

UUMILC 2017
9TH UUM INTERNATIONAL LEGAL CONFERENCE

**COMBATING CORRUPTION: THE TWO CHALLENGES UNDER
WHISTLEBLOWER PROTECTION ACT 2010 OF MALAYSIA**

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Abstract

The paper reviews on two challenges of a whistleblower in disclosing information on wrongdoing under Whistleblower Protection Act 2010 (WPA 2010) in Malaysia. Two elements regarding the definition of whistleblower under the act has become obstacles for a whistleblower to expose the misconduct. The first element obliged the wrongdoing to be exposed only through enforcement agencies despite the agencies are considered among the corrupt institutions in Malaysia. The second element required that the wrongdoing does not come under the purview of any written law regardless if the wrongdoing is against public policy. Additionally, this paper used the analytical and comparative legal research method where some statutes and decided cases were analyzed in order to identify the problems, examine the merits and bring improvements to the definition concerned. The findings show that a whistleblower will not be protected under WPA 2010 if he goes against the two criteria's of the definition above, instead he can be charged for breaching the above criteria.

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Keywords: Corruption, challenges, Whistleblower Protection Act 2010, Malaysia.



1. Introduction

Corruption is a pandemic in the world today. It occurred in all governments irrespective of region, continent and ethnics group. Corruption has varied definitions. Corruption has been defined as the misappropriation of entrusted power for personal gain (Transparency International, n.d.) or the abuse of public office for private gains (The World Bank, 1997). Malaysian Anti-Corruption Commission (n.d.) specifically defines corruption as an ‘act of giving or receiving of any gratification or reward in the form of cash or in-kind of high value for performing a task in relation to his/her job description.’”

Numerous efforts have been done to eradicate or reduce corruption. Many mechanisms and solutions have been developed to overcome it which included civil service and government salary reforms; increased transparency and reporting in government spending; cutting red tape; substituting distorting and regressive subsidies with targeted cash transfers; establishing international conventions and adopting smart technologies (Lopez-Claros, 2014). Whistleblowing is another efficient tool in uncovering fraud and combating corruption. It can enhance governance, therefore established morally and legally healthy governments and organizations (Schultz and Harutyunyan, 2015). Price WaterhouseCoopers has conducted a study on corporate fraud and the results showed that whistleblowers provide the most effective information in discovering and exposing corporate criminal activities (Kohn, 2017).

Whistleblowing is defined as the disclosure of information regarding corrupt, illegal, hazardous or fraudulent activities which include perceived or potential wrongdoing, being committed in or by private or public sector organisations (Transparency International, 2013). The activities concerned is affecting or threatening the public interest or to individuals or entities believed to be able to effect action. A whistleblower is describe as any private or public sector worker or employee who disclose the above information and is at risk of retribution. However, under Malaysia Whistleblower Protection Act 2010 (WPA 2010), a whistleblower means “any person who makes a disclosure of improper conduct to the enforcement agency” (Section 2 WPA 2010) “based on his reasonable belief that any person has engaged, is engaging or is preparing to engage in improper conduct provided that such disclosure is not specifically prohibited by any written law” (Section 6 WPA 2010).

Malaysia has incorporated protections to a whistleblower in many acts before the enforcement of WPA 2010. A whistleblower is protected of confidentiality as regards to his identity and information he discloses to Securities Commission (Securities Commission Malaysian Act 1993). Certain categories of people such as auditors of licensed intermediary, exchange holding company, stock exchange, derivatives exchange, approved clearing house, central depository and self-regulatory organizations are given additional protection under the Capital Market & Services Act 2007 (Section 29, CMSA 2007). Some other acts that have whistleblowing provisions are the Companies Act 2016, Witness Protection Act 2009 and Malaysian Anti-Corruption Commission Act 2009. WPA 2010 also gave vast protection to a whistleblower. A whistleblower is given protection of (a) confidential information; (b) immunity from civil and criminal actions and (c) protection against detrimental actions which also extended to person related or associated with the whistleblower (Section 7 WPA 2010).

However the protection can be revoked in some circumstances, such as ,(a) if the whistleblower also participated in the wrongdoing disclosed by him; (b) he gave a false statement that he believed to be false; (c) the disclosure is frivolous or vexatious; (d) the disclosure involves questioning the merit of

government or public bodies policies; (e) the disclosure is made with the motive to avoid dismissal or other disciplinary action and (f) the whistleblower commit an offence under WPA 2010 while in the course of making the disclosure (Section 11 of WPA 2010).

Whistleblowing is important in detecting fraud and corruption. This article examines the definition of a whistleblower under the WPA 2010 in Malaysia as a tool to combat corruption. It examines the criterias required from a whistleblower in order to be protected under WPA 2010. The article concludes regarding recommendation on how the definition of a whistleblower under WPA 2010 could be strengthened as an effective tool of addressing corruption.

2. Problem Statement

The definition of a whistleblower under section two of WPA 2010 is a crucial issue. Firstly, a whistleblower can be any person who exposed improper conduct of anyone to the enforcement agency. The enforcement agencies are “any ministry, department, agency or other body set up by the federal government of Malaysia, state government or local government” (section 2 WPA 2010). The main enforcement agencies are the Royal Malaysian Police Force, Malaysian Anti-Corruption Commission, Royal Malaysian Customs Department, Road Transport Department, Immigration Department of Malaysia, Securities Commission and Companies Commission of Malaysia. A whistleblower can channel their information on wrongdoing to these agencies if they want to be protected under WPA 2010. It would be a hindrance for Malaysian citizen to make a disclosure to the agencies concerned when they has perceived The Royal Malaysian Police Force as the most corrupt institution in 2013 and second most corrupt institution in 2014 (Malaysian Corruption Survey Report Barometer, 2014). Regarding other agencies above which are considered as public sector, the Malaysian citizen ranked the public officials and civil servant as third most corrupt institutions in both years.

Secondly, a whistleblower should make a disclosure with reasonable belief that any person has engaged, is engaging or is preparing to engage in improper conduct and such disclosure is not prohibited by any written law” (Section 6 WPA 2010). Acts that prohibits such disclosure are Malaysia Official Secrets Act 1972 (OSA 1972), Income Tax Act 1967 (ITA 1967), Witness Protection Act 2009 (WPA 2009), Banking and Financial Institution Act 1989 (BAFIA 1989) (which has been obliterated) and Financial Services Act 2013 (FSA 2013). It means disclosure on wrongdoing make under these acts would not be protected by WPA 2010.

3. Research Questions

1. What is the characteristic of a whistleblower that is recognize and protected by WPA 2010?
2. What are the improvements that can be done to encourage whistleblowing in Malaysia?

4. Purpose of the Study

The purpose of the study is to discover the challenges face by a whistleblower in disclosing wrongdoing under WPA 2010 of Malaysia.

5. Research Methods

This paper uses analytical and comparative legal research methods in order to achieve research objectives. It analysed legal texts, statutes and decided cases in order to understand, interpret and explain the statutes and the decided cases. Next will be to draw inferences and make conclusions. Comparison with some statutes and cases from UK will be made in order to examine the demerits and merits in both laws. Lastly, the writer will provide suggestions on changes or improvements that can be done to amend the ineffective provisions to attain desired results (Anwarul, 2007).

6. Findings

Two elements in the definition of a whistleblower under WPA 2010 become an obstacle for a whistleblower to disclose information. The first elements required a whistleblower to report the information of wrongdoing only to the enforcement agencies. Secondly, the information must not be forbidden by any written law. These elements have been illustrated in four cases of Mohd. Rafizi Ramli. The first case of Mohd Rafizi Ramli v. Public Prosecutor (2012) has proved the flaws regarding these elements. The plaintiff revealed a customer banking documents of Public Bank Berhad involving misappropriation of public funds through press release. The revelation lead to the bank customer's being sued for criminal breach of trust. However, the plaintiff is not allowed protection under WPA 2010 for the reason that the information is prohibited by Banking and Financial Institution Act 1989 (BAFIA 1989) and he did not disclose it to the enforcement agencies as required by WPA 2010. He was then charged under section 97(1) of BAFIA 1989 for breaching banking secrecy by revealing the banking documents to public. Apart from that, he was also ordered by the High Court Malaya of Kuala Lumpur to pay damages to the bank customer in a defamation suit (Datuk Seri Dr Mohamad Salleh Ismail & Anor v. Mohd Rafizi Ramli & Anor, 2016).

In the third case, Mohd Rafizi was sentenced to 18 months imprisonment under section 8(1)(c)(iii) and (iv) of the Official Secret Act 1972 (OSA 1972) for unauthorised possession of page 98 of IMDB audit report and exposing the content to the media conference (Borneo Post Online, 2016). IMDB fund is under investigations in US, Switzerland, UK, Singapore and other countries on allegations for embezzlement and money laundering scheme (Ramesh, 2016). He was not also not protected by WPA 2010, instead he was charged for possession of secret documents under written law and disclosing them to public through media.

He has also disclosed through press release concerning the government link corporation that is "MARA property purchase scandal in Australia" which has misappropriated public funds amounting to RM63million. (Khairul Azwan Harun v. Mohd Rafizi Ramli, 2016). Again, he did not get protection by WPA 2010, instead he has been sued for defamation. However, S Nantha Balan J. stated that Mohd Rafizi was only motivated by a public-spirited duty to reveal wrongdoings which involved public funds so that investigations might be carried out.

The first element under definition of a whistleblower in WPA 2010 that reporting must only be done through enforcement agencies is ineffective as these agencies are considered as the corrupt institutions by Malaysian citizen which would discourage a whistleblower from making the wrongdoing disclosure. The four cases of Mohd. Rafizi Ramli showed that no protection would be given to a

whistleblower even if it is for public interest when billions of public funds have been embezzled. Malaysia should consider other alternatives for channelling the wrongdoing statements to other transparent bodies apart from the enforcement agencies. The Public Interest Disclosure Act 1998 (PIDA 1998) of UK allowed disclosure to be made to employer or other responsible person (section 43C), legal adviser (section 43D), Minister of the Crown (section 43E), prescribed person (section 43F) and other medium if there is failure to disclosure previously made to employer or prescribed person.

WPA also forbid the exposition of information that are prohibited under any written law. Malaysian has many written laws that prohibit the exposition of certain information such as OSA1972, ITA 1967, WPA 2009, BAFIA 1989 and FSA 2013 which are considered as secret documents. The three decided cases of Mohd Rafizi has shown that billions of public funds have been abused and only a few cases were investigated. Therefore, the Malaysian government can consider certain conditions that a whistleblower should have in order to be protected under WPA 2010. PIDA 1998 required the element of good faith in order for a whistleblower to be protected under the act. Stricter test will apply if disclosure is made to other entity such as media. It requires good faith and a whistleblower believed that the information is substantially true and is not made for personal gain. He also believed that evidence will be destroyed or concealed if disclosure made to the employer or he will suffer if it was disclose to a regulator (UK Blue Print for Free Speech, 2014). Malaysian government can consider the above conditions for a whistleblower to disclose information through other transparent bodies rather than losing billions of citizens' money to unscrupulous people.

7. Conclusion

Corruption often goes unchallenged if people do not reveal it. One of the effective tool to detect corruption is through a whistleblower. However, this can bring high personal risk and endanger the life of a whistleblower; therefore, in need of certain protection from retaliation. WPA 2010 gives protection for a whistleblower in Malaysia. However, the definition of a whistleblower under the act create a setback for a person to disclose the wrongdoing of others. The requirement that the disclosure of information be made only to enforcement agencies which are revealed by a survey as corrupt institutions, might discourage Malaysian citizens to whistleblow. Another element that the disclosed information must not be forbidden by any written law also deter others from whistleblowing because decided cases had shown that the whistleblower was punished for disclosing the information even though it is done in good faith to stop the corruption that has robbed billions of dollars from the public funds.

Hopefully the Malaysian government would consider amendment to the above definition of a whistleblower in order to make improvements regarding whistleblower protection laws which is an important tool in combating corruption.

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