

Student Identifiers Bill 2014

Portfolio: Industry

Introduced: House of Representatives, 27 March 2014

Purpose

1.221 This bill establishes a framework for the introduction of a student identifier for individuals undertaking nationally recognised vocational education and training from 1 January 2015, and sets out how the identifier will be assigned, collected, used and disclosed. The bill further provides for the creation of an authenticated transcript of an individual's record of nationally recognised training undertaken or completed after 1 January 2015. The bill also provides for the appointment of a Student Identifiers Registrar (the Registrar), who will administer the student identifier scheme.

Background

1.222 The committee has previously examined the following, substantially similar, bill:

- Student Identifiers Bill 2013.¹

Committee view on compatibility

Right to education

1.223 The right to education is guaranteed by article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), under which States parties to the convention recognise the right of everyone to education, and agree that education shall be directed to the full development of the human personality and sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.

1.224 Under article 2(1) of the ICESCR, States parties must take steps, to the maximum of available resources, to progressively achieve the full realisation of the rights recognised in the covenant. A number of aspects of ICESCR rights, including the right to non-discrimination in the enjoyment of those rights, are subject to an obligation of immediate implementation.

1.225 Under article 4 of the ICESCR, economic, social and cultural rights may be subject only to such limitations as are determined by law and compatible with the nature of those rights, and solely for the purpose of promoting the general welfare in

1 See Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (May 2013), 'Student Identifiers Bill 2013', p. 65; and *First Report of 44th Parliament*, 'Student Identifiers Bill 2013', p. 203.

a democratic society. Such limitations must be proportionate to the achievement of a legitimate objective, and must be the least restrictive alternative where several types of limitations are available.

Scope of exemptions from prohibition on issuing of VET qualifications

1.226 The statement of compatibility for the bill notes that the introduction of the student identifier scheme will generally promote the right to education by 'improving the accessibility of technical and vocational education', and 'ensuring that eligibility for subsidised training can be determined with a higher degree of confidence than is currently possible'.²

1.227 The statement of compatibility notes also that the scheme may limit the right to education, to the extent that it may prohibit registered training organisations (RTOs) from issuing a VET qualification (or statement of attainment) to an individual who has not been assigned an identifier. It notes:

...for those students who do not obtain a student identifier (which is expected to be very few) and are not covered by an exemption, access to education may be limited if their ability to undertake further training is dependent on the student providing a VET qualification or a VET statement of attainment for a prerequisite course.³

1.228 The statement of compatibility notes that this prohibition is aimed at the objective of ensuring maximum participation in the scheme, and concludes that the limitation is 'reasonable, necessary and proportionate' to achieving its stated objective.

1.229 The committee notes that the scope of exemptions for the prohibition on the issuing of VET qualifications is relevant to the assessment of the reasonableness and proportionality of the measure, particularly as such exemptions 'will be necessarily limited to maintain the integrity of the scheme'. The EM for the bill states that such exemptions are necessary:

- to allow for consistency with 'existing and prospective legislative provisions (for example, to do with national security);
- for interaction with other regulatory instruments in the sector; and
- to address issues which may not yet have arisen.⁴

2 Explanatory memorandum (EM), p. 5.

3 EM, p. 5.

4 EM, p. 61.

1.230 Proposed section 53 provides that the minister may grant exemptions by reference to an RTO, a VET qualification (or statement of attainment) or an individual. While the ability to grant exemptions, particularly to individuals, may allow the prohibition to be applied as a reasonable and proportionate limitation of a person's right to education, the committee is unable to judge whether this is likely to be that case given the lack of specific criteria for the grant of an exemption. In particular, it is not clear in what circumstances, and according to what criteria, an individual without a unique student identifier might be granted an exemption from the prohibition on the issuing of VET qualifications.

1.231 The committee notes that the availability of merits review in relation to a decision to refuse to grant an exemption is also relevant to the assessment of whether the prohibition may be regarded as reasonable and proportionate in this context.

1.232 The committee therefore seeks the Minister for Education's advice as to what circumstances, and according to what criteria, an individual without a unique student identifier may be granted an exemption from the prohibition on the issuing of VET qualifications, and whether a decision to refuse to grant an exemption will be subject to merits review.

Right to work

1.233 The right to work and rights in work are guaranteed in articles 6(1), 7 and 8(1)(a) of the ICESCR. The UN Committee on Economic Social and Cultural Rights has stated that the right to work affirms the obligation of States parties to ICESCR to assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly.

1.234 Under article 2(1) of the ICESCR, countries must take steps, to the maximum of available resources, to progressively achieve the full realisation of the rights recognised in the covenant. A number of aspects of ICESCR rights, including the right to non-discrimination in the enjoyment of those rights, are subject to an obligation of immediate implementation.

1.235 The right to work and rights at work may be subject only to such limitations as are determined by law and compatible with the nature of the right, and solely for the purpose of promoting the general welfare in a democratic society.

Scope of exemptions from prohibition on issuing of VET qualifications

1.236 The statement of compatibility for the bill notes that the prohibition on the issuing of VET qualifications (outlined above) may equally limit an individual's right to work, where it would limit a person's ability apply for or undertake employment for which formal recognition of a qualification is a prerequisite.

1.237 The committee notes that, as above, the ability to grant exemptions, particularly to individuals, may allow the prohibition to be applied as a reasonable and proportionate limitation of a person's right to work. However, in the absence of specified criteria for the granting of exemptions, the committee is unable to assess whether this is likely to be the case.

1.238 The committee notes that the availability of merits review in relation to a decision to refuse to grant an exemption is also relevant to the assessment of whether the prohibition may be regarded as reasonable and proportionate in this context.

1.239 The committee therefore seeks the Minister for Education's advice as to what circumstances, and according to what criteria, an individual without a unique student identifier may be granted an exemption from the prohibition on the issuing of VET qualifications, and whether a decision to refuse to grant an exemption will be subject to merits review.

Right to privacy

1.240 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home.

1.241 However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that objective.

Permitted collection, use and disclosure of student identifiers

1.242 The statement of compatibility for the bill notes that it engages and potentially limits the right to privacy through authorising the collection, use and disclosure of student identifiers. It states that any such limitations are aimed at legitimate objectives (including the 'accessibility of vocational education and training and the promotion of free education'),⁵ and are accompanied by specific safeguards to ensure protection against misuse of personal information.⁶ It concludes that any limitations on the right to privacy are 'reasonable, necessary and proportionate'.⁷

1.243 However, the committee notes that the bill provides for student identifiers (that is, personal information) to be used for purposes in addition to those strictly necessary for the operation of the scheme. Proposed section 20 provides:

5 EM, p. 8.

6 EM, pp 8-9.

7 EM, p. 9.

An entity is authorised to collect, use or disclose a student identifier of an individual if the entity reasonably believes that the collection, use or disclosure is reasonably necessary for one or more of following things done by, or on behalf of, an enforcement body (*within the meaning of the Privacy Act 1988*):

- (a) the prevention, detection, investigation, prosecution or punishment of:
 - (i) criminal offences; or
 - (ii) breaches of a law imposing a penalty or sanction;
- (b) the conduct of surveillance activities, intelligence gathering activities or monitoring activities;
- (c) the conduct of protective or custodial activities;
- (d) the enforcement of laws relating to the confiscation of the proceeds of crime;
- (e) the protection of the public revenue;
- (f) the prevention, detection, investigation or remedying of misconduct of a serious nature, or other conduct prescribed by the regulations;
- (g) the preparation for, or conduct of, proceedings before any court or tribunal, or the implementation of the orders of a court or tribunal.

1.244 First, the committee notes that the permitting of the collection, use and disclosure of student identifiers on the basis that it is 'reasonably necessary' for one of the listed grounds imposes a lower standard than the usual international human rights law standard, which requires that a limitation on a right be 'necessary'. On this point, the statement of compatibility states:

While 'reasonably necessary' is [a] lower threshold than 'necessary', such an authorisation is required to ensure that the legitimate policy objective of law enforcement can be achieved which will ultimately benefit students and the wider community.⁸

1.245 In the committee's view, it is not apparent from the discussion in the statement of compatibility why the lower standard of 'reasonably necessary' is 'required' in this case. For example, the statement of compatibility does not specify how a requirement that such uses be 'necessary' would frustrate or otherwise fail to support the legitimate objective of 'law enforcement'.

1.246 The committee therefore seeks the Minister for Education's advice as to why the lower standard of 'reasonably necessary' is required to authorise the

8 EM, p. 8.

collection, use and disclosure of information for the purposes outlined in proposed section 20 of the bill.

1.247 Second, the committee notes that proposed subsection 20(f) provides that an entity will be authorised to collect, use or disclose the student identifier of an individual if it 'reasonably necessary' for the ' prevention, detection, investigation or remedying of misconduct of a serious nature, or other conduct prescribed by the regulations'.

1.248 The committee notes that the term 'misconduct of a serious nature' would appear potentially to encompass a broad range of behaviour, including behaviour that may not be related to law enforcement as such.

1.249 The committee therefore seeks the Minister for Education's advice as to whether the proposed limitation on the right to privacy in proposed subsection 20(f) is a reasonable, necessary and proportionate measure in pursuit of the legitimate objective of 'law enforcement'.

1.250 The committee notes that the range of conduct prescribed by proposed subsection 20(f) may also be expanded by way of regulation. The committee notes that any such regulations would be subject to the requirement for a statement of compatibility, as well as examination by the committee.

1.251 However, noting the absence of specified criteria for the prescribing of conduct by regulation for the purposes of subsection 20(f), the committee seeks the minister's advice as to what types of conduct are envisaged as likely to be prescribed in this way, and whether the measure is reasonable, necessary and proportionate to achieving the objective of 'law enforcement'.