



Law Council
OF AUSTRALIA

Office of the President

25 January 2019

Senator the Hon Ian Macdonald
Chair, Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Senator Macdonald

MIGRATION AMENDMENT (STREAMLINING VISA PROCESSING) BILL 2018

1. Thank you for the opportunity to contribute to the Senate Legal and Constitutional Affairs Committee's inquiry into the Migration Amendment (Streamlining Visa Processing) Bill 2018 (**the Bill**).
2. Please find attached the Law Council's submission to the inquiry.
3. The Law Council is grateful for assistance of its Migration Law Committee, Federal Litigation and Dispute Resolution Section.
4. The Bill proposes amendments to the *Migration Act 1958* (**the Migration Act**) which would enable the collection of personal identifiers to be a prerequisite to making a valid visa application in certain instances.
5. Currently under section 257A of the Migration Act, the Minister or an immigration officer may, in writing or orally, require a person to provide one or more personal identifiers. Section 5A of the Migration Act defines a personal identifier as including fingerprints, handprints, measurements of a person's height and weight, a photograph or other image of a person's face and shoulders, an audio or video recording of a person, an iris scan, a signature, and any other identifier prescribed by regulations.
6. Further to the existing provisions relating to personal identifiers, the Bill proposes to allow the Minister, by a legislative instrument, to specify classes of visa applicants who will be required to provide specified types of personal identifiers in order to make a valid visa application. Importantly, such a determination would require visa applicants to provide personal identifiers at the time of visa application, rather than post-lodgement during the application processing period.

The justification for the measures

7. The second reading speech accompanying the Bill points to 'recent terrorism related events both in Australia and overseas' as highlighting the need for the Department of Home Affairs (**the Department**) to know who is applying for a visa as soon as they make

a visa application through the provision of personal identifiers.¹ Further, the Explanatory Memorandum's Statement of Compatibility with Human Rights states that the 'collection of personal identifiers better protects the Australian community from imposters and people using fraudulent documents to conduct criminal or terrorist activities'.²

8. While the Law Council appreciates and respects the need to take measures to reduce the risk of terrorism and promote national security, there does not appear to be a clear link between requiring personal identifiers at time of application and at the level of visa application validity (as opposed to during processing of the application), and terrorism prevention.
9. Many applicants are already required to undertake personal identifier tests during the assessment of their visa application. Under the existing framework, if issues are raised in the personal identifier test, the visa can be refused, and where the person is offshore the person will not be allowed to enter Australia. If the person is onshore during the visa application process, then any such issues would no doubt lead to visa refusal.

The use of personal identifiers

10. The Law Council has previously raised concerns with the use of biometric testing in the visa application process,³ and submits that any alteration to this scheme must be done with the upmost regard to the sensitivity of the information, the privacy rights of the applicant and the justification for requesting such personal identifiers.
11. Once personal identifiers are collected, the proposed measures will allow for the Department to initiate law enforcement checks to ascertain if the visa applicant has a criminal history, the extent of that history (if applicable), and whether the visa applicant poses a criminal risk to the Australian community.⁴
12. While there will no doubt be consent provided by the visa applicant for such inquiries to be made on their behalf as is the current case when lodging an application, there are nevertheless privacy concerns with this approach, and uncertainty as to the ability for a visa applicant to respond to any adverse findings.
13. The Law Council suggests that greater 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.

Requiring personal identifiers at time of application

14. The Bill's Statement of Compatibility with Human Rights asserts that establishing identity immediately following a visa application, through the provision of personal identifiers at the time of application, supports the safety of the Australian community, the safety of vulnerable people, and the integrity of the visa system.⁵

¹ The Hon Melissa Price MP, *House of Representatives Hansard* (29 November 2018).

² Migration Amendment (Streamlining Visa Processing) Bill 2018, *Statement of Compatibility with Human Rights*, 12.

³ Law Council of Australia, Submission No 10 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration Amendment (Strengthening Biometrics Integrity) Bill 2015* (10 April 2015).

⁴ Migration Amendment (Streamlining Visa Processing) Bill 2018, *Statement of Compatibility with Human Rights*, 14.

⁵ *Ibid*, 19.

15. While the Law Council supports these goals, there are concerns regarding the practicality of a process that will require personal identifiers at the time of visa application for the purposes of validity under section 46 of the Migration Act, as opposed to during the consideration stage leading to a decision under section 65.
16. The Law Council notes that in many cases where personal identifiers may be required, visa applicants can live in remote, poverty-stricken conditions. Placing onerous requirements, such as the completion of personal identifiers at the application stage including potentially travelling to a physical office of the Department in a capital city inside Australia or to an Australian Consular post or similar agency outside of Australia, may lead to legitimate and worthy visa applicants being denied the opportunity to lodge a valid visa application due to no fault of their own.
17. By way of example, an orphaned relative of an Australian citizen may be residing in an internally displaced camp in Somalia. This person must lodge an orphan relative application before turning 18, otherwise they become ineligible - it is understood that clients often seek legal assistance close to a pending deadline such as this. In this example, the closest personal identifier centre (in Nairobi, Kenya) may be an extremely dangerous journey and one which would require significant logistical support.
18. In relation to onshore applicants, there is a concern that the proposed measures are contrary to the move by the Department towards online applications. The need for biometric information at the time of application may impact on the efficiency of visa processing through an increase in face-to-face interactions at the application stage.
19. It is submitted that the practical impact of requiring personal identifiers at the time of application requires further justification, as the Law Council remains unclear why personal identifiers, when required, could not remain part of the post-lodgement assessment process.
20. Additional issues of concern arise in relation to onshore applications. The Law Council is particularly concerned that the primary function of making this a validity requirement under section 46 of the Migration Act means that the applicant is not eligible for a Bridging visa unless and until all validity issues are satisfied. The Law Council questions the public benefit for the administration of the visa application system and the claimed safety of the Australian community by potentially allowing a person's initial visa to expire and allow them to become unlawful (or indeed extending their unlawful stay in Australia) through the separate requirement to provide biometrics.
21. Instead, the Law Council submits that the provision of biometrics should be a requirement for visa processing leading to a decision on the visa application itself under section 65 of the Migration Act instead of a criterion for validity under section 46.

Use of non-disallowable legislative instrument

22. Proposed subsection 46(2B) of the Migration Act provides that the Minister may, by legislative instrument, determine that a specified class of visa applicants must provide one or more specified personal identifiers in a specified way for their application to be valid. Proposed subsection 46(2C) of the Migration Act sets out what such a legislative instrument may specify in relation to the class of applicants, the different types of personal identifiers and the way in which the personal identifiers are to be provided.

23. In justifying the proposed measures, and the use of legislative instrument as opposed to primary legislation, the Explanatory Memorandum states:

*The flexibility about what classes of applicants, however described or categorised, can be required to provide a personal identifier will enable the Department to collect personal identifiers from specific cohorts in response to emergent risks based on specified circumstances, recent events, and detected or realised threats.*⁶

24. It is noted that the Senate Standing Committee for the Scrutiny of Bills (**the Scrutiny Committee**) has drawn attention to the non-disallowable nature of a legislative instrument that would be made pursuant to the proposed measures, and has raised a number of concerns with the level of consultation that will occur in relation to such determinations.⁷
25. The Law Council shares the concerns raised by the Scrutiny Committee and notes 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.
26. The Law Council submits that if the reforms are to continue by way of legislative instrument, that this should be made disallowable and subject to a mandatory consultation period to ensure adequate parliamentary oversight.

Yours sincerely

Arthur Moses SC
President

⁶ Migration Amendment (Streamlining Visa Processing) Bill 2018, *Explanatory Memorandum*, [21].

⁷ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2018* (5 December 2018), [1.87].