

GUIDING PRINCIPLES FOR PROTECTING WHISTLEBLOWERS AND ENCOURAGING PROTECTED DISCLOSURES

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1. INTRODUCTION

Corruption is an issue that affects many countries across the Pacific and globally. In the Pacific region, the small size of island communities creates specific challenges. The likelihood of personal links, including kinship, between elected representatives, public officials and the general public, leads to a greater risk of nepotism and personalised decision-making.¹ Many democracies in the Pacific have weak and loosely affiliated political parties and claims and counter claims about 'corruption' can often be used for political point scoring and self-interested purposes.² Across the region, many governments have limited personnel and infrastructure, which means that systems for checks and balances are not fully developed or able to be administered.

Partially due to the remote and widespread geographic layout of their island nations, many Pacific Island countries also lack resources to be able to extend services and formalise institutions throughout their jurisdictions. These are just some of the issues that impact on corruption in the Pacific and are likely to present real challenges to the practical operation of a protected disclosure regime. PILON member countries are encouraged to engage with these practical realities when considering how a protected disclosure regime could operate in their State.

Corruption is crime that has far-reaching and sometimes devastating consequences for Pacific Island communities. A significant concern, which has a direct impact on people's lives across the region is the harm caused by environmental crime, such as illegal fishing, logging and un-regulated resource extraction, often fuelled by corruption. Environmental crime harms individuals, the environment, and wildlife and creates ongoing risks to people and communities. The harm that environmental crime generates is often hidden and may not manifest for extended periods of time. In many cases of natural resource-related crime, the threat goes beyond national borders and may involve fraud, transnational criminal networks, and human trafficking. This often creates competitive risks for honest businesses and their employees.

The risk of corruption is significantly heightened in environments where the reporting of wrongdoing is not supported or protected by appropriate national laws and policies. While inspection systems and having process in place to detect corrupt activities provides one important way of uncovering wrongdoing, extensive research has identified that information provided by individuals is the single most common and important way in which instances of wrongdoing are detected.³ Having a protected disclosure regime in place to support and encourage reporting of wrongdoing reduces the ability of corrupt officials to rely on a 'culture of silence' and is the one of the most effective methods in combatting corruption. Public and private sector employees are often the first to recognise wrongdoings, given their access to current information about workplace practices. However, those who report wrongdoings may be subject to retaliation, such as intimidation, harassment, dismissal or violence by their fellow colleagues or superiors. Similarly, members of communities may often find out concerning information about the illegal activities of others in their communities, but may be too fearful to report it, or concerned about social ostracism if they do so.

It will be a real challenge for many Pacific Island countries to craft and adopt whistle blower protection regimes. Pacific communities are small and closely linked by kinship, clans and other ties. Commentators have often commented that a 'culture of silence' is pervasive in the Pacific region,

¹ Lamour, P. 2005, Corruption and accountability in the Pacific Islands, *Discussion Paper 05-10*, Asia Pacific Scholl of Economics and Government. https://openresearch-repository.anu.edu.au/bitstream/10440/1159/1/Lamour_Corruption2005.pdf

² *ibid*

³ UNODC, *Resource Guide on Good Practices in the Protection of Reporting Persons* 2015, p 3

where citizens choose to remain silent in the face of wrongdoing and public misconduct instead of calling it out.

Such laws risk running against the very grain of what many of us in the Pacific have grown accustomed to and conveniently classify as “tradition” or culture, under the pretext of respect. Whistle blowing in many people’s minds can be viewed as a betrayal rather than as an act that protects and serves the public interest. But one may ask whether it is also “traditional” to steal or to unjustly enrich one’s self at the expense of others. Corruption can channel significant monies away from public service programs and lessen the quality of life in the Pacific region by reducing or limiting community access to services, such as health and education. So, a paradigm shift in thinking is another real challenge that Pacific Island countries must overcome and face. Public education will be pivotal to ensuring that Pacific Islanders understand the good that can come from reporting wrongdoing and how it will benefit their communities.

Many Pacific Island countries are State Parties to the United Nations Convention Against Corruption (UNCAC).⁴ Article 33 of the Convention requires each State Party to consider adopting at the national level, measures to provide protection against any unjustified treatment for any person who reports in good faith any facts concerning offences established in accordance with the Convention. The deliberations of the Working Group have been made with the principles of UNCAC in mind and aim to assist PILON member countries to give effect to its provisions. This set of Guiding Principles is not meant to be prescriptive. The ECC Working Group recognizes that every PILON member country is sovereign and will make individual decisions about whether to consider adopting whistle blower (protected disclosure) laws or policies and craft those to be appropriate for its own circumstances. These guiding principles are intended to help generate discussion in Pacific Island countries about the benefits of a protected disclosure regime, so each can begin to identify how such a scheme could be adapted to suit the unique legal frameworks and political, cultural and social context of their nation.

2. OBJECT OF PROTECTED DISCLOSURE LAWS.

ECC members agreed that the principal objective of a law that protects people who report illegal or other wrongful conduct such as corruption to authorities (making a ‘protected disclosure’) is to encourage members of the public to report such conduct, by providing clear avenues for them to do so, and making them feel confident that their complaints will be investigated and that they will be protected from retaliation.

3. WHO SHOULD BE PROTECTED?

- i. ECC members were of the view that the scheme of protection should extend to the widest possible class of people. Jurisdictions should consider adopting definitions broad enough to include not just people making the report to authorities, but also people who have been mistakenly thought to have made a disclosure and who suffer retribution (when they haven’t made a disclosure at all) and the close friends and family of the person making the report.
- ii. Jurisdictions should be mindful to ensure that, to prevent abuse, a good faith test should be included. This would require the person making the report to have an honest belief on reasonable grounds that their disclosure is true.

⁴ Australia, Cook Islands, Fiji, Kiribati, Republic of the Marshall Islands, Federated States of Micronesia, Nauru, New Zealand, Palau, Papua New Guinea, Solomon Islands, Timor Leste, Tuvalu and Vanuatu.

- iii. It is important to include a provision that ensures that the person making the report is not required to prove the truth of the information being reported.⁵

4. WHAT KINDS OF WRONGDOING CAN BE REPORTED TO BE COVERED BY THE PROTECTION?

- i. ECC members agreed that the kinds of wrongdoing being reported should be defined. It would be helpful to include a definition of wrongdoing and ensure that it points to and cross references the widest possible relevant criminal, environmental and leadership codes and legislation and any other relevant laws to ensure a broad range of conduct can be reported and still capture the protection.⁶
- ii. Jurisdictions should also consider the need to add specifically the concepts of **maladministration**, **misconduct** and **misfeasance** and include inaction to the definition of “wrongdoing” to ensure that reports about a wide range of matters can be protected.
- iii. Jurisdictions should consider explicitly excluding protection for reports or complaints that are related to disagreement about policy decisions or lawful expenditure but which do not involve wrongdoing or illegality.
- iv. To prevent abuse of the protected disclosure framework, and help ensure that only genuine instances of potential wrongdoing are reported, ECC members noted that criminal offences should be included for wilfully, or recklessly, making a false or misleading disclosure.

5. HOW SHOULD INFORMATION BE REPORTED AND PROTECTED?

- i. It is desirable for jurisdictions to ensure that disclosures may be made in person or anonymously and are not necessarily required to be in writing or in any particular format.
- ii. The legislation must include strict confidentiality provisions that make it an offence for anyone to reveal or use the information, unless necessary for its investigation or other appropriate handling.
- iii. Jurisdictions should consider legislation that expressly provides that those making reports do not need to state that they are seeking the legal protections in order for them to apply. The protections should become available by the operation of the law as soon as a qualifying report is made.⁷
- iv. ECC members noted that the agencies that would receive reports would vary from country to country and be dependent on the nature of the wrongdoing or illegal conduct being reported. ECC members were mindful of the resources constraints and the desirability of working with existing agencies where appropriate, rather than necessarily creating new institutions (while not ruling out the possibility of the creation of new stand-alone agencies where resources permit).

⁵ ECC members noted that not making this provision clear could lead to vigilantism, disruption of an official investigation or danger for the person making, or intending, to make the report. It could also lead to a reduced public confidence in the scheme.

⁶ ECC members agreed that if only a narrow range or patchy selection of conduct is included in a protected disclosure regime, that this will defeat the main objective of the system to encourage disclosures, as the general public will be less confident about what kinds of wrongdoing are included and what are not.

⁷ This reduces the risk of a person making a report not being covered by the protections. If the protections are granted in an ad-hoc way, denied because of a technicality or delayed by bureaucratic processes, or even potentially not granted due to a corrupt decision; public trust in the protected disclosure regime could be compromised. This could lead to fewer disclosures and failure of the main objective of the scheme – to encourage disclosure.

- v. ECC members agreed that there would need to be flexibility about the person to whom reports should be made within agencies. Jurisdictions could consider identifying a number of appropriate positions, such as the auditor-general, an ombudsman, or a nominated position in various agencies that could receive protected reports.
- vi. Jurisdictions could consider permitting a person who has made a report to the media or who makes a report to a Member of Parliament to be protected, but only when all other options have been exhausted and the matter has not been resolved to the reasonable satisfaction of the person making the report.⁸

6. WHAT PROTECTIONS SHOULD BE AVAILABLE?

Jurisdictions should consider the following range of legislative protections for those reporting the specified wrongdoing or illegal conduct. The below should be considered a minimum list and not exhaustive.

i. Personal Protection

- Guarantee of confidentiality of identify of the person making the report;
- Acceptance of anonymous reports
- Physical protection of persons making reports, where appropriate (including any available witness protection measures, safe houses, alternative accommodation);
- Criminal offences should be included that make it an offence to threaten, intimidate or physically harm the person that made the report, or any other witnesses.
- Access to information and assistance

ii. Criminal protections

- An offence should be created that makes it unlawful for a person to take, or threaten to take, retaliatory, or detrimental action, against the person making the report. Significant penalties should apply as a deterrent. The burden of proof that the retaliation, or detrimental action, happened due to the report of wrongdoing should be reversed. The definition of retaliatory, or detrimental, action should be extremely broad and include disciplinary actions and other administrative actions related to the person's employment. Protection against criminal liability resulting from the report, unless the report was made wilfully knowing it was false or misleading.

iii. Civil Actions

- The creation of a civil cause of action allowing for the reversal of retaliatory measures in the context of employment (such as dismissal or demotion) should be included
- A provision that expressly states that the person may apply for compensation for damages, under the law of tort where appropriate, including where there is financial loss, loss to reputation or physical harm has been suffered or a retaliatory action cannot be, or is unsuitable for reversal (could be sourced from proceeds of crime, a fine or an ex-gratia payment);

⁸ The working group noted that other important provisions that require a report to be investigated within a specific timeframe and for the person who makes the report to be kept updated on the status of the investigation are important for this provision to operate sensibly.

- ECC members note that express provisions should be made for measures that allow a court to provide interim relief to reduce the impact of a detrimental action, or injunctive measures, to prevent detrimental action being taken (such as paid leave);
- The legislation could permit the investigating body to pay a reward to encourage others to also report wrongdoing where this results in successful enforcement/criminal action being taken against the wrong-doer (this could be funded from a percentage of recovered amount or court penalty);
- Optional transfer to other positions/agencies for public officials.

Jurisdictions agreed that the protections for the person making the report should be available as soon as a qualifying disclosure is made. The most appropriate protections will vary in each case and some will require considered steps, or a formal process, to access. The ECC members did not favour an additional process requiring the person making the report to claim and be granted protection before the range of protections would be available to them.

ECC members also agreed that if the person making the report was doing so to avoid the consequences of their own wrongdoing, then jurisdictions should provide protection for the consequences only of making the report itself, and not for the wrongdoing in which the person making the report might have engaged.

7. HOW SHOULD PROTECTED DISCLOSURES BE INVESTIGATED OR HANDLED?

- i. Jurisdictions should consider imposing a timeframe on the investigation⁹ of the report. Where a report has been made to a nominated person or authority who is not the most appropriate person or authority to investigate the report, the person receiving the report should be required to refer it to the most appropriate person or authority nominated under the relevant policy or legal framework, unless there is a good reason not to do so¹⁰.
- ii. Jurisdictions should consider requiring investigating bodies to keep the person who made the report (and the referring agency where relevant) informed of the status of any investigation, including where appropriate any reasons not to investigate the report.
- iii. It is good practice for an agency receiving protected reports to have procedures in place for dealing with such reports. To provide reassurance to the persons considering making a report of wrongdoing and what they can expect to happen, the procedures manual should be made publicly available.
- iv. It is important for the legislation to provide discretion not to investigate reports where it is considered that the report is frivolous or vexatious.

⁹ This is important so that the person who made the report knows that it is being investigated; it assists in determining when, if at all, the person could be justified in making protected disclosure to the media.

¹⁰ For instance if there is a conflict of interest, or the report involves alleged wrongdoing by the person to whom it should be referred