Chapter 9
The Whistleblowing Dilemma in Malta Continues: A Personal View and Analysis

David Fabri

Abstract For many years, Malta did not have a law which specifically dealt with whistleblowing. No law acknowledged or defended whistleblowers. As in other countries, whistleblowers in Malta have generally faced great difficulties and suffered retaliation for their deeds. A few years ago, whistleblowing was acknowledged in a few provisions in employment law but these were rather incomplete and were not supported by any proper structure. After a number of false starts, the Maltese Parliament finally passed a 'Protection of Whistleblowers Act' in 2013. This was the first ever comprehensive law on the subject; but is it good enough and do whistleblowers feel safe now? The writer argues that the law does not protect all disclosures and various onerous conditions have been imposed in the law. A prospective whistleblower should seriously consider his position before reporting wrong-doing or corruption in his work place. This chapter concludes that in Malta, despite the recent 2013 Act, whistleblowing remains a very risky and thankless decision.

A Personal Introduction

My long-standing interest in whistleblowing and whistleblowers probably started with the startling discovery that the well-known whistleblower Stanley Adams was actually Maltese and that his original Maltese surname had been Formosa.[1]

I addressed the issue of whistleblowing for the first time in a public forum in 1997 at a Malta Bankers Union annual conference on issues in financial services.[2] It was well received. Re-invited the following year, I prepared a formal paper on

[1] He wrote a book on his misadventures, see S Adams, *Roche* versus *Adams* (London, Jonathan Cape, 1984).

[2] The financial services industry in Malta was then still taking off.

D. Fabri (✉)
Commercial Law Department, University of Malta,
Msida, MSD 2080, MALTA
e-mail: david.fabri@um.edu.mt

'White Collar Crime – a Regulator's Perspective'[3] which concluded that 'whistleblowers find little protection, let alone gratitude under our law' and that laws provided no comfort to persons who make disclosures, even where these may be in the public interest. Reference was made to scattered rules in the legislation which made certain reporting requirements to the authorities obligatory, describing them as 'useful provisions, but they are far from enough, and their scope is very limited.' The conclusion was that 'local reality with regard to whistleblowers is a negative one' and the paper suggested that 'The State should therefore accept responsibility for devising mechanisms and structures whereby employees and officials could – for the benefit of the public interest and without fear of reprisals or other risks – make disclosures relating to illegal activity.' This objective could be achieved by amending the various laws or by 'formulating a new law exclusively dedicated to regulating all the various aspects and implications of the matter in a comprehensive manner.' That was 1998, still very early days, but the media picked it up.[4]

Later that same year, and just before general political elections were to be held, the same theme was pursued in an article in Malta's leading Sunday paper concerning corruption and whistleblowing. This time I wrote:

> Briefly, our legal system has been largely unappreciative of *bona fide* whistle-blowers; it is inefficient by repeatedly ignoring them as a potential source of vital information, and it intimidates them with the risk of criminal or civil proceedings or other retaliatory measures such as dismissal for their unauthorized disclosure of secrets.[5]

The article concluded by re-iterating 'the duty of a democratic society to recognize a public interest in whistleblowing', and the doubt 'whether a determined political will exists to put in place efficient measures to uncover political corruption and fraud and to identify and punish the culprits.'[6]

For many years Malta did not have a law which dealt specifically with whistleblowing and no law acknowledged or defended whistleblowers. Some limited scattered attempts in various laws regulating particular activities sought to protect certain disclosures, but these were incomplete and rather patchy and did not remedy the general position of potential whistleblowers. In this scenario, it will come as no surprise that whistleblowers in Malta have over the years faced a tough time and have received little sympathy or recognition from the authorities.

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[3] Malta Union Of Bank Employees Annual Conference held on the 22 July 1998.

[4] G Cini, 'White collar crime conference' (23 July 1998) *The Times (Malta)*, p. 17.

[5] D Fabri, 'Political corruption, prescription and whistleblowing' (30 August 1998) *The Sunday*

The 2013 Law

Whistleblowing is today regulated specifically for the first time, thanks to the 'Protection of Whistleblowers Act' introduced in 2013.[7]

This law establishes a number of specific procedures in terms of which employees may disclose information regarding improper practices by their employers or other employees. It purports to protect employees who make such disclosures from what is termed as 'detrimental action'. This is the first comprehensive law on the subject in Malta. The law is very recent and is uncharted territory; years will have to elapse before one can assess whether the law has had a positive effect on whistleblowing and on the collection of information about wrongdoing in public offices. To date, there have been no actual published cases of whistleblowing and of people specifically seeking protection under this new law.

A previous attempt to pass a law was initiated in 2010 when a Bill, 'The Protection of the Whistleblower Act', 2010[8] was presented by Dr Tonio Borg, then still a Minister under the Nationalist administration. That Bill stalled and did not become law. It was eventually superseded and replaced by Act No. VIII of 2013 passed by the new Labour government elected to power that same year.[9]

The Act applies to employees in both the public and private employment sectors. Employees include former employees and persons conducting voluntary work. Although self-employed persons are not specifically referred to in the Act, the law applies to a 'contractor or sub-contractor who performs work or supplies a service'.[10] This would seem not to exclude self-employed persons from receiving protection under this law in the appropriate circumstances.

This paper highlights the provisions of the Act which may create the highest risks for whistleblowers. Before proceeding further, it would be useful to set out a summary of the provisions of the Act (Table 9.1).

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[7] Act No. VIII of 2013, July 2013, Chapter 527 on the Laws of Malta. It was brought into force on 15th September 2013 and is available online at www.justiceservices.gov.mt/LOM.aspx?pageid=24.

[8] Bill No. 58 of 2010.

[9] J Ameen, 'Whistleblower Bill by end of the year: two electoral promises' (24 August 2009) *The Times*; N Grima, 'Whistleblower Bill presented' (1 October 2010) *The Malta Independent* (front page article); K Sansone, 'Draft law strives to protect whistleblowers' (1 October 2010) *The Times (Malta)* (front page article). See also brief review by Björn Rohde-Liebenau (Transparency International, November 2013, pp 63–65) section on Malta in *Whistleblowing in Europe: Legal protections for whistleblowers in the EU*. This refers to an earlier report by the same writer (Transparency International, November 2012) *Providing an Alternative to Silence: Towards Greater Protection and Support for Whistleblowers in the EU. Country Report: Malta*. These coun-

Table 9.1 Protection of the Whistleblower Act 2013

Article 1	Title of the act and entry into force
Article 2	Definitions (25 terms covering four pages, including important definitions of 'detrimental action', 'employees', 'improper practice', 'occupational detriment', 'whistleblower')
Article 3	Prohibits detrimental action against whistleblowers
Article 4	Grants whistleblowers immunity from civil and criminal liability
Article 5	Withdraws immunity from a whistleblower who was an accomplice or perpetrator but allows a court to mitigate punishment or damages against him in certain cases, and establishes a procedure how the mitigation is managed and by whom
Article 6	Establishes the duty to protect the identity of the whistleblower
Article 7	Grants a whistleblower the right to sue for the removal of a detrimental action and obtain a remedy, including moral and other damages
Article 8	Recognizes the right of a whistleblower to compensation for any detrimental action he may have suffered
Article 9	Defines protected disclosures: requires that the disclosure be made in good faith and not made for personal gain, and that the alleged improper practice is substantially correct; false allegations are punishable as a criminal offence
Article 10	Law does not protect a breach of professional secrecy
Article 11	The law does not protect anonymous disclosures
Article 12	Employers are required to establish and to publish internal whistleblowing procedures to allow in-house disclosures
Article 13	Duty of whistleblowing officer to keep whistleblower updated
Article 14	Further regulates internal whistleblowing procedures
Article 15	Introduces the notion of 'external disclosures' – these are only protected where an internal disclosure has already been made
Article 16	Describes external disclosures and explains when they are justifiable. The length and complexity of this Article alone shows the risks that would be taken by the whistleblowing in these situations. This Article is far from whistleblower-friendly and may in practice prove to be potentially hostile
Article 17	All authorities to set up a whistleblowing unit to receive external disclosures
Article 18	One authority may transfer a disclosure to another authority more properly connected with the subject matter
Article 19	Threats and misconduct against a whistleblower may amount to a criminal offence
Article 20	This Article gives the Minister for Justice powers to issue regulations to better implement in detail the provisions of the act. The authorities may issue guidelines binding on the respective entities they regulate
Article 21	Private agreements cannot reduce whistleblower's rights under this act or discourage whistleblowing
Article 22	The Minister may exempt any persons from 'any' of the provisions of the act – exemption cannot be given retrospective effect
Article 23	Transitory provision – the act applies to disclosures after its coming into force
Article 24–25	Amendments to the Police Act
First Schedule	Lists the authorities that can receive external disclosures
Second Schedule	Lists the employers falling under Article 12 which are obliged to establish internal disclosure procedures

Preliminary Matters

Stylistic Deficiencies

The 2013 Act is constructed rather clumsily relying on no less than five pages of definition of terms which comprise Article 2. As a result, several important substantial rules are not stated by way of principle, but need to be extracted from the wording which describes one of the definitions listed in this Article. The drafting of some important articles too is rather unsatisfactory. Some provisions overlap or are actually repeated: for one example, article 9 (1) and (2) substantially replicate the provisions of article 4 (2).

A more substantial criticism of the Act is its readiness to exclude the immunity of the whistleblower on a number of grounds. Various factors may be employed to exclude or withdraw the law's protection even from well-meaning whistleblowers. Various provisions of the Act allow the authorities to second-guess the whistleblower's judgement and belittle or nullify his achievement. A prospective whistleblower might well find himself unable to safely predict whether or not he will benefit from immunity.

A rather confusing variety of public authorities have been somewhat incoherently roped into the new whistleblowing framework. Each plays a different role in examining whether and the extent to which a whistleblower will be protected. In the order of their appearance in article 5, they are: (1) the courts and tribunals; (2) the prosecution; (3) the President of the Republic; (4) the Attorney General; (5) the Commissioner of Police; (6) a judge.

Company and Employment Law

The Maltese Companies Act[11] does not require companies to have any whistleblowing procedure in place while under ordinary principles of employment law, an employee has a general obligation to safeguard his employer's secrets and information and owes him a general duty of loyalty.

The new law has an impact on general employment law in so far as a new dimension has been added to the relationship between the employer and his employees and the obligation by the latter to keep the employer's secrets confidential. An early whistleblowing provision had been inserted in the Maltese Employment Relations Act.[12] This prohibited the 'victimization' of employees who disclose wrongdoing in the work place. This law was passed in 2002, and the relevant provision, which is still on the statute book, reads as follows:

28. It shall not be lawful to victimise any person for having made a complaint to the lawful authorities or for having initiated or participated in proceedings for redress on grounds of alleged breach of the provisions of this Act, or for having disclosed information, confidential or otherwise, to a designated public regulating body, regarding alleged illegal or corrupt activities being committed by his employer or by persons acting in the employer's name and interests.

It is however surprising (and annoying) that the new law does not even make a passing reference to the above-quoted legal provision.

Disclosures and Protection from Retaliatory Action

The crucial concept introduced by the Act is that relating to 'protected disclosures'. 'Protected disclosure' is described in article 2 as 'an internal disclosure or an external disclosure of information, made in writing or on any format which may be prescribed'. Article 4 (1) adds that a whistleblower who makes a 'protected disclosure' is not liable to any civil or criminal proceedings or to a disciplinary proceeding. An 'external disclosure' to one of the designated authorities is only protected in a few prescribed circumstances.[13]

Two other significant related notions in the law are 'detrimental action' and 'occupational action'. Whistleblowers who satisfy the legal requirements enjoy protection from such retaliatory action. These concepts are defined in the law. The definition of 'detrimental action' includes:

- action causing injury, loss or damage; and, or
- victimisation, intimidation or harassment; and, or
- occupational detriment; and, or
- prosecution under the Criminal Code for calumnious accusations; and, or
- civil or criminal proceedings or discipline proceedings.[14]

The law also protects legal whistleblowers against 'occupational detriment', which includes:

- being subjected to any disciplinary action including for breach of ethics or confidentiality;
  being dismissed, suspended or demoted except where administratively or commercially justifiable for organisational reasons;
  being transferred against his will or being refused transfer or promotion except where administratively or commercially justifiable for organisational reasons;
  being subjected to a term or condition of employment or retirement which is altered or kept altered to his disadvantage;

The Agencies authorized to receive prescribed external disclosures are listed in the First Schedule the Act.

- being refused a reference or being provided with an adverse reference from his employer except where justifiable on the basis of performance;
- being denied appointment to any employment, profession or office; or
- being otherwise adversely affected in respect of his employment, profession or office, including employment opportunities and work secrecy.[15]

The nature of information that a whistleblower may 'safely' report under the Act is specifically listed and classified in the Act. The information disclosed will be protected only where it concerns an 'improper practice' within the definition found in article 2. This includes breaches of the law, corruption, bribery and other criminal acts, miscarriage of justice, environmental damage, health and safety concerns. Other possible categories of information are therefore implicitly excluded.

The burden of proving oneself to be a legitimate *bona fide* whistleblower is on the whistleblower himself. The normal rules of evidence would apply, namely that he who alleges something must be in a position to prove it, and no presumptions in his favour apply. This means that a whistleblower would face the burden of proving both his status as a whistleblower and that his actions are protected under the Act.

Exclusion

The law raises other circumstances where legal protection does not apply. These exclusions merit close attention as they delineate where protection applies and where it is withheld.

Complicity

Article 5 withdraws protection from a whistleblower who may have co-participated in an improper practice which constitutes a crime or a contravention. He would also lose his exemption from any disciplinary or civil proceedings or liability arising from his own conduct. In this context, the law does not distinguish between playing a minor part as an accomplice and playing a decisive or material role. While one may accept the logic behind withholding protection from what are termed in the Act as 'perpetrators',[16] no public interest exists to push away potentially vital and valuable information about corruption and abuse in high places simply because a potential whistleblower may have found himself marginally involved or been a minor accomplice.

This article places a whistleblower at the hands of public authorities which may be in a position to pin an accusation of complicity on him in relation to the improper

practices disclosed. In such circumstances, he would find himself legally exposed as his immunity may be lifted. The only minor concession, which is effectively of little help, is that his whistleblowing exploits could eventually be taken into account by a criminal court prosecuting him for complicity, or by a civil court if he is sued for damages, in connection with the improper practice disclosed.[17] This Article is quite convoluted and other dangers lurk behind the complicated drafting. As already stated above, the law does not distinguish between minor or significant complicity. Practice shows that it is easy for the authorities, with all their resources and access to information and power, to attribute a remote or indirect responsibility to the person disclosing the improper practice, or to sow doubts about his non-involvement, his good faith and integrity. Here the law would probably have done better to concede to accomplices, particularly those at the margins, full immunity. Such immunity would encourage accomplices to come forward and disclose the real perpetrators and could create a wedge between the wrong-doers.

Trivial Whistleblowing

Article 16 allows the authorities to determine ex post facto that the whistleblower had been unreasonable when he disclosed information, and consequently did not deserve protection. This can happen either because the alleged breach was not 'serious' enough, or because it involved a breach of confidentiality against a third party, or because the correct procedure was not followed. It is truly remarkable that the law should seek to penalize whistleblowers on the ground that his confidential disclosure related to an improper practice was, according to the judgement of the authorities, not serious enough. This strange exception confirms another regrettable rule found at the end of the definition of 'improper practice' in Article 2 which excludes the application of the Act where 'very minor and trivial matters' are involved. The question here as elsewhere is who is best placed to know a priori what is serious, trivial or minor, and what is instead major or serious. The law certainly gives no value to what the prospective whistleblower thought or how he prescribed the situation in circumstances which may have included haste, panic and uncertainty. Disclosures on 'trivial matters' do not enjoy legal protection, leaving the whistleblower defenceless.

Internal and External Disclosures

Article 3 makes it clear that, except in a few instances, a whistleblower cannot disclose information to a public authority directly, but he must first make an internal disclosure. Indeed, the joint effect of articles 3 and 4 is that, under normal

[17] This concession is not an automatic one but depends entirely on the discretion of the adjudicator and of the Attorney General as explained in art. 5 (4).

circumstances, a whistleblower should make a report internally within the organization which employs him. He cannot simply proceed to report outside his organization and make a direct external disclosure to a public authority. If he does so, he risks forfeiting all legal protection. In this context, one notes with concern that retaliatory measures or criminal or civil proceedings would be possible in terms of articles 15 and 16 against a whistleblower who failed to comply with all the requirements and procedures set out in the Act.[18] It is disturbingly evident from all these rules and restrictions that the law looks at external disclosures with great disfavour.

External disclosures may only be resorted to directly in the few instances described in article 16 (1). Briefly, these instances are: where the 'head' (again an undefined term) is involved in the malpractice; where the whistleblower 'will' face retaliatory action by his employer; where the disclosure is 'urgent'; where relevant documentation might be destroyed; where no action was taken following an earlier disclosure.

Equally ominously, Article 16 also specifically assigns to the authorities a discretion to decide that the whistleblower was wrong to make an external disclosure rather than an internal one. In such a circumstance, the authority in question 'must' within 45 days notify him 'that an internal disclosure ... must be made and that it will not be dealing further with this disclosure'. If this sequence of procedure is not followed, the disclosure would not be protected, even though the public authority may have been given highly significant and useful information. There is no justification why disclosures should be kept strictly in-house and why whistleblowers should be discouraged and constrained from reporting at the outset to an external (and therefore nominally impartial) authority.[19]

The prohibition against external disclosures acts to the advantage of the organization or officials concerned and may help keep the malpractice in-house and hidden from the prying eyes of the relevant regulatory or enforcement authorities.

Good Faith and Personal Gain

Article 9(1) (a) only protects disclosures made in good faith. This requirement seems to be not merely superfluous but misguided. If the aim of the law is to help the State uncover serious wrongdoings, it should not be distracted or bothered by the possible internal motives of the whistleblower. Good faith is not defined in the law so this increases the uncertainties and risks for prospective whistleblowers. The enquiry into and possible contestation of motivations and intentions appear spurious.

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[18]The rule that legal protection is only extended where an internal disclosure, or an attempted disclosure, has been made beforehand, is repeated in Art. 15.

[19]It seems that a recent new Bill on whistleblowing in Switzerland raises a similar impediment and has been criticized accordingly: 'White Collar Crime: Proposed legislation on whistleblowing – de facto ban on reporting to the public?' (1 December 2014) *International Law Office Newsletter*.

Art. 4(2) then states that:

> The protection afforded to a whistleblower shall not be prejudiced on the basis only that the whistleblower making the disclosure was, in good faith, mistaken about its import or that any perceived threat to the public interest on which the disclosure was based has not materialised or that the person making the disclosure has not fully respected the procedural requirements of this Act or of any regulations or guidelines made under this Act.

However, art. 9(2) states that: 'The protections conferred by this article do not apply to an employee who knowingly discloses information which he knows or ought to reasonably know is false...'. A whistleblower finds himself exposed to legal action and retaliatory action should it transpire that the information disclosed was false. Legal protection does not extend to an informant who either (a) knew that the information being relayed was false, or (b) ought reasonably to have known that it was false. Mistakes may be overlooked where the disclosing whistleblower proves that he had been in good faith.

Under Art. 9(1) (c), a disclosure is not protected if it is made for 'personal gain'. Personal gain too remains an uncertain concept. Does it extend to self-protection, to attempts not to find oneself further embedded in the mire of wrong-doing, to reduce the risk of being accused of complicity and to protect one's own personal safety and physical and moral security? Since when does the law punish someone for acting to protect and safeguard his own juridical interests?

The First and Second Schedules: Implications and Exclusions

The First Schedule lists seven public authorities empowered to receive external disclosures. It might have been simpler and more user-friendly for a potential whistleblower if just one easily identifiable specialized central authority assumed this role. As things stand, a prospective whistleblower has to work out for himself which of the seven entities is the correct one to approach with a view to making an external disclosure. This seems to be an unnecessary and risky complication for a person who decides to jeopardise himself and his career and his future by revealing serious wrongdoing in the public interest. The least the State can do in return is to keep procedures simple.

The Second Schedule might at first appear to be an innocuous list of entities to which the Act refers. What is startling is that by way of exclusion, most of Maltese private entities are excluded from the application of the law. In other words, the protection purportedly introduced by this Act will not apply to whistleblowers who uncover improper practices in one of the many entities excluded under this Schedule. Paragraph 2 excludes small and medium sized enterprises, which all would broadly employ less than 250 workers, have less than Euro 43 million balance sheet and less than Euro 50 million turnover. Few Maltese companies fulfil these very high parameters. The law also excludes voluntary organizations which raise less than Euros 500,000 in a year. Few organizations are that lucky. The signal which the law sends

is that small and medium sized enterprises and entities need not bother with nuisance whistleblowers. By restricting the application of the legal protection so strictly, most whistleblowers in Malta will find that they have been left on the lurch.

These limitations make little sense in the local context as most Maltese enterprises do not fulfil these criteria. The net effect is that the law now actually serves as a serious discouragement of whistleblowing in the majority of Maltese private enterprises. The law only applies to a handful of companies and organizations.

Police and Army

Another particular limitation is found in Art. 2(3) which excludes the application of the Act to persons working with the Police, the Army, the Security Service or the diplomatic service. The Minister is given extraordinary powers to determine by way of regulations whether, when and how the primary Act will relate to these categories of persons and these regulations can dis-apply or modify any of the provisions of the Act. These law-making powers are to be exercised 'as necessary for the purpose of the protection of national security, defence, intelligence, public order and the international relations of the State'. This provision is yet another proof that the law is anything but whistleblower-friendly and goes far to dis-allow or discourage whistleblowing especially where important State interests are involved.

Whistleblowers Who Turn to the Media and Others

The law does not specifically protect whistleblowers who resort to the media. Reports to the media do not amount to protected disclosures. The Press Act[20] allows journalists to protect their sources.[21] The role of the media as a potential channel for disclosure receives no mention or recognition in the 2013 Act.[22]

The restrictive nature of the law also means that legal protection is withheld from persons who report serious corruption and fraud to the press, to religious/church groups, to non-governmental organizations, or to political parties. The law does not

[20] Chapter 248 of the Laws of Malta.

[21] Art. 46: '46. No court shall require any person mentioned in Art. 23 to disclose, nor shall such person be guilty of contempt of court for refusing to disclose, the source of information contained in a newspaper or broadcast for which he is responsible unless it is established to the satisfaction of the court that such disclosure is necessary in the interests of national security, territorial integrity or public safety, or for the prevention of disorder or crime or for the protection of the interests of justice…'.

[22] This concern was identified in K Sansone,' Whistleblowers who report to the media unprotected' (19 October 2010) *The Times* (online version) and later K Aquilina. 'A whistle-less whistleblower' (9 April 2014) *Malta Today* (online version).

envisage or allow certain interested groups (e.g. trade unions, consumer protection groups) to take collective action for the protection of whistleblowers.

The law only protects the actual whistleblower. It offers no protection to persons who assist or encourage whistleblowers, and to those who come forward to confirm his disclosures, unless they qualify as whistleblowers in their own right.

Other Important Issues

Safeguarding a Whistleblower's Identity

The law sets out insufficient safeguards and deterrents against deliberate, accidental or careless disclosure of a whistleblower's identity. The law is weak in this regard and can easily be bypassed. Much harm may be committed by careless disclosures. Indeed, Stanley Adams' fate was sealed when EEC officials unwisely and carelessly blew his identity as their whistleblower to his former employers.[23]

The law does not protect and discourages anonymous whistleblowers. Through this specific exclusion, art. 11 limits further scope for potential whistleblowing where the identity of the informant would usually have no bearing on the benefits of having serious wrongdoing uncovered.

Although Article 11(2) grants a whistleblower reporting officer or a whistleblower reports unit the discretion to 'consider' anonymous disclosures, the onus lies on this latter officer/unit. Nonetheless, a 'whistleblower reporting officer' or a 'whistleblowing reports unit' may receive and process an anonymous disclosure and may take such a disclosure into account in determining whether an improper practice has occurred.[24]

Rewards and Compensation

Article 8 gives a right to compensation to whistleblowers who suffer 'detrimental action' following their disclosure, but only where this is validly made in terms of the Act. The Article does not define the type of compensation that may be awarded, and in the lack of a specific mention, moral compensation is excluded under general Maltese private law governing the award of damages. It would have been better for

[23] See the writer's 'The Price of Whistle-blowing: the flawed ECJ Decision in Stanley Adams vs Commission of the European Communities (1985)'. Id-Dritt. Vol. XXII. 2012. More recent developments: 'FIFA whistleblower Pahedra Al-Majid fears for her safety' (20 November 2014) *BBC Sport* (online version) and 'Fifa whistleblowers submit formal complaint over blowing their cover' (17 November 2014) *The Guardian* (online version).

[24] Art. 11 (2).

the law to specifically allow whistleblowers to also receive moral damages by way of compensation for any loss or harm suffered, physical or psychological.

Maltese law does not introduce a system for rewarding whistleblowers. It is not essential for whistleblowing legislation to have rewards in place as is the case in the US. In principle such an approach might even undermine the true value of speaking up and acting against wrong-doing by adding what is a truly unnecessary mercenary element to it.

True whistleblowers do not ask for a reward, but they only ask for their disclosure to be kept secret and for their employment and personal safety to be adequately safeguarded. The notion that whistleblowing should be incentivized financially is abhorrent to true whistleblowing. Compensation for any loss suffered would be acceptable but actually profiting from whistleblowing is a different matter.[25]

Whistleblowing is not about making money, but about a person's moral right and duty to report wrongdoing, his right to remain detached from indirect involvement or complicity in such wrongdoing and his right to integrity and legality at his place of work.

Reports Received to Date

On the 12 October 2014, the Sunday Times[26] reported that the Justice Ministry had received 48 whistleblower helpline reports. Of these, 47 were ineligible as they fell outside the legal parameters. Details were provided as to the categories of reports received.[27] Finally the remarkable statement was made by the Justice Ministry that the government was considering amending the law so that 'all citizens could be treated as whistleblowers'.[28]

Some Final Considerations

Whistleblowing is but a small part of a broader fabric of how a transparent democratic society operates. In fact a proper workable whistleblowing framework can only function when a number of vital factors are present, including the satisfaction of certain basic surrounding assumptions. These include:

- that politicians and public officials accept themselves to be accountable and subject to scrutiny;

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[25] M Goldstein, 'Whistle-Blower on Countrywide Mortgage Misdeeds to get $57 Million' (17 December 2014) *The New York Times*.

[26] K Micallef, 'Just 48 whistleblower reports sent to helpline' (12 October 2014) *The Times*.

[27] See also '48 whistleblowing reports lodged with Justice Ministry' (13 October 2014) *Malta Today*.

[28] ibid.

- that transparency is generally valued as an element of enlightened governance and not practiced exceptionally or selectively on the basis of convenience or advantage;
- that the Police and other public oversight agencies operate at arms' length from the government and receive no instructions, pressures or suggestions from its representatives;
- that citizens are free to comment and criticize those in power; and
- that human rights are respected.

In Malta the risk has therefore largely remained with the whistleblower who effectively can never be re-assured that no negative repercussions would follow his disclosures. The law does not protect all disclosures by whistleblowers, but only those which qualify as 'protected disclosures'. Whistleblowers should therefore be very wary of the unprotected disclosures. As the conditions for a protected disclosure are set rather high, they penalize whistleblowers who may be or who are shown[29] not to be in good faith or if they somehow make personal gain[30] from the disclosure. A whistleblower is doomed should any suggestion of bad faith[31] or of personal gain stick to him. The law also allows the authorities to hound a whistleblower by alleging that he 'ought to have reasonably known' that the information disclosed was false. Indeed the real focus of the law is made clear in sub-article 3 which reminds whistleblowers that it is an 'offence punishable in accordance with article 101 of the Criminal Code to knowingly provide false information in terms of this Act'. A whistleblower does not receive unconditional protection under the Act; far from it. Indeed, the Act raises a number of difficulties[32] that a prospective whistleblower should seriously take into account before venturing with any disclosures of corruption or other wrongdoing.

Conclusion

Whistleblowing cannot be introduced in a vacuum and it is only effective and meaningful if adopted within a wider context where the state and its agencies follow, and are glad to follow, principles of good governance, where transparency reigns as a normal daily practice, where they feel accountable to the public and where they feel that the uncovering of public misdeeds is more important than keeping bad things hidden. Whistleblowing flourishes when it is integrated within a broader context of healthy and enlightened acceptance and consensus on high levels of transparency and accountability in the public sector.[33]

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[29] It is not stated to whom this must be shown.

[30] 'Personal gain' is not defined.

[31] Or even the lack of good faith.

[32] Especially in articles 5 and 9.

[33] The writer has written more extensively on these aspects in 'Whistleblowing in Malta: a note on recent developments, proposals and missed opportunities' (2002) *The Company Lawyer* Vol. 23 No. 1, p. 30.

Laws may prove ineffective in practice if potential whistleblowers do not have sufficient faith and comfort that they will not be treated coldly or viciously by those to whom they report. Employers have yet to show that they will not react negatively and unkindly to employees who breach their normal confidentiality obligations and sneak on wrongdoing. This test has yet to come and has yet to be passed. In the meantime, whistleblowing in Malta shall remain a risky business.

The 2013 law arrived accompanied by much political posturing and self-praise. One wonders whether in reality the State and its entities and officials are that keen to find, and to allow others to find, that they are not so perfect and efficient after all. One may rightly doubt whether these entities, usually so sensitive and defensive about their internal workings, are now converted and have become receptive to the submission of their dirty linen to investigation and possible public scrutiny. The law fails to promote or encourage whistleblowing, but merely tolerates it and puts up with it.[34]

For the above considerations, in the opinion of the writer, the 2013 law is not a good law. Not all whistleblowers are protected. They find legal protection only in a restricted number of instances and then only if a specific procedure had been followed. Whistleblowers are not protected if they fail to first resort to internal reporting procedures or if they report to the press or other media. In essence, therefore, the law seeks more to restrict, control and restrain potential whistleblowers and it fails to open up innovative channels whereby they may be further encouraged to safely unearth wrongdoing, abuse and corruption. To facilitate the detection of fraud and corruption, the law should have, in the best public interest, unambiguously encouraged whistleblowing. Instead, by making whistleblowing less attractive, the law renders the pursuit of effective discovery of wrong-doing and successful prosecutions more difficult.

The conclusion here therefore has to be that this recent law of 2013 is not the final answer to the whistleblowing dilemma in the Maltese experience. It will take a very courageous man to brave the legal niceties and pitfalls of Act No. VIII of 2013. This flawed law still distrusts whistleblowers and is reluctant to extend the full protection of the law to them. Today whistleblowing in Malta remains a dangerous, risky, unrewarded and thankless vocation.

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