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Comparative analysis of whistleblower protection legislations in England, USA and Malaysia

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This article explores the legislative efforts undertaken by the United States, England and Malaysia in providing legal protection to whistleblowers. This area has become a regularly debated topic due to the vast acknowledgement on the importance of whistle-blowing in countering fraud and other misbehavior of corporations to ensure better corporate governance of corporations. A comparative analysis would be undertaken on the law on whistleblower protection in the earlier mentioned countries to determine their similarities, differences, strengths and weaknesses. The results of this analysis would be a useful source of information to countries who want to legislate on whistleblower protection or to improve the law in this area.

Key words: Whistle-blowing, legal protection, whistleblower, corporate governance.

INTRODUCTION

Whistle-blowing forms part of the internal control system which a company adopts to achieve good corporate governance practices. Research has shown that whistle-blowing is one of the effective ways to detect fraud and wrongdoings in a corporation (Mak, 2007). This is further evidenced by the fact that the major world organizations are calling for the implementation of whistle-blowing policies and whistleblower protection laws. Thus, if the whistle-blowing policy and procedure are implemented successfully in a company, it would amount to a good early warning system to the company to eradicate improper conduct before the matter escalates to a point of no return. Whistle-blowing can be defined as 'the disclosure by organization members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action' (Near and Miceli, 1987). Despite the benefits of whistle-blowing in detecting and preventing fraud or other serious misconduct, not many are willing to come forward and blow the whistle on their employers' wrongdoing.

This is hardly surprising due to the possibility of severe

reprisal on the whistleblowers by their employers as a result of disclosure of incriminating information on their employers. This may result in loss of career, loss of family and social life. Thus, efforts must be taken to protect whistleblowers from any reprisal as a result of their noble and heroic deed of exposing any misfeasance or wrongdoing. This article has three main aims. First, this article will explore the legal protection afforded to whistleblowers in England, United States and Malaysia. Secondly, a comparative analysis on the laws relating to whistleblower protection in these three countries will be undertaken to show the similarities, differences, strengths and weaknesses between the laws in these countries. Thirdly, this article will provide recommendations to resolve any shortcomings in the Malaysian law on whistleblower protection.

METHODOLOGY

In conducting the comparative analysis for this article, an extensive literature review was undertaken by the researchers based on the legal resources such as legislations enacted and cases decided in the United Kingdom, the United States and Malaysia. A content analysis was also performed to identify major themes and to draw comparison between the whistle-blowing legislations in these three countries according to the following:

1) Scope of application of the whistle-blowing legislation,

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- II) Remedies afforded by the whistle-blowing legislation to aggrieved whistleblowers, and
 III) Actions introduced by the whistle-blowing legislation to deter people from retaliating against whistleblowers.

WHISTLEBLOWER PROTECTION IN ENGLAND

The English Parliament enacted the Public Interest Disclosure Act 1998 (hereinafter referred to as 'PIDA 1998') which inserted new sections and amended the existing sections in the Employment Rights Act 1996 (hereinafter referred to as ERA, 1996) to introduce whistleblower protection in England. PIDA came into effect on 2 July 1999. According to s.43A ERA, 1996, a worker would only be protected under the ERA, 1996 if he has made a 'qualifying disclosure' to the relevant persons or authority stated in s.43C to s.43H ERA 1996. Section 43B ERA stipulates that 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making disclosure, involves a criminal offence, any failure to comply with legal obligation, miscarriage of justice, health and safety of any individual, damage to the environment or the concealment of any of the wrongdoings mentioned earlier. In *Babula v Waltham Forest College*, the Court of Appeal decided that s.43B applies to a situation where the worker's belief of the wrongdoing turns out to be untrue. Disclosure of information can be made to the whistleblower's employer or any person who has legal responsibility over the subject matter of the information disclosed, in the course of obtaining legal advice, Minister of the Crown or to prescribed person. The PIDA 1998 also provides protection where the disclosure of information is made to people other than the persons specified in s.43C to s.43F (for instance, the media) if the requirements stated in s.43G and s.43H are satisfied. Section 43G applies to situations where the worker fears for reprisal if he discloses the information to his employer and s.43H deals with any disclosure of information relating to a failure of exceptionally serious nature.

It is to be noted that the test to determine whether a worker is entitled to protection under s.43C to s.43H is different. However, the element that the worker must act in good faith when making the 'protected disclosure' is required for all these categories except for disclosure of information to legal advisers. In *Street v Derbyshire Unemployed Workers' Centre*, the Court of Appeal held that a disclosure of information is made in good faith if it is made honestly and with no ulterior motive. The scope of protection provided to a worker who made a 'protected disclosure' is provided in s.47B (1) ERA 1996 which states that "A worker shall not be subject to detriment by any act or any deliberate failure to act by his employer on the ground that the worker has made a protected disclosure." The protection from retaliation of the worker's employer provided by s.47B covers the discriminating acts done after the worker's contract of employment

ended. Any worker who is subject to any detrimental act or failure to act in breach of s.47B is entitled to bring a legal claim to an employment tribunal within three months of the detrimental act or failure to act occurs. It is the employer who has to prove the ground in which such detrimental act or failure to act was done. Section 103A ERA 1996 states that a worker is considered to be unfairly dismissed if the ground of dismissal is due to the 'protected disclosure' of the worker. Similarly, s.105 (6A) ERA 1996 states that it is unfair to select workers for redundancy on the ground that they make a 'protected disclosure'. An employer could be held vicariously liable for any breach of s.47B committed by its employees.

The remedies in which a worker is entitled to as a result of breach of s.47B, s.103A or s.105 (6A) are damages and reinstatement (for unfair dismissal). Section 128 ERA 1998 also provides for interim relief such as reinstatement or continuation of contract if the courts think that the employees are likely to establish that their dismissal is due to the making of a 'protected disclosure' when the matter goes to trial (Lewis, 1998). Nonetheless, it must be noted that the ERA, 1996 does not make it an offence for an employer who takes or causes any detrimental action against an employer in breach of s.47B (Lewis, 2007). Due to the English government's effort in enacting the PIDA, 1998 many companies and institutions in England have either amended or introduced comprehensive whistle-blowing policy implementing the provisions of PIDA, 1998. Furthermore, the UK Corporate Governance Code which applies to the financial year after 29 June 2010 does provide that the audit committee shall review the arrangements introduced by its company to facilitate its staff to raise concerns in confidence about any improper conduct.

WHISTLEBLOWER PROTECTION IN UNITED STATES

In the light of a number of huge corporate scandals in the United States such as the Enron and Worldcom scandals, the Congress had enacted the Corporate and Auditing Accountability and Responsibility Act 2002 which is commonly known as Sarbanes-Oxley Act (hereinafter referred to as 'SOX 2002'). Section 806 SOX 2002 provides protection for employees of publicly traded companies who provide evidence of fraud by inserting s.1514A into Chapter 73 of title 18 of the United States Code. There are a number of academic articles which discuss the inadequacies and weaknesses of the SOX 2002 in protecting whistleblowers. Thus, it is not surprising that the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 (hereinafter referred to as the 'Dodd-Frank Act') which was passed by the Congress includes significant changes to the whistleblower protection law in the United States by amending the SOX 2002, Securities Exchange Act 1934 and the Commodity Exchange Act 1936 as well as providing new whistleblower protection in a new Act entitled Consumer Financial

Protection Act 2010 (hereinafter CFA 2010'). The Dodd-Frank Act was signed into law by the United States President on 21 July 2010.

SOX 2002

The protection under SOX 2002 is afforded to an employee who provides information, causes information to be provided or assists in an investigation regarding any conduct in which he reasonably believes that his employer has violated any rules of the Securities Exchange Commission or any Federal law relating to fraud against the company or shareholder. The employee is not required to show that there is actual violation of the Federal laws as long as he reasonably believes that such violation has occurred. Thus, an employee is still entitled to protection under s.1514A if the action that he complains of does not amount to a crime. The information must be provided to a Federal regulatory or law enforcement agency, any member of Congress or any committee of Congress or the employee's supervisor or someone appointed by the company to investigate complaints about violation of law by the company. As a result of the Dodd-Frank Act, SOX 2002 applies to not only the employees of any publicly traded company but also to employees of its subsidiaries or affiliates. These companies are not allowed to discharge, demote, suspend, threaten, harass or in any manner discriminate against an employee due to the 'protected disclosure' of information as mentioned in the preceding paragraph.

Any employee who faces such detrimental acts may file a complaint with the Secretary of Labour within 180 days after the occurrence of the violation of s.1514A. The employee bears the burden to prove that (i) the employer has knowledge of his 'protected disclosure' and (ii) the 'protected disclosure' is a 'contributing factor' resulting in retaliation acts taken against him. According to Watnick (2007), an employee only needs to show that his 'disclosure of information had a role to play in the decision to act adversely towards him'. The courts are entitled to grant all relief necessary to make the employee whole. The remedies include reinstatement with the amount of back wages with interest and compensation for special damages such as litigation costs and expert witness fees. Any person who retaliates against an employee for making a 'protected disclosure', for instance, taking any action harmful to the employee or interfering in any manner with his lawful employment or livelihood commits an offence. Any agreement to exclude the rights and remedies of employees under SOX 2002 cannot be waived or excused. A predispute arbitration agreement providing that any dispute arising from SOX 2002 to be settled by arbitration is void.

Securities exchange act 1934

Section 922 Dodd-Frank Act made a significant change

to the whistleblower protection law by inserting new provisions into the Securities Exchange Act 1934 (hereinafter referred to as 'SEC 1934') which states that the Securities Commission shall pay an award to whistleblower(s) who voluntarily provided original information to the Commission that led to the successful enforcement of a 'covered judicial or administrative action'. The whistleblower is entitled to an amount of 10 to 30% of the monetary sanctions (exceeding USD 1 million) imposed in the 'covered judicial or administrative action'. The amount payable to the whistleblower is determined at the discretion of the Commission. It would have to take into account the significance of the information and the degree of assistance provided by the whistleblower to the success of the 'covered judicial or administrative action', the interest of the Commission in deterring violations of the securities laws and any additional relevant factors. The award payable to the whistleblower is paid from the Securities and Exchange Commission Investor Protection Fund. However, a whistleblower is not entitled to any reward if he is an employee of the Commission or any other organizations related to law enforcement, where he is convicted of a criminal violation related to the judicial or administrative action which he would otherwise receive an award under s.922, where he gains the information through the performance of an audit of financial statements required under the securities laws or when disclosure of information to the Commission is not in compliance with the requirements of the Commission.

Disclosure of information to the Commission can be made anonymously through an attorney. However, the whistleblower shall disclose his identity prior to the payment of the award. The Commission is expressly required to protect the anonymity of the whistleblower. Section 922 Dodd-Frank Act also prohibits any retaliation taken against an employee for disclosing information to the Commission, initiating, testifying or assisting in any investigation or judicial or administrative action of the Commission or in making disclosure as required or protected under SOX 2002 or relating to any securities law within the jurisdiction of the Commission. The employee is entitled to bring a legal action against the employer as a result of any retaliation suffered due to the earlier mentioned protected activities. However, the legal action created by the Dodd-Frank Act under the SEC 1934 is different from the legal action under SOX 2002. First, under the SEC 1934, the whistleblower is entitled to bring the legal action in the appropriate district court in the United States without the need to refer the matter to the Secretary of Labour. Secondly, the limitation period under the SEC 1934 is longer, that is the whistleblower can bring a legal action within 6 years after the date on which the retaliation or violation takes place. Alternatively, the whistleblower is only entitled to a three year limitation period from the date when materials to the right of action are known or reasonably should have been known by the employee alleging retaliatory acts. Nonetheless, no action can be taken after more than 10 years

after the date on which the retaliation occurs. Thirdly, the whistleblower is entitled to two times the amount of back pay besides the other reliefs available under SOX 2002.

Consumer financial protection Act 2010

Section 1057 CFPB 2010 provides protection for employees belonging to any organization providing financial products or services to consumers from any retaliation as a result of disclosure of information, testifying or assisting in any investigation relating to the violation of this Act or objecting to or refusing to participate in any activity to be in violation of this Act. The whistleblower protection is available if the information or assistance in any related investigation is rendered to the whistleblower's employer or the Consumer Financial Protection Bureau, or any other State, local, or Federal, government authority or law enforcement. Any employee who was discharged or suffered from any retaliation as a result of a breach of s.1057 may file a complaint with the Secretary of Labour within 180 days after such violation occurs. The remedies which the whistleblower is entitled to are similar to the remedies provided by SOX 2002. Nonetheless, if the Secretary of Labour finds that a complaint made by the employee is frivolous or has been brought in bad faith, the employee can be made to pay to his employer reasonable attorney fee not exceeding USD 1,000.

WHISTLEBLOWER PROTECTION IN MALAYSIA

The Malaysian Parliament has from time to time introduced legal protection for whistleblowers in an attempt to counter malpractices and fraud of companies. Such protection is found in the Companies Act 1965 (Act 125) (hereinafter referred to as 'CA 1965'), Capital Markets and Services Act 2007 (Act 671) (hereinafter referred to as 'CMSA 2007') and the newly enacted Whistleblower Protection Act 2010 (Act 711) (hereinafter referred to as 'WPA, 2010'). The protection provided in these three legislations will be discussed in turn.

Companies ACT 1965 and capital markets and services ACT 2007

Section 368B (1) CA 1965 states that an officer of a company who in the course of performance of his duties has reasonable belief on any matter which may or will constitute breach of the CA 1965 or its regulations or a serious offence of fraud or dishonesty has been, is being or likely to be committed against the company or by other officers of the company may report the matter to the Registrar of company. The definition of officer refers to any director, secretary or employee of the company, receiver and manager appointed under a power contained

in any instrument or any liquidator appointed in a voluntary winding up. Section 368B (2) CA 1965 expressly prohibits the company from removing, discharging, discriminating or interfering with the livelihood or employment of the officer who makes a 'protected disclosure'. Furthermore, such officer shall not be liable to be sued in any court (for instance, breach of confidentiality agreement or defamation) or be subject to any tribunal process including disciplinary action due to the 'protected disclosure' if he is acting in good faith and in the intended performance of his duties as an officer of the company. Any person who breaches s.368B (2) or (3) shall be guilty of an offence and is liable to pay fine, subject to imprisonment or both.

The protection of whistleblowers as provided in the CMSA 2007 is largely similar to s.368B CA 1965. Section 321 CMSA 2007 applies to disclosure of information made by a chief executive, any officer responsible for preparing or approving financial statements or financial information, an internal auditor or a secretary of a listed corporation. Information disclosed should involved breach or non-performance of any requirement or provision of securities law or breach of rules of the stock exchange or any matter which may adversely affects to a material extent the financial position of listed corporations. Disclosure of information must be made to the Securities Commission in relation to matters involving breach of securities law, and to the relevant stock exchange for breach of rules of the stock exchange. The protection is only available for those who have in the course of the performance of their duties reasonable belief that there has been a breach of law regarding matters as mentioned earlier. A breach of s.321 (1) or (2) amounts to an offence. Section 367(1) CMSA 2007 states that where a corporation is liable for breach of any provision in CMSA 2007 or its regulations, its chief executive, director, an officer or a representative of the body corporate is deemed to have committed the offence.

Evaluation of the whistleblower protection provisions in CA 1965 and CMSA 2007

The scope of protection found in CA 1965 and CMSA 2007 is limited and inadequate. First, the protection for a whistleblower is only applicable if he forms a reasonable belief in the course of performance of his duties. It is questionable whether an officer who learns about the circumstances amounting to a wrongdoing outside office hours may be entitled to protection under the CA 1965 and CMSA 2007. Besides, from the wordings of both s.368B CA 1965 and s.321 CMSA 2007, it appears that an employee is only protected if he reports the wrongdoing committed by his employer or its officers. As such, an officer of one company who is aware of the wrongdoing of another company would not be protected if he reports the wrongdoing to the Registrar of Company,

Securities Commission or the stock exchange. It is possible for employees of one business entity to learn about the wrongdoing of another company as there may be some relationship between them such as between an auditor firm and its client company or between a parent and its subsidiary company.

Secondly, there is also no provision in CA 1965 and CMSA 2007 protecting the anonymity of the whistleblower. Thirdly, it is not expressly provided in the CA 1965 and CMSA 2007 as to whether the officer who makes a 'protected disclosure' is entitled to any civil law remedies such as damages. Fourthly, there is no duty imposed on the Registrar of Companies, Securities Commission and the stock exchange to investigate the matter highlighted by the officer. This is important as it would instil confidence on officers of companies if their complaint is taken seriously and is investigated. Otherwise, if a person realizes that the relevant body may not investigate his complaint, he may be discouraged to blow the whistle. This is due to the fact that his whistle-blowing would subject himself to the possibility of reprisal by his employer but yet the wrongdoing of his employer remains hidden from the public. In addition, there is also no clear guideline offered to the officers to lodge a complaint in the event that they suffer any reprisal in the course of their employment as a result of their 'protected disclosure'. As a result, the protection of whistleblowers based on CA 1965 and CMSA 2010 is clearly inadequate and lacks the necessary clarity to create assurance that individuals would be protected if they spill the beans on their employer's wrongdoing. So far, both s.368B CA 1965 and s.321 CMSA 1965 have not received any judicial treatment as there is no reported case on these two provisions.

Whistleblower protection ACT 2010

With the enactment of the WPA 2010, the officers of a company or any other person who provides information as to the misfeasance or wrongdoing of any company or its directors are entitled to wider protection under the this Act. The WPA 2010 applies generally to whistleblowers who disclose information relating to the wrongdoings in the private or public sector. The enactment of the WPA 2010 is part of the efforts taken by Malaysia to fulfill its obligations under the United Nation Convention against Corruption. The WPA 2010 came into force on 15 December 2010. Section 6 (1) WPA 2010 states that the whistleblower protection is only available to a person who makes 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. Section 2 WPA 2010 defines 'improper conduct' to mean any conduct which amounts to a disciplinary offence or criminal offence. The scope of 'improper conduct' is wide and clearly

includes any breach of the CA 1965, CMSA 2007, other securities law or listing rules and the code of ethics relating to auditors. However, the protection afforded by WPA 2010 is only limited to a disclosure made to an enforcement agency.

This includes any ministry, department, agency or other body set up by the Federal Government or State Government conferred with investigation and enforcement powers. The five main enforcement agency involved in the implementation of the WPA 2010 includes the Police, Customs, Road Transport Department, Malaysian Anti-Corruption Commission and the Immigration Department. Arguably, the Company Commission of Malaysia, the Securities Commission and the stock exchange fall within the definition of 'enforcement agency'. This inclusion is necessary as following the discussion above, the protection afforded to whistleblowers under the CA 1965 and CMSA 2007 is inadequate compared to the protection granted under the WPA 2010 as explained below. The enforcement agency under the WPA 2010 is given a number of powers including the power to receive disclosure of improper conduct, to implement and enforce the provisions of the WPA 2010. The coordination of all the enforcement agencies would fall within the responsibility of the Legal Affairs Division of the Prime Minister's Department. Section 6 (2) (a) WPA 2010 allows disclosure of improper conduct to be made even if the person making the disclosure is not able to identify a particular person involved in the misconduct. Disclosure of improper conduct which occurs prior to the commencement of the WPA 2010 is also included. Disclosure of improper conduct can be made in writing or orally. A whistleblower who makes a disclosure in accordance with s.6 WPA 2010 would be conferred with whistleblower protection under s.7(1) WPA 2010 such as (a) protection of confidential information; (b) immunity from civil and criminal action; and (c) protection against detrimental action.

The term 'confidential information' used in the WPA 2010 refers to information about the identity, occupation, residential and work address of the whistleblower and the person complained of by the whistleblower, information disclosed by the whistleblower and any information if disclosed may cause detriment to others. According to s.8 (1) WPA 2010, the whistleblower is entitled to full anonymity of any information about himself and the alleged improper conduct that he provided to the enforcement agency. Any person who makes disclosure of 'confidential information' to others unless allowed by the WPA 2010 would be guilty of an offence. Section 9 WPA 2010 states that a whistleblower should not be subject to any civil or criminal liability, including disciplinary action as a result of the disclosure of improper conduct. It must be remembered that an employee owes a number of duties to his employer such as duty of loyalty, duty to act in the interest of the employer and duty of confidence. Any disclosure of information relating

to the employer may amount to a breach of these duties. The protection afforded by s.9 is important as the defences provided by the common law for these breach of duties are very narrow. Section 10 WPA 2010 deals with the protection of a whistleblower against detrimental action. 'Detrimental action' has been defined as any action causing injury, loss, damage, intimidation, harassment, interference with the lawful employment or livelihood of any person and a threat to take any of the actions as stated earlier.

It is important to take note that the protection found in s.10 is available to persons related or associated to the whistleblower. But it is not expressly provided in the WPA 2010 as to who can be considered to be related to or associated with the whistleblower. Section 10 (1) prohibits any detrimental action to be taken against the whistleblower as a result of disclosure of improper conduct. Section 10 (5) WPA 2010 states that no person acting on behalf of any public or private body shall terminate a contract, withhold payment that is due under a contract or refuse to enter into a subsequent contract solely for the reason that the party to the contract or its employee or employer has made a disclosure of improper conduct to any enforcement agency relating to the public or private body. This section is applicable to a situation where an employee of the supplier of a private body makes a disclosure of the improper conduct of the private body to the enforcement agency. As a consequence, the private body terminates any contract with the supplier. Arguably, if the employee suffers any retaliation by the supplier as a result of the disclosure of an improper conduct of the supplier's client or creditor, the employee may rely on the protection under s.10 (1) as it does not limit that the disclosure of improper conduct must relate to the person taking the detrimental action.

A whistleblower may complain to any enforcement agency if he or any person related to or associated with him suffers from any detrimental action in breach of s.10 (1). A person is deemed to have taken a detrimental action against a whistleblower if (i) the reason behind his action is due to the disclosure of improper conduct or his belief that the whistleblower has made or intends to make disclosure of improper conduct or (ii) he incites or permits another person to take or threaten to take detrimental action against the whistleblower due to the disclosure of improper conduct. In any proceedings, the burden lies with the defendant to prove that the detrimental action taken or intended to be taken against the whistleblower or any person related to or associated with him is not in reprisal for a disclosure of improper conduct. Nonetheless, the whistleblower protection under the WPA 2010 may be revoked by the enforcement agency in six circumstances under s.11(1) WPA 2010 as follows:

- (a) The whistleblower himself has participated in the improper conduct disclosed.
- (b) The whistleblower willfully made in his disclosure of

improper conduct a material statement which he knew or believed to be false or did not believe it 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 the WPA 2010.

The enforcement agency must give a written notice to the whistleblower if the whistleblower protection is revoked. Any whistleblower aggrieved by the enforcement agency's decision to revoke his protection may refer the decision to a court for determination. Section 12 WPA 2010 imposes a duty on the enforcement agency to conduct an investigation and prepare a report as to the finding of the investigation and the recommendations to be taken. The enforcement agency has to inform the whistleblower if the disclosure of improper conduct is not substantiated and where the Public Prosecutor decides not to prosecute. If the improper conduct constitutes a disciplinary offence, s.13 (1) (b) requires the enforcement agency to make recommendation to the appropriate disciplinary authority or to the employer to initiate disciplinary proceedings or other appropriate steps against those who had committed any improper conduct. The appropriate authority and employer shall inform the enforcement agency as to the steps taken to give effect to the former's finding and recommendations or the reasons for not doing so. If the enforcement agency considers that insufficient steps or no action has been taken to give effect to its finding and recommendations within a reasonable time, it can report the matter to the Minister.

The enforcement agency must also inform the whistleblower as to the actions taken by the appropriate disciplinary authority or employer in relation to its finding and recommendations. Section 14 (1) WPA 2010 imposes a duty on the enforcement agency to investigate any complaint of detrimental action that it receives from a whistleblower. Duties and powers of the enforcement agency in dealing with investigation, finding and recommendations of any complaint of detrimental action are similar to s.13 WPA 2010. Section 15 (1) WPA 2010 provides that upon a request by the whistleblower that reprisal actions have been taken against him or at any time he fears that detrimental action would be taken against him, the enforcement agency may on his behalf, seek damages, injunction or any other relief as the court deems fit. Alternatively, the whistleblower may take legal action on his own to pursue the remedies as mentioned earlier.

COMPARISON BETWEEN ENGLAND, UNITED STATES AND MALAYSIA

There are number of similarities between the law on whistleblower protection in England, United States and Malaysia. Disclosure of information would not be protected if it would amount to an offence. For instance, any disclosure of information prohibited under the Malaysian Official Secrets Act 1972 (Act 88) would not be protected by WPA 2010. Disclosure of information can be made orally or in writing. The whistleblower must have reasonable belief that a breach of the law has been committed, is being committed or likely to be committed. However, both the SOX 2002 and WPA 2010 do not require the whistleblower to act in good faith compared to the ERA 1996. All three jurisdictions provide that any term in the employment contract which seeks to exclude the making of a 'protected disclosure' is void. The test utilized in the United States to determine whether any detrimental action taken by an employer on the whistleblower is due to the 'protected disclosure' is more flexible compared to the position in England and Malaysia. In the United States, it is sufficient to prove that the 'protected disclosure' a contributing factor to the detrimental action imposed on the employee. On the contrary, in England and Malaysia, any act of reprisal on the whistleblower must be taken on the ground of the 'protected disclosure'.

However, in the US, the burden rests on the employee to show that the 'protected disclosure' is one of the factors that leads to the detrimental action taken by his employer. For England and Malaysia, the burden is on the employer to show that the detrimental action is not taken as a result of the employee's protected disclosure. Arguably, all the three jurisdictions discussed in this article do not extend any whistleblower protection to a person who attempts to make a 'protected disclosure' and suffers from any detrimental action because of his attempt. Only the United States (SEC, 1934) position and the WPA 2010 allow rewards to be given to whistleblowers. However, there are at least three differences between the United States and the Malaysian position in relation to this matter. First, under the United States position, a reward is only granted to a whistleblower in the event of a successful 'judicial or administrative action' taken against the companies involving monetary sanctions exceeding USD 1 million. Secondly, the Dodd-Frank Act imposes a duty on the Securities Exchange Commission to make an award to the whistleblower. Thirdly, the payment of award is from a designated fund that is the Securities and Exchange Commission Investor Protection Fund. On the contrary, the wordings of the WPA 2010 are more general when it comes to the provision of a reward to a whistleblower.

The enforcement agency has the discretion to determine whether to reward a whistleblower whose information leads to the detection or cases on improper conduct or prosecution against persons who commit

improper conduct or detrimental action in breach of s.10 (1) WPA 2010. It is not expressly provided in the WPA 2010 as to the amount to be paid or where the payment of the reward would come from. The legal position in relation to whistleblower protection in Malaysia is also different from the law in England and US in many different aspects. The advantages of the Malaysian position compared to the other two jurisdictions would be discussed first. The scope of protection on the kinds of information to be disclosed is wider compared to the English and US position as the 'disciplinary offence' under the WPA 2010 includes breach of code of conduct and ethics. Out of the three jurisdictions (England, US and Malaysia), only the WPA 2010 extends protection to persons related to or associated with the whistleblower. Moreover, only the WPA expressly allows for relocation of place of employment of the whistleblower or persons related or associated with him. Besides, the WPA 2010 also expressly provides that no legal action (civil or criminal) can be taken against the whistleblower. Arguably, a whistleblower could not be sued for defamation if the information that he provides to an enforcement agency turns out to be untrue. The English position and the US position are silent on this issue. To further encourage the activity of whistle-blowing, the WPA 2010 imposes a duty on the enforcement agency to investigate any disclosure of improper conduct and complaint of detrimental action taken against the whistleblower.

The WPA 2010 also imposes a duty on the appropriate disciplinary authority or the employer to report to the enforcement agency as to the steps that they have taken to give effect to the finding and recommendation of the enforcement agency or reasons of their failure to take any action. Such provisions in WPA 2010 ensure that any disclosure of improper conduct or complaint made by a whistleblower would be acted upon. There are various provisions in the WPA 2010 which guarantee the right of the whistleblower to be informed as to the outcome of the enforcement agency's investigation, particularly, if the disclosure of improper conduct is not substantiated or the relevant bodies (Public Prosecutor, appropriate disciplinary authority or employer) fail to take any action in relation to the enforcement agency's finding and recommendations. Furthermore, the WPA 2010 is unique compared to the ERA 1996 and the United States position as it makes it an offence to obstruct an authorized officer in the performance of his duties under the WPA 2010, to destroy, falsify any document or thing relevant to an investigation under the WPA 2010 and to abet or attempt to commit any offences under the WPA 2010 in order to strengthen the investigation and detection of improper conduct. There are also a number of weaknesses in the WPA 2010 compared to the ERA 1996 or the SOX 2002. First, the WPA 2010 only offers protection where the disclosure of improper conduct is made to an enforcement agency. As a consequence, a whistleblower would not receive any protection from the

WPA 2010 if his disclosure is made to his employer or in the course of seeking legal advice. Such outcome is unfortunate as employees may wish to report any improper conduct internally within the organisation in which he is working for rather than to go to an external body such as an enforcement agency, particularly if they are not very sure as to whether the information that they have may lead to a violation of the law. According to Lewis (2011), research shows that the employees who resort to internal whistle-blowing have higher level of trust in the management of the employer rather than employees who resort to external whistle-blowing. This strengthens the argument that the WPA 2010 should be extended to protect employees who whistle-blow internally.

Such protection would build up the employees' trust and confidence on their employer which is vital for any successful implementation of a whistle-blowing policy and to inculcate a change in the corporate culture towards integrity, openness and transparency within a corporation. This is one of the best ways for corporations to 'keep out of legal trouble' as any wrongdoing can be detected and dealt with as early as possible (Meinert, 2011). At present, the WPA 2010 does not impose a requirement on corporations to introduce a whistle-blowing policy in its organization. But the Corporate Governance Guide issued by Bursa Malaysia (the Malaysian Stock Exchange) states that listed companies should ensure that appropriate whistle blowing policies are in place to allow and encourage employees to raise any concerns of misdemeanours in the company. As such, in relation to the same piece of information, the protection afforded to the whistleblower is different depending on whom he discloses the information to. If the information is disclosed to an enforcement agency, he is entitled to the remedies under WPA 2010 in the event that he suffers any reprisal as a result of his 'protected disclosure'. However, if the disclosure is made to his employer, his remedies for any reprisal actions would be under employment law or contract law. Furthermore, a whistleblower may wish to know more about the scope of WPA 2010, particularly the concern as to whether any disclosure of information that they make would be protected. It may be unavoidable that incriminating information may be disclosed during the process of seeking legal advice as to their position. The legislation protecting disclosure of information relating to improper conduct in both the public and private sector in other countries allows the disclosure to be made to a number of different sources. There is no reason why Malaysia should not adopt the same approach.

Another criticism of the WPA 2010 is on the list of situations in which the whistleblower protection could be revoked by an enforcement agency. According to s.11 WPA 2010, the whistleblower is not entitled to protection if he participates in the wrongdoing which he complains of. It is logical and fair that a whistleblower who is also a

wrongdoer should receive the necessary punishment for his own wrongdoing. However, the whistleblower's own wrongdoing should not deter him from getting any protection under the WPA 2010 if he is subject to additional detrimental action taken by his superior over and above the necessary punishment that he should suffer as a result of his own wrongdoing. The fact that the wrongdoer regrets over his own action, repents and is willing to co-operate with the enforcement agency to expose the wrongdoing should act as a mitigating factor from denying him total protection under the WPA 2010. Section 11 also excludes protection to a whistleblower whose motive is to avoid dismissal or other disciplinary action. It is contended that there are times where a whistleblower may require some added incentive in order to blow the whistle besides the motive to be ethical or conscionable. This is due to the fact that in ordinary circumstances, an individual may not be willing to whistle-blow as this act may be seen as an act of disloyalty to his fellow colleagues or superior. Therefore, the motive for making a disclosure of information should not ordinarily be relevant to revoke whistleblower protection (Lewis, 2010). What is more important is the ability of the enforcement agency to prevent or detect any wrongdoing as early as possible to minimize the losses or injuries caused. Besides, any disclosure of improper conduct which is frivolous or vexatious is excluded from protection under the WPA 2010.

The enforcement agency and the courts should be slow in determining that the improper conduct disclosed is frivolous or vexatious as different people may have different standard as to what is important or serious breach of the law. This is particularly so, as the definition of 'improper conduct' under WPA 2010 is widely drafted. There are also a number of areas in the WPA 2010 which require further clarification. First, the definition of 'detrimental action' refers to positive acts taken against the whistleblower. It would be an improvement to the WPA 2010 if it is expressly provided that 'detrimental action' also covers any failure to act similar to the position under the ERA 1996. Secondly, the WPA 2010 does not provide the time limit in which a whistleblower can complain to the enforcement agency that he has suffered from detrimental action as a result of his 'protected disclosure'. In England, the stipulated time is three months from the date the detrimental act or failure to act occurs. Similarly in the United States, under SOX 2002, an employee can file a complaint of any reprisal act within 180 days after the alleged wrongful act has occurred. If the SEC 1934 applies, the limitation period for a legal action taken by the employee is much longer as explained earlier. Thirdly, s.16 WPA 2010 imposes personal liability on those who take any detrimental action against the whistleblower on the ground of his 'protected disclosure'. It can be contended that employers should be made vicariously liable for their employees who are found liable for such wrongful acts similar to the position in

England. Imposing vicarious liability on the employers in this area of law will ensure that they take the necessary action to deter any detrimental act taken against the whistleblower. In addition, since employers often have 'deeper pockets', the whistleblower's claim to any judgment debt would most likely be satisfied.

CONCLUSION

In conclusion, the fact that many countries have enacted legislations to protect whistleblowers exemplifies the importance of whistle-blowing in promoting good governance within both the public and private institutions. Malaysia also shows its commitment in eradicating corporate fraud, corruption and misbehaviour through the enactment of the WPA 2010. However, there is still a bridging gap between whistleblower protection and good corporate governance practices in Malaysia compared to England and the United States. This is due to the shortcomings of the WPA 2010 in encouraging whistle-blowing in large corporations. One of the most important shortcomings to be overcome is the exclusion of internal whistle-blowing from the scope of the WPA 2010. Hopefully, the Malaysian Parliament would rectify this weakness of the WPA 2010 to ensure that the whistleblower protection in Malaysia would be on par with the international standards in this area. Strengthening whistleblower protection can contribute towards the strengthening of good corporate governance in Malaysia. This would prompt greater investors' confidence and attract a steady flow of investment funds into Malaysia (Low et al., 2011).

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END NOTE

1. The International Chamber of Commerce (ICC) issued Guidelines on Whistleblowing in 2008, the Organisation of Economic and Co-operation and Development (OECD) in its Guidelines for Multinational Enterprises of 2000 recommended that enterprises should refrain from taking any detrimental action against employees who report to the management of any wrongdoing and recently, in late April 2010, the Council of Europe Parliamentary Assembly has adopted a resolution to protect whistleblowers.
2. The activity of whistle blowing is particularly important in relation to large corporations because any violation of the law by them may lead to severe financial losses or physical harm to the public.
3. The discussion on the legal position in United States in relation to the whistleblower protection is limited to the discussion of the whistle blowing provisions in the Corporate and Auditing Accountability and Responsibility Act 2002, Securities Exchange Act 1934 and Consumer Financial Protection Act 2010 for the purposes of this article.
3. Section 43K ERA 1996 extends the definition of 'worker' to include among others, an independent contractor, agent and those who work as a person providing general medical services.
4. In *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] IRLR 38, the Employment Appeal Tribunal (EAT) distinguished between disclosure of information and allegation. Any allegation made by a worker would not fall within s.43B.
5. The information required under s.43B includes information where the wrongdoing has been committed, is being committed or likely to be committed. The word 'likely' means 'more probable than not'; *Kraus v Penna* [2004] IRLR 260.
6. [2007] EWCA Civ 174 obtained from www.bailii.com.
7. This includes someone who is authorized by the employer to receive the information; s.43C(2) ERA 1996. In *BP PLC v Elstone* [2010] IRLR 558, the EAT held that a person must be a 'worker' at the time he made the 'protected disclosure' in order to gain protection under s.43B. Furthermore, it does not matter if the wrongdoing complained of is in relation to another person or business entity other than his employer.
8. Section 43C ERA 1996.
9. Section 43D ERA 1996.
10. Section 43E ERA 1996.
11. The list of prescribed persons is provided in the Public Interest Disclosure (Prescribed Persons) Order 1999.
12. [2004] EWCA Civ 964 obtained from www.bailii.com.
13. *Woodward v Abbey National plc* [2006] 4 All ER 1209. In this case, it was held that it was unlawful for an employer to provide a bad reference in relation to his former employee as a result of the latter's whistle-blowing.
14. Section 48(1A) ERA 1996.
15. Section 48(3)(a) ERA 1996.
16. Section 48(2) ERA 1996.
17. *Cumbria County Council v Carlisle-Morgan* [2007] IRLR 314 (EAT).
18. Damages awarded due to breach of s.47B include compensation for injury to feelings. According to Lewis (2008) at 503, the tribunals in England had made some large compensatory awards due to breach of s.47B.
19. Clause 3.4. The predecessor to the UK Corporate Governance Code, i.e. the Combined Code of Corporate Government also contains similar provision as well.
20. Section 301 SOX 2002 makes it compulsory for each audit committee of
21. Clause 3.4. The predecessor to the UK Corporate Governance Code, i.e. the Combined Code of Corporate Government also contains similar provision as well.
22. Section 301 SOX 2002 makes it compulsory for each audit committee of public listed companies to establish procedures for whistle blowing.

23. The list of articles include Moberley (2007a) and (2007b), Dworkin, (2007) and Wiener, (2010).
24. Section 1001 Dodd-Frank Act.
25. Definition of employees include any agent, contractor or sub-contractor of the company.
26. Section 1514A(1).
27. *Collins v Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1376 (N.D. Ga. 2004).
28. Section 929A Dodd-Frank Act.
29. Section 1107 SOX 2002. Any person who is found guilty of this offence is subject to a fine or imprisonment of not more than 10 years or both.
30. Section 922 Dodd-Frank Act.
31. Section 922 Dodd-Frank Act.
32. The provisions relating to reward and protection for the whistleblowers under the Commodity Exchange Act 1936 as inserted by the Dodd-Frank Act (s.748) are in many ways similar to the Securities Exchange Act 1934 and would not be discussed in this article.
33. 'Original information' means information that is derived from the independent knowledge or analysis of a whistleblower, is not known to the omission from any other source and is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation or from the news media; s.922 Dodd-Frank Act.
34. This is defined as any 'judicial or administrative action brought by the Securities Commission under the securities laws that results in monetary sanctions exceeding USD 1,000,000; s.922 Dodd-Frank Act.
35. The CFPA 2010 applies to employees of institutions that extend credit, service or broker loans, provide real estate settlement services or provide financial advice to consumers.
36. There are also other legislation which provide protection to whistleblowers but these protection are not as comprehensive as the WPA 2010 and only apply in limited situations such as the Anti-Money Laundering Act 2001 (Act 613), Securities Commission Act 1993 (Act 498) and the Malaysian Anti-Corruption Commission 2009 (Act 694).
37. This refers to offences stated in s.174(8C)(b) CA 1965 such as an offence that is punishable by imprisonment for a term that is not less than two years or the value of assets derived or likely to be derived or any loss suffered by the company, member or debenture holder as a result of the commission of the offence exceeds RM 250,000 and includes offences under s.364, s.364A, s.366 and s.368 CA 1965.
38. S.368B CA 1965 was inserted into the CA 1965 by the Companies (Amendment) Act 2007 which took effect from 15 August 2007.
39. Section 4 CA 1965.
40. Section 368B(3) CA 1965.
41. There is no specific provision for the consequences of breach of s.368B(2) and (3) CA 1965. Thus, the general penalty provision in s.369 CA 1965 applies.
42. CMSA 2007 came into effect on 28 September 2007.
43. Section 2 CMSA 2007 provided that 'chief executive' means the principal executive officer of the corporation for the time being, by whatever name called, and whether or not he is a director.
44. Section 321(3) CMSA 2007 means a person who holds the position of company secretary in the corporation.
45. Section 321(1)(a) and (b) CMSA 2007.
46. Section 321(1) CMSA 2007.
47. Again, there is no specific provision for the consequences of breach of s.321(1) and (2) CMSA 2007. Thus, the general penalty provision in s.372 CMSA 2007 applies.
48. The defence available under s.367(1) CMSA 2007 is to show that the offence was committed without the consent of the director, chief executive, officer or representative of the company as the case may be and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.
49. Section 2 WPA 2010 further defines 'disciplinary offence' as any action or omission which constitutes a breach of discipline in a public body or private body as provided by law or in a code of conduct, a code of ethics or circulars or a contract of employment.
50. Section 2 WPA 2010.
51. The Star, 11 January 2011, 'No Protection for Glory Seekers, says MACC'.
52. Section 3(2) WPA 2010.
53. Section 6(2)(b) WPA 2010.
54. Section 6(3) WPA 2010. But the officer receiving the information must as soon as possible reduce it in writing.
55. Section 2 WPA 2010.
56. Section 8 WPA 2010.
57. Section 8(4) WPA 2010.
58. For instance, in *Lion Laboratories Ltd v Evans* [1985] QBD 526, the Court of Appeal held that the defence of disclosure in the public interest in a legal action for breach of confidence is only available if the court is satisfied that the information 'was so important to the public as to outweigh the plaintiff's interests' to maintain the confidentiality of the information.
59. This includes any discrimination, discharge, demotion, suspension, disadvantage, termination or adverse treatment in relation to a person's employment and disciplinary action.
60. Section 2 WPA 2010.
61. Section 7(1) WPA 2010.
62. Section 10(2) WPA 2010.
63. Section 10(3)(a) WPA 2010.
64. Section 10(3)(b) WPA 2010.
65. Section 10(7) WPA 2010.
66. Section 21 WPA 2010 states that it is an offence to willfully disclose information which the whistleblower knows to be untrue or does not believe in its truth.
67. For instance, a whistleblower would not be entitled to any protection under the WPA 2010 if he discloses the information on improper conduct to more than one channel such as media and his friends. This is the advice provided by the investigation director of the Malaysian Anti-Corruption Commission (MACC) as reported in an article 'No protection for glory seekers, says MACC' in The Star, 11 January 2011. This is due to the fact that the information disclosed to an enforcement agency amounts to 'confidential information' and s.8(4) WPA 2010 makes it an offence for anyone to disclose such 'confidential information'.
68. Section 11(2) WPA 2010.
69. Section 11(3) WPA 2010. This entitles the whistleblower to apply for a judicial review to challenge the decision of the enforcement agency.
70. Section 13(1)(a) and 13(1)(c)(ii) WPA 2010.
71. Section 13(2) WPA 2010.
72. Section 13(3) WPA 2010.
73. Section 13(4) WPA 2010.
74. The powers of the courts in granting the remedies due to breach of s.10 WPA 2010 are found in s.18 WPA 2010. These include reinstatement of the whistleblower or to take or effect personnel action to restore him to the position which he would have been in but for the detrimental action. 'Personnel action' includes among others, promotion and performance evaluation.
75. Section 15(2) WPA 2010.
76. Section 43B(3) ERA 1996, s.806 Sarbanes-Oxley Act, s.6(1) WPA 2010.
77. The Official Secrets Act 1972 prohibited any disclosure of information which is classified by the government to be an 'official secret'.
78. This is expressly provided in both the ERA 1996 (s.43L(3)) and WPA 2010 (s.6(3)).
79. This is due to the phrase used in s.922 Dodd-Frank Act that the Commission 'shall pay an award' (emphasis added).
80. Section 26 WPA 2010. It was reported in the Malaysian newspaper, *The Star* (10 December 2010) that the Finance Ministry is formulating a reward system for informants under the WPA 2010.
81. The right to apply for relocation is provided if the requirements in s.19 WPA 2010 are satisfied.
82. An 'authorized officer' means any officer of an enforcement agency; s.2 WPA 2010.
83. Section 22 WPA 2010.
84. Section 23 WPA 2010.
85. Section 24 WPA 2010.
86. Para 1.17
87. This is so if the employer provides whistle-blowing policy in the Employees Handbook or Code of Conduct where such reprisal may amount to breach of employment contract. See further Moberley (2008) and Tan, P.M. and Ong, S.F (2010).
88. The ERA 1996 is a good example. Other legislations include Protected Disclosures Act 2000 (New Zealand), Protected Disclosures Act 2000 (South Africa), Protected Whistleblower Protection Act 2004 (Japan), Whistleblower Act 2006 (Ghana) and Whistleblowers Protection Act 2010 (Uganda).