



Public interest whistleblowers in the Ontario Long Term Care System

Presentation to the Ontario Long Term Care COVID-19 Commission
Centre for Free Expression - Whistleblowing Initiatives

“whistleblowers are the neighbourhood watch of our society.”

Proposed agenda



1. About the CFE Whistleblowing Initiatives (CFEWI)
2. Whistleblowing – the basics
3. Whistleblower retaliation
4. Whistleblower protection law in Canada
5. Some tools we can use
6. What is needed to fix this

About the CFE Whistleblower Initiative



- Our mission is to strengthen Canadian society by making public-interest whistleblowing possible through effective protection for Canadian whistleblowers. This will enable Canadians to live and work more safely and assuredly and to combat misconduct that may threaten the well-being of our communities and our society.
- We work to facilitate adoption of best-in-class whistleblowing laws and regulations federally, provincially, and municipally along with compatible institutional policies and practices in the public and private sectors that:
 1. Provide real protection;
 2. Cover any individual who makes a public interest disclosure;
 3. Are designed for transparency and continuing improvement (through effective measurement, reporting, monitoring, and oversight);

Key initiatives and experience



Awareness Raising

- Through public educational events, our website, social media, and an email newsletter to promote an informed understanding of the importance of whistleblowers for public and private sector organizational effectiveness and for the health of our democratic society;
- Create and distribute educational materials showing how whistleblowing benefits society;
- Assist the media with finding and reporting stories about whistleblowers.

Previous work examples

- Support, advice and witnesses for Government Operations Committee review of the Public Servants Disclosure Protection Act – 2017
- Support and advice to BC Ombudsperson and BC government during the development and implementation of the Public Interest Disclosure Act

Whistleblowing - the basics

Who are whistleblowers and why do they speak up?

A decade of deception cost Halton Region millions

The shocking details in the report raise serious questions about Halton Region's oversight of contracts, invoices, payments as well as its oversight of external contractors and suppliers

NEWS

Dec 10, 2019

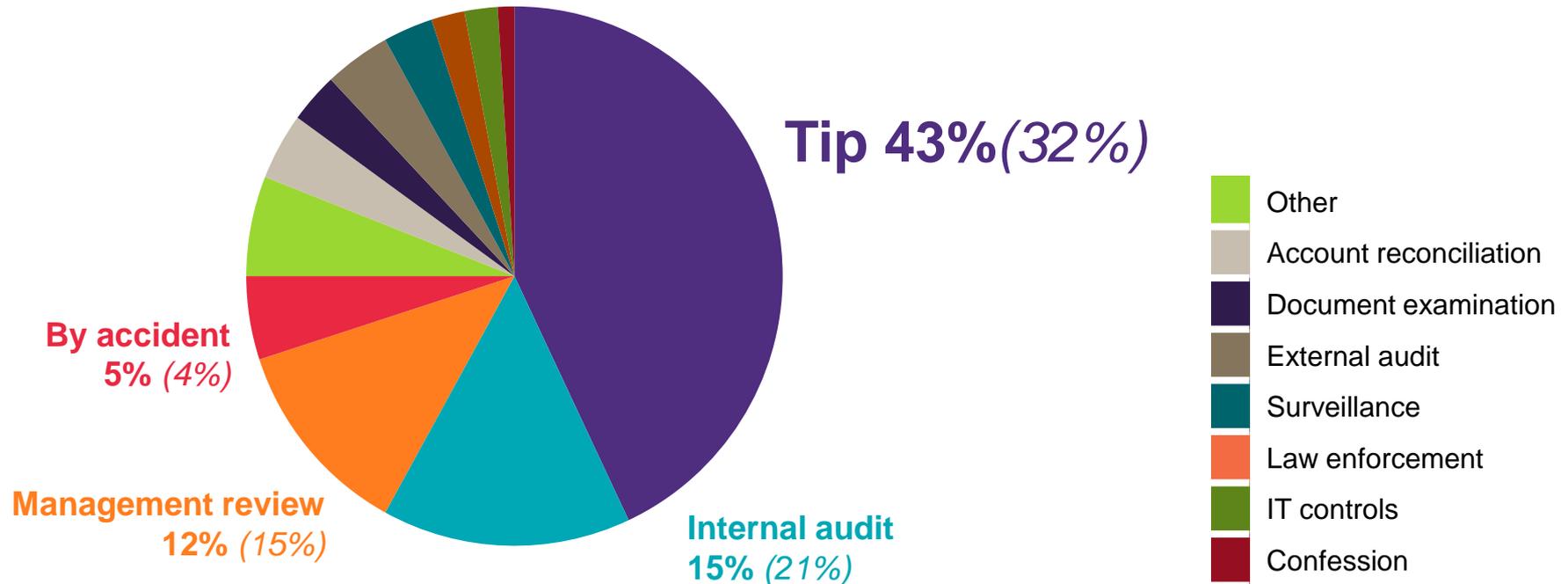
by [Steve Buist](#) 

The Hamilton Spectator

“ A **whistleblower** is reported to have been behind disclosures that uncovered **ten years of fraud** by a municipal employee and a vendor with whom he colluded. Both were found **guilty of fraud** involving **bribes, kickbacks and fraudulent invoices.**”

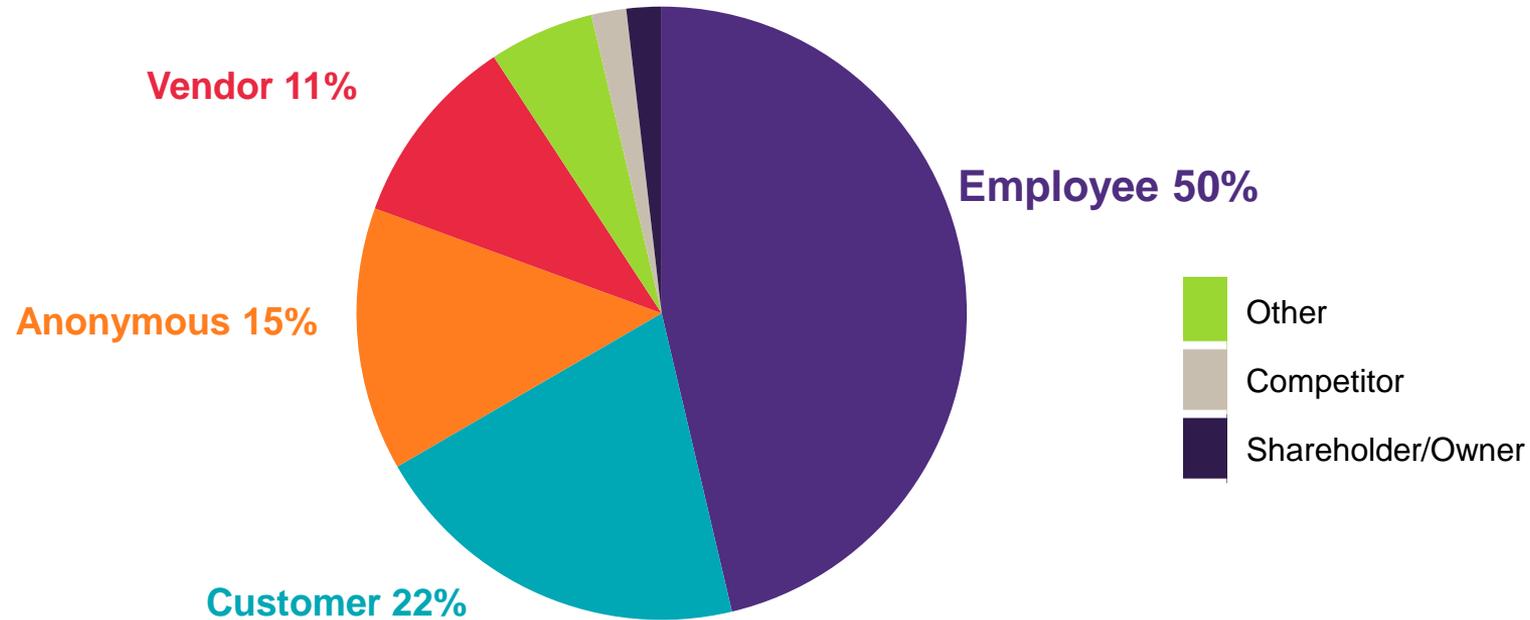


How is occupational fraud detected?



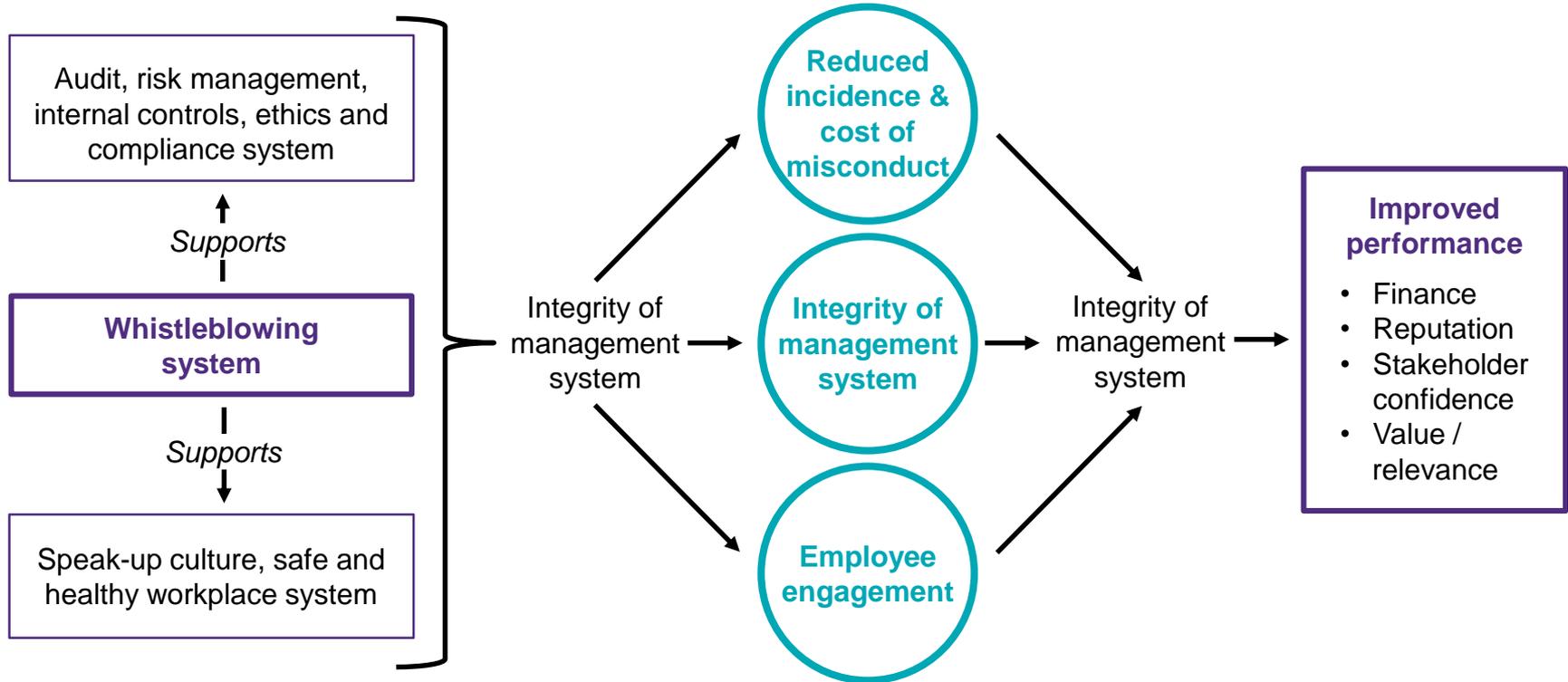
Association of Certified Fraud Examiners Report to the Nation 2020

Who reports occupational fraud?

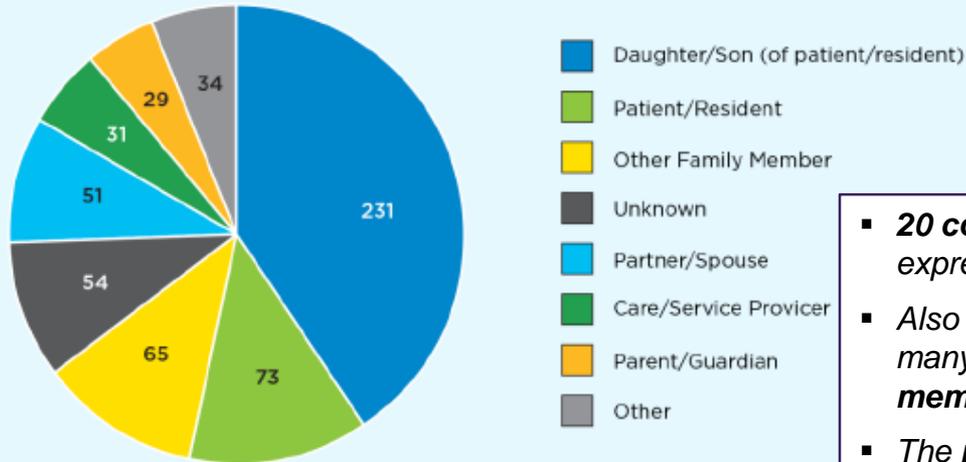


Association of Certified Fraud Examiners Report to the Nation 2020

Benefits of an effective whistleblowing system



Who contacted Patient Ombudsman (All COVID-19 Complaints)



Extracted from the
Patient Ombudsman's
Special Report
October 2020

- **20 complaints** from staff working in long-term care homes expressing serious concerns **classified as whistleblowers**;
- Also received **a larger number of anonymous complaints**, many of which appear to be **from unidentified staff members** raising serious concerns.
- The **majority of these feared negative impacts** to their job or standing at work.
- **Many did not want to be identified** to the health sector organization who employed them.
- **Many of the whistleblower and anonymous staff complaints we received were of a very serious nature.**
- Patient Ombudsman chose to contact health system leaders directly, notify the relevant Ministers directly and realign our internal complaints management process.

Extracted from Patient Ombudsman's Special report – October 2020

Recommendation #4: Enhanced whistleblower protection

Patient Ombudsman recommends that, in legislation, the government enhances whistleblower protections for health care workers who bring forward concerns in good faith, especially during an emergency.

Home > Beyond Local

ONTARIO: Province's long-term care commission will grant workers anonymity

Employees expressed fears of losing jobs, having their hours reduced for speaking out about the spread of COVID-19 in long term care homes across the province, minister says

Oct 28, 2020 7:15 AM By: Canadian Press



Anonymity for those who speak up before this commission has already been identified as a key tool in learning the truth and protecting those who tell it.

There is clear evidence of whistleblower retaliation against LTC workers who have spoken out.

The reality of whistleblower retaliation

Why do whistleblowers become victims?

Reprisal Tactics Used Against Whistleblowers

- **Discredit them** – to superiors, auditors, human resources
- **Attack them** – harassment, isolation, public humiliation, threats, slanders, false accusations
- **Set abusive work assignments** – no work, degrading work, impossible tasks
- **Falsify evidence** – destroy incriminating documents, create false documents
- **Manipulate internal processes** – performance review, grievances, punitive investigations

These actions are orchestrated by those who fear exposure.

Reprisal research slide

- There is no set list of reprisals: they are limited only by the imagination. However, they do follow patterns. They can be formal, which usually leaves a paper trail, or informal (e.g. ostracism). Lists can be found in any of these sources:
 - De Maria, W., & Jan, C. (1994). *Wounded Workers*. Brisbane, Australia. Retrieved from http://whistleblowersqld.com.au/wp-content/uploads/2017/06/3.-Wounded-Workers-Oct-1994_WR.pdf
 - Devine, T., & Maassarani, T. F. (2011). *The corporate whistleblower's survival guide: A handbook for committing the truth*. San Francisco: Berrett-Koehler Publishers Inc.
 - Ethics Resource Center. (2012). *Retaliation: When whistleblowers become victims: A supplemental report of the 2011 National Business Ethics Survey*. Arlington, VA. Retrieved from http://jpp.whs.mil/Public/docs/03_Topic-Areas/06-Retaliation/20150410/06_ERC_RetaliationWhenWhistleblowersBecomeVictims.pdf
 - Lennane, K. J. (1993). "Whistleblowing": a health issue. *BMJ*, 307(6905), 667–670. <https://doi.org/10.1136/bmj.307.6905.667>
 - Martin, B. (2013). *Whistleblowing: A Practical Guide* (2nd ed.). Sparnas, Sweden: Irene Publishing. Retrieved from <https://www.bmartin.cc/pubs/13wb.pdf>
 - Smith, R., & Brown, A. J. (2008). The good, the bad and the ugly: whistleblowing outcomes. In A. J. Brown (Ed.), *Whistleblowing in the Australian public sector: Enhancing the theory and practice of internal witness management in public sector organisations* (pp. 109–135). Canberra: ANU E-Press. Retrieved from <https://library.oapen.org/bitstream/id/4293744a-0a54-42cd-b272-2329c3633498/459791.pdf>

Impact of Reprisals on Whistleblowers

- Loss of job, reputation, career, livelihood
- Loss of family home, security
- Break-up of family – due to stress, fear, resentment, alienation
- Mental injuries: PTSD-like symptoms (chronic depression, insomnia, flashbacks, panic-attacks...)
- A decade or more of struggle (in legal proceedings etc..)

Typical trajectory: respected, accomplished career professional ends up doing menial work to survive

Consequences of Silencing Whistleblowers

- Senior leadership kept in the dark (but still responsible)
- Wrongdoing continues & grows – unchecked
- Leaders become unwittingly complicit – commit themselves to a stance that may later prove unethical / illegal / indefensible
- Negative impact on employee morale, engagement, trust in leadership – climate of fear – poor performance
- Some whistleblowers feel compelled to go public (1-2%)

Long term consequences: dysfunctional operations, reputational damage, loss of public trust, financial damage...

She blew the whistle to protect seniors at the Rosslyn. She paid a price.

Ashley Jenkins blew the whistle on the Rosslyn Retirement Residence. Then she was fired. Now, she's speaking out about the 'grey area' of whistleblower protections in Ontario.

By [Katrina Clarke](#) Hamilton Spectator
Wednesday, September 2, 2020

Jenkins is the registered nurse who blew the whistle on terrible conditions at the Rosslyn Retirement Residence in Hamilton. Conditions included bed bugs and mice, medication with expired dates, no medication records for an entire month, pills outside containers, no narcotic inventory record, a senior manager who refused to wear a mask, and staff reports that their personal protective equipment was locked up and they were only allowed one mask per shift.



Why are whistleblowers not heard?



- Adoption of negative terms from criminals; e.g. *snitch rat grass*
- Persistent negative whistleblower myths
- Societal perceptions, norms and conditioning
- Aggressive and persistent self-interest stereotyping by wrongdoers
- Group dynamics – whistleblowers are made “outsiders”
- Lack of understanding of whistleblower dynamics and realities – no trust in management or the system

Understanding whistleblowers

- 1 Who really are these people and what motivates them?
- 3 Persistent negative whistleblower myths skew this truth
- 5 Lack of understanding of whistleblower dynamics and realities undermines their value

- 2 Most whistleblowers are your best employees and people with very high integrity
- 4 Public interest whistleblowing is a key societal defence akin to press freedom
- 6 The two main reasons people decide not to report are 1. fear of retaliation and 2. fear nothing will be done....

Why do whistleblowers become victims?

- 1 Bullying, intimidation, harassment, malicious negative information propagated by the perpetrators
- 2 Negative perceptions lead to alienation by co-workers
- 3 Rebroadcasting and enhancement of negative perceptions
- 4 Inability of whistleblowers to be heard or believed
- 5 Knee jerk defensive reactions from supervisors and management
- 6 Cumulative negatives impact the WB's ability to work, financial stability, health and family life.

Why do whistleblowers become victims?

3 former civil servants file \$1.8M suit against former P.E.I. premier, government agency over privacy breach

3 women who raised concerns about immigration program had personal information leaked

[Kerry Campbell](#) · CBC News · Posted: Feb 07, 2019 5:55 PM AT | Last Updated: February 7, 2019



Whistleblower laws in Canada

Why are we so far behind?

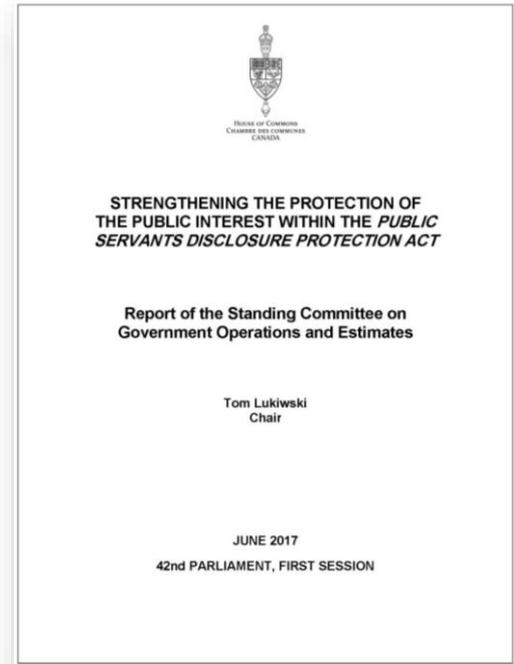
Federal Legislation: the Public Servants Disclosure Protection Act ("PSDPA")

- Passed in 2006, covering 400,000 federal public servants
 - “The Mount Everest of whistleblower protection” – Cabinet minister
 - “A law, not to protect whistleblowers, but to protect deputy ministers from whistleblowers” – opposition MP
- In 13+ years no whistleblower has been protected by the Tribunal
 - No one has been granted a remedy by the Tribunal
 - Nearly all are blocked from access to the Tribunal (8 referrals in 13 years)
 - Only one person has completed the Tribunal process, but did not prevail
- Legal requirement for a 5-year review
 - Ignored for 10 years, finally carried out by a Parliamentary Committee
 - Unanimous report with sweeping recommendations for reform: ignored
- International comparisons
 - Canada’s law ranked as one of the worst

Unanimous report from Parliament 2017

Government Operations Committee Report: **Strengthening the Protection of the Public Interest within the PSDPA**

Published 2017



International Trends: A Revolution

Adoption of national whistleblower protection laws

1978 – 1 nation (USA)

...

1998 – 2 nations (USA, UK)

...

2020 – 48 nations (--> 62 with EU countries)

Effectiveness of National Whistleblowing Laws

- A global assessment project by the Government Accountability Project & the AP / International Bar Association
- Using a 20-point criteria system to analyze effectiveness
- Covers 48 nations + EU Directive countries (--> 62)
- Looks at what's on paper, and how it works in practice

Score (0-20)

18

14-16

.....and at the bottom of the list

0 – 1

Jurisdictions

Australia, EU Directive countries

Ireland, New Zealand, USA ...

Canada, Lebanon

Other Canadian Legislation

The Provinces

- Many similarities to the PSDPA and to each other
- All are very weak on paper – Ontario's is the weakest
- None has the capacity to be effective, even with the best intentions

The Criminal code (section 45.21)

- Ineffective: due to an impossible burden of proof and dependency on law enforcement to initiate action
- Never used (to our knowledge)

Securities laws (OSC and AMF)

- Very limited in coverage & not yet best practice

Etc...

Changes to Ontario Securities Act

Enacted 2018

Reprisals prohibited and victims can file a civil claim

Broad definition of **whistleblower actions**, including intention

Broad definition of **retaliation**

A “**reasonable belief**” of wrongdoing requirement for the whistleblower

A **reversal of the burden of proof** onto the retaliating person or organization

Reinstatement at **same seniority and repayment** of up to 2x any lost pay with interest for whistleblower

Assessment of LTCHA and RHA against CFEWI Criteria (1)

A. Freedom to blow the whistle

- Good: reasonable belief standard
- Bad: narrow and subjective definitions of wrongdoing; does not protect everyone; does not protect disclosures made in course of duties; does not allow anonymous disclosures; does not ban gag orders

B. Preventing reprisals

- Good: no apparent time limits on complaints; Board has strong powers to investigate reprisal
- Bad: organizations do not have a duty to protect the whistleblower; no personal accountability for reprisals; no interim relief from reprisals; no protection against unconventional harassment (e.g. 'gaslighting'); no guarantees of confidentiality for whistleblower

C. Redress for reprisals

- Good: reverse onus of proof for reprisals; Board has strong powers for remedies
- Bad: legal fees not necessarily covered; no option of transfer

Assessment of LTCHA and RHA against CFEWI Criteria (2)

D. Protection of the public

- Good: in theory, government has strong investigation powers and should be able to order wrongdoing to cease
- Bad: corrective process (of wrongdoing) does not appear credible; whistleblower not given a role in investigation; external disclosure not protected (e.g. in emergency or on failure to correct wrongdoing)

E. Proof that the system is working

- Good: employees must receive training on whistleblowing rights and process
- Bad: no evidence of awareness raising or training on rights and process for residents and their families; no periodic evaluations of whistleblowing mechanism

Ontario Labour Relations Board referrals related to reprisals

Acts with whistleblowing provisions¹	2012 - 2020	2012	2013	FY2014	2015	2016	2017	2018	2019	2020
Long Term Care Homes Act	3						1		1	1
Retirement Homes Act	1								1	
Public Service of Ontario Act ³	3						2			1
Acts with complaint provisions⁴	2012 - 2020	2012	FY2013	2014	2015	2016	2017	2018	2019	2020
Public Inquiries Act	3						2			1
Environmental Protection Bill of Rights	8		3	1	1	1			1	1
Environmental Protection Act	2					1	1			
Smoke Free Ontario Act	7	2	2		1	1	1			

Some Tools We Can Use

Made-in Canada tools for evaluating the effectiveness of whistleblowing, and for guiding development efforts

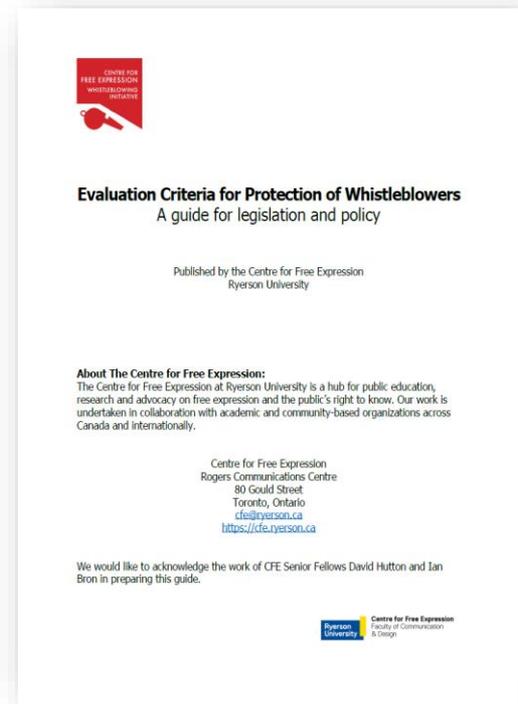
CFEWI Criteria

Evaluation Criteria for Protection of Whistleblowers

Published May 2020

Drawing on:

- GAP's 20-point criteria
- European Directive
- Canadian experience e.g. PSDPA shortcomings



CFEWI Criteria

Essential elements of a whistleblowing system

A. Freedom to blow the whistle

- e.g. anyone can report, on any matter of concern, gag orders banned...

B. Preventing reprisals

- e.g. management duty to protect, personal liability for reprisals...

C. Redress for reprisals

- e.g. reverse onus, true day in court, 'make whole' compensation...

D. Protection of the public

- e.g. powerful, independent investigative capacity + corrective action...

E. Proof that the system is working

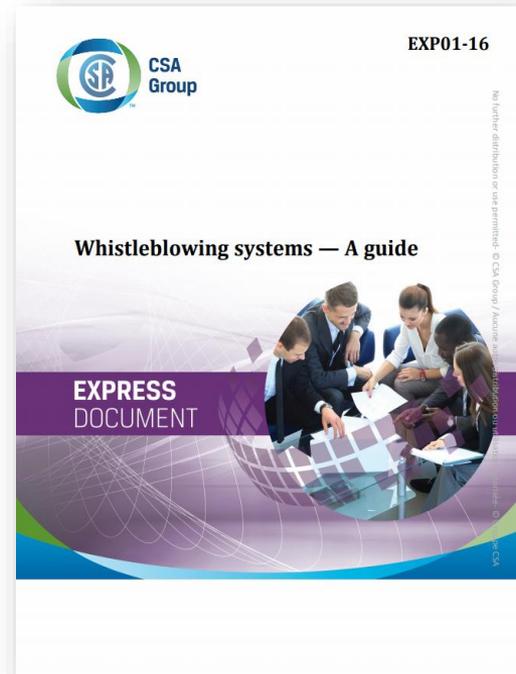
- e.g. levels of awareness & understanding, performance measures...

Canadian Standards Association Guideline

CSA Group Communities:

Whistleblowing Systems – A Guide

Published 2016



What is needed to fix this?

Our recommendations

CFEWI's role in 5-year review of PSDPA

1. Provided expert testimony at an early stage, and established trust and communication channels with committee members
2. Proposed other witnesses including whistleblowers and international experts
3. Provided written submissions e.g. report on 40 shortcomings in the PSDPA
4. Suggested questions to be put to defenders of status quo
5. Followed proceedings and highlighted misleading or false statements
6. Proposed comprehensive recommendations: many were adopted verbatim
7. Publicized and praised the extensive, thorough and non-partisan work of the committee
8. Publicized and criticized the failure of the government to act.

The Commission's Opportunity

By ensuring effective protection for whistleblowers involved in the LTC sector to voice concerns safely:

1. **Enhance oversight** by dramatically increasing the quality and timeliness of information available to regulators (and to the public)
2. **Enable proper investigations** of impropriety in an intensely profit-driven, cost-cutting environment
3. **Help lift the climate of fear** that pervades the industry and has prevented reports from being made
4. Provide **a whistleblower protection model for others to follow**, that organizations like CFEWI can publicize within Canada (and internationally through our associates)

Some issues to work on

The solutions to these problems are not simple or obvious

We need an appropriate independent body or bodies to undertake five key elements of the process

1. Receive whistleblower reports securely and work towards their anonymity/confidentiality/protection
2. Provide protection from reprisals for whistleblowers
3. Conduct investigations into the alleged wrongdoing
4. Conduct investigations into reprisals
5. A board or tribunal which can adjudicate these issues

Some issues to work on

1. How can reprisals against whistleblowers be prevented?
 - e.g. place a duty of care upon management
2. When reprisals do occur, how to make remedies accessible and effective?
 - e.g. can the OLRB channel be made effective?
3. How can we protect everyone who may have important information?
 - e.g. families (of residents and workers), volunteers, contractors, suppliers...
4. What safeguards are there against failures by the regulator
5. How to ensure that everyone knows about their rights (to speak up and be protected) and exactly how to exercise these
 - e.g. better training and education for LTC workers, management and owners

Our Proposal

1. Acknowledge the potential of whistleblowers to dramatically improve oversight of the LTC industry in Ontario and to restore public trust
2. Recognize the dire state of current whistleblower 'protections' and the need for effective, well-designed changes
3. Continue our discussion on how to provide effective protection, starting from the reality of where we are now – the solutions are not simple or obvious
4. Make whistleblowing experts part of the process – there is a wealth of knowledge and experience available and models of success that we can draw upon
5. Be prepared for determined and forceful pushback on solutions that truly will protect whistleblowers and the public!

Some useful resources

- [CFE Whistleblowing Initiatives website](#)
- [A list of prominent Canadian whistleblowers](#)
- [The whistleblower's ordeal](#)
- [How wrongdoers operate](#)
- [What's wrong with the PSDPA \(federal law\)](#)
- [CFE Evaluation criteria for whistleblowing](#)
- [Don't Shoot the Messenger \(panel discussion\)](#)
- [Legal Protections for Whistleblowers: What Is Needed? \(panel discussion\)](#)

Thank you

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