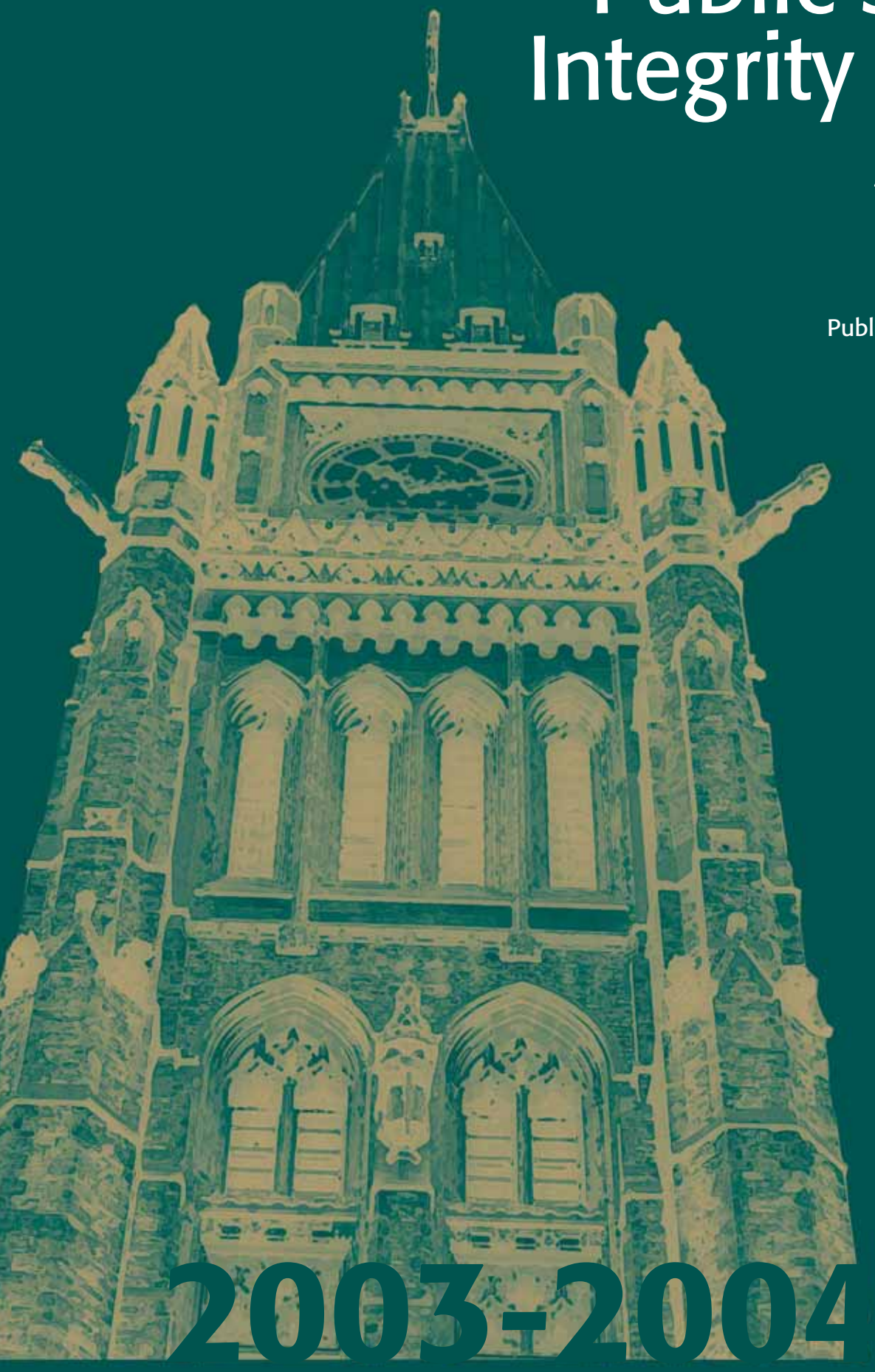
Public Service Integrity Officer

2003-2004 Annual Report to Parliament

Edward W. Keyserlingk
Public Service Integrity Officer
Government of Canada



2003-2004

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PG1-2004
0-662-68518-0

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November 2004
The Honourable Lucienne Robillard
President of the Queen's Privy Council for Canada
and Minister of Intergovernmental Affairs
House of Commons
Ottawa, Ontario
K1A 0A6

Dear Minister:

Pursuant to the Treasury Board *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace*, I have the honour and the privilege to transmit the 2003–2004 Annual Report of the Public Service Integrity Officer for tabling in Parliament.

Part I of this Report provides an overview of the operations of my Office from April 1, 2003 to March 31, 2004.

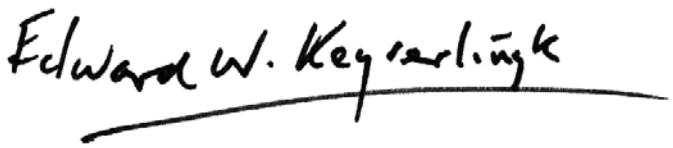
Part II reviews the steps taken and initiatives launched during the past year to give effect to the fundamental recommendation made in my previous 2002-2003 Annual Report that an effective and credible federal public sector wrongdoing disclosure regime ought to be anchored in legislation.

In Part III, I propose what I consider to be the key elements of a model legislated disclosure regime. I believe that if adopted they would contribute to ensuring a positive and receptive environment for employees to make credible public interest disclosures of wrongdoing without fear of reprisal and towards enabling the disclosure regime to effectively and fairly investigate and rectify wrongdoing.

As this Annual Report was being finalized, on October 8, 2004 the Government tabled Bill C-11, *An Act to establish a procedure for the disclosure of wrongdoings in the public sector, including the protection of persons who disclose the wrongdoings*. This constitutes a very important and significant initiative reflective of government intent. As such, this development is too significant to ignore in this report. Consequently, I refer to key aspects of Bill C-11 in my comments and observations in Part III.

It is my hope that this Annual Report will make an important contribution to the upcoming public and Parliamentary debate on the proposed legislation.

Yours sincerely,



Edward W. Keyserlingk
Public Service Integrity Officer
Government of Canada

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2003-2004

Introduction

Part I of this report covers the ongoing activities of the Public Service Integrity Officer in the last fiscal year – from April 1, 2003 to March 31, 2004 – and focuses on the investigation of disclosures of wrongdoing made to the Public Service Integrity Officer by public service employees. A brief description of the mandate is provided, along with an overview of the case management practices, statistics with analyses and a summary of some of the cases that were reviewed and investigated. Developments in policy, in particular the inclusion of new provisions relating to values and ethics and additional protection against reprisal for employees participating in parliamentary hearings or in public inquiries relating to the Auditor General's 2003 report, are also described.

Part II of the report reviews the role and contribution of the Public Service Integrity Officer to the activities that led to proposals that a new regime for the disclosure of wrongdoing be based on legislation. This section includes the activities and initiatives that came about following the Public Service Integrity Officer's 2002-2003 Annual Report, the report by the Working Group on the Internal Disclosure of Wrongdoing, the report of the Standing Committee on Government Operations and Estimates, the defunct Bill C-25, *the Public Servants Disclosure Protection Act* tabled in the previous Parliament and now Bill C-11, *An Act to establish a procedure for the disclosure of wrongdoings in the public sector, including the protection of persons who disclose the wrongdoings* tabled in this Parliament on October 8, 2004.

In Part III the Public Service Integrity Officer proposes key elements of a model regime in order to create an environment for employees who have credible public interest disclosures of wrongdoing to speak up without fear of reprisal, and to most effectively identify and rectify the wrongs, sanction wrongdoers when required and prevent any further occurrences of the wrongdoing.

A conclusion and a summary of key recommendations complete this Annual Report.

Part I

Overview of the PSIO Activities: The Second Year

Part I

OVERVIEW OF THE PSIO ACTIVITIES: THE SECOND YEAR

Edward Keyserlingk
Public Service Integrity Officer

1.1 Mandate and Jurisdiction

The Public Service Integrity Office (PSIO) was established by the Treasury Board's *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace* (hereafter identified as the *Disclosure Policy*). Both the policy and the PSIO became effective on November 30, 2001. The *Disclosure Policy* sets out the mandate and general procedures for the PSIO. This mandate is summarized in Appendix A.

The jurisdiction of, and access to, the PSIO presently extends to the 170,000 public service employees working in departments and agencies listed in Schedule 1, Part 1 of the *Public Service Staff Relations Act* (listed in Appendix B). This means that the PSIO covers departments and agencies under the purview of Treasury Board as the employer. The remaining 288,000 public sector employees working for separate employers and Crown Corporations – such as the Canada Revenue Agency, Canada Post Corporation and other government business enterprises – are excluded from the purview of the PSIO.

The mandate of the Public Service Integrity Officer is to act as a neutral entity on matters of internal disclosure of wrongdoing. In particular, the Public Service Integrity Officer assists employees who:

- **believe that their issue cannot be disclosed within their own department; or**
- **raised their disclosure issue(s) in good faith through departmental mechanisms but believe that the disclosure was not appropriately addressed.**

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

The PSIO was created as an alternative to the departmental process – also established by the *Disclosure Policy* – for the reporting, review and investigation of wrongdoing in the public interest.

The internal departmental process encompasses a role for managers who are responsible for promoting openness in their interaction with employees and acting promptly when information concerning wrongdoing is brought to their attention. Additionally, designated Senior Officers, who are appointed by and report to the Deputy Head of each department and agency, are accountable for addressing departmental disclosures made internally, initiating investigations and making recommendations as appropriate.

1.2 Policy Developments

1.2.1 Values and Ethics Code

In September 2003, the *Disclosure Policy* was amended to include in the definition of wrongdoing, "a breach of the *Values and Ethics Code for the Public Service,*" hereafter referred to as the *Code*. This change coincided with the promulgation of the *Code* that contains a Statement of Public Service Values and Ethics, Conflict of Interest Measures and Post-Employment Measures.

The *Code* states that, while "it is expected that most matters arising from the application of this *Code* can and should be resolved at the organizational level," any public servant who witnesses or has information concerning conduct inconsistent with the *Code*, or believes that he or she is being asked to act in a way that is inconsistent with the values and ethics set out in Chapter 1 of the *Code*, can report the matter in confidence and without fear of reprisal to the Senior Officer designated for the purpose by the Deputy Head. Subsequently, "if the matter is not appropriately addressed at this level, or the public servant has reason to believe it could not be disclosed in confidence within the organization, it may then be referred to the Public Service Integrity Officer, in accordance with the *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace*."

Pierre Martel
Executive Director

The *Disclosure Policy* defines wrongdoing as an act or omission concerning:

- **a violation of any law or regulation**
- **a breach of the *Values and Ethics Code for the Public Service***
- **misuse of public funds or assets**
- **gross mismanagement**
- **a substantial and specific danger to the life, health and safety of Canadians or the environment**

The **Disclosure Policy** *was amended to include in the definition of wrongdoing, "a breach of the* **Values and Ethics Code for the Public Service"**

1.2.2 Protection from Reprisal

The PSIO has two main responsibilities: investigating and reporting on disclosures of wrongdoing and protecting employees who disclose information concerning wrongdoing from reprisal. The fear of job reprisal and retaliation is considered to be the greatest obstacle to employees who consider reporting wrongdoing. This was the subject of debate during the examinations of the activities of the former Privacy Commissioner and the Auditor General Report into the Sponsorship Program. Indeed, in response to the Auditor General's report, the government further amended the *Disclosure Policy* to extend the reach of the PSIO to protect those employees who may be required to appear before a parliamentary committee or a public inquiry looking into the matter.

To further demonstrate its commitment, the Public Service Integrity Officer has sought and gained standing before the Commission of Inquiry into the Sponsorship Program and Advertising Activities. The PSIO will be present to ensure that the public servants who are required to testify are protected from reprisal.

…no employee shall be subject to any reprisal for having made a good faith disclosure in accordance with this policy, or in the course of a parliamentary proceeding or an inquiry under Part I of the *Inquiries Act* related to the 2003 Report of the Auditor General of Canada. This includes employees who may have been called as witnesses. Reprisal may include any administrative and disciplinary measures.

Disclosure Policy

1.2.3 Confidentiality and Information Protection

The PSIO does its utmost to protect the identity of those who make disclosures of wrongdoing and of any other parties involved in the case. Clearly, the expectation of confidentiality is a high priority for all parties.

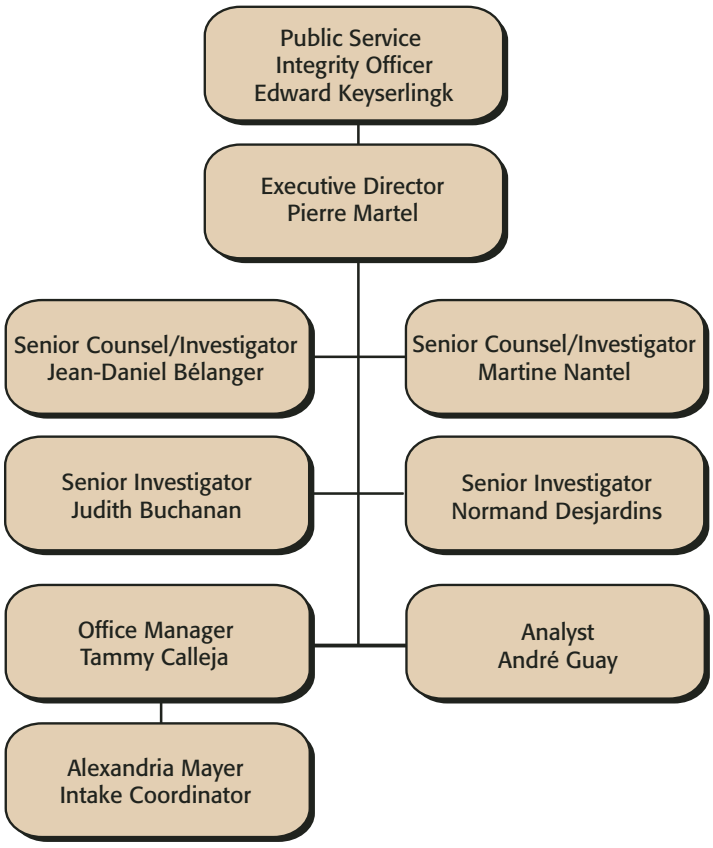
The expectation of confidentiality is a high priority for all parties

The PSIO is subject to the *Access to Information Act* and the *Privacy Act* and must respond to requests for information submitted in accordance with all the applicable provisions of the law. The PSIO can only provide qualified assurances to public service employees that their identity and the information that they provide will be held in confidence. The assurance is somewhat constrained by procedural requirements during an investigation that require an adherence to the rules of natural justice. Personal information can be withheld in some limited circumstances prescribed by law. Examples of this are when a person's identity needs to be protected from disclosure for safety reasons or, while an investigation is ongoing, if the disclosure of information would be injurious to the conduct of the investigation.

1.3 The Structure of the PSIO

The PSIO has continued to operate with a small staff. In addition to the Public Service Integrity Officer, the PSIO includes an executive director, two legal advisors, two investigators, an office manager and an intake coordinator. The PSIO has also benefited from the work of a law student in the summer of 2003 and an articling lawyer in early 2004. The PSIO continues to specialize its work and operate independently, relying to some extent on other government departments and agencies or contractual arrangements for corporate administration and technical services. Expenditures incurred in 2003-2004 are presented in Appendix C.

Public Service Integrity Office Organisation Chart



1.4 Publicizing and Reaching the PSIO

This year the Public Service Integrity Officer and the Office staff have continued to respond to requests for participation at various events to promote the work of the PSIO and inform various communities of public service employees, such as experts in staff relations, financial management, auditing, comptrollership and security about the PSIO and related topics.

The PSIO has responded to requests for information and has shared its experience with representatives from foreign governments and international institutions, including representatives from Belgium, Mali, the United States of America, Australia, the Republic of Korea, the Philippines, the United Nations, Transparency International and the International Ombudsman Institute.

The University of Ottawa's School of Management and the PSIO hosted a discussion concerning the risks and rewards of whistleblowing with guest speaker Mr. Louis Clark, Director General of the U.S. based Government Accountability Project (GAP). The mission of the GAP is to protect the public interest and promote government and corporate accountability by advancing free speech in the work place, defending whistleblowers and empowering citizen activists.

There continues to be a need to make the policy and work of the PSIO known throughout the public service. Efforts to this end will continue in the coming year.

Jean-Daniel Bélanger
Senior Counsel/Investigator

When a case is concluded, a report of findings is provided to the department and to the employee who made the allegation. Where wrongdoing is found, recommendations for addressing and correcting the matter are included in that report. Normally, the PSIO will follow up on the recommendations until the matter is resolved.

1.5 The Case Management Approach

The inquiries and disclosures received in the past year continue to arrive by various means, including mail, telephone, visits and e-mail. The PSIO deals with each inquiry promptly, providing proper referrals when required and seeking clarification and additional information when the matter appears to fall within the mandate of the PSIO. The screening of potential disclosures includes an assessment of whether the department involved in the allegation is subject to the *Disclosure Policy*, whether the person making the disclosure is a public service employee, and whether the allegations fall within the definition of wrongdoing and no other recourse is prescribed. The PSIO may also reject the disclosure of wrongdoing if it is determined that the matter is not credible, trivial, frivolous, vexatious or the disclosure was not made in good faith.

For cases within the mandate of the PSIO, a more formal intake review is conducted to obtain as complete an account of the allegation of wrongdoing as possible before determining whether a full investigation is required. In such cases, additional information and documentation are obtained from the employee or researched from public sources. This approach ensures that the investigator is well versed in the subject area related to the wrongdoing and able to determine the best course of action.

There is often a need to extensively research the subject area of the alleged wrongdoing. A thorough analysis may be required to determine the application of law, regulation, policy or other protocols. This may involve legal opinions or assessments by various experts, along with consultation to appreciate the applicable requirements and proper operation. This may be followed by an assessment of the allowable discretion, a determination of what would constitute wrongdoing, the degree of permissible management flexibility and whether another preferred recourse exists.

Weekly staff meetings are held to discuss cases as they reach key stages. Each case assigned to an investigator is presented after the initial screening and review stage; it is discussed and evaluated to determine the next steps. Every member of the PSIO participates and contributes expertise and knowledge to the discussion. This allows for a greater diversity of perspectives and a thorough review of the issues at hand.

When it is determined that a full investigation is required, the Public Service Integrity Officer normally informs the Deputy Head and requests the collaboration of the department. The Deputy Head, or a senior departmental representative, and the person making the disclosure are also separately informed in writing of the nature of the allegations, the issues to be investigated by the PSIO and the general approach to the investigation. At the onset of the investigation, the investigator will contact the department to obtain an account of events and relevant documentation. The perspectives of the person making the disclosure, witnesses, the alleged wrongdoer and other concerned parties may also be sought regarding different elements and at various stages during the course of the investigation. This information is reviewed and assessed to determine whether the activity in question constitutes wrongdoing. Throughout the investigation the parties are informed of the progress and provided with the opportunity to provide their views and respond. When a case is concluded, a report of findings is provided to the department and to the employee who made the allegation. Where wrongdoing is found, recommendations for addressing and correcting the matter are included in that report. Normally, the PSIO will follow up on the recommendations until the matter is resolved.

Martine Nantel
Senior Counsel/Investigator

The *Disclosure Policy* also provides the Public Service Integrity Officer with an additional means of addressing wrongdoing where departments and agencies do not respond appropriately or in a timely manner to findings and recommendations made: a report can be submitted by the PSIO to the Clerk of the Privy Council seeking his intervention as the head of the Public Service. To date, there have been no such reports.

The PSIO meets the Disclosure Policy's requirements:

- **To establish if there are sufficient grounds for further action and review**
- **To initiate an investigation when required**
- **To review the results of investigations**
- **To prepare reports and make recommendations to Deputy Heads on how to address or correct the disclosure**
- **In some special cases, or in cases when the departmental responses are not adequate or timely, to make a report of findings to the Clerk of the Privy Council in his role as head of the Public Service.**

André Guay
Analyst

1.6 Statistics

This year, in addition to hundreds of telephone calls, there were 159 contacts recorded by the PSIO. Sixty percent of these did not result in further actions by the PSIO as, at the outset, the concerns did not fall within the domain of the *Disclosure Policy* and other avenues were better suited for the matter raised.

The following table depicts the number of files reviewed and investigated and their disposition during the year:

Judith Buchanan
Senior Investigator/Analyst

FILES REMAINING AT END OF 2002-2003[1]	6
FILES OPENED IN 2003-2004[2]	67
TOTAL FILES FOR REVIEW AND INVESTIGATION IN 2003-2004	**73**
Files closed after intake or preliminary review stage	**38**
• Files closed after referral	31
• Files closed: no jurisdiction[3]	5
• Files closed: allegations found to be not substantiated	2
Files closed after research, review and investigation	**23**
• Files closed after referral	2
• Files closed: no jurisdiction[3]	2
• Files closed: allegations found to be not substantiated	16
• Files where allegations were founded	3
INVESTIGATIONS STILL ONGOING AS OF MARCH 31, 2004	**12**

[1] Fiscal year 2002-2003, from April 1, 2002 to March 31, 2003
[2] Fiscal year 2003-2004, from April 1, 2003 to March 31, 2004
[3] *"No jurisdiction" refers to circumstances where it turned out that the PSIO did not have a mandate to continue to investigate such as: the person or disclosure did not qualify under the terms of the Disclosure Policy; the wrongdoing alleged took place too long before the Disclosure Policy came into effect; it was not in the public interest to investigate; or, the allegations had been considered or would be dealt with better by another federal board, tribunal or court.*

This year the PSIO completed 11 reports of investigation with recommendations that were sent to the respondent organization. It should be noted that a significant number of cases in which no form of wrongdoing was found nevertheless involved extensive investigations and interactions with the departments concerned. These led to PSIO recommendations for improved departmental procedures, communications and interactions with employees and the program clientele, and elicited full co-operation from the departments concerned.

Normand Desjardins
Senior Investigator/Analyst

FILES BY CATEGORY OF WRONGDOING	
Violation of Laws or Regulations	13
Breach of the *Values and Ethics Code for the Public Service*	0
Misuse of Public Funds or Assets	6
Gross Mismanagement	20
A Substantial and Specific Danger to the Life, Health and Safety of Canadians or the Environment	1
Reprisal for making an allegation of wrongdoing	3
Conflict of Interest	1
Harassment, Abuse of Authority, Interpersonal Conflict	18
Others	11
TOTAL	**73**

1.7 Case Highlights (by category of wrongdoing)

Violation of Law or Regulation (13 cases)

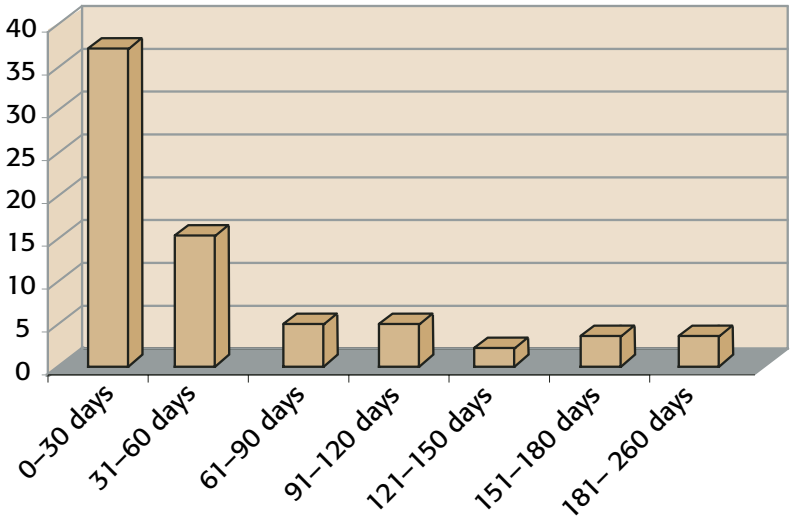
The PSIO concluded the review of 13 cases where the allegations related to the violation of law or regulation. This represents a decrease from last year's 24 cases in this category, mostly due to a reduction in the acceptance of cases by the PSIO when the matter could be referred to a more appropriate recourse mechanism.

Of the 13 cases, five were referred to another agency after preliminary review, as there was another appeal or recourse mechanism available to the employee. They included allegations relating to the *Canadian Human Rights Act* and the *Public Service Employment Act*.

Four other cases in which a more substantive review was undertaken were quickly concluded when respective departments provided appropriate evidence to demonstrate that the allegations were unfounded.

One such instance was the review of the manner in which a department, Human Resource Development Canada, completed an employee's Record of Employment (ROE) under the *Employment Insurance Act*. The department substantiated its actions and the PSIO found that, contrary to the allegation, the department properly completed the ROE.

Elapsed Time to Dispose of Cases as of March 31, 2004



As of March 31, 2004 four cases remained open and under investigation and will be reported on next year.

There were no findings of wrongdoing within this category resulting from the reviews and investigations completed during the fiscal year.

One of the cases that the PSIO reported in last year's annual report dealt with a disclosure alleging that Health Canada was not properly applying the regulatory framework within which it operated. The issues in contention related to the application of the *Food and Drugs Act and Regulations* and the veterinary drug approval process. After conducting a review of the legislation, policies and guidelines covering the subject area and the facts and circumstances surrounding a particular drug submission, the PSIO concluded that the department had adequately applied the regulations in view of the allowable ministerial discretion and the manner it was exercised.

Hence, there was no finding of wrongdoing regarding the application of the law and regulations in question. However, the PSIO suggested that the department continuously enhance its communications with employees, the businesses it regulates and the public it serves to ensure better understanding, consistency and transparency relating to the requirements of the drug approval process.

Subsequent to the PSIO's report issued in that case in March 2003, the disclosing employees filed an application for judicial review. This is the first time a judicial review of PSIO findings has been requested. On December 15, 2003 the PSIO was granted permission to intervene in the proceedings for the purpose of explaining its jurisdiction to the Federal Court. The matter is scheduled to be heard in November 2004. The outcome of this judicial review will be reported in a future annual report.

A Breach of the *Values and Ethics Code for the Public Service* (no cases)
There were no cases reported in this category.

Tammy Calleja
Office Manager

Misuse of Public Funds or Assets (six cases)

There were six cases alleging the misuse of public funds or assets. As of March 31, 2004 three of these cases remained under investigation and will be reported on in the next annual report. Of the remaining, one was closed due to the lack of substantiating information provided by the disclosing employee, another was concluded as unfounded and the other is described below.

One case that was investigated dealt with an allegation that funds intended to staff certain positions within a regional branch of the Correctional Service of Canada were being redirected for other purposes (a misuse of funds). Meetings and discussions were held with the Treasury Board Secretariat, the department's Comptroller and its region's Director of Financial Management to gain an understanding of the department's budget process and accountability structure. It was found that the initiative to establish greater budgetary controls was in its first year and aimed at ensuring that the resources are used in the area of activities for which funds were initially allocated, and that the resource indicators identified are strictly indicators and under no circumstances, should be considered as correctional operational standards, performance results, legal commitments or established norms. On this basis, the PSIO concluded that the evidence did not support the allegation of a misuse of funds. In addition, the PSIO received an account of the progress being made with the management of budgets. It was acknowledged that meeting the resourcing indicators was not accomplished in some sectors due to a number of existing pressures during the first year of this initiative. However, it was expected that the following year managers would be held to greater account to the resourcing indicators, thus helping the region to achieve its corporate objectives. It is expected that this ongoing work will result in the employees obtaining the workplace improvement they seek.

Gross Mismanagement (20 cases)

There were 20 cases in this category. Due to the complex nature of this category of wrongdoing, 12 cases required considerable additional research and investigation. Many of these related to how departments address the management of employees. Cases included how classification grievances are managed, how the performance management system functions, how administrative reviews and investigations are conducted, and what criteria should be applied when reducing the number of employees assigned to rather unique tasks. Most allegations were determined to be unfounded. In some other cases, employees were advised to refer the matter to the grievance process.

Three cases stood out as examples of gross mismanagement in the handling of harassment complaints. It was found that, despite clear evidence of harassment confirmed by a departmental investigation, departmental inaction contributed to extensive delays and failure to resolve the complaints. The PSIO's involvement contributed to the eventual resolution of the matter.

As reported in 2003, the PSIO was considering an investigation into the systemic factors that could contribute to the gross departmental mismanagement regarding the Treasury Board's *Policy on the Prevention of Harassment in the Workplace*. Again this year, the PSIO continued to receive numerous allegations concerning harassment in the workplace and the inadequate implementation of the provisions of that policy, specifically regarding the failure to address complaints. As a result, a review was launched by the PSIO to examine how one department responds and operates. The Correctional Service of Canada has welcomed this review and is cooperating fully with the PSIO. This review is ongoing.

"However, in view of the relatively high numbers (of harassment cases), there are aspects of this category of allegation that raise concern and merit further consideration and monitoring. Indeed, there may be grounds for investigating the systemic factors that contribute to individual cases. I will pay attention to this particular matter in the coming year."

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Alexandria Mayer
Intake Coordinator

Another case that was investigated by the PSIO dealt with the management, in the Department of Western Economic Diversification, of a financial contributions program to boost regional economic development. The allegations concerned the apparent lack of transparency in eligibility criteria, the perception of preferential treatment given to recipients who benefited from established contacts within the department and the seemingly inappropriate use of discretion by management in awarding financial contributions. The PSIO investigation concluded that the terms and conditions of the program approved by the Treasury Board were implemented and respected. Nevertheless, the PSIO did recommend ways for the department to improve transparency by publishing and disseminating more broadly information about the eligibility criteria and the decision-making process. While investigating the main allegation, the PSIO dealt with the complaint of a perceived potential conflict of interest. The question arose when a departmental employee began a job assignment with a recipient organization. A review of the testimony and an account of the procedures and approval requirements concluded that there was no conflict of interest in this instance. However, to alleviate such perceptions and concerns in the future, the PSIO recommended that the department adopt more specific guidelines to govern assignment and interchange arrangements with outside organizations, including the related conflict of interest provisions, and that these guidelines be communicated and implemented consistently to ensure greater transparency and accountability. The department accepted and implemented the PSIO recommendations.

The PSIO also investigated another disclosure that was initially made within an organization and subsequently referred to the PSIO. The allegation related to the gross mismanagement of an enforcement operation by the RCMP at a public protest. With the complete collaboration of the organization, the PSIO obtained full access to records, witnesses and technical expertise to conduct independent assessment and confirmation of the information gathered. The PSIO found that the allegation was not substantiated. Nevertheless, it was confirmed that there were lessons learned during the operation and that as a result guidelines for this type of operation were implemented and personnel were provided with specialized training.

As of March 31, 2004 four cases remain under investigation and will be reported on next year.

A Substantial and Specific Danger to the Life, Health and Safety of Canadians or the Environment (one case)

The one case in this category alleged that the absence of a program in the health care system to identify at an early stage persons suffering from environmental sensitivities was putting them at greater risk when it comes to diagnosis and medical treatment. After some research and interaction with the person concerned, the PSIO referred the matter to Health Canada's officials who were cognizant of the issue.

Reprisal Protection

The *Disclosure Policy* states that the PSIO is to protect from reprisal those employees who, in good faith, disclose information concerning wrongdoing. When a formal investigation of an allegation is undertaken, the PSIO normally reminds the concerned Deputy Head, in writing, of the importance attached to the protection of the employee who made the disclosure from any reprisal. There have been no findings of reprisal during this year.

The PSIO continues to be guided by what constitutes reprisal as determined in the *Disclosure Policy*. First, the original disclosure of wrongdoing that allegedly led to reprisal must have been made by a public service employee to his or her superior, or to the departmental Senior Officer or to the Public Service Integrity Officer. Second, while the disclosure of wrongdoing need not turn out to be founded, it must have been made in good faith. Third, the existence of reprisal would be confirmed if the original disclosure of wrongdoing is shown to be at least one of the reasons for the adverse impact on the employee, notwithstanding other justifications made for the departmental action.

Last year the PSIO reported one instance of reprisal while investigating other issues in a case. The finding of reprisal was largely based on the timing of a disciplinary action taken against the employee who had just made a good faith disclosure to the PSIO, and the fact that no documentary evidence existed to support any other contention justifying the discipline. The PSIO conclusion and a recommendation were reported to the concerned Deputy Head. There has subsequently been extensive discussion with the department about this result and the recommendation that any losses suffered by the employee as a result of the disciplinary action be restored. Lately the PSIO has again sought to ensure that this recommendation be acted upon and taken seriously in order to protect the integrity of the *Disclosure Policy*.

This year six anonymous disclosures were received by the PSIO. In most instances, these were accompanied by supporting information that necessitated a review by investigators. In cases that were without substance or sufficient detail, no action was taken. Some of the anonymous writers indicated that the reason for anonymity is based on the fear of reprisal.

1.8 The significance of finding little wrongdoing

As the above statistics and case descriptions demonstrate, even after sometimes extensive and complex investigations, the PSIO found few instances of wrongdoing.

The significance of that result is worthy of some reflection. It could suggest various interpretations, some of which are not justified by the evidence or probabilities.

It may be claimed that since little wrongdoing was substantiated despite the 73 allegations brought to the PSIO during the year in question, most of the allegations must have been frivolous or made in bad faith. In fact that was not the case. Not one of the allegations made was found to have been made in bad faith. It does not mean either that they were frivolous. On the contrary, for those who made the allegations they involved serious, often long-standing and unresolved issues, in many cases employment related or involving a workplace conflict. As the statistics indicate, a substantial number turned out not to fall within the jurisdiction of the PSIO and were better addressed by another mechanism or recourse avenue. By referring them to another avenue with the consent of those who brought the issue to the PSIO, and by recommending that a solution be found and in many cases maintaining a monitoring or mediating role, the PSIO contributed significantly to the resolution of a number of such cases.

Not one of the allegations made was found to have been made in bad faith. It does not mean either that they were frivolous.

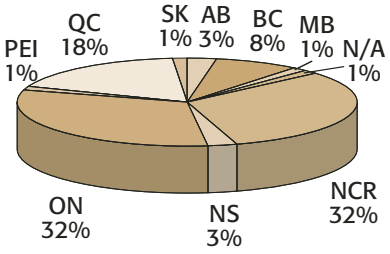
It may be claimed, secondly, that because a great many of the cases during the year in question involved workplace conflict and employment-related grievances, there must be very little serious public interest wrongdoing in the public service, the kind indicated earlier in this report that falls within the mandate of the PSIO. Those who sometimes express this view will say that since the PSIO is available for public servants to report serious wrongdoing, if they bring few such allegations forward, there must be very little such wrongdoing actually taking place. It would be a mistake to so conclude. This view vastly overestimates the credibility and effectiveness of the *Disclosure Policy* and the PSIO given its present structure and powers. It also greatly underestimates the courage it requires for public servants to report wrongdoing against the public interest, of which they are not the immediate victims, no matter how credible and effective the disclosure mechanism or agency might be or become.

Many public servants themselves have stated in surveys and elsewhere that they were aware of wrongdoing in their institutions but given the fear of reprisal and other concerns did not feel confident enough that the PSIO and the Disclosure Policy could be sufficiently effective and protective.

The PSIO is essentially reactive, not proactive. The PSIO investigates credible allegations brought forward, but does not have a mandate to go out looking for wrongdoing unrelated to one or more allegations. That means that the PSIO only has direct knowledge about possible wrongdoing that public servants are willing to report, and established wrongdoing that is determined as a result of subsequent PSIO investigations. On the other hand it is well known that there are significant allegations and incidents of serious wrongdoing in the public service. They have been widely publicized and some have been or are the objects of review and scrutiny by parliamentary committees, police investigations and appointed commissions of inquiry. It is inconceivable that some public servants not directly implicated were unaware of at least some of those reprehensible activities while they were taking place. Many public servants themselves have stated in surveys and elsewhere that they were aware of wrongdoing in their institutions but given the fear of reprisal and other concerns did not feel confident enough that the PSIO and the *Disclosure Policy* could be sufficiently effective and protective.

It may be claimed, thirdly, that because public servants are by and large not coming forward with allegations of serious wrongdoing against the public interest, there is really no need to have a Public Service Integrity Officer. That claim as well cannot be substantiated, and for the same reasons already indicated. If, as is the case, serious wrongdoing in the public sector does take place even if there is no evidence that it is widespread, yet little of it is reported to the PSIO, it is far more likely that the solution is to equip the PSIO or a successor agency to be credible and effective enough to encourage those in the public sector to come forward and to protect them from possible reprisal when they do so.

REGIONAL DISTRIBUTION OF CASES



REGIONAL DISTRIBUTION OF CASES	
Region	**Total**
Alberta	2
British Columbia	6
Manitoba	1
N/A	1
National Capital Region	23
Nova Scotia	2
Ontario	23
Prince Edward Island	1
Quebec	13
Saskatchewan	1
TOTAL CASES IN JURISDICTION	**73**

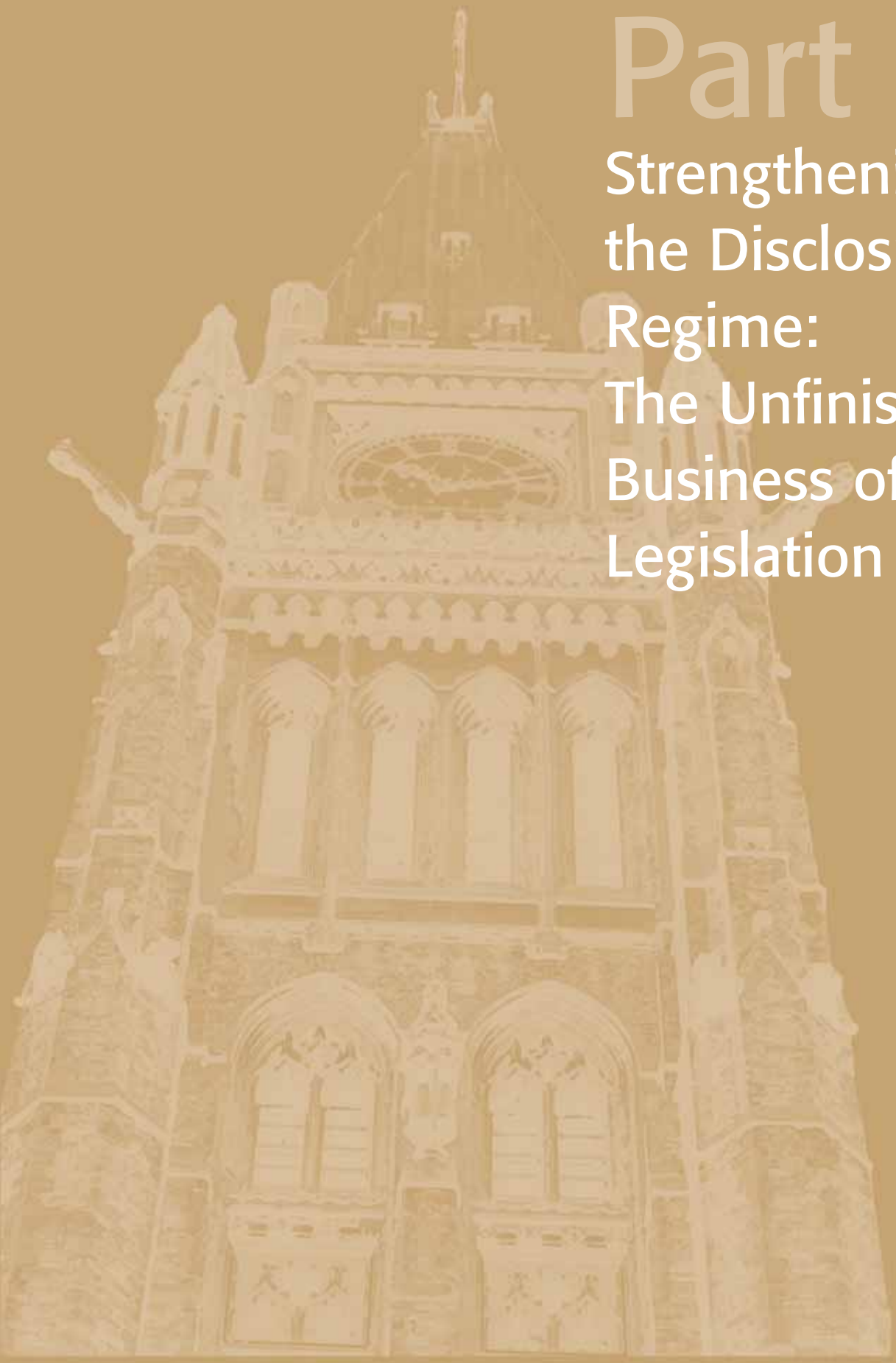
If, as is the case, serious wrongdoing in the public sector does take place even if there is no evidence that it is widespread, yet little of it is reported to the PSIO, it is far more likely that the solution is to equip the PSIO or a successor agency to be credible and effective enough to encourage those in the public sector to come forward and to protect them from possible reprisal when they do so.

Public servants themselves and many others, have indicated clearly what kind of structure and powers a disclosure mechanism should have before they are willing to be courageous enough to take the inherent risks involved in disclosing wrongdoing for the sake of a healthier public sector and to justify public confidence in the public service. What such a mechanism or agency should be, and how it should be equipped, is the subject of Parts II and III and the concluding recommendations of this Annual Report.

Only once such a mechanism is in place and functioning would it be legitimate and reasonable to consider its findings as one among other indicators of how much or how little serious wrongdoing there is in the public sector. And only then would it be appropriate to evaluate the effectiveness of, and the continuing need for, such a disclosure mechanism and agency.

DISTRIBUTION OF CASES BY DEPARTMENT AND AGENCY

Department:	**Total:**
Agriculture and Agri-Food Canada	1
Atlantic Canada Opportunities Agency	1
Canadian Industrial Relations Board	2
Citizenship and Immigration Canada	2
Communication Canada	2
Competition Tribunal	1
Correctional Service of Canada	12
Department of National Defence	3
Environment Canada	1
Federal Court of Canada	1
Foreign Affairs and International Trade	1
Health Canada	9
Human Resources Development Canada	12
Immigration and Refugee Board	2
Indian Affairs and Northern Development	1
Natural Resources Canada	2
Office of the Privacy Commissioner	1
Public Service Commission	2
Public Works and Government Services Canada	7
Royal Canadian Mounted Police	4
Supreme Court of Canada	1
Transport Canada	2
Treasury Board Secretariat	1
Western Economic Diversification	1
Organization not named in allegation	1
	73



Part II

Strengthening the Disclosure Regime: The Unfinished Business of Legislation

Part II

STRENGTHENING THE DISCLOSURE REGIME: THE UNFINISHED BUSINESS OF LEGISLATION

...the PSIO assessed the experience with the current policy-based disclosure regime and made recommendations for improvements and reform by means of new legislation.

Last year a number of significant events and circumstances propelled ethics, integrity and good governance in the public sector to the fore of policy considerations. Confidence in public institutions has been shaken and eroded as a result of specific instances of reported gross misconduct and mismanagement. Among the many issues raised in the debate, the need for more effective disclosure of wrongdoing in the public service emerged as a necessary initiative. Steps were taken and broad-based foundations were laid to encourage the government to take decisive action to substantially strengthen the current wrongdoing disclosure regime.

Laying the Foundations

The Public Service Integrity Officer 2002-2003 Annual Report

In the 2002-2003 Annual Report tabled in Parliament on September 15, 2003 (available at www. integritas.gc.ca), the PSIO assessed the experience with the current policy based disclosure regime and made recommendations for improvements and reform by means of new legislation. These recommendations took into account the results of consultations, surveys related to employee attitudes, the significant events surrounding the former Privacy Commissioner and serious instances of alleged or established wrongdoing that surfaced from program audits. As well, the recommendations drew upon the findings in the detailed study commissioned by the PSIO in 2003 entitled *A Comparative International Analysis of Regimes for the Disclosure of Wrongdoing ("Whistleblowing")* (available at www. integritas.gc.ca). This study examined the effectiveness and fairness of the disclosure regimes in seven countries: the United States, the United Kingdom, Australia, New Zealand, South Africa, Israel and the Republic of Korea.

In the 2002-2003 Annual Report, the PSIO called for legislation that would give the disclosure regime the required legitimacy and credibility in the eyes of the potential users, the federal public servants, and the general public. This legislation would encompass all institutions in the federal public sector, have an independent agent accountable to Parliament to receive and investigate disclosures fully and would guarantee legal protection from reprisal for those making disclosures. These recommendations are reproduced in Appendix D.

The 2002-2003 Annual Report also described the need to create and nurture cultural change, a long and continuing process that starts with recognizing and accepting that wrongdoing may indeed take place. In these instances, the duty of those who witness wrongdoing is to report it. For the authorities, the corresponding responsibility is to take such reports seriously, to address the issues promptly and fairly and to take corrective action when wrongdoing is established. The PSIO recommended that disclosures of wrongdoing should be encouraged and recognized in the form of a non-monetary award as being courageous and meritorious acts of service to the public sector and in the interest of the public. Disclosing and addressing wrongdoing allegations through an established process should be viewed as normal and healthy for a well functioning organization.

The President of the Treasury Board received the PSIO recommendations with considerable support and interest.

"The Government of Canada is committed to a public service where employees can honestly and openly discuss concerns without fear of reprisal (…) While it is evident that it is time to deal with legitimate concerns raised about weaknesses in our current approach, we need to ensure that any new framework would both encourage and support disclosures of wrongdoing while at the same time allowing managers to promote early measures to prevent wrongdoing from happening."

(*The President of the Treasury Board Announces Working Group to Review Internal Disclosure Protection in the Public Service of Canada. President of the Treasury Board*, Treasury Board News Release, September 29, 2003)

The Working Group issued its report on January 29, 2004 and made 34 recommendations that largely echoed those made in the Public Service Integrity Officer 2002-2003 Annual Report

Working Group Report

In response to the PSIO recommendations, the government created a working group to review the state of internal disclosure systems in the Public Service of Canada and elsewhere, and to report to the President of the Treasury Board by January 2004 with recommendations for improvements, including possible alternative legislative approaches. Dr. Kenneth Kernaghan, Professor of Political Science and Management at Brock University chaired the Working Group. The group was further comprised of Dr. Edward Keyserlingk, the Public Service Integrity Officer; Ms. Hélène Beauchemin, President of HKBP Inc and a former senior executive within the federal public service; Mr. Denis Desautels, Executive-in-Residence, University of Ottawa's School of Management and former Auditor General of Canada; and, Mr. Merdon Hosking, President of the Association of Public Service Financial Administrators. These individuals brought considerable relevant expertise and experience from a variety of backgrounds to the deliberations.

The Working Group issued its report on January 29, 2004 and made 34 recommendations that largely echoed those made in the Public Service Integrity Officer 2002-2003 annual report and proposed as well that there should be a legislated values and ethics framework. Among the recommendations made were the following: legislation should establish a new independent Agent of Parliament; the umbrella of the disclosure regime should be widened to include separate employers and Crown Corporations; the new Office should have adequate investigative powers; and, it should be able to investigate allegations regardless of their source. Five of the recommendations aimed beyond the confines of a disclosure regime and focused on leadership development and evaluation, a code of values, training in ethics and management accountability. The detailed recommendations are reproduced in Appendix E.

The Standing Committee recommended that the agency be independent, neutral and accountable to Parliament and be equipped with the necessary powers and mechanisms to investigate allegations of wrongdoing.

Report of the House of Commons Standing Committee

In November 2003, while the Working Group was deliberating, *The Thirteenth Report of the House of Commons Standing Committee on Government Operations and Estimates* focusing on whistleblowing was issued. After noting approvingly the recommendations of the PSIO's Annual Report and calling attention to the views of employees of the Privacy Commission, members of the public, public service unions and the Auditor General, the committee made a number of recommendations along the same lines as those of the PSIO, specifically that the agency be independent, neutral and accountable to Parliament and be equipped with the necessary powers and mechanisms to investigate allegations of wrongdoing. An extract of the report is reproduced in Appendix F.

Auditor General's Report

In February 2004, the Auditor General of Canada tabled her 2003 report in Parliament in which she reviewed the activities concerning a disclosure regime within the public service and stated that the recommendations in the PSIO's Annual Report should be given serious consideration. Extracts of the relevant portions of this report are provided in Appendix G.

Bill C-25, the *Public Servants Disclosure Protection Act*

On March 22, 2004, the President of the Queen's Privy Council and Minister responsible for the Public Service Human Resources Management Agency of Canada, introduced legislation in Parliament to establish a mechanism for the disclosure of wrongdoing in the public sector and to protect people who disclose wrongdoing (Bill C-25, the *Public Servants Disclosure Protection Act*).

In his presentation to the Committee, the Public Service Integrity Officer submitted that Bill C-25 did not meet the expectations of a wide spectrum of informed opinion about what this law should contain and achieve.

On April 29, 2004 the Public Service Integrity Officer appeared before the House Standing Committee to present his views and proposals regarding Bill C-25. Three documents were tabled:

1. Submission to the House Standing Committee on Government Operations and Estimated on Bill C-25
2. PSIO Clause by Clause Comments on Bill C-25
3. Proposed Investigation and Resolution Procedures
   (Available at www.integritas.gc.ca)

In his presentation to the Committee, the Public Service Integrity Officer submitted that Bill C-25 did not meet the expectations of a wide spectrum of informed opinion about what this law should contain and achieve. Among its defects were arguably the following: the proposed Commissioner would not be a parliamentary agent; access to the Commissioner would be restricted; no investigative powers were provided; access to some potentially relevant information would be excluded; investigations could not proceed beyond the public sector; the complaint of reprisal process would not in effect be under the complete purview of the Commissioner; and, no measures were provided in the legislation for sanctioning those who take reprisal actions against whistleblowers given that other federal legislation applicable to the private sector provides for such sanctions.

"In the final analysis, Mr. Chair, I do not believe it matters what you, I, the office of values and ethics, ministers, cabinet, or Parliament think the ideal wrongdoing in disclosure systems should be. What does matter is whether the people it was designed for have enough confidence in it to use it and whether they believe the system can be effective and protective."

Public Service Integrity Officer before Parliamentary Committee

Bill C-25 died on the order paper as a result of the May 23, 2004 election call. Nevertheless, a consensus had emerged that a federal public sector wrongdoing disclosure regime ought to be anchored in legislation. The many witnesses who appeared before the Standing Committee on Government Operations and Estimates noted that Bill C-25 was deficient not only in failing to reflect the general thrust of the advice received but also in falling short of adequately reflecting many of the specific aspects proposed by the above reports.

The reasoning and motives for a legislative initiative have not changed since then. In fact, recent events, developments and public concerns have only added further impetus to act. Clearly, the task must be completed.

Bill C-11: A revised *Public Servants Disclosure Protection Act*

On October 8, 2004, the President of the Treasury Board, the Honourable Reg Alcock, tabled Bill C-11, *An Act to establish a procedure for the disclosure of wrongdoings in the public sector, including the protection of persons who disclose the wrongdoings.*

"While a number of basic features remain from the previous Bill, the new proposed legislation includes significant revisions in response to concerns expressed by stakeholders last spring."

***The President of the Treasury Board announces the tabling of the new public servants disclosure protection legislation in the House of Commons*, Treasury Board News Release, October 8, 2004**

Taking stock of the progress and debate to date, the next section of this report presents and explores key provisions that, based on the experience of the Public Service Integrity Officer, must be reflected in new legislation if such a law is to be effective and credible.

Part III

Elements of a Model Legislation

Part III

ELEMENTS OF A MODEL LEGISLATION

There may never be a more receptive climate and auspicious time than the present for disclosure of wrongdoing legislation. The expectations for legislation have been loud and clear on the part of public servants, some management representatives, public service unions, Members of Parliament, Senators, past and current employees who reported wrongdoing, and members of the public. The case for legislation was made last year and, in response, legislation was tabled in the previous Parliament and re-introduced in a modified form, as Bill C-11, in the current Parliament. Recent government statements about its determination to identify and fix incidents of government wrongdoing give reason to expect movement toward effective legislation.

There may never be a more receptive climate and auspicious time than the present for disclosure of wrongdoing legislation.

In order to effectively replace the present policy-based disclosure of wrongdoing regime with an adequate law, a number of key elements must be in place. A disclosure regime in the large, diversified and complex federal public sector must also include mechanisms in each department and institution to allow employees to disclose internally, if they so choose. It is not my role as the Public Service Integrity Officer to comment in this report on the features of the internal departmental avenues other than to stress the vital importance and usefulness of their existence. They are necessary complements to an independent public sector entity in a legislated disclosure process.

The focus in this section will be on the elements of a legislated public sector disclosure regime and on what, in my view and that of many others, should be the main features of an independent public sector entity that will be called in a generic way from hereon the "Integrity Commissioner." The essential elements are presented under four headings:

1. Independence of the Integrity Commissioner
2. Jurisdiction of the Integrity Commissioner
3. Scope of investigations
4. Effective protection of individuals and information.

1. Independence of the Integrity Commissioner

1.1 An Agent of Parliament

The Integrity Commissioner should be an independent Agent of Parliament. This was a central recommendation of my previous annual report, the Report of the Working Group, the Thirteenth Report of the House of Commons Standing Committee on Government Operations and Estimates, and of almost all the witnesses before the committee in the previous Parliament.

It is most important that the Integrity Commissioner not be created or perceived to operate as an officer within the executive branch of government, since he or she will be tasked to investigate, in a neutral and impartial manner, activities within the federal public sector. Otherwise, the Commissioner would be placed or perceived to be in a potential conflict of interest. As an officer within the executive branch, it would be difficult to counter the perception that the Integrity Commissioner is not closely aligned with the interests of the government and that the office is not subject to potential influence or interference from other government authorities. As an Agent of Parliament,

the Integrity Commissioner's independent status is unassailable. This would provide the necessary autonomy and freedom required for the Commissioner to discharge the mandate in an impartial manner as an independent officer and to report directly to Parliament and the public.

As an Agent of Parliament, the Integrity Commissioner's independent status is unassailable.

The previously mentioned PSIO study, *A Comparative International Analysis of Regimes for the Disclosure of Wrongdoing ("Whistleblowing")*, revealed that among the seven countries reviewed – four Commonwealth countries (the United Kingdom, Australia, New Zealand and South Africa) and three non-Commonwealth countries (the United States, Korea and Israel) – only one has a commissioner within the executive branch of government. The six other countries have an entity independent from the government, reporting to an elected legislative assembly.

In Canada, the independence of the Integrity Commissioner would have to be provided in the legislation through a number of provisions:

1. the Integrity Commissioner's appointment should be approved by both Houses of Parliament;
2. the Integrity Commissioner should report directly to Parliament;
3. the Integrity Commissioner should be supported by an office and have the authority to select the staff for the office and control the other resources necessary to fulfill the mandate.

The authority to make annual and special reports directly to Parliament should be available to the Integrity Commissioner.

Examples of these provisions in Canada can be found in the statutes governing the existing Agents of Parliament.

Bill C-11 proposes to assign the role of the "Integrity Commissioner" to the President of the Public Service Commission. Further comments on this and other related matters are made in section 1.4 below.

1.2 Report to Parliament

Most importantly, the authority to make annual and special reports directly to Parliament, normally to the Speakers of the House of Commons and the Senate, should be available to the Integrity Commissioner as it is the case for other Agents of Parliament. The Privacy Commissioner, the Access to Information Commissioner, the Commissioner of Official Languages and the Auditor General are all required by their legislation to make their reports directly to Parliament via the Speakers of the House of Commons and the Senate. A similar authority in the case of the Integrity Commissioner would clearly underline the Commissioner's independence. It would also enhance the capacity of Parliament to oversee in the public interest activities that may be tainted by wrongdoing and to hold the government and those involved accountable for their actions.

Bill C-11 proposes that the President of the Public Service Commission would prepare an annual report for tabling in Parliament by a designated Minister. The President may make special reports directly to Parliament when the matter is urgent or important.

1.3 Control Over the Office

The Integrity Commissioner should have authority to appoint staff to his or her Office. It is noteworthy that the other Agents of Parliament have a similar provision in their governing statutes, as do as well the newly established positions of Senate Ethics Officer and (House of Commons) Ethics Commissioner. Those authorities were clearly deemed appropriate in order to ensure the independence and proper functioning of their offices. That reasoning should apply equally to the Integrity Commissioner.

Bill C-11 provides the Public Service Commission with the authority to appoint persons necessary for the proper conduct of the President's duties related to the disclosure regime.

As well, there will be a need to create transitional strategies between the PSIO and the Office of the Integrity Commissioner – Bill C-11 proposes to house this function in the Public Service Commission – to ensure continuity of service and provide for the completion of ongoing investigations. Given that the PSIO is already established and has developed an expertise and valuable experience, it would be reasonable therefore that the PSIO staff and its work evolve into at least the initial nucleus of the new Office.

Ideally ...the Integrity Commissioner would function in a separate, dedicated stand-alone capacity.

1.4 A Separate Stand-Alone Office or a New Branch of an Existing Agency?

I have long been an advocate of legislation establishing an independent Integrity Commissioner with strong investigative powers, who is not situated in the public service or the executive branch of government and is approved by and reports to Parliament. That ideally implies that the Integrity Commissioner would function in a separate, dedicated and stand-alone capacity and that the disclosure mechanism would not be part of and attached to any other office, agency or commission.

Furthermore, given the unique nature and challenges of the mandate of such a Commissioner, that Office requires its own experienced staff with specialized expertise and must be able to focus on its exclusive mandate and operate without interference.

Establishing such an independent and stand-alone organization was a core recommendation of my 2002-2003 Annual Report. That position was subsequently echoed in the Working Group report issued this past January. It remains, in my view, fundamental to the effectiveness and credibility of a disclosure regime.

However, the recently introduced Bill C-11 proposes to add the responsibilities for a disclosure regime to the existing duties of the President of the Public Service Commission. To do so would seriously risk undermining, in appearance and in reality, the independence of the process and function of the disclosure of wrongdoing regime since it would be attached to another commission, and one that for the most part (e.g. staffing and recruitment) operates within the executive branch of government.

Secondly, the primary focus of the Public Service Commission is on staffing issues, whereas the kinds of serious wrongdoing against the public interest that are defined in the existing *Disclosure Policy* and Bill C-11 go far beyond staffing matters. This conflict in mandates could result in a lack of focus on wrongdoing and protection from reprisal, and less attention to the fact that these matters require quite different investigative, protective and resolution processes than do staffing matters. As well, confusion could arise from the fact that the staffing mandate of the Public Service Commission would continue to apply only to the "core" public service (some 170,000 public servants) whereas according to Bill C-11 the proposed additional mandate regarding the disclosure regime would apply to the entire public sector (over 458,000 employees).

Thirdly, attaching the disclosure regime to another existing commission such as the Public Service Commission may be perceived to be a weaker commitment by the government to address wrongdoing and protect whistleblowers than would be signaled by a dedicated stand-alone and independent Integrity Commissioner.

On the other hand, it may seem to some at first glance that legislation which adds the responsibility for a disclosure of wrongdoing regime to the present responsibilities of the President of the Public Service Commission, could to a considerable degree encompass and respect the key elements of what an Integrity Commissioner should be and do.

In some matters, namely investigations and audits, the Public Service Commission already functions independently. The President of the Public Service Commission reports to Parliament annually. As well, the selection and appointment of the President of the Public Service Commission must be confirmed by Parliament. In principle it may not therefore be inconsistent with the Public Service Commission as presently structured, to add another branch by way of a disclosure regime to also function independently.

Furthermore, Bill C-11 includes a number of provisions directed at ensuring the independence of the President of the Public Service Commission in the investigation and disposition of disclosures of wrongdoing, including that of tabling special and annual reports to Parliament specifically regarding disclosures of wrongdoing. As well, the President of the Public Service Commission already has significant investigative powers, and Bill C-11 provides that the powers available under the *Inquiries Act* would be available for the proposed disclosure regime.

Nevertheless, it is not evident how in practice the President of the Public Service Commission could wear two very different hats at once, one as a government executive when dealing with staffing matters, another as a supposedly independent agent reporting to Parliament when dealing with the investigation and disposition of allegations of wrongdoing and protecting from reprisal those who make the allegations. It is equally difficult to conclude that public sector employees would think the roles, procedures and protections are distinct enough to engender the confidence needed to take the inherent risks in coming forward with allegations of wrongdoing. There would understandably remain a perception that the government would be investigating itself, thereby raising potential conflict of interest concerns.

If Parliament should nevertheless vote to retain this proposal to attach responsibility for the disclosure regime to the President of the Public Service Commission, there are a number of practical steps that could perhaps mitigate somewhat the concerns I am raising. A new and largely separate disclosure of wrongdoing branch would have to be established within the Public Service Commission. It would need to be staffed by dedicated and skilled investigators, headed by an executive who is credible to those in the public sector and who reports to the President of the Public Service Commission exclusively in his or her capacity as the person responsible for the disclosure regime. That disclosure branch would apply investigative and resolution processes adapted to the unique demands arising from the need to investigate allegations of wrongdoing in a manner that ensures effectiveness, confidentiality and protection from reprisal. That branch and regime would have to be maintained at arms length from the other functions of the Public Service Commission, and be separately accessible to public servants who require privacy and confidentiality when making a disclosure. The steps are not all spelled out explicitly in Bill C-11, but are arguably consistent with its provisions and intent.

If Parliament should nevertheless vote to retain this proposal to attach responsibility for the disclosure regime to the President of the Public Service Commission, there are a number of practical steps that could perhaps mitigate somewhat the concerns I am raising.

It remains uncertain at best, even if these steps are taken, that attaching responsibility for the disclosure regime to the President of the Public Service Commission could attract sufficient confidence of public servants contemplating the credible and good faith disclosure of wrongdoing. Since that should, after all, be the primary goal of such legislation, surely a far better legislative proposal would be to establish a separate stand-alone and independent Integrity Commissioner. That is what public servants themselves have requested for some time.

2. Jurisdiction of the Integrity Commissioner

2.1 Institutional Coverage

"An effective disclosure regime should cover as much of the federal public sector workforce as possible, including separate employers and Crown Corporations."
***Report of the Working Group on the Internal Disclosure of Wrongdoing*, January 29, 2004.**

In its report, the Working Group made a recommendation similar the one made in the PSIO 2002-2003 Annual Report that the entire federal public sector should be subject to a disclosure regime. In Bill C-11, the government indicates its agreement in principle by including Crown corporations, separate employers and other agencies in the definition of "public sector." This broad application constitutes an enhancement over the institutional coverage of the current *Disclosure Policy*. It responds favourably to the views expressed earlier and to the advice provided to the government. In my view, this broader coverage should remain a feature in the legislation.

It should be noted, however, that Bill C-11 precludes access to the President of the Public Service Commission, in her proposed role regarding the disclosure regime, in the case of members of the Royal Canadian Mounted Police (RCMP) and the Canadian Forces as well as employees of the Canadian Security Intelligence Service and the Communications Security Establishment. Individuals in those organizations, some 100,000 employees, would be denied access to an independent and impartial Office, external to their home organization, to which to report allegations of wrongdoing, a process that would be available to all others in the public sector. Such exclusion is difficult to justify.

After all, not all potential wrongdoing in those organizations would necessarily have a national security, national defense or policing dimension that requires special protective measures. An allegation could be made, for example, involving a serious abuse or misuse of public funds, or gross mismanagement within the organization. It is far preferable that the Integrity Commissioner and the Office staff be required to have the proper authorization to access classified information and the obligation to treat it as such than to deny members of the four above-mentioned organizations access to the Integrity Commissioner.

It is worth noting that the RCMP Commissioner elected to make the Treasury Board's *Disclosure Policy* applicable to RCMP members, and consequently they have currently access to the PSIO for allegations of wrongdoing and protection from reprisal. The resulting interactions between the PSIO and the RCMP have been positive for both organizations.

While conscious of the sensitive nature of the operations of the four above-mentioned organizations, I do not consider that blanket exclusion of those organizations from access to the Integrity Commissioner in the legislation is justified, nor does it accord with the public interest.

Employees of all federal public sector institutions should be allowed to make a disclosure of wrongdoing either through their institution's internal mechanisms or directly to the Commissioner.

2.2 Who can make a disclosure?

Employees of all federal public sector institutions should be allowed to make a disclosure of wrongdoing either through their institution's internal mechanisms or directly to the Commissioner. The PSIO experience under the current policy suggests that it is neither wise nor necessary to express in law a preference for disclosing internally within one's organization to one's supervisor or the designated senior officer. Direct access to the Integrity Commissioner should not be complicated nor should there be pre-conditions. To make it so would likely discourage some employees from coming forward, as they may not wish to report internally or may not know if their reasons for going to the Integrity Commissioner would meet the stated tests.

It seems that some parts of Bill C-11, for instance sections 13, 23 and 24 to illustrate the point, could be interpreted as impeding access to the President of the Public Service Commission in her proposed role regarding the disclosure regime.

Access to the Integrity Commissioner should also be possible for individuals who are not public servants, a recommendation in both the PSIO and the Working Group reports. Both reports proposed that the Integrity Commissioner should be authorized to receive and investigate any relevant and credible allegations of wrongdoing in the public sector, regardless of the source of the disclosure. It is essential that instances of public sector wrongdoing known by a citizen who has had dealings with the public sector can be brought to the Commissioner by that citizen and be investigated.

Direct access to the Integrity Commissioner should not be complicated nor should there be pre-conditions.

The study on the disclosure regimes in other countries that the PSIO commissioned revealed that the legislation in the countries examined covers at the minimum public service employees. In some instances, the legislation also included former employees (Australia, New Zealand, the United States), private contractors and their employees (New Zealand) and members of the general public (Korea, Israel).

2.3 What would constitute wrongdoing?

As noted in my 2002-2003 Annual Report, "public interest wrongdoing" should be understood to relate to those activities that have serious implications for the public interest because they *"have a detrimental effect on the interests and functions of a group of public servants or a whole department, and subvert the delivery of programs and services to the public."*

The disclosure of wrongdoing within the federal public sector must address situations with a significant public interest dimension and should not cover activities already governed by other legislation and processes. The disclosure regime must allow for a person who believes that he or she has witnessed wrongdoing in the organization to report it and provide a mechanism for that matter to be investigated.

At the same time, such a regime should not be a duplication of existing recourse mechanisms for employees involved in a conflict with their employers, nor should it be a process used in bad faith or for frivolous or vexatious purposes. Furthermore, while issues such as personal harassment or abuse in the workplace are serious and must be addressed, this should not normally be the type of issue that a disclosure regime addresses, except when such activity is sufficiently flagrant and systematic that it constitutes a threat to the public interest.

The disclosure of wrongdoing within the federal public sector must address situations with a significant public interest dimension and should not cover activities already governed by other legislation and processes.

With that in mind, and in light of the experience gained to date, I suggest that the definition of wrongdoing is a key matter in determining the scope of the Integrity Commissioner's jurisdiction.

Wrongdoing should be circumscribed to public interest matters: violation of law; abuse or misuse of public funds or assets; gross mismanagement regarding program and service delivery, resource stewardship and organizational leadership; substantial and imminent danger to the life, health and safety of persons or the environment. Some headings may need to be further defined. For example, gross mismanagement would typically apply to instances of systematic and serious mismanagement of an institution, sector, or program, or an instance involving a significant failure in the management of resources and assets. The gross mismanagement in question could be by action or inaction. In the same vein, substantial and imminent danger could be subject to additional criteria, such as a situation creating clearly identifiable and immediate harm or prejudice to people or to the environment.

Given the envisaged types of wrongdoing that would come under the purview of the Integrity Commissioner, the legislated disclosure regime should not necessarily include breaches of values as a category of wrongdoing, as is currently the case in the *Disclosure Policy*. Values are better fostered by example and appropriate education and training. Breaches of values may be best dealt with, in context, at the level of each organization. Since these matters are often highly subjective and potentially minor in nature, they should be covered by a separate mechanism outside the disclosure regime. Serious breaches of some key values (for example, respect for the law) will and do typically fall within one of the headings of public interest wrongdoing as listed in the current *Disclosure Policy*. However, breaches to a code of conduct, containing specific obligations for management and employees, could constitute a form of wrongdoing.

3. Scope of Investigation

3.1 Investigative Powers

As a general principle and to be effective, the Integrity Commissioner must be given broad discretionary powers to determine which allegations will or will not be reviewed by his/her Office and which cases are more appropriately referred to other bodies or dismissed. This will allow the Integrity Commissioner to deal only with those cases that are truly indicative of serious wrongdoing and to conduct complete investigations into those matters.

The Integrity Commissioner should be provided with adequate investigative powers, similar to those that other investigative bodies possess in their legislation. Powers provided by the *Inquiries Act*, such as the power to issue subpoenas or to order the production of documents, are necessary to ensure the proper conduct of investigations. Other agents of Parliament, for example the Auditor General, the Information Commissioner, the Privacy Commissioner, and the Commissioner of Official Languages have such powers in their respective legislation. Bill C-11 vests such powers in the President of the Public Service Commission in her proposed role regarding the disclosure regime.

These powers may be required to avoid unjustified delays or complications or in the event of a refusal to provide the requested and relevant information. Such powers would also enable more rigorous and swift investigations in some cases, and ensure that all those implicated are confident that the investigative process and resulting findings and recommendations are fair, objective and comprehensive.

A factor that strengthens the case for equipping the Integrity Commissioner with adequate investigative powers has to do with the nature and types of wrongdoing under the Commissioner's purview. For example, whether it is a matter of a violation of law, an abuse of public funds or a situation creating a substantial danger to human health or life, what are to be targeted are serious wrongs against the public interest. It is in the interest of Government, Parliament and, ultimately, the public that the Integrity Commissioner have investigative powers that match the seriousness of the alleged wrongdoing in question and that these be sufficiently robust to address and satisfy the public interest implications.

The Integrity Commissioner should be provided with adequate investigative powers.

Findings of wrongdoing have very significant implications for alleged wrongdoers, the entire public service and the public in general. This requires the Integrity Commissioner to have the tools to apply a fair, impartial and complete investigative process with the likelihood of producing conclusive findings. Otherwise, the Integrity Commissioner may not be in a position to shed light on allegations of wrongdoings or to provide an accurate picture about matters brought forward by public servants or others. Without such powers, the reliability and fairness of findings and subsequent corrective actions may be open to question.

3.2 Investigating beyond the public sector

The Integrity Commissioner should be able to follow the evidence of wrongdoing wherever it leads. Only if that is the case could some investigations provide final and conclusive findings in response to allegations of wrongdoing whenever the alleged activity in question implicates people other than public servants or if the evidence lies outside the federal public sector.

The ability to access and follow the evidence wherever it may be found, even beyond the federal public sector, is crucial if Parliament wishes the Integrity Commissioner to be able to conclude on any matters of wrongdoing brought forward.

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It is fairly easy to provide examples of situations where some evidence supporting or refuting wrongdoing may have to be sought outside the public sector. Under the heading of abuse of public funds, for example, questionable funding or grant payments by a department, or in exchange for services not covered by a legally tendered contract, may require the Integrity Commissioner to go beyond the departmental files and obtain documentary or other evidence from the recipients of the grant or the funding, or from the private contractor. It is also conceivable that an investigation by the Integrity Commissioner may require seeking information from the Minister accountable for the departmental activities being examined.

One effective way to obtain information and evidence is by means of exchange of information with other appropriate investigative bodies. The Integrity Commissioner should be allowed to collaborate with and receive information from those bodies in order to permit comprehensive and conclusive investigations.

Not to enable investigations of potential public sector wrongdoing that goes beyond the public sector could be grossly unfair to the public servants in question who may appear to be fully and exclusively responsible for a wrong when in reality others beyond the public sector may, at the very least, share a degree of responsibility.

Bill C-11 in its current prevents investigations by the President of the Public Service Commission beyond the public sector.

The Integrity Commissioner should not be precluded by legislation from accessing certain types or categories of information.

3.3 Access to any relevant information

The Integrity Commissioner should be allowed to access any type and source of relevant information or evidence needed to shed light on a matter of alleged wrongdoing. The Integrity Commissioner should not be precluded by legislation from accessing certain types or categories of information.

Bill C-11 is deficient in that respect. For instance, Cabinet confidences or information protected by solicitor-client privilege would not be accessible by the President of the Public Service Commission when required for investigative purposes.

Given that it is paramount for the public interest and the credibility of public institutions that wrongdoing be addressed fully, the Integrity Commissioner should be entitled for example, to see relevant Cabinet confidences as required and legal opinions provided to the department or agency under investigation. It could be provided in the legislation that such access by the President of the Public Service Commission, in her proposed role regarding the disclosure regime, is not a waiver of confidentiality or of the solicitor-client privilege. It could also be specified that the Integrity Commissioner is obliged to keep this information confidential and that it could not to be divulged to any person, except as provided by law.

In the experience of the PSIO, there have been instances where, after discussions with the department and its legal services, the contents of legal opinions were shared with the investigator. This was particularly useful in cases of allegations of violation of law or regulations and where the departmental actions were taken on the basis of the legal opinions obtained by management.

Another example is the parliamentary inquiry into the management of the Sponsorship Program. The Government allowed disclosure of Cabinet confidences to the House of Commons Standing Committee on Public Accounts and to the Commission of Inquiry into the Sponsorship Program and Advertising Activities (Gomery Commission) to allow for a complete inquiry into the matters raised in the Auditor General's 2003 Report. Similarly, an examination of Cabinet confidences could be pertinent and required for a complete investigation by the Integrity Commissioner.

Without complete access to all the information pertinent to an investigation of a disclosure, the Integrity Commissioner's investigation may remain inefficient, inconclusive and unreliable which could be unfair to those under investigation and detrimental to the public interest.

3.4 Public Inquiries

As it is the case in other legislation establishing an investigative body, such as the Transportation Safety Board or the Commission for Public Complaints Against the RCMP, the Integrity Commissioner should be entitled to launch a public inquiry into a matter arising from one or more allegations and where the public interest is paramount. Whereas most investigations arising from disclosures would be conducted in private, as is provided in Bill C-11, there may be situations that could have a significant impact on the public trust that warrant a public inquiry. The legislation could also provide that the Governor in Council may request the Integrity Commissioner to launch a public inquiry.

3.5 Stop Orders

Another power that should be considered for inclusion in the legislation establishing the function of Integrity Commissioner is the authority to issue "stop orders" in exceptional circumstances, such as when there is an imminent and substantial risk or danger for the life, health or safety of Canadians or the environment. This temporary order to prevent or stop any wrongful activity would only be applied when the responsible agency refuses to act upon an urgent finding and recommendation following the Integrity Commissioner's investigation, or in cases where the disclosure originated within the responsible agency and no timely action was taken.

Conferring such a power may understandably raise some practical difficulties, but it is justified when one considers the potentially harmful wrongdoing at stake. This power would be used only in exceptional circumstances in which there is evidence of imminent and very serious danger and after due notice has been given to the responsible agency.

The legislation should allow the Integrity Commissioner to issue a temporary order for a limited period of time (for example: up to 20 days) to allow for an urgent review into the matter and for the chief executive of the responsible agency to respond. These temporary stop orders could of course be challenged before the courts.

4. Effective protection of individuals and information

4.1 Legal prohibition against reprisal

The legislation should clearly establish a legal prohibition against any form of reprisal or retaliation against anyone for making a good faith disclosure of wrongdoing or for participating in an investigation conducted by the Integrity Commissioner. The prohibition should also cover any intimidation of witnesses and any action or omission with the intent of interfering with the conduct of an investigation or influencing a witness.

The PSIO study of the disclosure regimes in other countries found that in four of the seven countries examined there were explicit provisions in their legislation prohibiting reprisals against the whistleblower.

The ability to provide a strong legal prohibition against reprisal for disclosing wrongdoing is one of the persuasive arguments for enacting disclosure of wrongdoing legislation as opposed to leaving it as a mere policy instrument.

That is so in the first place because a mere policy-based prohibition is limited in the sanctions it can attach to the prohibition, and therefore to the likelihood of deterring such conduct. A law, on the other hand, will normally attach to it severe enough prohibitions and sanctions to deter those who may otherwise be inclined to take unjustified action against those who bring forward good faith allegations of wrongdoing.

Secondly, and as a result, whereas a mere policy based prohibition of reprisal cannot normally elicit the confidence of potential disclosers that they can safely come forward, a law establishing a legal prohibition of reprisal and appropriately severe sanctions is far more likely to do that.

Enacting legislation is the normal means our society reserves to prohibit and deter conduct considered to be the most threatening to its basic values, and in doing so it also encourages other conduct thereby protected. The basic values in this case are those of promoting an honest, transparent, ethical and accountable public service.

One way to promote those values is by ensuring the freedom to report instances of public service wrongdoing, which may not otherwise come to light and be corrected, and to be recognized rather than punished for such behaviour.

A legal prohibition of reprisal and the enactment of serious sanctions for it constitutes the strongest possible societal commitment to the values thereby protected and as a result is a necessary step towards assuring potential disclosers that they may speak freely and will be protected.

"… no public servant should ever suffer reprisal when he or she comes forward in good faith and uses official mechanisms to raise concerns over perceived wrongdoing…"

***Report of the Working Group on the Internal Disclosure of Wrongdoing*, January 29, 2004.**

4.2 Reprisal protection: the exclusive jurisdiction of the Integrity Commissioner

In the event that a public servant believes that he or she is the subject of reprisal for having made a disclosure, the Integrity Commissioner should have the exclusive jurisdiction to review and resolve the matter. The process to deal with such issues should convey to public servants that they may come forward in confidence to make a credible disclosure in good faith.

The method of handling reprisals is the key to the success of any wrongdoing disclosure legislation or regime.

The method of handling reprisals is the key to the success of any wrongdoing disclosure legislation or regime. If the process is not expedient, effective, fair and confidential, the employees will not trust it and may choose to remain silent about a wrongful act they know about for fear of personally paying the price for making a disclosure.

It has been the PSIO experience in dealing with many people considering making a disclosure that the fear of reprisal, in various forms, constitutes a major obstacle. The same phenomenon was observed in many other jurisdictions that have wrongdoing disclosure regimes.

The current *Disclosure Policy*, as a matter of significant principle, prohibits reprisal against an individual who discloses wrongdoing. Moreover, the Report of the Working Group stressed prohibition of reprisal as a fundamental principle. This provision should emphatically be maintained in the proposed legislation, as is the case in Bill C-11.

Responding to disclosures of wrongdoing and subsequent complaints of reprisal cannot be separated, the former being addressed by one avenue, the latter by another.

For these reasons, and to guarantee effective protection with minimal risks for disclosing employees, the Integrity Commissioner should make final determinations in dealing with complaints of reprisal for the disclosure of wrongdoing. The present *Disclosure Policy* clearly specifies that one of the primary responsibilities of the PSIO is "to protect from reprisal employees who disclose information concerning wrongdoing in good faith."

There should be no review of the Integrity Commissioner's findings about reprisal issues, other than the possibility of a judicial review. The process should also be uncomplicated, expeditious and predictable in order to provide the protective shield employees need when making a disclosure.

Responding to disclosures of wrongdoing and subsequent complaints of reprisal cannot be separated, the former being addressed by one avenue, the latter by another.

The PSIO experience confirms that when people who contemplate making an allegation of wrongdoing come forward and ask whether and how the Integrity Officer can protect them from reprisal, it is essential to provide reliable answers and assurances as to exactly how such complaints would be handled. If the Integrity Commissioner is not mandated to deal with the reprisal issue from start to end, he or she can give no such reliable assurances. As a result, it is predictable that this would discourage some individuals from coming forward.

An employee who courageously decides to make a disclosure should not be put in a situation where he or she is forced to enter into a long and complicated process in order to get the protection he or she deserves.

It may be thought that a reprisal complaint is merely another employment related issue and therefore the usual workplace dispute resolution processes, such as grievance hearings, should handle such complaints. However, the reality is that reprisal can be considerably more subtle and multi-dimensional than it appears at first glance or it may not be perceived as such immediately after the disclosure is made. In many instances, the retaliation may consist of potentially non grievable issues such as being isolated from the group, losing or not obtaining adequate accommodation arrangements, being moved to another location, losing career opportunities such as attending a learning event or course, obtaining acting or secondment assignments or many seemingly insignificant gestures which, when accumulated over time, may amount to retaliation.

The capacity to act in a preventive manner is an important component of the protection that would otherwise be lost if the employee was left with no choice but to file a grievance after the fact. An employee who courageously decides to make a disclosure should not be put in a situation where he or she is forced to enter into a long and complicated process in order to get the protection he or she deserves. The government should provide public servants with immediate protection. That is why the Integrity Commissioner should have the authority to order maintenance of the status quo while the investigation is ongoing. Alternately, the Integrity Commissioner could order that the employee be placed in another location and report to another supervisor, or any other creative solution. This is especially true for small organizations where the employee who makes a disclosure may be easily identified.

Effective protection against reprisal should include the authority for the Integrity Commissioner to proactively prevent situations that would adversely impact on employees during the course of an investigation. Presently, once an investigation commences, the PSIO reminds the department or the agency of the requirement to protect the employee and witnesses from reprisal and that any allegations of that nature will be investigated.

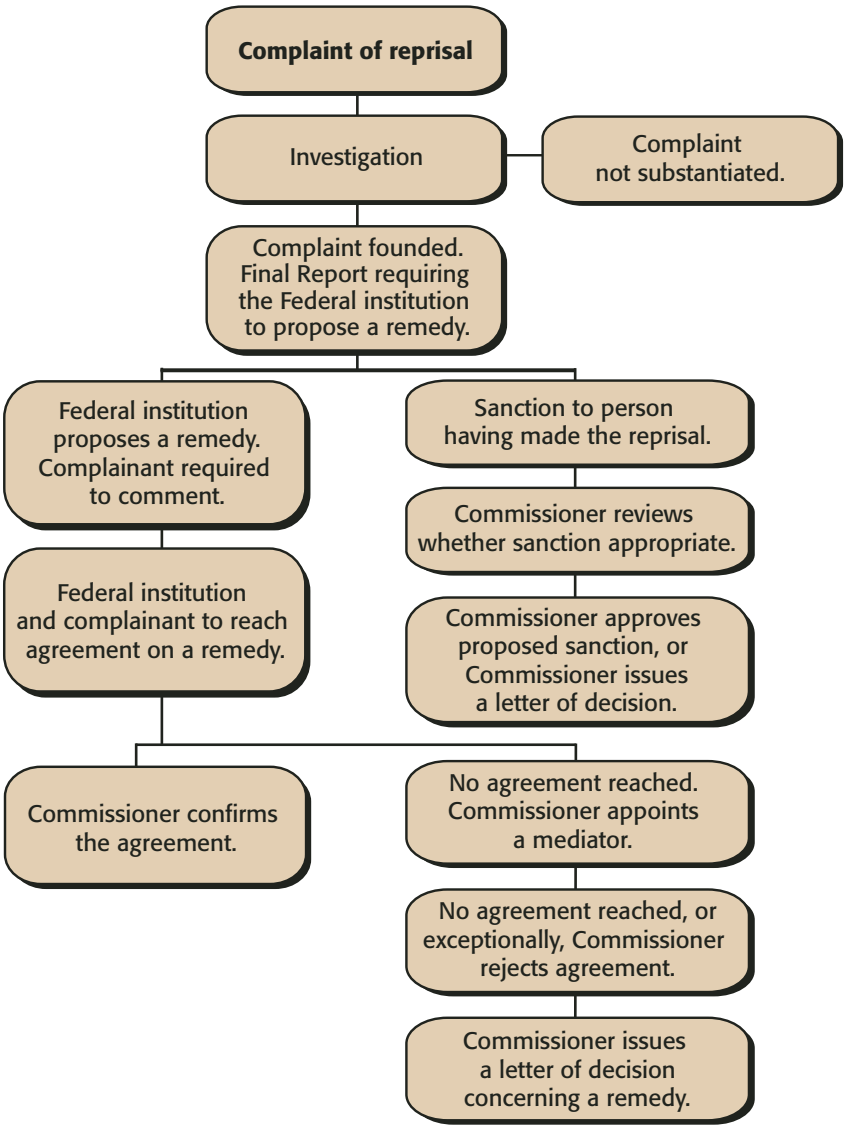
The process for dealing with matters of reprisal should address all aspects of the complaint as confidentially as possible. The scope of confidentiality should cover the identities of alleged victims of reprisal as well as other information related to them, such as personal details and history. This also applies to the employee allegedly taking the reprisal actions.

It is highly unlikely that confidentiality could be appropriately protected unless only the Integrity Commissioner deals with complaints of reprisal. If persons making reprisal complaints must participate in hearings before a grievance board, there would be no such assurance of confidentiality.

,... the Integrity Commissioner should be authorized when necessary to make final and decisive rulings regarding complaints of reprisal.

Given the paramount importance assigned to the protection from reprisal by those contemplating making an allegation of wrongdoing, and the need to allow the Integrity Commissioner to address both wrongdoing and reprisal matters, the Integrity Commissioner should be authorized when necessary to make final and decisive rulings regarding complaints of reprisal.

The attached flow chart illustrates the proposed complaint of reprisal process that would provide certainty of fair process and adequate protection for all concerned. It provides essentially that the Integrity Commissioner must make every effort to arrive at a solution acceptable to all parties involved, including the Commissioner acting impartially in the public interest. In the event that reprisal is confirmed by the investigation and that satisfactory resolution between the parties does not materialize, the Integrity Commissioner would then be authorized to resolve the matter by means of a letter of decision ordering the federal institution to adopt an appropriate remedy.



The fear of reprisal is a major factor inhibiting the disclosure of serious wrongdoing against the public interest. Given the inherent inseparability, in reality and in perception, between the initial disclosure of wrongdoing and any subsequent complaints of reprisal for that disclosure, that fear would be greater still if it required two separate processes and avenues to address each of them.

Bill C-11, as did Bill C-25, proposes a very different process, or more precisely processes. There would be one avenue and process for the initial disclosure of wrongdoing, namely taking it to the President of the Public Service Commission (PSC). If the President of the PSC decides to investigate then he or she would be required to make a finding and a report with a recommendation to the appropriate chief executive, and in specified circumstances also a report to the responsible Minister or even a special report to Parliament. That process is consistent with what I have proposed regarding the Integrity Commissioner for the initial disclosure of wrongdoing.

As for a subsequent complaint of reprisal, however, Bill C-11 proposes a choice of one of two avenues. The complainant could bring the allegation directly to the appropriate Board—Public Service Staff Relations Board or the Canada Industrial Relations Board. The Board would assist the parties to settle the complaint or if it is not settled, then the Board would hold a hearing, make a finding and if reprisal is found make an order to the chief executive requiring appropriate action be taken. Or, instead of going to the Board, the complainant could bring the allegation of reprisal to the President of the PSC. But if so, the President could only make a finding, and if reprisal is found could presumably assist the parties to settle the complaint. But if no agreement is forthcoming that would be the end of the President of the PSC's role. Only the Boards could actually make an order requiring specific remedial action be taken.

Not only is this proposed process for reprisal complaints unduly complex and cumbersome, but by providing for recourse to the President of the PSC for the initial disclosure but the option of recourse to a Board for a subsequent and related complaint of reprisal, erroneously assumes that the two issues of wrongdoing and reprisal are separable and can be handled by two distinct mechanisms and processes. Furthermore, the two processes would be substantially different—the initial disclosure of wrongdoing would be handled by means of an investigation with careful attention to the requirements of confidentiality, whereas the complaint of reprisal before the Boards would be handled in a public hearing with no guarantee of maintaining confidentiality. Finally, since the President of the PSC would only have intervener status before the Boards, he or she could not give a public servant, who is considering whether or not to make the initial disclosure of wrongdoing, any assurances as to how a subsequent and related reprisal complaint would be handled.

If Parliament should nevertheless decide to retain the involvement of the Boards in reprisal complaints, I would recommend an amendment to Bill C-11 that would revise, somewhat, the process already proposed in this Report. It would assign the primary role to the President of the PSC but also an important one to the Boards. All complaints of reprisal would be brought exclusively to the President of the PSC, who alone would make findings and recommendations, and would then make every effort to find agreement between the parties. Only if that agreement is not forthcoming would a complaint to a Board be permitted. That Board would not repeat the investigation and finding by the President of the PSC, but would make a ruling and order based upon them, similar to an appeal process. If adopted, this approach would avoid giving the President of the PSC a tribunal function, and except for "appeals" before the Boards,

would ensure that the investigation and disposition of the inherently inseparable initial disclosure and subsequent complaint of reprisal are both handled by the same independent third party, namely the President of the PSC, using similar processes.

4.3 Measures for sanctioning against reprisal

There should be a comprehensive set of legal measures to deal with sanctions related to wrongdoing.

It is doubtful that public servants and the public will believe that the government is serious about repudiating reprisal for making a disclosure unless there are clear sanctions. Furthermore, in other recent federal legislation applicable in the private sector, in one instance for privacy violations (*Personal Information Protection and Electronic Documents Act*, sections 27 and 28), in another for financial fraud such as insider trading offences (*Criminal Code*, section 425.1 recently enacted), fines up to $10,000 are specified for reprisals against whistleblowers. It is inconsistent and unfair not to provide for equally serious sanctions for largely similar offences in the federal public sector.

In response to the Auditor General's report on the Sponsorship Program, the Government has announced that it will review and strengthen the *Financial Administration Act* as part of its efforts to increase oversight and accountability, identify problems earlier and enhance its ability to take corrective or disciplinary action in cases of wrongdoing. The review is intended to clarify and strengthen administrative and criminal sanctions for wrongdoing, as well as to extend the scope of sanctions so that they apply to former public servants, employees of Crown Corporations and public office holders. At present, no action can be taken once the employment relationship has terminated, even for those in receipt of government pensions, other than penalties for criminal convictions. There should be a comprehensive set of legal measures to deal with sanctions related to wrongdoing.

In two of the countries examined (Australia and South Africa) in the PSIO study on disclosure regimes in other countries, there are provisions for severe penalties and fines for those who take reprisal action against a person making a disclosure.

4.4 Protection of identities and other information

The new disclosure legislation should provide that the information that might identify a person involved in the disclosure process, especially the name of the employee making a disclosure as well as the identity of the alleged wrongdoer, should be protected from access, notwithstanding any other act of Parliament. This would go a long way towards convincing an employee to make a disclosure of wrongdoing if it is known that names will not be revealed in the process.

However, when that information is required in fairness by the rules of natural justice, for instance to allow the alleged wrongdoer to prepare an adequate response, it should be disclosed. Employees whose conduct is under investigation have a right to be informed of the allegations and must have the opportunity to respond. The point at which this occurs will depend on the nature of the disclosure or investigation. It will normally not be appropriate to inform the alleged wrongdoer immediately upon receipt of the disclosure. For example, it may be unnecessary and unhelpful to inform a department or an alleged wrongdoer of allegations that may not be credible. Also, it is possible that an investigation may be impeded if there is a risk that material evidence might be destroyed.

If identities are not protected to the allowable extent, employees may elect to make disclosures anonymously. This is undesirable since it gives more scope for malicious disclosure and may not allow some disclosures to be adequately investigated since the person making the disclosure cannot be questioned nor the issues followed up properly, leaving the impression to those making the disclosure that nothing has been done about it.

It is also important that the identity of the alleged wrongdoer be kept confidential until the disclosure has been investigated. Any information related to the substance of the disclosure should be kept confidential. This would not only preserve the reliability of the Integrity Commissioner's investigations, but it would also help to reduce the risks for those who come forward and for alleged wrongdoers. That, in turn, would contribute to the needed confidence in the process without which people would not be inclined to come forward with such disclosures or participate frankly as witnesses in the investigation.

When it comes to reporting to Parliament, there may be particular instances when, in the public interest, the Integrity Commissioner would need to make information public. The Integrity Commission must be trusted that sensitive information normally protected under the *Access to Information Act* would not be disclosed.

The Integrity Commissioner should be allowed to have access to any information that he or she may require during the investigation, notwithstanding any other act of Parliament or any privilege under the law of evidence. No information should be withheld from the Integrity Commissioner on any grounds.

In response to those who may be inclined to object to these proposals on the grounds that not all of these measures have been extended to other agencies, it must be noted that those other agencies do not typically and exclusively rely for their information and investigations on public servants coming forward with disclosures. Those who do make credible disclosures of serious public interest wrongdoing expose themselves to considerable risk and perform a significant public service. In view of the unique

be correspondingly and uniquely serious. Without that assurance, some instances of serious wrongdoing in the public sector may go unreported.

The PSIO study of other countries' disclosure systems found that, in order to encourage disclosure of wrongdoing, the confidentiality of information obtained through the disclosure and investigative process was explicitly protected in the legislation of four of the seven countries examined.

Conclusion

Conclusion

1. Pursuant to the Disclosure Policy, the PSIO continued to discharge its mandate to receive and investigate allegations made by public servants about wrongdoing in the public service.
2. One hundred and fifty nine contacts were recorded by the PSIO during the past year. Seventy-three allegations were reviewed and investigated further. The majority dealt with employment related issues or workplace conflict. Many such cases were referred to other mechanisms best suited for addressing the matters in question. At times the PSIO maintained a monitoring or mediating role and was instrumental in bringing final resolution to these issues, many of them of a delicate, complex or long standing nature.
3. The PSIO completed eleven reports of investigation with recommendations that were sent to the respondent organization. It should be noted that a significant number of cases in which no form of wrongdoing was found nevertheless involved extensive investigations and interactions with the departments concerned. These led to PSIO recommendations for improved departmental procedures, communications and interactions with employees and the program clientele, and elicited full co-operation from the departments concerned.
4. The fact that the PSIO found few instances of wrongdoing does not constitute evidence that there is little serious wrongdoing in the public sector, nor does it cast doubt on the usefulness of a disclosure of wrongdoing mechanism and agency. Rather, the context and the circumstances described in this Annual Report together with the PSIO experience argue for a more robust and credible system with the structure and powers likely to elicit greater confidence on the part of public servants.

Recommendations

Time to Legislate

5. Last year, many reports were presented to the Government laying the foundations for legislation. It is now time to complete the task and to proceed to establish an effective legislated wrongdoing disclosure regime in the entire federal public sector. Specific recommendations in that regard were made in this Annual Report. The principal elements of such a disclosure regime are highlighted in the following paragraphs.

An Independent Integrity Commissioner Established by Legislation

6. An Integrity Commissioner should be established by legislation to replace the present Disclosure Policy and Public Service Integrity Officer. Such a legal basis would demonstrate effectively the government's commitment to encouraging disclosures of wrongdoing, having them investigated effectively and with due process and ensuring that appropriate protections and sanctions normally attached to legislation are in place.

Agent of Parliament

7. The Integrity Commissioner should be an Agent of Parliament, approved by and reporting to Parliament with complete authority to select his or her staff and control the affairs of the Office, as is the case with other agents of Parliament.

Separate Institution

8. To recognize the unique focus on public interest wrongdoing and to underscore the government's strong commitment to addressing and eradicating such wrongdoing in the public sector, it would be preferable that the Integrity Commissioner and agency be a separate and stand-alone institution.
9. If, on the other hand, a decision were made to attach or fold the Integrity Commissioner's function into another existing agency, a set of safeguards should be put in place to establish a new and largely separate disclosure of wrongdoing branch in that agency and to maintain that branch and regime at arms length from the other functions of the agency.

Jurisdiction and Access to the Integrity Commissioner

Effective Process for Wrongdoing Investigation and Reprisal Protection

10. In the interest of both fairness and effectiveness, the legislation should put in place the specific and detailed processes outlined in this Annual Report for investigating the allegations of wrongdoing, for protecting from reprisal those who make disclosures, and for reporting to the institutions concerned and Parliament.
11. As a general principle and to be effective, the Integrity Commissioner must be given broad discretionary powers to determine which allegations will or will not be reviewed by his/her Office and which cases are more appropriately referred to other bodies or dismissed. This will allow the Integrity Commissioner to deal only with those cases that are truly indicative of serious wrongdoing and to conduct complete investigations into those matters.
12. The Integrity Commissioner should control the investigative and reporting process for both initial allegations of wrongdoing and any subsequent allegations of reprisal. To assign responsibility for the former to the Commissioner and the latter to other agencies with responsibilities over grievance or redress mechanisms would severely weaken the effectiveness and credibility of the Integrity Commissioner and the disclosure regime.

Employees of the Entire Federal Public Sector Allowed to Disclose

13. The institutional coverage of the Integrity Commissioner should include the entire federal public sector. This would include all departments, agencies, commissions, Crown Corporations, separate employers and other federal bodies falling within a definition of "public sector." Members of the Royal Canadian Mounted Police (RCMP) and the Canadian Forces as well as employees of the Canadian Security Intelligence Service and the Communications Security Establishment should be allowed access to the Integrity Commissioner.

Unconditional Access to Integrity Commissioner

14. Any employee of institutions in the public sector should have direct access to the Commissioner should he or she chose that route rather than a mechanism internal to the institution. Direct access should not be complicated nor should there be pre-conditions. The law should not express a preference between disclosing internally within an organization or to the Integrity Commissioner.

Disclosure by the Public

15. The Integrity Commissioner should be entitled to receive and investigate any relevant and credible allegation about wrongdoing in the public sector, whatever the source including private citizens. In some cases someone outside the public sector who has had dealings with a department or public servant may be the only available source of information about seriously wrongful activity in the department concerned.

Serious Wrongdoing Targeted

16. The type of wrongdoing that should ideally fall within the mandate of the Integrity Commissioner is what is called "serious public interest wrongdoing," or more precisely serious wrongdoing against the public interest. In such cases the discloser of wrongdoing is in the position of a "witness" to the alleged wrong, not only or necessarily a "victim" of it. The real victim is the public interest, for instance a department so grossly mismanaged that the public is no longer being adequately served. Personal employment-related grievances should normally be referred to other avenues. Breaches of values, which typically are subjective, are better dealt with at the level of each organisation and should normally not fall within the Integrity Commissioner's purview unless they amount to instances of serious public interest wrongdoing.

Commissioner's Powers and Scope of Investigations

Investigative Powers

17. The legislation should provide the Integrity Commissioner with adequate investigative powers similar to those possessed by other Agents of Parliament. This would normally include the right to issue subpoenas and the power to summon witnesses and require them to give evidence under oath or produce requested documents. Not to have such powers, even though used sparingly and judiciously, may in some cases result in incomplete investigations and findings, which would be unfair to all parties concerned.

Investigating Beyond the Public Sector

18. The Integrity Commissioner should be entitled to investigate beyond the public sector when the evidence leads in that direction, or at least collaborate with relevant agencies or persons with mandates covering the sector in question. Not to so provide could lead to incomplete investigations that could be unfair to the alleged public servant wrongdoer who may in fact be only partially responsible or not at all.

Public Inquiry

19. In some instances the Integrity Commissioner should be entitled to initiate a public inquiry. This could be justified if for instance an important public interest issue arises as a result of one or more allegations, an issue with such a significant impact on the public trust that a public inquiry is called for.

Temporary Stop Orders

20. In exceptional circumstances of imminent and substantial risk or danger to life, health or safety, when a responsible agency does not act in a timely manner on the Commissioner's recommendation, the Commissioner should be entitled to issue a temporary stop order.

Protection of Individuals and Information

Reprisal Prohibition

21. The legislation should clearly and emphatically establish a legal prohibition for reprisal against those making good faith disclosures of wrongdoing, whether or not wrongdoing is found, and severe enough sanctions should be attached. Such a legal prohibition and appropriate sanctions can not only deter those who may otherwise be inclined to practice reprisal, but as a result also help to elicit the confidence of potential disclosers that they may safely come forward. The legal sanctions to be legislated should be in line with the sanctions provided by two other federal statutes for reprisal against whistleblowing in the private sector.

Access to All Relevant Information

22. The Integrity Commissioner should be allowed access to any type of relevant information or evidence that could reasonably shed light on an instance of alleged public service wrongdoing. The blanket exclusion in legislation of some forms of evidence in legislation is not justified. There are ways the Integrity Commissioner could protect for instance Cabinet confidences and legal opinions and control access to them rather than being denied all access.

Identity Protection

23. The legislation should ensure that all information leading to the identity of persons involved in the disclosure process, especially the name of the discloser, should be protected from access notwithstanding any other Act of Parliament, subject only to fairness as required by the rules of natural justice. That exception applies for instance if the alleged wrongdoer couldn't prepare an adequate response without that information being divulged at some point in the inquiry.

Appendices

Appendix A

RESPONSIBILITIES OF THE PUBLIC SERVICE INTEGRITY OFFICER*

The mandate of the Public Service Integrity Officer is to act as a neutral entity on matters of internal disclosure of wrongdoing. In particular, he or she assists employees who:

- believe that their issue cannot be disclosed within their own department; or
- raised their disclosure issue(s) in good faith through the departmental mechanisms but believe that the disclosure was not appropriately addressed.

Disclosure – *is defined as information raised within the organization in good faith, based on reasonable belief, by one or more employees concerning a wrongdoing that someone has committed or intends to commit.*

Wrongdoing – is defined as an act or omission concerning:

- a violation of any law or regulation; or
- a breach of the *Values and Ethics Code for the Public Service*; or
- misuse of public funds or assets; or
- gross mismanagement; or
- a substantial and specific danger to the life, health and safety of Canadians or the environment.

More specifically, the **responsibilities** of the Public Service Integrity Officer are:

1. to provide advice to employees who are considering making a disclosure;
2. to receive, record and review the disclosures of wrongdoing received from departmental employees and/or the requests for review submitted from departmental employees;
3. to establish if there are sufficient grounds for further action and review;
4. to ensure procedures are in place to manage instances of wrongdoing that require immediate or urgent action;
5. to initiate investigation when required, to review the results of investigations and to prepare reports, and to make recommendations to Deputy Heads on how to address or correct the disclosure;
6. in special cases, or in cases when the departmental responses are not adequate or timely, to make a report of findings to the Clerk of the Privy Council in his or her role as head of the Public Service;
7. to establish adequate procedures to ensure that the protection of the information and the treatment of the files are in accordance with the *Privacy Act* and the *Access to Information Act*;
8. to protect from reprisal employees who disclose information concerning wrongdoing in good faith;

*An excerpt from the Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace

9. to monitor the type and disposition of cases brought to the attention of the Public Service Integrity Officer; and
10. to prepare an Annual Report on his or her activities to the President of the Privy Council for tabling in Parliament.

As a minimum, the Annual Report should cover the number of general inquiries andadvice; the number of disclosures received directly from departmental employees and their status (e.g. rejected, accepted, completed without investigation, still under consideration); the number of disclosures investigated, completed, still under consideration. The same data would be provided in relation to requests for review. The Report could include an analysis of the categories of disclosures and recommendations to improve the processes.

Appendix B

LIST OF DEPARTMENTS AND AGENCIES SUBJECT TO THE *DISCLOSURE POLICY*

The following departments and other portions of the public service of Canada in respect of which Her Majesty as represented by the Treasury Board is the employer are subject to the Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace.

Departments named in Schedule I to the *Financial Administration Act*:

- Department of Agriculture and Agri-Food
- Department of Canadian Heritage
- Department of Citizenship and Immigration
- Department of the Environment
- Department of Finance
- Department of Fisheries and Oceans
- Department of Foreign Affairs and International Trade
- Department of Health
- Department of Human Resources Development
- Department of Indian Affairs and Northern Development
- Department of Industry
- Department of Justice
- Department of National Defence
- Department of Natural Resources
- Department of Public Works and Government Services
- Department of the Solicitor General
- Department of Transport
- Treasury Board
- Department of Veterans Affairs
- Department of Western Economic Diversification

Atlantic Canada Opportunities Agency
Canada Border Services Agency
Canada Industrial Relations Board
Canadian Artists and Producers Professional Relations Tribunal
Canadian Centre for Management Development
Canadian Dairy Commission
Canadian Environmental Assessment Agency
Canadian Firearms Centre
Canadian Forces Grievance Board
Canadian Grain Commission
Canadian Human Rights Commission
Canadian Human Rights Tribunal
Canadian Intergovernmental Conference Secretariat
Canadian International Development Agency
Canadian International Trade Tribunal
Canadian Radio-television and Telecommunications Commission
Canadian Secretariat
Canadian Space Agency
Canadian Transportation Accident Investigation and Safety Board
Canadian Transportation Agency

Communication Canada
Competition Tribunal
Copyright Board
Correctional Service of Canada
Courts Administration Service
Department of Human Resources and Skills Development
Department of International Trade
Director of Soldier Settlement
The Director, The Veterans' Land Act
Economic Development Agency of Canada for the Regions of Quebec
Emergency Measures Organization
Energy Supplies Allocation Board
Federal-Provincial Relations Office
Government Printing Bureau
Hazardous Materials Information Review Commission
Immigration and Refugee Board
Information Canada
International Joint Commission (Canadian Section)
Law Commission of Canada
Maritimes Marshland Rehabilitation Administration
Military Police Complaints Commission
NAFTA Secretariat -- Canadian Section
National Archives of Canada
National Farm Products Council
National Library
National Parole Board
Office of Indian Residential Schools Resolution of Canada
Office of Infrastructure of Canada
Office of the Chief Electoral Officer
Office of the Commissioner for Federal Judicial Affairs
Office of the Commissioner of Official Languages
Office of the Co-ordinator, Status of Women
Office of the Governor-General's Secretary
Office of the Grain Transportation Agency Administrator
Office of the Superintendent of Bankruptcy
Offices of the Information and Privacy Commissioners of Canada
Patented Medicine Prices Review Board
Prairie Farm Rehabilitation Administration
Privy Council Office
Public Service Commission
Public Service Human Resources Management Agency of Canada
Public Service Staffing Tribunal
Royal Canadian Mounted Police
Royal Canadian Mounted Police External Review Committee
Royal Canadian Mounted Police Public Complaints Commission
Staff of the Supreme Court
Statistics Canada
Transportation Appeal Tribunal of Canada
Veterans Review and Appeal Board

Appendix C

2003-2004 EXPENDITURES

Description	
Personnel	
Number of employees	8
Personnel Costs	($000)
Salaries	734
Employee benefits	147
Total	**881**
Other operating expenditures	
Travel*	58
Communications	29
Printing	41
Training	15
Computer services	123
Other professional / Specialised services	58
Materials / supplies	30
Other	25
Levy for administrative services provided by Treasury Board Secretariat	54
Total	**$ 433**
Total 2003-2004 Expenditures	**$ 1,314**

Source: TBS, Financial Reporting System

* In accordance with the policy on the mandatory publication of travel and hospitality expenses for selected government officials, the details for the PSIO are available at http://www.psio-bifp.gc.ca/trv-hsp/index.php?lang=e.

Appendix D

PSIO 2002-2003 ANNUAL REPORT – CONCLUSIONS AND RECOMMENDATIONS – SEPTEMBER 15, 2004

The Treasury Board's *Disclosure Policy*, and specifically the creation of the of the position Public Service Integrity Officer, was a worthwhile initiative. Provisions in the *Disclosure Policy* and the mandate of the PSIO have enabled this Office to take some important steps toward the eventual establishment of an effective and credible extra-departmental system for the disclosure and correction of wrongdoing in the Public Service.

My experience as Public Service Integrity Officer has provided a rare and needed opportunity to test (rather than simply speculate about) the credibility and effectiveness of a disclosure of wrongdoing system and mechanism that is policy based, within the ambit of the Treasury Board, extra-departmental but still internal within the Public Service, and armed with the ability to make essentially unenforceable recommendations. My experience has made it clear there is an urgent need for a more robust institution.

The past year and more has made it clear that in its present form and context, and with its current mandate and tools, this Office does not have sufficient support and confidence of the public sector employees for whom it was established. By and large, disclosures of wrongdoing reported to the PSIO are not about serious wrongdoing against the public interest – the kind this Office was established to address – but about human resource and employment disputes for which other recourse mechanisms are available.

- Despite considerable efforts to show that this Office is functionally independent in the investigation and disposition of cases, and despite a degree of success in the outcome of the cases it has taken on, skepticism persists. In my view, this skepticism is not unreasonable, and I would expect it to continue.
- Events during and subsequent to the year under review, as well as views expressed by influential leaders in many quarters, indicate that such skepticism is increasing, not abating. This indicates the need for significant reforms is becoming more urgent.
- Serious consideration should be given to making this Office or a successor agency legislatively-based instead of policy-based. Such legislation should not be added to existing or new statutes. Instead, it should focus exclusively on providing a legal framework to enable the disclosure of wrongdoing and to provide legal protection for disclosers.
- Such legislation should also remove this Office or a successor agency from the ambit of the Treasury Board, the employer of at least the "core" public servants. This Office or a successor agency would thereby also be removed from the human resource, employment and management context.
- Rather than simply make recommendations, this Office or a successor agency should be able to make orders or enforceable recommendations. Such recommendations would be enforced by the agency, or by another related agency, at a legally designated stage in the process.

- The head of this Office or successor agency should be appointed or approved by Parliament. The Office or agency should report to Parliament. Also, while its operations and expenditures should be overseen by a designated Parliamentary committee, the Office or successor agency should remain at arms-length regarding the investigation and disposition of cases.
- There should be a reporting channel to a Minister who would then be able to answer questions about the Office or agency in the House. However, when it comes to the investigation and disposition of cases, the Office or agency would function at arms-length from that Minister.
- The protection from reprisal umbrella should be widened by allowing this Office or successor agency to investigate allegations of reprisal even when the original disclosure of wrongdoing was made internally to a department, or when justified made externally outside the government, or made by witnesses to Parliamentary committees or other agencies.
- This Office or successor agency should be able to receive and investigate allegations of wrongdoing in the public sector regardless of the source of the allegation. It should be able to extend protection against reprisal accordingly. Such sources could include private citizens, advocacy groups or Public Service unions.
- All public sector employees who have an employment relationship with the federal government should have access to the revised office or agency. This includes Public Service employees in the strict sense, employees of crown corporations and other agencies, and people who work in government institutions classified as separate employers.
- Public servants should have direct access to this Office or successor agency without first being required to exhaust departmental mechanisms. Those who elect to make disclosures should be able to choose the mechanism they wish.
- The disclosure of wrongdoing in the public sector should be encouraged and rewarded from the highest levels. It should be publicly acknowledged to be a courageous act of service to the public sector and the public.
- Findings and directives by this Office or successor agency should be subject to all normal challenges, appeals and court reviews.

Appendix E

REPORT OF THE WORKING GROUP ON THE INTERNAL DISCLOSURE OF WRONGDOING – RECOMMENDATIONS – JANUARY 29, 2004

General Recommendations

1. A new, legislated, regime is required for the disclosure of wrongdoing.
2. The Government should consider placing a new disclosure regime within a broader legislative framework of values and ethics, rather than within an exclusive "whistleblowing" statute.

Elements of an Effective Disclosure Regime

3. A disclosure regime should cover as much of the federal public sector workforce as possible, including separate employers and Crown Corporations.
4. The regime should be based on a definition of "wrongdoing" similar to that used in the current policy, though it should be refined and expanded to include serious or flagrant breaches of the *Values and Ethics Code for the Public Service* and reprisal resulting from good faith disclosures of wrongdoing.
5. A new "Office" should be created that would incorporate the functions of the existing Public Service Integrity Office and would act as an independent investigative body for matters relating to the disclosure of wrongdoing.
6. The new "Office" should be created as an Agent of Parliament, accountable to Parliament either directly or through a Minister.
7. The appointment of the Head of the Office should receive parliamentary approval in a manner consistent with the new regime that is being developed to govern Agents of Parliament.
8. The Office should be given broad discretionary powers to determine which cases it will and will not review and which cases are more appropriately referred to other bodies or dismissed.
9. The Office should normally only entertain disclosures made by individuals, not by groups or agents working on the behalf of others (such as bargaining agents or lobby groups). The Office should, however, be authorized to investigate any allegations it deems relevant, regardless of the source of the complaint, if there is compelling evidence that wrongdoing has taken place, or will take place.
10. The Office should be authorized to undertake proactive investigations, if circumstances arise that justify, and even mandate, such proactivity.
11. While employees should be encouraged to use internal mechanisms for dealing with wrongdoing, they must be given the option of taking allegations directly to the Office.
12. The Office must be allowed to investigate allegations of wrongdoing by following evidence uncovered to its source, regardless of whether the alleged wrongdoing stemmed from a decision taken within the public service bureaucracy or from elsewhere.
13. The Office should be provided with investigative powers similar to those provided to other investigative agencies such as the Commissioner of Official Languages or the Information and Privacy Commissioners.

14. The Office should be given the power to compel public servants to provide information in support of an investigation.
15. The Office should be authorized to conduct investigations in private.
16. To effectively protect information related to investigations, the Office should be subjected to a statutory prohibition against release of such information, to the extent possible.
17. The identity of a person making allegations of wrongdoing should be protected to an extent compatible with the principles of natural justice.
18. If wrongdoing is established on completion of an investigation, the Office should make official recommendations to the Deputy Head of the relevant organization who should then take the action that he or she deems most appropriate. The Working Group recommends that ultimate responsibility for all discipline and sanctions continue to rest with the Deputy Head and not be delegated elsewhere.
19. Deputy Heads should be required to formally respond within a specified time period to any recommendations made by the Office.
20. The Office should be empowered, if it judges it is appropriate, to seek the intervention of the Clerk of the Privy Council (as is presently the case under the Internal Disclosure Policy), or the CEO, board or other appropriate authority responsible for the institution in question, in order to bring satisfactory resolution to an issue.
21. The Office should be empowered to report to Parliament at any time it deems necessary, should it feel that a Deputy Head is flagrantly ignoring its recommendations, and in doing so is placing an employee or employees in some form of harm.
22. The power of the Office should be enhanced to allow it to urgently intervene in circumstances where a Deputy Head of a department or agency refuses to follow the Office's recommendations, and, in so doing, pursues a course of action which, there is reason to believe, creates an imminent risk to the health and safety of the public or the environment, or to the public interest, or a threat of imminent or continuing reprisal to a person who made a public interest disclosure in good faith. The report identifies two ways the government might consider to enhance the powers of the Office for these purposes. One would involve providing the power to issue "stop" orders. Another would be to ensure that the Head of the Office has standing to refer matters to the Federal Court for interim interlocutory relief.
23. Flagrant and intentional misuse of disclosure mechanisms should be subject to disciplinary action, up to and including dismissal.
24. Departments and agencies should be required to continue to designate a Senior Officer and require that this function be staffed at a senior level. Similar arrangements should be required in other federal organizations.

25. Deputy Heads should be required to ensure that adequate and appropriate financial resources, support and training are provided to the Senior Officer.
26. Deputy Heads should be required to ensure that the arrangements and processes for disclosure within their organization perform at a standard that is comparable to the external mechanisms administered by the Office.
27. Parliament should consider the issue of offering reprisal protection for individuals disclosing to Parliamentary Committees.
28. The Office should report annually to Parliament on its investigations and internal operations.
29. Departments and agencies should report annually to the Office of Public Service Values and Ethics on disclosure activities. This material should then be released as a consolidated, roll-up report.

Building Supportive Working Environments

30. The Government should adopt a more comprehensive approach to the training and development of its leaders. Such an approach must provide for the progressive development of competence throughout a public service career.
31. The Government should develop a compulsory core curriculum for public servants at different levels of the organization. Such a curriculum could focus on core values and ethics for new employees to ensure that they share a common ethical orientation.
32. The Government should develop and implement more appropriate procedures and criteria for the screening, selection and orientation of senior personnel and Governor in Council appointees.
33. The Government should consider implementing a variety of modern measurement systems to ensure that managers at all levels are being held to account not only for their results, but also for the quality of their leadership, people management and organizational environment.
34. The Treasury Board Secretariat should move forward quickly with the government-wide implementation of the Management Accountability Framework (MAF).

Appendix F

REPORT 13, STUDY OF THE DISCLOSURE OF WRONGDOING (WHISTLEBLOWING) BY THE HOUSE STANDING COMMITTEE OF GOVERNMENT OPERATIONS AND ESTIMATES – CONCLUSION AND RECOMMENDATIONS – NOVEMBER 7, 2003

On the basis of the recommendations of the Public Service Integrity Officer, international experience, the conclusions of the case studies conducted at the Office of the Privacy Commissioner and Canadian public opinion, the Subcommittee makes the following recommendations:

1. **That the Government of Canada introduce legislation to facilitate the disclosure of wrongdoing and to protect whistleblowers.**

2. **That the agency responsible for applying the legislation be independent, neutral and accountable to Parliament.**

3. **That this agency be equipped with the necessary powers and mechanisms to encourage the disclosure of wrongdoing while preventing abuses.**

Appendix G

2003 REPORT TO THE HOUSE OF COMMONS BY THE AUDITOR GENERAL OF CANADA – EXTRACTS FROM CHAPTER 2 – FEBRUARY 12, 2004

Internal disclosure policy on wrongdoing

2.61 We believe that public servants must have a robust, credible mechanism for dealing with cases of wrongdoing. In 1996, public servants told the Tait study group that there was no point in asking them to uphold public service values or maintain high ethical standards if they were not given the tools to do so. The Tait Report concluded that unless recourse mechanisms were created, many public servants would consider all the talk about values and ethics as "so much hot air." Our October 2000 Report expressed similar concerns.

2.62 In response, the Treasury Board developed its Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace, which came into effect in November 2001. The policy defined wrongdoing as a violation of any law or regulation or a misuse of public funds or assets; gross mismanagement; or an act causing substantial and specific danger to the life, health, and safety of Canadians or the environment. Violations of the *Values and Ethics Code for the Public Service* have since been added to that definition.

2.63 The President of the Treasury Board indicated that the policy was instituted to help the public service carry out its "fundamental role in serving the public interest." The policy called for departments to designate senior officers who would receive and investigate disclosures of wrongdoing and ensure prompt action. It also established the Public Service Integrity Office (PSIO) to receive disclosures when public servants believe that they cannot disclose the information in their own departments or that their departments have not addressed such disclosures properly. The PSIO does not have the mandate to receive complaints from the public, officials in Crown corporations, and major federal entities such as the Canadian Food Inspection Agency and the Canada Customs and Revenue Agency.

2.64 The policy allows for the disclosure of wrongdoing; however, it fails to adequately address the fact that disclosure is seen as highly risky in a risk-averse public service.

2.65 The Public Service Employee Survey by the Treasury Board Secretariat in December 2002 shed some light on the extent to which public servants feel vulnerable to reprisal for reporting wrongdoing. While the survey did not ask public servants whether they believe they can report wrongdoing without fear of reprisal, it did ask whether they believe they can seek formal redress without fear of reprisal on such matters as a grievance, right of appeal, or a health and safety concern.

2.66 The survey found that

- 35 percent of public servants did not feel they could seek formal redress without fear of reprisal and
- 40 percent of finance officers and 38 percent of procurement officers felt they could not seek formal redress without fear of reprisal.

2.67 A July 2003 study by the Secretariat surveyed public servants' awareness of, knowledge of, use of, and willingness to use the policy on internal disclosure of information on wrongdoing.

2.68 About 13 percent of the public servants who responded to the survey said that they had been aware in 2002 of wrongdoing in the workplace; of that group, 65 percent said they had not disclosed the information. However, the survey did not report the types of wrongdoing that had occurred.

2.69 During our study we found that a small number of cases had been reported to senior internal disclosure officers in National Defence, Public Works and Government Services Canada (PWGSC), Human Resources Development Canada (HRDC), and Industry Canada. Many of them were related to personal employment concerns rather than disclosure of wrongdoing as defined by the government.

2.70 The Public Service Integrity Office released its first annual report on 15 September 2003. The report contains a thoughtful analysis of the current situation and recommendations to improve it. The report concluded that the PSIO "does not have sufficient support and confidence of public sector employees" and that serious consideration should be given to making the PSIO legislation-based instead of policy-based.

2.71 On 16 September 2003, the President of the Treasury Board told the Senate Standing Committee on National Finance that she was creating a working group "to examine disclosure of wrongdoing in the workplace and to propose concrete solutions." The President appointed a working group on 29 September 2003 and a report to the President is expected by the end of January 2004. Based on our analysis, we believe the working group should give serious consideration to the PSIO report recommendations, including that the PSIO should be based on legislation rather than policy.