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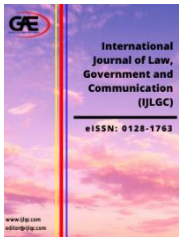

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# THE CONCEPT OF WHISTLEBLOWING: HOW IS IT APPLIED IN MALAYSIA?

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**Abstract:**

Whistleblowing serves as a critical mechanism for promoting transparency and accountability in Malaysia, particularly in the fight against unethical or illegal behaviour such as corruption. This article explores the legal framework surrounding whistleblowing in Malaysia, focusing on the Whistleblower Protection Act 2010. It examines the legal protections afforded to whistleblowers, including laws designed to prevent retaliation and encourage reporting of unethical or illegal behaviours. Additionally, the article explores the role of the enforcement agencies in facilitating and safeguarding whistleblowing activities. This article applied qualitative study by analysing the effectiveness of these legal provisions and institutional support systems. The article offers insights into the effectiveness of the whistleblowing practices in Malaysia. The article concludes with recommendations for strengthening legal protections to better protect those who expose unethical behaviour particularly corruption, emphasizing the need for continued legal reform to ensure whistleblowers can contribute effectively to upholding accountability and transparency in Malaysia.

**Keywords:**

Whistleblowing, Corruption, Protection, Transparency, Accountability

## Introduction

Whistleblowing has been recognized as one of the effective ways to fight unethical or illegal behaviour particularly corruption. (Transparency International, 2010). The existence of a person called an informer or the nowadays term a whistleblower is crucial as bringing

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information on unethical or illegal behaviour to the surface would lead to stopping such a practice from continuing and eventually bringing the wrongdoer to justice. However, it should be noted that revelation or disclosure of information on such matter is not an easy task as it may come with risks of retaliation or reprisal from the person suspected of committing illegal or wrongful act. This would certainly deter any potential whistleblower from coming forward exposing the matter. Therefore, to create a culture of no fear as well as to encourage any people with information relating to wrongdoings, particularly corruption, to come forward, proper legislation on whistleblowers must be put in place. In Malaysia, legislation named the Whistleblower Protection Act 2010 was enacted with the purpose of providing legal protection to whistleblowers from retaliation or reprisal for disclosing information about unethical or illegal behaviour to enforcement agencies. Nevertheless, there has been criticism that the law is not as effective as it should be in providing protection to whistleblowers (Wan Hashim, 2023).

This article aims to analyze the operations and effectiveness of the provisions governing protection for whistleblowers as provided in the Act. In addition, the process of whistleblowing applied by enforcement agency shall be examined to provide insight into the manner in which the agency is providing protection to whistleblowers.

## Literature Review

### *The Concept of Whistleblowing*

The term 'whistleblowing' originally comes from the word 'whistle' and 'blow'. It initially refers to an act of a referee who blows a whistle during a game or match to indicate illegal or foul play. Later it was used to refer to an act of enforcement officials in the 19th century to alert the public or fellow police for any wrongdoings (Martin, 2019). The person who discloses information is called 'whistleblower' which is previously called as 'informant' or 'informer'. Currently, the term whistleblower has been widely used as compared to informer or informant even though both are almost the same i.e. exposing or disclosing information. Nevertheless, to be more accurate, the term whistleblowing and whistleblower are specifically used in matters concerning corruption and illegal activities.

#### *Definition of Whistleblowing*

There are numerous definitions given to the term whistleblowing based on different sets of criteria that have been developed over the years. By and large, the definitions given by various researchers or scholars can be divided into two categories to wit: general and restrictive (Safire, 1983). The difference between these two lies in the context of whistleblowing and how it may operate, i.e., either in a broad or narrow manner. The restrictive definition provides for whistleblowing to operate in a narrow manner which requires the disclosed information to be within the control of the informant and the disclosure itself is optional; not a duty upon the person to do so (Jubb, P 1999). The general definition on the other hand provides no restriction on such matter as it covers a broad spectrum of concern but must be specifically related to public interest (Nader et all, 1972;).

A reference to a global international anti-corruption instrument highlights significant differences in the definition of the term 'whistleblower'. For instance, The Inter-American Convention against Corruption made a reference of whistleblower to public employees and private citizens. The OECD's Anti-Bribery Convention and the European Convention on

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Corruption, nevertheless, have adopted a restrictive scope of whistleblower by referring it to employee only. The United Nation Convention against Corruption (UNCAC), on the other hand, provides a much wider scope compared to the above given definition whereby the term is referred to any person regardless of position. Therefore, the term whistleblowers cover all types of persons either human beings/natural or legal persons, persons from public or private sector employment, persons who are employed or unemployed, persons in terms of association of industry or businesses, citizens, or non-citizens. It may also include a person who has been implicated with the offence itself.

***The Rationale of Whistleblowing and Protection to Whistleblowers***

Whistleblowing, as a matter of fact, relates and constitutes part and parcel of the fundamental human right of expression, i.e., freedom to speak out or to express one's mind. This freedom has been universally recognized and expressed in Article 19 of the United Nations Universal Declaration of Human Rights (UNDHR). Thus, the application of freedom of expression in relation to whistleblowing is deemed to take place when a person is allowed to make a report either in a written or verbal way on any malpractice or maladministration or wrongdoing that occurred or likely to occur with the intention that some action would be taken to stop such practices from continuing (W. Hashim, 2023). As a result of such reporting, no harm or detriment should be inflicted upon the whistleblower, but instead the person against whom the concern is raised shall be the one who should suffer punishment accordingly upon proven guilty.

***The Historical Background of Whistleblowing in Malaysia***

The fundamental rights, including the right of expression as stipulated in the UNDHR, are found embedded in the Federal Constitution (FC), which constitutes the supreme law of the land. Article 10 of the FC provides that every citizen is given freedom of speech and expression subject to limitations imposed by the legislature. Despite the recognition, there is no specific legislation on whistleblowing being enacted at an early stage in Malaysia. The laws on the matter are found put in scattered legislation and quite rigid in their application since they are used for specific scope and situation only. For instance, section 368B of the Companies Act 1965 (Act 125) which has been abolished and replaced with section 587 of the Companies Act 2016 (Act 777) provides protection to an officer of a company who discloses information relating to offences such as fraud or dishonesty, but no procedures were provided on how and what protection could be afforded to the person.

In consequence of the above matters, a new plan was launched by the government of Malaysia in 2009 to reform public services so as to make the government more performance oriented and accountable for results. The plan called Government Transformation Programme or known as GTP addresses seven selected areas under the term 'National Key Results Areas" (also known as NKRAs) for reformation and one of the areas of concern is about fighting corruption (Jabatan Perdana Menteri, 2011). As a result, a stand-alone law on whistleblowing was passed by Parliament known as the Whistleblower Protection Act 2010 with the objectives to encourage public at large to come forward exposing any corrupt act on one hand, and to provide legal protection to whistleblowers on the other hand should he suffer any retaliation for blowing whistle.

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***Whistleblower Protection Act 2010 [Act 711]***

The Whistleblower Protection Act 2010 (WPA 2010) outlines four specific objectives for its enactment as follows:

a) To combat corruption and other wrongdoings by encouraging and facilitating disclosure of improper conduct in the public and private sector,
b) To protect those who are making disclosures from detrimental action,
c) To provide for matters disclosed to be investigated and dealt with; and
d) To provide for other matters connected therewith.

The provisions of WPA 2010 amongst others provide rules in relation to definition of whistleblowers, the reporting channel, the measures used in protecting whistleblowers as well as rules and procedures for enforcement agencies to apply when dealing with the disclosed matters. The WPA 2010 also comprised provisions relating to the manner in which the enforcement agency must apply when dealing with complaints of corruption as well as complaints of detrimental action suffered by whistleblowers for blowing whistles.

Section 7 of the Act provides that protection shall be afforded to whistleblowers once the disclosure of improper conduct has been disclosed to enforcement agencies. The protections provided under the Act are (a) Confidentiality of Information; (b) Immunity from criminal and civil action; and (c) Protection against detrimental actions. The legal protection stipulated in the Act shall also be extended to any person related to or associated with whistleblowers. The number of complainants recognized as whistleblowers in Malaysia since the introduction of the law in 2010 is shown below.

**Table 1: Statistics of the Number of Whistleblowers under the WPA 2010 from 2011 to 2019**

| YEAR | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | TOTAL |
|---|---|---|---|---|---|---|---|---|---|---|
| COMPLAINTS RECEIVED | 1,690 | 14,007 | 12,333 | 12,722 | 12,527 | 7,507 | 3459 | 3866 | 5053 | 73164 |
| WHISTLEBLOWER | 17 | 98 | 69 | 208 | 4 | 50 | 41 | 18 | 13 | 518 |

Source: Website of the Legal Affairs Division (LAD), Prime Minister's Department

The statistics above show that only a small proportion of complainants are entitled to protection under the WPA 2010. This has been admitted by Datuk Seri Wan Junaidi Tuanku Jaafar, the Law Minister at the Prime Minister's Department, that the number of informants getting protection under the WPA 2010 was a very relatively low ratio compared to the number of complaints received by the enforcement agencies (Ong Pek Mei, 2021). As such, this creates suspicion and doubt as to the usefulness and the efficacy of the Act as it seems to not bode well with the very objective of the law which is to encourage people to assist government in combating corruption by providing information on the matter and in return, protection will be given under the law.

**Methodology**

This article applies qualitative approach which is primarily a library-based study. The purpose of this study is to explore and understand the practices and legal framework on whistleblowing

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in Malaysia. The study employs exploratory design using document analysis of relevant laws particularly Whistleblower Protection Act 2010, case reports, articles from academic journals, dissertation, thesis, conference papers, newspapers and magazines. The data were collected from websites and library databases collections which provide access to the development of the related field of law. The collected data was then analyzed in depth so as to gain insight into the matters.

## Discussion

### *The Efficacy of the WPA 2010*

As regards the efficacy of WPA 2010, this article shall not discuss all the provisions of the Act but focuses on a few provisions only. The discussion shall be on several specific matters, namely the definition of whistleblower, whistleblowing channel and prohibition in making disclosure. These matters are found in sections 2 and 6 which shall determine whether or not any person shall be protected under the law as whistleblower.

#### *Definition of Whistleblower*

The definition of whistleblower as stated in section 2 of the Act reads "*Person who makes a disclosure of improper conduct to the enforcement agency under section 6"* AND section 6 reads *"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*".

Based on the above, the definition of whistleblower consists of four important elements namely (a) Person; (b) Improper Conduct; (c) Enforcement Agency; and (d) The reasonable belief of the disclosed information.

All the elements mentioned above have not been commented on much, except for the enforcement agency. This is because the definition of a whistleblower has been capped with the element of enforcement agency i.e. the party whom the disclosure must be made so as for the person to be a whistleblower. Currently there are only seven main enforcement agencies, of which the reportable information can be disclosed to, namely the Malaysian Royal Police, the Malaysian Anti-Corruption Commission, the Custom Department, the Immigration Department, the Road Transport Department, the Securities Commission, and the Companies Commission. This certainly narrows down the definition of whistleblower to a person who made disclosure of improper conduct to the agencies recognized by the law, thus any contravene renders the person ineligible for protection under the WPA 2010.

In *Rokiah Mohd Noor v Menteri Perdagangan Dalam Negeri, Koperasi & Kepenggunaan Malaysia & Ors*, [2016] 8 CLJ 635, the appellant (Rokiah), a former Deputy CEO of the Companies Commission of Malaysia (CCM), applied to court for an order that she was entitled to protection as whistleblower under the WPA 2010. Before this, she was charged with misconduct by the CCM for circulating a letter containing some damaging allegations against the CCM. The letter was sent to the third party, namely the Prime Minister, his Deputy, the Minister, and the Chief Secretary. She was found guilty of the charge and was terminated from the service. She applied to the High Court for judicial review to quash the decision but was dismissed. She then appealed to the Appeal Court and amongst the issues raised was the protection given to a whistleblower under the WPA 2010. The Appeal Court ruled that to seek

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protection under the WPA 2010, the person must disclose the improper conduct only to any of the specified enforcement agencies under the Act and not to others. The court further said that since the disclosure of the improper misconduct had been made to various parties namely the members of the CCM, the Malaysian Anti-Corruption Commission (MACC) as well as third parties who were not enforcement agencies, she was then not qualified to be a whistleblower, thus no protection under the Act could be afforded to her.

The restrictive approach of section 6 has delimited the meaning of whistleblower and thus affected the protection afforded for whistleblower. As such, there shall be no protection given to a person who discloses information about corruption does not fulfil the definition of a whistleblower as provided in the Act. Therefore, associating the term whistleblower with the recipient of information in order for the former to be entitled for protection under the Act is indeed not a good law as it would significantly affect the willingness of the people with information to make disclosure. This would in fact defeat the very purpose of the law being enacted.

***Manners of Reporting***

The Act specifically spelt out that the recipient of the information must be government agencies with enforcement and investigation powers for protection to be given. This indicates that WPA 2010 recognizes only external whistleblowing. Therefore, with regard to reporting channel, WPA 2010 does not provide any rule for internal whistleblowing. As mentioned earlier, there are currently seven enforcement agencies to which information must be disclosed for protection to be granted. As far as government agencies, departments and commercial entities in Malaysia are concerned, there is no statutory requirement imposed upon them to put in place any policy, rules, and procedures in relation to internal whistleblowing. Since the matter is optional, it is left to the departments or entities to decide whether to have any policy regarding whistleblowing.

Having internal whistleblowing in place is valuable and beneficial in the sense that it might be able to stop the wrongdoing faster since the standard of proof applied in internal reporting is not as high as the external reporting to enforcement agencies. Moreover, internal reporting is preferable when whistleblowers are not able to provide enough evidence to enforcement agencies particularly when the wrongdoing is at an early stage of commission (Iwasaki, 2018). A study in the United States revealed that 95% of whistleblowers report any wrongdoing that they discovered internally on the belief that the organization would address the matter responsibly (Government Accountability Project, 2017). External whistleblowing on the other hand may be used as a support system after the employer fails to address the problem or attacks the messenger or whistleblower.

The fact that the WPA 2010 does not impose a mandatory requirement upon organizations or entities either public or private to put in place internal reporting channels render the government being reactive towards enhancing good governance. Furthermore, it may discourage a whistleblower who only wanted to see the wrongdoing to be solved internally rather than externally on the grounds to avoid tarnishing the reputation of the employers.

As such, it would be far better if WPA 2010 contains a provision that requires internal whistleblowing to be put in place as it could give more choices for people to do reporting i.e., internally, or externally. Should there be no action being taken by the internal recipient after

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the disclosure is made, it would then give the whistleblower an opportunity to take further action by bringing the matter externally.

***Prohibited Disclosure***

Another issue in WPA 2010 is about the prohibition in disclosing certain information. Section 6 of the Act prohibits any information that has been specifically prohibited by any written law to be disclosed even if it is related to improper conduct. Literally it means that a disclosure of information, especially the one that is confidential by any existing law, shall be totally prohibited and if someone does so, the protection under the Act would not be operative for him. Furthermore, a disclosure contrary to the law would render the person committing an offence for making such a disclosure. Hence, as far as the whistleblower is concerned, a liability either under criminal or civil law would be imposed upon him for disclosing information that falls under the prohibited disclosure. Having limitation on the type of information to be disclosed would render some information though related to wrongdoings such as corruption to be disclosed, thus discourage anyone with such information from lodging complaint.

***Enforcement Agency as the Support System of Whistleblowing***

The enforcement agency in relation to whistleblowing as provided in section 2 of the WPA 2010 refers to any ministry, department, agency or body set up by Federal Government, State Government or local government conferred with investigation and enforcement functions or powers given by any written laws. Currently, there are seven enforcement agencies that shall be an external recipient of information disclosed by a whistleblower about improper conduct and to protect the whistleblower from any detrimental action that might be inflicted upon the person due to the disclosure. Thus, the enforcement agencies have been entrusted with the responsibility to administer and govern the whistleblowing process in relation to 1) the disclosure of information on corruption and 2) the complaint of detrimental action by whistleblowers to the agency.

Section 3 of the WPA 2010 provides the power of the enforcement agencies in relation to whistleblowing process. It starts with receiving information on corruption and carrying out investigation into the matter. The person who becomes a whistleblower shall be given protection under the WPA once he or she has been registered as such with the relevant enforcement agencies. Thereafter, the person shall be protected from any detrimental action that might be imposed due to the disclosure made. This process can be illustrated as below

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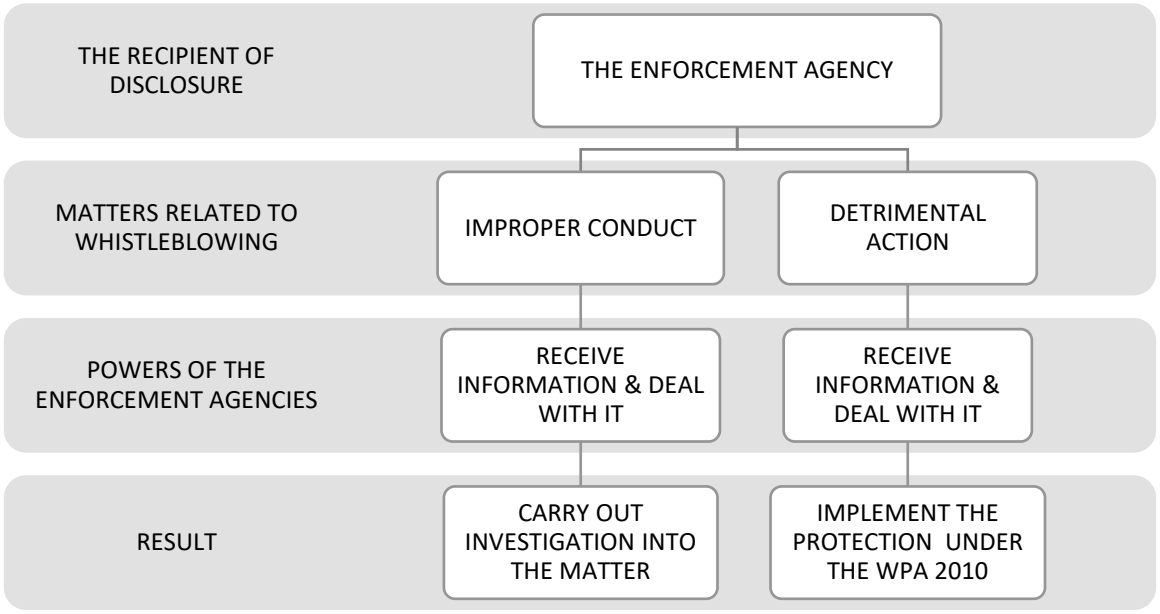


**Figure 1: The Whistleblowing Process for Enforcement Agencies**

The above shows that once information about improper conduct is received by an enforcement agency, the whistleblower shall immediately be given protection as provided under the WPA 2010. Even if the information received has no merit, the protection shall still be given to whistleblowers and any detrimental action taken against whistleblowers shall constitute an offence under the Act.

In 2022, there was a case brought by the Malaysian Anti-Corruption Commission (MACC) as one the enforcement agencies in Malaysia against an individual accused of taking detrimental action against a whistleblower. This was the first-ever case of an individual charged under section 10 of the Whistleblower Protection Act 2010 since its introduction in 2010. In *PP v Wafiy Abdul Aziz* [2023] 1SMC 309, the accused was charged for causing a dismissal of a company employee after the employee provided information about the accused's misconduct to the MACC. Section 10(3) of the Act criminalizes retaliatory action against any whistleblower or those related to them, and prescribed penalties of up to 15 years' imprisonment, a maximum fine of RM100,000 or both upon conviction. Under the Act, even if the retaliation is not carried out directly by the accused, section10(3)(b) prohibits any person from inciting or permitting another person to take or threaten to take any detrimental action for whatever reason related to whistleblowing. Furthermore, section 10 (7) put the burden of proof on the accused that the detrimental action taken against the whistleblower was not in reprisal for such a disclosure. However, at the end of the trial, the court dismissed the case and discharged the accused without calling for a defence, on the ground that the prosecution had failed to establish a prima case against the accused. As such, the effectiveness of the protection provided under the Act which is intended to be exercised by enforcement agencies remains uncertain.

## Conclusion and Recommendations

Based on the above discussion, the WPA 2010 contained some loopholes particularly in the definition of whistleblower, the channel of reporting and the restriction of disclosing information. The loopholes in the laws could significantly impact the effectiveness of whistleblowing protection. The definition of whistleblower under the WPA 2010 seems to be

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rather restrictive in its real sense due to the imposition of many conditions or elements to the term. As regards the channel of reporting, whistleblowing should not be restricted to the enforcement agencies but to other parties whom a whistleblower trusts. The information can be channelled internally, i.e. any unit/office/department established for that purpose by the organization. In the event there is no internal channel or reporting, the information can also be channelled to other institutions established by government such as Suhakam, etc. or other platforms such as journalists, media, lawyers etc. Regarding the prohibition to disclose certain information that is prohibited by any written law, an exemption should be given to whistleblowers especially when the matter involved corruption. If this is not possible, some rules and regulation governing the matter must be established so that whistleblowing process could still be applied in such situations. By reforming the relevant laws, the whistleblowing system could be enhanced, encouraging more people to come forward and ensuring better and stronger protection for whistleblowers. It is hoped that this article and along with the suggestions provided, will contribute to improving the effectiveness of the whistleblowing legislation in Malaysia.

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