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The Fifth Estate:
Whistleblowing for Corporations
in Malaysia





"Man is least himself when he talks with his own person.
Give a man a mask, and he will tell you the truth."
– Oscar Wilde, The Happy Prince and Other Tales.

Whistleblowing, in general, is an act of disclosing sensitive information to the public regarding criminal activities such as corruption and fraud, is a crucial tool in combating misconduct.¹ Anonymity, protection, and immunity are key ingredients in ensuring that the public can disclose any improper conducts without any fear of repercussions from any person.

WHISTLEBLOWER PROTECTION ACT 2010

In Malaysia, recognizing the significance of whistleblowing in addressing corruption and misconduct, the government has enacted the Whistleblower Protection Act 2010 (referred to as '**the Act**'). This legislation serves as a mechanism to safeguard whistleblowers, ensuring their safety and well-being while encouraging them to expose wrongdoings. By providing a secure environment for reporting misconduct, the Act fosters transparency, accountability, and an ethical culture within various organizations and institutions.

CORPORATE WHISTLEBLOWING POLICY

In a corporate setting, some companies offer a whistleblowing policy, either as a collective agreement or inserted into the employment contracts of their employees. An internal whistleblowing policy provides further protection towards whistleblower in disclosing any misconduct within the organization. This provides the organization with better control in handling, investigating, and penalizing any person within the organization and avoid publicity, scandals, and media coverage that disrepute the organization. The Act has recognized the existence of internal whistleblowing policies under **Section 10(4)**, stipulating that the protection afforded by the Act will not affect any additional protection provided by internal policies.

WHO IS A WHISTLEBLOWER ACCORDING TO THE ACT?

A whistleblower, according to the Encyclopedia Britannica, is *an individual who, without authorization, reveals private or classified information about an organization, usually related to wrongdoing or misconduct. Whistleblowers generally state that such actions are motivated by a commitment to the public interest.* However, in Malaysia, the definition of a whistleblower has a legal impact in accordance to the Act whereas not all 'whistleblower' in general will have the protection conferred by the Act.

According to Section 2 of the Act, **a whistleblower is defined as a person who made a disclosure of improper conduct pursuant to Section 6 of the Act.** It is strictly defined

¹ <https://economictimes.indiatimes.com/definition/whistleblower>



category of whistleblower as the disclosure must be made to relevant enforcement agencies of the Federal or State Government or any statutory bodies that empowered with investigations and enforcement functions by the law. Hence, for a person to be a whistleblower and further protected by the Act, strict compliance with Section 6 of the Act shall be complied with.

PROTECTION FOR WHISTLEBLOWER UNDER THE ACT

When a whistleblower chooses to disclose improper conduct in accordance with the Act, several procedures and protections come into effect. **Section 7(1) of the Act** outlines four categories of protection granted to individuals who report improper conduct to enforcement agencies:

- a. Protection of confidential information: The whistleblower's identity, occupation, residential address, work address, and whereabouts are kept confidential, including during civil, criminal, or other legal proceedings (**Section 8 of the Act**);
- b. Immunity from civil and criminal action: The whistleblower is immune from civil or criminal liability, including disciplinary action (**Section 9 of the Act**);
- c. Protection against detrimental action: The whistleblower is shielded from any detrimental action taken in response to the disclosure of improper conduct (**Section 10 of the Act**);
- d. Extension of protection to related persons: Protection against detrimental action is extended to any person related to the information provided (**Section 7(1) of the Act**).

Specifically, towards the protection against detrimental action, the Act defines the term under **Section 2** as:

“detrimental action” includes—

(a) action causing injury, loss or damage;

(b) intimidation or harassment;

(c) interference with the lawful employment or livelihood of any person, including discrimination, discharge, demotion, suspension, disadvantage, termination or adverse treatment in relation to a person’s employment, career, profession, trade or business or the taking of disciplinary action;

and

(d) a threat to take any of the actions referred to in paragraphs (a) to (c).

Section 10(2) of the Act outlines the protection against detrimental action to the extent that it covers the action of threatening to take detrimental action and incites or permits another person to take or threaten to take detrimental action. Additionally, Section 10(5) of the Act safeguards whistleblower from termination of his contract, suspension of



payments due and payable under a contract, and refusal to enter into subsequent contracts solely due to the disclosure of improper conduct to any enforcement agency. This ensures that employees are not subjected to adverse consequences because of the disclosure.

With regards to immunity against criminal or civil action, including disciplinary proceedings or any other liability through administrative processes, Section 9 of the Act provides immunity solely to the whistleblower themselves. This immunity does not extend to any other individual related to the whistleblower.² Additionally, the scope of the immunity is not restricted solely to actions pursued by the enforcement agency that received the disclosure or any civil actions initiated by persons involved in the improper conduct or who received the disclosure. It covers generally to any action that arise from the making of the disclosure.

PENALTIES AND REMEDIES

What happens when an employer or any other person conducts detrimental action against the whistleblower? If detrimental action was conducted against a whistleblower due to the disclosure of misconduct, they may be liable to a fine not exceeding RM100,000 or imprisonment for up to fifteen years, or both pursuant to Section 10(6) of the Act. The Act also entitles a whistleblower to remedies, including damages or compensation, injunctions, and any other relief as deemed appropriate by the court when detrimental action is taken against them for whistleblowing pursuant to **Section 15(1) of the Act**.

In seeking for the remedies, **Section 15(1) of the Act** outlines the legal mechanism for seeking these remedies as follows: -

- a. request to be made to the enforcement agency within three (3) months after being informed by the enforcement agency of under **Section 14(6)** of the Act that detrimental action in reprisal for a disclosure of improper conduct has been taken against him; or
- b. at any time that the whistleblower fears that detrimental action in reprisal for a disclosure of improper conduct may be taken against him.

The remedies provided to protect whistleblowers extend to any individual, regardless of their involvement in the reported improper conduct. This broad application is based on the inclusive definition of the term 'person' as stated in Section 7(3) of the Act. It means that even if the person who takes detrimental action against a whistleblower was not related or involved in the disclosed improper conduct, the Act allows the civil remedies to be sought by the whistleblower.

² Mohamad Rohailizal Ramli V. Pengerusi Lembaga Pencegahan Jenayah & Ors [2021] MLRHU 543



In the event that a whistleblower wishes to initiate a court action on his own, he must notify the enforcement agency of his intention to do so³. A pertinent example of such legal remedies can be found in the High Court case of **Syed Omar Syed Agil v Institut Profesional Baitulmal Sdn Bhd [2017] MLJU 2357**. In this case, the Plaintiff sought remedies from the Court against the Defendant for protection against detrimental action. The Plaintiff had reported certain improper conduct by employees of the Defendant's institute to the Malaysian Anti-Corruption Commission (MACC) and Royal Malaysian Police (PDRM). In response, the Plaintiff faced investigation, suspension, and disciplinary action, which the Court found to be retaliatory measures against the Plaintiff's whistleblowing reports to the authorities.

Also, in the case of **Yushri bin Zainudin v Silterra Malaysia Sdn Bhd (dahulunya dikenali sebagai Wafer Technology (M) Sdn Bhd) [2017] MLJU 2201**, the Court made a finding at paragraphs 30 and 31 that the plaintiff in that case, who is a whistleblower, is entitled to seek for remedies under the Act on his own personal capacity without going through the enforcement agency.

The remedies under Section 15 of the Act are exclusively related to the detrimental action taken by any person by reason stated in Section 10(3) of the Act. In the event that there's any breach of protection under Section 8 of the Act which respectively related to the protection of confidential information, the Act does not provide any liabilities for civil action and only provides criminal penalty against the offender.

CAN A WHISTLEBLOWER BE EXCLUDED FROM ANY PROTECTION UNDER THE ACT?

Notwithstanding the protections and remedies available, it is essential to note that the Act, under **Section 6(1)**, excludes disclosure of improper conduct that violates other written laws, such as the Official Secrets Act 1972 and banking secrecy provisions under the Financial Services Act 2013 and Islamic Financial Services Act 2013. For example, in the event that X made a disclosure of improper conduct that related to the documents protected from disclosure under the Officials Secrets Act or any other written law, the said protection under the Act will not operate to protect him. This is an ongoing debate since the enactment of the Act which seen as Therefore, whistleblowers must exercise caution when making disclosures to avoid repercussions under other relevant laws.

Further, it is important to take note that the said disclosure should not be disclosed to any other person who is not listed or falls under the definition of 'enforcement agency' under the Act. In the High Court case of **Rokiah Mhd Noor V. Menteri Perdagangan Dalam Negeri, Koperasi & Kepenggunaan Malaysia & Ors And Another Appeal [2017] 2 MLRA 672**, the Court found that the appellant did not qualify as a whistleblower under

³ Section 15(2) and 15(3) of the Act



the Act when the disclosure was made not only to MACC (which is an enforcement agency) but also to other third parties who are not an enforcement agency.

In addition, Section 11(1) of the Act specifies a series of circumstances under which protection shall be revoked. This occurs when the enforcement agency forms the opinion, either during its investigation or as a result of its investigation, that: -

- a) the whistleblower himself has participated in the improper conduct disclosed;
- b) the whistleblower willfully made in his disclosure of improper conduct a material statement which he knew or believed to be false or did not believe to be true;
- c) the disclosure of improper conduct is frivolous or vexatious;
- d) the disclosure of improper conduct principally involves questioning the merits of government policy, including policy of a public body;
- e) the disclosure of improper conduct is made solely or substantially with the motive of avoiding dismissal or other disciplinary action; or
- f) the whistleblower, in the course of making the disclosure or providing further information, commits an offence under this Act.

CONCLUSION

Based on the preceding discussion, it is evident that the protection offered under the Act may still fall short in fully safeguarding whistleblowers from potential repercussions that could deter them from making disclosures. However, in a corporate context, companies can proactively address the issues on detrimental action within the company by crafting comprehensive whistleblowing policies and implementing additional measures to shield their employees from adverse consequences within the organization. This approach will not only foster an integrity-driven culture among the workforce but also encourage a more open and transparent environment for reporting any misconduct. Companies also may include the procedure and the conditions of whistleblowing under the Act for the awareness of the employee to ensure that they are qualified to be protected by the Act.

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