

GAPS

IN

THE

ACT:



A
LEGAL ANALYSIS OF
MALAYSIA'S CURRENT
**WHISTLEBLOWER
PROTECTION
LAWS**



THE CENTER TO COMBAT
CORRUPTION AND CRONYISM

**Gaps in the Act:
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Whistleblower Protection Laws**

C4 Center Report

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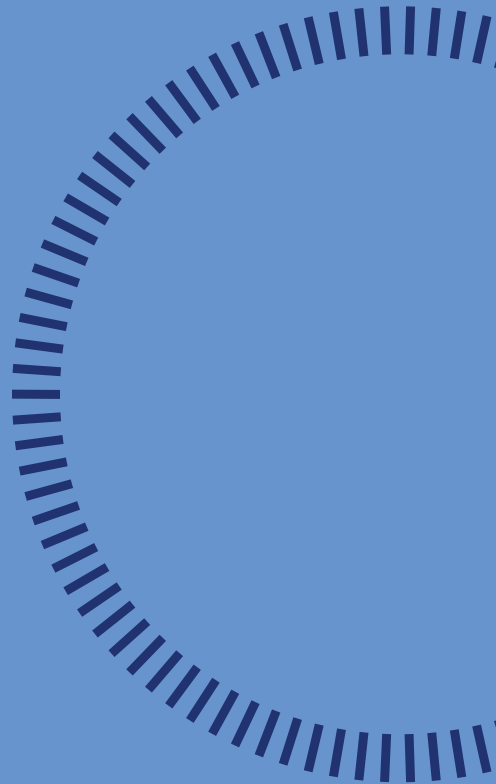
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Gaps in the Act: A Legal Analysis of Malaysia's Current Whistleblower Protection Laws





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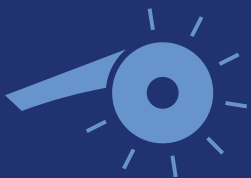


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1 Introduction



As part of its effort to prevent and combat corruption and other related wrongdoing, the Government enacted a piece of legislation known as the Whistleblower Protection Act 2010 (Act). The enactment of this Act was one of the initiatives laid out under the Government Transformation Plan (GTP) – a plan meant to bring about fundamental changes in relation to the operation of all its public institutions.

As a broad-based program, the GTP aims to ensure that these institutions become efficient and *rakyat*-centred. The Act was specifically enacted to strengthen the existing legislation which provided legal mechanisms for dealing with whistleblower protection. The Act is applicable to both the public and the private sector.

To understand the objectives of the Act, the preamble to it is worth recalling:

An Act to combat corruption and other wrongdoing 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.

It is important to note that even though the Act has been in force for eleven years now, in a state with almost 31.95 million, the number of requests for protection filed with the Malaysian Anti-Corruption Commission (MACC) has been low. In 2019, there were only 50 requests made by whistleblowers to the MACC.¹ The highest number of requests were made the year before, which stands at 76.² From 2015 to 2019, the total number of protection requests was only 224.³

For comparison, the Republic of Korea – with a population of almost 51.71 million – had 28,472 corruption disclosures filed with the Anti-Corruption and Civil Rights Commission (ACRC) from 2015 to 2019.⁴

These staggering facts – given how endemic corruption is in Malaysia – are indicative of the ineffectiveness of the current whistleblowing protection mechanism provided under the Act. In light of this, it is inescapable to conclude that whistleblowers remain hesitant about reporting corruption. This grim reality is concerning and deserves urgent attention and intervention.

It is worth emphasizing that whistleblowing is key to stamping out corruption. Given the covert nature of corruption, reliance on the information held by whistleblowers becomes even more urgent and necessary. This is especially true where a whistleblower is from the organisation from which corruption emanates, and so would have direct access to the inner workings of the organisation they are part of.

As the research by the Association of Certified Fraud Examiners, titled “Report to the Nations on Occupational Fraud and Abuse: 2016 Global Fraud Study,” indicates, 45.2% of fraud cases were detected through whistleblowing in the Asia Pacific region.⁵ As such, there must be a concerted effort made to ensure that the protection of whistleblowers is the paramount consideration when establishing and implementing whistleblower protection.

¹ MACC, Annual Report 2019, p. 37.

² Ibid.

³ Ibid.

⁴ See <https://www.acrc.go.kr/en/board.do?command=searchDetail&method=searchList&menuId=02031607>, accessed 22 September 2021

⁵ Association of Certified Fraud Examiners, Report to the Nations on Occupational Fraud and Abuse: 2016 Global Fraud Study, p. 23.

This step – which is important in building confidence in whistleblowing – can only be achieved through the implementation of effective protection mechanisms not only before disclosure of pertinent information related to the illegal act in question but also during and after the disclosure. Additionally, appropriate measures ought to be taken to ensure that the bodies tasked with protecting whistleblowers are able to carry out their duties independently and without fear or favour.

Whistleblower protection is integral to fostering transparency, promoting integrity, and detecting corruption, misconduct, and fraud both in the private and public sector. An effective whistleblower protection system supports and encourages businesses, individuals within an organisation, and members of the public to expose corrupt practices. This is fundamental to combatting impunity that continues to allow corruption to fester.

The United Nations Convention against Corruption (UNCAC), to which Malaysia is party, requires all its signatory countries to put in place legal mechanisms meant to protect people who bring to light corruption and other related wrongdoing from retaliation. In affirming the importance of putting in place a comprehensive whistleblower protection system, Articles 13(2) and 33 of the UNCAC state:

*Article 13(2).
Participation of society*

Each State Party shall take appropriate measures to ensure that the relevant anti-corruption bodies referred to in this Convention are known to the public and shall provide access to such bodies, where appropriate, for the reporting, including anonymously, of any incidents that may be considered to constitute an offence established in accordance with this Convention.

*Article 33.
Protection of reporting persons*

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

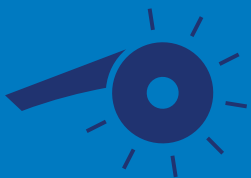
Cast in this light, this report seeks to discuss:

- i) Current whistleblower protection under the Act
- ii) Gaps in the Act
- iii) Cases pertaining to the Act
- iv) The introduction of section 17A of the MACC Act
- v) The best practices to support whistleblowing
- vi) Related issues concerning the Act





2 CURRENT WHISTLEBLOWER PROTECTION UNDER THE ACT



2.1 An Act to Encourage and Facilitate Disclosure of Wrongdoing

Among the legal protection frameworks put in place before the enactment of the Act in 2010 were the Securities Commission Act 1993 (SCA), the Capital Markets and Services Act 2007 (CMS), and section 65 of the MACC Act 2009. It is important to note that the Act sought to extend whistleblower protection given that both the SCA and the CMS did not have detailed and comprehensive provisions that dealt with the protection of whistleblowers. The Act also expanded on the protection given under section 65 of the MACC Act 2009. This step was taken to ensure there was a more robust whistleblower protection in Malaysia.

The Act spells out, among others:

- i) The definition of a whistleblower
- ii) The powers given to the enforcement agencies tasked with dealing with whistleblowing
- iii) The powers given to the Minister to issue directions to the enforcement agencies and make regulations
- iv) The mechanisms for dealing with whistleblowing, such as disclosure of improper conduct, whistleblower protection, protection of confidential information, immunity from civil and criminal action, protection against detrimental action, and revocation of whistleblower protection
- v) The mechanisms for dealing with complaints of detrimental action and remedies
- vi) The revocation of whistleblower protection.

2.1.1 The Definition of a Whistleblower

Section 2 of the Act defines a whistleblower as:

... any person who makes a disclosure of improper conduct to the enforcement agency under section 6.

Section 6(1) of the Act states that:

A person may make a disclosure of improper conduct to any enforcement agency 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.

It is noteworthy that “improper conduct” is defined under section 2 of the Act as:

... any conduct which if proved, constitutes a disciplinary offence or a criminal offence.

2.1.2 Content of Disclosure

Section 6(1) of the Act provides that disclosure must be based on the whistleblower’s reasonable belief that a person has committed a wrongdoing. The wrongdoing or “improper conduct” (as referred to in this provision) in question must, as section 2 of the Act puts it, constitute a disciplinary or a criminal offence.

2.1.3 Disclosure Channels

To obtain protection, section 6(1) of the Act mandates that whistleblowers make disclosures to the enforcement agencies empowered by the law to deal with whistleblowing. Section 2 of the Act defines an “enforcement agency” as:

(a) Any ministry, department, agency or other body set up by the Federal Government, State Government or local government including a unit, section, division,

department or agency of such ministry, department, agency or body, conferred with investigation and enforcement functions by any written law or having investigation and enforcement powers;

(b) A body established by a Federal law or State law which is conferred with investigation and enforcement functions by that Federal law or State law or any other written law; or

(c) A unit, section, division, department or agency of a body established by a Federal law or State law having investigation and enforcement functions;

It is noteworthy that the five active enforcement agencies in Malaysia are the Royal Malaysian Police Force, the Royal Malaysian Customs Department, the Road Transport Department, the MACC and the Immigration Department of Malaysia.

2.1.4 Confidentiality Protection

Section 8(1) of the Act provides a channel for individuals who choose to make confidential disclosures. Section 8(1) states:

Any person who makes or receives a disclosure of improper conduct or obtain confidential information in the course of investigation into such disclosure shall not disclose the confidential information or any part thereof.

2.1.5 Protection Against “Gang Orders”

Section 6(5) of the Act renders terms and conditions of employment contracts that preclude disclosure of improper conduct void. Section 6(5) states:

Any provision in any contract of employment shall be void in so far as it purports to preclude the making of a disclosure of improper conduct.

2.1.6 Access to Court and Interim Relief

Section 15(1) of the Act provides access to court for whistleblowers who face detrimental action after making disclosures. Additionally, section 15(1)(b) provides whistleblowers relief during the interim after a preliminary determination is made. This provision seeks to remedy anti-reprisal systems that commonly drag out for years.

Section 15(1) reads:

- (1) Upon request made by a whistleblower—*
- (a) Within three months after being informed by the enforcement agency under subsection 14(6) 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 enforcement agency may seek the following remedies from the court:*
 - (A) Damages or compensation;*
 - (B) Injunction; or*
 - (C) Any other relief as the court deems fit.*

2.1.7 Relocation of Place of Employment

Section 19 of the Act allows whistleblowers who fear or have suffered detrimental action to apply for relocation of their place of employment. Section 19 states:

A whistleblower or any person related to or associated with the whistleblower who fears or has suffered detrimental action may request to the enforcement agency to apply in writing, for and on his behalf, to the relevant public body or employer or other appropriate person in the private body for relocation of his place of employment.

2.1.8 Prohibited Disclosures

The proviso to section 6(1) of the Act makes it clear that disclosures must not offend any written law in Malaysia. When read with section 11(1)(f) of the Act, the legal effect is that if a specific law prohibits the disclosure of certain information, the whistleblower who makes such disclosure will not be afforded protection under the Act. If the law makes such disclosure an offence, the whistleblower could also be subjected to criminal prosecution.

Additionally, section 8(1) prohibits not only the person who receives the disclosure from disclosing it to a third party but also the whistleblower from doing the same. Section 8(1) reads:

Any person who makes or receives a disclosure of improper conduct or obtain confidential information in the course of investigation into such disclosure shall not disclose the confidential information or any part thereof.

2.1.9 Types of Protections

Section 7 of the Act affords three types of protections to a whistleblower. They are:

- i) Protection of confidential information;
- ii) Immunity from civil and criminal action; and
- iii) Protection against detrimental action.

It is noteworthy that the protection conferred to whistleblowers under the Act also extends to anyone related to or associated with them. Additionally, the whistleblowers are entitled to immunity from civil and criminal action and protection against detrimental action arising from his or her act of blowing the whistle.

2.1.10 Revocation of Whistleblower Protection

Section 11(1) of the Act empowers the enforcement agencies to revoke whistleblower protection based on several grounds. Section 11(1) states:

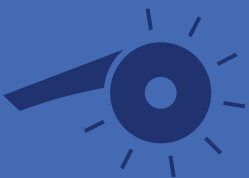
The enforcement agency shall revoke the whistleblower protection conferred under section 7 if it is of the opinion, based on its investigation or in the course of its investigation that—

- (a) The whistleblower himself has participated in the improper conduct disclosed;*
- (b) The whistleblower wilfully 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.*

It is important to note that the decision made by the enforcement agencies to revoke whistleblower protection is not readily subject to scrutiny, given that any challenge against that decision would have to be pursued in court via judicial review proceedings that are lengthy, complicated, and costly.



3 GAPS IN THE ACT



Despite the extended whistleblower protection provided under the Act, there are still gaps in this piece of legislation that need to be urgently addressed. This chapter examines these gaps and how they hinder effective whistleblower protection.

3.1 Limits on Disclosure Channel

Section 6(1) of the Act mandates that disclosure be made to enforcement agencies. This provision therefore excludes external disclosures to regulatory and public bodies. It also bars whistleblowers from resorting to internal reporting channels. As such, the only channel available to whistleblowers who intend to seek protection under the Act is through disclosure to enforcement agencies.

Section 6(1) of the Act further provides that the disclosure made must not be prohibited by any written law.

The implications of section 6(1) of the Act are twofold. First, the whistleblower will not be afforded protection if he or she decides to go public with his or her information, uses other channels other than what is stipulated under the provision to reveal the information, or reveals the information to a third party after disclosing it to the enforcement agency. Second, he or she could face criminal prosecution if the information revealed is classified under the Official Secrets Act 1972 or subject to section 133 of the Financial Services Act 2013. Additionally, section 203A of the Penal Code criminalises public officials for revealing the information obtained while executing their duties or functions.

Furthermore, the prohibition imposed under section 8(1) of the Act where a whistleblower is not allowed to reveal the information initially disclosed to the enforcement agency will consequently discourage whistleblowing. This is because some whistleblowers might need to consult third parties such as lawyers or close confidants when circumstances warrant it.

These restrictions – which serve as an obstruction to whistleblowing – defeat the very purpose of the Act, which is to encourage and facilitate disclosure of improper conduct. They also contravene the objective of the GTP, which is to ensure that public institutions, which include institutions tasked with whistleblowing, become efficient and *rakyat*-centred, which essentially means the people's interests and security are of the utmost importance; they ought to be protected and upheld.

3.2 Power to Revoke Whistleblower Protection

Section 11(1) of the Act gives power to the enforcement agencies to revoke whistleblower protection. If any one of the circumstances in section 11(1) (a) – (f) arises, it appears that the enforcement agency must revoke the protection given. No discretion is accorded to the enforcement agencies to exercise some degree of flexibility to weigh all the factors involved when deciding on the revocation – such discretion is fundamental to enabling whistleblowing.

This legal flaw can be cured by making a provision for establishing an independent oversight body tasked with deliberating and deciding on the revocation of whistleblower protection. This body ought to be given the power to oversee the decisions made by the enforcement agencies to revoke protection under section 11(1) of the Act and reverse the decisions not to grant protection under section 6 of the Act.

It is noteworthy that section 11(1)(a) of the Act empowers the enforcement agencies to revoke protection conferred to whistleblowers who are subsequently found to have prior involvement in the wrongdoing in question. It is important to

highlight that a proper balance between whistleblowing and granting immunity to those involved in the commission of a crime ought to be struck. This balancing act is key to ensuring that whistleblowing is not used as a channel to whitewash one's crime.

The proper balance is to protect whistleblowers against retaliation but to retain the option for the state to proceed with prosecution if successful negotiation of an immunity agreement cannot materialise.

This position is in line with Article 37 of the UNCAC. Article 37(1) of the UNCAC states:

(1) Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.

3.3 Limited Scope of Coverage

Under section 6 of the Act, disclosures are limited to improper conduct. This effectively excludes disclosures of any illegality, abuse of power, danger to public health and safety, and other activity which undermines the public interest.

3.4 **No Right to Refuse to Violate the Law**

The Act does not make provision for the right to refuse to violate the law. This right is essential as it prevents *fait accomplis*, given the risk – vulnerability to retaliation – associated with a person's decision to disobey an order on the ground that it's illegal if it is subsequently found that the order was not illegal.

3.5 **No Protection Against Spillover Retaliation**

Under the Act, the right to protection against spillover retaliation is non-existent. A provision to address spillover retaliation will protect individuals who are perceived as whistleblowers or as assisting whistleblowers and individuals who are “about to” make disclosures.

3.6 **No Support Services for Whistleblowers**

Access to legal assistance or services, which is crucial to supporting whistleblowers, is not provided for under the Act.

3.7 **No Option for Alternative Dispute Resolution or Mediation**

The Act does not provide an option for alternative dispute resolution or mediation with an independent body to resolve retaliation cases. It is noteworthy that third party dispute resolution can be cost-effective and save time.

3.8 **No Time Frame to Act on Rights**

The law does not make provision for a time frame upon which whistleblowers are required to exercise their rights.

3.9 **No Right to Make-Whole Compensation**

There is no provision under the Act to allow whistleblowers who prevail to obtain comprehensive relief that covers all the direct, indirect, and future consequences of the detrimental action.

3.10 **No Statutory Entitlement to Legal Fees**

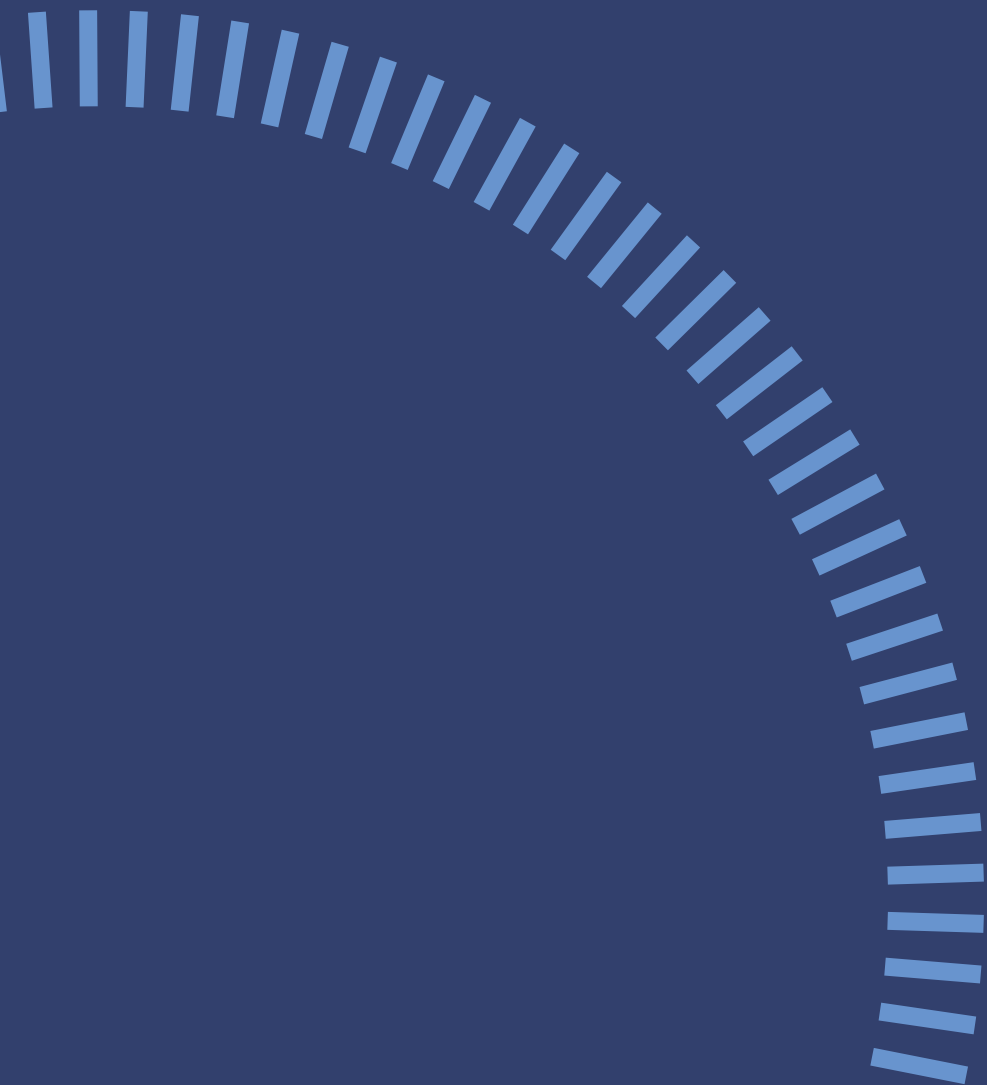
The Act does not make provision for entitlement to legal fees or associated litigation costs for whistleblowers who prevail.

3.11 **No Accountability for Reprisals**

The Act does not have a provision that holds individuals, for example, managers, accountable for whistleblower reprisals.

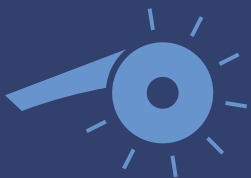
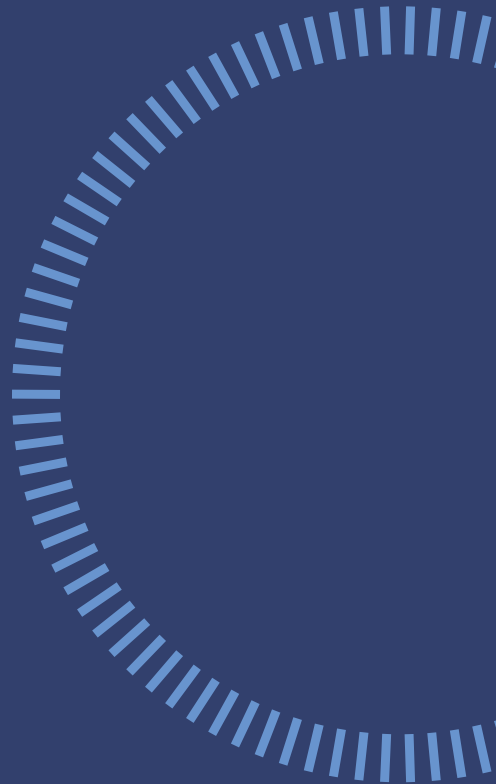
3.12 **No Review Mechanism**

There is no provision under the Act to establish a review mechanism that can assess the effectiveness of the Act.





4 CASES PERTAINING TO WHISTLEBLOWER PROTECTION



This report examines several cases pertaining to the Act to demonstrate how the existing gaps in the Act pose significant obstacles to whistleblowing.

I **Rokiah bt Mhd Noor v Menteri Perdagangan Dalam Negeri Koperasi & Kepenggunaan Malaysia**

Facts of the Case

Rokiah bt Mhd Noor (Rokiah) and Azryain bin Borhan (Azryain) were employees of the Companies Commission of Malaysia (CCM). Rokiah served as the Deputy Chief Executive Officer (Operations) and Azryain served as the Director of Training Academy. Both of them wrote a letter dated 25 October 2011 entitled "Integrity and Leadership Crisis in the CCM" detailing the allegations of improprieties involving the top management of the CCM. This letter was addressed to the CCM Chairman and members of the board. The letter was also sent to the following parties:

- i) Prime Minister
- ii) Deputy Prime Minister
- iii) Chief Secretary to the Government
- iv) Minister of Domestic Trade, Co-operatives and Consumerism (Minister)
- v) Chief Commissioner of the MACC
- vi) Director of Investigation of the MACC.

Rokiah and Azryain claimed that the CCM had failed to investigate the allegations contained in the letter. The CCM Disciplinary Committee subsequently commenced an inquiry against Rokiah and Azryain for allegedly breaching discipline. They were later found guilty for breaching discipline and bringing disrepute to the CCM. As a result, Rokiah's contract of employment was terminated and her appointment as the Deputy Chief Operating Officer (Operations) was revoked. Azryain was demoted by one grade.

In 2012, Rokiah and Azryain proceeded to file an application for judicial review with the High Court⁶ to challenge the legality of the punishment meted out against them. Additionally, they invoked section 10(3) of the Act which provides protection against detrimental action.

Decision

The High Court dismissed Rokiah and Azryain's claims for whistleblower protection under the Act. The Court held that they were not entitled to protection as the CCM had found that their allegations were baseless, and it would not disturb the findings made by the body. The decision of the Court on the issue of whistleblower protection is worth recalling:

When the whole of the provisions of the WPA are considered, it would become apparent that the protection afforded by ss 10(1) or (3) of the WPA did not mean that the whistleblower was granted a carte blanche to say whatever he or she wanted. They were still subjected to the requirement of justifying cogently the truth of the statements made.

It is also important to note that the Court had set an impossible standard for whistleblowing where whistleblowers need to have cogent evidence when making disclosures. This interpretation, which places an undue burden on whistleblowers, goes against the essence of section 6(1) of the Act, which requires that whistleblowers base the disclosures on their reasonable beliefs.

⁶ [2015] MLJU 238

Dissatisfied with the verdict, in 2015, Rokiah and Azryain filed an appeal with the Court of Appeal.⁷ Although the Court of Appeal acknowledged that the allegations in question fell within the meaning of “improper conduct” under section 2 of the Act and the disciplinary actions taken against them constituted “detrimental action” prohibited under section 10 of the Act, it rejected their claims to protection under the Act because they failed to whistleblow only to the enforcement agencies as mandated by section 6(1) of the Act. The Court affirmed:

In the present case, clearly Rokiah and Azryain did not qualify as whistleblowers as other than disclosing the alleged improper conduct to members of CCM and the Anti-Corruption Commission, the disclosure was also made to the following third parties, none of whom falling under the definition of an “enforcement agency” within the meaning of section 2 of the WPA, namely:

- (i) The Prime Minister;*
- (ii) The Deputy Prime Minister;*
- (iii) The Minister of Domestic Trade, Cooperative and Consumerism;*
- (iv) The Chief Secretary to the Government.*

It is important to highlight that the Court of Appeal did not address the High Court’s interpretation of the Act that whistleblowers are required to justify “cogently the truth of the statements made” in their disclosures. The Court of Appeal’s failure to correct this erroneous interpretation of the burden of proof as provided for under section 6(1) of the Act – which expressly provides that disclosures ought to be based on whistleblowers’ reasonable beliefs; which allows for some degree of uncertainty – leaves the door wide open for an onerous burden to be placed on whistleblowers where they have to prove with certainty that the content of the disclosures is true.

The OECD’s observation on the reasonableness of whistleblowers’ beliefs is worth recalling:

Accordingly, protection is afforded to an individual who makes a disclosure based upon his or her belief that the information disclosed evidenced one of the identified conditions in the given statute, even if the individual’s belief is incorrect.⁸

In 2016, Rokiah appealed the Court of Appeal’s decision with the Federal Court, which issued its decision in 2018. However, the appeal was only on the legality of her dismissal and not on the denial of whistleblower protections under the Act. This essentially means that the High Court’s erroneous interpretation of the reasonableness of the whistleblowers’ beliefs about the truth of the disclosures remains unchallenged and, therefore, law. It is worth noting that the whole legal dispute took 6 years. It took the High Court approximately 822 days to reach a decision, the Appeals Court 365, and the Federal Court 730 days.

These court decisions illustrate how section 6(1) of the Act, which limits disclosure channels, actively prevents whistleblowers from getting the much-needed protection after making a disclosure. The denial of protection on this ground exposes whistleblowers to detrimental action, which the Act explicitly prohibits, in this case, loss of employment. The failure of the Court of Appeal to address and provide clarity on the issue of the reasonableness of the whistleblower’s belief further adds uncertainty to the issue.

⁷ [2016] MLJU 1765

⁸ OECD, Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation (2011), p.8.

II **The Center to Combat Corruption and Cronyism (C4 Centre)**

In May 2020, C4 Center issued a press statement highlighting its research findings which showed that the shareholders and directors of a property development company Khazanah Jaya Sdn Bhd (KJSB) are Tan Boon Keong and Tan Jiat Jui who are also shareholders and directors of South Asia Noble Sdn Bhd (SAN).

C4 Center further highlighted that one of the former directors of SAN is Iskandar Miza Ahmad, who happens to be a shareholder and director in the Health Minister's private clinic, Klinik Adham. Klinik Adham is mostly owned by Health Minister Adham Baba (96.8%) while Iskandar Miza who has been a director since April 2004 owns approximately 1,000 shares.

The research conducted by C4 Center was in response to news articles which reported that the MACC had called in at least five contractors to facilitate the investigation relating to contracts believed to have cost at least RM30 million. These contracts involved the purchase of Covid-19 test kits, personal protective equipment, and face masks.

The Health Minister subsequently issued a letter to C4 Center demanding an apology and payment of RM30 million in damages failing which a legal proceeding would be commenced against the organisation.

The Health Minister resorting to legal action in response to legitimate questions raised by an independent anti-corruption watchdog amounted to detrimental action prohibited under the Act. It is a foregone conclusion that the organisation will not be accorded whistleblower protection as the disclosure, which was a matter of public interest, was made to the media and not to any of the enforcement agencies prescribed by the Act.

III **Justice Hamid Sultan Abu Backer**

In February 2019, Court of Appeal Justice Hamid Sultan Abu Backer (Justice Hamid) filed a 65-page affidavit detailing allegations of judicial misconduct involving several judges who had interfered in several high-profile cases. As a result of this disclosure, Justice Hamid was suspended from office from 4 February 2020 until 27 August 2021. The decision to suspend him was handed down by the Judges' Ethics Committee (JEC) chaired by Chief Justice Tun Tengku Maimun Tuan Mat. What is also concerning is that the JEC made this decision without the presence of Justice Hamid.

The way in which Justice Hamid was treated after disclosing a serious allegation of judicial misconduct that could further undermine the judiciary is illustrative of how ineffective the current whistleblower protection system is. Instead of conferring the protection that he needs, which is fundamental to ensuring effective investigation into the matter, he was subjected to detrimental action that not only denied him due process but also gravely jeopardised his judicial career.

IV Mohd Rafizi Ramli

Mohd Rafizi Ramli (Rafizi) blew the whistle on the following corruption scandals:

- i) The National Feedlot Corporation (NFC) corruption scandal where Rafizi and a bank employee Johari Mohamad had disclosed confidential documents comprising summaries of bank account balance of the NFC and its Chairman to the media. This disclosure, which was made in 2012, was in breach of section 97(1) of the Banking and Financial Institutions Act 1989 (BAFIA).

Following the disclosure, he and the bank employee were charged in the Sessions Court. In February 2018, they were found guilty and sentenced to 30 months' imprisonment. Both of them subsequently filed an appeal against the conviction in the High Court.

In November 2019, the High Court allowed their appeal on the ground that the prosecution had failed to fulfil the evidentiary requirements under the Evidence Act 1950. Additionally, the NFC sued Rafizi for defamation and in October 2016, the High Court ordered its NFC's Chairman to pay Rafizi RM200,000 in damages.

Rafizi proceeded to appeal the decision in the Court of Appeal, and in May 2019, the Court overturned the decision made by the High Court. The NFC and its Chairman filed an appeal with the Federal Court. In September 2020, the Federal Court granted them leave to appeal, and the case is pending hearing.

- ii) The purchase of the 746 Swanston Street property in Australia by a company wholly owned by MARA Inc, Thrushcross Land Holdings Limited. In July 2015, Rafizi held a press conference to expose certain suspicious transactions tied to said purchase. He cited an internal MARA document and the price list from property consultant, On The House, which indicated that the property cost A\$23.5 million (RM75.7 million) in November 2012, but MARA paid A\$41.8 million.

In July 2015, the then Deputy Youth Chief of the United Malaysia National Organisation Khairul Azwan bin Harun filed a defamation suit against Rafizi in the High Court. In October 2016, the High Court dismissed his claim.

Dissatisfied with the decision, he filed an appeal in the Court of Appeal, and in August 2017, the Court of Appeal dismissed his appeal.

- iii) The 1Malaysia Development Bhd (1MDB) corruption scandal where Rafizi had disclosed part of an audit report of 1MDB in a press conference at the Parliament lobby.

On 8 April 2016, he was charged in the Sessions Court with possessing and disclosing the document without authorisation under the Official Secrets Act 1972. In November 2016, the Sessions Court sentenced him to a total of 36 months in jail (18 months for each offence) for both possessing and disclosing the document without authorisation.

He filed an appeal against the conviction in the High Court. In August 2017, the High Court upheld the 18 months' jail sentence for disclosing the audit report and overturned the conviction on the other charge. He appealed the decision in the Court of Appeal. In June 2018, the Court of Appeal allowed his appeal and released him on a good behaviour bond of RM10,000.

As evident in these cases, the prescribed limits on the channel of disclosure and what can be disclosed expose the gaping hole in the Act, rendering it incapable of protecting genuine whistleblowers such as Rafizi, who faced immense backlash for whistleblowing on suspected acts of corruption.

Moreover, the fact that he, a member of Parliament no less, had been subjected to multiple criminal prosecutions – which risked his liberty although they did not result in a conviction – will undoubtedly deter the general public from coming forward to expose acts of corruption.

V Major Zaidi Ahmad

In October 2014, Major Zaidi Ahmad (Major Zaidi), the Royal Malaysian Air Force (RMAF) senior officer made a media statement where he raised the ineffectiveness of the indelible ink used during the 13th General Elections. He was subsequently charged in the Military Court with making an unauthorised media statement. In January 2015, he

was found guilty and consequently dismissed from the RMAF.

The detrimental action – which is explicitly prohibited by the Act – subjected to Major Zaidi, a senior officer who had served on the RMAF for 26 years, clearly acts as a deterrent to other civil servants who intend to report wrongdoing that are taking place in public institutions.

4.1 Implications of the Limits on Whistleblowing

The cases cited above demonstrate that the whistleblower protections provided for under the Act remain illusory and meaningless. The arbitrary limits placed on the channel and content of the disclosure continue to deny whistleblowers the protection that they urgently need.

As demonstrated in these cases, the whistleblowers involved had to pay a heavy price for honouring their duties to come forward and expose corrupt practices that came to their knowledge in the performance of their functions. The fierce retaliation inflicted on them constitute detrimental action, which is supposed to be prevented by the Act.

Given how senior civil servants, a member of Parliament, a bank employee, an anti-corruption watchdog, an activist, and a judge were subjected to punishment for whistleblowing, it is difficult

not to conclude that members of the public will be greatly discouraged from coming forward with confidence to expose corruption and other wrongdoing in the future.

The negative implications that have befallen the whistleblowers involved in the cases cited above – loss of employment, criminal prosecutions and investigations, threats of legal action – without a doubt have a chilling effect on whistleblowing. If not eliminated immediately, these legal barriers will instil immense fear in the hearts and minds of other potential whistleblowers, which will further weaken the current whistleblower protection system and anti-corruption efforts in general.



5 BEST PRACTICES TO SUPPORT WHISTLEBLOWING



It is noteworthy that there are varied approaches to whistleblower protection undertaken by state parties to the UNCAC in their respective jurisdictions. This chapter highlights several main features of whistleblower protection mechanisms in other jurisdictions. It also discusses the extent to which these main features promote the objective of whistleblowing, which is to encourage and facilitate whistleblowers who intend to report corruption and other wrongdoing.

A closer look at these main features and how they work could help us identify best practices for whistleblower protections and serve as a frame of reference for filling the gaps in Malaysia's whistleblower protection system.

5.1 Disclosure Channels

To encourage and facilitate whistleblowing, disclosure channels should be expanded rather than restricted. On top of internal disclosures and external disclosures to prescribed bodies, disclosure channels should also include external disclosures to the public, including the media, members of parliament, and civil society organisations.

In providing reporting channels, states must, as the United Nations Office on Drugs and Crime (UNODC) has emphasised, "obtain or receive information about corruption from many different sources."⁹ These sources include:

- *Public officials in government bodies, e.g. central and local government, administrative agencies, and State-owned enterprises, etc. (including those in other countries)*
- *Private sector workers, in private or publicly listed companies, and in all sectors, whether regulated or not (e.g. finance, transportation, food, health, social care, education, energy, retail and construction)*
- *Companies or other private legal entities (e.g. competitor companies who were not*

awarded a specific contract because they refused to pay a bribe or otherwise participate in corruption)

- *Unions or business and industry associations*
- *Non-governmental organisations (NGOs) and community groups*
- *Members of the public*
- *Media, including social media*
- *Offenders or implicated persons¹⁰*

Allowing disclosures to the public will expand the space for whistleblowing and build and support the confidence of the public. This expansion is crucial to cultivating a robust whistleblowing system that will effectively stamp out corruption. It will also remedy any issues arising from the lack or absence of confidence in bodies prescribed by law to deal with whistleblowing.

In noting the importance of public disclosures, Article 33 of the Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law states:

⁹ United Nations Office on Drugs and Crime, *The United Nations Convention against Corruption: Resource Guide on Good Practices in the Protection of Reporting Persons* (2015), p.5.

¹⁰ United Nations Office on Drugs and Crime, *The United Nations Convention against Corruption: Resource Guide on Good Practices in the Protection of Reporting Persons* (2015), p.5.

Reporting persons normally feel more at ease reporting internally, unless they have reasons to report externally. Empirical studies show that the majority of whistleblowers tend to report internally, within the organisation in which they work. Internal reporting is also the best way to get information to the persons who can contribute to the early and effective resolution of risks to the public interest. At the same time, the reporting person should be able to choose the most appropriate reporting channel depending on the individual circumstances of the case. Moreover, it is necessary to protect public disclosures, taking into account democratic principles such as transparency and accountability, and fundamental rights such as freedom of expression and the freedom and pluralism of the media, whilst balancing the interest of employers to manage their organisations and to protect their interests, on

the one hand, with the interest of the public to be protected from harm, on the other, in line with the criteria developed in the case law of the ECHR.

It is noteworthy that Australia's Public Interest Disclosure Act 2013 provides multiple channels of disclosure. They are internal disclosures, external disclosures, emergency disclosures, and legal practitioner disclosures.

Similarly, Ireland's Protected Disclosures Act 2014 covers disclosures to employers or other responsible persons, disclosures to prescribed persons, disclosures to Ministers, and disclosures to legal advisers. Additionally, the Act also provides for wider disclosures – disclosures that do not fall under disclosures to employers or other responsible persons, prescribed persons, Ministers, or legal advisers.

5.2 Content of Disclosure

A comprehensive whistleblower protection system must ensure, among others, that whistleblowers are not criminally liable for disclosing information which the law deems a national secret or a matter of national security. It is important to note that despite the growing attention given by state parties to the UNCAC to the importance of establishing and implementing robust whistleblower protection systems, not much has been done to address this particular aspect of whistleblowing.

Secrecy and national security laws in many jurisdictions continue to criminalise the act of whistleblowing. As David Banisar has observed:

Most whistleblower laws fail to adequately deal with the problem in this area, either by ignoring it or by setting special, weaker procedures. As noted in an earlier section, many countries have laws on official secrets that provide a significant barrier to whistleblowing.¹¹

In the United Kingdom, PIDA does not protect whistleblowers who reveal information classified as secret under the Official Secrets Act 1989.¹²

Similarly, in Canada, the PSDPA does not afford protection to employees working for the Canadian Security Intelligence Service and the Communications Security Establishment.¹³

¹¹ David Banisar, Whistleblowing: International Standards and Developments in Sandoval, I. (ed.), *Corruption and Transparency: Debating The Frontiers Between State, Market and Society* (February 2011).

¹² PIDA, s. 43B(3).

¹³ PSDPA, s. 2(1).

For whistleblower protection to be truly effective, laws that strictly prohibit the disclosure of matters pertaining to national secrets and national security must be immediately reviewed. There must be a statutory public interest defence put in place to protect those who disclose classified information.

A more significant move could also be made where arbitrary national security and secrecy laws are repealed and replaced with comprehensive freedom of information laws. It is worth pointing out that New Zealand made this move in 1982, where it abolished the Official Secrets Act with the adoption of the Official Information Act.

It is important to emphasise that these freedom of information laws should have limited exceptions, proactive obligations to disclose information, clear and simple procedures for making requests, an independent and effective oversight system, and adequate promotional measures. These exceptions must be in line with the conditions spelled out under Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR), which regulates the kinds of restrictions imposed on freedom of expression, including freedom of information.

The United Nations Special Rapporteur on Freedom of Expression and Opinion has recommended three considerations that ought to be taken when formulating restrictions on freedom of information, which also impact whistleblowing. The considerations are as follows:

i) The restrictions must protect a specific legitimate interest from actual or threatened harm that would otherwise result, pointing out that it is not legitimate to resist disclosure to protect against embarrassment or exposure of wrongdoing, or to conceal the functioning of an institution.

- ii) Disclosure should only be refused under the “well-accepted” proportionality element of the necessity test, where a specific risk of harm to a legitimate State interest must be shown to outweigh the public’s interest in the information to be disclosed. Furthermore, some matters should be considered “presumptively” to be in the public interest such as criminal offences and human rights or international humanitarian law violations, corruption, public safety, environmental harm, and abuse of public office.
- iii) Restrictions must be drafted clearly and narrowly, designed to give guidance to authorities and subject to independent judicial oversight.¹⁴

The UNODC’s observation on this important aspect of whistleblowing is worth highlighting:

While there are valid grounds to protect certain information relating to ordre public or national security as also provided for in international standards, including article 13(1)(d) of UNCAC, care must be taken to ensure that this exception to access to information is not so overly broad as to prevent effective public scrutiny and debate about government decision-making and activities, and importantly, in this context, to make it much more difficult to detect corrupt activities in public services.¹⁵

¹⁴ David Kaye, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression” (specifically on the protection of sources to information and whistle-blowers) (2015, Un Doc A/70/361), para. 9 – 11.

¹⁵ United Nations Office on Drugs and Crime, The United Nations Convention against Corruption: Resource Guide on Good Practices in the Protection of Reporting Persons (2015), p.5.

5.3 Oversight Mechanism

To prevent abuse of power, there needs to be an oversight mechanism put in place. An independent statutory body must be established to serve as an oversight mechanism. The primary function of this body is to review the decisions made by the enforcement agencies pertaining to the granting of protection, the need for revocation of protection, and the investigation of retaliation.

This measure is fundamental to building a robust and effective whistleblowing system that acts with independence and integrity. Having this kind of system in place will effectively enable the public, regardless of their position in society, to come forward to report acts of corruption and other related wrongdoing with confidence.

In Korea, the Anti-Corruption and Civil Rights Commission (ACRC) established under Article 11 of the Act on the Prevention of Corruption

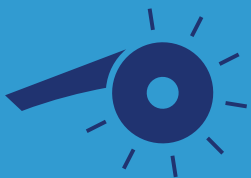
and the Establishment and Management of the Anti-Corruption and Civil Rights Commission 2008 (APCEMACRC) is empowered to deal with matters concerning whistleblower protection, including hearing claims of reprisals against whistleblowers. This function is provided for under Article 12 of the APCEMACRC.

Similarly, in the United States, the Office of Special Counsel (OSC) is empowered to investigate reports of wrongdoing within the federal government's executive branch. The OSC is an independent federal investigative and prosecutorial agency whose mandate and authority come from four federal statutes: the Civil Service Reform Act, the Whistleblower Protection Act, the Hatch Act, and the Uniformed Services Employment & Reemployment Rights Act.





6 THE INTRODUCTION OF SECTION 17A OF THE MACC ACT 2009 TO STRENGTHEN THE ACCOUNTABILITY FRAMEWORK IN THE PRIVATE SECTOR



This chapter examines the main features of the newly amended section 17A of the MACC Act 2009 (MACC Act) and how it could be harmonised with the current whistleblower protection.

6.1 Main Features of Section 17A

An amendment was made to section 17 of the MACC Act in 2020 to introduce a corporate liability provision for corrupt practices. The new amendment, which came into force on 1 June 2020, is embodied in section 17A. It is noteworthy that this provision was modelled after section 7 of the United Kingdom's Bribery Act 2010 (UK Bribery Act), which criminalises the failure of commercial organisations to prevent bribery.

This amendment is in line with Article 26 of the UNCAC, which mandates that state parties take necessary measures to establish the liability of legal persons for involvement in corruption offences dealt with under the Convention.

Article 26 of the UNCAC stipulates:

- (1) *Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.*
- (2) *Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.*
- (3) *Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.*

- (4) *Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.*

The newly introduced section 17A of the MACC Act – which deals with the offence committed by commercial organisations – is a strict liability offence. A strict liability offence is one where no fault needs to be proven to hold commercial organisations liable for corruption offences committed by persons associated with them.

It is noteworthy that on 18 March 2021, an offshore vessel support company known as Pristine Offshore Sdn Bhd was charged in the Sessions Court under the new section 17A of the MACC Act. The company was accused of committing bribery worth RM321,350 to ensure that a subcontract from Petronas Carigali Sdn Bhd was awarded to it. According to the charge, the bribe was allegedly given to one Mazrin Ramli, the chief operating officer of Deleum Primera Sdn Bhd. Pristine Offshore Sdn Bhd became the first company to be charged under the new corporate liability provision.

6.1.1 Definition of the Offence

Section 17A(1) of the MACC Act defines what constitutes the offence:

- (1) *A commercial organisation commits an offence if a person associated with the commercial organisation corruptly gives, agrees to give, promises or offers to any person any gratification whether for the benefit of that person or another person with intent—*
 - (a) *To obtain or retain business for the commercial organisation; or*
 - (b) *To obtain or retain an advantage in the conduct of business for the commercial organisation.*

6.1.2 Who Could be Liable

Section 17A(3) of the MACC Act spells out who could be liable for the offence:

- (3) *Where an offence is committed by a commercial organisation, a person—*
 - (a) *Who is its director, controller, officer or partner; or*
 - (b) *Who is concerned in the management of its affairs,*
 - (c) *At the time of the commission of the offence, is deemed to have committed that offence unless that person proves that the offence was committed without his consent or connivance and that he exercised due diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his function in that capacity and to the circumstances.*

Section 17A(6) defines what constitutes association with a commercial organisation as follows:

- (6) *For the purposes of this section, a person is associated with a commercial organisation if he is a director, partner or an employee of the commercial organisation or he is a person who performs services for or on behalf of the commercial organisation.*

6.1.3 Definition of a Commercial Organisation

Section 17A(8) of the MACC Act defines a “commercial organisation” as:

- (a) *A company incorporated under the Companies Act 2016 [Act 777] and carries on a business in Malaysia or elsewhere;*
- (b) *A company wherever incorporated and carries on a business or part of a business in Malaysia;*
- (c) *A partnership—*
 - (i) *Under the Partnership Act 1961 [Act 135] and carries on a business in Malaysia or elsewhere; or*
 - (ii) *Which is a limited liability partnership registered under the Limited Liability Partnerships Act 2012 [Act 743] and carries on a business in Malaysia or elsewhere; or*
- (d) *A partnership wherever formed and carries on a business or part of a business in Malaysia.*

6.1.4 Defence Against Corporate Liability Offence

Section 17A(4) – which is similar to section 7(2) of the UK Bribery Act provides a defence against corporate liability offence. A commercial organisation that wishes to raise this defence is required to have taken all the necessary measures meant to prevent the individuals associated with it from committing the offence.

6.2 Lifting the Corporate Veil

The introduction of section 17A of the MACC Act is highly significant as it provides for corporate liability resulting from the corrupt conduct of any person associated with the commercial organisation in question. It is worth noting that, previously, commercial organisations would not be held liable when individuals connected to them were found guilty of corruption under the MACC Act.

Private sector corruption continues to be a pressing issue. It is worth pointing out that a survey conducted by PricewaterhouseCoopers titled “Global Economic Crime and Fraud Survey 2020: Malaysia Report” indicates that 25% of respondents from the business community in Malaysia, as opposed to 11% of respondents in 2018, reported that they were asked to pay a bribe.¹⁶ In the same

survey, 30% of respondents, as opposed to 11% of respondents in 2018, said they lost business opportunities because their competitors paid a bribe.¹⁷ This survey is indicative of how corruption in the private sector is as deeply rooted as in the public sector and continues to fester with impunity.

As such, the additional, stricter measure introduced by section 17A of the MACC Act last year – which seeks to lift the corporate veil – serves as a stronger deterrent to specifically combat bribery and corruption in the private sector. This measure is key to ensuring that commercial organisations do not act with impunity; that only those associated with them are personally liable and held accountable for corrupt practices.

6.3 The Long Arm of Section 17A of the MACC Act

Section 17A of the MACC Act has far-reaching power meant to address corruption in the private sector strictly. Given how deeply seated corruption is in the private sector, having this far-reaching power legislated and effectively implemented could bolster anti-corruption efforts and accountability in the private sector.

6.3.1 Extensive Category of Persons Deemed Associated with Commercial Organisations

It is important to note that the category of persons deemed to be associated with a commercial organisation under section 17A(6) of the MACC Act

is rather extensive. According to this category, the corrupt conduct of any person associated with the commercial organisation could render the organisation liable for a corruption offence under section 17A(1) of the MACC Act.

6.3.2 Extension of Personal Criminal Liability to Senior Officers

Section 17A(3) of the MACC Act extends personal criminal liability to senior officers of commercial organisations – which include directors, controllers, partners, and officers tasked with managing the organisations – when the organisations are found guilty of the offence under section 17A(1) of the

¹⁶ Pricewaterhouse Coopers, Global Economic Crime and Fraud Survey 2020: Malaysia Report, p. 8.

¹⁷ Ibid.

MACC Act. It is worth highlighting that this aspect of the provision differs from section 7 of the UK Bribery Act 2010 which does not provide for personal criminal liability to be automatically attached to senior officers associated with organisations that were found criminally liable.

Section 17A(3) reverses the burden of proof by requiring that they prove that the crime was committed without their consent or connivance and that they exercised due diligence to prevent the commission of that crime.

6.3.3 Extraterritorial Jurisdiction

Section 17(8) of the MACC Act – which is similar to section 12(5) of the UK Bribery Act – provides that an offence under section 17A(1) may be committed by commercial organisations established in Malaysia or commercial organisations formed elsewhere but operating in Malaysia.

This particular provision – which provides for extraterritorial jurisdiction – is crucial because illicit financial flows associated with grand corruption scandals are generally cross-border and facilitated by companies and financial institutions incorporated overseas.

6.4 Harmonising section 17A of the MACC Act with the Whistleblower Protection System

To ensure that corporate liability provision provided for under section 17A of the MACC Act is effectively enforced, section 17A(5) mandates that the Government issue guidelines on how to formulate “adequate procedures” which could be raised as a defence under section 17A(4) of the MACC Act.

It is noteworthy that the Prime Minister’s Office had issued the Guidelines on Adequate Procedures¹⁸ in 2018 to assist commercial organisations in establishing the procedures meant to prevent and combat corruption in the private sector. The Guidelines outline the “T.R.U.S.T” principles:

- Principle I: **T**op level commitment
- Principle II: **R**isk assessment
- Principle III: **U**ndertake control measures
- Principle IV: **S**ystematic review, monitoring, and enforcement
- Principle V: **T**raining and communication

It is important to note that Principle I, which governs top-level commitment expected of commercial organisations, requires that they, among others, “encourage the use of any reporting (whistleblowing) channel in relation to any suspected and/or real corruption incidents or inadequacies in the anti-corruption compliance program.”¹⁹

¹⁸ Prime Minister’s Department, Guidelines on Adequate Procedures Pursuant to Subsection (5) of Section 17A under the Malaysian Anti-Corruption Commission Act 2009 (December 2018).

¹⁹ Ibid

Additionally, Principle III of the Guidelines, which deals with control measures, requires that commercial organisations put in place a reporting channel to enable whistleblowing. Principle III of the Guidelines stipulates that such commercial organisations:

- (i) Establish an accessible and confidential trusted reporting channel (whistleblowing channel), which may be used anonymously, for internal and external parties to raise concerns in relation to real or suspected corruption incidents or inadequacies of the anti-corruption programme. For smaller organisations, the reporting channel can be as simple as a dedicated e-mail address;*
- (ii) Encourage persons to report, in good faith, any suspected, attempted or actual corruption incidents;*
- (iii) Establish a secure information management system to ensure the confidentiality of the whistleblower's identity and the information reported; and*
- (iv) Prohibit retaliation against those making reports in good faith.²⁰*

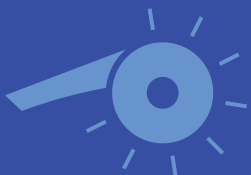
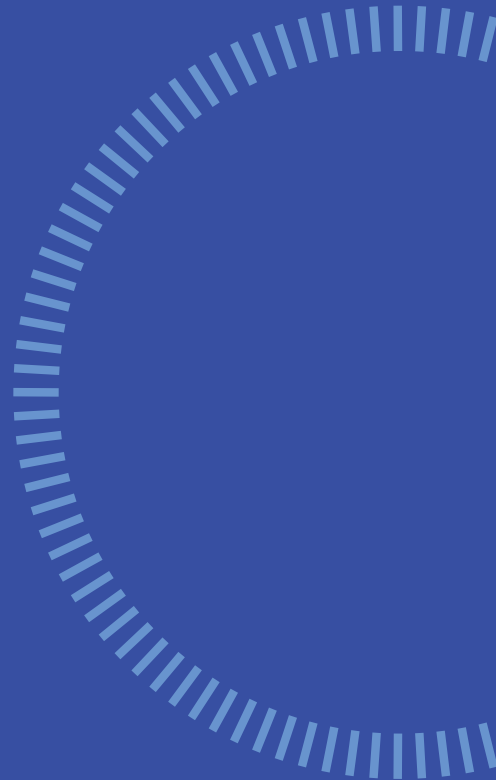
The incorporation of the guideline on whistleblower protection into the Guidelines illustrates the importance of whistleblowing in strengthening accountability in the private sector. Only by harmonising the corporate liability provision with comprehensive whistleblower protection can the long roots of corruption in the private sector be effectively eradicated.

In light of the introduction of section 17A of the MACC Act and the issuance of the Guidelines on Adequate Procedures, which notes the need for a whistleblower mechanism, there are no excuses for all commercial organisations not to immediately take necessary measures to establish and implement effective whistleblowing protection in their respective organisations.

²⁰ Prime Minister's Department, Guidelines on Adequate Procedures Pursuant to Subsection (5) of Section 17A under the Malaysian Anti-Corruption Commission Act 2009 (December 2018).



7 OTHER RELATED ISSUES



This chapter highlights several issues related to whistleblowing that need to be further addressed.

7.1 Reward System

Several countries have adopted reward systems meant to serve as an incentive to encourage whistleblowing. In the United States, the Wall Street Reform and Consumer Protection Act 2010, popularly known as the Dodd-Frank Act, provides a financial reward for whistleblowers who voluntarily provide "original information" that leads to the recovery of more than \$1 million in monetary sanctions. Qualified whistleblowers will be awarded 10 to 30 percent of the collected monetary sanctions.

In Korea, the Anti-Corruption and Civil Rights Commission (ACRC) is empowered to provide whistleblowers with rewards of up to USD2 million if their reports directly result in recovering money lost to corruption. The ACRC is also empowered to grant or recommend awards if whistleblowing is deemed to be in the public interest.

Similarly, in Indonesia, the 1999 Eradication of the Criminal Act of Corruption provides for the granting of "tokens of appreciation" in the form of commendation or monetary reward to whistleblowers who have assisted in preventing and combatting corruption. In 2018, the Indonesian government issued a new government regulation known as GR No. 43/2018, which provides for, among others, a monetary reward of Rp200 million (approximately US\$13,175) for whistleblowers who report corruption cases.

It is noteworthy that Malaysia has adopted a similar reward system. The Act, however, does not specify what constitutes rewards. Section 26 of the Act, which deals with rewards, merely states:

The enforcement agency may order such rewards as it deems fit to be paid to the whistleblower for—

- (a) Any disclosure of improper conduct; or*
- (b) Any complaint of detrimental action in reprisal for a disclosure of improper conduct, which leads to the detection of cases on improper conduct or detrimental action or prosecution of the person against whom the disclosure of improper conduct was made or the person who commits the detrimental action.*

Putting in place various incentives to encourage whistleblowing is undoubtedly a step in the right direction. However, awarding monetary rewards must be treated with caution so that it would not lead to financial gains being the sole motivation for whistleblowing. Building a robust anti-corruption culture requires that members of the public take action to prevent and combat corruption because it is a morally right thing to do, not because of the monetary benefit attached to anti-corruption efforts.

It is important to emphasise that this approach – which is key to building a solid moral compass in society – does not mean that the whistleblowers' time and energy put into reporting acts of corruption that violate public interest go uncompensated. As such, whistleblower laws must clarify the purpose of the reward systems and the kinds of rewards that should be given to make them in line with the need to build that moral compass and fairly compensate whistleblowers for the labour involved.

7.2 Investigative Journalism

The media, in particular, investigative journalism, plays a crucial role in shedding light on corruption, which in most cases is hidden from the public eye. As affirmed by the OECD, “media reporting is an essential—albeit untapped—source of detection in corruption cases.”²¹

To illustrate this crucial role played by the media, what emerged from the Panama Papers investigation is worth recalling. The investigation, which took 5 years of reporting, saw how the International Consortium of Investigative Journalists dug into financial secrecy havens and exposed figures for the top ten countries where intermediaries operate, namely Hong Kong, United Kingdom, Switzerland, United States, Panama, Guatemala, Luxembourg, Brazil, Ecuador, and Uruguay.

Similarly, in Malaysia, investigative journalists played an essential role in exposing the world’s biggest financial scandal involving a Malaysian investment fund known as 1MDB. It is important to note that the exposure of the 1MDB scandal in Malaysia, which implicated former prime minister Najib Razak, had also set off a chain reaction of investigations in several countries, including the United States, Singapore, and Switzerland.

However, the revelation by the media of the severity of the 1MDB corruption scandal came at a high cost. In July 2015, the Home Ministry suspended the publishing permit of The Edge Weekly and The Edge Financial Daily over their reporting on the corruption scandal. A Malaysian news site known as The Malaysian Insider suffered a similar fate in March 2016 where its site was blocked by the government following its coverage of the same corruption scandal.

In November 2016, the co-founder and editor-in-chief of Malaysiakini, an independent news website, Malaysiakini, were charged with offences under the Communications and Multimedia Act 1998. The charge was in relation to a video posted on the Malaysiakini website of a sacked ruling party member talking at a press conference about the 1MDB corruption scandal and criticising the attorney general for his close relationship with cabinet ministers.

It goes without saying media practitioners, particularly those involved in investigative journalism, face significant risks when discharging their duties. As an anonymous respondent to the OECD Survey on Investigative Journalism conducted in 2017 noted, “Exposing corruption means disturbing powerful and ruthless people, a risk one must be aware of”.²²

²¹ OECD, *The Role of the Media and Investigative Journalism in Combating Corruption* (2018), p.3.

²² OECD, *The Role of the Media and Investigative Journalism in Combating Corruption* (2018), p.6.

Protecting media practitioners, including investigative journalists whose function is to uphold the right to freedom of expression, which includes the right to information – rights integral to whistleblowing – from detrimental action, is therefore imperative. This obligation is in line with Article 13(1)(d) of the UNCAC:

(1) Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organisations and community-based organisations, in the prevention of and the fight against

corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as:

- (d) Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary:*
- (i) For respect of the rights or reputations of others;*
 - (ii) For the protection of national security or ordre public or of public health or morals.*

7.3 Freedom of Information vs. Whistleblowing

The right to information is an integral part of the right to freedom of expression. This right, which is enshrined in Article 19 of the ICCPR, is further reaffirmed by Article 13(1)(d) of the UNCAC (see point 7.2). As such, it is inescapable to conclude that freedom of information plays a critical role in strengthening efforts to prevent and combat corruption.

Freedom of information (FOI) laws govern an individual's right to access information held by government bodies. The objective of FOI laws is to allow them to have a considerable degree of access to information to bolster transparency and accountability in the government. If implemented

effectively, heavy reliance on whistleblowers to impart information in the government's possession would be significantly eased.

It is important to note that most FOI laws, as they are currently implemented, have several gaps that hinder the effective realisation of access to information. Most FOI laws do not apply to the private sector. Additionally, there are stringent requirements – which in most cases are time-consuming – that ought to be fulfilled by individuals making FOI requests.

These existing limitations continue to pose major obstacles to getting access to relevant information. OECD's observation on how these

²³ OECD, *The Role of the Media and Investigative Journalism in Combating Corruption* (2018), p.11.

²⁴ OECD, *The Role of the Media and Investigative Journalism in Combating Corruption* (2018), p.11.

obstacles impact investigative journalism – which particularly seeks to expose corruption – is worth highlighting:

One journalist noted that even in countries with effective FOI legislation, ‘most freedom of information laws exclude the private sector from their jurisdiction and in many cases access to this kind of information held by the private sector is illegal. This limitation has serious implications because the private sector performs many functions which were previously the domain of the public sector.’²³

It further observes:

Another limitation relates to the time taken to fulfil FOI requests. By the time a journalist receives the information, it is often too late and the window of opportunity to break the story may have passed.²⁴

Given these existing obstacles, whistleblowing remains a crucial means of exposing corrupt practices and acts that undermine the public interest.

7.4 Internal Audit in the Public Sector

Internal audits (IA) are one of the mechanisms to strengthen governance frameworks and detect corruption and other unethical activities. Internal auditors play an important role in preventing and combatting corruption not only by promoting the adoption of principles that would ensure good governance but also by bringing to light corrupt and unethical practices discovered in the course of discharging their duties.

In Malaysia, the establishment of IA in the public sector was initially governed by Treasury Circular No. 2 of 1979 (Circular No. 2), requiring an IA function to be established at the federal level. In 2004, Circular No. 2 was replaced with Treasury Circular No. 9 (Circular No. 9) to extend the requirement for the establishment of an IA function at the state level. In 2011, circulars concerning IA were consolidated under 1 Treasury Circular (1PP – 1 Pekeliling

Perbendaharaan). Treasury Malaysia is tasked with coordinating and monitoring the IA function at all levels of government. It is noteworthy that the IA function is different from the National Audit Department, which serves as an external audit.

Despite the long history of the establishment of the IA function in the public sector, its effectiveness remains a cause for concern. Studies have shown that the IA function poses several obstacles to effective auditing.²⁵ Some of the obstacles include a lack of resources and training for internal auditors.²⁶ Apart from these obstacles, the existence of laws – such as the Official Secrets Act 1972 and section 203A of the Penal Code – which also prohibit civil servants, including internal auditors, from disclosing classified information further renders the IA function ineffective.

²⁵ Nur Ain Zakiah binti Mohd Yusof, Hasnah binti Haron, Ishak bin Ismail, Internal Audit Practice in Malaysian Public Sector Organizations, The National Conference for Postgraduate Research 2016, Universiti Malaysia Pahang (2016), p. 124.

²⁶ Ibid.





8

RECOMMENDATIONS



Building on the Memorandum for the Reform of the Malaysian Anti-Corruption Commission²⁷ by civil society organisations, including C4 Center, submitted to the Government in 2015, C4 Center seeks to reiterate the recommendations contained therein and put forward new recommendations. These new recommendations capture the latest development in anti-corruption efforts and the obstacles that continue to prevent effective whistleblowing – obstacles which result from the gaps in the current whistleblower protection system.

In light of the foregoing, C4 Center recommends:

I Disclosure Channels

Section 6(1) of the Act be amended to include internal disclosures and external disclosures to the public, including the media, members of parliament, civil society organisations, and other entities not prescribed by the Act.

Additionally, section 8(1) of the Act, which prohibits whistleblowers from revealing information initially disclosed to enforcement agencies, ought to be amended. The amendment is crucial as it will expand the disclosure channel and, therefore, encourage whistleblowing.

II Content of Disclosure

Section 6(1) of the Act be amended to include a public interest defence that can be raised by whistleblowers who disclose information prohibited by written laws such as the Official Secrets Act 1972, section 133 of the Financial Services Act 2013, and section 203A of the Penal Code.

Alternatively, arbitrary laws that deal with national security and secrecy such as the Official Secrets Act 1972 be repealed and replaced with comprehensive freedom of information laws which provide for limited exceptions, proactive obligations to disclose information, clear and simple procedures for making requests, an independent and effective oversight system, and adequate promotional measures.

²⁷ The Malaysian Bar, in collaboration with the Institute for Democracy and Economic Affairs (“IDEAS”), the Centre to Combat Corruption and Cronyism (“C4”), Citizens’ Network for a Better Malaysia (“CNBM”), and Transparency International Malaysia (“TI-M”), Memorandum for the Reform of the Malaysian Anti-Corruption Commission (2015).

III Oversight Mechanism

Section 6(1) of the Act be amended to include internal disclosures and external disclosures to the public, including the media, members of parliament, civil society organisations, and other entities not prescribed by the Act.

Additionally, section 8(1) of the Act, which prohibits whistleblowers from revealing information initially disclosed to enforcement agencies, ought to be amended. The amendment is crucial as it will expand the disclosure channel and therefore encourage whistleblowing.

IV Discretion with Respect to Revocation of Protection

Section 11(1) of the Act, which gives the enforcement agencies power to revoke whistleblower protection, ought to be amended. The amendment should provide the enforcement agencies with discretion to exercise some degree of flexibility to weigh all the factors involved when deciding on the revocation of protection.

V Whistleblowing And Corporate Liability

Commercial organisations to ensure that:

- i) A comprehensive whistleblower protection policy is put in place
- ii) Mechanisms to conduct regular reviews which seek to assess the implementation and effectiveness of the organisations' whistleblower policy are established. Such reviews may be carried out by internal or external auditors
- iii) The existing whistleblower policy be improved if circumstances warrant it
- iv) Provide their employees and individuals associated with the organisations with adequate training to ensure that they thoroughly understand the organisations' whistleblower protection policy
- v) Cooperate with civil society organisations, in particular organisations that work on anti-corruption, to strengthen the whistleblowing culture in the private sector.

VI Reward System

Section 26 of the Act be amended to clarify the purpose of the reward system and the kinds of rewards. The purpose of the reward system and the kinds of rewards must be in line with the need to build a solid moral compass in society – which would constitute the motivation for the public to fight corruption – and fairly compensate whistleblowers for the labour involved.

VII Incorporation of International Best Practices

In addition to the above recommendations, we propose that the following international best practices – standards based on a compilation of national laws from the 31 nations with minimally credible dedicated whistleblower legislation²⁸ – also be incorporated into the Act:

i) Extension of Scope of Coverage

The scope of coverage must include disclosures of any illegality, abuse of power, danger to public health and safety, and other activity which undermines the public interest.

ii) Right to Refuse to Violate the Law

The Act must make provision for the right to refuse to violate the law. This right is essential as it prevents *fait accomplis*, given the risk – vulnerability to retaliation – associated with a person's decision to disobey an order on the ground that it's illegal if it is subsequently found that the order was not illegal.

iii) Protection Against Spillover Retaliation

The Act must provide the right to protection against spillover retaliation. This right will protect individuals who are perceived as whistleblowers or as assisting whistleblowers and individuals who are “about to” make disclosures.

²⁸ Government Accountability Project, International Best Practices for Whistleblower Policy, 22 July 2016.

- iv) **Support Services for Whistleblowers**

The Act must make provision for access to legal assistance or services, which is crucial to supporting whistleblowers.
- v) **Option to Resort to Alternative Dispute Resolution or Mediation**

The Act must give whistleblowers the option to resort to alternative dispute resolution or mediation with an independent body to resolve retaliation cases.
- vi) **Time Frame to Act on Rights**

The Act must provide a time frame upon which whistleblowers are required to exercise their rights. A one-year time frame is consistent with common law rights.
- vii) **Right to Make-Whole Compensation**

The Act must allow whistleblowers who prevail to obtain comprehensive relief that covers all the direct, indirect, and future consequences of the detrimental action.
- viii) **No Statutory Entitlement to Legal Fees**

The Act must make provision for entitlement to legal fees or associated litigation costs for whistleblowers who prevail.
- ix) **Accountability for Reprisals**

The Act must hold individuals, for example, managers, accountable for whistleblower reprisals.
- x) **No Review Mechanism**

The Act must make provision for the establishment of a review mechanism tasked with assessing the effectiveness of the Act.

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