



# Evaluation Criteria for Protection of Whistleblowers

## A guide for legislation and policy

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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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### 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 errors or misconduct 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, no 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 error or 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.

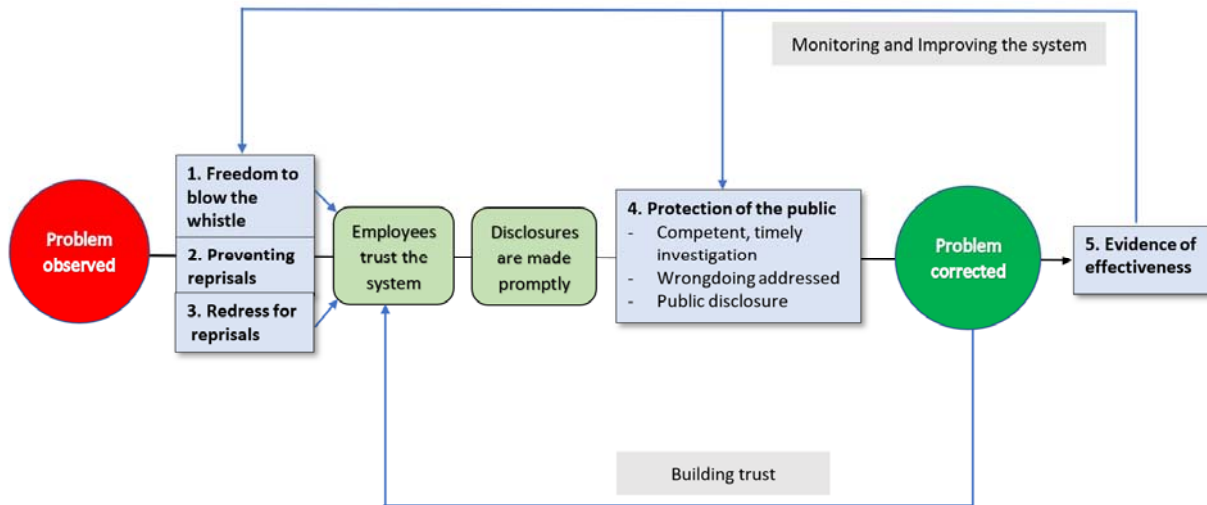
The criteria set out in this document have been developed based on the extensive body of knowledge regarding whistleblowing that has been assembled around the world over the past several decades, such as the criteria published by the [Government Accountability Project](#) (GAP) in Washington, DC (which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

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

## II. How Whistleblower Protection Protects the Public



This diagram shows how the five categories of whistleblower protection work together to protect the public by encouraging people to come forward when they see problems.

The starting point occurs when someone sees a problem that may harm the public interest. Giving them **freedom to blow the whistle** (category 1), **preventing reprisals** against them (category 2) and **providing redress for reprisals** that occur (category 3) can encourage them to overcome their natural fears and come forward.

When problems are reported, **protection of the public** (category 4) means conducting thorough, independent investigations and acting on the results to ensure that any problems exposed are properly and visibly corrected.

Providing **evidence of effectiveness** (category 5) shows that whistleblowers are being protected and problems corrected and enables the system to be monitored routinely and improved periodically.

Doing all of these things well builds trust – the lifeblood of whistleblower protection – so that others are more likely to come forward readily and promptly if they see problems. Conversely, when the law is weak in any of these categories, this undermines its overall effectiveness.

### III. Essential Categories of Whistleblower Protection

#### 1. Freedom to blow the whistle

**Purpose:** to enable anyone to raise a concern about anything that may threaten the public interest, without barriers, hazards and uncertainties that could inhibit this.

- a. Contains no loopholes or qualifications (e.g. tests of motive, unreasonable time limits, mandated channels) on protections for a disclosure that would be accepted as evidence of misconduct
  - i. Broad definitions of wrongdoing and reprisal
  - ii. Standard for protection based on reasonable belief
  - iii. Disclosures in course of job duties protected
  - iv. Informal disclosures, to different bodies
- b. Protects any person who makes a disclosure (e.g. employees, contractors, temp workers, volunteers, clients, etc.). Additionally, protects any person obtaining advice before making a disclosure.
- c. Employees have the right to refuse orders that involve committing a wrongdoing, including those with a risk to safety, health or the environment, violations of policy or regulations, unethical acts, or other acts that may be legal in strictest sense, but defeat the purpose of law
- d. 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
- e. External disclosure is protected if there is an imminent threat to safety, health, or the environment
- f. Allows for confidential and anonymous disclosures
- g. Bans and invalidates gag orders, and attempts to enact these are considered to be wrongdoing or reprisal
- h. 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)

#### 2. Preventing reprisals

**Purpose:** to prevent reprisals of any sort by ensuring consequences for those responsible: those who threaten, attempt, orchestrate or enable reprisals, or fail to protect those who raise concerns.

- a. Organizations have a duty to protect and assist any individual making a protected disclosure. This includes but does not need to be limited to:
  - i. Training and awareness in the use of disclosure mechanisms, for employees

- ii. Training and awareness in how to appropriately respond to disclosures to appropriate personnel (e.g. managers, designated officers/recipients, ombudspersons)
  - iii. Advice and guidance before, during and after the disclosure is made
  - iv. Providing legal and social support
  - v. Moving or assigning the whistleblower, if requested or with the agreement of the whistleblower, to a position or work location that shields the whistleblower from reprisal
  - vi. Prohibiting efforts to identify anonymous or confidential whistleblowers
  - vii. Protecting those making inquiries about how to disclose wrongdoing or seeking support
  - viii. Protecting for those who are supporting the whistleblower (see e. below)
- b. Personal accountability for reprisals, including violations of anonymity and confidentiality: individuals and organizations are held liable for failure to protect and for reprisals, civilly and criminally, as appropriate
  - c. Authorities have similarly strong powers to investigate allegations of reprisal as they do to investigate wrongdoing
  - d. Interim relief to quickly prevent/reverse reprisals before harm is done
  - e. Protection against unconventional harassment, covering formal and informal reprisals against whistleblowers and those who support them, including
    - i. individuals who provide supporting evidence or testimony to disclosures
    - ii. recipients of disclosures (e.g. managers and ombudspersons)
    - iii. friends and colleagues perceived as allies of the whistleblower
    - iv. family members of the whistleblower or those supporting the whistleblower
  - f. Reasonable time limits for complaints of reprisal and for investigations to be completed
  - g. Confidentiality to the extent possible (and warnings if it must be broken)

### 3. Redress for reprisals

**Purpose:** when reprisals occur, ensure that complete remedies can be obtained; readily and in a timely manner.

- a. 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 to demonstrate that adverse action is not a reprisal for a protected disclosure
- b. Alternative dispute resolution available with and mutual agreement for mediator

- c. Includes “true day in court” options for redress via a credible remedial agency
- d. Compensation without loopholes and to a “make whole” standard
- e. Compensation for legal fees for those whose cases are found to be valid, including for advice in advance of a disclosure and regardless of avenues used (e.g. fees for ADR, adjudication costs)
- f. Option of transfer to alternative and equivalent employment (e.g. if the workplace has become hostile)

#### 4. Protection of the public

**Purpose:** to ensure that disclosures are subject to thorough, independent, competent and timely investigation; that appropriate and timely corrective action is taken to protect the public; and that the public is informed of the process, findings and actions taken.

- a. Credible corrective process:
  - i. Includes requirements that the subject of disclosure is properly investigated in a reasonable period of time
  - ii. Process transparent to the degree possible (e.g. wrongdoers should not be able hide behind privacy laws, reasons for dismissing cases can be reported, etc.)
  - iii. Power from court or objective body to halt violations/wrongdoing or require specific corrective action
- b. The whistleblower has the right to contribute to the process (e.g. the opportunity to provide more evidence, offer professional expertise, clarify points, respond to claims from the organization, and to see and challenge findings)
- c. Investigating authorities have the authority to compel evidence
- d. Investigating authorities can self-initiate investigations (e.g. when patterns of behavior suggest systematic problems or wrongdoing) and consolidate multiple similar disclosures, and should employ analytic methods to detect signs of systemic problems
- e. Scope includes all types of organization: public, private, non-profit, charitable, etc.
- f. 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
- g. Appointment and removal process for ombudsman/agency head is independent of the bureaucracy and free from real or apparent conflict of interest

#### 5. Evidence of effectiveness

**Purpose:** to ensure that suitable evidence is collected and made readily available, which demonstrates how effectively the system is working and also provides the evidentiary basis for routine monitoring and subsequent improvement cycles.

- a. Tracking and corrective action on effective awareness-raising and training for management, employees and other relevant stakeholders
- b. Set outcomes and performance measures of effectiveness for whistleblowing regime, including but not necessarily limited to:
  - i. Levels of awareness and trust in the whistleblowing system
  - ii. Perceptions of prevalence and seriousness of wrongdoing within the organization
  - iii. User satisfaction with the process
  - iv. Processing time and backlogs
  - v. Short and long term outcomes for whistleblowers
  - vi. Completed corrective action
- c. Periodic evaluations, including possible audits of noteworthy cases
- d. Regular review of the law (typically every 5 years or less)

## IV. Scoring System for CFEWI Criteria

### A. Scoring Table

Scoring band	On paper (Categories 1-5) What the law says	In practice (Category 5 only) What evidence is available, and what this says about implementation	Colour code
4-5	<ul style="list-style-type: none"> <li>Fully meets the purpose of the category</li> <li>There are no critical shortcomings</li> </ul>	<ul style="list-style-type: none"> <li>There is ample evidence that the purpose of the criteria is being fully met</li> <li>There are no critical shortcomings (in the scope or content of the evidence)</li> </ul>	Green
			Pale Green
2-3	<ul style="list-style-type: none"> <li>Generally meets the purpose of the category</li> <li>There are no critical shortcomings</li> <li>There are some shortcomings</li> </ul>	<ul style="list-style-type: none"> <li>There is evidence that the overall purpose of the criteria is generally being met</li> <li>There are no critical shortcomings (in the scope or content of the evidence)</li> <li>There are some shortcomings (in the scope or content of the evidence)</li> </ul>	Amber
0-1	<ul style="list-style-type: none"> <li>Does not meet the purpose of the category</li> <li>There are one or more critical shortcomings</li> </ul>	<ul style="list-style-type: none"> <li>There is little or no evidence available</li> <li>OR</li> <li>There are one or more critical shortcomings (in the scope or content of the evidence)</li> </ul>	Pale Red
			Red

### B. Scoring instructions

1. Referring to the criteria, assign a score of 0-5 for each category
2. The “on-paper” review applies to all categories as set out in law, while “in-practice” assesses the data available, including the evidence called for in category 5.
3. First decide which scoring band is appropriate, then decide which end of the scoring band (high or low) is the best fit

We do not recommend adding up category scores to reach an overall rating since this may be misleading. Rather, we suggest viewing the five categories as a chain in which the strength of the whole is determined by the weakest link: if a law fails in one category this usually undermines the effectiveness of the entire law.



## C. Worked Example

Category	Strengths	Weaknesses	Score
<b>Freedom to blow the whistle</b>	Few loopholes - covers “any person”; meets “reasonable belief” standard; <b>employees may refuse to participate in misconduct; disclosures in course of duties protected</b>	Includes “good faith” requirement; does not ban gag orders	4
<b>Preventing reprisals</b>	Potential fines high; <b>strong powers of investigation; confidentiality to extent possible for whistleblower</b>	<b>No duty to protect the whistleblower;</b> spillover reprisal not covered; unclear which circumstances would dictate whether an offence is a summary or indictable offence; no standards set for investigation process	3
<b>Redress for reprisals</b>	Commissioner has injunctive power; complainant may appeal findings of Commissioner to Tribunal; if reprisal found by Commissioner, whistleblower has right of action in court; <b>range of damages available appears to be to “make whole” level</b>	<b>No reverse onus of proof; Commissioner is gatekeeper for access to redress mechanism;</b> no compensation for legal fees of whistleblower (except via court decision)	1
<b>Protection of the public</b>	<b>Commissioner has strong power to compel evidence and make orders;</b> fines available to Tribunal are high; Commissioner must give complainant opportunity to provide input	No standards set for investigations; unclear to what degree whistleblower can meaningfully contribute investigations and findings	2
<b>Evidence of effectiveness</b>	Act is reviewed every 5 years	Organizations need only make complaint process information “readily available”; no performance indicators; no periodic evaluation (except review of <i>Act</i> ) reporting requirements limited and not clear; little data available	0

**Summary:** While the freedom provided to blow the whistle is quite broad, and the measures for preventing reprisals may be somewhat effective, these strengths are undermined by the lack of effective redress for reprisals and a lack of assurance that corrective action will take place to protect the public. The almost complete lack of evidence of effectiveness undermines trust in the system as well as hampering efforts to monitor or improve performance. Overall, these weaknesses render this law and its implementation largely ineffective in protecting whistleblowers or the public.

## V. 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/>

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