

The Senate

Legal and Constitutional Affairs
Legislation Committee

Migration Amendment (Streamlining Visa
Processing) Bill 2018 [Provisions]

February 2019

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Recommendations

Recommendation 1

1.34 The committee recommends that the bill be passed.

Chapter 1

1.1 On 6 December 2018, the Senate referred the Migration Amendment (Streamlining Visa Processing) Bill 2018 [Provisions] (the bill) to the Legal and Constitutional Affairs Legislation Committee for inquiry and report by 25 February 2019.¹

Conduct of the inquiry

1.2 Details of the inquiry were advertised on the committee's website, with submissions closing 25 January 2019. The committee received 4 submissions. These are available on the committee's webpage and are listed at Appendix 1.

1.3 The committee thanks all submitters for the evidence they provided to this inquiry.

Purpose of the bill

1.4 According to the bill's Explanatory Memorandum, the bill proposes amending the *Migration Act 1958* (the Migration Act) so that the Minister for Immigration, Citizenship and Multicultural Affairs (the Minister) could specify that particular groups of visa applicants are required to provide one or more personal identifiers, or biometrics, at the time of application.² At present, the Migration Act allows the Minister or an officer to require a person to provide one or more personal identifiers. The changes would mean that this requirement would become a condition of making a valid visa application, if the Minister determines this should be the case for particular groups.³

1.5 According to the bill's second reading speech, under the proposed provisions, persons from a specific country applying for a specific visa would 'be required to provide fingerprints, photographic ID or any other personal identifier as defined by the *Migration Act 1958* at the time the application is lodged'.⁴

Key provisions of the bill

1.6 The bill contains one schedule, which proposes repealing subsection 46(2A) of the Migration Act, and contains small amendments to the Act for consistency with the proposed new subsection. The amendments would constitute the following provisions:

- the Minister, by legislative instrument, may determine that visa applicants from a specified class 'must provide one or more specified types of personal identifiers in one or more specified ways'⁵; and

1 *Journals of the Senate*, No. 137, 6 December 2018, p. 4479.

2 Explanatory Memorandum, p. 2.

3 *Migration Act 1958*, s 257A; Law Council of Australia, *Submission 3*, p. 1.

4 *House of Representatives Hansard*, 29 November 2018, p. 11981.

5 Migration Amendment (Streamlining Visa Processing) Bill 2018, proposed ss. 46(2B).

- a visa application is invalid if the applicant is included in a class of visa applicants as outlined above and, in the application, the applicant has not complied with the requirement to provide personal identifiers in the way specified.⁶

Consideration by other Parliamentary committees

1.7 Two Parliamentary committees raised concerns in relation to the bill: the Parliamentary Joint Committee on Human Rights and the Senate Scrutiny of Bills Committee.

Parliamentary Joint Committee on Human Rights

1.8 The Parliamentary Joint Committee on Human Rights (PJCHR) noted that it had previously considered the issue of the Minister collecting personal identifiers under the Migration Amendment (Strengthening Biometrics Integrity) Bill 2015. The PJCHR stated that concerns it had raised about appropriate safeguards to protect privacy remain relevant in relation to the collection of biometrics. It argued that 'there are questions as to whether the current laws would provide adequate and effective safeguards for the purposes of international human rights law'.⁷

1.9 The PJCHR questioned whether the proposed measure is 'sufficiently circumscribed and accompanied by adequate and effective safeguards' with regards to the security of the biometric information collected. It also expressed concern about how the proposed measure would apply to persons 'who may be incapable of understanding and consenting to the collection of personal identifiers', such as children, and whether this measure is proportionate to the objective of the bill. The PJCHR further noted that it is 'unclear' whether the classes of visa applicants determined by the Minister:

...could lead to distinctions based on protected attributes (such as, race, sex, religion or national origin) which could amount to direct discrimination...
Where a measure impacts on particular groups disproportionately, it establishes *prima facie* that there may be indirect discrimination.⁸

1.10 The PJCHR requested that the Minister provide advice as to whether the proposed measures are proportionate to the objectives of the bill, and appropriate safeguards exist in the bill or associated instruments, in relation to the concerns the Committee has raised. At the time of this committee's adoption of this report, the Minister had not yet provided a response to the PJCHR.

1.11 The bill's Explanatory Memorandum stated that present safeguards in the Act concerning identification tests would 'continue to apply for the provision of personal identifiers'.⁹ It acknowledged that the proposed measure would 'target certain non-

6 Migration Amendment (Streamlining Visa Processing) Bill 2018, proposed ss. 46(2A).

7 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: Report 1 of 2019*, 12 February 2019, pp. 40–41.

8 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: Report 1 of 2019*, 12 February 2019, pp. 41–43.

9 Explanatory Memorandum, p. 13.

citizens... based on the objective assessment of national security and fraud risks'. However, it argued that this would be necessary, given that:

At this point in time, the Department does not have personal identifier collection facilities in every country of the world, hence the need to target certain groups based on the objective assessment of national security and fraud risks.¹⁰

Senate Scrutiny of Bills Committee

1.12 The Senate Scrutiny of Bills Committee expressed concern that the bill would leave 'significant matters' to delegated legislation, including classes of applicants required to provide personal identifiers, the type of identifiers required and how they are to be provided. It argued that these 'should be included in primary legislation unless a sound justification for the use of delegated legislation is provided'.¹¹ The Scrutiny of Bills Committee acknowledged that although the information would be set out in a legislative instrument, and not merely left to executive discretion:

...the fact that such an instrument would not be subject to disallowance would result in no parliamentary oversight of the intended applicant classes, the types of personal identifiers required or the manner in which those identifiers are to be provided.¹²

1.13 As a result, the Scrutiny of Bills Committee asked the Minister for detailed advice on the necessity and appropriateness of leaving key elements of the visa processing framework to non-disallowable legislative instruments, and questioned what consultation would be undertaken prior to making an instrument under proposed subsection 46(2B). The Committee further sought the Minister's advice regarding whether it would be appropriate to amend the bill so that determinations made under proposed subsection 46(2B) would be disallowable, and to require that specific consultations take place, including with the Privacy Commissioner, as a condition for valid determinations.¹³

1.14 In his response, the Minister noted that the provisions of the Migration Act dealing with biometrics have already been subject to public scrutiny (through the inquiry into the Migration Amendment (Strengthening Biometrics Integrity) Bill 2015).¹⁴ The Minister argued that the appropriate place for the proposed instrument is in subsection 46, as this concerns how to make a visa application. Instruments made under Part 2 of the Migration Act, which includes subsection 46, are not subject to

10 Explanatory Memorandum, p. 15.

11 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2018*, 5 December 2018, p. 26.

12 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2018*, 5 December 2018, p. 27.

13 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2018*, 5 December 2018, p. 28.

14 Senate Legal and Constitutional Affairs Legislation Committee, Migration Amendment (Strengthening Biometrics Integrity) Bill 2015 [Provisions], June 2015.

disallowance.¹⁵ The Minister suggested that if the proposed instrument was 'subject to disallowance, the Australian Government would be less agile in addressing emerging issues relating to trends in identify fraud'. He further contended that 'it would not be appropriate to mandate' consultations before making the proposed instrument, as this 'would reduce the Department [of Home Affairs]'s flexibility in responding quickly to emerging threats and trends'. He stated that the Privacy Commissioner had been consulted when section 5A on the definition and purposes of 'personal identifier' was first inserted into the Migration Act.¹⁶

1.15 The Scrutiny of Bills Committee, in response to the Minister's advice, was of the opinion that 'flexibility, operational certainty or broad statements regarding potential threats [are not]... sufficient justification for leaving significant matters to non-disallowable legislative instruments' and reiterated its concerns over lack of consultation. However, the Scrutiny of Bills Committee left 'to the Senate as a whole the appropriateness' of the proposed measures.¹⁷

Key issues raised

1.16 Concerns raised in evidence provided to the inquiry about particular aspects of the bill included the following:

- whether the proposed changes are necessary;
- whether the changed requirements would impact the ability of applicants in Australia to apply for bridging visas if their current visas expired;
- whether the changes deal appropriately with applicants' privacy and would allow them to the opportunity to respond to decisions; and
- the fact that the measures would be outlined in a legislative instrument not subject to Parliamentary oversight.

Need for proposed measures

1.17 The Law Council of Australia (Law Council) questioned whether there was a 'clear link' between preventing terrorism and requiring visa applicants to provide personal identifiers as a condition of making a valid visa application. It suggested that given applicants are already required to undergo personal identifier tests when their visa applications are being assessed, further justification is needed as to the necessity of requiring this information at the time of application.¹⁸

1.18 The Law Council also expressed concerns that visa applicants living in 'remote, poverty-stricken conditions' would be unable to 'lodge a valid visa application

15 Legislation (Exemptions and Other Matters) Regulation 2015, s. 10, item 20.

16 See Ministerial responses, the Hon. David Coleman MP, Minister for Immigration, Citizenship and Multicultural Affairs, 30 January 2019, *Scrutiny Digest 1 of 2019*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Scrutiny_Digest (accessed 15 February 2019).

17 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2019*, 13 February 2019, pp. 60–61.

18 Law Council of Australia, *Submission 3*, pp. 2, 3.

due to no fault of their own' if they were required at the application stage to travel to an Australian Consular post or similar agency outside Australia to undergo the necessary personal identifier tests.¹⁹

1.19 Further, the Law Council was of the opinion that the proposed measures could be 'contrary to the move by the Department towards online applications' and 'impact on the efficiency of visa processing'.²⁰

1.20 In the bill's second reading speech, the Minister emphasised the importance of identifying issues with applicants at the beginning of the application process:

It is important that identity checks are able to be conducted against personal identifier data to detect individuals of concern as soon as they make a visa application...

Recent terrorism related events both in Australia and overseas highlight the need for the Department of Home Affairs to know who is applying for a visa as soon as they make a visa application through the provision of personal identifiers. These amendments will enable enhanced scrutiny, improve the integrity of our visa programs, and reduce the risk of terrorism.²¹

1.21 The Minister was of the opinion that by requiring personal identifiers upfront, the proposed amendments would 'mitigate unnecessary delays or fraudulent lodgements'.²² The Department of Home Affairs echoed this assertion, submitting that the bill would result in 'more efficient and effective visa processing, providing benefits to both the security of Australia and integrity of the visa system and provide a more streamlined process for visa applicants'.²³

Impact on bridging visas

1.22 The Law Council stated that it was 'particularly concerned' that making personal identifiers a validity requirement would mean that applicants would not be 'eligible for a Bridging visa unless and until all validity issues are satisfied'. It raised the possibility of people's visas expiring, leading to them becoming unlawful because they would not be able to access bridging visas immediately.²⁴

1.23 The Department of Home Affairs noted that the proposed amendments would not remove the Department's discretion to require personal identifiers after a visa application has been made, rather than at the time of application, depending on individual circumstances.²⁵

19 Law Council of Australia, *Submission 3*, p. 3.

20 Law Council of Australia, *Submission 3*, p. 3.

21 *House of Representatives Hansard*, 29 November 2018, p. 11981.

22 *House of Representatives Hansard*, 29 November 2018, p. 11982.

23 Department of Home Affairs, *Submission 4*, p. 6.

24 Law Council of Australia, *Submission 3*, p. 3.

25 Department of Home Affairs, *Submission 4*, p. 4.

Concerns about privacy and the opportunity to respond

1.24 The Law Council raised 'privacy concerns' with the bill's proposed measure and questioned whether a visa applicant would be able to respond to any adverse findings. It suggested that:

[G]reater clarity is required on how personal identifiers are to be used in the visa processing framework and the extent to which applicants will be informed of these processes and have an adequate opportunity to respond.²⁶

1.25 These concerns echoed those raised by the Parliamentary Joint Committee on Human Rights, as discussed earlier in this report.²⁷

1.26 The Department of Home Affairs argued that the bill 'retains existing protections associated with the collection of personal identifiers in the Migration Act such as those relating to privacy, humanity and dignity'. It also outlined current privacy protection measures carried out by the department and its requirements in this regard of the service delivery partners that have collected biometrics offshore for the department since 2010.²⁸

Non-disallowable nature of a legislative instrument

1.27 Like the Senate Scrutiny of Bills Committee,²⁹ the Law Council was of the opinion that measures should not be left to delegated legislation, arguing that:

...without adequate parliamentary oversight and consultation requirements, determinations made under the proposed reforms as to applicant classes, the types of personal identifiers or the manner in which those identifiers are provided, may cast doubt over the non-discriminatory nature of Australia's migration programme.³⁰

1.28 The Law Council proposed that if the measures are to be contained in a legislative instrument, 'this should be made disallowable and subject to a mandatory consultation period to ensure adequate parliamentary oversight'.³¹

1.29 The Department of Home Affairs noted that at present, 'there are no specific cohorts who are intended to be specified in the legislative instrument'. It further stated that those cohorts would be determined in line with future 'operational priorities, identifiable risks and other factors'.³²

26 Law Council of Australia, *Submission 3*, p. 2.

27 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: Report 1 of 2019*, 12 February 2019, pp. 40–43.

28 Department of Home Affairs, *Submission 4*, p. 5.

29 See discussion earlier in this report; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2018*, 5 December 2018, pp. 26–28.

30 Law Council of Australia, *Submission 3*, p. 4.

31 Law Council of Australia, *Submission 3*, p. 4.

32 Department of Home Affairs, *Submission 4*, p. 5.

Committee view

1.30 The committee considers that the proposed measures are proportionate to the objective of the bill to protect the Australian community and prevent terrorism. The committee is satisfied that necessary privacy protections are already in place under the existing scheme that requires certain applicants to provide biometric information. Should there be any issues with applicants in Australia being ineligible for bridging visas, the Department of Home Affairs would still be able to use its discretion to request that applicants provide biometric information further into the process, rather than upfront as a condition of eligibility.

1.31 Further, the committee is of the opinion that given Australia's operational priorities and risks are subject to change, sometimes at short notice, it is appropriate that the measures should be outlined in a form of legislation that enables flexibility – that is, the form of legislative instrument as proposed in the bill. The committee agrees with the Minister that the appropriate place for the legislative instrument is section 46 of the Migration Act, which concerns valid visa applications.

1.32 The committee notes that the majority of the submitters supported the bill in its current form.³³ The concerns raised in relation to human rights considerations were previously dealt with by the Senate Legal and Constitutional Affairs Committee during its inquiry into the Migration Amendment (Strengthening Biometrics Integrity) Bill in 2015. This bill does not propose major additions to existing biometric requirements or the way these are dealt with in legislation; rather, the bill proposes amending *when* the provision of biometric personal identifiers would be required.

1.33 The proposed changes are an important measure towards making Australia's visa processing system more efficient, and will help officials to identify criminals, terrorists and other applicants of concern faster than is currently the case. For these reasons, the committee considers that the bill should be passed.

Recommendation 1

1.34 The committee recommends that the bill be passed.

**Senator the Hon Ian Macdonald
Chair**

33 Legal Services Commission of South Australia, *Submission 1*; Mr Melville Miranda, *Submission 2*; Department of Home Affairs, *Submission 4*.

Australian Greens Dissenting Report

1.1 The Australian Greens draw attention to the committee report's statement that 'the majority of the submitters supported the bill in its current form'. There were four submissions made to this inquiry. One submission supporting the bill was from the sponsoring Minister's own department, the Department of Home Affairs (Submission 4). Two submissions supporting the bill were written in less than half a page (Submissions 1 and 2). One submission raised several and significant concerns with the bill (Submission 3).

1.2 Regarding justification of the bill, the Law Council of Australia (Submission 3) argued that the collection of additional personal identifiers as a prerequisite to making valid visa applications (in certain instances) has no clear link to the bill's stated objectives of preventing terrorism. As such, the Law Council called on the Government for greater clarity on:

...how personal identifiers are to be used in the visa processing framework and the extent to which applicants will be informed of these processes and have an adequate opportunity to respond.¹

1.3 As noted in the committee's report, the Parliamentary Joint Committee on Human Rights (PJCHR) has also previously raised concerns regarding the collection of additional personal identifiers under the *Migration Act 1958*, particularly regarding privacy safeguards and 'how the proposed measure would apply to persons "who may be incapable of understanding and consenting to the collection of personal identifiers", such as children'.²

1.4 This latter concern, regarding consent, is shared by the Australian Greens, who question whether consent for all people subjected to this legislation could be considered fully informed—where socio-economic determinants such as language, education, age, culture, and/or location could be compromising factors—and whether consent could in certain circumstances be considered to be given under duress, for example, for persons fleeing persecution.

1.5 Furthermore, reported by the PJCHR, the proposed collection of additional personal identifiers 'could lead to distinctions based on protected attributes (such as, race, sex, religion or national origin) which could amount to direct discrimination'.³

1.6 On these concerns regarding consent and discrimination, as noted in the committee's report, but bearing reiteration in this dissenting report: 'At the time of this committee's adoption of this report, the Minister had not yet provided a response'.

1 Law Council of Australia, *Submission 3*, p. 2.

2 See paragraph 1.9 of committee report; Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: Report 1 of 2019*, 12 February 2019, p. 41.

3 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: Report 1 of 2019*, 12 February 2019, p. 43.

1.7 As submitted by the Law Council of Australia, further discrimination against vulnerable peoples that could result from additional personal identifiers being required at the time of visa application, as opposed to post-lodgement (for which there is already capacity within current legislation), could include 'legitimate and worthy visa applicants being denied the opportunity to lodge a valid visa application due to no fault of their own'.⁴

1.8 In May 2018, the Senate passed a Greens motion calling on the Government to strengthen protections in Australia's 'woefully inadequate' *Privacy Act 1988*, to provide protections comparable with the European Union's General Data Protection Regulation (GDPR). However, this bill, if considered within the GDPR, would likely fail the following tests:

- processing is permitted if it is necessary for the purposes of legitimate interests pursued by the controller (or by a third party), except where the controller's interests are overridden by the interests, fundamental rights or freedoms of the affected data subjects which require protection, particularly where the data subject is a child (Article 6); and
- if informed consent is used as the lawful basis for processing, consent must have been explicit for data collected and each purpose data is used for (Article 7).

1.9 Another significant concern for the Australian Greens regarding this bill is its use of a non-disallowable legislative instrument to determine specified collection of specified personal identifiers for specified classes of visa applicants.

1.10 This concern was also held by the Senate Scrutiny of Bills Committee and the Law Council of Australia, with the latter submitting:

...without adequate parliamentary oversight and consultation requirements, determinations made under the proposed reforms as to applicant classes, the types of personal identifiers or the manner in which those identifiers are provided, may cast doubt over the non-discriminatory nature of Australia's migration programme.⁵

Recommendation 1

1.11 The Australian Greens recommend that the bill not be passed.

Senator Nick McKim

Senator for Tasmania

4 Law Council of Australia, *Submission 3*, p. 3.

5 Law Council of Australia, *Submission 3*, p. 4.

Appendix 1

Submissions

Submissions

1 Legal Services Commission of South Australia

2 Mr Melville Miranda

3 Law Council of Australia

4 Department of Home Affairs

