



TM Group

Our Ref: GLCCSD/LSIP/WPA/Circular 6/2011

29 April 2011

Dear Colleagues,

**WHISTLEBLOWER PROTECTION LAW: AN OVERVIEW OF MALAYSIA'S  
WHISTLEBLOWER PROTECTION ACT 2010 [ACT 711]**

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We refer to the above matter.

**A. INTRODUCTION**

Legal Strategy & Intellectual Property ("LSIP") wishes to inform that a new act was passed namely the **Whistleblower Protection Act 2010** ("Act") which has been given the Royal Assent on 2<sup>nd</sup> June 2010 and gazetted on 10<sup>th</sup> June 2010. The Act came into force on **15 December 2010**.

The Act aims to combat corruption and other wrongdoings by:-

- a) encouraging and facilitating disclosures of improper conduct in the public and private sector;
- b) to protect persons making those disclosures from detrimental action;
- c) to provide for the matters disclosed to be investigated and dealt with; and
- d) to provide other matters connected therewith.

The Act is a specific act that covers all matters in relation to the protection of whistleblowers. Any provision in the existing law which contradicts with the provision of this law, this law will be applicable to the extent of such contradiction only. It is to be noted that this Act applies to both **public and public sectors**.

**B. WHO IS A WHISTLEBLOWER?**

A whistleblower under the Act is defined as any person who makes a disclosure of improper conduct to the enforcement agency under Section 6.

Examples of such wrongdoing could range from mismanagement to corruption. Whistleblowers are extremely vulnerable to reprisals since the persons they report against are, more often than not, the ones in authority or power. Fear of such reprisals would normally cause an employee to choose not to divulge on the goings-on in the organizations thus allowing the wrongdoing to continue – Black's Law Dictionary.

**C. ADMINISTRATION**

As provided under Section 3(1) of the Act, the **enforcement agency** shall have the general direction, control and supervision of all matters relating to whistleblower protection.

An enforcement agency refers to any ministry, department, agency or other body set up by the Government or a body set up by the Government or a body established by a Federal or State law or a unit, section, division, department or agency of a body established by law. In each case that body or agency must be conferred investigation and enforcement function.

Legal Affairs Division, Attorney General Chamber ("BHEUU") has been appointed by the Government to enforce this Act. Guidelines, SOP and the relevant forms have been prepared by BHEUU to assist the enforcement agency in understanding and enforcing this Act.

**D. WHISTLEBLOWER PROTECTION**

***What constitutes "improper conduct" under the Act?***

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

**(1) Disclosure of improper conduct**

- (a) Section 6(1) of the Act provides 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** such disclosure is not specifically prohibited by law such as Official Secret Act 1972, Income Tax Act 1967, BAFIA 1989 and Legal Profession Act 1976.

- (b) Under Section 6(2) (a), a disclosure of improper conduct may also be made although the person making the disclosure is not able to identify a particular person to which the disclosure relates.
- (c) **Retrospective effect** of Section 6(2) (b), (c) and (d)
- (i) although the improper conduct has occurred before the commencement of the Act;
  - (ii) information acquired while he was an officer of a public body or an officer of a private body; or
  - (iii) of any improper conduct of a person while that person was an officer of a public body or an officer of a private body.
- (d) May be made orally or in writing provided any oral disclosure shall be reduce into wiring – Section 6 (3)

- (e) A disclosure made in relation to a Member of Parliament or a State Assembly shall not amount to a breach of privilege – Section 6 (4)
- (f) Any provision in any contract of employment shall be void in so far as its purports to preclude the making of a disclosure of improper conduct – Section 6 (5)

**(2) What protection is given to a whistleblower under the Act?**

Under Section 7(1), the whistleblower is accorded three (3) types of protection under the Act, namely protection of confidential information, immunity from civil and criminal action and protection against detrimental action. Protection against detrimental action shall be extended to any person related to or associated with the whistleblower.

**(3) How is confidential information protected?**

Section 8 prohibits the disclosure of improper conduct or any confidential information, including information disclosed by the whistleblower, obtained in the course of investigation of such disclosure. The prohibition extends to disclosure of such confidential information in proceedings in any court, tribunal or other authority.

**(4) Dealing with disclosure of improper conduct**

The Act imposes a mandatory obligation on the enforcement agency to investigate the disclosure of improper conduct.

Section 12 provides that an enforcement agency which receives a disclosure of improper conduct under Section 6 shall conduct its own investigation regarding the disclosure and make a report as to its findings and the recommendation for further steps to be taken, if any.

If the enforcement agency under Section 13, makes a finding that the disclosure of improper conduct is unsubstantiated, it must inform the whistleblower.

If the improper conduct constitutes a disciplinary offence, the enforcement agency is required to make a recommendation to the appropriate authority (in the case of public body) or **to the employer** (in the case of a private body) to initiate disciplinary proceedings or to take appropriate steps against the person who committed the improper conduct.

If the improper conduct constitutes a criminal offence and the Public Prosecutor (PP) decides to prosecute, the enforcement agency shall obtain periodic reports from the PP until the matter has been duly disposed of. If the PP decides not to prosecute, the enforcement agency shall inform the whistleblower.

**(5) Protection against detrimental action**

***What is "detrimental action"***

Detrimental action includes (i) action causing injury, loss or damage; (ii) intimidation or harassment; (iii) interference with a person's lawful employment or livelihood, and (iv) a threat to take any of the aforesaid action.

Section 10 (1) of the Act prohibits any person from taking detrimental action against a whistleblower or a person related or associated to him in reprisal of a disclosure of improper conduct.

Under Section 10 (2), a whistleblower may make a complaint to any enforcement agency of any detrimental action committed against him or any person who is related or associated to him.

A person is deemed to take detrimental action against a whistleblower or any person related to or associated with the whistleblower if:-

- (i) the person takes or threatens to take detrimental action because a whistleblower has made a disclosure of improper conduct or the person believes that a whistleblower has made or intend to make a disclosure of improper conduct; or
- (ii) the person incites or permits another person to take or threaten to take detrimental action for any reason stated herein.

**(6) Revocation of whistleblower protection**

Section 11 provides the enforcement agency the power to revoke the protection conferred under Section 7 if, (i) where the whistleblower himself has participated in the improper conduct disclosed; (ii) where the whistleblower willfully made a false material statement in his disclosure; and (iii) where the whistleblower makes the disclosure solely or substantially for the motive of avoiding dismissal or other disciplinary action.

**(7) Relocation of place of employment**

The relevant public body or employer in the private body may relocate the place of employment of a whistleblower or a person related or associated to him, if that is the only practical means of removing or substantially removing the danger or the effect of a detrimental action.

**(8) Remedy**

The whistleblower may seek damages or compensation or apply for an injunction or any other relief that the Court deems fit.

**(9) Rewards to whistleblower**

Section 26 provides that the enforcement agency can order rewards to be paid to a whistleblower for any disclosure of improper conduct or complaint of detrimental action in reprisal of such disclosure or complaint leads to the detection of cases on improper conduct or detrimental action or to the prosecution of the person against whom the disclosure was made or the person who committed the detrimental action.

**E. PENALTIES**

Any person who takes detrimental action against a whistleblower or any person to or associated with the whistleblower in reprisal for a disclosure of improper conduct commits an offence under the Act and shall conviction be liable to a fine not exceeding RM100,000.00 or to imprisonment for a term not exceeding 15 years or both.

**F. IMPACT TO TM AND ITS GROUP OF COMPANIES**

The Act does not only apply to the public sector but also in the private sector.

Based on the above, care must be taken in light of the companies within TM Group where the enforcement agency makes a finding that the improper conduct constitutes a disciplinary offence and disciplinary proceedings based on the terms and conditions of employment/Employment Act 1955 or any such recommendation by the enforcement agency be initiated accordingly.

As provided under Section 13(2), TM must inform the enforcement agency as to

- (a) the steps taken or intended to be taken, to give effect to the finding and recommendation **within six (6) months** from the date of receipt of the finding and recommendation; or

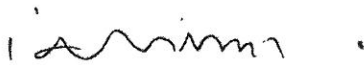
- (b) the reason for not initiating any disciplinary proceedings or for not taking the steps recommended by the enforcement agency **within fourteen (14) days** of making such decision. In contemplation that the Act will be applicable to the said companies, the assessment of the introduction of the Act is therefore required to be made.

If it appears to the enforcement agency that insufficient steps or no action has been taken to give effect to the finding or recommendation within a reasonable time, the enforcement agency may report to the Minister on the investigation, finding, recommendation and the response to the finding and recommendation.

Therefore appropriate measures such as conducting awareness programme for TM and its group of companies is hereby recommended to ensure TM Group does not run foul with the provision of the Act.

If you require further clarification on the above, kindly contact Nor Aishah Muyop, Associate General Counsel at 03-22402701 or Zaleha Abd Aziz, Corporate Counsel at 03-22407334.

Thank you and Salam Hormat,



**IDRUS ISMAIL**

Chief Legal, Compliance & Company Secretary

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