

# Protect integrity; protect whistleblowers

A submission to the Standing Committee on Government Operations and Estimates

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## Executive Summary

This paper will offer a professional public service union's perspective on the whistleblower protection regime within the federal government, specifically the *Public Servants Disclosure Protection Act (PSDPA)*.

Drawing on international and national research and legislative precedent, as well as our own extensive institutional experience, this paper will also make five recommendations for amending the *PSDPA* and enhancing the Office of the Public Sector Integrity Commissioner (PSIC). These recommendations include:

- guaranteed staffing priority for transfers to other departments and income protection, both immediately upon making a disclosure to PSIC;
- reverse onus for alleged reprisal, such that the onus of proof falls on the respondent;
- a broader scope for the *PSDPA*, such the rights and implications of the *Act* be extended to contractors, consultants, former employees, volunteers, students and clients;
- a reward system for whistleblowers whose original information results in the recovery of revenue and;
- that the disclosure process to reside completely under PSIC and to have all departmental resources reallocated to this Office.

These recommendations are made with the aim of improving whistleblower protections, mitigating fears of reprisal, encouraging disclosures and fostering trust in the disclosure process.

## Introduction

Whistleblower protection is a relatively new area of legislation; the term “whistleblower” itself only entered the public lexicon in 1971.<sup>1</sup> Canada already has significant protections in place including *the Public Servants Disclosure Protection Act* and the Office of the Public Sector Integrity Commissioner (PSIC). We have a foundation on which to build but a foundation is not itself a structure; we cannot stop building.

It is our ethical and moral imperative to shine a light on corruption and ensure that those who stand up against wrongdoing are protected and, indeed, celebrated. In his Ministerial Mandate Letters, the Prime Minister committed to setting a “higher bar for openness and transparency in government” and declared that it was “time to shine more light on government to ensure it remains focused on the people it serves.” This commitment to integrity and transparency is admirable. But if Canada is entering a new age of transparency and integrity in government, it must go further in its efforts to protect the public servants who, at great personal risk, choose to stand up for integrity in their workplace.

As a result of their position, public servants are uniquely placed to observe wrongdoing, either in their organization’s interactions with other sectors or in their own agencies or departments. Amending and improving the *Public Servants Disclosure Protection Act* and extending the reach of the Office of the Public Sector Integrity Commissioner are critical steps in rooting out corruption and wrongdoing and protecting whistleblowers.

To that end, the Association of Canadian Financial Officers recommends that *the Public Servants Disclosure Protection Act* be amended such that:

- whistleblowers have guaranteed staffing priority and income protection upon making a disclosure to PSIC;
- there is reverse onus for alleged reprisal, such that the burden of proof falls on the respondent;
- the scope of the definition of public is broadened such that the rights and implications of the *Act* apply to include contractors, consultants, former employees, volunteers, students and clients;
- a reward is instituted for whistleblowers whose original information results in the recovery of revenue; and

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<sup>1</sup> Marcia P. Miceli and Janet P. Near, "An International Comparison of the Incidence of Public Sector Whistle-Blowing and the Prediction of Retaliation: Australia, Norway, and the US," *Australian Journal of Public Administration* (December 2013)

- the entire disclosure process should reside under the Office of the Public Sector Integrity Commissioner and the departmental program should be dismantled with its resources redirected to PSIC.

Wide-ranging comparisons of whistleblowing across nations have definitively shown that the more supportive of whistleblowers a nation's culture and legal systems are, the more willing people are to come forward and disclose wrongdoing.<sup>2</sup> To stop corruption, mismanagement and wrongdoing, we must create a culture in which standing up for what's right is safe and valued. Canada is well-placed to improve and evolve our whistleblower legislation at home and consequently become a leader on the world stage – if we have the will to act.

## 1) Guarantee staffing priority and income protection

### Context

International research on whistleblowers has demonstrated that fear of reprisal is the number one reason workers refrain from disclosing wrongdoing.<sup>3</sup> These findings are consistent with Canadian studies: in a report prepared for the Office of the Public Sector Integrity Commissioner of Canada (PSIC) surveying focus groups of federal public servants from Ottawa, Winnipeg, Regina, Quebec City, and Moncton, reprisal was consistently listed as a feared consequence of and deterrent to whistleblowing.<sup>4</sup>

The 2014 Public Service Employee Survey Results showed that, across the federal public service, only 38% of respondents felt free to initiate a formal recourse process (including a grievance, complaint or appeal) without fear of reprisal.<sup>5</sup> These findings are also borne out ACFO's own internal survey of its membership, in which only 39% of respondents indicated confidence that they wouldn't be subject to reprisal.

A study in the United Kingdom found that formal reprisals such as demotion, relocation or reassigning job responsibilities are the most common type of retaliation and that job loss is the second most common.<sup>6</sup> However, the consequences of blowing the whistle extend far beyond these

<sup>2</sup> Ibid.

<sup>3</sup> "Checkmate to Corruption: Making the Case for a Wide-Ranging Initiative on Whistleblower Protection," *Public Services International* (2016) [http://www.world-psi.org/sites/default/files/documents/research/en\\_whistleblower\\_protection.pdf](http://www.world-psi.org/sites/default/files/documents/research/en_whistleblower_protection.pdf)

<sup>4</sup> "Exploring the Culture of Whistleblowing in the Federal Public Sector," *Office of the Public Sector Integrity Commissioner* (2015) [http://epe.lac-bac.gc.ca/100/200/301/pwgsc-tpsgc/poref/office\\_public\\_sector\\_integrity\\_commissioner/2016/2015-12-e/report.pdf](http://epe.lac-bac.gc.ca/100/200/301/pwgsc-tpsgc/poref/office_public_sector_integrity_commissioner/2016/2015-12-e/report.pdf)

<sup>5</sup> "2014 Public Service Employee Survey Results," Government of Canada <http://www.tbs-sct.gc.ca/pses-saff/2014/results-resultats/bq-pq/00/org-eng.aspx>

<sup>6</sup> "Whistleblowing: The Inside Story," *Public Concern at Work and University of Greenwich* (2013) <http://www.pcaw.co.uk/files/Whistleblowing%20-%20the%20inside%20story%20FINAL.pdf>

direct types of reprisal. Whistleblowers can also suffer isolation, character defamation, imposition of hardship or disgrace, exclusion and harassment in their workplace.<sup>7</sup>

Public servants take a tremendous risk when they choose to disclose wrongdoing but there are concrete, meaningful steps legislators can take to alleviate whistleblowers' stress and suffering, such as staffing priority and income protection (sometimes referred to as "interim relief").

Staffing priority would ensure that whistleblowers are given the first priority to transfer to a similar job in a different department. This would protect them from an environment that can be extremely stressful and toxic. Staffing priority is already a well-established system in the government that works well. There are several reasons why a public servant might get staffing priority; extending this priority to those who disclose wrongdoing would be a zero-cost whistleblower protection measure.

This is essential because in many cases, whistleblowers would prefer to continue to work. Whistleblowers are more likely to be high-performing individuals with strong ethics who care deeply about their work.<sup>8</sup> Being forced to leave their position as a result of a toxic atmosphere isolates and ostracizes them and can have a detrimental impact on their mental health. It is also detrimental to the public service itself, as this kind of dedicated, principled employee is precisely the kind of employee departments should want to maintain.

Income protection would ensure that a whistleblower does not suffer further financial distress as a result of job loss, demotion, loss of acting pay or other punitive measures. It protects whistleblower's income in the interim as they await a transfer to a new department or the outcome of a reprisal grievance.

## Recommendation

ACFO strongly recommends that *the Public Servants Disclosure Protection Act* be amended to guarantee staffing priority and income protection for whistleblowers.

## Rationale

Variations of staffing priority and income protection are widely-accepted whistleblower protection measures cited as best practices by several global institutions and experts, and with precedents in other countries' legislation.

Transparency International, a widely-recognized expert on anti-corruption and whistleblower protection, recommends in its list of best practices that "a full range of remedies must cover all direct, indirect and future consequences of any reprisals, with the aim to make the whistleblower

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<sup>7</sup> Jessica R. Mesmer-Magnus and Chockalingam Viswesvaran, "Whistleblowing in Organizations: An Examination of Correlates of Whistleblowing Intentions, Actions, and Retaliation," *Journal of Business Ethics* (2005) <http://bit.ly/2iILmgF>

<sup>8</sup> Ibid.

whole,” including “interim and injunctive relief” pay and “transfer to a new department or supervisor.”<sup>9</sup>

The Council of Europe’s Parliamentary Assembly Resolution on Whistleblower Protection recommends that whistleblower protection legislation should “seek corrective action from the employer, including interim relief.”<sup>10</sup>

In the report prepared for PSIC, the public servants surveyed listed transfer to another department or agency in cases of suspected reprisal as a suggestion for reducing the fear of reprisal.<sup>11</sup>

There is also significant precedent for staffing priority in whistleblower protection legislation from other jurisdictions. In the United States, South Korea and South Africa, whistleblowers can obtain transfers to other comparable jobs if it can be shown that problems such as further harassment would arise if the person stayed at their current position.<sup>12</sup>

The greater the suffering of whistleblowers, the greater the chilling effect on more whistleblowers coming forward, and the more that corruption and mismanagement goes unchecked. Measures such as staffing priority and income protection have the added benefit of fostering a culture where integrity is rewarded, not punished.

## 2) Require reverse onus of proof in cases of reprisal

### Context

As discussed in the previous chapter, fear of reprisals is the number one barrier to whistleblowing. Unfortunately, this fear is well-founded: a recent survey of over 10,000 workers in the public, private and non-for-profit sectors across 13 countries found that 36% of workers who observed and then reported misconduct suffered formal retaliation.<sup>13</sup> The implication of this study is that a full 7% of the global workforce is in need of protection from retaliation or reprisal.

<sup>9</sup> “International Principles for Whistleblower Legislation,” *Transparency International* (2013) [https://issuu.com/transparencymagazine/docs/2013\\_whistleblowerprinciples\\_en](https://issuu.com/transparencymagazine/docs/2013_whistleblowerprinciples_en)

<sup>10</sup> Council of Europe Parliamentary Assembly Resolution 1729 (2010) on the Protection of Whistleblowers, Article 6.2.5.

<sup>11</sup> “Exploring the Culture of Whistleblowing in the Federal Public Sector,” *Office of the Public Sector Integrity Commissioner* (2015) [http://epe.lac-bac.gc.ca/100/200/301/pwgsc-tpsgc/por-ef/office\\_public\\_sector\\_integrity\\_commissioner/2016/2015-12-e/report.pdf](http://epe.lac-bac.gc.ca/100/200/301/pwgsc-tpsgc/por-ef/office_public_sector_integrity_commissioner/2016/2015-12-e/report.pdf)

<sup>12</sup> David Banisar, “Whistleblowing: International Standards and Developments,” from *Corruption and Transparency: Debating the Frontiers Between State, Market and Society*, ed. I. Sandoval (Washington: World Bank Institute for Social Research, 2011)

[https://www.researchgate.net/publication/228124587\\_Whistleblowing\\_International\\_Standards\\_and\\_Developments](https://www.researchgate.net/publication/228124587_Whistleblowing_International_Standards_and_Developments)

<sup>13</sup> “Global Business Ethics Survey 2016: Measuring risk and promoting workplace integrity,” *Ethics & Compliance Initiative* (2016) [http://www.boeing.com/2016\\_Global\\_Ethics\\_Survey\\_Report.pdf](http://www.boeing.com/2016_Global_Ethics_Survey_Report.pdf)

Reprisal can take many forms, including formal actions such as demotion, relocation, reassignment of job responsibilities or dismissal. But reprisal can also be subtle and extremely difficult to establish. Despite the prevalence of reprisal in cases of whistleblowing, it can be incredibly difficult to establish proof of reprisal so long as the employer does not explicitly mention whistleblowing.<sup>14</sup>

Compounding the issue, research has shown that the most vulnerable workers in an organization are the most likely to experience reprisal. Whistleblowers with more power in an organization, including social power – such as expertise, respect or charisma – or organizational power – such as valuable organization-specific skills or knowledge – are less likely to experience retaliation.<sup>15</sup> In other words, the less powerful the whistleblower, the greater their need of protection.

Reverse-onus of proof of reprisal is integral to protecting these workers.

## Recommendation

ACFO strongly recommends that the *Public Servants Disclosure Protection Act* be amended to reverse the onus of proof for reprisals. It should be the respondent's responsibility to prove that measures taken against a whistleblower are unrelated to their disclosure.

## Rationale

Reverse onus of proof for reprisals is a whistleblower protection mechanism with broad support from anti-corruption institutions and experts and with legal precedents in Canadian provinces and across the world. It was also one of the major recommendations made by the Commission of Inquiry into the Sponsorship Program and Advertising Activities (informally known as the Gomery Commission).

Reports prepared for Public Services International (PSI) and Transparency International (TI) call for reverse onus of proof of reprisals, as does the G-20's Anti-Corruption Action Plan for the Protection of Whistleblowers.

There is also a strong precedent for reverse-onus of proof of reprisals in other whistleblower protection legislation. The *South African Public Disclosure Act*, for example, states that employees cannot be subjected to “any occupational detriment” as a result of their disclosure, and any dismissal in breach of this principle is automatically considered an unfair dismissal or unfair labour practice.<sup>16</sup>

<sup>14</sup> "G20 Anti-Corruption Action Plan for Protection of Whistleblowers," *Organization for Economic Co-Operation and Development* (2011) <https://www.oecd.org/g20/topics/anti-corruption/48972967.pdf>

<sup>15</sup> Marcia P. Miceli and Janet P. Near, "An International Comparison of the Incidence of Public Sector Whistle-Blowing and the Prediction of Retaliation: Australia, Norway, and the US," *Australian Journal of Public Administration* (December 2013)

<sup>16</sup> "G20 Anti-Corruption Action Plan Protection of Whistleblowers," *Organization for Economic Co-Operation and Development* (2011) <https://www.oecd.org/g20/topics/anti-corruption/48972967.pdf>

Similarly, in the United States the *USA Whistleblower Protection Act* of 1989 establishes that the burden of proof shifts to the employer if the whistleblower fulfils a number of requirements. This provision has proved extremely successful, and has increased whistleblowers' rate of success since the adoption of the Act.<sup>17</sup>

Legislation recently enacted in Québec puts the onus on the employer in cases of perceived reprisal by stating that the demotion, suspension, dismissal, transfer or any other disciplinary measure taken against a whistleblower is presumed to be a reprisal.<sup>18</sup>

Finally, the Phase II Report of the Commission of Inquiry into the Sponsorship Program and Advertising Activities suggested reverse onus as an improvement to the *Public Servants Disclosure Protection Act*: “if a whistleblower makes a complaint alleging a reprisal, the burden should be on the employer to show that the actions were not a reprisal.”<sup>19</sup> This recommendation was made in 2006 but over a decade later has yet to be realized.

### 3) Broaden the scope of the Act

#### Context

The *Public Servants Disclosure Protection Act* defines “public servant” as “every person employed in the public sector, every member of the Royal Canadian Mounted Police and every chief executive.”<sup>20</sup> This definition excludes a great many people who may have occasion to witness wrongdoing in the public service and who may be in need of protection should they choose to disclose that wrongdoing –including volunteers, contractors, consultants, students, former employees and clients including broader public – from the protections of the Act.

The narrow scope of the *PSDPA* not only limits the protections of the Act but also its implications. Only current public servants can be compelled to act as witnesses for investigations held by the Office of the Public Sector Integrity Commissioner (PSIC). A public servant who may have been involved or implicated in wrongdoing can, under the Act as it currently stands, leave the public service and then refuse to participate in an investigation, which can have the effect of stalling or stymying it.

<sup>17</sup> “Recent Trends and Best Practices in Whistleblower Protection Legislation,” *Transparency International* (2013) [http://www.transparency.org/files/content/corruptionqas/Trends\\_in\\_whistleblower\\_protection\\_legislation.pdf](http://www.transparency.org/files/content/corruptionqas/Trends_in_whistleblower_protection_legislation.pdf)

<sup>18</sup> An Act to facilitate the disclosure of wrongdoings relating to public bodies, Chapter VII

<sup>19</sup> Brian R. O'Neal et al., *The Gomery Commission Report Phase 2 – An Overview* (2006) <http://publications.gc.ca/collections/Collection-R/LoPBdP/PRB-e/PRB0560-e.pdf>

<sup>20</sup> *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46

Scholarship and institutional recommendations on whistleblower protection, by contrast, tend to deliberately use a broad definition of the term whistleblower. The most frequently-cited and widely-accepted definition of the term whistleblowing is “the disclosure by organization members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action.”<sup>21</sup> The all-encompassing term “member” (rather than “employee”) is used, and according to this definition, former organizational members are also to be understood as whistleblowers.

A broader definition of whistleblower is also championed in legal scholarship as well. Comparisons of whistleblower protection from around the world note that protections which apply only to disclosures made by permanent employees fall far short of the ideal.<sup>22</sup> Legislators are cautioned against “loopholes” in whistleblower legislation that would exclude contracted, term employees and former employees.<sup>23</sup>

## Recommendation

ACFO recommends that the full force of the *Public Servants Disclosure Protection Act* be extended to include former employees, consultants, contractors, term employees, clients, students and volunteers. Former public servants should also be compelled to participate in investigations and tribunals held by the Office of the Public Sector Integrity Commissioner.

## Rationale

There is broad consensus among international institutions for an expansion of the definition of whistleblower. The G-20 Anti-Corruption Action Plan for Protection of Whistleblowers recommends a “no loophole” approach to whistleblower protection, listing a scope of coverage “including contractors, temporary employees, former employees and volunteers” as one of its best practices.<sup>24</sup> Similarly, Public Services International argues that “the notion of ‘working relationship’ for the purposes of whistleblower protection needs to be understood to have a broader scope than the standard employer/employee relationship.”<sup>25</sup>

For guidance on how to extend these protections, Canadian legislators can look to language used in whistleblower protection legislation in other nations, which allow for a broader scope of the term whistleblower.

<sup>21</sup> “Checkmate to Corruption: Making the Case for a Wide-Ranging Initiative on Whistleblower Protection,” *Public Services International* (2016) [http://www.world-psi.org/sites/default/files/documents/research/en\\_whistleblower\\_protection.pdf](http://www.world-psi.org/sites/default/files/documents/research/en_whistleblower_protection.pdf)

<sup>22</sup> Paul Latimer and A.J. Brown, “Whistleblower Laws: International Best Practice,” *UNSW Law Journal* (2008) [http://www.unswlawjournal.unsw.edu.au/sites/default/files/40\\_latimer\\_and\\_brown\\_2008.pdf](http://www.unswlawjournal.unsw.edu.au/sites/default/files/40_latimer_and_brown_2008.pdf)

<sup>23</sup> *Ibid.*

<sup>24</sup> “G20 Anti-Corruption Action Plan for Protection of Whistleblowers,” *Organization for Economic Co-Operation and Development* (2011) <https://www.oecd.org/g20/topics/anti-corruption/48972967.pdf>

<sup>25</sup> “Checkmate to Corruption: Making the Case for a Wide-Ranging Initiative on Whistleblower Protection,” *Public Services International* (2016) [http://www.world-psi.org/sites/default/files/documents/research/en\\_whistleblower\\_protection.pdf](http://www.world-psi.org/sites/default/files/documents/research/en_whistleblower_protection.pdf)

Australia's *Public Service Act*, for example, allows for whistleblower protections to be extended to anyone performing functions "in or for an Agency," including external contractors.<sup>26</sup> Similarly, the *Irish Protected Disclosures Act* broadly defines the term "worker" to include anyone who "entered into or works or worked under any other contract, whether express or implied and (if it is express) whether oral or in writing."<sup>27</sup>

The New Zealand *Protected Disclosures Act*, widely perceived to be of the most comprehensive whistleblower protection regimes, defines employee to include: a former employee; a person seconded to the organisation; an individual who is engaged or contracted to do work for the organisation; a person concerned in the management of the organisation (including a person who is a member of the board or governing body of the organisation); and a person who works for the organisation as a volunteer without reward or expectation of reward for that work.<sup>28</sup>

## 4) Institute a reward system for disclosing wrongdoing

### Context

A recent Global Fraud Report found that in 32% of cases where fraud was uncovered, an employee had blown the whistle to provide information that facilitated an investigation. In cases where a senior or middle manager was implicated, that number increased to 41%.<sup>29</sup> Whistleblowers have been found to be the single most effective way to uncover fraud.<sup>30</sup>

It is no exaggeration, then, to say that whistleblowers are essential to the integrity of governments around the world. There is a clear ethical imperative for governments to root out corruption and protect those who disclose it, but recent research suggests that there is also a significant financial incentive for governments to develop and maintain strong whistleblower protection legislation.

A recent analysis out of the United States found that the benefits of whistleblower involvement outweighed the costs.<sup>31</sup> This study found that, from 1978-2012, whistleblowers allowed US

<sup>26</sup> *Australia Public Service Act* (1999), Article 16

<sup>27</sup> *Protected Disclosures Act* 2014, Article 3

<sup>28</sup> *Protected Disclosures Act* 2000, Article 3

<sup>29</sup> Kroll (2014). Global Fraud Report. New York: Kroll

<http://www.kroll.com/CMSPages/GetAzureFile.aspx?path=~%5Cmedia%5Cfiles%5Cintelligence-center%5Cglobal-fraud-report-2013-2014-english.pdf&hash=a84e800f9068acd3e3ce664e95666772c22ccf4547183e750ecf984b2041343d>

<sup>30</sup> *Ibid.*

<sup>31</sup> Andrew C. Call et al., "The Impact of Whistleblowers on Financial Misrepresentation Enforcement Actions," (December 2014) [https://www.kkc.com/assets/site\\_18/files/resources/the-impact-of-whistleblowers-on-financial-misrepresentation-enforcement-actions-december-2014.pdf](https://www.kkc.com/assets/site_18/files/resources/the-impact-of-whistleblowers-on-financial-misrepresentation-enforcement-actions-december-2014.pdf)

regulators to successfully obtain a total \$16.86 billion in additional judgments against firms and employees that would not have been obtained without whistleblower involvement.<sup>32</sup>

Whistleblowers provide a significant ethical and operational corrective and financial benefit to their societies and governments. However, as discussed throughout previous sections, whistleblowers take a tremendous personal risk in disclosing wrongdoing. In particular, disclosure often results in financial hardship, including job loss, a temporary loss of income, as well as associated costs. Any measures that could increase a public servant's willingness to disclose wrongdoing and reward ethical behaviour could only benefit Canada.

## Recommendation

ACFO strongly recommends that the *Public Servants Disclosure Protection Act* be amended to include a provision allowing for whistleblowers who provide original information leading to the recovery of revenue to be awarded a percentage of the recovered amount.

## Rationale

Legislation allowing for a reward for whistleblowing has a robust precedent in international legislation and a history with roots tracing back to the English common law principle, *Qui Tam*.

Modern iterations of this legislation include the United States' *False Claims Act*, which allows individuals to sue on behalf of the government to recover lost or misspent money and to receive up to 30% of the amount recovered.<sup>33</sup> The *Dodd-Frank Act* orders the Securities and Exchange Commission to reward those that provide the Commission with original information that results in successful enforcement actions. These rewards can range anywhere from 10-30% of the recovered funds.<sup>34</sup>

The Ontario Securities Commission recently announced its own whistleblower program, which includes a reward of up to \$1.5 million for information about accounting fraud, insider trading and market manipulation, or up to \$5 million if the securities regulator is able to collect at least \$10 million in sanctions related to the case.<sup>35</sup>

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<sup>32</sup> Ibid.

<sup>33</sup> *False Claims Act*, 31 U.S.C. §3729.

<sup>34</sup> G20 Anti-Corruption Action Plan for Protection of Whistleblowers," *Organization for Economic Co-Operation and Development* (2011) <https://www.oecd.org/g20/topics/anti-corruption/48972967.pdf>

<sup>35</sup> "Award Eligibility," *Ontario Securities Commission* <http://www.osc.gov.on.ca/en/award-eligibility.htm>

The Anti-Corruption and Civil Rights Commission (ARC) of Korea provides monetary rewards of up to \$2 million (USD) for those who blow the whistle on corruption and whose report results in increased or recovered revenues.<sup>36</sup> Under the ARC whistleblowers can also be granted awards or recognition.<sup>37</sup>

Rewards or incentives for whistleblowers also has support among whistleblower protection experts and international institutions. Both the G20 Anti-Corruption Action Plan for Protection of Whistleblowers and Transparency International's International Principles for Whistleblower Protection list it under their best practices or recommendations.

Similarly, a formative Canadian study on private sector whistleblowers that offers an in-depth and painstakingly thorough analysis of the potential risks, costs and drawbacks of financial incentives for whistleblowers, ultimately found that they are "similar in nature to other types of instruments that permit valuable corporate information to be disseminated in a timely and accurate way to public authorities, and which in turn enhance the quality of the regulatory systems governing corporation."<sup>38</sup> Ultimately the authors strongly recommend these measures to Canadian policy-makers.<sup>39</sup>

From a practical standpoint, a reward system for whistleblowers could go some way in counteracting the chilling effect on disclosing wrongdoing that results from fears of reprisal. If whistleblowers are necessary to rooting out corruption but face suffering and financial peril if they do so, it only stands to reason that whistleblowers should be rewarded for doing the right thing in the face of personal risk.

Some may try to claim that instituting a reward system for whistleblowers should be avoided because will encourage meritless claims, but experts from across the United States, where *Qui Tam* legislation has existed for over one hundred and fifty years, agree almost unanimously that this is not the case. Experts have variously called these fears "overblown,"<sup>40</sup> "overstated"<sup>41</sup> and "not soundly based."<sup>42</sup> The process for filing and investigating a claim can be costly, time-consuming and involve a

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<sup>36</sup> Anti-Corruption and Civil Rights Commission of Korea, "Protecting and Rewarding Whistleblowers" [http://www.acrc.go.kr/eng\\_index.html](http://www.acrc.go.kr/eng_index.html)

<sup>37</sup> Ibid.

<sup>38</sup> Robert Howse and Ronald J. Daniels, "Rewarding Whistleblowers: The Costs and Benefits of an Incentive-Based Compliance Strategy," in *Corporate Decision-Making in Canada*, ed. Ronald J. Daniels, (Calgary: University of Calgary Press, 1995) [http://repository.upenn.edu/cgi/viewcontent.cgi?article=1003&context=law\\_series](http://repository.upenn.edu/cgi/viewcontent.cgi?article=1003&context=law_series)

<sup>39</sup> Ibid.

<sup>40</sup> Jerod S. Gonzalez, "A Pot of Gold at the End of the Rainbow: An Economic Incentives-Based Approach to OSHA Whistleblowing," *The Employee Rights and Employment Policy Journal* (2010) <http://www.defendingscience.org/sites/default/files/upload/Gonzalez-OSHA-Whistleblower-2009.pdf>

<sup>41</sup> Geoffrey Christopher Rapp, "Beyond Protection: Invigorating Incentives for Sarbanes-Oxley corporate and Securities Fraud Whistleblowers," *Boston University Law Review* (2007) <http://www.bu.edu/law/journals-archive/bulr/volume87n1/documents/rappv.2.pdf>

<sup>42</sup> Elletta Sangrey Callahan and Terry Morehead Dworkin, "Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act," *Villanova Law Review* (1992) <http://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=2777&context=vlr>

great deal of technical knowledge, which discourages false claims.<sup>43</sup> There is also little to be gained in a settlement or settlement leverage from a false claim.<sup>44</sup> Ultimately, in the American context, the likelihood of frivolous whistleblower claims is "not decidedly different from any civil statute that creates a private right of action"<sup>45</sup> and any concerns about false claims "do not outweigh the significant information generation advantages."<sup>46</sup>

## 5) Reallocate resources from departmental disclosure system to PSIC

### Context

On February 9, 2017, Mr. Luc Bégin, the Senior Integrity Officer and Ombudsman at Health Canada, appeared before the Government Estimates and Operations Committee to provide information about Health Canada's Ombudsman, Integrity and Resolution Office as an example of the government's departmental disclosure system.

Mr. Bégin stated that within this office, there was one full-time employee tasked with handling disclosures, and in addition to approximately 10% of his own time and that private investigators would be contracted to handle disclosures requiring investigations.<sup>47</sup>

According to Mr. Bégin, there are 12,000 employees at Health Canada and in the 2016-2017 fiscal year, not a single disclosure had been made to the department's Ombudsman, Integrity and Resolution Office; in the previous year there had been eight disclosures.<sup>48</sup>

One cannot know precisely why there have been so few disclosures within the departmental system. However, in his testimony, Mr. Bégin cited as a concern the 2014 Public Service Employee Survey

<sup>43</sup> Geoffrey Christopher Rapp, "Beyond Protection: Invigorating Incentives for Sarbanes-Oxley corporate and Securities Fraud Whistleblowers," *Boston University Law Review* (2007) <http://www.bu.edu/law/journals-archive/bulr/volume87n1/documents/rappv.2.pdf>

<sup>44</sup> Iletta Sangrey Callahan and Terry Morehead Dworkin, "Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act," *Villanova Law Review* (1992) <http://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=2777&context=vlr>

<sup>45</sup> Jerod S. Gonzalez, "A Pot of Gold at the End of the Rainbow: An Economic Incentives-Based Approach to OSHA Whistleblowing," *The Employee Rights and Employment Policy Journal* (2010) <http://www.defending-science.org/sites/default/files/upload/Gonzalez-OSHA-Whistleblower-2009.pdf>

<sup>46</sup> Geoffrey Christopher Rapp, "Beyond Protection: Invigorating Incentives for Sarbanes-Oxley corporate and Securities Fraud Whistleblowers," *Boston University Law Review* (2007) <http://www.bu.edu/law/journals-archive/bulr/volume87n1/documents/rappv.2.pdf>

<sup>47</sup> House Standing Committee on Government Operations and Estimates, February 9, 2017 [http://parlvyu.parl.gc.ca/XRender/en/PowerBrowser/PowerBrowserV2/20170209/-1/26637?globalstreamId=23&useragent=Mozilla/5.0%20\(Macintosh;%20Intel%20Mac%20OS%20X%2010\\_10\\_5\)%20AppleWebKit/537.36%20\(KHTML,%20like%20Gecko\)%20Chrome/55.0.2883.95%20Safari/537.36](http://parlvyu.parl.gc.ca/XRender/en/PowerBrowser/PowerBrowserV2/20170209/-1/26637?globalstreamId=23&useragent=Mozilla/5.0%20(Macintosh;%20Intel%20Mac%20OS%20X%2010_10_5)%20AppleWebKit/537.36%20(KHTML,%20like%20Gecko)%20Chrome/55.0.2883.95%20Safari/537.36)

<sup>48</sup> Ibid.

Results (mentioned in a previous section of this paper) which found that only 38% of respondents felt free to initiate a formal recourse process, including a grievance, complaint or appeal, without fear of reprisal.<sup>49</sup> These findings echo ACFO's own internal survey of its membership: only 39% of respondents indicated any degree of confidence that, if they made a disclosure of wrongdoing, they wouldn't be subject to reprisal.

ACFO's own experience as a union that has dealt with many concerns about disclosure is that the departmental system creates confusion and largely functions to shield senior public servants. Perhaps more alarmingly, it serves merely to contain rather than shine a light on wrongdoing. Our experience is that our members do not trust the departmental program and that there will only be disclosure if there is trust. People need to believe the person they are disclosing to is independent, unbiased and can protect them.

The reticence of potential whistleblowers to disclose wrongdoing poses a tremendous risk to the public service; to Ministers who may not be properly informed of issues in their departments; and most importantly to the Canadian people. It is plain to see that the departmental disclosure system as it stands is not encouraging the kind of reporting that Parliament intended when the *Public Servants Disclosure Protection Act* was passed.

## Recommendation

ACFO recommends that the departmental disclosures program be dismantled and that the departmental resources be reallocated to strengthening the Office of the Public Sector Integrity Commissioner.

## Rationale

Under the current departmental system, would-be whistleblowers are encouraged to report wrongdoing to their immediate supervisor. However, studies show that disclosure process should not be dependent on interactions between the whistleblower and their department or agency.<sup>50</sup> The involvement of external institutions, such as regulatory or enforcement agencies, have been found to improve the safety and effectiveness of the whistleblower.<sup>51</sup>

Governments must always balance the need to provide effective services to the public at a responsible financial cost. Whistleblowing about wrongdoing in the public service has been shown to

<sup>49</sup> "2014 Public Service Employee Survey Results," Government of Canada <http://www.tbs-sct.gc.ca/pses-saff/2014/results-resultats/bq-pg/00/org-eng.aspx>

<sup>50</sup> "Whistleblowing: The Inside Story," *Public Concern at Work and University of Greenwich* (2013) <http://www.pcaw.co.uk/files/Whistleblowing%20-%20the%20inside%20story%20FINAL.pdf>

<sup>51</sup> Ibid.

have the benefit of both reducing costs and improving service outcomes.<sup>52</sup> But in order for this to be the case, the resources invested in disclosure mechanisms must be spent wisely.

If Health Canada is an example of the departmental disclosure systems, which ultimately rely on third-party investigators, the money invested in these systems could be better spent elsewhere. If each department or agency in the federal public service has a single dedicated employee and a budget for external, contracted investigators, those resources could be reallocated to the Office of the Public Sector Integrity Commissioner, strengthening it at no additional cost to the government.

Trained, dedicated investigators who are familiar with the inner workings of government departments but who are independent from those departments and who report to an officer of Parliament also independent of those departments, would necessarily be more effective and inspire more trust. Changes must be made to deal with wrongdoing at the source and to encourage more effective, earlier disclosures.

## Conclusion

Canadian legislators should not be discouraged by the flaws of our current system. Whistleblower protection is, relatively-speaking, still new legislative territory. It is only to be expected that our first attempt at comprehensive whistleblower protection would not also be our last.

At the same time, we cannot rest on our laurels. There is still a significant fear of reprisal, and the number of disclosures are still low. Meanwhile mismanagement scandals still dog the federal government. It is clear that there is more work to be done. The *Public Servants Disclosure Protection Act (PSDPA)* was a good first step but we cannot stop moving forward.

Canada can look to research from anti-corruption institutions and whistleblower protection experts, and legislation from provinces and other countries as our guides. There are significant improvements to be made to the current system, and there is no better time than now, when the leader of government has declared a renewed commitment to transparency, integrity and openness.

The recommendations made throughout this paper were designed to improve whistleblower protection and the disclosure system — specifically the *PSDPA* and the Office of the Public Sector Integrity Commissioner — effectively and with the judicious use of resources.

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<sup>52</sup> Marcia P. Miceli and Janet P. Near, "An International Comparison of the Incidence of Public Sector Whistle-Blowing and the Prediction of Retaliation: Australia, Norway, and the US," *Australian Journal of Public Administration* (December 2013)

Our county and our government depend on the courage of these individuals who, at great personal risk, shine a light on wrongdoing. We in turn have an ethical and moral imperative to ensure they are protected, supported and encouraged.