



PO Box A147
Sydney South
NSW 1235
info@alhr.org.au
www.alhr.org.au

9 April 2015

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary,

Submission concerning the *Migration Amendment (Strengthening Biometrics Integrity) Bill 2015*

Australian Lawyers for Human Rights (“ALHR”) thanks the Senate Legal and Constitutional Affairs Committee for the opportunity to comment on the *Migration Amendment (Strengthening Biometrics Integrity) Bill* (“Bill”).

ALHR was established in 1993 and is a network of legal professionals active in practicing and promoting awareness of international human rights. ALHR has a national membership of over 2,600 people, with active National, State and Territory committees. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.

The stated aim of the Bill is to enhance the capability of the Department of Immigration and Border Protection to identify citizens and non-citizens seeking to enter and depart Australia by removing existing restrictions in the *Migration Act 1958* to create a flexible and sound legislative basis for the collection of biometric data.¹

ALHR recognizes the need to verify that a person is who they claim to be, and to link an individual to security, law enforcement, and immigration information. However, the new subsection 257A(1) creates a broad, discretionary and unfettered power which is not limited in any proportional or legitimate manner.

General comments on the Bill

1. New subsections 257A(1) and (2) create a broader power than what currently exists by extending the categories where biometric personal identifiers may be asked from 12 existing categories in existing subsection 5A(3) to “the purposes of the Act and regulations”.
2. New subsection 257(4) states that the power to request personal identifiers applies in all prescribed circumstances. ALHR notes that the new subsection replaces similar powers to prescribe circumstances in existing subsection 188(4) and subsection 192(2A) which are limited to situations where a lawful non-citizen is required to give evidence and the detention of visa-holders where their visa is likely to be cancelled.
3. New subsection 257(5) permits identification tests to be authorised in ways other than the authorised tests listed in existing section 5D of the current Act and therefore creates a situation where an identification test or method is used which is not internationally or domestically recognized, tested, validated, regulated or approved.
4. New subsection 257(7) has no limits placed on it.
5. There is also concern regarding the storage, security, retention and destruction of data obtained under new subsection 257A. ALHR notes the recent example of the Department of Immigration and Border Protection accidentally leaking details of

¹ *Migration Amendment (Strengthening Biometrics Integrity) Bill 2015* – Explanatory Memorandum.

10,000 asylum seekers online.²

For the above reasons, ALHR is of the opinion that the new section 257A creates an broad, discretionary and unfettered power which is not limited in a proportional and legitimate manner. ALHR is concerned that this may create a situation where the power is abused and asylum seekers are subjected to a system with no checks and balances, resulting in the absence of accountability.

ALHR recommends that the situations where biometric personal identifiers are allowed are categorised and limited; the situations when an identification test can be requested is also limited; and a limit is placed on how many times an identification test can be requested.

Specific concerns about the Bill

The *United Nations Convention on the Rights of the Child* (“CRC”) is the key international treaty protecting children’s rights and the most widely ratified treaty in the world. Australia became party to the CRC in 1990 and, as such, has a range of obligations it has agreed to fulfill under the Convention. Australia’s obligations under the CRC, which are relevant to children who arrive in Australia unaccompanied, can be summarised as follows:

- In all actions concerning children, it must ensure that the “best interests of the child” are a “primary consideration”;³
- It must provide “such protection and care as is necessary” for the well-being of every child and, to this end, take all “appropriate legislative and administrative measures”;⁴
- It must ensure that, where parents are absent and a legal guardian has been appointed, the guardian has the “primary responsibility for the upbringing and development of the child” and that the “best interests of the child” is the guardian’s “basic concern”;⁵

² <http://www.gizmodo.com.au/2014/02/immigration-department-gaffe-sees-10000-asylum-seeker-details-leaked-online/>.

³ *United Nations Convention on the Rights of the Child 1989*, art. 3(1).

⁴ Above n 2, art. 3(2).

⁵ Above n 2, art. 18(1).

- In relation to children who arrive in Australia unaccompanied, especially those seeking asylum, it must provide them with “special protection and assistance” and with “alternative care”;⁶
- In relation to children seeking asylum, it must provide them with “appropriate protection and humanitarian assistance” in the enjoyment of all the rights set out in the CRC and other human rights treaties to which Australia is a party;⁷
- It must ensure that children can enjoy the rights contained in the CRC which include: protection against all forms of discrimination;⁸ participation in decision-making;⁹ protection from violence, abuse and neglect;¹⁰ enjoyment of the highest attainable standard of health;¹¹ standard of living adequate for the child’s development;¹² access to education;¹³ ability to engage in play and recreational activities;¹⁴ not to be subjected to torture or other cruel, in human or degrading treatment or punishment;¹⁵ not to be arbitrarily deprived of liberty.¹⁶

ALHR notes that the Bill will remove existing restrictions in the *Migration Act 1958* on collecting biometrics from minors and incapable persons. The amendments are said to be a child protection measure aimed at preventing child trafficking and/or smuggling.¹⁷ However, in ALHR’s view the proposed action is not consistent with the rights of unaccompanied children to be able to provide informed consent in relation to their own personal information. Creating a situation where unaccompanied children are required to provide information without any assistance is inconsistent with Australia’s obligations under the CRC in the following ways:

1. Noting that no interpreter may be present or may be unqualified,¹⁸ the Minister for

⁶ Above n 2, art. 20(1) and 20(2).

⁷ Above n 2, art. 22(1).

⁸ Above n 2, art 1(2).

⁹ Above n 2, art. 12.

¹⁰ Above n 2, art. 19(1).

¹¹ Above n 2, art. 24(1).

¹² Above n 2, art. 27(1).

¹³ Above n 2, art. 28(1).

¹⁴ Above n 2, art. 31(1).

¹⁵ Above n 2, art. 37(a).

¹⁶ Above n 2, art. 37(b).

¹⁷ *Migration Amendment (Strengthening Biometrics Integrity) Bill 2015* – Explanatory Memorandum.

¹⁸ https://www.humanrights.gov.au/sites/default/files/document/publication/an_age_of_uncertainty.pdf - page 348.

Immigration is the legal guardian for unaccompanied children.¹⁹ The “best interests of the child” has clearly not been the primary concern in creating this provision.

2. The new provisions do not provide for any guardian or independent observer to be present thus creating a situation where an unaccompanied child is required to look after their own interests in a system they are unfamiliar with. This is inconsistent with the requirement to provide “protection and care”, “special protection and assistance” and the ability to permit children to participate in informed decision-making.

ALHR note that unaccompanied children are an especially vulnerable group in need of immediate and ongoing protection and assistance.²⁰ ALHR further notes the unfortunate history of wrist x-rays being used as age identifiers by the Department of Immigration and Border Protection and that consent for wrist x-rays were often not obtained which has significant consequences in the future.²¹

An individual has the right to choose what happens to his or her own body and it is a fundamental rule of domestic law and international law that informed consent must be obtained before there is any interference with a person’s bodily integrity. Where a child is unable to consent, a guardian or parent is generally able to consent on behalf of the child. However, the current amendments make no provision for the requirement that an independent adult, guardian or independent observer be present which is in itself inconsistent with policy that an independent observer be present whenever an unaccompanied child is interviewed.²²

ALHR recommends that the Bill should not remove existing restrictions in the *Migration Act 1958* on collecting biometrics from minors and incapable persons as this provides a necessary safeguard.

If you would like to discuss any aspect of this submission, please contact Claire

¹⁹ See *Immigration (Guardianship of Children) Act 1946* (Cth), s 6.

²⁰ *United Nations Convention on the Rights of the Child 1989*.

²¹ https://www.humanrights.gov.au/sites/default/files/document/publication/an_age_of_uncertainty.pdf

²² https://www.humanrights.gov.au/sites/default/files/document/publication/an_age_of_uncertainty.pdf
- p. 204

Hammerton, ALHR Refugee Sub-Committee Coordinator by email at:

Yours faithfully,

Claire Hammerton
Refugee Sub-Committee Coordinator
Australian Lawyers for Human Rights