

SECURING PROTECTION & COOPERATION OF WITNESSES AND WHISTLE-BLOWERS

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I. INTRODUCTION

In our effort to ensure successful prosecution of organized crime and corruption, in Malaysia we have various laws and systems in place to protect witness and whistleblowers.

They are namely:

- a) Abduction and Criminal Intimidation of Witnesses Act 1948 (Act 191)
- b) Witness Protection Act 2009 (Act 696)
- c) Whistleblower Protection Act 2010 (Act 711)
- d) Pleas in mitigation [S. 176 (ii) (r) Criminal Procedure Code (Act 593)]
- e) Plea bargaining [S.172C Criminal Procedure Code (Act 593)]

Witness protection is given utmost priority in our criminal justice system. This is evidently clear as it is being emphasized by the British colonial administration through the enactment of the Abduction and Criminal Intimidation of Witnesses Act 1947 (Ordinance no. 26 of 1947). We become a sovereign state after gaining independent from Great Britain on the 31st August 1957 and the law continued to serve our criminal justice system effectively. Then in 1977 it was revised by Act No.191 which became effective from 1 October 1977.

Then in 2009 a specially dedicated Witness Protection Act 2009 was enacted as Act No. 696 by our parliament. This follows by Whistleblower Protection Act 2010 (Act No.711) as it was published in the Gazette on 10 June 2010.

Besides the above mentioned three Acts, there are provisions in our Criminal Procedure Code (Act 593) which provide for pleas in mitigation and plea bargaining.

II. WITNESS PROTECTION

A. Legislation

Witness Protection Act 2009 (Act 696) is a piece of legislation specially enacted in order to give protection to a threatened witness, before, during and after a trial, by a specially formed Witness Protection Unit, an agency under Prime Minister's Department. The Act was passed by the Parliament of Malaysia and given Royal Assent on 18 April 2009. Then it was published in the Gazette on 30 April 2009. This Act will come into operation on a date to be appointed by the Minister by notification in the Gazette.

B. Objectives

The objective of the Witness Protection Act 2009 is to establish a programme for the protection and assistance of witnesses or participants and for other matters connected therewith. It also covers high risk informers as a result of their assistance in a criminal investigation. Witness protection is usually required in trials against organized crime, where law enforcement sees a risk for witness to be intimidated by colleagues of defendants or accused persons.

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C. Interpretation

In this Act, unless the context otherwise requires –

- “enforcement agency” includes a body or agency that is responsible for the enforcement of laws relating to the prevention, detection and investigation of any offence;
- “Register” means the Register of Participants;
- “Director General” means the Director General of Witness Protection;
- “Minister” means the Minister charged with the responsibility for Witness Protection Programme;
- “Registrar” means the registrar of Witness Protection;
- “participant” means a witness who has been included in the Programme;
- “public authority” means the public authority as defined in Clause (2) of Article 160 of the Federal Constitution;
- “Programme” means the Witness Protection Programme established under this Act;
- “criminal proceeding” includes any criminal trial or inquiry before a court or tribunal having criminal jurisdiction, an inquest or inquiry into death and a police investigation under the Criminal Procedure Code [Act 593], and any investigation by any other authority under any written law;
- “witness” means –
 - a) a person who has given or who has agreed to give evidence on behalf of the Government in a criminal proceeding;
 - b) a person who has given or who has agreed to give evidence, otherwise than as mentioned in paragraph (a), in relation to the commission or possible commission of an offence;
 - c) a person who has provided any information, a statement or assistance to a public officer or an officer of a public authority in relation to an offence;
 - d) a person who, for any other reason, may require protection or assistance under the Programme; or
 - e) a person who, because of his relationship to or association with any of the persons referred to in paragraphs (a) to (d), may require protection or assistance under the programme.

D. Scope of Protections

The Director General shall take such actions, as he considers necessary and reasonable, to protect the safety and welfare of a participant.

The action may include –

- a) providing accommodation for the participant;
- b) relocating the participant;
- c) applying for any document necessary to allow the participant to establish a new identity;
- d) providing transport for the transfer of the property of the participant;
- e) providing payment equivalent to the remuneration that the participant was receiving before being included in the Programme including any increment to the remuneration which the participant would have been entitled to, if he was not included in the Programme;
- f) where the participant is unemployed before being included in the Programme, providing payments to the participant for the purpose of meeting the reasonable living expenses of the participant including, where appropriate, living expenses of the family of the participant and providing, whether directly or indirectly, other reasonable financial assistance;
- g) providing payments to the participant for the purpose of meeting costs associated with relocation;
- h) providing assistance to the participant in obtaining employment or access to education;
- i) providing other assistance to the participant with a view to ensuring that the participant becomes self-supporting; and
- j) any other action that the Director General considers necessary.

E. Effectiveness

As Witness Protection Act 2009 (Act 696) is a new Act which creates a new government agency to implement it, it is now in the process of setting up its own office and making various appointments. The Act will come into operation on a date to be appointed by the Minister by notification in the Gazette soon (December 2010). Therefore at the moment it is not possible to gauge the effect of the Act to the criminal

justice system in Malaysia. But it is no doubt that it will definitely give a positive impact in protecting and assisting witnesses and informers in Malaysia in future.

III. WHISTLE-BLOWER PROTECTION

A. Legislation

Another milestone in the effort to enhance the criminal justice system in Malaysia is the enactment of Whistleblower Act 2010 (Act 711). The Act was enacted by the Parliament of Malaysia and given Royal Assent on 2 June 2010. Then it was published in the Gazette on 10 June 2010. The Act will come in force on a date to be appointed by the Minister by notification in the Gazette (on a later date).

B. Objectives

The objectives of the Whistleblower Protection Act 2010

- a) To combat
Corruption and other wrongdoings by 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 matters disclosed to be investigated and dealt with; and
- d) To provide for other matters connected therewith

C. Interpretation

In this Act, unless the context otherwise requires –

“Enforcement agency” means –

- a) any ministry, department, agency or other body set up by the Federal Government, State Government or local government including a unit, section division, department, agency or body, conferred with investigation and enforcement. Functions by any written law or having investigation and enforcement powers;
- b) a body established by Federal Law or State Law which is conferred with investigation and enforcement function by that Federal Law or State Law or any other written law; or
- c) unit, section, division, department, agency of a body established by a Federal Law or State Law having investigation and enforcement functions;

“Public Body” includes–

- a) the Government of Malaysia.
- b) the Government of State.
- c) Any local authority and any other statutory authority.
- d) Any department, service or undertaking of the Government of Malaysia, the Government of a State, or local authority; and
- e) Any company or subsidiary company over which any public body as is referred to in paragraph (a),(b),(c) or (d) has controlling power or interest.

- “Private Body” means an office entity other than public body;
- “Improper Conduct” means any conduct which proved, constitutes a disciplinary offence or criminal offence;
- “Disciplinary Offence” means any action or omission which constitutes a breach of discipline in public body or private body as provide by law or in a code of conduct, a code of ethics or circulars or a contract of employment, as the case may be.
- “Authorized officer” means any officer of any enforcement.
- “Whistleblower protection” means protection conferred to a whistleblower under this Act
- “detrimental action” includes–
 - a) act of causing injury, loss or damage.

- b) Intimidation or harassment.
- c) Interference with the lawful employment or livelihood of any person, including discrimination, discharge, demotion, suspension, disadvantage, termination or adverse treatment in relation to a person's employment, career, profession, trade or business or the taking of disciplinary action; and
- d) A threat take any of the actions referred to in paragraphs (a) to (c)

D. Scope of Protections

A whistleblower shall, upon receipt of the disclosure of improper conduct by any enforcement agency, be conferred with whistleblower protection under this Act as follows:

- a) protection of confidential information;
- b) immunity from civil and criminal action; and
- c) protection against detrimental action (the protection shall be extended to any person related to or associated with the whistleblower).

E. Effectiveness

Whistleblower Protection Act 2010 is a new law, it will comes into operation on a date to be appointed by the Minister by notification in the Gazette (in the future), therefore it effectiveness is yet to be measured but it is no doubt that it will bring a positive effect in combating corruption and other wrongdoing in Malaysia.

IV. IS “OBSTRUCTION OF JUSTICE” CRIMINALIZED?

A. Legislation

The answer is yes! “Obstruction of justice” is a criminal act in Malaysia.

Abduction and Criminal Intimidation of Witnesses Act 1947 (Act 191) is an Act enacted to handle this issue. It was first enacted in 1947 (ordinance no. 26 of 1947) and then it was revised in 1977 (Act 191 with effect from 1 October 1977).

B. Objectives

This Act is to provide enhanced punishments for the offences of abduction and criminal intimidation in certain circumstances.

C. Interpretation

In this act, unless the subject or context otherwise requires –
“criminal proceeding”

Includes any criminal trial or inquiry before a court or tribunal having criminal jurisdiction, and inquest an inquiry into a death, and a police investigation under the Criminal Procedure Code [Act 593]

For the purpose of this Act, the course of justice is impeded if any person from whom is required any evidence testimony, statement or information in or for the purpose of any criminal proceeding, ceases to be available to give such evidence, testimony, statement or information, or with holds such evidence, testimony, statement or information, or gives or fabricates false evidence.

D. Effectiveness

It is important piece of legislation in Malaysia which keep “obstruction of justice” at check ever since it was enacted in 1947. Offenders are punished appropriately.

E. Punishment

It provide four types of offences/punishments for –

Section 3. Offence

Abduction with intent to commit

Punishment

Shall be punished with imprisonment for a term which may extend to fourteen years and shall also be liable to fine.

Section 4. Offence

Abduction impeding the course of justice

Punishment

Shall be punished with imprisonment for a term which may extend to fourteen years and shall also be liable to fine.

Section 5. Offence

Criminal intimidation to impede the course of justice

Punishment

Shall be punished with imprisonment which may extend to ten years and shall also be liable to fine.

Section 6. Offence

Abetments and attempts.

Punishment

Shall be punished with the punishment provided for that offence.

V. SYSTEM OF MITIGATION OF PUNISHMENT

A. Mitigation Factors

Section 176 (ii) (r) of the Criminal Procedure Code [Act 593] makes specific reference to mitigating factors. Among the accepted factors in mitigation of punishments after he is found guilty by the court and before passing sentence is the accused cooperation with the police (investigation stage) and the plea of guilty (prosecution stage).

The provision of mitigation may be regarded as a further safeguard to the accused.

B. Immunity Granted

There is a provision under Article 145 (3) of the Federal Constitution of Malaysia which stated that the Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings before a Syariah court, a native court or a court – martial.

C. Is it Effectively Utilized?.

Yes! It is effectively utilized in Malaysia. Mitigation of punishment is for the court to consider while the question of immunity is up to the Public Prosecutor to decide. But both are important instrument in securing cooperation of key witnesses, including accomplice witnesses.

D. Plea Bargaining

It is the latest amendment to the Criminal Procedure Code (Act 593). Section 172C provides for plea bargaining which can be done at any time before the commencement of the trial.

Two areas where plea bargaining are allowed –

- a) On the choice of the charge; or
- b) On the quantum of punishment

Accused plea guilty after the process of plea bargaining is considered as cooperation rendered and therefore he is entitled for a leniency to the sentence.

VI. STATISTICS/CASES

A. Witness Protection Programmes

Not in operation yet, therefore no statistic or sample case available.

B. Whistle-blower Protection Law

Not in force yet, therefore no statistic or sample case available.

C. Obstruction of Justice

There were cases and accused person being convicted under the Abduction and Criminal Intimidation of Witnesses Act 1947, especially under section 5, that is “criminal intimidation to impede the course of justice”, but the statistic is very low because the existing law has successfully act as a deterrent to the likely offender.

D. Mitigation of Punishment or Immunity

There is no statistic available but it is widely practice in Malaysia in order to secure cooperation from key witnesses, as where as, it is allowed by the law.

VII. CONCLUSION

Malaysia is always keeping abreast with the international community by having an effective instrument of laws to protect and assist witnesses and whistleblowers in order to secure their cooperation. These important elements of Good Governance is enshrined in Malaysia since 1947 until today. It formed a vital part in our criminal justice system which managed to keep “obstruction of justice” at bay.