On Whistleblower Protection in the UN System
Note Prepared by CCISUA

May 2011

Introduction

1. At its 69th Session, the International Civil Service Commission decided to review the standards of conduct for the international civil service “to ensure that they continue to meet the needs of the organizations […]”\(^1\) The Commission recognized that whistleblower protection is among a number of ethical issues facing the organizations which was not adequately reflected in the existing standards of conduct.

2. While many organizations have developed their own guidelines for addressing Whistleblower protection, CCISUA’s research has concluded that the quality of these policies and their application in the organizations is mixed. While some organizations do perform better than others in this regard, overall, it must be said that there remains a great deal to be done in order to promote a true accountability culture in the United Nations system. CCISUA thus welcomes the opportunity to strengthen the standards of conduct in the important area of whistleblower protection, and this note is intended to provide some background on the subject.

General

3. There must be a clear commitment through a statement in the standards of conduct that the protection of whistleblowers against retaliation for reporting misconduct or cooperating with an audit or investigation is an essential element to ensuring transparency and accountability in the UN system. If policies are put in place without a full organizational commitment to accountability and transparency, which recognizes that such disclosures in the public interest are in fact also in the interest of the good administration of the organizations, it will likely have the unintended consequence of discouraging whistleblowing. This is currently the case in many organizations.

4. The rights of a whistleblower to exercise their freedom of expression, and to be protected in the exercise of this right – in the public interest – is a fundamental human right (recognized by the Universal Declaration of Human

\(^1\) ICSC/69/R.3
Rights, the International Covenant on Civil and Political Rights and a number of other instruments). This should be recognized by any such policies.

Definitions

5. “Protected activity” must be clearly – and broadly – defined in any policy. Organizations must seek to avoid defining protected activity too narrowly, if the true origin of such a policy is a commitment to ensuring that the public interest is protected. The definition of a whistleblower should be provided in the body of the procedure itself, and should include: reporting wrongdoing (unlawful activities, waste, mismanagement, abuse of authority, or other actions which conflict with the values, mission or objectives of the organization) through internal mechanisms, external oversight mechanisms or in some cases to the media; refusing to participate in unlawful activities as described above; providing testimony in judicial proceedings; and cooperating with an audit or investigation. “Protected activity” must be defined to include questions asked about potential misconduct and evidence gathered. In other words, all of the research that might be necessary as background to a responsible disclosure should be protected.

6. Protection should be provided not only to those reporting misconduct, but also to those suspected of engaging in protected activity, those associated with others who engaged in protected activity, and those about to engage in protected activity. Retaliation is often a pre-emptive measure taken or threatened in order to dissuade a whistleblower from making a disclosure, and only the broadening of the definition of protected activity addresses this issue.

7. Defining retaliation is also essential, and through this definition, explicit reference must be made to passive retaliation, which could include failure to renew a contract or withholding of resources, training opportunities or access to information. The definition of retaliation is extremely important and should be clearly stated in any policies. All scenarios should be encompassed by the definition, and in particular those that could have a chilling effect on the exercise of free expression in whistleblowing.

Scope

8. Whistleblower protections must apply as widely as possible, irrespective of their “formal” status as staff members to include:

- Candidates for competitions
- Staff members (all contract type)
- Consultants, Project Officers (or other so-called “non-staff”)
- Interns
- Contractors
- Anyone else paid with the resources organization’s and who carries out activities related to the organization’s mission and objectives

9. Complaints which constitute “protected activity” must not be limited to a small number of very specific and bureaucratic reporting mechanisms, and
should be accessible and user-friendly. In one organization a staff member is required to consult (and understand) two separate Financial Rules and three Circulars (only one of which has an obvious link to whistleblowing, and which itself does not reference the other relevant documents. A search of this organization’s website and another of its database of administrative circulars for the terms “whistleblow” or “whistleblower” does not return all relevant documents. This increases the complexity of the process, and may discourage a staff member from reporting.

10. All relevant, lawful (i.e. a whistleblower acts in good faith to disclose what s/he reasonably believes to be evidence of wrongdoing as defined above) disclosure should be protected, irrespective of whether or not it is reported perfectly through internal bureaucratic channels. To demonstrate full transparency, and to avoid a chilling effect, any lawful act of whistleblowing should be protected regardless of audience, including through external channels, as is the case with the UN policy (though it, too, is overly restrictive). Typically, the term “external disclosure,” refers to the circumstances under which a whistleblower may report misconduct outside the organization, i.e., to law enforcement authorities or other public officials, member states, journalists and the public.

11. The organizations should put in place a simple, straightforward and fully independent disclosure and complaint procedure. The procedure should ensure a rigorous review, while maintaining the anonymity and confidentiality of disclosures. Any person or group receiving complaints should be fully free from any institutional conflict of interest. This is far from a reality in many organizations. Whistleblowers should be permitted to report to any number of independent sources, including directly to any governance structure.

Procedures

12. Given the specific nature of whistleblowing, and the inherent weaknesses in the internal justice system in the international civil service, there must be a shift in the burden of proof once a prima facie case of retaliation is established. It should be noted that discriminatory treatment / passive retaliation does not need to involve direct retaliation, but anything which takes place as a result of a protected activity must be addressed. Across the common system, once the competent independent authority determines that a prima facie case of retaliation exists, the burden of proof shifts to the Administration to demonstrate by "clear and convincing evidence" that it would have taken the same action absent the protected activity.

13. Some so-called whistleblower protection policies go to great lengths to ensure due process for the alleged retaliator, with little attention being paid to protecting the whistleblower him/herself. Some of the procedural steps even seem to call into question whether the anonymity or confidentiality of the whistleblower will be protected. This must be avoided, as the organization will, in the vast majority of cases act as both judge and defendant, this seems to be overly skewed to favour the Office in defending retaliators, and could lead to a dramatic chilling effect on potential whistleblowers.
14. In addition to providing for confidential and anonymous means to report wrongdoing, the identity of a whistleblower that chooses to come forward must under no circumstances be disclosed without express written permission of the whistleblower. In extreme cases where this is not possible (i.e. an imminent threat to public health or safety), the whistleblower must be provided reasonable prior written notice of this fact.

15. Anyone involved in investigating cases of whistleblowing or allegations of retaliation must be free from any conflicts of interest, either perceived or real. In some organizations, the Ethics Officer is also the Legal Adviser to the organization, for example. These individuals or institutions must be financially, politically and functionally independent from the Administration.

16. Good practice dictates that Human Resources should never be involved in treatment of whistleblower complaints, due to the fact that retaliation is often related to (or implemented through) an administrative action that is carried out by HR.

17. Interim relief must be explicitly foreseen in any policies, and should only be provided with the consent of the whistleblower, as is the case in the UN, and the African Development Bank which sets out: Upon receipt of a complaint of Retaliation, the Auditor General shall initiate an investigation and as appropriate provide interim relief to the Whistleblower, and take such interim remedial action to cure the underlying circumstances […] The interim relief and actions to protect and adjudicate the rights of the Whistleblower shall be separate processes from the investigation of related underlying issues within the jurisdiction of the Auditor General (Para. 9.6, 9.7). Financial considerations must not play a role in the decision to provide interim relief, for example, in the extension of a contract, in a transfer, or in allowing administrative leave.

18. Policies should include reference to ‘cat’s paw’ employer liability. Rather than requiring an official who takes a retaliatory / discriminatory action to have done so in full knowledge of the protected disclosure, it must recognize that the department or official who actually takes the retaliatory action may not be aware of the disclosure, but the employer remains liable. HR, for example, may take the retaliatory action based on inaccurate information provided, directly or indirectly, formally or informally, by a retaliator. A panel denying a whistleblower a promotion may rely on negative or nuanced evaluations provided by a retaliator.

Alternative Dispute Resolution and the Right to Due Process

19. Given the considerable challenges facing whistleblowers in an internal judicial forum (again with the organization acting as both defendant and judge) provision should be made for external arbitration. This allows for an

---

2 “Cats paw” liability is a term used to recognize the responsibility of an employer for any adverse decisions in relation to conditions of employment or work which may be motivated by a discriminatory animus of a lower-level official, even if the ultimate decision maker is unaware of this.
independent, fair resolution of whistleblower disputes, which would not require the Office to waive its immunity from a national legal system. Both UNDP and UNFPA allow for (weak) third-person mediation. Any resolution reached through mediation or arbitration must be respected and carried out.

20. Arbitration, which is available to contractors at the Asian Development Bank, provides a time-efficient, low-cost alternative to both the formal and informal justice systems. When a complainant opts for binding arbitration, the procedure should be based on the mutual strike process for selection of an arbitrator.

21. The whistleblower must be assured of full judicial due process rights, including the right to timely decisions, access to the formal dispute resolution machinery, objective and balanced rules of procedure, reasonable deadlines and decision makers independent from institutional conflicts of interest. There should be explicit reference to the fact that the whistleblower has full and unfettered access to the formal grievance procedures, as is the case in the UN Secretariat policy. This includes the right to legal representation, and full “equality of arms”.

22. Relief to whistleblowers who prevail must be comprehensive, including all possible direct, indirect and future impacts of the retaliation (including but not limited to transfer, relocation, payment of medical bills and attorney fees). The policy should make explicit reference to accountability for retaliation against whistleblowers, through personal liability for punitive damages for those guilty of violating the policy. Final relief must be based on the “make whole” principle, with the whistleblower restored to the status and career advancement process enjoyed prior to the disclosure and retaliation. The African Development Bank policy serves as a good basis in addressing relief for a vindicated whistleblower:

**Disclosure / Accessibility**

23. Policies must be provided, in the working languages and in a prominent location at the workplace. Any searches on the intranet and the public website related to whistleblowing (using keywords such as “whistle”, “whistleblower” and any derivative, as well as “accountability” “wrongdoing” “fraud” or other relevant terms) must be directed to the policy. Staff members should be able to reference one policy document to understand the policy. The more complex the system, the less likely it is to be used.