

# A Framework for Thinking About Whistleblowing Systems

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## I. Introduction

Over the past years, various studies have been done that have identified some best practices with regard to whistleblowing systems.

This document is intended to supplement such documents in providing a further — organizational — lens through which to examine whistleblowing systems. What this small paper intends to do is to clarify that an assessment of whether a whistleblowing system is satisfactory needs to be made bearing in mind organizational structures and accountabilities.

## II. Whistleblowing and Organizations

I'll begin with what may seem a trite observation, but one that I believe has not been adequately thought about in relation to whistleblowing: a whistleblower is always involved in providing information for the benefit of others, usually for the benefit of some collectivity — an organization of some kind, a business, an educational institution, or a political entity such as a state (bearing in mind that all organizations are ultimately to serve the interests of their human members, shareholders, or citizens in the context of these people's interconnected relationships with others including the earth).

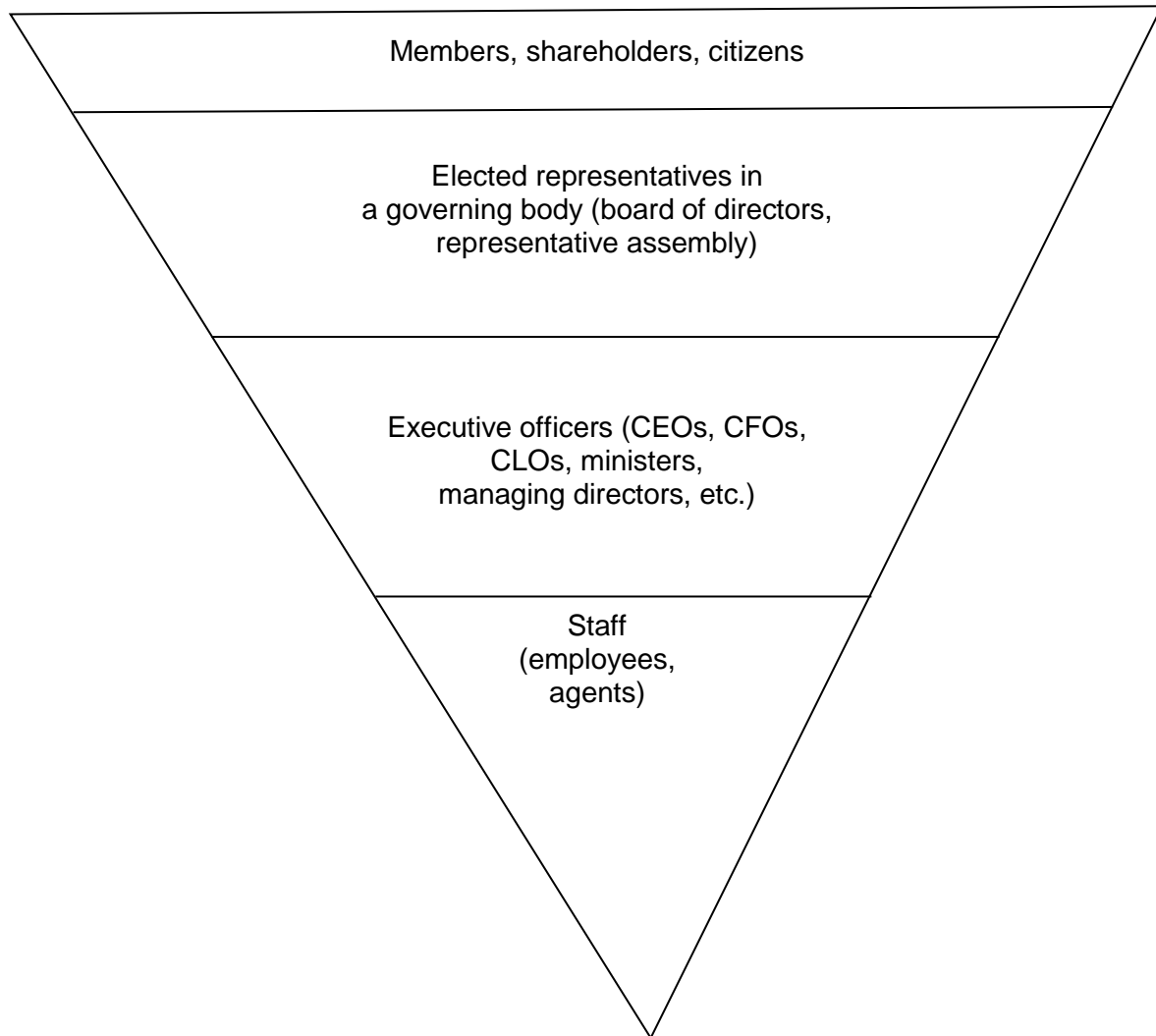
To understand what an effective whistleblowing system for a particular organizational context requires, one must first know the organization's own internal hierarchy of norms and authority. This provides one with the internal framework for the organization's internal system for reporting and correcting wrongdoing and protecting those who disclose it from harm.

But most organizations operate within a broader context of norms and authority — every corporation, for example, operates within the legal framework for its existence created by the state. That legal framework includes the Acts under which corporations come into existence and other laws governing the activities of persons subject to the state's authority.

So, for organizations that operate within a broader context, a complete and fully effective whistleblowing system must also account for that broader context and provide for appropriate reporting, corrective action, and protection when the whistleblower reports about her or his organization in relation to its broader normative context.

## III. A Typical Organization

In Canada (and many other parts of the world), an organization typically has a structure along the lines of what is shown in the following illustration. We often conceptualize the triangle in the inverted form of a pyramid, but that can be misleading.



## A. Members/citizens as highest authority

In terms of authority, organizations exist to serve their members, citizens, shareholders and because of that, they are the highest-level decision-makers. So, for example, in corporate organizations, typically a shareholder or member decision is a higher level norm than a decision of the board of directors<sup>1</sup>. In democratic states, this is always expressed in the citizens' rights to

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<sup>1</sup> An illustrative example: under the *Canada Business Corporations Act*

- section 173 requires amendments to the constituting document (its articles) to be made only on the approval of the shareholders by a special resolution (a resolution adopted by a majority of at least 2/3 of the votes cast);
- section 103 provides that by-laws may be made by the board of directors but must be submitted to the next meeting of shareholders and, unless then confirmed by the shareholders, the by-law ceases to have effect; and
- of course, and of fundamental importance, the directors are elected by the shareholders (section 106(3)).

choose their representatives in the representative legislative assemblies, but is also sometimes expressed through binding referenda or similar instruments of direct citizen decision-making.

## B. Elected representative body as next highest authority

The next highest level of authority in most organizations is the representative governing body. It could be a board of directors or a representative legislative assembly. In corporations, the authority of this body is typically provided for in the statutes providing for the establishment of corporations. For example, the *Canada Business Corporations Act*, in subsection 102(1), provides as follows:

### **Duty to manage or supervise management**

**102 (1)** Subject to any unanimous shareholder agreement, the directors shall manage, or supervise the management of, the business and affairs of a corporation.

In the political organization that is the Canadian state, we express the authority of the representative assemblies with the expression “the supremacy of Parliament”. What this is intended to convey is that any other person or body in the state is subject to the decisions and will of the representative assemblies: so executive officers are to “execute” or carry out the legislature’s decisions and are accountable to — and serve at the pleasure of — the legislative assembly.

The powers of executive officers are subject to the will of Parliament. While executive officers (ministers individually and the ministers acting together as the “Privy Council”) of the state may have customary or residual powers (sometimes called “prerogative powers”), those powers can at any time be altered by a decision of the legislature. In Canada and similar states with the supremacy of Parliament, executive powers are never beyond the reach of the elected representative body.

Even the courts are subject to the supremacy of Parliament: for example, common law remedies created by the courts can be modified or displaced by decisions of the legislatures, and thereafter the courts are to implement those remedies in accordance with the decisions of the legislatures (expressed in Acts).

## C. Executive officers as third highest authority

In parliamentary democracies such as Canada, executive officers serve at the pleasure of the elected representative governing body in that they serve only so long as they have the confidence of the representative assembly. However, by custom, it is effectively the prime minister (essentially the CEO) who decides what offices (i.e. what ministries) will exist and who will be the state’s officers in charge of each ministry or department.<sup>2</sup>

In a typical corporation, the board of directors decides what offices will exist and who shall occupy them<sup>3</sup>.

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<sup>2</sup> Note, however, that even this is definitely subject to the Parliamentary will. The federal Parliament has chosen to create specific departments or ministries (e.g. the *Department of Justice Act*) and these will continue to exist as decreed by Parliament unless some other power has been granted by Parliament to the executive officers to reorganize the state administration, such as by the *Public Service Rearrangement and Transfer of Duties Act*, RSC 1985, c P-34, <https://canlii.ca/t/hzxd> (retrieved on 2021-10-14). I submit further that if Parliament chose by statute to institute a system by which it would directly appoint ministers or require their appointment to be ratified by one or more Houses of Parliament, it could do so. The present system continues in place by the forbearance of Parliament to enact another.

<sup>3</sup> See, for example, section 121 of the *Canada Business Corporations Act*.

#### **D. The staff or administration as the fourth level**

All except the smallest of organizations also generally require a staff to carry out the organization's activities. The staff serves under the leadership of an organization's officers. In the organization that is the Canadian state, the staff is the public service.

Because there are those, even within the public service itself, who do not understand this, it is important to be clear that the public service is NOT employed by the cabinet, the ministers or the "government" (if we use that expression to mean the aggregate of state's officers for the moment having the confidence of the representative assembly). Public servants are in the "public administration". Their salaries are paid by the state. Their offices, the equipment they need to do their work, the infrastructure they use to do their work — all of it belongs to the state. A very thoughtless canard mindlessly repeated by many managers in the public service suggests that the public service "serves the government of the day". This is a fundamentally incorrect statement. As in any organization, the staff of the organization support the current executive officers of the organization to carry out their own roles in the organization. Of course they do. And in that sense, they work under the direction of, and support the work of, the executive officers of the moment. However, they are not employed by the officers and do not owe their duty of loyal service to them. Their duty of loyal service is always owed to the organization that employs them.

The truth that the casually incorrect statement about serving the government of the day is intending to express is that it is not the place of the staff of the organization to presume that they know better than the state's representative assembly who should be the executive officers of the state or what policies these executive officers support or propose to the representative assembly. Since the House of Commons or provincial legislative assembly has expressed its confidence in a cadre of executive officers, the staff's place is to serve under their leadership. And that means that in questions of policy choice (NOT in questions of existing law or statutory obligation), the state service accepts the leadership of the duly appointed executive officers, and does not seek to undermine or sabotage them or their policy choices.

That does not, however, mean that they will accept directions to disobey enactments of the legislature, or suppress information that those executive officers find inconvenient. An organization's staff have a duty to act in the interests of their employing *organization* including in the provision of accurate and complete information to the organization's officers (and, in appropriate cases to its elected representatives and its members, shareholders or citizens, see later in this article), whether they are happy to hear such truth or not.

#### **IV. Feedback: the Essence of Whistleblowing in an Organizational Context**

Any organization that makes decisions or takes actions wants to know what has, in fact, resulted from the decision or action — whether it has been carried out, what the outcomes were, what difficulties were encountered in carrying it out, what success was achieved, what, if any, perverse consequences were discovered to result.

Any healthy organization wants to know the truth: not just the good news of decisions being carried out by officers, management and staff and having the desired outcomes but also information of decisions being ignored, subverted, or having unwanted outcomes. The truth on these matters permits the organization to correct non-implementation or incorrect implementation of its decisions and, if the outcomes are not the desired ones, to modify the decisions or make new ones with the goal of achieving the desired outcomes.

Whistleblowing, from that perspective, does not deserve to be in any special category. It is merely the provision of feedback, of information relating to the organization's decisions and activities, so that the relevant decision-makers can take the appropriate actions.

But typically, whistleblowing involves some form of bad news. It often involves information about organizational actors failing to carry out the organization's decisions or objectives, subverting processes for non-organizational motives, taking actions that serve their own interests rather than the interests of the organization. Or, it may involve reporting honestly some undesired facts even if they are not directly anyone's fault. So, for example, if it becomes clear that an organizational project is going to be significantly delayed, go significantly over-budget, or has encountered a significant unexpected impediment, it is in the organization's interests to know this, but the responsible organizational actors may often be reluctant to be open with the organization about these facts, fearing it reflects — or will be taken to reflect — badly on them or their competence or job performance. And the reactions of such organizational actors may go far beyond unhappiness to active concealment or attacks on the persons reporting such information.

Basically, therefore, whistleblowing is not some special activity; it is part of the ordinary process of feedback that an organization needs in order to be able to assess the implementation and success or failure of its decisions and undertakings. It is essentially the "bad news" side of that feedback process. And because it is the bad news side, there is a much greater likelihood that persons involved in the bad news will actively conceal the facts, retaliate against, punish, marginalize, undermine, or otherwise injure a person considering reporting or actually reporting such bad news.

But, from the perspective of the organization, this information is among the most important information it can receive. While information that confirms the implementation of its decisions and the success of its projects is useful, it is particularly information about the failures in implementation or undesired outcomes that an organization needs in order to be equipped to take corrective action.

## **V. The Implications of the Organizational Context for a Whistleblowing System**

### **A. An organization's whistleblowing system must prevent information roadblocks at every relevant level within the organization**

When one bears in mind an organization's hierarchy of authority and norms, it soon becomes clear that an effective whistleblowing system must provide for information flow from all levels and to all levels of the organization.

#### **1. An illustration**

Imagine an employee of the organization becomes aware that her immediate supervisor within the organization's administration or staff is diverting the organization's funds to his own personal benefit (e.g. using the funds to pay for improvements to his own home). To address this wrongdoing, the information needs to be delivered at least to the level *above* the employee's supervisor, i.e. to a person with the power and authority to correct the situation.

If there is a higher management level (than the embezzler) within the organization, reporting to that level might address the issue (if the higher management takes the information, investigates, and remedies the situation, while protecting the reporting employee).



But, what if the employee's supervisor is the most senior manager in the organization's administrative unit, reporting directly to an organizational officer (e.g. the CFO). Now, the organization's interests in correcting this abuse of its resources can only be served through reporting to the officer level of the organization, i.e. to the CFO.

And if the wrongdoer was the CFO? Then the whistleblowing system must provide for a way for the information to reach the board of directors to whom the CFO is accountable.

And if the wrongdoer was a director on the board, again the information needs to have a path to reach the board as a whole or, if the board fails to take corrective action, the members or shareholders of the organization who can deal with the errant director and/or the other directors who failed to take corrective action.

So we can see that an effective whistleblowing system must provide for information paths to reach the very highest level of authority within the organization. If it stops at any point short of that, it is incomplete and leaves the organization vulnerable to wrongdoing (and it is worth bearing in mind that the higher in the organization the wrongdoer is located, the greater the harm to the organization the wrongdoer is likely capable of causing).

## **2. A special situation with regard to the state**

The structures of accountability in the state are somewhat complex. In Canada, it is true that we have a state structure that proclaims the supremacy of Parliament. But there is at least one wrinkle within that. Parliament does not act as the definitive interpreter of its own enactments, the courts of the state do this work (though a legislature could, if it is not pleased with the interpretation given to an Act by the courts, effectively overrule the decision through its enactments to clarify its intention).

What this means, therefore, is that in some circumstances — such as the misinterpretation of an enactment — the reporting channels for within-the-state wrongdoing must allow for the relevant information to be brought before the courts and resolved there. In other cases, it may be sufficient for the information to come before the representative assembly.

## **3. A common shortcoming**

Whistleblowing systems commonly provide for reporting to senior members of an organization's staff. Sometimes they provide for reporting to the organization's representative governing council or body. They almost never provide for matters to be brought before the courts. And existing systems virtually never clearly and expressly provide for reporting to the very highest level of authority in the organization: its shareholders, members, or citizens.

States have, through Access to Information ("ATI") statutes, recognized the importance for democratic accountability of information being provided to citizens. But whistleblowing statutes have not, in general, clearly taken citizens' interests into account. Perhaps there needs to be better integration of whistleblowing and ATI regimes, so that a person in the state apparatus would be free to initiate a disclosure of information or documents to the public in relation to any matter or document to which the public would have a right under ATI (and be protected from reprisals for any such disclosure). Transparency might become more of a habit and less of an exception if this were the case.

Very limited transparency to members and shareholders is also common among non-state organizations.



## **B. A whistleblowing system must, for non-state organizations, facilitate appropriate reporting to state authorities (i.e. outside or beyond the organization)**

As stated earlier, non-state organizations — such as corporations, universities, churches, or other organizations that operate within a state-created legal framework — often are subject to obligations imposed on them by the state.

For example, a mining corporation may be subject to state laws that require it to process mining tailings in ways that prevent them from polluting nearby rivers, lakes or groundwater. There is a compelling public interest in the protection of such waters and that is why the public, through the state, has imposed environmental obligations on the mining corporation.

Now imagine that a particular mining corporation was failing to comply with the relevant environmental requirements (and thereby jeopardizing the safety and well-being of the earth that these requirements sought to protect). An employee of the mining corporation who becomes aware of the failure to comply may be acting in the corporation's interests by reporting this within the organization. But imagine that the corporation's highest internal authority, its shareholders, on being made aware of the situation do not wish to correct it (as it permits short-term higher profits and thus benefits them in that way). Should the state permit or encourage reporting by such an employee to the relevant state authorities so that the pollution could be stopped? In general, it seems clear that the public interest is served by such reporting.

If the public interest would be served by such reporting, then a complete whistleblowing system for the corporation must include an aspect outside the corporation itself. This aspect of the system cannot be fully provided by the organization itself. It must be provided or supported by enactments of the state. The state would need to, by law, provide for the making of such disclosures and the protection from reprisal of the employees or other persons who make them.

## **VI. Questions to Ask of a Whistleblowing System**

There are many questions for whistleblowing systems that flow from an understanding of the importance of organizational structures. The following are only illustrative and nowhere near exhaustive. The object of this paper is not to replace the excellent documents that already exist with regard to key elements of whistleblowing systems<sup>4</sup>, but to add a particular lens for the examination of such systems. In other words, when asking about the particular qualities set out in such best practices documents, we should ask about those qualities in light of the entire relevant structure of the organization.

Only for the purposes of example, what follow are some illustrative questions.

### **A. Can a whistleblower at any level of an organization communicate the relevant information to persons in the level above that of the wrongdoer or other person impeding communication?**

The difficulties typically lie at the higher levels of wrongdoing (which, it bears repeating, are also the ones with the most potential for serious harm, as the power and influence of actors increases the higher they are in the organizational structure).

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<sup>4</sup> Among these documents are *International Best Practices for Whistleblower Policies*, a publication of Government Accountability Project ([https://whistleblower.org/wp-content/uploads/2018/12/Best\\_Practices\\_Document\\_for\\_website\\_revised\\_April\\_12\\_2013.pdf](https://whistleblower.org/wp-content/uploads/2018/12/Best_Practices_Document_for_website_revised_April_12_2013.pdf)) and *Whistleblowing Systems: A Guide*, a publication of the CSA Group (<https://view.csagroup.org/qn7TTM>).

- Does the whistleblowing system allow whistleblowing information to be given to senior management staff?
- Does it allow information to be given to officers of the organization when the wrongdoing is at the senior staff management level?
- Does it allow information to be given to the elected representative governing body when the wrongdoing is at the organizational officer (CEO, CFO, CLO, minister, prime minister, etc.) level?
- Does it allow information to be given to the ultimate “owners” of the organization, its citizens, members, or shareholders if the elected representative governing body fails to act or if the “owners” interests are served by such a communication?
- In cases where a non-state organization acts unlawfully, does it allow disclosure to the responsible state authorities?
- If the system uses a designated official to head up its disclosure office/program, is this official protected from adverse consequences (dismissal, non-renewal of appointment, etc.) that high-level persons in the organization might wish to impose if that official pursues disclosures of their wrongdoing?

## **B. Is a whistleblower protected with regard to each level of disclosure?**

Does the whistleblowing system provide for the protection of the persons providing the disclosure at all of the levels of disclosure? For example,

- If a deputy minister were to fail to inform (or misinform) the minister of certain important information, will it protect the employee in the Department who advises the minister of this?
- If a minister were to mislead the representative assembly, and refuse to correct the misinformation, would it protect a deputy minister who disclosed the truth to the assembly?
- Does the legal structure favour the protection of information of unlawful state actor activity over the rights of the public to know of it (e.g. through criminalizing such disclosures<sup>5</sup>)?

## **C. Are there adequate investigative powers for all levels of wrongdoing?**

Does the chief whistleblowing system official have the power to receive all relevant information, to conduct thorough investigations, and, if necessary compel production of documents or examinations under oath of all relevant actors? For example,

- Does the whistleblowing system mistakenly provide that information within the organization that is subject to solicitor-client privilege (and remember that solicitor-client privilege for advice given to someone acting in an organizational capacity belongs to the *organization*, not the official to whom it was given!) is off-limits to that organization’s own chief whistleblowing official?
- Do notions such as cabinet confidentiality or executive privilege mistakenly protect information about wrong-doing at the executive level? Or is it understood that such notions are always intended to serve the overall organizational interest?

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<sup>5</sup> An example of this is the legislation under which Edward Snowden’s disclosure of NSA illegal activity was itself (potentially) illegal under the *Espionage Act*. See Mark Friedman, “Edward Snowden: Hero or Traitor? Considering the Implications for Canadian National Security and Whistleblower Law”, (2015) 24 Dal J Leg Stud 1.

#### **D. Is access to the courts provided for?**

Since the judicial system, humanly imperfect as it is, is often the highest verdict other than an electoral one, a complete whistleblowing system must provide for access to the courts to resolve issues arising out of wrongdoing or its reporting.

- Is there a “gatekeeper” for such court access other than the courts themselves?
- Is it clear that the courts have the authority, if they consider the resolution of the matter before them to be in the organization’s own interests, to order that all parties’ costs be paid out of the organization’s funds?

### **VII. A Final Caution: Moral Considerations Transcend the State**

This small paper ends its hierarchy of norms and decisions at the level of the state. However, I think that the reader ought to bear in mind that the law (expressing decisions of state legislatures or courts) is itself often limited and is capable of being perverse (statutes have perversely protected slavery, dispossessed and disempowered indigenous peoples, etc.).

As for the law’s limitations, the state cannot be the instrument through which every difficulty is solved. So moral actors may need to act through channels beyond those of the state. We recognize this reality through the existence of many voluntary NGOs, churches, and similar institutions, and through individual acts of kindness or help.

As for moral perversity, a complete whistleblowing system within the state can address failings of entities subject to the state (such as corporations) and of actors within the state, but it cannot address failings by the entire state. Where the decisions of the state’s legislatures and courts are both morally repugnant, a moral actor may well see the need to go beyond the requirements of the law and potentially to act without regard to such perverse law. So, for example, persons faced with statutes and jurisprudence that supported the oppression of slavery acted in defiance of the state and its laws to assist at least a few of the oppressed to escape their oppression.

A state’s whistleblowing system cannot address such situations. But any person thinking about the morality of their own conduct must be aware of the such limitations of law. In other words, whistleblowing systems can be highly useful, but they form part of the web of the law and are subject to its limitations.