THE WHISTLEBLOWER PROTECTION ACT 2010 – NINE YEARS ON

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ABSTRACT

The Malaysian Parliament enacted the Whistleblower Protection Act (hereinafter referred to as 'WPA 2010') in 2010 as part of its commitment under the United Nations Convention against Corruption which was ratified by the Malaysian government in 2008. However, despite the fact that many of the weaknesses of the WPA 2010 were highlighted at its inception by legal academic and practitioners, there was no review undertaken by the government on this matter. This is a stark contrast with the international front where many developments have taken place where whistleblower protection laws were reviewed and improved on. Nine years have passed since the WPA came into effect on 15 December 2010. It is definitely time to conduct a review as to how this Act has fared in the Malaysian courts. The research objective of this article is to evaluate the effectiveness of the WPA 2010 in meeting its aim of encouraging individuals to come forward with valuable information to counter corruption and wrongdoings. This research adopts a qualitative method where the court judgments on the WPA 2010 and the recent news on whistleblowers in Malaysia were reviewed. The results of this research shows that there are inconsistencies in relation to the approach taken by the courts in applying the WPA 2010 which exacerbate its existing weaknesses. The results of this research is useful to provide the data to the government to justify amending the WPA 2010 to improve the protection afforded to whistleblowers in Malaysia.

Key words: corruption, Whistleblower Protection Act, courts, whistleblower

INTRODUCTION

The importance of whistleblowers in recent years can hardly be denied. According to the report entitled "A Global Study on Occupational Fraud and Abuse (2018)" by the Association of Certified Fraud Examiners, the 45% of the discovery of fraud was due to tips provided. A whistleblower can simply be defined as an individual who discloses information of alleged wrongdoings (Lewis, 2006). Most of the major scandals in the world involving either public or private entities were discovered as a result of whistleblowing. From the Enron scandal to the recent Cambridge Analytica scandal, dieselgate scandal and tax avoidance scandals were all discovered through whistleblowing. Malaysia is of no exception as well. The 1Malaysia Development Bhd (IMDB) scandal involving a misappropriation of billions of ringgit was exposed by the efforts of an employee whistleblower of a corporation which had dealings with 1MDB. Similarly, the RM 250 million National Feedlot Corporation scandal and the recent allegations on the judicial misconduct in the Malaysian judiciary were discovered through whistle-blowing. However, whistleblowers who are always deemed as traitors, often face reprisals as a result of providing the proof to launch an investigation on the alleged wrongdoing (Bjorkelo, 2013). This has led to immense calls to conduct a periodic review on the effectiveness of the whistleblower protections law from time to time. The year 2019 is particularly crucial for whistleblowing as the European Parliament and its members state have reached a provisional agreement on new whistleblowing regulations (European Commission's Press Release, March 2019) and the Australian Parliament has also passed the Treasury Laws Amendment (Enhancing Whistleblower Protection) Bill 2018 in February 2019 to improve the protection of whistleblowers.

However, the same cannot be said of the Malaysian legal position in relation to our own Whistleblower Protection Act 2010 (Act 711) (WPA 2010) which came into effect on 15 December 2010. Despite the fact that many shortcomings have been identified in the WPA 2010 since its inception, the government has not conducted a review on its effectiveness or attempted to introduce any amendments to it. Since the WPA 2010 would soon enter its 10th year, it is definitely the time to review its effectiveness in achieving its objective of encouraging whistleblowers to come forward by guaranteeing them that they would be protected adequately if they do so. This research is conducted by assessing how the WPA 2010 fared in courts by evaluating the court judgments, news published in the major newspapers and the statistics available in relation to whistleblowing in Malaysia since the WPA 2010 took effect. The literature review for this research consists of the earlier mentioned materials for the past nine years. The need to conduct this review is strengthened by the following developments in Malaysia. First, the ranking of Malaysia in the list of the Corruption Perception Index (CPI) prepared by Transparency International has dropped to the 62nd position in 2017 and 61st position in 2018 (. Secondly, it was reported that the graft level among civil servants in Malaysia has reached a critical level (*The Star*, May 24, 2017). Thirdly, the Prime Minister of Malaysia has recently emphasised that the government is committed to protect whistleblowers who report and testify on corruption to achieve the objective of having a clean government (*The New Straits Time*, July, 20 2018).

Significance of study and contribution to other countries:

There is a lack of research on the cases decided by the courts under the WPA 2010. As such, the results of this research would provide data to the government as to the types of cases on whistle-blowing which were brought to court and the approach taken by the courts in applying the WPA 2010. The evaluation of the cases would also provide information to the government as to the weaknesses of the WPA 2010 in real-life situations. This research also provides some recommendations which can be considered by the government in improving the whistleblower protection in Malaysia. This research could also be of assistance to other

countries who wish to improve whistleblower protection as this research highlights the pitfalls which these countries should take note of in drafting their laws in this area.

This article would include the following parts:

(i) Introduction
(ii) Whistleblower Protection Act 2010
(iii) Review of cases involving the WPA 2010
(iv) Evaluation, recommendations and conclusion

WHISTLEBLOWER PROTECTION ACT 2010

The WPA 2010 was enacted in 2010 as a major initiative under the Corruption National Key Results Area (NKRA) of the Government Transformation Plan (GTP). The WPA 2010 consists of seven parts. The major statutory provisions in the WPA 2010 would be discussed in turn below.

Situations where a whistle blower would be protected under the WPA 2010

The WPA 2010 would only provide protection to those who satisfies the requirements in s.6(1) WPA 2010. The requirements are as follows:

(i) Disclosure shall relate to improper conduct

Section 2 WPA 2010 defines 'improper conduct' as any disciplinary offence or a criminal offence. 'Disciplinary offence' is defined broadly by s.2 as any action or omission which amounts to a breach of law, code of conduct, code of ethics, circular or a contract of employment in relation to a public body or private body. Anyone can make a disclosure of improper conduct. The WPA 2010 does not limit its protection to employees only.

(ii) Disclosure shall be made to an enforcement agency

A whistle blower would only be protected under the WPA 2010 if his disclosure is made to an enforcement agency. This is defined as any ministry, department, agency or other body (including, a unit or division) which was set up by the Federal Government, State Government or a local government which was conferred with investigation and enforcement functions and powers; s.2 WPA 2010. The examples of enforcement agencies in Malaysia are the Royal Malaysia Police (Police), Malaysian Anti-Corruption Commission (MACC), Inland Revenue Board (IRB), Royal Malaysian Custom Department, Securities Commission of Malaysia and Companies Commission of Malaysia.

(iii) Disclosure shall not amount to breach of any other written law

There would be no protection granted to a whistle blower if the disclosure is in breach of other statutory provisions (written law) in Malaysia (Pointon, 2012). For instance, disclosure of information amounting to official secrets would be in breach of the Official Secrets Act 1972. Similarly, disclosing confidential information relating to a banking account would be in breach of the Financial Services Act 2013. The civil servants of the government are also bound by s.203 Penal Code ('Code') which was inserted into the Code and given effect to on 31 December 2014 which makes it an offence for a civil servant to disclose any information that he obtains in the course of performance of his duties.

Types of protection provided by WPA 2010

There are three types of protection afforded to a whistle blower under the WPA 2010. Section 8(1) WPA 2010 provides that the enforcement agency who receives any information shall not disclose any part of the information including the improper conduct alleged and the details of the whistle blower such as his identity, occupation, residential and work address. This information also cannot be disclosed in any civil, criminal or other legal proceedings; s.8(2) WPA 2010. A whistle blower shall not be subject to any civil or criminal liability or other disciplinary action as a result of making the disclosure of information; s.9 WPA 2010. Section 10(1) WPA 2010 prohibited any person from taking any detrimental action against the whistle blower in retaliation of his disclosure of information. 'Detrimental action' is defined broadly in s.2 WPA 2010 as any action causing injury, loss or damage, intimidation and harassment. It also includes any other act which interfere with the lawful employment or livelihood of the whistle blower such as discrimination, termination, demotion or any other adverse treatment and threats to commit any of the earlier mentioned acts. The protection is also extended to a person related or associated to the whistle blower. Where there is a dispute as to whether the detrimental action is meted out as a retaliation against the whistle blower, the burden lies with the defendant to show otherwise; s.10(7) WPA 2010. The penalties imposed for breach of s.10(1) is heavy as anyone who breaches this section commits an offence and upon conviction shall be liable to a fine not exceeding RM100,000 or to an imprisonment for a term not exceeding 15 years or both; s.10(6) WPA 2010. If a whistle blower fears or has suffered detrimental action, he may request to the enforcement agency to apply to his employer on his behalf for relocation of his work place; s19(1) WPA 2010.

Revocation of whistle blower protection

There are six instances where the protection provided to a whistle blower would be revoked; s.11(1) WPA 2010. The enforcement agency may revoke such protection if in the course of its investigation, it discovers that the whistle blower has participated in the improper conduct disclosed or that he wilfully disclosed information which he knew or believed to be false. The protection is also

revoked if the improper conduct disclosed is frivolous or vexatious. This means that the improper conduct is insignificant or very minor or that the disclosure of improper conduct is intended to harass or cause trouble or annoyance. The revocation of protection could also happen if the disclosure of improper conduct principally involves the questioning of the merits of a government policy. A whistle blower would also lose its protection if it is discovered that the disclosure of information is motivated solely or substantially to avoid dismissal or other disciplinary action. The last instance where the whistle blower would lose its protection is where he commits an offence under the WPA 2010. A possible offence that the whistle blower could commit under the WPA 2010 is where he discloses confidential information to others after he lodges a report with the enforcement agencies; s.8(1) WPA 2010.

Duties of enforcement agency upon receiving disclosure of improper conduct

Any enforcement agency which receives a disclosure of improper conduct is under a duty to investigate the allegations and prepare a report on the findings of the investigation and the recommendations for further steps to be taken, if any; s.2 WPA 2010.

Duties of enforcement agency upon receiving complaints of detrimental action

If an enforcement agency receives a complaint of detrimental action, it shall begin investigation into the complaint; s.14(1) WPA 2010. Upon completion of its investigation, it has to inform the whistle blower if the claim is not substantiated. However, where a disciplinary offence was discovered, it shall make recommendation to the appropriate authority (public or private, such as employer) to initiate proceedings or any other steps against the person who had taken detrimental action against the whistle blower; s.14(2) WPA 2010.

Remedies available for whistle blower as a result of detrimental action

Section 15 WPA 2010 provides two options for the whistle blower in the event that he suffers from any detrimental action. He may request the enforcement agency to seek remedies for him or he could do so personally. The powers of the courts to grant remedies to the whistle blower in these circumstances are very broad. The courts can make an order for compensation, costs, interest and any other form of pecuniary relief to the whistle blower, injunction and any other relief as the court deems fit; s.18(1) WPA 2010. The types of orders which a court may make is listed in s.18(2) WPA 2010 which include among others, an order to permit the whist blower to return to his duties and to reinstate the whistle blower.

Rewards

Section 26 WPA allows an enforcement agency to provide rewards as it deems fit to be paid to the whistle blower. The enforcement agencies in Malaysia have taken advantage of this provision and provide rewards to encourage more disclosure of improper conduct. For instance, it was reported that the IRB would give a percentage of the tax recovered from those who are found guilty of the improper conduct disclosed. The amount of reward given would depend on the amount of information provided by the whistle blower (*The Star*, May 1, 2011).

According to the MACC, civil servants who disclosed information about the corrupt practices would receive an incentive which is equivalent to the amount of the bribe if the accused is subsequently charged in court (*The Star*, January, 19, 2017). For instance, if the bribe offered is RM 5,000, the civil servant reporting the graft would be entitled to RM5,000 if the persons involved in the grafted are charged in court. The lowest incentive to be handed out to the civil servants is RM500.

REVIEW OF CASES INVOLVING THE WPA 2010

This part consists of an explanation and evaluation of the reported cases relating to the WPA 2010.

Rokiah binti Mohd Moor v Menteri Perdagangan Dalam Negeri Koperasi & Kepenggunaan Malaysia [2018] 3 AMR 653

In the above case, Rokiah and Azryain were employees of the Companies Commission of Malaysia (CCM). Rokiah was the Deputy Chief Executive Officer (Operations). They wrote a letter entitled "Integrity and Leadership Crisis in the CCM" detailing the allegations of improprieties among the top management of the CCM. This letter was addressed to the Chairman and members of the board of CCM. They also carbon copied the letter to the Prime Minister, Deputy Prime Minister, Chief Secretary to the Government, Minister of Domestic Trace, Co-operatives and Consumerism (Minister), Chief Commissioner of the Malaysian Anti-Corruption Agency (MACC) and the Director of Investigation of MACC. Among the allegations made were as follows:

(a) There was a conspiracy to plan for Zahrah Abdul Wahad Fenner (Zahrah) (Deputy Chief Executive Officer (Services) of CCM to be appointed as the next Chief Executive Officer of CCM although she was not qualified to hold such a position.
(b) Zahrah had lied to the Prime Minister and the government in relation to the MyCOID project.
(c) There was another conspiracy to oust Datuk Redzuan Abdullah from his position as Senior Director of Enforcement at CCM.
(d) Dato' Axmi Ariffin, the Chief Executive Officer (CEO) of CCM was entrapped by Zahrah and had condoned her wrongful acts and interfered with the investigations carried out by the MACC against Zahrah.

Upon receiving the letter, the CCM resolved in its Special Commission meeting that the CEO of the CCM would investigate the issues arising from the letter. It was later found that the allegations made by Rokiah were unfounded. As a consequence of the letter written by Rokiah and Azryain, CCM brought a displinary action against them for bringing discredit to CCM. The disciplinary

committee concluded that both of them were guilty. Rokiah's contract was terminated under the Statutory Bodies (Discipline and Surcharge) Act 2000 and her appointment as the deputy CEO was revoked by the Minister. Dissatisfied with the outcome of the disciplinary hearing, Rokiah and Azryain filed application for judicial review to challenge the validity of the punishment meted out against them. Rokiah also sought the protection afforded under the WPA 2010 by claiming that the disciplinary actions taken against them were in breach of s.10(3) WPA 2010.

The High Court rejected Rokiah's claim for protection under the WPA 2010. The court held that the WPA 2010 did not protect Rokiah as she had made unfounded statements. The CCM and MACC had investigated her allegations which were decided to be baseless and unfounded. The court further held that there was no reason to disturb the findings of these two bodies. It is submitted that the reasoning by the trial judge would introduce a dangerous precedent to the whistle blower protection in Malaysia. First, from a reading of s.6(2) WPA 2010, a 'person may make a disclosure of improper conduct to an enforcement agency based on *his reasonable belief* that any person has engaged, is engaging or is preparing to engage in improper conduct' (emphasis added). Therefore, a whistle blower is not under a burden to prove that his claims are accurate as long as he has a reasonable belief that his claims are true. S.6(2)(a) WPA 2010 further provides that there can be a disclosure of improper conduct although the whistle blower is not able to identify a particular person to which the disclosure relates to. Based on the facts of Rokiah, it can be argued that Rokiah might have a reasonable belief as to the truth of her allegations due to the position she held in CCM where she had inside information and that she was willing to put her career at risk in exposing the improprieties of her superior and colleagues.

Secondly, with due respect, it seems unfair for the trial judge to rely on the findings of the CCM and MACC to support his decision in rejecting Rokiah's claim as a whistle blower. This was because a whistle blower would not be aware of the outcome of the investigation at the time he makes the disclosure of information. If this is the position of the law, many would be whistle-blowers would be discouraged from coming forward to provide information as there would not be any guarantee that they would be protected. Particularly, they would be very concerned whether the process of the investigation is biased or tampered with. For instance, in Rokiah, the CCM placed the CEO in charge of the investigation of Rokiah's claim though he was one of the persons accused in the letter written by Rokiah and Azryain.

To ensure that a whistle blower does not abuse the protection provided under the WPA 2010, s.11(1)(c) states that the enforcement agency shall revoke the whistle blower protection if it is of the opinion that based on its investigation that the disclosure of improper conduct is frivolous or vexatious. Perhaps, Rokiah's disclosure of information was considered to be vexatious. However, it must be noted that s.11(1)(c) shall not be applied lightly as it again would act as a deterrent for potential whistle-blowers.

The Court of Appeal [2016] AMEJ 1386 in Rokiah also rejected her claim as a whistle blower under the WPA 2010. However, the reasoning provided by the Court of Appeal differed from the reasoning of the High Court. In fact, the reasoning of the High Court was not mentioned in the judgment of the Court of Appeal. It is a pity as the Court of Appeal should have taken the opportunity to comment and provide guidance as to how the courts should interpret the WPA 2010. The Court of Appeal did acknowledge that the allegations in the letter written by Rokiah and Azryain fell within the meaning of 'improper conduct' and the disciplinary actions taken against them amounted to a 'detrimental action' which was prohibited under s.10 WPA 2010. But the Court of Appeal held that "to seek protection under the WPA, the person disclosing the improper conduct must *make the disclosure only to any of these enforcement agencies* and to no others (emphasis added), pg 19. In Rokiah, the disclosure of alleged wrongdoings was made to CCM and MACC which amount to enforcement agencies under the WPA 2010. However, Rokiah also disclosed to the Prime Minister, Deputy Prime Minister, Chief Secretary to the Government and Minister of Domestic Trace, Co-operatives and Consumerism and none of these individuals falls under the definition of an enforcement agency under the WPA 2010. Such a finding, though is in accordance with the WPA 2010 highlights one of the biggest weaknesses of the WPA 2010 where the law is very restrictive as to whom the information can be disclosed to. This would be of concern if the whistle blower has no confidence in the enforcement agency's investigation as faced by Rokiah in this case. A whistle blower who has put his career at risk would want to ensure that a proper investigation is carried out and for justice to be achieved. Sadly, the WPA 2010 does not accommodate such possibility.

Rokiah appealed against the decision of the Court of Appeal to the Federal Court [2018] 3 AMR 653. However, she did not appeal on the decision of the Court of Appeal in rejecting her claim as a whistle blower.

Zainudin v Silterra Malaysia Sdn Bhd [2017] AMEJ 1794

In this case, Yushri Zainudin was the Vice President of Finance of the defendant (Silterra). On 23/4/2015, Yushri sent an email to the members of the Board of Silterra, member of the Exco (Executive Committee of Silterra), Company Secretary and Khazanah National Bhd (principal investor of Silterra) regarding the inconsistencies in the Chairman of Silterra's profile. On 13/5/2015, Yushri lodged a police report seeking protection under the WPA 2010 and he also lodged a report with MACC on the same day. Yushri received a letter on 18/5/2015 from Silterra stating that he was suspended pending investigation of his misconduct and he was shown a show cause letter on 25/5/2015. On the same day, all the profile of all the directors of Silterra, including that of the Chairman was removed from its website. Subsequently, Yushri was required to attend a domestic inquiry and he was found guilty of six counts of misconduct and he was terminated from his employment with immediate effect. Therefore, Yushri brought a legal action against Silterra to claim damages from the latter for breach of the WPA 2010. Yushri claimed that his termination was as a result of his disclosure of the Chairman's misconduct.

Silterra then filed an application to strike out Yushri's claim based on the following grounds. First, Silterra claimed that Yushri had failed to comply with the procedure under s.15 WPA 2010 as he did not lodge any complaint with any enforcement agency regarding to his alleged reprisal before he pursued this legal action. It was held by the High Court correctly that s.15(2) WPA 2010 allows a whistle blower to bring a legal action on his own (personal capacity) to seek remedies for his reprisal. It was therefore not necessary for Yushri to go through any enforcement agency before he took this legal action.

Secondly, Silterra also claimed that Yushri's legal action under the WPA 2010 amounted to duplicity of proceedings and was an abuse of the court's process. This was so as he also brought a legal action against Silterra in the Industrial Court at the same time based on the same facts and the relief claimed by Yushri under these two legal actions was similar too. This argument was rejected by the High Court which held that Yushri's claim in the High Court and the Industrial Court was two separate legal actions. As such, the High Court refused to strike out Yushri's claim against Silterra.

Dr Syed Omar Syed Agil

Dr Syed Omar Syed Agil (Syed) was appointed as the CEO of Institute Professional Baitulmal Sdn Bhd (IPB) on 1/9/2014 and he was suspended on 7/10/2015 for alleged misconduct (*The Star*,January 4, 2017). IPB runs a private college and 70% of its shares are owned by the Federal Territories Islamic Religious Council (Council) (*The Star*,January 4, 2017). Prior to his suspension, Syed had disclosed alleged financial misconduct of IPB with the chairman of IPB and the Council before lodging a report with the police and the MACC. Shortly after Syed's disclosure of information of the alleged financial misconduct, IPB issued a notice to him accusing him of misconduct and proceeded to launch an investigation on him with a view to hold an internal disciplinary proceeding against him. Accordingly, Syed brought a legal action against IPB claiming protection as a whistle blower under the WPA 2010 in order to get IPB to cancel a notice of internal investigation against him to ensure that his employment record was not smeared by such allegations.

During the court hearing, IPB claimed that the alleged charges of misconduct was substantiated by proof and were not a reprisal as a result of the whistleblowing by Syed (*The Star*,August 18, 2016). But the High Court was not convinced and decided that IPB had failed to prove that the alleged charges were not detrimental actions taken in retaliation of Syed's disclosure of information to the MACC and the police. As such, the High Court ruled in favour of Syed and ordered IPB to cancel a notice of internal investigation against him and to pay costs amounting to RM18,750 to him (*The Star*, January 21, 2017).

Other reported instances where the WPA 2010 is not applicable

There are other instances in Malaysia where the whistle blower exposed major irregularities of public importance and yet failed to obtain any protection under the WPA 2010 due to its restrictive provisions. One of the major culprits in the WPA 2010 which denies protection to whistle-blowers is s.6(1) WPA 2010 which states that a whistle blower is not entitled to any protection if his disclosure of information amounts to a breach of any written law.

For instance the whistle blower (Mohd Rafizi bin Ramli) was not provided with any protection under the WPA when he disclosed information relating to the following scandals:

(i) National Feedlot Corporation scandal (NFC) where he and a bank employee had disclosed confidential banking information relating to key institutions and persons in the NFC to the media in breach of the former Banking and Financial Institutions Act 1989 (BAFIA). He was charged with an offence under BAFIA and was sentenced to 30 months' imprisonment (*The Star*, February 7, 2018). He was also sued for defamation by NFC and its executive chairman and was ordered by the High Court to pay RM200,000 damages (*The Star*, October 31, 2016).

(ii) Property purchase scandal involving Majlis Amanah Rakyat (MARA) as he had made a press release instead of reporting to any enforcement agency. He was subsequently sued for defamation by the then Deputy Youth Chief of the United Malaysia National Organisation (UMNO) (Khairul Azwan bin harun v Mohd Rafizi bin Ramli [2016] 6 AMR 706)

(iii) 1MDB scandal where he had disclosed part of an audit report of 1MDB in breach of the Official Secrets Act 1972 (OSA 1972) to the media. He was charged under the OSA 1972 and was sentenced to 18 months' imprisonment (*The Strait Times*, November 15, 2016).

Besides the above, Major Ahmad Zaidi, the Malaysian Air Force officer who disclosed to the police and the media that the indelible ink used in the 2013 elections was not effective was terminated from his position after the Royal Malaysian Air Force court found him guilty for violating the military standing orders for his disclosure of information (*The Sun Daily*, February 17, 2015).

A whistle blower who participated in the improper conduct which he disclosed in accordance to the investigation by the enforcement agency would also not be entitled to any protection under the WPA 2010. This is likely to be the reason why Siow Chung Peng's claim as a whistle blower was dismissed by the High Court as upon investigation it was discovered that he aided in the commission of the offences and he was charged accordingly (Siow Chung Peng v Pendakwa Raya [2014] 5 AMR 217)

EVALUATION, RECOMMENDATIONS AND CONCLUSION

The below are the statistics on the implementation of the WPA 2010 retrieved from the Malaysian government. These statistics show a worrying trend on whistleblowing in Malaysia. First, out of 62,852 complainants, only 473 of them were given protection as a whistle blower under the WPA 2010. The success rate of claiming protection is less than 0.01%. Secondly, the number of complaints also dwindled from 2015 to 2017. There were merely 2,066 complaints made as of August 2017. This could mean that

the public might have lost confidence in the ability of the WPA 2010 in protecting them should they decide to come forward to expose any misconduct. Such discouragement might be due to the widely published news whether in the newspaper, internet or social media of the criminal charges and the subsequent convictions of whistle-blowers in Malaysia. The public might have gotten the cold feet with regards to the effectiveness of the WPA 2010.

WHISTLEBLOWER PROTECTION ACT 2010 [*ACT 711*] IMPLEMENTATION REPORT

YEAR	2011	2012	2013	2014	2015	2016	2017*	TOTAL
COMPLAINTS RECEIVED	1,690	14,007	12,333	12,722	12,527	7,507	2,066	62,852
WHISTLEBLOWER	17	98	69	208	4	50	27	473

*Updated Date: August 2017

Source: Official Website Legal Affairs Division (BHEUU), Prime Minister's Department, http://www.bheuu.gov.my/index.php/en/statistics/statistics-for-implementation-of-the-whistleblower-protection-act-2010

There are not many reported cases on the WPA 2010. From the few cases as discussed above, there seems to be an inconsistency as to whether a whistle blower would be denied any protection under the WPA 2010 as a result of the different avenues relied on to disclose information on improper conduct. This could be seen from the different outcome in Rokiah, on one hand and Yushri and Syed on the other. The Court of Appeal in Rokiah rejected her claim as a whistle blower as she had sent her letter containing her allegations to the Prime Minister, Deputy Prime Minister, Chief Secretary to the Government and the Minister of Domestic Trace, Co-operatives and Consumerism which were not enforcement agencies. However, in Yushri, he had also disclosed to members of the Board of Silterra, member of the Exco (State Executive Council), Company Secretary and Khazanah National Bhd before lodging a report with the police and MACC. Similarly, in Syed, he had also disclosed to the Chairman of IPB and the Federal Territories Islamic Religious Council before lodging a report with the police and MACC. Therefore, it begs the question as to why Yushri and Syed were protected but not Rokiah. One of the differences between Rokiah and others was that she sent the allegations to the enforcement agencies (CCM and MACC) at the same time she sent to the other recipients. This is due to s.8(1) WPA 2010 which makes it an offence for a whistle blower to disclose information that they provide to the enforcement agency (confidential information) to any other parties. Thus, once a whistle blower makes a disclosure of improper conduct, this would amount to confidential information which he was prohibited from repeating the information elsewhere. Due to this offence, the whistle blower would lose his protection in accordance to s.11(1)(f) WPA 2010. But there was no mention of s.8 and s.11 in Rokiah's judgment. The other possible reconciliation between Rokiah and Yushri and Syed could be that the court finds it unreasonable for Rokiah to disclose to so many recipients.

Hence, the advice to would-be whistle-blowers is that it is acceptable for them to resort to internal whistle-blowing before turning to enforcement agencies. However, once they lodge a report with the enforcement agencies, they must be reminded not to divulge any of these information to any other party.

Another major shortcoming of the WPA 2010 as seen from the discussion of real-life situations of whistleblowing in Malaysia is due to the prohibition in s.6(1) WPA 2010 where any disclosure of information which amounts to an offence would fall outside the ambit of the WPA 2010. The possible rationale behind this prohibition is to prevent any individual from abusing the privilege afforded by the WPA 2010 as a shield against their own wrongdoing. As such, similar prohibitions are also found in whistle blower protection laws in other countries. However, inserting a blanket prohibition to deny a whistle blower from protection seems harsh in the light of the many possible offences which a whistle blower can breach in Malaysia by exposing fraud and other misconduct. It is necessary for the Malaysian government to consider where the tip of the balance should fall either on discovery of fraud or the upholding of other written laws.

In conclusion, this research has highlighted the importance of whistle-blowing and the need to improve the protection afforded to whistle-blowers in Malaysia. From this research, it can be seen that the WPA 2010 has room for improvement. In summary, two recommendations can be made as a result of the review conducted above. The first recommendation is to expand the category of bodies or individuals which a whistleblower can resort to without losing any protection under the WPA 2010. The second recommendation is to either remove the prohibition in s.6(1) WPA 2010 (Leong, 2017) or to provide discretion to the courts to consider waiving the prohibition where the information disclosed relates to a matter of public importance. It is hoped that the Malaysian government would heed the criticisms leveled against the WPA 2010 from various quarters and amend the WPA 2010 to ensure that evil would not persist by the silence of the public.

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