



## **Australian Education Union**

### **Submission to the Senate Education, Employment and Workplace Relations Committee**

### **Inquiry into the Student Identifiers Bill 2013**

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### **Introduction**

1. The Australian Education Union welcomes the opportunity to provide a written submission to the Senate Education, Employment and Workplace Relations Committee Inquiry into the Student Identifiers Bill 2013.
2. The AEU is an organisation of employees registered under the provisions of the *Fair Work (Registered Organisations) Act 2009*. It has approximately 190,000 members employed in government schools and public early childhood work locations, in public institutions of vocational and/or technical and further education and training, in Adult Multicultural or Migrant Education Service centres and in Disability Services centres as teachers, school leaders and education assistance or support work classifications.
3. The AEU has had experience of the development and implementation of systems for unique student identification numbers in Victoria and Queensland and has previously recommended in principle the development of a national unique student identifier in the context of an Indigenous Education Action Plan overseen by the then Ministerial Council for Education, Early Childhood Development and Youth Affairs in 2010.
4. The AEU notes the proposal to develop a system/s of or for ‘unique student identifiers’ has been an element within discussion at Council of Australian Government meetings at least since 2009 and one of a number of so-called ‘reforms’ agreed by all governments under the National Partnership Agreement on Skills Reform in April 2012. The Commonwealth was to assume a lead role in the development of the legislative package for a Unique Student Identifier under that agreement.
5. However, the AEU has long maintained a strong objection to the content and direction of government initiatives in the VET sector which promote market competition between TAFE as a government owned and funded public provider and private ‘for profit’ providers of VET, which introduce income contingent loan schemes that burden already disadvantaged students and their families and which increasingly direct more public funding or taxpayer subsidies to private registered training organisations.
6. Within this context, a policy objective of the Bill which would enable a number of entities, eg, government departments or authorities and registered training organisations to identify, and thereby restrict, an individual student’s entitlement to publically subsidised VET based on previously completed qualifications is highly problematic.

7. The volatility of today's labour markets and the 'mobility' or 'flexibility' required of the modern workforce evidenced in the need to train and re-train over a lifetime inevitably will mean workers (students) have to change their occupations and careers several times over a lifetime. For the low or lower paid and those retrenched from their work or otherwise 'displaced' in these times of accelerating change, this 'denial of access to education and training' measure or objective associated with the Bill is objectionable and contrary to fair and decent public policy.
8. The Bill will not promote social inclusion and will operate to increase discrimination in access to education and training against the young, the socio-economically disadvantaged, the career-change worker and many others.

## Outline of Bill

9. The Bill provides in Part 4, for the establishment of a new statutory authority, the Student Identifiers Agency, to assist its Chief Executive Officer in the performance of the CEO's functions which are set out in clause 33 as:

*'(1) ....:*

- (a) to assign student identifiers to individuals;*
  - (b) to verify or give a student identifier of an individual;*
  - (c) to prepare and provide access to authenticated VET transcripts of individuals or extracts from such transcripts;*
  - (d) to ensure that a record of all student identifiers is kept in such form as the CEO considers appropriate;*
  - (e) to resolve problems that have occurred in relation to the assignment of student identifiers, including cases where:*
    - (i) an individual has been assigned more than one student identifier; or*
    - (ii) the same student identifier has been assigned to 2 or more individuals;*
  - (f) to establish and maintain a mechanism to enable an individual who has been assigned a student identifier to set controls (the **access controls**) on:*
    - (i) the registered training organisations and VET-related bodies that may request access to an authenticated VET transcript of the individual; and*
    - (ii) the registered training organisations and VET-related bodies that may request access to an extract from an authenticated VET transcript of the individual and the content of the extract;*
  - (g) any other functions conferred on the CEO by this Act, the regulations or any other law of the Commonwealth;*
  - (h) to do anything incidental or conducive to the performance of those functions*
- (2) The CEO has power to do all things that are necessary or convenient to be done for or in connection with the performance of his or her functions.'*

10. The Bill sets out a process:

- for applications by an individual or other specified bodies if authorised by the individual to be made to, and granted by, the Agency CEO for a student identifier to be assigned to that individual (clauses 8-9),
- for access to that student identifier to be provided to other specified bodies with or without the consent of the individual (clauses 8, 13),
- for the protection of the records of the student identifiers and of other information associated with them (clauses 10 and 15)
- for the collection, use and disclosure of those records (clauses 16-21)
- for how the provisions of the Bill will interact with the *Privacy Act 1988 [Cth]* (clauses 22-24);
- for individuals or others, subject to those individuals setting access controls, to have access to an authenticated VET transcript, or extract, of the individual's VET studies (clauses 25-27); and
- for a prohibition on the issuing of a VET qualification or Statement of Attainment to students without a student identifier (clause 53)

11. It is apparent from the Bill's Explanatory Memorandum and Minister's Second Reading Speech that currently there is no streamlined or simple process whereby a student's VET activity records (which are variously stored with the NCVET and other agencies) can be accessed by that student, or anyone else, over a lifetime.

12. In turn these extrinsic materials indicate this current situation:

- restricts the capacity of individuals to obtain and use a single, comprehensive & authentic record of their VET activity,
- limits training organisations efficiently being able to assess student achievement or prior learning at the point of enrolment,
- hampers government policy makers' better management of the transparency and responsiveness of their VET systems under student entitlement models; and
- constrains the capacity of government and researchers to assess VET system activity and performance.

13. Within this context the AEU raises a number of concerns for consideration by the Committee.

## **No Objects or Purpose Clause**

14. The Minister in the Second Reading Speech makes it very clear that the key principle underpinning the scheme is that individuals have control over their student identifiers and can determine who can have access to it and the educational records associated with it.

15. The absence of an Objects or Purpose clause – or a definition as to proper purpose or use of the Student Identifier – leads to a confusion as to this purpose and this is reflected in the Bill.
16. This is seen when comparing the provisions concerning the creation and assignment of the Student Identifier in clauses 8 and 9 with requests to be provided with a student's student identifier under clause 13 and with the requirements for collection, use and disclosure of student identifiers in clauses 16-21.
17. The clause 8 process requires that if an entity other than the individual applies for the assignment of a student identifier, the consent of the individual is required.
18. This is protective of the individual as well as supportive of administrative convenience and is supported by the AEU.
19. However, clause 13 enables a number of specified other entities to apply to be given an individual's student identifier without the consent of the individual being required.
20. Although the Agency CEO has a broad discretion about granting the request, without specification of the Act's purpose the CEO will be at large to consider a vastly wider range of purposes and these may conflict with the primacy afforded individual control highlighted by the Minister.
21. This concern is heightened by the requirements concerning collection, use and disclosure of student identifiers.
22. Clause 18 provides that collection, use and disclosure may occur with the consent of the individual. However the provision makes it clear that this consent can be either express or implied.
23. Implied consent is not a strong protection which ensures an individual is actually in control of the assignment and use of their student identifier. A very wide range of circumstances can give rise to the operation of implied consent, for example, simply being an enrolled student can imply the consent of that student to a whole host of administrative and other procedures of the institution concerned. If the Bill's provision is retained, a student would or could impliedly consent to the use of the Identifier without knowing the full range of uses to which it could be put.
24. The AEU does not support the use of the concept of implied consent in this context and recommends its deletion. A stronger protection would exist if the concept of express consent is reinforced with the qualification that it also be 'informed consent'.
25. Further, clause 21 enables an entity to collect, use and disclose a student identifier if that collection, use and disclosure is authorised by the regulations.
26. The Regulations are not yet finalised and certainly are not yet before the Parliament. The draft Regulations which are publically available identify a broad range of entities that may collect, use and disclose a student identifier. These include government departments, other bodies established by a parliament, registered training organisations, schools and any bodies declared by the Agency CEO.

27. The AEU submits that the only ‘mechanical’ purpose of a student identifier (or any unique identifier) is to provide a capacity to link identified individuals with records of one sort or another. In this context it is to provide a link between an individual and their records of VET activity.
28. Absent an Objects or Purpose Clause, the Act simply places no further legislative restraints upon the ‘use’ or ‘purposes’ for which a student identifier can be put.
29. It is therefore obvious that individuals are not in control of their student identifiers and their records will be readily available to a very wide range of entities.

### **Poor Protection of Personal Information and Records of Student Identifiers**

30. Firstly, Clause 10 purports to provide for the destruction of personal information when collected for the purpose of applying for a student identifier.
31. This protection is so heavily qualified as to offer virtually no protection at all.
32. It only applies to bodies that have been authorised by an individual under clause 10 and so excludes bodies that collect personal information under clause 13 or clause 21.
33. It applies only to information collected *solely* for the purpose of an application for a student identifier and so excludes information that is collected for a range of additional purposes.
34. It is the view of the AEU that all the entities or bodies that the Bill refers to, collect personal information for a variety of purposes. Most public agencies, in fact, are required to comply with some form of statutorily prescribed ‘record keeping’.
35. A necessary consequence is that the information will not be destroyed at all.
36. Secondly, under clause 15 both the CEO and other entities who keep records of student identifiers are obliged to take reasonable steps to protect the record from misuse, interference, loss, unauthorised access, modification and disclosure.
37. The AEU submits these ‘protections’ are inadequate. It is not possible to obey a legislative protection against ‘misuse’ unless there is firstly, a legislative prescription defining ‘proper’ use.
38. The protections, such as they are, would be strengthened if there was a further obligation upon the Agency CEO to be satisfied that these other entities had adequate protections in place before providing them with an individual’s student identifier.

## **No sanction applies to misuse of Student Identifiers**

39. The Bill advances no specific scheme of offences or penalties. Rather clause 22 provides that contraventions of only clauses 10, 15 and 16 are to be treated as interferences with the privacy of an individual and enforced through the provisions of the Privacy Act 1988.
40. It is noteworthy, for example, that there is no contravention of s17 which permits the Agency CEO to collect, use and disclose student identifiers for the purpose of performing his functions or exercising his powers and for the purposes of research which relates, directly or indirectly, to education and training.
41. It is true that any individual providing false or misleading information when applying for a student identifier can be liable for criminal penalties under section 137 of the *Criminal Code Act 1995* and that Commonwealth officers generally, which includes the Agency CEO and staff, are also subject to section 70 of the *Crimes Act 1914* in relation to the unauthorised disclosure of information.
42. The AEU submits the Bill provides no adequate sanction for the misuses of Student Identifiers.
43. Criminal Offences require too high a threshold to establish all the elements of the alleged crime (knowing or careless intent) and too high a burden of proof (beyond all reasonable doubt).
44. Further, the Privacy Act processes involve an investigation (ss36, 40) which is largely complaint-based in origin although the Information Commissioner does have an 'own motion' power of investigation. However, it provides only for conciliation and a non-binding determination as to remedy (s52(1B)) with any enforcement having to occur through an additional Federal Court action (s55A). While the Commissioner does have a broad power to make public interest determinations concerning an agency's contravention of 'privacy principles' this operates only to excuse or exempt the agency from compliance in the public interest (s72).
45. Figures provided in the 2011-2012 Annual Report of the Office of the Australian Information Commissioner (pxv) show an 11% increase in the number of complaints, a 37% decrease in own motion investigations and an 18% decrease in voluntary data breach notifications over the previous financial year. There was only 1 Determination made in 2011-2012 (p61).
46. The AEU submits that consideration should be given to the provision of a range of civil penalty provisions enforceable through the Federal Court for contravention of the Bill's provisions. It notes that the Victorian legislation concerning Student Numbers provides for offences & penalties (see, eg, *Education & Training Reform Act 2006 [Vic]*, s5.3A.10).

## Breach of Human Rights

47. The AEU notes the Statement on Compatibility with Human Rights published with the Bill's Explanatory Memorandum. It finds the Statement's Conclusion that *'the Bill is compatible with human rights because it promotes the rights to education and work under Articles 13 and 6 of the ICESCR and protects the right to privacy under Article 17 of the ICCPR. Any potential limitations to these rights are reasonable, necessary and proportionate in achieving the Bill's legitimate policy objectives'* very troublesome, especially given that the Statement itself acknowledges that the Bill may also have the effect of limiting an individual's access to education (Explanatory Memorandum, p5).
48. The AEU submits that the Bill is at least inconsistent with, and arguably in breach of, Australia's obligations under international human rights conventions.
49. The International Covenant on Economic, Social and Cultural Rights, especially at Article 13(2)(b) commits the Australian Government to a full realisation of the right to or for  
  
*'secondary education in its different forms, including technical and vocational secondary education, ...[to] be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.'*
50. While the Bill, in terms, does not provide for fees to be payable for assignment of student identifiers or the access to authenticated VET transcripts, it is evident from the extrinsic materials referred to earlier that one of the intents of the Bill is to restrict eligibility of individuals to government subsidised VET or access to VET that, until current government policy prescriptions, was comparatively free or at very low cost.
51. When viewed fairly, this can only be described as a progressive restriction on free education and thereby inconsistent with the obligations voluntarily assumed by Australia under the Covenant in question.
52. It is true that the ICESCR at Article 4 permits limitations on the rights it pursues. However this may be *'only to such limitations as are determined by law [and] only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.'*
53. While the Bill, if passed, would undoubtedly be determined by law, it would facilitate government capacity to restrict access to free or low cost VET and this is incompatible with the nature of the right/s upheld by the ICESCR.
54. The Statement on Compatibility with Human Rights also acknowledges that the Bill may limit the privacy of an individual protected by Article 17 of the International Covenant on Civil and Cultural Rights. It accepts that it will be easier for a considerable range of VET system entities to attach a student identifier to records and to identify an individual associated with that identifier and those records (EM, p7).



55. This admitted interference with the right to privacy however is said not to be arbitrary as it will only be done with the permissions or authorisations provided in the Bill. As such, it is claimed, this is not inconsistent with Australia's obligation to protect an individual's right to privacy from arbitrary interference.
56. Further, the permissions and authorisations are said to be reasonably necessary to give effect to the purposes of the Bill.
57. The Statement outlines some 12 separate purposes on pp7-8 of the Explanatory Memorandum.
58. For the reasons outlined earlier in this submission concerning the poor protections the Bill provides to records of personal information and the absence of any prescription in the Bill of its Objects or Purposes, the AEU submits the Committee should be concerned that the Bill in its current form is inconsistent with, and potentially undermines, Australia's obligation under international covenants to protect human rights.

## **Other Matters**

### ***Issue of VET qualifications***

59. Clause 53 provides that a registered training organisation must not issue either a VET qualification or a Statement of Attainment unless the individual has been assigned a student identifier.
60. The AEU submits that the effect of this clause will be to remove with retrospective effect an entitlement or right an individual otherwise would have to be issued with qualifications etc studied for when the provisions of the Bill were not in operation.
61. This can be contrasted to the provisions concerning Authenticated VET Transcripts at clauses 25-26. The definition of an Authenticated VET Transcript at clause 4 makes it clear the information on the transcript will be prescribed by the regulations.
62. The draft Regulations make it clear that an Authenticated VET Transcript will contain records of units of competency or modules or course or qualification commenced or completed only after 1 January 2014, the intended date of commencement of the Bill/Act. (The Transcript will also contain information such as the individual's personal information, the source of funding for each unit of competency etc as well as the outcome, the provider of the unit and the issuer of the qualification.)
63. With such a clear expression of intent evinced by clause 23, in the view of the AEU, it would not be sufficient to rely upon the 'Savings' provision in clause 54 to protect an individual's accrued rights or access to remedies. In any case where the legislature intends to step in and regulate affairs, it is a poor public policy position for legislative prescription to rely upon individual action to enforce rights.
64. This inconsistency should be removed so that the clause 53 provision contains the same 'operative date' as the clause 25-26 provision. Further there should also be removed the requirement to include the source of funding for the unit, module or course.

## **Conclusion**

The AEU could support a Bill introducing a Student Identifier that would facilitate an individual's access to records of their VET activity, and also enable other entities to do so on their behalf with their express, written and informed consent. Such records, de-identified, could be further used for bona fide research purposes or for assessing VET system performance.

The Bill in its current terms does not do this. It will facilitate a wide range of uses, operate to restrict access to education and training and increase the risk of breach of rights to privacy and other human rights.

For the Bill to overcome the concerns expressed, it requires a specific Object as to proper purpose and a prohibition on use for other secondary, extraneous or otherwise improper purposes. To be meaningful, the prohibition needs support by an effective regime of offences and civil penalties.