



# Yukon Legislative Assembly

## SELECT COMMITTEE ON WHISTLE-BLOWER PROTECTION 32<sup>nd</sup> Yukon Legislative Assembly

### Discussion paper for the Select Committee on Whistle-blower Protection

#### The Committee

The Yukon Legislative Assembly established the Select Committee on Whistle-blower Protection in May 2007. The Members appointed to the Committee were:

- Hon. Ted Staffen (MLA – Riverdale North), Speaker of the Yukon Legislative Assembly and the chair of the committee,
- Steve Cardiff (MLA – Mount Lorne),
- Eric Fairclough (MLA – Mayo-Tatchun),
- Hon. Jim Kenyon (MLA – Porter Creek North); and
- Steve Nordick (MLA – Klondike).

#### The Committee's Mandate

The motion appointing the Committee instructed it “to report to the House its findings and recommendations respecting the central issues that should be addressed in whistle-blower protection legislation...”

The Committee will not draft a Whistle-blower Protection bill. Its role is to assess the central issues and gather views about what should be included in such a bill and report those views to the Legislative Assembly. Other steps will be taken – perhaps even further public consultation – before a Whistle-blower Protection Act is introduced in the Assembly. The Committee's role, therefore, is a first, but important, step in determining whether Yukon will have whistle-blower protection legislation and, if so, what form that legislation will take.

#### The Discussion Paper

The motion appointing the Committee focused on 10 central issues. The purpose of this discussion paper is to explain these central issues in further detail and provide an opportunity for groups and individuals to submit their views on whistle-blower protection legislation to the Committee.

#### What is Whistle-blowing?

Employees have a duty of loyalty and confidentiality to their employer and can be disciplined if they disclose information that they should not. “Whistle-blowing” is an exception to this duty. It occurs when a person discloses information about some misconduct that has occurred in the organization in which they work. Whistle-blowing arises out of a conflict between the person's duty to their employer and another

obligation, such as a sense that the public interest would be served by such a disclosure.

### **What is Whistle-Blower Protection?**

Generally, there is nothing to prevent a person – whether that person works in the public or private sector – from exposing illegal, unethical or improper decisions taken by others in the organization in which they work. However, many people believe whistle-blower protection legislation is necessary because certain kinds of disclosures are in the public interest and superiors or co-workers may retaliate against persons who blow the whistle.

The purpose of whistle-blower protection legislation is to protect whistle-blowers from retaliation from superiors, co-workers and others whose actions have been exposed. At the same time whistle-blower protection legislation must define what is, and is not, legitimate whistle-blowing; the processes whistle-blowers should have to follow in exposing improper actions; and what consequences there will be for (a) persons who attempt to retaliate against whistle-blowers, and (b) persons who recklessly or maliciously “blow the whistle” on others.

Certain protections already exist for Yukon public service employees. These protections can be found in the *Public Service Act*, the collective agreement between the Government of Yukon and the Public Service Alliance of Canada (Yukon Employees Union), and the Workplace Harassment Prevention and Resolution Policy. The Yukon Government’s Internal Audit Services Policy and the *Access to Information and Protection of Privacy Act* also deal with disclosure but do not address protecting those who disclose information. Government employees, and members of the general public, can – depending on the nature of the issue – bring their concerns to the attention of the Ombudsman or the Yukon Human Rights Commission.

Whistle-blower protection legislation could go beyond what is provided for in these acts, policies and agreements and cover any circumstances not covered by them.

### **The Central Issues**

#### **1. Should all public institutions and private organizations performing "public" functions be covered by whistle-blower protection legislation?**

The central issue here is: How broadly should whistle-blower protection apply and who should be covered by it? Whistle-blower protection legislation could be written so that it covers only government departments and their employees. It could be written so that it also covers government corporations (such as the Yukon Development Corporation, the Yukon Energy Corporation, the Yukon Hospital Corporation, the Yukon Liquor Corporation, the Yukon Housing Corporation), and other bodies like the Workers’ Compensation Health and Safety Board. Or it could be written to include other organizations outside of government that perform public functions.

## **2. Who should be able to use whistle-blower protection legislation, only employees or others such as unions, advocacy groups, the media, and citizens?**

Generally, whistle-blower protection legislation is written in a way that covers the relationship between an employer and employees, and between employees in the same organization. The central issue here is whether Yukon whistle-blower protection legislation should protect persons from outside government departments and corporations, etc. against reprisals taken by individuals in government departments, corporations or other bodies covered by the law. On the other hand, it might be that other processes – like the Office of the Ombudsman, the Yukon Human Rights Commission, or courts of law – might be better avenues for protecting persons who are not employees of government departments or corporations.

## **3. What types of wrongdoing should be covered by whistle-blower protection legislation?**

Whistle-blowers might want to expose actions that may be illegal or unethical. They may also want to expose what they believe to be poor decision-making by superiors or co-workers. The central issue here is which kinds of acts should a whistle-blower be able to expose and be protected by the law. In other words, whether whistle-blowers will only be protected for exposing acts that are potentially illegal, or whether that protection is extended to the exposure of acts or decisions that show mismanagement or are unethical, or pose a danger to health and safety, etc.

## **4. Should the same office be responsible for conducting investigations, mediation and the protection of whistle-blowers?**

Resolving a whistle-blower complaint involves a number of stages – the complaint itself, the investigation of the complaint, finding a resolution to the complaint and ensuring the protection of the whistle-blower. The central issue here is whether the same office should be responsible for all these functions, or whether these functions should be divided among different offices.

## **5. Should employees have to exhaust departmental procedures before approaching the whistle-blower protection office?**

Government departments and corporation have processes for dealing with complaints from, and conflicts between, its employees. The central issue here is whether a whistle-blower should have to follow the existing complaint or conflict resolution process within a particular department or corporation before going to the whistle-blower protection process. The other option is to let them go directly to the whistle-blower protection office, even if their government department or corporation has a complaint or conflict resolution process. In certain situations a whistle-blower may have more than one avenue for complaint. This raises the issue of whether a whistle-blower should be allowed to use more than one process at a time.

## **6. How should retaliation against whistle-blowers be defined and how long should protection against retaliation exist?**

There are many kinds of actions that can be taken against a whistle-blower. Some of these may be the same as the disciplinary actions that could be taken against an employee in normal circumstances. There are two central issues covered by this question. The first is what forms of discipline taken against a whistle-blower will be defined as 'retaliation' (rather than ordinary, proper discipline). The second is how long a whistle-blower will have to complain after someone has allegedly taken an act of retaliation against him or her.

## **7. Should there be a reverse onus on the employer to demonstrate that adverse decisions on a whistle-blowing employee were not a reprisal?**

In Canada we operate on the basis that a person is innocent until proved guilty. Reverse-onus provides for the opposite. The central issue here deals with a situation where a whistle-blower feels that he or she has been unfairly punished for blowing the whistle. If that is the case should their employer (or fellow employee) have to prove that they did not retaliate against the employee? Or do we still assume that the employer is innocent and put the burden of proving retaliation on the whistle-blower?

## **8. What remedies should the legislation specify for employees judged to be adversely affected?**

Let us consider a situation where it has been determined that a superior or co-worker has improperly retaliated against a whistle-blower in their organization. The central issue here is, what kind of remedy should the whistle-blower receive? Should, for example, the whistle-blower receive financial compensation or should the focus be on changing how their workplace operates?

## **9. What consequences will there be for employees who engage in reckless or malicious accusations of wrongdoing and for managers who engage in reprisal against employees who act in good faith?**

Persons may blow the whistle in a situation where it is not warranted or for the wrong reasons. On the other hand, employers or co-workers may retaliate against employees who bring a legitimate complaint against them. The central issue here is, what penalties should there be for people who do either of these things? Should there be fines? Should the guilty party lose their job? Should a malicious or reckless whistle-blower or employer be subject to imprisonment?

## **10. Should whistle-blower protection legislation include a sunset clause similar to that found in section 35 of the *Ombudsman Act*?**

Section 35 of the *Ombudsman Act* requires that the Legislative Assembly renew the act every five years by passing a motion in the Assembly to that effect. If the Legislative

Assembly did not pass such a motion the act would cease to exist. The central issue here is whether the same should apply to whistle-blower protection legislation. The advantage of a sunset clause is that, if after a period of time the Assembly decides that the legislation is not needed or is not working, it can cause the Act to disappear, simply by not renewing it. The disadvantage of a sunset clause is that it may lead to uncertainty for those covered by the act. They won't be certain if it will be there to protect them when they need it. One might also argue that a sunset clause is not necessary because the Legislative Assembly can always repeal legislation that it feels is not working or has outlived its usefulness.

### **Written Submissions**

Individuals and groups who wish to make written submissions to the Select Committee on Whistle-blower Protection may do so by sending their documents by email to [yla@gov.yk.ca](mailto:yla@gov.yk.ca) or in hard copy to:

Hon. Ted Staffen, Chair  
Select Committee on Whistle-Blower Protection  
Yukon Legislative Assembly Office  
P.O. Box 2703 (A-9)  
Whitehorse, Yukon  
Y1A 2C6

The deadline for written submissions is 5:00 p.m. on January 22, 2010.

If you require further information about the work of the Select Committee on Whistle-blower Protection you may contact the Committee at the above address or at:

Email: [yla@gov.yk.ca](mailto:yla@gov.yk.ca)  
Phone: (867) 667-5494  
Toll-free: 1-800-661-0408 (ask for extension 5494)  
Fax: (867) 393-6280

Please note that submissions to the Select Committee on Whistle-blower Protection become the property of the Committee and may be posted to the Committee's webpage <http://www.legassembly.gov.yk.ca/310.html> or included (in whole or in part) in the Committee's final report to the Legislative Assembly. This report, once it is tabled in the Legislative Assembly, will become a public document.