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THE *PUBLIC SERVANTS DISCLOSURE PROTECTION ACT* AND PROPOSED AMENDMENTS

Tara Gray
Economics Division

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THE *PUBLIC SERVANTS DISCLOSURE PROTECTION ACT* AND PROPOSED AMENDMENTS

The *Public Servants Disclosure Protection Act* is the federal government's recently adopted legislation facilitating the disclosure of wrongdoing and the protection of whistleblowers within the broader public service. The legislation integrates a number of improvements from a review of previous legislation and was well received by most stakeholders. However, some have been critical of the legislation and have encouraged the government to introduce further amendments to strengthen it and the protection afforded to public servants under it. This discussion focuses on the proposals contained in the prospective Federal Accountability Act as outlined in the Conservative Party of Canada's 2006 election platform, and the related recommendations included in the Gomery Commission report, Phase 2, *Restoring Accountability: Recommendations*. In order to facilitate the analysis of the proposals, the substantial amendments proposed at committee stage hearings and, in some cases, later adopted are provided.

OVERVIEW OF THE ACT

The *Public Servants Disclosure Protection Act* (the Act) was introduced in the House of Commons as Bill C-11 on 8 October 2004 and received Royal Assent on 25 November 2005. It comes into force at a date yet to be set by Governor in Council. The Act establishes a legislative mechanism for the disclosure of wrongdoing in the public sector, including Crown corporations and other public agencies, and protects public servants in those departments and organizations who in good faith disclose wrongdoing.

HISTORY OF THE BILL AND COMMITTEE STAGE AMENDMENTS

Bill C-11 was the successor to Bill C-25, which was intended to replace the Treasury Board's policy on whistleblowing, the *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace*. At that time, the majority of witnesses heard by the

House committee considering the bill expressed significant reservations over many of its provisions. Introduced in May 2004, it died on *Order Paper* upon the dissolution of Parliament later that year.

While a number of basic features remained from the previous bill, Bill C-11 included significant revisions intended to respond to those initial concerns. For example, Bill C-11 strengthened the confidentiality provisions for those who make disclosures and provided greater protection from reprisal for authorized public disclosures. As adopted, the Act also contains further important amendments proposed at committee stage. In all, 52 amendments were adopted at committee stage, including amendments proposed by members of the opposition.(1)

Perhaps the most fundamental amendment proposed at committee stage and later adopted was the creation of a new agency reporting directly to Parliament, the Public Sector Integrity Commissioner (PSIC), to receive and investigate disclosures of wrongdoing. During committee hearings on the bill, witnesses had expressed concerns with the original choice of the Public Service Commission (PSC) as the investigative body, feeling that it was not sufficiently independent and that public servants would be extremely reluctant to disclose any wrongdoing to the PSC. The government responded by introducing amendments to the bill in order to create the independent, stand-alone PSIC. The Commissioner of the agency is an officer of Parliament.

Other amendments were introduced to provide greater balance between openness and transparency, and the protection of persons who make disclosures. These amendments were made in response to the concerns of the Information Commissioner, who testified that the initial provisions relating to access to information were too restrictive. Amendments were introduced to narrow the timeframe and scope of senior managers' discretionary authority to refuse to disclose records following a request under the *Access to Information Act*, the *Privacy Act*, or the *Personal Information Protection and Electronic Documents Act*. For example, under the original version of Bill C-11, records might be withheld if they came into existence less than 20 years before a request for disclosure. That period was subsequently reduced to 5 years.

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(1) For a more detailed discussion of Bill C-11, see: David Johansen and Sebastian Spano, *Bill C-11: The Public Servants Disclosure Protection Act*, LS-482E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 18 October 2004, revised 2 November 2005.

Other significant amendments made at committee stage and later adopted by the House include:

- inclusion of the RCMP under the Act;
- an expanded definition of wrongdoing that includes any activity in *or relating to* the public sector;
- the introduction of provisions for the temporary reassignment of public servants involved in a disclosure investigation whose identity has become known and who fear reprisal;
- a broader investigative mandate for the PSIC that gives the Commissioner the discretion to investigate disclosure on the basis of information received from persons outside the public service;
- greater encouragement for disclosure by allowing public servants to disclose information about possible wrongdoings;
- the requirement that all organizations covered by the legislation establish their own codes of conduct; and
- an extension of the time limit for public servants to make reprisal complaints to the labour boards.

PROPOSED AMENDMENTS

On the whole, the passage of the legislation was viewed positively by unions and other stakeholders. Some, however, have been critical of the legislation, notwithstanding the recent substantial amendments. Among other criticisms, it is argued that the legislation lacks a mechanism to authorize corrective actions and includes no provision to punish wrongdoers. Others have found that, rather than promoting disclosures, the legislation closely restricts the kinds of disclosure that can be made.(2) A high-profile government whistleblower commented that a major flaw in the legislation is that a public servant must prove that a reprisal is related to the reporting of a wrongdoing.(3)

(2) J. Gualitieri and K. Kilgour, "Senate Must Defeat Whistleblower Legislation," *Windsor Star*, 4 November 2005, p. A6.

(3) K. Harris, "New Law 'Flawed' – Whistleblower Claims Measure Won't Protect Public Servants," *Edmonton Sun*, 2 November 2005, p. 31.

The prospective Federal Accountability Act addresses some of these issues by proposing numerous amendments to the Act. It will:

- Give the Public Service Integrity Commissioner the power to enforce compliance with the Act.
- Ensure that all Canadians who report government wrongdoing are protected, not just public servants.
- Remove the government's ability to exempt Crown corporations and other bodies from the Act.
- Require the prompt public disclosure of information revealed by whistleblowers, except where national security or the security of individuals is affected.
- Ensure that whistleblowers have access to the courts and that they are provided with adequate legal counsel.
- Establish monetary rewards for whistleblowers who expose wrongdoing or save taxpayers' dollars.(4)

The Gomery Commission also notes in its Phase 2 report, *Restoring Accountability: Recommendations*, that it views the passage of this type of protection as a positive step, but has concerns as to whether this legislation will achieve what parliamentarians wanted.(5) It takes the position that the new Act could be significantly improved if it were amended. Proposed changes include broadening the definition of the class of persons authorized to make a disclosure under the Act to include anyone who is carrying out work on behalf of the government. It recommends that the list of wrongdoings, as well as the list of actions that are forbidden reprisals, should be an open list, so that actions that are similar in nature to the ones explicitly listed in the Act would also be covered. Moreover, in the event that a whistleblower makes a formal complaint alleging a reprisal, the burden of proof should be on the employer to show that the actions taken were not a reprisal. The Gomery Commission also proposes establishing an explicit deadline for all chief executives to establish internal procedures for managing disclosures. Finally, the Commission recommends that the government adopt legislation to entrench into law a Public Service Charter.(6)

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(4) *The Federal Accountability Act: Stephen Harper's commitment to Canadians to clean up government*, 4 November 2005, p. 8.

(5) The Gomery Commission Report, Phase 2, *Restoring Accountability: Recommendations*, 1 February 2006, p. 186.

(6) *Ibid.*, p. 67.

COMMENTARY

While Prime Minister Stephen Harper welcomed the Gomery Commission report recommendations, he noted that further study would be required with regard to including its recommendations into his own proposed accountability legislation.(7) This study will be facilitated by the fact that many of the recommendations in the final Gomery Commission report are consistent with, and in some cases identical to, the proposals in the Federal Accountability Act. Others received previous consideration at committee stage but were not adopted, for reasons outlined below.

One of the more substantial provisions of the proposed Federal Accountability Act would give the Public Service Integrity Commissioner the power to enforce compliance with the Act. This raises constitutional issues relating to the relationship between Parliament and the executive. Having made the Commissioner an officer of Parliament, an entity reporting directly to Parliament, the PSIC cannot have an order power over the executive.(8)

As it stands, the purpose of investigations by the Commissioner under the Act is to bring the existence of wrongdoing to the attention of the chief executive and to make *recommendations* concerning corrective action to be taken.(9) Where wrongdoing has been found, the chief executive of the organization in question has the authority to apply administrative and disciplinary measures, including the return of monies, financial penalties, reprimands, suspensions, demotions and termination of employment. In addition, penalties apply under all existing legal sanctions or breaches of any acts or regulations. For example, in cases of financial mismanagement in contravention to the *Financial Administration Act*, the Attorney General exercises discretion to intervene, lay charges, and prosecute. In instances of reprisal, public servants are to seek redress from the relevant labour board, i.e., the Public Sector Labour Relations Board or the Canada Industrial Relations Board. Under the legislation, these boards have extensive powers to remedy reprisal. Moreover, the labour boards have order-making authority that may be enforced through the *Federal Courts Act*.

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(7) CBC News, "Harper promises 'new era of accountability,'" 1 February 2006, 20:11:00.

(8) House of Commons, Standing Committee on Government Operations and Estimates, *Minutes of Proceedings*, 1st Session, 38th Parliament, 28 June 2005 (11:25).

(9) "Chief executive" refers to a deputy head within the core public service or a chief executive within the broader public sector.

While the Commissioner does not have the power to enforce compliance, he or she reports directly to Parliament on an annual basis as an officer of Parliament, and it is through this mechanism that accountability is achieved. Annual reports are to include the nature of the disclosures received, the investigations undertaken, and the issues raised. The Commissioner also has the ability to bring issues to the attention of Parliament *at any time* should the public interest warrant. Parliament would then be able to take the political action necessary to effect an outcome. Presumably, this would be applicable in situations where the chief executive fails to respond in a timely manner to the Commissioner's recommendations following an investigation.

With regard to scope, the legislation currently covers all federal public sector employees, including those in Crown corporations and the RCMP. It excludes former public servants, Ministers, members of Ministers' staffs, Crown corporations' Boards of Directors, Parliament and its institutions, federally appointed judges, the Canadian Security Intelligence Service (CSIS), the Communications Security Establishment (CSE) and the Canadian Forces. The prospective Federal Accountability Act would broaden coverage of the Act in order to ensure that all Canadians reporting government wrongdoing are protected.

Amendments made at committee stage were thought to satisfy the goal of facilitating disclosure without the legislation becoming overly onerous. The Commissioner is allowed to accept information of wrongdoing from any source, and is required to refer instances of wrongdoing outside the public sector to outside authorities. It should be noted that both the disclosure and reprisal-related mechanisms outlined in the legislation are intended to serve public servants. One of the reasons for creating an internal, protected disclosure regime for public servants arises from the conflict of interest inherent in the position. Public servants have a duty of loyalty that may prevent them from speaking publicly; on the other hand, they have a right of free speech and a duty to report wrongdoing. Those outside the public service are not subject to the same conflict.(10)

Monetary rewards and incentives for whistleblowers received considerable attention at committee hearings on Bill C-11. Witnesses were divided on the issue. While some though that it could serve to encourage disclosures, others thought that it would cast doubts on

(10) House of Commons, Standing Committee on Government Operations and Estimates, *Minutes of Proceedings*, 1st Session, 38th Parliament, 21 June 2005 (16:05).

the true motivation of whistleblowers and serve to diminish their credibility. No other jurisdictions (international or provincial) provide financial incentives to public servants for making disclosures.(11)

On the issue of access to the courts and legal counsel, the Act currently provides that a complainant be reimbursed for expenses and other financial losses that are incurred as a direct result of reprisal, should it be determined that the complainant has suffered reprisal. However, the Act prohibits complaints of reprisal being referred for outside arbitration or adjudication. On the other hand, persons summoned by the Commissioner during the course of an investigation have the right to be assisted or represented by counsel.

Proposed amendments would require the prompt public disclosure of information revealed by whistleblowers, except where national security or the security of individuals is affected. The legislation currently provides the Commissioner with the authority to disclose information if he or she judges that it is in the public interest. The legislation attempts to balance this provision by making it clear that there are a number of matters that are extremely sensitive, and he or she must have excellent grounds for making disclosures public. Moreover, in special circumstances public servants are authorized to go public with information, i.e., if there is an imminent and substantial danger to public health and safety. Any changes to these provisions would need to take into consideration the same intent to balance transparency and the protection of public servants and public interests.

Finally, the Act commits the government to establishing a charter that sets out the values that should guide federal public servants. It also requires the Treasury Board to develop a code of conduct for the public sector, with the involvement of unions. In addition, the Act requires that each organization establish its own code of conduct, consistent with the Treasury Board code but adapted to the organization’s needs. It is not clear whether this would satisfy Judge Gomery’s call for a Public Service Charter.

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(11) The U.S. Whistleblower Protection Act does not provide for awards for public servants making disclosures of wrongdoing. However, private citizens may sue, on behalf of the government, individuals and corporations for defrauding governments and retain a portion of the proceeds under the False Claims Act.