

## What is the purpose?

### Whistleblower Protection Act 2010:

"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."



## Whistle-blower

- Defined under s.6 as any person who makes a disclosure of improper conduct to any enforcement agency (defined in s.2)

### Qualifications under WPA (s.11):

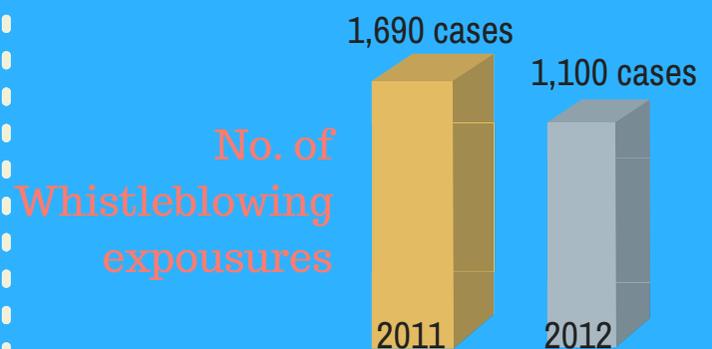
- Cannot participate in the improper conduct
- Cannot make the statement whom he/she knows is false
- Disclosure cannot involve the merits of government policy, including the policy of a public body
- Disclosure cannot be the motive of avoiding dismissal or other disciplinary action
- Cannot commit offence under WPA itself

## Types of Protection?

### Under s.7 of WPA 2010:

1. Protection of confidential information
2. Immunity from civil and criminal action
3. Protection against detrimental action – defined under s.2 as any action causing injury/loss/damage, any intimidation or harassment, any interference with livelihood of the person, and any threat to do with the aforementioned.

## What are the Statistics?



Performance Index Officer Shuhairoz Mohamed Shukeri says that out of 55,287 who has applied for protection under the WPA since enactment, 392 individuals were given protection.

**1% GIVEN PROTECTION**

## What are the criticisms?

### MALAYSIAN BAR COUNCIL

The disclosure cannot be prohibited by any other laws of Malaysia: This weakens the effectiveness of the WPA. The act can be further weakened if the Penal Code (Amendment) Bill is to be passed, where there is a section relating to 'disclosure of information' - it does not allow for disclosure of information obtained while in performance of his work/function under any laws. However, the issues were dismissed when some MPs brought it up.

### JOURNAL ARTICLES

**Whistleblower laws will only be effective in a society "supporting transparency, disclosure and accountability"**

If the society does not support these values, there will be less practice of such culture. The Whistleblower Protection Act is to encourage informants of any discrepancies to whistle-blow without fear. Moreover, if disclosures are being made and nothing is done about it, the Act would be redundant, especially matters regarding the public interest (such as corruption).

**"An effective whistleblower protection scheme should serve the public interest"**

A Whistleblower Protection Act can be a winning scheme to ensure that the rule of law is complied with, and does not publicly expose the wrongdoer, leading to bad publicity for the country.

# Gaps in the Whistleblower Protection Act 2010 and Potential Solutions

## Gap

The act does not protect those who report any discrepancies to their employers - Employees may have a relationship of “mutual trust and confidence” with their employers and may not want to report to the enforcement agency, in fear of tarnishing the employer’s reputation.

Some might even report to their employer without knowledge of the whistleblower protection act, and be subjected to detrimental action.

## Recommendation

1. Allow the whistle-blower to disclose to a more flexible body like the company’s own independent internal auditor or their direct employee to report to, not just any enforcement agency – to ensure corporate governance.
2. Implement a system like the UK’s public Interest Disclosure Act, which encourages employees to report any irregularities to their first point of contact - internal audit or their employers, before reporting to anyone else.

It has been reported in Malay Mail Online that the Act contains clauses that does not actually encourage whistleblowers to come forward.

- s. 8 of the Act says that the whistleblower or any recipient of the disclosure must keep the matter confidential. Failure to comply would land them either a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding ten years or to both.  
- Under s.2 of the Act, the definition of “detrimental action” does not include passive detrimental action. The whistleblower might still be subjected to passive detrimental action, whereby the employer does nothing to prevent other employees from having detrimental action against the whistleblower.

Implement vicarious liability if the employer has omitted to protect the whistleblower from any detrimental action, like in the Employment Rights Act 1996 in the UK. Also, the government could impose a lower penalty for any lack of compliance, for example monetary compensation.

The Act does not protect any whistleblowers who disclose information to the press or a third party – as seen in the case of *NFC Corporation v Rafizi Ramli*.

Implement a provision similar to the UK's Public Interest Disclosure Act, which allows for disclosure of malpractice to the media if it is in the public interest – with additional requirements that the subject has to be exceptionally serious or that the issue will be covered up even though it has been disclosed to the employer, and that it cannot be done to have personal gain.

Under S. 11(1)(d) – the disclosure cannot involve questioning the merits of government policy, including policy of a public body.

The government should allow whistleblowers to report on matters even on the merits of government policy, since it has to be proven that the disclosure be done in good faith and only to an enforcement policy (which is linked to the government) to encourage improvement within the government sector

If the disclosure breaches any other concurrent laws of Malaysia (like the Official Secrets Act 1972), the whistleblower will not be protected.

Have examination on a case-by-case basis and impose additional requirements for such illegal disclosure to be allowed – only when it is in the public interest and made in good faith

Under s.13 of the Act, whether or not action is to be taken falls on the hands of the enforcement agency/public prosecutor, and the whistleblower only has the right to be informed of the outcome of his disclosure.

The New South Wales Public Interest Disclosure Act allows for the whistleblower to bring the matter to an MP or the media, should action not be taken to resolve the disclosure made. Perhaps this could be a useful provision to ensure better corporate governance, as it imposes a duty on wrong-doers to rectify their mistake.

# Ensuring corporate governance?

What does the government do to ensure good corporate governance within companies, in terms of whistle-blowing protection?

On top of the Whistleblower Protection Act 2010, there are additional protection offered to employees:

Under **Companies Act 1965**: S.174(8): if an auditor is satisfied that the circumstances are such that a matter hasn't been dealt with adequately he shall report to the Registrar. S.368B:

Protection to certain officers who make disclosures

Under **Capital Markets and Services Act 2007**: S. 321 (1): Additional protection is given to CEO or any officer responsible for giving financial statements for reporting to the Securities Commission/ stock exchange for any breach of law or rules of the stock exchange

The Corporate Governance Guide provides a guide in encouraging Companies to implement internal whistle-blowing policy to help identify fraud risk. It gives duty to every employee to speak up about their concerns regarding any breach of a legal obligation (civil/criminal), miscarriage of justice, danger to health and safety and cover up of any of these issues.

## Effectiveness?

- There is no mention of any penalties in the corporate governance guide which imposes a duty on all companies listed on Bursa Malaysia to implement an internal whistleblowing policy.
- The ASEAN Corporate Governance Scorecard Country Reports and Assessments 2013/14 has reported that Malaysian Companies lacks the disclosure of clear whistle-blowing policy in terms of the Role of Stakeholders.
- Out of the 4450 listed companies surveyed by Bursa Malaysia, 40% didn't meet corporate governance standards. It was mentioned that the BOD are not independent, and the audit committee's report lacked information. With regards to whistle blowing report, it was mentioned that the effectiveness of the implementation of the whistleblowing policy was not in their annual report.

## What are the cases reported?

### Misuse of public funds (cont.), 2016

The whistleblower who was involved in the National Feedlot Corporation (NFC) in 2011, Johari, was accused of breaching guidelines and discipline at workplace, and is currently being investigated by Bank Negara. He is accused for leaking information regarding the bank accounts of Mohamad Salleh, contrary to the Banking and Financial Institutions Act 1989.



### Fraudulent Transactions, 2016

Disclosure of 1MDB documents by Rafizi Ramli breached the official secrets Act 1972, and the fact that it was not disclosed



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to an enforcement agency, which in turn does not grant him the protection under The Whistleblower Protection Act.

### Misuse of Public Funds, 2011

Accusing the Chairman of NFC, Rafizi Ramli alleged that Dr. Salleh pledged a sum of RM 71 mil government loan deposit – corrupt practices. However, because it breached the Banking and Financial Institutions Act 1989, Rafizi was prosecuted for revealing details about Dr. Salleh's personal banking accounts.

### Corruption, 2016

A whistleblower disclosed to a whistleblower website *Sarawak Report* regarding corruption alleging that the cost of the East Coast Rail Project has been inflated to cover debts of 1MDB, a strategic development government-owned company. Not only that, the funds are alleged to be borrowed from the Chinese Government, in a secret deal between Malaysia's finance Minister and a Chinese state company CCCC (China Communications Construction Company).

### Financial Impropriety, 2016

CEO of a company has reported financial irregularities within his company, especially of financial impropriety of his colleague within the company - Currently still protected under the Whistleblower Protection Act.

### Suspicious Appointment, 2015

The Deputy CEO and the director of the Companies Commission of Malaysia (CCM) filed for judicial review on disciplinary action taken against them for whistleblowing (on suspicious appointment of the CEO of the CCM) and tainting the name of CCM. It was said that the protection under the WPA S.10(1) & (3) was revoke as she had disclose the information to third parties, tarnishing the name of CCM and resulting in a serious breach of discipline.