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# The Case for Whistle-blowing Legislation in Canada

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by Senator Noël A. Kinsella

*On 31 January 2001, Senator Noël Kinsella introduced Bill S-6, the Public Service Whistle-blowing Act. It is virtually identical to a Bill introduced in the previous Parliament but which died on the Order Paper with the dissolution of Parliament. The purpose of the Bill is to establish a mechanism for dealing with the reporting of wrongdoing in the federal Public Service. On February 22, 2001, the Senate agreed to send the Bill back to the Committee on National Finance where it was at dissolution. This article is based on remarks by Senator Kinsella in the Senate on December 14, 1999 and in testimony to the Committee on National Finance on April 5, 2000.*



The Bill speaks to a contemporary, professional public service that we are fortunate to have here in Canada. Indeed, the Public Service of Canada is second to none in the world.

A report entitled *A Strong Foundation* was commissioned by the Clerk of the Privy Council a few years ago, chaired by the late John Tait. The purpose of *A Strong Foundation* was to help the Public Service think about and, in some cases, rediscover and understand its basic values and recommit to and act on those values in all its work.

Some of the issues and problems identified as concerns of public servants of Canada include evolving conventions about accountability; tension between old values

and new; ethical challenges emerging from new service and management approaches in the Public Service; and leadership and people management in this time of great change.

My Bill addresses the need to provide for a framework to deal with the matter of whistle-blowing within this new context of ethics and values as a strong foundation of our Canadian Public Service.

As indicated in the Tait report, an ethics regime is not a single initiative but rather a comprehensive series of initiatives, mutually supporting and complementing one another.

One element of an ethics regime which has particular importance is the establishment within public service organizations of suitable recourse mechanisms, counsellors, or ombudsmen for public servants who may feel that they or others are in potential conflicts of interest or other ethical difficulties, or may feel that they are under pressure or have been asked to perform actions that are unethical or contrary to public service values and to the public interest. One refrain that we have heard from public servants is that there is no point in asking them to uphold public service values or to maintain high ethical standards in public service, if we do not give them the tools to do so. One of the essential tools they require is an accessible person to whom they can turn, in confidence, to seek advice and guidance, to express concern about instructions given, or to report a serious

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breach of public service ethics. Such a function must have sufficient seniority, independence and authority to carry out the duties effectively and to protect the identity and positions of those who have recourse to it. There must be means, consistent with public service values, for public servants to express concern about actions that are potentially illegal, unethical or inconsistent with public service values, and to have those concerns acted upon in a fair and impartial manner.<sup>1</sup>

## The Legislation

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My Bill is built on a framework of four pillars. The first protects the public interest in general; the second enriches the Public Service as a first-class institution; the third provides for accountability and solutions at the unit level; and the fourth protects the public servant. Thus, we have provided in clause 2 of Bill S-13 what I call the triple "P" approach. The first of the three "Ps" is for promotion. Clause 2(a) provides that we wish to place a focus on education, and that persons working in the public service workplace will have the opportunity to be exposed to a reflection on ethics and values in the Public Service.

The second "P" is for process. Clause 2(b) provides for protection of the public interest by providing a means for employees of the Public Service to make allegations of wrongful acts or omissions in the workplace, and to make those allegations in confidence to an independent Public Interest Commissioner, one of the three commissioners of the Public Service Commission. It will then be on the shoulders of that commissioner, in the public interest, to investigate the allegations and to have the situation dealt with. The Public Service Commission makes an annual report to Parliament on its activities. The Bill provides for a section of the annual report of the Public Service Commission to focus on the work done pursuant to this legislation.

Finally, the third "P" is for protection. Clause 2(c) indicates that the purpose of the Bill is to protect employees of the Public Service from retaliation for having made or for proposing to make, in good faith, allegations of wrongdoing and submitting these allegations to the Public Interest Commissioner.

The rest of the framework of the Bill is also straightforward and clear. The education function of the Commissioner is contained in clause 8, which states:

The Commissioner shall promote ethical practices in the Public Service workplace and a positive environment for giving notice of wrongdoing, by disseminating knowledge of this Act and information about its purposes and processes and by such other means as seem fit to the Commissioner.

This should help members of the Public Service of Canada at all levels to concentrate on ethical practices re-

sulting in a more harmonious, effective and focused workplace.

Clauses 9 to 17 of the Bill set out the mechanisms under which a complaint of wrongdoing is to be made and investigated. A complaint is first filed with the Public Interest Commissioner. The Bill makes it clear that a complaint made in good faith and on the basis of reasonable belief is not a breach of any oath of office or any duty that the given public servant may have taken. The Commissioner, under clause 13, may accept the complaint under certain circumstances and cause an investigation of the complaint, if the investigation meets certain criteria, and prepare a written report of findings and recommendations. This report is then sent to the Minister responsible for the employee against whom the complaint was made, whereby responsibility at the departmental or agency level is maintained and undertaken. The Minister must then take action and inform the Commissioner of the nature of such action, or the Minister may advise that no action was taken. Under certain circumstances, such as cases of emergency, the Commissioner may require the President of the Treasury Board to table in Parliament an emergency report prepared by the Commissioner if he or she believes that it is in the public interest to table such a report. The Public Service Commission's annual report to Parliament will be required to contain details of activity under the Bill.

Clauses 18 to 22 of the Bill provide protection for the whistle-blowing employee against adverse action being taken because of the whistle-blowing activity. The employee has both the remedies available under this Bill and all existing remedies provided in both the civil courts and in any grievance procedures. The Bill would not diminish or detract from any of those pre-existing mechanisms.

## Conclusion

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The potential for illegal or improper activity within the machinery of government is a reality which cannot be ignored if the public interest is to be protected. It is a reality with which other jurisdictions have attempted to deal, and in which successive governments at the federal level have indicated an interest.

Appropriate and balanced whistle-blowing legislation forms a key part of any response to this important issue. Public Service employees must have available to them a clear and well-publicized means of reporting any wrongdoing which they observe. They must be assured of protection in the event that they choose to do so. At the same time, it is necessary to promote ethical practices within the Public Service to ensure their assessments of activities are informed ones.

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This Bill fulfils the requirements of establishing a whistle-blowing process, ensuring employee protection and promoting education, by proposing a model in which one of the Public Service Commission of Canada commissioners would be designated as a Public Interest Commissioner. The carriage of any case of wrongdoing alleged by an individual public servant would be placed on the shoulders of the Public Interest Commissioner. Cases which are found to be frivolous or vexatious would be dismissed in the first instance, thus guarding against any waste of time and resources by the Commissioner or by the department or agency in question.

*Bona fide* cases would be investigated, and the Commissioner would deal with the department to which the allegation relates. The department would be invited to conduct itself in such a way as to deal with issues of wrongdoing. This reflects the importance of departments and agencies operating and managing on the basis of ethics and values which are the foundation of the Public Service, while at the same time keeping the complaint within the department.

Therefore, this is not a top-down model. Rather, it endeavours to keep the accountability and the responsibility at the operating level. However, should the Public Interest Commissioner, when dealing with a case of wrongdoing, fail to receive a satisfactory response from the agency or department involved, he or she could approach the Minister responsible to have the problem rectified. If no resolution is obtained, the Commissioner would submit a report directly to Parliament.

In accordance with Canada's Westminster model of government, Parliament would hold the Minister in question accountable. Ultimately, through Parliament, it is Canadians themselves who would ensure accountability, in order to safeguard their interests against possible wrongdoing in the Public Service of Canada.

#### Notes

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1. *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics*, Canadian Centre for Management Development, Ottawa, 2000, pp. 43-44.