



**Australian Government**

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**Department of Immigration and Border Protection**

**Submission to the Senate Legal and Constitutional Affairs  
Legislation Committee Inquiry into the Migration Amendment  
(Strengthening Biometrics Integrity) Bill 2015**

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## 1. Introduction

The Department of Immigration and Border Protection (the Department) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Strengthening Biometrics Integrity) Bill 2015 (the Bill).

In 2013-14 over 35 million passengers arrived and departed from Australia's border and nearly five million visas were granted. Traveller volumes and the use of online services are increasing and criminals are becoming increasingly sophisticated in their attempts to circumvent the law. The reforms proposed by the Bill will support the Department's capacity to confirm identity and will thereby strengthen the Australian Government's ability to maintain effective border controls while allowing people to move seamlessly and efficiently across the border.

Developments in biometric technologies are at the forefront of these reforms and increasing use of biometric technologies is likely to continue in ways that we cannot yet predict. To keep pace with their rapid evolution we must modernise our legislative framework for collecting biometrics.

### 1.1 Definitions

A biometric – termed personal identifiers in the *Migration Act 1958* (the Migration Act) – is a unique identifier that is based on individual physical characteristics (such as facial image, fingerprints and iris) which can be digitised into a biometric template for automated storage and checking. The collection of personal identifiers is essential to establish identity as they are more accurate than document-based biographic information (such as name, date of birth and nationality).

Identification tests, currently provided for in the Migration Act, involve the collection and storage of a facial image and ten fingerprints. Detailed information about the procedure and the legislative basis for the collection are provided to the person before the test is conducted which:

- involves an officer carrying out the test which takes between 30 to 60 minutes;
- allows for a person to require that the officer seek an authority to take personal identifiers;
- must afford reasonable privacy to the person;
- must not be carried out in the presence or view of a person whose presence is not necessary, required or permitted by another provision of the Migration Act; and
- must not involve the removal of more clothing than is necessary for carrying out the test.

Verification checks, provided for in the Bill, involve collecting an image of two to four fingerprints using a mobile hand-held scanner. The image is not stored and is deleted after the check. Verbal advice about the process and its purpose will be provided by the Departmental officers conducting the check which:

- will take approximately 30 seconds to complete; and
- is conducted in public.

## 1.2 Safeguards

The Department is cognisant of the sensitivities and perceptions that can be associated with the collection and use of personal identifiers. Where relevant, the safeguards associated with the Bill's proposed measures are outlined at section 4. Key measures in the Bill.

## 2. Existing legislative framework

The powers to collect personal identifiers from citizens and non-citizens are contained in eight separate sections of the Migration Act.

- s 40 – circumstances for granting visas (applies to non-citizens);
- s 46 – valid visa application (applies to non-citizens);
- s 166 – persons entering Australia to present certain evidence of identity (applies to citizens and non-citizens);
- s 170 – certain persons to present evidence of identity (applies to citizens and non-citizens);
- s 175 – departing person to present certain evidence etc (applies to citizens and non-citizens);
- s 188 – lawful non-citizen to give evidence of being so (applies to non-citizens and persons whom an officer reasonably suspects is a non-citizen);
- s 192 – detention of visa holders whose visas are liable for cancellation (applies to non-citizens); and
- s 261AA – immigration detainees must provide personal identifiers (applies to non-citizens).

While this legislative framework has effectively supported Australia's border protection efforts to date it needs to be modernised to reflect increasing numbers of people passing through Australia's border, the current threat environment and to keep pace with advances in biometric technology.

## 3. Proposed amendments

The Bill amends the Migration Act to improve the Department's capacity to confirm an individual's identity during travel to and from Australia, post-arrival of non-citizens in the

Australian community and for visa holders to remain in Australia. The proposed amendments will:

- streamline existing collection powers into a single, discretionary power to collect one or more personal identifiers from non-citizens onshore and offshore and from citizens at the border;
- provide flexibility on the types of personal identifiers that may be required, the circumstances in which they may be collected and the places where they may be collected;
- enable personal identifiers to be provided either by way of an identification test or by another way specified by the Minister or an officer (that is, a verification test);
- enable personal identifiers to be required by the Minister or an officer (orally, in writing or through an automated system) and allow for existing deemed receipt provisions in the Migration Act to apply in relation to requests in writing;
- enable personal identifiers to be collected from minors and incapable persons without the need for the consent and presence of a parent, guardian or independent person; and
- omit provisions which are unused or no longer necessary.

The Bill is not introducing a universal collection policy and the Department does not intend to collect personal identifiers from all non-citizens who have not previously provided them. Rather, personal identifiers will be selectively collected from individuals who have been identified, based on risk analysis, intelligence and evidence, as persons of concern on their arrival to Australia or while living in the Australian community.

## 4. Key measures in the Bill

### 4.1 Single collection power

The Bill will consolidate existing powers in the Migration Act into a single power that will allow the Minister (or delegate) or an officer to require personal identifiers from a person. The only exception is the power to collect personal identifiers from immigration detainees, which will continue to be a separate power with the associated safeguards continuing to apply (detailed at section 4.5 Immigration detainees).

The Bill also allows for:

- automated systems (computer programs) to require personal identifiers, for example as part of an electronically lodged visa application; and
- personal identifiers to be collected by way of:
  - an identification test carried out by an authorised officer or an authorised system (with the current safeguards to continue to apply); or

- in another way specified by the Minister (or delegate) or an officer (for example a verification check) which will improve the Department's capability to conduct identity and security checks in real-time at Australia's borders as well as significantly reducing the burden on individuals from whom personal identifiers are collected.

The existing waiver in the Migration Act that applies to a requirement to provide personal identifiers as a key component of a valid visa application will be maintained. The Minister may waive (for example in exceptional and compelling circumstances) a requirement to provide personal identifiers where the person is prevented from being able to do so.

It is intended to include a waiver that will also allow the Minister to waive a requirement to provide personal identifiers to the grant of a visa if the visa applicant is prevented from being able to do so. It is intended that the waiver will be included in the *Migration Regulations 1994* to come into effect concurrently with the Bill.

#### 4.2 Verification checks

Verification checks take advantage of advances in biometric technology collection. They have been conducted at two Australian international airports on a voluntary basis since 2012. This process has shown there has been a paradigm shift in public perception and confidence about use of mobile devices to collect biometrics as an everyday, rather than an occasional, method of assuring identity.

The Bill authorises the use of verification checks:

- at Australia's border to:
  - conduct identity and security checks of citizens; and
  - identity, security, law enforcement and immigration checks of non-citizens; and
- potentially in other circumstances involving non-citizens such as in compliance and enforcement activities.

#### 4.3 Australian citizens

The Migration Act currently permits the collection of personal identifiers from Australian citizens at the border when seeking to travel to or from Australia, or travel from port to port on an overseas vessel. The Bill will provide the power to conduct verification checks of citizens when they are at the border. Citizens may be required to provide personal identifiers, by way of a verification check, where the person:

- fails automated immigration clearance through Smartgate (for example if their facial image does not match their passport photo or their passport is listed as stolen);
- triggers an alert as a person of interest (based on a match of biographical details against the Department's database);

- matches a high-risk profile – for example for identity fraud, which may include combinations or patterns of a range of variables including age and ticketing features (such as a ticket purchased with cash and within a day or two of travel, travel routes, etc.); or
- acting suspiciously in the arrival or departure hall.

#### 4.4 Minors and incapable persons

The Department is currently authorised to collect certain personal identifiers from minors and incapable persons for identification purposes and for conducting security, law enforcement and immigration checks. Minors aged 15 to 18 years can be required to provide facial image and fingerprints and all minors and incapable persons can be required to provide measurements of their height and weight and a photograph of their face and shoulders.

The Bill amends the Migration Act to remove restrictions on the types of personal identifiers that can be required from minors and incapable persons as well as the limitations on how they must be collected. The single collection power will mean fingerprints will be able to be collected from minors under 15 years of age. In practice this will mean:

- offshore: minors applying for a visa, as part of a family visa, from a country where facial images are already collected may also be required to provide fingerprints where there is a higher risk of trafficking;
- onshore:
  - borders - all minors (citizens and non-citizens) will continue to be subject to existing border processing using a passport. In extreme circumstances, such as suspected child trafficking cases, a minor may also be subject to a verification check;
  - visa applicants - in addition to the collection of facial images, non-citizen minors may be subject to collection of fingerprints to conduct identity, security, law enforcement and immigration history checks; and
- in detention: the existing provisions will continue to apply.

The Bill will align Australia's biometric collection framework, in respect to minors, with other countries. Internationally governments are increasingly collecting fingerprints from minors. Fingerprints can be collected from the age of six in the United Kingdom and European Union. New Zealand and United States of America do not legislate an age limit for the collection of biometric information for immigration purposes; in both cases it is determined as a matter of policy.

Under the Migration Act, in certain circumstances, personal identifiers cannot currently be collected from a minor or an incapable person if a parent, guardian or independent person

refuses consent. The ability to collect personal identifiers from minors and incapable persons is necessary in circumstances where there is a suspicion of trafficking or exploitation and therefore a need to obtain an additional level of identity assurance before allowing travel to or from Australia, or a change in visa status.

It is important that where an officer requires a minor or incapable person to provide personal identifiers, that the requirement is not circumvented by a parent, guardian or independent person refusing consent. This would be contrary to the lawful purpose of collection and the primary aim of the Bill, which is to implement measures to detect identity fraud and conduct appropriate security, law enforcement and immigration checks in a range of circumstances including prior to visa grant, at touch-points during travel to Australia, post-arrival in the Australian community and for any subsequent visas to remain in Australia.

Where a minor or incapable person is required under the new broad power to provide personal identifiers, there will be no legislative requirement for the consent of a parent, guardian or independent person. Under policy, officers of the department will seek the consent and the presence of a parent, guardian or independent person when requiring a minor or incapable person to provide personal identifiers. If consent is not given or if the parent, guardian or independent person frustrates collection by walking out of the room consequences would flow from that conduct. For example, the minor may be refused a visa application or their visa application may be invalid.

#### **4.5 Immigration detainees**

The legislative framework that applies to a non-citizen providing personal identifiers in immigration detention will be largely retained. The limitations that currently apply on the types of personal identifiers that can be collected, and how identification tests are to be carried out, when exercising the power to require personal identifiers from immigration detainees will also continue to apply.

If an immigration detainee has previously provided a particular personal identifier under the power that is applicable to detainees, the new power proposed by the Bill cannot be exercised to require re-collection of that personal identifier.

#### **4.6 Multiple collections**

The Bill makes it clear that personal identifiers can be required from a person more than once under the proposed new power. Circumstances where personal identifiers are required multiple times include:

- where a visa applicant is granted a visa offshore, and the person's personal identifiers are used at multiple points along their travel pathway to Australia to confirm their identity;
- where the initial provision of personal identifiers was ineffective (for example, the personal identifiers were taken, but the system crashed before returning a result);



- where it is suspected that a person has successfully defrauded the Department; and
- where there is some break in continuity in Departmental oversight between when a person is first tested and when the Department wishes to be certain of their identity.

#### **4. 7 Determination that personal identifiers are not required**

The Bill provides the power for the Minister to determine that particular persons or persons in particular circumstances are not required to provide personal identifiers.