
ENCOURAGING “RIGHTDOING” AND DISCOURAGING WRONGDOING: A PUBLIC SERVICE CHARTER AND DISCLOSURE LEGISLATION

Kenneth Kernaghan

The major argument in this paper is that the Government of Canada should adopt both a *Charter of Public Service Values* and a statute on disclosure protection—and that these two actions should be closely linked. A *Charter of Public Service Values* is a formal written statement outlining the constitutional position of the public service, including its relationship with the political sphere of government. A Charter would provide a foundation and a framework for good governance by setting the core values of public service within the broader context of the principles of Canada’s parliamentary democracy. A disclosure of wrongdoing statute (often described as a whistleblower statute) would provide protection for

public servants who reveal information about such forms of misconduct in government as illegal activity and gross mismanagement.

These two ideas—disclosure legislation and a public service Charter—should form an integral part of the overall accountability regime in Canada’s federal government. The implementation of both ideas was proposed in the 1996 *Report of the Deputy Ministers Task Force on Charter of Public Service Values and Ethics* (the “Tait” Report) where the Charter idea was discussed in terms of a “moral contract.”¹ In the early 2000s, the Government took two major steps towards implementing these ideas. It adopted a policy on the *Internal Disclosure of Wrongdoing* in 2001² and the *Values and Ethics Code for the Public Service* in 2003.³ Breaches of the Code became one of the kinds of wrongdoing under the disclosure policy. The two ideas have since become increasingly central to political and public service discourse. They were included in the recommendations of the 2004 external Working Group on the Disclosure of Wrongdoing⁴ and, subsequently, in Bills C-25 and C-11, entitled the *Public Servants Disclosure Protection Act*.⁵ At the time this paper was written, Bill C-11, which focused on disclosure and simply committed the Government to establishing a *Charter of Public Service Values* and a code of conduct, had not been adopted.

This study sets an examination of the Charter and disclosure ideas within a comparative context. The objective of the study is to examine how learning from experience in other countries can help Canada adopt a Charter and disclosure legislation that best meet its particular needs. The first section of this paper explains briefly the importance of the concept and management of public service values. The second section focuses on the concept of a Public Service Charter, with reference to policies and practices concerning values and ethics in Australia, New Zealand, and the UK (described as the Westminster countries). The third section reviews the disclosure of wrongdoing regime in each of these countries and draws out major learning points

for Canada. The fourth section examines alternatives to Canada’s current arrangements for protecting disclosures and promoting values, and recommends a strong disclosure regime built on a strong values base.

1 Values and Ethics

Values are enduring beliefs that influence our attitudes and actions. Values influence the choices we make from among available means and ends.⁶ Over the past two decades, public service values have become a major component of the management of public organizations, not only in Canada but also in many other countries around the world. On the basis of a comprehensive examination of public sector values, Montgomery Van Wart, a U.S. scholar, concluded that values are so deeply embedded in public management that “[t]he art of values management for practitioners has already become *the leading skill* necessary for managers and leaders of public sector organizations.”⁷ Public service values occupy a central place in Canada’s Tait Report, which concluded that public service reform “must be animated from within by sound public service values,” by “values consciously held and daily enacted, values deeply rooted in our own system of government, values that help to create confidence in the public service about its own purpose and character, values that help us to regain our sense of public service as a high calling.”⁸

Both the Van Wart book and the Tait Report draw attention to the difference between the closely related concepts of values and ethics.⁹ These two concepts should not be used interchangeably because ethical values are a sub-set of values in general. The Tait Report classifies values into four main categories, or “families,” of values—*democratic* values, *ethical* values, *professional* values and *people* values. This classification has now been widely accepted in Canada’s public administration community and has been entrenched in the federal government’s *Values and Ethics Code* and in other official documents.

Over the past decade, the importance of public service values has been considerably elevated in the public service systems of the three

Westminster governments examined in this paper. The New Zealand State Services Commission asserts that “[v]alues are essentially the link between the daily work of public servants and the broad aims of democratic government. . . .”¹⁰ The values contained in Australia’s 1999 *Public Service Act* are described as encapsulating “the distinctive character of the Australian Public Service (APS)” and as being “central to the public interest aspect of public sector employment. They provide the real basis and integrating element of the Service, its professionalism, its integrity and its culture of impartial and responsive service to the government of the day.”¹¹ Similar language is contained in the UK’s *Civil Service Code* that purports to provide the “constitutional framework” for the public service.

The examination in this paper of public service values in these three countries focuses on the form and content of their central values and ethics documents. The means by which values and ethics are being integrated into the public service as a whole and into individual public organizations are also discussed. Particular attention is paid to the extent to which these efforts inform the movement in Canada towards a *Charter of Public Service*. For each country, reference is made to the four categories of values explained above. An additional distinction is made between *traditional* values (for example, accountability, integrity) and *new* values (i.e., such *professional* values as service and innovation).

An emphasis on the importance of public service values is not an invitation to reduce unduly the use of rules, including ethics rules.¹² A values statement (often described as a code of conduct) is by itself insufficient to ensure values and ethics-based behaviour in the public service. It should be a central component of a regime that includes “such measures as *ethics rules* and guidelines, ethics training and education, ethics counselors or ombudsmen. . . .”¹³ Commitment to shared values can help *reduce* the need for rules. Moreover, reference to values helps to explain to public servants the foundation on which rules are based. For example, values like honesty and fairness underpin rules on conflict of interest.

1.1

Australia

Australia leads Westminster-style governments in efforts to integrate values into the structures, processes and systems of its public service. Since the mid-1990s in particular, Australia’s federal government has made a clear and continuing commitment to promoting a values-based public service. The objectives of this commitment are a change in public service culture that includes greater relative emphasis on values rather than rules and on results rather than processes. A landmark event in the evolution of values and ethics in Australia was the enactment of a new *Public Service Act* (PSA) in 1999. In respect of values and ethics, the PSA is the culmination of several earlier initiatives and the foundation for the culture change that is being sought. The final explanatory memorandum for the PSA asserted that the values of the Australian Public Service (APS) contained in the Act were designed to:

- provide the philosophical underpinning for the APS;
- reflect public expectations of the relationship between public servants and the government, parliament and the Australian community; and
- articulate the culture and operating ethos of the APS...¹⁴

The lead section in the PSA is a statement entitled *APS Values* that takes the form of a list of 15 one-sentence assertions. The statement’s prominent placement confirms its status as the philosophical foundation for public service values and ethics. Illustrative of the form and content of the *APS Values* are the following:

- (a) the APS is apolitical, performing its functions in an impartial and professional manner;
...
- (e) the APS is openly accountable for its actions, within the framework of Ministerial responsibility to the Government, the Parliament and the Australian public;
...

(g) the APS delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public;

...

(j) the APS provides a fair, flexible, safe and rewarding workplace; and

(k) the APS focuses on achieving results and managing performance

....

While the list focuses primarily on democratic and ethical values, it also includes people values, traditional professional values and new professional values (for example, achieving results). Since several clauses contain more than one value, the total number of values is considerably greater than 15.

The *APS Values* statement and the *APS Code of Conduct* that immediately follows it are explicitly linked. The statement provides that “the APS has the highest ethical standards,” and the Code provides that “[a]n APS employee must at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS.” To a large extent, the statement serves as a values foundation on which the more specific guidance of the Code is built. However, the Code contains not only ethics *rules* on such matters as conflict of interest but also what are generally considered to be values (for example, integrity). Among the provisions of the *Code of Conduct* are these:

(1) An APS employee must behave honestly and with integrity in the course of APS employment;

(2) An APS employee must act with care and diligence in the course of APS employment;

...

- (6) An APS employee must maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister’s member of staff; and
- (7) An APS employee must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment.

As explained in the next section of this paper, the PSA also provides protection for whistleblowers who report breaches of the Code.

All public servants are required to uphold the *APS Values* and to comply with the *Code of Conduct*. Agency heads are required both to uphold and to foster the Values within their agencies and they have the authority to impose sanctions for breaches of the Code. The Public Service Commissioner has the main responsibility for integrating the Values and the Code into the public service. The Commissioner is required to issue written directions covering each of the Values so as to ensure that the public service respects them and to make clear their scope and application. The Commissioner also submits an annual State of the Service report to Parliament that assesses the extent to which agency heads respect and promote the Values and the extent to which agencies have developed appropriate procedures and systems to ensure compliance with the Code. Finally, the Commissioner has authority to investigate alleged breaches of the Code by agency heads and to report any breaches to the Prime Minister or the agency’s Minister.

Long before the 1999 PSA, Australia had adopted *Guidelines on Official Conduct of Commonwealth Public Servants*. The 1995 version of this lengthy document contained extensive guidance on a large number of values and ethics matters for which provision had already been made in statutes, regulations and guidelines. In August 2003, the Public Service Commissioner issued a substantially revised version of the Guidelines under the title *APS Values and Code of Conduct in Practice: Guide to official conduct for APS employees and Agency Heads*. The Guide and the *APS Values*

are explicitly linked in that the Guide sets coverage of a broad range of values and ethics matters within an APS Values Framework.

Also in August 2003, the Public Service Commissioner released a “good practice” guide entitled *Embedding the APS Values*. This guide provides materials such as case studies and a checklist to help agencies make values come alive for their employees. The guide notes several factors that are essential to integrating values into the public service:

- the importance of leadership in each agency in promoting the message that the Values are relevant and should be taken seriously;
- employees’ perceptions of the extent to which senior managers in the agency model behaviour consistent with the Values;
- the availability of training and other information about the Values and ethical behaviour within each agency;
- the integration of the Values into key corporate documents, especially service/client Charters, Chief Executive Instructions (CEIs) and performance management arrangements; and
- the use of assurance mechanisms such as staff surveys to ensure that Values strategies remain focussed and effective.¹⁵

The PSA does not set out the *APS Values* in a manner that makes them easy to understand, communicate or remember. This is in part a result of the Government’s effort to obtain bi-partisan support for the PSA. Indeed, several Values were added to the list during the legislative process. To make the Values more easily explainable and memorable throughout the public service, they have since been classified into four groups that are broadly similar to the four-fold classification of public service values contained in Canada’s *Public Service Values and Ethics Code*, that is, democratic, ethical, professional and people values. The Australian classification, which is based on relationships and behaviours, includes:

1) relationships with the Government and Parliament; 2) relationships with the public; 3) relationships in the workplace; and 4) personal behaviour. The importance in the Australian system of what in Canada are called democratic values is evident in a singling out of those values that reflect the role of the APS “as an institution” and that comprise “the core principles of public administration that have applied in Westminster systems of government for over a hundred years”¹⁶ (for example, accountability, responsiveness, impartiality).

The framework also includes three supporting elements that are the driving forces for integrating the *APS Values* into the public service. The first element is *commitment*, which involves the pursuit of values-based behaviour, especially by senior executives and managers, and learning and development opportunities to sensitize public servants to the importance of making their behaviour congruent with the Values. The second element—*management*—focuses on integrating values into all aspects of the organization so its policies, processes and systems are in tune with the Values. The final element is *assurance*—the requirement for effective accountability mechanisms such as the *Code of Conduct*, to ensure that the Values are being respected, for the imposition of sanctions when necessary, and for staff and client surveys to measure the extent to which the Values are being upheld.

A review of the State of the Service Reports since 1998-1999 suggests that the PSC, supported by vigorous values and ethics programs in some agencies, has made steady progress in “hard-wiring” the *APS Values* into Australia’s public service. The 2003-2004 Report concluded, on the basis of an employee survey, that “the vast majority of employees feel they are familiar with the *APS Values* and view them as relevant to their daily work.”¹⁷

1.2

New Zealand

In New Zealand, public service values are set out in the *Public Service Code of Conduct*. Under the authority of the 1988 *State Sector Act*, the State Services Commissioner issued the Code for departmental public servants. A 2005 amendment to the Act authorized the Commissioner to set standards and provide advice on integrity and conduct for a broader range of employees across the “State Services,” including those in Crown agencies. The Commissioner also received authority to issue codes of conduct tailored to the needs of specific agencies—to reflect, for example, an agency’s particular legal or commercial requirements. The *Code of Conduct* contains three main principles:

- Employees should fulfill their lawful obligations to Government with professionalism and integrity;
- Employees should perform their official duties honestly, faithfully and efficiently, respecting the rights of the public and their colleagues; and
- Employees should not bring their employer into disrepute through their private activities.

The Code elaborates on each principle at some length. The first principle, for example, covers such topics as public servants’ obligations to government, political neutrality, public comment on government policy, political participation, and protected disclosures (whistleblowing). Although the Code contains several references to such values as honesty and integrity, neither the word “values” nor the word “ethics” appears in the Code. However, a reading of the Code, together with other official documents, shows that the main public service values in New Zealand are integrity, honesty, political neutrality, professionalism, obedience to the law, respect for the institutions of

democracy, respect for the Treaty of Waitangi (on aboriginal peoples), and free and frank advice.¹⁸ Like the *APS Values* statement, the Code speaks primarily to democratic values.

More recently, in 2001, the Minister of State Services, on behalf of all Government Ministers, issued a separate two-part document entitled *Statement of Government Expectations of the State Sector and Commitment by the Government to the State Sector*.¹⁹ The purpose of the document was to provide a clear and concise statement of values. The first part contains a list of 11, mostly democratic, values under the headings of “integrity” and “responsibility,” followed by a long list of principles for giving effect to these values in the day-to-day conduct of public servants. The second part briefly outlines four obligations that the Government and Ministers have towards state employees, including, for example, the obligations to “acknowledge the importance of free, frank and comprehensive advice” and to “treat people in the State Sector in a professional manner.” It is notable not only that this document was issued by Ministers but also that it prescribes certain mutual obligations of Ministers and public servants. Thus, it comes closer than the country’s *Public Service Code of Conduct* and Australia’s Values statement to articulating the kind of constitutional position of the public service that would be required in a Public Service Charter.

The State Sector Standards Board, which drafted and recommended the Expectations Statement, envisaged that the Statement would “stand above and guide the development of codes, mission statements or statements of values of individual organizations within the State Sector.” A similar purpose was envisaged for the *Public Service Code of Conduct*, which was designed in part to provide “a basis for more detailed codes that are required to meet the particular circumstances of individual departments.”²⁰ The Statement makes no reference to the *Code of Conduct*, however, and the relationship between these two values and ethics documents is unclear. What is clear is that efforts to integrate

values into the structures, processes and systems of the New Zealand Public Service have revolved around the *Code of Conduct* rather than the Expectations Statement. The State Services Commission has prepared an elaborate facilitation guide,²¹ based on the *Code of Conduct*, to explain the meaning, importance and application of public service values and to encourage public servants to respect these values in their daily work.

1.3

United Kingdom

Like both New Zealand and Australia, the UK has two especially notable documents dealing with public service values and ethics. The main UK document is the *Civil Service Code* that was issued in 1996 by the Minister for the Civil Service under the authority of the Civil Service Order in Council 1995. The Code forms part of the lengthy *Civil Service Management Code* that sets out a broad range of regulations and instructions for departments and agencies on the terms and conditions of employment for public servants. Individual departments and agencies are responsible for setting standards of conduct for their employees that reflect the provisions of the *Civil Service Code*, and for specifying sanctions for Code violations.

Compared to the *APS Values* statement and the *New Zealand Code of Conduct*, the *Civil Service Code* focuses somewhat more on democratic values and expresses their importance in more elegant language. It is also more concerned with the constitutional role of the public service in its relations with Ministers and Parliament. It begins by asserting that the “constitutional and practical role of the Civil Service is, with integrity, honesty, impartiality and objectivity, to assist the duly constituted Government... in formulating [its] policies, carrying out decisions and in administering public services for which [it is] responsible.”

To a greater extent than New Zealand’s Expectations Statement, the *Civil Service Code* sets out obligations for Ministers as well as for public

servants. The Code is to be seen in the context of the responsibilities of Ministers contained in the Ministerial Code. These include:

- the duty not to use public resources for party political purposes, to uphold the political impartiality of the Civil Service, and not to ask civil servants to act in any way which would conflict with the *Civil Service Code*; [and]
- the duty to give fair consideration and due weight to informed and impartial advice from civil servants, as well as to other considerations and advice, in reaching decisions.

Like New Zealand’s *Code of Conduct*, the UK *Civil Service Code* is permeated by references to values, but the term “values” is never used. This is not the case with a second major document dealing with public service values and ethics. The *Vision and Values Statement*²² was adopted at a meeting of permanent heads of departments in 1999. Its purpose was to make values come alive by embedding them in the day-to-day conduct of public servants. The Statement contains a list of “common principles” or “values” on which departments and agencies can build their own statements. The public service is encouraged to reflect the values in the main management processes of recruitment and selection, training and development, and performance management. More specifically, the performance management system should “recognize and reward the people who deliver and uphold the values; confront the poor performance of the people who consistently work against the values; and develop competencies . . . which reflect the behaviours required to underpin the vision and values.”²³

The Statement complements the Code by emphasizing professional values (for example, innovation, results) but not to the exclusion of democratic and ethical values. The Statement does not seem to have gained much traction in the UK’s values and ethics regime. The Code, which itself asserts that it is “*the key statement* of the rights and responsibilities of

civil servants,” has maintained its central status. This is reflected in the recent discussion of the desirability and content of a Civil Service Act for the UK. In January 2004, the House of Commons Public Administration Select Committee (PASC) submitted for the Government’s consideration a draft civil service bill²⁴ incorporating the *Civil Service Code* in substantially its existing form. The intent was to provide a framework whereby Parliament could “ensure that public service principles are upheld and that civil servants and others are carrying out their jobs with propriety.” The Government responded in November 2004 with a consultation document containing a draft civil service bill of its own that was similar to the PASC bill.²⁵ PASC noted that this was the first time in history that a UK government had proposed “to put the Civil Service on a statutory footing, and give its core values constitutional protection.”²⁶ PASC noted also, however, the suspicion that the Government is not really committed to a civil service bill.

Compared to the *APS Values* statement and the New Zealand Public Service *Code of Conduct*, the overall format, language and content of the UK Code provides the best model for a Canadian *Charter of Public Service*. We shall return to this topic after an examination of the issue of disclosure of wrongdoing.

2 The Disclosure of Wrongdoing

This section examines the disclosure protection regimes adopted recently in Australia, New Zealand and the UK. In all three countries, the main values document contains, or is linked to, disclosure protection for public servants. However, each country’s disclosure regime differs significantly from the others and thereby provides Canada with a variety of models from which to learn. Note that this study follows the practice in New Zealand and the UK of using the term “disclosure of wrongdoing” rather than “whistleblowing.” The latter term has invidious connotations of “tattling” and “squealing” that undermine efforts to make the disclosure of wrongdoing an integral and praiseworthy part of a public servant’s duties.

The examination of the three disclosure regimes provided below is not an exhaustive treatment of the many dimensions and complexities of such regimes. The focus is on those features that seem most likely to inform decisions on disclosure arrangements for Canada. The main topics discussed for each country are: the portion of public sector employees covered by the regime, the definition of wrongdoing, the roles and powers of the main actors, the protection of “disclosers” from reprisal, false allegations, and experience to date. The term “regime” is used to sum up the means and mechanisms by which a particular jurisdiction manages public servants’ disclosure of wrongdoing in government.

2.1

Australia

The sections of Australia’s 1999 *Public Service Act* (PSA) dealing with the APS *Code of Conduct* are followed immediately by section 16 on “Protection for whistleblowers.” This section, like the PSA itself, applies to all public service employees. Unlike disclosure schemes in most other countries, including New Zealand and the UK, the PSA does not define categories of wrongdoing that may justify disclosure. Rather, an employee can be involved in wrongdoing by violating one or more of the 13 requirements of the Code, including, for example, the provisions that employees must behave honestly and with integrity. For the purpose of an employee survey relating in part to whistleblowing that was conducted by the Public Service Commission (PSC), illustrations of a “serious breach” of the Code were said to include such offences as fraud, theft, misusing clients’ personal information, sexual harassment and leaking classified documentation.²⁷

A critical feature of the Australian disclosure regime is the expectation that most disclosures will be made and investigated within the agency rather than by any external authority. Within the framework of minimum directives set down by the Public Service Commissioner, the design of

agency mechanisms for managing disclosures is left to the agencies themselves. The PSA requires agency heads to establish procedures for handling disclosure reports and for determining whether a breach of the Code has occurred. It also gives agency heads authority to impose sanctions for Code violations. Agencies are required to investigate disclosure reports unless they consider them to be frivolous or vexatious. Agencies are also required to apply their regular disclosure procedures to anonymous disclosures, if these disclosures are accompanied by sufficient evidence to warrant an investigation.

An employee may make disclosure reports directly to either the Public Service Commissioner or the Merit Protection Commissioner, but only when the Commissioner agrees that the matter is too sensitive to be disclosed to an agency head (for example, if the report alleges wrongdoing by the agency head). Also, an employee may refer an allegation to either Commissioner if he or she has made a disclosure report within an agency but is not satisfied with the outcome of the investigation. The Commissioners will not investigate a report that they consider frivolous or vexatious. Both the Commissioners and the agencies are required to conduct their inquiries with due regard for procedural fairness. Following their investigation of a disclosure report, the Commissioners have authority only to recommend, not to direct, that the agency take remedial action. In practice, the heads of agencies usually, but not always, follow the recommendations.

The whistleblower section of the PSA provides that employees who report breaches (or alleged breaches) of the Code must not be subjected to victimization or discrimination. Retaliatory action against employees who disclose wrongdoing could constitute a breach of the Code and could, therefore, be investigated by the PSC. If necessary, the Public Service Commissioner could recommend to the Minister that sanctions be applied for reprisal that has taken place in an agency, but in practice such matters are handled almost exclusively within the agencies.²⁸

Since Australia’s disclosure legislation dates only from 1999, drawing firm conclusions about its long-run effectiveness is premature. The number of reports of wrongdoing has so far been surprisingly small. In 2003-2004, the number of suspected breaches reported under section 16 was only about two percent of the total breaches of the Code that were reported. There was concern, however, that some agencies were not categorizing correctly the “whistleblower complaints” received.²⁹ During the same reporting period, the Merit Protection Commissioner received six disclosure reports, only one of which was accepted for investigation. The issues raised included such personnel matters as leave entitlements and probation, harassment, and recruitment processes.³⁰ The Public Service Commissioner received 12 reports. The four reports that were deemed to warrant investigation dealt with such matters as abuse of powers by an agency head and a senior employee, and failure to comply with the law in relation to approval of a leave application.³¹

An employee survey conducted for the 2003-2004 State of the Service report found that 22% of employees had low confidence that they would not be victimized or discriminated against for reporting a suspected serious breach of the Code involving their supervisor/manager (25% for other managers and 19% for peers/colleagues).³² The survey also found that employees who had actually witnessed a suspected serious breach were much more likely to have low confidence that they would be protected against reprisal.³³

The 2004 draft report of the National Integrity System Assessment of Australia described the section 16 whistleblower scheme as inadequate and said that reports by the Public Service Commission that the scheme is working well are “not persuasive.”³⁴ Among the deficiencies identified in the report were that the scheme applies only to APS employees rather than the entire public sector; the nature of the matters covered is vague; protection from reprisal is limited; and “there is no clear

independent investigative or remedial capacity given limitations on the statutory role of the Public Service Commission.”³⁵

2.2

New Zealand

The New Zealand *Protected Disclosures Act 2000* (PDA) came into effect on January 1, 2001. The PDA covers both public and private sector employees. It is concerned with “serious” wrongdoing in the categories of:

- an unlawful, corrupt, or irregular use of public funds or public resources; or
- an act, omission, or course of conduct that constitutes a serious risk to public health or public safety or the environment; or
- an act, omission, or course of conduct that constitutes a serious risk to the maintenance of law, including the prevention, investigation and detection of offences and the right to a fair trial; or
- an act, omission, or course of conduct that constitutes an offence; or
- an act, omission, or course of conduct by a public official that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement.

Employees are protected in their disclosures if they adhere to certain requirements. In substantive terms, they are protected if their disclosure relates to wrongdoing in the public or private sector and if the discloser reasonably believes that the allegation is true or likely to be true, is making the disclosure so that serious wrongdoing will be investigated, and wishes the disclosure to be protected.

There are also procedural requirements for protected disclosures. As in the Australian case, New Zealand’s PDA requires that, in general, disclosures must be made in accordance with the internal procedures

of the organization. Among arguments that have been offered for this internal disclosure system are that it will ensure that no legitimate disclosure is made without the organization’s knowledge; it will increase the organization’s involvement, certainty and control over potentially serious issues; and it will enhance the organization’s communications, culture and reputation with staff, stakeholders and the public.³⁶

A disclosure report can be made to the head of the organization if the organization has not established internal procedures for disclosure or if the discloser reasonably believes that the person authorized to receive the disclosure may be involved in the wrongdoing or is associated with a person who may be involved. Moreover, disclosure may be made to an “appropriate authority” outside the organization if the discloser reasonably believes that the head of the organization is involved in the wrongdoing, if immediate reference to an appropriate authority is justified by the urgency of the matter, or if no action is taken on a disclosure within 20 days. Finally, in certain circumstances (for example, the person or appropriate authority to whom a disclosure was made decides not to investigate the matter) a disclosure can be made to a Minister of the Crown or an Ombudsman.

The Act provides a remarkably long list of appropriate authorities, including the Controller and Auditor General, the Commissioner of Police, the State Services Commissioner, the Director of the Serious Fraud Office, the head of every public organization, and the Ombudsmen. The latter are independent officers of Parliament who are singled out in the PDA from the other appropriate authorities as being responsible for such tasks as providing information and guidance to disclosers and serving as the only appropriate authority for certain departments. A review of the Act’s operation that was published in late 2003 concluded that the most beneficial change would be greater involvement by an authority such as the Office of the Ombudsmen to assist disclosers, coordinate the referral of matters to the appropriate agencies, and monitor the Act’s operation.³⁷

If employees suffer reprisal for making a disclosure report, they can lodge a personal grievance under the *Employment Relations Act*. They are also protected from civil, criminal or disciplinary proceedings “despite any prohibition of or restriction on the disclosure of information under any enactment, rule of law, contract, oath, or practice” (Section 18). Finally, the PDA provides strong protection for the confidentiality of the discloser. These protections do not apply, however, if disclosers make an allegation that they know is false or otherwise act in bad faith.

New Zealand’s experience with its disclosure regime has been even briefer than that of Australia. As in Australia, the number of reports of serious wrongdoing has been remarkably small. The reasons offered for this low number are very similar to those in other Westminster jurisdictions, but are highly speculative. They include the argument that individual organizations are dealing effectively with any reports of serious wrongdoing, so there is no need to involve other authorities; the kinds of wrongdoing defined in the PDA are rare; the existence of the PDA is not well enough known; employees do not believe that they will be adequately protected if they do disclose wrongdoing; and people feel uneasy about disclosing real or possible wrongdoing by others.³⁸

The 2003 review identified several deficiencies in the PDA, including its inconsistent application, problems arising from an excess of “appropriate authorities,” and a strong feeling that the identity of disclosers could not be kept confidential. The review also concluded that the PDA worked well where its provisions “had been incorporated into an organization’s culture of risk management and its institutions relating to appropriate ethical conduct.”³⁹ The PDA is formally linked to the Public Service *Code of Conduct* by means of a half-page summary in the Code of the PDA’s objectives and main features.

2.3

United Kingdom

Compared with New Zealand’s Code, the UK *Civil Service Code* deals much more substantively with the disclosure of wrongdoing. Indeed, the disclosure provisions in the UK Code are an integral part of the disclosure regime. The other main mechanism is the *Public Interest Disclosure Act* (PIDA) that came into effect in July 1999. The PIDA covers not only all public sector employees (except in such areas as security services), but private sector employees as well.

The categories of wrongdoing that “qualify” for protection are similar to those in the New Zealand PDA, namely:

- a criminal offence;
- a failure to comply with a legal obligation;
- a miscarriage of justice;
- the endangering of the health or safety of an individual;
- damage to the environment; and
- deliberate concealment of information that could disclose the existence of any of these types of wrongdoing.

In addition, the *Civil Service Code* states that employees should report any instances in which they are required to act in a manner that:

- is illegal, improper, or unethical;
- is in breach of constitutional convention or a professional code;
- may involve possible maladministration; or
- is otherwise inconsistent with this Code.

Employees are also advised to report evidence of criminal or unlawful activity and any instances in which they become aware of breaches of the Code or are required to act in a manner that “raises a fundamental issue of conscience.”

In Australia, employees are *expected* and *encouraged* in the first instance to make disclosure reports within their agency. In the UK, as in New Zealand, internal reporting of disclosures is *required*, subject to a few exceptions. UK departments are required to establish clearly defined procedures for handling disclosure reports. The PIDA sets out a complex system of disclosure procedures that is divided into four categories. The first category, *internal disclosures*, refers to the standard procedure whereby employees make disclosure reports in the first instance within their department. There are three categories of external disclosures: *regulatory disclosures*, *wider disclosures*, and *disclosures of exceptionally serious matters*. These involve disclosures to a range of entities (for example, Ministers, MPs, the media). Resort to these mechanisms is justified by such considerations as the possibility that evidence would be destroyed, or the serious nature of the alleged offence. The *Civil Service Code*, which applies only to public sector employees, provides that employees who do not believe that their department has given them a reasonable response to their disclosures may appeal to the Civil Service Commissioners, an independent body. If the Commissioners’ investigation leads them to uphold the appeal, they will “make recommendations” for remedial action to the discloser’s department. The UK government, in its consultation document regarding a civil service bill, supports the idea of permitting public servants to take their complaint directly to the Commissioners if the requirement to make an internal allegation first could act as a deterrent to disclosure.⁴⁰

The PIDA provides protection against reprisal for disclosers who have respected the Act’s procedural requirements, but who are victimized or dismissed for making a qualifying disclosure. Employees may seek

redress and compensation by presenting a claim to an employment tribunal. The PIDA does not explicitly provide protection for the confidentiality of a discloser's identity, nor does it contain prohibitions or penalties regarding false allegations.

As in Australia and New Zealand, there is very little information on the effectiveness of the UK's disclosure regime. Public Concern at Work, a whistleblower support organization, reported that employees had made 1,200 reprisal claims before employment tribunals during the first three years of the PIDA, but it provided no information as to how many of these complaints involved the public sector.⁴¹ The Civil Service Commissioners heard no appeals during 2003-2004.⁴² The UK's Parliamentary Committee on Standards in Public Life has "emphatically endorsed" several principles of good disclosure practice that were put forward by Public Concern at Work. These principles were ensuring that employees know about and trust the disclosure mechanisms; that employees have realistic advice on the implications of disclosure for openness and confidentiality; that there is continual review of how the procedures work in practice; and that employees are routinely informed of the disclosure channels available to them.⁴³

Given the complexities of disclosure regimes, it is useful to summarize their main dimensions in the three Westminster countries and to compare these dimensions briefly with the Canadian federal government's current *Internal Disclosure Policy* (IDP).

None of the three regimes examined above has attracted a significant number of disclosures of serious wrongdoing by public servants. Australia's employee survey indicates that a major explanation for this result may be that public servants do not believe that they will be adequately protected from retaliation if they disclose wrongdoing. This is the most frequent explanation offered in New Zealand and the UK as well. Both the evidence from these three countries and common sense

suggest that adequate protection from reprisal must be a central element in any disclosure regime. There are other elements, however, that can help to support protection against reprisal, and that are essential to the overall effectiveness of a disclosure regime. The three countries vary substantially in the manner in which they handle these elements.

Both New Zealand and the UK have a disclosure statute that covers the private as well as the public sector, whereas the Australian regime covers only the public sector and is embedded in a *Public Service Act* covering a variety of human resource matters. In all three countries, the disclosure scheme applies to a broad range of public sector employees—a broader range than that provided in Canada's IDP.

The New Zealand and UK statutes set out the categories of wrongdoing that are usually included in disclosure regimes around the world, whereas Australia's PSA defines wrongdoing as breaches of its *Code of Conduct*. Canada's IDP combines these two approaches by listing the conventional justifications for disclosure, but including a breach of the *Values and Ethics Code* as a category of wrongdoing.

Public servants will tend to be confused by a disclosure regime that identifies more than one authority outside their department or agency to which disclosures can be made. New Zealand lists several authorities, and even Australia and the UK offer more than one. If more than one external authority is available, public servants should be able to understand easily which authority is most likely to deal effectively with their concern. Canada's IDP provides for a Public Service Integrity Office that receives disclosures from public servants who believe that a disclosure cannot reasonably be made within their own organization or that a disclosure made within their organization has not been appropriately handled. Thus, Canada has a single authority, but one that is located within the public service and that is not widely perceived as sufficiently independent of government.

Public servants in New Zealand and the UK are *required* to exhaust internal remedies before appealing to an outside authority, whereas Australia’s public servants are *expected* to do so. The rationale for use of the internal disclosure system in the first instance was explained above for New Zealand. The same reasons apply to Australia and the UK—and to Canada, where public servants are responsible under the IDP for following the internal procedures for raising instances of wrongdoing.

Australia, New Zealand and the UK all provide protection against reprisal for public servants who disclose wrongdoing. In Canada, the IDP permits public servants to complain about reprisal to a Senior Officer (who is responsible for receiving disclosures and managing disclosure procedures within the organization) or to the Public Service Integrity Officer. They may also resort to other specified redress mechanisms. Since reprisals cannot be taken against disclosers whose identity is kept confidential, the confidentiality provisions of each disclosure regime are extremely important. These provisions seem to be strongest in New Zealand and weakest in the UK. Canada’s IDP notes that confidentiality in respect of disclosures is subject to the *Privacy Act* and the *Access to Information Act* and that the departmental Senior Officer and the Public Service Integrity Officer will explain the parameters of confidentiality to disclosers. This approach is unlikely to encourage public servants to make disclosures, but the reality is that there is tension between the duty to preserve the anonymity of the discloser and the principles of natural justice, notably the right to know the identity of one’s accuser.

3 Building Strong Disclosure Protection on a Strong Values Foundation

3.1

Disclosure Protection

Canada's decisions on the best means of developing disclosure protection and promoting public service values and ethics can be informed by experience in the other Westminster countries discussed above. It is essential to keep in mind that the experience in these countries has been brief. Both comparative analysis and domestic experience suggest that if Canada's disclosure regime is to have public credibility, it must be a strong one. It is risky, on the basis of experience elsewhere, to assert with confidence that a strong regime will necessarily be an effective one. It is likely, however, that a strong statutory regime will be *more* effective than the current policy-based one.

To a large extent, the desirable elements of a Canadian regime were outlined in early 2004 by an external Working Group on the Disclosure of Wrongdoing.⁴⁴ The Working Group's deliberations took place in the midst of widespread public, media and political concern about wrongdoing in government that led to the creation of the Commission of Inquiry into the Sponsorship Program and Advertising Activities (the Gomery Inquiry).⁴⁵ While this brief paper cannot review the facts and allegations about unethical and illegal activities that have come to light in recent years, it is clear that these activities have resulted in widespread public support for a stronger disclosure regime. The Public Service Integrity Officer, who was appointed in 2001 under the IDP, has made a forceful case for a stronger regime. His first Annual Report,⁴⁶ which was tabled in Parliament in September 2003, recommended improvement of the current disclosure mechanism by basing the Public Service Integrity Office (PSIO) in a statute rather than in a policy. The report also recommended that the PSIO be removed from the ambit of the Treasury Board and be given an independent status that would

enhance its credibility and help to attract disclosures of “public interest” wrongdoing rather than primarily employment-related concerns.

The Working Group made similar recommendations.⁴⁷ Several of these recommendations are shown below because they provide a Canadian response to the disclosure issues discussed in the comparative sections of this study. They have also influenced substantially the content of Bills C-25 and C-11 on disclosure protection. Among the Working Group’s 34 recommendations are these:

- (1) A new, legislated, regime is required for the disclosure of wrongdoing.
...
- (3) A disclosure regime should cover as much of the federal public sector workforce as possible, including separate employers and Crown Corporations.
- (4) The regime should be based on a definition of “wrongdoing” similar to that used in the current policy, though it should be refined and expanded to include serious or flagrant breaches of the *Values and Ethics Code for the Public Service* and reprisal resulting from good faith disclosures of wrongdoing.
- (5) A new “Office” should be created that would incorporate the functions of the existing Public Service Integrity Office and would act as an independent investigative body for matters relating to the disclosure of wrongdoing.
- (6) The new “Office” should be created as an Agent of Parliament, accountable to Parliament either directly or through a Minister.
...
- (9) The Office should be authorized to investigate any allegations it deems relevant, regardless of the source of the complaint, if there is compelling evidence that wrongdoing has taken place, or will take place.
...

- (11) While employees should be encouraged to use internal mechanisms for dealing with wrongdoing, they must be given the option of taking allegations directly to the Office.
- ...
- (16) To effectively protect information related to investigations, the Office should be subjected to a statutory prohibition against release of such information, to the extent possible.
- (17) The identity of a person making allegations of wrongdoing should be protected to an extent compatible with the principles of natural justice.
- ...
- (23) Flagrant and intentional misuse of disclosure mechanisms should be subject to disciplinary action, up to and including dismissal.

The Working Group encountered some resistance to its idea that the disclosure regime should be applied as far as possible to the whole of the public sector, including Crown Corporations and public agencies. The Group argued that these non-departmental entities should at the very least be required to adopt internal disclosure regimes based on the model set out in the report. The resistance to this recommendation was undermined by subsequent revelations and allegations of wrongdoing involving officials in certain Crown Corporations.

In addition to the recommendations noted above, the Working Group recommended that the position of Senior Officer in each department be strengthened so that public servants would feel comfortable raising disclosure issues within their department instead of taking their concerns to an authority outside the department. Though the Working Group concluded that public servants should be strongly encouraged to exhaust internal remedies before submitting allegations to an outside authority, the Group suggested that public servants “be given the option of *taking allegations directly to the Office, without having to first exhaust internal mechanisms.*”⁴⁸ This option is not available in the other Westminster systems.

While some public servants have been involved in recent allegations of wrongdoing in government, a relatively larger number of politicians, political appointees and party officials have been implicated. In this context, the Working Group noted that the current IDP does not permit the PSIO to "follow credible trails of responsibility that lead beyond the public service." With a view to fostering ethical government in general, the Group argued that under the proposed new regime "allegations of wrongdoing must be followed to their source, regardless of whether the alleged wrongdoing stemmed from a decision taken within the public service bureaucracy or from an order or request from a Minister's office."⁴⁹ It is desirable also that an integrity officer investigating disclosures by public servants should be able to coordinate efforts with other investigative bodies, including the Ethics Commissioner for the House of Commons and the Senate Ethics Officer.

The Working Group did not specify institutional arrangements for the disclosure regime beyond recommending the creation of a new office to replace the existing Public Service Integrity Office and to act as an independent investigative body accountable to Parliament, either directly or through a Minister. There was considerable debate during parliamentary committee hearings on Bill C-11 as to whether a new office was needed or whether the responsibilities for managing the disclosure regime should be added to those of the Public Service Commission or the Office of the Auditor General. Most of the committee witnesses argued that a separate office of a public service integrity commissioner would be the most credible and effective option.

Experience in Australia, New Zealand and the UK suggests that the major reason for public servants' reluctance to disclose serious wrongdoing is fear of reprisal. A frequently asked question during the recent scandals in Canada was why public servants who knew about the wrongdoing did not report it. A 2003 study for Canada's Treasury Board Secretariat sheds some light on this question. The study was prompted by allegations

of wrongdoing in the Office of the Privacy Commissioner. The primary reasons that employees gave for non-disclosure were “fear of reprisal (92%) and lack of faith in managers’ ability (69%) and intent (58%) to protect staff. Other barriers were the lack of understanding of the policy (35%), a culture of acceptance (25%), and [lack of] understanding of public service values (21%).”⁵⁰ Fewer than half of the 48 employees surveyed were aware that they would be protected under the IDP if they made disclosure reports, and only three employees thought that they would receive adequate protection. It is important to keep in mind that the IDP was not adopted until 2001.⁵¹

The disclosure regime that the Working Group envisaged for Canada is stronger than those in Australia, New Zealand and the UK. It would provide more robust protection than the current IDP. Moreover, a weak disclosure statute, like that contained in Bill C-25, is bound to fail. Even a strong disclosure regime will not guarantee that public servants will report all, or even most, instances of serious wrongdoing.

The failure of public servants to disclose wrongdoing despite statutory protection is one of several arguments advanced by opponents of disclosure legislation for Canada.⁵² Among these arguments is the assertion that the IDP is only four years old, that its existence and content are not well known yet, and that over time it may prove to be an effective and, therefore, a credible mechanism. Another broad argument is that getting the balance right among contending considerations in a disclosure statute is extremely difficult. A major objective of the legislation is to encourage public servants to disclose wrongdoing while safeguarding them from retaliation. However, these two considerations must be balanced not only against one another but also against the need to ensure that the alleged wrongdoer is protected from frivolous or vexatious allegations that may unfairly damage his or her

reputation. Furthermore, to protect against reprisal, an employee's identity must be kept confidential, but the principles of natural justice require that within reasonable limits the alleged wrongdoer may have the right to know the identity of the person making the allegation. Canada's Information Commissioner has highlighted the difficulty of getting the balance right in his lament that Bill C-11 provides for amending the *Access to Information Act* to require that all documents relating to an allegation be kept confidential for up to 20 years.⁵³ Finally, there is concern about adding a Public Integrity Commissioner to what is already a long list of officers of Parliament.

To reduce the need to sort out these difficult issues in practice, it is helpful to discourage wrongdoing in the first place. In this context, it is important to note that the Working Group's terms of reference went beyond the issue of disclosure. The Group was requested to examine the extent to which an emphasis on public service values and ethics could serve "as a positive means for supporting ethical government and for the disclosure of wrongdoing." The Group's response was to propose that its recommendations on disclosure be set within a positive framework of values and ethics rather than simply within a statute focused exclusively on wrongdoing. This approach would signal to Canadians that "right-doing" based on core public service values will be encouraged and that wrongdoing, when it occurs, will be disclosed and punished. Effective means are required not only to deter wrongdoing in the short term but also to foster a culture of "right-doing" over the longer term. The Group noted that the vast majority of public servants are honest, industrious professionals with no involvement in unethical or illegal activities and that an exclusive focus by Parliament on disclosure legislation would send the wrong message to Canadians.

3.2

The Public Service Charter

Disclosure of wrongdoing is only part of the many value and ethical concerns that need to be covered by a *Charter of Public Service Values*. Moreover, the Tait Task Force called for a statement of principles that went beyond laying a foundation of core public service values to provide “a new moral contract between the public service, the Government and the Parliament of Canada.”⁵⁴ In particular, it was envisaged that this statement would include principles clarifying relations between public servants and parliamentary committees—“an area where public service values and conventions have been subject to great pressure in recent years.”⁵⁵

Dr. Ralph Heintzman, the Task Force’s Executive Director, subsequently articulated this idea of a moral contract as an integral part of a Public Service Charter.⁵⁶ Then, as already noted, the Working Group on the Disclosure of Wrongdoing recommended that both Ministers and Parliament consider legislation that would embed a disclosure of wrongdoing regime within a broad framework of public service values and ethics. The Working Group argued that this would provide an opportunity for the Government and Parliament to establish a moral contract between the elected and non-elected spheres of Government “as the necessary foundation for public service values, and for ethical government.”⁵⁷ This approach “could commit and bind ministers, MPs and public servants alike, in support of a professional public service, dedicated to the public interest.”⁵⁸ The Working Group’s proposal was in essence a call for a Public Service Charter that would do more than list the core values of public service. It would explain the constitutional position of the public service by setting the core values within the broader context of a three-way relationship between public servants, government and Parliament.

In April 2004, the federal Government introduced into Parliament Bill C-25—the *Public Servants Disclosure Protection Act*—which was then

referred to the House of Commons Standing Committee on Government Operations and Estimates. The preamble to the Bill recognizes that confidence in public institutions can be increased by adopting effective procedures for public servants' disclosure of wrongdoing, by protecting public servants who disclose wrongdoing, and by adopting a code of conduct for the public sector. In addition, the Bill's preamble commits the Government "to establishing a Charter of Values of Public Service setting out the values that should guide public servants in their work and professional conduct." Section 4 of the Bill requires that the Treasury Board establish the code of conduct. The preamble to Bill C-11, a revised version of Bill C-27 that was referred to the Committee in November 2004, contains identical wording.

Bill C-25 was widely criticized as a weak and inadequate response to the Working Group's recommendations and to the concerns of a wide range of Canadians who testified about the Bill. Bill C-11, which adopted many of the Group's recommendations, was much more positively received. It must be noted, however, that virtually all of those who testified on Bill C-11 suggested additional changes. What Dr. Keyserlingk, the current Public Service Integrity Officer, said about Bill C-25 also applied to Bill C-11. He observed that the Bill "contains no framework of ethics and values," and that it "contains no discernible reflection of the guiding principles and priorities that should infuse such a bill."⁵⁹ Unlike Australia's PSA, Bill C-11 does not base its disclosure regime on a foundation of such core public service values as accountability and honesty. Nor does the Bill entrench a statement of values and a code of conduct in the statute itself. The Bill commits the Government to adopting a Charter and a code but it does not signal or specify the form they should take. It is important, therefore, to consider various options for providing both disclosure protection and a foundation for public service values and, more broadly, for ethical government in Canada.

Among the possible options are:

- a statute on disclosure and a separate values statement/code of conduct in the form of a central agency requirement authorized by a public service act—the New Zealand approach;
- a statute on disclosure and a separate values statement/code of conduct as a condition of employment that also contains disclosure provisions—similar to the UK approach;
- a statute with a statement of values and a code of conduct as the centerpiece but also providing disclosure protection—the Australian approach;
- a statute with a public service Charter and a code of conduct as the centerpiece but also providing disclosure protection—a variation of the Australian approach;
- a statute *focusing on* the disclosure of wrongdoing but *calling for* the separate adoption of a public service Charter and a code of conduct—Canada’s Bill C-11 approach;
- a statute *focusing on* the disclosure of wrongdoing but *calling for* the separate adoption of a public service Charter and a code of conduct *in the form of a statute or a parliamentary resolution*—a variation on the Bill C-11 approach;
- a statute on disclosure and a separate statute (or a parliamentary resolution) providing a public service Charter and a code of conduct; and
- a statute on disclosure and a separate statute (or a parliamentary resolution) providing a public service Charter that underpins a separate code of conduct.

Options four through eight are likely to be most acceptable to the various political actors with an interest in fostering “right-doing” and preventing wrongdoing in Canadian government. The preferred option will depend

to some extent on one’s view as to how closely the Charter and disclosure protection should be linked (i.e., in the same document or simply cross-referenced). Another important consideration is one’s assessment of the arguments for and against adopting a Charter in statutory form or as a parliamentary resolution rather than in such non-legislative forms as a policy or Order in Council. Enshrining a Charter in a statute or a parliamentary resolution could:

- signal and symbolize strong political support for the Charter, including the support of parliamentarians as well as Ministers;
- promote greater public, parliamentary and media discussion of, familiarity with, and respect for the Charter;
- inform the public in a highly visible manner about the values for which public servants stand, and their rights and responsibilities in relation to politicians;
- foster greater bi-partisan support for the Charter; and
- provide a firm legal basis for promoting and requiring compliance.

Adopting a Charter in the form of a policy or Order in Council could:

- inform the public to a modest extent about the values for which public servants stand and their rights and responsibilities in relation to politicians;
- be easier to adopt than a statute;
- be easier to revise than a statute; and
- avoid partisan conflict over the Charter’s form and content.

In the governmental context, the term “Charter” has been applied to a wide variety of documents, including the *Magna Carta*, the *Canadian Charter of Rights and Freedoms*, and the State of Queensland (Australia)

Public Service Charter.⁶⁰ The latter document is in essence a statement of values. It was not sponsored or formally endorsed by the state's elected representatives. Rather, it was adopted by the public service itself as a statement of public servants' commitments to the people, to the government of the day, and to a professional public service. The document constitutes a one-way flow of commitments that imposes no reciprocal obligations on the Government or Parliament.

In this paper, the term Charter is used in a stricter sense to refer to a statement of rights and responsibilities that is bestowed by the people's representatives in the legislature. To have the Cabinet alone issue the Charter would be a second-best approach. A public service Charter should include, but should go beyond, a statement of core public service values to set out the constitutional position of the public service in relation to the political side of government. The legitimacy of the Charter would, therefore, be enhanced by the formal endorsement of the legislature. A parliamentary resolution could accomplish this. In addition, the Charter should follow the example of the UK *Civil Service Code* which states that the Code "should be seen in the context of the duties and responsibilities set out for UK Ministers in the Ministerial Code," which include giving due consideration to public servants' informed and impartial advice and complying with the law.

The Charter should be positioned as the centrepiece of the Government's values and ethics regime. A common characteristic of such regimes around the world is the proliferation over time of a variety of statements, codes, rules and guidelines, many of which have emerged in response to particular events. One result of this accumulation of instruments is that it is often difficult for public servants to get a coherent, comprehensive and comprehensible picture of their values and ethics requirements. Moreover, some of these instruments impose requirements on politicians, as well as on public servants.

It is important to rationalize and cross-reference a government’s main values and ethics documents. For this purpose, it is helpful to have a central document like a Public Service Charter to provide a foundation on which the overall values and ethics edifice can be built. While the *APS Values* statement and the *New Zealand Code of Conduct* help to serve this purpose by providing a foundation of core public service values, they provide a less adequate basis for ethical government in general because, unlike the UK Code, they say relatively little about relationships between politicians and public servants. As in the existing *Code of Public Service Values and Ethics*, pride of place in the Charter should be given to democratic values. It is democratic values like accountability, neutrality and legality that distinguish the public service from other sectors of society, and it is democratic values that define the three-way relationship between Ministers, Parliament and the public service. The Tait Report argued that the role of the public service should be set “within the principles of federalism and responsible government: to anchor the public service in its primordial [democratic] values.”⁶¹

A Charter for Canada’s public service should include reference to the government’s disclosure legislation or policy, as well as to such other central and related documents as the *Guide for Ministers and Ministers of State*⁶² and the *Guidance for Deputy Ministers*.⁶³ These two documents are already linked. *Guidance for Deputy Ministers* makes explicit reference to the existence and content of the *Guide for Ministers*. And while this Guide preceded the *Guidance for Deputy Ministers*, it is linked conceptually to it through its provision that public servants should respect the traditional political neutrality of the public service⁶⁴ and that Ministers should respect the non-partisan nature of the public service.⁶⁵

Guidance for Deputy Ministers contains a substantial section on values and ethics in which the four families of values are explained, and in which emphasis is placed on the critical leadership role of Deputy Ministers in upholding and demonstrating public service values and ethics.

Reference is made to other central values and ethics documents: the *Values and Ethics Code* for the Public Service, the Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace, and the Conflict of Interest and Post-Employment Code for Public Office Holders. *Guidance for Deputy Ministers* also includes reference to the *Management Accountability Framework* (MAF) adopted by the Treasury Board of Canada Secretariat in June 2003. The MAF consists of ten essential components of sound management, including a Values and Ethics component asserting that “[t]hrough their actions, departmental leaders continually reinforce the importance of public service values and ethics in the delivery of results to Canadians (e.g. democratic, professional, ethical and people values).” MAF is used as a basis for bilateral meetings between the Secretary of Treasury Board and Deputy Ministers to review how well Deputies are managing their departments.

The values statements in Australia, New Zealand and the UK all put considerable emphasis on accountability, but include little or nothing on the public service values of transparency and openness. Over the past decade in particular, the latter values have become increasingly important in the Canadian context. The Information Commissioner has lamented the culture of secrecy in the federal government, and it has become clear that this culture is partly to blame for recent wrongdoing involving both politicians and public servants. The Charter should speak to the duty of public servants to be as open and transparent as possible in their relations with both elected representatives and the public.

The Charter of Public Service Values, like a statement of values or principles, should be “succinct, dignified in tone and diction, focused on the great principles of public service, and intended to endure.”⁶⁶ Separating the *Code of Conduct* from the Charter would facilitate this. The Charter should make only brief reference to related but lengthy expository documents such as the *Guide for Ministers and Ministers of State and Guidance for Deputy Ministers*. Ideally, these and other pertinent documents should

reference the Charter, since it would contain the principles and values underpinning their content. This harmonization of official documents would provide a clear, comprehensive and coherent picture of the values and ethical standards to which public servants should aspire. The Charter should have, at least in part, an aspirational and inspirational tone that captures the essence of what public service is all about in Canada’s parliamentary democracy. Over time, this approach would help to promote a public service culture that encourages “right-doing” and avoids wrongdoing. The Charter should, however, be combined with strong disclosure legislation that discourages and, when necessary, punishes wrongdoing.

Taken together, disclosure legislation and the Charter will promote the two major forms of public service accountability identified in the scholarly literature. Disclosure legislation will promote formal accountability in the sense of prescribing rules of right conduct. The Charter will foster personal or psychological accountability in the sense of an internalized commitment to do the right thing. As Henry Mintzberg has observed, “[t]he best accountability systems recognize ... that ‘control is normative... rooted in values and beliefs.’”⁶⁷

Endnotes

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- ⁴⁶ Canada, Public Service Integrity Officer, *2002-2003 Annual Report to Parliament* (Ottawa: Public Service Integrity Office, 2003).

- ⁴⁷ Canada, Working Group on the Disclosure of Wrongdoing, *Report*, pp. 36-38.
- ⁴⁸ *Ibid.*, p. 37.
- ⁴⁹ *Ibid.*, p. 19.
- ⁵⁰ Treasury Board of Canada Secretariat, *A Case Study of the Application of the Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace, Report of Findings*, August 22, 2003, p. 2.
- ⁵¹ *Ibid.*, p. 1.
- ⁵² Scholarly writings presenting the case against disclosure legislation are scarce compared to the extensive literature supporting such legislation or criticizing the deficiencies of existing legislation. For writings covering the downside of disclosure legislation, see H.L. Laframboise, "Vile Wretches and Public Heroes: the Ethics of Whistleblowing in Government," *Canadian Public Administration*, vol. 34 (Spring 1991), pp. 73-77; Fred C. Alford, *Whistleblowers: Broken Lives and Organizational Power* (Ithaca: Cornell University Press, 1993); and M.A. Hersh, "Whistleblowers-Heroes or Traitors?: Individual and Collective Responsibility for Ethical Behaviour," *Annual Reviews in Control*, vol. 26, 2002, pp. 243-262.
- ⁵³ Canada, Information Commissioner of Canada, *Annual Report 2004-2005* (Ottawa: Minister of Public Works and Government Services, 2005), pp. 9-10.
- ⁵⁴ Canada, *A Strong Foundation*, p. 75.
- ⁵⁵ *Ibid.*
- ⁵⁶ While Dr. Heintzman mentioned the Charter idea in several presentations that he made both within and outside the public service after 1996, the first major "public" reference was in a speech entitled, "A Strong Foundation: Values and Ethics for the Public Service of the Future," that he presented at the International Summit on Public Service Reform in Winnipeg on June 10, 1999. His first published reference to the idea was in "A Strong Foundation: values and ethics for the public service of the future," *Isuma: Canadian Journal of Policy Research*, vol. 2, no. 1 (Spring 2001), http://www.isuma.net/v02n01/heintzman/heintzman_e.shtml.
- ⁵⁷ Government of Canada, Working Group on the Disclosure of Wrongdoing, *Report*, January 29, 2004, p. 30. Emphasis added.
- ⁵⁸ *Ibid.*
- ⁵⁹ Canada, House of Commons, Standing Committee on Government Operations and Estimates, *Evidence*, April 29, 2004, <http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=81460>.
- ⁶⁰ Queensland, *Public Service Charter*, <http://www.opsme.qld.gov.au/pubs/charter.htm>.
- ⁶¹ Canada, *A Strong Foundation*, p. 60.
- ⁶² Canada, Privy Council Office, *Governing Responsibly: A Guide for Ministers and Ministers of State*, December 2003, <http://www.pco-bcp.gc.ca>.
- ⁶³ Canada, Privy Council Office, *Guidance for Deputy Ministers*, June 20, 2003, <http://www.pco-bcp.gc.ca/>.
- ⁶⁴ Canada, Privy Council Office, *Governing Responsibly: A Guide for Ministers and Ministers of State*, p. 9.
- ⁶⁵ *Ibid.*, p. ii.
- ⁶⁶ *A Strong Foundation*, p. 61.
- ⁶⁷ "Managing Government: Governing Management," *Harvard Business Review*, May-June 1996, p. 81.