Office of the Public Sector Integrity Commissioner of Canada

Commissariat à l'intégrité du secteur public du Canada

REVIEW OF THE *PUBLIC SERVANTS DISCLOSURE PROTECTION ACT* (PSDPA or the Act)

PROPOSAL OF THE PUBLIC SECTOR INTEGRITY COMMISSIONER FOR LEGISLATIVE AMENDMENTS

Submitted to the House of Commons Standing Committee on Government Operations and Estimates (OGGO)

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PROPOSED LEGISLATIVE AMENDMENTS

Supporting Whistleblowing

1. Broaden the definition of "supervisor"
2. Provide authority to request and use evidence obtained outside the public sector
3. Remove the disincentive of the "good faith" requirement in making a disclosure of wrongdoing
4. Expand authority under section 33 of the Act
5. Clarify confidentiality provisions to include any records created for the purpose of making a disclosure under the Act

Strengthening Reprisal Protection

6. Clarify confidentiality provisions for reprisal investigations
7. Establish a reverse onus at the Tribunal (burden of proof)
8. Provide the Tribunal with the authority to award interim remedies
9. Increase the maximum amount awarded for pain and suffering
10. Provide the Tribunal with the authority to award legal fees to the complainant
11. Expand the definition of "reprisal"
12. Enable former public servants to request legal advice
13. Clarify the concept of employer respondent

Enhancing Flexibility

14. Provide the President of the Treasury Board with the authority to increase the maximum monetary limit for legal advice
15. Provide authority for the Commissioner to delegate decision-making power to an external ad hoc Commissioner in appropriate circumstances
16. Provide the full authorities of the Commissioner to the Auditor General of Canada when investigating PSIC

Proposed Legislative Amendments

SUPPORTING WHISTLEBLOWING

1. Broaden the definition of "supervisor"

Proposal: *Amend section 12 of the Act to broaden the definition of "supervisor" by including any supervisor in the discloser's direct reporting line up to the chief executive, as well as a manager who has authority over the subject of the disclosure.*

Section 12 of the Act provides that a public servant may make a protected disclosure to "his or her supervisor". This provision is very restrictive. A public servant should be able to make a disclosure to any supervisor in a direct reporting line, up to and including the chief executive, or to a manager who has authority over the subject matter of the disclosure. This should facilitate the making of disclosures, especially if the public servant is not at ease in raising it with his or her direct supervisor, for whatever reason, including the fact that the disclosure may involve the direct supervisor.

2. Provide authority to request and use evidence obtained outside the public sector

Proposal: *Repeal section 34 of the Act.*

Section 34 prevents the Commissioner from obtaining information that is outside the public sector. The experience of the last few years demonstrated that this provision has the potential to seriously undermine the effective conduct of investigations. For example, during the course of some investigations, this provision has prevented the Office from obtaining relevant information from retired public servants. Currently, several provinces, including Manitoba, Ontario, New Brunswick and Nova Scotia are able to compel information from outside the public sector, to at least some degree. Manitoba, for example, can obtain information from anywhere outside the public sector under the *Public Interest Disclosure (Whistleblower Protection) Act*, 2006 (paragraph 30(1)).

Consequently, section 34 of the Act should be repealed to extend the authority of the Commissioner, in order to support the ability of the Commissioner to complete a thorough investigation.

3. Remove the disincentive of the "good faith" requirement in making a disclosure of wrongdoing

Proposal: *Amend subsection 2(1), paragraph 19.3(1)(d), and paragraph 24(1)(c) of the Act to remove the words "good faith".*

Not only is the term "good faith" not defined in the Act, determining "good faith" directly raises the issue of an individual's motivation in coming forward, which does not and should not have an impact on the assessment or validity of the disclosure or reprisal complaint. Motivation is not relevant; what is relevant is whether wrongdoing or reprisal has been committed. This is determined on the assessment of facts and evidence, not on the assessment of the motivation of the discloser or complainant.

The PSDPA imposes a "good faith" test on disclosers and reprisal complainants. This imposes a level of complexity and an evidentiary burden that is unfair and that can reasonably be expected to serve as a discouragement or disincentive. If a person reasonably believes in the truth of the information they are coming forward with, that should be sufficient. To further impose a "good faith" requirement is to potentially impose a double test: reasonable belief in the truth of the information plus proving you have come forward in "good faith".

It is also important to note that a fundamental legal principle is that good faith is presumed until bad faith is proven, and further, that PSIC has never closed or dismissed a case on the basis of bad faith.

In 2013, the United Kingdom (U.K.) removed the "good faith" requirement almost entirely from its legislation. Similarly, the United States does not have a "good faith" test.

Removing the requirement in subsection 2(1) (definition of protected disclosure), paragraph 19.3(1)(*d*) and paragraph 24(1)(*c*) (giving the Commissioner discretion to not deal with a disclosure or reprisal complaint because it "was not made in good faith"), would address these serious concerns, focusing PSIC's attention on the public interest rather than on personal motivation.

4. Expand authority under section 33 of the Act

Proposal*: Amend subsection 33(1) of the Act to provide the Commissioner with the power to initiate an investigation based on information obtained in the course of a reprisal investigation.*

Currently, subsection 33(1) of the Act gives the Commissioner the power to self-initiate a separate investigation into wrongdoing based on information obtained in the course of a disclosure investigation. However, the Commissioner cannot investigate the wrongdoing if the information is obtained in the course of a reprisal investigation. The power of the Commissioner under subsection 33(1) is limited by the definition of the word "investigation"

under subsection 2(1) of the Act. It would be in the public interest for the Commissioner to have the authority to investigate wrongdoing that comes to his attention in the course of either a disclosure or reprisal investigation.

5. Clarify confidentiality provisions to include any records created for the purpose of making a disclosure under the Act

Proposal: *Amend paragraph 16.4(1)(a) of the* Access to Information Act *and section 22.2 of the* Privacy Act *to authorize the refusal of disclosure of any records requested under either Act that contain information obtained or created for the purpose of making a disclosure of wrongdoing under the PSDPA or in the course of an investigation into a disclosure under that Act.*

Currently, the exemption provisions in respect of information created by PSIC in the context of disclosures in both the *Privacy Act* and the *Access to Information Act* are inconsistent with those that apply to heads of government institutions.

At stake is the protection of information created or obtained by PSIC prior to an investigation at the initial case analysis stage. Protection of information throughout PSIC's handling of a disclosure is essential, and the exemptions extended to heads of government institutions should be extended equally to the Commissioner of PSIC. Disclosers and participants in investigations into disclosures of wrongdoing should be afforded the same level of confidentiality under the Act whether they choose to disclose internally or to PSIC.

STRENGTHENING REPRISAL PROTECTION

6. Strengthen confidentiality provisions for reprisal complaints

Proposal: *Amend paragraph 16.4(1)(a) of the* Access to Information Act *and section 22.2 of the* Privacy Act *to include any record requested under those Acts that contains information created for the purpose of making a complaint of reprisal or in the course of an investigation into a complaint of reprisal under the PSDPA.*

Currently, the exemption provisions under subsection 16.4(1) of the *Access to Information Act* and section 22.2 of the *Privacy Act* protect the confidentiality of information obtained or created by PSIC only in the context of disclosures. As the current exemptions do not apply to reprisal complaints, personal and sensitive information about reprisal complaints can be made public through access to information requests, whether or not a reprisal complaint is investigated or referred to the Tribunal. Under this amendment, reprisal complaints and disclosures would be dealt with the same way under the *Access to Information Act* and the *Privacy Act*, thereby extending the protections for all participants in the reprisal complaint process.

7. Establish a reverse onus at the Tribunal (burden of proof)

Proposal: *Establish a reverse onus before the Tribunal in favour of the complainant.*

Given the disparity in resources between an individual complainant and a respondent organization, proof of causation between the alleged reprisal and the protected disclosure or the participation in an investigation is considerably more difficult for the complainant to establish than for the respondent/employer to refute. More appropriate balance would be achieved, and the spirit of the Act would be further respected, by creating a reverse onus once a case is before the Tribunal. Simply stated, the burden would shift from the complainant having to establish that reprisal occurred, to the respondent/employer having the burden to establish that it did not. The respondents could rebut this presumption of causation by leading evidence to the contrary on a balance of probabilities. The presumption would not have an impact on the conduct of investigations by the Office, but would contribute to an even playing field before the Tribunal.

Other jurisdictions have incorporated a reverse onus in their disclosure of wrongdoing regime. For example, in Ontario, the *Public Service of Ontario Act*, subsection 140(13) contains a reverse onus clause. The United States Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB) have also shifted the burden in favour of the discloser. Where there exists a reverse onus, the discloser must first establish a *prima facie* case that the disclosure was a contributing factor in the retaliation against them.

8. Provide the Tribunal with the authority to award interim remedies

Proposal: Provide the Tribunal with the authority to award interim remedies

Subsection 21.7(1) of the PSDPA confers authority on the Tribunal to make an order granting a remedy to a complainant after it determines that a reprisal occurred. Considering the time it can take for a reprisal investigation to be completed, followed by the time required for a hearing before the Tribunal, a complainant could wait for a significant time before receiving any relief. In what may be seen to be the most severe cases of reprisal, for example, where an individual's employment was terminated, this represents a particularly difficult situation for a complainant.

To address this, it is recommended that the Act be amended to authorize the Tribunal to issue interim relief pending the final determination of the case.

9. Increase the maximum amount awarded for pain and suffering

Proposal: *Amend paragraph 21.7(1)(f) of the Act by increasing the maximum amount the Tribunal may order for pain and suffering.*

Paragraph 21.7(1)(*f*) of the Act provides that the Tribunal may order the employer or the appropriate chief executive to compensate a complainant, in an amount not more than $10,000, for any pain and suffering experienced as a result of the reprisal.

In contrast, paragraph 53(2)(*e*) of the *Canadian Human Rights Act* provides that the Canadian Human Rights Tribunal may make an order against the person found to have engaged in a discriminatory practice to compensate the victim in an amount not exceeding $20,000, for any resulting pain and suffering. Moreover, subsection 53(3) of the *Canadian Human Rights Act* provides that additional compensation of $20,000 may also be granted if the respondent engaged in the discriminatory practice wilfully or recklessly. This means that, regardless of compensation related to remedial measures, lost wages and expenses incurred, a victim of discrimination may receive an additional payment of up to $40,000. This is in stark contrast to the maximum of $10,000 a victim of reprisal may receive.

10. Provide the Tribunal with the authority to award legal fees to the complainant

Proposal: *Provide the Tribunal with the authority to include legal fees in the remedies for the complainant.*

The Act does not authorize the Tribunal to specifically reimburse reasonable legal expenses incurred by a successful complainant. While paragraph 21.7(*e*) of the Act states that the Tribunal may pay to the complainant an amount equal to any expenses and any other financial losses incurred by the complainant as a direct result of the reprisal, this is not considered to include legal fees.

While legal fees vary from case to case, such expenditures could increase substantially, as the case continues, which could reasonably lead to reluctance on the part of potential complainants to come forward.

It is recommended that paragraph 21.7(*e*) of the Act be amended to expressly provide that the Tribunal may award a remedy in the form of reimbursement of legal fees reasonably incurred. This avoids the risk that a complainant whose case is not founded by the Tribunal would have to pay the legal expenses incurred by the respondent (e.g., employer). Such an amendment could encourage individuals to come forward with complaints, given that there are greater provisions for assistance in pursuit of justice.

11. Expand the Definition of "Reprisal"

Proposal: *Amend section 2 of the Act to expand the definition of "reprisal" to include the additional grounds of: (1) filing a reprisal complaint or (2) cooperating in an investigation into a reprisal (3) or cooperating in an investigation under any other Act of Parliament. This amended definition would be consistent with the definition of "protected disclosure" in subsection 2(1) of the Act.*

The definition of "reprisal" in section 2 of the Act only contemplates instances where public servants have made a protected disclosure or have, in good faith, cooperated in an investigation into a disclosure. The Act does not provide protection in those cases where a public servant has suffered a reprisal for filing a reprisal complaint or for participating in a reprisal investigation or cooperation in any other investigation of wrongdoing under any other Act of Parliament. This is a major gap in protection against reprisal.

12. Enable former public servants to request legal advice

Proposal: *Amend subsection 25.1(1)(e) of the Act to include a specific reference to "former public servant"*

Subsection 25.1(e) of the Act gives the Commissioner the authority to provide funding to public servants contemplating making a reprisal complaint. It is silent, however, concerning former public servants who are considering filing a complaint of reprisal with the Office.

This gap, which may have been a drafting oversight, results in the anomalous situation of a public servant who has suffered possible reprisal by being dismissed, not being eligible to apply for funds to seek legal advice, while a public servant who has suffered possible reprisal, other than being dismissed, would be eligible.

This presents an unfair and inequitable situation. Consequently, paragraph 25.1(1)(e) of the Act should also apply to former public servants to ensure equal treatment under the law in evaluating whether to file a complaint of reprisal.

13. Clarify the concept of employer respondent

***Proposal**: Amend paragraph 20.6(b) to include that if the complainant is a public servant, notice must be given to the complainant's employer and, if applicable, to his or her employer at the time the alleged reprisal was taken. Similarly, the parties in respect of the application before the Tribunal, listed in paragraphs 21.4(2)(b) and 21.5(2)(b) of the Act, should include the employer at the time of the alleged reprisal.*

The Commissioner must give notice of his or her decision to apply to the Tribunal. The Act states that notice must be given to the public servant's employer or, in the case of a former public servant, to his or her employer at the time the alleged reprisal was taken. Issues may arise if, for instance, the complainant has changed employers since the time the incident occurred.

ENHANCING FLEXIBILITY

14. Provide the President of the Treasury Board with the authority to increase the maximum monetary limit for legal advice

***Proposal**: Amend subsection 25.1 of the Act to provide the President of the Treasury Board with the authority to change, by regulation, the maximum entitlements for legal advice.*

Section 25.1 of the Act identifies those situations where the Commissioner may pay for legal advice and establishes the criteria that the Commissioner must consider in determining the amount to be paid. The Act is not intended to cover the full costs of legal representation.

The Act provides that the maximum amount that may be paid for legal advice is $1,500 or $3,000 in exceptional circumstances. The amounts set out in the Act appear to be currently adequate for legal advice (not representation); however, they can reasonably be expected to be increased over time, to reflect the increasing costs of legal services, and, in the interest of efficiency, it would be preferable that the Act be amended to allow the Minister to change these maximum entitlements by regulation.

15. Provide authority for the Commissioner to delegate decision-making powers to an external ad hoc commissioner in appropriate circumstances

***Proposal:** The Act should provide for a power to delegate the Commissioner's powers and duties to an external ad hoc commissioner.*

The decision maker's perceived impartiality and objectivity are crucial to the credibility of the Act. Situations may arise where both the Commissioner and the Deputy Commissioner are unable to act in a disclosure or reprisal case because of a conflict of interest or other impediment giving rise to a reasonable apprehension of bias on their part; for example, if a case

involves a former colleague or acquaintance. The Act provides for delegation for decision-making powers to the Deputy Commissioner only. The Commissioner should have the power to name a temporary ad hoc Commissioner to address such situations, *similar to the power in section 59 of the Access to Information Act.*[1]

16. Provide the full authorities of the Commissioner to the Auditor General of Canada when investigating PSIC

Proposal: *Amend section 14 of the Act to confer on the AG the power to receive disclosures from the public and reprisal complaints concerning PSIC, with all the related powers and duties of the Commissioner.*

Section 14 of the Act confers on the Auditor General of Canada (AG) the power to receive public servants' disclosures concerning PSIC, as well as the protections, powers and duties of the Commissioner in this regard. The current Act does not permit the AG to receive disclosures from members of the public concerning PSIC or reprisal complaints from employees or former employees of PSIC. This recommendation will address this gap.

[1] S. 59 ATI: The Commissioner may authorize any person to exercise or perform, subject to such restrictions or limitations as the Commissioner may specify, the powers, duties or functions of the Commissioner under the *Act*, except for the power to delegate.