

Executive Summary

A critical look into the Whistleblower Protection Act 2010

David Lehmann, former Head of Deloitte Forensics in Malaysia said that whistleblowing is the most effective means of detecting fraud and corruption. In the United States, over 46.2%¹ of fraud cases were discovered thanks to whistleblowers. But in Malaysia, only 0.3% of cases reported to the Malaysian Anti-Corruption Commission (MACC) are by whistleblowers - so why is Malaysia falling behind its international counterparts in whistleblowing?

In this policy paper, author Christopher Leong suggests crucial improvements to the Whistleblower Protection Act 2010 (WPA 2010) in order to encourage whistleblowing in Malaysia. Leong highlights the weaknesses of the existing framework for whistleblower protection and makes recommendations for improvements to whistleblower protection and whistleblowing mechanisms as well as independence from the executive.

The WPA 2010 defines a whistleblower as anybody with information with respect to improper conduct who discloses that information to an enforcement agency. Whistleblowing is also supported by other acts. They include:

- Section 140 of the Securities Commission Act 1993 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
- Section 65 of the Malaysian Anti-Corruption Act 2009, extends the same protection for whistleblowers reporting any fraud in the public sphere.

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 1² demonstrate this:

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

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

¹ The US Association of Certified Fraud Examiner's Report to the Nation in 2008

² The latest MACC Annual Report available online is for 2012.

Given the importance of whistleblowing as a means of discovering corruption and misconduct by public officials, several measures need to be taken to address gaps in the current laws. In this paper, Christopher Leong addresses the following areas:

Protection for Whistleblowers	
<p>Current Issue:</p> <p>Whistleblowers can only report cases to enforcement agencies</p> <ul style="list-style-type: none"> Section 6(1), 7(1) and 8(1) of the WPA 2010 specifies that whistleblowers cannot disclose information to non-enforcement agencies. Speaking to 3rd parties like the media or to politicians may result in a fine, imprisonment or both. <p>Whistleblowers cannot make disclosures on information that fall under secrecy laws</p> <ul style="list-style-type: none"> Section 6 of the current Act specifies that disclosures are only allowed if they are not specifically prohibited by any written law, e.g., the Official Secrets Act. Breaking the law may result in punishment of RM 1 million ringgit and/or imprisonment of up to 1 year under the penal code. <p>Motive can disbar potential whistleblowers from receiving protection</p> <ul style="list-style-type: none"> Section 11(1)(a) automatically removes protection for those who were participants or accomplices in the improper conduct. Section 11(1)(e) also does not allow for disclosures made by employees motivated by fear of dismissal or disciplinary action. 	<p>Our Proposal:</p> <p>Allow disclosures to non-enforcement agencies and remove punishment</p> <ul style="list-style-type: none"> Amend Section 6(1), 7(1) and 8(1) to allow whistleblowers to speak to other parties without losing protection or being subject to punishment. In Australia whistleblowers can report cases to any appropriate authority and may also speak to other persons including the media. <p>Remove section 6(1) and create legal protections for whistleblowers</p> <ul style="list-style-type: none"> Given that the Act is to encourage reports on corruption, section 6(1) should be deleted. Instead the government should introduce provisions that protect whistleblowers who in disclosing evidence, may breach laws like the OSA. <p>Create flexibility in the types of people who can whistleblow</p> <ul style="list-style-type: none"> Amend Section 11(1) (a) to ensure that whistleblowers are protected even if he was a participant of the misconduct so long as he was not the mastermind. Amend Section 11(1)(e) motive should not be a prime factor in denying protection.
Independence of the Act	
<p>Current Issue:</p> <p>The Act lacks independence from the executive</p> <ul style="list-style-type: none"> Section 4 of the Act gives the Minister complete discretion to direct the enforcement agency's actions. 	<p>Our Proposal:</p> <p>Remove ministerial oversight</p> <ul style="list-style-type: none"> Create an independent authority, such as the office of an ombudsman, to manage whistleblowers instead of a Minister. This is to maintain the overall independence of the operations of the act.
Whistleblower mechanism and procedures	
<p>Current Issue:</p> <p>Difficulties in reporting</p> <ul style="list-style-type: none"> In some cases a potential whistleblower may be unsure which agency to report to the MACC, the police, or the Securities Commission etc. <p>Whistleblowers are not updated regularly enough</p> <ul style="list-style-type: none"> Section 13 of the Act states that the whistleblower will only be informed once the investigation has been concluded. <p>The remuneration for whistleblowers is not made public</p> <ul style="list-style-type: none"> Section 26 of the Act provides discretion to enforcement agencies to order rewards as it deems fit to whistleblowers for disclosure of improper conduct. The reward is given according to categories of offences. 	<p>Our Proposal:</p> <p>Establish a central point for reports</p> <ul style="list-style-type: none"> Establish a centralised unit that acts as a one-stop point for whistleblowing to make it easier for people to whistleblow. This unit should also streamline the whistleblowing process and work to raise public awareness on how to whistleblow. <p>Update whistleblowers according to general timeline</p> <ul style="list-style-type: none"> Create a general timeline and update whistleblowers on the status of investigations accordingly. <p>Make reward for whistleblowing publicly known</p> <ul style="list-style-type: none"> The amounts of awards for whistleblowing should be made public as a standing offer. For example, in South Korea, the Anti-Corruption and Civil Rights Commission is able to provide whistleblowers with rewards of up to USD 2million

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.

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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Christopher has extensive experience in the fields of corporate and commercial litigation, shareholders' disputes, banking litigation and insolvency. Additionally, he practices in the area of constitutional and administrative law.

In the field of dispute resolution, Christopher has been named as a Leading Individual/Lawyer in Malaysia by Asia Pacific Legal 500 since 2004, Chambers Asia since 2009, by The Asialaw Leading Lawyer since 2008, and is a Recommended Individual in the 2015 edition of Asialaw Profiles.

Christopher was the 30th President of the Malaysian Bar and the immediate past Chairman of the Bar Council of Malaysia.