

## Whistleblowers Policy in Malaysia ; What Takes for the Media Organizations?

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Whistleblowing is about free speech rights and democratic freedoms. Whistleblowers must be able to go public fearlessly through the media (Press) and watchdogs. It is in the public interest to be aware of such information when organizations are not able to or willing to stop wrongdoings.

The Watergate scandal would have never surfaced in the United States (US) were it not for inside information from a whistleblower, Deep Throat. He was an ex-Deputy Director of the FBI and White House counsel, who gave crucial evidence which resulted in the criminal prosecution of 69 government officials and the impeachment of President Nixon (Marsh, 2005). In Malaysia, the financial scandal in the early 1980s involving Bumiputra Malaysia Finance (BMF)2 which led to the murder of its internal auditor, may have been uncovered before such a fatal occurrence had there been a decent whistleblower protection law in place. (Christopher L, 2017)

The latest Malaysian financial misconduct, 1MDB scandal was another blatant exposure by the whistleblower. (Jones, 2020).

In Malaysia, the Whistleblower Protection Act 2010 was enforced on 15th December 2010. The act aims to provide protection and encourage whistleblowers to disclose wrongdoing and improper conduct in public and private sectors (Dangi et al., 2020).

A person may begin to blow the whistle if they think illegal acts eventually harm everyone within the organization, society, and national security.

The Act defines a whistleblower as anybody with information with respect to improper conduct who discloses that information to an enforcement agency. Improper conduct is defined as conduct which, if proven, constitutes a disciplinary or criminal offence (Legal Affairs Division, Prime Minister's Office, 2010). Improper conduct under the Act, therefore, comprises of any corrupt practices or any criminal offences (Legal Affairs Division, Prime Minister's Office, 2010).

A whistleblower, based on his reasonable belief, can disclose any information about any person that has engaged in, is engaging or preparing to engage in such conduct. The protection given is protection of confidential information, which includes the identity of the informant, immunity from civil and criminal action for the informant, and protection against retaliatory action. Under the Act, protection given to the whistleblower is the protection of confidential information. Confidential information is defined as the identity of the informant, the information given by the informant, and the circumstance in which that information is received. If the person makes the disclosure to an enforcement agency, he is assured protection (Legal Affairs Division, Prime Minister's Office, 2010).

Whistleblowers will be subject to a fine not exceeding RM100,000.00 or imprisonment not exceeding 15 years or both. The protection extended by the Act to "any person related to or associated with the whistleblower" recognizes that the wellbeing and security of those close to the whistleblower is an important consideration for a whistleblower's decision to come forward.

According to "Whistleblowing, Securities Commission Malaysia" ( 15 December 2016 ), the Malaysian government has made a commendable initiative to pass the Whistleblower Protection Act 2010 (hereinafter referred to as "WPA") as per the National Key Results Area (hereinafter referred to as "NKRA") headed by the Minister in charge of Law in the Prime Minister's Department under the Government Transformation Plan (hereinafter referred to as "GTP") This initiative is also a reflection of our international commitment after ratifying the United Nations Convention Against Corruption on 24 September 2008 .

Article 33 of the Convention imposes an obligation on state parties to adopt laws to protect a whistleblower who discloses on good faith and on reasonable grounds from any unjustified treatment while Article 37 focuses on encouragement to provide information to authorities in exchange for mitigation in punishment or immunity from prosecution.

The WPA was enacted with the intent to fight corruption as well as other malpractices in public and private sectors by giving support and providing avenues for people to report improper conduct in their respective organizations. It also protects those who make report from harmful and damaging acts, besides facilitating the investigation process.

However, many have criticized the law as being flawed. It is said that certain provisions in the Act do not grant adequate protection to whistleblowers and this ultimately hinders whistleblowers from coming forth to unveil dishonest practices in their respective organizations. ( Whistleblowing, Securities Commission Malaysia, 15 December 2016 <https://www.sc.com.my/whistleblowing/>

Whistle blowing came into existence as one of the effective tools when companies involve themselves or a person in a company in illegal, unethical practices or wrong doing.

Whistleblowing is increasingly recognized globally as an effective tool to detect and prevent corruption and other malpractices. Whistleblowing is also a form of protection to the whistleblower.

## **Whistleblowers Protection in Malaysia**

Whistleblower Protection Act 2010 [Act 711] is an act designed to provide protection for a whistleblower who reveals inappropriate behavior. For example, if a Whistleblower discloses corrupt practices by his own employer or a friend at his workplace, he is entitled to be protected under this act.

An act to promote disclosure of information about any corruption or other misconduct. The Act will provide protection to whistleblowers from any act prejudicial effect of disclosure has been made.

The details below are from : Official website, Legal Affairs Division Prime Minister's office

### **Terms Protection**

- The informant wants to be identified by MACC.
- The informant personally attends and meets with MACC officers either in the office or at any place.
- If the disclosure of Improper Behavior made by letter/email/phone calls/short message service, informant must reveal his identity and address of or the way he can be contacted.

### **Types of Protection**

- The identity of the informant and the information provided is kept confidential and not to be disclosed to anybody, even during the trial in court. (Section 7(1)(a) Whistleblowers Protection Act 2010)
- Whistleblowers should not be liable to any civil action, criminal or disciplinary consequences of such disclosure. (Section 7(1)(b) Whistleblowers Protection Act 2010)
- Whistleblowers are protected from any act prejudicial to the outcome of the reaction disclosures have been made. (Section 7(1)(c) Whistleblowers Protection Act 2010)
- Protection is also given to those who have a connection / relationship with the informant. (Section 7(3) Whistleblowers Protection Act 2010)

### **What is the protection afforded to whistleblowers?**

Protection provided covers three areas as follows:

- Confidentiality of information. For example, information on identity, occupation, residential address, place of employment, etc.
- Immunity from civil or criminal action that is imposed on the whistleblower. As an example, a whistleblower cannot be sued or prosecuted by the party of whose improper conduct he has disclosed.
- Protection against detrimental action. For example, when a whistleblower had given information about a corrupt employer, he is protected under this Act against dismissal from work by the employer.

### **What is meant by improper conduct?**

Improper conduct means an offence which may amount to disciplinary misconduct or criminal offence. Disciplinary offence means an act that breaches discipline in a public or private body. Offence is to be provided by law, code of ethics or circular or employments contract. While criminal offences are offences which are provided under any criminal law of the State, i.e. the Penal Code.

### **What is meant by detrimental action?**

Detrimental actions include acts of harm, intimidation, harassment, discrimination, termination, suspension of work, threat or anything that causes damage by any person on the whistleblower.

### **To whom does this Act apply?**

This Act applies to those who are in the public and private sectors. All government bodies, agencies and departments under the Federal Government, State Governments, local authorities, statutory bodies and private bodies such as a company.

### **When will the whistleblower be covered under this Act and can the protection given be revoked?**

At the time the whistleblower reveals improper conduct (complaints), he is protected under this Act. Protection will last forever unless revoked under section 11 of this Act.

- Among the reasons for revocation of protections are – the whistleblower himself participated in improper conduct.
- The whistleblower willfully made a false statement.
- Disclosure is frivolous or vexatious.
- Questions the merits of a government policy.
- Disclosure is made solely to avoid dismissal/disciplinary action.
- The whistleblower has committed an offense under this Act.

The whistleblower may disclose such information to any other enforcement agency as Malaysia Police (RMP), Malaysian Anti-Corruption Commission (MACC), Road Transport Department (RTD), the Immigration Department of Malaysia and other enforcement agencies. Based on "no wrong door policy", enforcement agencies will not refuse disclosure.

Under the Act, disclosure may be made orally or in writing and the authorized officer shall put it into writing. Disclosure can be made by e-mail, phone or letter, but the whistleblower is required to be present for the purpose of verification.

To protect the information, the authorized officer will contact the whistleblower to attend an appointment so that protection under the Act can be implemented.

The informant and the person who has a relationship or connection to the whistleblower may claim remedies from the court if a harmful action is taken against him in response to the disclosure of improper conduct or he is concerned that such action would be taken.

Remedies that may be claimed by the informant:-

- Damages or compensation.
- Injunction (injunctive).
- Any other relief as the court thinks fit.

This Act has been enforced on 15 December 2010.

The Securities Commission of Malaysia defines a “whistleblower” as someone who informs the authority or the public about something he reasonably believes to be fraudulent, illegal or unlawful.

Bank Negara Malaysia’s Whistleblowing Act is very specific to its banking nature. (<https://www.bnm.gov.my › whistleblowing-policy>)

Whistleblowing law is in the Employment Rights Act 1996 (as amended by the Public Interest Disclosure Act 1998). It provides the right for a worker to take a case to an employment tribunal if they have been victimized at work or they have lost their job because they have 'blown the whistle'.

BNM strives to conduct its business with integrity, competence and professionalism while achieving the highest level of effectiveness and excellence. To uphold this aspiration, BNM must detect and deal with improper conduct. One way of detecting this is through whistleblowers.

Whistleblowers who come forward in good faith with information on actual or potential improper conduct are protected under the Whistleblower Protection Act 2010. This Act requires the authorities receiving the complaint to protect the whistleblowers' identities, provide them with immunity from civil and criminal proceedings, and protect them from detrimental action.

Disclosure of "improper conduct" may be made to BNM if it relates to an “improper conduct”, committed or about to be committed, involving:

- 1.Criminal offences by BNM’s officers, employees and directors including fraud, corruption or abuse of power;
2. Misuse of BNM’s funds or assets;
3. Gross mismanagement within BNM;
4. Breach of BNM’s Code of Conduct by its officers and employees;
5. Breach of BNM’s Vendor Code of Conduct by its vendors;
6. Failure to comply with the provisions of the laws administered by BNM by any person;
7. Assisting a person to commit any of the above instances of improper conduct; and
8. Detrimental action taken against whistleblowers or persons closely associated with whistleblowers.

It is advisable for a potential whistleblower to consider whether the alleged improper conduct to be disclosed to BNM falls within any of the above, prior to making the disclosure. The potential whistleblower should also consider whether the intended disclosure is specifically prohibited by any written law such as the Official Secrets Act 1972. In this regard, potential whistleblowers may wish to seek legal advice from a legal practitioner before making the disclosure to BNM.

Source : Bank Negara Malaysia’s Whistleblowing Act is very specific to its banking nature. (<https://www.bnm.gov.my › whistleblowing-policy>)

## **Malaysian Perspectives on Whistleblowers**

Detrimental actions include acts of harm, intimidation, harassment, discrimination, termination, suspension of work, threat or anything that causes damage by any person on the whistleblower.

Relevant studies on Whistleblowers issues were conducted by Malaysian academicians and advocates.

A research that analyses the gaps and weaknesses in the existing legislative framework for whistleblower protection in Malaysia was conducted in 2022 by Mohd Al Omar Che Abu Bakar and Mazlina Mohamad Mangsor on "Not Enough to Speak, But to Speak True: Revisiting the Whistleblower Protection Law in Malaysia" DOI: <https://doi.org/10.47405/mjssh.v7i11.1949>

This research analyses the gaps and weaknesses in the existing legislative framework for whistleblower protection in Malaysia. The study found two main issues in the Malaysian Whistleblower Protection Act 2010 dealing with the disclosure of wrongdoings. They are the limited disclosure channel and an act of disclosure of information is an offence under other legislation. The protection for whistleblowers becomes vulnerable with the current restraints. Whistleblowing has significantly become one of the critical requirements in society as a medium to curb corruption.

By analyzing the weaknesses of this Act, the research contributes to the body of knowledge and plays a critical role in proposing to the policymakers for advocating some enhancement in the future for the sake of a whistleblower's safety. The research adopts doctrinal and qualitative methodology. A content analysis through analytical legal approach is employed by examining the Malaysian existing law. A brief reference analysis is conducted on the United Kingdom Public Interest Disclosure Act 2010 and the Employment Act 1996. Thus, salient improvements of law provisions are recommended to better regulate the existing laws in Malaysia. The findings demonstrate the need for practical strength of amendments to protect the whistleblower due to unpredictable consequences. To date, potential whistleblowers are discouraged from disclosing information if the system is incapable of protecting them from fearing a backlash against them. The proposals suggested changes to the legislation to provide a good practice of guidance in handling concerns of wrongdoings.

Another research in 2023 conducted by Masdiah Abdul Hamid, Suzana San, & Faizah Mohd Khalid looked at "Blowing the Whistle in the Workplace: An Empirical Study from Malaysian GLCS (European Proceedings of Finance and Economics EpFE [www.europeanproceedings.com](http://www.europeanproceedings.com) e-ISSN: 2672-8958 The Author(s) 2023. This article is licensed under a Creative Commons Attribution-NonCommercialNoDerivatives 4.0 International License (<http://creativecommons.org/licenses/by-nc-nd/4.0/>). DOI: 10.15405/epfe.23081.7)

This research analyses the unethical behavior in the organization has become a serious issue within larger corporations, and there has been pressure on the government and corporate players to practice good governance. The organizational context is considered for testing the factors influencing whistleblowing among the people within the organization. This study examines three determinant factors of whistleblowing intention: organization factors, personal relationships and personal characteristics of employees in Malaysian government-linked companies (GLCs). This study used a quantitative research approach in which 400 questionnaires were distributed and 306 received as a completed survey.

According to the findings, organizational structure has a significant relationship with whistleblowing intention, with most employees more inclined to blow the whistle if suitable reporting procedures are available. Employees are more likely to report wrongdoing if not linked to the perpetrator. Regarding personal traits, younger and higher-ranking employees are more likely to report whistleblowing, but gender does not play a role since neither male nor female influences whistleblowing intention. The study was conducted in Malaysian GLCs setting. Extending the research to other sectors and industries would be beneficial and generalized the findings.

In 2017, Institute for Democracy and Economic Affairs published Policy Ideas No 36 on A critical look into the Whistleblower Protection Act 2010, authored by Christopher Leong .

[Christopher Leong is a Board member at IDEAS and an advocate and solicitor of the High Court of Malaya of more than 25 years standing. He is also the Managing Partner of Chooi & Company. Christopher has extensive experience in the fields of corporate and commercial litigation, shareholders' disputes, banking litigation and insolvency. Christopher was the 30th President of the Malaysian Bar and the immediate past Chairman of the Bar Council of Malaysia].

According to his research and perspectives, despite the introduction of the Whistleblower Protection Act 2010 (the Act), whistleblowing is still a rare occurrence in Malaysia. In fact, the annual report from the Malaysian Anti-Corruption Commission (MACC) in 2012 indicates that out of a total of 8,953 complaints received by the Commission only 28 were from whistleblowers. However, data from the US suggests that as a method of detection whistleblowing is the single most effective means of uncovering graft. Considering the importance of whistleblowers in discovering cases of fraud the low number of whistleblowers as observed through the MACC statistics suggest that whistleblowers in Malaysia remain hesitant. In order to encourage more individuals to come forward and whistleblower, there must be several changes made to Whistleblower Protection Act 2010. To achieve this, the following three areas need to be reformed under the Act:

1. Protection for Whistleblowers - the level of protection for whistleblowers needs to be improved and reinforced.
2. Independence of the Act - the Act remains vulnerable to Ministerial action, and it needs to be made entirely independent of such influence.
3. Whistleblowing Mechanism - a more comprehensive whistleblowing mechanism needs to be created - one that is more robust than the current model.

As corruption is usually covert, it is difficult to combat it if there is limited access to crucial evidence in the form of confidential or insider information. The success of our enforcement agencies such as the police, or the Malaysian Anti-Corruption Commission (MACC) would in many instances depend on the information specifically given by people who are willing to come forward and inform enforcement agencies of a corrupt act or of organized crime. These people are known as whistleblowers. David Lehmann, the former Head of Deloitte Forensics at Deloitte Malaysia, has described whistleblowing as 'the most significant means by which serious misconduct, such as fraud and corruption is detected' (Lehmann, 2015).

"However, we must consider that safety is a concern for an individual who is contemplating whistleblowing. For a whistleblower to come forward, they must have the confidence that they will be guaranteed protection before, during, and after the disclosure; that the enforcement agencies are independent; and that action will be taken after the disclosure of improper conduct, (Christopher Leong 2017)

He concluded by reinstating and reiterating the fact that "while the Act fills a vital gap in Malaysia's anti-corruption landscape, whistleblowing statistics continue to show Malaysians remaining hesitant to come forward. To encourage whistleblowing and the discovery of corruption, it is imperative that the Act is further improved upon. Whistleblowers should be updated on the status of their investigations throughout the process. A substantial reward system should be announced and made public to encourage potential whistleblowers. By increasing whistleblower protection, reinstating the independence of the Act, increasing its transparency, and setting out a clear whistleblowing mechanism whistleblower can be encouraged to come forward.

He further blatantly recommended that there are steps that can and must be taken to achieve the objectives of the Act, ensure whistleblowers are protected and to successfully root out corruption in Malaysia.

1. Ensure the extension of whistleblower protection by allowing for disclosures to non-enforcement agencies; Repeal the proviso to Section 6(1) of the Act and allow disclosure of information that may in normal circumstances fall under restrictions of other legislation;
2. Allow for the removal of Ministerial involvement and oversight.
3. Remove the automatic disqualification from protection for whistleblowers who had been part of or participated in the improper conduct, and instead provide for a discretion to allow for protection as well as remove the importance placed upon the motive behind the disclosure.

His suggestion ought to be taken up by the relevant Ministries and to be acted upon as a serious step in curbing corruptions, wrongdoings and matters of public interests.

## Policy Recommendation for Whistleblowers and The Malaysian Media

Whistleblowing in the media is not essentially an earth breaking incidents . The tip off “Deep Throat Mark Felt to investigate journalists in 1972 was invaluable for the Washington Post’s expose of the infamous Watergate bugging which cost Richard Nixon the US Presidency.

Digital storage and distribution have facilitated whistleblower, including in countries without a liberal democratic tradition. In China, journalist-whistleblowers routinely report power abuses of officials on the Internet. Weibo, the Chinese version of Twitter, has been described as a serious challenge to Beijing’s control of information.(Suruchi Mazmundar, 2013 Jan Serveas (Chair Professor and HOD of Media and Communication, City University Hong Kong) in Suruchi M stated that in Asia, it varies from case to case. “But it would be less likely for whistleblowers in certain Asia countries to be protected from prosecutions if they go public with exposes of power abuses,”.

An interview with Editors and Journalists in Malaysia media organizations revealed that Whistleblowers are important as it can help to expose many wrongdoings however it takes a long time to assure them of their safety. “Generally, whistleblowers are concerned about their safety and willing to go to certain miles which are not that far out,” When asked if Investigative Journalisms (that requires Whistleblowers and paper trails) are still alive and kicking, some of them stated that it is but due to the nature of time taken, Editor normally stopped at certain level because of human factors – staff issues – and extra funds involved as it is time consuming.

An Editor with a daily newspaper said that she went through the Whistleblowers processes, published the stories and protect the Whistleblower till today.

Another Editor claimed that it is not easy to gain the trust from Whistleblowers as it takes a long time to establish the rapport, and the newspapers companies might lose interest in the news.

Generally, some of the main concerns which demotivated the Whistleblowers and Journalist alike to pursue the tip off are of global concerns :

1. The threats to the lives of whistleblowers and journalists.
2. Justice is denied to whistleblowers.
3. The commitment to protecting whistleblowers in Malaysia

According to A.J.Brown in Suruchi M (2013) “Good legislation is an important step, but legislation cannot be implemented effectively unless there is an underlying understanding of the role of whistleblowing, commitment to integrity and the presence of institutions that could make legislation work. Policies and guidelines that make the concerned people take the concerns raised by whistleblowers seriously”.

Essentially , his statement is the crucial part of making Whistleblowers an important source in the media. Public discourses in understanding as to what Whistleblower is to make public understand that the Whistleblower is about public good and not self-interest.

Basically, media does not exist in a vacuum. Malaysian media is controlled and governed by the government. Hence, the Malaysian government must also give attention to the roles play by Whistleblowers in the media industry and not just the other sectors. Media as a source of information plays a critical role in bridging information to the public. Whistleblowers are that bridge. A specific policy on Whistleblowers and the media will help to unearth more crucial matters. It took the Watergate Scandal and Deep Throat 30 years but with the current technology and especially with the advent of social media, Whistleblowers intention to blow the whistle, might be easier as a prevention and deterrent to potential misconduct.

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