



New South Wales
Council for Civil Liberties

**Submission to the Legal and
Constitutional Affairs Committee
on the Migration Amendment
(Strengthening Biometrics
Integrity) Bill 2015**

9 April 2014

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts; attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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NSWCCL Submission to the Legal and Constitutional Affairs Committee on the Migration Amendment (Strengthening Biometrics Integrity) Bill 2015 (the Bill).

The NSW Council for Civil Liberties (NSWCCL) thanks the Committee for its invitation to make a submission on this bill.

1. Summary & principal points

NSWCCL is not absolutely opposed to the collection of biometric data as proposed in the Bill and understands the justification for the collection and use of biometric data in this context. However, the NSWCCL is concerned that the Bill in its current form is too open-ended and does not contain essential safeguards to limit the collection and retention of additional biometric data, including fingerprints, handprints, a measurement of height and weight, an audio or video recording, an iris scan and any other identifier prescribed by the regulations for both non-citizens and citizens.

NSWCCL is further concerned that the Bill in its current form may disproportionately effect minors, incapable persons and asylum seekers.

NSWCCL recognises that security measures are required to protect the Australian community from threats of domestic terror attacks and to prevent Australians travelling to fight in foreign conflicts and the abduction of children. However, the potential for unnecessary and disproportionate invasion of privacy of a large number of non-citizens and Australian citizens by the proposed amendments is a serious concern.

NSWCCL recommends that a privacy impact assessment be conducted and that relevant safeguards be implemented to ensure that the proposed provisions do not allow for the mass collection and retention of biometric data of non-citizens and non-suspect citizens or disproportionately effect minors, incapable persons or asylum seekers.

2. Detailed Comments

2.1. Section 257A

Pursuant to section 257A (1) of the Bill, the Minister or officer may require a person to provide one or more personal identifiers for the purposes of the Act or the Migration Regulations. In respect of Australian citizens, personal identifiers may only be required when arriving or departing Australia or when travelling (or intending to travel) on a foreign vessel.

Under the Act “personal identifier” means any of the following (including any of the following:

- (a) fingerprints or handprints of a person (including those taken using paper and ink or digital live scanning technologies);
- (b) a measurement of a person's height and weight;

- (c) a photograph or other image of a person's face and shoulders;
- (d) an audio or a video recording of a person (other than a video recording under section 261AJ);
- (e) an iris scan;
- (f) a person's signature;
- (g) any other identifier prescribed by the regulations, other than an identifier the obtaining of which would involve the carrying out of an intimate forensic procedure within the meaning of section 23WA of the *Crimes Act 1914* .

The effect of section 257A is explained in the explanatory memorandum as authorising the collection of personal identifiers in any circumstance where a link to the purposes of the Act or the Migration Regulations can be demonstrated and the collection is not otherwise prohibited.¹

While the explanatory memorandum notes that these powers will only be used in limited circumstances, there are no safeguards included in the legislation to ensure this. The NSWCCCL is concerned that the failure to clearly define the circumstances in which biometric data can be collected leaves the powers open to misuse and may result in extensive data collection of non-citizens and non-suspect citizens.

Should this data be retained, additional concerns arise in relation to the security, use and disclosure of the collected biometric data. Should this data be retained, safeguards will need to be implemented to ensure that there are adequate mechanisms to protect the data from misuse and potential privacy breaches, and to ensure that any use or disclosure of information to individuals, departments, organisations or countries is identified and regulated.

In addition, pursuant to subsection (5), if requested, a personal identifier will be provided by way of one or more identification tests carried out by an authorised officer or an authorised system or if another way is specified by the Minister or officer – provided in that specific way.

The inclusion of the phrase “another way” grants a broad power to the Minister or officer to determine and specify the means by which data can be collected. This may include the use of technology or assessment criteria which should be transparent and accountable not vague and nondescript.

NSWCCCL is concerned that the apparent flexibility and absence of clarity in respect of the collection method raises privacy concerns and leaves the collection method open to misuse.

The insertion of section s 257A in the Bill raises serious privacy concerns in relation to the collection, method of collection, retention, use and disclosure (both permitted and un-permitted) of the biometric data.

These privacy concerns are heightened in relation to minors and incapable persons, and asylum seekers who may be adversely affected if their personal identifiers are accessed by foreign countries or organisations by reason of disclosure policies or a privacy breach.

¹ Explanatory Memorandum, Migration Amendment (Strengthening Biometrics Integrity) Bill 2015 (Cth) 35,15.

NSWCCL is of the view that the issues above have not been adequately addressed in the Bill or the explanatory memorandum and require further consideration.

NSWCCL recommends that privacy impact assessment be conducted that comprehensively reviews the implications of the Bill on the privacy of both citizens and non-citizens.

NSWCCL recommends that safeguards be implemented to provide clarity and regulate the collection, the method of collection, retention, use and disclosure of personal identifiers.

2.2. Minors and Incapable Persons

The proposed amendments to sections 261AL and 261AM of the Act remove the limits on collection of personal identifiers from minors and incapable persons and remove the requirement for the consent and presence of a parent, guardian or independent person for and during the collection of such biometric data.

As noted above, these amendments give rise to serious privacy concerns, in particular in respect to the retention and use of data. These issues should be further considered in a privacy impact assessment.

2.3. Refusal to provide personal identifiers

The explanatory memorandum notes that a failure by a non-citizen to comply with a request of a personal identifier in the context of a visa application could result in the refusal of that person's visa or that a visa application is invalid.

Safeguards need to be put in place to ensure that the entry and visa applications of minors, incapable persons and people seeking asylum in Australia are not adversely affected by the operation of s 257A.

It is important to consider that asylum seekers may be unwilling to provide personal identifiers by reason of their past experiences with authorities or the use of false travel documents to ensure safe travel. Furthermore, minors or incapable persons may not understand a request for personal identifiers and consequently refuse to provide such information.

NSWCCL recommends that Safeguards must be put in place to ensure that the operation of the Bill does not facilitate the refoulement of refugees or prevent a minor or incapable person from obtaining a visa.

3. Conclusion

As it stands the Bill poses an unnecessary and disproportionate threat to the privacy of all non-citizens and Australian citizens. Effective safeguards will need to be included to ensure that

individuals' biometric data is protected, or preferably destroyed, to ensure that their privacy and safety are not undermined by the collection and potential adverse use or disclosure of their biometric data. This is particularly a concern with regard to minors, incapable persons and asylum seekers.

The NSWCCCL is of the view that the Bill should not proceed without significant amendment informed by a rigorous privacy impact statement.

4. NSWCCL Recommendations

1. The NSWCCCL recommends that a privacy impact assessment be conducted that comprehensively reviews the implications of the Bill on the privacy of both citizens and non-citizens.
2. The NSWCCCL recommends that safeguards be implemented to provide clarity and regulate the collection, the method of collection, retention, use and disclosure of personal identifiers.
3. The NSWCCCL recommends that safeguards be implemented to ensure that the Bill does not facilitate the refoulement of refugees or adversely effect minors or incapable persons.

NSWCCL hopes these comments are helpful to the Committee. We would be pleased to elaborate our comments directly to the Committee if it holds public hearings on this matter.

This submission was written by Kathleen Douch, Co-Convenor of the Asylum Seekers and Refugees Action Group with research assistance from NSWCCCL intern Chloe Lefevre.

With regards



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