

# Chapter 1

## Introduction and Background

### Referral of the inquiry

1.1 On 5 March 2015, the Migration Amendment (Strengthening Biometrics Integrity) Bill 2015 (Bill) was introduced into the House of Representatives by the Minister for Immigration and Border Protection, the Hon Peter Dutton MP (the minister).<sup>1</sup> On the same day, the Senate referred the provisions of the Bill to the Legal and Constitutional Affairs Legislation Committee (committee) for inquiry and report by 12 May 2015.<sup>2</sup>

### Conduct of the inquiry

1.2 In accordance with usual practice, the committee advertised the inquiry on its website and wrote to a number of organisations and individual stakeholders inviting submissions by 9 April 2015. Details of the inquiry were placed on the committee's website at [http://www.aph.gov.au/senate\\_legalcon](http://www.aph.gov.au/senate_legalcon).

1.3 The committee received 18 submissions to this inquiry. The submissions are published on the committee's website and are listed at Appendix 1.

1.4 The committee held a public hearing for this inquiry in Sydney on 16 April 2015. Details of witnesses who gave evidence at the hearing are listed at Appendix 2.

### Acknowledgment

1.5 The committee thanks those organisations and individuals who made submissions and appeared at the public hearing.

### Background

#### *The nature and use of biometric technology*

1.6 The field of biometrics relates to technologies that measure and analyse characteristics of the human body for identity authentication purposes. The Explanatory Memorandum to the Bill (EM) outlines the nature these technologies:

A biometric (termed 'personal identifier' in 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.<sup>3</sup>

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1 *House of Representatives Votes and Proceedings*, 5 March 2015, p. 1177.

2 *Journals of the Senate*, 5 March 2015, p. 2257.

3 Explanatory Memorandum (EM), p. 1.

1.7 The minister detailed the role of biometrics in the migration context in his second reading speech to the Bill:

Biometrics are an important integrity measure that contribute significantly to protecting Australia's border, and preventing the entry of persons who may threaten the Australian community. Once anchored to a person's biographic information, such as name, nationality and date of birth, a biometric adds significantly to the portfolio's capability to verify that a person is who they claim to be, and links an individual to security, law enforcement, and immigration information.<sup>4</sup>

1.8 The collection of biometric information in the migration context in Australia has been increased several times in the last decade, as noted in the EM:

The Department of Immigration and Border Protection's (the department) biometric programme has been progressively expanded over time, commencing in 2006 with collecting facial images and fingerprints of illegal foreign fishers, through to 2010, when the department commenced collecting facial images and fingerprints from offshore visa applicants in certain higher risk locations and onshore protection claimants, to 2012, when collecting facial images and fingerprints from non-citizens refused entry at Australia's international airports commenced.<sup>5</sup>

#### *Accuracy of biometric data*

1.9 The accuracy and fidelity of biometric data is a key issue in the context of using biometrics to positively identify individuals. The use of biometric identifiers does not provide an absolute assurance of the identity of an individual; as such, biometrics has been described as a 'probabilistic science'.<sup>6</sup> A representative of the Biometrics Institute told the committee that generally, biometrics are around 98-99 per cent accurate at the present time, however there are particular issues relating to the accuracy over time of biometric information obtained from minors.<sup>7</sup>

1.10 The Minister noted in his Second Reading Speech that biometrics are 'more accurate than document based checks of biographic detail, such as name, date of birth and nationality because they are relatively stable over time and are significantly more difficult to forge'.<sup>8</sup>

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4 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 5 March 2015, p. 2131.

5 EM, p. 1.

6 Refugee Council of Australia, *Submission 13*, p. 2 (quoting the Science and Technology Committee of the UK House of Commons). See also Australian Privacy Foundation, *Submission 9*, [p. 6].

7 The Hon Terrence Aulich, Chair Privacy Experts Group, Biometrics Institute, *Committee Hansard*, 16 April 2015, p. 10. Issues relating to the accuracy of biometric data obtained from young people are discussed further in chapter 2 at paragraphs 2.34-2.35.

8 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 5 March 2015, p. 2131.

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### ***Current legislative framework for collecting biometric information***

1.11 The Department of Immigration and Border Protection (department) noted in its submission that the *Migration Act 1958* (Migration Act) currently contains eight separate sections which deal with the collection of personal identifiers from citizens and non-citizens, as follows:

- section 40—circumstances for granting visas (applies to non-citizens);
- section 46—valid visa application (applies to non-citizens);
- section 166—persons entering Australia to present certain evidence of identity (applies to citizens and non-citizens);
- section 170—certain persons to present evidence of identity (applies to citizens and non-citizens);
- section 175—departing person to present certain evidence etc (applies to citizens and non-citizens);
- section 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);
- section 192—detention of visa holders whose visas are liable for cancellation (applies to non-citizens); and
- section 261AA—immigration detainees must provide personal identifiers (applies to non-citizens).

1.12 The EM states that these provisions create a 'complicated legislative framework for when particular types of personal identifiers can be collected, dependent on the circumstance in which the personal identifier is required, and what power is being exercised'.<sup>9</sup>

1.13 Some provisions in the Migration Act relating to the use of biometrics were amended in the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*. These changes allow a clearance officer or an authorised system (for example, SmartGate and eGates in place at Australian border points) to collect and retain personal identifiers (specifically a photograph of the person's face and shoulders) of citizens and non-citizens who enter or depart Australia.<sup>10</sup>

### **Purpose of the Bill**

1.14 The minister stated in his Second Reading Speech that the Bill would strengthen security at Australia's borders:

The amendments to be made by this bill support changes introduced last year by the Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014. The Foreign fighters act, among other things, addressed the emerging threat of Australians seeking to travel overseas to fight with

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9 EM, p. 1.

10 Revised Explanatory Memorandum to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, p. 67.

terrorist organisations. Importantly in the context of this bill, it also enhanced the capability of the [department] to identify persons seeking to enter and depart Australia, and noncitizens who remain in Australia...

Recent terrorism related events in Australia and globally serve to remind us that the threat of a domestic terrorist attack remains real. This bill further strengthens Australia's border protection measures by enhancing the capability of the department to identify persons seeking either to enter or depart Australia, and noncitizens who remain in Australia.<sup>11</sup>

## Overview of the Bill

1.15 The Bill consists of several introductory clauses and one schedule containing amendments to the *Migration Act 1958* (Migration act). The EM states that the Bill seeks to amend the Migration Act in order to 'implement a number of reforms which will consolidate and simplify the provisions relating to the collection of personal identifiers'.<sup>12</sup> Further:

[T]he amendments to the Migration Act to be made by this Bill will expand existing personal identifier collection capability, and provide for new capabilities, which will increase the integrity of identity, security, law enforcement and immigration checks of people seeking to enter and depart Australia, and of non-citizens who remain in Australia.<sup>13</sup>

1.16 Specifically, the EM states that the proposed amendments to the Migration Act would:

- streamline seven existing personal identifier collection powers into a broad, discretionary power to collect one or more personal identifiers from non-citizens, and citizens at the border, for the purposes of the Migration Act and the *Migration Regulations 1994* (Migration Regulations);
- provide flexibility on the types of personal identifiers (as defined in the existing legislation) 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 officer (such as a live scan of fingerprints on a handheld device);
- enable personal identifiers to be required by the minister or an officer, either 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 for the purposes of the Migration Act and Migration Regulations under the

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11 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 5 March 2015, p. 2131.

12 Explanatory Memorandum (EM), p. 1.

13 EM, p. 2.

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new broad power without the need to obtain the consent, or require the presence of a parent, guardian or independent person during the collection of personal identifiers; and

- omit provisions which are unused and no longer necessary.<sup>14</sup>

## **Key provisions of the Bill**

### *Single broad collection power*

1.17 Item 34 of Schedule 1 of the Bill would insert proposed new section 257A into the Migration Act. This would introduce a single, broad power for the collection of personal identifiers by the minister or immigration officers, to replace the eight existing provisions dealing with the collection of personal identifiers in specified circumstances.

1.18 Proposed new subsection 257A(1) provides that the minister or an officer may require a person to provide one or more personal identifiers for the purposes of the Migration Act or the Migration Regulations.<sup>15</sup>

1.19 The EM includes a rationale for the collation of these powers into a single provision:

The broad nature of new subsection 257A(1) reflects the policy intention that personal identifiers can be required from an individual or group of persons for any purpose under the Migration Act or the Migration Regulations. The intention is that the power to collect personal identifiers from persons should not be limited to particular circumstances, as is the situation under the current Migration Act.

This flexibility in the Migration Act will enable the department to effectively and quickly collect personal identifiers in response to emergent risks based on individual circumstances, recent events, and detected or realised threats. This is more efficient and effective to enable the department to contribute to the national security effort in securing Australia's border and protecting the Australian community than the current piecemeal authorisations to collect personal identifiers that are currently in the Act that limit the department to collecting personal identifiers to particular circumstances and not others.<sup>16</sup>

### *Types of persons from whom personal identifiers can be collected*

1.20 The EM details a non-exhaustive list of the types of persons who can be required to provide a personal identifier under proposed new section 257A, including:

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14 EM, p. 2.

15 Proposed new subsection 257A(2) states that the purposes for which personal identifiers may be collected include those listed in subsection 5A(3) of the Migration Act; under subsection 5A(3) a range of purposes are listed including authentication of an individual's identity, identifying persons who are of character or security concern, and combatting document and identity fraud.

16 EM, p. 18.

- unauthorised maritime arrivals who have not lodged an application for a visa;
- non-citizens who are applicants for temporary or permanent protection visas, or any other visa of a class that is designated as a class of humanitarian visas;
- non-citizens who are applicants for any other class of visa created under the Migration Act or the Migration Regulations;
- visa holders, who are the subject of identity fraud allegations; and
- persons (citizens and non-citizens) at the border seeking to enter or depart Australia.<sup>17</sup>

*Types of personal identifiers that can be collected*

1.21 The EM states that a further purpose of proposed new subsection 257A(1) is 'to ensure that any type of personal identifier, as defined in the Migration Act, can be required from a person'.<sup>18</sup> The term 'personal identifier' is defined in subsection 5A(1) of the Migration Act as any of the following:

- fingerprints or handprints of a person (including those taken using paper and ink or digital live scanning technologies);
- a measurement of a person's height and weight;
- a photograph or other image of a person's face and shoulders;
- an audio or a video recording of a person (other than a video recording under section 261AJ);
- an iris scan;
- a person's signature; and
- 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*.

1.22 The EM notes that the department currently collects facial images, fingerprints and signatures. Further:

The collection of fingerprints is currently limited to only some circumstances, and not others. The department's policy intention is that there should not be any limitations on the type of personal identifier, as defined in subsection 5A(1), which can be required from a person under the new section 257A.<sup>19</sup>

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17 EM, p. 18.

18 EM, p. 19.

19 EM, p. 19.

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### *Means of collecting personal identifiers*

1.23 Proposed new subsection 257A(5) provides that, if a person is required to provide one or more personal identifiers under subsection 257A(1), those personal identifiers must be:

- (a) provided by way of one or more identification tests carried out by an authorised officer or an authorised system; or
- (b) if another way is specified by the minister or officer—provided in that specified way.

1.24 In relation to proposed new paragraph 257A(5)(b), the EM states that this power may be used where it is not practical or efficient for personal identifiers to be provided by way of an identification test carried out by an authorised officer or system, for example where visa applicants reside in countries where the department does not have the capability to carry out identification tests.<sup>20</sup>

1.25 The EM states that proposed new paragraph 257A(5)(b) is also envisaged to be used where personal identifiers can be obtained through a 'verification check':

[A verification check] is an efficient, quick and non-intrusive method involving a scan of fingers using a mobile hand-held device at the border. In these circumstances, it is considered appropriate and efficient to be able to require a person to provide their personal identifiers other than by way of an identification test carried out by an authorised officer, which currently takes approximately 30 to 60 minutes to complete.

1.26 The EM notes that the department has conducted verification checks of non-citizens on a voluntary basis at two Australian airports since 2012:

The check involves a one-to-one check of fingerprints previously collected offshore as part of a visa application, on arrival at Perth and Melbourne airports. A mobile, hand-held device is used to scan fingers, which are then checked against the department's fingerprint data holdings. The identity of each passenger was verified in all cases. More than 10,000 checks have been conducted since the checks commenced in 2012. The same procedures and similar hand-held devices will be used in the future to conduct identity checks to be specified under new paragraph 257A(5)(b).<sup>21</sup>

### *Collection of personal identifiers from minors*

1.27 Under current section 261AL of the Migration Act, individuals under the age of 15 must not be required to provide personal identifiers, other than a measurement of height and weight or a photograph of the person's face and shoulders.

1.28 Item 48 of Schedule 1 of the Bill would alter this arrangement by amending section 261AL. Under these proposed changes, non-citizen minors under the age of 15 in immigration detention will still only be required to provide height and weight

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20 EM, p. 21.

21 EM, p. 21.

measurements or photographs, but for other minors under the age of 15, any personal identifiers available under the Migration Act would be able to be required.<sup>22</sup>

1.29 By way of comparison, the EM notes that in the United Kingdom, the age of collecting fingerprints from minors is five years and above. Further:

The department's intent is to set the age of collecting fingerprints in policy to allow for flexibility to determine when personal identifiers will be collected...The amendment to subsection 261AL(1) therefore reflects the intention behind the new section 257A [proposed by the Bill], that the power to collect personal identifiers is to be applied equally to all persons. Therefore, there is no exemption for minors in relation to the requirement to provide personal identifiers.<sup>23</sup>

1.30 The Bill also proposes to alter the requirements in relation to the consent and presence of a parent or independent person for the collection of a personal identifier from a minor.

1.31 Item 49 of Schedule 1 would remove the requirement for the consent of a parent, guardian or independent person in order for a non-citizen minor to provide a personal identifier in the limited circumstances in which this is currently required.<sup>24</sup> Item 50 of Schedule 1 would remove the requirement for a minor (regardless of whether they are a citizen) to have a parent, guardian or other independent person present while a personal identifier is being provided, except in the case of minors who are in immigration detention. The EM contains the following rationale for these proposed changes:

[These] amendments...are primarily a child protection measure aimed at preventing child trafficking and/or smuggling. In addition, the amendments will ensure that the power to collect personal identifiers is consistent for all persons, and to provide flexibility for officers to respond effectively and quickly to emergent risks. The amendments will address situations where a parent, guardian or independent person may seek to frustrate the collection of personal identifiers by way of an identification test by leaving a room where an identification test is to take place.<sup>25</sup>

1.32 The EM further states that the power to require a minor to provide a personal identifier without the consent or the presence of a parent, guardian or independent person 'is expected only to be utilised in limited circumstances'. It notes that the

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22 EM, p. 27.

23 EM, p. 27.

24 The department informed the committee that currently, the consent of a parent/guardian or independent person is not required when collecting personal identifiers from any minor at Australia's border on arrival or departure, or in transit from port-to-port. Under current subsection 261AL(2), the consent of a parent/guardian or independent guardian of a non-citizen minor is required in some other prescribed circumstances. See: Department of Immigration and Border Protection, *Responses to questions taken on notice at a public hearing on 16 April 2015* (received 30 April 2015), [p. 9]; *Migration Act 1958*, Section 261AL.

25 EM, p. 28.



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consequence of a minor failing to comply with this request would depend on the circumstances; for example, 'in the context of a visa application, it could mean refusal of the minor's visa, or that their application for a visa is invalid'.<sup>26</sup>

***Collection of personal identifiers from 'incapable' persons***

1.33 Section 261AM of the Migration Act provides for the provision of personal identifiers by 'incapable' persons.<sup>27</sup> Currently, an incapable person is not required to provide a personal identifier other than a measurement of height and weight or a photograph of the face and shoulders. Item 51 of Schedule 1 of the Bill would remove this restriction on the types of personal identifiers that can be collected, except for incapable persons who are in immigration detention.

***Requirements relating to consent and presence of a parent or independent person***

1.34 Subsection 261AM(2) of the Migration Act currently requires that for non-citizen incapable persons in limited circumstances, the consent of a parent, guardian or independent person must be given before a personal identifier can be provided. Subsection 261AM(4) provides that, for all incapable persons, a parent, guardian or independent person must be present when a personal identifier is provided.

1.35 Item 52 of Schedule 1 of the Bill would repeal subsections 261AM(2) and (3), removing the consent requirements in relation to non-citizen incapable persons. Item 53 of Schedule 1 would amend subsection 261AM(4) to remove the requirement for a parent, guardian or independent to be present during the collection of personal identifiers from an incapable person, except in cases where the incapable person is in immigration detention.

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26 EM, p. 29.

27 'Incapable person' is defined in subsection 5(1) of the Migration Act as 'a person who is incapable of understanding the general nature and effect of, and purposes of, a requirement to provide a personal identifier'.

