



Public Service Alliance of Canada
Alliance de la Fonction publique du Canada

Submission by the

Public Service Alliance of Canada

to the

**House of Commons Standing Committee on
Government Operations and Estimates**

regarding

The Public Servants Disclosure Protection Act

March, 2017

The Public Service Alliance of Canada (PSAC) is the largest federal public sector union, representing more than 180,000 people from coast to coast to coast. The majority of PSAC members work for the federal government and its agencies. PSAC also represents workers in the private sector, in territorial governments and in the broader public sector, including universities.

The purpose of the *Public Servants Disclosure Protection Act* is not being met

For over four decades, PSAC has called for legislation that provides guidance, support and protection for public sector workers who wish to speak out against wrongdoing.

The federal government enacted the *Public Servants Disclosure Protection Act (PSDPA)* in 2007. Its intent was to protect most of the federal public service from reprisals for reporting wrongdoing. The Disclosure Act has been failing public service workers from the start.

It is undisputed that workers are reluctant to come forward. When they do, they often experience great sacrifice in their personal and work lives. This sends a powerful message to others to remain silent.

Perceived freedom to speak up without fear of reprisal is described as a “basic need” in the Canadian Standard Association’s 2016 publication on whistleblowing systems and best practices. CSA concluded that there is a strong relationship between the creation of a psychologically safe and healthy workplace and the creation of a whistleblowing system. Both involve establishing and reinforcing a culture that gives employees “voice, as well as confidence that concerns will be handled in a just manner”.

Overall, a ‘speak up’ culture is not being applied in Canada, nor is there an independent process or effective protections for whistleblowers.

There is much to criticize in the Act

The Act has been extensively criticized as setting too many conditions on whistleblowers and for protecting wrongdoers.

- **Disclosure are severely and unnecessarily restricted**

The Act reins in whistleblowers by restricting them to making disclosures through internal mechanisms. They can only disclose a wrongdoing directly to the Public Service Integrity Commissioner in limited circumstance.

A disclosure to the Commissioner can be made if the individual has “reasonable grounds” to believe that it would not be appropriate to disclose internally. This effectively shuts cases down.

In addition, the Commissioner can refuse to deal with any disclosure if the Commissioner believes that the whistleblower is not acting in “good faith”, or it is not in the “public interest” or any other “valid reason”.

- **Large areas are omitted from scrutiny**

The Act also does not ensure the right to disclose all illegality and misconduct. The definition of wrongdoing selectively omits large areas, such as Treasury Board policies, breaches of which spawned the Gomery Inquiry.

- **Public disclosures put workers at additional risk**

Public disclosures are only permitted when there is not sufficient time to make a protected disclosure and when “...the public servant believes on reasonable grounds that the subject-matter of the disclosure is an act or omission that (a) constitutes a serious offence under an Act of Parliament or of the legislature of a province; or (b) constitutes an imminent risk of a substantial and specific danger to the life, health and safety of persons, or to the environment.”¹

If public servants go to the media with a disclosure of wrongdoing that doesn't meet one of these exceptional requirements, and they suffer reprisals as a result, the Commissioner cannot accept their complaint of reprisal because technically they never made a disclosure under the Act.

- **Statistics show the Act is not working** (Appendix A)

Between the year 2007, when the Commissioner's office was established, and 2016, the office received 709 disclosures of wrongdoing. The Commission's own statistics show that only 11 – or 1.55 per cent – were considered as “founded” under the Act.

The office also received 237 complaints of reprisals. Only 11 – or less than 5 per cent (4.64) – were referred to a Tribunal.

These low rates can be explained in part by shortcomings in the Disclosure Act. They also suggest that the Integrity Commissioner's office has not proven itself as trusted and independent. These failures matter because they help foster an unhealthy and ineffective culture of silence in the public service.

- **The Act does not adequately address issues related to retaliation against whistleblowers**

The 60-day time limit to complain about a reprisal is totally unrealistic because those who file complaints are often experiencing significant stress as a result of the harassment.

¹ *Public Servants Disclosure Protection Act, 2016, Disclosure to public, Section 16 (1) a) and b)*
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It does not redress all forms of harassment, particularly passive retaliation. Instead, it takes a narrow and short-term view of what may constitute harassment. In reality, whistleblowers are typically harassed over long periods by every method imaginable.

Legal Assistance provided to whistleblowers is completely inadequate with a limit set at \$1500, or \$3,000 in exceptional cases. One former Commissioner did not approve any whistleblower funds for legal assistance. This effectively helped protect alleged wrongdoers who would be represented by a government legal team.

If reprisal complaints are referred, the Disclosure Tribunal has no authority to award costs to complainants. These are often long and drawn out cases that can last for years. For example, the recent Sylvie Therrien case started in 2013 and is still ongoing.

The investigation of reprisal complaints by the Integrity Commissioner must be fair and transparent. The Therrien case shows that the Commission has been plagued with issues in investigations which lack basic procedural fairness.

In claims of reprisals, the onus should be on the respondent to prove that their actions against the whistleblower do not constitute retaliation. This was a recommendation of the Gomery inquiry in 2006 but was never implemented. However, Article 31 of Quebec's new whistleblowing legislation includes such a reverse onus.

- **The Act permits too much secrecy**

The Disclosure Act carefully blocks all possible avenues to access any details of the Commissioner's investigation, putting these beyond the reach of access to information laws not just for a few years, but forever.

In addition, Tribunal hearings may be conducted in secret and need not be filed with the Federal Court. When whistleblower cases are settled by the Canadian government there is a draconian gag order attached which prevents whistleblowers from ever discussing the wrongdoing.

- **There are critical exclusions from the Act**

Security agencies are excluded from the Act and employees cannot approach the Commission to report wrongdoing or seek protection from reprisal.

The law also does not address private sector misconduct at all and private sector information cannot be used. Therefore, government misconduct involving the private sector cannot be investigated.

Public-private partnerships are on the increase, and when contractors perform an increasing proportion of the government's work, this is a gaping omission in the law.

The number of full time employees is decreasing compared to precarious workers. According to the Parliamentary Budget Office, term employment has increased 9.3%, casual employment by 8.3% and student employment by 6.0%.²

Looking at staffing actions, the Public Service Commission reports that in 2015-16 there were 4533 indeterminate workers hired overall, not counting departures and retirements. Over the same time there were 32,370 workers hired to fill jobs on a term, casual or student basis.³

These statistics do not capture the growing use of contract employees who are hired through temporary staffing agencies. The Professional Services budget line in the estimates for the 2016-17 fiscal year, which outlines these kinds of employment costs was estimated to be \$10.9 billion. When departments were asked to report about their use of contract employees, most departments advised Parliament that they “didn’t capture that information.”⁴

The recent Phoenix fiasco alone should be sufficient evidence that the Act must be extended to cover potential misconduct where the private sector and government are involved.

- **Adequate corrective measures are missing from the Act**

An important purpose of whistleblower legislation is to investigate and correct wrongdoing. While the Act gives the Commissioner power to investigate individual disclosures it does not provide the tools necessary to finish the job properly.

Overall, the Act does not ensure corrective action to end wrongdoing. The Commissioner has no power to order corrective action, sanction the wrongdoers, initiate criminal proceeding, or apply for injunctions to halt ongoing misconduct. The Commissioner can only report the founded wrongdoing to the department head and then to Parliament and hope that something happens as a result.

² Parliamentary Budget Officer Expenditure Monitor 2016-17 Q1 2.1 Operating pp 7-8

³ Public Service Commission of Canada 2015-16 Annual report p.10

⁴ ORDER/ADDRESS OF THE HOUSE OF COMMONS Q-89 by “Ms. Finley (Haldimand-Norfolk) April 7, 2016)

When dealing with complaints of reprisals, the Commissioner can apply to a Tribunal which will determine whether or not reprisals occurred. However, the Tribunal has limited remedies to offer complainants.

In the very first case of wrongdoing reported to Parliament by the PSIC in March 2012, a manager was found guilty of gross mismanagement and multiple violations of the Financial Administration Act. The manager retired and thus became untouchable - the Commissioner declined to use the only sanction that was within his power: to name the individual concerned.

How can wrongdoing be deterred or honest employees protected when there is no reliable mechanism to sanction proven wrongdoers or those who engage in reprisals?

Recommendations to improve the *Public Servants Disclosure Protection Act*

- Expand the application of the *Public Servants Disclosure Protection Act* to include all areas of government operations including contracts with the private sector.
- Improve the provisions for sanctions and corrective action against those guilty of wrongdoing.
- Expand the Act to include former public service workers to allow the Integrity Commissioner to investigate allegations of their misconduct.
- Remove the Integrity Commissioner's discretion to deny complaints of wrongdoing without an investigation.
- Make the Integrity Commissioner's investigative process more transparent and open up the investigations to Access to Information requests.
- Ensure the Office of the Integrity Commissioner is well resourced in order to assist victims of retaliation and to fulfill a mandate to educate public service workers about their rights and managers about their responsibilities under the Disclosure Act.
- In cases of complaints of reprisals against whistleblowers:
 - Extend the 60-day time limit to report retaliation to one year
 - Place the onus on respondents
 - Provide sufficient financial assistance to complainants to include consultation and legal fees
 - Expand the ability to apply sanctions and corrective action to those who engage in reprisals

Comments on the Public Service Integrity Commissioner's proposed legislative amendments

PSAC supports the Integrity Commissioner's proposed legislative amendments with the exception of the following two proposals.

- Proposal No. 5: Clarify confidentiality provisions to include any records created for the purpose of making a disclosure under the Act
- Proposal No. 6: Strengthen confidentiality provisions for reprisal complaints

PSAC interprets these proposals to mean that information obtained prior to a case analysis into a disclosure investigation or information obtained or created for a reprisal complaint remains entirely confidential. While protecting the confidentiality of the whistleblower is important in order to encourage disclosures of wrongdoing, it is this kind of secretive measure that makes it impossible for bargaining agents to obtain information created and obtained in the course of a Public Service Integrity Commissioner's investigation when representing members' complaints of reprisals.

Appendix A – Wrongdoing and Reprisals Statistics: The Office of the Public Sector Integrity Commissioner⁵

| Wrongdoing and Reprisal Statistics: The Office of the Public Sector Integrity Commissioner (PSIC) | | | | | | | | | | |
|--|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|--------------|
| | 2007-2008 | 2008-2009 | 2009-2010 | 2010-2011 | 2011-2012 | 2012-2013 | 2013-2014 | 2014-2015 | 2015-2016 | TOTAL |
| Cases of Wrongdoing | 0 | 0 | 0 | 0 | 1 | 3 | 4 | 2 | 1 | 11 |
| Possible Reprisals Against Whistleblowers referred to tribunal | 0 | 0 | 0 | 0 | 3 | 1 | 3 | 3 | 1 | 11 |
| General Inquiries | 206 | 151 | 208 | 256 | 300 | 244 | 201 | 194 | 165 | 1925 |
| Disclosures of Wrongdoing Received | 59 | 55 | 56 | 72 | 94 | 113 | 84 | 90 | 86 | 909 |
| Reprisal Complaints Received | 22 | 20 | 16 | 25 | 43 | 24 | 29 | 28 | 30 | 237 |

⁵ Office of the Public Sector Integrity Commissioner of Canada Annual Reports, 2007-08, 2008-09, 2010-11, 2012-13, 2014-15, 2015-16.