THE
VICTORIAN
BAR

AUSTRALIAN SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE: MIGRATION LEGISLATION AMENDMENT (IDENTIFICATION AND AUTHENTICATION) BILL 2003

SUBMISSION OF THE VICTORIAN BAR: 3 SEPTEMBER 2003

1.1 There can be no objection to the general statutory purposes set out in paragraph 1 of the Outline in the Explanatory Memorandum. The proposed amendments expand the collection powers contained in the Migration Act ("the Act") from signatures and photographs to biometric information such as fingerprints, iris scans and facial scans and body measurements and sets up a regulatory framework for databases that would be established. One key issue is whether the biometric databases in relation to non citizens in a non criminal context are proportionate to the size of currently undetected identity fraud by non -citizens and how the information which is to be supplied under the new arrangements will achieve these purposes. Another key issue is whether the proposed protections and safeguards in the operation of the system of taking personal identifiers are adequate or need to be further strengthened.

1.2 The following matters are raised in relation to items in the Bill.

Item 7

1.3 The definition of "Independent person" could be narrowed in the case of minors to a person who is a parent or guardian or person who is taking responsibility for the child in the circumstances (as in s141(3) Immigration and Asylum Act 1999 (UK).

Item 11

1.4 There is a fundamental objection to the Bill as it stands where in **Item 11** (and in **Items 13, 16, 17, 20 and 22)** it provides for the Minister to prescribe who may or may not be required to comply with certain provisions extending to situations where (as in S46(2A) (a)(i)) invalidity of an application may result. Future regulations will set out the circumstances in which personal identifiers are required and exemptions to

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these requirements. Where there are “prescribed circumstances” the Minister is allowed an unfettered discretion to decide the circumstances where the new identification scheme does or does not apply and to designate classes of persons who can not be required to provide personal identifiers (eg. **Item 31** s 258). This should be dealt with by Statute and is a matter for Parliament not Ministerial prerogative.

1.5 There is a serious question whether the expansion of future mechanisms in s5A(1)(g) which are to be dealt with by regulations is acceptable. This should be provided for by later amendment to the Act as and if required or be incorporated now by redrafting the section. There would be no difficulty in designating identifiers derived from facial recognition technology as part of the list of matters in s5A(1).

1.6 There is a question whether “authorised officers” should be extended to employees of detention centre contactors for purposes of taking identifiers as is proposed or be confined to officers otherwise defined.

1.7 There is a concern in the definition of “character concern” in s5C (1)(b) regarding the width of the term “association“ with someone else or group reasonably suspected etc”. This definition is unacceptably broad. Similarly, the use of the term “significant risk” is objectionable where it seeks to state a predictive benchmark for future criminal conduct. “Danger” in s5C (d)(v) is similarly broad and should be narrowed to ‘real sensible risk’ .

Item 16

1.8 The requirement to provide in the alternative in s46(2A((a)(ii) *other evidence of identity*, and the provision that, in the event of non-compliance, the application is invalid will, in certain circumstances, have the effect of defeating the purposes of the Refugees Convention. Invalidity provisions for failure to provide evidence of identity in the case of asylum seekers who may have destroyed documents before arrival (so therefore are unable to provide such evidence) will prevent those who may have genuine claims which should be dealt with from having them assessed. Destruction of one’s travel or identity documents does not necessarily equate with lack of a genuine claim to protection. People may do things under instructions from smugglers or agents in whose hands and under whose power they are, or in fear of the authorities of their country of origin or country of destination. It is currently open, in the course of protection visa determination, to take account of any false representations made, orally or in writing, for which no reasonable explanation is advanced. Equally, the destruction of, or damage to, any passport or other document relevant to the claim, for which no reasonable explanation is advanced, can go to credit in appropriate cases. The inability to produce evidence of identity or identifiers should not preclude consideration of claims.

Item 20

1.9 The wording in s170(2) of a non-citizen who *appears to intend* to travel is arguably too widely and/or vaguely expressed. It could be replaced by a term such as “reasonably suspected”.

Item 24-27

1.10 The manner in which, through amendments to s190, persons with *permanent resident status and/or with rights as visa holders* may end up in s189 detention raises serious questions . While he or she must be released in certain circumstances pursuant to s191(2) the provisions of s196 still apply where these exceptions are not satisfied.

1.11 In all the circumstances where personal identifiers are required by identification test or provision of identifiers, there is a question whether, as in the Immigration and Asylum Act 1999 (UK), there should be a discretion in an officer to excuse compliance if he considers there is a reasonable excuse for a failure to provide (as in UK) “fingerprints”…..or other personal identifiers.

Item 30

1.12 In the situation where existing visa holders find themselves through the operation of s190 in <u>s189 detention</u> why should they not have the *same rights to request an authorisation* from a senior officer as is envisaged for persons who come within s 258B .

1.13 Where there has been non-recording of the authorisation when requested, currently this will not invalidate an identification test. What is the case if it never is recorded?

Item 31

1.14 The obligation to inform should be strengthened; and the contents of the information to be provided should be specified. The matters at p 30 par 11 of the Explanatory Memorandum should be included in the Act, and should be matters that must be provided whether requested or not. In relation to the rules for carrying out identification tests, why should not at least s258E(b)(c)(d) apply where the identifier is to be provided other than by way of a test ?

1.15 While there are penalties for non-compliance with provision of information and/or the invalidating of an identification test, there are no penalties for failure to provide information to subjects of the identification tests concerning the taking of personal identifiers

Item 32

1.16 The question of use of reasonable force, and what this may mean in terms of degree of restraint and qualifications of those who are exercising this “force”, needs to be further clarified and explained.

1.17 The meaning of “any *meaningful* identifier derived from the personal identifier” in s261AE needs to be clarified, particularly given the context in which it appears.

Item 33

1.18 In S336A the term “meaningful” in the definition of “identifying information” in paragraphs (b) (c) and (d) is neither defined nor explained; also paragraph (d) is very wide. All this is problematic, particularly when later issues of comparison for purposes of matching with other domestic or foreign data bases to ascertain identity arise.

1.19 In S336D where the purpose of access is “modification” should there be limits or a further explanation in the Act regarding, inter alia, appropriate standards regulating access?

1.20 There is no right of access of a person to information in order to verify its accuracy and its relationship to him, e.g. mistakes in names etc. This should be included.

1.21 S336 F – The disclosure of personal identifiers to foreign governments in the case of a failed asylum seekers should not be confined to situations where the case is finally determined (which is defined in s5(9) as completion of merits review only). This should only happen in the case of a failed asylum seeker whose application has been rejected, <u>who has no judicial review rights or appeals outstanding</u> and who has no other applications to remain in Australia pending. While issues of removal are important, serious risks of disclosure of prejudicial information to the authorities of a country of origin in protection visa cases will remain unless a further amendment along these lines is made.

1.22 The whole Bill raises the broader issues of oversight of the database in matters of collection, storage, use and destruction. This is not adequately provided for in this Bill.

1.23 There is no reference to standards and mechanism by which identities will be checked or comparisons will be made with data held by foreign governments, or to standards for such checks or comparisons within Australia. There are no mechanisms for correction, or recognition of the rights of persons to know both what is kept and the results of matching undertaken (note within the EU context the central data bank in the EURODAC system Council Regulation (EC) no 275/2000 of 11 December 2000 and the protections therein for safety and reliability of data, comparison, storage, security, retention and destruction). There is no reason also why these provisions should not comply with the Information Privacy Principles contained in the Privacy Act 1988 (C’th).

1.24 The ability to retain identifiers indefinitely for persons who ultimately are granted status, despite being in detention etc or being illegal overstayers, should be limited in duration and/or they should be destroyed (cf UK position where grant of indefinite leave to remain to asylum seekers or leave to remain in other cases means destruction of fingerprints as soon as reasonably practicable – Immigration and Asylum Act 1999 (UK) s143(3)). Query also the situation where a person has been subject to action for the purpose of removal, where ultimately the person remains and is granted status, or where persons are convicted for minor infringements of the Act. In these cases, if identifiers are taken, there should likewise be provision for erasure or destruction as soon as practicable (and notice to the person).

1.25 There is a fundamental question whether there should be a limit for retention in any event, of 10 years as in the EURODAC system, unless special defined circumstances apply.

3 September 2003