



PRINCE EDWARD ISLAND PUBLIC INTEREST DISCLOSURE AND WHISTLEBLOWER PROTECTION ACT

- Comparison with International Best Practices

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COMPARISON OF *PRINCE EDWARD ISLAND PUBLIC INTEREST DISCLOSURE AND
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WITH INTERNATIONAL BEST PRACTICES

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While whistleblower protection laws are increasingly popular, in many cases the rights have been largely symbolic and therefore counterproductive. Employees have risked retaliation thinking they had genuine protection, when in reality there was no realistic chance they could maintain their careers. In those instances, acting on rights contained in whistleblower laws has meant the near-certainty that a legal forum would formally endorse the retaliation, leaving the careers of reprisal victims far more prejudiced than if no whistleblower protection law had been in place at all.

The Government Accountability Project, a U.S. based whistleblower support NGO, labels token laws as “cardboard shields,” because anyone relying on them is sure to die professionally. Genuine whistleblower laws are “metal shields,” behind which an employee’s career has a fighting chance to survive. The checklist of 20 requirements below reflects over 40 years of lessons learned on the difference. All the minimum concepts exist in various employee protection statutes currently on the books. These “best practices” standards are based on a compilation of national laws from the 60 nations with minimally credible dedicated whistleblower laws, as well as Intergovernmental Organization policies, including those at the United Nations, World Bank, African Development Bank, Asian Development Bank, and Inter-American Development Bank.

The 20 points below have been adapted with the assistance of Whistleblowing Canada Research Society as they apply to the Prince Edward Island context.

As discussed below, the PEI law enacted in 2017 only partly meets 3 of the 20 criteria (#2, 4, and 20). Even more significant, it includes provisions that could increase vulnerability to retaliation. Government Accountability Project would be duty bound to warn whistleblowers against using this law.

¹ This assessment compares the PEI whistleblower law with global best practices summarized in the new study by the [International Bar Association and Government Accountability Project](#), *Are Whistleblowing Laws Working? A Global Study of Whistleblower Protection Litigation*.

² [Whistleblowing Canada Research Society](#) is a registered charity concerned to explore issues relating to whistleblowing.

SCOPE OF COVERAGE

1. Broad whistleblowing disclosure rights with ‘no loopholes’

Protected whistleblowing should cover any lawful disclosure that would be accepted as evidence of significant misconduct or would assist in carrying out legitimate compliance functions, without loopholes for formality, context or audience outside of specific legislative or military restrictions. This means that protection should cover persons in the public, private and non-governmental organization (NGO) sectors.

A person should be protected for any disclosure made where the person has reasonable grounds to believe a wrongdoing has occurred or the public safety is at risk.

Motives should not be a relevant factor. Protection should extend to all who make disclosures on the basis of such reasonable grounds, and should be in effect while the accuracy of a disclosure is being assessed. The worst offender here is a requirement to demonstrate 'good faith' for the disclosure rather than merely reasonable grounds to believe that a disclosable matter exists (e.g. a wrongdoing has occurred or public safety is threatened). A good faith standard puts the whistleblower's motives on trial.

As to a disclosure to the public, the current practice is to protect immediate public disclosure only under exceptional circumstances. The key criterion currently used is that public disclosure should be protected only if such disclosure is necessary to prevent serious harm or address serious misconduct.

In any case, disclosures should still be protected if made to organizational leaders or to appropriate law enforcement offices or legislative offices.

It also is necessary to specify that disclosures in the course of job duties are protected because most communication of protected information and subsequent retaliation is done through 'duty speech' responsibilities by those whose institutional role is blowing the whistle as part of organizational checks and balances.

Assessment: The law fails to comply with this criterion. There is no freedom to disclose to the public or to longstanding institutional or law enforcement offices. It provides for disclosures only by current employees without considering former employees, contractors, or any other persons who might have knowledge of a disclosable matter. It permits disclosures only to deputy heads or to the Office of the Commissioner, and only for written communications following a rigid procedure. Significantly, it conditions protection on “good faith,” which in practice has meant putting the whistleblower’s motives on trial.

2. Wide subject matter scope, with ‘no loopholes’

Whistleblower rights should cover disclosures of any illegality, significant waste, significant mismanagement, abuse of authority, significant danger to public health or safety and any other activity that undermines the public welfare or the institutional mission of a public body, as well as any other information that assists public entities in carrying out their duties.

Assessment: The law only partially complies. It ought not to require “gross” wrongdoing or mismanagement (surely significant wrongdoing is enough), ought to add protection for

disclosures of abuse of authority, matters of public health and safety, and include a catch-all category for the public welfare.

3. Right to Refuse Violating the Law.

This provision is fundamental to stop *faits accomplis*, to respect the rule of law, and could, in some cases, prevent the need for whistleblowing. As a practical reality, however, in many organizations an individual who refuses to obey an order on the grounds that it is illegal must proceed at his or her own risk, assuming vulnerability to discipline if a court or other authority subsequently determines the order would not have required illegality. Thus, what is needed is a fair and expeditious means of reaching such a determination while protecting the individual who reasonably believes that she or he is being asked to violate the law from having to proceed with the action or from suffering retaliation while a determination is sought.

The law does not address this criterion. It provides no right to raise reasonable issues of lawfulness and to have them determined at public expense.

4. Protection against spillover retaliation at the workplace

The law should cover all common work-related scenarios that could have a chilling effect. This is necessary to shield those who assist or associate with the whistleblower who acts as the messenger for a disclosure. It 'takes a village' to blow the whistle responsibly and effectively. Protection should be provided to persons who are perceived as whistleblowers (even if mistaken) or as 'assisting whistleblowers' (to guard against guilt by association), and persons who are 'about to' make a disclosure (to preclude pre-emptive strikes to circumvent statutory protection.) Such broader protection will encourage and protect the necessary inquiries or investigations of reasonable suspicions so that they may be either negated or confirmed (growing from a suspicion to a "reasonable basis to believe") and be appropriate for a disclosure. Since corroboration and supporting evidence are essential, failure to protect these indirect contexts often can have the most significant potential for a chilling effect, keeping people with relevant corroborative or supporting evidence silent out of fear and thereby hindering the discovery and reporting of the truth.

Assessment: The law partially complies but needs to add protection for those assisting or associated with the inquiries and ultimate reporting of a whistleblower.

5. Protection for those beyond the workplace

Regardless of the formal employment status, coverage for employment-related reprisals should extend to all who could be affected by secondary retaliation. Significantly, this includes protecting against threats or harassment of family members. The chilling effect of that retaliation can be more severe, as many view the duty to protect their families as overarching.

In addition to conventional salaried employees, whistleblower policies should protect all who carry out activities relevant to the organization's mission, such as contractors. What matters is the contribution they can make by bearing witness. The value of whistleblower laws is the evidence, not who provided it. If harassment could create a chilling effect that undermines an organization's mission, the reprisal victim should have rights. This means that the mandate should also cover those who apply for jobs, contracts or other funding, since blacklisting is a common tactic.

Most significantly, whistleblower protection should extend to all those who participate in or are affected by the organization's activities. An increasing number of global statutes do not limit protection to employees, but rather protect 'any person' who discloses misconduct.

Assessment: The law fails to comply with this criterion, not protecting any of the above scenarios.

6. Reliable identity protection

To maximize the flow of information necessary for accountability, reliable protected channels must be available for those who choose to protect their identities. Otherwise, there will be a severe chilling effect, as sponsors of whistleblower rights laws have repeatedly recognized. The concept covers both anonymous disclosures, in which no one knows the identity of the whistleblower, and confidential communications, in which identity must be safeguarded by the institutional audience. Anonymity requires a commitment to the best available anti-surveillance technologies to shield privacy. Confidentiality must go beyond a promise not to reveal a name without that person's written consent. Confidentiality should also extend to restrictions on disclosure of 'identifying information'. Often when only a few are aware of certain facts, that information is easily traceable back to the source.

However, almost no whistleblower can be guaranteed absolute confidentiality because testimony or identification of the person may be mandatory for civil or criminal proceedings, or other essential purposes. When exposure is non-discretionary, a best practice confidentiality policy provides for timely advance notice to whistleblowers that their lawfully required exposure is imminent.

Assessment: The law fails to comply with this criterion. It only protects identity, but there are open-ended loopholes even to that narrow scope. It does not require the whistleblower's written consent to non-mandatory identity disclosure, or notice if, that identity has been unintentionally exposed, or notice if disclosure of the whistleblower's identity will be lawfully required.

7. Protection against full scope of harassment

The forms of harassment a whistleblower can suffer are limited only by the imagination. As a result, it is necessary to ban any discrimination taken because of the whistleblowing, whether active (e.g., termination) or passive (e.g., a refusal to promote or a failure to provide training). Recommended, threatened and attempted actions can have the same chilling effect as actual retaliation. The prohibition must cover recommendations, as well as the official act of discrimination, to guard against managers who 'don't want to know' why subordinates have targeted employees. In non-employment contexts, laws should protect whistleblowers against a wide range of possible harassment, including violence and threats to property; provide immunity from civil liability, such as defamation claims or breach of contract lawsuits; and safeguard against the most chilling form of retaliation: criminal prosecution.

One of the key ways to protect whistleblowers from subtler or more indirect forms of harassment or retaliation is to provide for a reverse onus for any actions that are detrimental to the whistleblower, requiring that the person taking such detrimental action must prove it has an independent justification apart from the whistleblowing.

Assessment: The law fails to comply with this criterion. While it protects against liability, it fails to cover common employment retaliation such as passive aggression by failing to act,

blacklisting, interference with penalties for former employees, and similar tactics. The law does not require the person responsible for measures detrimental to the whistleblower to justify them.

8. Shielding Whistleblower Rights from Gag Orders.

Any whistleblower law or policy must include a ban on “gag orders” through an organization’s rules, policies or nondisclosure agreements that would otherwise override free expression rights and impose prior restraint on speech.

This is important because the public benefit (the taking of corrective action, the deterrence of similar future conduct, etc.) is often dependent on the facts of the case being publicly known and discussed.

Assessment: The law does not deal with this criterion at all.

9. Providing essential support services for paper rights

a. Information and training

Whistleblowers gain little protection from laws if they do not know of their existence.

Whistleblower rights, along with duties to disclose illegality, should be posted prominently in any workplace. Training employees on their rights, employers on their responsibilities and judges or other decision-makers to understand the law’s purpose and provisions are prerequisites for the rights to be meaningful. This training should be the particular responsibility of the whistleblowing protection office and also part of the mandate of public service managers.

b. Support for rights

Most whistleblowers cannot afford lawsuits to assert or protect their rights. Because the whistleblowing is in the public’s interest, it is appropriate that the public support whistleblowers and their rights.

Legislation should provide for an independent public officer to conduct relevant investigations relating to whistleblowers’ rights and the powers to provide administrative remedies.

A whistleblowing office with sufficient access to documents and institutional officials can neutralize resource handicaps and cut through draining conflicts to provide expeditious corrective action. As an example, the US Whistleblower Protection Act provides for an Office of Special Counsel, which investigates retaliation complaints and may seek relief on behalf of whistleblowers. These resources should be risk free for the whistleblower, without any discretion by relevant staff to act against the interests of individuals seeking help.

Support for truth-telling including whistleblowing and the prevention of retaliation should be part of the mandate of leadership in the public service. (Australia and a few other nations have adopted a leadership 'duty to prevent' retaliation.)

Assessment: The law fails to comply with this criterion. While the Office of the Commissioner is an administrative institution, it is not a remedial agency. There is no service function for victims of retaliation. There are no education, outreach or training duties. The whistleblower has no rights within the process. The current Act does not impose any of the above-mentioned duties on public service leadership.

I. FORUM

The setting to adjudicate a whistleblower's rights must be free from institutionalized conflict of interest and operate under due process rules that provide a fair day in court. The histories of administrative boards have been so unfavorable that so-called hearings in these settings have often been traps, both in perception and reality.

10. Right to a genuine day in court

This criterion requires normal judicial due process rights, the same rights available to citizens generally.

The elements of an appropriate adjudicative process include a day in court with witnesses and the right to confront accusers, objective and balanced rules of procedure, and reasonable deadlines, and timely decisions.

Institutions' internal misconduct-reporting systems must be structured to provide autonomy and freedom from institutional conflicts of interest. Making internal review(s) of harassment complaints a prerequisite for court access is particularly prone to institutional conflicts of interest. Such internal reviews are inherently compromised by structural conflict of interest because the decision-maker will usually be the defendant in any subsequent court proceeding. Instead of being remedial, such activities are vulnerable to becoming 'free discovery' and de facto investigations of the whistleblower, often hampering their eventual prospects of success in an independent due process forum.

Assessment: The law fails to comply with this criterion. It does not provide any access to court, either for fact-finding in a trial, or even to appeal a decision by the Commissioner.

11. Option for Alternative Dispute Resolution with an Independent Party of Mutual Consent.

Third party dispute resolution can be an expedited, less costly forum for whistleblowers. For example, labor-management arbitrations have been highly effective when the parties share costs and select the decision-maker by mutual consent through a "strike" process. It can provide an independent, fair resolution of whistleblower disputes.

Assessment: The draft bill does not address this criterion.

II. RULES TO PREVAIL

The rules governing how to prevail — i.e., the tests a whistleblower must pass to prove that illegal retaliation violated his or her rights, and win — control the bottom line.

12. Realistic standards to prove the violation of rights

The US WPA of 1989 overhauled antiquated, unreasonable burdens of proof that had made it hopelessly unrealistic for whistleblowers to prevail when defending their rights. The legal test adopted by the US in 1989, described below, has been adopted within international law, as well as generic professional standards for intergovernmental organizations (IGOs) such as the United Nations. In 2019, the EU Directive created an even more employee-friendly burden of proof mechanism.

This US and IGO standard is that a whistleblower establishes a prima facie case of violation by showing, through a preponderance of the evidence, that protected conduct was a 'contributing factor' in the challenged detrimental action or decision. This essentially is a relevance test, satisfied if whistleblowing affected a decision 'in any way'. The discrimination does not have to involve retaliation, but only need occur 'because of' the whistleblowing. Once a prima facie case is made, the burden of proof shifts to the organization to demonstrate by clear and convincing evidence that it would have taken the same action for independent, legitimate reasons in the absence of protected activity.

Since the US Government changed the burden of proof in its whistleblower laws, the rate of success on the merits increased from between one and five per cent annually to a range of 10–30% per cent depending on the year and forum, which gives them a more realistic chance to successfully defend themselves.

The most advanced version of the burdens of proof is in the EU Whistleblower Directive. Article 21, section 5 provides that after a presumption of retaliation, the employer can prevail by 'proving that this measure was based on duly justified grounds'. The recital provides specific guidance for national laws on how to interpret this. It states, at 54 (paragraph 93), that after the whistleblower has proven a prima facie case, the 'burden of proof should shift to the person who took the detrimental action, who should then demonstrate that the action was not linked in any way to the reporting or the public disclosure'.

Assessment: The law fails to comply with this criterion. There are no burdens of proof or rights to remedy on the part of the whistleblower, meaning the Commissioner has unchecked discretion to issue arbitrary denials of protection for reprisal victims.

13. Realistic Time Frame to Act on Rights.

This Act provides that the complaint as to reprisals must be made within one year of the taking of the reprisal. Prince Edward Island's limitation period for torts (negligence, assault, etc.) is not less than 2 years from when the cause of action arose. A whistleblower's right to a remedy for reprisal (usually or perhaps always an intentional act) is surely not less worthy than these?

Assessment: The law's one-year limitation is not aligned with other remedial options available under PEI law where a minimum two-year limitation applies.

III. RELIEF FOR WHISTLEBLOWERS WHO WIN

The twin bottom lines for a remedial statute's effectiveness are whether it achieves justice by adequately helping the victim obtain a net benefit and by holding the wrongdoer accountable. Otherwise, the whistleblower may still "lose by winning."

14. Compensation with "No Loopholes"

If a whistleblower prevails, the relief must be comprehensive to cover all the direct, indirect and future consequences of any reprisal. In some instances, this means relocation or payment of medical bills for consequences of physical and mental harassment. In non-employment contexts, it could require relocation, identity protection, or withdrawal of litigation against the individual.

Assessment: The law fails to comply with this criterion. The Commissioner has unchecked discretion whether to apply "make whole," partial or no relief after finding illegal retaliation.

15. Interim relief

Anti-reprisal mechanisms that appear streamlined on paper commonly drag out for years in practice. Ultimate victory may be no more than an academic vindication for unemployed, blacklisted whistleblowers who go bankrupt while they are waiting to win. Injunctive or interim relief must therefore be available following a preliminary determination. Timely provision of interim relief also prevents unnecessary protracted litigation. Without it, employers have little to lose by dragging out lawsuits and appeals indefinitely. Until a contrary final decision, harassment or delays by employers can succeed both in depriving the whistleblower of income and in sustaining a chilling effect in the workplace. Employers may augment the chilling effects by purging whistleblowers to set an example. If the whistleblower is reinstated while the substantive case proceeds, the employer's best interest is more likely to 'stop the bleeding' by resolving the dispute on fair terms. Few other criteria have more impact on whether a whistleblower law makes a difference in reality than the effectiveness of interim relief.

Assessment: The law fails to comply with this criterion. It does not even provide an option to seek interim relief while the case is pending.

16. Coverage for Attorney Fees

Attorney fees and associated litigation costs should be available for all who substantially prevail. Whistleblowers otherwise couldn't afford to assert their rights. The fees should be awarded if the whistleblower obtains the relief sought, regardless of whether it is directly from the legal order issued in the litigation. Otherwise, organizations can and have unilaterally surrendered outside the scope of the forum and avoided fees by declaring that the whistleblower's lawsuit was irrelevant to the result. Affected individuals can be ruined by that type of victory, since attorney fees often reach sums more than an annual salary.

Further, where the disclosure is *prima facie* true, the public interest in fostering such disclosures means that the whistleblower must not only *ultimately* be reimbursed for legal costs, but that these costs should be paid as the matter proceeds. Why should a person acting in the public interest be forced to do so at their own expense for the duration of the investigation and its resolution?

Assessment: The law fails to comply with this criterion. It does not provide legal aid or attorney fees for attorney fees in meritorious cases, not even ultimately, let alone along the way. This creates a significant financial disincentive to whistleblowing.

17. Transfer Option

It is unrealistic to expect a whistleblower to go back to work for a boss whom he or she has just defeated in a lawsuit. Those who prevail must have the ability to transfer for any realistic chance at a fresh start. This option prevents repetitive reprisals that cancel the impact of newly created institutional rights.

Assessment: The law fails to meet this criterion. It does not address any protection for prior successful exercise of rights under the Act.

18. Personal accountability for reprisals

To deter repetitive violations, those responsible for whistleblower reprisals should be held accountable. Otherwise, managers have nothing to lose by doing the dirty work of harassment. The worst that will happen is they will not get away with it, and they may be likely to be rewarded for trying. The most effective option to prevent retaliation is personal liability for those found responsible for violations.

Assessment: The law fails to meet this criterion. The Commissioner only has authority to recommend discipline. The institution whose managers are found guilty of retaliation has the discretion whether to impose it. Also, typically the persons responsible for reprisals are defended at public expense. There is no provision for an order, as part of the reprisal process, that the person responsible for the reprisal would be ordered to bear their own legal costs.

IV. MAKING A DIFFERENCE

Whistleblowers may risk retaliation if they think that their disclosures will make a difference. Numerous studies have confirmed this motivation. This is also the bottom line for affected institutions or the public – positive results. Legislatures unanimously pass whistleblower laws to make a difference for society.

19. Credible internal corrective action process

Whether through hotlines, ombudsmen, compliance officers or other mechanisms, the aim of whistleblowing through an internal system is to provide organisations with an opportunity to address internal failings before matters deteriorate into a public scandal or law enforcement action. In addition to a good faith investigation, two additional elements are necessary for legitimacy.

First, the whistleblower who raised the issues should be enfranchised in the process, receive progress reports, contribute to the record and assess whether there has been a good faith resolution. While whistleblowers are reporting parties rather than investigators or finders of fact, they are typically the most knowledgeable, concerned witnesses in the process. The entire package then should be in the public record. As experience under the US WPA illustrates, whistleblowers' evaluation comments often lead to significant improvements and change conclusions, as well as calling bluffs on the public record about the report's official 'final word'. They should not be silenced in the final stage of official resolution for the alleged misconduct they risk their careers to challenge.

Second, transparency should be mandatory. Secret reforms are an oxymoron. As a result, unless the whistleblower elects to maintain anonymity, both the final report and whistleblower's comments should be a matter of public record, posted on the organisation's website.

Assessment: The law fails this criterion. The Commissioner has open-ended grounds not to act on any evidence. If an investigation is opened, the whistleblower has no right to participate or contribute, or even know the results other than receiving notice that the case is closed. There is no transparency for access to the reports or other resolution of the alleged misconduct.

20. Review

The foregoing criteria are to evaluate whistleblower laws on paper. Unfortunately, due to ambiguities, reliance on bad faith officials for enforcement or cultural resistance, in many instances the new rights in

practice might be traps that victimize the naïve. Every whistleblower law should include a formal review process that tracks how many whistleblowers use the new rights, whether they have proven effective empirically, and what changes should be enacted based on lessons learned.

The law complies with this criterion to the extent that it requires a regular 5 yearly review. However, it is less clear that the reporting by the Commissioner is sufficient to provide the legislative committee with all of the information it ought to have for such a review.