



**Presentation on the Disclosure of Wrongdoing to the
House Standing Committee on Government
Operations and Estimates**

By the

**Association of Professional Executives of the Public
Service of Canada**

Ottawa, February 17, 2005

Introduction:

1. Good afternoon. Thank you for this opportunity to speak to you on behalf of the Association of Professional Executives of the Public Service of Canada (APEX).

Background on APEX:

2. APEX is a voluntary, nonprofit organization which fosters excellence in leadership, and promotes learning and networking. It is a strong advocate on behalf of the approximately 4,000 executives in the Federal Public Service.
3. This legislation is very important to the executive community; executives wear three hats with respect to the disclosure of wrongdoing. They are employees with expectations about the level of protection and support that will be afforded to them should they disclose wrongdoing. They may also, as a result of their management role, be the subject of disclosures of wrongdoing. As leaders and managers they are also responsible for the resolution of instances of wrongdoing as they are identified.

APEX support

4. Our association and its members support the spirit of this proposed legislation and are committed to maintaining the highest standards of integrity in the Federal Public Service. We believe that no one should be exempt from being cited through the disclosure process, wrongdoing must be addressed swiftly and the process by which it is addressed must be open and transparent while, at the same time, offering all parties the protection of the rules of natural justice.
5. We are happy to note that the proposed legislation is in accord with APEX's position that the officer responsible should report directly to Parliament. The Association does not support the creation of an entirely new body and we believe that either the Auditor General or the President of the Public Service Commission would be an appropriate choice for this function, provided the operational services provided by the PSC are moved elsewhere.
6. We believe that the disclosure process must be based on values. We, therefore, are pleased to see in the Preamble a commitment to the establishment of a Charter of Values of Public Service, as well as the importance given to the promotion of ethical practices in the public sector (clause 4).
7. APEX supports the provision that anyone responding to an allegation can be assisted or represented either by counsel or someone else. This is an important issue for executives who do not have a union to represent them. It should be noted that, currently, executives who do obtain legal advice do so at their own expense, a problem that we continue to flag

with Central Agencies in the context of the Indemnification Policy. This situation must not be replicated in the context of this legislation. This is why we ask that it be modified to clarify that legal expenses will be covered by the employer so long as the respondent has not been found guilty of wrongdoing.

Areas of Concern

8. Since APEX members will be affected by the legislation both as potential complainants and as potential respondents, we seek to ensure that the legislation is balanced, effective and provides for the timely resolution of disclosures.
9. While the current version of the Bill is in our view a great improvement over the previous proposal, APEX still has four key areas of concern. Let me touch on each of these.

A. Scope of Protection

10. Senior Executives may be in a position to observe wrongdoing at the political level. APEX believes that it should be clear in the legislation that this legislation also applies in the case of wrongdoing committed by Ministers or their staff, and that there would be protection for an executive making a disclosure.

B. Certainty in the Law

11. APEX believes that the definition of “wrongdoing” must be limited to issues of significant public interest. The proposed legislation provides parameters for some of the wrongdoings identified, e.g., allegations of mismanagement are limited to a gross mismanagement in the public sector. However, no such limitations are established for a misuse of public funds or a public asset, which could increase the possibility of frivolous complaints.
12. Codes of conduct have not yet been developed. In the interests of clarity and certainty in the law, APEX is concerned about the possibility that the legislation could come into effect before the codes are in place. We would like to see the mention of codes of conduct removed from the definition of wrongdoing, or be assured that the legislation would not be implemented before they are in place.
13. APEX wants to be clear that we strongly support the creation of codes of conduct both for the government as a whole, and for departments and agencies. This exercise would be an important step in building the culture change required within the public service. This change in culture should, for example, make it possible to have frank and open discussions on sensitive issues, without fear of reprisal or censure. Once detailed codes

are in place, they also would be useful as evidence before the court in the future interpretation of the law.

14. The proposed legislation, in Section 5 (3), provides for consultations with certified bargaining agents before Treasury Board can establish a code of conduct for the federal public service. APEX wishes to emphasize the importance of consultations throughout the implementation of the new legislation. The consultations should not be limited to certified bargaining agents, but should also involve recognized professional organizations that represent the interests of excluded employees, such as APEX, the National Managers Community, and the Association of Justice Counsel.

C. Fair Process

15. This is an area of particular concern to executives in light of our experience with the internal harassment policy. There must be protection for those who bring sincere and significant complaints. This must also, however, be a means of dealing with frivolous and vexatious complaints which may be brought strategically by disaffected staff in response to management interventions.
16. APEX believes that there should be time limits established for the making of a complaint and the duration of an investigation. The longer an investigation takes, the greater the potential impact on the person who has disclosed the wrongdoing, the alleged wrongdoer and the workplace. Someone who has disclosed wrongdoing is always vulnerable. On the other side of the equation, an alleged wrongdoer always suffers a stain on his or her reputation, whether or not he or she is ultimately cleared of doing wrong. Time limits, in our view, would be consistent with a fair and efficient process.
17. APEX also would like to see in legislation the standards of information required to accept a complaint for investigation as well as standards for action when a complaint is deemed to be frivolous or vexatious. There should be a clear definition of what constitutes vexatious or frivolous complaints and some guidance on what might constitute bad faith in bringing a complaint.
18. APEX also feels that there should be consequences for those who abuse the process. The previous version of the proposed legislation included the potential for disciplinary action in cases where a public servant “makes a disclosure that is frivolous, vexatious or in bad faith . . .” APEX would like to see this provision reintroduced in the proposed legislation. A clear statement of this nature is more likely to discourage frivolous or vexatious complaints.
19. Where individuals are alleged to have committed a wrongdoing, we ask that the law stipulate that they be provided with enough information to know the case against them and that they have an opportunity to respond to these allegations. Under the proposed

legislation, the President of the Public Service Commission must “ensure that the right to procedural fairness and natural justice of all persons involved in investigations is respected, including persons making disclosures, witnesses and persons alleged to be responsible for wrongdoings” (S. 22. (d)). However subsequent provisions in Section 28 leave it to the President’s discretion whether a person whose acts or conduct has been called into question is notified of the investigation and whether they have the opportunity to answer the allegation. The latter point, which we disagree with, is inconsistent with the former, which we support.

D. Particular impact on executives

When Disclosing Wrongdoing

20. Executives will face particular personal and financial challenges when disclosing wrongdoing. As I mentioned previously, executives will not have the moral or financial support of a union representative to advise and assist them and furthermore, under the current Indemnification Policy, they will have to obtain legal advice at their own expense.

When Accused of Wrongdoing

21. Executives are vulnerable to censure if there is an allegation of wrongdoing within their area of responsibility. APEX believes that the law should ensure that no informal or formal disciplinary action, such as a negative performance review, a reassignment to a less responsible position, etc., will be taken against a respondent unless the investigation is concluded and wrongdoing has been confirmed.
22. We have great respect for the integrity and ability of the vast majority of executives in the Public Service. We are confident that in most cases it will be established that wrongdoing did not occur. With this in mind, we would like to propose that some provision be made for the rehabilitation of an executive’s reputation, when an allegation is found to be unsubstantiated. This could take the form of a letter from the chief executive to all staff if requested. Furthermore, should that executive decide not to remain in the Public Service, APEX recommends that the executive’s career transition be facilitated by a variety of financial and non-financial measures such as those found in the Executive Employment Transition Program.

Conclusion

In closing, I would like to stress again that APEX strongly supports the spirit of this initiative.

We recognize the challenges inherent in creating an environment that will encourage the disclosure of wrongdoing. We are as committed to protecting the career potential of

someone who has made a disclosure in good faith, as we are to protecting those who might suffer because of a disclosure made in bad faith. A delicate legislative balancing act is required.

We thank you once again, for allowing us the opportunity to contribute to this debate.