene language, unruly behaviour, fighting, or assault, use of alcohol or drugs, insubordination, theft or gambling, smoking in forbidden areas, indictable offence, or summary conviction offence, misuse of government property or services including the use of such property or services for purposes other than for government business;
- personal behaviour away from work including any act that would bring the civil service into disrepute, or indictable offence.
- Disciplinary action should be used only after other corrective measures have been considered (s.32(1)).
- When it is necessary for the deputy head to remove an employee from a place of employment to investigate the employee's conduct because of a suspected disciplinary offence, the deputy head, may, subject to the approval of the Department, suspend the employee for a period of up to 30 days. (s.32(3))
- The deputy head may extend the period of suspension for an additional 30 days. (s.32(4))
- The following is the scale of disciplinary actions: oral reprimand, written reprimand, suspension, dismissal or demotion. (s.33(1))
- An employee demoted for disciplinary reasons shall not be eligible for a salary increment for six months from the date of the demotion. (s.35)

Comments

- *Civil Service Act Regulations* lists conduct that could be considered "disciplinary offences," such as a breach of the employer's rules or policies, falsifying records, etc.
- Demotion is available as a sanction, for cause
- Suspension during investigation is allowed for 30 days (unless extended by deputy head)

Jurisdiction: Quebec

Legislation and Regulations

Public Service Act

- The Act legislates ethics and discipline together: "A public servant shall exercise his powers and perform his duties in accordance with the standards of ethics and discipline prescribed in this Act or in the regulations under it." (s.4)
- The Act legislates the duty of loyalty, impartiality (perform his or her duties in the public interest, to the best of his or her ability…), confidentiality, conflict of interest, gifts, undue benefit, political neutrality, political opinion, and membership in a political party (Chapter II, Rights and Obligations of Public Servants, Division I, Conditions of Service)

- The Act provides for disciplinary action, including dismissal for contravention of the standards of ethics and discipline, "according to the nature and gravity of the fault" (s.16), providing that discipline is to be meted out by deputy heads. (s.17)
- The Act provides for demotion or dismissal of an employee who is incompetent or unable to perform his or her duties. (ss.18-23)

Regulation respecting ethics and discipline in the public service

- Regulates the standards of ethics and discipline applicable to public servants, including information management (non-disclosure of public information, public servants cannot obtain confidential information not required for the performance of their duties), conflict of interest, gifts, etc.
- Regulates provisional suspension (ss.15 – 17) and states that disciplinary measures consist of reprimand, suspension, or dismissal (s.18)

Comments

- Standards of ethics are legislated in the *Public Service Act,* along with standards of discipline.
- Disciplinary action may be taken against a public servant who contravenes the standards of ethics and discipline.
- The Act deals with administrative measures separately.
- The Act does not provide for whistle-blowing.

Jurisdiction: Saskatchewan

Legislation and Regulations

Public Service Act

- A permanent head may suspend an employee without pay for disciplinary reasons (s.27)
- Provides that a permanent head may dismiss or demote any employee in his or herdepartment when he or she considers it to be in the interest of the public service to do so (s.28(1))
- A permanent head may dismiss an employee for misconduct (s.28(3))
- *The Public Service Regulations, 1999*
  A permanent head may demote an employee (s.10)
- Conflict of interest provision (s.95)

Policies, Guidelines, Manuals, etc.

Human Resources Manual

Includes a section on corrective discipline that states that corrective discipline applies only to culpable misconduct: culpable misconduct is behaviour that has the following characteristics:

(a) the employee knows, or could reasonably be expected to know, what is required;

(b) the employee is capable of carrying out what is required;

(c) the employee chooses to perform in a manner other than as required.

Includes a section on performance improvement that deals with non-culpable or blameless performance problems where the means for resolving such problems exist at work

Comments

- Very broad provision to dismiss or demote any employee when "in the interest of the public service do so"; although this provision has been in place since 1947, we found no reported cases of a dismissal or demotion (for mismanagement or for non-culpable behaviour) pursuant to this specific authority.
- Behaviour that is considered "culpable misconduct" is described in the HR Manual to clearly capture behaviour such as an employee who performs in a manner "other than as required"

Jurisdiction: Yukon

Legislation and Regulations

Public Service Act

- A deputy head may suspend or dismiss an employee for misconduct, neglect of duties, or refusal or neglect to obey a lawful order; if employee is incapable of performing duties; if employee is unsatisfactory in performing duties, if employee is charged with a criminal offence making it inadvisable to continue with his or her duties (s.121)
- Provides the authority to suspend (s.122)
- Provides that a deputy head may not appeal the suspension, dismissal, or release to an adjudicator (s.142)
- Provides for conflict of interest provisions (s.190)

Public Service Commission Regulations

- Provides that a deputy head may reprimand, suspend or dismiss an employee

Policies, Guidelines, Manuals, etc.

Application guidelines issued by the Public Service Commission to assist with the interpretation of collective agreements deals with suspensions, discipline and union representation, performance management, etc.

Comments

- Merges the concepts of disciplinary and non-disciplinary suspension or dismissal for misconduct, neglect of duties, refusal to obey a lawful order, incapacity, unsatisfactory performance of duties, and being charged with a criminal offence

2. Comparison of Disciplinary and Non-disciplinary Authorities in Australia, New Zealand, and the United Kingdom[20] (2004)

Country: Australia (federal)

Legislation and Regulations

Public Service Act, 1999

Key Disciplinary Authorities

Legislates a Code of Conduct (s.13)

Includes a list of 13 behaviours:

- behave honestly and with integrity in the course of Australian Public Service (APS) employment
- act with care and diligence in the course of APS employment
- treat everyone with respect and courtesy, and without harassment
- comply with all applicable Australian laws — for this purpose, "Australian law" means:

  (a) any Act (including this Act), or any instrument made under an Act; or

  (b) any law of a State or Territory, including any instrument made under such a law
- must comply with any lawful and reasonable direction given by someone in the employee's agency who has authority to give the direction
- maintain appropriate confidentiality about dealings that the employee has with any minister or Minister's member of staff
- disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment
- use Commonwealth resources in a proper manner
- do not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's APS employment

20. The United States was examined, but given the large number of federal laws that deal with conduct and discipline applicable to the federal Public Service, we have concluded that a summary at this point would not be useful. Very briefly, some of those laws include the *Civil Service Reform Act* (1978), which established the Merit Systems Protection Board (a quasi-judicial agency designed to ensure that federal Employees are protected against abuses by agency management) and the Office of the Special Counsel (independent federal investigative and prosecutorial agency); the *Ethics in Government Act* (1978) which establishes the Office of Government Ethics; the *Hatch Reform Amendments* of 1993, which restricts the political activities of Federal Government Employees. Other relevant laws include *Government Performance and Results Act* (1993), *Government Management Reform Act* (1994), *Federal Acquisition Streamlining Act* (1994), *Federal Acquisition Reform Act* (1996), *Information Technology Management Reform Act* (1996), *Whistleblower Protection Act* (1989).

- do not make improper use of:
  - inside information; or
  - the employee's duties, status, power, or authority;
- in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person.
- behave in a way that upholds the APS values and the integrity and good reputation of the APS
- an APS employee on duty overseas must at all times behave in a way that upholds the good reputation of Australia
- comply with any other conduct requirement that is prescribed by the regulations

Provides that the *Code of Conduct* binds agency heads in the same way as employees (s.14)

Breaches of the *Code of Conduct* (s.15)
Agency heads may impose the following sanctions: termination, reduction in classification, re-assignment of duties, reduction in salary, deductions from salary by way of fine, reprimand

Provides for suspension of employees with or without pay (s.28)

Provides the grounds for termination, including (s.29):

- the **employee** is excess to the requirements of the agency;
- the **employee** lacks, or has lost, an essential qualification for performing his or her duties;
- non-performance, or unsatisfactory performance, of duties;
- inability to perform duties because of physical or mental incapacity;
- failure to satisfactorily complete an entry-level training course;
- failure to meet a condition imposed under subsection 22(6);
- breach of the *Code of Conduct*;
- any other ground prescribed by the regulations

Legislates Public Service Values (s.10)
Includes a list of values, from being open and accountable for actions to providing frank, honest, comprehensive, accurate, and timely advice

Imposes a duty on agency heads to promote the values (s.12)

Provides protection for whistle-blowers (s.16)

Separate Division dealing with "Senior Executive Service" employees (Division 2)

(a) Defined as those who provide one of the following at a high level: professional expertise, policy advice, and management

(b) Promotes co-operation with other agencies

(c) By use of personal example and other appropriate means, promotes the values and compliance with the *Code of Conduct*

(d) Commissioner's certificate needed to terminate these **employees**

Comments

Comprehensive legislation that legislates a code of conduct, values and ethics, protection for whistle-blowers, sanctions for breach of the *Code of Conduct*, termination, and specifies that the "senior executive service" have a duty to promote the code of conduct and values and ethics.

Country: New Zealand

Legislation and Regulations

State Sector Act, 1988

Key Disciplinary Authorities

The Act does not set out specific disciplinary measures, rather, it delegates this to each departmental chief executive pursuant to s. 32 of the Act which states that chief executives are delegated the responsibility for the "general conduct of the department" and the "efficient, effective, and economical management of the activities of the Department."

Establishes a State Services Commissioner (s.6):

(a) appoints and employs public service chief executives on behalf of the Crown

(b) reviews the performance of public service chief executives on behalf of their responsible ministers

(c) sets standards of conduct and integrity for the Public Service

(d) investigates and reports on matters relating to departmental performance

Code of Conduct issued pursuant to s.57 of the Act and has three general principles:

(a) professionalism and integrity;

(b) honesty and efficiency; and

(c) not bringing the Public Service into disrepute through private activities.

(d) Each general principle has a number of more specific obligations, such as the obligation to obey all lawful and reasonable employer instructions and to work as directed; to avoid behaviour that might endanger or cause distress to colleagues, or otherwise contribute to disruption of the workplace; to exercise care in private communications with ministers and members of Parliament; to be competent, etc.

Departments may issue their own *Code of Conduct*.

Separate Part dealing with Chief Executives (Part 3)

(a) Places responsibility on chief executives for the conduct of the department

(b) Places responsibility on chief executives for the efficient, effective, and economical management of the activities of the department

(c) Each chief executive shall ensure that all **employees** maintain proper standards of integrity, conduct, and concern for the public interest.

(d) Provides that the Commissioner may, with the agreement of the Governor-General in Council, for just cause or excuse, remove the chief executive of a department from office

Separate Part dealing with the Senior Executive Service (Part 4)

- Subject to any contract of service, the chief executive of a department may, after consultation with the Commissioner, for just cause or excuse, remove from office any person employed in the senior executive service of the department
- Specifically provides that the Commissioner is responsible for training the Senior Executive Service

Comments

The Act does not prescribe specific disciplinary mechanisms; rather, it focusses on conduct and the responsibility of "chief executives" who are specifically given the responsibility for good management and to maintain proper standards of integrity and conduct.

New Zealand has separate whistle-blowing legislation.

The Act specifically provides that the Commissioner must train chief executives.

Country: United Kingdom

Legislation and Regulations

The Civil Service Order in Council 1995 provides the authority "for controlling the conduct of the Service." Pursuant to this authority, the *Civil Service Management Code* was adopted.

Key Disciplinary Authorities

Chapter 4 re: Conduct and Discipline

This Code is composed of a general section, and a number of more specific sections.

General Section (s.4.1):

Outlines general principles such as the need to be honest and impartial, not misuse official positions or information obtained in official positions, use money properly and effectively, etc.

States that the Code is not comprehensive, it does not deal with isolated neglect of duty, failure to obey reasonable instructions, or other forms of misconduct that may be the subject of discipline

Departments must establish their own procedures for dealing with discipline

Specific Sections:

Discipline (4.5):

(a) Discipline may be imposed for misconduct or breaches of the Code, and any other circumstances in which the behaviour, action, or inaction of individuals significantly disrupts or damages the performance or reputation of the organization

(b) Sets out specific procedures to discipline heads of departments and the senior civil service

(c) Provides for suspension

(d) Provides for recovery of losses to public funds

confidentiality and official information (s.4.2)

standards of propriety (s.4.3)

political activities (s.4.4)

Chapter 6, Management and Development

poor performance: inefficiency and limited efficiency (6.3)

Comments

One code that deals with discipline, conduct and values, recovery of losses of money, confidentiality and official information, etc.

UK has a separate whistle-blowing regime.

Appendix C: Debt Collection

Centralized Approach

U.S.

The Financial Management Service is a bureau of the U.S. Department of the Treasury. Within the Financial Management Service is a section called the Debt Management Service (DMS), which is responsible for the co-ordination and general management of debt collection on behalf of federal agencies.

Pursuant to the *Debt Collection Improvement Act of 1996*, any non-tax debt owed to the U.S. Government that is 180 days delinquent, with certain exceptions, will be referred to the Department of Treasury for collection. One of the key tools used to recover debt is the Treasury offset program, which facilitates the use of offset by maintaining a database of delinquent debtors that can be matched against payments disbursed by the Treasury. This program is merged with the tax refund offset program, which provides a single point of contact for agencies to refer debts for both tax refund offset and other administrative offset programs. Other debt recovery tools used by the Treasury include demand letters, telephone follow-up, skip tracing, and referral of debts to private collection agencies on the government-wide contract. Under the *Debt Collection Improvement Act of 1996*, the Treasury is required to maintain a schedule of private collection agencies or private sector companies having expertise in the area of debt collection. The DMS monitors the activities of the private collection agencies on a daily basis.

Decentralized Approach

South Africa

The *Public Finance Management Act* (PFMA) and related regulations provide the framework for financial management in South Africa, including debt collection. The PFMA delegates responsibility for financial management to departments with a focus on the chain of accountability, monitoring, and reporting requirements.

Each department appoints an accounting officer with a performance contract that specifies his or her responsibility for budgetary control and reporting. Internal audit committees in each department are established and made up of auditors, management, someone from outside the

Public Service, and a chairperson not employed in the department. The internal audit committee reports findings to the accounting officer, and the accounting officer may implement measures in response to the report (such as training, guidelines, etc.).

The accounting officer must take effective and appropriate steps to collect all money due to the department. This will require the accounting officer to consider the following: procedures for writing off debts; monthly reconciliations of the debtors ledger with each debtor's account(s); preparation of monthly age analysis reports and follow-up action on debtors; terms of trade for debtors and the issuing of reminder notices; and charging interest on all debts. Collection measures should be progressive and include the following routine actions: issuing invoices when a service is rendered; sending monthly statements; sending reminders; and making personal contact. Departments may use private sector agencies to trace debtors when their normal tracing activities fail. Any related costs should be borne by the debtor and not the department.

The PFMA makes clear that disciplinary proceedings and criminal proceedings may be held against an accounting officer or an official in cases of financial misconduct. "Financial misconduct" is defined differently for accounting officers, Treasury officials, and officials of other departments. For example, an accounting officer commits an act of financial misconduct if he or she fails to comply with certain sections of the PFMA or makes an unauthorized expenditure, irregular expenditure, or a fruitless or wasteful expenditure. Losses and damages may be recoverable from an accounting officer or official in certain circumstances outlined in the *Treasury Regulations* (Chapter 4 and 12).

Australia

The *Financial Management and Accountability Act 1997* (FMAA) sets out the framework for the proper use and management of public money. It provides agency heads with greater flexibility and autonomy in their financial management, rather than a more prescriptive and centralized approach.

The FMAA imposes criminal liability and other liability on officials or ministers in certain cases of financial mismanagement. For example, there may be criminal liability in cases where an official or minister misapplies public money or improperly disposes of or uses public money. Further, an official or minister may be liable for the loss of public money if the official or minister contributed to the loss by misconduct or by a deliberate or serious disregard of reasonable standards of care. Finally, the FMAA specifically states that a person's liability (which arose while the person was an official or minister) cannot be avoided simply because the person ceases to be an official or minister.

With respect to debt recovery, the FMAA states that each Chief Executive must pursue the recovery of debt unless the debt has been written off, the Chief Executive is satisfied that the debt is not legally recoverable, or the Chief Executive considers that it is not economical to pursue recovery of the debt.

United Kingdom

Most recently, pursuant to the *Government Resources and Accounts Act, 2000,* a permanent head of a department is separately appointed by the Treasury as an accounting officer.

The United Kingdom has specific guidelines set out in the *Government Accounting Manual*, which deals with the recovery of overpayments and losses. In the case of overpayments, recovery is often pursued through a salary deduction or through the common law right of set-off. The Manual provides a detailed analysis of the common law right of set-off, including a description of the right, the effect of the *Limitation Acts*, and possible defences against recovery such as estoppel, change of position, and good consideration. The Manual also provides guidelines in cases where the overpayment involved bad faith on the part of the payee and prosecution or disciplinary action may be appropriate.

The Parliamentary Ombudsman is empowered, under the *Parliamentary Commissioner Act, 1967*, to investigate complaints referred by members of Parliament from members of the public who consider they have suffered injustice as a result of maladministration. The Parliamentary Ombudsman may recommend that the department or agency should provide redress for the complainant (and for any others who may have suffered in the same way). Redress may be an explanation, an apology, an undertaking to improve procedures or systems, an ex gratia payment, or a combination of such measures. The Ombudsman's recommendations on remedies are not legally binding and can be rejected.