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A critical look into the Whistleblower Protection Act 2010

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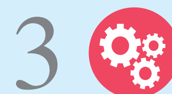
Abstract:

Despite the introduction of the Whistleblower Protection Act 2010 (the Act), whistleblowing is still a rare occurrence in Malaysia. In fact, the annual report from the Malaysian Anti-Corruption Commission (MACC) in 2012 indicates that out of a total of 8,953 complaints received by the Commission only 28 were from whistleblowers. However, data from the US suggests that as a method of detection whistleblowing is the single most effective means of uncovering graft. Considering the importance of whistleblowers in discovering cases of fraud the low number of whistleblowers as observed through the MACC statistics suggest that whistleblowers in Malaysia remain hesitant.

In order to encourage more individuals to come forward and whistleblow, there must be several changes made to Whistleblower Protection Act 2010[1]. To achieve this, the following three areas need to be reformed under the Act:

Protection for Whistleblowers - the level of protection for whistleblowers needs to be improved and reinforced.

Independence of the Act - the Act still remains vulnerable to Ministerial action and it needs to be made entirely independent of such influence.



Whistleblowing Mechanism - a more comprehensive whistleblowing mechanism needs to be created - one that is more robust than the current model.

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[1] This paper is an adaptation of Christopher Leong's speech at a Whistleblower Forum organised by the Malaysian Anti-Corruption Commission (MACC) on July 21, 2014

1. Introduction

As corruption is usually covert, it is difficult to combat it if there is limited access to crucial evidence in the form of confidential or insider information. The success of our enforcement agencies such as the police, or the Malaysian Anti-Corruption Commission (MACC) would in many instances depend on the information specifically given by people who are willing to come forward and inform enforcement agencies of a corrupt act or of organised crime. These people are known as whistleblowers.

According to the US Association of Certified Fraud Examiner's report to the Nation in 2008

46.2%

of fraud cases are discovered by tipoffs.

David Lehmann, the former Head of Deloitte Forensics at Deloitte Malaysia, has described whistleblowing as 'the most significant means by which serious misconduct, such as fraud and corruption is detected' (Lehmann, 2015). The Watergate scandal would have never surfaced in the United States (US) were it not for inside information from a whistleblower, Deep Throat. He was an ex-Deputy Director of the FBI and White House counsel, who gave crucial evidence which resulted in the criminal prosecution of 69 government officials and the impeachment of President Nixon (Marsh, 2005). In Malaysia, the financial scandal in the early 1980s involving Bumiputra Malaysia Finance (BMF)[2] which led to the murder of its internal auditor, may have been uncovered before such a fatal occurrence had there been a decent whistleblower protection law in place.

Data from the US suggests that as a method of detection **whistleblowing is the single most effective means of uncovering graft.** The US Association of Certified Fraud Examiner's Report to the Nation in 2008 revealed that 46.2 percent of all fraud cases discovered in that year were through tip-offs from whistleblowers. The next most common means of discovery, being internal controls, was only half as effective, at 23.3 percent (Association of Certified Fraud Examiners, 2008).

However, we have to consider that safety is a concern for an individual who is contemplating whistleblowing. For a whistleblower to come forward, they must have the confidence that they will be guaranteed protection before, during, and after the disclosure; that the enforcement agencies are independent; and that action will be taken after the disclosure of improper conduct.

[2] In this case it was discovered that Bumiputra Malaysia Finance, a Hong Kong based subsidiary of state-owned Bank Bumiputra Malaysia Berhad, engaged in a wide range of suspicious dealings with the Carrian Group, a major player in Hong Kong's then booming property market. This case occurred in the mid-1980s. Details of this case included fiscally imprudent decisions such as lending to "connected" borrowers.

Existing Legal Framework for Whistleblower Protection

The Securities Commission Act 1993, Section 140, provides confidentiality for whistleblowers to the Securities Commission with regards to their identity and information. The Capital Markets and Services Act 2007 extends additional protection to auditors and CEOs (Securities Commission Malaysia website). Additionally, under Section 65 of the Malaysian Anti-Corruption Act 2009, the same protection is extended to whistleblowers reporting any fraud in the public sphere. In 2010, to complement the existing legal framework, the government enacted the Whistleblowers Protection Act 2010 (hereinafter referred to as the "Act").

Despite the introduction of various legal frameworks, whistleblowing in Malaysia remains rare in comparison to the number of complaints received by various enforcement agencies. Figures presented in Table 1 show that, in 2012, out of a total of 8,953 complaints received by the MACC only 28 were from whistleblowers. For the Police, out of a total of 1,475 complaints, 67 were from whistleblowers (MACC Annual Report, 2012). Considering the importance of whistleblowers in discovering cases of fraud, as exemplified by the US, these numbers suggest whistleblowers in Malaysia remain hesitant.

> *In 2012, out of a total of 8,953 complaints received by the MACC* ***only 28 were from whistleblowers.*** *For the police, out of a total of 1,475 complaints,* ***67 were from whistleblowers****.*
>
> *MACC Annual Report 2012*

Table 1: Number of whistleblowers complaints to various Malaysian enforcement agencies in 2012[3]

AGENCY	NUMBER OF COMPLAINTS RECEIVED	NUMBER OF WHISTLEBLOWERS
Royal Malaysian Police	1,475	67
MACC	8,953	28
KASTAM	375	0
JPJ	737	1
IMIGRESEN	125	0
SC	447	0
SSM	1,895	2

While the Whistleblower Protection Act 2010 has helped fill a key gap in Malaysia's anti-corruption landscape, it needs to be improved upon. This paper discusses key features that can be incorporated into the Act to make whistleblowing more effective and palatable to potential whistleblowers.

[3] The latest MACC Annual Report available online is for 2012.

2. An overview of the current Whistleblower Protection Act 2010

2.1 *An Act to Combat Corruption*

The Act was enacted in 2010 as part of the Government Transformation Plan (GTP)[4] in a drive to eliminate corruption. The Act was aimed at tying together previous whistleblowing legislations to create a more comprehensive whistleblowing system.

Whistleblowing protection was extended to those reporting corruption in the public sphere, complementing both the Securities Commission Act and the Capital Markets and Services Act which focused mainly on the private sector. The Act also expanded on the whistleblower protection outlined in Section 65 of the MACC Act to create a more detailed and comprehensive system. All this was aimed at bringing Malaysia closer to the targets it had agreed to as a signatory of the United Nations Convention Against Corruption (UNCAC)[5]. In particular this included promoting and strengthening measures to prevent and combat corruption more efficiently and effectively (United Nations Office on Drugs and Crime, 2004).

The Act consists of 27 sections grouped into 7 parts[6]. It sets out a mechanism for whistleblowers to make disclosures as well as measures to protect whistleblowers, both in ensuring their confidentiality and ensuring they are not the target of reprisals via harassment, intimidation and a variety of other actions that would lead to adverse or negative consequences.

The preamble to the Act describes it as:-

An Act to combat corruption and other wrongdoings by encouraging and facilitating disclosures of improper conduct in the public and private sector, to protect persons making those disclosures from detrimental action, to provide for the matters disclosed to be investigated and dealt with and to provide for other matters connected therewith.

[4] The Government Transformation Programme (GTP) is a broad-based programme of change to fundamentally transform the Government into an efficient and rakyat-centred institution.
[5] Malaysia signed the United Nations Convention against Corruption (UNCAC) on 9th December 2003 and ratified UNCAC on 24th September 2008.
[6] The sections include: Administration, Whistleblower Protection, Dealing with Disclosure of Improper Conduct, Complaints of Detrimental Action and Remedies, and Enforcement, Offences and Penalties.

2.2 Defining a Whistleblower

The Act **defines a whistleblower as anybody with information with respect to improper conduct who discloses that information to an enforcement agency**. Improper conduct is defined as conduct which, if proven, constitutes a disciplinary or criminal offence (Legal Affairs Division, Prime Ministers Office, 2010). Improper conduct under the Act, therefore, comprises of any corrupt practices or any criminal offences (Legal Affairs Division, Prime Ministers Office, 2010).

A whistleblower, based on his reasonable belief, can disclose any information about any person that has engaged in, is engaging or preparing to engage in such conduct – provided that such disclosure is not specifically prohibited by any written law. This can be interpreted to include any hearsay[7] statements or information as long as the informant has reasonable belief that the information is true.

Under the Act, protection given to the whistleblower is the protection of confidential information. Confidential information is defined as the identity of the informant, the information given by the informant, and the circumstance in which that information is received. As long as the person makes the disclosure to an enforcement agency[8], he is assured protection (Legal Affairs Division, Prime Ministers Office, 2010).

> *"As long as the person makes the disclosure to an enforcement agency, he is assured protection."*

2.3 The Protections Granted

The protection given is protection of confidential information, which includes the identity of the informant, immunity from civil and criminal action for the informant, and protection against retaliatory action.[9] Such retaliatory action is termed as "detrimental action"[10] in the Act.

Anybody who takes detrimental action against the whistleblower or anyone associated with the whistleblower will be subject to a fine not exceeding RM100,000.00 or imprisonment not exceeding 15 years or both. [11]The protection extended by the Act to "any person related to or associated with the whistleblower" recognises that the wellbeing and security of those close to the whistleblower is an important consideration for a whistleblower's decision to come forward.

> *Anybody who takes detrimental action against the whistleblower or anyone associated with the whistleblower will be subject to a* ***fine not exceeding RM100,000.00 or imprisonment not exceeding 15 years or both.***

[7] Hearsay statement refers to information which an informant does not have 1st hand knowledge of and has obtained it from a third party.
[8] The five key enforcement agencies are the Royal Malaysian Police Force, Royal Malaysian Customs Department, Road Transport Department, Malaysian Anti-Corruption Commission and the Immigration Department of Malaysia.
[9] Section 7 of the Act.
[10] This would cover any interference with the lawful employment and livelihood of any person including discrimination, discharge, demotion, suspension, and disadvantage. Termination or adverse treatment in relation to a person's employment, career, professions, trade or business also counts as retaliation.
[11] Section 10 of the Act. Sections 14 to 19 cover the procedure for redress against detrimental action.

2.4 *Room for improvement*

The Act has some positive features which are not included in whistleblower protection legislation in some other Commonwealth countries. For example, India's whistleblower protection act known as the Public Interest Disclosure and Protection to Persons Making the Disclosure Act 2010, limits its jurisdiction to the government sector at federal level, and does not provide financial incentives for whistleblowing or penalties for victimising a complainant. The second example is that of United Kingdom's (UK) Public Interest Disclosure Act 1998 (PIDA) (UK Legislation, 1998) and the Employment Rights Act 1996 (ERA) (UK Legislation, 1996) which require the whistleblower to act in good faith and both do not extend protection to persons related to or associated with the whistleblower. Whereas, the Malaysian Act extends its jurisdiction down to the state level, provides fiscal incentives and penalties as well as extending protection to persons related to whistleblower.

While the Act in Malaysia may be said to be more comprehensive than similar legislation in these other countries gaps still remain. The whistleblowing mechanism still has shortcomings. Further modifications can strengthen the Act and increase the independence of the whistleblowing process. The proposals listed in the next section aim to strengthen the Act and encourage whistleblowing.

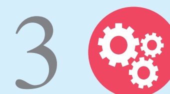
“The Malaysian Act extends its jurisdiction down to the state level, provides fiscal incentives and penalties as well as extending protection to persons related to whistleblower.”

3. Proposals for Reform

In order to encourage more whistleblowing there needs to be a dedicated channel for disclosure by whistleblowers and a more transparent process. Whistleblowers must be confident that they will be treated seriously, and will enjoy protection before, during, and after the disclosure. Additionally, it must be ensured that enforcement agencies are independent, seen to be independent and that proper action will be taken upon disclosure of improper conduct. To achieve this, the following three areas need to be reformed under the Act:

Protection for Whistleblowers -
the level of protection for whistleblowers needs to be improved and reinforced.

Independence of the Act -
the Act still remains vulnerable to Ministerial action and it needs to be made entirely independent of such influence.



Whistleblowing Mechanism -
a more comprehensive whistleblowing mechanism needs to be created - one that is more robust than the current model.

3.1 *Increasing protection for whistleblowers*

While the Act is a step in the right direction some areas of the legislation leave whistleblowers exposed. Keeping in mind that the purpose of the Act is to encourage whistleblowers to come forward, protection should be extended in the following three ways:-

- Allowing disclosure to non-enforcement agencies;
- Removing limits on the types of disclosures permitted; and
- Removing restrictions on the motive behind disclosures.

3.1.1 Allow disclosure by whistleblowers to a non-enforcement agency without losing protection, or being subject to imprisonment or a fine

Disclosure to an enforcement agency is a condition for protection. Section 6(1) states that "a person may make a disclosure of improper conduct to any enforcement agency". Section 7(1) provides that a whistleblower who makes a disclosure of improper conduct to any enforcement agency under Section 6 shall be conferred protection. The Act in effect defines "enforcement agency" as any ministry, department, agency or body conferred with investigation and enforcement functions or powers and established by the Federal or State governments, or by Federal or State laws.

It is implied that for whistleblower protection to be accorded, the disclosure must be made to an enforcement agency. The authorities have in some instances denied whistleblower protection to persons who have disclosed information of improper conduct to the news media.[12]

Moreover, Section 8(1) states that "any person who makes or receives a disclosure of improper conduct or obtain confidential information in the course of the investigation into such a disclosure of improper conduct shall not disclose the confidential information or any part thereof". This means that a **whistleblower who has made a disclosure of improper conduct to an enforcement agency may not at the same time or thereafter disclose such information to anyone else**. This would presumably include a disclosure to the news media or a . Any person who contravenes this rule, "commits an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding ten years or to both.

Section 8(1) would be pertinent in safeguarding or protecting the confidential information provided by the whistleblower. This should not however prevent the whistleblower from disclosing the confidential information to other appropriate persons.

A potential whistleblower may consult confidantes before deciding to approach enforcement agencies. Even upon deciding to make the disclosure, he or she may seek the advice of a legal advisor or a or other entities in which the whistleblower repose confidence. Protection is not only about the identity of a whistleblower for purposes of security, it is also about protection from detrimental action or reprisals. A whistleblower may not be concerned to keep his or her identity confidential, but is concerned that no retaliatory action is suffered for coming forward with information of misconduct.

"Section 8(1) would be pertinent in safeguarding or protecting the confidential information provided by the whistleblower. This should not however prevent the whistleblower from disclosing the confidential information to other appropriate persons."

[12] Member of Parliament Rafizi Ramli revealed information to the media about the National Feedlot Corp case and was unable to seek protection under the Act. He was subsequently charged under the Banking and Financial Institutions Act 1989 (Bafia) on secrecy.

In some instances, people choose to communicate information of misconduct to a , the news media or other appropriate 3rd parties due to a lack of confidence in the authorities, a perception that the whistleblower's disclosure is not being investigated or taken seriously, or as a protective step for their own safety or security.

In Australia and the UK the relevant provisions do not limit disclosure to enforcement agencies, and whistleblowers continue to enjoy protection. Section 5(2) of the Australian Whistleblower Protection Act 1993 states that, "A person makes an appropriate disclosure of public interest information…if the disclosure is made to a person to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure." The Australian provision goes on to provide that a person is deemed to make an appropriate disclosure if it is make to an appropriate authority, however "this is not intended to suggest that an appropriate authority is the only person to whom a disclosure of public interest information may be reasonably and appropriately made" (South Australian Legislation, 2013). In the case of the UK, the Public Interest Disclosure Act 1998 introduced amendments to the ERA. Sections 43C-43F of the ERA states that a whistleblower can make a, "disclosure to employer or other responsible person, to legal adviser, to a Minister of the Crown, and to a person prescribed by an order made by the Secretary of State under ERA."

The Act should be designed to protect the whistleblower, rather than to suppress per se any information. If the information a whistleblower discloses is regarding a corrupt act by a public official or within a government institution the law should not be concerned with ring-fencing this information. The Act should be amended, in particular Sections 7 and 8[13], to permit disclosure of improper conduct to non-enforcement agencies without the whistleblower losing protection.

Furthermore, at present, evaluation of whether protection should be granted or withdrawn is currently carried out by the enforcement agency to which the disclosure is made. In this regard, Section 11(1) of the Act provides that "the enforcement agency shall revoke the whistleblower protection conferred under section 7 if it is of the opinion…". The Act should allow for an independent statutory body to oversee protection for whistleblowers like in Australia and the US, independent authorities such as the office of Ombudsman and the US Special Counsel, ensure whistleblower protection.

OUR PROPOSAL

The Act should be amended, in particular Sections 7 and 8, to ***permit disclosure of improper conduct to non-enforcement agencies without the whistleblower losing protection****.*

OUR PROPOSAL

Allow an independent statutory body to oversee protection for whistleblowers like in Australia and the US, independent authorities such as the office of Ombudsman and the US Special Counsel, ensure whistleblower protection.

[13] Section 7 is Whistleblower protection and Section 8 is about Protection of confidential information.

Textbox: An Alternative Solution

- The disclosure to other persons comprises substantially the same information provided to the enforcement agency;
- The identity of the whistleblower is made public by the whistleblower;
- The enforcement agency either decided not to investigate or did not complete investigation within a reasonable time;
- The enforcement agency has failed to reasonably update the whistleblower of the status of the investigation, or inform the whistleblower within six months of the disclosure, as to whether the matter is being investigated or not;
- The enforcement agency has investigated but not recommended any action, or recommended no action to be taken;
- The appropriate disciplinary authority or other appropriate authority or employer takes no action or decides not to take action; or
- The Public Prosecutor takes no action or decides not to prosecute.

Ultimately, the Act does provide safeguards against frivolous disclosures, and provides that a whistleblower would not be accorded protection, or would lose protection, under the Act in the event the whistleblower knowingly makes a false disclosure or does not believe the information to be true, or the disclosure is frivolous or vexatious.

3.1.2 Do not limit the type of information disclosed and protected

Section 6[14] of the current Act provides that a person may make a disclosure of improper conduct to an enforcement agency "provided that such disclosure is not specifically prohibited by any written law".

In the context of Malaysia, **this proviso would in effect make it almost impossible to whistle blow when it concerns acts or omissions of public officials and governmental bodies**. This is because a substantial amount of government documents, information and data are automatically classified as official secrets under the OSA, and any person who may observe or have evidence of misconduct or of any corrupt practices by a public official would likely not be able to disclose such information or evidence to the appropriate authorities. Such **a person would not only be disentitled to protection under the Act, but would likely face arrest or prosecution for alleged breach of the OSA**.

Additionally, the recent amendment to the Penal Code introduced Section 203A which provides for the criminal offence of "Disclosure of information". It provides that it is an offence for "Whoever discloses any information or matter which has been obtained by him in the performance of his duties or the exercise of his functions under any written law shall be punished with fine of not more than 1 million ringgit, or with imprisonment for a term which may extend to 1 year, or with both."

It is immediately observed that the commission of this offence is not dependent upon the information being classified as secret under the OSA. This amendment clearly weakens, if not makes the Act irrelevant, bearing in mind that very often the information observed or obtained by whistleblowers is observed or obtained in the course of their work. Section 203A of the Penal Code would defeat the very purpose of the Act. Therefore Section 203A should be repealed.

It is pertinent to note that Section 6(2)(c) of the Act provides that "A disclosure of improper conduct under subsection (1) may also be made…in respect of information acquired by him while he was an officer of a public body or an officer of a private body;" This appears to conflict with the proviso to Section 6(1), as well as the new Section 203A of the Penal Code. The provisions of Section 6(1), read with the proviso, and (2)(c) creates ambiguity. Such ambiguity does not instill confidence in whistleblowers nor encourage them to come forward.

> *"A person who discloses information or evidence would not only be disentitled to protection under the Act, but would likely face arrest or prosecution for alleged breach of the OSA."*

OUR PROPOSAL

Remove section 6(1) and instead introduce provisions that protect whistleblowers who in disclosing evidence, may breach laws like the OSA.

[14] Section 6 is Disclosure of improper conduct.

Given that the objective of the Act is to encourage the uncovering of misconduct and corruption, the proviso to Section 6(1) should be deleted. Instead, provisions for in-built defenses for whistleblowers should be included for where the disclosure of improper conduct involves disclosure of information that may be protected or prohibited from disclosure under other laws, if the disclosure is with respect to evidence of corruption or a serious crime, and it is in the public interest to make such a disclosure.

3.1.3 Prior involvement in misconduct should not automatically lead to revocation of protection

Section 11[15](1)(a) should be amended to ensure that the whistleblower may still enjoy protection even if the whistleblower was a participant in the improper conduct as long as the whistleblower was not the principal or mastermind of the misconduct. Often, a corrupt practice or criminal activity is brought to light by an insider or a person who was involved in the activity but who later decides to blow the whistle on his/her partners in crime. In such circumstances, there should be discretion as to whether whistleblower protection should be extended to accomplices or participants who whistleblow. At present, s.11(1)(a) of the Act is inflexible.

OUR PROPOSAL

Amend Section 11(1)(a) to ensure that the whistleblower will be protected even if he/she was a participant in the improper conduct as long as the whistleblower was not the mastermind of the misconduct.

When dealing with whistleblowers who were participants or accomplices in the improper conduct, there may be good reasons as a matter of public policy not to provide them with automatic protection, however, it would serve the fight against corruption, and the objective of the Act, if the Act provides for discretion in extending to them protection, and the extent of such protection, in appropriate cases and circumstances. This would encourage whistleblowers who were part of a nefarious scheme to come forward, rather than confine ourselves to encouraging innocent bystanders or those who stumble upon information or improper conduct to step forward. The Act should provide for the discretion to extend whistleblower protection, and the extent of such protection, to be exercised by an independent authority or oversight authority. Such an independent authority may receive and act upon recommendations of the relevant enforcement agencies when considering the exercise of such discretion.

Section 11(1)(e) should also be amended to allow for disclosures by employees motivated by fear of dismissal or disciplinary action. As long as the disclosure is not frivolous or vexatious, motive should not be a prime factor in denying protection. The Act's objective is to bring forward disclosure of wrongdoing, the motive behind such disclosures should be considered as secondary.

OUR PROPOSAL

Amend Section 11(1)(e) to allow for disclosures by employees motivated by fear of dismissal or disciplinary action. Motive should not be a prime factor in denying protection.

[15] Section 11 is Revocation of whistleblower protection

3.2 Establishing the Independence of the Act

As an Act seeking to protect whistleblowers and encourage them to expose corruption both in and out of government, the framework of the Act and the regulation of its mechanisms should be independent of executive government. At present, the Act allows for the Minister (which is not defined in the Act) to oversee the workings of the Act. It is of vital importance that the operations and implementation of the Act be independent and completely free of executive government involvement. Ministerial oversight of the Act should be removed and an independent authority be established to oversee the Act and the whistleblower protection provisions and mechanisms.

OUR PROPOSAL

Ministerial oversight of the Act should be removed and an independent authority be established to oversee the Act and the whistleblower protection provisions and mechanisms.

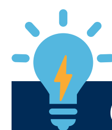
3.2.1 Remove Ministerial Oversight

Section 4[16] of the Act provides that the Minister may give to the enforcement agency directions of a general character not inconsistent with the Act as to the exercise of the powers, discretions and duties conferred on enforcement agencies, and the said agencies are required to comply with such directions.

Section 13[17](3) of the Act states that if an enforcement agency is not satisfied with steps or action taken, or the inaction of any disciplinary or other appropriate authority after the enforcement agency has provided them with its investigative report and recommendations, the enforcement agency may report or complain to the Minister.[18] The Act does not however provide for what the Minister is to do in such a circumstance.

Section 27[19] of the Act gives the power to the Minister to make any regulations as may be necessary or expedient for the purpose of carrying into effect the provisions of the Act.

It can be discerned from the above that the Minister plays an important function in the workings and implementation of the Act. The manner in which the enforcement agencies are to act and discharge their powers and perform their duties under the Act should be free from Ministerial oversight.



OUR PROPOSAL

The oversight function of the Act should be placed in the hands of an ***independent authority****, such as the office of an ombudsman, established for these specific purpose.*

[16] Section 4 is Power of Minister to issue directions.
[17] Section 13 is Finding of enforcement agency after investigation of improper conduct.
[18] Section 13(3) applies only to disciplinary offences. It does not apply to instances where the improper conduct constitutes a criminal offence, and which is referred to the Public Prosecutor.
[19] Section 27 is Power of Minister to make regulations.

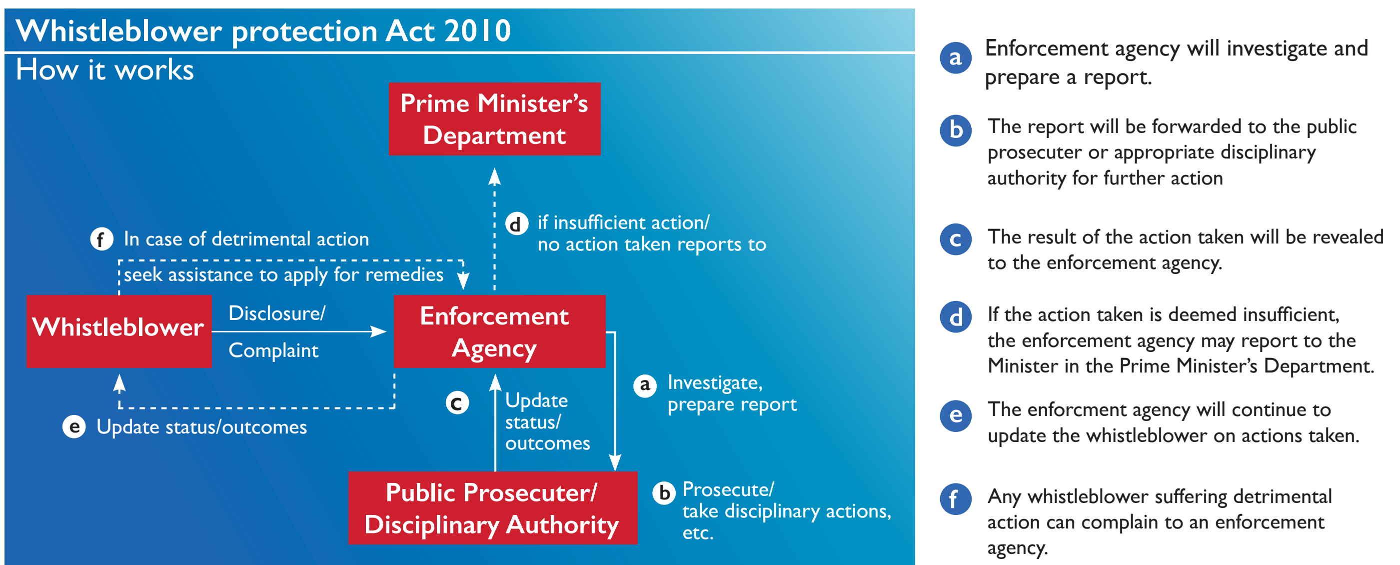
In maintaining the overall independence of the operations of the Act and securing the confidence of the public, as well as whistleblowers, the oversight function of the Act should be placed in the hands of an independent authority, such as the office of an ombudsman, established for this specific purpose. This has been mentioned earlier in the context of evaluating and conferring protection for whistleblowers.

3.3 *Creating a more comprehensive whistleblowing mechanism*

Recognising the uncertainties, incredible stress and fears potential whistleblowers face or undergo, it is imperative that a clear, understandable whistleblowing mechanism and procedure be laid out in laymen's terms in order to encourage disclosure. As shown in Figure 1, a relatively clear procedure for handling disclosures and subsequent investigation currently exists in Malaysia.

Whistleblowers reporting to an enforcement agency, such as the MACC, may report a disclosure through: walk-in, email, letter, fax, call, or a text message. Once this disclosure is reviewed and approved by the Information Review Committee, investigation begins. The enforcement agency undertakes the investigation. If the investigations reveal the commission of a criminal offence, the results of the investigation and recommendations by the enforcement agency will be forwarded to the Public Prosecutor (who is also the Attorney General). If the agency is not satisfied with the action taken by the AG it may report directly to the Prime Minister's Department.[20]

Figure 1: How the Whistleblower Protection Act 2010 works



[20] Please note that there is no provision for this in the Act. The report to the PM is only in respect of non-criminal offences. In the situation where the Public Prosecutor does not prosecute or take insufficient or no action, there appears to be no recourse in the Act. Therefore, the diagram below is not entirely accurate.

Although this process for investigating disclosure has been set out it can be vastly improved with amendments in the following areas:

- Creating specialised and dedicated units within enforcement agencies to handle disclosures;
- Increasing the frequency with which a whistleblower is updated on the progress of the investigation; and
- Offering greater remuneration to whistleblowers.

3.3.1 Creating specialised and dedicated units within enforcement agencies to handle disclosures

Disclosing information about improper misconduct to anyone let alone an enforcement agency can be a frightening and unnerving experience. In order to ensure whistleblowers feel secure in making such disclosures, dedicated units within enforcement agencies should be established. A general hotline, as is the current practice, is insufficient. It is in fact counter-productive to providing a secure means of disclosure communications. A whistleblower with sensitive information should know from the outset that there is a dedicated and secure channel to communicate with an enforcement agency, whether it is by telephone, email or walk in. Trained units specialised in handling whistleblower disclosures will enable the proper reception and handling of sensitive disclosures as well as increasing public confidence in making disclosures to such agencies.

“A whistleblower with sensitive information should know from the outset that there is a dedicated and secure channel to communicate with an enforcement agency.”

The MACC has an easily accessible and readily available website dedicated to helping whistleblowers, however it does not provide information regarding a dedicated unit to which whistleblower can report to (Malaysian Anti-Corruption Commission website). Unfortunately, enforcement agencies such as the police do not even have a clear mechanism for potential whistleblowers. **Such inconsistencies on the part of enforcement agencies must be improved, ironed out and made uniform**.

Additionally, a layperson seeking to whistleblow may be unsure as to which agency he should turn to. Some members of the public would know whether they ought in any particular situation to approach the MACC, the police, or the Securities Commission etc., but there are a substantial number of the persons who do not. Members of the public should be able to approach and make a disclosure to any enforcement agency, irrespective of relevance to the purview of the particular agency. There should therefore be a mechanism for enforcement agencies to

channel disclosures made to them, but which are not within the purview of the enforcement agency, to a centralised unit or body. At present, section 5[21] of the Act provides that any enforcement agency may co-operate with any other agencies in its investigations. This pertains only to the situation where the enforcement agency has accepted the disclosure and commenced investigations.

The centralised unit or body would assist and facilitate in a confidential manner the handling of the disclosure and the whistleblower to the appropriate enforcement agency. This would avoid the situation where a whistleblower is turned away by an enforcement agency or required to start over again the approach, any formalities and re-make a disclosure to another agency. Again, such a centralised unit or body should ideally take the form of an independent body, which may also have oversight functions (in place of the Minister), for example, in the form of the office of an ombudsman.

Such an independent body would also itself be empowered to receive disclosures of improper conduct, with the attendant protections provided to a whistleblower under the Act. It would also be the task of such a body to streamline and make uniform the procedures and mechanisms for whistle blowing, to provide comprehensive information to the public as to how the whistle blowing provisions work, what it provides, how information would be dealt with, how whistleblowers would be handled, what their rights are and what they may expect from the process. In general, the entire process from the disclosure of information of improper conduct until potential prosecution or disciplinary action should be clearly set out and explained to the public. This independent body would thus also function to educate and raise public awareness. In a way, this creates a one-stop-point.

OUR PROPOSAL

Establish a one-stop point for whistleblowing, this should be managed by an independent centralised body to:

- *Make it more accessible for whistleblowers*
- *Streamline and make whistleblowing process uniform*
- *Inform public and raise awareness on proper whistleblowing procedures*

3.3.2 Increasing the frequency with which a whistleblower is updated on the progress of the investigation

Whistleblowers should have the right to be informed regularly regarding the investigation which resulted from their disclosure. Section 13 of the Act says that the whistleblower will only be told about the result of their disclosure after the investigation has been concluded. This is not sufficient. They should be kept informed throughout the process from the start, rather than only at the end. This is not to say that whistleblowers should be informed of the details of the investigations, as this may affect the integrity of the investigations, but rather, that they should be updated as to the general progress of stages of the investigations and the steps taken, sufficiently so that they are aware that the matter is being actively looked into and progressing at a regular pace.

[21] Section 5 is Co-operation with other agencies.

It is also important for enforcement agencies to provide general timeframes for stages or steps in the investigation as part of its update to the whistleblower. As of now, there is no timeframe for an investigation to begin, proceed and conclude once the disclosure has been made. In fact Section 12 only sets out the duties of the enforcement agency as "prepare a report which contains the finding of the investigation and recommendations…".

The only timelines to be found are in Section 13(2)(a) and (b) which provides that an appropriate disciplinary authority or other authority shall, within 6 months of receiving the report and recommendations for action from the enforcement agency, inform the enforcement agency of the steps and action taken or to be taken by the appropriate disciplinary authority or other authority; or shall inform the enforcement agency within 14 days of a decision by the appropriate disciplinary authority or other authority for not initiating any action or for not taking steps as recommended by the enforcement agency.

It is understood and accepted that it is not possible to set firm timelines for the investigation of a matter or to set a date for its conclusion. However, providing for and informing the whistleblower of general timelines as a guide for attending to the investigations is important because it reassures the whistleblower that action is being taken, that the information is not being suppressed, and that there is an ongoing investigation into the matter, especially if the disclosure pertains to high-level corporate executives or government officials.

OUR PROPOSAL

Create general timelines of investigations and update whistleblowers on the status of investigations accordingly.

[22] Section 26 is Rewards

3.3.3 Offering greater remuneration to whistleblowers

Section 26[22] of the Act provides discretion to enforcement agencies to order rewards as it deems fit to whistleblowers for disclosure of improper conduct which leads to the prosecution. The amount and nature of the reward should be decided on for certain categories of offences, for example, corruption, and such reward should be made known to the public as a standing offer. The amounts of such awards should not be meager. It should be sufficiently substantial to reflect the seriousness of the fight against corruption and the gravity of the offence. This may lend encouragement for whistleblowers to take the sometimes difficult step to come forward.

In the USA, the Dodd-Frank Act authorises the US Securities Commission to pay rewards of 10-30 percent of recovered funds (Dodd-Frank Act, 2009). In South Korea, the Anti-Corruption and Civil Rights Commission is able to provide whistleblowers with rewards of up to USD 2million (Anti-Corruption and Civil Rights Commission). The potential reward for whistleblowers should be increased to encourage those to take the risk of whistleblowing.

“ *The amounts of such awards should not be meager. It should be sufficiently substantial to reflect the seriousness of the fight against corruption* ”

OUR PROPOSAL

Increase the potential reward for whistleblowing in order to encouragee and properly compensate those that take the risk of whistleblowing.

4. Conclusion

While the Act fills a vital gap in Malaysia's anti-corruption landscape, whistleblowing statistics continue to show Malaysians remaining hesitant to come forward. In order to encourage whistleblowing and the discovery of corruption, it is imperative that the Act is further improved upon.

Sections 4, 6, and 11 need to be amended to:

Ensure the extension of whistleblower protection by allowing for disclosures to non-enforcement agencies;

Repeal the proviso to Section 6(1) of the Act, and allow disclosure of information that may in normal circumstances fall under restrictions of other legislation;

Remove the automatic disqualification from protection for whistleblowers who had been part of or participated in the improper conduct, and instead provide for a discretion to allow for protection as well as remove the importance placed upon the motive behind the disclosure;

Allow for the removal of Ministerial involvement and oversight.

Additionally, to complement the above Section 203A of the Penal Code should also be repealed.

An independent statutory body should be set up to oversee whistleblower protection. Furthermore, a clear whistleblowing process and mechanism must be established with dedicated whistleblower units within enforcement agencies. Whistleblowers should be updated on the status of their investigations throughout the process. A substantial reward system should be announced and made public in order to encourage potential whistleblowers.

By increasing whistleblower protection, reinstating the independence of the Act, increasing its transparency, and setting out a clear whistleblowing mechanism whistleblowers can be encouraged to come forward. These are steps that can and must be taken in order to achieve the objectives of the Act, ensure whistleblowers are protected and to successfully root out corruption in Malaysia.

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