



**PROTECTION FOR FEDERAL PUBLIC SERVICE WHISTLEBLOWERS:  
GOVERNMENT POLICY AND RECENT DEVELOPMENTS**

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## **PROTECTION FOR FEDERAL PUBLIC SERVICE WHISTLEBLOWERS: GOVERNMENT POLICY AND RECENT DEVELOPMENTS**

Recent allegations of contracting irregularities and abuse of authority in the federal government have given increased urgency to calls for legislative protection for whistleblowers in the federal public sector (including Crown corporations). The adequacy of the current federal government policy regarding this matter has been seriously questioned. This paper outlines the policy and traces more recent developments in this area.

### **POLICY BACKGROUND**

On 28 June 2001, the Hon. Lucienne Robillard, the then President of the Treasury Board of Canada, announced the federal government's *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace* (commonly referred to as the Internal Disclosure Policy).<sup>(1)</sup> This policy is the first of its kind at the federal level, and its effective date was 30 November 2001 in order to: allow sufficient time for all affected federal government departments and agencies to ensure that their own processes dealing with internal disclosures met the policy's requirements; and establish the Office of the Public Service Integrity Officer provided for in the policy. The departmental press release<sup>(2)</sup> announcing the policy noted that it effectively responded to recommendations of the Task Force on Public Service Values and Ethics in its December 1996 report entitled *A Strong Foundation*,<sup>(3)</sup> as well as to those of the Auditor General in two reports (1995 and October 2000) dealing with values and ethics in the federal Public Service.

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- (1) The Internal Disclosure Policy can be viewed at: [http://www.tbs-sct.gc.ca/pubs\\_pol/hrpubs/tb\\_851/idicww-diicaft\\_e.html](http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/tb_851/idicww-diicaft_e.html).
  - (2) The departmental press release and accompanying backgrounder concerning the Internal Disclosure Policy can be viewed at: [http://www.tbs-sct.gc.ca/media/nr-cp/2001/0628\\_e.html](http://www.tbs-sct.gc.ca/media/nr-cp/2001/0628_e.html).
  - (3) The report is commonly referred to as the "Tait Report" in honour of the Task Force Chair, the late John Tait, former Deputy Minister of Justice.

In announcing the policy, the Minister stated that the government believed it was the “best approach” to address the issue of wrongdoing in the workplace. The Minister noted that the policy was not intended to encourage accusations but rather “to ensure any serious and well-founded disclosure can be dealt with in an equitable, timely and confidential manner.”

The policy’s objective is “to allow employees to bring forward information concerning wrongdoing, and to ensure that they are treated fairly and are protected from reprisal when they do so in a manner consistent with [the] policy.”

The Internal Disclosure Policy was revised as of 1 September 2003 to expand the definition of wrongdoing to incorporate a breach of the *Values and Ethics Code for the Public Service*<sup>(4)</sup> which became effective on that date.

## **POLICY DESCRIPTION**

The policy applies to all government departments and organizations of the federal public service that are listed in Part I, Schedule I, of the *Public Service Staff Relations Act*. The Treasury Board is the employer of those departments and organizations. Separate employers of the federal government are also encouraged to implement similar internal disclosure measures in their organizations.

For purposes of the policy, a “wrongdoing” is defined as an act or omission concerning:

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

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(4) The *Values and Ethics Code for the Public Service* can be viewed at:  
[http://www.tbs-sct.gc.ca/pubs\\_pol/hrpubs/TB\\_851/vec-cve-PR\\_e.asp?printable=True](http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/TB_851/vec-cve-PR_e.asp?printable=True).

A “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.”

The primary responsibility and authority for applying the policy rests with the Deputy Heads of government departments and organizations. The policy states that Deputy Heads must:

- ensure that employees understand the requirement to use government information responsibly;
- promote a culture of open communication within their organizations;
- establish internal mechanisms to manage the disclosure of wrongdoing, including, as a minimum, a designated Senior Officer who is responsible for receiving and acting on such disclosures;<sup>(5)</sup>
- inform all employees of the policy, including the name, location and phone number of the Senior Officer who is responsible for receiving and acting on disclosures;
- ensure that disclosures are reviewed in a timely fashion and investigated when required, and (where necessary) that prompt appropriate action is taken to correct the situation; and
- protect, from employment reprisals, employees who disclose wrongdoing in good faith.

Under the policy, the designated Senior Officer of each affected federal government department and organization is responsible for:

- disseminating information on the policy and providing interpretation and related advice;
- receiving and reviewing disclosures of information concerning wrongdoing, establishing if there are sufficient grounds for further action;
- ensuring that prompt action is taken in all cases;
- ensuring that procedures are in place to manage disclosures requiring immediate or urgent action;

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(5) The policy notes that government departments which, prior to the effective date of the policy, already had in place internal mechanisms to administer the disclosure of wrongdoing should ensure that these mechanisms meet the policy’s requirements, while others may wish to take additional measures to respond to their specific mandate or organizational requirements.

- initiating investigations when required, reviewing and reporting the results, and making recommendations to the Deputy Head;
- ensuring that the privacy rights of both the employee making the disclosure and the employee(s) implicated or alleged to be responsible for the wrongdoing are respected;
- establishing adequate procedures to ensure that the protection of the information and treatment of the files are in accordance with the *Privacy Act* and the *Access to Information Act*;
- maintaining relevant statistical information; and
- preparing an annual report to the Deputy Head.<sup>(6)</sup>

Details concerning the process that will be followed when an employee makes a disclosure of wrongdoing to the Senior Officer are provided in Appendix A<sup>(7)</sup> to the policy.

The policy also places certain obligations on employees. The preamble to the policy notes that public service workers owe a duty of loyalty to their employer and that, in serving the public interest, they are entrusted – as a fundamental part of their duties – with a wide range of government information and must treat this information responsibly and with discretion and integrity. According to the requirements spelled out in the policy, they must use government information responsibly and in good faith in accordance with their duty of loyalty and must follow internal processes established for dealing with instances of wrongdoing in the workplace. As well, they must not make trivial or vexatious disclosures of wrongdoing or make disclosures in bad faith. The policy also reminds employees that they should be aware of their responsibilities under the various relevant laws and policies, for example, the *Criminal Code*, the *Government Security Policy*, the *Values and Ethics Code for the Public Service*, the *Conflict of Interest and Post-Employment Code for the Public Service*, and the *Policy on Losses of Money and Offences and other Illegal Acts Against the Crown*.

The policy further provides for the creation of the Office of the Public Service Integrity Officer (PSIO). That officer is responsible for acting as a neutral entity on matters of

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(6) According to the policy, the annual report as a minimum should cover the number of: general inquiries and advice; disclosures received from employees and their status; and disclosures investigated, completed, or still under consideration.

(7) Appendix A is entitled *Departmental/organizational internal disclosure and resolution process*.

internal disclosure of wrongdoing. He or she must assist employees who: believe that their issue cannot be disclosed within their own department or organization; or have raised the issue through internal disclosure mechanisms but believe that the disclosure was not appropriately addressed. As such, the PSIO is responsible for:

- providing advice to employees who are considering making a disclosure;
- receiving and reviewing disclosures of wrongdoing received from departmental employees and/or requests for review submitted by departmental employees;
- determining whether there are sufficient grounds for further action and review;
- ensuring that appropriate procedures are in place to deal with instances of wrongdoing that require immediate or urgent action;
- initiating investigations when required, reviewing the results of investigations and preparing reports, and making recommendations to Deputy Heads on how to address or correct the disclosure;
- in special cases or in cases where departmental responses are not adequate or timely, making a report of findings to the Clerk of the Privy Council in his or her role as head of the Public Service;
- establishing adequate procedures to ensure that the protection of the information and the treatment of files are in accordance with the *Privacy Act* and the *Access to Information Act*;
- protecting from reprisal employees who, in good faith, disclose information concerning wrongdoing;
- monitoring the type and disposition of cases brought to the attention of the PSIO; and
- preparing an annual report to the President of the Privy Council on the PSIO's activities for tabling in Parliament.<sup>(8)</sup>

Details concerning the procedure to be followed when an employee believes that an issue cannot be raised in confidence within his or her department or organization, and the

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(8) The policy states that, as a minimum, the annual report should cover the number of: general inquiries and advice; disclosures received directly from departmental employees and their status; and disclosures investigated, completed, or still under investigation. The same data would be provided in relation to requests for review. The report could also include an analysis of the categories of disclosures and recommendations to improve the processes.



employee instead makes the disclosure of wrongdoing directly to the PSIO, are set out in heading A<sup>(9)</sup> under Appendix B<sup>(10)</sup> to the policy. A separate heading B<sup>(11)</sup> under Appendix B sets out the procedure to be followed where an employee has disclosed wrongdoing by means of internal disclosure mechanisms within his or her department or organization and the employee believes that the disclosure was not adequately reviewed and/or investigated, and has therefore made a request to the PSIO for a review of the departmental decision.

Under the Internal Disclosure Policy, employees and managers may be subject to administrative and disciplinary measures, up to and including termination of employment, when they retaliate against another employee who has made a disclosure in accordance with the policy or who was called as a witness. The same applies to employees who choose to disclose wrongdoing in a manner that does not conform to the policy and its procedural requirements. The policy points out that any administrative or disciplinary procedures are to be taken in consultation with departmental Human Resources Services and Legal Services.

Also, the policy states that, except in the circumstances outlined above, no employee shall be subject to any reprisal, including any administrative and disciplinary measures, for having made a disclosure in accordance with the policy. This includes employees who may have been called as witnesses.

Under the policy, employees who believe they are subject to reprisal as a direct consequence of having made a disclosure in accordance with the policy may complain to the Senior Officer or, in a case where the original disclosure was made directly to the PSIO, to that Officer. The Senior Officer or the PSIO will review the matter following basically the same process as a disclosure. As well, according to the policy, employees may resort to other existing redress procedures, for example, those under the *Public Service Staff Relations Act* and the *Treasury Board Policy on the Prevention and Resolution of Harassment in the Workplace*.

The Office of Values and Ethics of the Treasury Board Secretariat is responsible for:

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- (9) Heading A under Appendix B is entitled *Disclosure of wrongdoing could not be raised within the department*.
- (10) Appendix B is entitled *Public service integrity officer disclosure and review process*.
- (11) Heading B under Appendix B is entitled *Request for review after employees have raised their issues within their department*.

- verifying that all affected departments and organizations have internal disclosure mechanisms in place on the effective date of the policy;
- providing policy support and interpretation to Deputy Heads and departmental Senior Officers;
- providing advice and assistance to departmental Senior Officers on the handling of disclosures of information concerning wrongdoing, as required; and
- reviewing the efficiency of mechanisms established in departments for the internal disclosure of information concerning wrongdoing.

The policy states that it will be evaluated no later than three years after implementation.

## SUBSEQUENT DEVELOPMENTS

### A. Initial Comments in the Press

According to an article that appeared in the press<sup>(12)</sup> the day after the policy was announced, Opposition politicians welcomed the move and praised the government. However, a spokesperson for one of the leading labour unions, the Canadian Union of Public Employees (CUPE), criticized the policy and suggested it would fail. The CUPE spokesperson was quoted as saying, “This looks like a confessional system for people in the public service confessing to others in the public service. It’s long on creating another bureaucracy to contain any questions in-house and short on any protections for whistle-blowing workers.”

The article noted that the Liberal government had moved to introduce the policy in the spring of 2001, following the earlier tabling of Bill S-6, the Public Service Whistleblowing Act,<sup>(13)</sup> in the Senate by the Hon. Noel Kinsella. Senator Kinsella was quoted as saying he was

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(12) “Ottawa to let civil servants blow whistle: Federal Ombudsman: Public Service Integrity Office draws opposition praise, labour doubts,” *National Post*, 29 June 2001.

(13) The bill was introduced in the Senate on 31 January 2001 (1<sup>st</sup> session, 37<sup>th</sup> Parliament), and was virtually identical to the Senator’s earlier bill, S-13, which had been introduced in the Senate in the 2<sup>nd</sup> session of the 36<sup>th</sup> Parliament but which died on the *Order Paper* with the dissolution of Parliament. The bill was subsequently reintroduced as Bill S-6 in the Senate on 8 October 2002 (2<sup>nd</sup> session, 37<sup>th</sup> Parliament). For a description and analysis of the bill, see Legislative Summary LS-430E, Parliamentary Research Branch, Library of Parliament, Ottawa.

pleased that the government had taken a “step in the right direction” and that the new policy closely resembled his own bill. “I’m pleased that we obviously got their ear, but there is still no proper legal protection for whistleblowers and not much to prohibit bureaucrats from launching reprisals against workers who reveal wrongdoing.... They’ve accepted the principle that they need whistleblowing machinery. Why not do it right and draft legislation?” he said.

### **B. Report of the Public Service Integrity Officer**

After a couple of years’ experience with the Internal Disclosure Policy, its efficacy has been seriously questioned by the Public Service Integrity Officer and others. In his first Annual Report (2002-2003)<sup>(14)</sup> tabled in Parliament on 15 September 2003, the PSIO, Dr. Edward Keyserlingk, called for legislation for a revised agency to better enable the disclosure and correction of wrongdoing in the federal public service and protection of whistleblowers from reprisal. “Despite considerable effort to demonstrate that my Office is functionally independent from government in the investigation and disposition of cases, scepticism persists, and is in fact, increasing,” said Dr. Keyserlingk. “Until the Office is based on legislation that ensures functional independence from government, it will not attract the credibility it needs to encourage public interest disclosures of wrongdoing.”

Dr. Keyserlingk’s report provided an overview of the operations of the Public Service Integrity Office from when the Internal Disclosure Policy was instituted on 30 November 2001 through to 31 March 2003, an evaluation of the Office’s mandate, and a number of recommendations to improve the way the Office functions. The report recommended, among other things, that the Office or its successor agency:

- be legislative-based rather than policy-based, focusing exclusively on providing a legal framework to enable the disclosure and investigation of wrongdoing and to provide legal protection for disclosers;
- be removed from the ambit of the government and from the human resource, employment, and management context to encourage disclosures or wrongdoing with a more serious public interest dimension;

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(14) The 2002-2003 *Annual Report* of the Public Service Integrity Officer can be viewed at: [http://www.pso-bifp.gc.ca/publications/ann-rpt-2002-2003/cover\\_e.html](http://www.pso-bifp.gc.ca/publications/ann-rpt-2002-2003/cover_e.html).

- be able to make enforceable orders, rather than simply making recommendations;
- be able to receive and investigate any allegations of wrongdoing in the public sector, regardless of the allegation source, including private citizens, advocacy groups, or public service unions; and
- cover all federal public sector institutions, including separate employers and Crown corporations.

The report also recommended that the head of the Public Service Integrity Office, or its successor agency, be appointed or approved by Parliament.

While recommending stronger measures, Dr. Keyserlingk nevertheless maintained that the current Internal Disclosure Policy and the Public Service Integrity Office have been a worthwhile initiative and a first step in establishing an agency that is “external” from government. “The experience provided a rare and needed opportunity to test the credibility and effectiveness of a system that is based on policy,” he stated. He noted that “[i]t also made it clear that there is an urgent need for a more robust institution.”

The PSIO’s recommendations in this regard were supported by the Auditor General in her *2003 Report*.<sup>(15)</sup> The Auditor General’s comments were based on her Office’s own analysis of the Internal Disclosure Policy.

### **C. House Committee Report**

On 7 November 2003, two months after the release of the first annual report of the Public Service Integrity Officer, the House of Commons Standing Committee on Government Operations and Estimates tabled its Thirteenth Report (2<sup>nd</sup> session, 37<sup>th</sup> Parliament), entitled *Study of the Disclosure of Wrongdoing (Whistleblowing)*.<sup>(16)</sup> Earlier, in September 2003, the Standing Committee had created two subcommittees: the Subcommittee on Matters Related to the Review of the Office of the Privacy Commissioner, and the Subcommittee on

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(15) The Auditor General’s comments appear under the heading “Internal disclosure policy on wrongdoing” in Chapter 2, “Accountability and Ethics in Government,” of the *2003 Report of the Auditor General of Canada*. Chapter 2 can be viewed at:  
<http://www.oag-bvg.gc.ca/domino/reports.nsf/html/20031102ce.html>.

(16) The Committee’s report can be viewed at:  
<http://www.parl.gc.ca/InfoCom/PubDocument.asp?FileID=66465&Language=E>.

Whistleblowing. Based on the Committee's previous (June 2003) hearings on serious irregularities committed in the Office of the Privacy Commissioner, as well as ensuing subcommittee deliberations, members of the Subcommittee on Whistleblowing concluded that controls such as those established by the Treasury Board's Internal Disclosure Policy do not suffice. In their view, "Only a legislative framework would provide the necessary protections and mechanisms to enable the disclosure of wrongdoing, while preventing abuses." On the basis of the PSIO's recommendations, international experience, the conclusions of the case studies conducted at the Office of the Privacy Commissioner and Canadian public opinion, the Subcommittee made the following three recommendations:

- that the federal government introduce legislation to facilitate the disclosure of wrongdoing and to protect whistleblowers;
- that the agency responsible for applying the legislation be independent, neutral and accountable to Parliament; and
- that this agency be equipped with the necessary powers and mechanisms to encourage the disclosure of wrongdoing while preventing abuses.

#### **D. Working Group Report**

Shortly after the report of the Public Service Integrity Officer was released, and based on concerns that had been raised by Dr. Keyserlingk and others, the then President of the Treasury Board, the Hon. Lucienne Robillard, announced on 29 September 2003 the formation of a Working Group on the Disclosure of Wrongdoing to examine the whistleblowing issue within the federal public sector. The Terms of Reference were very broad, and the Working Group was asked to report by the end of January 2004.

In its report<sup>(17)</sup> released on 30 January 2004, the Working Group stated its belief that the basic operational approach to the disclosure of wrongdoing established in the existing Internal Disclosure Policy and *Value and Ethics Code for the Public Service* is fundamentally sound. In general, it found that the existing model addresses the needs of the public service and conforms to the Canadian and political reality. Nevertheless, it felt that there is a "compelling

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(17) The *Report of the Working Group on the Disclosure of Wrongdoing* can be viewed at:  
[http://www.tbs-sct.gc.ca/pshrmac-agrhfpc/rep-rap/wgdw-gtdaf-PR\\_e.asp?printable=True](http://www.tbs-sct.gc.ca/pshrmac-agrhfpc/rep-rap/wgdw-gtdaf-PR_e.asp?printable=True).

need for major improvements or refinements in a variety of key areas, including such matters as the definition of wrongdoing, organizations covered by the regime, protection from reprisal, enforcements, investigations as well as the roles and powers of Senior Officers and of the Public Service Integrity Officer.” It was of the view that, to achieve the essential changes outlined in its report, provisions for the disclosure of wrongdoing must be enshrined in legislation.

The Working Group also recommended that the government consider incorporating the disclosure provisions outlined in the report into a broader framework of values and ethics. In its view, disclosure of wrongdoing provisions must be complemented by broader reform activities “if the Government is going to truly create supportive, values-based working environments where wrongdoing is discouraged and ‘rightdoing’ is actively promoted.” It suggested that “[t]he Government must focus more attention on areas such as leadership development, screening and selection of senior appointments and performance management if it wishes to promote a values-based foundation for ethical government across the full spectrum of entities that make up the Canadian federal government.”

A summary of the working group’s 34 recommendations appears at the end of its report.

### **E. Government Comments**

In an article<sup>(18)</sup> that appeared in the *Ottawa Citizen* on 31 January 2004, the day after the Working Group’s report was released, the Hon. Denis Coderre, President of the Privy Council and Minister responsible for the Public Service Human Resources Management Agency of Canada, welcomed the report, saying that whistleblowing legislation is a top priority and he intended to take a proposal to Cabinet for approval. “I think we need legislation,” said Mr. Coderre. “I have to go to cabinet, but my mindset is made. The content of the legislation is another issue but the main part is to protect people, their privacy and have a more transparent, accountable public service.”

Subsequently, on 10 February 2004, as part of the government’s response to the Auditor General’s 2003 report tabled in the House of Commons on that same day, Mr. Coderre

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(18) “Disclosure legislation a priority: Coderre,” *Ottawa Citizen*, 31 January 2004.

announced that the government will introduce legislation on the subject no later than 31 March 2004.<sup>(19)</sup>

#### **F. Public Service Unions' Views**

The *Ottawa Citizen* article dated 31 January 2004 also quoted Steve Hindle, President of the Professional Institute of the Public Service of Canada, as saying that his union “will hound the Martin government until legislation is passed.”

Several months earlier, Nicole Turmel, National President of the Public Service Alliance of Canada, had commented on the Auditor General's Report on the Office of the Privacy Commissioner (OPC) and the first Annual Report of the Public Service Integrity Officer, and had also called on the government to enact legislation. “Don't wait until another OPC situation occurs,” warned Turmel. “It's obvious from these recent reports that federal public sector workers are not encouraged to report wrongdoing because they are not sufficiently protected. Re-packaging the current policy is not the answer. The government must introduce strong legislation to reassure Canadians that the excesses of the OPC won't happen elsewhere.”<sup>(20)</sup>

#### **CONCLUSION**

Following calls from the Public Service Integrity Officer, the Auditor General, the Working Group on the Disclosure of Wrongdoing, a parliamentary committee, the President of the Privy Council, public service unions and others for detailed legislation to replace the current federal Internal Disclosure Policy, the government has made a commitment to introduce such legislation by 31 March 2004. The precise elements of the legislation remain to be seen.

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(19) Government of Canada, News Release, “Government of Canada to Introduce Legislation to Protect Whistleblowers,” 10 February 2004. The release can be viewed at:  
[http://www.tbs-sct.gc.ca/pshrmac-agrhfpc/announce/wpl-lpd\\_e.asp](http://www.tbs-sct.gc.ca/pshrmac-agrhfpc/announce/wpl-lpd_e.asp).

(20) Public Service Alliance of Canada, News Release, “Whistleblowing legislation needed to prevent another Privacy Commissioner situation,” 30 September 2003.