

SECURING PROTECTION AND COOPERATION OF WITNESSES AND WHISTLEBLOWERS: PART II

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I. BACKGROUND

The Philippine government recognizes that graft and corruption are threats to the sustained growth and development of the country. It admits that initiatives against graft and corruption, which include administrative measures and legislative actions to enhance transparency and effectiveness of sanctions against corrupt behaviour, have fallen short of expectation.

By increasing the chances of discovering corrupt practices, whistle-blowing makes it costly to search for a corrupt partner. By enhancing the transparency and control, individual's actions done in behalf of a principal whistle-blowing may promote an individual's accountability and prevent the breakdown in principal-agent relations that happens when a corrupt act is committed.

The potential of whistle-blowing to cure corruption is slowly gaining recognition and support in the public and private sectors. In the Philippine Congress, several measures have been proposed to encourage whistle-blowing. Generally, these bills suggest that the exposure of wrongdoings in government will deter corruption, and therefore, should be encouraged by instituting measures that will protect whistleblowers from reprisals and harassment.

The motives for whistle-blowing and the lack of whistleblower protection have often lent controversy to whistle-blowing. Although whistle-blowing has been studied in considerable detail in developed economies, there is still lack of similar studies in the Philippine contexts. Cultural obstacles notwithstanding, whistle-blowing could be a promising anti-corruption practice in the Philippines. However, its adoption and eventual institutionalization requires an in-depth look into the existing political, social, cultural and legal structures that hamper and promote the practice, as well as the level of awareness and attitude towards whistle-blowing among direct stakeholders. In addition, any proposed measure towards its adoption should be carefully designed, factoring an inherent pitfalls alongside potential benefits.

II. AN ACT PROVIDING FOR PROTECTION, SECURITY AND BENEFITS OF WHISTLEBLOWERS

“Proposed Whistleblower Protection Act of 2011”

A. Salient Features

Public Office is a public trust. It is the policy of the State to promote and ensure full accountability in the conduct of its officers and employees, and exact full retribution from those who shall engage in improper conduct. Toward this end, the State shall:

- (A) Maintain honest and high standards of integrity in the public service;
- (B) Safeguard the national interest through the prosecution of corrupt and erring public officials and employees; and
- (C) Encourage and facilitate the disclosure of corrupt conduct and practices in the public service by providing benefits provided in existing laws.

B. Definition of Some Terms

“Whistleblower” shall refer to any person who has personal knowledge or access to any data,

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information, factor event constituting improper conduct; Provided that such person must not have any direct participation in such improper conduct, or in cases where such person participated in any improper conduct, such person is not the most guilty and shall therefore qualify as a state witness against the persons subject of such disclosure.

“Qualified Whistleblower” shall mean a whistleblower qualified and admitted into the Whistleblower’s Program of the Implementing Agency in accordance with this Act and its implementing rules and regulations.

“Acts constituting improper conduct” shall mean any act or omission of a public officer or employee solely, or in cooperation, conspiracy with, or with the assistance of, private persons which is covered by or constitute a violation of:

- (1) Presidential Decree No. 46 otherwise known as “Making it punishable for Public Officials and Employees to receive, and for Private persons to give, gifts on any occasion, including Christmas;”
- (2) Republic Act No. 3019 otherwise known as “Anti-Graft and Corrupt Practices Act;”
- (3) Republic Act No. 6713 otherwise known as “An Act Establishing a Code of Conduct and Ethical Standards for Public Officials and Employees;”
- (4) Republic Act No. 7080 otherwise known as the “Anti-Plunder Law;”
- (5) Title VII of Book Two of the Revised Penal Code on Crimes Committed by Public Officers; and
- (6) All other laws which penalize or sanction any act or omission of a public officer or employee.

“Implementing Agencies or Agency” shall collectively or individually refer to the Department of Justice (DOJ), the Office of the Ombudsman, the Commission on Human Rights (CHR), and the Public Attorney’s Office (PAO).

C. SEC. 4. Coverage

Notwithstanding the provisions of law on prescription of crimes, this Act shall cover all acts constituting improper conduct irrespective of the time of commission.

D. SEC. 5. Admission/Qualification to the Program

Whistleblowers, whether from the public or private sector, shall be entitled to the benefits under this Act, provided, that all the following requisites concur:

- (a) The disclosure is voluntary, in writing and under oath;
- (b) The disclosure relates to acts constituting improper conduct;
- (c) The information to be disclosed is admissible in evidence;
- (d) The whistleblower appears to be not the most guilty;
- (e) The whistleblower is not a beneficiary of the act or acts of improper conduct in the amount of more than One Million Pesos (Php 1,000,000.00) or any kind of consideration of the same value.

It is only upon concurrence of the above requisites can a whistleblower be qualified and thus admitted in to the program as provided for in this Act.

E. SEC. 6 Necessity of Testimony

The testimony of a whistleblower in court shall not be necessary for the entitlement of the benefits and protection under this Act. In the event that the whistleblower’s testimony is required as found by the Implementing Agency to be necessary and indispensable for a successful investigation or prosecution of a case, he/she shall be entitled to the additional benefits and protection under Republic Act 6891, otherwise known as the “Witness Protection, Security and Benefit Act”, funding for which shall be sourced from the budget as provided under Section 32 hereof.

F. SEC. 7 Credibility of a Whistleblower

In all cases, the fact of the entitlement of the qualified whistleblower to the protection and benefits

provided in this Act shall not be admissible in evidence to diminish or affect his credibility.

G. SEC. 8 Perpetuation of Testimony

Once admitted into the program, a whistleblower may perpetuate his/her testimony pursuant to Rule 134 of the Revised Rules of Court.

H. SEC. 9 Memorandum of Agreement with the Whistleblower

Before a person is provided protection and benefits as a whistleblower for the State, he/she shall first execute a Memorandum of Agreement with the Implementing Agency which shall set forth his/her responsibilities including the following:

- (a) To provide information to and testify before all branches or agencies of government appropriate proceeding on facts constituting improper conduct;
- (b) To avoid a commission of a crime;
- (c) To take all necessary precautions to preclude detection by others of the facts concerning the protection provided him/her under this Act;
- (d) To cooperate with respect to all reasonable requests of officers and employees of the government who are providing him/her protection under this Act; and
- (e) To regularly inform the appropriate program official of his/her current activities and address.

I. SEC. 10 Breach Memorandum of Agreement

Substantial breach of the Memorandum of Agreement provided for in Section 9 hereof, shall be a ground for termination of the protection and benefits provided under this Act. Provided, however, that before terminating the same the Implementing Agency shall send notice to the qualified whistleblower concerned, stating therein the reason for such termination.

Provided, finally, that substantial breach of the Memorandum of Agreement shall be punishable by imprisonment of not less than six months but not more than one year independent and separate from any other criminal liability that may be incurred by reason of such breach.

J. SEC 11. Confidentiality

Except insofar as allowed by this Act, during and after this disclosure, and throughout and after any proceeding taken thereafter, a whistleblower is entitled to absolute confidentiality as to:

- (a) His/her identity;
- (b) The subject matter of his/her disclosure; and
- (c) The person to whom such disclosure was made.

There shall be no such confidentiality in his/her identity if a whistleblower makes a public disclosure of a conduct constituting improper conduct unless, notwithstanding such public disclosure, he/she has taken means and measures obviously intended to preserve his/her anonymity.

K. SEC. 12 Confidential Information

No person to whom a disclosure has been made or referred shall divulge any information that may identify or tend to identify a whistleblower or reveal the subject matter of such disclosure, except only as to the following circumstances:

- (a) The whistleblower consents in writing prior to a disclosure of an information;
- (b) The disclosure is indispensable and essential as determined by the Implementing Agency, taking into consideration the necessary proceedings to be taken after the disclosure; or
- (c) The disclosure or referral is made pursuant to an obligation under this Act. The prohibition on disclosure under this Section shall apply to any person who has become privy to any confidential information, whether officially or otherwise.

L. SEC. 13 No Breach of Duty of Confidentiality

A whistleblower who has made a disclosure under this Act on whom a provision of law, regulation, issuance, practice or other convention, imposes upon him/her a duty to maintain confidentiality with respect to any information disclosed, is considered not to have committed a breach thereof.

M. SEC. 16 False and Misleading Disclosures

A whistleblower who deliberately and voluntarily gives false or misleading information in connection

with acts or omissions constituting improper conduct shall be guilty of an offense and shall suffer the penalty of imprisonment of not more than two years and perpetual absolute disqualification from holding public office, in case of public officer or employee without prejudice to other liabilities under existing laws.

N. SEC. 17 Protection against Disciplinary Action or Reprisals

A whistleblower who has made or is believed or suspected to have made a disclosure under this Act is not liable to disciplinary action for making said disclosure.

Prohibited acts under this section include retaliatory action in a workplace or prejudicial conduct towards a whistleblower, such as: discriminatory actions behind policies and procedures, reprimand, punitive transfers, unwarranted referral to a psychiatrist or counselor, and undue poor performance reviews. Other prejudicial actions include obstruction of an investigation, withdrawal of essential resources, undue reports and the attachment of unfair personnel file notes.

To this end, any employer who shall discourage and impose sanctions or reprisals based on workplaces interaction, which shall include workplace ostracism, questions and attacks on motives, accusations of disloyalty and dysfunction, public humiliation, and the denial of work or promotion, or who encourages, causes or does retaliatory action or reprisal against the whistleblower or anyone believed or suspected to be one shall be liable for an offense defined under this Act.

Any employee who refuses to follow orders of employers that would cause them to violate any provision of this Act shall likewise be protected from reprisals and retaliatory action in the workplace.

For purposes of this protection, an applicant for employment shall be deemed an employee and entitled to such protection.

Provided however, that an employer of a whistleblower shall be notified through a certification issued by the Implementing Agency within a period of 30 days, from the date when the whistleblower last reported for work. Provided further that an employer shall have the option to remove said whistleblower from employment after securing a clearance from the Civil Service Commission and the Department of Labor and Employment, whichever the case may be, in case of a prolonged absence due to transfer or permanent relocation under this Act or RA 6891.

O. SEC. 18 Protection against other Actions

A whistleblower who has made a disclosure under this Act shall not be subject to any liability whether administrative, civil, criminal for making such disclosure. No action, claim or demand may be taken against a whistleblower for making such disclosure, nor any evidence presented shall be use against him/her in court.

This protection shall also operate as immunity in favor of a whistleblower against any action or proceeding taken against him/her by reason of his/her disclosure.

Provided however, that the whistleblower appears to be not the most guilty.

P. SEC. 23 Financial Rewards for Whistleblowers

A qualified whistleblower shall be entitled to a corresponding monetary reward on a contingency basis, equivalent to at least ten percent of the amount which may be recovered or the amount of one million pesos (Php 1,000,000.00), whichever is lower, as a result of his/her disclosure.

Q. SEC. 28. Powers and Functions of the Implementing Agencies or Agency

In addition to their respective powers and functions under existing laws, the Implementing Agencies shall:

- (a) Supervise, monitor and coordinate all efforts relative to the implementation and enforcement of the provisions of this Act;
- (b) Investigate all disclosures made under this Act, prosecute or recommend prosecution of the same when warranted;

- (c) Evaluate the qualification of whistleblowers for coverage within this Act, and whichever the case may be, make the appropriate decision on their entitlement to the benefits and security and protection extended herein;
- (d) Undertake, in coordination and cooperation with the private and public sectors, an information campaign to educate the public on the provisions and benefits of this Act;
- (e) Develop plans and implement programs to further encourage whistleblowers on acts constituting improper conduct with a view to effective deterrence and/or prosecution;
- (f) Control and administer, through coordination and consistent with the provisions and purpose of this Act, the protection and benefits of whistleblowers and the funds necessary to carry out the provisions of this Act;
- (g) Call upon, or deputize and department, bureau, office or any other government agency or public official to assist in the effective implementation and enforcement of this Act; and
- (h) Grant immunity in accordance with the provisions of this Act and its implementing rules and regulation.

III. CONCLUSION

Today, witness protection is viewed as crucial in combating organized crimes. In the investigation and prosecution of crimes, particularly the more serious and complex forms of organized crime, it is essential that witnesses have trust in the criminal justice system. This is the cornerstone of successful investigation and prosecution.

Experiences have shown that witnesses can turn hostile during crucial court proceedings due to threats, coercion and monetary considerations and other innumerable corrupt practices ingeniously adopted to smother and stifle truth. As we require observance of the laws by our citizens, let us also provide them with equal assurance of security and protection necessary to counteract the peril of being hunted or harassed by anti-social elements.

In the Philippines, witness and victim protection programmes are formal systems designed to provide full range of physical protection, psychological support and other assistance to its beneficiaries. However, it should be emphasized that witness and victim protection cannot be viewed in isolation, rather, as a crucial part of a comprehensive system designed to effectively investigate and prosecute perpetrators of crimes, including even human rights violations. Protection measures will be ineffective if other parts of the criminal justice system do not function well. Every step of the process, from investigation to conviction and punishment should be analysed. Possible risks to witnesses should be identified and reforms should be made to limit those risks.

The issues related to whistleblower legislation are quite complex. The question of witness protection, for example, though not an obvious consideration, might arise in situations where a whistleblower becomes a witness in proceedings relating to the information disclosed. Particularly, the widespread hostility towards individuals perceived as informers. This heightens the need for members of the public to be assured that adequate safeguards are implemented to secure their protection. An important advantage of having whistleblower legislation is its tendency to foster development of internal mechanisms for handling disclosure of wrongdoings within organizations, as this helps increase accountability and transparency. Furthermore, whistleblowers whose exposes led to the prosecution of corrupt officials will be granted immunity from administrative, civil or criminal liability and provided some form of financial assistance.

Since there is no such law in the Philippines, certain adjustments may be needed to the existing witness protection and legal aid schemes in order to provide much needed support to whistleblowers. The speedy enactment of the pending Whistleblower's Bill by the Philippine legislature would certainly be a welcome development.