



WHO, WHAT, WHY OF

Whistleblower Protection

FOR THE PACIFIC





BACKGROUND AND ACKNOWLEDGEMENTS

The booklet has been developed by the PILON Environmental Crime and Corruption (ECC) Working Group for the benefit of PILON member countries and is designed to be read in conjunction with the PILON *Guiding Principles for Protecting Whistleblowers and Encouraging Protected Disclosures*. The principles and the booklet are not intended to be prescriptive but are designed to stimulate further thought and consideration of how these policies might contribute to the broader Pacific anti-corruption agenda. Consideration has been given to some of the real challenges faced by Pacific Island countries in shaping and implementing these types of systems and a number of ideas are posed for how they might be overcome. It is hoped that this resource will assist Pacific Island countries with the implementation of Sustainable Development Goal 16, in building effective, accountable and inclusive institutions and the United Nations Convention Against Corruption (UNCAC), to which many Pacific nations are a party.

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INTRODUCTION



by PILON Environmental Crime and Corruption (ECC) Working Group Chair,
Mr Graham Leung, Secretary for Border Control and Justice, Nauru

Whistleblowing is a vital tool for combatting corruption, playing an important role in the detection and prevention of wrongdoing. By helping to expose corruption, whistleblowers promote an informed society and provide an essential and valuable service to the public.

Unless legal protections are in place to protect whistleblowers, they will most likely remain silent. Reporting of misconduct or wrongdoing can come at a high price, often at great personal risk. Without the benefit of inside knowledge, misconduct in the public sector can often be difficult to detect and report. Effective laws that protect whistleblowers help prevent and mitigate against acts of retaliation taken against them, and encourage people to come forward and report misconduct. Effective whistleblowing laws can assist and promote the twin goals of greater transparency and accountability and have the potential to encourage a culture where honest disclosures are respected and valued, rather than those making the report being punished.

There are many examples of wrongdoing in the public sector that lend themselves to reporting, such as contravention of an Act of Parliament, misuse of public funds or a public asset, gross mismanagement in the public sector, an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment.

Strong laws are one instrument in a suite of measures aimed at increasing confidence in the accountability and integrity of governments, and in the eyes of the communities they serve. In this regard, whistleblowing legislation is an important buttress supporting democracy and democratic institutions. The PILON ECC Working Group has developed this booklet with the intention of encouraging continued discussion and identification of public interest disclosure schemes that are tailored for the unique political, cultural and social context of the Pacific. It is intended to contribute to the broader anti-corruption agenda in the Pacific and provide countries with the tools necessary to implement effective internal whistleblower policies and mechanisms, as a step in meeting the Boe Declaration's objective of creating a more secure environment in the Pacific.



What do whistleblower laws aim to achieve and how do they fit within the broader anti-corruption framework?

What is Whistleblowing?

Whistleblowing is the disclosure of information about a perceived wrongdoing within an organisation.¹ A whistleblower is a person who has a reasonable belief that wrongdoing has occurred and provides information to the proper authority or media regarding the wrongdoing.

The term 'whistleblower' is a metaphor for an umpire or referee who blows a whistle to alert players that a rule has been broken or a wrongdoing has occurred. Whistleblowing legal frameworks are designed to encourage people to report corruption, and other types of wrongdoing, such as malpractice, misfeasance and maladministration. Whistleblowers may be referred to by different terms in different cultures. In cultures where the term whistleblower has a pejorative or disapproving implication, the use of protected, or public interest, disclosure and 'person making the report' or 'reporter' are preferred terms to describe the behaviour.

Corruption has been defined as the abuse of public office, or entrusted power, for private gain. Examples of corrupt activities are bribery, embezzlement, the misuse of public funds and/or resources and misusing a position of influence for gain.

Corruption exacerbates already poor living conditions by diverting resources from the public budget for private benefit. Consequently, there is less public money available to spend on necessities such as medicine, hospital upgrades and public health, as well as education and infrastructure. Importantly, corruption weakens political institutions and citizen participation, having a significant impact on public trust in government institutions and incentive to engage in productive economic activities.² The cost of corruption weighs heavily on society. The World Economic Forum estimates that the cost of corruption today equals more than 5 percent of global GDP (\$2.6 trillion).³

By reporting corruption, whistleblowers help their communities benefit from public resources and in this way are superheroes.



1 Transparency International – UK, Recommended draft principles for whistleblowing legislation, 2009, 1.

2 USAID – Corruption and Poverty: https://pdf.usaid.gov/pdf_docs/PNACW645.pdf

3 Patrick Keuleers, Fighting corruption for global peace, development and security, 2017, <http://www.undp.org/content/undp/en/home/blog/2017/fighting-corruption-for-global-peace--development-and-security.html>.





Corruption is paid by the poor.

– Pope Francis

Studies of the Pacific region suggest that corruption remains a problem in many islands of the region, despite varying levels of policy and legal frameworks aimed at addressing it.

Pacific Island – internal corruption

In 2009-10, 12 government workers from a Pacific Ministry of Finance and Ministry of Health conspired to defraud the government of large sums of money. This fraudulent activity included money that had been provided in the form of grants. Those involved in the conspiracy split the proceeds amongst themselves.

This ring came to light during the process of investigations, following the testimony of one of the defendants who agreed to testify against the others and expose the government employees involved.

The greatest impact of the fraudulent behaviour was on the community including individuals and businesses as the government has struggled securing future grant monies as a result of the fraud.

When you see corruption, when you see injustice, you speak up. You don't just shut up and say it's none of my business.

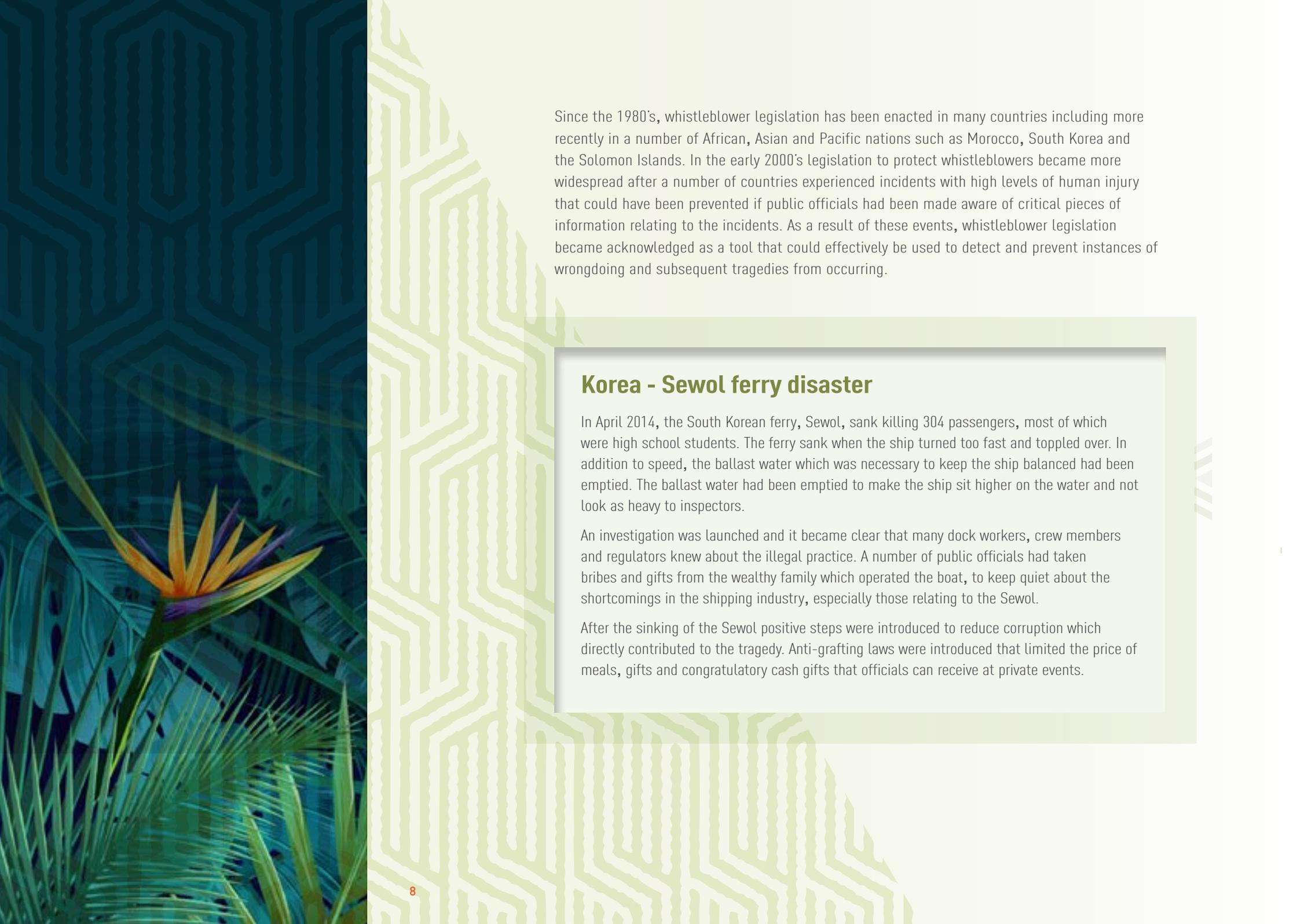
– Manal al-Sharif

Whistleblowing policies are an essential part of an anti-corruption framework as they encourage people to report illegal or wrongful conduct by providing confidence that they will be protected from retaliation. Such frameworks, by providing a channel for reporting, also increase the chances of the wrongdoing being investigated. When whistleblowing is included as an established mechanism in an anti-corruption framework, it heightens the chance that instances of corruption and wrongdoing will be detected in a timely manner. For instance, in 2011, the US Attorney's Office recovered \$24 billion on behalf of Government programs, the majority of which was recovered because of disclosures made by whistleblowers.⁴



⁴ United States Department of Justice, Civil Division, FY 2011 Performance Budget Congressional Submission, 2011.





Since the 1980's, whistleblower legislation has been enacted in many countries including more recently in a number of African, Asian and Pacific nations such as Morocco, South Korea and the Solomon Islands. In the early 2000's legislation to protect whistleblowers became more widespread after a number of countries experienced incidents with high levels of human injury that could have been prevented if public officials had been made aware of critical pieces of information relating to the incidents. As a result of these events, whistleblower legislation became acknowledged as a tool that could effectively be used to detect and prevent instances of wrongdoing and subsequent tragedies from occurring.

Korea - Sewol ferry disaster

In April 2014, the South Korean ferry, Sewol, sank killing 304 passengers, most of which were high school students. The ferry sank when the ship turned too fast and toppled over. In addition to speed, the ballast water which was necessary to keep the ship balanced had been emptied. The ballast water had been emptied to make the ship sit higher on the water and not look as heavy to inspectors.

An investigation was launched and it became clear that many dock workers, crew members and regulators knew about the illegal practice. A number of public officials had taken bribes and gifts from the wealthy family which operated the boat, to keep quiet about the shortcomings in the shipping industry, especially those relating to the Sewol.

After the sinking of the Sewol positive steps were introduced to reduce corruption which directly contributed to the tragedy. Anti-grafting laws were introduced that limited the price of meals, gifts and congratulatory cash gifts that officials can receive at private events.

WHO SHOULD BE PROTECTED?

The scope of whistleblower protection should be broad, covering the widest possible class of people.





A case of mistaken identity – retaliation against the wrong person

After a disclosure has been made, ECC Working Group members identified the propensity for rumour (or the 'coconut wireless') amongst small Pacific Island communities about what has occurred. It is not an unlikely scenario (especially if the identity of the person making the report is anonymous, or kept confidential) that rumours could lead people to mistakenly identify a discloser, when in fact they are not the person who made the report. As such, it is important that if retaliation is taken against a person who did not make a report that person is also protected under the whistleblowing policy for any retaliatory actions.

Impact on friends and family of the whistleblower

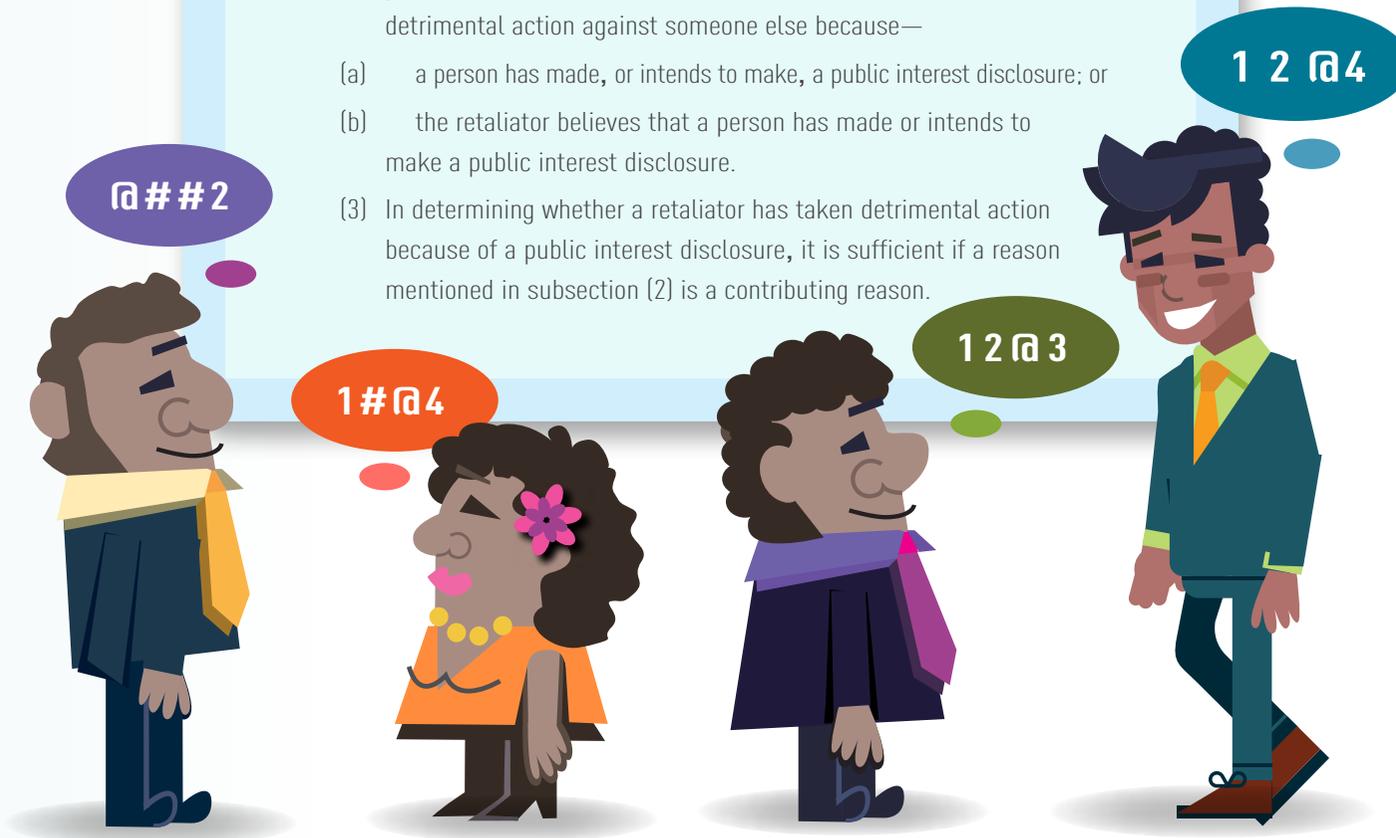
ECC members have identified that it is particularly important for whistleblowing legislation/policies to provide protection to the family and friends of a person making a disclosure. This is because there is a cultural perception that a person should not report any suspicious activity, even if that activity is evidence of corruption. On occasion, this attitude can mean that when a person does make a public interest disclosure, others in the community react negatively and retaliate. The retaliation may extend to the family and kin of the person who made the disclosure.



Providing protection for a wide class of people in legislation can be achieved by creating offences that cover a broad category of persons against whom retaliatory action has been taken. The Australian *Public Interest Disclosure Act 2012 (ACT)* is an example of this approach.

40 Offence—taking detrimental action

- (1) A person commits an offence if the person (the **retaliator**) takes detrimental action because of a public interest disclosure.
Maximum penalty: 100 penalty units, imprisonment for 1 year or both.
- (2) For this Act, a retaliator **takes** detrimental action because of a public interest disclosure if the retaliator takes, or threatens to take, detrimental action against someone else because—
 - (a) a person has made, or intends to make, a public interest disclosure; or
 - (b) the retaliator believes that a person has made or intends to make a public interest disclosure.
- (3) In determining whether a retaliator has taken detrimental action because of a public interest disclosure, it is sufficient if a reason mentioned in subsection (2) is a contributing reason.





The relevance of motive when making a disclosure

A person making a protected disclosure should be protected from retaliatory actions without any consideration of their motive for reporting. This is especially important in the Pacific, where it is recognised that instances of retaliatory reporting may occur (ie a person reports a wrongdoing in exchange for the wrongdoer having reported on another wrongdoing involving their family or 'wontok'). The preferred view is that a whistleblower should be protected if he or she holds a 'reasonable belief that the information is true at the time it is disclosed'. This assessment requires the belief to be reasonable for someone in their position based on the information available to them at the time, the motive for reporting is not relevant to access the protection.

If the person making the report has been involved in wrongdoing themselves, whistleblower protection is only recommended for retaliatory actions as a result of the disclosure. It does not extend to protecting the person from being held accountable for their own wrongdoing (ie by losing their job or being criminally charged).

What is defamation?

FACT BOX

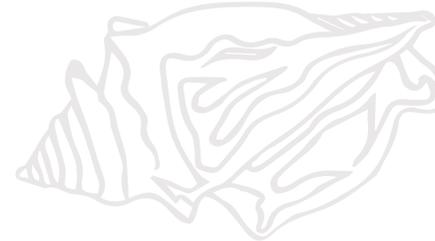
Defamation occurs when information is disseminated that could injure a person or an organisations reputation. It could falsely cause people to think lesser of a person and may damage a person's livelihood or result in social exclusion. An effective whistleblowing framework needs to protect whistleblowers who hold a reasonable belief of wrongdoing from actions of defamation. However, a person who knowingly makes a false allegation, is **not** a person who should be afforded protection under a whistleblower framework.

WHAT KINDS OF WRONGDOING CAN BE REPORTED?

Wrongdoing, which forms the basis of corrupt activities, occurs in many forms. It is important that wrongdoings are uncovered so they can be addressed and rectified before causing more harm.

Whistleblowers should be protected for disclosing a wide range of conduct, or failure to act, including:

1. Violations of health and safety and environment regulations,
2. Maladministration, misconduct and misfeasance
3. Financial mismanagement and fraud, and
4. Unlawful or criminal activities.



These issues are often matters of public concern and making a disclosure of these activities has the greatest benefit for the community. The body which such disclosures should be made will vary depending on the content of the disclosure and who makes the disclosure. For example, breaches of public financial management laws should be reported to the Auditor General and criminal activities should be disclosed to the Police. If a Public Servant reports the disclosure then this should be reported to the Public Service Commission. Each jurisdiction should outline the most appropriate body for various disclosures in their own jurisdiction.

“The focus of whistleblower legislation should be the message rather than the messenger”

- Transparency International⁵

⁵ A Best Practice Guide for Whistleblowing Legislation, 2013.





Many Pacific Island countries have leadership codes, financial management rules and criminal codes that can be referenced to clearly identify the kinds of wrongdoing that can be reported. Different approaches may work best in particular jurisdictions, but could include either a broad definition or a reference to a list of offences that are covered or existing regulatory codes.

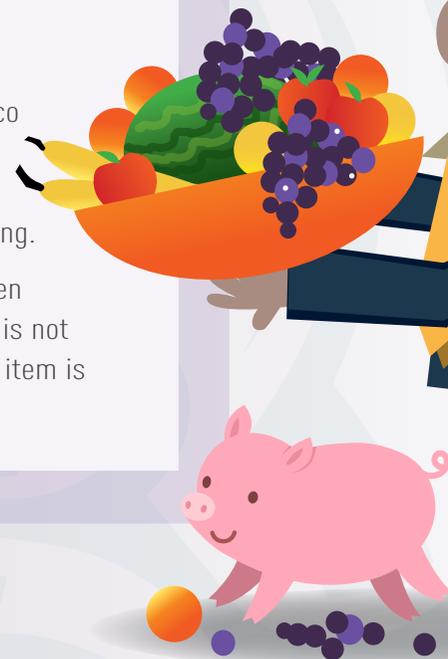
The culture of gift-giving in the Pacific can easily be distinguished from actions that are corrupt and involve stealing or bribery and are clearly criminal in nature. ECC Working Group members considered that it may be useful for Pacific Island countries to have a framework in place to help distinguish between what is gift-giving and what crosses the line into corrupt actions. For instance, this could include a gift register for all gifts over a certain value that is publicly available and transparent.

Pacific Island - Election corruption

The distinction between gifts and bribes has been addressed by a number of South Pacific courts when examining electoral acts.

For example, a Pacific government minister who gifted others tobacco during his election campaign was found guilty of electoral malpractice and dismissed from his office. His wife later came into office and was also dismissed and prosecuted for doing a similar thing.

The Court clarified that bribes occur when the gift; has not been given in furtherance of an older tradition, is an offering rather than a gift, is not obligatory for visitors to provide, the amount is excessive and/or the item is designed to influence a vote.



HOW SHOULD INFORMATION BE REPORTED AND PROTECTED?

The types of information that should be reported will vary depending on the nature of the wrongdoing. Accordingly, there should be a number of methods available to the discloser so that they can make their complaint via the most appropriate avenue. The kinds of protections that are available must be tailored for the individual circumstances of each jurisdiction and the types of wrongdoing that are being reported.

“ Never underestimate the value of a single disclosure. Your information could provide a vital clue that a larger problem exists ”

– Queensland Government ⁶

Reporting requires a great deal of trust in the particular organisations and institutions receiving the report, which can be an issue for public bodies that lack accountability and transparency. Having publically available whistleblower policies can help overcome some trust issues. However, leadership from senior levels of an organisation demonstrating that whistleblowing is taken seriously, treated confidentially and that reprisals are not tolerated are essential for building the trustworthiness of an organisation. Other ways that organisations could consider improving trust includes training staff on the most appropriate response to reported conduct and ensuring that a response is provided to the person making the report.

⁶ Making a Public Interest Disclosure, 2011.



Some of the possible ways to overcome challenges faced in small Pacific jurisdictions include:

- multiple options for making a report and flexible mechanisms for reporting,
- establishing external bodies to hear and investigate reports,
- establishing anonymous reporting hotlines,
- creating offences for breach of confidentiality,
- raising awareness about ability to make reports to MPs (who can use parliamentary privilege, or commission an enquiry),
- having a box where complaints can be left anonymously.

There should be no restrictions placed on the method of reporting.

To make a report about wrongdoing, please fill out form 3



Indonesia's disclosure website

Indonesia has established an online reporting system called Lapor. This service allows people to make disclosures regarding wrongdoing.

Users register for this service with social media accounts and file a report by electing a category and then filling in the report and sending it off. Supporting documentation may be uploaded to support the person's disclosure.

The service also allows users to make disclosures via text message, which has proven very effective with a high number of disclosures being made this way.

Disclosures have been made on a variety of topics, including simple things such as deadlines for ownership certificates not being met. A number of success stories have come out of using the website.

<https://www.techinasia.com/indonesians-crack-corruption-crowd-reporting-site-lapor>

Papua New Guinea's 'phones against corruption platform'

In 2014, the UNDP partnered with MobiMedia, an Australian telecom company to develop an SMS – based reporting system that allows the citizens of PNG to report corruption. The system is free of charge and allows for anonymous reports to be made. As the system does not rely on an internet connection, it is an inclusive tool that can be utilised by the rural population.

Between 2014-15, the platform existed as a prototype within the Department of Finance. During this time, more than 20,000 SMS messages were received. Of these, 251 cases of alleged corruption were investigated with two public officials arrested for fund mismanagement of more than 2 million USD. Five more public officials await court decisions.

Based on the success of the trial the initiative was rolled out to all public servants across government and it is envisaged that the platform will eventually be available to the entire PNG population.

<https://www.oecd.org/governance/observatory-public-sector-innovation/innovations/page/phonesagainstcorruption.htm>



WHAT PROTECTIONS SHOULD BE AVAILABLE?

The Pacific experiences a unique set of cultural, geographic and economic difficulties to reporting wrongdoing. As outlined previously, Pacific communities are usually small, posing challenges to anonymity and confidentiality of reporting. People are often closely linked by kinship, clan or other ties and whistleblowers may be related to the person perpetrating the wrongdoing. This is a significant barrier to reporting, and may result in social exclusion, a reputation as a 'troublemaker' and other reprisals. Commentators have written on the 'culture of silence' in the Pacific, in which authority and communal structures act as a disincentive to speak out.

Fear of retaliation is often cited as the main disincentive for reporting wrongful conduct.⁷ Commonly reprisals can be directed to the whistleblower's personal safety, social welfare, employment or can be in the form of legal attacks.

INFORMATION BOX

Some of the things that can be put into place in the Pacific to protect whistleblowers:

- training staff about appropriate conduct when receiving reports,
- raising awareness in the workplace and more broadly about whistleblowing policies and consequences for non-compliance,
- education and awareness raising about the impacts of corruption and changing attitudes to tolerating corruption,
- providing advice to people who have suffered reprisals and need help to access protection,
- allowing for employment transfers and/or housing relocation for whistleblowers,
- involving the Church as a mediator and sometimes as a safe place of refuge,
- providing whistleblowers with the right to return to their land,
- providing rewards to whistleblowers,
- protection orders,
- v criminal offences for retaliatory behaviour.

⁷ OECD, Anti corruption in Asia-Pacific, <https://www.oecd.org/site/adboecdanti-corruptioninitiative/>.



HOW SHOULD DISCLOSURES BE INVESTIGATED OR HANDLED?

It is essential that there are procedures in place within an agency so that when a report is made, there is guidance about how to address disclosures.⁸ It is important that this information can be accessed by potential disclosers.

To ensure effectiveness of a whistleblowing policy, an organisation must provide for:

1. a process for handling disclosures including investigating and following up on a disclosure, collecting data and understanding whether a claim is true,
2. a process for maintaining confidentiality,
3. mandated timeframes for handling of disclosures,
4. a process for managing retaliatory actions.

⁸ The Parliament of the Commonwealth of Australia, Whistleblower protection: a comprehensive scheme for the Commonwealth public sector, 2009, 106.

⁹ Fiji Independent Commission Against Corruption, You can stop corruption. https://www.ficac.org.fj/about_us_ficac.php/.

Financial rewards

The Fijian Revenue and Customs Service has implemented a reward system as part of their whistleblowing policy. The policy encourages members of the public to disclose fraudulent acts or unethical behaviour to the Office of the CEO either in writing, by telephone or in person.

If a disclosure leads to a successful recovery of revenue, the whistleblower may receive a reward. The reward amount is determined by considering a number of factors, including the significance and reliability of the disclosure.

In 2017, the Fiji Revenue and Customs Service made a payment of \$250,000 to a whistleblower whose information led to the recovery of \$8 million dollars in company taxes and penalties.

<http://fijisun.com.fj/2017/11/11/the-whistle-blower-policy/>

NEXT STEPS

To assist in implementing whistleblowing frameworks within each jurisdiction, ECC Working Group members encourage PILON colleagues, as senior law officials in the Pacific, to consider implementing and proactively raising awareness about the importance of whistleblowing frameworks in their own law and justice agencies. The model internal reporting policy at Annex 1 is intended to assist in this process and outlines best practices for whistleblowing policies.

It is noted that uptake of protected disclosure regimes in the Pacific is on the rise. The Solomon Islands enacted anti-corruption and whistleblowing legislation earlier this year. Within the Pacific, a number of Independent Commissions Against Corruptions (ICACs) and internal units exist to investigate and prosecute corruption, with the Fijian body also providing public education about corruption through school curriculums,⁹ and Samoa has recently established an internal unit within their Audit Office.

Having effective whistleblowing policies and legislation in place will assist the Pacific region in its efforts to create a more secure and corruption free region that mitigates against the human suffering and poverty caused by corruption.



Appendix 1

An example an internal reporting policy for staff that could be drafted for a Pacific organisation is provided below. This model policy is a guide only and should be individualised to each agency based on their needs.

Model Internal Policy for Whistleblowing

1. This *Organisation* encourages transparency, integrity and accountability. This policy is developed to ensure that all employees can disclose reports about wrongdoing without fear of retribution or reprisals.
2. If any requirement of this policy is inconsistent with a requirement under law, the legal obligation prevails over the contents of this policy.

Reportable conduct

3. It is expected that employees of this *Organisation* will make a report under this policy if they have a reasonable belief that another employee of this organisation has engaged in conduct which is:
 - Dishonest, fraudulent or corrupt
 - Misconduct, within the meaning of the *Leadership Code*
 - Misfeasance, or other non-compliance with the *Financial Management Act or Code*
 - Illegal conduct
 - An abuse of authority
 - Unethical and breaches the *Employee Code of Conduct*
4. This *Organisation* will ensure that any employee disclosing conduct in accordance with this policy will not be victimised or disadvantaged in relation to their employment conditions, security or career advancement.
5. The *Organisation* will ensure that the identity of the discloser and all files, records relating to the disclosure will be handled with confidentiality.
6. A breach of this policy, including breaches of confidentiality may have serious consequences for employees, including, in appropriate circumstances, termination.

Making a report

7. Reporting disclosable conduct may be made verbally, in writing, or anonymously if you do not wish to make your identity known. A report may be made through the following channels:

- (a) Report the conduct to your immediate supervisor, or another senior manager within your *Division/Unit*.

The manager must pass on the report to a *Special Officer*, or senior official of the *Organisation*ⁱ, in accordance with the protocol set out in *clause X*.

- (b) Make a report to any of the following *Special Officers*:

Special Officer

Organisation House

Email: protected.disclosure@organisation.com

Ph: 999 9999

- (c) Provide a report to a free external hotline, which is managed by *Company X* on behalf of the *Organisation*. After receiving a report, *Company X* will provide the report to a *Special Officer*, but will not disclose your identity or contact details without your consent.

Assessing a report

8. The *Special Officer* will assess all matters reported under this Policy within fourteen (14) days of a report being received and determine if:

- (a) the disclosure is reportable conduct,
- (b) the report warrants an investigation,
- (c) the report should be referred to the police, *Corruption Commission* or *Ombudsman*.

9. The *Special Officer* will provide written reasons to the reporter of a decision not to investigate within *twenty-one* (21) days of a report being made. A discloser may apply to the *Head of the Organisation* to review a decision not to investigate.

ⁱ Consider whether the policy also needs to extend to contractors, suppliers, tenderers or other people who have dealings with the *Organisation*.





10. All *Special Officers* will be trained extensively by the *Organisation* in the handling of disclosures made under this policy.

Investigating reportable conduct

11. An investigation undertaken as a consequence of a report will be conducted confidentially, fairly and impartially within *ninety* (90) days of a report being made. Records will be kept and the reporter will be notified of progress of the investigation and/or the outcome where possible.
12. The *Special Officer* may seek independent advice or assistance in relation to the investigation of the complaint, subject to confidentiality requirements under this policy.

Reprisals

13. Any person who incurs reprisal as a result of the disclosure they have made should notify the *Head of Organisation* so that action may be taken.
14. Any person who is falsely accused of being a whistleblower and incurs reprisal as a result of the disclosure they are alleged to have made, should notify the *Head of Organisation* so that action may be taken.

Distribution

15. This policy will be provided to all staff when they commence their employment.
16. This policy can only be amended with the agreement of the *Head of Organisation*.





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