FAIR Federal Accountability Initiative for Reform

Testimony to the Senate Committee on Legal and Constitutional Affairs

BILL C-2 as it amends C11: The Public Servants Disclosure Protection Act

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About FAIR
FAIR (Federal Accountability Initiative for Reform) promotes integrity and accountability within government by empowering employees to speak out without fear of reprisal when they encounter wrongdoing. Our aim is to support legislation and management practices that will provide effective protection for whistleblowers and hence occupational free speech in the workplace. FAIR is a registered Canadian Charity.

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The following notes summarize key points that we believe this Committee must address.

1) Effective whistleblower legislation is the centrepiece of broader efforts to restore transparency and accountability to government

The scope of Bill C-2 is broad, but many of the reforms that it contains will have little effect as long as public sector employees continue to be intimidated into silent compliance by managers who fear exposure. The scandals that we have witnessed over the past few years demonstrate just how easy it is to silence honest and conscientious employees in order to avoid public embarrassment.

Yet the public service is staffed with capable and public spirited employees. We need legislation that will restore their right to do their jobs honestly and conscientiously, to speak out safely when they encounter wrongdoing, and to see justice done.

2) The whistleblower provisions of C-11 and C-2 are flawed and will inevitably fail

During the election, the Government promised “ironclad” protection for whistleblowers. But Bill C-11 as amended by C-2 (herinafter referred to as the Bill) in fact subverts public service whistleblowers by taking away from them the right that every other Canadian citizen has: to seek relief in our regular courts of law, which are open and independent. As it stands today, the Bill creates a mandatory internal process that makes it *easier* for the bureaucracy to identify, rein in, and silence whistleblowers; and it provides no meaningful protection against workplace retaliation. FAIR cannot in good conscience recommend this process to potential whistleblowers who seek our advice, and public employees who invoke this procedure will put be putting their careers and their well being at risk.

Here are just a few of the important shortcomings in this bill:

1. **It does not provide full free speech rights to public service whistleblowers.** Rather, it reins them in and restricts when, how and to whom they may blow the whistle.
2. **It does not ensure the right to disclose <u>all</u> illegality and misconduct.** The Bill’s definition of wrongdoing selectively omits large areas – such as Treasury Board policies, breaches of which spawned the Gomery Inquiry.
3. **It does not redress all forms of harassment, particularly passive retaliation.** Rather, it takes a narrow and short-term view of what may constitute harassment, when in reality whistleblowers are typically harassed over long periods by every method imaginable.
4. **It strips public servants of their right to access our courts of justice with realistic burden of proof and appropriate remedies for retaliation.** Rather, it ensures that they can never gain access to the normal court system to seek relief, but only to a special purpose tribunal composed of people appointed by the Prime Minister of the day. This type of approach has failed disastrously in other jurisdictions (for example, in the USA, of the first 2000 federal whistleblowers obliged to use an administrative board, only 4 prevailed.).
5. **It does not ensure corrective action to end wrongdoing.** There are some reporting mechanisms, and some powers to punish those responsible for retaliation against the whistleblower. But there is no order power to ensure that the original wrongdoing is corrected.

3) What needs to be done to make the Bill effective

The Bill is an excessively large, complex and badly-written document. (Compare it with the Auditor General Act, which is a model of clarity, simplicity and brevity.)

This Bill is an inadequate result for more than four years of diligent committee work by both houses. It is unconscionable that time and again, faulty drafts have been produced which ignore readily available expert knowledge. This places an impossible burden on committees to develop the numerous amendments required to clean up the mess.

Part of the problem may be that those in power tend to view whistleblowers as a threat to the status quo. This is not just a Canadian phenomenon! Could it be that those in positions of power have influenced the drafting process in an effort to protect their own interests? Bill C-11's precursor – C-25 – was aptly described by one MP as a bill "not to protect whistleblowers, but to protect ministers from whistleblowers".

4) Proposed changes to the (re-) drafting process

Whatever the reasons for this outcome, the drafters must be told to return to the drawing board, this time with much clearer instructions. What is required is a new set of amendments to make the Bill effective.

One way to accomplish this is to instruct the drafters to make the Bill comply fully with the **Organization of American States (OAS) Model Law Protecting Freedom of Expression against Corruption** (submitted to this Committee, along with an explanatory guide). These documents spell out clearly the essential elements of effective whistleblower protection. Canada ratified the OAS Convention on Anti-Corruption on June 6th, 2000.

The Committee Members are also advised to refer the **Twenty Three Key Points for Effective Whistleblower Protection** written by Tom Devine of the Government Accountability Project (GAP), an author of the OAS Model Law and one of the world's leading authorities on whistleblower legislation.

It is also essential during the drafting process to work closely with independent and recognized experts in this field, rather than relying solely on the government's lawyers and advisors. We recommend that such experts, including FAIR (Canada), GAP (USA) and Public Concern at Work (UK) be formally involved in the drafting process, and also be called to testify to the relevant committees upon completion of the new and improved Bill.

We urge the Senate to shape its legacy to Canadians by 'doing the right thing' and sending back this flawed legislation for further revision.

All of this is respectfully submitted:

Federal Accountability Initiative for Reform
Joanna Gualtieri, The Honourable David Kilgour, and David Hutton