

Privacy Commissioner's Submission to the Education and Workforce Committee on the Protected Disclosures (Protection of Whistleblowers) Bill (294-1)

Executive summary

1. I welcome the opportunity to provide a submission on the Protected Disclosures (Protection of Whistleblowers) Bill ('the Bill'). I am supportive of modernising and strengthening the protections afforded to individuals' personal information when they make a protected disclosure.
2. One of my functions as Privacy Commissioner is to examine new legislation for its possible impact on individual privacy. Central to my examination of any proposed legislation is the principle that policy and legislation should be consistent with privacy rights unless there is very good reason (and evidence) to override those rights.
3. This Bill clarifies the definition of serious wrongdoing in the Protected Disclosures Act 2000, enables people to report serious wrongdoing directly to an appropriate authority at any time, strengthens protections for disclosers, clarifies the internal procedure requirements for public sector organisations and the potential forms of adverse conduct disclosers may face.
4. As Privacy Commissioner, my primary interest is in how the Bill treats individual's personal information when they make or are otherwise involved in protected disclosures. My comments on the Bill relate to clause 15 (*Receiver may refer disclosure*) and clause 16 (*Confidentiality*).
5. I have the following concerns about the Bill:
 - There is no specific mechanism for an employee to seek review of how an agency has complied with the confidentiality protections in the Bill.
 - An organisation disclosing identifying information does not have to consider whether the disclosure is "essential".
 - That the receiver, before referring a protected disclosure, does not have to conclude that the disclosure is more appropriately handled by the organisation concerned or that another/an appropriate authority is more closely connected with subject of the disclosure.
6. To address these concerns, I **recommend** the following changes:
 - A clear complaint mechanism for breaches of clause 16 (*Confidentiality*) is inserted into the Bill. This should cover all agencies subject to the Bill, not just public entities that are already covered by the Ombudsman.
 - Clause 16(2)(b) be moved to clause 16(2)(c) to read "*there are reasonable grounds to believe that the release of the identifying information is essential – (iv) to a law enforcement or regulatory agency for the purpose of law enforcement*".

- Clause 15(3) to be redrafted to read “A receiver, before referring a protected disclosure, must reasonably believe the disclosure is more appropriately handled by the organisation concerned or that another/an appropriate authority is more closely connected with subject of the disclosure. A receiver must also consult the discloser and the intended recipient prior to referral”.

The confidentiality of protected disclosures

Clause 16 establishes confidentiality protections

7. Clause 16 of the Bill requires every person to whom a protected disclosure is made or referred to use their best endeavours to avoid identifying the person who made the protected disclosure. There are exceptions to this:
 - if identification is to a law enforcement or regulatory agency for the purpose of law enforcement
 - if identification is with the consent of the individual concerned
 - if the person reasonably believes disclosing identifying information is essential for an effective investigation, and
 - the identification is essential to prevent serious risk to public health or public safety or the environment or to comply with the principles of natural justice.
8. The clause 16 protections are of a different character to the normal privacy rights employees have under the Privacy Act. The high threshold of confidentiality in clause 16 aims to balance the public interest in encouraging people to expose serious wrongdoing with other interests, including supporting effective investigations and natural justice.
9. Confidentiality is a measure to support the Bill’s core aim of ensuring that a person who makes a good faith disclosure alleging serious wrongdoing does not suffer adverse consequences including retaliation and discrimination.
10. If an organisation discloses a person’s identity after they make a protected disclosure, the Bill is silent as to how they can seek to enforce the protections under clause 16. This has caused and, if left unresolved, will continue to cause confusion for disclosers wanting to submit a complaint and ambiguity for my Office as to the relationship between the confidentiality provisions and the Privacy Act.

A clear complaint mechanism for confidentiality is needed

11. There is no specific mechanism for an employee to seek review of how an agency has complied with the confidentiality protections in the Bill. This is dissimilar to other core protections under the Protected Disclosures (Protection of Whistleblowers) Act 2020 that do have complaints avenues. An individual can complain to the Human Rights Commission that they have been treated less favourably because of their protected disclosure¹, or raise a personal grievance if they experience retaliation².

¹ Section 66(1)(a) Human Rights Act 1993

² Clause 19

12. Clause 32 of the Bill maintains the Ombudsman's specific functions of reviewing and guiding public sector organisations' investigations into protected disclosures and providing advice on the confidentiality protections. While the Bill does not create a specific complaint mechanism relating to breaches of the clause 16 confidentiality provisions, the Ombudsman can investigate breaches of confidentiality of public sector agencies under section 13 of the Ombudsmen Act 1975.
13. Section 7 of the Privacy Act provides for other laws to override the general privacy principles. This means that if an agency complies with specific legislation that says personal information shall be used in a certain way, such as clause 16 of the Bill, I cannot find that they have interfered with an individual's privacy under the Privacy Act.
14. This interplay between the Protected Disclosures Act and Privacy Act creates ambiguity about how to respond to privacy complaints related to confidentiality. The Ombudsman and I have agreed that under the Protected Disclosure Act, I refer such complaints to the Ombudsman. The Bill should clarify this situation by establishing a specific complaint mechanism.
15. A clear complaint mechanism will strengthen the operation of the Protected Disclosures Act as individuals will be able to seek review of the confidentiality protections that have been applied to their disclosures.
16. I **recommend** a specific complaint mechanism for breaches of clause 16 is inserted into the Bill. This should cover all agencies subject to the Bill, not just public entities who are already covered by the Ombudsman. This mechanism could link into the existing complaint mechanism established through the Human Rights Commission or could be assigned to another relevant oversight body such as the Ombudsman or my Office. Any complaint mechanism should include the ability for the individual to enforce their rights and seek remedies such as through the Human Rights Review Tribunal.
17. One option for a complaint mechanism would be to provide for the individual to complain to the Privacy Commissioner of a failure by the recipient agency to meet its obligations under clause 16. This provision could say that when the Privacy Commissioner makes a finding that a disclosure was not justified under clause 16, this is deemed to be an interference of privacy under the Privacy Act. This would open up remedies under the Privacy Act to the individual.

Identifying information should only disclosed for law enforcement purposes if it is essential

18. I note that the explanatory note of the Bill says that clause 16 is a revision with no change of legal effect. However, the drafting appears to lower the threshold for departing from the confidentiality obligation under the Protected Disclosures Act. Under section 19 of that Act (Confidentiality), the person receiving the protected disclosure is obliged to maintain confidentiality unless 'essential'. The drafting in clause 16 removes the 'essential' requirement for disclosures to a law enforcement or regulatory agency for the purpose of law enforcement, thereby reducing the level of protection afforded to whistleblowers. Given the stated intention not to change the standard, this may have been inadvertent.

19. I **recommend** clause 16(2)(b) be moved to clause 16(2)(c) to read *“there are reasonable grounds to believe that the release of the identifying information is essential – (iv) to a law enforcement or regulatory agency for the purpose of law enforcement”*. This would ensure that the organisation disclosing identifying information must turn their mind to consideration as to whether the disclosure is “essential”.

Referral of disclosures (Clause 15)

20. Clause 15 provides that a person who receives a protected disclosure may refer that disclosure to an appropriate authority and that an appropriate authority may refer a disclosure to the organisation concerned or another appropriate authority.
21. Requiring the person receiving the disclosure to turn their mind to finding the most appropriate body to handle the disclosure ensures that individuals are not unnecessarily impeded in making a protected disclosure. As clause 15(6) provides for multiple referrals, it is imperative that any referral is necessary and does not unduly delay an investigation or put an individual's identity at risk.
22. I **recommend** redrafting clause 15(3) to read: *“A receiver, before referring a protected disclosure, must reasonably believe the disclosure is more appropriately handled by the organisation concerned or that another/an appropriate authority is more closely connected with subject of the disclosure. A receiver must also consult the discloser and the intended recipient prior to referral”*.

Conclusion

23. I trust my comments are of use to the Committee in its consideration of the Bill. I would be happy to present this submission to the Committee in person and be available to answer questions if that would be of assistance.



John Edwards
Privacy Commissioner

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