UN “whistleblower protection” for public interest disclosures
aims to prevent retaliation before it occurs

Introduction

The proposed revisions to the United Nation’s “whistleblower protection policy” (“Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations” Secretary-General’s Bulletin 2005/21 or the “PaR Policy”) have drawn the interest of the Government Accountability Project (GAP). Given its expertise in whistleblower protection, the UN appreciates GAP’s observations and would like to respond.

On its website, GAP reports “…we’ve been told that Ban Ki-moon is pushing a draft policy through the Organization’s staff-management committee this week that makes it easier to fire whistleblowers” (see: https://www.whistleblower.org/blog/091828-ban-ki-moon-should-strengthen-not-weaken-whistleblower-protections-un). Moreover, the GAP article observes that the proposal “(t)hreatens the full contribution of the US to the UN under the provision of Sec. 7048 of the Consolidate Appropriations Act.” Given the potential serious impact of these statements, it is important for the UN to set the record straight.

Need for Updating the Policy

The UN agrees with GAP that whistleblower protection is critical to holding organizations accountable. Whistleblower protection is an essential part of an effective accountability framework for public sector organisations. Because crime and corruption can cause enormous financial and reputational damage to an organisation, and significant harm to the public interest, whistleblower protection mechanisms are designed to encourage the reporting of fraud, bribery, gross mismanagement of funds and resources, and other forms of serious misconduct. The promotion and protection of such reporting enhances an organisation's ability to combat corrupt and unlawful practices at an early stage, strengthening institutional accountability and public trust.

The purpose of the UN’s policy on whistleblower protection is no different. It encourages staff to report concerns so that the Organization can respond and resolve reported problems and hold perpetrators to account.

Despite this intent, the majority of reports of misconduct cited in retaliation complaints in the UN have not risen to the level of public interest. Rather, they have been allegations involving inter-personal conflicts or performance matters. While the UN also considers seriously such allegations, the PaR policy has been inappropriately used by staff members as an additional recourse mechanism to pursue inter-personal conflicts and workplace grievances and disputes. This development has occurred despite the fact that the PaR policy provisions “are without prejudice to the rights of an individual who has
suffered retaliation to seek redress through the internal recourse mechanisms” (see ST/SGB/2005/21, Section 6.3).

For instance, during its most recent reporting period (1 August 2015 to 31 July 2016), the Ethics Office received 50 enquiries under the PaR policy. Of these, 25 were requests for advice while two were outside of the Office’s jurisdiction. The Ethics Office initiated preliminary reviews in the remaining 23 enquiries. Of these, 18 (or 78%) were explicitly for claims alleging protected activity related to workplace grievances including performance issues. Furthermore, in all but three of the 23 preliminary reviews, claimants had also availed themselves of alternative internal recourse mechanisms such as management evaluation, rebuttals of performance evaluations, requests for investigations, appealing administrative decisions before UN administrative tribunals, etc. This duplication of recourse is both ineffective and an inefficient use of UN resources.

Linking protection with disclosures in the public interest

In light of the above, the core objective of the revisions of the UN’s PaR policy is to strengthen the protection for staff who “blow the whistle” in the public interest by preventing retaliation rather than waiting to address it after the fact, as is currently the case. The definition of the public interest is in line with the World Bank's and the WHO's whistleblower policies. The revised policy will permit the Organization to focus its resources on addressing situations where staff members have reported serious instances of misconduct, such as fraud, waste, abuse, or corruption.

Importantly, linking protected disclosures to public interest is in line with the GAP’s own mission, “GAP has served as a lifeline to employees of conscience and has helped them release critical information that serves the public interest and the common good” (see: https://www.whistleblower.org/our-history-and-mission). Moreover, “GAP seeks to focus on widespread, systemic issues and problems within the aforementioned program areas. We do not handle small-scale cases or individual problems unless they are indicative of a large-scale problem.” (see https://www.whistleblower.org/report-waste-fraud-illegality-or-abuse).

1 The UN adopted its Protection against Retaliation Policy in late 2005. From 1 August 2006 to 31 July 2016, the Ethics Office completed preliminary reviews on 153 claims for protection against retaliation, of which 21 were found to be prima facie cases in which the protected activity was determined to be a contributing factor in causing the alleged retaliation or threat of retaliation. Of the 21 prima facie cases, five (5) cases were found to involve retaliation, seven (7) cases did not find retaliation, six (6) cases are pending investigation, one (1) was not investigated in the past by OIOS and a further two (2) cases were resolved informally to the satisfaction of the claimant. These results correspond with those of comparable organizations. The World Bank’s Office of Ethics and Business Conduct (the “EBC”) closed a total of 261 cases in FY13, of which 5 (or 2%) of the cases were retaliation cases. In FY12, the EBC closed a total of 278 cases, of which 8 (or 3%) of the cases were retaliation cases. And in FY11, the EBC closed a total of 287 cases, of which 7 (or 2%) of the cases were retaliation cases. Similarly, the Swiss Federal Audit Office (SFAO), the Swiss Federal Administration’s contact point for “whistle-blowers”, reported receiving 64 impropriety reports in 2015, of which two reports (or 3%) were transmitted to the Office of the Attorney General of Switzerland (OAG). In Canada, the Office of the Public Sector Integrity Commissioner referred six cases of reprisals to the Public Servants Disclosure Protection Tribunal since 2011-2012. And the U.S. Office of Special Counsel, in FY14, closed 4,666 cases, of which 8 (or 0.17%) cases involved protecting “whistle-blowers” from retaliation. (See UN Special, July-August 2016 edition at: https://www.unspecial.org/2016/07/the-un-whistleblower-protection-policy-2/)
Under relevant national whistleblower legislation, and pursuant to the OECD’s G20 Compendium of Best Practices and Guiding Principles for Legislation on the Protection of Whistleblowers, disclosure protection is typically provided for serious allegations of wrongdoing, including gross public sector mismanagement, gross misuse of public funds, specific dangers to the life, health or safety of persons, and corruption. There is a developing trend at the national level to reserve protection for disclosures made in the public interest.\(^2\)

**Key elements of the revised policy**

The heart of the new policy is to protect whistleblowers from suffering from retaliation by focusing the Organization’s resources on monitoring the whistleblower’s situation once he/she has come forward. In this regard, at the reporting stage, OIOS will notify the Ethics Office of wrongdoing that constitutes public interest disclosures and which OIOS identifies as posing a risk of future retaliation. The Ethics Office will then work with the complainant and his/her management to mitigate this risk.

Second, the revisions provide for an independent review of contested determinations by the Ethics Office by an independent ethicist, agreed upon by staff and management. The difference of opinion on reviewability of Ethics Office determinations is well known.\(^3\) Nonetheless, in recognition of staff members’ perceptions that Ethics Office determinations should be the subject of review, an independent expert ethicist, appointed from a mutually agreed roster of experts, can review challenges to Ethics Office determinations.

Third, the revisions will help reduce redundancies, clarify roles and responsibilities in more effectively dealing with workplace grievances in the UN. They can prevent the potential for multiple offices reviewing the same claim under different policies and with potentially different outcomes. Workplace reprisals that follow other reports of possible misconduct that may not rise to the level of public interest, because they concern inter-personal or performance matters, should be addressed through other existing internal recourse mechanisms.

Finally, the revisions would preclude inter-personal conflicts or workplace grievances triggering the shift in burden of proof – that is, the accused is considered guilty until proven innocent, contrary to the principle of natural justice of being considered innocent until proven guilty. The difference between the PaR policy (to protect public interest disclosures) and other internal recourse mechanisms (to address workplace grievances) is that the PaR policy triggers a shift in the burden of proof onto the administration and its agents.

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\(^2\) Examples include Australia’s Public Interest Disclosure Act, and the United Kingdom’s Enterprise and Regulatory Reform Act 2013, whose explanatory notes provide that “in order to benefit from protection, whistleblowing claims must in the future satisfy a public interest test and disclosures which can be characterised as being personal rather than public interest will not be protected.” In April 2014, the Council of Europe further recommended to member States that they put in place a legislative framework to protect public and private sector individuals who “report or disclose information on threats or harm to the public interest”.

\(^3\) The United Nations Appeals Tribunal has ruled that recommendations made by the Ethics Office in response to staff members’ complaints of retaliation are not administrative decisions taken by the Secretary-General and may not be appealed before the formal system of internal justice (Wasserstrom, 2014-UNAT-457).
Conclusion

In sum, the policy revisions will strengthen the protections against retaliation available to staff members, by adding a capability to actually prevent retaliation. The new policy will also reduce duplication of redress mechanisms, thereby increasing efficiency. These changes will serve to encourage staff to report matters involving fraud, bribery, gross mismanagement of funds and resources, and other forms of serious misconduct.