

Privacy Commissioner's Submission to the Education and Workforce Committee on the Fair Pay Agreements Bill (115-1)

Introduction

1. The Fair Pay Agreements Bill (the Bill) provides a framework for bargaining for fair pay agreements. The objective of fair pay agreements is to improve labour market outcomes in New Zealand by enabling employers and employees to collectively bargain industry-wide or occupation-wide minimum employment terms. At present, New Zealand's employment relations and employment standards regulatory system only allows for collective bargaining at an enterprise level (i.e. between individual employers and unions). There is no mechanism for parties to co-ordinate collective bargaining across entire occupations or industries. The Bill aims to address this gap.
2. The Bill creates a framework for bargaining for fair pay agreements by -
 - setting out a general duty of good faith, and good faith obligations that apply to bargaining parties (within the same bargaining side and between bargaining sides); and
 - prescribing processes for initiating bargaining (including when a default bargaining party may be required), carrying out bargaining, and finalising a fair pay agreement; and
 - providing processes to resolve disputes that may arise during bargaining for a fair pay agreement; and
 - establishing regulation-making powers to give full effect to fair pay agreements bargained under the Bill.
3. The Privacy Act 2020 is New Zealand's privacy law. One of the functions of the Privacy Commissioner include examining new legislation for its possible impact on individual privacy. Central to that examination is the principle that policy and legislation should be consistent with privacy rights unless there is very good reason (and evidence) to override those individual rights.
4. This submission focusses on the different parts of the fair pay agreement bargaining process that will prescribe the collection, use, retention, disclosure of personal information collected during the different stages of the fair pay agreement bargaining process.

Part 2 – Subpart 3: General Obligations of the Bill

5. Clauses 23 and 24 provide limitations on the collection, use and disclosure of personal information under the Bill.

Clause 23 – Personal information

6. Clause 23(1) sets out restrictions when personal information can be collected and used, clearly setting out that
 - personal information must be used only for purposes of bargaining of a fair pay agreement, and

- personal information must not be disclosed to any person except in a form that does not identify the individual.
7. This clause overrides the applicability of Information Privacy Principle 10 under section 22 of the Privacy Act 2020, making the use of personal information narrower and only enabling the use of personal information if it is meant for purposes of bargaining a fair pay agreement. While this clause explicitly sets a requirement for the use of personal information for a specified purpose, it also means it cannot be used for another new purpose.
 8. Given the clause is intended to clarify, as well as limit, the use of personal information, I would support the inclusion of a provision setting out the specific functions under the bargaining process that would require the use of personal information.
 9. Clause 23(1) also imposes the requirement to disclose personal information in a form that does not identify the individual. The Privacy Act does not define non-identifiable information or de-identified information. Information Privacy Principle 11 permits disclosure without authorisation when the information does not identify the individual.
 10. I support the requirement to de-identify personal information before disclosing personal information. This requirement enables the disclosure of information while protecting and preserving the individual's privacy. This also means that the individual cannot be identified from the information.
 11. Clause 23(2) clarifies the individual's right to access or disclose personal information. However, under the Privacy Act, the individual has a right to correct personal information as well. I would recommend this clause clarifies that the Privacy Act continues to apply in addition to the specificity in the relevant clause.
 12. Clause 23(2) provides a mechanism for individuals to challenge the compliance with the collection, use, disclosure of the individual's personal information. Any procedure established should clearly set out how individuals can make a complaint and the complaint process.

Clause 24 - Chief executive may collect personal information

13. Clause 24 authorises the Chief Executive to collect personal information for assessing whether an application to initiate bargaining has met the required tests for the Chief Executive to approve the application; verifying that a ratification vote complies with the requirements set out in the Bill; and for monitoring compliance with the Bill.
14. I recognise the importance for the Chief Executive to collect personal information for assessing whether an application meets the required tests. However, I recommend a data minimization approach be adopted to ensure only necessary personal information is collected. A data minimization approach would include the process of identifying the minimum amount of personal information needed to assess whether an application meets the bargaining tests.
15. I also recommend a two-step approach in assessing the application, at first for the Chief Executive to use of aggregate information to satisfy the assessment requirement by the Chief Executive. Only request limited personal information when the Chief Executive has reasonable grounds to belief that the aggregate information is insufficient to assess an application.

Part 3 – Subpart 1: Process for initiating bargaining and forming bargaining sides

Process for initiating bargaining and forming bargaining sides

16. Clause 29 sets out two tests for initiating bargaining for a proposed fair pay agreement, the representation test and the public interest test. Clause 29 requires sufficient evidence be provided to demonstrate that the employee support initiate bargaining.
17. It is unclear what personal information will be put forward as evidence to demonstrate support by the employee. I understand that competing public interests must be considered and balanced with individual privacy rights, but it is prudent to ensure that careful consideration is given to the types of personal information that might be needed to demonstrate support to initiate bargaining.
18. I recommend that the Bill clearly specify the type of personal information that might be required from employees as evidence to meet the relevant tests under clause 29.

Employee information

19. Clause 40(4) enables the initiating union or the employee bargaining party to use the covered employee's contact details to provide supplementary information that includes information on how to join a union. This clause creates a provision to use personal information for purposes unrelated to the fair pay agreement process.
20. Information Privacy Principle 10 under the section 22 of the Privacy Act, sets limits on the use of personal information and creates a framework for organisations to use personal information for the purposes it was collected. In this instance employee personal information or non-union covered employee information is collected for the purposes of the fair pay agreement process. However, clause 40(4) creates a provision for the initiating union or the employee bargaining party to use personal information to solicit new members for the relevant union.
21. I do not support the use of personal information for a purpose unrelated to the purpose of collection.

Part 7 – Subpart 2: Ratification

22. Clause 143 requires the bargaining sides to notify each covered employee for whom the bargaining side has contact details at least 10 working days before the date on which a ratification vote for a proposed agreement is to take place.
23. This clause means that non-union employees who are still covered by the proposed agreement, but who had opted out of sharing their contact details with the initiating union or the employee bargaining party, would not have an opportunity to participate in the ratification vote of the proposed agreement.
24. I recommend that an additional requirement be placed on employers to notify all covered employees and provide information on the ratification vote.

Conclusion

25. In summary, I support the Bill's objectives to provide a framework for bargaining for fair pay agreements. The Bill supports the protection of individual privacy rights and provides safeguards for how information is collected and used. However, I propose the following recommendations to strengthen the intended privacy protections in this Bill and make the following recommendations to the Committee:

- Clause 23 should include specific functions under the bargaining process that would require the use of personal information.
- Clause 23(2) should clarify that the individual's rights under the Privacy Act continue to apply in addition to the specified individual's right to access or disclose personal information under this clause.
- Clause 29 should include a two-step approach in assessing the bargaining application by ensuring the Chief Executive uses aggregate information to satisfy the assessment requirement, and only when the Chief Executive has reasonable grounds to believe that aggregate information is insufficient to assess an application can they request for certain personal information as evidence to assess the application. In addition, this clause should specify the types of personal information that could be used as evidence for assessing the application.
- Clause 143 should include an additional requirement on employers to notify all covered employees and provide information on the ratification vote. This requirement will ensure all covered employees that had opted out from sharing their contact details with the bargaining party will have information on the right to vote at the ratification of the proposed agreement.

26. I do not support the use of personal information for purposes unrelated to the fair pay agreement process and recommend clause 40 should be amended to ensure the integrity of the fair pay agreement system is retained by ensuring personal information is only used for the purposes it was collected.

27. Officials from the Ministry of Business, Innovation and Employment have advised me that they are committed to addressing any outstanding privacy issues in the Bill, prior to it being passed. I look forward to my Office's continued engagement with MBIE regarding any further redrafting of provisions relating to privacy, and implementation of the Bill itself.

28. I trust my comments are of use to the Committee in its consideration of the Bill. I do not seek to speak to my submission but am happy to appear before the Committee if that would be of assistance.



Liz MacPherson
Acting Privacy Commissioner

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