

Whistleblowing

Introduction

Whistleblowing involves a member of an organisation releasing information (either to the public or to public authorities) on wrongdoing within that organisation. It is a feature of most contemporary integrity systems and interlinks in several important ways with the professions.

This title explains the nature of whistleblowing, and its many different types. It notes whistleblowing's associated risks and costs and describes the ways whistleblowing can be morally justified and legally protected. It considers the specific ways whistleblowing relates to the professions – including through professional codes and professional bodies.

Key Concepts: Defining Whistleblowing

The classic case of whistleblowing is straightforward. An employee becomes aware of serious wrongdoing being perpetrated within their organisation. When attempts to resolve the problem internally are rebuffed, the employee releases information into the public sphere, usually through a journalistic outlet. The revealed information seizes public attention and provides grounds for suspicion of wrongdoing. Investigation by the relevant authorities ensues.

For our purposes, the following attributes define an act as whistleblowing, and distinguish it from other, similar, activities. Whistleblowing involves:

- *Entrusted information or access:* Whistleblowers are insiders. They are members of an organisation, or people (especially professionals like lawyers or accountants) who have been otherwise entrusted with privileged access to the organisation's workings. Acts of whistleblowing involve releasing this entrusted information.
- *Unauthorised release of information:* Whistleblowers go outside the official channels set down by the organisation for dealing with wrongdoing. Whistleblowers may go to higher-level executives within the organization, to the relevant public authorities, or to the public – sometimes to all three in succession.
- *Proactive stance:* Whistleblowers' responses to wrongdoing are usually unsolicited. Reporting unwelcome news to one's superiors as part of one's job may implicate many of the challenges raised in whistleblowing – as can testifying honestly to an authority's formal questions. However, whistleblowing involves a decision to pro-actively report the wrongdoing.
- *Accomplishment:* 'Whistleblowing' connotes an achievement – namely, that the whistleblower has succeeded in exposing wrongdoing to public scrutiny. This accomplishment normally requires that the wrongdoing in question was serious, and that the whistleblower was able to provide sufficient evidence to secure the attention of authorities or the public.

Key Concepts: Types of Whistleblowing

Theorists distinguish several types of whistleblowing, all of which can be relevant to whistleblowing in the professions:¹

- *Internal vs. External Whistleblowing*: Internal whistleblowers go outside official channels to raise awareness of the wrongdoing. However, the incriminating information is kept within the organisation itself. External whistleblowing remains the canonical case of whistleblowing, where information is released to independent parties outside the organisation.²
- *Open vs. Anonymous Whistleblowing*: Because of the high risks of retaliation (see below), some whistleblowers choose to keep their identity hidden. In other 'open' cases, whistleblowers expose their identity, often to lend credibility and gravity to their accusations.³
- *Personal vs. Impersonal Whistleblowing*: Personal whistleblowing involves the exposing of wrongs done to the whistleblower. Impersonal whistleblowing reveals generic wrongdoing, or harms to others, including other employees, clients, consumers or stakeholders.
- *Governmental vs. non-governmental whistleblowing*: Governmental whistleblowing may be distinguished from private sector whistleblowing, as it implicates concerns with public interest and accountability. The need to 'go public' may be stronger in the case of government, as the relevant authorities may, themselves, be incriminated in the wrongdoing.

Risks and Costs of Whistleblowing

Whistleblowing is a high-stakes endeavour and is rarely undertaken lightly. The potential pitfalls can be moral and occupational.

Moral risks

Whistleblowing can involve a number of apparently worrying activities. Whistleblowers may be thought to betray the loyalty and honesty they owe to their organisation, or their colleagues; they may act with incomplete knowledge; they may release sensitive, proprietary and even top-secret information; and, they are usually unable to control the fallout from the information's release. Sometimes, whistleblowing can be performed for vexatious or self-interested reasons.⁴

¹ Richard T. De George, *Business ethics* 6th ed, (Pearson, 2006), Ch.12; Michael Davis, 'Whistleblowing' in Hugh LaFollette (ed), *The Oxford Handbook of Practical Ethics* (Oxford University Press, 2005).

² Some theorists hold that only external releases should count as whistleblowing. See, e.g., Damian Grace and Stephen Cohen, *Business Ethics* (Oxford University Press, 5th ed, 2013).

³ De George, *Business Ethics*, 314.

⁴ See, eg, Grace and Cohen, *Business Ethics*, 230.

Often, these seeming concerns wilt under examination. Loyalty, honesty and promise-keeping to the organisation rely on a reciprocal respect that the organisation grants its employees.⁵ If the organisation makes its employees complicit in serious wrongdoing, and refuses to resolve this issue through normal channels, it surrenders any rights to respectful treatment.

Moral concerns with respect to work colleagues and team-mates – and even mentors and friends – may remain relevant. Ordinary workplaces create a web of moral relationships, built around trust, good faith intentions and reciprocal support. Whistleblowing may require a level of subterfuge that clashes with such personal attachments.⁶

The prospect of unintended consequences looms large in any moral reckoning. To be effective, external whistleblowing must achieve widespread public attention. The ensuing scandal will often impact the overall organisation, creating reputational damage with significant knock-on effects. Paeth highlights the potentially tragic dimensions of the practice, as whistleblowers try to navigate “the tension between two deeply held and subjectively binding sets of obligations, neither of which can be let go by the agent without some moral sacrifice.”⁷

Occupational and personal risks

The prospective whistleblower must consider the risks to their wellbeing and career. In the most extreme cases, involving claims of national security, there may be legal risks, even when the whistleblower successfully exposes serious wrongdoing, criminality, or war crimes (as occurred with the leaking of information by Edward Snowden and Bradley Manning (and also the historical case of Clive Ponting)).⁸ Outside of national security cases, whistleblowers are on stronger legal ground. A confidentiality clause preventing employees from reporting breaches of criminal law (including ‘regulatory offences’ punishable only by fines) would, almost certainly, be voided by a Court as contrary to public policy. But the existence of such a clause could be used to intimidate even the legally well-advised.

Yet, even if legal risks remain small, the risks of institutional retaliation against whistleblowers are enormous.⁹ Research demonstrates that executives’ careers can suffer for reporting wrongdoing, even when disclosure is entirely in line with their institutional mandate and operates wholly within official channels.¹⁰ If the bearer of bad news is punished merely for performing their mandated duties, this gives a sense of the type of institutional blowback invited by the external whistleblower. When they are not simply fired or hounded out of

⁵ Scott Paeth, ‘The Responsibility to Lie and the Obligation to Report: Bonhoeffer’s “What Does It Mean to Tell the Truth?” And the Ethics of Whistleblowing’ (2013) 112 *Journal of Business Ethics* 559; Davis, ‘Whistleblowing’.

⁶ Davis likens the emotional fallout to one of going through a divorce. Davis: ‘Whistleblowing’, 14.

⁷ Paeth, ‘The Ethics of Whistleblowing’, 560.

⁸ British Broadcasting Corporation, *Blowing the whistle on Belgrano* <http://news.bbc.co.uk/onthisday/hi/dates/stories/february/16/newsid_2545000/2545907.stm> (accessed 1 August 2017).

⁹ De George, *Business ethics*, 304, 319.

¹⁰ Davis, ‘Whistleblowing’, 12.

their job, whistleblowers are routinely shunned, blackballed and treated as pariahs, often across entire industries.

Moral Justifiability

Moral concerns shape the definition of whistleblowing. Usually, to describe a particular act as a case of whistleblowing is, at once, to claim the act needs justification – and to claim that the act, in fact, could be justified.¹¹

The moral benefits that whistleblowing performs (including in professional contexts) are widely recognised by the general public and elected representatives.¹² Whistleblowing shines a light on past or present wrongdoing, allowing an authoritative investigation and public response to occur. An ongoing or future harm may be averted by the publicity. Whistleblower-driven scandals sometimes create the impetus for large-scale structural reforms of an entire industry. The risk of exposure from such scandals can also impel organisations to improve their ethical behaviour, or to create less-damaging means for employee dispute resolution (such as through internal hotlines).

With these factors in mind, commentators list several factors that combine to justify a given act of whistleblowing.

- *Serious wrongdoing*: Whistleblowing is inappropriate for minor infractions. To be successful, the wrongdoing must be serious enough to seize public attention, and will almost always involve wilfully violating the law or established regulations. With respect to whistleblowing to the authorities, the bar may be set lower, as the authorities themselves will be in a position to judge the seriousness of the wrongdoing and respond proportionately.
- *Accuracy of accusation*: Accusations of wrongdoing must stand up under investigation. Normally, this will require the whistleblowing having strong evidence. However, investigating authorities often rely on the collection of information from a range of sources, none of which, individually, involves strong evidence, meaning a whistleblower's revelations can still be valuable if they form part of a large picture.
- *Attempt at internal resolution*: The whistleblower must have tried internal, official channels before resorting to external release (or must, at least, have had reason to believe such channels would be unsuccessful). To the extent that an organisation does not provide credible and confidential channels, it must shoulder responsibility if it suffers reputational damage from whistleblower's accusations.

¹¹ See Davis, 'Whistleblowing', 2.

¹² See, eg, Stephen Bolsin et al, 'Whistleblowing and patient safety: the patient's or the profession's interests at stake?' (2011) 104 *Journal of the Royal Society of Medicine* 278.

- *The public's right to know*: The more the wrongdoing impacts on the public, and the more the public possesses a right to know the revealed information, the more justifiable will be the whistleblowing. This consideration can guide the whistleblower's selection of outlets for the information's release (professional bodies, authorities, journalists or online repositories like Wikileaks). This 'right to know' is particularly important when public bodies collect information on behalf of, and at the expense of, the public. Such knowledge is the people's property, and there must be good (non-partisan) reasons to withhold that property from the people.

Other relevant considerations include:

- *Prospect of success*: Given the likelihood of unwanted fallout from the whistleblowing, some commentators argue that the whistleblowing must have a reasonable chance of preventing harm or wrongdoing.¹³ Others see this as a more prudential, rather than moral, consideration.
- *Altruistic*: Whistleblowing will be most justified in cases of impersonal whistleblowing, where the whistleblower does not stand to gain from the action. While this condition rules out vexatious accusations, it must not be overplayed: whistleblowers are human beings, with complex motivations for their actions.¹⁴ Given the huge personal costs that most whistleblowers face, it is arguable that integrity systems should have institutions that compensate whistleblowers with a portion of funds recovered or fines collected (as occurs in some jurisdictions).

Whistleblowing that meets these several conditions will be morally justified. But will it be morally required? Ethicists disagree on this question, with some holding that the serious personal risks involved mean that whistleblowing must count as a heroic, rather than a morally obligatory, action (a 'supererogatory' act¹⁵). Generally, the more closely the employee is enmeshed in the wrongdoing (the more inaction would amount to *complicity*), and the more serious the harms to lives that exposure could prevent, the stronger will be the moral obligation to blow the whistle.

Whistle-blower Protection

The likelihood of institutional retaliation against whistleblowers – even in cases where their revelations prevent grave harms – have impelled many jurisdictions to enact whistleblower protection laws. These laws have significant limitations. While they can prevent overt reprisals, such laws offer little prevention against informal measures, such as passing over for promotions and assigning unpleasant jobs.¹⁶ The coverage of such laws also remains uneven. Different jurisdictions cover different sectors with different protections and may only protect those who blow the whistle on certain types of wrongdoing.¹⁷ The high probability of

¹³ See, e.g., De George, *Business Ethics*, 308.

¹⁴ Paeth, *Ethics of Whistleblowing*'.

¹⁵ Grace and Cohen, *Business Ethics*.

¹⁶ De George, *Business Ethics*, 319; Davis, 'Whistleblowing'.

¹⁷ For an outline of the protections in the US, UK and Australia, see Peter Bowden, *In the public interest: Protecting whistleblowers and those that speak out* (Tilde University Press, 2013).

retaliation, and the uneven nature of legal protections, drives many calls for better education on the topic, in order to furnish prospective whistleblowers with adequate knowledge of their rights and risks.

Currently in Australia, the *Public Interest Disclosure Act 2013* (Cth) offers certain protections to Commonwealth public officials, and contractors, who make a “public interest disclosure” to an investigating entity. Separate (and somewhat different) Acts cover whistleblowing public officials at the state and territory levels. PART 9.4AAA of the *Corporations Act 2001* (Cth) offers explicit protections for private sector whistleblowers who fulfil the relevant conditions.¹⁸ However, the Act has serious limitations. It applies only to breaches of corporations’ legislation,¹⁹ and fails to protect whistleblowers who expose other illegal, criminal or harmful activities.

Whistleblowing in the professions

Professions have to consider how to handle whistleblowers as clients, as clients’ adversaries, and as colleagues. Their roles as journalists or lawyers might be to work with and protect whistleblowers – but these same professions (and even medical professions²⁰) have been utilised by wrongdoing organisations to discredit whistleblowers.

Sometimes, professionals will blow the whistle themselves. Professionals routinely enjoy privileged access to high-level and sensitive information – and often possess the expertise to perceive its potential ramifications (doctors and nurses for patient outcomes, engineers for structural safety, accountants for bookkeeping accuracy, and so on). Handling whistleblowers thus constitutes a key part of professional integrity systems.

There are three areas where professional obligations interweave with whistleblowing practices.

Professional obligations to blow the whistle

Professional codes can lay down duties that require whistleblowing. For example, some codes of nursing ethics frame the nurse as an advocate for patient wellbeing, laying down an explicit obligation “to report behavioural failures in the organization”.²¹ In the multi-professional hospitals that constitute the major employer of nurses, this obligation can require standing up against other professionals. In Australia, nurse Toni Hoffman famously blew the whistle on the deadly wrongdoing of surgeon Jayant Patel.²²

¹⁸ ASIC, *The Corporations Act and Whistleblowers - Video Transcript* <<http://asic.gov.au/about-asic/asic-investigations-and-enforcement/whistleblowing/the-corporations-act-and-whistleblowers-video-transcript/>> (accessed 1 August 2017).

¹⁹ The Conversation, *Patchy Laws Leave Corporate Whistleblowers Vulnerable* <<https://theconversation.com/patchy-laws-leave-corporate-whistleblowers-vulnerable-58406>> (accessed 1 August 2017).

²⁰ Grace and Cohen, *Business Ethics*, 227.

²¹ Abraham Mansbach and Yaacov Bachner, ‘Internal or external whistleblowing: Nurses’ willingness to report wrongdoing’ (2010) 17 *Nursing Ethics* 483.

²² Bowden, *In the public interest*, 7-8.

Whistleblowing on clients

The most challenging cases occur for professionals when the wrongdoer is a client – whose revelations may be protected by confidentiality obligations, such as lawyer-client privilege. However, in most cases where this situation arises, the professional code of ethics provides an exception. For example, one of the explicit exceptions to lawyer-client privilege regards *future* criminal acts. The classic example is a parent ringing their lawyer from the airport to say that they are going to take their child out of the jurisdiction, rather than returning the child to the parent with custody.²³ Sometimes, professionals may have a legal obligation to report past wrongdoing admitted by clients and others – e.g., social workers with regard to child abuse.

Whistleblowing on colleagues

Professional ethics can offer clear guidance, and specific institutional processes, to require and empower professionals to report on their colleagues in cases of major breaches. For example, lawyers' obligations as officers of the court require them to report other lawyers' breaches – rarely to the court directly but instead to the relevant professional ethics or disciplinary committees. Such complaints can be confidential. However, in investigating misconduct of lawyers, the relevant committee almost always possesses the ability to go behind lawyer-client privilege – though only in order to determine if the lawyer has engaged in wrongdoing.

There are cases where codified professional obligations press in a quite opposite direction. Bolsin et al cite a code which states that: "depreciation by a doctor of the professional skill, knowledge, qualifications or services of another doctor could amount to Serious Professional Misconduct".²⁴ The authors observe that the General Medical Council have indeed investigated and prosecuted doctors for raising legitimate concerns – creating ambiguous and conflicting obligations for good faith whistleblowers.

In all these cases, there is a role for the professional organisation, which has an interest in its members' ethical and competency standards, and in supporting its members when they stand up for those standards. At its best, the professional organisation can play a helpful intermediary role in whistleblowing processes, as it remains independent of the employing organisation – but not fully public in the manner of news media.

²³ This is covered by what some call the 'delinquent client rule': Charles Sampford, 'Goldsmith's delinquent client' in Hugh Breakey (ed), *Law, Lawyering and Legal Education: Building an Ethical Profession in a Globalizing World* (Routledge, 2017) 285.

²⁴ The code is in a 1980s edition of the 'Blue Book'; see Bolsin et al, 'Whistleblowing and patient safety', 279.

Summary

Whistleblowing is a double-edged sword – and all too often it harms the principled, good faith employees who wield it. For this reason, a perfect integrity system, whether private, public or professional, would not need whistleblowers or whistleblower protections. But no human system is perfect. There is, thus, a continuing need for whistleblowing education, institutional guidance, and protection in law, even as further integrity mechanisms are developed to mitigate the need for whistleblowing.

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This subject overview has been written with the support of the following partners:



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Australian Research Council



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