Legislative Summary **LS-476E**

BILL C-25: THE PUBLIC SERVANTS DISCLOSURE PROTECTION ACT

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LEGISLATIVE HISTORY OF BILL C-25

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	22 March 2004	First Reading:	
Referred to Committee:	20 April 2004	Second Reading:	
Committee Report:		Committee Report:	
Report Stage and Second Reading:		Report Stage:	
Third Reading:		Third Reading:	

Royal Assent:

Statutes of Canada

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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BILL C-25: THE PUBLIC SERVANTS DISCLOSURE PROTECTION ACT*

BACKGROUND

On 22 March 2004, Bill C-25, the Public Servants Disclosure Protection Act, was introduced in the House of Commons by the Hon. Denis Coderre, President of the Queen's Privy Council and Minister responsible for the Public Service Human Resources Management Agency of Canada. The bill establishes a legislative mechanism for the disclosure of wrongdoing in the federal public sector, including Crown corporations and other public agencies, and protects public servants in those departments and organizations who in good faith disclose wrongdoing.

A government press release issued on the same day the bill was introduced noted that the bill is part of the federal government's broader commitment to ensure transparency, accountability, financial responsibility and ethical conduct.

The bill is the first government bill to deal with the subject of disclosures of wrongdoing (i.e., whistleblowing) by federal public servants generally, although there have been numerous private Members' bills on the subject.(1) The bill is the culmination of a number of events that have transpired over the past several years, as outlined below.

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive royal assent, and come into force.

(1) For examples of private Members' bills on the subject, see: David Johansen, *Bill S-6: Public Service Whistleblowing Act*, LS-430E, Parliamentary Research Branch, Library of Parliament, Ottawa, 8 October 2002.

A. Chronology

December 1996 – The Task Force on Public Service Values and Ethics, in its report entitled *A Strong Foundation* (commonly referred to as the Tait Report) recommended that "the Government and Parliament of Canada should adopt a statement of principles for public service, or a public service code," including a strong disclosure mechanism, to enable employees to voice concerns "about actions that are potentially illegal, unethical or inconsistent with public service values, and to have these concerns acted upon in a fair and impartial manner."

30 November 2001 – The Treasury Board adopted a *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace* (commonly referred to as the Internal Disclosure Policy),(2) which requires that deputy heads of those government departments and organizations that are listed in Part I, Schedule I, of the *Public Service Staff Relations Act* (in respect of which the Treasury Board is the employer) designate a senior officer responsible for receiving information about alleged wrongdoing in the workplace. As well, the policy created the position of a Public Service Integrity Officer, a neutral third party available to deal with disclosures that an employee believes cannot be raised internally, or that have not been adequately dealt with by the department. Reprisals for disclosures in good faith are prohibited under the policy.

1 September 2003 – The *Values and Ethics Code for the Public Service*, previously announced by the President of the Treasury Board, came into effect and became a condition of employment in the federal public service. A breach of the Code was added as one of the grounds for disclosure of wrongdoing in the Internal Disclosure Policy.

15 September 2003 – The first Annual Report (2002-2003) of the Public Service Integrity Officer recommended a legislative regime for the disclosure of wrongdoing in the entire federal public sector, including Crown corporations. This recommendation was supported by the Auditor General in her 2003 Report, based on her Office's own analysis of the current Internal Disclosure Policy.

29 September 2003 – The President of the Treasury Board announced the formation of a working group to examine the whistleblowing issue within the federal public sector, and the feasibility of enacting legislation on the subject.

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(2) For further information (including references to appropriate Web sites) concerning the Internal Disclosure Policy and subsequent developments leading up to Bill C-25, the Public Servants Disclosure Protection Act, see: David Johansen, *Protection for Federal Public Service Whistleblowers: Government Policy and Recent Developments*, PRB 01-21E, Parliamentary Research Branch, Library of Parliament, Ottawa, 11 February 2004.

7 November 2003 – The House of Commons Standing Committee on Government Operations and Estimates tabled its Thirteenth Report, entitled *Study of the Disclosure of Wrongdoing* (*Whistleblowing*). The report recommended that the federal government enact legislation to facilitate the disclosure of wrongdoing by workers in the federal public sector and to protect them from employment reprisals.

30 January 2004 – The Report of the Working Group on the Disclosure of Wrongdoing recommended a new, legislated, regime for the disclosure of wrongdoing in the federal public sector, including Crown corporations.

31 January 2004 – The Hon. Denis Coderre, President of the Queen's Privy Council and Minister responsible for the Public Service Human Resources Management Agency of Canada, welcomed the Working Group's report, saying that public sector whistleblowing legislation was a top priority and that he intended to take a proposal to Cabinet for approval.

10 February 2004 – As part of the federal government's response to the Auditor General's 2003 Report tabled in the House of Commons on the same day, Mr. Coderre announced that the government would introduce whistleblowing legislation no later than 31 March 2004.

22 March 2004 – Mr. Coderre introduced Bill C-25, the Public Servants Disclosure Protection Act, in the House of Commons.

B. Highlights

The highlights of the bill are that it:

- contains a preamble that commits the government to establishing a Charter of Values of Public Service that should guide public servants in their work and professional conduct;
- generally applies to the entire federal public sector, including Crown corporations;
- requires the Treasury Board to establish a code of conduct applicable to the federal public sector;
- defines wrongdoing as: the contravention of relevant laws; the misuse of public funds or assets; gross mismanagement in the federal public sector; an act or omission that creates a substantial and specific danger to the life, health or safety of persons or to the environment; a serious breach of the code of conduct; and the taking of a reprisal against a public servant;
- defines a reprisal as any disciplinary action taken against a public servant because he or she made a wrongdoing disclosure in good faith, including: the demotion of the person; termination of employment; the taking of any measure that adversely affects the employment or working conditions of the person; or a threat to do any of those things;

- requires each chief executive responsible for a portion of the federal public sector to establish an internal disclosure mechanism, including the appointment of a senior officer to receive and act on wrongdoing disclosures;

- ensures that there is an additional avenue for disclosures, where necessary, by committing the Governor in Council to appointing an independent Public Sector Integrity Commissioner on approval by resolution of the Senate and House of Commons;

- empowers the Commissioner to investigate alleged wrongdoings and to make recommendations to the relevant chief executive on the Commissioner's findings;

- obligates the Commissioner to report annually to Parliament through a Minister to be designated by the Governor in Council;

- requires chief executives and the Commissioner to protect the identity of public servants involved in the disclosure process and the confidentiality of information collected in relation to disclosures, in accordance with other applicable federal statutes and in a manner that ensures that the right to procedural fairness and natural justice of all persons involved in investigations is respected;

- empowers the Commissioner to investigate reprisal complaints from public servants and permits them to have their complaints dealt with by the appropriate board or tribunal that already has a mandate to address staff relations and workplace issues; and

- allows for appropriate disciplinary action, including termination of employment, for public servants who commit a wrongdoing or who make a wrongdoing disclosure in bad faith; this is in addition to, and apart from, other sanctions provided by law.

DESCRIPTION AND ANALYSIS

A. Preamble

The bill includes a preamble that recognizes that the public service of Canada is an important national institution that is part of the essential framework of Canadian parliamentary democracy. Among other things, the preamble notes that public servants owe a duty of loyalty to their employer and enjoy the right to freedom of expression as guaranteed by the *Canadian Charter of Rights and Freedoms*, and that the bill strives to achieve an appropriate balance between those two important principles. The preamble commits the government to establishing a Charter of Values of Public Service that should guide public servants in their work and professional conduct. It is likely that the values will draw upon the value statement in

chapter 1 of the existing *Values and Ethics Code for the Public Service*. However, the charter will apply more broadly in that it will cover employees not only in the federal public service but in all of the federal public sector. The charter is in addition to, and separate from, the code of conduct that the bill requires the Treasury Board to establish for the federal public sector.

B. Short Title and Interpretation

The bill is entitled the Public Servants Disclosure Protection Act (clause 1).

Clause 2 contains a number of definitions for purposes of the bill, including those for "public sector," "public servant," and "reprisal."

"Public sector" is defined to mean the departments and other portions of the public service of Canada named in Schedule I to the *Public Service Staff Relations Act*, the bodies named in Schedules I.1, II and III to the *Financial Administration Act*, and the additional Crown corporations and other public bodies set out in the schedule to the bill.

Because of security concerns, the definition of "public sector" does not include the Canadian Forces, the Canadian Security Intelligence Service, the Communications Security Establishment and the RCMP in relation to members and special constables and persons employed by the RCMP under terms and conditions substantially the same as those of a member. Accordingly, the procedures set out in the bill for the disclosure of wrongdoings do not apply to the above organizations. However, by virtue of clauses 45 and 46, these organizations are required to establish comparable procedures. The relevant clauses are discussed under heading "O. Obligation of Excluded Organizations."

In short, the definition of "public sector" for purposes of the bill means that Crown corporations and public agencies are brought within the ambit of the new disclosure regime set out in the bill. The existing Internal Disclosure Policy applies only to public servants working in departments and agencies listed in Part I of Schedule I to the *Public Service Staff Relations Act*, often referred to as the "core public service." Those individuals and their institutions come under the purview of the Treasury Board as corporate employer.

A "public servant" is defined to mean every person employed in the "public sector" as defined above.

"Reprisal" is defined to mean any of the following measures taken against a public servant, by reason that the public servant has, in good faith, disclosed a wrongdoing (as

explained in clause 8) under the bill or in the course of a parliamentary proceeding or an inquiry under Part I of the *Inquiries Act*, or has, in good faith, cooperated in an investigation carried out under the bill:

- disciplinary measure;
- demotion;
- termination of employment;
- any measure that adversely affects the employment or working conditions of the public servant; or
- a threat to take any of the above measures.

C. Amending the Schedule

A schedule is included at the end of the bill listing a number of Crown corporations and other bodies that, along with the departments, Crown corporations and public bodies that fall within other parts of the definition of "public sector" in clause 2, are also included within the definition for purposes of the bill. Clause 3 permits the Governor in Council to, by order, amend the schedule by adding or deleting the name of any Crown corporation or other public body.

D. Promoting Ethical Practices

Clause 4 requires the Minister responsible for the Public Service Human Resources Management Agency of Canada to promote ethical practices in the public sector and a positive environment for disclosing wrongdoings by disseminating information about the bill by appropriate means.

E. Code of Conduct

Clause 5 requires the Treasury Board to establish a code of conduct applicable to the public sector, and the Minister responsible for the Public Service Human Resources Management Agency of Canada must cause the code to be tabled before each House of Parliament at least 30 days before it comes into force.

However, pursuant to clause 6, chief executives (defined in clause 2 to mean the deputy head or chief executive officer of any portion of the public sector) may go further and establish their own codes of conduct for that portion of the public sector for which they are responsible. The codes must be consistent with the Treasury Board code. The provision permits chief executives to adapt the code of conduct to the needs of their particular organizations.

F. Wrongdoings

Clause 2 defines a "wrongdoing" for purposes of the bill as a wrongdoing referred to in clause 8. In line with the Working Group's suggested definition, clause 8 states that the bill applies to the following wrongdoings:

- a contravention of a federal or provincial law or regulation, if the contravention relates to the official activities of public servants or any public funds or assets;
- the misuse of public funds or assets;
- a gross mismanagement in the federal public sector;
- an act or omission that creates a substantial and specific danger to the life, health or safety of persons or to the environment;
- a serious breach of a code of conduct established under the bill; and
- the taking of a reprisal against a public servant.

G. Disciplinary Action

Clause 9 provides that, in addition to, and apart from, any other sanction provided by law, a public servant is subject to appropriate disciplinary action, including termination of employment, if he or she:

- commits a wrongdoing;
- makes a disclosure that is frivolous or vexatious or in bad faith; or
- subject to clause 13 (permitting disclosures in specified instances to outsiders), makes a disclosure other than in the course of a procedure established under the bill or another federal Act or when otherwise lawfully required to do so.

H. Disclosure of Wrongdoings

1. Disclosure to Supervisor or Senior Officer

Each chief executive must establish internal procedures to manage disclosures of wrongdoing in the portion of the public sector for which the chief executive is responsible. He or she must also designate a senior officer to receive and act on such disclosures (in accordance with the code of conduct that must be established by the Treasury Board). The senior officer may be from another portion of the public sector. There is an exception in that the above does not apply if the chief executive has, after giving notice to the Public Service Human Resources Management Agency of Canada, declared that it is not practical to designate a senior officer given the size of that portion of the public sector (clause 10).

The bill, in clause 11, authorizes a public servant who believes that he or she is being asked to commit a wrongdoing, or who believes that a wrongdoing has been committed, to disclose the matter to his or her supervisor or the senior officer designated for the purpose by the appropriate chief executive.

2. Disclosure to Commissioner

Clause 12(1) imposes conditions on when a public servant may disclose a matter to the Public Sector Integrity Commissioner appointed under the bill. According to that provision, a public servant may disclose a matter to the Commissioner only if:

- the public servant has already disclosed the matter to his or her supervisor or the appropriate senior officer and is of the opinion that the matter has not been adequately addressed;
- the public servant believes on reasonable grounds that it would not be appropriate to disclose the matter to his or her supervisor, or to the appropriate senior officer, by reason of the subject-matter of the wrongdoing or the person alleged to have committed it; or
- the portion of the public sector in which the public servant is employed is subject to a declaration made by the chief executive under clause 10.

The above provision applies notwithstanding any provision in another federal Act respecting the confidentiality of information (clause 12(3)).

Nothing in the bill authorizes a public servant to disclose to the Commissioner a Cabinet confidence or information protected by solicitor-client privilege (clause 12(2)).

3. Disclosure to Outsider

Clause 13 permits a public servant to make a disclosure other than in accordance with the bill, if he or she believes on reasonable grounds that there is not sufficient time to make the disclosure under the bill and:

- a serious offence under a federal Act is being, or is about to be, committed by another public servant in the performance of his or her duties; or
- another public servant is doing (or is about to do) something, or omitting (or is about to omit) to do something, in the performance of his or her duties that creates an imminent and serious danger to the life, health or safety of persons or to the environment.

4. Exception to Disclosure – Persons Permanently Bound to Secrecy

The above provisions regarding wrongdoing disclosures by public servants (to their supervisors or senior officers or, in specified circumstances, to the Commissioner or an outsider) do not apply to a public servant who is permanently bound to secrecy within the meaning of section 8(1) of the *Security of Information Act* if the disclosure involves special operational information within the meaning of that provision (clause 14).

I. Protection of Public Servants Making Disclosures

Clause 15 prohibits any person from taking any reprisal (as that term is defined in clause 2 and earlier referred to) against a public servant.

A public servant (or former public servant) who alleges that a person has taken a reprisal against the public servant in contravention of clause 15 may make a written complaint (either himself or herself or through a designated person) to the appropriate Board (clause 16(2)). In relation to a complainant who is (or was) employed in the federal public service, the relevant Board is the Public Service Staff Relations Board. In relation to complainants employed in other portions of the federal public sector, the relevant Board is the Canada Industrial Relations Board (clause 16(1)).

The complaint must be made within 30 days after the date on which the complainant knew, or in the Board's opinion ought to have known, that the reprisal was taken or, in the event that the complainant has made a disclosure to the Commissioner in respect of the reprisal and the Commissioner has decided to deal with the disclosure, within 30 days after the Commissioner reports his or her findings to the complainant and the appropriate chief executive (clause 16(3)).

Despite any law or agreement to the contrary, a complaint under clause 16 may not be referred by a public servant to arbitration or adjudication (clause 16(4)).

Once the relevant Board has received a complaint, it may assist the parties to the complaint to settle it. The Board must hear and determine the complaint if it decides not to so assist the parties or the complaint is not settled within a reasonable period (clause 16(5)).

If the Board determines that the complainant has been the subject of a reprisal in contravention of clause 15, the Board may, by order, require the employer or the appropriate chief executive (or a person acting on their behalf) to take all necessary measures to:

- permit the complainant to return to his or her duties;
- reinstate the complainant;
- pay compensation in an amount not exceeding the amount that, in the Board's opinion, is equivalent to the compensation that would, but for the reprisal, have been paid to the complainant;
- rescind any measure or action (including disciplinary action) taken in respect of the reprisal, and pay compensation to the complainant in an amount not exceeding the amount that, in the Board's opinion, is equivalent to any financial or other penalty imposed on the complainant; and
- reimburse the complainant for any expenses and other financial losses incurred as a direct result of the reprisal (clause 16(6)).

Clause 17 stipulates that, subject to any other federal statute and the principles of procedural fairness and natural justice, each chief executive must protect the identity of persons involved in the disclosure process, including that of persons making disclosures, witnesses and persons alleged to be responsible for wrongdoing. In addition, the chief executive must establish procedures to ensure the confidentiality of information collected in relation to wrongdoing disclosures.

J. Public Sector Integrity Commissioner

1. Appointment, Tenure, Remuneration, etc.

Clause 18 concerns the appointment, tenure, remuneration, etc., of a Public Sector Integrity Commissioner. The Governor in Council must appoint a Commissioner, whose appointment has to be approved by resolution of the Senate and House of Commons. The Commissioner holds office during good behaviour for a term of seven years (once renewable for a further term of up to seven years), but may be removed by the Governor in Council on address of the Senate and House of Commons. The Commissioner is deemed to be employed in the federal public service for purposes of the *Public Service Superannuation Act*, the *Government Employees Compensation Act*, and regulations made under section 9 of the *Aeronautics Act* (i.e., regulations establishing compensation payable for the death or injury of a public servant resulting from a flight undertaken in the course of duty).

The Commissioner's remuneration is determined by the Governor in Council. The Commissioner is entitled to be paid reasonable travel and other expenses incurred in the course of his or her duties while absent from the Commissioner's ordinary workplace.

In the event of the absence or incapacity of the Commissioner, or if the Commissioner's office is vacant, the Governor in Council may appoint a qualified person to the office for a period not exceeding six months and, during that time, that person has all the powers and duties of the Commissioner.

The Commissioner is prohibited from holding any other office or employment in the public sector or carrying on any activities that are inconsistent with his or her powers and duties.

2. Staff and Facilities

The Minister responsible for the Public Service Human Resources Management Agency of Canada may provide the Commissioner with officers and employees from within the federal public service, and with the facilities and professional advisers that are necessary for the proper conduct of the Commissioner's duties (clause 19).

3. Commissioner's Duties

As specified in clause 20 of the bill, the Commissioner is responsible for:

- providing advice to public servants who are considering disclosing a wrongdoing;
- receiving, recording and reviewing wrongdoing disclosures made by public servants in order to establish whether there are sufficient grounds for further action;
- investigating wrongdoing disclosures made to the Commissioner by public servants pursuant to clause 12, reviewing the results of the investigations, reporting findings to the persons who made the disclosures and to the appropriate chief executives and making recommendations to the latter concerning measures to be taken to correct the wrongdoings, including those involving reprisals;
- receiving reports on measures taken by chief executives in response to recommendations made by the Commissioner;
- ensuring that the right to procedural fairness and natural justice of all persons involved in investigations is respected, including public servants making disclosures, witnesses and persons alleged to be responsible for wrongdoings;
- subject to any other federal Act, and in his or her capacity as an investigative body referred to in section 16(1)(a) of the *Access to Information Act* and section 22(1)(a) of the *Privacy Act*, protecting, to the extent possible in accordance with the law, the identity of persons involved in the disclosure process, including public servants making disclosures, witnesses and persons alleged to be responsible for the wrongdoings; and
- establishing procedures to ensure the confidentiality of information collected in relation to a) disclosures or b) investigations commenced by the Commissioner on his or her own initiative.

4. Purpose of Commissioner's Investigations

The Commissioner carries out investigations in order to bring the existence of wrongdoings to the attention of chief executives and to make recommendations concerning corrective measures to be taken by them (clause 21).

5. Access to Offices, Duty to Cooperate, Self-incrimination, and Exceptions

Chief executives must provide the Commissioner with information, access to offices, etc., under their control that the Commissioner requires for the performance of his or her duties (clause 22(1)). Similarly, public servants must cooperate with the Commissioner and provide any information that the latter requires in the performance of his or her duties (clause 22(2)).

According to clause 22(3), a public servant cannot be excused from cooperating with the Commissioner on the grounds that the information given by the public servant may tend to incriminate the public servant or subject him or her to any proceeding or penalty. However, that information (or evidence derived from it) may not be used or received to incriminate a public servant in any criminal proceeding against him or her, other than a prosecution under section 132 (perjury) or 136 (witness giving evidence contrary to his or her previous evidence) of the *Criminal Code*.

Clause 22 does not apply in respect of Cabinet confidences or information protected by solicitor-client privilege (clause 23(1)). Nor does it apply to a person bound to secrecy within the meaning of section 8(1) of the *Security of Information Act* in relation to any information that is special operational information within the meaning of that provision (clause 23(2)).

6. Restriction on Commissioner's Powers

The bill prohibits the Commissioner from dealing with a wrongdoing disclosure if a person or body acting under another federal statute is dealing with the subject-matter of the disclosure other than as a law enforcement authority (clause 24).

7. Commissioner's Right to Refuse Wrongdoing Disclosure

Clause 25 provides that prior to dealing with a wrongdoing disclosure, the Commissioner must be satisfied that:

- the public servant making the disclosure has exhausted other procedures otherwise reasonably available;
- the subject-matter of the disclosure is not one that could be more appropriately dealt with, initially or completely, according to a procedure provided in another federal statute;
- the subject-matter of the disclosure "is not trivial, frivolous or vexatious" or the disclosure is not made in bad faith; or
- there is a valid reason for dealing with the disclosure.

8. Commissioner's Power to Investigate Other Wrongdoings

Clause 26 provides that if, in the course of investigating a wrongdoing disclosure under the bill, the Commissioner has reason to believe that another wrongdoing has been committed, he or she may, subject to clauses 24 and 25 (outlined above), commence an investigation into that other wrongdoing. In this case, the provisions of the bill applicable to investigations commenced as the result of a wrongdoing disclosure apply.

9. Investigations Involving the Obtaining of Information from Outside the Public Sector

If the Commissioner is of the opinion that a matter under investigation involves the obtaining of information that is outside the public sector, he or she must cease that part of the investigation and may refer the matter to any authority that he or she considers competent to deal with it (clause 27)

10. Remittal of Information to Appropriate Authorities

If the Commissioner reasonably suspects that information obtained in the course of an investigation may be used in the investigation or prosecution of an alleged contravention of a federal or provincial statute, the Commissioner may, in addition to or in lieu of continuing the investigation, remit the information, at that point in time, to a peace officer having jurisdiction to investigate the alleged contravention or to the Attorney General of Canada (clause 28(1)).

In order to maintain the separation of investigations carried out under the bill and those carried out for law enforcement purposes, once information has been remitted under clause 28(1) in relation to any matter, the Commissioner may not remit any further information in relation to that matter that the Commissioner obtains in the course of his or her investigation into it (clause 28(2)).

11. Report to Appropriate Minister or Governing Council

In circumstances where the Commissioner considers it necessary, he or she may report a matter to the Minister responsible for the portion of the public sector concerned or, if the matter relates to a Crown corporation, to its board or governing council, including, but not limited to, when the Commissioner is of the opinion that:

- action has not been taken within a reasonable amount of time in respect of one of his or her recommendations; and

- a situation that has come to the Commissioner's attention (in the course of carrying out his or her duties) exists that constitutes an imminent risk of a substantial and specific danger to the health and safety of the public, or to the environment (clause 29).

12. Special and Annual Reports to Minister

Clause 30 empowers the Commissioner, at any time, to submit to the Minister (defined in clause 2 to mean, in respect of clauses 30 to 32, the Cabinet member designated by the Governor in Council as the Minister) a special report to alert the Minister of any matter that, in the Commissioner's opinion, should not be deferred until the next annual report is submitted.

Clause 31 requires the Commissioner, within three months after the end of each financial year, to submit to the designated Minister an annual report on the Commissioner's activities during that financial year. The annual report must include the following information:

- the number of general inquiries relating to the bill;

- the total number of wrongdoing disclosures received, and of that total number, the number that were acted on and the number that were not;

- the number of investigations begun;

- the number of recommendations that the Commissioner has made and their status;

- any systemic problems that give rise to wrongdoings;

- any recommendations for improvement that the Commissioner considers appropriate; and

- any other matter that the Commissioner considers necessary.

Clause 32 requires the designated Minister to cause a copy of every annual report, and every special report made under clause 30, to be tabled in each House of Parliament on any of the first 10 days on which that House is sitting after the Minister receives the report.

K. Prohibitions

Clause 33 prohibits a public servant, in a wrongdoing disclosure or in the course of an investigation of a wrongdoing, from knowingly making a false or misleading statement,

either orally or in writing, to a supervisor, a senior officer designated under clause 10, the Commissioner, or a person acting on behalf of or under the direction of any of them.

Clause 34 prohibits a person from wilfully obstructing a senior officer designated under clause 10 or the Commissioner, or any person acting on behalf of or under the direction of either of them, in the performance of the duties of the senior officer or the Commissioner (as the case may be) under the bill.

Clause 35 prohibits a person who knows that a document or thing is likely to be relevant to an investigation under the bill, from:

- destroying, mutilating or altering the document or thing;
- falsifying the document, or making a false document;
- concealing the document or thing; or
- directing, counselling or causing, in any manner, any person to do any of the things mentioned above, or proposing to any person that they do any of those things.

L. Confidentiality

Clause 36 requires the Commissioner, and every person acting on behalf of or under the direction of the Commissioner who receives or obtains information relating to an alleged wrongdoing, to satisfy any security requirements applicable to persons who normally have access to and use of that information, and to take any oath of secrecy required to be taken by them.

Clause 37 prohibits the Commissioner, and every person acting on behalf of or under the direction of the Commissioner, from disclosing any information that comes to their knowledge in the performance of their duties under the bill, unless disclosure is required by law or permitted by the bill.

M. Legal Protection

The bill protects the Commissioner, and any person acting on behalf of or under the direction of the Commissioner, from civil or criminal proceedings in respect of anything done or omitted to be done, or reported or said, in good faith in the exercise of any power or duty of the Commissioner (clause 38).

The Commissioner or any person acting on behalf of or under the direction of the Commissioner is not a competent or compellable witness in any proceedings other than a prosecution for an offence under the bill in respect of any matter coming to the knowledge of the Commissioner or that person as a result of performing any duties under the bill (clause 39).

For the purposes of libel and slander laws:

- anything said, any information supplied or any document or thing produced in good faith in the course of an investigation by or on behalf of the Commissioner is privileged; and
- any report made in good faith by the Commissioner, and any fair and accurate account of the report made in good faith in the media, is privileged (clause 40).

N. General Provisions

The disclosure of information to the Commissioner under the bill does not, by itself, constitute a waiver of any privilege that may exist with respect to the information (clause 41).

Clause 42 prohibits the Commissioner from disclosing information of the kind referred to in sections 13 to 24 (regarding exemptions from access to information in government records) or 69 (concerning the exclusion of Cabinet confidences that have been in existence for less than 20 years from the application of the Act) of the *Access to Information Act,* when either referring a matter to another authority because the Commissioner feels that the matter under investigation would involve obtaining information that is outside the public sector (clause 27) or making a special or annual report for submission to the designated Minister (clauses 30 and 31).

Section 5 (in Part 1, entitled "Protection of Personal Information in the Private Sector") of the *Personal Information and Protection of Electronic Documents Act* (PIPEDA) obligates organizations involved in commercial activities to generally comply with the obligations set out in Schedule 1 to that Act regarding the collection, use and disclosure of personal information by those organizations. Part 1 of PIPEDA does not, however, apply in respect of personal information under the control of federal government institutions to which the *Privacy Act* applies and that are listed in the schedule to the latter. Clause 43 of the bill provides that despite section 5 of PIPEDA, to the extent that that provision relates to obligations set out in Schedule 1 to that Act relating to the disclosure of personal information, a report by a chief executive in response to recommendations made by the Commissioner to the chief executive

may include personal information within the meaning of section 2(1) of PIPEDA or section 3 of the *Privacy Act*, depending on which of those Acts applies to the portion of the public sector for which the chief executive is responsible.

Clause 16(4) of the bill provides that when a public servant complains to the appropriate Board under clause 16 alleging a person has taken a reprisal against him or her in contravention of clause 15, despite any law or agreement to the contrary, the complaint may not be referred to arbitration or adjudication. Clause 44 stipulates that, subject to clause 16(4), nothing in the bill is to be construed as prohibiting a person from presenting a grievance under section 91 of the *Public Service Staff Relations Act*, or an adjudicator from considering a complaint under section 242 of the *Canada Labour Code*.

O. Obligation of Excluded Organizations

For security reasons, the definition of "public sector" in clause 2 of the bill provides that, subject to clauses 45 and 46, the definition does not include the Canadian Forces, the Canadian Security Intelligence Service, the Communications Security Establishment and the RCMP in relation to members, special constables and persons employed by that police force under terms and conditions substantially the same as those of a member.

However, clause 45 provides that, as soon as possible after the coming into force of the clause, the person responsible for each of the above excluded organizations must establish procedures, applicable to that organization, for the disclosure of wrongdoings, including protection for persons in those organizations who disclose the wrongdoings. Those procedures must, in the opinion of the Treasury Board, be similar to those set out in the bill.

According to clause 46, the Governor in Council may, by order, direct that any provision of the bill applies, with any modifications that may be specified in the order, in respect of an organization excluded from the definition of "public sector" in clause 2.

P. Five-year Review

Clause 47 requires that five years after that clause comes into force, the Minister responsible for the Public Service Human Resources Management Agency of Canada must cause to be conducted an independent review of the Act, its administration and operation, and must

cause a report on the review to be laid before each House of Parliament on any of the first 15 days on which that House is sitting after the review is completed.

Q. Amendments

Clauses 48 to 51 set out a number of consequential amendments to other Acts and coordinating amendments to the bill.

Among the consequential amendments contained in clauses 48 and 50 of the bill are those adding the Public Sector Integrity Commissioner as a government institution listed in the appropriate schedules to both the *Access to Information Act* and the *Privacy Act*, in other words, making those Acts applicable to that office.

Clause 49 amends the schedule of the *Canada Evidence Act* to add as item 20 "The Public Sector Integrity Commissioner, for the purposes of the *Public Servants Disclosure Protection Act*."

Clause 51 contains a number of coordinating amendments to the bill that are dependent on the coming into force of certain provisions of the *Public Service Modernization Act* and the bill.

R. Coming Into Force

The provisions of the bill, other than the coordinating amendments to the bill set out in clause 51, come into force on a day or days to be fixed by order of the Governor in Council (clause 52).

COMMENTARY

On 23 March 2004, the day after Bill C-25, the Public Servants Disclosure Protection Act, was introduced in the House of Commons, the current Public Service Integrity Officer under the Internal Disclosure Policy, Mr. Edward Keyserlingk, was quoted in an *Ottawa Citizen* article(3) as saying the bill is too weak and could actually discourage bureaucrats from exposing corruption and wrongdoing in government. In his view, the bill is a "disappointment" that ignores the strongest of the recommendations urged by the Working Group on the

(3) Kathryn May, "Whistleblower bill 'deficient in so many ways': critics," *Ottawa Citizen*, 23 March 2004.

Disclosure of Wrongdoing. "It does not respond to public servants' cynicism and lack of confidence and I think it might end up feeding both and, to me, that's a tragedy," he said. "It's better than what we have now, but it is deficient in so many ways."

Mr. Keyserlingk went on to say that he thinks the bill "will surprise an awful lot of people, it certainly surprises me… There has never been a climate more receptive to whistleblowing protection and given everything that the government is saying about getting at wrongdoing and protecting whistleblowers, we all expected something far more robust."

The biggest disappointment, according to the article, is that the new Public Sector Integrity Commissioner (PSIC) created by the bill reports through a Minister, rather than directly, to Parliament. The article points out that the three major recent reports received by the government calling for stronger whistleblower protection over the past year all "called for an independent parliamentary watchdog, similar to agents of Parliament such as the auditor general, official language commissioner, information commissioner, chief electoral officer and privacy commissioner."

The article also notes that the bill does not provide for any fines or sanctions against employers who retaliate against whistleblowers.

In a subsequent article(4) that appeared in the *National Post*, Mr. Keyserlingk is quoted as saying that because the proposed PSIC office will not be reporting directly to Parliament but instead to a Minister, its independence will be compromised. "The commission is not established as an agency of Parliament but essentially as an office within the executive of government and that means it also does not have [the] investigative power that normally goes along with a legislatively established body," he said.

The earlier *Ottawa Citizen* article quoted Mr. Keyserlingk as saying that the proposed Commissioner will have no more investigative and enforcement powers than the Public Service Integrity Officer currently has under the Internal Disclosure Policy. The article notes that while the Commissioner will investigate wrongdoing and make recommendations to heads of government departments and agencies, "the commissioner has no subpoena powers, can't get access to cabinet documents, nor can [he or she] probe complaints from Canadians about wrongdoing in government or follow investigations into ministers' offices, all of which were recommended by the working group."

The *National Post* article also draws attention to Mr. Keyserlingk's concerns that, under the bill, public servants who face reprisals for speaking out must seek redress through

(4) Robert Fife, "Whistleblower legislation 'fatally flawed,' critics charge," *National Post*, 30 March 2004.

labour boards rather than the Office of the Public Sector Integrity Commissioner. "People will not be encouraged to come forward," he said. An *Ottawa Citizen* article(5) on the same date also quotes Mr. Keyserlingk: "People want the assurance if they come to the commission that we will protect them from reprisals, but if it goes off to the (labour) boards then we cannot give them that kind of assurance."

NDP MP Pat Martin, who co-chaired the House of Commons subcommittee that called for whistleblower protection legislation, is also quoted in the *National Post* article, saying that the bill is designed to "plug leaks rather [than] protect whistleblowers." He is particularly upset that public servants face disciplinary action, including termination of employment, if they go directly to the media, parliamentarians or the public with information about wrongdoing (clause 9 of the bill). "The word has already spread that this is … all fluff and has no substance. More and more, it's obvious it is more an act to protect ministers from whistleblowers than an act to protect whistleblowers," he said.

The Hon. Denis Coderre, President of the Queen's Privy Council and Minister responsible for the Public Service Human Resources Management Agency of Canada, is quoted in the earlier *Ottawa Citizen* article as saying the bill was "inspired" by the 34 recommendations of the Working Group on the Disclosure of Wrongdoing and strikes a "balance" between encouraging bureaucrats to report wrongdoing while protecting against disgruntled employees with an axe to grind. The later *National Post* article quotes Mark Dunn, a spokesperson for the Minister, as saying that the government is open to accepting a tougher bill if it is recommended by Parliament. "If there are weaknesses in the legislation, then it is up to the committee to correct them," he said.

Public service unions have also expressed concerns about the bill. For example, in a news release(6) issued by the Public Service Alliance of Canada (PSAC) on 22 March, the same day Bill C-25 was introduced in Parliament, the PSAC underlined a number of weaknesses in the bill which it described as follows:

- The proposed Public Sector Integrity Commissioner does not report directly to Parliament but through a minister's office. This, according to the PSAC, will seriously weaken the agency's independence and its credibility among public service employees.

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(5) Robert Fife, "Proposed whistleblower bill offers no protection, critics say," *Ottawa Citizen*, 30 March 2004.

(6) "Whistleblowing bill: Too little, too late," *News release*, Public Service Alliance of Canada, 22 March 2004.

- Potential whistleblowers do not have the unfettered right to go to the Public Sector Integrity Commissioner, but instead are normally obligated to go first to their supervisors. For example, before commencing an investigation, the Commissioner must be satisfied that the employee has exhausted all other avenues prior to taking the matter to the Commissioner.

- There are penalties for whistleblowers whose reports are either deemed "frivolous," in "bad faith," or did not follow established procedures. This means that any vindictive retaliation by the government can create a chilling effect on other potential whistleblowers.

"With all these weaknesses in the bill, any public service employee will be forced [to] think twice about reporting any wrongdoing," said PSAC National Executive Vice-President John Gordon. "The present situation cries out for a more immediate and effective solution to protect whistleblowers and ensure the trust of the Canadian public. The only proper course for government to take now is to include this protection in our collective agreements," he said. The news release noted that the PSAC will therefore be stepping up its call for the government to negotiate whistleblower protection in the collective agreements of some 100,000 of its members.

The Professional Institute of the Public Service of Canada (PIPSC), a national union representing some 49,000 professionals and scientists, issued a news release(7) on the same day the bill was introduced, saying that it welcomed legislation that it had been advocating for over 15 years. Its president, Steve Hindle, said that the bill deserves full consideration and that the union will, over the next few weeks, carefully review its provisions. However, "at first blush," the PIPSC described what it considers to be a number of flaws (requiring correction) in the bill as follows:

- Employees do not have direct access to an independent third party. Internal processes now in place are not credible with employees and to force disclosures through the employer will be considered by many as a continuing attempt to discourage whistleblowers.

- The Public Sector Integrity Commissioner does not have adequate authority to protect from reprisal an employee who discloses wrongdoing. The employee should not have to make reference to another administrative tribunal to seek remedy from the effects of reprisal.

- There are too many persons excluded from the proposed legislation. The benefit of legislation to encourage, protect and regulate disclosure of wrongdoing in good faith is

(7) "Whistleblower Protection Bill Greeted with Caution," *News release*, Professional Institute of the Public Service of Canada, 22 March 2004.

undermined when there are excessive categories of persons excluded from the application of the legislation.

- The legislation does not have a satisfactory definition of what constitutes "reprisal." The definition must ensure that a broad range of insidious actions over time are prohibited.

- The legislation does not provide for the Public Sector Integrity Commissioner to report directly to Parliament. In order to reinforce the independence and objectivity of the PSIC, direct access to Parliament is required.

Mr. Hindle noted that the bill was being referred to a House of Commons committee after first reading, and that the PIPSC would be prepared to provide members of the committee with its complete analysis of the bill when invited to testify.

Although critics have welcomed the move for legislative protection for federal public sector whistleblowers, they continue to express scepticism about how far the bill goes. There are also concerns that the bill may not be enacted before Parliament is dissolved for a federal election.