



HOUSE OF COMMONS
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CANADA

**STRENGTHENING THE PROTECTION OF
THE PUBLIC INTEREST WITHIN THE *PUBLIC
SERVANTS DISCLOSURE PROTECTION ACT***

**Report of the Standing Committee on
Government Operations and Estimates**

**Tom Lukiwski
Chair**

JUNE 2017

42nd PARLIAMENT, FIRST SESSION

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THE STANDING COMMITTEE ON GOVERNMENT OPERATIONS AND ESTIMATES

has the honour to present its

NINTH REPORT

Pursuant to its mandate under Standing Order 108(2), the Committee has studied the *Public Servants Disclosure Protection Act* and has agreed to report the following:

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STRENGTHENING THE PROTECTION OF THE PUBLIC INTEREST WITHIN THE *PUBLIC SERVANTS DISCLOSURE PROTECTION ACT*

EXECUTIVE SUMMARY

On 2 February 2017, the House of Commons Standing Committee on Government Operations and Estimates (the Committee) decided, at the request of the President of the Treasury Board, to conduct the first statutory review of the *Public Servants Disclosure Protection Act* (PSDPA) since its implementation in 2007. In the course of its study, the Committee held a total of 12 meetings, heard from 52 witnesses and received 12 briefs.

The Committee reviewed the origins and the objectives of the PSDPA, the disclosure procedures it prescribes, and the Canadian experience under the Act as well as foreign whistleblower protection legislation and international best practices. The report features a holistic presentation of the main procedural challenges and successes of the Act in protecting whistleblowers and strengthening accountability and the integrity of the public service. The report also analyzes in depth many challenges and includes 15 recommendations to improve the Act in its objects and processes to ensure the integrity of the public sector and the protection of Canadian whistleblowers.

In the opinion of the Committee, the six main challenges are the following:

1. The lack of clarity around the public interest purposes of the Act;
2. The disclosure mechanisms under the Act do not necessarily ensure the protection of the public interest;
3. The Act does not sufficiently protect whistleblowers from reprisals as most of them face significant financial, professional and health-related consequences;
4. The commonly held perception that the federal organizational culture towards the disclosure of wrongdoing seems to discourage it;
5. The mandatory annual reporting as prescribed under the Act is inadequate to provide a meaningful evaluation of the effectiveness of the disclosure mechanisms; and
6. Public servants and external experts lack confidence in the adequate protection of whistleblowers under the Act, notably due to the potential conflicts of interest of those administering the internal disclosure process.

The Committee's recommendations seek to address these challenges by:

1. Expanding the definitions of the terms "wrongdoing" and "reprisal," and modifying the definition of the term "protected disclosure" under the Act;
2. Amending the legislation to protect and support the whistleblowers and to prevent retaliation against them;
3. Reversing the burden of proof from the whistleblower onto the employer in cases of reprisals;
4. Providing legal and procedural advice, as necessary, to public servants seeking to make a protected disclosure of wrongdoing or file a reprisal complaint;
5. Embedding in the legislation confidentiality provisions of witnesses' identities;
6. Making the Office of the Public Sector Integrity Commissioner responsible for training, education and oversight responsibilities to standardize the internal disclosure process; and
7. Implementing mandatory and timely reporting of disclosure activities.

INTRODUCTION

This year Canada celebrates 150 years of a proud and rich history. [The Committee] has a unique opportunity to contribute to this milestone [by finally securing] meaningful and legitimate whistleblower rights for [Canada's] public service.

*[Joanna Gualtieri](#),
Director, The Integrity Principle, As an Individual*

On 13 September 2016, the President of the Treasury Board, the Honourable Scott Brison, asked the House of Commons Standing Committee on Government Operations and Estimates (the Committee) to conduct the review provided for in the *Public Servants Disclosure Protection Act* (PSDPA), which came into force in 2007.

On 2 February 2017, the Committee decided to undertake this study and adopted the following motion to that effect:

That the Committee undertake a review of the *Public Servants Disclosure Protection Act*.

The PSDPA was the result of a series of actions taken with regard to the disclosure of wrongdoing in the public sector and the protection of public servant whistleblowers. Since as early as 1996, there have been task forces, policies, codes, reports and government and private members' bills dealing with the subject. However, the conclusions of an Auditor General of Canada's [November 2003](#) report, and those of the commission of inquiry that was subsequently established to study the Sponsorship Program from 1997 to 2001 and the federal government's advertising activities from 1998 to 2003 highlighted the need to better protect public servants who want to disclose wrongdoings in the federal public service.¹

In November 2005, the Parliament of Canada adopted the [PSDPA](#). In 2006, prior to its coming into force, the PSDPA was substantially amended by the [Federal Accountability Act](#). The PSDPA came into force on 15 April 2007 and established disclosure procedures for wrongdoing and related complaints of unlawful reprisals in the public service, Crown corporations² and other federal public bodies. It also replaced the

1 Commission of Inquiry into the Sponsorship Program and Advertising Activities, Justice John H. Gomery, Commissioner (Gomery Commission), [Who Is Responsible? Fact Finding Report](#), Department of Public Works and Government Services Canada, Ottawa, 2005, pp. 200–203.

2 However, the *Public Servants Disclosure Protection Act* (PSDPA) does not apply to the Canada Pension Plan Investment Board and Crown corporation subsidiaries held at 100% such as the Canada Lands Company CLC Limited, Old Port of Montréal Corporation Inc. and Parc Downsview Park Inc., which are wholly owned subsidiaries of the Canada Lands Company Limited. For a full list of Crown corporation subsidiaries held at 100%, see Government of Canada, [Crown Corporations' Corporate Holdings](#). Source: Treasury Board of Canada Secretariat, *Follow-up to the February 7, 2017 meeting of the House of Commons Standing Committee on Government Operations and Estimates* (OGGO), pp. 1–2. [Brief submitted to OGGO on 2 March 2017]

Treasury Board's *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace*.³

From February to April 2017, the Committee held 12 meetings to study the PSDPA and heard from 52 witnesses including:

- Officials from the Treasury Board Secretariat;
- Officials and ombudsmen from federal departments and agencies' integrity and resolution offices;
- The Public Service Integrity Commissioner and his senior officials;
- Officials from the Public Servants Disclosure Protection Tribunal;
- The Auditor General of Canada and his senior officials;
- An executive official of the Association of Canadian Financial Officers;
- Executive officials of federal public service unions;
- Experts on whistleblowing and anticorruption legislation from Canada and selected foreign countries (Australia, the United States, Ireland and the United Kingdom); and
- Individual Canadian whistleblowers.

The full list of witnesses is available in Appendix A and the list of briefs submitted is found in Appendix B.

The Committee's statutory review report of the PSDPA consists of an overview of the provisions of the law and identified flaws, the suggested solutions brought forward by witnesses and experts, and finally the Committee's observations and recommendations. Part I of the report reviews the disclosure of wrongdoing process, the types of protections offered to whistleblowers and the associated corrective measures. Part II analyzes in depth the protection provisions for whistleblowers under the Act as well as the remedial process in the event reprisals occur. Part III explores the federal organizational culture with respect to whistleblowing, and examines methods to improve it. Finally, part IV evaluates the objects of the Act, the reporting provisions of the Act and how proactive the law is to prevent wrongdoing in order to maintain confidence in the integrity of the federal public sector.

Although some witnesses called for the Act to be completely redrafted, the Committee has opted for an incremental legislative approach regarding the recommendations contained in this report. However, the Committee wishes to encourage

3 OGGO, [Evidence](#), 1st Session, 42nd Parliament, 7 February 2017, 0848 (Carl Trotter, Assistant Deputy Minister, Governance, Planning and Policy Sector, Treasury Board Secretariat).

those undertaking the next statutory review of the PSDPA, no later than five years from now, to explore the following themes, as well as whether the implementation of a restorative justice approach is appropriate in this context:

1. Implementing a duty to protect and support whistleblowers;
2. Granting whistleblower protection to all employees, whether they are from the public sector or the private sector;
3. Determining whether the Canadian Armed Forces, the Canadian Security Intelligence Service, the Canadian Security Establishment, and the Royal Canadian Mounted Police (RCMP) should be covered by all the provisions of the Act;
4. Implementing the payment of rewards to those that uncover certain types of wrongdoing;
5. Permitting more pathways for public servants to make public disclosures of wrongdoing and still be protected from reprisals in the event service standards are breached; and
6. Allowing allegations of wrongdoing or acts of reprisals to be brought directly to law enforcement units and/or the courts without the need to access any specialized commission or tribunal.

PART I – PROTECTING THE PUBLIC INTEREST

[T]his act is an important part of the Government of Canada's integrity framework and we take it quite seriously. We feel that integrity is the cornerstone of good governance and democracy.

*[Anne Marie Smart](#),
Chief Human Resources Officer,
Office of the Chief Human Resources Officer,
Treasury Board Secretariat*

1.1 Provisions of the Act Concerning the Disclosure of Wrongdoing

1.1.1 What May Be Disclosed

1.1.1.1 The Definition of Wrongdoing

The PSDPA seeks to maintain and enhance public confidence in the integrity of public servants and public institutions through effective procedures for the disclosure of wrongdoings and the protection of public servants who make such disclosures. The PSDPA strives to achieve an appropriate balance between public servants' duty of loyalty to their employer, their right to freedom of expression as guaranteed by the *Canadian Charter of Rights and Freedoms*, and the public interest.⁴

Section 8 of the Act, defines wrongdoing in or relating to the public sector as:

- a) A contravention of any Canadian or provincial law and related regulation;
- b) A misuse of public funds or a public asset;
- c) A gross mismanagement in the public sector;
- d) An act or omission that creates a substantial and specific danger to a person or the environment (other than a danger inherent in the performance of the duties or functions of a public servant);
- e) A serious breach of a code of conduct; and
- f) Knowingly directing or counselling a person to commit a previously mentioned wrongdoing.

According to [Brian Radford](#), General Counsel, Office of the Public Sector Integrity Commissioner of Canada (the Commissioner's Office), it is the view of the Commissioner's

⁴ [PSDPA](#), S.C. 2005, c. 46, *Preamble*.

Office – an independent and confidential channel to enable public servants and members of the public to disclose potential wrongdoing in the federal public sector – that the definition of “wrongdoing” is broad and provides the flexibility to fully investigate matters brought to its attention. He indicated that:

The public interest importance of the act means that the act is there to address wrongdoing of an order of magnitude that could shake public confidence, if not reported and corrected. When the Commissioner is dealing with an allegation of wrongdoing, it is something that if proven involves a serious threat to the integrity of the public sector.

[Joe Friday](#), Commissioner, Commissioner’s Office, supports that his Office “deal[s] with everything from human behaviour and interactions to potential crime.” However, as it does not have criminal jurisdiction, criminal acts of wrongdoing investigated by the Commissioner’s Office are referred to the RCMP. Accordingly, the Commissioner’s Office has referred cases of wrongdoing to the RCMP at least four times.⁵

Regarding the disclosure of wrongdoing, as defined by the Act, [Carl Trottier](#), Assistant Deputy Minister, Governance, Planning and Policy Sector, Treasury Board Secretariat, and [Barbara Glover](#), Assistant Deputy Minister, Departmental Oversight Branch, Public Services and Procurement Canada (PSPC),⁶ emphasized that disagreement with policy or disagreement with implementation is not necessarily equivalent to wrongdoing.

Nonetheless, it was expressed by [Craig MacMillan](#), Assistant Commissioner, Professional Responsibility Officer, RCMP, that the type of wrongdoing a public servant may be guilty of committing varies depending on its institution of employment. For example, he noted that an RCMP member would be found to have committed a wrongdoing for breaching its code of conduct under the Act even if it is not a serious breach.

1.1.1.2 When Is Wrongdoing Serious Enough?

Disclosure activity statistics demonstrate that very few disclosures of wrongdoing, 25% to 32%,⁷ warrant an investigation under the PSDPA, on average, by the Commissioner and within the departments and agencies, respectively. [Mr. Trottier](#) explained that “in many instances [the disclosures made internally] do not meet the definition of wrongdoing in any shape or form. In other instances, [disclosures] should have been sent through another means, another grievance process.” For example, [Marc Thibodeau](#), Director General, Labour Relations and Compensation, Canada Border

5 OGGO, [Evidence](#), 1st Session, 42nd Parliament, 23 mars 2017, 1026 (Joe Friday, Commissioner, Office of the Public Sector Integrity Commissioner).

6 On 4 November 2015, the federal government changed the name of Public Works and Government Services Canada to “Public Services and Procurement Canada.” However, the department’s legal title, “Department of Public Works and Government Services,” has not yet been updated.

7 OGGO, [Evidence](#), 1st Session, 42nd Parliament, 6 April 2017, 0959 (Raynald Lampron, Director of Operations, Office of the Public Sector Integrity Commissioner of Canada). The internal disclosure statistic was calculated based on data obtained in the [Annual Report on the Public Servants Disclosure Protection Act 2015-16](#) of the Treasury Board Secretariat.

Services Agency (CBSA), submitted that CBSA had received 93 allegations of wrongdoing in 2015-2016, but that 46 of these “did not meet the threshold for investigation under the Act [and another] 23 were referred to other processes.”

[Mr. MacMillan](#) and [Mr. Thibodeau](#) claimed that the PSDPA is meant to address wrongdoing of a more “serious” nature and is a “last resort mechanism for issues that are not covered by other [processes]. In that context, a lot of issues were raised and resolved through other processes.” Nonetheless, [John Tremble](#), Director, Centre for Integrity, Values and Conflict Resolution, Department of Indigenous and Northern Affairs Canada, indicated that all disclosures are subject to a “rigorous analysis” to determine their merit under the Act.

In response to a question from a Committee member, [Mr. Friday](#) sustained that the Commissioner’s Office found a low number of wrongdoings due to the level of seriousness the term’s definition reflects.

The Committee also invited international experts to compare and comment on the similarities and differences between the PSDPA and other whistleblower protection laws. Definitions of wrongdoing from selected jurisdictions are presented in Table 1.

**Table 1 – Definition of the Term ‘Wrongdoing’ from Selected Jurisdictions’
Legislation on Whistleblower Protection**

Australia	United States	Ireland	United Kingdom
<p>“Disclosable conduct” includes:</p> <ul style="list-style-type: none"> • illegal conduct; • corruption; • maladministration; • abuse of public trust; • deception relating to scientific research; • wastage of public money; • unreasonable danger to health or safety; or • danger to the environment. 	<p>Wrongdoing includes:</p> <ul style="list-style-type: none"> • violation of a law, rule or regulation; • gross mismanagement; • gross waste of funds; • abuse of authority; or • a substantial and specific danger to public health or safety. <p>(Includes abuse of authority but does not include danger to the environment.)</p>	<p>Relevant wrongdoings are:</p> <ul style="list-style-type: none"> • commission of an offence; • failure to comply with any legal obligation; • miscarriage of justice; • endangerment of health or safety of any individual; • damage to the environment; • unlawful or improper use of funds or resources of a public body, or of other public money; • oppressive or grossly negligent act or omission by or on behalf of a public body; • gross mismanagement by or on behalf of a public body; and • concealment or destruction of information related to wrongdoings. <p>It is immaterial under the Act whether a relevant wrongdoing occurs in the State or elsewhere and whether the law applying to it is that of Ireland or that of any other country or territory.</p>	<p>A “qualifying disclosure” includes behaviour that is:</p> <ul style="list-style-type: none"> • a criminal offence; • a failure to comply with any legal obligation; • a miscarriage of justice; • an endangerment to the health or safety of any individual; • likely damage to the environment; or • concealment of information related to the above wrongdoings. <p>Public servants can raise concerns about a breach of the <i>Civil Service Code</i>.</p>

Sources: Table prepared using data obtained from Australian Capital Territory Government, [Public Interest Disclosure Act 2012](#); U.S. Government, [Whistleblower Protection Act of 1989](#); Government of Ireland, [Protected Disclosures Act 2014](#); and U.K. Government, [Public Interest Disclosure Act 1998](#).

Notwithstanding the similarities between the different definitions, [Mark Worth](#), Manager, Blueprint for Free Speech, testifying as an individual, recognized that there may be an issue as no “provision in the [PSDPA] distinguishes rampant, systemic, or across-the-board workplace problems like discrimination, unsafe conditions at work, or bullying from individual employee grievances.”

In addition, the Committee heard from many witnesses, such as [Debi Daviau](#), President, Professional Institute of the Public Service of Canada, that the definition of wrongdoing is actually “too narrow.” In agreement, [David Yazbeck](#), Partner, Raven, Cameron, Ballantyne & Yazbeck LLP, appearing as an individual, said that the law is interpreted such that “gross mismanagement” is a wrongdoing, but “mismanagement” is not. [Larry Rousseau](#), Executive Vice-President, National Capital Region, at the Public Service Alliance of Canada, concurs that the Act does not ensure a whistleblower the right to disclose all acts of illegality and misconduct. According to him, the definition of “wrongdoing” selectively omits large areas, including the Treasury Board’s policies.

Moreover, [John Devitt](#), Chief Executive, Transparency International Ireland, testifying as an individual, explained that the impact of a limiting definition of wrongdoing is that it would not afford protection to public servants that disclose potential wrongdoing outside that definition.

Another limitation of the definition, in the opinion of [Patricia Harewood](#), Counsel, Public Service Alliance of Canada, is that the definition of wrongdoing under section 8 of the Act restricts its application to the public sector as defined under the Act.

1.1.2 To Whom May a Disclosure Be Made?

1.1.2.1 Internal Disclosure Procedures

Sections 10 and 12 of the PSDPA establish the first of two channels for the disclosure of wrongdoings in the federal public sector: the internal disclosure procedures. Chief executives must, in their respective portion of the public sector, designate a senior officer to be responsible for receiving any information a public servant believes reveals that a wrongdoing has been committed or that the public servant has been asked to commit a wrongdoing. A public servant may also provide such information to his or her supervisor.

The PSDPA requires the Treasury Board to establish a code of conduct applicable to the federal public sector. It also provides that every chief executive of a department or federal body must establish internal procedures, including designating a senior officer to be responsible for receiving and dealing with disclosures of wrongdoing. This procedure should protect the identity of the persons involved and the confidentiality of the information collected in relation to disclosures and investigations.

Chief executives of federal departments and agencies are responsible for ensuring that the [Values and Ethics Code for the Public Sector](#), a code of conduct and internal disclosure procedures are effectively implemented in their organization. They must also ensure that their code of conduct and internal disclosure procedures are regularly monitored and evaluated.

The Commissioner's Office's [decision-making guide](#) reminds potential public servant whistleblowers that many internal resources are available to help them resolve problems in their organization, including senior officers for internal disclosure,⁸ union representatives, staff relations advisors, ethics officers, human resources advisors, conflict management advisors, diversity coordinators, equity coordinators, health and wellness coordinators, and conflict of interest advisors.

Representatives of federal departments spoke about an interdepartmental working group, the Internal Disclosure Working Group, which includes senior officers, Treasury Board Secretariat officials and officials from the Commissioner's Office. The working group discusses issues relating to the internal disclosure process and shares guidance and best practices. The departmental representatives stated that the working group is also developing the tools necessary to manage disclosures in the best way possible.⁹

[Tom Devine](#), Legal Director, Government Accountability Project, appearing as an individual, argued that the protection provided in the internal process is essential, as over 90% of whistleblowers make their disclosure to their superior. However, according to [Scott Chamberlain](#), Director of Labour Relations and General Counsel, Association of Canadian Financial Officers, the internal disclosure process in federal departments and agencies does not work and employees do not use it because they believe it is designed to contain problems, not resolve them. He said this is why wrongdoings are often revealed through the media or other avenues. [He](#) added that the internal process is dysfunctional because it is not independent and that only an independent external process could be effective.

[Mr. Devine](#) also noted that the PSDPA does not cover disclosures made to co-workers, even though these "are necessary for the homework to make responsible disclosures, to law enforcement, to Parliament, to the public, or to the media."

Finally, [Mr. Friday](#) emphasized that the internal process is quite different from the external one and that, unlike for the external disclosure process, the PSDPA provides very little direction regarding the functioning of the internal process. In [his](#) view, this role was assigned to the employer, namely, the Treasury Board Secretariat.

A. Risk of Conflicts of Interest

The Committee heard that federal department and agency executives could find themselves in a conflict of interest situation when they manage cases of wrongdoing. [Anne Marie Smart](#), Chief Human Resources Officer, Office of the Chief Human Resources Officer, Treasury Board Secretariat, explained that, where wrongdoing is founded, chief executives of federal departments and agencies consider what disciplinary measures should be taken and sometimes hire a third party to help them with that task. When chief

8 The federal government publishes internally a list of senior officers for the disclosure of wrongdoing.

9 OGGO, [Evidence](#), 1st Session, 42nd Parliament, 9 February 2017, 0904 (Mr. Luc Bégin, Ombudsman and Executive Director, Ombudsman, Integrity and Resolution Office, Department of Health) and [Evidence](#), 1st Session, 42nd Parliament, 16 February 2017, 0845 (Amipal Manchanda, Assistant Deputy Minister, Review Services, Department of National Defence).

executives are in a conflict of interest situation, they can ask another person, such as the Public Service Integrity Commissioner, or another department to determine what measures should be taken.

In response to a question from a Committee member, representatives of federal departments and agencies asserted that their obligation to report to their manager in cases of allegations of wrongdoings does not create conflicts of interest. For example, [Ms. Glover](#) stated that the system used by her department seems to work because each deputy minister is responsible for operations in his or her department and must correct any and all problems that arise there. Moreover, she said she has to prepare a report for each allegation of wrongdoing and that, if an allegation is founded, a disciplinary process is launched. While recognizing that the internal process is not as independent as the external one, [Amipal Manchanda](#), Assistant Deputy Minister, Review Services, at the Department of National Defence, noted that the PSDPA nonetheless includes some provisions to ensure independence. For example, his duties do not involve any operational activity within his department, as the person responsible for investigations into wrongdoings cannot be connected with operations or any elements of wrongdoing within those operations. [Line Lamothe](#), Acting Director General, Human Resources and Workplace Services, at the Department of Indigenous and Northern Affairs Canada, said it is staff, not the deputy minister, who must take the necessary measures when wrongdoing is found to have occurred. Nonetheless, according to [Mr. Friday](#), there is an “issue of the potential conflict” in the internal process.

Replying to another question from a Committee member, [Ms. Smart](#) stated that, if the senior officers of federal departments and agencies responsible for disclosures were independent and reported separately to a chief investigator, “it would set up a clash between the authorities of deputy heads to manage people.” However, [A.J. Brown](#), Professor, Griffith University, who testified as an Individual, argued that internal disclosure units in departments and agencies should operate with a certain degree of independence from management.

B. Values and Ethics Codes

Some officials from federal departments and agencies discussed the process surrounding the public service’s values and ethics codes. [Ms. Smart](#) noted that federal departments and agencies develop their own codes of conduct and must not only adopt them, but also carry out awareness campaigns with their employees. [Mr. Trottier](#) added that all federal departments and agencies write their values codes into the letters of offer for new public servants and these newcomers must read the code as soon as they are hired. In addition, [he](#) said values and ethics training is mandatory for all public servants, which makes the process quite robust in his view. [Luc Bégin](#), Ombudsman and Executive Director, Ombudsman, Integrity and Resolution Office, at the Department of Health, explained that all Health Canada employees must, on their appointment, attest that they have read and understood the Department’s code of conduct when they sign their letter of employment.

[David Hutton](#), Senior Fellow, Centre for Free Expression, appearing as an Individual, reported that, five years after the PSDPA came into force, the Treasury Board Secretariat drafted a new code of conduct for the federal public service and each federal department and agency had to write its own code of conduct. Yet, in his view, many of the codes were rewritten “to criminalize whistle-blowing and to make it a firing offence to say anything negative about your department,[such that] all kinds of negative consequences would flow from that.”

[Allan Cutler](#), Allan Cutler Consulting, testifying as an individual, said that, even though the deputy ministers of federal organizations are designated as being accountable for establishing procedures and policies pursuant to the *Federal Accountability Act* as well as effective internal controls, there are no consequences if these requirements are not met. He believes this is a fundamental flaw in the PSDPA.

C. Selected Examples of Departments and Agencies

The Committee invited representatives from selected federal departments and agencies to appear during its study in order to better understand their internal disclosure processes.

Indigenous and Northern Affairs Canada

[Ms. Lamothe](#) presented the internal disclosure process for Indigenous and Northern Affairs Canada. She explained that it is managed by the senior officer, who is also the Director of the Centre for Integrity, Value and Conflict Resolution. Supported by three staff members, the senior officer is responsible for providing impartial advice and guidance to public servants who are considering making a disclosure of wrongdoing. The senior officer may hire the assistance of a subject matter expert to review the allegations and gather additional information. If the senior officer finds sufficient grounds to launch an investigation, he or she informs the deputy minister and asks for approval to launch an investigation. The Department then hires an independent investigator, and once the investigation is complete, the senior officer presents the findings and his or her recommendations to the deputy minister. She added that, since 2007, the department has received an average of three disclosures per year.

Canada Border Services Agency

[Mr. Thibodeau](#) explained that, to determine whether an investigation under the PSDPA is warranted, the immediate superior or the senior officer must address the following possibilities: “whether there is another recourse mechanism available to review the allegations; whether the matter, if proven to be founded, meets the act’s definition of “wrongdoing” and the precedents set by the Integrity Commissioner; and, whether the issue is one of public or personal interest.” Where an investigation is not warranted, the employee receives the decision and an explanation in writing and is informed about the other recourse mechanisms available, such as the informal conflict resolution process.

Communications Security Establishment

[Joanne Renaud](#), Director General, Audit, Evaluation and Ethics, Communications Security Establishment (CSE), explained that, for national security reasons, the CSE receives exceptional treatment under the PSDPA. However, its employees must have access to an internal mechanism for discussing or reporting serious ethical issues, including wrongdoings, that is vetted by the Treasury Board Secretariat.

[Ms. Renaud](#) stated that CSE employees may make disclosures to their manager, a union representative, a labour relations official, the manager of the ethics office or her. As the Director General for Audit, Evaluation and Ethics, Ms. Renaud is responsible for receiving and reviewing allegations and subsequently establishing whether there are sufficient grounds for further action and whether resolution is appropriate. In addition, she must prepare an annual report to the Chief of the CSE setting out the number of disclosures received and investigations initiated, the recommendations made and any systemic issues identified. The Chief of the CSE is in turn responsible for reporting the disclosures made and related issues in his or her annual reports to the Minister of National Defence.

In addition, the Committee learned that the CSE has multiple structures in place to meet the requirements of the PSDPA.¹⁰ These include executive control and oversight, policy compliance teams in its operational areas, an on-site legal team from the Department of Justice and ongoing monitoring of internal processes. Moreover, all CSE activities are subject to scrutiny from the independent CSE Commissioner. Pursuant to the *National Defence Act*, the CSE Commissioner is responsible for undertaking any investigation he or she deems necessary in response to a complaint about the CSE.

Finally, [Ms. Renaud](#) described the reprisal protections provided to CSE employees who make disclosures or co-operate with investigations into disclosures.

Royal Canadian Mounted Police

According to [Mr. MacMillan](#) the new code of conduct for members of the RCMP and the new code of conduct for RCMP public service employees “adopted a more positive, responsibilities-based approach to conduct, and both contain an obligation to report concerns relating to misconduct.” Since the PSDPA came into force, the RCMP has had three instances of founded wrongdoing.

Under the RCMP’s PSDPA policy, the RCMP’s senior officer may form an assessment committee to confidentially review allegations of wrongdoings based on a list of assessment criteria. Unlike federal departments and agencies governed by the PSDPA, the RCMP has its own internal process for addressing reprisals, as it is the case for other internal RCMP processes, including the harassment and grievance processes.

10 OGGO, [Evidence](#), 1st Session, 42nd Parliament, 16 February 2017, 0955 (Joanne Renaud, Director General, Audit, Evaluation and Ethics, Communications Security Establishment).

Department of National Defence and Canadian Armed Forces

[Mr. Manchanda](#) explained that the Canadian Armed Forces (CAF) internal whistleblower protection mechanism is very similar to that of the Department of National Defence, as every single component of the PSDPA is included in the CAF protection process. In addition, [he](#) said the definition of wrongdoing is very similar to that of the PSDPA and that the internal disclosure processes at the CAF and the Department are identical.

[Mr. Manchanda](#) also noted that the Department of National Defence and the CAF share a values and ethics code and that an annual report on disclosure is prepared and submitted to the Treasury Board Secretariat's Office of the Chief Human Resources Officer.

Health Canada

[Mr. Bégin](#) stated that Health Canada encourages its employees to report wrongdoing to their supervisor. [He](#) also told the Committee that Health Canada's Ombudsman, Integrity and Resolution Office was created in February 2016 to provide confidential, neutral and independent ombudsperson, informal conflict resolution, and internal disclosure services as well as values and ethics' training to public servants at Health Canada and the Public Health Agency of Canada.

[Mr. Bégin](#) went on to inform the Committee about the measures the Ombudsman, Integrity and Resolution Office takes when a disclosure is founded. The Ombudsman Office reports its findings, any systemic problems that may give rise to wrongdoings and its recommendations for corrective measures to senior management. The reports are also posted on the Health Canada's website. In response to a question from a Committee member, [Mr. Bégin](#) explained that when the Ombudsman Office receives a disclosure of wrongdoing, it contracts out the investigation to an independent firm.

Public Services and Procurement Canada

According to [Ms. Glover](#), PSPC has a strong framework to prevent and respond to possible wrongdoings, as it has embedded measures into its corporate culture, management practices, systems and processes. Additionally, PSPC has a procurement code of conduct for contractors. Ms. Glover added that, when allegations of wrongdoing are founded, disciplinary and corrective measures are taken and, when systemic issues are apparent, recommendations are made to remedy deficiencies in processes and procedures. However, she did not specify to whom these recommendations are made.

Each year, PSPC receives between 25 and 30 complaints under the PSDPA.¹¹ [Biagio Carrese](#), Director, Special Investigations Directorate, PSPC, stated that a team of 10 investigators with varying backgrounds, from criminal investigations to public procurement investigations, is dedicated to internal disclosures.

11 OGGO, [Evidence](#), 1st Session, 42nd Parliament, 16 February 2017, 0850 (Ms. Barbara Glover, Assistant Deputy Minister, Departmental Oversight Branch, Public Services and Procurement Canada).

1.1.2.2 Other Resolution Mechanisms

Some witnesses described other resolution mechanisms available in federal departments and agencies that do not handle disclosures of wrongdoings, but rather other conflict situations such as harassment, toxic labour relations or grievances for other complaints, such as those relating to pay or the reimbursement of travel costs. For example, [Mr. Trottier](#) explained that the federal public service has a harassment grievance process, a harassment policy and a labour relations disciplinary policy.

[Mr. Bégin](#) stated that, in his view, the problems raised through the internal disclosure process in many cases do not need to be investigated because they can be dealt with informally, including through labour relations or informal conflict management processes.

Among the other resolution mechanisms at PSPC, [Ms. Glover](#) cited internal investigations; routine audits by the human resources, acquisitions and finance branches; and complaints relating to procurement.

In addition, unions play a role in the disclosure of wrongdoings since, according to [Mr. Yazbeck](#), they have a duty to represent members who have disclosed wrongdoings and they hire labour relations lawyers for difficult or complex cases.

1.1.2.3 Public Sector Integrity Commissioner and its Office

In carrying out my duties under the act, I should emphasize that I am not an advocate for any party. Rather, I am a neutral decision-maker who is required to be objective and impartial and to respect all parties' rights to procedural fairness and natural justice.

*[Joe Friday](#),
Commissioner,
Office of the Public Sector Integrity Commissioner of Canada*

Section 39 of the PSDPA establishes the Public Sector Integrity Commissioner (the Commissioner), the second of two channels for the disclosure of wrongdoings in the federal public sector. The Commissioner is appointed by the Governor in Council with the approval of Parliament. Under section 13(1) of the PSDPA, a public servant can disclose wrongdoings directly to the Commissioner, without having to go through his supervisor or the senior officer designated by his chief executive. In addition, under section 33(1) of the Act, the Commissioner may begin a new investigation if a previous investigation or a person that is not a public servant provides information indicating that a wrongdoing has been committed.

The Commissioner conducts investigations in order to bring “the existence of wrongdoings to the attention of chief executives and [makes] recommendations

concerning corrective measures to be taken by them.”¹² The Commissioner holds all the powers of a commissioner under [Part II](#) of the Inquiries Act, in addition to those specifically granted by the PSDPA.¹³ The Commissioner reports the results of investigations and provides information about the disclosures to chief executives, ministers, the Treasury Board, Parliament, or other relevant authorities depending on the circumstances and the nature of the information.¹⁴

Thus, the Commissioner reports directly to Parliament and has the power to receive and investigate allegations of wrongdoing and reprisal complaints, to make recommendations to chief executives concerning corrective measures to be taken, and to review reports from chief executives following up on his or her recommendations.

Under sections 38(3.1)–38(4) of the PSDPA, when an investigation leads to a finding of wrongdoing, the Commissioner must report it to the speakers of the Senate and the House of Commons within 60 days. This case report must include the finding of wrongdoing, any recommendations of the Commissioner to the chief executive of the portion of the public sector involved, and the comments of this chief executive.

The Commissioner’s Office’s role is to establish a safe, independent and confidential process to enable public servants and members of the public to disclose potential wrongdoing in the federal public sector. The Commissioner’s Office’s jurisdiction extends to the entire federal public sector, including separate agencies and Crown corporations, which represents approximately 375,000 public servants.¹⁵

For fiscal year 2017–2018, the Commissioner’s Office plans to spend a little more than \$5.4 million under the [2017–2018 Main Estimates](#) and to have 23 full-time equivalent employees.¹⁶

The Commissioner’s Office’s disclosure [procedure](#) comprises three steps:

1. To complete the appropriate Disclosure Form.¹⁷
2. To gather any additional information or documentation to support the allegations.¹⁸

12 PSDPA, s. 26(1).

13 Ibid., s. 29.

14 Ibid., s. 36–38.1.

15 Office of the Public Sector Integrity Commissioner of Canada, [2016–17 Report on Plans and Priorities](#), p. 3.

16 Office of the Public Sector Integrity Commissioner of Canada, [2017–18 Departmental Plan](#), p. 14.

17 There are two disclosure forms. The first is for [public servants and members of the RCMP](#), and the second is for [members of the public](#).

18 The Public Sector Integrity Commissioner of Canada may seek the additional information for the public servant whistleblower. The public servant whistleblower need only share with PSIC the information he or she already possesses. Moreover, the public servant whistleblower will have the opportunity to discuss the matter with an analyst and to provide further information later, if necessary.

3. To submit all documents in a secure manner or in person to the Commissioner's Office.

The Commissioner's Office subsequently reviews the disclosure and determines the next steps. The public servant whistleblower must respect the confidentiality of the process.

If reprisal actions are taken against the public servant whistleblower, he or she may file a complaint with the Commissioner's Office, which must decide whether to investigate within 15 days. The case is referred to the Public Servants Disclosure Protection Tribunal if the Commissioner "has reasonable grounds to believe that reprisals occurred."¹⁹

In fiscal year 2015–2016, the Commissioner's Office received 86 new disclosures of wrongdoing and 30 new reprisal complaints. It should be noted that these complaints are different from those received by public sector organizations and compiled in the *Annual Report on the Public Servants Disclosure Protection Act* published by the Treasury Board Secretariat. As shown in Table 2, the number of new disclosures and complaints made to the Commissioner's Office has remained relatively stable over the last three years.

Table 2 – Statistics on disclosures to the Commissioner's Office of the Public Sector Integrity Commissioner of Canada, Fiscal Years 2011–2012 to 2015–2016

	2011–2012	2012–2013	2013–2014	2014–2015	2015–2016
New disclosures of wrongdoing	94	113	84	90	86
Disclosures of wrongdoing carried over from previous years	76	93	78	33	39
Files resulting in a founded case of wrongdoing	1	4	5	0	1
New reprisal complaints	43	24	29	28	30
Reprisal Complaints carried over from previous years	17	27	13	12	16
Cases referred to the Public Servants Disclosure Protection Tribunal	3	0	0	3	1

Sources: Table prepared using data from the Office of the Public Sector Integrity Commissioner of Canada, [2011–2012 Annual Report](#), p. 8; [2012–13 Annual Report](#), p. 8; [2013–14 Annual Report](#), p. 9; [2014–15 Annual Report](#), p. 9; and [2015–16 Annual Report](#), p. 12.

Since 2007, the Commissioner's Office is responsible to investigate disclosures of wrongdoing and all reprisal complaints related to a protected disclosure. Some witnesses, such as [Mr. Brown](#), suggested that the design of the dual roles of the Commissioner investigating disclosures and protecting whistleblowers place him in a situation of conflict

19 Office of the Public Sector Integrity Commissioner of Canada, [Guide – How am I Protected?](#)

of interest: “there’s a fundamental problem with the legislation in terms of the clarity and combination of roles of the Integrity Commissioner.”

He suggested properly embedding in the legislation the whistleblower protection regime rather than relying on one body to “handle everything.” In addition, [Mr. Yazbeck](#) agreed that there can also be a problem with the commissioner’s role as the investigator of wrongdoing and the decision maker on whether wrongdoing occurred or not.

[Michael. Ferguson](#), Auditor General, Office of the Auditor General of Canada, brought to the Committee’s attention to the fact that his Office cannot investigate reprisal complaints from employees of the Commissioner’s Office.

[Joanna Gualtieri](#), Director, The Integrity Principle, who testified as an individual, went on to say that, since its budget is not allocated in an independent fashion, the Commissioner’s Office “is entirely dependent on government, more specifically Treasury Board.” In the same vein, [Mr. Hutton](#) said the Commissioner, as an officer of Parliament, is “supposed to be completely independent of the bureaucracy, but he's not.” In [his](#) view, one problem with the investigation process used by the Commissioner’s Office is its frequent reliance on external service providers.

Finally, concerning resources, [Mr. Brown](#) believes it is essential for the Commissioner’s Office to have the resources it needs to fulfil its role.

1.1.2.4 Public Disclosures

Section 16(1) allows a public servant to make a disclosure to the public under certain conditions. First the public servant must have the right to make a disclosure either externally to the Commissioner’s Office or internally to his or her supervisor or senior officer. Second, there must also be no sufficient time to make a disclosure through the aforementioned disclosure mechanisms. Lastly, the public servant must believe on reasonable grounds that the subject matter of the disclosure is an act or omission that either constitutes a serious offence under Canadian law or constitutes an imminent risk of a substantial and specific danger to people or the environment.

Section 16(1.1) creates an exception to section 16(1) and prohibits the disclosure to the public of information subject to any restriction created by an Act of Parliament. However, section 16(2) stipulates that if a different legislation provides a public servant the right to make a disclosure, that disclosure will not be limited by conditions under section 16(1).

Concerning public disclosures, [Mr. Radford](#) noted that whistleblowing to the media likely implies “hardship” for the whistleblower because they are often not protected from reprisals, as was the case before the PSDPA came into force. Essentially, as explained by [Mr. Rousseau](#), unless the public servants meet the “exceptional requirements” defined in section 16 of the Act, if they suffer from reprisals, they are not protected because their disclosure of wrongdoing was not a “protected disclosure” under the Act.

In an attempt to provide context to public disclosures, [Ms. Gualtieri](#), voiced that:

Most of the whistle-blowers I've talked to, especially when you're talking about systemic wrongdoing ... spend a tremendous amount of effort trying to effect corrective action and be heard inside the organization. I did it for six years, right up to the minister's office.

Going to the media was not something that I relished. I had no experience in it, but what were my options? Going to the media was the last step ... Whistle-blowers do not run to the media....

Also, I think we have to remember that the media historically has been the channel or the avenue by which we, the public, and you, the politicians, have been informed about systemic wrongdoing.

1.1.3 Am I Protected?

Throughout the course of the study, the Committee was told that victims of reprisals may not be protected under the PSDPA if their disclosure of wrongdoing was not made following the prescribed guidelines of the Act. Generally, a “protected disclosure” under the Act is defined as a disclosure of wrongdoing, as defined by the Act, made in good faith by a public servant directly to their organization’s designated officer, to their supervisor or to the Commissioner. On this topic, [Mr. Radford](#) explained that in accordance with the PSDPA, “all persons who have made a protected disclosure are protected [from reprisals], whether or not their [allegation] of wrongdoing is founded, whether or not their claim of wrongdoing even has merit.”

[Mr. Cutler](#) recounted numerous failures of the Act to protect employees within the public service, including private contractors. He spoke of an apparent “lack of willingness” of the Commissioner’s Office to investigate certain disclosures and reprisal complaints. For example, he raised the issue of an employee’s reprisal complaint – in the form of termination of employment – that was rejected because he or she was no longer a public servant. In brief, it is the opinion of many witnesses, including [Mr. Cutler](#), that the act “completely fails to protect those it's [supposed] to protect. It's designed to protect senior bureaucrats, not the ordinary public servant.”

That said, section 11 of the PSDPA includes confidentiality requirements to ensure the protection of whistleblowers. Chief executives must take measures necessary to protect the identity of persons involved in the disclosure process – including witnesses and alleged wrongdoers – and the confidentiality of the information collected. Under section 22 of the PSDPA, the Commissioner holds the same responsibility towards the persons involved in the disclosure.

According to [Mr. Trottier](#), confidentiality is “one of the main tenets” of the Act; it ensures that disclosures of wrongdoing will be “treated with the appropriate degree of confidentiality” to guarantee whistleblowers’ protection. Conversely, a large number of witnesses, including [Mr. Hutton](#), claimed that the “strict confidentiality” protection is “completely bogus.” He explained that often, only a small number of people have access to the information disclosed in which case it is relatively easy to identify the whistleblower, especially if they were asking questions during the preliminary work necessary to make a

disclosure. In [Isabelle Roy](#)'s, General Counsel, Legal Affairs, Professional Institute of the Public Service of Canada, own words: "Anonymity often can't be protected.... There may be an attempt to keep the informer's identity confidential, but it's often impossible, despite people's best efforts and intentions."

1.1.3.1 Access to Legal Advice

Pursuant to section 22(a) of the PSDPA, it is the Commissioner's duty to provide information and advice regarding the making of a disclosure of wrongdoing. However, the Commissioner has the power to authorize free access to legal advice of \$1,500, and in exceptional circumstances of \$3,000, for public sector employees who are considering making a disclosure of wrongdoing, serving as a witness or alleging a reprisal.²⁰ [Mr. Friday](#) recognized that as an "independent, neutral, objective, investigative decision-making body," the Commissioner's Office "may not be necessarily perceived as the right body to provide advice." Thus, the Commissioner "make[s] the distinction between advice and information."

It can be difficult for a public servant to know how to proceed when they believe wrongdoing may be occurring in the workplace.²¹ Notwithstanding those difficulties, [Mr. Brown](#) indicated that "the entitlement to legal aid" in the Canadian legislation is a good precedent and should be preserved.

1.1.4 Investigations of Wrongdoing

1.1.4.1 Commissioner's Duty and Investigative Powers

Section 26 of the PSDPA identifies the purpose of investigations under the Act as that to bring the existence of wrongdoing to the attention of chief executives and to make recommendations concerning corrective measures to be taken by them. Investigations are also to be conducted as informally and expeditiously as possible.

Concerning the entire process of disclosures and investigations of wrongdoing under the Act, the Commissioner, according to section 22 must:

- a) Provide information and advice regarding the making of disclosures under the Act and the conduct of investigations by the Commissioner;
- b) Receive, record and review disclosures of wrongdoings in order to establish whether there is sufficient ground for further action;
- c) Conduct investigations of disclosures or appoint persons to conduct the investigations on his or her behalf;

20 PSDPA., s. 25.1.

21 OGGO, [Evidence](#), 1st Session, 42nd Parliament, 7 February 2017, 0923 (Carl Trotter, Assistant Deputy Minister, Governance, Planning and Policy Sector, Treasury Board Secretariat).

- d) Ensure that the right to procedural fairness and natural justice of all persons involved in investigations is respected;
- e) Protect, to the extent possible, the identity of persons involved in the disclosure process;
- f) Establish procedures for processing disclosures and ensure the confidentiality of information collected in relation to disclosures and investigations;
- g) Review the results of investigations into disclosures and report his or her findings to the persons who made the disclosures and to the appropriate chief executives;
- h) Make recommendations to chief executives concerning the measures to be taken to correct wrongdoings and review reports on measures taken by chief executives in response to those recommendations; and
- i) Receive, review, investigate and otherwise deal with complaints made in respect of reprisals.

However, according to section 23, the Commissioner cannot deal with a disclosure or begin an investigation when a person or body – acting under federal legislation other than the PSDPA – is dealing with the subject matter of the disclosure or the investigation, providing that this person or body does not do so as a law enforcement authority. Moreover, according to section 30(1) of the Act, the investigation powers of the Commissioner (sections 28 and 29 of the PSDPA) do not extend to information that is subject to solicitor-client privilege. Lastly, the Commissioner cannot use a confidence of the Queen’s Privy Council for Canada disclosed in violation of section 13(2) of the Act.

The Commissioner can issue a subpoena or summon an individual in the exercise of his or her powers. However, the Commissioner must, under subsection 29(3), before entering the premises of any portion of the public sector in the exercise of his aforementioned powers, notify the chief executive of that portion of the public sector. Under the Act, chief executives must provide public access to some information related to the wrongdoing in the course of an investigation, subject to restrictions created by other federal legislation.²²

To tend to its responsibilities, the Commissioner’s Office performs an admissibility analysis and investigates both disclosures of alleged wrongdoing and reprisal complaints. According to [Raynald Lampron](#), Director of Operations, Commissioner’s Office, since 2011, the Commissioner’s Office has investigated approximately 25% of the submitted disclosures of wrongdoing because “there [was] a valid reason not to deal with the disclosure” in 47% of cases and 3% of cases of disclosures of wrongdoing were not deemed sufficiently important by the Commissioner’s Office. Since 2013, Mr. Lampron reports that the Commissioner has not refused to investigate a disclosure because of the

22 PSDPA, s. 28(1).

delay criteria of subsection 24(1)d). As such, 11 case reports of founded wrongdoing were tabled before Parliament from 15 April 2007 to 10 February 2017, which stemmed from the receipt of 774 disclosures and the launch of 110 investigations. The Commissioner has tabled two reports of founded wrongdoings since then. [Mr. Radford](#) noted that not one decision of the Commissioner pertaining to the 13 cases of founded wrongdoing, either in admissibility analysis or investigation, was overturned by a federal court or federal court of appeal.

However, [Mr. Rousseau](#) added that, when wrongdoing is founded, the Commissioner cannot order corrective action, sanction the wrongdoers, launch criminal proceedings or seek injunctions to put an end to ongoing misconduct. [Mr. Yazbeck](#) stated that, even though the federal government has decades of case law on the process for investigating complaints and referring them to the Canadian Human Rights Tribunal under the *Canadian Human Rights Act*, the investigation process used by the Commissioner's Office "is flawed," "lacks thoroughness," "view[s] whistle-blowers with suspicion," is often "procedurally unfair," has "a tendency to find ways not to deal with a complaint or dismiss it" and fails to take "a contextual or a subtle approach."

A. Investigation Time Frames

Under the Act, there are no provisions concerning the time frame the Commissioner can and should take to complete the admissibility analysis or investigations of disclosures under the Act. Nevertheless, [Mr. Friday](#) said the Commissioner's Office has established service standards for processing cases. It aims to finish an initial case analysis within 90 days and complete an investigation within one year in 80% of cases. He reported that, to date, the Commissioner's Office has met its service standards over 90% of the time.

In cases where those norms were not respected, such as in the case of [Don Garrett](#), a contractor whistleblower that was exposed to asbestos during the course of his work for the federal government, the investigation process "turned out to be a nightmare".

[Mr. Friday](#) expressed that part of the challenge for his Office is to ensure that they have the resources and service standards necessary to prevent delays. The work of his Office is substantial as certain cases may have 20 or 30 witnesses, some of them unavailable and others seeking legal representation. All these factors contribute to the delays. Nonetheless, his Office also has three staff members meet every three weeks to review files to identify and manage delays appropriately.

According to [Ms. Gualtieri](#), "it is naive to believe that an office like [the Commissioner's] has the power, independence, and resources to take on cases of monumental impact and embarrassment to government. By definition, it is not a failing of the commissioner, but of the structure of the commission itself."

Furthermore, according to [Ms. Daviau](#), the lack of resources at the Commissioner's Office has led the organization to outsource certain investigations and creates an accountability loophole in which the rules, regulations and guidelines of the government do not apply to contracted investigators.

B. Commissioner's Jurisdiction

Although certain provisions under the Act apply to contractors of the federal government, according to Section 34 of the Act, if the Commissioner is of the opinion that a matter under investigation would involve obtaining information that is outside the public sector, he or she must cease that part of the investigation. [Mr. Friday](#) admits that this section has interfered with his ability to complete an investigation in the past, but that such a situation rarely happens. His Office has interpreted the Act as allowing them to ask for information from the private sector, but not demand it, although he would prefer to have the authority to request it under law.

In the public sector, the Commissioner has the authority to demand access to information and facilities, although he must first notify the appropriate chief executive. According to [Mr. Cutler](#), it is a problem that the Commissioner's Office informs federal departments and agencies before he or she visits their offices to consult documents concerning investigations into disclosures because managers could destroy evidence in the meantime. Questioned about the possibility of evidence going missing or being destroyed, [Mr. Friday](#) responded that he does not believe that there is an issue with the notification requirement and sustains that it has so far never proven "deleterious" to an investigation.

C. Commissioner's Discretionary Authorities

Various sections under the Act provide the Commissioner with the discretionary power to refuse to investigate a disclosure of wrongdoing. According to section 24(1), the Commissioner may refuse to commence or continue an investigation if he or she is of the opinion that:

- a) The disclosure has been or could be more appropriately dealt through a different legal procedure;
- b) The disclosure is not sufficiently important;
- c) The disclosure was not made in good faith;
- d) The length of time that has elapsed is such that dealing with the disclosure would serve no useful purpose;
- e) The subject matter of the disclosure results from a balanced and informed decision-making process on a public policy issue; or
- f) There is a valid reason for not dealing with the disclosure.

Section 23(1) also precludes the Commissioner from investigating a disclosure of wrongdoing (under section 33) if a person or body acting under another Act of Parliament is dealing with the subject matter of the disclosure or the investigation other than a law enforcement authority. [Mr. Radford](#) notes that this section only prevents the Commissioner from duplicating a wrongdoing investigation, but not a reprisal one, and [he](#) added that

even if an investigation has been dismissed, the public servant is always protected against reprisals.

[Mr. Radford](#) said that the Commissioner's Office accepts investigations of systemic harassment situations. For example, if a senior management bullies an entire unit or office. In such a case, the Commissioner's Office would potentially consider the case as meeting the definition of wrongdoing in matters of gross mismanagement or a serious breach of the code of conduct. However, if a public servant presents a single situation of harassment, the Commissioner's Office will generally encourage them to file a complaint under the harassment policy.

Because a large number of disclosures are dismissed at the admissibility analysis stage, [Mr. Devine](#) supported that "whistle-blowers have a toothless investigative agency ... that has a blank cheque not to 'deal with' complainants' cases or their rights, that has immunity for its actions, and that operates in total secrecy." In the opinion of [Ms. Daviau](#), "the Commissioner's investigation processes are often unfair, lacking in thoroughness, and insensitive to whistle-blowers." [Mr. Rousseau](#) testified, based on his experience defending whistleblowers that the investigative processes should be "fair and much more transparent."

[Mr. Devine](#) said the fact that the Commissioner's Office has immunity for its actions and "operates in total secrecy" contradicts the PSDPA's aim to improve transparency. [He](#) added that there is no limit on the Commissioner's discretion and that, unlike his American counterpart, the Commissioner has no obligation to help whistleblowers. [Mr. Rousseau](#) argued that the Commissioner can "refuse to deal with any disclosure if the commissioner believes that the whistle-blower is not acting in good faith, or it is not in the public interest, or for any other valid reason."

1.1.4.2 Auditor General of Canada

Pursuant to section 14 of the PSDPA, federal public servants may disclose wrongdoings that concern the Commissioner's Office to the Office to the Auditor General of Canada. The latter has the same powers and immunities as the Commissioner for dealing with disclosures.

According to [Mr. Brown](#), it is important for the Auditor General of Canada to play a role in protecting public servant whistleblowers. [Mr. Ferguson](#) noted that, under the PSDPA, he cannot investigate complaints of reprisals from employees of the Commissioner's Office or seek information from outside the public sector.

1.1.5 Corrective Measures

Under section 9 of the PSDPA, a public servant is subject to appropriate disciplinary action in addition to, and apart from, any penalty provided for by law, including termination of employment, if he or she commits a wrongdoing. A wide range of disciplinary actions can be taken although [Mr. Trottier](#) admitted it may be limited to a simple reprimand. [Ms. Stevens](#) communicated that notwithstanding the provisions of section 9, corrective measures can be taken without a finding of wrongdoing. These

corrective measures would update processes to ensure a problem does not occur again. At other times, however, [Mr. Trottier](#) sustained that corrective measures were not necessary, for example, when “the employee or the manager is gone; the situation has self-corrected.” Other examples may include misunderstandings or the natural termination of a contract.

One of the main shortcomings identified in the context of corrective measures is that the Commissioner can only make recommendations on the appropriate corrective measure to be taken, based on his investigation, such that the deputy head, as explained by [Ms. Smart](#), has to begin a completely new investigation into the wrongdoing to then order corrective measures. With regard to the internal investigations of wrongdoing, [Ms Smart](#) suggested that the legislation may lack direction and that it could compromise the appropriateness of corrective measures taken. However, [she](#) insisted that appropriate corrective measures would not be deterred by potential conflicts of interest since a third party can be hired in such instances. For his part, [Mr. Rousseau](#) suggested that the Act “does not ensure corrective action to end wrongdoing.” He then argued that the Commissioner’s inability to “order corrective action, sanction wrongdoers, initiate criminal proceedings or apply an injunction to halt ongoing misconduct” is a serious gap in the current legislation.

1.2 Solutions Proposed by Witnesses

1.2.1 Expand the Definition of the Term ‘Wrongdoing’

According to the [International Best Practices for Whistleblower Policies](#), developed by Mr. Devine, the second best practice is the “subject matter for free speech rights with ‘no loopholes’.” In his opinion, whistleblower rights should cover all and any type of illegality, gross waste, mismanagement, abuse of authority, substantial and specific danger to public health or safety as well as any other activity or information that would undermine the mission of the organization to the public and its stakeholders. This definition would permit early protection and identification of wrongdoing or potential wrongdoing. [Anna Myers](#), Director, Whistleblowing International Network, testifying as an individual, supports that this would create a safe alternative to silence.

In response to a Committee member’s question, [Mr. Devine](#), [Mr. Devitt](#) and [Mr. Worth](#) all explained that nearly all foreign whistleblower protection laws exclude personal injustices. For example, the Irish legislation excludes disclosures that are directly related to the employee’s contract of employment to ensure that personal grievances are not mixed with public interest disclosures.

1.2.2 Increase the Number of Protected Disclosure Avenues

According to the [International Best Practices for Whistleblower Policies](#), the first best practice is the “context for free expression rights with ‘no loopholes’.” This provision entails that any disclosure which identifies significant misconduct or that would assist in carrying out legitimate compliance functions should be protected. Mr. Devine criticized loopholes in the legislation for “form, context, time or audience.” He also notes that

disclosures in the workplace are always protected as retaliation often takes place in response to “duty speech” when a public servant may have only disclosed his suspicions to a co-worker. [He](#) qualified the requirements of the Act as “arbitrary restrictions” at odds with international best practices and claimed that they create a disincentive for whistleblowers to come forward.

Other witnesses such as [Mr. Worth](#) and [Duff Conacher](#), Co-Founder of Democracy Watch, likewise maintained that multiple disclosure channels should be available. A protected disclosure, according to [Mr. Brown](#), should include

[a]ny direct disclosures to a regulator or an integrity agency [and] should be automatically protected, whether they've gone internally or not. Disclosures to third parties, whether they're unions, civil society organizations, or the media, should be protected in any circumstances where either those internal or regulatory disclosures were not adequately dealt with and there are reasonable grounds for concluding that after a reasonable time, or where the court or tribunal can be reasonably satisfied that there was no safe mechanism, either internally or to the regulator, for somebody to disclose.

He went on to say that, “[i]f a person has reasonable concerns that there was no safe way to disclose internally or to a regulator, that person should be entitled to a public-interest defence if he or she is prosecuted for a breach of confidence or any other remedy.”

1.2.2.1 An Accountable Internal Disclosure Mechanism

[Mr. Friday](#) proposed amending section 12 of the PSDPA to expand the definition of “supervisor” to include any supervisor in the reporting line, up to and including the deputy minister, and the manager responsible for the subject of the disclosure. He believes that such an amendment would increase employee trust while making the process less constraining. However, [Mr. Devine](#) suggested that this proposal is still too restrictive since, before making a disclosure, public servants must research the matter to ensure their allegations are credible and may therefore suffer reprisals even before they can make a protected disclosure to a supervisor. In addition, [Ms. Smart](#) argued that making a protected disclosure should be as simple as possible for the public servant. Additionally, [Mr. Radford](#) assured the Committee that the Commissioner’s Office tries as much as possible “to help people who have made a protected disclosure by using the broadest possible definition of ‘protected disclosure.’”

Some witnesses pointed out that, to avoid conflicts of interest, the internal disclosure units of federal departments and agencies must report to an external oversight body such as the Commissioner’s Office.²³ [Mr. Brown](#) specified that the latter would be responsible for not only compiling statistics, but also assessing situations and intervening if necessary. [He](#) believes that, as a result, the Commissioner’s Office would be more proactive, rather than reactive as it is today.

23 OGGO, [Evidence](#), 1st Session, 42nd Parliament, 3 April 2017, 1720 (Mr. A.J. Brown, Professor, Griffith University, As an individual) and [Evidence](#), 1st Session, 42nd Parliament, 4 April 2017, 0955 (Mr. Mark Worth, Manager, Blueprint for Free Speech, As an individual).

Moreover, [Mr. Brown](#) contended that the whistleblower protection system should be embedded in both the governance of the Commissioner's Office and the integrity systems of federal departments and agencies. To acknowledge and recognize that whistleblowers may not be aware of the severity of the information they dispose of, [he](#) also suggested extending protection under the Act to public-interest disclosures made to the police, for example.

1.2.2.2 Clarifying Public Disclosure Provisions

In situations of conflict of interest and obstruction of justice, [Mr. Devine](#) argued that a whistleblower should have the right to address the public directly. In Ireland, for example, whistleblowers can address the media or Member of Parliament when the internal disclosure channel is compromised, according to [Mr. Devitt](#). In such circumstances, [Mr. Brown](#) is also of the opinion that whistleblowers should be protected from reprisals even when they have not first made a disclosure internally and [he](#) added that the Canadian legislation is "deficient" in this regard.

1.2.3 A Merit-Based Appointment

[Mr. Cutler](#) argued that the process for appointing the Commissioner must be revamped. [Mr. Hutton](#) agreed and suggested appointing a respected and experienced individual from the private sector rather than someone who has worked solely in the public sector, making the appointment process more open and transparent, as in the United States, and giving the Commissioner a very clear mandate to expose wrongdoing. Mr. Conacher proposed in his [brief](#) to the Committee that the person appointed as Commissioner must have legal experience and a record of enforcing whistleblower protection, ethics rules or similar accountability laws. [He](#) added that the appointment process should be merit-based, open, transparent and independent, and it should be controlled by an independent committee of individuals from outside government and politics chosen by all the political parties represented in Parliament. This committee would assess the candidates and submit to Cabinet a short list from which the Commissioner must be selected. This system is similar to that currently used to appoint provincial judges in Ontario.

In his [brief](#), Mr. Conacher also proposed forbidding the renewal of the Commissioner's fixed term. He further suggested that the

[C]ommissioner must be clearly designated as the trainer (including by issuing interpretation bulletins), investigator and enforcer of all government policies (other than the policies enforced by the Auditor General) and must be required to conduct training sessions, conduct regular random audits of compliance and to investigate whistleblower complaints about violations of these policies...

During its study on the *Main Estimates 2017-18*, the Committee was informed by [Chantal Maheu](#), Deputy Secretary to the Cabinet, Plans and Consultations, Privy Council Office, that

[t]he government announced a new approach to ensure open and transparent merit-based selection processes for [Governor in Council] appointments, with greater access for Canadians. The new approach now applies to more than 1,500 positions, including heads, vice-chairs, members of agencies and boards, chairpersons, chief executives, and agents and officers of Parliament.

Since the Commissioner is an agent of Parliament, these changes will apply to his or her nomination.

1.2.4 Repealing the Requirement of Good Faith

Motivation is not relevant. What is relevant is whether a wrongdoing or reprisal took place.

*Joe Friday,
Commissioner,
Office of the Public Sector Integrity Commissioner*

The vast majority of witnesses, including [Mr. Brown](#), [Mr. Yazbeck](#) and the [Commissioner's Office](#), supported eliminating the subjective requirement of good faith imposed on a whistleblower making a protected disclosure under the PSDPA. The Commissioner, [Mr. Friday](#), also claimed that he has never rejected a disclosure of wrongdoing on the basis of “bad faith” and finds it an unnecessary disincentive.²⁴

In lieu of this “outmoded” requirement, in the opinion of [Mr. Devine](#), a reasonable belief test should be sufficient to prevent intentional false disclosures of wrongdoing, which are never protected. As such, [Mr. Devitt](#) proposed that as long as a person has reason to believe that what they are reporting is true, they should be protected.

1.2.5 Ensuring Effective Protection

In order to ensure the effective protection of whistleblowers and all parties involved in supporting the disclosure, such as expert witnesses and coworkers, the following suggestions were made to the Committee.

Firstly, as explained previously, all witnesses, including [Mr. Brown](#), were of the opinion that disclosures for which there is an honest and reasonable belief should be protected irrespectively of the accuracy of the allegations or the motivation of the whistleblower. In this endeavour, the Commissioner proposed in a written [brief](#) to the Committee to amend subsection 2(1), paragraph 19.3(1)(d), and paragraph 24(1)(c) of the PSDPA to remove the words “good faith.”

Secondly, in [Mr. Conacher](#)'s view, the difficulty to access legal advice or any kind of procedural advice to make a protected disclosure suggests that an office or legal clinic, to

24 OGGO, [Evidence](#), 1st Session, 42nd Parliament, 14 February 2017, 0845 (Joe Friday, Commissioner, Office of the Public Sector Integrity Commissioner of Canada).

which public servants and members of the public could, anonymously, seek advice and be protected by default, even before making the disclosure, is necessary. If no such office or legal clinic is available, Mr. Conacher suggested that funding for legal fees to the whistleblower be comprehensive. An alternative suggestion, from the [Commissioner's Office](#), is to grant the President of the Treasury Board greater flexibility with the maximum monetary limit for legal advice that can be provided to whistleblowers. Furthermore, the Commissioner's Office also suggested to amend subsection 25.1(1)(e) of the Act so that former public servants may also receive funds for legal advice.

Thirdly, it was suggested that a comprehensive disclosure system should maximize the number of disclosure avenues available to whistleblowers. [Mr. Worth](#) clarified that internal disclosures should be encouraged when it is reasonable and possible but insisted that if an employee has reason to be uncomfortable disclosing internally, then they should be able to make a disclosure directly to the Commissioner or a different oversight agency. In cases of extreme emergencies, including the threat that evidence may be destroyed; the employee should be entitled to address the public without first reporting internally or to the Commissioner. In such situations, [Mr. Brown](#) suggested that a whistleblower should have the right to a public-interest defence or different remedies if he or she is prosecuted for a breach of confidentiality.

Finally, Mr. Conacher recommended in his [brief](#) that, when the Commissioner

refers a whistleblower complaint about the violation of another law, regulation or policy for which a designated investigative and enforcement agency exists, the commissioner must be required to ensure that the agency investigates the complaint within 90 days, and if an investigation does not begin within this time frame [then] the commissioner must be required to investigate the complaint.

1.2.6 Improving Investigation Processes

Concerning the matters of conflicts of interest in the midst of internal investigations mentioned by [Mr. Chamberlain](#), it was suggested by [Ms. Smart](#) to include provisions in the Act to guide the internal investigation process and ensure it is effective in achieving the purposes of the Act. [Mr. Ferguson](#) noted that one of the solutions available to employees who have identified problems with a department or agency's internal process is to file a complaint with the Commissioner's Office.

In its [brief](#), the Public Service Alliance of Canada proposed making the investigation process used by the Commissioner's Office more transparent and subject to Access to Information requests, and removing the Commissioner's discretion to deny disclosures of wrongdoing without conducting an investigation.

[Mr. Brown](#) said he supports a change to subsection 23(1) of the PSDPA, which prevents the Commissioner from taking up cases that another person or body is reviewing, calling it a retrograde provision. He added that, in other jurisdictions, commissioners have the discretionary authority to intervene as they see fit. Furthermore, he argued that, like numerous other whistleblower protection and oversight bodies around the world, the Commissioner's Office is very reactive, responding only to disclosures and complaints

received rather than being proactive. Yet, in his view, “[t]he only way the system will work is if the Integrity Commissioner or the oversight agency has a very active role in making sure that those systems and procedures at the agency level are in place, that they’re working, and that the discretions being applied by CEOs and their staff are actually fair and reasonable.”

According to [Mr. Devine](#), the Commissioner’s Office should be able to conduct informal investigations “so that there’s a legitimate channel for closure as an alternative to due process proceedings that many unemployed whistle-blowers can’t afford.”

Concerning the Commissioner’s investigative powers, many witnesses, such as Mr. Conacher, in a [brief](#), suggested that the Commissioner should have punitive rights to ensure that wrongdoing ceases. Examples of such punitive powers include:

- The power to order chief executives and/or deputy heads to take corrective action;
- The power to keep chief executives and/or deputy heads accountable to report on corrective actions; and
- The power to penalize any chief executive and/or deputy head with a fine, suspension or termination of employment if the chief executive and/or deputy head does not comply with the Commissioner’s order, if retaliation action against a whistleblower was taken or if the chief executive/deputy head did not maintain a system that complies with the law.

Moreover, the [Commissioner’s Office](#) requested that subsection 33(1) of the Act be amended to provide the Commissioner with the power to initiate an investigation based on information obtained in the course of a reprisal investigation.

With regard to the Commissioner’s jurisdiction to investigate, [Mr. Friday](#) suggested that repealing section 34 of the Act which limits the authority of the Commissioner to request and use evidence obtained outside the public sector would increase public confidence. This technical improvement was supported by all witnesses that testified on this topic before the Committee, including [Mr. Brown](#).

Regarding accountability measures, [Ms. Daviau](#) suggested, with urgency, to close the accountability loophole outsourcing investigations create. Furthermore, [Ms. Myers](#) proposed that the Commissioner’s Office adopt the practice of the United States Office of Special Counsel to not only provide timely feedback to those who make disclosures, but also consult them during its investigation. She said that whistleblowers “are incredibly powerful in terms of making sure that the investigation and the ideas on how you should resolve it are really clear.”

From a regulation perspective, a number of witnesses, including [Mr. Brown](#) and [Mr. Worth](#), proposed or supported the introduction of an oversight agency responsible to

maintain the Commissioner as well as departments and agencies accountable for the way they handle cases. [Mr. Conacher](#) also suggested that the Protection Commissioner or agency could be responsible to conduct regular audits and submit news releases of the investigation results in a timely manner, and that the Auditor General of Canada conduct an independent audit of the entire whistleblower protection system every three years. As for potential conflicts of interest from the Commissioner's Office, [Mr. Brown](#) is of the opinion that technical improvements to the Act will have limited success if the roles of the Commissioner are not clearly defined in the legislation, distinguishing his investigative role from his duty to protect whistleblowers, and an accountability reporting relationship is not established.

Regarding the Auditor General of Canada's role, [Mr. Friday](#) suggested expanding that office's powers so that it can receive disclosures from the public and reprisal complaints concerning the Commissioner's Office. As a result, the Auditor General of Canada would have "a more complete set of powers ... vis-à-vis their oversight of [the Commissioner's] office."

[Mr. Ferguson](#) outlined two solution options to enable the Auditor General of Canada to investigate reprisal complaints, including the one suggested by Mr. Friday. However, Mr. Ferguson asserted that expanding his office's mandate could increase the number of disclosures and have a significant impact on its resources. For example, over the past four fiscal years, his office's investigations under the PSDPA cost between \$32,814 in 2015-2016 and \$876,979 in 2013-2014. As of February 2017, the costs for fiscal year 2016-2017 were \$136,901.²⁵ The second option would be to give the Auditor General of Canada the authority to appoint an independent investigator to review complaints, as it is the case for the Information Commissioner and the Privacy Commissioner.

1.2.7 Improving the Application of Corrective Measures

According to the [International Best Practices for Whistleblower Policies](#), the 19th best practice is to establish a "credible corrective action process." Mr. Devine contends that two elements are necessary for an internal disclosure process to be legitimate. The first is that the whistleblower must have the opportunity to review and comment on the draft report intended to resolve the alleged misconduct, as he or she is the most knowledgeable and concerned person in the situation. The second is that transparency must be mandatory. This means that, unless the whistleblower objects, the whistleblower's comments must be included in the final report and the report released to the public.

Many witnesses, such as [Mr. Devine](#), argued that the only way to effectively prevent reprisals and future wrongdoings is to ensure that the authors of wrongdoings or acts of reprisals face consequences for their actions. Speaking about the importance of this point, [Mr. Worth](#) recalled an incident in Bosnia-Herzegovina where the threat of a fine, in this case of 5,000 to 10,000 euros, was a sufficient incentive for an employer to reinstate a whistleblower that had made a protected disclosure. To prevent future

25 Office of the Auditor General of Canada, *Note to the Standing Committee on Government Operations and Estimates: Review of Public Servants Disclosure Protection Act*, p. 3. [Brief submitted to OGGO on 20 February 2017]

wrongdoing, [Mr. Conacher](#) suggested that wrongdoers not be subject to confidentiality and be named in each case report of founded wrongdoing. In his opinion, the Commissioner should have the power to levy fines and compensate whistleblowers, and whistleblowers should be allowed to go directly to the courts if the Commissioner does not deal with their complaint properly. In addition, he said the Commissioner's Office should have the power to require executives of federal departments and agencies to correct their internal disclosure processes and awareness activities, to conduct audits, to publicly rule on all complaints in a timely manner and to publish the names of wrongdoers.

1.2.8 How Will the Public Know That Justice Is Administered

1.2.8.1 Public Recognition Program and Reward System

[Mr. Chamberlain](#) explained that, in the United States, a person who launches a prosecution for wrongdoing committed in the public service and successfully recovers money for the government receives part of the amount recovered. He said the American system appears to work very well, as the United States has recovered billions of dollars this way, and [Mr. Devine](#) sustained that there is no evidence of a surge of false claims since this system's implementation. Accordingly, in the [brief](#) submitted by the Association of Canadian Financial Officers, it was suggested that the PSDPA be amended to include a provision that would give whistleblowers a percentage of the amount recovered by means of the disclosure.

[Mr. Conacher](#) argued that compensating whistleblowers in cases where their allegations are founded may be controversial, but he wanted the Committee to know that the Ontario Securities Commission offers compensation of up to \$5 million for fraud disclosures.

Lastly, [Mr. Friday](#) stated that he has already discussed with his team the possibility of publicly presenting awards for disclosing wrongdoing as does the United States Office of Special Counsel, the American counterpart of the Commissioner's Office. He went on to say that such an initiative would pose certain challenges, including the preservation of confidentiality surrounding disclosures.

1.3 Committee's Observations and Recommendations

First and foremost, the Committee welcomes the establishment of a whistle-blowing line in April 2017, the [Federal Contracting Fraud Tip Line](#), for wrongdoing in government contracts and real property agreements by PSPC, the RCMP and the Competition Bureau. It hopes that this initiative will facilitate the reporting of wrongdoing involving these contracts and agreements, and allow the federal government to identify wrongdoers as well as recover unfairly allocated funds.

The Committee is of the opinion that whistleblowing should not only identify acts of wrongdoing, but also, to the extent possible, prevent wrongdoings by allowing whistleblowers to raise reasonable concerns of actions of wrongdoing, even at a negligence level, and in this way maintain public confidence at a more rigorous standard.

To assist public servants in this endeavour, the Committee believes that legal and general advice should be made available to them, at no cost, as necessary for the proper handling of potential disclosures of wrongdoing. However, to address some of the difficulties faced by whistleblowers, the Committee is also of the opinion that the disclosure mechanisms should be simplified such that a public servant can understand the Act and the definition of wrongdoing so he or she is not dependent on legal advice to navigate the system.

Additionally, the Committee recognizes that it is important for federal public servants to be able to disclose wrongdoings in their organizations and encourages federal departments and agencies, including agencies that are not covered by the PSDPA, to strengthen their internal disclosure processes by providing them with the resources they need to function properly and by carrying out regular evaluations in co-operation with the Treasury Board Secretariat. However, to ensure departments and agencies' internal disclosure processes are robust and independent, and in particular, to mitigate the risk of conflicts of interest, the Committee believes that changes to the way federal departments and agencies are held accountable are needed.

Moreover, the Committee believes that, for public servants to be willing to disclose wrongdoings, they must be able to confide in any manager they trust within the organization. Therefore, the PSDPA should not limit public servants to making disclosures to specific individuals such as their immediate supervisor.

In the Committee's view, there is a real risk of conflicts of interest arising from the fact that disclosures are handled by federal departments and agencies, and that the Treasury Board Secretariat is responsible for overseeing the internal disclosure process. To address this serious deficiency, the Committee believes the Commissioner's Office should be responsible for assessing these disclosures, intervening if necessary and evaluating the internal process as a whole while making recommendations to federal departments and agencies and following up with them in a rigorous fashion.

Furthermore, the Committee acknowledges the important role of the Commissioner's Office in offering an alternative to whistleblowers who prefer an external disclosure mechanism and in receiving anonymous disclosures from public servants and members of the public. However, the Committee believes that some of the functions of the Commissioner's Office should be revamped to make it more proactive. The Commissioner's powers should be expanded so that he or she can intervene in cases that are before another person or body to ensure cases are resolved in a timely manner.

The Committee also appreciates the Auditor General of Canada's essential work and believes that his role should be expanded. First, the Auditor General of Canada must have the power to receive disclosure from the public and reprisal complaints concerning the Commissioner's Office and be given the authority to investigate these complaints. Second, the Auditor General of Canada should regularly audit the whistleblower protection system as a whole. Third, to enable the Auditor General of Canada to effectively fulfil this expanded role, the Office of the Auditor General of Canada should receive additional financial resources.

Finally, the Committee believes that the Commissioner should be appointment following an open, transparent and merit-based selection process.

Therefore, the Committee recommends that:

RECOMMENDATION 1

The Government of Canada amend the *Public Servants Disclosure Protection Act* in order to:

- A. Clarify and broaden the definition of the term “wrongdoing;”**
- B. Broaden the definition of the term “supervisor” to enable public servants to make a protected disclosure to any manager, within their organization;**
- C. Ensure the Public Sector Integrity Commissioner conducts investigations of disclosures of wrongdoing and reprisal complaints in a timelier manner;**
- D. Repeal the requirement of “good faith” for making a protected disclosure of wrongdoing(s);**
- E. Ensure that a whistleblower disclosing wrongdoing is protected as long as the whistleblower has cause to reasonably believe that what he or she is disclosing is true;**
- F. Expand the Auditor General of Canada’s mandate to receive disclosures of wrongdoing from the public and reprisal complaints concerning the Office of the Public Sector Integrity Commissioner, with all the related powers and duties of the Public Sector Integrity Commissioner;**
- G. Provide the Office of the Public Sector Integrity Commissioner and the Office of the Auditor General of Canada, in the course of an investigation, additional investigative powers, including the authority to demand and use evidence obtained outside the public sector, that are enforceable through a Federal Court order;**
- H. Explicitly mandate managers and supervisors in federal departments and agencies with a duty to protect and support employees who made a disclosure, any person that helped him or her as well as witnesses and people mistaken as whistleblowers;**
- I. Ensure that the Public Sector Integrity Commissioner must exercise his authority to intervene in cases being considered by**

other bodies in accordance with the ruling of 17 January 2017 of the Federal Court of Appeal in the case *Therrien v. Attorney General of Canada* (2017 FCA 14);

- J. Provide the Public Sector Integrity Commissioner with the authority to commence an investigation of wrongdoing that is not being addressed in existing processes based on evidence obtained in the course of a reprisal investigation;
- K. Allow all persons involved in aspects of government operations, including contractors and former public servants, to make protected disclosures of wrongdoing to the Public Sector Integrity Commissioner; and
- L. Allow the Public Sector Integrity Commissioner to request corrective actions to address wrongdoing uncovered by investigations.

RECOMMENDATION 2

The Government of Canada provide regular education and training on the *Public Servants Disclosure Protection Act* to ensure that employees are aware of the disclosure channels and resources available to them as well as their rights.

RECOMMENDATION 3

The Government of Canada give the Office of the Public Sector Integrity Commissioner the mandate to protect whistleblowers and the authority to intervene in mishandled cases as well as to oversee, evaluate and introduce improvements to the internal disclosure process of the federal public service to address conflicts of interest.

RECOMMENDATION 4

The Government of Canada appoint the Public Sector Integrity Commissioner following an open, transparent and merit-based selection process.

PART II – PROTECTING THOSE THE DISCLOSURE RENDERS VULNERABLE

*Small breaches or small failures in duty to protect and support
can lead to the destruction of an entire career.*

[A.J. Brown](#),

Professor, Griffith University, As an Individual

2.1 Provisions of the Act to Protect Whistleblowers

2.1.1 Duty to Protect and Support

[Mr. Brown](#) explained that in other jurisdictions, recent whistleblower protection laws may be framed such that not only direct and deliberate reprisals are forbidden, but also those that occur because of a failure on somebody's part to fulfill a duty to protect and support.

The duty to protect and support, whether at common law or by virtue of legislation, obliges employers to provide employees with a safe working environment. Under certain circumstances, reprisals suffered by a public servant in response to whistleblowing – harassment, for example – could engage an employer's duty to protect and, if an employer violates that duty, trigger legal consequences.

In common law, an employer's duty to protect is derived from an implicit condition of any contract of employment.²⁶ There is precedent in Canadian case law for including personal harassment of an employee within the general duty to protect.²⁷ Personal harassment could take multiple forms, including threats, verbal abuse, turning employees against each other by spreading false rumours, or putting an employee into intolerable or demeaning working conditions.²⁸ Its inclusion in the duty to protect requires that employers take reasonable steps to "prevent employees from being harassed, bullied, or otherwise personally intimidated by other employees, customers, or other visitors to the work site."²⁹ Should an employer fail to take such steps, and provided no worker's compensation legislation bars the employee from initiating a common law action, the employer could be liable to pay damages to the employee for violating one of the conditions of the employment contract.

26 Geoffrey England, *Individual Employment Law*, 2nd ed (Toronto: Irwin Law, 2008), p. 100.

27 [Haggarty v. McCulloch](#), 2002 ABPC 3 at para. 19-20.

28 Geoffrey England, *Individual Employment Law*, 2nd ed (Toronto: Irwin Law, 2008), p. 98.

29 *Ibid.*

Numerous federal and provincial legislations impose upon employers an explicit duty to protect their employees. This is the case, for example, of the [Canada Labour Code](#) (the Code), which applies to the federal service. According to [section 124](#) of the Code: “[e]very employer shall ensure that the health and safety of every person employed by the employer is protected.”

More specifically, section 125(1)(z.16) of the Code compels employers to prevent and protect employees against violence at the work place in conformity with regulations. According to section 20.2 of the [Canada Occupational Health and Safety Regulations](#) (the Regulations), work place violence constitutes any action, conduct, threat or gesture of a person towards an employee in their work place that can reasonably be expected to cause harm, injury or illness to that employee.³⁰

The duty to protect employees from work place violence should not be limited to the prevention of physical harms, injuries or illnesses and exclude impacts on the mental health of an employee. Indeed, according to Geoffrey England, such an exclusion would amount to unlawful discrimination on the basis of mental disability under section 15 of the *Canadian Charter of Human Rights and Freedom*.³¹

[Section 20.3](#) of the Regulations compel employers to develop a work place policy setting out obligations of the employer regarding, notably, the prevention of work place violence and the provision of assistance to employees exposed to it. Employers aware of work place violence or alleged work place violence must try to resolve the matter with the employee as soon as possible and, if the matter is unresolved, appoint a competent person to investigate the matter and report to the employer by writing. The employer must, among other things, adapt or implement controls to prevent the recurrence of work place violence (section 20.09 of the Regulations). A person who contravenes to his or her duty to prevent work place violence in conformity with the Regulations is guilty of an offence, unless he or she can prove having exercised due care and diligence to avoid the contravention. Depending on the circumstances, the guilty party is liable to a fine of not more than \$1 million and to an imprisonment for a term of not more than two years.³²

30 The *Canada Occupational Health and Safety Regulations* do not specifically define harassment. Compare with *Act Respecting Labour Standards*, R.S.Q., c. N.1.1, (defining “psychological harassment” as “any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures, that affects an employee’s dignity or psychological or physical integrity and that results in a harmful work environment for the employee,” s. 81.18); and *Occupational Health and Safety Act*, R.S.O. 1990 (defining “workplace harassment” as “engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome,” s. 1).

31 Geoffrey England, *Individual Employment Law*, 2nd ed (Toronto: Irwin Law, 2008), p. 101.

32 [Canada Labour Code](#), R.S.C., 1985, s. 148(1)–(4).

2.1.1.1 Ramifications of a Disclosure

[D]epartments spare no effort and do everything they possibly can to track down the traitor, the leaker. That's their attitude. There's a very strong likelihood that very quickly the whistle-blower's cover will be blown and they'll be subject to reprisals.

David Hutton,

Senior Fellow, Centre for Free Expression, As an individual

Regarding the ramifications of a disclosure, [Mr. Rousseau](#) stated that federal public servants hesitate to make disclosures because, “[w]hen they do, they often experience great sacrifice in their personal and work lives. It sends a powerful message to others to remain silent.” Similarly, all the whistleblowers and whistleblower advocates who testified before the Committee spoke about the negative consequences of disclosures on the work and family lives, mental and physical health, and finances of whistleblowers.³³ For example, [Stan Korosec](#), who appeared as an individual and who filed a reprisal complaint with the Commissioner’s Office while he was a public servant at the Blue Water Bridge Authority, told the Committee that after making his disclosure he lost his job and his benefits and went through a great deal of stress.³⁴ Another whistleblower, [Don Garrett](#), D.R. Garrett Construction Ltd., testifying as an individual, expressed that when he reported wrongdoing, “instead of acknowledging the problem, [he] was treated as the problem.”

[Ms. Daviau](#) spoke about a few disclosure cases, including one involving three scientists who blew the whistle about the veterinary drug approval process at Health Canada because they believed that drugs administered to livestock can cause illnesses in humans. She lamented the fact that after 15 years in the courts the case has still not been resolved.

Conversely, [Mr. Chamberlain](#) reported that, in many cases, the person responsible for taking reprisals following a disclosure of wrongdoing receives “a slap on the wrist” and moves on to another department.

Finally, based on the effectiveness of the Act thus far, [Mr. Korosec](#) claimed that if a public servant sought his advice about disclosing wrongdoing, he would tell him not to

33 OGGO, [Evidence](#), 1st Session, 42nd Parliament, 9 February 2017, 0945 (Mr. Allan Cutler, Allan Cutler Consulting, As an individual), 1000 (Mr. David Hutton, Senior Fellow, Centre for Free Expression, As an individual) et 1010 (Mr. David Yazbeck, Partner, Raven, Cameron, Ballantyne & Yazbeck LLP, As an individual); [Evidence](#), 1st Session, 42nd Parliament, 21 February 2017, 0850 (Mr. Scott Chamberlain, Director of Labour Relations, General Counsel, Association of Canadian Financial Officers) et 1005 (Mr. Stan Korosec, As an individual); [Evidence](#), 1st Session, 42nd Parliament, 21 March 2017, 1015 (Mr. Don Garrett, D.R. Garrett Construction Ltd., As an individual) et 0905 (Ms. Joanna Gualtieri, Director, The Integrity Principle, As an individual); et [Evidence](#), 1st Session, 42nd Parliament, 23 March 2017, 1720 (Ms. Sylvie Therrien, As an individual).

34 The Blue Water Bridge Authority is a Crown corporation that, since 1 February 2015, has been amalgamated with the Federal Bridge Corporation Limited.

unless he or she is willing and has the capacity to “be out of work for maybe up to a year and half with no benefits [and] go through a lot of stress” both at work and at home.

2.1.1.2 Protection of Whistleblowers from Reprisals

The current law is focused almost entirely on a strict regime dictating and controlling how public servants blow the whistle. Protection is almost an afterthought.

[Joanna Gualtieri](#),

Director, The Integrity Principle, As an individual

The Act sets out mechanisms to protect whistleblowers from unlawful reprisals. More specifically, the PSDPA compelled federal public bodies to establish internal disclosure procedures for wrongdoings, created the Commissioner’s Office, and established the Public Servants Disclosure Protection Tribunal. According to sections 19(4) and 19(5) of the Act, the Commissioner disposes of 15 days to decide whether or not to deal with a reprisal complaint.

[Mr. Brown](#) explained that many of the negative impacts on whistleblowers are not related to reprisals, but are in fact the result of organizational incompetence. Organizations may not have appropriate procedures for protecting whistleblowers or may not follow their procedures. In his view, the front-line responsibility for protecting public servant whistleblowers and implementing adequate internal procedures lies with an organization’s senior executives.

Regarding whistleblower protection, [Mr. Friday](#) said the Commissioner’s Office accepts reprisal complaints regardless of whether a person has made a disclosure to the Commissioner’s Office or whether the wrongdoing is founded. However, [he](#) noted that 50% of reprisal complaints are outside of his jurisdiction. For example, the PSDPA prohibits him from dealing with issues that are the subject of grievances and complaints from provincial public servants.

According to [Mr. Rousseau](#), public servants who disclose wrongdoings through the media and whose situations do not meet certain exceptional requirements – such as not having enough time to make a protected disclosure or having reasonable grounds to believe the problem amounts to a serious offence under the law – cannot make reprisal complaints to the Commissioner’s Office because they did not make a protected disclosure under the PSDPA.

[Mr. Hutton](#) stated that nothing is done in the federal public service to prevent reprisals and that federal departments and agencies’ managers can generally take reprisals against whistleblowers because the PSDPA is “an act not to protect whistleblowers, but to protect deputy ministers from whistle-blowers.” He further stated that whistleblowers are given a false promise of protection since, after a reprisal complaint is

made, the investigation takes a very long time to complete, even though the Commissioner must quickly decide whether or not to launch an investigation into the reprisals. Moreover, he said the investigations “stop and start, and ... [are] very slipshod.” Mr. Hutton gave the example of a simple reprisal investigation that took two years to complete.

According to [Mr. Yazbeck](#), “the way the system is structured is such that the likelihood of someone getting relief if they have been subject to reprisal is extremely slim. There are many tools that senior management can use. They can delay. They could remove evidence.” [Mr. Hutton](#) asserted that laws that give good results in other countries have strong investigation and review mechanisms and serious penalties, including for reprisals.

2.1.1.3 Selected International Examples of Whistleblower Protection

Our primary lesson learned is that weak rights are counterproductive.

*[Tom Devine](#),
Legal Director, Government Accountability
Project, As an Individual*

Some witnesses discussed the duty to protect and support whistleblowers that exists in other countries. For example, [Mr. Hutton](#) explained that other countries with better laws than Canada provide for personal liability for taking reprisals against employees. As a result, individuals who take reprisals face consequences.

[Mr. Brown](#) informed the Committee that, in Australia, the focus is less on direct and deliberate reprisals than in Canada and “where there is a failure on the part of somebody to fulfill a duty to protect and support, or to control others who are meant to protect and support, and then damage occurs to the whistle-blower, a liability will arise, and an entitlement to remedies and damages will arise.” [He](#) added that, under the Australian federal regime and that country’s *Public Interest Disclosure Act*, there is a fundamental duty to protect and support whistleblowers. A person who suffers harm because of a failure to fulfil that duty could go before Australia’s national employment relations tribunal, called the Fair Work Commission, or the Federal Court, but not both.

[Mr. Worth](#) argued that reprisals against whistleblowers are a workplace hazard akin to unsafe machinery. [He](#) cited the example of Bosnia–Herzegovina, whose whistleblower protection legislation contains a provision that holds directors of government agencies personally liable and subject to fines of up to 10,000 euros if they do not comply with an order to reinstate a whistleblower.

Finally, [Mr. Devitt](#) noted that, in Ireland, employers are legally required to protect whistleblowers from unfair dismissal, any form of penalties, bullying or any harm stemming from a disclosure.

2.1.2 Identifying and Addressing Reprisals

Section 19 of the PSDPA prohibits any person from taking reprisals against a public servant or from directing that reprisals be taken against a public servant. Section 2(1) of the Act defines “reprisal” as follows:

[A]ny of the following measures taken against a public servant because the public servant has made a protected disclosure or has, in good faith, cooperated in an investigation into a disclosure or an investigation commenced under section 33 [by the Commissioner]:

- (a) a disciplinary measure;
- (b) the demotion of the public servant;
- (c) the termination of employment of the public servant, including, in the case of a member of the Royal Canadian Mounted Police, a discharge or dismissal;
- (d) any measure that adversely affects the employment or working conditions of the public servant; and
- (e) a threat to take any of the measures referred to in any of paragraphs (a) to (d).

Two observations are in order. First, the Act establishes an exhaustive list of reprisals that will trigger its application. Any reprisal that does not fall under the aforementioned section cannot be considered as a “reprisal” under the Act. Second, the application of section 19 of the PSDPA and the protection it provides is limited to reprisals made in response to a disclosure protected under the Act or for cooperating in good faith to an investigation conducted under the Act. Should none of these conditions apply, a public servant cannot benefit from the protection of the PSDPA.

The main issue brought forward by many witnesses, including [Mr. Yazbeck](#), is that cases of reprisals are not always recognized for what they are and may not be included in the definition of reprisals. [Mr. Devitt](#) described the wide range of potential reprisals as unfair dismissal, penalization, bullying, relocation, informal sanctions and ostracization at work. As such, the Serbian legislation, presented by [Mr. Devine](#), speaks of reprisals as “any action that puts the person at a disadvantage,” which makes a list of reprisals obsolete. [Ms. Myers](#) added that in many situations, a culprit cannot be identified for having exercised reprisals; they may be detriments suffered from poor evaluations affecting the credibility of the complainant, for example.

According to [Mr. Radford](#), the term “reprisals,” under the Act, is already broadly interpreted to “include all measures that adversely affect an individual’s job or working conditions,” but protection is limited to those who have made a protected disclosure. According to a [brief](#) from the Internal Disclosure Working Group, it is not known which criteria are used by the Commissioner’s Office to determine that a reprisal complaint is linked to a protected disclosure.

Based on the statistics provided by the Commissioner's Office, 55% of reprisal complaints were not investigated, in accordance with subsection 19.3(1)c), either because the allegations did not correspond to the definition of reprisals, the complainant was not deemed to have made a protected disclosure under the Act, or the complaint was not admissible because it did not pertain to the public sector as defined in the Act.

2.1.2.1 Redesigned but Not Concealed

A broad definition of reprisals is necessary as [Mr. Rousseau](#) denounced that whistleblowers are typically harassed by "every method imaginable."

[Mr. Devine](#) informed the Committee that over a third of the international whistleblower protection laws now protect against civil and criminal liability, rather than only employment liability. Extending these protections allows to address the numerous ways a person can "threaten, scare, or effectively silence" a whistleblower, or someone thought to have made a disclosure. [Mr. Friday](#), recognizing the particularities of such cases, remarked that harassment allegations that would fall within the definition of "wrongdoing" should be addressed by the Commissioner rather than internally by the departments and agencies. To support his suggestion, he gave the example of a case where senior officials had found a way to "go around" existing procedures to exercise reprisals under the form of harassment.

However, since not all harassment complaints reflect reprisals, [Mr. Radford](#) specified, in the spirit of limiting the duplication of processes, that for the case of harassment, a person is also protected under the Treasury Board's Policy. If the complaint of harassment is in fact a reprisal complaint, then:

At the admissibility analysis stage of a reprisal complaint, we don't ask ourselves whether it was or was not serious. We say, tell us more about your harassment. For the purpose of reprisal protection, a harassment complaint is deemed to be a protected disclosure.

A. Spillover Reprisals

Throughout the disclosure process, the parties involved are not restricted to the whistleblower, the wrongdoer and the investigator only. [Mary Anne Stevens](#), Senior Director, Workplace Policies, Programs, Engagement and Ethics, Governance, Planning and Policy Sector, Treasury Board Secretariat, pressed upon the Committee that the Act only protects individuals responsible for making a disclosure or that participated as witnesses in a protected disclosure. As such, someone mistakenly believed to be the whistleblower who suffers "misplaced" retribution is not protected under the Act. In that respect, [Mr. Devine](#) argued that the PSDPA does not protect those who assist whistleblowers or those who are mistakenly labelled as whistleblowers. He introduced the idea of a "village of supporting witnesses, experts, second opinions and peer review" that are required for an effective, legitimate and responsible whistleblowing disclosure. Consequently, [he](#) supported that the law should protect the entire village to prevent the isolation of the whistleblower out of fear of spillover reprisals. [Ms. Smart](#) conceded that it is important to protect "not just the discloser, but others associated with the case, even if that

association is mistaken” because the PSDPA currently does not extend reprisal protection to those individuals.

In Ireland, an employee has the right of tort under the *Public Interest Disclosure Act*, and he or she can seek redress through the courts, whether because they made a protected disclosure or were suspected of having made one. In either situation, [Mr. Devitt](#) explained, the individual suffered and was therefore afforded an avenue for remedies.

2.1.2.2 Reprisal Complaint Investigations

The PSDPA establishes a procedure to assist public servants and former public servants who suffered reprisals for disclosing wrongdoings or for participating in an investigation under the Act. The procedure begins with a complaint to the Commissioner and may end with proceedings before the Public Servants Disclosure Protection Tribunal (the Tribunal). The Tribunal is composed of judges of the Federal Court or a provincial superior court appointed by the Governor in Council, and operates under the chairmanship of one of the appointed judges.³⁵

The Commissioner effectively controls access to the Tribunal. If the Commissioner accepts a complaint, he suspends any disciplinary action against the complainant and assigns an investigator to the case. The Commissioner may also appoint a conciliator to facilitate a settlement between the complainant and the person having authority to take disciplinary action.³⁶ The investigations are to be conducted as informally and expeditiously as possible. The Commissioner or designated investigator notify the appropriate chief executive and inform him or her of the investigation and the substance of the complaint. The Commissioner or the designated investigator may also notify any other person he or she considers appropriate, including every person whose conduct is called into question by the complaint, and inform that person of the investigation and the substance of the complaint. On request and for the purpose of the investigation, chief executives and public servants provide the investigator with any facilities, assistance and access to their offices. If the investigation cannot be completed due to insufficient co-operation, the investigator reports it to the Commissioner. However, it is unclear what consequences would result from a lack of co-operation during the investigation and what procedures follow for the reprisal complaint.

[Mr. Friday](#) maintained that, since his nomination in 2015, he has “made every effort to identify opportunities to effect positive change by way of adopting policies and practices to address uncertainty in the law or to clarify, for example, how I use the considerable discretion given to me under the law.” [He](#) pointed out that the role of the Commissioner’s Office is not to review the decisions made by other bodies, adding that, when he decides not to examine a case using his discretionary authority, it is because he believes another body can deal with it better. [Mr. Radford](#) explained that, since 2011, 12% of the reprisal

35 PSDPA, s. 20.7.

36 *Ibid.*, s. 19.1–20.2 (“[t]he Commissioner may not deal with a complaint if a person or body acting under another Act of Parliament or a collective agreement is dealing with the subject matter of the complaint other than as a law enforcement authority,” s. 19.3(2)).

complaints rejected by the Commissioner's Office were rejected because another body was reviewing the matter.

However, should the investigation support it, the Commissioner can apply to the Tribunal to seek a remedy in favour of the complainant or a disciplinary order against the person who took the reprisal.³⁷ In [Mr. Korosec's](#) opinion, these two recourse options should not be mutually exclusive.

The redress avenues in cases of reprisals under the Act are limited. [Mr. Radford](#) noted that under the PSDPA 2005, complainants could access the courts directly and would approach, as public servants, the Public Service Labour Relations Board or, as employees of crown corporations, the Canadian Industrial Labour Relations Board. However, the current PSDPA requires complainants to address their complaint to the Commissioner who is responsible to investigate and determine whether an act of reprisal likely occurred. [Mr. Radford](#) conceded that "it does preclude complainants from having control over their complaint, in a sense ... [Thus], only a small number of complaints end up before the tribunal."

Furthermore, when investigating a reprisal complaint, the Commissioner benefits from a range of discretionary measures. In accordance with subsection 19.3(1) of the Act, the Commissioner may refuse to deal with a complaint if he or she is of the opinion that:

- a) The subject matter of the complaint has been adequately dealt with, or could be more adequately dealt with, according to a procedure provided by another Act of Parliament, or a collective agreement;
- b) The complainant is a member or former member of the Royal Canadian Mounted Police, the subject matter of the complaint has been adequately dealt with by the procedures referred to in subsection 19.1(5);
- c) The complaint is beyond the jurisdiction of the Commissioner; or
- d) The complaint was not made in good faith.

However, in the same vein as section 23(1) concerning wrongdoing investigations, section 19.3(2) prevents the Commissioner from dealing with a complaint if a person or body under another Act of Parliament or a collective agreement is dealing with the subject matter of the complaint other than as a law enforcement authority. However, in response to a question from a Committee member, [Mr. Radford](#) clarified that, once the grievance process is complete, the Commissioner can review the case and determine whether the other body has adequately dealt with it.

[Mr. Lampron](#) indicated that the Commissioner's Office investigates approximately 20% to 25% of the reprisal complaints it receives. Following the admissibility analysis stage, [he](#) added that the service standard to investigate and complete a reprisal complaint is one year. As such, when there is merit to it, the Commissioner's Office offers conciliation

37 [Ibid.](#), s. 20.3–20.6.

arrangements if the two parties agree. To date, nine cases have been resolved in this fashion, making it unnecessary for them to go before the Tribunal. In answer to a question from the Committee, [Mr. Friday](#) clarified that the Commissioner's Office does not act as a mediator, but instead retains the services of a neutral third party acceptable to all parties and covers the costs of the process.

Furthermore, under sections 19.1(2) and 19.2(2), a complaint must be filed no later than 60 days after the day on which the complainant knew or, in the Commissioner's opinion, ought to have known, that the reprisal was taken. However, the Commissioner has the discretionary power to accept a complaint, notwithstanding section 19.1(2), if he or she feels it is appropriate considering the circumstances of the complaint under section 19.1(3).

[Mr. MacMillan](#) told the Committee about his concerns regarding "the premature release by [the Commissioner's Office] of information related to a reprisal matter when the RCMP may have ongoing, outstanding processes or investigations of its own." He used the example of a case where the Commissioner's Office followed the requirements stemming from the *El-Helou v. Courts Administration Service* decision and disclosed information it had gathered through its reprisal investigation to the complainant before the RCMP had completed its investigation. Mr. MacMillan said that releasing this information to the complainant could influence the complainant or the investigation.

[Mr. Rousseau](#) claimed that the 60-day time limit to file a complaint is too short. To provide context, [Mr. Devine](#) explained that it is a lengthy process to find a lawyer and gather evidence to file a "winning lawsuit." Often time, in his experience, an employee may not even know they have rights and resources until the deadline has passed to file a complaint. Another problem, in [Mr. Korosec's](#) view, is that in the initial stages after filing the reprisal complaint, there is no protection for the whistleblower that may have been fired, but there are many restrictions on the disciplinary actions that may be taken against the "repriser" under subsection 19.5.

In [Mr. Yazbeck's](#) opinion, having represented whistleblowers victim of reprisals for whom delays in their cases are "years and years old," restrictions on timelines are a double-edge sword. Shorter time frames would be beneficial to limit the injury and suffering of a whistleblower victim of reprisals, but too short time frames could harm the complainant's preparation of his or her case. He also raised that for the Commissioner's Office to "just sit there waiting for the evidence to come to [it]" misses out on the opportunity to gather useful information and potentially harms the complainant's case in the end. [Mr. Hutton](#) supported this allegation and lamented that for reprisal investigations, the Commissioner does not benefit from the same "special powers" as he does for investigations of wrongdoings, thus "[he] simply has to go to those accused, the aggressors, and seek their voluntary co-operation. We can see that the investigation itself is likely to be very superficial and take a long time."

Since 2007, four decisions of the Commissioner concerning reprisal investigations have been overturned by the Federal Court or the Federal Court of Appeal. According to [Mr. Radford](#), "clearly and admittedly, reprisals are difficult." In 2014, the Federal Court of

Appeal instructed the Commissioner to only use his discretionary power to dismiss a complaint when it is “plain and obvious” it is out of his jurisdiction or is not related to a protected disclosure.

Recently, the Commissioner’s Office was instructed by the Federal Court of Appeal that “subject matter” under the PSDPA includes the merits of the complaint. This decision was made in light of evidence in the reprisal complaint of [Ms. Therrien](#), a whistleblower who alleged the existence of insurance employment quotas to the media, following an unsuccessful internal disclosure, to the Commissioner’s Office. The Federal Court of Appeal ruled that:

The Commissioner’s determination that the subject matter of the appellant’s complaint was being dealt with by a body acting under the grievance process provided in the *Public Service Labour Relations Act [PSLRA]* was unreasonable as the Commissioner failed to ascertain whether the Public Service Labour Relations and Employment Board (the PSLREB) would be hearing the suspension and dismissal grievances on their merits and, if so, whether in the course of so doing would be examining the subject matter of the reprisal complaints.³⁸

In accordance with subsection 19.3(2), the Commissioner had decided that it could not deal with a reprisal complaint for which the subject matter is being dealt with by another body. However, it is the opinion of the Federal Court of Appeal that:

The Commissioner’s interpretation, which found the mere referral of a grievance to the PSLREB to come within subsection 19.3(2) of the *PSDPA*, is incompatible with the intent and purpose of the *PSDPA*, which is designed to provide protection from reprisals to public servants in addition to rights they possess under the *PSLRA*.³⁹

Moreover, in the circumstances of this case, the [Federal Court of Appeal](#) also criticized the Commissioner for having “violated the appellant’s procedural fairness rights.”

In reference to Ms. Therrien’s case, [Mr. Radford](#) sustained that

As the Federal Court of Appeal set aside the former commissioner’s decision rejecting some of the allegations [of reprisals], currently all of Madame Therrien’s allegations are with us. The investigation into some allegations and the analysis of the other allegations is currently in abeyance as we await the disposition of her matters before the PSLREB.

Similarly, [Ms. Daviau](#) said the investigation process is “often unfair, lacking in thoroughness, and insensitive to whistle-blowers.” She said deficiencies in investigations lead to needless litigation and unacceptable delays, and that these problems must be corrected.

Nonetheless, [Mr. Friday](#) intervened on this topic during the course of the study and explained that “from a practical perspective, [his Office] ha[s] had to put [its] investigation in abeyance until grievances were dealt with.” He sustained to share the same concerns regarding the speed of the process.

38 Federal Court of Appeal Decisions, [Therrien v. Canada \(Attorney General\)](#), 17 January 2017.

39 Ibid.

A. Gatekeeper of the Tribunal

Just as it is with investigations of wrongdoing, [Mr. Brown](#) raised the issue of a potential conflict of interest from the Commissioner's Officer with regard to its investigative and protective roles when dealing with complaints of reprisals, especially if no wrongdoing was found. [Mr. Devitt](#), in echo of the views of other witnesses, expressed concerns over the decision-making powers and lack of accountability of the Commissioner to provide and deny access to a worker's legal rights and to the courts.

Furthermore, some witnesses, including [Mr. Worth](#), [Mr. Devitt](#) and [Mr. Devine](#), lamented the fact that only the Commissioner can refer a case to the Tribunal. [Mr. Worth](#) also said this process is inconsistent with international best practices and that requiring the whistleblower to go through an executive branch agency "perverts" the separation of powers. Effectively, this practice creates a bottleneck effect.⁴⁰

In the United Kingdom, over the last 18 years, 18.7% of complainants of reprisals under the whistleblower protection act accessed the courts. Commenting on the statistics from the Commissioner's Office, [Mr. Worth](#) told the Committee that, according to the data on its website, the Commissioner's Office received one reprisal complaint for every three disclosures and over the past eight years, seven cases were referred to the Tribunal out of 215 reprisal complaints, about 3% of cases. In his opinion, that is a "very low percentage" and demonstrates the merit of addressing the barriers faced by public servants to have a hearing. [He](#) also claimed that having to provide clearance to have access to a hearing is at odds with international best practices and categorized it as a "perversion of the separation of powers." In a second instance, [Mr. Brown](#), unsure about the pertinence of an initial investigation to refer a complaint to the Tribunal, suggested that it probably took a lot of time and resources away from the Commissioner's investigations of wrongdoings.

[Mr. Friday](#) explained that the PSDPA "does not prohibit and, indeed, it expressly provides in section 51.2 for access to the Federal Court for any party involved in the disclosure or reprisal to have a decision of my office reviewed." [He](#) also noted that the Commissioner's Office is drafting a manual to improve access to the Tribunal.

40 OGGO, [Evidence](#), 1st Session, 42nd Parliament, 21 February 2017, 1022 (Debi Daviau, President, Professional Institute of the Public Service of Canada).

2.1.2.3 Before the Public Servants Disclosure Protection Tribunal

I just think that the nature of reprisal as an insidious, difficult thing [to identify] in the workplace [and] is uniquely suited to an expert investigator, an expert decision-maker, or an expert tribunal to deal with, as opposed to a court dealing with a more general duty on behalf of somebody vis-à-vis a complainant or employee. I think the need for expertise in this area is crucial. I draw on the human rights jurisprudence for that, because we know that human rights commissions and tribunals have developed an expertise that enables them to identify discrimination and find it.

[David Yazbeck](#),

*Partner, Raven, Cameron, Ballantyne & Yazbeck LLP,
As an individual*

The PSDPA establishes a procedure, the [Public Servants Disclosure Protection Tribunal Rules of Procedure](#), to assist public servants and former public servants who suffered reprisals for disclosing wrongdoings or for participating in an investigation under the Act. The procedure begins with a complaint to the Commissioner and may end with proceedings before the Tribunal.

If the investigation supports it, the Commissioner can apply to the Tribunal to seek a remedy in favour of the complainant or a disciplinary order against the person who took the reprisal.⁴¹ Subject to rules of procedure adopted by its Chairperson, the Tribunal operates with much of the powers and proceedings of a superior court, but is intended to be simpler and of a more expeditious form. The Commissioner is a party to the proceedings, along with the complainant and her current or past employer, in the case of a former public servant.⁴² The Tribunal may provide the complainant a wide range of remedies and orders, such as compensating the complainant for the financial losses that directly result from the reprisal – in addition to damages of up to \$10,000 for any pain and suffering.⁴³ Investigations must respect procedural fairness and natural justice.

The Tribunal is an independent quasi-judicial body that deals with reprisal complaints referred by the Commissioner. The Tribunal rules on cases of alleged reprisals and orders corrective or disciplinary measures if it finds that reprisals have been taken. It should be noted that the Commissioner's Office cannot determine that reprisals have been taken, as only the Tribunal has that power.

41 PSDPA, s. 20.3–20.6.

42 Ibid., s. 21.1–21.6.

43 Ibid., s. 21.7–21.8.

A registry was established in 2007 to support the Tribunal in the conduct of its work,⁴⁴ which had a budget of \$1.2 million for fiscal year 2013–2014.⁴⁵ Pursuant to the [Administrative Tribunals Support Service of Canada Act](#), however, since 1 November 2014, the Tribunal Registry has been amalgamated to the Administrative Tribunals Support Service of Canada.⁴⁶

As illustrated in Table 3, since its creation in 2007, the Tribunal has dealt with seven reprisal complaints, of which five are now completed.

44 Public Servants Disclosure Protection Tribunal Panel Canada, [2014–15 Report on Plans and Priorities](#), p. 2.

45 Treasury Board Secretariat, [2015–2016 Main Estimates](#), p. II-242.

46 The Administrative Tribunals Support Service provides support services and facilities to 11 federal administrative tribunals. These are: Canada Agriculture Review Tribunal, Canada Industrial Relations Board, Canadian Cultural Property Export Review Board, Canadian Human Rights Tribunal, Canadian International Trade Tribunal, Competition Tribunal, Public Servants Disclosure Protection Tribunal, Public Service Labour Relations and Employment Board, Social Security Tribunal, Specific Claims Tribunal and Transportation Appeal Tribunal of Canada. Government of Canada, [Administrative Tribunals Support Service of Canada](#).

**Table 3 – Information on cases dealt with by the Public Servants
Disclosure Protection Tribunal since 2007**

	Case name	Status	Complainant	Employer
2011	El-Helou and Courts Administration Services, Power and Delage	Active	Charbel El-Helou	Courts Administration Service
2011	Roberts and Atomic Energy Canada Limited	Settled through mediation / Application withdrawn	Wayne Roberts	Atomic Energy Canada Limited
2012	Lambert and Health Canada	Settled between parties / Application summarily dismissed	Gérard Lambert	Health Canada
2014	David Joy and Blue Water Bridge Canada	Withdrawn given a settlement reached by the parties	David Joy	Blue Water Bridge Canada
2014	Cathy Gardiner and Blue Water Bridge Canada	Withdrawn given a settlement reached by the parties	Cathy Gardiner	Blue Water Bridge Canada
2014	Stan Korosec and Blue Water Bridge Canada	Withdrawn given a settlement reached by the parties	Stan Korosec	Blue Water Bridge Canada
2016	Dunn and Indigenous and Northern Affairs Canada, Lecompte	Active	Chantal Dunn	Indigenous and Northern Affairs Canada

Source: Table prepared using data from the Public Servants Disclosure Protection Tribunal Canada, [All Cases](#).

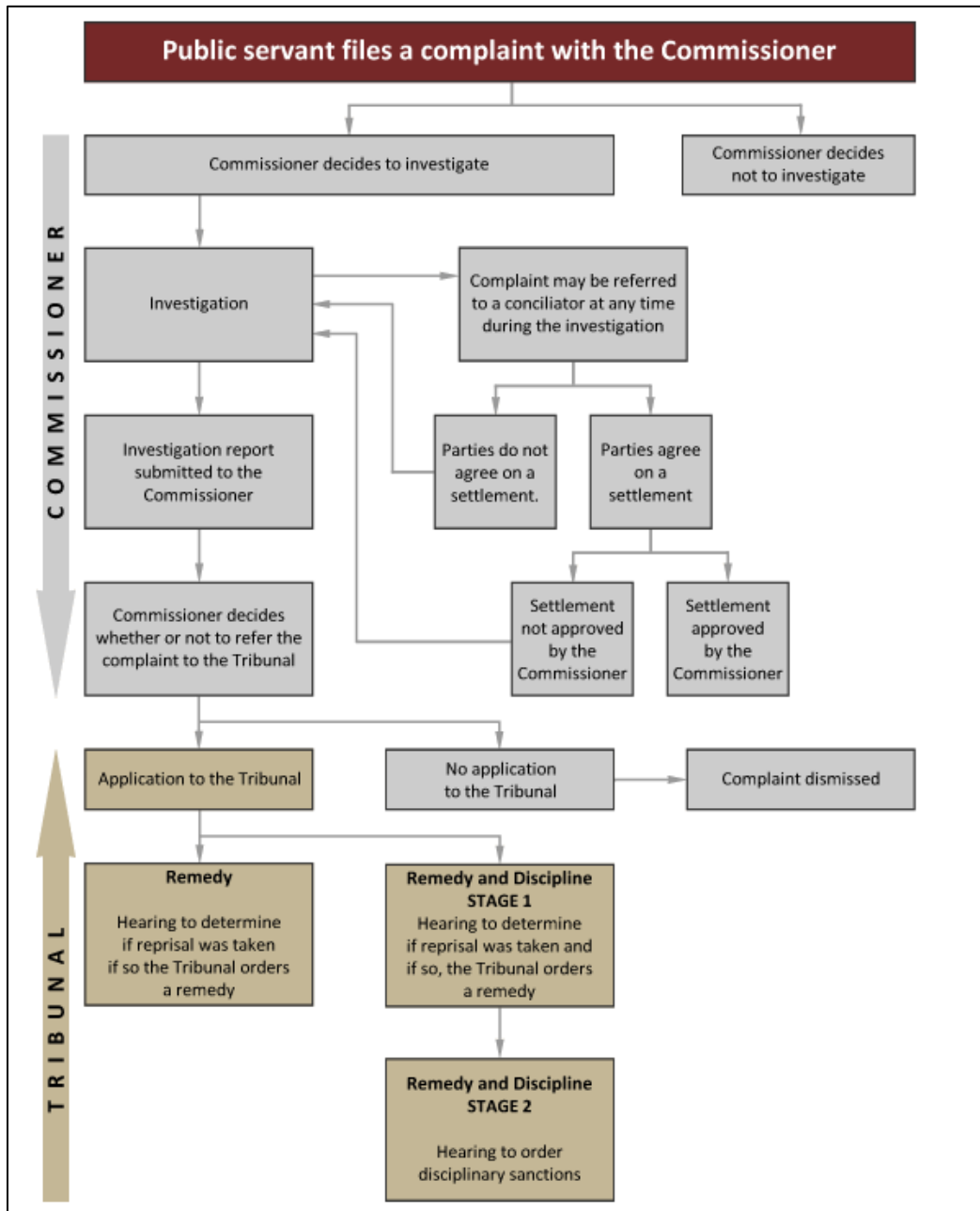
The [Tribunal](#) provides an overview of the reprisal complaint process consisting of the following seven stages:

1. After receiving a complaint, the Public Sector Integrity Commissioner decides whether or not to conduct an investigation.
2. If the Commissioner decides to conduct an investigation, he assigns the file to an investigator.
3. A conciliator may be appointed at any time during the investigation to try and resolve the complaint.
4. If a settlement is reached and approved by the Commissioner, the complaint may be dismissed or withdrawn. If not, the investigator continues his or her work and submits a report to the Commissioner.
5. If the Commissioner is of the opinion that an application to the Tribunal is warranted, he can ask the Tribunal to determine if reprisals were taken against the public servant whistleblower.
6. If the Tribunal determines that the public servant whistleblower has been the subject of a reprisal, it can order a range of remedies.
7. If asked by the Commissioner, the Tribunal can also order disciplinary action against the persons who took the reprisals.⁴⁷

Figure 1 presents the reprisal complaint process for information provided to the Commissioner and complaints that are referred to the Tribunal.

47 Public Servants Disclosure Protection Tribunal Canada, [Complaint Process](#).

Figure 1 – Diagram of the Reprisal Complaint Process



Source: Figure reproduced using data from the Public Servants Disclosure Protection Tribunal Canada, [Complaint Process](#).

Regarding the Tribunal’s role, [Rachel Boyer](#), Executive Director, Tribunal, explained to the Committee that its sole function is to determine whether or not a reprisal has taken place as a result of a disclosure. She added that the parties who appear before the Tribunal “include the individual who filed the complaint, the complainant, the complainant’s employer, the person or persons alleged to have engaged in acts of reprisal, and the respondent or respondents, as well as the Commissioner, the office that initiated

the adjudicative process.” The Tribunal consists of chairperson and two to six members appointed by the Governor in Council, all of whom must be judges of the Federal Court or a provincial superior court. She also said the Tribunal “has many of the powers and attributes of a court. It is empowered to find facts, to interpret and apply the laws to the facts before it, and to award appropriate remedies and disciplinary actions.” However, the Tribunal cannot examine employment practices in the public service, participate in policy development or carry out public advocacy.

[Ms. Boyer](#) went on to say that the Tribunal has issued an average of two interlocutory decisions per year since it was established. However, it has not yet rendered a single decision on the merits of a case, as the complaints received either have been resolved by the parties in the course of proceedings before the Tribunal or are still pending.

Regarding the cases referred to the Tribunal, [Mr. Yazbeck](#) cited a case where three allegations of reprisals were submitted to the Commissioner’s Office but only one was brought to the Tribunal because the Commissioner rejected the other two. Mr. Yazbeck reported that this decision was set aside because the Commissioner’s process was unfair, and after an order from the Federal Court, the Commissioner had to start a new investigation. Moreover, Mr. Yazbeck noted that it was only with the help of their unions, the Public Service Alliance of Canada and the Professional Institute of the Public Service of Canada, that two public servants managed to have their cases heard by the Federal Court. In his new investigation, the Commissioner reviewed the three allegations and rejected all of them, including the one he had previously referred to the Tribunal.

With regard to access to the Tribunal, [Mr. Friday](#) and [Ms. Smart](#) said they support a more direct access. Responding to a Committee member’s question, [Ms. Boyer](#) noted that, in the case of the Competition Tribunal, most of the applications come through the Office of the Commissioner of Competition, but industry can also go directly to that tribunal. [She](#) further stated that she believes no conflict of interest arises from the Commissioner’s Office being responsible for both ensuring the confidentiality of the process and determining whether a reprisal complaint should be reviewed by the Tribunal.

[Mr. Worth](#) expressed dismay that the case of Chantal Dunn, whose reprisal complaint was referred to the Tribunal in 2012, has not yet been resolved. By comparison, [he](#) said that the average case in the United Kingdom takes 20 months. Mr. Conacher suggested that whistleblowers be able to appeal to the Tribunal for a review of any decision made by the Commissioner and to request a court’s intervention when the Tribunal fails to resolve their case in a timely manner.⁴⁸

A. Informal and Expeditious Procedures

[Ms. Boyer](#) explained that the nature of the relationship between the Commissioner’s Office and the Tribunal is similar to that of the Human Rights Commissioner and the Human Rights Tribunal of Canada. [She](#) specified that the rules of

48 OGGO, [Evidence](#), 1st Session, 42nd Parliament, 21 March 2017, 1000 (Duff Conacher, Co-Founder, Democracy Watch) and [Evidence](#), 1st Session, 42nd Parliament, 4 April 2017, 0915 (Mr. Conacher).

the Tribunal can be “liberally interpreted” and that it allows for the informal and expeditious resolution of complaints. However, [Mr. Korosec](#), having been through the process of the Tribunal, strongly opposed this point of view:

Regarding the informal part, as I told you before, I was a police officer for 18 years and I was used to testifying in a court-like setting. Well, the logistics for this tribunal that we went through.... It was very intimidating, even for me a bit, but imagine somebody who's never been to court before, never been under that stress. They have to get up there in the stand ... and then they're getting hammered with cross-examination. It's very intimidating ... and it's by no means informal. I think that has to change, or at least be taken into consideration, when the case goes to a tribunal.

Additionally, [Ms. Boyer](#) confirmed that the Tribunal has not had a full hearing nor made a ruling in any of the seven cases reviewed since 2007.

B. The Burden of Proof

The worst part of the Act is that the burden of proof is on the whistle-blower.

[Allan Cuttler](#),

Allan Cuttler Consulting, As an Individual

Under the Act, the whistleblower must demonstrate in court that he or she was effectively the victim of reprisals. All witnesses that spoke about the burden of proof expressed this to be a daunting and quasi-impossible task or, at least, that a reverse onus would level the field for whistleblowers before the Tribunal.⁴⁹ [Mr. Yazbeck](#) explained that reprisals are “subtle, insidious and difficult to prove” because it is rare to have direct evidence of it and, moreover, the evidence can be hidden by the time the complainant makes it to the Tribunal. He sustained that “the reverse onus is not a radical notion” and it exists in many other jurisdictions, including the province the Quebec.

As an alternative to a hearing, [Ms. Boyer](#) emphasized that the Tribunal “offers a voluntary mediation process to attempt to resolve a complaint reprisal without a hearing” that enables the parties “to reach a mutually agreeable resolution through the assistance of a neutral third party.” She said that mediation is less time-consuming, less costly and less adversarial than a judicial hearing. However, [Mr. Hutton](#) argued that, owing to the negative consequences of whistleblowing on the mental, physical and financial health of the whistleblower and the length of the investigation process, every single whistleblower

49 OGGO, [Evidence](#), 1st Session, 42nd Parliament, 9 February 2017, 0957 (David Hutton, Senior Fellow, Centre for Free Expression, As an Individual); [Evidence](#), 1st Session, 42nd Parliament, 21 February 2017, 0958 (Larry Rousseau, Executive Vice-President, National Capital Region, Public Service Alliance of Canada); [Evidence](#), 1st Session, 42nd Parliament, 20 March 2017, 1806 (A.J. Brown, Professor, Griffith University, As an Individual); [Evidence](#), 1st Session, 42nd Parliament, 21 March 2017, 0904 (Tom Devine, Legal Director, Government Accountability Project, As an Individual); and [Evidence](#), 1st Session, 42nd Parliament, 23 March 2017, 1617 (Anne Marie Smart, Chief Human Resources Officer, Office of the Chief Human Resources Office, Treasury Board Secretariat); and [Evidence](#), 1st Session, 42nd Parliament, 4 April 2017, 0910 (Duff Conacher, Co-Founder, Democracy Watch).

so far has chosen to settle rather than go before the Tribunal. In his view, these decisions are motivated by the whistleblowers' desire to "escape this terrifying process where they know they can't win."

2.1.3 The Administration of Justice

2.1.3.1 Interim Reliefs

Under the current framework of the law, there does not appear to be interim reliefs, if the employment was terminated for example, or sanctions in cases of reprisals. The Committee has only heard about cases that have lasted months to years and during which the complainant had no interim recourse.⁵⁰

However, if the reprisals do not include dismissal, [Ms. Smart](#) argued that the deputy head has the authority and the resources to help the whistleblower who feels he or she is victim of reprisals, as provided under section 51.1 of the Act.

In Ireland, the law has been structured such that victims of reprisals can seek redress in a timely manner. [Mr. Devitt](#) sustained that an injunction or interim relief application to a lower court – circuit court – could be filed within 21 days of termination. [He](#) explained that the measure only serves the purpose of reinstatement until the case is heard and ruled upon, which can take over two years.

2.1.3.2 Remedies and Sanctions

With the whistle-blowing system that we now have in place, even if you win, you lose.

*[Scott Chamberlain](#),
Director of Labour Relations,
General Counsel, Association of Canadian Financial Officers*

The PSDPA provides penalties for a person who knowingly takes reprisals against a public servant, makes a false or misleading statement in a disclosure of wrongdoing or an investigation conducted under the Act, obstructs such an investigation, or tampers with a document or thing relevant to such an investigation. Any person committing such an offence is liable to a fine of up to \$10,000, imprisonment for up to two years, or both.⁵¹

Many witnesses expressed that the remedies and sanctions the Tribunal can impose are insufficient. [Mr. Rousseau](#) questioned the disincentive to commit wrongdoing and exercise reprisals and qualified the sanction mechanisms as "unreliable." Additionally,

50 OGGO, [Evidence](#), 1st Session, 42nd Parliament, 21 February 2017, 1006 (Stan Korosec, As an Individual); [Evidence](#), 1st Session, 42nd Parliament, 21 March 2017, 1010 (Don Garrett, D.R. Garrett Construction Ltd., As an Individual); and [Evidence](#), 1st Session, 42nd Parliament, 23 March 2017, 1720 (Sylvie Therrien, As an Individual).

51 PSDPA., s. 42.3.

the “caps on damages are fairly farcical,” according to [Mr. Brown](#). In cases of dismissal, [Mr. Korosec](#) also qualified the damages as “woefully inadequate.”

Furthermore, complainants can either represent themselves before the Tribunal or hire a lawyer, for which the costs exceed the \$1,500 or \$3,000 the Commissioner can award. For example, [Mr. Korosec](#)’s legal costs reached \$30,000. According to many witnesses, the financial burden, besides the emotional and personal turmoil faced by complainants, makes the situation all the more difficult.

2.1.4 Legal Framework

2.1.4.1 The Short Reach of the Law

It doesn't matter whether the institution that betrays the public trust is public or private.

[Tom Devine](#),

Legal Director, Government Accountability Project, As an Individual

Section 34 of the PSDPA does not permit the Commissioner to gather information from outside the public sector; he or she must cease that part of the investigation and refer the matter to any appropriate authority. Nonetheless, the Commissioner’s Office, in an attempt to complete its investigations, asks for the private sector’s co-operation to access information relevant to an investigation when necessary, according to [Mr. Lampron](#). However, in instances that the Commissioner’s Office receives disclosures from the private sector, [he](#) explained that those whistleblowers are quickly notified that the Commissioner does not have jurisdiction.

In Ireland, the protected disclosure act is sector-blind, i.e. it includes the public, private and non-profit sectors.⁵² [Mr. Devine](#) added that other countries, such as South Korea, Zambia and Uganda also protect all citizens regardless of their sector of employment, and that the United States’ legislation covers “virtually the entire public and private sectors.” Moreover, according to [Mr. Devitt](#), an Irish survey has determined that 90% of employers are supportive of whistleblower protection legislation, even in cases where confidential information may be disclosed.

Another jurisdiction issue is the status of the employee covered by the Act. For example, the United Nations protection against retaliation applies to all its staff members, including interns and volunteers.⁵³ The same is true in the United Kingdom as the law was amended from protecting employees to contractors, interns and other types of workers

52 OGGO, [Evidence](#), 1st Session, 42nd Parliament, 21 March 2017, 0940 (John Devitt, Chief Executive, Transparency International Ireland, As an Individual).

53 United Nations, “[Protection Against Retaliation](#),” *Ethics Office*.

that may encounter wrongdoing in the course of their work.⁵⁴ Under the PSDPA, only federal public servants are covered – not former public servants – and contractors to a certain extent. Members of the public can also make a disclosure of wrongdoing to the Commissioner, but it must relate to the public sector exclusively.

A. Contractors

[Mr. Garrett](#) explained that when he had accepted, in 2008, to do construction work on the Kent Prison located in British Columbia, it was never disclosed to him that precautions should be taken because him and his crew would be exposed to asbestos. Upon his discovery, Mr. Garrett first attempted to resolve the issue directly with the government, but eventually addressed the Commissioner. The description given of the handling of the case by the former Commissioner suggests that it was mishandled as [Mr. Garrett](#) believes his procedural fairness rights were violated. The investigation was concluded with the finding that no wrongdoing had occurred. PSPC claimed to have shared with contractors the Asbestos Containing Material (ACM) survey conducted 2004, while Mr. Garrett affirms that, when he received the news in writing from the Commissioner’s Office, it was the first time he had ever heard of the ACM survey.

In response to this testimony, [Mr. Conacher](#) maintained that “everyone needs to be protected, including suppliers to the government,” and suggested that audits be performed to ensure contractors do not lose their contracts or become ‘blacklisted’ and a victim of retaliation. However, [Mr. Friday](#) stated that the act already prohibits the termination of a contract or to withhold payment because of a disclosure. It is also prohibited to not award future contracts to a supplier because of a disclosure. Nonetheless, [he](#) recognized that contractors do not have access to the Tribunal and suggested that it could be a means of redressing the issue. Finally, [he](#) also explained that it is the procurement ombudsman role to ensure that a supplier is not ‘blacklisted.’ If the right of a supplier is breached under any of those conditions, the contractor would have to address a complaint to the procurement ombudsman or the Commissioner.

Looking back on his experience, [Mr. Garrett](#) urged for the law to be reviewed to ensure the public sector is fully transparent and accountable, especially as the number of public-private partnerships increases.

2.1.4.2 A Complex Legal Framework

Throughout the course of the study, all witnesses agreed that the PSDPA is a complex Act and the Internal Disclosure Working Group requested clarifications for interpretation in its submitted [brief](#). The complexity of the law and process, according to [Mr. Devine](#), weakens the protection provided to whistleblowers. In such circumstances, the law, [he](#) said, is a cardboard shield rather than a metal shield, and further claimed that Canada’s law is “more like a paper shield.” Fundamentally, according to [Mr. Devitt](#), an effective legislation is simple and clear.

54 OGGO, [Evidence](#), 1st Session, 42nd Parliament, 21 March 2017, 1003 (Anna Myers, Director, Whistleblowing International Network, As an Individual).

It was suggested to the Committee, by [Mr. Brown](#), that the law is “substandard” and should be completely redrafted. However, [Mr. Friday](#), as well as witness from the Treasury Board Secretariat, was of the opinion that the PSDPA could be improved through significant amendments.

Certain witnesses, such as [Mr. Chamberlain](#), suggested that a single disclosure avenue would be preferable and simplify the legislation. However, [Mr. Worth](#), although in agreement that the PSDPA is complex, asserted that a higher number of disclosure channels is always considered preferable on the international platform. [Mr. Brown](#) explained that the Australian system has four types of players in its disclosure and protection process: supervisors, the internal disclosure system, an independent external body like the Auditor General of Canada that reviews information and conducts investigations, and the whistleblower protection agency. He believes it is very important to provide multiple avenues for disclosure to give whistleblowers a choice and for all the players to know their role and coordinate their work. The true challenge, in his opinion, is the coordination of those channels:

[In] any given situation you can't predict who can be trusted and who will be trusted by either the agency or by the ... whistle-blower. There basically has to be a choice, and then it's important for all players in the game to know their role and be coordinated.

[Mr. Brown](#) further ascertained that the processes under the PSDPA are not coordinated and that this could be remedied through an oversight agency to prevent cases from “[falling] through the cracks. It’s less of a problem to have duplication or redundancy in the system.” In [his](#) opinion, an oversight agency must be established to quickly resolve problems, avoid confusion and conflict among the various players, and make recommendations where required, such as where cases are stuck between two players.

2.2 Solutions Proposed by Witnesses

2.2.1 Duty to Protect and Support

According to the [International Best Practices for Whistleblower Policies](#), the third best practice is the “right to refuse violating the law.” This provision is, in Mr. Devine’s view, essential to prevent *faits accomplis* and eliminate the need for whistleblowing in certain situations. Given that in many organizations employees who refuse to follow an order because they believe it to be illegal are subject to disciplinary action, a fair and expeditious mechanism to protect employees who have reasonable grounds to believe they are being asked to violate the law is needed. This protection would prevent employees from having to carry out the action and face reprisals while a court or other authority determines whether the order was legal.

[Mr. Devine](#) explained that one of the problems whistleblowers face is the perception that they are being disloyal to their organization, damaging it and negatively affecting the careers and welfare of their colleagues. In his opinion, the solution is for managers to create an environment of trust by communicating to their employees that they want to know about problems before they get worse.

According to [Mr. Yazbeck](#), in the past, whistleblowers who suffered reprisals often had to prove their allegations were true. But he believes that reasonable suspicions should be enough for the Commissioner to launch an investigation.

[Mr. Brown](#) emphasized that it has been shown that public servant whistleblower protection legislation must be calibrated to include a broader organizational responsibility similar to the workplace health and safety responsibility. [He](#) specified that it is important to assign clear responsibilities for the duty to protect whistleblowers and to hold those who fail to carry out that duty personally liable.

In addition, the Public Service Alliance of Canada argued in its [brief](#) that the Commissioner's Office must have the resources necessary to assist victims of reprisals and educate public servants about their rights and managers about their obligations under the PSDPA.

Finally, [Mr. Yazbeck](#) suggested that all reprisal complaints be referred to the Tribunal. Other witnesses, including union representatives and [Mr. Brown](#), were of the same view, noting that other countries take this approach.⁵⁵

2.2.2 Recognizing Reprisals and Providing Effective Protection

To prevent reprisals, a number of witnesses, including [Ms. Myers](#) and [Mr. Brown](#), suggested implementing interim or automatic remedies, as waiting for reprisals to occur is contrary to the underlying objective. [Mr. Hutton](#) said it should be “dangerous” for someone to take reprisals. Many witnesses, including the Public Service Alliance of Canada in its [brief](#), proposed toughening the penalties and corrective measures imposed on those guilty of taking reprisals.

According to the [International Best Practices for Whistleblower Policies](#), the fourth best practice is “protection against spillover retaliation.” Mr. Devine believes this provision is essential for the legislation to cover all scenarios that could deter public servants from disclosing wrongdoings as a whistleblower, a witness or someone mistakenly perceived to be a whistleblower. This protection would minimize the risk that whistleblowers become isolated and potential witnesses distance themselves for fear of reprisals.

The seventh best practice is “protection against unconventional harassment.” The goal of this provision is to include any kind of discrimination, both active and passive, in the legislation to ensure no one involved in a disclosure suffers “innovative” reprisals. Recommended, threatened and attempted actions can have the same effect as actual reprisals.

55 OGGO, [Evidence](#), 1st Session, 42nd Parliament, 21 February 2017, 0945 (Ms. Debi Daviau, President, Professional Institute of the Public Service of Canada) and 1035 (Ms. Patricia Harewood, Counsel, Public Service Alliance of Canada).

2.2.2.1 Remedies and Sanctions

According to the [International Best Practices for Whistleblower Policies](#), the 14th best practice is “compensation with ‘no loopholes.’” This provision entitles a prevailing whistleblower to comprehensive relief of all direct, indirect and future consequences of the reprisal. In cases of mental or physical harassment, it may include relocation or the payment of medical bills. In non-employment contexts, the whistleblower could be granted identity protection, relocation or the withdrawal of litigation against the individual.

The 15th best practice is the provision of “interim relief.” This provision aims to ensure relief is awarded during the interim for employees who prevail. In practice, anti-reprisal systems tend to expand over years of litigation and victory is only on paper if the whistleblower is nonetheless unemployed, blacklisted and possibly bankrupt. The goal is to afford injunctive and interim relief after a preliminary determination to prevent further pain and suffering.

The 17th best practice is the “transfer option.” This provision seeks to provide prevailing whistleblowers the possibility to start anew. The goal is to prevent repetitive reprisals which could occur if the individual returned to work for a manager he or she has defeated in a lawsuit. [Mr. Devine](#) explained that a whistleblower should be “made whole” if he prevails because he still loses otherwise. This would include remedies, corrective action and public accountability.⁵⁶

All witnesses, including [Ms. Stevens](#), suggested that extending reprisal protection in the legislation to anyone involved in a protected disclosure, including someone mistakenly believed to be the whistleblower, could be an avenue for the Committee to explore. The goal of this amendment is to prevent spillover reprisal.

The Committee heard from [Ms. Smart](#) that deputy heads and chief executives have many tools to prevent reprisals and protect whistleblowers. However, it was suggested to the Committee by a number of witnesses, such as [Mr. Devitt](#), that rather than relying on the deputy head or chief executive to recognize the threat of reprisals and act on it, it should be embedded in the legislation that whistleblowers have access to priority staffing and leave with pay, for example, to ensure no detriment would come their way as a result of their protected disclosure of wrongdoing. Additionally, [Mr. Brown](#) explained that it is imperative, in cases as sensitive as those brought forward by whistleblowers, to ensure the management and “the assessment of reprisal risk or detrimental action risk” throughout the entire disclosure process.

A large number of witnesses, including [Mr. Chamberlain](#) and [Mr. Korosec](#), suggested staffing priority and pay protection as two interim remedies in cases of reprisals. The Commissioner’s Office also suggested, in its written [brief](#), increasing the maximum amount for pain and suffering, under the Act.

56 OGGO, [Evidence](#), 1st Session, 42nd Parliament, 21 March 2017, 0907 (Joanna Gualtieri, Director, The Integrity Principle, As an Individual).

Under section 20.4(1) of the Act, the Commissioner, when referring a case to the Tribunal, can either recommend remedies for the complainant or sanctions on the person having exercised reprisals. In [Mr. Korosec](#)'s view, that is not appropriate. Moreover, [he](#) shared that during his hearing, he was told that he could only be afforded one remedy listed under subsection 21.7(1) and argues that whistleblowers should be awarded as many remedies as deemed necessary considering the circumstances. A vast number of options should be available and decided upon in agreement with the whistleblower.⁵⁷

Concerning sanctions, Mr. Conacher suggested in a submitted [brief](#), increasing the minimum fine for retaliation to \$50,000 with a maximum range from \$100,000 to \$200,000 for government officials, and 40% of the total annual salary for business executives. He also suggested the “loss of any severance payment, and partial clawback of any pension payments.”

2.2.2.2 Legal Costs

According to the [International Best Practices for Whistleblower Policies](#), the 16th best practice is the “coverage of attorney fees.” This provision entitles a prevailing whistleblower the reimbursement of attorney fees and associated litigation costs. The goal is to permit whistleblowers to assert their rights without carrying the burden of high legal costs. Moreover, these costs should be awarded if the relief sought is obtained, regardless if it is through an issued legal order.

[Mr. Rousseau](#) denounced that the legal provisions in the Act are contingent on the Commissioner's approval. He suggested instead the establishment of a whistleblower fund for legal assistance, which is an idea similar to the free legal clinic suggested in Mr. Conacher's [brief](#).

The Commissioner's Office suggested in its [brief](#) that the Tribunal have the authority to award legal fees to the complainant and that the President of the Treasury Board have the authority to increase the maximum monetary limit for legal advice.

2.2.2.3 Personal Accountability

According to the [International Best Practices for Whistleblower Policies](#), the 18th best practice is “personal accountability for reprisal.” This provision seeks to deter repetitive violations by holding a person who exercises reprisals personally liable for punitive damages. Otherwise, there is no deterrent value for the act of reprisal, i.e. no disincentive to committing the act. Certain law models also extend the liability to persons who fail, in bad faith, to protect whistleblowers. Alternatively, whistleblowers can be given the right to counterclaim for disciplinary action, including dismissal.

[Mr. Brown](#) suggested that, in consideration of penalties for a criminal offence of reprisals, the sanction could be similar to that of perverting the course of justice, jury

57 OGGO, [Evidence](#), 1st Session, 42nd Parliament, 3 April 2017, 1735 (A.J. Brown, Professor, Griffith University, As an Individual).

tampering or witness intimidation in the course of legal proceedings. Essentially, “whistle-blower reprisal is about interfering with the course of justice,” he said.

2.2.2.4 Reasonable Time Frames

According to the [International Best Practices for Whistleblower Policies](#), the 13th best practice is a “realistic time frame to act on rights.” This provision seeks to afford whistleblowers a chance to learn and understand their rights in case of reprisals before they are waived due to an arbitrary time limit. The minimal functional statute of limitations is six months, although one-year statutes of limitations are preferable and consistent with common law rights.

2.2.3 The Right to a Genuine Day in Court

According to the [International Best Practices for Whistleblower Policies](#), the 10th best practice is the “right to a genuine day in court.” This provision entitles whistleblowers to normal judicial due process rights for those aggrieved by illegality or abuse. The goal is to offer a fair hearing free from institutional conflicts of interest. It includes:

- Timely decisions;
- A day in court with witnesses;
- The right to confront one’s accusers;
- Objective and balanced rules of procedure; and
- Reasonable deadlines.

Some witnesses, including [Ms. Gualtieri](#), argued that whistleblowers need to have access to the courts to obtain redress for the harm and reprisals they suffer. For example, [Mr. Devitt](#) said one of the flaws of the PSDPA is that only the Commissioner’s Office can refer reprisal complaints to the Tribunal. In Ireland, nothing prevents individuals from seeking redress through the courts if they believe they have suffered harm following a protected disclosure. Moreover, [Mr. Devine](#) contended that whistleblowers should have access to the courts when the Commissioner’s Office fails to render a timely decision, as in the United States, where the time limit is between 180 and 210 days.

The [International Best Practices for Whistleblower Policies](#)’ 11th best practice is the “option for alternative dispute resolution with an independent party of mutual consent.” This provision offers an expedited and less costly forum for whistleblowers. The goal is to present an independent and fair resolution mechanism.

2.2.3.1 The Reverse Onus

According to the [International Best Practices for Whistleblower Policies](#), developed by Mr. Devine, the 12th best practice is “realistic standards to prove violation of rights.” This provision has stemmed from an emerging global standard which aims to correct a situation

of unreasonable burdens of proof and hopelessly unrealistic odds for whistleblowers when defending their rights.

All the witnesses supported reversing the burden of proof so that the employer would be required to demonstrate that disciplinary actions alleged to be reprisals were not related to a public servant's disclosure of wrongdoing.⁵⁸ Indeed, [Mr. Friday](#) argued that the reversal of the onus of proof would be "fair and just as it seeks to level what is otherwise an uneven playing field."

2.2.4 Improving the Legal Framework

2.2.4.1 Extending the Reach of the Law

According to the [International Best Practices for Whistleblower Policies](#), the fifth best practice is "no loopholes' protection for all citizens with disclosures relevant to the public service mission." In his opinion, this requirement is essential to extend the protection coverage to relevant applicants or personnel that challenge betrayals of the organization's mission or the public trust, regardless of the formal status of the whistleblower.

Many witnesses, including Mr. Conacher in his [brief](#), recommended that protection should be extended to all working persons of the Canadian economy, while the [Commissioner's Office](#) suggested to begin by enabling former public servants to request legal advice. For his part, [Mr. Brown](#) proposed to grant the Commissioner the authority to request information from beyond the public sector.

With regard to procurement, [Ms. Myers](#) raised the option to include a provision in procurements for the supplier or contractor to have whistleblower protection arrangements and that the employees can address the ombudsman of the government department or agency in case of reprisals. According to [Ms. Daviau](#), at least \$8 billion is annually contracted to the private sector.

2.2.4.2 Simplifying the Legal Framework

When speaking of tangible improvements to the legal framework within the existing institutions of the integrity framework, [Mr. Brown](#) suggested clarifying the objectives of the legislation, and the responsibilities of the departments and agencies, as well as the

58 OGGO, [Evidence](#), 1st Session, 42nd Parliament, 9 February 2017, 0955 (David Hutton, Senior Fellow, Centre for Free Expression, As an Individual) and 1005 (David Yazbeck, Partner, Raven, Cameron, Ballantyne & Yazbeck LLP, As an Individual); [Evidence](#), 1st Session, 42nd Parliament, 21 February 2017, 0845 (Scott Chamberlain, Director of Labour Relations, General Counsel, Association of Canadian Financial Officers), 0945 (Debi Daviau, President, Professional Institute of the Public Service of Canada), 1005 (Stan Korosec, As an Individual) and 0955 (Larry Rousseau, Executive Vice-President, National Capital Region, Public Service Alliance of Canada); [Evidence](#), 1st Session, 42nd Parliament, 20 March 2017, 1805 (A.J. Brown, Professor, Griffith University); [Evidence](#), 1st Session, 42nd Parliament, 21 March 2017, 0900 (Tom Devine, Legal Director, Government Accountability Project, As an Individual); [Evidence](#), 1st Session, 42nd Parliament, 23 March 2017, 1615 (Anne Marie Smart, Chief Human Resources Officer, Office of the Chief Human Resources Officer, Treasury Board Secretariat); [Evidence](#), 1st Session, 42nd Parliament, 4 April 2017, 0910 (Duff Conacher, Co-Founder, Democracy Watch); and Office of the Public Sector Integrity Commissioner, [Review of the Public Servants Disclosure Protection Act \(PSDPA or the Act\): Proposal of the Public Sector Integrity Commissioner for Legislative Amendments](#), p.2. [Brief submitted to OGGO on 20 February 2017].

oversight agency, and also ensuring that remedy provisions are available without loopholes restricting access to them. However, [he](#) also suggested considering the important number of amendments needed to ensure those changes occur, and to rewrite the legislation completely from square one as an alternative.

Finally, Paul G. Thomas, professor at the University of Manitoba, suggested in a [brief](#) to the Committee simplifying and clarifying the Act, “particularly with respect to the use of the [disclosure channels] and the procedures for handling reprisals.”

2.3 Committee’s Observations and Recommendations

The Committee believes that just as senior managers of federal departments and agencies have the organizational responsibility for workplace health and safety, they also have a duty to protect and support their employees throughout the disclosure process. Therefore, they have a duty to take whatever measures are necessary to curb the reprisals that whistleblowers often experience. Furthermore, individuals found guilty of taking reprisals against a whistleblower must be held accountable and face corrective penalties.

The Committee is of the opinion that protection should apply not only to the whistleblower, but also to any persons that helped him or her as well as witnesses and people who are mistaken to be whistleblowers. Additionally, it believes the Act should be amended to allow both a range of civil and employment remedies for the complainant and sanctions on the person having exercised reprisals.

The Committee is of the opinion that it is essential for those alleged to have been victims of reprisals after reporting a wrongdoing to be heard by the Tribunal. Forcing them to first go through the Commissioner’s Office to have their case reviewed and referred to the Tribunal not only delays the process, but also contradicts international whistleblowing policy best practices. Moreover, the Committee is of the opinion that the Tribunal takes much too long to deal with cases and must considerably speed up the process to ensure reprisal victims can obtain a timely decision.

Lastly, the Committee is of the opinion that major amendments to the *Public Servants Disclosure Protection Act* are needed to ensure the rights of whistleblowers are respected and to improve the process by which they obtain redress for reprisals.

Therefore, the Committee recommends that:

RECOMMENDATION 5

The Government of Canada explicitly mandate managers and supervisors in federal departments and agencies with a duty to protect and support employees who made a disclosure, any person that helped him or her as well as witnesses and people mistaken as whistleblowers.

RECOMMENDATION 6

The Government of Canada amend the *Public Servants Disclosure Protection Act* in order to:

- A. Ensure that protection under the Act extends to any person that helped a whistleblower as well any witness and person mistaken as a whistleblower;**
- B. Clarify and expand the definition of the term “reprisal” to include all acts and omissions which are inconsistent with the duty to protect and support;**
- C. Provide remedies to whistleblowers to ensure he or she is made whole, giving due consideration to his or her employment status prior to the disclosure, and that, irrespective of this, corrective measures can still be ordered against a wrongdoer;**
- D. Provide the Public Sector Integrity Commissioner and the Public Servants Disclosure Protection Tribunal with the authority to award reasonable legal costs as to encourage whistleblowers to come forward;**
- E. Provide the Public Servants Disclosure Tribunal with the right to rule to sanction individuals who take reprisals or any form of detrimental action against an employee having made a disclosure, any person that helped him or her as well as witnesses and people mistaken as whistleblowers;**
- F. Extend the deadline provided to file a reprisal complaint to 12 months;**
- G. Enable whistleblowers who suffer reprisals, including federal contractors, to directly address the Public Servants Disclosure Protection Tribunal without having their case first validated by the Public Sector Integrity Commissioner and provide the Tribunal with more resources so that it can rule on complaints in a timelier manner;**
- H. Remove the requirement that investigations by the Office of the Public Sector Integrity Commissioner cannot overlap with investigations under other laws; and**
- I. Reverse the burden of proof so that the employer must demonstrate that no reprisals were taken against the whistleblower for having made a disclosure.**

PART III – ORGANIZATIONAL CULTURE

Our primary lesson learned is that weak rights are counterproductive. They increase the chilling effect and associated secrecy when the rights on paper do not reflect reality in practice.

[Tom Devine](#),

Legal Director, Government Accountability Project, As an individual

3.1 Provisions of the Act Concerning the Culture Surrounding Whistleblowing

3.1.1 Ensuring a Safe and Healthy Workplace

3.1.1.1 Empowering a Culture Shift

Some witnesses informed the Committee that, in a 2016 publication, CSA Group issued disclosure guidelines, and one of its main recommendations for all employers was to create a culture that lets employees speak frankly.⁵⁹ In this publication, CSA Group also concluded that there is a close link between establishing a psychologically safe and healthy workplace and creating a whistleblowing system.⁶⁰

Similarly, a number of witnesses discussed the need to change the existing culture in the public service. For example, [Mr. Devine](#) said that “[i]f there's not cultural acceptance and there's not a cultural revolution, the legal revolution will be irrelevant for our practical purposes.” Likewise, [Mr. Friday](#) argued that “there cannot be an effective whistle-blowing system without a culture shift so that speaking out about potential wrongdoing is an accepted part of public sector culture and can be responded to and supported in a climate free from reprisal and free from fear of reprisal.” He added that, to successfully change the culture in the federal public service, the fact that fear of reprisal exists must be recognized and the need for major changes to reduce and ultimately eliminate that fear must be acknowledged.

According to [Mr. Rousseau](#), the culture in Canada is generally not to disclose, as there is no independent disclosure process or effective protection for whistleblowers. Additionally, he said that the flaws of the PSDPA foster an unhealthy and ineffective culture of silence in the federal public service.

Mr. Thomas explained in his [brief](#) that, according to studies in other jurisdictions, employee trust in the whistleblowing process may be influenced by factors such as

59 CSA Group was previously named the Canadian Standards Association (CSA).

60 OGGO, [Evidence](#), 1st Session, 42nd Parliament, 9 February 2017, 1025 (Mr. David Yazbeck, Partner, Raven, Cameron, Ballantyne & Yazbeck LLP, As an individual) and [Evidence](#), 1st Session, 42nd Parliament, 21 February 2017, 0955 (Mr. Larry Rousseau, Executive Vice-President, National Capital Region, Public Service Alliance of Canada).

supervisory support, organizational commitment and the status of the employee – seniority, sex, type of position, ethnic background, etc. He also noted that, by analyzing certain questions from the comprehensive survey of federal public servants in 2014, he was able to identify a pattern indicating that organizations where a higher number of employees said they knew where to raise ethical concerns and where employees said ethical matters were regularly discussed had a higher percentage of employees who did not fear reprisals for making disclosures.

3.1.1.2 Raising Awareness

One may have the best legal and ethical framework in the world, but if few people are aware of its existence, it is all beside the point.

*[Amipal Manchanda](#),
Assistant Deputy Minister, Review Services,
Department of National Defence*

Since 1999, the Office of the Chief Human Resources Officer, part of the Treasury Board Secretariat, has conducted a comprehensive survey of federal public servants every three years to measure their opinions about engagement, leadership, the workforce and the workplace. In addition, a short annual survey of federal public servants is conducted every year the comprehensive survey does not take place. These surveys are intended to help the federal public service identify both what it is doing well and what it needs to improve in the area of people management practices.⁶¹

The most recent comprehensive survey of federal public servants was completed in 2014, and 71.4% of them responded, that is, 182,165 people working for 93 federal departments and agencies. In response to Question 50 – “I feel I can initiate a formal recourse process (e.g., grievance, complaint, appeal) without fear of reprisal” – 40% of respondents said they somewhat or strongly agreed with that statement, an increase of 2% compared with the same question in 2011.⁶²

In addition, the Commissioner’s Office commissioned a study of federal employees from Phoenix Strategic Perspectives Inc. in 2011 and again in 2015 in order to explore the whistleblowing culture in the federal public service. According to the 2015 report, the study participants reported the following concerns: possible reprisals, the strength of their evidence, and the lack of anonymity and confidentiality. The report also found that federal managers saw fear as the key factor hindering employees from disclosing wrongdoings.⁶³ [Mr. Friday](#) explained that the two reports on the studies of 2011 and 2015 underscored that truly making whistleblowing more acceptable will require greater support from senior management.

61 Government of Canada, [Public Service Employee Surveys](#).

62 Government of Canada, [2014 Public Service Employee Survey Results by Question for the Public Service](#).

63 Phoenix Strategic Perspectives Inc., [Exploring the Culture of Whistleblowing in the Federal Public Sector](#), December 2015, p. ii.

[Mr. Chamberlain](#) told the Committee he believes training public servants is not as important as making the necessary changes to the PSDPA, as most public servants receive training when they are hired. He said he thinks “it’s not very effective because most [employees] assume that they are not going to have that problem, so it goes in one ear and out the other.” Moreover, he emphasized that “outreach and training are valuable, but it’s only one small piece of the solution.”

A. Current Initiatives in the Federal Public Service

Regarding the efforts of the federal public service leadership to promote the disclosure of wrongdoings, [Mr. Trottier](#) explained to the Committee that the Office of the Chief Human Resources Officer is responsible for supporting federal departments and agencies in administering the PSDPA, including with the designation of senior officers and through learning events, training, meetings and ongoing guidance and information tools posted on the federal government website. He continued by saying that the Treasury Board Secretariat believes in “promoting a positive and respectful public sector culture that is grounded in values and ethics.” [Ms. Smart](#) explained that her office follows up with deputy heads to ensure they disseminate the information, raise awareness and provide the resources necessary to ensure the internal disclosure process functions properly. [She](#) added that all federal employees must complete a three-hour online course followed by a test to assess their knowledge of the public service code of conduct. Finally, [she](#) stated that, in addition to her office’s surveys of the federal public service, some departments follow up on these surveys with their employees.

3.2 Protecting the rights of employees

3.2.1 Reliable Confidentiality Protection

The PSDPA includes provisions to protect the identity of persons involved in a disclosure, including the whistleblower, the witnesses and the persons alleged to be responsible of wrongdoing. Section 11(1)(b) requires the chief executives to establish procedures to ensure the confidentiality of information collected in relation to disclosures of wrongdoing. Under sections 22(e) and (f), the Commissioner must protect, to the extent possible in accordance with the law, the identity of persons involved in a disclosure, and establish procedures for processing disclosures and ensure the confidentiality of information collected in relation to disclosures and investigations.

According to the [Whistleblower Protection Laws in G20 Countries](#) report, the criterion the PSDPA performs the least in is confidentiality. Under the Act, an anonymous disclosure is not deemed a protected disclosure by the Treasury Board Secretariat.

[Mr. Lampron](#) expressed that when investigators speak with witnesses, “we do everything in our power to ensure that these witnesses’ confidentiality is maintained.” Although [Mr. Radford](#) specified that investigators cannot promise absolute confidentiality as it is restricted by judicial fairness and the principle of natural justice. Conversely, [Ms. Stevens](#) thought that there could be concerns regarding the provisions of

confidentiality for the alleged wrongdoer. [Ms. Smart](#) argued that in order for the wrongdoer to rehabilitate, shaming is not the solution.

All witnesses before the Committee agreed that fear of reprisals is the main reason potential whistleblowers do not come forward. In [Mr. Trottier](#)'s view, fear of reprisal is difficult to assess, although the latest Public Service Employee Surveys of 2014 states that over 50% of public servants would not disclose a wrongdoing for this reason. Faced with this evidence, [Mr. Rousseau](#) supposed that the Commissioner's Office would like to have provisions to protect anonymity included in the legislation. It was conceded by other witnesses, such as [Mr. Conacher](#), that in small organizations, it can be very difficult to protect an individual's identity because only a handful of people could have known the information disclosed.

Finally, in the course of an investigation, [Mr. Radford](#) affirmed that the identity of the whistleblower is known to the Commissioner's Office and the investigator. In response to a question from a Committee member, it was explained that a whistleblower is a key witness in an investigation to confirm information and follow-up on matters valuable to investigators. [Mr. Friday](#) noted that anonymity is a "two-edge sword" and he does not believe that this type of disclosure fulfills the intent of the PSDPA.

3.2.1.1 About Freedom of Speech

Put simply, whistle-blowers are employees who exercise their free speech rights to challenge abuses of power or illegality that harm or betray the public. They represent the highest ideals of public service: loyalty, honesty, and dedication.

*[Joanna Gualtieri](#),
Director, The Integrity Principle, As an individual*

The Act relieves public servants from obligations of confidentiality established under other federal legislation for the purpose of disclosing a wrongdoing, subject to specific [exceptions](#). The public servant must limit the disclosure of information to the case of wrongdoing, and follow established procedures relative to the handling of protected information. A public servant can make such information public only in exceptional cases.⁶⁴

[Mr. Devine](#) presented three significant criteria for a healthy disclosure infrastructure. First, to shield whistleblowers from gag orders; second, to ensure free speech rights with no loopholes; and third, to guarantee confidentiality protections which drive the flow of information and the identification of wrongdoing. In the Canadian law, he identified shortcomings in each of those criteria. To begin, he sustained that the law does not protect against agency gag orders, but rather only against parliamentary restraint. Additionally, the

64 PSDPA, S.C. 2005, s. 16.

act does not cover certain broad categories of rules such as the Treasury Board regulations significant for procurement. Lastly, [he](#) pointed to other jurisdictions, the United States and Serbia, which prevent the identification of the subject matter of disclosures and not only of the identity of the whistleblower to ensure confidentiality.

The Committee, concerned about the impact of non-disclosure agreements and gag orders on public servants' freedom of speech, requested clarifications on the subject. In response to a question from the Committee, Department of Justice officials explained in writing that some public servants and members of the CAF have signed a security form entitled the "Special Security Accountability Form" in relation to the Department of National Defence's [Future Fighter Capabilities Project](#). They explained that this security form is not a non-disclosure agreement and that it simply highlights the obligations of public servants and members of the CAF to safeguard federal government information. Therefore, it does not prevent public servants covered by the PSDPA from disclosing wrongdoings, and these public servants remain protected by the PSDPA.⁶⁵

Regarding non-disclosure agreements, [Mr. Devitt](#) explained that, under the *Irish Protected Disclosures Act*, employers are prohibited from forcing employees to sign non-disclosure clauses. But there are "exceptions for those sharing information that might be related or have an impact on national security. However, where public contracting is believed to be subject to wrongdoing, there are no provisions to prevent an employee from sharing information or making protected disclosure about that."

3.2.1.2 About Access to Information

Section 44 of the Act states that unless the disclosure is required by law or permitted by this Act, the Commissioner and every person acting on behalf of or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their duties under this Act. [Mr. Hutton](#) denounced the secretive nature of the PSDPA because all information is "buried forever."

[Mr. Brown](#) explained that, in Australia, confidentiality provisions are not intended to shield the results of investigations conducted in the public interest. Their only purpose is to ensure the integrity of the investigations.

Furthermore, Tribunal hearings may be conducted in camera. [Mr. Rousseau](#) and [Ms. Myers](#) consider these measures at odds with the intent of whistleblower protection laws, which were developed around the public interest freedom of speech and right to know through access to information.

65 Department of Justice, *House of Commons Standing Committee on Government Operations and Estimates: Review of the Public Servants Disclosure Protection Act*, p. 1. [Brief submitted to OGGO on 15 February 2017]

3.2.2 Organizations Not Covered by the Act

The PSDPA defines “public servants” as “every person employed in the public sector, every member of the Royal Canadian Mounted Police and every chief executive”, while the “public sector” includes the Royal Canadian Mounted Police, but – subject to exception – not the CAF, the Canadian Security Intelligence Service or the CSE.⁶⁶ However, the Act does apply to the employees of the Department of National Defence.

The institutions not covered by the PSDPA are required to have internal procedures similar to those set by the PSDPA, in the opinion of the Treasury Board Secretariat, under section 52 of the Act.⁶⁷ For example, the [Canadian Armed Forces \(CAF\) Disclosure Process](#) that came into force on 1 April 2013 recognizes “the specialized nature of operations by CAF members, primarily in regard to national security.” The process provides whistleblowers with “the same rights and protections that are afforded to public servants under the PSDPA.” For the CAF, wrongdoing is defined as a serious violation that goes against the public interest rather than a personal wrongdoing.

A number of witnesses, including [Mr. Devine](#), called the fact that the PSDPA does not apply to either soldiers or the employees of intelligence agencies a flaw in the legislation and inconsistency with international best practices. Furthermore, [Ms. Smart](#) affirmed that they report to the Treasury Board annually and that the Secretariat monitors and works with them even though their statistics are not included in its annual report concerning the PSDPA.

3.3 Solutions Proposed by Witnesses

3.3.1 Empowering a Culture Shift

The Committee received multiple suggestions to change the culture towards whistleblowing. Each aims to prevent or remedy to the potential detriments a whistleblower may suffer by coming forward. One of these is to recount the success stories of whistleblowers having prevailed and conserved their livelihood. According to [Mr. Brown](#), success stories are necessary to restore faith in the system:

One thing that we know is crucial to making a good whistle-blowing system work in an organization is having the organization use its own history to get a positive message out within the organization about how real cases have been handled.

He explained that it is a form of recognition although it is not focused on the individual. It would rather serve to demonstrate the public benefit of whistleblowing, its importance and value.

In this respect, [Mr. Hutton](#) argued that a fundamental strategy to achieve this would be to “ring-fence” the whistleblowers when identified such that anyone who goes

66 [PSDPA](#), S.C. 2005, c. 46, s. 2(1).

67 The internal procedures of the Canadian Security Intelligence Service were approved in December 2009, the Communications Security Establishment Canada in June 2011 and the Canadian Armed Forces in April 2012. Government of Canada, [Annual Report on the Public Servants Disclosure Protection Act 2015-16](#), p. 3.

against them does so at their “severe peril.” Personal accountability for retaliation is, in [Mr. Devine](#)’s opinion, necessary to ensure a deterrent value to not conforming to the law. In his view, “no significant corrective action” has been taken in over a decade under the PSDPA. As for the whistleblowers, Mr. Conacher suggested in his [brief](#) that whistleblowers whose allegations are proven receive automatically, as a reward, the payment of at least one year’s worth of salary so that they can, if they choose to, seek employment elsewhere as their disclosure may make it uncomfortable for them to maintain their employment.

Incidentally, [Mr. Devitt](#) suggested simplifying the requirements under the Act for a whistleblower to come forward under “one single standard.” According to [Mr. Thibodeau](#) such a strategy is threefold: proactivity, “no wrong door” and “no stone unturned.” He explained that, at CBSA, investigations may be launched based on suspicions and that disciplinary measures for misconduct are communicated regularly. Furthermore, he said that employees, regardless of the disclosure mechanism, are guided towards the appropriate avenue for resolution by an internal specialist. Lastly, he asserted that “issues are tracked and reviewed” through numerous processes, including misconduct investigations, workplace assessments and even criminal investigations.

Moreover, a fail-proof mechanism was suggested by [Mr. Conacher](#) in case a whistleblower’s disclosure or reprisal complaint is mishandled or suffers from unreasonable delays.

Notwithstanding these suggestions, [Mr. Brown](#) maintained that the true challenge is how the process is implemented to ensure its effectiveness and nurture confidence in the system.

3.3.2 Ensuring a Safe and Healthy Workplace

According to the [International Best Practices for Whistleblower Policies](#), the ninth best practice is “providing essential support services for paper rights.” Whistleblowers can be protected only if they know that a law to protect them exists. Therefore, the rights of whistleblowers and the duty to disclose illegality must be posted in all workplaces. In addition, the support services available to them must include an ombudsperson such as the Commissioner’s Office that has access to documents and officials from any organization, enabling it to overcome any resource handicaps and gruelling conflicts, as well as take expeditious corrective measures.

In his [brief](#) to the Committee, Mr. Thomas stated the following:

Changing the culture of a large, diverse organization like the federal public service is a slow, uncertain process that more resembles gardening than engineering. With respect to whistleblowing, leaders must plant seeds of integrity, openness and safety and they must nurture them to fruition. Creating an interpersonal climate of trust and cultures of safety to encourage and support whistleblowing is proving to be difficult.

Moreover, Mr. Thomas suggested that “[p]revention through education and dialogue about ‘rightdoing’ is much to be preferred over disclosure and punishment of wrongdoing.”

According to [Mr. Conacher](#), any person who witnesses or has evidence of wrongdoings by anyone in politics, government or business should be required to report it to the Commissioner’s Office.

In response to a question from a Committee member, [Mr. Brown](#) advised identifying the initiatives in departments and agencies that are working best in developing a healthy culture of disclosure in the public service and using them as examples to inspire the others.

The Commissioner’s Office commissioned a research paper on whistleblowing and the fear of reprisal that stated that qualitative research “confirmed that a sense of futility and fears of retaliation were top of mind for public servants when they did not speak up” and that “research conducted outside the federal public service also reached identical conclusions about how these factors generate silence.”⁶⁸ The paper offered the following three proposals: conduct more research into fear of reprisal in the federal public service, review the PSDPA, and raise awareness and better promote the mandate of the Commissioner’s Office.

A number of witnesses discussed the importance of training and awareness activities for employees. [Mr. Ferguson](#) said he believes training is vital to promoting a healthy culture in the federal public service in which employees understand “the importance of treating [disclosures] respectfully and in the right way, by believing people who are coming forward and doing a thorough and appropriate investigation.” [Ms. Myers](#) asserted that starting a culture change depends in part on the “proactive side of making sure that ... you have a system you’re going to rely on and that you tell people about it and do so really well.”

Multiple witnesses, including [Ms. Gualtieri](#), explained that the best way to change the culture in the public service is to provide examples of whistleblowers who were successfully protected. In this regard, [Mr. Chamberlain](#) said that “[o]nly a small part of changing that culture is about training. It’s more about making sure that they can see examples out there of people who’ve blown the whistle and haven’t suffered dire consequences.” [Mr. Brown](#) said that an effective way to ensure a whistleblowing system works well is to “get a positive message out within the organization about how real cases have been handled, using appropriate cases.”

3.3.3 Confidentiality Provisions

According to the [International Best Practices for Whistleblower Policies](#), the sixth best practice is “reliable confidentiality protection.” This provision attempts to maximize the flow of information necessary for accountability and the reliability of protected disclosure

68 Craig Dowden, *The Sound of Silence: Whistleblowing and the Fear of Reprisal – Commissioned by the Office of the Public Sector Integrity Commissioner*, 22 December 2016, p. 3.

channels. Whistleblower advocates agree that denying whistleblowers the right to reliable confidentiality protection is a strong deterrent and prevents the disclosure of wrongdoing.

Supporting the importance of confidentiality, the Commissioner's Office suggested, in a [brief](#), strengthening the confidentiality provisions under the Act to include any record created for the purpose of making a disclosure and of an investigation of reprisals. However, in the public interest's right to know, [Mr. Conacher](#) suggested that the identity of anyone found guilty of wrongdoing be made public.

An alternative solution, according to [Mr. Conacher](#), would be to submit anonymous disclosures to the Commissioner or create a new body to accept those disclosures and provide advice to potential whistleblowers.

3.3.3.1 Freedom of Speech

According to the [International Best Practices for Whistleblower Policies](#), the eight best practice is "shielding whistleblowers rights from gag orders." This provision seeks to protect employees' free expression rights by incorporating in an organization's rules, policies or non-disclosure agreements a ban on gag orders.

In order to ensure there is no loophole to prevent a person from exercising their freedom of speech right, [Mr. Devine](#) suggested the inclusion of anti-gag provisions in the Act. In the United States, there are three anti-gag provisions in the *Whistleblower Protection Act*. Alternatively or additionally, such provisions could be included in a code of conduct, as suggested in a [brief](#) by the Professional Institute of the Public Service of Canada, to prevent "muzzling, meddling and undue political interference in the work of public service professionals."

3.3.3.2 Access to Information

A number of witnesses have suggested amending the access to information provisions to minimize the duplication of work under the Act without necessarily breaching the provisions of confidentiality. In [Mr. MacMillan](#)'s view, sections 43 and 44 of the Act should be amended to allow the RCMP access to information obtained in the course of an investigation by the Commissioner that does not necessarily pertain to the subject matter of the investigation. Similarly, [Ms. Smart](#) noticed the duplication of work on the part of chief executives that have to investigate founded cases of wrongdoing by the Commissioner internally in order to determine the appropriate corrective measures. She suggested that having access to the case file would assist the chief executives and facilitate proper discipline.

Other witnesses have expressed the right of the public to know about the cases of wrongdoing and the handling of reprisal cases, possibly after a certain number of years have elapsed.

3.3.3.3 Security and Intelligence Employees

[Mr. Devine](#) presented the system from the United States, which he deems successful because the enforcement “has been operating in good faith and is highly committed to it.” Essentially, employees have the right for dissent within the organization, although they do not have public freedom of expression, but they are protected against retaliation for having exercised their free speech rights.

3.3.4 A Protection and Oversight Agency

Throughout the study, many witnesses discussed the creation of an office or agency that could provide legal advice, an entity responsible to ensure that the rights of whistleblowers are respected and that measures are taken to prevent reprisal and address it immediately if it does occur. According to [Ms. Therrien](#), there is nobody to whom witnesses of wrongdoings or victims of reprisals can seek legal advice in a reasonable measure.

The objective of the agency would be to ensure due diligence throughout the entire disclosure and reprisal complaint processes in order to resolve matters as expeditiously as possible and prevent long judicial hearings. For example, [Mr. Conacher](#) suggested that if a department or agency did not address a disclosure or reprisal complaint because of a conflict of interest, then the protection agency would intervene. Moreover, the work of the agency would be proactive according to [Mr. Worth](#) because “court protection is not the best practice.” Best value would be obtained from an agency that evaluates the risks of reprisals and whose main role is to defend whistleblowers at each step of the process.

In [Mr. Brown](#)’s view, the evaluation of the risks of reprisals should be implemented in the process of both the department or agency and an oversight agency at each stage of the disclosure process such that:

It’s actually somebody’s job to [assess the risks of detrimental action or reprisal and identify] the best strategy for managing a situation... because it will always vary.

Moreover, [he](#) highly suggested that the internal ethics unit of federal departments be subject to a mandatory accountability reporting relationship with the oversight agency:

Very often, all that’s needed for an agency [or an internal ethics unit] to resolve that conflict of interest to a large degree and realize that they can and should protect the whistle-blower is to know that somebody else is looking over their shoulder and that it will be known how they handle the situation.⁶⁹

Speaking of either the Integrity Commissioner or a Protection Commissioner, many witnesses, including [Mr. Conacher](#) expressed that in order to be effective, they should have the authority to impose corrective measures and conduct regular audits. It was also suggested that the department disclosure offices should be independent and report directly to a Commissioner, but [Ms. Smart](#) conveyed that there would be uneasiness with

69 OGGO, [Evidence](#), 1st Session, 42nd Parliament, 3 April 2017, 1724, (A.J. Brown, Professor, Griffith University, As an Individual).

that option on the chief executives' part as they are responsible for employee management in the department or agency.

Finally, according to [Mr. Hutton](#), if the federal government endowed itself with an agency that has “the power, the reputation, and the leadership of the Auditor General of Canada, but focused on whistle-blowers,” it would correct the Commissioner’s lack of independence.

3.4 Committee’s Observations and Recommendations

The Committee believes that understanding, engagement and co-operation between the various stakeholders – namely, public service employees, federal departments and agencies, seniors officers for internal disclosure, the Treasury Board Secretariat and the Office of the Chief Human Resources Officer, the Commissioner and the Commissioner’s Office, the Tribunal, the courts, and the public service unions – are critical to effectively protect whistleblowers.

The Committee considers awareness one of the key characteristics of effective whistleblower protection, as identified by the Organisation for Economic Co-operation and Development (OECD) in the [action plan](#) developed for the G20 Anti-Corruption Working Group in 2011. Accordingly, the PSDPA must be accompanied by effective awareness, communication and training initiatives throughout the public service. The Committee is of the opinion that all federal public service employees must not only know about and understand the disclosure processes, but also be familiar with their rights and the recourse available to them if they suffer reprisals. Therefore, it is vital that all federal departments and agencies, including Crown corporations, in collaboration with the Commissioner’s Office, promote these elements by increasing the number of training and information sessions they offer their employees.

In addition, the Committee recognizes that a great deal of work needs to be done to foster a culture change in the federal public service and that there is an ongoing need to raise awareness and provide information. A culture change requires that managers of federal departments and agencies first recognize their obligations to their employees and, second, make a concrete and ongoing commitment to take whatever actions are necessary to make this change happen. The progress of this culture change should also be assessed regularly.

Finally, the Committee favours an open and transparent government in matters concerning investigations of wrongdoing and reprisal complaints, including transparency and openness with regard to the outcomes of investigations and corrective actions taken. While it is important that gag orders and non-disclosure agreements do not preclude public servants from disclosing wrongdoings or investigations from taking place, the Committee is concerned that the outcomes of investigations remain hidden from the public and that Canadians are unaware of the corrective measures taken and justice administered. Furthermore, confidentiality provisions to protect the identity of whistleblowers should not prevent the disclosure of wrongdoing or serve the purpose of protecting wrongdoers. To serve the public interest in an open and transparent manner, information should be

disclosed to the whistleblower, alleged reprisal victim and/or the public, as appropriate, at each completed stage of an investigation.

Therefore, the Committee recommends that:

RECOMMENDATION 7

The Office of the Public Sector Integrity Commissioner be responsible, in co-operation with federal departments and agencies, to raise awareness among, to communicate with and to provide training to federal employees regarding the disclosure process, their rights and whistleblower protection, and that organizations not covered by the *Public Servants Disclosure Protection Act* do the same for their employees.

RECOMMENDATION 8

The Office of the Chief Human Resources Officer of the public service conduct more research, in alignment with leading international research for comparison purposes, such as that of Australia, into the best practices to change the existing culture of disclosure and the fear of reprisals in the public service, and to identify the weaknesses in the protection and disclosure systems to be addressed in each federal department and agency.

RECOMMENDATION 9

The Office of the Chief Human Resources Officer of the public service regularly assess the culture of disclosure and the fear of reprisals in the public service by notably recording the frequency of perceived wrongdoing and reported wrongdoing, and evaluating the level of confidence of public servants in the protection and effectiveness of the internal reporting mechanism, and publicly release the information collected and the findings.

RECOMMENDATION 10

The Government of Canada amend the confidentiality provisions of the *Public Servants Disclosure Protection Act* in order to ensure information obtained in the course of investigations by the Public Sector Integrity Commissioner may be used by federal departments and agencies, by the Public Servants Disclosure Protection Tribunal and by the Federal Court, to avoid the duplication of efforts, but without compromising the confidentiality of whistleblowers and witnesses.

RECOMMENDATION 11

The Government of Canada amend the *Public Servants Disclosure Protection Act* in order to include provisions that respect and maintain the confidentiality of witnesses, including the whistleblower, unless consent to disclose one's identity has been expressively given in writing by the person concerned.

PART IV – THE ROAD FORWARD

Every whistleblower law should include a formal review process that tracks how many whistleblowers use the new rights, whether they have proven effective empirically, and what changes should be enacted based on the lessons learned.

[Tom Devine](#),

Legal Director, Government Accountability Project, As an individual

4.1 Evaluation Provisions of the Act

4.1.1 Statutory Review and the Preamble

Pursuant to section 54 of the PSDPA, five years after the Act comes into force, the President of the Treasury Board must ensure that there is an independent review of the Act and its administration and application

[Mr. Devine](#) suggested that statutory reviews every five years is reasonable as long as a formal structure for the review is in place. The PSDPA does not include such provisions. Alternatively, he explained that the United States has oversight hearings to conduct a comprehensive assessment of the Act through legislative hearings every other year. [Ms. Gualtieri](#), supported, once the current shortcomings are corrected, the idea of “testing” the law through real-life examples to evaluate if it is effective and requires a thorough review. In other jurisdictions, such as in Ireland, according to [Mr. Devitt](#), reviews occur on a more regular basis, for example every three years.

The objects in the preamble of the Act are threefold. First, it seeks to maintain and enhance public confidence in the integrity of public servants. Second, it aims to enhance confidence in the public institutions by establishing effective procedures for the disclosure of wrongdoings and for protecting public servants who disclose wrongdoings. Third, it strives to achieve an appropriate balance between public servants’ duty of loyalty to their employer and public servants’ right to freedom of expression as guaranteed by the *Canadian Charter of Rights and Freedoms*.

In the view of [Mr. Devine](#), it is a problem that whistleblowing is perceived as disloyalty to the institution. He advanced that most often, whistleblowers disclose wrongdoing for the benefit of the organization because not doing so could “backfire and hurt everyone.” In agreement with that statement, [Ms. Daviau](#) defined the work of the Committee as an opportunity to “ensure that [whistleblowing] is recognized as a service, not punished as a betrayal.”

In [Mr. Yazbeck](#)'s opinion, the preamble places the Act at the "heart of democracy" and is essential for the well-functioning of government. However, in his experience, the Act has not served that purpose so far.

4.1.2 Monitoring and Reporting

The Chief Human Resources Officer must prepare and submit to the President of the Treasury Board an annual report providing an overview of all disclosure activities in the public service. It must set out:

- a) The number of general inquiries relating to the Act;
- b) The number of disclosures received, the number of those that were acted upon and the number of those that were not acted upon;
- c) The number of investigations commenced as a result of disclosures made through the internal disclosure mechanism;
- d) Whether there are any systemic problems that give rise to wrongdoings; and
- e) Any other matter that the Chief of Human Resources Officer considers necessary.

The President of the Treasury Board must table this report before each House of Parliament within the first 15 days on which that House sits after he has received it.⁷⁰

Regarding the Treasury Board Secretariat's role in implementing, monitoring, evaluating the whistleblower protection processes in departments and agencies, [Ms. Smart](#) explained that there is an annual survey in place and a requirement for annual reports, which are submitted directly to her by the chief executives of each department and agency. These chief executives are responsible for preparing the annual reports, including the aforementioned statistics as well as recommendations for improvement.⁷¹

The Commissioner is also required to submit various reports and account for his activities under the Act. First, he must table an annual report before Parliament that includes the following:

- a) The number of general inquiries relating to this Act;
- b) The number of disclosures received and complaints made in relation to reprisals, and the number of them that were acted on and those that were not acted on;

70 *PSDPA*, s. 38.1(2)-(4).

71 OGGO, [Evidence](#), 1st Session, 42nd Parliament, 16 February 2017, 0955 (Ms. Joanne Renaud, Director General, Audit, Evaluation and Ethics, communications Security Establishment).

- c) The number of investigations commenced under this Act;
- d) The number of recommendations that the Commissioner has made and their status;
- d.1) In relation to complaints made in relation to reprisals, the number of settlements, applications to the Tribunal and decisions to dismiss them;
- e) Whether there are systemic problems that give rise to wrongdoing;
- f) any recommendations for improvement that the Commissioner considers appropriate; and
- g) Any other matter that the Commissioner considers necessary.

The Commissioner is also required to submit case reports, within 60 days from determining there is wrongdoing, to the appropriate chief executive concerning the investigation. The report includes many provisions, including the finding of wrongdoings.⁷²

To ensure that chief executives fulfill their requirements and are accountable, [Ms. Smart](#) named various initiatives such as monthly meetings and follow-ups, but specifically expressed concerns about the importance of ensuring consistent standards across all departments and agencies when applying the Act. She informed the Committee that she is working on this initiative to provide further guidance to the departmental chief executives. However, [she](#) stressed that the Treasury Board Secretariat does not conduct audits to fulfill its duties under the Act.

Others, such as [Mr. Conacher](#), consider reporting from departments and agencies to be done on a subpar level and seek greater accountability both from the Chief Human Resource Office and from the Commissioner.

4.1.2.1 Incomplete and Incompatible Statistics

In response to Committee member questions, a wide range of conflicting interpretations of the statistics compiled and disseminated through the annual reports were provided. For some, such as [Ms. Glover](#) and [Mr. Trottier](#), the data available suggests that there are no issues with the protection of information and that public servants have confidence in the established procedures. [Mr. Trottier](#) analyzed the consistency in the number of disclosures from one year to another as a favourable indicator and expressed that he would only have concerns if there were important fluctuations in the statistics. However, [Mr. MacMillan](#) does not believe that annual variations are an informative indicator of the effectiveness of the Act. More qualitative and quantitative information could help discern the bigger picture. Indeed, [Mr. Friday](#) defended that a higher number of disclosures now meet the definition of wrongdoing under the Act than when the PSDPA

72 PSDPA, s. 38.

was first implemented. In his opinion, that is one tangible improvement in their work under the Act since 2007.

In essence, [Mr. MacMillan](#) concluded that the statistics disseminated concerning the disclosure activities under the PSDPA should not be analyzed in isolation of statistics from other mechanism resolutions, since it is part of the integrity framework and addresses wrongdoing of a more serious nature than other mechanisms. [Mr. Friday](#) also pointed out that the methodology to calculate the statistics by his Office and the Secretariat differ as the former reports disclosures of wrongdoing and the latter allegations of wrongdoing, where a disclosure of wrongdoing can include multiple allegations. Therefore, they are not comparable and a clear understanding of the disclosure activity across the entire public service is more difficult to obtain.

4.1.3 A Reactive Legislation

The processes for disclosing wrongdoing and making reprisal complaints are triggered by an act of wrongdoing or an act of reprisal. [Mr. Friday](#) called this a responsive model that does not prevent these actions or support a culture change. However, [Mr. Lampron](#) confirmed that the Commissioner's Office has nonetheless investigated a number of speculative allegations from a preventive standpoint.

In addition, [Mr. MacMillan](#) argued that one of the goals of the PSDPA is to prevent duplication of investigation processes. Therefore, as [Ms. Renaud](#) explained, it is common for a disclosure to be referred to another established process. To [Mr. Brown](#), the reactive nature between the Act and the agents implementing it is problematic, but he notes that it is not specific to Canada. Fundamentally, the issue is that a reactive system cannot be at the front line to protect whistleblowers and other persons involved from detrimental action.

All things considered, to [Mr. Hutton](#), the PSDPA is the *Titanic* of whistleblower protection laws because mechanisms are triggered too slowly for whistleblowers to have the opportunity to prevail if reprisals are taken against them. [He](#) claimed that the protections promised under the Act are not genuine, and pointed out that no remedy was ever awarded by the Tribunal. In alignment with that thought, [Mr. Yazbeck](#) explained that the implementation of the PSDPA has not significantly changed anything for whistleblowers and that he still gives the same advice, i.e. to not make a disclosure unless willing to go through hardships, because the processes now available are ineffective. In [Mr. Garrett's](#) experience, proactively managing risks of potential wrongdoing goes much further than improving the processes so that ongoing wrongdoing comes to an end. He reported that "it doesn't stop" and that he knows of an employee at the Kent prison that has knowledge of at least six other incidents of asbestos exposure in the facility.

4.2 Solutions Proposed by Witnesses

A previous chair of this Committee remarked some time ago that this was an act not to protect whistle-blowers, but to protect deputy ministers from whistle-blowers. That's exactly the way it is.

[David Hutton](#),

Senior Fellow, Centre for Free Expression, As an Individual

4.2.1 Objectives of the Act

To properly evaluate an act, it is necessary to know against what criteria it should be evaluated. However, the Act does not state clear objectives. [Ms. Myers](#) explained to the Committee that the preamble states a desired outcome and not a goal. According to [Mr. Cutler](#), the PSDPA was intended to enable whistleblowers to come forward without fear, but was not written adequately to deliver on that objective. He suggested to the Committee that allowing the public sector to write the legislation governing its own integrity compromised it from the start.

In 2014, a joint initiative of four whistleblower protection organizations identified and rated, according to 14 criteria, the [whistleblower protection laws in G20 countries](#). The criteria are: internal disclosure procedures, anonymity, external reporting channels, transparency, oversight, confidentiality, sanctions, remedies, thresholds, wrongdoing, breadth of retaliation, scope of coverage, definition of whistleblowers and reporting channels. Canada ranks third in the public sector laws category, but third to last in the private sector laws category. However, the vast majority of witnesses before the Committee expressed, to varying degrees, that although the PSDPA appeared to be written in a comprehensive matter, it cannot be applied effectively and contains important loopholes that prevent whistleblowers from being protected as intended by the Act.

[Mr. Worth](#) explained the following to support the importance of statutory reviews:

[W]hen Canada's law passed in 2005, we did not yet have the Transparency International principles. We did not yet have the OECD principles. We did not yet have the Council of Europe principles. We did not have other principles developed by other NGOs and organizations, so I think the review you're doing is coming at the right time. There's been a flurry of [whistleblower] laws passed. Just since 2010 there have been about 25 whistle-blower laws passed around the world. There are a lot of lessons to learn.

Additionally, many witnesses urged the Committee to review the preamble to ensure that it provides the right objectives to guide the implementation of the Act and future reviews. In this endeavour, [Ms. Gualtieri](#) noted that even the title, in English, is flawed because it suggests the Act should protect the “disclosure” rather than the “discloser” or whistleblower. [Mr. Brown](#), of a similar opinion, pressed upon the Committee that a good legislative intent and good objectives were the foundation of an effective and intelligible law.

4.2.2 Meaningful Monitoring and Timely Reporting

Reporting should... not just [be] the responsibility to file statistics, but a responsibility to use that information to identify which cases need intervention. It's what we call the "intervention challenge."

*A.J. Brown,
Professor, Griffith University, As an Individual*

According to the [International Best Practices for Whistleblower Policies](#), the 20th best practice is the “review” of the law. This provision ensures the evaluation of the written law and its implementation. The goal is that each and every whistleblower protection act should include a formal review process that empirically analyzes the use and success of whistleblowers’ new rights to make appropriate changes to the legislation.

In terms of evaluation of the effectiveness of the act, [Mr. Devitt](#) shared that, in Ireland, the Department of Public Expenditure and Reform is responsible for governing the relevant data and that they are assisted by other organizations to monitor and assess individual whistleblowers’ experience from different government departments. Indeed, [Mr. Worth](#) supported that it is the reasons why complaints and disclosures were discarded that are interesting. He suggested that the data published by the Commissioner and the Treasury Board Secretariat need to include more specific details as to what actually happened to the disclosures and added that it should be made public annually in easy to access formats.

During the course of the study, [Mr. Radford](#) presented new and more detailed statistics regarding the types of allegations of wrongdoing received by the Commissioner’s Office: 20% of cases involved gross mismanagement; 24% of cases involved a serious breach of code of conduct; 17% a contravention of an act or a regulation; and 14% the misuse of public funds or assets. [He](#) added that of the 13 case reports tabled before Parliament, six related to a [serious breach of conduct](#).

Mr. Thomas, in a [brief](#) submitted to the Committee, suggested the following partial list of indicators of the effectiveness of a whistleblower protection act which goes beyond reporting disclosures of wrongdoing and allegations of reprisals:

- Whether the law encourages organizations to develop their own well understood, fair and efficient disclosure procedures;
- The confidence of public servants in the safety and fairness of the disclosure procedures and whether wrongdoing will be corrected;
- The volume of disclosures within the “home” organizations of employees and through the [Commissioner’s Office];

- The types of wrongdoing disclosed in terms of their appropriateness under the act and their seriousness;
- Whether the problems disclosed are corrected and preventive measures are taken;
- Whether public servants who make a disclosure are protected against reprisals;
- Whether the law and its operation make internal dissent and disclosure more legitimate and accepted behaviour in the public service culture;
- How often public servants mistakenly believe there is wrongdoing; and
- Whether the law and its operation serves a preventative purpose, reduces the incidence of wrongdoing and over time contributes to increased trust and confidence in government.

International whistleblower advocates, such as [Mr. Devine](#) and [Mr. Worth](#), use the success rates of making a disclosure of wrongdoing without suffering reprisals and of prevailing in court if reprisals occurred to analyze and determine whether the Act does protect whistleblowers and meet its other objectives. [Mr. Brown](#) suggested investing in research to better understand the impact of the disclosure mechanisms on various groups in order to have evidence to support tangible and sensible amendments.

4.2.3 A Proactive Legislation

The majority of witnesses, but first and foremost [Mr. Brown](#), urged the Committee to amend the Act or rewrite it completely in order to have a whistleblower protection system that is both proactive and simple to navigate.

According to [Mr. Trottier](#), the Treasury Board Secretariat is already proactive in reaching out to employees and ensuring workplace wellness initiatives are implemented. However, some witnesses, including [Mr. Begin](#), called for a more proactive approach to identify wrongdoing. He suggested that when an investigation concludes some allegations to be unfounded, they may nonetheless have identified areas where wrongdoing is likely to occur and therefore warrant prevention measures. However, [Ms. Glover](#) sustained that it is not obvious to identify cases where an investigation could be launched proactively. For example, in the case of the Phoenix Pay System, employees disagreeing with the process or implementation of the project would not have sparked any kind of proactive measure because it is not considered wrongdoing.

In [Mr. Brown](#)'s opinion, a proactive approach would include ensuring the appropriate implementation of the procedures and that protections are embedded at the departmental level. [He](#) added that the key ingredient for a proactive system is mandatory reporting about the cases received and how they are handled. This would also imply

setting verifiable standards and subjecting the investigation offices to audits.⁷³ With regard to early protection, [Mr. Brown](#) supported that:

It's primarily protection and support downstream, because any process requiring the whistle-blower to put together a case is misplaced in the first place. All these protections should be triggered simply by a reasonable suspicion or a reasonable concern. The onus should pass to the agency or to the Integrity Commissioner to then deal with that properly and to do the investigation. As soon as it becomes a situation where the whistle-blower is responsible for "putting the case", it's almost saying he or she has to investigate it, he or she has to put together all the evidence, and the whole system is far too reactive. The whole idea is that it becomes the government's problem, the agency's problem, to deal with it responsibly.

Finally, [Mr. Korosec](#) made the comment, in a request for tangible and significant amendments to be made, that even with the best intentions, those implementing and administering the law are restricted by what it says since "they're only as good as what they work with."

4.3 Committee's Observations and Recommendations

The Committee believes it is essential that the Act remain subject to an independent review on a regular basis in order to ensure that whistleblowers are adequately protected under the Act and that the required amendments are implemented and evaluated in a timely manner.

While some senior public servants, including [Mr. Trottier](#), said they believe the PSDPA works well, the Committee's view is that there is a severe lack of quantitative and qualitative information to support this assertion. The Committee recognizes and agrees that the objects of the Act should be revised to better reflect its true goals – namely, to enable an individual who believes that wrongdoings have occurred or could occur in the public service to report them without fear of reprisal. Moreover, the purpose of the legislation is to ensure that the public sector functions properly, that public servants behave in an ethical fashion, and that they cannot commit wrongdoings within the meaning of the Act and prosper in the public service. The Committee also believes that, when wrongdoings or illegal acts are committed, there is no conflict between a public servant's duty of loyalty to their employer and their freedom of speech. Rather, it is the duty of each public servant to report wrongdoings in order to protect the public interest and the duty of the employer to protect the public servant in such circumstances.

The Committee recognizes the important role of the Treasury Board Secretariat, under the Act, to implement, monitor and administer the internal disclosure process. However, the Committee believes that an integrity framework cannot rely merely on the integrity of its administration, and should therefore be subject to audits. For the purpose of future reviews of the Act, the Committee wishes that the Commissioner's Office assumes a more active role and acquire an inherent comprehension of the evolution of the disclosure activity in the public sector in order to identify necessary improvements in the

73 OGGO, [Evidence](#), 1st Session, 42nd Parliament, 3 April 2017, 1749, (A.J. Brown, Professor, Griffith University, As an Individual).

procedures. The Commissioner's Office should be responsible for monitoring internal disclosure activities of federal departments and agencies in order to identify situations of potential conflicts of interest and mishandling of cases. In such situations, the Commissioner should also have the responsibility and authority to intervene and ensure a proper and impartial investigation ensues, and the implementation of appropriate corrective measures. The Committee is committed to ensuring that a system that supports whistleblowers and highly discourages reprisals is built and expects the full co-operation of the Treasury Board Secretariat, all the federal departments and agencies, the Commissioner and the Tribunal in this endeavour.

Concerning the role of statistics, the Committee is of the view that meaningful and interpretable statistics should be produced with clear indicators to monitor the effectiveness of the Act. The Committee recognizes that research; potentially intersectionality analyses such as Gender-Based Analysis Plus, could also assist the administrators of the Act in identifying problematic areas in the implementation of the disclosure processes.

Finally, the Committee believes that efforts should be made for the implementation of the legislation to be more proactive and supportive of those coming forward in the public interest. Loopholes should be addressed, in the statutory reviews, but also by all the parties involved, in the meantime, and an earnest effort should be made to prevent whistleblower cases from falling in abeyance.

Consequently, the Committee recommends that:

RECOMMENDATION 12

The President of the Treasury Board initiate an independent review of the *Public Servants Disclosure Protection Act* no later than five years after the coming into force of the amendments recommended.

RECOMMENDATION 13

The preamble of the *Public Servants Disclosure Protection Act* be amended to reflect more accurately the objectives of the Act, notably the protection from reprisals of individuals participating in a public interest disclosure of wrongdoing.

RECOMMENDATION 14

The Office of the Public Sector Integrity Commissioner draft, in collaboration with the Internal Disclosure Working Group, and implement a proactive framework for regular, transparent and relevant reporting and accountability at each stage of the internal disclosure process to ensure established service standards are respected.

RECOMMENDATION 15

The Government of Canada amend the *Public Servants Disclosure Protection Act* to include in the annual report issued by the Office of the Public Sector Integrity Commissioner more meaningful statistics concerning all the departments and agencies covered by the Act, including:

- A. The synopses of significant cases;**
- B. The levels of disclosure and reprisal activity, and backlogs;**
- C. The number of disclosures made by category of wrongdoing;**
- D. The duration of all open cases and cases closed during the fiscal year;**
- E. The distribution of cases by region across the organization; and**
- F. The distribution of cases by federal departments and agencies.**

CONCLUSION

Whistleblower protection rights are essential to the proper functioning of a healthy and strong democracy. The Committee believes that, by implementing the 15 recommendations outlined in this report, the federal public sector will be better equipped and capable to identify, address and correct wrongdoing in the workplace as well as effectively protect whistleblowers, those that helped him or her, case witnesses and those mistakenly identified as whistleblowers.

In the Committee's opinion, the Government of Canada's priority must continue to be the integrity of the federal public service. To accomplish this, the PSDPA should be amended to improve the disclosure mechanisms by notably:

1. Expanding the definitions of the terms "wrongdoing" and "reprisal," and modifying the definition of the term "protected disclosure" under the Act;
2. Amending the legislation to protect and support the whistleblowers and to prevent retaliation against them;
3. Reversing the burden of proof from the whistleblower onto the employer in cases of reprisals;
4. Providing legal and procedural advice, as necessary, to public servants seeking to make a protected disclosure of wrongdoing or file a reprisal complaint;
5. Embedding in the legislation confidentiality provisions for witnesses' identities;
6. Making the Office of the Public Sector Integrity Commissioner responsible for training, education and oversight responsibilities to standardize the internal disclosure process; and
7. Implementing mandatory and timely reporting of disclosure activities.

When it comes to whistleblower protection laws, there is no one-size-fits-all model, but continuous improvement through reviews and auditing of the Act would ensure that it does what it is intended to do: offer an appropriate protection to whistleblowers. It is important for each implementation agent of the Act to work with due diligence and embrace their very important duty to protect and support whistleblowers and all individuals involved in a disclosure of wrongdoing.

LIST OF RECOMMENDATIONS

The Committee recommends that:

RECOMMENDATION 1

The Government of Canada amend the *Public Servants Disclosure Protection Act* in order to:

- A. Clarify and broaden the definition of the term “wrongdoing;”**
- B. Broaden the definition of the term “supervisor” to enable public servants to make a protected disclosure to any manager, within their organization;**
- C. Ensure the Public Sector Integrity Commissioner conducts investigations of disclosures of wrongdoing and reprisal complaints in a timelier manner;**
- D. Repeal the requirement of “good faith” for making a protected disclosure of wrongdoing(s);**
- E. Ensure that a whistleblower disclosing wrongdoing is protected as long as the whistleblower has cause to reasonably believe that what he or she is disclosing is true;**
- F. Expand the Auditor General of Canada’s mandate to receive disclosures of wrongdoing from the public and reprisal complaints concerning the Office of the Public Sector Integrity Commissioner, with all the related powers and duties of the Public Sector Integrity Commissioner;**
- G. Provide the Office of the Public Sector Integrity Commissioner and the Office of the Auditor General of Canada, in the course of an investigation, additional investigative powers, including the authority to demand and use evidence obtained outside the public sector, that are enforceable through a Federal Court order;**
- H. Explicitly mandate managers and supervisors in federal departments and agencies with a duty to protect and support employees who made a disclosure, any person that helped him or her as well as witnesses and people mistaken as whistleblowers;**

- I. Ensure that the Public Sector Integrity Commissioner must exercise his authority to intervene in cases being considered by other bodies in accordance with the ruling of 17 January 2017 of the Federal Court of Appeal in the case *Therrien v. Attorney General of Canada* (2017 FCA 14);
- J. Provide the Public Sector Integrity Commissioner with the authority to commence an investigation of wrongdoing that is not being addressed in existing processes based on evidence obtained in the course of a reprisal investigation;
- K. Allow all persons involved in aspects of government operations, including contractors and former public servants, to make protected disclosures of wrongdoing to the Public Sector Integrity Commissioner; and
- L. Allow the Public Sector Integrity Commissioner to request corrective actions to address wrongdoing uncovered by investigations..... 37

RECOMMENDATION 2

The Government of Canada provide regular education and training on the *Public Servants Disclosure Protection Act* to ensure that employees are aware of the disclosure channels and resources available to them as well as their rights..... 37

RECOMMENDATION 3

The Government of Canada give the Office of the Public Sector Integrity Commissioner the mandate to protect whistleblowers and the authority to intervene in mishandled cases as well as to oversee, evaluate and introduce improvements to the internal disclosure process of the federal public service to address conflicts of interest..... 37

RECOMMENDATION 4

The Government of Canada appoint the Public Sector Integrity Commissioner following an open, transparent and merit-based selection process..... 37

RECOMMENDATION 5

The Government of Canada explicitly mandate managers and supervisors in federal departments and agencies with a duty to protect and support employees who made a disclosure, any person that helped him or her as well as witnesses and people mistaken as whistleblowers..... 67

RECOMMENDATION 6

The Government of Canada amend the *Public Servants Disclosure Protection Act* in order to:

- A. Ensure that protection under the Act extends to any person that helped a whistleblower as well any witness and person mistaken as a whistleblower;**
- B. Clarify and expand the definition of the term “reprisal” to include all acts and omissions which are inconsistent with the duty to protect and support;**
- C. Provide remedies to whistleblowers to ensure he or she is made whole, giving due consideration to his or her employment status prior to the disclosure, and that, irrespective of this, corrective measures can still be ordered against a wrongdoer;**
- D. Provide the Public Sector Integrity Commissioner and the Public Servants Disclosure Protection Tribunal with the authority to award reasonable legal costs as to encourage whistleblowers to come forward;**
- E. Provide the Public Servants Disclosure Tribunal with the right to rule to sanction individuals who take reprisals or any form of detrimental action against an employee having made a disclosure, any person that helped him or her as well as witnesses and people mistaken as whistleblowers;**
- F. Extend the deadline provided to file a reprisal complaint to 12 months;**
- G. Enable whistleblowers who suffer reprisals, including federal contractors, to directly address the Public Servants Disclosure Protection Tribunal without having their case first validated by the Public Sector Integrity Commissioner and provide the Tribunal with more resources so that it can rule on complaints in a timelier manner;**
- H. Remove the requirement that investigations by the Office of the Public Sector Integrity Commissioner cannot overlap with investigations under other laws; and**
- I. Reverse the burden of proof so that the employer must demonstrate that no reprisals were taken against the whistleblower for having made a disclosure..... 68**

RECOMMENDATION 7

The Office of the Public Sector Integrity Commissioner be responsible, in co-operation with federal departments and agencies, to raise awareness among, to communicate with and to provide training to federal employees regarding the disclosure process, their rights and whistleblower protection, and that organizations not covered by the *Public Servants Disclosure Protection Act* do the same for their employees..... 80

RECOMMENDATION 8

The Office of the Chief Human Resources Officer of the public service conduct more research, in alignment with leading international research for comparison purposes, such as that of Australia, into the best practices to change the existing culture of disclosure and the fear of reprisals in the public service, and to identify the weaknesses in the protection and disclosure systems to be addressed in each federal department and agency..... 80

RECOMMENDATION 9

The Office of the Chief Human Resources Officer of the public service regularly assess the culture of disclosure and the fear of reprisals in the public service by notably recording the frequency of perceived wrongdoing and reported wrongdoing, and evaluating the level of confidence of public servants in the protection and effectiveness of the internal reporting mechanism, and publicly release the information collected and the findings..... 80

RECOMMENDATION 10

The Government of Canada amend the confidentiality provisions of the *Public Servants Disclosure Protection Act* in order to ensure information obtained in the course of investigations by the Public Sector Integrity Commissioner may be used by federal departments and agencies, by the Public Servants Disclosure Protection Tribunal and by the Federal Court, to avoid the duplication of efforts, but without compromising the confidentiality of whistleblowers and witnesses..... 80

RECOMMENDATION 11

The Government of Canada amend the *Public Servants Disclosure Protection Act* in order to include provisions that respect and maintain the confidentiality of witnesses, including the whistleblower, unless consent to disclose one's identity has been expressively given in writing by the person concerned..... 81

RECOMMENDATION 12

The President of the Treasury Board initiate an independent review of the *Public Servants Disclosure Protection Act* no later than five years after the coming into force of the amendments recommended. 91

RECOMMENDATION 13

The preamble of the *Public Servants Disclosure Protection Act* be amended to reflect more accurately the objectives of the Act, notably the protection from reprisals of individuals participating in a public interest disclosure of wrongdoing..... 91

RECOMMENDATION 14

The Office of the Public Sector Integrity Commissioner draft, in collaboration with the Internal Disclosure Working Group, and implement a proactive framework for regular, transparent and relevant reporting and accountability at each stage of the internal disclosure process to ensure established service standards are respected..... 91

RECOMMENDATION 15

The Government of Canada amend the *Public Servants Disclosure Protection Act* to include in the annual report issued by the Office of the Public Sector Integrity Commissioner more meaningful statistics concerning all the departments and agencies covered by the Act, including:

- A. The synopses of significant cases;
- B. The levels of disclosure and reprisal activity, and backlogs;
- C. The number of disclosures made by category of wrongdoing;
- D. The duration of all open cases and cases closed during the fiscal year;
- E. The distribution of cases by region across the organization; and
- F. The distribution of cases by federal departments and agencies. 92

APPENDIX A LIST OF WITNESSES

Organizations and Individuals	Date	Meeting
<p>Treasury Board Secretariat</p> <p>Mary Anne Stevens, Senior Director, Workplace Policies, Programs, Engagement and Ethics Governance, Planning and Policy Sector</p> <p>Carl Trottier, Assistant Deputy Minister Governance, Planning and Policy Sector</p>	2017/02/07	68
<p>As individuals</p> <p>Allan Cutler Allan Cutler Consulting</p> <p>David Hutton, Senior Fellow Centre for Free Expression</p> <p>David Yazbeck, Partner Raven, Cameron, Ballantyne & Yazbeck LLP</p>	2017/02/09	69
<p>Department of Health</p> <p>Luc Bégin, Ombudsman and Executive Director Ombudsman, Integrity and Resolution Office</p> <p>Carole Ferlatte, Manager Ombudsman, Integrity and Resolution Office</p>		
<p>Office of the Public Sector Integrity Commissioner of Canada</p> <p>France Duquette, Deputy Commissioner</p> <p>Joe Friday, Commissioner</p> <p>Brian Radford, General Counsel</p>	2017/02/14	70
<p>Public Servants Disclosure Protection Tribunal</p> <p>Rachel Boyer, Executive Director</p> <p>François Choquette, Senior Legal Advisor</p>		
<p>Canada Border Services Agency</p> <p>Marc Thibodeau, Director General Labour Relations and Compensation</p>	2017/02/16	71
<p>Communications Security Establishment</p> <p>Joanne Renaud, Director General Audit, Evaluation and Ethics</p>		
<p>Department of Indian Affairs and Northern Development</p> <p>Line Lamothe, Acting Director General Human Resources and Workplace Services</p>		

Organizations and Individuals	Date	Meeting
<p>Department of Indian Affairs and Northern Development</p> <p>John Tremble, Director Centre for Integrity, Values and Conflict Resolution</p> <p>Department of National Defence</p> <p>Glenn MacDougall, Director, Special Examinations and Inquiries Amipal Manchanda, Assistant Deputy Minister Review Services</p> <p>Department of Public Works and Government Services</p> <p>Biagio Carrese, Director Special Investigations Directorate</p> <p>Barbara Glover, Assistant Deputy Minister Departmental Oversight Branch</p> <p>Royal Canadian Mounted Police</p> <p>Craig MacMillan, Assistant Commissioner Professional Responsibility Officer</p> <p>Jo-Anne Taylor, Manager Public Servants Disclosure Protection Act</p>	2017/02/16	71
<p>As an individual</p> <p>Stan Korosec</p> <p>Association of Canadian Financial Officers</p> <p>Scott Chamberlain, Director of Labour Relations, General Counsel</p> <p>Office of the Auditor General</p> <p>Michael Ferguson, Auditor General of Canada Andrew Hayes, Principal</p> <p>Professional Institute of the Public Service of Canada</p> <p>Debi Daviau, President Isabelle Roy, General Counsel Legal Affairs</p> <p>Public Service Alliance of Canada</p> <p>Patricia Harewood, Counsel Larry Rousseau, Executive Vice-President National Capital Region</p>	2017/02/21	72
<p>As an individual</p> <p>A.J. Brown, Professor Griffith University</p>	2017/03/20	76

Organizations and Individuals	Date	Meeting
As individuals Tom Devine, Legal Director Government Accountability Project John Devitt, Chief Executive Transparency International Ireland Don Garrett, D.R.Garrett Construction Ltd. Joanna Gualtieri, Director The Integrity Principle Anna Myers, Director Whistleblowing International Network Duff Conacher, Co-Founder	2017/03/21	77
Office of the Public Sector Integrity Commissioner of Canada Joe Friday, Commissioner Brian Radford, General Counsel Public Servants Disclosure Protection Tribunal Rachel Boyer, Executive Director François Choquette, Senior Legal Advisor	2017/03/23	78
As individuals Sylvie Therrien David Yazbeck, Partner Raven, Cameron, Ballantyne & Yazbeck LLP Treasury Board Secretariat Anne Marie Smart, Chief Human Resources Officer Office of the Chief Human Resources Officer Carl Trottier, Assistant Deputy Minister Governance, Planning and Policy Sector	2017/03/23	79
As an individual A.J. Brown, Professor Griffith University	2017/04/03	80
As individuals Tom Devine, Legal Director Government Accountability Project John Devitt, Chief Executive Transparency International Ireland Mark Worth, Manager Blueprint for Free Speech Democracy Watch Duff Conacher, Co-Founder	2017/04/04	81

Organizations and Individuals	Date	Meeting
Office of the Public Sector Integrity Commissioner of Canada Raynald Lampron, Director of Operations Brian Radford, General Counsel	2017/04/06	82

APPENDIX B LIST OF BRIEFS

Organizations and Individuals

Anonymous (confidential)

Association of Canadian Financial Officers

Democracy Watch

Dennison, Barry

Internal Disclosure Working Group

National Whistleblower Center

Office of the Auditor General of Canada

Office of the Public Sector Integrity Commissioner of Canada

Professional Institute of the Public Service of Canada

Public Service Alliance of Canada

Thomas, Paul G.

Treasury Board Secretariat

REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this Report.

A copy of the relevant *Minutes of Proceedings* ([Meetings Nos. 68, 69, 70, 71, 72, 76, 77, 78, 79, 80, 81, 82, 87, 89, 90, 91, 92 and 93](#)) is tabled.

Respectfully submitted,

Tom Lukiwski
Chair

