



Le 31 octobre 2019

Synd.AG.2019-10

FICSA WORKING GROUP ON WHISTLEBLOWER PROTECTION POLICY

2018 Report of Activities

***Presented at the
72nd FICSA Council (Vienna, 4-8 February 2019)***

"International civil servants are crucial for global governance. They are unique and indispensable in promoting human rights, overcoming the democratic deficit and achieving sustainable development,

among others. Yet they are often exposed to threats, attacks, diseases, have even lost their lives, in the line of duty while serving in the world's most dangerous places". (30th World Congress of Public Services International (PSI), Geneva, Switzerland, 2017.)

"Whistle-blowing and protection against retaliation are essential components of an organization's accountability and integrity; when responses are inadequate, or where systems are weak, personnel are deterred from coming forward to report misconduct and wrongdoing. This increases the risk of substantive damage to the organization's reputation and undermines operations." (JIU Review of Whistle-Blower Policies and Practices in United Nations System Organizations, 2018.)

BACKGROUND

The 70th FICSA Council (Kuala Lumpur, 2017) decided that the FICSA Executive Committee, together with the other Staff Federations (CCSUA and UNISERV), should advocate for the incorporation of provisions for external arbitration and independence in the new UN whistleblower protection policy (which also affects the UN Common System agencies).

The FICSA Working Group on Whistleblower Protection Policy was set up upon the recommendation of the Standing Committee on Human Resources Management (SCHRM) at the 70th FICSA Council. It comprises a Chair, a Vice-Chair and four members, drawn widely across FICSA membership (WIPO, ITU, ICAO, WHO and WTO).

The Terms of Reference of the working group are as follows:

- a) To conduct research into current whistleblower protection policies among FICSA membership.
- b) To determine the instances where policies are aligned.
- c) To outline best practices.
- d) To standardize the definition of retaliation and whistleblowing.

It presented its first report to the SCHRM at the 71st FICSA Council (Bonn, 2018).

The report listed key elements of whistleblower protection ("The Basics"), namely that:

- UN staff are bound by duty to report wrongdoing.
- UN staff can file for protection against retaliation.
- The Ethics Office should make a determination or recommendation when seized by whistleblowers.
- "The UN is in the unique position of not being bound by any legal system other than its own Rules and Regulations, which the Organizations will always interpret **in their own favour**."» (Peter Gallo).
- The burden of proof is on the complainant: beyond a reasonable doubt vs. clear and compelling evidence.
- The notion of an independent external investigation to ensure impartiality and due process.
- Various problems arising from a narrow definition of whistleblower.

- What to do if the reporting chain of « established channels » is compromised and the dangers of leaking to the press.

Attention was drawn to Section 7048 of the US Appropriations Act, according to which the US Administration is required by law to withhold 15 per cent of its contributions to international organizations if the Secretary of State determines that the organization is not effectively implementing and enforcing policies and procedures that reflect best practices for the protection of whistleblowers from retaliation.

Best practices as listed include protection against retaliation for internal and lawful public disclosures and for legal burdens of proof. They also relate to the status of limitations for reporting retaliation and refer to access to independent adjudicative bodies, including external arbitration. Finally, they must include results that eliminate the effects of proven retaliation.

The report also quoted the [Public Service International Report \(2017\) entitled "Checkmate to Corruption: Making the Case for a Wide-ranging Initiative on Whistleblower Protection"](#), which included six best practice standards proposed by the [Government Accountability Project](#) (GAP). These include:

- Burden of proof
- Forum
- Final relief
- Interim relief
- Corrective action
- Training and outreach

It further quoted the publication "Staff Members Guide to Reporting Misconduct in the UN Secretariat", in which Peter Gallo referred to four rules for reporting misconduct:

- 1) Organizations will use any excuse to summarily dismiss complaints.
- 2) Whistleblowers will suffer retaliation.
- 3) There is a need to minimize the risk of the organization summarily dismissing misconduct complaints.
- 4) When in doubt, the whistleblower must take legal advice.

The report also highlighted the fact that whistleblowers are human beings that need protection ("whistleblowers have a name"). It enumerated various methods of retaliation that were used against whistleblowers: non-renewal of fixed-term contracts; deliberately bad PMSDS performance evaluations / problems with supervisors; ostracization; blacklisting; and attempts to destroy the WIPO Staff Association.

The Working Group requested that its work be re-conducted in 2018 and evoked the possibility of creating a questionnaire for FICSA members on whistleblower

protection; proposed the organization of a FICSA training session on whistle-blowing and drew attention for the need to create a policy paper (if possible) on this subject.

2018 HIGHLIGHTS

This section presents an overview of selected initiatives pertaining to whistleblower protection that took place in 2018.

1. [Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law](#)

On 23 April 2018, the European Commission proposed a new law to strengthen whistleblower protection across the EU. This proposal is expected to guarantee a high level of protection for whistleblowers that report breaches of EU law, by setting new EU-wide standards. It will ensure EU-wide protection for blowing the whistle on breaches of EU legislation in the fields of public procurement; financial services, money laundering and terrorist financing; product safety; transport safety; environmental protection; nuclear safety; food and feed safety, animal health and welfare; public health; consumer protection; privacy, data protection and security of network and information systems. It will also apply to breaches of EU competition rules, violations and abuse of corporate tax rules and damage to the EU's financial interests. Moreover, the Commission encourages Member States to go beyond this minimum standard and establish comprehensive frameworks for whistleblower protection based on the same principles.

The new law will establish safe channels for reporting both within an organization and to public authorities. All companies with more than 50 employees or with an annual turnover of over EUR 10 million will have to set up an internal procedure to handle whistleblowers' reports. All state, regional administrations and municipalities with over 10,000 inhabitants will also be covered by the new law.

The protection mechanisms to be set up must include:

- Clear reporting channels, within and outside of the organization, ensuring confidentiality.
- A three-tier reporting system of:
 - Internal reporting channels
 - Reporting to competent authorities – if internal channels do not work or could not reasonably be expected to work (for example, where the use of internal channels could jeopardize the effectiveness of investigative actions by the authorities responsible)
 - Public/media reporting – if no appropriate action is taken after reporting through other channels, or in case of imminent or clear danger to the public interest or irreversible damage

- Feedback obligations for authorities and companies, who will have to respond to and follow-up on the whistleblowers' reports within three months (for internal reporting channels).
- Prevention of retaliation and effective protection: all forms of retaliation are forbidden and should be sanctioned. If a whistleblower suffers retaliation, he or she should have access to free advice and adequate remedies (for example measures to stop workplace harassment or prevent dismissal). The burden of proof will be reversed in such cases, so that the person or organization must prove that they are not acting in retaliation against the whistleblower. Whistleblowers will also be protected in judicial proceedings, in particular through an exemption from liability for disclosing the information.

The new law will require national authorities to inform citizens and provide training for public authorities on how to deal with whistleblowers. It also includes safeguards to discourage malicious or abusive reports and prevent unjustified reputational damage. Those affected by a whistleblower's report will fully enjoy the presumption of innocence, the right to an effective remedy, a fair trial, and the right of defense. It should be noticed that the proposed law provides protection for former staff, journalists and other people who support whistleblowers – including (why not?) staff representatives.

2. [JIU/REP/2018/4 - Review of Whistle-Blower Policies and Practices in United Nations System Organizations](#)

The 2018 review by the United Nations Joint Inspection Unit (JIU) stemmed from a proposal made by the United Nations Educational, Scientific and Cultural Organization for JIU to look at the effectiveness of whistle-blower policies and practices across the United Nations system organizations to ensure that whistleblowers are accorded adequate levels of protection, especially with regard to retaliation.

The system-wide review focused on policies, processes and procedures for reporting misconduct/wrongdoing and for protecting from retaliation those who do report. It involved an analysis of protection against retaliation policies, questionnaire responses and other documentation collected from the 28 JIU participating organizations; interviews with over 400 stakeholders, including 17 individuals who had reported misconduct/wrongdoing and retaliation; focus groups; and a global staff survey on whistle-blower policies, which was conducted across the United Nations system organizations in order to measure perceptions.

The JIU reviewed 23 protection against retaliation policies that build upon and complement other internal policies pertaining to the reporting of misconduct and wrongdoing.

The report contains nine recommendations to be implemented from 2019 to 2020 by executive heads. Executive heads should prioritize developing a comprehensive accountability framework and, to that end, engage in a revision of their protection

against retaliation policies, a review of the independence of relevant staff functions, appropriate and clear reporting channels and appeals mechanisms, targeted training, and communication and outreach strategies, and the surveying of staff on accountability and integrity issues. In order to effectively implement an accountability framework, standard operating procedures for handling misconduct/wrongdoing cases aimed at proactively preventing retaliation should be developed, and separate procedures for handling retaliation cases are also necessary. To ensure the sustainability of these changes, executive heads need to set a “tone at the top” that encourages respectful dissent, supports reporting of misconduct/wrongdoing and effectively protects those who do report.

The report also contains two recommendations directed at legislative bodies, which are called on to exercise their oversight role to ensure, by 2020: that policies and procedures are in place to specifically address allegations against executive heads; that relevant professional staff functions are appropriately independent; and that the latter regularly report on their activities to the legislative body. The Inspectors also implore legislative bodies, through oversight committees or other mechanisms, to mandate their organizations to develop and/or revise their frameworks and hold executive heads accountable for their implementation.

3. The FICSA Seminar on ensuring the protection of whistleblowers

The FICSA seminar on whistleblower protection was held on 15 November 2018 at the ITU in Geneva. The meeting was convened by Miranda Brown, assisted by Beatrice Edwards (Government Accountability Project), Emma Reilly (a whistleblower at OHCHR) and Carmen Montenegro (ITU).

Staff representatives from 15 organizations attended the meeting. Prior to the meeting, participants were requested to familiarize themselves with any whistleblower protection policies or procedures in place in their organizations. Several of the organizations did not have whistleblower protection policies in place.

The seminar provided participants first with an overview of whistleblower protection systems in place around the world, notably in the US and European Union, as well as within the UN system. Participants then focused on the technical definitions of a whistleblower and of retaliation, used by the UN and other international organizations, as well as best practices. These include the *‘reverse burden of proof’*, in which the onus is on the organisation to demonstrate that the adverse actions taken against the whistleblower were not retaliatory and would have taken place irrespective of the whistleblower’s disclosures.

The different forms of retaliation were examined as well as the level of risks faced by whistleblowers, depending on the type of employment contract. In the UN system, the forms of retaliation reported include: dismissal, contract-non-renewal, forced transfer to another duty station, blacklisting, harassment, discrimination and ostracism. Blacklisting is an insidious problem.

The meeting then considered the two systems in place to protect UN whistleblowers: the internal mechanism which typically involved filing a request for protection from

retaliation with the Ethics Office, and the external independent mechanism through the Administrative Tribunals (UNDT/UNAT or ILOAT).

Participants examined in detail the Secretary General's "bulletin" ST/SGB/2017/2/Rev.1 *'Protection from retaliation for reporting misconduct or cooperating in duly authorized audits and investigations'* and the process to be followed by the UN whistleblower and the UN Ethics Office. The Ethics Office reviews the whistleblower's request for protection from retaliation and makes a recommendation to the Secretary General. Participants considered the two criteria used by the Ethics Office, namely whether the individual had engaged in a 'protected activity' (either by making a protected disclosure or by participating in a duly authorized audit or investigation) and whether there was a 'prima facie case of retaliation'. If both criteria are met, the Ethics Office refers the matter for investigation by the UN's Office of Internal Oversight Services (OIOS). The OIOS reports its findings to the Ethics Office, which then makes recommendations to the Secretary General. The Ethics Office is to apply the 'reverse burden of proof'.

Discussion focussed on the role of the Ethics Office, and specifically its structural lack of independence, with the head of the Ethics Office usually reporting to the UN Executive Head. This lack of independence was compounded when the whistleblower's disclosures related to the conduct of the Executive Head or other senior officials. The conveners expressed their concerns about the Ethics Office's narrow interpretation of the criteria for protected activity and prima facie case of retaliation, which led to a low number of staff members' claims being referred for investigation and very few being afforded any protection.

Participants also considered in detail the external mechanism that allows a UN whistleblower who has already been subject to retaliation and an adverse personnel action (adverse administrative decision to seek a review of this adverse administrative decision by the Administrative Tribunals). Participants heard about the low number of judgments finding in the favour of the whistleblower. The Tribunals are independent from management; however, they do not apply the 'reverse burden of proof' and the onus rests on the whistleblower to prove through the heightened standard of clear and convincing evidence that the actions taken by management were not retaliatory (the reverse burden of proof is recognised internationally as a basic requirement of any whistleblower protection system). Additionally, the whistleblower has no powers of investigation.

Working in break-out groups, participants examined critically one of the whistleblower policies from an organization represented and reported back to the full meeting their findings on whether these policies met best practice standards. There were considerable differences in the policies in place in the participants' organizations. Overall, there were substantial protection gaps. There was also a lack of focus on implementation – what was written on paper did not amount to protection in real life.

How best to report misconduct – whether internally, externally or anonymously – was also discussed, as well as the possible role of the media. The meeting heard, first-hand, the experiences of UN whistleblowers Emma Reilly and Miranda Brown,

and the personal toll whistleblowing can take on the whistleblower – financially, emotionally and on health – and the stresses placed on family members.

There was a substantive discussion on the role of staff representatives in supporting whistleblowers. Participants heard from Carmen Montenegro about her personal experience of supporting several whistleblowers, notably at WIPO. There were differences of opinion between participants on the role of the staff representative and whether this was to defend or represent the whistleblower, as opposed to acting as bridge with the Administration. Issues for staff representatives to consider in relation to whistleblowers included: legal representation and the associated fees; psycho-social support; ostracism, harassment and blacklisting; retaliation against staff representatives; and policy development (engagement with the Administration).

The seminar provided participants with a thorough overview of whistleblower protection systems, focusing on those in place in the UN common system, best practices and how to improve their organisations' policies and implementation, and what practical advice they could provide as staff representatives to a whistleblower in their organisation.

OTHER RELEVANT ACTIVITIES

[The EU General Data Protection Regulation \(GDPR\)](#)

Regulation (EU) 2016/6791 ("GDPR") is a regulation in EU law on data protection and privacy for all individuals within the European Union (EU) and the European Economic Area (EEA). It also addresses the export of personal data outside the EU and EEA areas. The GDPR aims primarily to give control to individuals over their personal data and to simplify the regulatory environment for international business by unifying the regulation within the EU.

Superseding the Data Protection Directive 95/46/EC, the regulation contains provisions and requirements pertaining to the processing of personal data of individuals (formally called data subjects in the GDPR) inside the EEA, and applies to any enterprise established in the EEA or – regardless of its location and the data subjects' citizenship – that is processing the personal information of data subjects inside the EEA.

The data subject has the right to access their personal data within prescribed timeframes.

Controllers of personal data must put in place appropriate technical and organizational measures to implement the data protection principles. Business processes that handle personal data must be designed and built with consideration of the principles and provide safeguards to protect data (for example, using pseudonymization or full anonymization, where appropriate), and use the highest-possible privacy settings by default, so that the data is not available publicly without explicit, informed consent, and cannot be used to identify a subject without additional information stored separately. No personal data may be processed unless it is done under a lawful basis specified by the regulation, or unless the data

controller or processor has received an unambiguous and individualized affirmation of consent from the data subject. The data subject has the right to revoke their consent at any time.

The GDPR was adopted on 14 April 2016 and became enforceable beginning 25 May 2018. As the GDPR is a regulation, not a directive, it is directly binding and applicable.

FINDINGS AND RECOMMENDATIONS

Below is a summary overview of the Working Group's findings and recommendations. It is a humble blueprint for action, with a view to starting a conversation about a process that must be inclusive and based on the premise of bottom-up sensitization to the problems associated with whistleblower protection.

Review and expand the definitions of whistleblower and retaliation

Whistleblowing is generally understood to be the disclosure of misconduct or wrongdoing in the context of a work-based relationship. However, in order for the said disclosure to be considered a protected activity within the UN system – a status that will afford its author(s) protection from retaliation – it must be reported via designated established channels (i.e., direct or hierarchical supervisor, Office of the Director of Internal Oversight, Director of HRMD, Chair of the Governing Body or Ethics Office).

The Working Group is of the view that staff representatives and staff associations are *de facto* whistleblowers by association. Unable to claim official whistleblower status, they lack access to the mechanisms of protection against retaliation. More robust protection other than the vague references to the protection of staff representatives as contained in ICRC International Code of Conduct for International Civil Servants or the SRR of International Organizations is required.

The Working Group recommends that FICSA ExCom should lobby for the definition of retaliation to be broadened in order to define any action taken or not taken with a view to harm persons who disclose misconduct/wrongdoing.

Data protection and privacy

The European Union General Data Protection Regulation (GDPR) came into force in May 2018, placing the issues of data protection and privacy in full limelight. "Going paperless" is the new buzzword and throughout the UN system HRMDs have started moving personnel data files online, causing concern among staff representatives as to possible repercussions for the whole of the personnel. It should be noted that some organizations do not have a data protection policy in place. To date, it is unclear what the implications of the GDPR will be for the UN system, if any.

Given that whistleblowers would be a particularly vulnerable category to breaches of privacy, the Working Group respectfully requests the FICSA Council to commission a legal opinion on the potential implications of **GDPR** to UN System activities to guide staff representatives in their dealings with their respective organizations.

Furthermore, staff associations should be encouraged to lobby for staff rules and regulations to be amended, as needed, to ensure staff has full access to their personal data as contained in the organization files, and that the said information will be treated as strictly confidential.

Having a voice

Most organizations draw inspiration from UN policy to establish their own procedures, rules and regulations. Although FICSA is often invited to comment on draft policies at later stages, it has no part in the discussions that shape those policies.

The Working Group recommends that FICSA ExCom should lobby for a seat at the table and the opportunity to provide input from the onset of discussions.

“Inequality of arms”

It has come to the attention of the Working Group that one Ethics Office in the UN system has determined that former staff are not protected by the policies of their former employing organization, even in instances where the said staff were retaliated against as a result of engaging in a protected activity, and forced to leave the organization as a result of the said retaliation.

The Working Group is of the view that such an interpretation adds insult to injury and further compounds the precariousness and vulnerability that are the predicament of whistleblowers. The Working Group calls upon the three federations to join efforts to address this flawed interpretation.

Blacklisting

The Working Group notes with concern the current trend of the HR Network to pool resources with a view to streamlining recruitment procedures, notably the sharing of a common platform for the submission of application to posts in the UN system.

The potential for perverse practices such as blacklisting to flourish in this type of environment is ripe. In order to counter this perceived threat, the Working Group respectfully requests FICSA ExCom to lobby for the adoption of policies and procedures that specifically address blacklisting.

PROPOSED ACTIVITIES FOR 2019

In the light of what precedes, the Working Group on Whistleblower Protection Policy requests that its work be re-conducted in 2019 and suggests that the following activities be included in its 2019 programme:

- The revamp and expansion of the FICSA webpage on Whistleblowing, with input from the three staff federations in the UN common system, with a view to streamlining resources and useful information for staff representatives on the topic of whistleblowing, in a user-friendly fashion. It is suggested that the following information be posted on the said webpage, inter alia: PSI report: "Checkmate to Corruption: Making the Case for a Wide-Ranging Initiative on Whistleblower Protection"; JIU/REP/2018/4 – "Review of Whistle-Blower Policies and Practices in United Nations System Organizations"; whistleblower protection policies system-wide; roster of lawyers who can assist in legal procedures; persons or institutions to lobby; media contacts; provision of psycho-social support to whistleblowers.
- The organization of three or four two-day workshops on whistleblower protection policies. Proposed format is Day 1: Discussions, Day 2: Individual consultations on the specific needs of participants. Suggested locations are Rome, Vienna, Geneva and, upon request, somewhere on the African continent. It is further suggested that, in an effort to ensure greater participation, UN common-system staff federation members (e.g. CCISUA, UNISERV) be offered special reduced rates.
- The creation of a cross-federation whistleblower protection task force with a view to initiating a much-needed dialogue with staff reps, organizing consultations and coordinating the pooling of information and resources.
- Submission to the 72nd FICSA Council (Vienna, 2019) of a Resolution on the protection of whistleblowers.

Useful JIU definitions

Whistleblowing is the disclosure of misconduct/wrongdoing in the context of a work-based relationship. The reporting must be to a designated channel to constitute a “protected activity”.

Protected activity is the reporting of misconduct and/or wrongdoing to an appropriate mechanism or body. Protected activities also include cooperating with a duly authorized investigation or audit.

Misconduct/wrongdoing refers to a failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Rules of the United Nations or other relevant administrative issuances and organizational policies, or failure to observe the standards of conduct expected of an international civil servant. This includes, but is not limited to: abuse or misuse of organizational property and funds, including for personal gain or gain by another; abuse of position, including for personal gain or gain by another; solicitation or receipt of “kickbacks” or bribes; willful misrepresentation (fraud); corruption; sabotage; coercion; collusion; embezzlement; work harassment; sexual harassment; discriminatory practices; retaliation, including retaliation against alleged whistleblowers; abuse of authority; and conflicts of interest. The Inspectors have chosen to use “misconduct/wrongdoing” throughout the report to reflect both terms, so as not to exclude one and to best reflect the variance of scope in the policies of the 28 participating organizations.

Retaliation is defined as any direct or indirect detrimental action recommended, threatened or taken towards an individual who has previously reported misconduct/wrongdoing or participated in an oversight activity.

Prima facie case (of retaliation) is established when the information available to the designated entity receiving the retaliation complaint (an ethics or oversight office) indicates that it is more likely than not that a causal connection exists between the protected activity and the detrimental action taken or threatened against the complainant. When the office handling the retaliation complaint has determined that a prima facie case has been established, the matter is referred for a full investigation.

Respectful dissent is the right to have, and appropriately express, an unpopular opinion or a perspective that may not conform with established policies or positions of the organization.

BIBLIOGRAPHY

Public Service International Report: "Checkmate to Corruption: Making the Case for a Wide-Ranging Initiative on Whistleblower Protection", December, 2017.

https://www.world-psi.org/sites/default/files/documents/research/en_whistleblower_protection.pdf

Peter Gallo: "Staff Members' Guide to Reporting Misconduct in the UN Secretariat". 2018. (This document is no longer available on the internet)

Government Accountability Project, <https://www.whistleblower.org>

Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, 2018.

https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=620400

JIU/REP/2018/4 – "Review of Whistle-Blower Policies and Practices in United Nations System Organizations", 2018. <https://www.unjiu.org/content/reports>

The EU General Data Protection Regulation (GDPR), 2018.

https://ec.europa.eu/commission/priorities/justice-and-fundamental-rights/data-protection/2018-reform-eu-data-protection-rules_en