



# Evaluation Criteria for Protection of Whistleblowers

## A guide for legislation and policy

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### **About The Centre for Free Expression:**

The Centre for Free Expression at Ryerson University is a hub for public education, research and advocacy on free expression and the public's right to know. Our work is undertaken in collaboration with academic and community-based organizations across Canada and internationally.

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# Evaluation Criteria for Protection of Whistleblowers

## A guide for legislation and policy

### I. Introduction

This is a tool for evaluating the adequacy of arrangements by governments or private sector organizations to enable reporting on concerns about organizational wrongdoing.

Research consistently confirms that tips from insiders are the most effective way of exposing problems within organizations such as fraud or mistreatment of those in their care. Information from whistleblowers is especially valuable to help identify and correct emerging problems that may harm both the organization and the public.

However, few governments in Canada and few organizations, public or private, have effective mechanisms to ensure employees or others can speak out safely, even as the wrongdoers are attempting to hide their misdeeds and to silence witnesses. As a result, those seeing wrongdoing are likely to remain silent out of well-founded fears of reprisal and leaders are kept in the dark – until perhaps they learn about the problems from newspaper headlines or from law enforcement.

Recognizing the valuable role that whistleblowers can play in protecting the public by combatting government and corporate misconduct, many countries have set out to legislate protection for whistleblowers, and this trend has been accelerating since the first tentative steps in taken in the 1970's. A recent example is the [European Union Directive](#) passed in October 2019 which sets out detailed requirements that all member states must now meet by enacting appropriate national whistleblower protection laws.

The criteria set out in this document have been developed based on the extensive body of knowledge regarding whistleblowing that has been assembled around the world over the past several decades, such as the criteria published by the [Government Accountability Project](#) (GAP) in Washington, DC (which has been the pioneer in this field since 1977) and many others.

We also drew heavily on the Canadian experience, especially the federal whistleblowing legislation, the spectacularly ineffective *Public Servants Disclosure Protection Act* (PSDPA) which provides a rich source of practices to avoid. (The PSDPA came into force in 2007, and after 13 years of operation and tens of millions of dollars of operating costs it has yet to protect a single whistleblower.)

Our intended audience for this document includes the general public, governments, journalists, whistleblowers and their counsel, and others to help them understand the essential components of whistleblower protection.

We welcome feedback from users, and also point readers to the resources listed at the end of the document.

## II. Essential Components of Whistleblower Protection

### *A. Freedom to blow the whistle*

1. Contains no loopholes or qualifications (e.g. motive, unreasonable time limits, mandated channels) on protections for a disclosure that would be accepted as evidence of significant misconduct
  - a. Standard for protection based on reasonable belief
  - b. Disclosures in course of job duties protected
2. Protects any person who makes a disclosure (e.g. employees, contractors, temp workers, volunteers, clients, family, etc.). Additionally, protects any person obtaining advice before or after making a disclosure.
3. Employees have the right to refuse illegal orders, as well as those with a substantial risk to the safety and health of the public or the environment
4. Allows for anonymous disclosures
5. Bans gag orders
6. Where exceptions are necessary for national security or policing, robust internal mechanisms are available for disclosing wrongdoing (i.e. generally following the same principles listed here, albeit with less transparency for public)

### *B. Preventing reprisals*

1. Organizations have a duty to protect and assist any individual making a protected disclosure (including, as appropriate, advice and guidance, legal support, social support, separation from abusers, etc.; could involve an ombudsman)
2. Personal accountability for reprisals: individuals and organizations are held liable for failure to protect and for reprisals, civilly and criminally, as appropriate
3. Authorities have similar powers to investigate allegations of reprisal as they do to investigate wrongdoing (see 4 below)
4. Interim relief to quickly prevent/reverse reprisals
5. Protection against unconventional harassment, covering formal and informal reprisals against whistleblowers and individuals who provide supporting evidence or testimony to disclosures, as well as those who otherwise support or are seen as supporting whistleblowers

6. Reasonable time limits for complaints of reprisal and for investigations to be completed
7. Confidentiality to the extent possible (and warnings if it must be broken)

### *C. Redress for reprisals*

1. Realistic standards to prove violation of rights: when a *prima facie* case connection exists between whistleblowing and organizational action against a whistleblower (and supporters), includes a reverse onus of proof for reprisal
2. Alternative dispute resolution available
3. Includes “true day in court” options for redress
4. Compensation without loopholes and to a “make whole” standard
5. Compensation for legal fees regardless of the process used
6. Option of transfer to alternative employment

### *D. Protection of the public*

1. Credible corrective process:
  - a. Includes requirements that the subject of disclosure is properly investigated in a reasonable period of time
  - b. Process transparent to the degree possible (e.g. wrongdoers not be able to hide behind privacy law, reasons for dismissing cases can be reported, etc.)
  - c. Power from court or objective body to halt violations/wrongdoing or require specific corrective action
2. The whistleblower has the right to contribute to the process (e.g. the opportunity to provide more evidence, clarify points, respond to claims from the organization, and to see and challenge findings)
3. Investigating authorities have the authority to compel evidence
4. Investigating authorities can self-initiate investigations (e.g. when patterns of behavior suggest systematic problems or wrongdoing)
5. Scope includes all types of organization: public, private, charitable, etc.
6. If scope is limited (e.g. to government or a specific sector) investigations can “follow the money” and the trail of evidence if this leads elsewhere
7. Appointment process for ombudsman/agency head is independent of the bureaucracy and free from real or apparent conflict of interest
8. External disclosure is protected if the responsible authority decides not to investigate or deal with the disclosure, does not inform the whistleblower of action within a reasonable time, or investigates but does not recommend the taking of any action
9. External disclosure is protected if there is an imminent threat to public safety, health, or the environment.

## *E. Proof that the system is working*

1. Evidence of effective awareness-raising and training for management, employees and other relevant stakeholders
2. Set outcomes and performance measures of effectiveness for whistleblowing regime (e.g. user satisfaction with the process, processing time and backlogs, long term outcomes for whistleblowers, completed corrective action)
3. Periodic evaluations, including possible audits of noteworthy cases
4. Regular independent review of the law (typically every 5 years or less) with input from subject matter experts.

## III. Resources

To learn more about whistleblowing:

- The Centre for Free Expression Whistleblowing Initiative (CFEWI) has conducted an in-depth analysis of the federal *Public Servants Disclosure Protection Act*, which has been spectacularly ineffective and is dismissed as a “tissue paper shield” by international whistleblowing expert Tom Devine:  
<https://cfe.ryerson.ca/key-resources/cfe-publications/what%E2%80%99s-wrong-canada%E2%80%99s-federal-whistleblower-legislation>
- The 2017 Report by the Parliamentary Committee on Government Operations and Estimates (OGGO), *Strengthening the Protection of the Public Interest within the Public Servants Disclosure Protection Act*, contains recommendations for sweeping changes to the federal law, none of which have been implemented:  
<https://www.ourcommons.ca/DocumentViewer/en/42-1/OGGO/report-9/>
- Government Accountability Project (GAP) has published its own criteria: *International Best Practices for Whistleblowing Law*:  
<https://whistleblower.org/international-best-practices-for-whistleblower-policies/>
- The CSA Group has developed a guide for the development of whistleblowing policies within organizations, *Whistleblowing Systems - A Guide*. The document is available for free download after providing your email address:  
<https://community.csagroup.org/docs/DOC-32545>

There are also excellent resources available for guidance if you or someone you know has witnessed wrongdoing and are thinking about raising concerns.

- CFEWI publishes various resources for whistleblowers:

- The Whistleblower Ordeal: <https://cfe.ryerson.ca/key-resources/guidesadvice/whistleblowers-ordeal>
  - How wrongdoers Operate: <https://cfe.ryerson.ca/key-resources/guidesadvice/how-wrongdoers-operate%E2%80%8B>
  - Bibliography: <https://cfe.ryerson.ca/key-resources/bibliographies/whistleblower-protection>
  - How to contact CFE securely: <https://cfe.ryerson.ca/key-resources/guidesadvice/how-contact-cfe-securely>
- Brian Martin's book, *Whistleblowing: A Practical Guide* is available for free download: <https://www.bmartin.cc/pubs/13wb.pdf>
  - GAP's *Resources About Whistleblowing* page includes a number of guides that can be downloaded for free: <https://whistleblower.org/resources/>